आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
''A'' BENCH, AHMEDABAD

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
MS. MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./**ITA No. 1840/AHD/2018**
निर्धारणवर्ष/Asstt. Year: 2015-16

A.C.I.T, Circle-3(2), Ahmedabad	Vs.	M/s Vishnu Export, Shop No.4,Shivdhara Complex, Maha Gujarat Estate, Sarkhej Bavla Highway, Sanand, Ahmedabad-382213. **PAN: AALFV9288N**

(Applicant)		**(Respondent)**

Revenue by :	Shri Ravindra, Sr. D.R.
Assessee by :	Shri Tushar Hemani, Sr. Advocate with Shri Parimalsinh B. Parmar, A.R.

सुनवाईकीतारीख/**Date of Hearing : 02/02/2023**
घोषणाकीतारीख/**Date of Pronouncement: 31/03/2023**

आदेश/O R D E R

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Revenue against the order of the Learned Commissioner of Income Tax (Appeals)-3, Ahmedabad, dated 20/06/2018 arising in the matter of assessment order passed under s. 143(3) of the Income Tax Act 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2015-16.

2. The Revenue has raised the following grounds of appeal:

(i) The Ld.CIT(A) has erred in law ond on facts in deleting addition of Rs 1,49,72,275/- made by AO u/s 10AA of the act when such deduction was not claimed by the assessee in original return of income.

(ii) The Ld CiT(A) has erred in law and on tacts in holding that filing of return within due dale is not a pre-requisite condition for claim of deduction u/s 10AA of the act.

(iii) The Ld.CIT(A) has erred in law and on facts in not treating conversion of ownership of business from proprietorship to partnership as reconstruction of business and violative of claiming deduction u/s 10AA of the act.

(iv) The Ld CIT(A) has erred in law and on facts in holding usage of pouch making machine by taking 'ease in conformity with the conditions to claim deduction u/s.10AA of the Act.

(v) The Id CIT(A) has erred in law and on facts in treating sale of goods by the firm to domestic parties as deemed export and not violative of the conditions of claim deduction u/s 10AA of the act.

(vi) The Ld CIT(A) has failed to appreciate the true material facts brought on record by the assessing officer while disallowing the claim of deduction u/s 10AA of the act.

(vii] On fie facts and circumstances of the case, Ld.CIT(A) ought to have upheld the order of the Assessing Officer.

(viii) It is, therefore, prayed that the order of Ld CIT(A) may be set aside and that of the Assessing Officer be restored.

3. The interconnected issue raised by the Revenue is that the Ld.CIT(A), erred in deleting the disallowance made by the AO for the deduction claimed u/s 10AA of the Act amounting to Rs. 1,49,72,275/- despite the fact that the assessee was not eligible in such deduction.

4. The facts in brief are that the assessee in the present case is a partnership firm and engaged in the manufacturing business of Pan Masala with and without Ghutka. The factory of the assessee is located at Kandla Special Economic Zone, Gandhidham Kachh. The assessee in the revised return of income, dated 19/01/2017, has claimed the deduction of Rs. 1,49,72,275/- under the provisions of section 10AA of the Act. But the same was disallowed by the AO by observing as under:

4.(ii) After careful consideration of the assessee's submission, it is noticed that the facts and circumstances of cited judgements on which the assessee relied upon are differs from the facts and^ circumstances of the assessee's case. Further, the submission of the assessee is not found acceptable because the assessee has not fulfilled basic terms & conditions as required for claiming deduction u/s 10AA of the Income tax Act, the discussion on each required terms & conditions are as under: -

I. CONDITION THAT RETURN SHOULD BE FILED WITHIN DUE DATE IS MANDATORY.

The assessee has claimed deduction u/s 10AA of Rs.1,49,72,275/- in the Revised Return of Income filed on 19/01/2017 without filing online required report, documents & Form No. 56F along with e-return of income.

***Rajkot ITAT in the case of** Saffire **Garments v.ITO, 151 TTJ 114** held that The special bench was constituted to decide the following question, "Whether the proviso to section 10A(IA) of the Income-tax Act which says that no deduction under section 10A shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under section 139(1} is mandatory or merely directory?" The Tribunal held that provisions of section 10A(iA) are mandatory and not directory ; deduction under section 10A cannot be allowed to an assessee who does not furnish return on or before due date specified under sub section (1) of section 139. The charging of interest is held to be mandatory. When one of the consequences for not filing return of income within due date prescribed under section 139(1) is mandatory then other consequences cannot be held to be directory and the same is also mandatory.*

II. CONVERSION OF EXISTING UNIT

In the assessee's case, the unit initially installed as proprietorship concern in F.Y. 2013-14 later on from the 01-09-2014 the proprietorship concern converted in partnership concern. All the setup of the concern belongs to proprietor ship concern initially and the firm take this business. Further, the assessee has taken Machine Rotary FFS Pouch Packing Machine of SANKO" on lease basis and the assessee has not set up your infrastructure

***• Income-tax Officer Ward-(1),Range-1, Trivandrum VS. Stabilix Solutions (P.) Ltd. [2010] 8 taxmann.com 45** (COCH) - Assessee-company set up a 100 per cent export oriented undertaking by taking on sub-lease 4000 sq.ft. Built up area from STPL which held leasehold rights in total area of 6000 sq.ft.- STPL **also leased out plant and machinery to assessee-company** in excess of statutory limit of 20 per cent - Both companies manufactured same product i.e., computer software and sold same to a particular company abroad - Even employees of both companies, who represented human capital were headed by same functional head -Whether, on facts, it could be concluded that assessee's undertaking stood formed almost wholly by transfer of resources, including plant and machinery from STPL, and, therefore, it was not entitled to deduction under Sertcn 103 as it failed to fulfill conditions stipulated under section 10B(2)-- Held, yes*

