IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'H' NEW DELHI

BEFORE Sh. R. S. SYAL, ACCOUNTANT MEMBER
AND
SMT DIVA SINGH, JUDICIAL MEMBER

I.T.A .No.-2093/Del/2005
(ASSESSMENT YEAR-2001-02)

Indo Count Industries Ltd., 1206, Pragati Tower, Rajendra Place, New Delhi **(APPELLANT)**	vs	Dy. Commissioner of Income Tax, Circle 11(1), C.R. Building, New Delhi **(RESPONDENT)**

Appellant by	**Sh.O.P. Mody, Adv**
Respondent by	**Sh. Syed Nasir Ali, CIT DR**

Date of Hearing	**11.05.2015**
Date of Pronouncement	**05.06.2015**

ORDER

PER DIVA SINGH, JM

The present appeal has came up for hearing as a result of the order of remit by the Hon'ble High Court in an appeal moved by the Revenue against the original order dated 24/6/2009 passed by the Co-ordinate Bench. The said order was set aside by the order and judgment dated 20th December 2010 by the Hon'ble High Court in ITA No. 1142/2010 wherein the afore-said order was challenged by the Revenue. Accordingly in terms of the remand by the Hon'ble High Court, we consider the claim of the assessee who assails the correctness of the order dated 8/2/2005 of CIT(A) VIV, New Delhi pertaining to 2001-02 Assessment Year on the following grounds:-

1. *"For that the Commissioner of Income Tax (Appeals) grossly erred in arbitrarily concluding that the appellant's counsel has not been able to file any evidence that Unit-2 is a separate unit and not expansion of Unit-1 and in that view of the matter erroneously holding that the Assessing officer has rightly merged the loss of*

Unit-2 in the profit of Unit-1. For that the decision of the Commissioner of Income Tax (Appeals) being contrary to facts on record, is not maintainable.

2. *For that the Balance Sheet on record of Unit-2 irrefutably evidences the fact that Unit-2 was established by the appellant company at a fixed capital outlay of Rs.99,80,68,554/- to independently manufacture cotton yam and grey knitted fabrics and that Unit-2 is a separate and distinct integrated unit capable of being carried on separately as a physically identifiable and industrially recognizable viable undertaking. For that the fact that Unit-2 is a separate unit is borne out of records.*
3. *For that establishment of Unit-2, though it led to an expansion of the existing business of the appellant company, it also led to emergence of a new, physically separate, identifiable, integrated industrial undertaking, viable by itself, separate and distinct in all and every respect from the existing Unit- 1.*
4. *For that no deduction having been claimed by the appellant company under section 10B of the income Tax Act 1961 in relation to Unit-2. the question of applicability thereto of clause (iv) of Explanation 2 of section 10 B of the Income Tax Act, 1961 simply does not arise and is of no relevance.*
5. *For that Unit-2 having been established by the appellant company in terms of letter of permission granted by the Government of India, Ministry of industry, Department of Industrial Development Secretariat for Industrial Approvals, EOU section, the same is a hundred percent export-oriented undertaking within the meaning of section 10 B of the Income Tax Act, 1961 and the conclusion of the Commissioner of Income Tax (Appeals) to the contrary is not sustainable.*
6. *For that the fact that Unit-2 is separate and distinct from Unit-1 is borne out of records and is an accepted fact on record ever since assessment year 1997-98.*
7. *For that it is prayed that deduction under section 10 B of the income Tax Act, 1961 may kindly be allowed to the appellant company in respect of the whole of the profits of Unit-1 without reducing it by the loss of Unit-2. For that it is further prayed that the whole of the loss of Unit-2 may kindly also be allowed to be carried forward in the hands of the appellant company for set off in subsequent years.*
8. *For that the appellant company craves leave to take additional ground or grounds of appeal at or before the time of hearing."*

2. Before proceeding to address the arguments of the parties before the Bench we deem it appropriate to first extract the following specific direction of the Hon'ble High Court hereunder:-

