

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G", MUMBAI**

**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND
SHRI N.K. PRADHAN, ACCOUNTANT MEMBER**

ITA NO. 3128/MUM/2019

A.Y : 2012-13

Solitaire Diamond Exports
2, A-wing, 1st floor,
Nagindas Mansion, Opera House,
Mumbai. (Appellant)
PAN : ABXFS1928F

vs. ITO-19(3)(4),
Mumbai (Respondent)

**Appellant by : Shri Dharmesh Shah
Respondent by : Shri Nitin Waghmode**

**Date of Hearing : 06/08/2019
Date of Pronouncement : 30/10/2019**

ORDER

PER SAKTIJIT DEY, JUDICIAL MEMBER

This appeal by the assessee is against the order dated 28.03.2019 passed by learned Commission of Income Tax (Appeals)-30, Mumbai for assessment year 2012-13.

2. The grievance of the assessee in the present appeal is confined to disallowance of deduction claimed under Section 10AA of the Income Tax Act, 1961 (in short 'the Act'). Briefly, the facts are that the assessee, a partnership firm, is engaged in the business of importing for the purpose of re-export of

cut and polished diamonds after sorting and grading them. For this purpose, the assessee has set-up a registered unit in the Special Economic Zone (SEZ), Surat. For the assessment year under dispute, assessee filed its return of income on 27.09.2012 declaring Nil income after claiming deduction under Section 10AA of the Act. During the assessment proceedings, the Assessing Officer called upon the assessee to justify its claim of deduction under Section 10AA of the Act. In response to the query raised by the Assessing Officer, it was submitted by the assessee that the activity undertaken by it of importing diamonds for re-export is in the nature of services, hence, qualifies as an 'activity' under the Special Economic Zones Act, 2005 (in short 'SEZ Act') and corresponding rules. Therefore, it is eligible for deduction under Section 10AA of the Act. The Assessing Officer, however, was not convinced with the submissions of the assessee. The Assessing Officer was of the view that to claim deduction under Section 10AA of the Act, assessee must manufacture goods and products for export. He observed, the assessee does not have the necessary plant and machinery to process raw material and also lacks the requisite manpower. Thus, he ultimately concluded that the assessee does not undertake any manufacturing activity at all and is simply engaged in trading activity. Further, referring to the notes attached to the Audit report, he observed that as per the said notes, assessee has been described as a trading firm engaged in the business of import and export of diamonds from the SEZ unit. On the basis of the aforesaid factual analysis and referring to the provisions of Section 10AA of the Act as well as certain judicial precedents, the Assessing Officer ultimately held that the assessee is not eligible to claim deduction under Section 10AA of the Act. Accordingly, he disallowed assessee's claim of deduction under the said provision. Being aggrieved, assessee preferred appeal before learned Commission (Appeals). However,

learned Commission (Appeals) also sustained the disallowance concurring with the view expressed by the Assessing Officer.

3. The learned Authorised Representative (AR) submitted, the assessee is a SEZ unit and its activity is to import diamonds for re-export after sorting and grading. He submitted, the activity carried on by the assessee is in the nature of services. He submitted, as per Section 10AA of the Act, not only manufacture and production of articles for export qualifies for deduction, but export of services also qualifies for deduction. He submitted, the term 'services' has not been defined under Section 10AA of the Act and since Section 10AA of the Act was brought to the statute by virtue of SEZ Act, the definition of 'services' as provided under the SEZ Act has to be referred to, to find the true meaning of the said expression. He submitted, 'services' under the SEZ Act means such tradable services which are covered under the general agreements of trade in services or which may be prescribed by the Central Government for the purpose of Special Economic Zones Act, 2005 to earn foreign exchange. He submitted, the term 'services' has been defined in Rule 76 of the SEZ Rules, 2006 which, *inter-alia*, includes trading. Referring to explanation to the said rule, he submitted, the expression 'trading' shall mean import for the purpose of export. He submitted, as the assessee has rendered services as per the definition of 'services' provided under the SEZ Act and rules framed thereunder, it is eligible to claim deduction under Section 10AA of the Act. The learned AR submitted, Section 51 of the SEZ Act makes it clear that the provisions of the SEZ Act will have overriding effect over any other law in case of any inconsistency with the SEZ Act. He submitted, since the expression 'services' has not been defined under Section 10AA of the Act and has only been defined under the SEZ Act, the meaning provided in the SEZ Act has to be

adopted in view of the overriding provision of Section 51 of the SEZ Act. For such proposition, the learned AR relied upon the decision of the Hon'ble Supreme Court in the case of *Tax Recovery Officer vs Custodian appointed under the Special Court (Trial of offences relating to transactions in Securities) Act, 1992 and others, 293 ITR 369 (SC)*. Further, the learned AR submitted, in a series of decisions involving identical nature of dispute, the Tribunal has consistently held that import of diamonds for the purpose of export qualifies for deduction under Section 10AA of the Act. In this regard, he relied upon the following decisions :-

- i) *DCIT vs Goenka Diamonds & Jewellers Ltd., 146 TTJ 68 (ITAT-Jaipur)*
- ii) *Hon'ble Rajasthan High Court order in the case of CIT vs Goenka Diamonds & Jewellers Ltd. and ors., D.B. ITA No. 222/2012 dated 24.08.2017.*
- iii) *Goenka Diamonds and Jewellers Ltd. vs ACIT & Ors., ITA No. 153/JP/2014 (ITAT-Mumbai)*
- iv) *ITO vs Duty Free Distribution Services Pvt. Ltd., 50 ITR (Trib) 325*
- v) *Midas DFS (P) Ltd. vs ITO, 96 taxmann.com 351*

4. Thus, he submitted, the issue even otherwise stands squarely covered in favour of the assessee by virtue of the various decisions of the Tribunal. The learned AR finally submitted, the decision of the Hon'ble Supreme Court in the case of *Commissioner of Customs (Import) Mumbai vs M/s. Dilip Kumar and Company & Ors., CA No. 3327 of 2007 dated 30.07.2018* relied upon by the learned Commission (Appeals) would have no impact as in the present case there is no ambiguity with regard to the interpretation of the statutory provision and the assessee has fulfilled the basic conditions of Section 10AA of the Act to claim deduction thereunder.

5. The learned Departmental Representative (DR) strongly relied upon the observations of the Assessing Officer and learned Commission (Appeals) and submitted that the assessee is simply engaged in trading activity and has not undertaken any manufacturing or production activity for the purpose of exporting goods/products to qualify for deduction under Section 10AA of the Act. He submitted, the provisions of Section 10AA of the Act would make it clear that the object behind introducing such provision is to encourage manufacturing and export of goods. It is not meant to promote trading activities. Thus, he submitted, the assessee having failed to fulfill the conditions of Section 10AA of the Act, was rightly denied deduction.

6. We have considered the rival submissions and perused the material on record. We have also carefully examined the decisions cited before us. Insofar as the factual aspect of the issue is concerned, there is no dispute that the assessee is importing diamond for re-export after sorting and grading. It is also not disputed that for carrying out such activity, assessee has a registered unit in SEZ, Surat. So it is governed under the SEZ Act. Section 10AA of the Act, which is introduced in the statute by virtue of SEZ Act, provides exemption for a specified period to SEZ units in respect of profits and gains derived from export of articles or things manufactured or produced or from services. It is the claim of the assessee from the very inception that import of diamonds for re-export is in the nature of services. Admittedly, the expression 'services' has not been defined either under Section 2 or Section 10AA of the Act. Therefore, we have to look to the meaning of 'services' as defined under the SEZ Act and the rules framed thereunder since the provision of Section 10AA of the Act was introduced by the SEZ Act. As per the definition of 'services' under the SEZ Rules, 2006, trading also comes within its ambit. Section 51 of the SEZ Act has

an overriding effect to the extent that it makes clear that if there is any inconsistency between the SEZ Act and rules framed thereunder and any other law, the provisions of SEZ Act and rules framed thereunder would prevail. In the aforesaid circumstances, in the absence of definition of 'services' under Section 10AA of the Act, 'services' as defined under the SEZ Act and rules framed thereunder would be relevant. As discussed earlier, the definition of 'services' under the SEZ Act and rules framed thereunder encompasses trading activity also. Therefore, import of diamonds for re-export though, may be in the nature of a trading activity, but is certainly in the nature of 'services', hence would qualify for deduction under Section 10AA of the Act. In the case of *Goenka Diamonds & Jewellers Ltd. (supra)*, the Tribunal, after examining the provisions of Section 10AA of the Act vis-à-vis the SEZ Act and rules framed thereunder, had concluded that since the definition of 'services' under the SEZ Act also includes trading activity, the activity relating to import of diamonds for re-export would qualify for deduction under Section 10AA of the Act. The aforesaid decision of the Tribunal was upheld by the Hon'ble Rajasthan High Court while discussing a batch of appeals filed by the Revenue against the decision of the Tribunal. The judgment of the Hon'ble Rajasthan High Court was delivered on 24.08.2017 in Income Tax Appeal no. 222 of 2012 and others. It is relevant to observe, in the aforesaid case also, the assessee had its unit in Surat SEZ. Similar view was again expressed by the Mumbai Bench of the Tribunal in the case of the same assessee in ITA No. 153/JP/2014 and 216/JP/2014 dated 10.01.2018. The other decisions cited by the learned AR also express similar view. Therefore, consistent with the view taken by the different Benches of the Tribunal, we are of the view that assessee is eligible to claim deduction under Section 10AA of the Act, since, the activity of import of

diamonds for re-exporting comes within the nature of 'services' as provided under Section Section 10AA of the Act.

7. Before parting, we must observe that learned Commissioner (Appeals), while sustaining the disallowance of deduction claimed by the assessee under Section 10AA of the Act, has referred to the decision of the Hon'ble Supreme Court in the case of *M/s. Dilip Kumar and Company & Ors. (supra)*. However, the ratio laid down in the said decision rather supports the claim of the assessee, since, the assessee has fulfilled the basic conditions of Section 10AA of the Act and comes within the framework of the provision. As discussed earlier, the activity of the assessee comes within the expression 'services' as per Section 10AA of the Act, as per the definition of 'services' under the SEZ Act and rules framed thereunder. Therefore, in our considered opinion, reference to the decision in the case of *M/s. Dilip Kumar and Company & Ors. (supra)* would be of no help to the Revenue. In view of the aforesaid, we direct the Assessing Officer to allow assessee's claim of deduction under Section 10AA of the Act. In view of our aforesaid decision, there is no need to adjudicate ground no. 2 raised by the assessee.

8. In the result, appeal of the assessee is allowed as indicated above.

Order pronounced in the open court on 30th October, 2019.

Sd/-
(N.K. PRADHAN)
ACCOUNTANT MEMBER

Sd/-
(SAKTIJIT DEY)
JUDICIAL MEMBER

Mumbai, Date : 30th October, 2019

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Copy to :

- 1) The Appellant
- 2) The Respondent
- 3) The CIT(A) concerned
- 4) The CIT concerned
- 5) The D.R, "G" Bench, Mumbai
- 6) Guard file

By Order

Dy./Asstt. Registrar
I.T.A.T, Mumbai