*111. SALE PROCEEDS **MUST** BE BROUGHT IN INDIA IN FOREIGN **EXCHANGE***

The assessee has executed total Sales transactions with three local parties namely (i) sales Ra.1,235,00,000/- to M/s Amar Flavour Pvt Ltd, Delhi, PAN-AAHCA2253M (ii)sales Rs.6,95,25,000/- to M/s Ankita Overseas, Delhi, PAN-AEHPK3989D (iii)sales Rs.3,91,30,000/- to M/s Nimex Trading Corporation, Mumbai, PAN- AAGPK6484J and neither export goods outside India nor received converted foreign currency in reference to the sales proceeds, hence the assessee has not followed the basic required condition for eligibilities of deduction u/s 10AA.

*The definition of export for the purpose of eligibility for claiming deduction u/s 10AA **- ."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.*

*• In this reference, it is pertinent to mention here that **the hon'able High Court of Kerala in the case of Commissioner of Income-tax, Cochin v. Electronic Controls & Discharge Systems (P.) Ltd.* [2011] 13 taxmann.com 193 {Kerala)** held that Section IDA of the Income-tax Act, 1961 - Free trade zone -Whether section IDA provides for exemption only on profits derived on export proceeds received in convertible foreign exchange - Held, yes - Whether, therefore, benefit of exemption under section I0A cannot be extended to local sales made by units in Special Economic Zone, whether as part of domestic tariff area sales or as inter-unit sales within zone or units in other zones - Held, yes [In favour of revenue]*

The provisions in section 10A are comprehensive and exhaustive and (here is no dispute that the mandatory conditions of section 10A(3) have to be satisfied to get exemption on export profits. In other words, exemption is available only on actual exports and only if consideration of export is received in convertible foreign exchange. In the case in hand, both the conditions are not satisfied because assessee's sales of components are to another industrial unit in India and the sale proceeds are received in Indian rupee. The question, therefore, is whether provisions of another statute, that too, enacted after the end of both the relevant assessment years can come to the rescue of the assessee, which is the finding of the Tribunal. [Para 3]

On going through the provisions of section 10A and the provisions of the Special Economic Zones Act, the order of the Tribunal could not be upheld because the concept of deemed export under the Special Economic Zones Act is not incorporated in the scheme, of exemption under section IOA and it is the settled position that the 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 or (he Foreign Exchange Regulation Act. 1973 or the Foreign Exchange Management Act, 1999 are not referred to in the Act. The Act refers to several statutes in different places and wherever required, provisions of such statutes are incorporated in the Act through reference 01- 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 the Customs Act and the Central Excise Act. 1944. However, when section 1OA provides for exemption only on profits derived or. 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 is 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. If the provisions of the Special Economic Zones Act, are brought in to 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, 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, has no justification to extend it to profits received on local sales within India against payment received in Indian rupees. Therefore, the orders of the Tribunal were to be reversed by restoring the orders cancelled by the Tribunal. [Para 6]
Further, there are various verdicts wherein it was decided that the Sale proceeds must be brought in India in foreign exchange.

- ***Swayam Consultancy (P.) Ltd. VS. Income-tax*** *Officer[2012] 20 taxrnann.com 803 (AP.) / [2011] 336 ITR 189 (AP)- Assessment year 2007-08 -* ***Delivery of goods to a foreign buyer in India does not amount to export.***
- ***Assistant Commissioner of Income-tax, Range 1, Hyderabad VS. Bodhtree Consulting Ltd.*** *[2010] 41 SOT 230 (HYD.) / [2010] 134 TTj 214 (HYD.) —Whether in order to avail deduction under section 10B sale proceeds must be receivable in convertible foreign exchange - Held, yes -* ***Whether sale proceed received in convertible foreign exchange means 'actual receipt' and not deemed receipt - Held, yes - Whether if***

that object is kept in mind, amount received by an assessee in form of investment in equity shares in foreign exchange cannot be considered to be received in form of convertible foreign exchange - Held, yes - Whether merely because an assessee takes permission from RBI to receive foreign exchange in form of equity investment it does not lead to conclusion that assessee has received export proceeds in foreign exchange, as RBI has no role to play to suggest whether any investment/income for capitalization of expenditure is genuine or otherwise in terms of section 10B - Held, yes - Whether, therefore, an assessee would not be eligible for benefit of section 10B on such investments - Held, yes

IV. In the case of Wipro Ltd. v. Dy.CIT, 143 ITD 1 (Bang.)(Trib.) it was held that *"The assessee software company carried out deemed exports by raising bills on local parties and received sale proceeds in convertible foreign exchange thereby claimed deduction on same under section 10A.* ***On*** *ground that deemed* ***exports are exports as per EXIM policy.*** *On* ***appeal Tribunal held*** *that* ***deduction under section*** *10A* ***is to be*** *allowed* ***only when*** *foreign exchange is received on export of software and EXIM policy cannot overruns income- tax Act which is a separate code in itself. In view of same claim of assessee could not be allowed Further, Assessing Officer excluded foreign tax (VAT/GST) collected from customers from export turnover as well as from total turnover., thereby, granting lower deduction under section IDA to assessee a STP unit, on ground that tax collected was subsequently remitted to government the Tribunal held that once this sum is not included in export turnover then the same cannot be included in the total turnover.*

Mumbai ITAT in the case of Capital Foods Exports (P.) Ltd. v. ACIT held that Assessee, engaged in business of manufacturing and export of processed food products-claimed deduction under section 10A. It was held that In terms of provisions of section 10A, unless foreign remittances are credited in the account of the assessee or at least credited in account of bank, it cannot be said that export proceeds have been received in or brought into India. Since certificate issued by Bank did not state that foreign remittances had been credited in its account within period of six months so that it could be considered as having brought into India, assessee's claim was rightly rejected.

