

**(2011) 04 AP CK 0021**

**In the Andhra Pradesh High Court**

**Case No : Income Tax Tribunal Appeal No. 62 of 2011**

Swayam Consultancy (P) Ltd.

APPELLANT

Vs

The Income Tax Officer

RESPONDENT

**Date of Decision : 26-04-2011**

**Acts Referred:**

Customs Act, 1962 — Section 2(16), 2(18), 50, 51  
Income Tax Act, 1961 — Section 10A, 10AA, 10B, 10B(1), 10B(3)

**Citation :** (2011) 273 ELT 193 : (2011) 336 ITR 189 : (2011) 8 RCR(Civil) 1280

**Hon'ble Judges :** V.V.S. Rao, J;Ramesh Ranganathan, J

**Bench :** Division Bench

**Advocate :** M.V.J.K. Kumar, for the Appellant; A. Rajasekhar Reddy, for the Respondent

**Final Decision :** Dismissed

## **Judgement**

V.V.S. Rao, J.—This appeal u/s 260A of the Income Tax Act, 1961 (the Act) is against the order dated 31.1.2011 of the Income Tax Appellate Tribunal, Hyderabad Bench "A", in ITA NO. 1242/H/2010. By the said order, the appeal of the Assessee against the order dated 03.2.2010 of the Commissioner of Income Tax (Appeals)-IV, Hyderabad was dismissed holding that the Appellant is not entitled to claim deduction u/s 10B of the Act.

2. The Appellant is engaged in the manufacturing and assembling of wire and cable drawing/manufacturing machines. It is an Assessee within the jurisdiction of the Respondent. The Assessee filed income tax returns for the year 2007-08 declaring loss of Rs. 45,469/-. Though the surplus, as per the profit and loss account, is Rs. 1,29,79,828/-, the Assessee claimed deduction of Rs. 1,28,97,161/- u/s 10B of the Act. They contended that they are a 100% export oriented unit (EOU) as approved under the scheme of the Government of India, and they are entitled for deduction u/s 10B of the Act. The assessing officer noticed that the goods were cleared from the factory on 04.11.2006 and, as per the invoice-cum-challan, the place of delivery is at Attola Village in Silvasa

(Daman 85 Nagar Haveli Union Territory). During the scrutiny of the return, the Assessee pleaded that the" machinery was delivered to M/s. Chandra Proteco Ltd., (the Agent for short) u/s 143(3) of the Act on the express instructions of the foreign buyer, M/s. Proteco De Marino Ozino and C Sass, Italy (the Proteco for short) and, therefore, it is deemed to be an export for the purpose of Section 10B of the Act. The assessing officer disallowed deduction holding that the Assessee did not fulfil the conditions laid down for deduction u/s 10B of the Act; the goods were delivered in India; and they were not exported out of India. Being aggrieved, the Appellant preferred an appeal to CIT (A). While holding that the Assessee did not furnish any evidence that the goods had moved out of India so as to fall within the definition of "export", the appeal was dismissed. This view found favour with the learned Tribunal as well.

3. Learned Tribunal considering the Explanation to Section 80HHC of the Act held that delivery of the machinery to the Proteco's agent in India does not amount to export out of India. The relevant observations are as follows:

In our opinion, in view of the above provisions of the IT Act, deemed export is not recognized by the provisions of the IT Act. Even otherwise, as seen from the facts of the case, it is an admitted fact that M/s. Chandra Proteco Ltd. is not the buyer of the goods. The said concern is only the "Consignee", at whose place the delivery of the goods sold by the Assessee to M/s. Proteco De Marino Ozino and C Sass (Italy), was to be given at their request of said buyer. Therefore, it is not the case that the Assessee had sold the goods to other EOU against relevant declaration in Form CT 3, so as to consider the transaction as an export. In view of this fact, we do not find any merit in the contention that there was a case of sale from one EOU to another. Therefore, for the mere fact that there was movement of goods from one bonded warehouse to another cannot be taken to mean that there was an "Export". In order to claim deduction u/s 10B, it must be proved by the Assessee that such sale transaction must involve clearance at any Customs station as defined in the Customs Act. Otherwise, there was possibility that goods after the purchase may not be exported at all and yet the benefit may be claimed. Since in the present case, the transaction involves no clearance at the Customs station, it cannot be treated as export out of India.