" The question of law which is raised by the Revenue in this appeal is as to whether the assessee would be entitled to claim the benefit

of Section 10B of the Income Tax Act in respect of profit making unit without adjusting the losses there against which were suffered by another unit of the same assessee, i.e, the loss making unit. We find that precisely this issue was raised before the Income Tax Appellate Tribunal (in short ' the Tribunal') also and ***it is pure legal issue touching upon the interpretation which is given in Section 10B of the Act. The Tribunal has, however, not decided the issue on merits and the appeal of the assessee herein has been allowed only on the ground that in previous years such a benefit was given., by following the principle of consistency.***

We are of the opinion that in a matter like this, since ***the grant of benefit depends upon the interpretation to be given to Section 10B of the Act, the Tribunal should have decided the issue on merits rather than taking the aforesaid short route.*** *In view of this, Ld. Counsel for the respondent/assessee states that he has no objection if the matter is remitted back to the Tribunal for decision on merits.*

We accordingly set aside the impugned order and remit the case back to the Tribunal with direction that the appeal preferred by the assessee before the Tribunal shall be decided on merits.

This appeal is disposed of in the aforesaid terms. "

(emphasis provided in the present proceedings)

3. Addressing the issue under challenge, the Ld.AR sought to rely upon the findings arrived at by the Co-ordinate Bench in its order dated 24/6/2009 (copy of the said order placed at pages 22 to 28) so as to submit that the facts have been correctly brought out in the said order and considering the judicial precedent on the same, the issue it was submitted is to be decided in favour of the assessee. It was pointed out to the Ld. AR that since as per record, the said order has been set aside by the Hon'ble High Court, accordingly instead of referring to facts recorded in the said order, it would be more appropriate to refer to the facts as found recorded in the orders of the authorities below. In view of the same, the Ld. AR drew the attention of the Bench first to the findings recorded in the assessment order. While doing so, it was his stand that full facts have not been discussed in the assessment order as the AO has directly proceeded to reduce the eligible profits of Unit-I by the losses of Unit-II which was not claimed as an eligible unit by the assessee. Accordingly it was his submission that since relevant discussion is missing in the assessment

order, he had wanted to refer to the facts recorded by the Co-ordinate Bench. However, since the order stood set aside, it was submitted that the only finding given by the Assessing Officer is at page 3 i.e the last page of the assessment order where instead of allowing the exemption to the entire profits of unit 1 which was the eligible unit, the Assessing Officer has reduced the same by first disallowing the loss from unit II. Referring to the material available on record it was his submission that the assessee has never claimed that Unit 2 is an eligible unit and has given narration to this effect in its Audited Balance Sheet. Referring to the impugned order it was his submission that the CIT(A) while deciding the issue has wrongly proceeded to consider the issue in an entirely different context by bringing in an irrelevant discussion on "Green Card" and thereafter has upheld the conclusions arrived at in the assessment order. Referring to paper book page no. 19 which contains copy of the statement of Income which is part of the Audited Balance Sheet of Unit II. it was submitted that the assessee, had never claimed that unit 2 is an eligible unit and accordingly in the circumstances the tax authorities are not justified in reducing the eligible profit of Unit 1 by the losses of Unit II. Reliance was placed on the judgment of the jurisdiction High Court in the case of CIT VS. Technologies Pvt. Ltd (2014)361 ITR 36 Delhi. The Ld. AR was specifically required to address any direct evidence in regard to the claim of the assessee on record apart from the narrations given in the audited books of accounts. However, it was submitted that the only direct evidence could be "consistency" on the issue and this factor had been relied upon by the assessee before the Co-ordinate Bench and the said factor was accepted for deciding the issue in assessee's favour. Accordingly it was his prayer that the same should be followed.

