IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.8.2020

CORAM

THE HONOURABLE MR. JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MRS. JUSTICE V.BHAVANI SUBBAROYAN

TAX CASE APPEAL NO.972 OF 2018

(heard through video conferencing)

Preludesys India Ltd., Chennai-63. ...Appellant

Vs

The Assistant Commissioner of
Income Tax, Company Circle 5(2),
Chennai-34. ...Respondent

APPEAL under Section 260A of the Income Tax Act, 1961 against the order dated 04.8.2017 made in ITA.No.3151/Mds/2016 on the file of the Income Tax Appellate Tribunal, Chennai 'B' Bench for the assessment year 2009-10.

For Appellant : Mr.R.Sivaraman

For Respondent : Mrs.R.Hemalatha, SSC

Judgment was delivered by T.S.SIVAGNANAM,J

This appeal by the assessee under Section 260A of the Income Tax Act, 1961 (for short, the Act) is directed against the order dated 04.8.2017 made in ITA.No.3151/Mds/2016 on the file of the Income Tax Appellate Tribunal, Chennai 'B' Bench (for brevity, the Tribunal) for the assessment year 2009-10.

2. The appeal has been admitted on 21.12.2018 on the following substantial questions of law :

> *"(i) Whether, on the facts and circumstances of the case, the Tribunal was right in law in denying the appellant the benefit of deduction under Section 10A of the Income Tax Act, 1961 on the 'deemed export' of Rs.1,23,66,641/- made to another STP unit? And*
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> *(ii) Whether, on the facts and circumstances of the case, the Tribunal was right in law in remitting back to the Commissioner of Income Tax (Appeals) on the issue of allowance of expenditure incurred towards telecommunication amounting to Rs.17,09,510/- under Section 10A of the Income Tax Act, 1961 without considering its*

inextricable nexus to the export made by the appellant ?"

3. ***After perusing the impugned order, we find that the second substantial question of law admitted is, in effect, a question of fact and that the Tribunal affirmed the order passed by the Commissioner of Income Tax (Appeals)-3, Chennai-34 [hereinafter called the CIT(A)], who remanded the matter to the Assessing Officer for a fresh consideration. Therefore, the only substantial question of law, which will be taken up for consideration in this appeal is the first substantial question of law.***

4. We have heard Mr.R.Sivaraman, learned counsel appearing for the appellant – assessee and Mrs.R.Hemalatha, learned Senior Standing Counsel appearing for the respondent – Revenue.

5. The assessee is a company engaged in the business of software development, which is a unit in a Special Economic Zone (SEZ) in Chennai. For the assessment year under consideration namely 2009-10, the assessee filed its return of income on 29.9.2009 admitting a total income of Rs.21,08,581/- under normal computation and Rs.1,75,11,355/- under Section 115JB of the Act. The assessee's case was subsequently selected for scrutiny and a notice under Section

143(2) of the Act along with a questionnaire under Section 142(1) of the Act was issued on 13.9.2011. The assessment was completed under Section 143(3) of the Act by order dated 30.11.2011 arriving at an assessed income of Rs.78,79,453/- as per normal computation and Rs.1,75,11,355/- as per Section 115JB of the Act.

6. The assessee included a sum of Rs.1,23,66,641/- as export receipt, which was stated to be a '***deemed export***' towards software development to another Software Technology Park (STP) Unit. The contention of the assessee was that if software was supplied to an STP Unit, it should be a '***deemed support***' as per the Foreign Trade Policy vis-a-vis the Income Tax Act, 1961. The Assessing Officer held that as per the contract agreement between the assessee and the principal, the work had to be carried out in India. Further, he found that the receipt for such work was received in Indian rupees only, as the payment was routed through the Hyderabad office of the principal. Accordingly, the export turnover of the assessee was recomputed and reduced to Rs.6,84,25,755/- and the Assessing Officer disallowed the deduction under Section 10A of the Act amounting to Rs.1,23,57,188/- after holding that the supply would not fall within the scope of the word '***export***' as defined under the provisions of the Income Tax Act.