It is cleared from above mentioned facts that the assessee is not fulfilled basic required terms & conditions for claiming deduction u/s 10AA of the income tax Act, As, the unit of the assessee initially installed as proprietorship concern in F.Y. 2013-14 later on from 01st SEP 2014 later on converted in partnership concern and the business setup of the Unit belongs to proprietorship concern, taken over by partnership concern; Secondly, the assessee has taken Machineries on lease basis and the assessee has no machinery set up its new infrastructure; Thirdly, the assessee has claimed deduction u/s 10AA of Rs.1,49,72,275/- in the Revised Return of Income filed on 19-01-2017 without filing online required reports, documents & ***Form,*** *No. 56F along with e-return of income; Fourthly, the assessee has execute Sales transactions with three domestic parties for total sale proceeds of Rs,12,21,55,000/- during the year and not exported goods directly outside India and nor earned foreign currency in reference of export and the whole amount of sales proceeds belong to local sales to domestic parties.*

In view of the facts, it is cleared that the assessee is not fulfilled basic required terms & conditions for claiming deduction u/s 10AA of the income tax Act and the assessee not eligible for claiming deduction u/s10AA of the Income Tax Act and claimed amount of deduction found totally wrong footing and accordingly the claimed amount of deduction u/s 10AA of Rs.1,49,72,275/- is hereby disallowed and added back to the total income of the assessee.

5. Aggrieved, assessee preferred an appeal before the Ld.CIT(A) who allowed the appeal of the assessee by observing as under:

> ***4. Decision:*** ***I*** *have considered the facts mentioned in the assessment order and the submission of the appellant carefully together with the legal* ***decisions*** *relied upon. Since all the three grounds of appeal are inter connected / inter related, all of them are taken together. In the original return of income filed by the appellant on 30/09/2015, deduction u/s. 10AA of the Act was not claimed through oversight and the same has been ciaimed in the revised return of income filed on 19/01/2017. There is no dispute about the fact that the revised return of income filed by the appellant firm is within the time limits prescribed under the Act. During the course of assessment proceedings, the AO issued the Show cause Notice dated 08/12/2017 asking the appellant to justify all the basic conditions which are required to be fulfilled to claim deduction u/s. 10AA of the Act. The appellant filed its detailed submission vide reply dated 14/12/2017, the relevant portion of which has been reproduced by the AO in the assessment order. The AO did not* ***accept*** *the submission and justification of the appellant and disallowed the claim of deduction u/s. 10AA of the Act observing that three conditions have not been fulfilled by the appellant nameiy (1) condition that return shoufd be filed within due date is mandatory, (2) conversion of existing unit and (3) Sales proceeds must be brought in India in foreign Exchange.* ***So far as first condition*** *namely the return should be filed within due date is mandatory, the appellant contends that there is no conditions prescribed u/s. 10AA of the Act that the claim of the deduction should be made in the original return of income to be filed u/s. 139 of the Act. The reliance placed by the AO on the decision of Hon'ble* ***ITAT,*** *Rajkot Bench in* ***case*** *of Saffire Garments, the appellant contends that the same is misplaced and the said decision is not applicable in the case of the appellant since it was in respect of deduction u/s. 10A and not u/s. 10AA. Further, it is seen that u/s. 10A(1A), there is specific condition to file the return of income u/s. 139(1} of the Act whereas there is no such specific conditions under the provisions of section 10AA of the Act. In the judgment in the case of Dhampur Sugar Mills Ltd. V. C!T 91973) 90 ITR 236 (All.) it is held* ***"Whether effective return for purposes of assessment is return which is ultimately filed by an assessee on basis of which he wants his income to be assessed. - Held, yes •*** *Whether when assessee voluntarily files a revised return after 1-4-1962, assessment must be completed by virtue of clause (b) of section 297(2) of 1961 Act in accordance with procedure specified in Act of 1961 - Held, yes – Whether therefore, assessment in question was validly made under section 143(3) - Held, yes." In another judgment of [2012]* ***25*** *taxmann.com (Mumbai - Trib.), ITAT Mumbai Bench 'D[1], in the case Of Rachana S. Talreja v. DCIT has held "The assesses, after filing the original return of income, subsequently filed the revised computation of income claiming deduction on account of interest income. The Assessing Officer ignored the revised computation of income and made the assessment as per the original return of income. The Commissioner (appeals) confirmed the action of the assessing officer. Held that the issue was restored to the file of the Assessing Officer with a direction to consider the revised computation of income filed by the assesses."*
>
> *In view of the ratio laid down in above case laws, the claim through revised return of income to get deduction u/s.10AAis bonafide and admissible.*
>
> *Further, the Audit report in Form No. 56F has been obtained by the appellant which has been filed with the AO during the course of assessment proceedings. Regarding the second reason given by the AO about conversion of the existing unit and thereby violation* ***of*** *the provisions of Sec. 10AA, it is seen that initially, M/s. Vishnu Export was established as 10 per cent export oriented Unit in Kandala Special Economic Zone (KASEZ) which was proprietary concern of Shri Ankur Garg. Afterwards, said proprietary concern*

was converted into a partnership firm having same name i.e. M/s. Vishnu Export. Such change in the constitution of the Unit was also informed to the KASEZ authorities and they have also issued the approval for said change. The relevant evidences in this regards have been placed on the record of the AO as well as in this office. As per facts on record there is no new unit out of split, has come into existence. There is a change in status of the appellant. There is a clarion call from the highest echelon of the government to create an environment friendly to doing of business in this country. In the DO letter of Chairman, No.FTS: 30311806/2016 dtd.01.11.2016, the field formation has been directed "..... it is equally important to take steps to prevent avoidable dispute....." As a sequel to this a compendium of ***22*** *circulars was circulated vide letter No.CC 2/ABD/Circulars/RTC/48/2016-17 dated 20.12.2016 entitled, "Clarificatory circulars issued by CBDT to reduce litigation Settted/view/Department view".*