4. Ld. CIT DR Mr. Syed Nasir Ali, appearing for the Revenue vehemently submitted that Hon'ble High Court has strongly deprecated the approach to decide the issue on consistency accordingly reliance placed thereon by the Ld. AR, it was submitted is misplaced. Apart from that heavy reliance was placed

upon the assessment order and the CIT(A)'s order. Attention of the Bench was invited to Paras 3.3.5 at page 7 of the impugned order, so as to submit that the CIT(A) has concluded the issue taking into consideration the submission advanced on behalf of the assessee itself who has stated that the green card is issued in the name of the appellant company and the said card covers both the units. Addressing the "Green Card" it was his submission that a perusal of the relevant provisions of the Act which have been considered by the CIT(A) would show that this is a license given by the Competent Authority under the Act to eligible companies. For the said purpose attention was invited to Clause (iv) of Explanation 2 of Section 10B of the Income Tax Act. Based on the facts and the provisions of the Act, it was his submission that the claim of the assessee has rightly been denied. Referring to the copy of the audited balance sheet which was also relied upon by the Ld. AR at page 19, it was his submission that as per assessee's own claim in the "Notes" to the accounts the assessee has first made a disclosure that *"the assessee company is a 100 percent Export Oriented Unit claims exemption u/s 10B from the assessment years."* Further it was argued that the thereafter narration is given on which reliance is placed upon by the Ld. AR that the assessee does not "propose" to claim exemption for Unit-II this year. This narration it was submitted is a self-serving note. Thus this self-serving note, it was argued cannot decide the issue in the face of the directions of the Hon'ble High Court. The Ld. CIT DR was required to show from the findings in the impugned order whether there is any direct reference to the fact that unit-II was an eligible unit or not. The Ld. CIT DR stated that apart from the narration of the assessee on the issue in its Notes to Accounts which cannot be accepted the only other direct evidence is the submission made before the CIT(A) recorded in the last page of his order where the assessee through the AR accepts that the green card covers both the units. Thus this plea of the assessee on facts which the assessee ought to know decides the eligibility of the Unit-II also and the consistent finding of fact on record, it was submitted deserves to be upheld.

5. We have heard the rival submissions and perused the material available on record, it is seen that the assessee company is engaged in the business of manufacturing and exporting combed cotton yarn and grey knitted fabrics. The assessee's claim of exemption u/s 10B for unit I was reduced by the losses of Unit II by the assessing officer. The action was assailed in appeal contending that for Unit II the assessee had not put forth any claim of exemption u/s10B and thus since the assessee never treated it as an eligible unit the occasion to reduce the eligible profits of Unit I by the losses of Unit II did not arise. It is seen that the CIT(A) also did not agree with the claim put forth by the assessee and it is only before the Tribunal that the assessee succeeded for the first time. The Co-ordinate Bench considering the principle of consistency allowed the appeal of the assessee. The said order as per record has been challenged before the Hon'ble High Court who was pleased to remit the issue back directing the Tribunal to return a finding on merits.

5.1. In the said background, we note that as far as the assessment order is covered there is no discussion on the issue and based on the material available conclusion has been drawn by the AO. The correctness of the decision in appeal has been assailed as per record before as per Page 4 of the impugned order on the following ground:-

> *i) Unit 1 began to manufacture and export in the previous year relevant to A.Y: 1992-93. The exemption u/s 10(B) was claimed for this unit from A. Y 1995-96 and is available to the unit up to A.Y 2001-02 i.e the year under appeal.*
> *vii) Unit 2 was established which began to manufacture and export in the previous year relevant to A.Y 1997-98. The appellant company had opted for non application of the provisions of Section 10(B) to its unit for the A.Y 1997-98 and thereafter. Unit 2 is a separate independent production unit.*

5.2. Further relying on the decision of the Apex Court in the case of Textile Machinery Corporation Ltd 107, ITR 195 (SC)& ors it was claimed that Unit II is not an expansion of the existing unit but in fact it was a distinct and separate identifiable unit.