7. As against the order dated 30.11.2011 passed by the

Assessing Officer, the assessee preferred an appeal before the CIT(A), who confirmed the disallowance under Section 10A of the Act, vide order dated 30.6.2016, as against which, the assessee preferred further appeal to the Tribunal, which also rejected the appeal filed by the assessee by the impugned order.

8. The decision of the Tribunal is in paragraph 4, on a reading of which, we find that the Tribunal did not render any positive finding against the assessee while affirming the view taken by the CIT(A). In fact, the Tribunal appears to have been doubtful with regard to the legal position and while rejecting the assessee's appeal, the Tribunal made an observation that if this Court is of the view that the transaction is to be regarded as 'export', the matter can be restored back to the file of the Assessing Officer for a fresh decision. Thus, we find that the Tribunal did not render any specific finding. Rather, there was no finding rendered by the Tribunal.

9. Under normal circumstances, this would have been a good ground to remand the matter to the Tribunal. However, considering the facts that the case relates to the assessment year 2009-10 and that the assessment was completed under Section 143(3) of the Act during November 2011, we proceed to determine the answer to the first substantial of law, which is the only question framed for

consideration.

10. More or less, an identical question was considered by the Karnataka High Court in the case of ***Tata Elxsi Ltd. Vs. ACIT [reported in (2015) 94 CCH 0202]*** wherein the assessee provided software services to another STP Unit in Bangalore and the services were provided on a principal to principal basis and based on the purchase orders placed by the recipient of those services on the asseessee therein with instructions to bill and deliver to the recipient. The software development work done by the said assessee for the recipient was exported out of India by the recipient. When the Assessing Officer called upon the assessee therein to explain as to why the amount should not be treated as a domestic sales from Section 10A Unit, the aforementioned explanation was given by the assessee therein explaining the nature of transaction and stating that it was a '***deemed export***' and that they would be entitled for deduction under Section 10A of the Act as they satisfied the condition in Clauses (a) and (b). The substantial question of law, which was framed for consideration, was as to whether the Tribunal was right in holding that the computer software sales made to the recipient therein did not fall under the expression 'export turnover' for the purpose of deduction

under Section 10A of the Act.

11. After noting the statutory provisions and examining the factual position in the said case, the Karnataka High Court held in favour of the assessee in the following terms :

> *"20. From the aforesaid provisions, it is clear that if a assessee wants to claim the benefit of Section 10A, firstly he must export articles or things or computer software. Secondly, the said export may be done directly by him or through other exporter after fulfilling the conditions mentioned therein. Thirdly, such an export should yield foreign exchange which should be brought into the country. If all these three conditions are fulfilled, then the object of enacting Section 10A is fulfilled and the assessee would be entitled to the benefit of exemption from payment of Income Tax Act on the profits and gains derived by the Undertaking from the export.*
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> *21. Clause 6.11 of Exim Policy dealing with entitlement for supplies from the DTA states that supplies from the DTA to EOU/EHTP/STP/BTP units will be regarded as 'deemed export', besides being eligible for relevant entitlements under paragraph 6.12 of the Policy. They will also be eligible for the additional entitlements mentioned therein.*

What is of importance is when a supply is made from DTA to STP, it does not satisfy the requirements of export as defined under the Customs Act. However, for the purpose of Exim Policy, it is treated as 'deemed export'. Therefore, when Section 10A of the Act was introduced to give effect to the Exim Policy, the supplies made from one STP to another STP has to be treated as 'deemed export' because Clause 6.19 specifically provides for export through Status Holder. It provides that an EOU/EHTP/STP/BTP unit may export goods manufactured/ software developed by it through other exporter or Status holder recognized under this policy or any other EOU/ EHTP/ STP/SEZ/BTP unit. What follows from this provision is that to be eligible for exemption from payment of income tax, export should earn foreign exchange. It does not mean that the undertaking should personally export goods manufactured/ software developed by it outside the country. It may export out of India by itself or export out of India through any other STP Unit. Once the goods manufactured by the assessee is shown to have been exported out of India either by the assessee or by another STP Unit and

foreign exchange is directly attributable to such export, then Section 10A of the Act is attracted and such exporter is entitled to benefit of deduction of such profits and gains derived from such export from payment of income tax. Therefore, the finding of the authorities that the assessee has not directly exported the computer software outside country and because it supplied the software to another STP unit, which though exported and foreign exchange received was not treated as an export and was held to be not entitled to the benefit is unsustainable in law. The substantial question of law is answered in favour of the assessee and against the revenue. The appeal is allowed. The impugned orders are set aside. The assessee is held to be entitled to deduction of such profits and gains derived from the export of the computer software."