In view of the above facts and supporting evidences, I am of the considered opinion that there is no violation of the condition of Sec. 10AA of the Act on conversion of proprietary concern into partnership firm. AO has not disputed the fact of incorporation of the initial proprietary concern as newly established undertaking without splitting up or reconstruction of a business already in existence. Thus, such newly established undertaking was then subject to change in constitution and it cannot be considered as splitting up or reconstruction of a business already in existence. As regards the observation of the AO regarding taking of packing machine on lease basis, I find that the appellant firm is having its own plant and machinery which is reflecting under the head "Fixed Assets" in the Audited Accounts for the FY 2014-15. The appellant has given the details and descriptions of various plant and machineries used in the manufacturing, which has not been disputed by the AO in the assessment order. Further, from the perusal of the provisions of section 10AA of the Act, it can be seen that by taking the packing machines on lease, there is no violation / contravention of any of the conditions of said section. Further, from the wordings used in clause (iii) of section 10AA(4) of the Act, it is seen that the condition of used plant and machineries applies at the time of formation of the eligible undertaking / unit and this view is supported by the ratio laid down by the Hon'ble ITAT, Rajkot Bench in the case of DCIT Vs. M/s. Choice Sanitaryware Industries (ITA No. 274/rjt/2008 - AY 2005-06 - Order dated 23/12/2010). As regards the legal decision in case of Income Tax Officer Vs. Stablix Solutions (P.) Ltd. (2010) 8 Taxmann.com 45 (Coch.) relied upon by the AO, it is seen from the said decision that it was rendered in the context of deduction u/s. 10B of the Act and further, in the said case the assessee has taken on lease not only the premises but also the plant and machinery which were in excess of 20% statutory limit Thus, on the facts of the said case, the instant case stand differentiated therefore, said decision relied upon by the AO is not applicable. So far as the third reason i.e. sales proceeds must be brought in India in foreign exchange, given by the AO, the AO has observed that the appellant has not ") brought in India the convertible foreign exchange since the appellant has sold the goods to local parties, in this regard, the AR of the appellant submitted complete details of total sales of Rs. 12,21,55,OOO/-made during the FY 2014-15 and explained that the parties to whom the sales made by the appellant firm have, in turn exported the goods out of India which were manufactured by the appellant firm. The sale to approved merchat exporter cannot be treated as local sale. Thus, the sales made by the appellant firm is Deemed Export and not local sales within India as mistakenly observed by the AO. Before the AO, the appellant has submitted the statement showing invoice-wise details of sale and its deemed exports along with the specimen copy of all the relevant documents required to remove the goods from SEZ to Discharge Port of export of goods out of India. On perusal of the invoice raised by the appellant firm, it is seen that the name of the appellant firm is as "Supplier/Manufacturer" and further it has been mentioned as "on a/c. of exporter" and the name of .exporter, has been mentioned. Further, the name of "Consignee" in the said invoice is the name of the ultimate buyer of foreign country. Further, the invoice also gives the details of country of final destination, vessel's name / flight number, port of loading,

Port of discharge, place of delivery, description of goods with number and kind of packages, quantity in cartons, rate per carton and the total amount. Further, it is also seen from the invoice that it has been raised by the appellant from in USD i.e. foreign currency and not in Indian Rupees. It is also seen that the Merchant Exporter has exported the goods as per Rule 46(10(11) of the SEZ Rules 2006, which has been categorically mentioned in the invoice raised by the appellant firm. Further, shipping bill for export of duty free goods has also been verified and certified by the KASEZ authorizes while affixing their seal on it. Further, the invoice and packing list raised by the merchant exporter (e.g. M/s Ankita Overseas) ***also*** *mentions the name of manufacturer i.e. Vishnu Export (the appellant firm) having its address in KASEZ. Further, since the appellant firm is a 100 per cent export oriented unit established in the SEZ (in the present case KASEZ), it cannot sell the manufactured goods in local market of India. Thus, the goods sold to merchant exporters have ultimately been exported as per the SEZ Rules 2006 and the procedure of export laid down in SEZ Rules 2006 are duly observed, verified and authenticated by KASEZ authorities which proves beyond doubt that KASEZ authorities have also accepted that the goods manufactured by the appellant firm as goods exported as per the permission granted to establish the Unit in KASEZ. In support of the contention that deemed export is eligible for the deduction u/s. 10AA of the Act, the appellant firm has relied upon the decisions of jurisdictional ITAT, Ahmedabad Bench in the case of Gokul Overseas Vs. AC!T (ITA No. 1028/Ahd/2013 - AY 2009-10 - Order dated 30/08/2016). I have gone through the said decision, and find that the ratio laid down in the said judgment is squarely applicable to the case of the appellant firm. In its entirety, the appellant firm has duly established that it has fulfilled all the conditions laid down u/s. 10AA of the Act and therefore, the disallowance of claim u/s. 10AA of the Act of Rs. 1,49,72,271/- made by the AO is not sustainable in law. Accordingly, the AO is directed to allow the claim of deduction u/s. 10AA the Act of Rs.1,49,72,271/-. The grounds No. 1 to 3 of appeal are decided accordingly.*

6. Being aggrieved by the order of the Ld. CIT(A), the Revenue is in appeal before us.

7. The Ld. DR before us filed the written submission running from page 1 to 2 wherein it was contended that the assessee can claim the deduction only in the return filed u/s 139(1) of the Act and not in the revised return of income. As such, the assessee cannot be given benefit of deduction u/s 10AA of the Act in the revised return of income, in pursuance to the order of the Rajkot, ITAT in the case of Saffire Garments Vs. ITO, reported in 151 TTJ 114. As per the Ld. DR, the way the interest under the provisions of section 234A, B and C is mandatory, the same way, it is mandatory for claiming deduction u/s 10AA of the Act to file the return of income within the due date specified u/s 139(1) of the Act.

7.1 The Ld. DR further submitted that the factory was set up in Special Kandla Economic Zone by the proprietor but the deduction has been claimed by the firm.

As such the proprietorship firm was converted into a partnership firm in the year under consideration, therefore it is discernible that the partnership firm was set up after restructuring the business of the proprietary concern which is prohibited under the provisions of section 10AA of the Act.

7.2 The Ld. DR also submitted that the assessee has taken certain plant and machineries on lease which evidences that the assessee has not set up the new infrastructure facility, though it is the mandatory requirement for claiming deduction u/s 10AA of the Act.

7.3 The Ld. DR also submitted that the assessee has not made any export sales which implies that foreign convertible exchange was not brought in India which was prerequisite for claiming the deduction u/s 10AA of the Act.

8. On the other hand, the Ld. AR filed a paper book running from pages 1 to 292 and contended that there is no prohibition for claiming the deduction u/s 10AA of the Act, in the revised return of income. As such, there was no provision in the statute at the relevant time to file the return of income within the due date specified u/s 139(1) of the Act for claiming deduction u/s 10AA of the Act. It was also pointed out by the Ld. AR that it has been proposed to by way of amendment in the Finance Bill, 2023 to file the return of income within the due date specified u/s 139(1) of the Act, but such amendment is not applicable in the year under consideration.

8.1 The Ld. AR likewise, contended that the Audit Report in form 56F was filed during the assessment proceedings which is the sufficient compliance for claiming deduction u/s 10AA of the Act. Similarly, there is no prohibition for claiming the deduction u/s 10AA of the Act, upon conversion of its status i.e. conversion of proprietorship firm into partnership firm.

8.2 Similarly, the Ld. AR also contended that at the time of formation of industrial undertaking, there were available sufficient plant and machineries with it. Therefore, the assessee cannot be denied the benefit of deduction u/s 10AA of the Act on acquiring certain asset on lease. The Ld. AR further submitted that SEZ Rules 2006 permits to make deemed export to the merchant exporter which is equivalent to export sales only. As per the Ld. AR, the assessee has made sales to the merchant exporter who in turn has exported goods to the foreign parties. The Ld. AR in support of his contention has filed details as under:

> *"Name of the assessee" appears as "supplier/manufacturer" in the invoice raised by assessee and further, it has been mentioned as "on account of exporter" and the name of exporter has been mentioned.*
>
> *"Name of consignee" in invoice is name of "ultimate buyer of foreign country".*
> *Following details can also be gathered from the invoice:*
> *Details of country of final destination*
> *Name of vessel/flight number*
> *Port of lading*
> *Port of discharge*
> *Date of deliver}'*
> *Description of goods with number and kind of packages;*
> *Quantity in carton;*
> *Rate per carton;*
> *Total amount.*
>
> *"Invoice" has been raised by assessee in "USD (i.e., foreign currency) " and not in India rupees.*
> *The merchant exporter has exported goods as per "Rule 46(lO)(Ii) of the SEZ Rules, 2006" which has been categorically mentioned in the invoice raised by assessee.*
> *"Shipping bill" for export of duty-free goods have also been verified and certified by KASEZ while authorizing and affixing their seal.*
> *"Invoice" & "packing list" raised by the merchant exporter also mentioned "name of manufacturer" i.e. Vishnu Exports (assessee).*
> *Since assessee is "100% EOU" established in SEZ, it cannot sale manufactured goods in local market of India.*
> *Thus, goods sold to merchant exporters have ultimately been exported as per SEZ Rules, 2006 and even the procedure of exports laid down in SEZ Rules, 2006 has been duly observed, verified and authenticated by KASEZ Authorities which proves beyond doubt that KASEZ has also accepted that the goods manufactured by assessee firm have been exported as per permission granted to establish the unit in KASEZ*
> *Thus, parties to whom sales have been made by assessee have, in turn, exported the goods out of India.*
> *It is well settled that sales to approved merchant exporters cannot be treated as local sales.*

8.3 In view of the above, the Ld. AR submitted that the assessee cannot be deprived of the deduction granted under the statute u/s 10AA of the Act. It was also pointed out by the Ld. AR that the requirement for bringing foreign exchange to claim the deduction u/s 10AA of the Act was brought by the Finance Act 2023 and therefore the assessee cannot be denied for deduction on the reasoning that the foreign convertible currency was not brought to the Country.

9. Both the Ld. DR and the Ld. AR vehemently supported the order of the authorities below.

10. We have heard the rival contentions of both the parties and perused the materials available on record. There is no dispute with respect to the facts of the case which have been elaborated in the preceding paragraph, therefore we are not inclined to repeat the same for the sake of brevity and convenience. The following controversies arise for our adjudication:

i. Whether the deduction can be claimed under the provisions of section 10AA of the Act in the revised return of income?
ii. Whether the assessee can be denied the benefit of deduction under section 10AA of the Act on account of furnishing the audit report in form 56F during the assessment proceedings?
iii. Whether the assessee can be denied the benefit of deduction under section 10AA of the Act upon the conversion of its status i.e. proprietorship conversion into partnership firm?
iv. Whether the assessee can be denied the benefit of deduction under section 10AA of the Act on the reasoning that the machineries were acquired on lease?
v. Whether the assessee can be denied the benefit of deduction under section 10AA of the Act on account of non-remittance of convertible foreign exchange on account of the non-exports?

10.1 As regards the 1st controversy, we note that the provisions of subsection (5) of section 139 of the Act entitles the assessee to file the revise return of income if there is any omission or any wrong statement in the return filed under section 139(1) of the Act. Once, a return is revised then the original return has to be ignored and the revised return has to be considered by the Revenue. In this respect the Hon'ble Allahabad High Court in the case of *Dhampur Sugar Mills Ltd.* v. *CIT*, 90 ITR 236 held as under:-

> *"The effective return for purposes of assessment is thus the return which is ultimately filed by an assessee on the basis of which he wants his income to be assessed... But when an assessment has to be made the assessee is given a right to file a correct and complete return if he discovers an error or omission in the return filed earlier. The assessment can be completed only on the basis of the correct and complete return.... Once a revised return is filed, the original return must be taken to have been withdrawn and to have been substituted by a fresh return for the purpose of assessment."'*

10.2 It is not out of the place to mention that a return can be revised only in the situations where there is an omission or any wrong statement in the return filed under section 139(1) of the Act. But, there is no allegation in the order of the AO that there was no omission or any wrong statement in the return of income. Thus, without going into the question whether there was any omission or any wrong statement in the return filed under section 139(1) of the Act, we hold that the AO was duty-bound to take a note of the revised return of income while framing the assessment.

10.3 It is the admitted position that the assessee has claimed the exemption under the provisions of section 10AA of the Act wherein there is no mandate to file the return of income within the time specified under section 139(1) of the Act for claiming the deduction unlike the proviso under the provisions of section 10A(IA) of the Act requiring the assessee to file the return of income within the time specified under section 139(1) of the Act for claiming the deduction. Thus, in the absence of any specific provision under the provisions of section 10AA of the Act to file the return of income within the provisions of section 139(1) of the Act, the assessee cannot be deprived of the benefit granted under the statute for the

deduction under the provisions of section 10AA of the Act in the given set facts and circumstances.

10.4 The above reasoning is further strengthened by the Finance Bill 2023 wherein it was proposed to file the return of income within the due date as specified under section 139(1) of the Act for claiming the benefit of the deduction under section 10AA of the Act which is effective from 1 April 2024 for the assessment year 2024-25. The relevant extract of the amendment is reproduced as under:

> *6. In section 10AA of the Income-tax Act, with effect from the 1st day of April, 2024,—*
>
> > *(a) in sub-section (1), after clause (ii) and before the Explanation, the following proviso shall be inserted, namely:—*
> > *"Provided that no such deduction shall be allowed to an assessee who does not furnish a return of income on or before the due date specified under sub-section (1) of section 139.";*

10.5 It is important to note that the AO in his order has made reference to the order of the ITAT in the case of M/s Saffire Garments Vs. ITO 151 TTJ 114 wherein it was provided that the deduction cannot be claimed under section 10A of the Act if the return of income has not been filed within the time specified under section 139(1) of the Act. But undeniably the assessee has not claimed any deduction under section 10A of the Act. Therefore, we are of the view that no reference can be made to the order of the ITAT cited above.

10.6 Moving further, we note that the Hon'ble Gujarat High Court in the case of CIT versus Mitesh Impex reported in 367 ITR 85 has observed as under:

> ***"39.*** *This is primarily on the premise that if a claim though available in law is not made either inadvertently or on account of erroneous belief of complex legal position, such claim cannot be shut out for all times to come, merely because it is raised for the first time before the appellate authority without resorting to revising the return before the assessing officer."*

10.7 In the above case, the claim of the assessee was allowed by the Hon'ble Gujarat High Court even such claim was not made in the Income Tax Return and it was raised 1st time before the learned CIT-A whereas the facts of the case of

the assessee are on better footing than the case of the Hon'ble Gujarat High Court cited above. In the case on hand, the claim was made in the revised return of income and therefore, respectfully following the judgement of the Hon'ble Gujarat High Court cited above, we hold that the assessee cannot be deprived of the benefit granted under the statute merely on the reasoning that it was claimed in the revised return of income.

10.8 The 2nd controversy arises whether the assessee can be deprived of the benefit available to it under the provisions of section 10AA of the Act merely on the reasoning that the audit report in form 56F was filed during the assessment proceedings and not with the return of income. In our considered view, the assessee cannot be deprived of the benefit provided under section 10AA merely on the reasoning that the audit report in form 56F was filed during the assessment proceedings. We hold so on the reasons as applicable to the 1st question discussed above that the deduction was claimed in the revised return of income. Thus, the revenue fails on this reasoning also.

10.9 The 3rd controversy arises whether the assessee is not eligible for deduction under section 10AA of the Act in the event it is converted from proprietorship concern into partnership firm. Admittedly, the conversion of proprietorship concern into partnership firm was duly approved by the SEZ authorities which is evident from the details placed on pages 90 to 92 of the paper book. There is no prohibition under the provisions of section 10AA of the Act to deny the benefit of deduction upon the change of the status of the assessee i.e. conversion of proprietorship into the partnership firm. The Hon'ble Madras High Court in the case of CIT vs. Heartland KG Information Ltd reported in 359 ITR 1 dealing with identical situation held as under:

> ***7.*** *Given the fact that the findings of the Tribunal is that the entire business of M/s.KGISL stood transferred to the assessee and that the assessee is also recognised to have had its industrial unit, in the Software Technology Park, we have no hesitation in confirming the order of the Tribunal in granting the relief to the assessee under Section 10B. Consequently, the first question of law is answered against the Revenue.*

> ***8.*** *As far as the second question of law as to whether the Tribunal was right in sustaining the order of the Commissioner of Income Tax (Appeals), that the assessee had not satisfied the provisions under Section 10A(2)(iii) of the Act to claim the deduction under Section 10A, is concerned, the factual position has already been pointed out that the assessee had the entire medical transcription transferred to its favour, a fact which would not be controverted by the Revenue at any stage. Contrary to the assertion of the Revenue that what was transferred was only machinery, we find that the Officer himself had accepted that the balance sheet of the assessee reflected the transfer of the entire business and to that extent, it was removed in the vendor's balance sheet.*
> *********
> ***10.*** *A cursory reading of the above Section shows that where an undertaking is formed by splitting up or reconstruction of business already in existence then the said undertaking would not be entitled to claim deduction under Section 10A. The other conditions is that the industrial undertaking should not be formed by transfer of plant and machinery already used for any purpose. Thus, what is prohibited in Section 10(A)(2)(iii) is that the transfer of used machinery and plant to a new business undertaking and forming of an industrial undertaking by splitting or reconstruction of the existing industrial undertaking. The intention thus under Section 10A being clear and that there is no specific prohibition or even by inference to an industrial unit formed by transfer of entire business, we have no hesitation in rejecting the Revenue's plea that by transfer of machinery, the assessee would be disentitled to the relief under Section 10A. As already pointed out, the fact herein is that the transfer was not that of plant and machinery alone but of sale of whole business unit to the transferor company which was primarily only of export of articles or things. In the circumstances, going by clear provisions of Act, we reject the Revenue's plea.*

10.10 Similarly, the Hon'ble Allahabad High Court in the case of CIT vs. Bullet International reported in 349 ITR 267 has observed as under

> ***10.*** *It is not disputed before us that for the earlier assessment years exemptions have been granted to the undertaking. In this view of the matter, the Tribunal was justified in holding that the assessee is entitled to get exemption under Section 10-A of the Act, 1961. The argument of the learned counsel for the department that since the proprietorship has been converted into partnership, therefore, this disentitles the assessee to claim benefits under Section 10-A of the Act,1961 does not borne out either from the plain language of sub-sections (9) and (9A) of Section 10-A of the Act, 1961 or in view of the Circular of the CBDT referred to above. No substantial question of law is involved in the appeal.*

10.11 From the above, there remains no ambiguity to the fact that the assessee cannot be denied the benefit upon the conversion from the proprietorship concern to the partnership firm. Likewise, there was also no allegation of the AO that the present assessee came into existence after splitting up or the reconstruction of the existing business or undertaking. It is for the reason that there is no violation of the conditions applicable for claiming the deduction under section 10AA of the Act.

10.12 The next controversy arises whether the assessee can be denied the benefit of the provisions of section 10AA of the Act if certain machineries were acquired by it on lease. First of all, it is seen that there were Plant and Machineries available with the assessee amounting to ₹ 1,49,36,541/- as evident from the audited financial statement placed on page 10 of the paper book. Furthermore, the use of the plant and machinery should be seen at the time of formation of the eligible undertaking. At the time of formation of the undertaking, there was no violation of the provisions of section 10AA of the Act. In holding so, we rely on the order of order of ITAT in the case of the CIT versus M/s Choice Sanitaryware Industries in ITA 274/RJT/2008 order dated 23 December 2010 wherein the issue was in relation to claim of deduction under section 80IB of the Act but the principles of the same can also be imported to the case on the hand. The relevant finding of Tribunal in above cited case reads as under:

> *In a nutshell, the assessee has acquired its sister concern's land, building, plant and machinery on lease without there being any further responsibility on the part of its sister concern. With these factual matrix, could the assessee be held under an obligation to maintain separate books of account, one for the production carried out with the machinery of the assessee and the other for the production carried out with the hired machinery for the purpose of claiming deduction u/s 80IB of the Act. It transpires to us from the reading of the orders of authorities below that the only objection of the assessing officer in withdrawing he deduction already available to the assessee is non maintenance of separate production records with the plant & machinery of the assessee and those hired from the sister concern, which was not eligible unit for claiming deduction u/s 80-IB of he Act. Thus, it is clearly understood that but for the production achieved through hired plant & machinery, even as per the assessing officer, the assessee is entitled for deduction u/s 80IB of the Act. The conditions ascribed for claiming deduction u/s 80IB are prescribed in sub section (2) of section 80IB of the Act, which are as follows:*
> *******************
> *Clause (ii) to sub section (2) of section 80IB is very much relevant to decide the issue under consideration. It states that "it is not formed by the transfer to a new business of machinery or plant previously used for any purpose". In the case on hand, the assessee firm was already in existence since 1990 and was availing deduction u/s 80IB since then. Therefore, it cannot be said that "it is not formed by the transfer to a new business of machinery or plant previously used for any purpose". It can also not be said that by acquiring some of the assets on lease for a fixed period, which were used by the sister concerns, the assessee has taken over the business of the assessee's sister concern. As such, the question of maintaining two separate sets of books for production does not arise. In the case of Bajaj Tempo Ltd cited supra, the Hon'ble Apex Court held that the restriction would come into picture to deny the deduction only if the second hand asset results in formation of the undertaking. In the instant case there is no formation of an undertaking. The facts and circumstances in the case of Laxmi Packers (14 SOT 303) dealt by the Mumbai Tribunal are pari material to the case on hand. The Hon'ble co-ordinate bench has held that the prohibition in clause (ii) to sub section (2) of section 80IB is only with regard to purchase and use of any second hand machinery at the time of formation of the industrial undertaking and not purchase and use of machinery after the formation of*

the industrial undertaking. In yet another decision in the case of Pembril Indl & Engg Co (P) Ltd vs DCIT cited supra, the "D" Bench of the Mumbai Tribunal held that though previously used plant and machinery has been used in the new unit, there being no transfer of plant and machinery, the deduction u/s 80-IA / 80-IB cannot be denied.

10.13 Likewise, the order referred by the AO in the assessment is distinguishable from the facts of the case. In the case referred by the AO, the assessee has taken not only the premises but also the plant and machineries which were in excess of 20% of statutory limit. But there is no such allegation in the order of the AO in case on hand. Therefore, no credence to the finding of the order of the ITAT as referred by the AO can be given. Accordingly, we hold that the revenue on this allegation also fails.

10.14 The next controversy arises that whether assessee can be denied the benefit of the deduction provided under section 10AA of the Act in case of domestic sales and no convertible foreign exchange was brought to India. There is no dispute to the fact that the assessee has made the sale of ₹ 12,21,55000.00 to the parties who were the merchant exporters. In other words, the goods sold by the assessee to the parties were eventually exported by the merchant exporters and the foreign exchange was received by these merchant exporters and not by the assessee. As per SEZ rules 2006, the assessee cannot make local sales but allowed to make sales to the merchant exporters which will be treated as deemed export. Therefore, the assessee is eligible for deduction under section 10AA of the Act on such deemed exports even the assessee does not bring any foreign exchange on account of such sales. In holding so we draw support and guidance from the orders of Hon'ble Karnataka High Court in case of Granite Mart Ltd. vs. ITO reported in [2020] 121 taxmann.com 168 where it was held as under:

12. *Thus, from perusal of section 10A of the Act, it is evident that the intention of the legislature is to encourage establishment of export oriented industries with the object of receiving convertible foreign exchange. In order to claim deduction under section 10A of the Act, the conditions laid down under section 10A(2) have to be complied with. It is pertinent to mention here that in International Stones India (P.) Ltd. case (supra), a division bench of this court has held that a narrow and pedantic approach cannot be applied in construing the words "by an undertaking" and restricting the benefit under section 10B of the Act only in respect of direct export of such goods manufactured by such units. The deemed export by the assessee undertaking even through third party who has exported such goods to foreign country and has fetched foreign currency for India still*

remains a deemed export in the hands of the assessee undertaking also. The aforesaid decision was proved by another division bench of this court in the case of Metal Closures Steel Ltd. (supra), which has been affirmed by the Supreme Court. In view of aforesaid enunciation of law, it is evident that the appellant is entitled to benefit of deduction under section 10B of the Act in respect of export made to third parties and inter unit transfers.

10.15 The above reasoning is further strengthened by the Finance Bill 2023 wherein it was proposed to specify the time limit for bringing consideration against exports proceeds into India for claiming the benefit of the deduction under section 10AA of the Act which is effective from 1 April 2024 for the assessment year 2024-25. The relevant extract of the amendment is reproduced as under:

6. In section 10AA of the Income-tax Act, with effect from the 1st day of April, 2024,—
*(a) ******
(b) after sub-section (4), the following shall be inserted, namely:— '
(4A) This section applies to a Unit, if the proceeds from sale of goods or provision of services is 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.
Explanation 1.—For the purposes of this sub-section, the expression "competent authority" means the Reserve Bank of India or the authority authorised under any law for the time being in force for regulating payments and dealings in foreign exchange.
Explanation 2.—The sale of goods or provision of services shall be deemed to have been received in India where such export turnover is credited to a separate account maintained for that purpose by the assessee with any bank outside India with the approval of the Reserve Bank of India.';
(c) in Explanation 1, for clause (i), the following clause shall be substituted, namely:— '(i) "convertible foreign exchange" shall have the meaning assigned to it in clause (ii) of the Explanation 2 to section 10A;
(ia) "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 in convertible foreign exchange in accordance with the provisions of sub-section (4A), 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;'.

10.16 From the above, it becomes clear that there was no condition applicable for the year under consideration to bring foreign exchange in India on account of the exports of sales. In view of the above, we hold that the assessee cannot be deprived of the benefit of the deduction granted under section 10AA of the Act merely on the reasoning that the assessee did not receive the convertible foreign exchange on the deemed exports.

10.17 In view of the above and after considering the facts in totality, we are of the view that there is no infirmity in the finding of the learned CIT-A. Even at the time of hearing, the learned DR has not brought anything on record contrary to the finding of the learned CIT-A. Hence, the appeal filed by the revenue is hereby dismissed.

11. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in the Court on 31/03/2023 at Ahmedabad.

Sd/-	**Sd/-**
(MADHUMITA ROY)	**(WASEEM AHMED)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

(True Copy)

Ahmedabad; Dated 31/03/2023
Manish, Sr. PS