5.3. The CIT(A) held the said claim contrary to record and as per assessee's own submissions qua the availability of the necessary approval of the competent authority as per the mandate of Clause (iv) of Expln 2, Section 10B of the Income Tax Act, 1961. For ready reference we extract the specific statutory portion as it stood at the relevant time from the impugned order itself:-

> *"3.3.5. The relevant provisions of Section 10(B) are note below:*
> *10B. Special provisions in respect of newly established hundred per cent, export oriented undertakings.*
> *Explanation 2.------ for the purposes of this section,---*
> *(i) " Computer software" means,---*
> *(a) any computer programme recorded of any disc, tape, perforated media or other information storage device; or*
> *(b) any customized electronic date or any product or service of similar nature, as may be notified by the Board, which is transmitted or exported from India to any place outside India by any means;*
> *(ii) " Convertible foreign exchange" means foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Regulation Act, 1973 (46 of 1973) and any rules made there under or any other corresponding law for the time being in force;*
> *(iii) " export turnover" means the consideration in respect of export by the undertaking of articles or things or computer software received in, or brought into India by the assessee in convertible foreign exchange in accordance with sub-section (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things or computer software outside India or expenses, if any incurred in foreign exchange in providing the technical services outside India.*
> ***(iv) " hundred percent. Export oriented undertaking" means an undertaking which has been approved as a hundred percent. Export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by Section 14 of the Industries (Development and Regulation)Act, 1951 (65 of 1951), and the rules made under that Act;***
> ***(v) " relevant assessment years" means any assessment year failing within a period of ten consecutive assessment years, referred to in this section.***

5.4. Considering the same, the CIT(A) it is seen concluded that for claiming the exemption u/s 10(B), it is necessary to obtain approval as a 100% export oriented undertaking by the Board appointed in this behalf by the Central Govt. in exercise of the powers conferred by Section 14 of the Industries Development & Regulation Act, 1951 and the Rules made under that Act. The Ld. CIT(A) considering the papers filed by the assessee before him vide letter dated 18th January 2005, observed that the green card has been issued by the Export Promotion Officer vide letter dated 26/8/1992 and the company had been informed about the issue of the green card No. is 037 dated 25/8/1992 valid upto 23/8/1997. Considering the discussion in the impugned order, we find that the submission of the Ld. AR that the CIT(A) misdirected himself by discussing an irrelevant issue of "Green Card" on facts is found to be not tenable we find that the discussion on green card was a valid discussion and it was introduced by the assessee itself before the CIT(A) in support of its claim. It is further seen that the CIT(A) took into consideration the information given that the Dy. Development Commission vide letter dated 22/8/1997 as per record informed the assessee that the earlier green card no. 037 dated 25/8/1992 is cancelled and the new green card no. 377 dated 22/8/1997 valid up 21/8/1992 had been issued. Thereafter as per record reference is also made to the letter dated 14/8/20002 of the Assistant Development Commissioner which informed the assessee that the green card No. 377 dated 22/8/1997 is also cancelled and a new green card no. 000971 dated 14/8/2002 valid upto 31/3/2006 was being issued. On the basis of this information the CIT(A) concluded that the green card issued is in respect of the unit set up in 1992. A copy of certificate issued by Ministry of Commerce was also made available to the CIT(A) as per record by the assessee and on considering the same, it was noticed that the certificate has been issued in the name of M/s Indo Count Industries Ltd. Certifying it to be 100% EOU dated 14/8/2002 valid upto 31/3/2006. The said certificate it was noted is in relation to green card No. 000971 i.e the industrial unit which started manufacturing in 1992. In this background, considering the statutory