12. The aforesaid decision was relied upon by the Karnataka High Court in the case of ***PCIT, Bangalore Vs. International Stones India (P) Ltd. [reported in (2018) 95 Taxmann.com 287]*** wherein it has been held as follows :

"***17.*** *We cannot accept the aforesaid submission for two reasons:*

(i) Firstly, sub-section (2), in our opinion, only determines the eligibility of the unit in question, while sub-section(1) of S.10B is the main provision which grants the deduction in respect of profit and gains to the assessee-unit in question. It is true that the assessee-unit in question in order to be entitled to avail the benefit of S.10B of the Act has to be a manufacturing unit and it cannot be merely a trading house, but on a plain reading of sub-section(1) the deduction u/s.10B cannot be restricted to the goods manufactured or produced by the assessee-unit himself or itself. There is no restriction imposed in sub-section(2) of S.10B on the quantum of deduction eligible u/s.10B(1) of the Act with reference to export of goods manufactured by unit itself. The purpose of sub-section (2) is only to ensure that the conditions of unit not formed by splitting up of a new industrial unit and which is engaged in manufacturing of goods and articles is satisfied by the assessee in question. We do not see any restriction of export of goods purchased from the domestic units also by the assessee to be included for the purpose of deduction u/s.10B(1) of the Act.

(ii) Secondly, the Division Bench of this Court in Tata Elxsi's Ltd. case (supra) has already dealt with this aspect of the matter that even the deemed export of the goods sold by a unit covered likewise u/s.10A of the Act, which also incorporates the similar sub-section(2) as contained in S.10B of the Act, that while such goods are sold within India to another STP unit, which as per the Exim Policy, the Union of India treats as 'Deemed Export' and if a similarly situated assessee in a Free Trade Zone has been held entitled to the benefit of deduction u/s.10A, in respect of the exports made through a third party or another units located in India within STP only, with which reason, we respectfully agree, there is no reason to exclude such 'Deemed Export' being taken into account as 'Export Turnover' for the purpose of S.10B of the Act also.

18. *For both these reasons, we cannot accept the aforesaid submissions of the learned counsel for the Revenue and the contention therefore is liable to be rejected and the same is accordingly rejected.*

19. *Another contention which was raised by the learned counsel for the Revenue before us is that in sub-section (1) of S.10B, the*

words used "profit and gains as are derived by a 100% Export Oriented Unit Undertaking", he emphasized the words "by the Undertaking" and therefore, submitted that for this reason, the export in question should take place directly from the hands of Undertaking in question itself and not through a third party. He also submitted that like in the case of M/s. Tata Elxsi Ltd. (supra), both the units were located in the same STP area. In the present case, the entity through whom the export has been made by the assessee is not 100% Export Oriented Unit and therefore, the benefit of S.10B should be denied to the Respondent-assessee before this Court.

20. *We are unable to accept even this submission of learned counsel for the appellant-Revenue. We do not find any good reason to take a narrow and pedantic approach in construing the words "by an Undertaking" and restricting the benefit u/s.10B of the Act only in respect of the direct export of such goods manufactured by such Unit as contended by the learned counsel for the appellant-Revenue.*

21. *As held by the Division Bench of this Court in M/s. Tata Elxsi's Ltd. case, the*

purpose of giving these deductions in these special provisions is to encourage exports and fetch foreign currency in terms of Exim Policy propounded and announced by the Union of India. The 'Deemed Export' by the assessee Undertaking even through a third party who has exported such goods to a Foreign country and has fetched Foreign Currency for India, still remains a 'Deemed Export' in the hands of the assessee undertaking also. If the Parliament intended to put any restrictive meaning for curtailing the said deduction, such words could be employed in sub-section(1) itself, which could have excluded 'Deemed Export' from the ambit and scope of word 'export' employed in sub-section(1) of S.10B of the Act. The Explanation defining 'Export Turnover' in both these provisions does not make any such distinction between the 'Direct Export' and 'Deemed Export'.

