IN THE INCOME TAX APPELLATE TRIBUNAL
JAIPUR BENCH 'B' JAIPUR

(BEFORE SHRI R.K.GUPTA AND SHRI N.L.KALRA)

ITA No.509/ JP/2011
Assessment year : 2008-09
PAN: AAACG 7934 Q

The DCIT Circle- 2, Jaipur (Appellant)	Vs.	M/s. Goenka Diamond & Jewellers Ltd. 40, Panchratana, MSB Ka Rasta Jaipur (Respondent)

Department by : Shri Sunil Mathur
Assessee by : Shri G.G. Mundra

Date of hearing: 20-01-2012
Date of Pronouncement: 31-01-2012

ORDER

PER N.L. KALRA, AM:-

The revenue has filed an appeal against the order of the ld. CIT(A)-1, Jaipur dated 21-03-2011 for the assessment year 2008-09.

2.1 The ground of appeal raised by the revenue is as under:-

> ''Whether on the facts and in the circumstance of the case and in law the ld. CIT(A) is justified in allowing the deduction of Rs. 12,26.32,018/- u/s 10AA of the I.T. Act, 1961 as the conditions laid down in the Section 10AA of the I.T. Act, 1961 for claiming the deduction are not fulfilled.''

2.2 The assessee firm is engaged in the business of trading and manufacturing of precious and semi precious stones, diamond and studded gold jewellery. The AO noticed that the assessee claimed deduction u/s 10AA of the Act in respect of profits from the

Surat Unit. The assessee is having another unit at Bombay and is having Head Office at Jaipur. During the course of assessment proceedings, the assessee was asked to justify the claim of deduction u/s 10AA of the Act. Vide letter dated 29-11-2010, it was submitted that the assessee is engaged in the business of precious and semi precious stones. The AO examined the process through which the assessee is obtaining the finished products as against initial purchase items. The AO noticed the following facts.

1. The perusal of the fixed asset chart in respect of Surat Unit showed that the assessee was having no fixed assets including machinery except factory land as on 01-04-2007. The assessee made first machinery addition in the fixed asset chart on 03-12-2007. The fixed asset was diamond polishing Bench. The Bench itself could not have been sufficient for the purpose of manufacturing unless other tools were purchased. Such tools were purchased till 31-01-2008. The AO therefore, inferred that the assessee merely doing purchase and sale of goods and no manufacturing or processing was done as there were no machines or manufacturing set up.

2. From the perusal of purchase and sale bill, the AO noticed that the assessee was purchasing readymade goods which he was selling without value addition or any process added to it.

3. The AO noticed that the assessee was not having manpower to manufacture / process the turnover shown as sold by the assessee.

2.3 The above facts were confronted to the assessee and the assessee was asked as to why the deduction u/s 10AA be not denied. The assessee filed the reply vide letter dated 20th Dec. 2010. The submissions in brief are as under:-

1. The assessee company is continuously engaged in the business of trading and manufacturing of precious and semi

precious stones, diamond and studded gold jewellery. In the immediately preceding year , the revenue itself has allowed deduction u/s 10AA of the Act.

2. The assessee company was granted letter of approval by the Development Commissioner, Surat u/s 15(9) of the SEZ Act to set up a unit for undertaking authorized operations of manufacturing and trading of the Diamond and Jewellery as mentioned in the letter of approval.

3. Attention was towards Section 10AA of the Act in which it has been mentioned that the unit which provided any services will be eligible to claim deduction u/s 10AA of the Act. The word 'services' have been defined in sub clause (z) of Section (2) of SEZ Act, 2005. The Central Govt. has defined the services in the rule 76 of the SEZ Rules, which includes the trading. The extract of rule 76 was reproduced in the letter. The trading for the purpose of the second schedule of the Act mean import for the purpose of the re-export.

3. Attention was drawn towards Instruction No. 4/2006 dated 24-06-2006 issued by the Ministry of Commerce, Govt. of India in which it was mentioned that the units who hold the approval to do trading activities will be allowable to carry out all forms of trading activity but the benefits u/s 10AA will be available to trading in the nature of re-export of imported goods.

4. The entire purchases in Surat unit are of imported items and all these items have been subsequently exported to the foreign countries. It was therefore, submitted that the assessee is entitled to deduction u/s 10AA of the Act and on similar facts, such deduction was allowed for the assessment year 2007-08.

2.4 The AO after considering the submissions of the assessee observed that deduction u/s 10AA is available in case the assessee is engaged either in manufacturing or production of article or things. The services have not been defined in the Income tax Act. The definition of service as provided in clause 2(z) of SEZ Act cannot be imported. Only the definition of manufacture given in Section 2(z) of SEZ Act was imported in Section 10AA of the Act. Hence, the definition of services as provided in SEZ Act cannot be applied. The AO relied on following decisions and held that the definition of expression in one statute cannot be automatically applied to another statute.

1. CIT Vs. Vasan Publications (P) lted 159 ITR 381 (Mad)
2. CIT Vs. Buhari sons (P) Ltd. 144 ITR 12 (Mad.)
3. Laxmanda Pranchand & Ors Vs. Union of India & Ors 234 ITR 261 (M.P.)
4. CIT Vs. R.J. Trivedi & Sons , 183 ITR 420(MP)

The AO observed that the provisions in a taxing statute dealing with machinery for assessment have to be construed by the ordinary rules of construction that is to say, in accordance with the clear intention of the legislature which is to make a levy of charge effective.

1. Sardar Harvinder Singh Sehgal & Ors Vs. ACIT, & Ors 227 ITR 512 (Gau)
2. Gursahai Saigal Vs. CIT 48 ITR 1 (SC)
3. Jayalakshmi Leasing Co. Vs. ACIT 228 ITR 1 (AT)

The provisions which conferred the benefit to the assessee should be interpreted in spirit of strict construction. Reliance has been placed on the following decisions.

1. Kota Cooperative Marketing Society Ltd. Vs. CIT 207 ITR 608 (Raj.)
2. CIT Vs. Orissa State Warehousing Corporaton 201 ITR 729 (Orissa)
3. Renuka Datla Vs. CIT, 240 ITR 463 (A.P.)
4. Novopan India Ltd. Vs. Commissioner of Central Excise, 1994 (73) ELT 769 (SC)

Thus the legislature has deliberately excluded the definition of services from SEZ Act from its scope. Therefore, the definition of services cannot be imported from SEZ Act./

2.5 A service is an interconnection between the provider and the client that creates and captures value. The trading cannot be considered as service. The AO has referred to the service provided by the doctor to the patient to make the meaning of services as clear as possible. The AO has referred to the definition of the services given in certain books. The AO has also referred to the one notification issued by the Board in which certain services were included in the Information Technology enabled services. These were like Back-office operations, Call Centre, Data Processing etc. The AO further observed that in case the deduction has been give in earlier year the it is not necessary that the same should be allowed, if it is not allowable as per provision of law. Each year is separate year. Accordingly the AO held that the assessee is not entitled to deduction u/s 10AA of the Act.

2.6 Before the ld. CIT(A), the assessee submitted as under:-

> ''It was submitted by the AR before the AO that for the definition of 'services' sub clause (z) of section 2 of SEZ Act, 2005 may be referred to wherein 'trading' includes 'services'. The AO held that for the definition of 'manufacturing' section 10AA refers to sub section 2(r) but

for the definition of 'services' the Income tax Act has deliberately not referred to SEZ Act, 2005. That definition of expression in a statute cannot automatically be applied to another statute. For this, the AO relied upon various case laws. With this, the AO held that benefit of provision which could have been provided by the Act but actually not provided deliberately, cannot infer or interpreted automatically. That the Income tax Act was not intended to refer definition of services as provided in SEZ Act. Relying on various case laws, the AO has emphasized that provisions to confer benefit to the assessee should be interpreted in the spirit of strict construction. With this, the AO held that the definition of services cannot be borrowed from SEZ Act and trading cannot be inclusive of "services". The AO has explained the word "services" as provider/client interaction that creates and can capture value. In general parlance services are provided when certain value addition is made to some existing goods so that it becomes more useful and fetches more value. Thus, element of value addition and use of skills are there in services. Also that there should be a service agreement between the provider and client. With this discussion the AO held that in the present case the appellant has not done any value addition or has not applied any skills for the improvement of the product, and therefore, the appellant cannot be said as providing services. The AO has also taken support from one notifications of CBDT issued for Information Technology enabled services to define what "service" include. That the appellant is merely engaged in trading activity without any value addition which cannot be termed as services and, therefore, claim of deduction u/s 10AA regarding Surat Unit was not found justified.

Further, plea of the appellant that similar deduction allowed last year was not accepted by the AO on the ground that principle of "Estopped" has little relevance when it comes to appreciation of a particular legal position as against the perception of such legal position at any time in the past. Relying on various case laws the AO held that existence of similar transactions cannot in any way operate as resjudicata to preclude the authorities from holding such transactions as non service activities in the current year. Deduction claimed u/s 10AA was, therefore, rejected and addition of Rs. 122632018/- was made.

It was submitted by the AR that a new unit in SEZ Surat commences manufacturing in FY 06-07 after obtaining all the approvals and permissions under SEZ Act, 2005. Ths Unit fulfills all the conditions laid down in section 10AA (4)/10AA(1) and the same is not in dispute. The SEZ unit is manufacturing diamonds and importing diamonds for re export. In A.Y. 07-08, first time claim of deduction u/s 10AA was made. The AO after examining all the details has allowed deduction u/s 10AA. However, in the year under consideration the claim was denied on the ground that the appellant company is not doing any manufacturing, producing or providing any services in respect to goods it exported from

its Surat unit but merely purchasing and selling the goods without applying any skills on it or improving its value quotient.

As per the provisions of section 10AA a unit established in SEZ is entitled to get an exemption of its income from manufacturing and services i.e. trading activities. 100% of profits and gains derived from the export of such articles or things or from services for a period of 5 consecutive assessment years will be available.

The word 'manufacture' has been defined in section 2(r) of SEZ. The word 'service' is defined in sub section 2(()) of SEZ Act, 2005 and services means:-

1. Such tradable Services covered under the General Agreement on Trade.
2. As prescribed by the Central Govt. for the Act and
3. Earn foreign exchange

The Central Govt. has defined the 'services' in rule 76 of SEZ Rules, 2006 which inter alia includes trading. Thus the trading activity has been included in the definition of services under rule 76. Further, explanation to rule 76 states that trading for the purposes of second schedule of the Act shall mean import for the purpose of re export. The Income tax Act has not defined "re export" but explanation u/s 10AA explains export in relation to SEZ as taking goods or providing services out of India from a SEZ by any other mode, whether physical or otherwise. Further, Ministry of Commerce vide their notification dated 10.8.06 has explained the word trading for the purpose of second schedule of the Act as import for the purposes of re export. Thus the appellant company fulfills the primary conditions of section 10AA for getting the exemption. The appellant is a entrepreneur and the unit has started to provide services i.e. trading and manufacturing activities. The appellant company has exported goods or services in physical mode. Thus it is clear that not only the profits and gains of manufactured goods but also trading of goods are allowed for getting the exemption u/s 10AA if imported goods are re exported by a Unit duly approved by Development Commissioner of the concerned SEZ. The appellant company's entire purchases are imported in SEZ unit and the entire goods are exported to foreign country. The appellant company is entitled for deduction u/s 10AA as the company fulfills all other terms and conditions. The AO's action of disallowing the entire claim of deduction u/s 10AA is not justified and, therefore, addition made by AO may be deleted.

2.7 The ld. CIT(A) after considering the submissions of the assessee deleted the addition and directed the AO to allow deduction u/s 10AA of the Act after observing as under:-

> ‘’Contention of the AR is considered. The appellant company has unit in SEZ Surat area and besides the manufacturing activities the company is importing the goods and exporting the same and has claimed that what he is doing is covered by the word ‘trading’ as provided in the SEZ Act. The AO has not accepted the submission of AR on the ground that the definition of ‘services’ should not be taken from SEZ Act, 2005 when the Income tax Act has deliberately not referred to SEZ Act. The definition of expression in one statute cannot automatically be applied to another statute. With this observation the AO has gone by the general meaning of word ‘services’. As in the common parlance, services mean providing certain value addition and use of skills to make the existing goods more useful and in the present case the appellant has simply exported what was imported without putting any value addition or use of any skills or doing any manufacturing activities on it. The AO, therefore, held that it cannot be said that the appellant was providing services.
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> First of all it should be very clear that Section 10AA was inserted to the IT Act by SEZ Act, 2005. Thus Section 10AA originates from SEZ Act and not Finance Act. Section 51 of SEZ Act,2005 makes it clear that the SEZ Act has overriding effect and the provisions of SEZ Act shall have effect notwithstanding anything in consistent there that contained in “any other law” for the time being in force. Thus, it is clear that anything which is not in consistence with SEZ Act will have no bearing and it is the SEZ Act which will prevail on any other law which includes Income tax Act as well. Section 27 of SEZ Act further clarifies that the provisions of Income tax Act in force for the time being, shall apply to, or in relation to, developer or entrepreneur for carrying on the authorized operation in SEZ unit subject to modifications specified in the Second Schedule. In other words, the provisions of Income Tax Act will be applicable subject to the modifications specified in Second Schedule. Second Schedule defines the word “manufacture” has same meaning as assigned to it in Section 2® of SEZ Act. Various definitions including ‘manufacture’ given in section 10AA is nothing but definitions provided u/s 2 of SEZ Act, 2005. That the word service has not been defined in section 10AA of IT Act as well as second schedule but as whatever definitions provided in section 10AA have been imported from second schedule of SEZ Act which is origin of section 10AA, the definition of ‘services’ also must be taken from SEZ Act only. The word services as understood in common parlance cannot be

taken for section 10AA. As already discussed section 51 of SEZ Act is an overriding provision and, therefore, anything which is not in consistency with the SEZ Act cannot be taken from any other Act. Section 2(()) of SEZ Act defines the word 'service' as (i) tradable service which is covered under general agreement on trade, (ii) what is prescribed by the Central Govt. for the purpose of SEZ Act and (iii) which earns foreign exchange. Subsequently, the Central Govt. has prescribed the definition of 'service' by introducing rule 76 to the SEZ Rules, 206. The word services for the purpose of section 2(z) include trading and various other activities. Further, the explanation provides that the expression "trade" for the purpose of second schedule of the Act shall mean import for the purpose of re export. Thus the explanation makes it clear that for second schedule of SEZ Act "which is nothing but section 10AA of IT Act", the trading means re export of imported goods. Since section 10AA owes its genesis to SEZ Act, services as defined in SEZ Act and as are authorized and permitted by SEZ Act should qualify. In that view of the matter, trading which is in the nature of re-export of imported goods should qualify as export of services. What the word 'services' is understood in common parlance has no significance while deciding the claim of deduction u/s 10AA.

The SEZ Act 2005 was enacted and notified along with SEZ Rules 2006 to give effect to foreign trade policy for the purpose of setting up of SEZ in the country with a view to provide globally competitive and hassle free environment for export. The act was enacted with the objectives of making available goods and services free of taxes and duties supported by integrated infrastructure for export production, expeditious and single window approved mechanism and package of incentives to attract foreign and domestic investments for promoting export led grow. Consequently the SEZ has emerged as duty free enclave and are deemed to be a foreign territory for the purposes of trade operations and duties and tariffs. Accordingly SEZ enjoys a large number of exemptions from duties and taxes, cess etc. Sec. 51 of SEZ Act therefore, confers an overriding effect and specified that it shall have effect notwithstanding anything in consistent therewith contained in any other law for the time being in force. The said fact has been approved in the case of Mohan Lal Sharma vs. Union Bank of India and others where Hon'ble HC has mentioned that Sec. 51 of SEZ Act is overriding even state SEZ Act. That the Central Act of 2005 prevails by law of doctrine of parliamentary supremacy. Sec. 27 of SEZ Act provides that provisions of Income Tax Act 1961 will apply with certain modifications in relation to developers and entrepreneur and thus the SEZ Act overrides the provisions of Income-tax Act. The A.O. is therefore not correct in holding that as 'services' is not defined in I. T. Act, it should be given meaning what is understood in common parlance.

> Further the Development Commissioner SEZ, Surat has also clarified vide his letter dated 18.3.01 that the benefit of section 10AA is available to the unit engaged in trading activities in respect of re-export of the imported goods only. He has also clarifies that in case of contradiction viz. a viz. the provisions of IT Act and SEZ Act, 2005, provisions of SEZ Act, 2005 shall prevail. In section 4 of 2006 dated 24.5.06 issued by the department of Commerce clarifies that the benefit u/s 10AA will exclude trading other than trading in the nature of re-export of imported goods. As the appellant fulfills other conditions as discussed above, the appellant is providing services by re-exporting the goods in terms of SEZ Act and, therefore, entitled for deduction u/s 10AA. The AO is, therefore, directed to allow deduction u/s 10AA and the addition made by the AO is, therefore, deleted. The 1st and 2nd grounds of appeal are decided in favour of the appellant.

2.8 During the course of proceeding before us, the ld. DR drew our attention to various provision of the Income Tax Act, 1961 and SEZ Act. The word 'services' as mentioned in Section 10AA cannot be equated with the word 'services' as contained in SEZ Act. The ld. DR also drew our attention to Section 27 and 51 of the SEZ Act and stated that these sections did not help the assessee to claim deduction u/s 10AA of the Act. We appreciate the way in which the ld. DR has been able to point out the central issues which are required to be considered by the Tribunal while deciding this appeal. We are reproducing the written submission of the ld. DR as under:-

> The appellant herein submits the following written arguments in addition to the verbal arguments to be taken during the course of hearing in the above appeal.
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> The only ground involved in this appeal is whether Ld. CIT (A) was justified in allowing the deduction of Rs. 12,26,32,018/- u/s 10AA when the conditions laid down u/s 10AA for claiming such deduction were not fulfilled by the assessee.
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> 2. The facts of this case are that the assessee company claimed to be involved in the business of trading and manufacturing of precious and semi precious stones, gold jewellery etc. It has its head office at Jaipur and two units at Mumbai and Surat. In respect of its Surat unit

the assessee claimed that it was located in a SEZ and its profit from that unit amounting to Rs. 12,26,32,018/- was eligible for deduction u/s 10AA as it fulfilled all the relevant conditions of sec. 10AA.

3. The AO asked the assessee to justify its eligibility for claiming deduction u/s 10AA. The assessee claimed that at the Surat SEZ its unit was involved in manufacturing and processing of precious and semi precious stones and was therefore eligible for deduction u/s 10AA. The AO found that for the Surat unit the assessee did not have any plant or machinery upto the beginning of the F.Y. 2007-08 and even during F.Y. 2007-08 the first machinery viz. Diamond polishing machine was procured in Dec. 2007 and other tools etc. were bought upto 31/1/08. The AO also found that the assessee was purchasing readymade goods and selling them without any value addition because the nature of goods purchased and sold was exactly the same**.** The assessee had not maintained any wages register, which showed that there was no evidence that any manpower was used for manufacturing or processing.

It was obvious that no manufacturing had been done by the assessee maintained any wages register, which showed that there was no evidence that any manpower was used for manufacturing or processing.

It was obvious that no manufacturing had been done by the assessee and therefore it was wrong on part of the assessee to claim that it was involved in manufacturing at the Surat SEZ unit.

3.1 When confronted with the above facts the assessee filed a reply in which it was claimed that it was involved in both manufacturing and trading of goods. The assessee claimed that from its unit in SEZ Surat it also carried out import of goods for re-export and as per the SEZ Act and SEZ Rules the activity of import for re-export was treated as trading activity on which deduction u/s 10AA was allowable as per Rule 76 of SEZ Rules 2006 and Section 2(z) of SEZ Act, 2005. Thus the assessee claimed that it was eligible for deduction u/s 10AA on both manufacturing and trading activity carried on by it from its SEZ unit at Surat.

4. The AO did not accept the arguments of the assessee.

4.1 First of all the AO held that the assessee was not carrying out any manufacturing activity. For this the **first reason** given by the AO is that at the beginning of the previous year under consideration i.e. as on 1-4-2007 the assessee did not have any machinery except factory land at Surat. The first machinery purchase was on 3-12-2007 which was a diamond polishing bench, which itself could not produce any goods. The other tools were bought after 31-1-2008 only. Thus upto first 10 months of the financial year the assessee could not have produced or manufactured

any goods. **Secondly,** from the sales and purchase bills the AO noted that the assessee was purchasing readymade goods and the nature of goods purchased and sold was exactly the same and the assessee was not doing any process or value addition on the same. **Thirdly,** from the wages expenditure the AO further found that the assessee was not having manpower to manufacture/process the quantum of turnover shown by it. In view of these reasons the AO held that the assessee was actually not carrying out any manufacturing at Surat.

4.2 In respect of the claim of the assessee that it was also eligible for deduction u/s 10AA on trading done from its unit at Surat SEZ, the AO was of the opinion that the SEZ Act 2005 inserted section 10AA in the IT Act 1961. While inserting this section some terms were defined in the Explanation-I under this section. In clause (iii) of this explanation the term 'manufacture' has been defined as section 2(r) of the SEZ Act 2005 but the term 'service' defined in section 2(z) has not been included. Therefore the claim of the assessee that as per Rule 76 of SEZ Rules and section 2(z) of SEZ Act trading is eligible for deduction u/s 10AA could not be accepted. The AO has pointed out that definition of one statute cannot be applied to other statute. She has also contended that what is not provided in the Act cannot be supplied by the Courts and the provisions should be construed in accordance with clear intention of the legislature. In support of these contentions the AO has relied on a number of court cases mentioned on page 8 & 9 of the assessment order. On page 9, the AO has also mentioned certain court cases in which the courts have held that provisions to confer benefit to the assessee should be interpreted in the spirit of strict construction. On the basis of the above discussion the AO concluded that when the legislature deliberately excluded definition of services from the scope of section 10AA by not referring to the SEZ Act, 2005 then such definition .cannot be imported from the SEZ Act. Therefore, the AO held that as provided in the SEZ Act/Rules 'trading' cannot be treated as 'services'. AO further held that even by general meaning of trading it cannot be considered as providing of services as required u/s 10AA(1), and therefore the assessee was not eligible for deduction u/s 10AA on the 'trading' activity done from its Surat SEZ unit.

The AO rejected the plea of the assessee that it had been granted LOA by the Development Commissioner and therefore it was eligible for deduction u/s 10AA, on the ground that this was not the only condition for claiming this deduction.

The AO also rejected the argument of the assessee that it should be allowed deduction u/s 1 OAA because last year also this deduction was allowed on trading. The AO has observed that the principle of *resjudicata* does not apply to the Income-tax assessment and the AO is empowered to

look into an issue from fresh perspective. For this the AO has relied on some Supreme Court decisions cited on page 13 & 14 of her order.

In view of the above discussion the AO disallowed the deduction of Rs.12,26,32,018/- claimed by the assessee u/s 10AA.

5. The assessee filed appeal against this disallowance of deduction of Rs.12,26,32,018/- u/s 10AA. In his order dtd.21-3-2011, ld. CIT(A) has granted full relief to the assessee. The decision of ld. CIT(A) is not acceptable in view of the reasons discussed below.

5.1 Ld. CIT (A) has given his conclusion on page 4 to 7 of his order. First of all it is seen that though the AC had given a specific finding that the assessee was not involved in manufacturing activity still Ld. CIT (A) has not given any decision on this finding. The assessee has also not challenged the absence of such finding before Ld. CIT (A) or Hon'ble ITAT. Therefore, the finding of AC that he assessee has not carried out any manufacturing may please be upheld.

5.2 Further, ld. CIT (A) has held, that for the purposes of deduction u/s 10AA (1) of the IT Act 1961 trading in the nature of import for re-export will be treated as providing of services and the assessee company will be eligible for deduction u/s 10AA . It is submitted that the reasoning given by Ld. CIT (A) to give relief to the assessee on this issue is not accepted. The various arguments given by Id. CIT (A) are countered as follows.

1) First, Ld. CIT (A) has mentioned that section 10AA was inserted in the I.T. Act,1961 by the SEZ Act,2005 and not by the Finance Act. Thus, according to Ld. CIT (A) sec.10AA originates from the SEZ Act, and hence it will determine the provisions of section 10AA. Further, Ld. CIT (A) has mentioned that section 51 of the SEZ Act, says that it will have overriding effect over all the other laws. Therefore the definition of service provided in the SEZ Act should be used for the purpose of sec. 10AA.

These arguments of Ld. CIT (A) are complete mis-construction of the legal position. Sec 10AA was introduced in the IT Act, by SEZ Act, 2005 only as a matter of legislative convenience . This does not mean that one can provide for something which the legislature did not want to provide in Sec. 10AA of the IT Act. The legislature intended only to use the definition of 'manufacture' from the SEZ Act and not the definition of 'Service'. If it had intended to do so it would have said so for definition of 'service' also as it did for 'manufacture'. Since 'service' as defined in SEZ Act is not to be used for the purpose of section 10AA of the IT. Act,

therefore, the definition of service as per Rule 76 of SEZ Rules 2006 can also not be used for the purpose of section 10AA.

In this respect the following headnote from the decision of CIT V/s. Buhari Sons Pvt. Ltd. (Madras High Court) (1983) 144 ITR 12 is reproduced below, and relied on:

"It is well established that in the absence of any definition in the statute, words occurring in a statute will have to be understood with reference to the objects of the Act and in the context in which they occur. Consequently, the definitions given for the words in one statute cannot automatically be imported for interpreting the same words in another statute. The interpretation of the expression "manufacturing process" for purposes of the Factories Act, 1948, will not be relevant in construing the same expression for purposes of the Finance Act, 1966. The preparation of eatables cannot be taken to be manufacture of goods. The words "goods" used in s.2(7)(d) of the Finance Act, 1966, has been used in the sense of merchandise, i.e., articles for sale, and so understood in a commercial sense, the expression "goods" will not included eatables prepared in a hotel. Further, the expression "manufacture" does not connote a trading activity and an activity carried on in a hotel can only be taken to be a trading activity and not a manufacturing activity.

The assessee-company, which ran a group of hotels, claimed that it should be treated as an industrial company under s.2(7)(d) of the Finance Act, 1966, and assessed to income-tax at 55% of its income. This claim was upheld by the Tribunal relying on the decision of the Madras High Court in New Taj Mahal Café Ltd. v. Inspector of Factories, AIR 1956 Mad 600 and P. Lakshmanrao and Sons v. AddI. Inspector of Factories, AIR 1959 AP 142, where it had been held that the preparation of articles of food will amount to a manufacturing process as defined in the Factories Act.

**Held, * that the Tribunal was not justified in its view and the assessee was not an industrial company entitled to the lower rate of tax."*

In view of this clear cut decision the definition of 'service' as per SEZ Act 2005 cannot be imported to the I.T. Act 1961.

It is wrong to presume that SEZ Act is supreme for the purpose of Section 10AA. It may be noted that section 10AA (4) (which lays down the eligibility criteria for this deduction) as introduced by the SEZ Act was substituted by the Finance Act 2007 w.r.e.f. 10.02.2006, which shows that section 10AA is very much governed by the Finance Act and I.T. Act.

Further, as per Sec. 51 of the SEZ Act 2005, the provisions of this Act will have overriding effect over other laws but it will be so only in the matters related to implementation of the SEZ Act. It cannot have overriding effect on the provisions of IT Act 1961 in the matter related to this Act. The SEZ Act made provisions of Sec. 10AA in the IT Act and did not include the definition of service as per its section 2(z) in this section 10AA. If now Sec. 51 of SEZ Act is used to insert this definition in the IT Act it will be violative of the SEZ Act itself.

2) Secondly, Ld. CIT (A) has mentioned that section 27 of the SEZ Act provides that the provisions of I.T. Act, will apply to the cases of the assessees operating in the SEZ subject to modification specified in Second Schedule. The Second Schedule defines 'manufacture' as per the definition given in sec.2(r) of the SEZ Act. According to Ld. CIT (A) various definitions given in Sec. 10AA are nothing but definitions given in Sec.2 of the SEZ Act. According to Ld. CIT (A) 'service' is not defined in Second Schedule and Sec. 10AA both but since whatever defined in sec IOAA has been taken from Sec.2 of the SEZ Act, therefore for 'Service' also the definition given in the SEZ Act, should be used.

This interpretation of ld. CIT (A) is an attempt to stretch the matter too far and make provisions which the legislature never intended. First of all the above interpretation of ld. CIT (A) is factually incorrect. For the purpose of Sec.10AA, some definitions are given in Explanation I under this section. In this Explanation I total 6 terms are defined in clauses (i) to (v) but out of these only three terms in clauses (iii) and (v) are defined as per the SEZ Act,2005 but the other 3 are independent definitions. Section 2 of the SEZ Act, 2005 has definitions from clauses (a) to (zd). All of them cannot be applied to section 10AA of the IT Act. If that was the intention of legislatures it would have said so in clear terms. Since in Explanation-I only three terms re defined as per SEZ Act, therefore for the purpose of Sec.10AA, only these three terms are to be used. Other terms in Sec. 10AA have to be interpreted as per the IT Act, itself or as they are used in the general parlance.

Kind attention is drawn to **section 27 and Second Schedule(copy enclosed) of the SEZ Act.** Section 27 mentions that the provisions of l.T. Act 1961 shall apply to developers and entrepreneurs in a SEZ subject to the modifications specified in Second Schedule: In the Second Schedule the various modifications made in the IT. Act through this Schedule have been specified. It may be noted that through this Second Schedule a number of modifications numbered from (a) to (j) have been made in various sections of the I.T. Act 1961. The introduction of Section 10AA is one of such 10 modifications. These modifications are very specific and changes in the IT Act can be considered to the extent of these modifications only. In all these modifications a number of specific

definition have been imported from the SEZ Act 2005 but the definition of 'service' as provided in section 2(z) has not been brought in anywhere. Therefore the decision of Ld. CIT (A) is contrary to the provisions of the l.T. Act as well SEZ Act 2005.

3) Thirdly, Ld. CIT (A) has referred to Rule 76 of the SEZ Rules 2006 in which it is mentioned that for the purpose of Sec. 2(z) of SEZ Act 2006 'services' include 'trading' also. He has also referred to the Explanation under this Rule 76 which states that the expression 'Trading' for the purposes of Second Schedule of the SEZ Act shall mean import for the purposes of re-export. Ld. CIT(A) has observed that the Second Schedule is nothing but Sec.10AA of the IT Act and therefore trading which is in the nature of re-export of imported goods should qualify as export of services and the meaning of the word 'services' as understood in common parlance will not have any significance.

In this regard first of all it is wrong for Ld. CIT (A) to observe that the Second Schedule of the SEZ Act is nothing but Sec. 10AA of the IT Act. Second Schedule actually contains the various modifications which were carried out in3the IT Act through the SEZ Act 2005. There were 10 modifications numbered from (a) to (j) mentioned in this Second Schedule which made modifications in a number of sections of the IT Act. Introduction of sec. 10AA is only one of these 10 modifications made in the IT Act 1961.

It may further be noted that this meaning to the expression 'trading' has been given through the Rules but in the main SEZ Act in the Second Schedule the terms 'services' and 'trading' have not been included under definitions of section I0AA of the IT. Act at all. it is a well settled principle of law that something which is not provided in the main legislation (i.e. an Act) cannot be provided through a subordinate legislation (i.e. Rules). Thus when the definition of service as provided in SEZ Act is not included in Section 10AA of the IT Act then it cannot be applied for the purpose of this section.

4) Fourthly, Ld. CIT(A) has also stated that the Development Commissioner SEZ, Surat has also clarified vide his letter dated 18/03/2010 that the benefit of section I0AA is available to the unit engaged in trading activities in respect of re-export of the imported goods. The Development Commissioner has also clarified that in case of contradiction between the provisions of l.T. Act and SEZ Act, 2005, provisions of SEZ Act, 2005 shall prevail. Ld. CIT(A) has also mentioned that in instruction No. 4 of 2006 dated 24/05/2006 issued by the Department of Commerce it is clarified that the benefit u/s 10AA will exclude trading other than trading in the nature of re-export of imported goods.

In this regard it is submitted that the Development Commissioner of SEZ is not at all empowered to interpret the provisions of the IT Act. His jurisdiction is limited to implementation of the SEZ Act only. SEZ Act has only introduced Sec. 10AA in the l.T.Act.1961. This Act does not empower him to interpret the IT Act. By doing this he has exceeded his jurisdiction. This letter cannot supersede the provisions which have been specifically made by the legislature.

As regards Instruction 4 of 2006 dated 24/05/2006 claimed to be issued by the Deptt. of Commerce, first of all, it is submitted that this Instruction was kept on hold by the Department of Commerce vide another Instruction No. 5 dated 31 .05.2006 **(copy enclosed)**. Moreover, Deptt. of Commerce does not have any authority to issue instructions about Sec.1OAA in the IT Act 1961. Any instructions about any provision of the IT Act can be issued by the CBDT, Deptt. of Revenue only.

Further, the last line of para I of this Instruction is very important. It states that **'Appropriate amendments in this regard are being issued'**. This line shows that till the issue of this instruction the deduction u/s I OAA was not allowable on trading including re-export of imported goods. This instruction just mentioned that for this the appropriate amendments were being issued. This appropriate amendment was to be carried out in section IOAA of the l.T. Act 1961. But no such amendment in form of including 'service' in the definitions to be used for the purpose of section 10AA of the lT Act was done. Therefore, trading including re-export of imported goods cannot get deduction u/s IOAA of the IT. Act 1961.

5.3 Thus, it can be seen that ld. CIT (A) has completely misconstrued the provisions of sec.10AA of l.T. Act and SEZ Act 2005 to allow relief to the assessee. The definition of services as given in section 2(z) of the SEZ Act cannot be used for section 10AA. For the purpose of section 10AA(1), the meaning of service has to be taken as it is understood in general parlance and in general parlance any trading including re-export of imported goods, cannot be treated as services. The A.O has discussed the meaning of the work 'service' on page 10 to 12 of her order and has clearly brought out that trading cannot be considered as service. It is further added that whenever a service is provided it involves two distinct parties one a provider and second a recipient of the service. But in case of trading of goods the assessee is the only party and one cannot provide service to himself. Thus, in general parlance trading cannot be called providing of service and therefore deduction u/s 10AA cannot be allowed on trading including trading in the nature of re-export of imported goods.

6. In respect of this appeal the Id. AR of the assessee has filed a written submission on 30-12-2011 before Hon'ble ITAT. In this submission Id. AR has basically taken all the arguments which are given by Id. CIT (A) in his order. The arguments of ld. CIT (A) have been countered in para 5 above.

In this written submission ld. AR has also submitted a break up of gross margin and net profit of the Surat unit of the assessee for trading activity and so called manufacturing activity carried at this unit. These details are given on page 5 & 6 of the written submission of ld. AR. It is seen that in these details ld. AR has given the following figures:-

	Sales (Rs.)	Gross margin (Rs.)	Net Profit (Rs.)
Trading	115,21,16,216	7,04,55,671 (6.11%)	4,34,19,349 (3.76%)
Manufacturing	30,33,76,799	8,63,39,303 (28%)	7,92,20,589 (26.11%)

First of all it is submitted that this break up of sales, gross margin and net profit for trading and manufacturing was neither given to the AO nor to the CIT (A) and it is submitted before Hon'ble ITAT for the first time. Therefore this break up is unverified and cannot be accepted to be correct at this stage. Secondly, prima facie this break up appears to be correct at this stage. Secondly, prima facie this break up appears to be unusual because in this the net profit from manufacturing is shown as 26.11% but from trading it is shown as 3.76%. However, it is submitted that the AO has already given a finding that the assessee did not carry out any manufacturing as provided u/s 10AA of the IT Act and this finding has remained unchallenged till now. Therefore the above claim of the assessee about having carried out any manufacturing cannot be accepted.

In view of the above discussion, it is requested that the order of Ld. CIT (A) deleting the addition of Rs. 12,26,32,018/- may be cancelled and the order of the A.O. may please be restored.''

2.9 Before us, the ld. AR has also filed the written submission and drew our attention to the fact that the assessee is entitled to deduction u/s 10AA of the Act. The submissions of the assessee are reproduced as under:-

‘’The assessee company reiterates its submissions made before CIT (A) and relies on appeal order passed by CIT (A). However for ready reference the submissions of assessee are summarized again as under: -

The assessee company has been granted a letter of approval (LOA) dated 05-01-06 by the Development Commissioner, Surat u/s 15(9) of the SEZ Act, 2005 to set up a unit for undertaking the authorized operations of **manufacturing** and **Trading** of the Diamonds and Jewellery as mentioned in the LOA which is not in dispute. As per the provisions of section 10AA of the I.T.Act, 1961 a unit established in SEZ is entitled to get an exemption of its income from manufacturing and services i.e. trading activities. The Section 10AA of I. T. Act, 1961 was inserted in Income Tax Act, 1961 by second schedule of Special Economic Zones Act, 2005 w.e.f. 10-02-2006. For sake of convenience and ready reference relevant portion of section 10AA is reproduced below:

10AA. (1)Subject to the provisions of this section, in computing the total income of an assessee, being an entrepreneur as referred to in clause (f) of section 2 of the Special Economic Zones Act, 2005 from his Unit, who begins to manufacture or produce articles or things or ***provide any services*** during *the previous year relevant to any assessment year commencing on or after the 1st day of April, 2006, a deduction of*

(i) hundred per cent of profits and gains derived from the export of such articles or things or from ***services*** for a period of five consecutive assessment years beginning with the assessment year relevant to the previous year in which the Unit begins to manufacture or produce such articles or things or provide services as the case may be, and fifty per cent of such profits and gains for further five assessment years and thereafter:

The word manufacture have been defined in sub clause (r) of section 2 of SEZ Act, 2005.

(r) “Manufacture” means to make, produce, fabricate, assemble, process or bring into existence, by hand or by machine a new product having a distinctive name, character or use and shall include processes such as refrigeration, cutting, polishing, blending, repair, remaking, reengineering, and includes agricultural, aquaculture, animal husbandry, floriculture, horticulture, pisciculture, poultry, sericulture, viticulture and mining.

The word services have been defined in sub clause (z) of section 2 of SEZ Act, 2005.
(z) “services” means such tradable services which : -

(i) are covered under the General Agreement on Trade in Services annexed as IB to the Agreement establishing the World Trade Organisation concluded at Marrakes on the 15th day of April, 1994.

(ii) may be prescribed by the Central Government for the purpose of this Act: and

(iii) earn foreign exchange;

The Central Government has defined the services in the rule 76 of the SEZ Rules, 2006 which inter alia includes trading. The extract of the rule 76 is reproduced as under:

"Trading, warehousing, research and development services, computer software services, including information enabled services such as back-office operations, call centers, content development or animation, data processings, engineering and design, graphic information system services, human resources services, insurance claim processings, legal data bases, medical transcription, payroll, remote maintenance, revenue accounting, support centers and web-site services, off-shore banking services, professional services (excluding legal services and accounting) rental/leasing services without operators, other business services, courier services, audio-visual services, construction and related services, distribution services (excluding retail services), educational services, environmental services, financial services, hospital services, other human health services, tourism and travel related services, recreational, cultural and sporting services, entertainment services, transport services, services auxiliary to all modes of transport, pipelines transport.

Explanation: – The expression "Trading" for the purposes of the second schedule of the Act, shall mean import for the purposes of export."

Thus Trading activity has been included in the definition of "service" under Rule 76 of the SEZ Rules, 2006.

Explanation to Rule 76 states that "trading", for the purposes of the Second Schedule of the Act, shall mean import for the purposes of re-export.

According to Income Tax Act: The term "re-export" has not been defined. According to Explanation under section 10AA of the Income-tax Act, "export in relation to Special Economic Zone" means taking goods or

providing services out of India from a Special Economic Zone by land, sea, air, or by any other mode, whether physical or otherwise.

The Ministry of Commerce, Govt. of India has issued a notification dated 10-08-2006 which inter alia introduced an explanation which defined the word trading "Trading" for the purpose of the second schedule of the Act, shall mean import for the purpose of re-export.

Similarly the Ministry of Commerce, Govt. of India has also clarified vide instruction no. 4/2006 that the trading activities will be allowed to carry out all forms of trading activity but the benefits u/s 10AA will be available to trading in the nature of re-export of imported goods. A copy of said instruction enclosed. The said instruction is also made available on the web site of Govt. of India www.sezindia.gov.in

The assessee company thus fulfills all the primary conditions of section 10AA for getting the exemption i.e.

(a) The assessee is a entrepreneur (i.e. person who has granted approval by Development Commissioner) as per sec. 2(i) of SEZ Act, 2005.

(b) The unit has started to provide services (trading i.e. import for the purpose of re-export only) and manufacturing activity during the previous year relevant to assessment year under proceeding.

(c) Assessee company has exported goods or services by filing bills of entry/shipping bill in physical mode.

The assessee company claimed profits and gains of manufactured goods as well as of trading of goods as exempt u/s 10AA. The details are as under: -

Sales Head	**Nature of Activity**	**Sales Value**	**Gross Margin**
Sales – Trading	Trading	1,139,900,844.00	69,003,388.00
Sales – Mounting	Trading	12,215,372.00	1,450,283.00
Sales – Manufacturing	Manufacturing	303,376,799.00	86,339,303.00
		1,455,493,015.00	**156,792,974.00**

Total Expenses during the year 07-08.			
Direct Expenses			933,380.37
Indirect Expenses			33,219,654.83
Total			**34,153,035.20**
Net Profit			**122,639,938.80**
Trading Profit for the period ended 31/3/2008			70,453,671.00
Less:	Proportional Expenses for Trading Activity		27,034,321.00
	In the ratio of Sales		
	Total Expenses	34,153,035.20	
	Total Trading T/o	1,152,116,216.00	
	Total Manufacturing T/o	303,376,799.00	
	Proportional Expenses for Trading Activity	27,034,321.21	
Net Profit from Trading Activity			**43,419,349.00**
Balance Net Profit from Manufacturing			79,220,589.00
TOTAL			**122,639,938.00**

Thus total net profit of SEZ units does not include only profit of trading but that of manufacturing also and Ld. A.O. is wrong to treat the entire profit as that of trading only.

The Ld. A.O. however held that assessee company is not doing any manufacturing, producing or providing any service in respect to the goods it exported from its Surat SEZ unit but merely purchasing and selling goods without applying any skills on it or improving its value quotient and transactions are devoid of basic fundaments of services and so cannot be termed as service also and so cannot be termed service also and, therefore, it is not entitled to deduction u/s 10AA of I. T. Act, 1961 as claimed by it.

In this connection it is submitted that:

The scope of Section 10AA is mainly focused on encouraging the trading activity at an international level from newly established units operating in an SEZ. The intention behind the introduction of Sec. 10AA is to encourage international trade and in the process enable more and more organizations to participate in global trade.

The Section was introduced not as an amendment but as a modification to the Income Tax Act, 1961 by the SEZ Act, 2005.

Reference to the introduction of section in the I. T. Act, 1961 can be found in the Second Schedule to the SEZ Act, 2005.

b. Instructions given by the Ministry of Commerce and Industry under the SEZ Rules, 1976.

As per INSTRUCTION NO. 4/2006 In respect of SEZ Rules (Issued by Department of Commerce) Dated 24.5.2006 (F. No. F.5/1/2006-EPZ) which states as follows:

"Subject: Modification in Instruction No. 1/2006 dated 24th March, 2006 of the Department of Commerce regarding setting up of trading units in the Special Economic Zones – Reg.

This Department has been receiving representations on difficulties faced by the existing SEZ units holding approval to do trading, that their exports are adversely affected and also that several of their orders are held up due to the restriction on trading on account of the above instruction. Taking cognizance of these representations, in partial modification of the above-referred Instruction dated 24th March, 2006, it has been decided that while units in the Special Economic Zones who hold approval to do trading activities will be allowed to carry out all forms of trading activity, the benefits under Section 10AA will exclude trading other than trading in the nature of re-export of imported goods**.** Appropriate amendments in this regard are being issued.

2. In the meantime, sourcing from domestic area may be permitted by units in the SEZs which are allowed to do trading, subject to this circular being cited and on production of an undertaking by the concerned unit that no Income tax benefits will be availed by the unit for trading, except in the nature of re-export of imported goods.
3. Development Commissioners are requested to note the above and take appropriate action."

The instruction specifies that the activity of trading in the nature of re-export of imported goods is eligible for benefit under section 10AA.

The assessee company on the activity of trading in the nature of re-export of imported goods claims benefit under Section 10AA justifying its classification under service (referred to as "provide any service" under the said section). As the Income Tax Act does not define the term "service", the assessee company has to take reference to the definition of service referred to in the SEZ Act, 2005 (given that the Section 10AA was introduced by SEZ Act, 2005 and referred to in the Second Schedule to the said Act) and furthur the SEZ Act, 2005 has overriding effect on all other

enactments by virtue of section 51 of SEZ Act, 2005 which reads as under: -

> *The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act."*

The Ld. A.O. has taken a stand on the issue which is not a logical interpretation, instead every effort has been made by him to overlook and misinterpret the meaning and logic behind the introduction of Section 10AA.

The term **"Service"** has been examined by Ld. A.O. on the basis whether mere purchase & sale with no value addition as done by the assessee can be termed services. However there is no reason to deviate far from the immediately available definition of **"Services"** under the SEZ Act. (given that the Income Tax Act, 1961 does not define the term "services") and, therefore in accordance with Section 51 of SEZ Act, 2005 the definition given in SEZ Act, 2005 will apply moreso when explanation to rule 76 clearly provides Trading for the purposes of the second schedule of the Act, (by which Section 10AA inserted in I. T. Act, 1961) shall mean import for the purposes of re-export. The Ld. A.O. in assessment order discussed irrelevant references to case laws and decisions that bear no relevance to case specifically on the fact that unit of assessee is established in the SEZ in accordance with section 10AA of I. T. Act, 1961 and SEZ Act, 2005. Thus the discussions references and decisions used in assessment order are not at all applicable in the case. It will be thus clear that trading activity in the nature of re-export of imported goods is falling under the head service u/s 10AA of I. T. Act, 1961 r/w section 2(z) of SEZ Act, 2005 r/w rule 76 of SEZ Rules, 2006 and above referred notification. We also submit herewith clarification issued by Development Commission SEZ, Sachin, Surat issued to the assessee company which is self explanatory and states that assessee company is entitled to the benefit of section 10AA of I. T. Act, 1961 in respect to import of goods which are re-exported to buyers in other countries in view of provisions of section 2(z) of SEZ Act, 2005 r/w Section 27 and section 51 of SEZ Act, 2005 r/w rule 76 of SEZ Rules, 2006. (P.B. Page 8).

In view of the above it is evident that not only profits and gains of manufactured goods but also trading of goods are allowed for getting the exemption u/s 10AA of the I.T. Act, 1961 if imported goods are re-exported by a unit duly approved by development commissioner of concerned SEZ. The assessee company's entire purchases are import in SEZ unit. The entire goods are exported to foreign country. Further the assessee company also fulfills all other terms & conditions laid down in

> section 10AA of the I.T.Act, 1961 and as such deduction is claimed as per provisions of law and allowable as such. The Ld. A.O. is wrong and has erred in law in disallowing the entire claimed deduction u/s 10AA which was allowed by him in A.Y. 2007-08 and in accordance with Section 10AA (i) (i) the assessee company was entitled to hundred percent exemption of its profit and gains from the said business for a period of five consecutive years as there is absolutely no change in any of the facts of the case.
>
> The Ld. CIT (A) after examining all the above provisions has allowed the claimed deduction u/s 10AA which order is in accordance with law having no infirmity and deserves to be confirmed. The appeal of department has no merit which deserves to be dismissed.''

2.10 We have heard both the parties. The ld. CIT , DR patiently drew our attention to the provision of Section 10AA of the Act and the provision SEZ Act. We appreciate the efforts of ld. CIT DR in bringing our attention to the focal issue relevant in this case. It is true that the word 'services' is not mentioned either in Section 10AA or in Section 2 of the I.T. Act which contains the definition of various words. Deduction u/s 10AA is available in case the unit begins to manufacture or produce such article or things or provide service. It is not disputed that the unit of the assessee has done trading activity by importing the items and thereafter selling them. However, it is disputed by the revenue that the assessee has done only trading and no value addition has been made.

2.11 The explanation 1 to Section 10AA contains the definition of the word 'export turnover. Export in relation to Special Economic Zone, Manufacture relevant to Section 10AA Special Economic Zone and Unit. The word manufacture is to be considered to have the same meaning as assigned in clause (r) of Section 2 of SEZ Act, 2005. Similarly, SEZ unit will have the same meaning as assigned to them under clause (za) of Section 2 of SEZ Act. The word 'services' has been defined in SEZ Act, 2005 u/s 2 (z) of the Act and the same is reproduced as under:-

(z) "services" means such tradable services which –

(i) are covered under the General Agreement on Trade in Services annexed as IB to the Agreement establishing the World Trade Organisation concluded at Marrakesh on the 15th day of April, 1994;

(ii) may be prescribed by the Central Government for the purposes of this Act; and
earn foreign exchange

2.12 Before we proceed further, it will be useful to reproduce Section 27 and Section 57 of the SEZ Act, 2005.

> 27. Provisions of Income – tax Act, 1961 to apply with certain modification in relation to Developers and entrepreneurs. – The provisions of the Income-tax Act, 1961 (43 of 1961), as in force for the time being, shall apply to, or in relation to, the Developer or entrepreneur for carrying on the authorized operations in a Special Economic Zone or Unit subject to the modifications specified in the Second Schedule.

> 51. Act to have overriding effect – The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

Rule 76 of SEZ Rules, 2006 is as under:-

> 76. The "services" for the purposes of [clause] (z) of section 2 shall be the following, namely: –
>
> Trading, warehousing, research and development services, computer software services, including information enabled services such as back-office operations, call centers, content development or animation, data processing, engineering and design, graphic information system services, human resources services, insurance claim processing, legal data bases, medical transcription, payroll, remote maintenance, revenue accounting, support centers and web-site services, off-shore banking services, professional services (excluding legal services and accounting) rental / leasing services without operators, other business services, courier services, audio-visual services, construction and related services,

distribution services (excluding retail services), educational services, environmental services, financial services, hospital services, other human health services, tourism and travel related services, recreational, cultural and sporting services, entertainment services, transport services, services auxilliary to all modes of transport, pipelines transport.

[*Explanation* – The expression "Trading", for the purposes of the Second Schedule of the Act, shall mean import for the purposes of re-export.]

21.3 The contention of the revenue is that the word services being not defined under the I.T. Act, therefore, the meaning of the word services should be considered the same as understood in normal parlance. The trading cannot be considered as services. For providing services, one has to have a party which provides services to other party and that accepts the services. The word trading is included in the services under SEZ Act and not under I.T. Act and therefore, it was submitted that deduction u/s 10AA should not be allowed in respect of trading activities.

2.14 The AO in his order has referred to the decision of Hon'ble Jurisdictional High Court in the case of Kota Cooperative Marketing Society Ltd. Vs. CIT 207 ITR 608 for the proposition that granting exemption should be strictly construed. In the case before Hon'ble Jurisdictional High Court, , the issue was as to whether proportionate share of expenses attributable to earning income which is entitled for deduction should be made in computing such income. The assessee was claiming the entire expenses to be allowable and it was the contention of the assessee that the expenditure should not be bifurcated between the income which is eligible for deduction and the income which is not eligible for deduction. If no separate books of accounts have been maintained and the expenses have been incurred jointly for earning both the income then such expense have to be estimated by the ITO which are relatable to earn the non-exempted activities in order to

arrive at the true and correct income. For this proposition, Hon'ble Jurisdictional High Court observed that exemption clause in taxation statute has to be construed strictly and cannot be extended beyond the clear language used in the section. The Hon'ble Apex Court in the case of Bajaj Tempo Ltd. Vs. CIT, 196 ITR 168 had an occasion to consider the issue as to how the provision related to incentive for growth and development should be interpreted. The Hon'ble Apex Court held that such provision should be interpreted liberally. The provision construed so as to advance the objectives and not to frustrate it. It will be useful to reproduce the held portion.

> ''A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally; and since a provision for promoting economic growth has to be interpreted liberally, the restriction on it too has to be construed so as to advance the objective of the provision and not to frustrate it.
>
> By the Court: If a provision for checking abuse is found to have resulted in nullifying the very purpose of the its enactment and the Legislature intervenes, then it can be assumed that the Legislature, having been satisfied of the failure of the purpose for which the provision was inserted to cure the defect by suitable amending the provision or removing it.''

2.15 The Hon'ble Kerala High Court in the case of Girnar Industries Vs. CIT, 230 CTR 401 had an occasion to consider the meaning of the word manufacture introduced in Section 10AA w.e.f. 10-02-2006 for the purpose of considering as to whether the blending of tea will be manufacture for allowing exemption u/s 10A for the assessment year 2004-05. The case before the Hon'ble Kerala High Court was for the assessment year 2004-05 and at that relevant time, the word manufacture was not defined either in

Section 10A or 10AA in Section 2 of the I.T. Act. The blending of tea was not considered by the revenue as manufacture in the case being heard by the Hon'ble Kerala High Court. The word manufacture was defined in explanation 1 to Section 10AA of the Act w.e.f. 10-02-2006. The word manufacture was also mentioned in EXIM Policy. In the case before the Hon'ble Kerala High Court , it was noticed that Development Commissioner of Special Economic Zone has issued a permanent registration certificate to the assessee declaring that the assessee is engaged in manufacture and export of blended tea. The case of the assessee was that every unit in the Special Economic Zone enjoys the income tax exemption on the profit derived on the export of their products. The Hon'ble Kerala High Court has referred to the meaning of manufacture as contained in EXIM Policy and has also considered the meaning of manufacture as done in Explanation 1 to Section 10AA of the Act which means that the word manufacture should be same as contained in clause 2 (r) the SEZ Act. The Hon'ble Kerala High Court in the case of Girnar Industries Vs. CIT, 230 CTR 401 has referred to the decision of Hon'ble Apex Court in the case of CIT Vs. Gwalior Rayons Silk Manufacturing. Co. Ltd. 196 ITR 149 in which the Hon'ble Supreme Court held as under:-

> ‘’It is settled law that the expression used in a taxing statute would ordinarily be understood in the sense in which it is harmonious with the object of the statute to effectuate the legislative intention. It is equally settled law that if the language is plain and unambiguous, one Ld. CIT(A) only look fairly at the language used and interpret it to give effect to the legislative intention. Nevertheless, tax laws have to be interpreted reasonable and in consonance with justice adopting a purposive approach. The contextual meaning has to be ascertained and given effect to. A provision for deduction, exemption or relief should be construed reasonably and in favour of the assessee.’’’

2.16 While holding that the word manufacture as defined in Section 10AA of the Act,w.e.f. Feb. 2006 will be applicable for allowing exemption u/s 10A to the assessee for the assessment year 2004-05. The Hon'ble Kerala High Court at pages 407 and 408 has observed as under:-

> ''We have already noticed that in substance the provisions of s.10A and s.10AA later introduced serve the very same purpose of granting exemption on the profits earned by industrial units in the free trade zone/Special Economic Zone. These provisions introduced in the IT Act are essentially implementation of EXIM Policy periodically announced by the Government providing incentives to export-oriented units located in free trade zones/Special Economic Zones mainly to augment foreign exchange earnings. In fact, it is pertinent to note that though s.10A did not contain a definition of "manufacture", definition of the said term contained in s.2(r) of the Special Economic Zones Act, 2005 is incorporated in s.10AA w.e.f. 10th Feb., 2006. Admittedly the said definition covers blending also. Therefore, blending and packing of tea done by the appellant-assessee qualify for exemption under s.10AA from 10th Feb., 2006 onwards. The question to be considered is whether the benefit is available to the appellant-assessee for the year 2004-05 for the reason that the then existing provision s.10A did not contain a definition clause. Admittedly s.10A also provides for exemption in respect of goods manufactured or produced and sold by units in the Free Trade Zone. Going by the decision of the Supreme Court above-referred, the exemption clause has to be considered with reference to the object with which it is enacted. Nobody can have doubt that exemption to industries in the free trade zone is granted based on the EXIM Policy framed by the Government periodically. In this context it is pertinent to refer to the definition of "manufacture" contained in Chapter IX of the EXIM Policy extracted above. We notice that "manufacture" is given a very wide definition to take in even processing involving conversion of something to another with distinct name, character and use. Further, even refrigeration of an item which involves only freezing, repacking, labeling etc. are also covered by the definition of "manufacture". Blending of tea is mixing of different varieties of teas produced in estates located in different regions having different altitudes. Climate conditions etc. It is common knowledge that new flavours of tea are generated by blending different varieties. In our view, it would not be incorrect to say that in the course of blending the product obtained namely, the blended tea, certainly has different

> characteristics in as much as flavor, taste etc. of the blended tea is different from that of the various varieties of tea used in blending. We are of the view that since the purpose of exemption under s.10A is to give effect to the EXIM Policy of the Government, the definition of "manufacture" contained in the EXIM Policy is applicable for the purpose of the said provision. We have already noticed that "manufacture" as defined under the EXIM Policy has a wide and liberal meaning covering tea blending as well and so much so, blending and packing of tea qualify for exemption under s.10A. Besides this, appellant-industry presently in the Special Economic Zone engaged in the same process of blending and packing of tea is specifically brought under the exemption clause through incorporation of s.2(r) of the Special Economic Zones Act, 2005, in the provisions of s.10AA of the IT Act. We are, therefore, of the view that the later amendment is only clarificatory and the definition of "manufacture" contained in s.2(r) of the Special Economic Zones Act, 2005, incorporated in s.10AA of the IT Act w.e.f. 10th Feb., 2006, which is essentially the same as the definition contained in the EXIM Policy, applies to s.10A also. We, therefore, hold that blending of tea is a manufacturing activity which entitles the appellant-assessee for exemption under s.10A of the IT Act for the asstt. yr. 2004-05. Accordingly the appeal is allowed by vacating the order of the Tribunal and by restoring the order of the first appellate authority.''

It is interesting to note that Section 10AA was not inserted by the Finance Bill. Section 10AA was inserted by the SEZ Act, 2005 w.e.f. 10-02-2006. We have earlier reproduced Section 27 of SEZ Act. It says that provision of Income Tax Act shall apply to, or in relation to, the Developer or entrepreneur for carrying on the authorized operations in a Special Economic Zone or Unit subject to the modifications specified in the Second Schedule. Thus if the operations are authorized then the provision of the Income tax Act shall be subject to modifications of SEZ Act. The SEZ Act provides that services may be prescribed by the Central Govt. for the purpose of SEZ Act and services have been prescribed in Rule 76 of SEZ Rules. As per Instruction No. 1/2006 dated 24-03-2006 issued on the basis of Board of Approval Meeting held on 17-03-206 on the issue of setting up trading units in the Special Economic Zone it was stated that rule 76 SEZ

Rules would be confined to import of goods for export. Such instruction was modified vide instruction no. 4/2006 dated 24-05-2006 and the same is reproduced as under:-

INSTRUCTION NO. 4/2006, DATED 24.5.2006

(F.No. F.5/1/2006-EPZ)

Subject : Modification in Instruction No. 1/2006 dated 24th March, 2006 of the Department of Commerce regarding setting up of trading units in the Special Economic Zones – Reg.

This Department has been receiving representations on difficulties faced by the existing SEZ units holding approval to do trading, that their exports are adversely affected and also that several of their orders are held up due to the restriction on trading on account of the above instruction. Taking cognizance of these representations, in partial modification of the above-referred Instruction dated 24th March, 2006, It has been decided that while units in the Special Economic Zones who hold approval to do trading activities will be allowed to carry out all forms of trading activity, the benefits under Section 10AA will exclude trading other than trading in the nature of re-export of imported goods**.** Appropriate amendments in this regard are being issued.

2. In the meantime, sourcing from domestic area may be permitted by units in the SEZs which are allowed to do trading, subject to this circular being cited and on production of an undertaking by the concerned unit that no Income tax benefits will be availed by the unit for trading, except in the nature of re-export of imported goods.

3. Development Commissioners are requested to note the above and take appropriate action.

2.17 In the above instruction, a reference has been made to Section 10AA of the Act. It is made clear to the entrepreneur having units in SEZ that benefit u/s 10AA will exclude other trading except in the nature of re-export of imported goods. Thus there is a promissory estoppel by the Govt. to the entrepreneur putting up the units in the SEZ that benefit u/s 10AA will be available on trading in the nature of re-export of imported goods. The Hon'ble Apex Court in the case of Union of India and Others Vs. Godfrey

Philips India Ltd., 158 ITR 574 had an occasion to consider the applicability of doctrine of promissory estoppel It will be useful to reproduce the following para from the above decision.

> ‘’The doctrine of promissory estoppel as explained above was also held to be applicable against public authorities as pointed out in Motilal Padampat Sugar Mills' case [1979] 118 ITR 326 (SC). This court, in Motilal Padampat Sugar Mills' case, quoted with approval the observations of Shah J. in Century Spinning and Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council [1970] 3 SCR 854, where the learned judge said:
>
> > " Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. " (at p. 1024 of AIR 1971 (SC)).
> >
> > " If our nascent democracy is to thrive, different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is, in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice." (at p. 1025 of AIR 1971 (SC)).
>
> The court refused to make a distinction between a private individual and a public body so far as the doctrine of promissory estoppel is concerned.
>
> There can, therefore, be do doubt that the doctrine of promissory estoppel is applicable against the Government in the exercise of its governmental, public or executive functions and the doctrine of executive necessity or freedom of future executive action cannot be invoked to defeat the applicability of the doctrine of promissory estoppel. We must concede that the subsequent decision of this court in Jeet Ram v. State of Haryana [1980] 3 SCR 689, takes a slightly different view and holds that the doctrine of promissory estoppel is not available against the exercise of executive functions of the State and the State cannot be prevented from exercising its functions under the law. This decision also expresses its disagreement with the observations made in Motilal Padampat Sugar Mills' case [1979] 118 ITR 326 (SC), that the doctrine of promissory estoppel cannot be defeated by invoking the defence of executive necessity, suggesting by necessary implication that the doctrine of executive necessity is available to the Government to escape its obligation under the doctrine of promissory estoppel. We find it difficult to understand how a Bench of two judges in Jeet Ram's case, could possibly overturn or disagree with what was said by another Bench of two judges in Motilal Padampat Sugar Mills' case. If the Bench of two judges in Jeet Ram's case found themselves unable to agree with the law laid down in Motilal

Padampat Sugar Mills' case,. they could have referred Jeet Ram's case to a larger Bench, but we do not think it was right on their part to express their disagreement with the enunciation of the law by a co ordinate Bench of the same court in Motilal Padampat Sugar Mills case [1979] 118 ITR 326 (SC). We have carefully Considered both the decisions in Motilal Padampat Sugar Mills' case and Jeet Ram's case [1980] 3 SCR 689, and we are clearly of the view that what has been laid down in Motilal Padampat Sugar Mills' case represents the correct law in regard to the doctrine of promissory estoppel and we express our disagreement with the observations in Jeet Ram's case [1980] 3 SCR 689, to the extent that they are in conflict with the statement of the law in Motilal Padampat Sugar Mills' case [1979] 118 ITR 326 (SC) and introduce reservations cutting down the full width and amplitude of the propositions of law laid down in that case.

Of course, we must make it clear, and that is also laid down in Motilal Padampat Sugar Mills' case [1979] 118 ITR 326 (SC), that there can be no promissory estoppel against the legislature in the exercise of its legislative functions nor can the Government or public authority be debarred by promissory estoppel from enforcing a statutory prohibition. It is equally true that promissory estoppel cannot be used to compel the Government or a public authority to carry out a representation or promise which is contrary to law or which was outside the authority or power of the officer of the Government or of the public authority to make. We may also point out that the doctrine of promissory estoppel being an equitable doctrine, it must yield when the equity so requires, if it can be shown by the Government or public authority that having regard to the facts as they have transpired, it would be inequitable to hold the Government or public authority to the promise or representation made by it, the court would not raise an equity in favour of the person to whom the promise or representation is made and enforce the promise or representation against the Government or public authority. The doctrine of promissory estoppel would be displaced in such a case, because on the facts, equity would not require that the Government or public authority should be held bound by the promise or representation made by it. This aspect has been dealt with fully in Motilal Padampat Sugar Mills' case [1979] 118 ITR 326 (SC) and we find ourselves wholly in agreement with what has been said in that decision on this point.''

2.18 The Hon'ble Apex Court in the case of State of Haryana Vs. M/s. Mahabir Vegetable Oils (P) Ltd. 2011-TIOL-24-SC-CT had an occasion to consider the applicability of promissory estoppel on public authorities. In the case before Hon'ble Apex Court , the state of Hayana in Industrial Policy for the period 01-04-1988 to 31-03-1997 promised to give incentive by way of sales tax exemption for the industries set up in

backward areas of the State. Schedule III appended to the Rules provides for a negative list of the industries and at the initial stage the solvent extract plant was admittedly not included in the negative list. On 16th Dec. 1996, amendment to the draft rules were notified and according to which sales tax benefit was to be given to the investment made upto 3rd Jan. 1996 and solvent extraction plant was also placed in negative list. The Hon'ble Apex Court after considering the doctrine of promissory estoppel held that the assessee will be entitled to sales tax exemption in respect of the investment made upto 16th Dec. 1996, though the draft rules wee circulated on 03-01-1996. It will be useful to reproduce the head note of this case.

> ''It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppels: It is elementary that in a republic governed by the rule of law, no one, howsoever high or low, is above the law. Everyone is subject to the law as fully and completely as any other and the Government is no exception. It is indeed the pride of constitutional democracy and rule of law that the Government stands on the same footing as a private individual so far as the obligation of the law is concerned: the former is equally bound as the latter. It is indeed difficult to see on what principle can a Government, committed to the rule of law, claim immunity from the doctrine of promissory estoppels. Can the Government say that it is under no obligation to act in a manner that is fair and just or that it is not bound by considerations of "honesty and good faith"? Why should the Government not be held to a high "standard of rectangular rectitude while dealing with its citizens"? There was a time when the doctrine of executive necessity was regarded as sufficient justification for the Government to repudiate even its contractual obligations; but, let it be said to the eternal glory of this Court, this doctrine was emphatically negative and the supremacy of the rule of law was established. It was laid down by this Court that the Government cannot claim to be immune from the applicability of the rule of promissory estoppels and repudiate a promise made by it on the ground that such promise may fetter its future executive action.

2.19 Though vide Instruction no. 1/2006 dated 24-03-2006, it was clarified that trading units can be set up in the SEZ. However, the modification was made on 24-05-2006 in which it was made clear that the deduction u/s 10AA will be available in respect of the trading in the nature of re-export of imported good. Thus the assessees were promised that they will be eligible for deduction u/s 10AA of the Act in respect of the profit earning on trading of re-export of imported goods. The revenue has not been able to show us that such instruction was not withdrawn or the Board has issued instruction that instructin dated 24-05-206 from the Ministry of Commerce will not be applicable for the purpose of allowing exemption u/s 10AA of the Act. Hence, in view of the doctrine of promissory estoppel, we hold that the assessee is entitled to deduction.

2.20 We have also reproduced Section 51 of the SEZ Act. As per this Section, it is mentioned that notwithstanding any thing inconsistent therewith contained in any other law for the time being in fore or in any instrument having effect by virtue of any law other than this Act, the provision of SEZ Act will prevail. The Hon'ble Apex Court in the case of Tax Recovery Officer, Vs. Custodian Appointed under the Special Court, 293 ITR 369 had an occasion to consider the meaning of language employed in Section 13 of the Special Court Act. In Section 13 of the Special Court Act, it was stated that provision of the Act shall have effect notwithstanding any thing inconsistent therewith contained in any other law for the time being in force. The Hon'ble Apex Court held that there can be no manner of doubt that the provision of Special Court Act wherever they are applicable shall prevail over the provision of the Income tax Act. The Hon'ble Delhi High Court in the case of CIT Vs. Vasisth Chay Vaapar Ltd., 330 ITR 440 held that when there is a

provision in another enactment which contains a non obstente clause than that would override the provisions of the Income Tax Act. Thus one will have to consider the implication of Section 51 of the SEZ Act. It means that anything in-consistent to the provision of the SEZ Act will not be considered. Thus the word services as mentioned in Section 10AA cannot be construed in-consistently with the definition of services given in the SEZ Act. Under the SEZ act, the trading is included in the services provided the trading is export of imported goods. We therefore, feel that the assessee is entitled to deduction u/s 10AA of the Act and therefore, the ld. CIT(A) was justified in allowing the exemption.

3. In the result, the appeal of the revenue is dismissed.

The order is pronounced in the open Court on 31-01-2012 .

Sd/-	Sd/-
(R.K. GUPTA)	(N.L. KALRA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Jaipur
Dated; 31 /01/2012

*Mishra

Copy forwarded to :-

1. The DCIT, Circle- 2, Jaipur
2. M/s. Goenka Diamond & Jewellers Ltd., Jaipur
3. The ld. CIT(A)
4 The ld. CIT
5 The ld.DR
6 The Guard file (ITA No. 509/JP /11)

By Order

A.R, ITAT, JAIPUR