requirement, the CIT(A) required the assessee to address the said requirement having been met by unit 2 by way of a certificate as per the Explanation 2(iv) of section 10B noted above. In response thereto the CIT(A) records that the assessee has given the following reply *"The appellant counsel submitted that the green card is issued in the name of the appellant company and covers both the units."* The CIT(A) has concluded that the stand of the assessee in the submissions made is contradictory to the stand taken by the assessee in the written submission. Thus, holding that when exemption is claimed to be available qua the undertaking in such a situation to hold that it was not available based on the claim put forth in the balance sheet is not relevant. However not concluding the issue against the assessee despite the oral submissions, it is seen that the assessee was directed to file copy of application made to the Board as mentioned in Explanation 2(iv) for unit 2 to verify whether the assessee sought to expand the existing units or set up an entirely new independent undertaking for which separate permissions were required to be made. A perusal of the impugned order shows that the counsel failed to produce copy of the same.

5.5. In the said background where we are called upon by the Hon'ble High Court to decide the issue on merits where admittedly in the assessment order there is no discussion but facts are thrashed out by the CIT(A) where admittedly the only direct evidence would be the letter/application addressed to the Competent Authority by the assessee for its approvals is not available on record, we find that the issue has to be sent back to the AO. While doing so, we hold that the Ld. CIT DR is justified in relying upon the finding of the CIT(A) as the claim cannot be decided on the basis of the self-serving Note to Accounts No. (ii) in paper Book page 19 given by the assessee in the Audited Book of Account. The same is reproduced hereunder:-

> *(i) "The company being an 100% Export Oriented Unit claims exemption u/s 10B from assessment year.*
> *(ii) The Unit-II of the assessee company which commenced business is year 1997-98 is an 100% of export Oriented Unit and its*

income Tax u/s 10B of the Income Tax Act, 1961, the assessee do not propose to avail the exemption this year in respect of its Unit-II."

5.6. A perusal of the above shows that not only there is a contradiction in Note (i) and Note (ii) in the above extract even otherwise the Note (ii) relied upon is unsupported by any evidence. The principle of consistency on the issue relied upon by the Ld. AR and accepted by the Co-ordinate Bench has not been approved of by the Hon'ble High Court accordingly in the absence of any direct evidence on record the issue needs to be restored. As observed, the direct evidence in the facts of the case would be the letter/application addressed by the assessee to the Competent Authority at the time of setting up Unit II as that is the evidence which would demonstrate whether the assessee intended to start a new independent undertaking or did the assessee intend to expand the existing unit as for both the eventualities permission/approval of the Competent Authority was necessary. The permission evidently having been granted which the Revenue on facts considers it to be in the case of expansion it is for the assessee to show that the permission granted was on the application of setting up a new unit and not on an application for expansion. The self-serving note in the accounts cannot be treated to be a direct evidence of any credible relevance. The justification for setting up a new undertaking on the basis of costs incurred for capital acquisition, investments in assets, new employees, new business, new premises etc. would be irrelevant evidences as both for expanding an existing unit or setting up a new unit specific separate bonded premises, assets, employees, separate books of account and bank accounts and business premises would be necessary. Thus reliance placed on decisions rendered in different facts and arguments would be of no relevance.

5.7. Before parting, it may be appropriate to refer to the decision of the Apex Court cited in the case of Textiles Machinery Corporation Ltd.(cited supra). A perusal of the principle laid down therein with which there can be no quarrel it is seen is that the said decision is on entirely different facts and circumstances and does not help the assessee in any manner. The following extract from the

head note of the said judgement brings out the material facts before the Hon'ble Court, these have been bold texted by us for emphasis:-