4. The Counsel for the Appellant, placing reliance on M/s. Central Coal Fields Ltd. and Others Vs. State of Orissa and others, , Commissioner of Income Tax Vs. Silver and Arts Palace, , Ram Babu and Sons and Another Vs. Union of India (UOI) and Another, and Commissioner of Income Tax Vs. Silver and Arts Palace, would contend that Section 10B of the Act is intended to extend the benefit of exemption to Industries and, therefore, it should be construed liberally. He would submit that the machinery intended for export is delivered to the agent of Proteco and, even though it is delivered in India at Silvassa, it should be deemed to be delivery to a foreign buyer, and a delivery on export. He points out that payment was made in convertible foreign exchange as evidenced by Foreign Inward Remittance Certificate (FIRC) issued by the State Bank of Hyderabad

and, therefore, the learned Tribunal erred in rejecting the contention of the Appellant.

According to the Counsel, the FIRC is conclusive proof of export and, therefore, the Assessee is entitled for claiming deduction u/s 10B of the Act.

5. Exports and imports are regulated by the Customs Act, 1962 which, among others, repealed the Sea Customs Act, 1878. Section 2(18) of the Customs Act defines "export" to mean "taking out of India to a place outside India". As defined in Section 2(16) of the Customs Act "entry" in relation to goods, inter alia, means an entry made in a bill of entry, shipping bill or bill of export. Sections 50 and 51 of the Customs Act stipulate the procedure for entry of goods for exportation as well as clearance of goods for exportation. For ready reference they are quoted below.

Section 50. Entry of goods for exportation.- (1) The exporter of any goods shall make entry thereof by presenting to the proper officer in the case of goods to be exported in a vessel or aircraft, a shipping bill, and in the case of goods to be exported by land, a bill of export in the prescribed form.

(2) The exporter of any goods, while presenting a shipping bill or bill of export, shall at the foot thereof make and subscribe to a declaration as to the truth of its contents.

Section 51. Clearance of goods for exportation.- Where the proper officer is satisfied that any goods entered for export are not prohibited goods and the exporter has paid the duty, if any, assessed thereon and any charges payable under this Act in respect of the same, the proper officer may make an order permitting clearance and loading of the goods for exportation.

6. The exporter of any goods has to present a shipping bill making entry in relation to the goods to be exported in a vessel and the shipping bill should contain a declaration as to the truth of the contents thereof. After the officer is satisfied that the goods entered in the shipping bill are not prohibited goods, and the exporter has paid the duty of customs and charges leviable under the Customs Act, he may make an order for clearance and loading the goods for exportation. Therefore the document evidencing clearance and loading the goods for exportation is conclusive proof of export outside India. It is also the fact that, for the purpose of Central Excise Act and the Customs Act, certain transactions involving sale of goods in India are treated as "deemed exports" under different schemes evolved by the Central Government to facilitate growth of income from export and import duties. But for the purpose of income tax Act as we shall presently see, the law neither contemplates nor recognizes such "deemed exports".

7. The term "export" is not defined in the income tax Act though the term "export turnover" is explained/defined by four provisions, namely, the Explanations to Sections 10A, 10AA, 10B and 80HHC of the Act. Be it noted,

Section 10A of the Act enables an undertaking in a free trade zone to claim deduction of profits and gains from the export of articles or things or computer software for a period of 10 consecutive years. Similarly, u/s 10AA of the Act, a newly established unit in a Special Economic Zone can claim deduction of 100% profits and gains derived from the export for a period of 10 years and, u/s 10B of the Act, an Assessee can claim deduction of profits and gains as are derived by 100% EOUs from the export of articles or things for a period of 10 years. Section 80HHC of the Act is to the effect that an Assessee, being an Indian company engaged in the business of "export out of India", may be allowed deduction of the profits to the extent specified in Section 80HHC(1B) of the Act. The Explanation to all these provisions has a definite bearing in understanding Section 10B(3) of the Act on which the Petitioner's Counsel placed considerable emphasis. For ready reference, we quote the same hereunder.

Section 10B(3). This section applies to the undertaking, if the sale proceeds of articles or things or computer software exported out of India are received in, or brought into, India by the Assessee in convertible foreign exchange, within a period of six months from the end of the previous year or, within such further period as the competent authority may allow in this behalf.

8. The language of Section 10B(3) of the Act is plain. It does not admit any other meaning than what is conveyed by the language used therein. The benefit u/s 10B(1) of the Act is available to 100% EOUs only if the sale proceeds of articles or things exported out of India are received in convertible foreign exchange. Two conditions should be satisfied before the benefit u/s 10B(1) of the Act is claimed. There should be export of articles or things or computer software out of India, and the sale proceeds therefore shall be received in convertible foreign exchange. One would not exclude the other nor only one condition would satisfy the eligibility conditionalities. The intention of the Parliament, in granting benefit to the units in free trade zones, special economic zones and EOUs, is to allow the benefit of deduction only when the articles or things or computer software are actually and factually exported out of India for foreign currency. This is made very clear by the Explanation to other such similar Sections conferring the benefit of deduction of profits. For ready reference, they are shown in the following table.

Section 10A Explanation 2(iv) "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;

Section 10AA Explanation 1

(i) "export turnover" means the consideration in respect of export by the

undertaking, being the Unit of articles or things or services received in, or brought into, India by the Assessee but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things outside India or expenses, if any, incurred in foreign exchange in rendering of services (including computer software) outside India; "export in relation to the Special Economic Zones" 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;

#### Section 10B Explanation 2(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;

#### Section 80HHC Explanation (aa)

"export out of India" shall not include any transaction by way of sale or otherwise, in a shop, emporium or any other establishment situated in India, not involving clearance at any customs station as defined in the Customs Act, 1962 (52 of 1962);

#### Explanation (b)

"export turnover" means the sale proceeds received in, or brought into, India by the Assessee in convertible foreign exchange in accordance with Clause (a) of Sub-section (2) of any goods or merchandise to which this section applies and which are exported out of India, but does not include freight or insurance attributable to the transport of the goods or merchandise beyond the customs station as defined in the Customs Act, 1962 (52 of 1962);

(emphasis supplied)

9. Sections 10A, 10AA, 10B and 80HHC of the Act allow an Assessee to claim deduction of profits from export of articles. These provisions, in effect, deal with different categories of eligible undertakings and establishments engaged in the export of articles and things in various locations. The Explanation to these provisions defines/explains the "export turnover". The freight and telecommunication charges incurred in connection with the "delivery of articles or things outside India" during the course of export cannot be reckoned as "export turnover". This clearly indicates that when the profits from exports are allowed as deduction, the Parliament intended the actual export out, of India of the articles or things. The intention was never to consider the delivery of goods to a foreign buyer in India as amounting to export.

10. The decisions relied by the Petitioner's Counsel do not in any manner assist the point argued by him. Indeed they support the view expressed by us supra. Explanation (aa) of Section 80HHC of the Act is clarificatory in nature and explains a transaction which cannot be treated as "export out of India". A sale in a shop, emporium, or other establishment in India which does not require any clearance in any Customs station is not considered as "export out of India". The view of the Allahabad High Court in Ram Babu and Sons to the said effect followed by the Rajasthan High Court received imprimatur from the Supreme Court in Silver and Arts Palace. Suffice to excerpt the following observations from the decision of the Supreme Court which reads as under.

The Allahabad High Court specifically considered the effect of introduction of Explanation (aa) to Section 80HHC of the Act and had taken view in Ram Babu and Sons and Another Vs. Union of India (UOI) and Another, that this Explanation means that, for the purpose of this section, there will be no export out of India if two conditions are cumulatively fulfilled viz. (a) it is a transaction by way of sale or otherwise in a shop, emporium or establishment situate in India, and (b) that it does not involve clearance in any customs station as defined in the Customs Act. This view of the Allahabad High Court had been consistently followed by several other High Courts, including the Rajasthan High Court itself in Income Tax Officer Vs. Vaibhav Textiles,

11. It is the admitted position herein that initially Proteco agreed to take delivery of wire/cable drawing machines at Hyderabad Ex-factory, subsequently Proteco sent a communication advising the Appellant to deliver the machinery to their Agent at Silvassa which is also a 100% EOU, the payment was received in convertible foreign exchange as evidenced by FIRC, and the goods were delivered to the Agent under a proforma invoice in the name of the foreign buyer. This transaction of manufacturing machines in India by EOU and delivering them in India to another 100% EOU, which is alleged to be the agent of a foreign buyer, does not amount to "export out of India" either under the Customs Act or under the income tax Act. The assessing officer, the appellate authority and the learned Tribunal appreciated the principle of law and applied it correctly. The appeal is misconceived.

12. The appeal, for the above reasons, is dismissed, without any order as to costs.