***22.** For a harmonious reading of these provisions of the Act which are undoubtedly beneficial provisions, the word 'export' read with the background of Exim Policy of Union of India would certainly include 'Deemed Export' also within the ambit and scope of the 'Export Turnover' as explained in Explanation-2*

of sub-section (9A) of the said S.10B of the Act.

23. *Therefore, both the contentions raised by the learned counsel for the appellant-Revenue to restrict the deduction in the hands of the respondent-assessee by excluding the 'Deemed Exports', does not have any merit and the said contention deserves to be rejected and the same is accordingly rejected.*

24. *The appellant-Revenue before us was unable to establish that both the Respondents-assessees before us and the entity through whom such export was made by the assessee for the period in question, have claimed any double or repetitive benefit u/s.10B of the Act for the same transaction of export.*

25. *Therefore, we are clearly of the opinion that the issue raised in the present case by the Revenue is squarely covered by the decision of the Division Bench of this Court in M/s. Tata Elxsi's Ltd. case (supra) and we respectfully agree with a view expressed by the earlier Division Bench and therefore, we answer the said substantial question of law framed above against the Revenue and in*

favour of the assessee and the appeals filed by the Revenue deserves to be dismissed and the same are accordingly dismissed."

13. The learned counsel appearing for the appellant – assessee has also placed reliance on a decision rendered by one of us ***(TSSJ)*** while sitting singly in the case of ***Tulsyan Nec Ltd. Vs. Assistant Commissioner (CT) [reported in (2015) 82 VST 63],*** to explain the concept of a '***deemed export***'. Thus, the submission of the learned counsel is that the Assessing Officer failed to take note of the nature of transaction done by the assessee and failed to examine the copies of invoices raised on M/s.Microsoft Global Services Centre (India) Limited (MGSCIL), which had exported the services rendered by the assessee and the copies of payment advices received from the bank against the foreign exchange receipt. It is emphasized that the invoices clearly show that they had been received in foreign currency, that the payment was received in foreign currency and that the Assessing Officer committed a factual mistake in stating that the receipts were made in Indian currency and not foreign currency. The concept of a '***deemed export***' was explained by producing agreements and invoices and stating that the agreement was for the onsite development of software for M/s.Agilent Technologies, USA,

which was the client of M/s.MGSCIL, to whom, the assessee deputed its employees in the place of business of M/s.MGSCIL, for developing software for the US company.

14. It is further submitted by the learned counsel for the appellant - assessee that there is no dispute to the fact that M/s.MGSCIL, is an STP Unit and in this regard, he has drawn our attention to the Notification issued by the Ministry of Electronics and Information Technology, Government of India. Our attention is also invited to the sample invoices, which have been placed before us. The learned counsel has also referred to the relevant provisions of the Foreign Trade Policy, which defines as to what is a '***deemed export***'. A reference is also made to the circular issued by the Reserve Bank of India dated 12.5.2016 in Circular No.68, which intimates about the coming into force of new Regulations namely Foreign Exchange Management (Export of Goods and Services) Regulations, 2015 superseding the Regulations of the year 2000. This has been referred to show as to what are the eligible credits namely payments received in foreign exchange by a 100% EOU Unit or a Unit in

(a) export processing zones or

(b) software technology park or

(c) electronic hardware technology park for supply of goods to similar

such unit or to units in the Domestic Tariff Area (DTA) and also payments received in foreign exchange by a unit in DTA for supply of goods to a unit in SEZ.

15. A reference is also made to Circular No.1001/8/2015-CX.8 dated 28.4.2015 issued by the Central Board of Excise and Customs (CBEC), which is a clarification issued with regard to the rebate of duty on goods cleared from DTA to SEZ. This circular has been referred to show that Section 53(1) of the Special Economic Zones Act (for brevity, the SEZ Act) mentions that a special economic zone shall, on and from the appointed date, be deemed to be a territory outside the customs territory of India for the purpose of undertaking the authorized operations.

16. Rule 30(1) of the Special Economic Rules, 2006 has also been referred to and it has been clarified in the said circular that according to the SEZ Act, supply of goods from DTA to SEZ constitutes export and that as per Section 51 of the SEZ Act, the provisions of the SEZ Act shall have overriding effect over the provisions of any other law in case of any inconsistency as Section 53 of the SEZ Act makes an SEZ a territory outside the customs territory of India.

17. Thus, it is argued by the learned counsel for the appellant – assessee that the first substantial question of law entertained in this

appeal has already been decided in the aforementioned decisions and it is no longer res integra.

18. Per contra, Mrs.R.Hemalatha, learned Senior Standing Counsel appearing for the respondent – Revenue submits that the CIT(A), while dismissing the assessee's appeal, had rightly relied upon the decision of the Kerala High Court in the case of ***CIT, Cochin Vs. Electronic Controls and Discharge Systems (P) Limited [reported in (2011) 13 Taxman.com 193]*** wherein it has been held that the benefit of exemption under Section 10A of the Act cannot be extended to local sales made by a unit in SEZ whether as part of DTA sales or as inter unit sales within the zone or units in other zones. The appeals were allowed in favour of the Revenue and in this regard, the learned Senior Standing Counsel has drawn the attention of this Court to paragraph 6, which reads as follows :

> "*After hearing both sides and after going through the above referred provisions of the Income-tax Act and the provisions of the Special Economic Zones Act, 2005, we are unable to uphold the order of the Tribunal because the concept of deemed export under the Special Economic Zones Act is not incorporated in the scheme of exemption under section 10A of the Income-tax Act and it*

is the settled position that the Income-tax Act is a self-contained code and the validity or correctness of the assessment has to be considered with reference to statutory provisions. It is not as if the Special Economic Zones Act, 2005 or the Foreign Exchange Regulation Act or the Foreign Exchange Management Act are not referred to in the Income-tax Act. The Income-tax Act refers to several statutes in different places and wherever required, provisions of such statutes are incorporated in the Act through reference or by incorporation. It is not as if the Parliament is unaware of other statutes which have specific purposes. Inter-unit transfers in Economic Zones are treated as exports for the purpose of Customs Act and the Central Excise Act. However, when section 10A, provides for exemption only on profits derived on export proceeds received in convertible foreign exchange, the Legislature never intended the benefit to be extended to local sales made by the units in the Special Economic Zone, whether as part of Domestic Tariff Area sales or inter-unit sales within the Zone or units in other Zones. In fact all Special Economic Zones are allowed to make 25 per cent sales

to Domestic Tariff Area and the profit derived from such sales are not entitled to exemption. Exemption under section 10A(3) is specifically geared to profits on actual exports, that too, made against receipt of convertible foreign exchange. We are of the view that if the provisions of the Special Economic Zones Act, 2005, are brought into extend the exemption on profits derived on inter-unit sale made by industries within the Export Processing Zone, the court will be re-writing the legislation which is exactly what the Tribunal has done. In fact, the unit which purchased components from the assessee must be manufacturing final products and being a unit in the Special Economic Zone will be exporting the final product, on which that unit will get exemption on the entire profits which include the value of the components supplied by the assessee. Probably the Legislature did not want duplicity in exemption on export profit. That is why inter-unit sales in the Export Processing Zone are not treated as export within the meaning of section 10A of the Income-tax Act, no matter such transfers are treated as exports for the purpose of Customs and Excise duty exemption. When the exemption is only on

actual profits derived on exports made against receipt in convertible foreign exchange, the Tribunal, in our view, has no justification to extend it to profits received on local sales within India against payment received in Indian rupees. For the above reasons, we are unable to sustain the orders of the Tribunal and we, therefore, allow the appeals by reversing the orders of the Tribunal and by restoring the orders cancelled by the Tribunal."

19. It is further submitted by the learned Senior Standing Counsel appearing for the Revenue that in both the decisions of the Karnataka High Court in the case of ***Tata Elxsi Ltd.,*** and in the case of ***International Stones India Private Ltd.,*** the Court did not consider the effect of ***Section 27 of the SEZ Act***, which states that ***the provisions of the Income-tax Act, 1961 (Act 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.*** It is her submission that the concept of '***deemed export***' is alien to the provisions of the Income Tax Act, 1961 as rightly held in the decision of the Kerala High Court in the case of ***Electronic Controls and***

Discharge Systems (P) Limited., and that the Income Tax Act is a complete Code by itself, that for deduction in the nature of concession, strict interpretation is to be given and that no words can be read into the Statute.

20. In this regard, the learned Senior Standing Counsel appearing for the Revenue has also relied upon the recent decision of the Hon'ble Supreme Court in the case of ***Ramnath & Co. Vs. CIT [Civil Appeal Nos.2506 to 2509 of 2020 dated 05.6.2020]*** wherein the Court considered the provisions of Section 80-O of the Act and after referring to the decision of the Constitution Bench in the case of ***Commissioner of Customs (Import), Mumbai Vs. Dilip Kumar & Co. and Ors [reported in (2018) 9 SCC 1],*** it has been held as follows :

> *"19. Without expanding unnecessarily on variegated provisions dealing with different incentives, suffice would be to notice that the proposition that incentive provisions must receive "liberal interpretation" or to say, leaning in favour of grant of relief to the assessee is not an approach countenanced by this Court. The law declared by the Constitution Bench in relation to exemption notification, proprio vigore, would apply to the*

interpretation and application of any akin proposition in the taxing statutes for exemption, deduction, rebate et al., which all are essentially the form of tax incentives given by the Government to incite or encourage or support any particular activity.

20. The principles laid down by the Constitution Bench, when applied to incentive provisions like those for deduction, would also be that the burden lies on the assessee to prove its applicability to his case; and if there be any ambiguity in the deduction clause, the same is subject to strict interpretation with the result that the benefit of such ambiguity cannot be claimed by the assessee, rather it would be interpreted in favour of the revenue. In view of the Constitution Bench decision in Dilip Kumar & Co. (supra), the generalised observations in Baby Marine Exports (supra) with reference to a few other decisions, that a tax incentive provision must receive liberal interpretation, cannot be considered to be a sound statement of law; rather the applicable principles would be those enunciated in Wood Papers Ltd. (supra), which have been precisely approved by the Constitution Bench. Thus, at and until the stage of finding out eligibility to

claim deduction, the ambit and scope of the provision for the purpose of its applicability cannot be expanded or widened and remains subject to strict interpretation but, once eligibility is decided in favour of the person claiming such deduction, it could be construed liberally in regard to other requirements, which may be formal or directory in nature."

21. It is argued that Section 27 of the SEZ Act clearly states that the provisions of the Income Tax Act, subject to modifications specified in the Second Schedule, will be applicable, which itself shows that the provisions of the Income Tax Act will prevail. In this regard, the learned Senior Standing Counsel appearing for the Revenue has referred to the Second Schedule as well as Section 10A and Section 10AA, which was inserted in April 2006. Therefore, it is submitted that both the decisions of the Karnataka High Court in the case of ***Tata Elxsi Ltd.,*** and in the case of ***International Stones India Private Ltd.,*** cannot be applied, as those decisions were rendered without taking note of the provisions of Section 27 of the SEZ Act.

22. We have carefully considered the contentions raised by the learned counsel on either side.

23. The first aspect that has to be considered is as to whether

the Income Tax Act, 1961 deals with the concept of a '***deemed export***'. This position has been clearly explained by the High Court of Karnataka both in the case of ***Tata Elxsi Ltd.,*** and in the case of ***International Stones India Private Ltd.*** The Court rightly took note of the provisions of the SEZ Act and held that the export in question need not take place directly from the hands of the undertaking in question and this finding was rendered upon a harmonious reading of the provisions of the Act in the background of the EXIM Policy of the Union of India and the concept of a '***deemed export***' was held to be included within the ambit and scope of an '***export turnover***' as explained in Explanation 2 to Sub-Section 9A of the said Section 10B of the Act.

24. In fact, the decision of the Karnataka High Court in the case of ***Tata Elxsi Ltd.,*** will squarely apply to the facts of the assessee's case, because the nature of transaction in both the cases is identical. The Court, in the said decision, held that Section 10A of the Act was introduced to give effect to the EXIM Policy, the supplies made from one STP Unit to another STP Unit should be treated as deemed export under Clause 6.10 of the EXIM Policy. Therefore, it was held that it does not mean that the undertaking should personally export goods manufactured/software developed by it outside the country, that it

may export out of India by itself or export out of India through any other STP Unit and that once the goods manufactured by the assessee are shown to have been exported out of India either by the assessee or by another STP Unit and foreign exchange is directly attributable to such export, then Section 10A of the Act is attracted and such exporter is entitled to benefit of deduction of such profits and gains derived from such exports from payment of income tax.

25. It is no doubt true that the provisions of Section 27 of the SEZ Act were not considered in both the said decisions. Rather, that contention was not raised by the Revenue in those cases. Thus, we have to consider as to the correctness of the submissions of the Revenue by referring to Section 27 of the SEZ Act, which, at the risk of repetition, is extracted as hereunder:

> *"The provisions of the Income-tax Act, 1961 (Act 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."*

26. The emphasis laid by the learned Senior Standing Counsel appearing for the Revenue is on the expression '***subject to the modifications specified in the Second Schedule'.*** It is argued that the expression '***subject to the modifications specified in the Second Schedule'*** will clearly indicate that the Income Tax Act will prevail over the SEZ Act.

27. For appreciating such an argument, we need to refer to the Second Schedule, the relevant portions of which are as follows :

> "*(a) in Section 10,*
>
> *(A) in clause (15), after sub-clause (vii), the following clause shall be inserted at the end, namely:*
>
> *(viii) any income by way of interest received by a non-resident or a person who is not ordinarily resident, in India on a deposit made on or after the 1st day of April, 2005, in an Offshore Banking Unit referred to in clause (u) of section 2 of the Special Economic Zones Act, 2005; ;*
>
> *(B) in clause (23G), after the words, brackets, figures and letters sub-section (4) of section 80-IA, the words, brackets, figures and letters or sub-section (3) of section 80-IAB shall be inserted;*
>
> *(C)* [1]***[***]***
>
> *(b) in section 10A, after sub-section (7A), the following sub-section shall be inserted, namely :*

(7B) The provisions of this section shall not apply to any undertaking, being a Unit referred to in clause (zc) of section 2 of the Special Economic Zones Act, 2005, which has begun or begins to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year commencing on or after the 1st day of April, 2006 in any Special Economic Zone;

(c) after section 10A, the following section shall be inserted, namely :

10AA. Special provisions in respect of newly established units in Special Economic Zones. - (1) Subject to the provisions of this section, in computing the total income of an assessee, being an entrepreneur as referred to in clause (j) 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;

(ii) for the next five consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the Special Economic Zone Re-investment Reserve Account) to be created and utilized for the purposes of the business of the assessee in the manner laid down in sub-section (2)."

28. From the above, it is seen that in Section 10A of the Act, Sub-Section (7B) was inserted and it says that *the provisions of this Section shall not apply to any undertaking, being a Unit referred to in Clause (zc) of Section 2 of the Special Economic Zones Act, 2005, which has begun or begins to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year commencing on or after the 1st day of April, 2006 in any Special Economic Zone.* Therefore, the expression occurring in Section 27 of the SEZ Act namely '***subject to modifications specified in the Second Schedule'*** is the modification, which was made in 2006 by introducing Sub-Section (7B) in Section 10A and

inserting Section 10AA of the Act.

29. Therefore, a proper reading of Section 27 of the SEZ Act would mean that the benefit, which will accrue to the assessee will be subject to the modification specified in the Second Schedule and it would mean fulfillment of certain conditions for being entitled to the benefit of the special provision namely Section 10AA of the Act. The provisions of the SEZ Act cannot be ignored because of the fact that the terms '***developer***', '***entrepreneur***' and '***authorized operations***' are not defined under the Income Tax Act, but they are defined under the SEZ Act, which, being a special Statute, will have to be applied to consider as to whether the transaction is an '***export***' or a '***deemed export***'. This is amply made clear by the provisions of Section 53 of the SEZ Act, which states that '***a Special Economic Zone shall, on and from the appointed day, be deemed to be a territory outside the customs territory of India for the purposes of undertaking the authorized operations'.***

30. In fact, the CBEC issued a clarification vide Circular No. 1001/8/2015-CX.8 dated 28.4.2015 with regard to rebate of duty on goods cleared from DTA to SEZ, which clearly explains the concept of a '***deemed export***' and also states that the provisions of the SEZ Act shall have overriding effect of the provisions of the Income Tax Act in

case of any inconsistency.

31. In the instant case, there was no inconsistency. Rather, the provisions of the Income Tax Act resorts to the provisions of the SEZ Act while considering as to whether the assessee would be entitled for the benefit under Section 10A or 10B of the Act.

32. It is argued by the learned Senior Standing Counsel appearing for the respondent – Revenue that the provision, being a beneficial provision, requires to be strictly interpreted in favour of the Revenue.

33. However, the law has been settled by the Constitution Bench of the Hon'ble Supreme Court in the case of ***Dilip Kumar,*** which has been referred to in the decision of the Hon'ble Supreme Court in the case of ***Ramnath & Co.***

34. Further, the question before us is as to whether a transaction is an '***export***' or a '***deemed export***' and not on the quantum of deduction, which the assessee is entitled to. The Income Tax Act being silent with regard to the concept of '***deemed export***' and since, even under Sections 10A and 10B of the Act, the provisions of the SEZ Act are required to be read, the decision of the Hon'ble Supreme Court in the case of ***Ramnath & Co.,*** will not be applicable to the facts and circumstances of this case.

35. In the light of the above discussion, we hold that the Tribunal committed an error in not even rendering a finding as to whether the order passed by the CIT(A) was right in law and as to whether the decision in the case of ***Electronic Controls and Discharge Systems (P) Limited*** would be applicable to the facts and circumstances of this case. The decision in the case of ***Electronic Controls and Discharge Systems (P) Limited*** cannot be applied to the facts of the present case firstly for the reason that the Court, in the said decision, found that the receipt was in Indian currency whereas in the instant case, the receipt was routed through the banking channel by convertible foreign exchange. Secondly, the Court had not decided the effect of the provisions of the SEZ Act 2005, the Rules framed thereunder and the Foreign Trade Policy Guidelines issued by the Director General of Foreign Trade as well as the decision of the Kerala High Court in the case of ***Tata Tea Limited Vs. ACIT [reported in (2010) 189 Taxmann.com 303].*** **It is not out of place to mention that** as against the decision in the case of ***Tata Tea Limited,*** a special leave petition was filed by the Revenue before the Hon'ble Apex Court and it was dismissed on the ground of low tax effect in the decision reported in ***[2020] 115 taxmann.com 347.*** Therefore, the decision in the case of ***Electronic Controls and Discharge Systems (P) Limited*** is

distinguishable and cannot be applied to the assessee's case. For all the above reasons, the assessee is entitled to succeed.

36. For all the above reasons, the tax case appeal is allowed and the first substantial question of law, which is the only substantial question law framed, is answered in favour of the assessee.

37. So far as the other issue is concerned namely regarding deduction of interest on bandwidth and telephone expenses, the Tribunal affirmed the order of remand passed by the CIT(A) and we find that no substantial question of law arises for consideration in this regard. We have never entertained such a substantial question of law. We leave that question open for the Assessing Officer to take a decision on merits after affording an opportunity to the assessee. No costs.

17.8.2020

Speaking
Index & Internet : Yes
To
1.The Income Tax Appellate Tribunal, Chennai 'B' Bench.
2.The Assistant Commissioner of Income Tax, Company Circle 5(2), Chennai-34.

RS

T.S.SIVAGNANAM, J

AND

V.BHAVANI SUBBAROYAN, J

RS

17.8.2020