> ***" The appellant, a heavy engineering concern manufacturing boilers, machinery parts, wagons, etc., set up two new units, a steel foundry division and jute mill division. The steel foundry division started manufacturing some castings, which the appellant was previously buying from the market, but the castings were mostly used by the other existing divisions of the appellant itself. Raw materials were supplied to the jute mill division by the boiler division of the appellant and after machining and forging, the parts were given back by the jute mill division to the boiler division.*** *The appellant claimed exemption from tax u/s 15C of the India Income-tax, 1922, in respect of the profits form the steel foundry division for the assessment years 1958-59 and 1959-60, and in respect of the profits from the jute mill division for the assessment year 1959-60. The income-tax authorities held that the two units were formed by reconstruction of the business already existing within the meaning of section 15C(i); but the Appellate Tribunal, on appeal, held that the appellant was entitled to the relief u/s 15C because the two divisions were new industrial undertakings and that they were not formed by reconstruction of the existing business.* ***The Tribunal found that the machinery in the two divisions were new, they were housed in a separate building and that industrial licenses had to be obtained for manufacturing the parts; that the existing business of the appellant consisted of manufacturing boilers, wagons, etc., and for that purpose the appellant was purchasing the parts, forgings and castings from outside; and that the business of the new units was to manufacture these very parts; and that, therefore, it could not be said that the new undertakings were formed out of the existing business to come within the mischief of section 15C (2)(i).*** *On a reference, the High Court held that the change of producing one's own goods systematically used in the existing business instead of buying them from outside would only be a reconstruction of an existing business within the meaning of section 15C (2)(i).* ***On appeal to the Supreme Court:***
>
> ***Held,*** *reversing the decision of the High Court , that the steel foundry division and the jute mill division were not formed by the reconstruction of the business already in existence within the meaning of Section 15C (2)(i) and that, therefore, the appellant was entitled to the exemption claimed.*

> *For the reconstruction of an existing business there must be transfer of the assets of the existing business to the new industrial undertaking.*
>
> *A new activity launched by the assessee by establishing new plants and machinery by investing substantial funds may produce the same commodities of the old business or it may produce some other distinct marketable products, even commodities which may feed the old business. These products may be consumed by the assessee in his old business or may be sold in the open market. One thing is certain that the new undertaking must be an integrated unit by itself wherein articles are produced and at least a minimum of ten person with the aid of power and a minimum of twenty persons without the aid of power have been employed. Such a new industrially recognizable unit of an assessee cannot be said to be reconstruction of his ld business since there is no transfer of any assets of the old business to the new undertaking which takes place when there is reconstruction of the old business. For the purpose of section 15C the industrial units set up must be new in the sense that new plants and machinery are erected for producing either the same commodities or some distinct commodities. In order to deny the benefit of section 15C the new undertaking must be formed by reconstruction of the old business."*
>
> ***(emphasis provided by the Bench)***

5.8. On a perusal of the above it is seen that the conclusion that deduction u/s 15C of the Income Tax Act 1922 was allowable was arrived at dismissing the plea of the Revenue who had proceeded to deny the same for the reason that it was considered to be an act of reconstitution of existing business for an assessee who was an engineering concern manufacturing boilers etc. The assessee after setting up Steel Foundry Division and Jute Mill Division started consuming their products instead of procuring them from the market as was done in the past. Rejecting the reasoning of the Revenue their Lordships held that "reconstruction" presupposes that transfer of assets of the existing business took place which was not a fact in that case as fresh capital had been introduced. It was also held that the fact that the product of the two divisions was utilized by the assessee who earlier was purchasing it from outsiders was not a relevant criteria for denying the claim. Accordingly the well settled principle in the said judgment in the facts of the assessee's case has no bearing

on the issue at hand as in the facts of the present case. What was the intention of the assessee at the time of setting up the new unit would be brought out from the application made to the Competent Authority. Introduction of fresh capital is required even for expanding an existing business to a different location. Accordingly in the absence of any discussion on the direct evidence to decide the issue the same is remitted back to the file of the AO with the direction to decide the same afresh by way of a speaking order in accordance with law after giving the assessee a reasonable opportunity of being heard.

6. In the result the appeal of the assessee is allowed for statistical purposes.

The order is pronounced in the open court on 05th of June, 2015.

Sd/- **Sd/-**

(R. S. SYAL) **(DIVA SINGH)**
ACCOUNTANT MEMBER **JUDICIAL MEMBER**

Dated:05/06/2015
R. Naheed/Amit Kumar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI