आयकर अपीलीय अधिकरण "डी" न्यायपीठ मुंबई में।
IN THE INCOME TAX APPELLATE TRIBUNAL "D" BENCH, MUMBAI

श्री शक्तिजीत दे,न्यायिक सदस्य **एवं**
श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।

BEFORE SHRI SAKTIJIT DEY, JM AND SHRI MANOJ KUMAR AGGARWAL, AM

आयकरअपीलसं./I.T.A. No.248/Mum/2017
(**निर्धारणवर्ष** / Assessment Year: 2012-13)

Assistant Commissioner of Income Tax-19(1) Room No.203, 2nd Floor Matru Mandir, Tardeo Road Mumbai-400 007	**बनाम**/ Vs.	**Deepak Kanwarlal Jain** Flat No.B 6, Rock Side Apartment, 116, Walkeshwar Road Mumbai-400 006
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. **AACPJ-2057-Q**		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

Assessee by	:	Suchek Anchaliya, Ld. AR
Revenue by	:	Ram Tiwari, Ld. DR

सुनवाई की तारीख/ **Date of Hearing**	:	19/07/2018
घोषणा की तारीख / **Date of Pronouncement**	:	10/10/2018

आदेश / O R D E R

Per Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by revenue for Assessment Year [AY] 2012-13 contest the order of the Ld. Commissioner of Income-Tax (Appeals)-30 [CIT(A)], Mumbai, *Appeal No.CIT(A)-30/19(1)/363/15-16* dated 06/10/2016 by raising the following effective grounds of appeal:-

1. *On the facts and in the circumstances of the case and in law, where the Ld. CIT(A) erred in allowing the deduction u/s 10AA of the Act, 1961."*
2. *On the facts and in the circumstances of the case and in law, whether the Ld. CIT(A) has erred in not taking the fact into consideration that the assessee did not fulfill the conditions laid down u/s 10AA of the Act,1961.*

The assessment for impugned AY was framed by *Ld. Assistant Commissioner of Income Tax-19(1), Mumbai [AO] u/s. 143(3) of the Income tax Act, 1961* on 27/03/2015 wherein the income of the assessee has been assessed at Rs.600.91 Lacs after certain adjustments as against returned income of Rs.70.60 Lacs filed by the assessee on 29/09/2012. As evident from grounds of appeal, the sole subject matter of the appeal is assessee's eligibility to claim deduction u/s 10AA on trading activities carried out by him during impugned AY.

2. The brief facts are that the assessee being *resident individual* engaged as *diamond importers, exporters, traders and manufacturers* reflected income of Rs.491.01 Lacs from his proprietorship concern namely *Deepak Gems (SEZ)* and claimed deduction u/s 10AA for the same amount in the re urn of income. This deduction was being claimed for the first time. Accordingly, the assessee was asked to substantiate his eligibility to claim the aforesaid deduction. The assessee, vide replies dated 09/03/2015 23/03/2015 justified the same. The relevant extract of the replies have already been reproduced in the quantum assessment order, the perusal of which reveal that the assessee set up its activities in *Special Economic Zone [SEZ]* from 30/12/2011 which was approved by *SEZ authority*. The assessee was engaged in the business of import for the purpose of re-export i.e. trading activity and claimed the said trading activity to be covered within the ambit of *Service* in terms of

Section 10AA and hence, eligible for deduction u/s 10AA. Reliance was placed on *Ministry of Commerce instruction No. 4/2006* in support of the said contention. The assessee, in its reply, demonstrated the fulfillment of other conditions as envisaged by Section 10AA and the same has also not been disputed by the revenue. However the only point of dispute is the fact that trading activity as carried out by the assessee, in the opinion of Ld. AO, could not qualify for deduction since the assessee was neither engaged in manufacturing activity nor producing any articles or things or providing any services as envisaged by Section 10AA. After perusal of statutory provisions as contained in Income Tax Act as well as *SEZ Act, 2005*, Ld. AO reached a conclusion that the definition of Service, as defined by *Finance Act 2012* would mean an activity carried out by one person for another and that too for consideration and since the assessee was not engaged in providing services in the said manner, the benefit of Section 10AA was not available to the assessee. The Ld. AO also reached a conclusion that unless specifically stated, the meaning of *service* could not be derived from *SEZ Act, 2005* unlike the term *manufacturing* which expressly derived its meaning from *SEZ Act.* Finally, the aforesaid deduction was denied to the assessee.

3. Aggrieved, the assessee reiterated the contentions with success before Ld. CIT(A) vide impugned order dated 06/10/2016 where Ld. CIT(A), after due consideration of factual matrix and placing reliance on several judicial pronouncements, concluded the matter in assessee's favor by observing as under:-

> *6.3 I have carefully considered the rival contentions on the issue, perused the material on record and also the applicable legal position. Appellant claimed deduction of Rs.4,91,01,525/- on the profit earned on the SEZ unit u/s 10AA of the*

Act. AO denied the same on the ground that the appellant is engaged in the business of import for the purpose of re-export, hence assessee is neither manufacturing nor producing any articles or thing nor providing any services. The activity is not covered under the definition of services but as the services are not defined under the Income Tax Act, AO took the same from Finance Act, wherein services are defined as any activity carried out by a person for another person for consideration. According to the AO the provision of services is inserted for software development companies who render services to foreign clients which are trading activity in nature. Whereas, Ld.AR, contended in the written submission filed during the present proceedings, which were reproduced in the above Para 6.2, the impugned addition is totally unsustainable on facts and in law. Ld. AR has invited the attention to the definition of Service as per SEZ Act and contends that all the conditions for claiming deduction u/s 10AA of the Act are satisfied. The services definition as per section 2(1)(z) of SEZ Act includes trading warehousing research and development services ….etc., and in the explanation it is stated that 'The expression "trading", for the purpose of the Second Schedule of the Act, shall mean import for the purposes of re-export'. Looking into the definition of word 'service' and since the appellant is engaged in the business for the purpose of re-export, which is considered as a service activity as per the definition of SEZ Act, which supersede the Income Tax Act as the same is special Act. Appellant also relied on instruction, No. 4/2006 of Ministry of Corporate Affairs which clarified the issue that the import for the purpose of re-export is allowed for benefit of IT deduction u/s 10AA.

6.4 Section 10AA was inserted by the SEZ Act, 2005 w.e.f. 10-02-2016 to the IT Act to consider special provisions in respect of newly established units in SEZ. Section 51 of SEZ Act, 2005 makes it clear that the SEZ Act has overriding effect and the provisions of SEZ Act shall have effect notwithstanding anything inconsistent there that contained in "any other law" for the time being in force. Thus, it is clear that anything which is not in consistence with SEZ Act will have no bearing and it is the SEZ Act which will prevail on any other law. Section 27 of SEZ Act further clarifies that the provisions of Income Tax Act in force for the time being, shall apply to, or in relation to, developer or entrepreneur for carrying on the authorized operation in SEZ unit subject to modifications specified in the Second Schedule. In other words, the provisions of Income Tax Act will be applicable subject to the modifications specified in Second Schedule. Second Schedule defines the word "manufacture" has same meaning as assigned to it in Section 2(r) of SEZ Act. Various definitions including 'manufacture' given in section 10AA is nothing but definitions provided u/s 2 of SEZ Act, 2005. That the word service has not been defined in section 10AA of IT Act as well as second schedule but as whatever definitions provided in section 10AA have been imported from second schedule of SEZ Act, which is the origin of section 10AA, the definition of 'services' can also be taken from SEZ Act. As already discussed section 51 of SEZ Act is an overriding provision and, therefore, anything which is not in consistency with the SEZ Act cannot be taken from any other Act. Section 2(z) of SEZ Act defines the word 'service' as (i) tradable service which is covered under general agreement on trade, (ii) what is prescribed by the Central Govt. for the purpose of SEZ Act and (iii) which ears foreign exchange. Subsequently, the Central Govt. has prescribed the definition of 'service' by introducing rule 76 to the SEZ Rules, 2006. The word services for the purpose of section 2(z) include trading and various other activities.

Further, the explanation provides that expression "trade" for the purpose of second schedule of the Act shall mean import for the purpose of re-export. Thus the explanation makes it clear that for second schedule of SEZ Act "which is nothing but section 10AA of IT Act", the trading means re-export of imported goods. Since section 10AA owes its genesis to SEZ Act, services as defined in SEZ Act and as are authorized and permitted by SEZ Act should qualify. In that view of the matter, in my considered opinion trading which is in the nature of re-export of imported goods should qualify as export of services. What the word 'services' is understood in common parlance has no significance while deciding the claim of deduction u/s 10AA of the Act.

6.5 Ld. AO relied on following case law in support of his arguments:
CIT vs. Vasan Publication (P) Ltd 159 ITR 381 (Mad)
CIT vs. Buhari Sons (P) Ltd 144 ITR 12 (Mad)
Laxmanda Pranchand & Ors VS. Union of India & Ors 234 TR 261 (M.P.)
CIT vs R.J. Trivadi & Sons, 183 ITR 420 (M.P.)

Whereas, the Ld. AR pointed out that the above case laws cite by the Ld. A.O. has been thoroughly discussed by the Hon. ITAT, Ja pur Bench in the case of ***Goenka Diamond and Jewellery Limited, reported in 146 TTJ 68*** *and after considering the above case laws, passed the order in favour of the assessee.*

6.6 The identical issue of allow ability of deduction u/s 10AA of the Act on import for the purpose of export was decided by various Benches of the ITAT, including the jurisdictional Hon'ble ITAT, Mumbai and the relevant portions of the said decisions are as under: -

a. ***Gitanjali Export Corporation Limited vs ADCIT 5(1), ITA No.6947, 6948,6950,6949,6783,6785,6787/2011, (ITAT Mumbai)*** *in that case the Hon'ble ITAT, Mumbai Bench held that*

"We noted that learned CIT(A) has taken into considering the aspect and observation of the AO that deduction under section 10AA is not allowable for the reason tha the assessee has not carried out any manufacturing activity but has done trading of goods only. For this purpose, learned AO has placed reliance on the order of Hon'ble Delhi High Court. Learned CIT(A) has taken into consideration these observation of the AO and thereafter he found that the Government of India has issues a circular No. 17 of 29.5-2006, which was issued by Export Promotion Council for EOUs & SEZ Unit (Ministry of Commerce & Industry, Government of India). The contents of the Circular have also been incorporated in the finding of the learned CIT(A), which have also been reproduced somewhere above in this order. Therefore, we are not repeating the contents of that circular issued by the Ministry of Commerce & Industry, Government of India). Under Section 51(1) of the SEZ Act, it has been clearly provided that the provision of this Act has overriding effect in case of contradiction between the SEZ Act and other Act. Hence, by virtue of Section 51 of the SEZ Act, the provision of SEZ Act and rules will have overriding effect over the provision contained in any other Act. Learned CIT(A) has taken into consideration this circular issued by Government of India and the provision of Section 51 of the SEZ Act and found that trading done by the assessee is a service and therefore, deduction under Section 10AA is allowable. We further noted that on similar facts in case of Goenka

Diamonds and Jewellery Limited (supra), the Jaipur Bench of the Tribunal has discussed the issue in detail. The provisions of Section 51 of SEZ Act were also considered. The decision of the Hon'ble Supreme Court in the case of Tax Recovery Officer Vs. Custodian Appointed Under The Special Court, reported in the case of 211 CTR 369 (SC) and the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Vasisth Chay Vyapar Ltd., reported in 238 CTR 142 (Delhi), were also taken into consideration and thereafter it was concluded that in view of the Instruction No.1 of 2006, dated 24-3-2006 as modified by Instruction No.4 of 2006, dated 24-5-2006 issued by the Ministry of Commerce & Industry, Government of India and the definition of service given in the SEZ Act, 2005, which overrides the word 'service' accruing in Section 10AA b virtue of Section 51 of the SEZ Act. The assessee engaged in trading in nature of re-export of imported goods and for the same the assessee was entitled deduction under Section 10AA of he Act. Facts are similar before us, as the assessee is engaged in trading of re-export of imported goods and, therefore, the assessee is entitled for deduction under Section 10AA of the Act. All the arguments advanced by the learned DR before us have also been taken care of by the Tribunal while discussing the appeal in the case of Goenka Diamonds and Jewellery Limited (supra). It is further noted that the main plank of argument of learned DR is that rules provided under the SEZ Act cannot partake the character of the Section of the Income Tax Act. We find that in the SEZ Act under Section 51, it has been clearly provided that the provision of SEZ Act will override the provision of any other Act, meaning thereby the provision provided under the SEZ Act to override on the provision of Section 10AA of the Income Tax Act. Under the rules, it is not provided but under Section 51 of the SEZ Act, it is provided, therefore, in our view, the contention raised by the learned DR is not tenable. Moreover, the issue is squarely covered by the decision of the coordinate Bench in the case of Goenka Diamonds and Jewellery Limited (supra). Therefore, respectfully following the decision of the Tribunal in the case of Goenka Diamonds and Jewellery Limited (supra) and in view of the reasoning given by the learned CIT(A), we confirm his order."

*b. **Also in the case of M/s Diamond 'R' US vs. CIT, Central III (ITA No. 2793/Mum/2012**, the Hon'ble ITAT, Mumbai Bench allowed the deduction u/s 10AA of the Act on profit from import for the purpose of re-export of goods.*

"We find that similar issue came up in A.Y. 2006-07 in assessee's own case wherein following the decision of the ITAT in ITA No. 509/JP/2011 in the case of Goenka Diamond & Jewellers Ltd. The issue has been decided in favour of the assessee by observing as under: -

"We noted that learned CIT(A) has taken into considering the aspect and observation of the AO that deduction under section 10AA is not allowable for the reason that the assessee has not carried out any manufacturing activity but has done trading of goods only. For this purpose, learned AO has placed reliance on the order of Hon'ble Delhi High Court. Learned CIT(A) has taken into consideration these observation of the AO and thereafter he found that the Government of India has issues a circular No.17 of 29.5.2006, which was issued by Export Promotion Council for EOUs & SEZ Unit (Ministry of Commerce & Industry, Government of India). The contents of the Circular

have also been incorporated in the finding of the learned CIT(A), which have also been reproduced somewhere above in this order. Therefore, we are not repeating the contents of that circular issued by the Ministry of Commerce & Industry, Government of India). Under section 51(1) of the SEZ Act, it has been clearly provided that the provision of this Act has overriding effect in case of contradiction between the SEZ Act and other Act. Hence, by virtue of Section 51 of the SEZ Act, the provision of SEZ Act and rules will have overriding effect over the provision contained in any other Act. Learned CIT(A) has taken into consideration this circular issued by Government of India and the provision of Section 51 of the SEZ Act and found that trading done by the assessee is a service and, therefore, deduction under Section 10AA is allowable. We further noted that on similar facts in case of Goenka Diamonds and Jewellery Limited (supra), the Jaipur Bench of the Tribunal has discussed the issue in detail. The provisions o Section 51 of SEZ Act were also considered. The decision of the Hon'ble Supreme Court in the case of Tax Recovery Officer Vs. Custodian Appointed Under The Special Court, reported in the case of 211 CTR 369 (SC) and the decision of the Hon'ble Delhi High Court in the case of CIT Vs. Vasisth Chay Vyapar Ltd., reported in 238 CTR 142 (Delhi), were also taken into consideration and thereafter it was concluded that in view of the Instruction NO.1 of 2006, dated 24-03-2006 as modified by Instruction No.4 of 2006 dated 24-5-2006 issued by the Ministry of Commerce & Industry, Government of India and the definition of service given in the SEZ Act, 2005 which overrides the word 'service' accruing in Section 10AA by virtue of Section 51 of the SEZ Act. The assessee engaged in trading in nature of re export of imported goods and for the same the assessee was entitled deduction under section 10AA of the Act. Facts are similar before us, as the assessee is engaged in trading of re-export of imported goods and, therefore, the assessee is entitled for deduction under Section 10AA of the Act. Al the arguments advanced by the learned DR before us have also been taken care of by the Tribunal while discussing the appeal in the case of Goenka Diamonds and Jewellery Limited (supra). It is further noted that the main plank of argument f learned DR is that rules provided under the SEZ Act cannot partake the character of the Section of the Income Tax Act. We find that in the SEZ Act under Section 51, it has been clearly provided that the provision of SEZ Act will override the provision of any other Act, meaning thereby the provision provided under the SEZ Act has to override on the provision of Section 10AA of the Income Tax Act. Under the rules, it is not provided but under Section 51 of the SEZ Act, it is provided, therefore, in our view, the contention raised by the learned DR is not tenable. Moreover, the issue is squarely covered by the decision of the coordinate Bench in the case of Goenka Diamonds and Jewellery Limited (supra). Therefore, respectfully following the decision of the Tribunal in the case of Goenka Diamonds and Jewellery Limited (supra) and in view of the reasoning given by the learned CIT(A), we confirm his order."

6. Nothing contrary was brought to our knowledge on behalf of Revenue. The fact being similar, following the same reasons we uphold the order of the CIT(A) who has allowed the claim of assessee of deduction under section 10AA of the Act. As a result, Revenue's appeal is dismissed."

C. In the case of ***Goenka Diamond and Jewellery Limited, reported in 146 TTJ 68****. The Hon ITAT Jaipur Bench held as under "it means that anything inconsistent to the provision of the SEZ Act will not be considered. Thus the word services as mentioned in Section 10AA cannot be construed inconsistently with the definition of services given in the SEZ Act.* ***Under the SEZ act, the trading is included in the services provided the trading is export of imported goods. We therefore, feel that the assessee is entitled to deduction u/s 10AA of the Act and therefore, the Ld. CIT(A) was justified in allowing the exemption.***

6.7 From the above case laws and decisions, it is emerged that, section 10AA was inserted to the IT Act referring to SEZ Act, 2005 where in some sections of the SEZ Act, has overriding effect over all the other Acts. Trading in the nature of import for the purpose of Re-Export in the SEZ is covered under the definition of Services and can be applied for the purpose of definition of "Services" to the provisions of section 10AA of the Act.

6.8 The Ld. AR also pointed out that the Instruction 4 of 2006 dated 24-05-2006 issued by Dept. of Commerce was kept on hold by Dept. of Commerce vide another Instruction No.5 dated 31-05-2006. However, the Ld. AR stated that Instruction No.5 dated 31-5-2006 has been withdrawn with immediate effect vide another Instruction No.7 dated 14-11-2006. The Ld. AR submitted the copy of Instruction No.7 dated 14-11-2006 in paper book and it is noticed that the said Instruction No.5 dated 31-05-2006 has been withdrawn by said instruction no.7 dated 14-11-2006.

6.9 In the above instruction, a reference has been made to Section 10AA of the Act. It is made clear to the entrepreneur having units in SEZ that benefit u/s 10AA will exclude other trading except in the nature of re-export of imported goods. Thus therefore is a promissory estoppel by the Govt. to the entrepreneur putting up the units in the SEZ that benefit u/s 10AA will be available on trading in the nature of re-export of imported goods.

6.10 The Ld. AR stated that all the transaction of the appellant are routed through Indian Custom Depar ment and the Ld. A.O. has not doubted the import and export transaction carried out in SEZ unit and there is no manipulation in the appellant case. The Ld. AR time and again stated that the trading in the nature of import for the purpose of Re-export in the SEZ is covered under the definition of Services as defined in SEZ Act, 2005 and there is no doubt that entire purchase in SEZ unit is imported goods and all these goods have been subsequently exported to the foreign countries.

6.11 The assessee has 100% export turnover from the SEZ unit during the current F.Y. The appellant has submitted the details of import and export in the paper book. Therefore, there is no doubt that the appellant has imported the goods and subsequently exported the same goods after value addition. Even the AO did not doubted the genuineness of the imports which were subsequently exported from the SEZ unit.

6.12 In view of the above, respectfully following the decisions of the jurisdictional Benches of the Hon'ble ITAT, Mumbai and the Hon'ble Jaipur Bench of the Tribunal in the cases cited above, trading in the nature of import for the purpose of Re-Export in the SEZ is covered under the definition of Services as defined in SEZ Act, 2005, hence the appellant is eligible for deduction u/s 10AA of the Act. Accordingly, Ld.

AO is directed to allow the deduction u/s 10AA of the Act to the appellant. This ground of appeal is treated as "Allowed.'

Aggrieved, the revenue is in further appeal before us.

4. The Ld. Departmental Representative [DR], *Shri Ram Tiwari,* supported the stand taken by Ld. AO which has been controverted by Ld. Auhtorized Representative for Assessee [AR], *Shri Suchek Anchaliya,* who drew our attention to the fact that the issues stood squarely covered in assessee's favor by catena of judgments, few of which have been relied upon by Ld. first appellate authority.

5. We have carefully heard the rival contentions and perused the impugned order including judicial pronouncements as cited before us. The basic facts are not in dispute The short question before us is that whether or not trading activity as carried out by the assessee during impugned AY would constitute *service* in terms of Section 10AA so as to enable him to claim deduction under the said Section. The perusal of impugned order revea s that Ld. first appellate authority, in the process of adjudication, has placed reliance in several decision of this Tribunal which could be tabulated as follows:-

(i) Gitanjali Export Corp. Ltd. Vs. ADIT [ITA Nos. 6947 & Others /Mum/2011 dated 08/05/2013 Mumbai Tribunal]
(ii) Diamond 'R' US Vs. CIT [ITA 2793/Mum/2012 Mumbai Tribunal]
(iii) Goenka Diamond & Jewellery Limited [146 TTJ 68 ITAT Jaipur]

In all the above decisions, the Tribunal has taken a consistent view that keeping in view the over-riding effect of the provisions of Section 51 of the SEZ Act, 2005, the term *service* for the purpose of Section 10AA, deriving its meaning from *Rule 76 of the SEZ Rules 2006* includes trading activities if it relates to the import of the goods for the purposes of

re-export. Nothing on record suggest that the above decisions have been reversed subsequently by any higher judicial authorities. Further, the revenue is unable to bring on record any contrary decisions. Therefore, respectfully following binding judicial pronouncements, we find no infirmity in the impugned order.

6. Having held so, in principal while agreeing with the claim of the assessee u/s 10AA, we deem it fit to restore the matter back to the file of Ld. AO to examine and verify the financial results reflected by the assessee in *Deepak Gems (SEZ)* since the same was not delved into by Ld. AO on account of the fact that the assessee was not eligible to claim the deduction u/s 10AA. The Ld. AO is directed to verify the financial results of the assessee reflected in the aforesaid unit and if found satisfactory, grant deduction thereof as per assessee's claim. The assessee, in turn, is directed to provide requisite supporting documents to substantiate the same.

7. Finally, the appeal stands dismissed in terms of our above order subject to aforesa d verification by Ld. AO.

Order pronounced in the open court on 10th October, 2018.

Sd/-	**Sd/-**
(Saktijit Dey)	**(Manoj Kumar Aggarwal)**
न्यायिक सदस्य / **Judicial Member**	लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 10.10.2018
Sr.PS:-Thirumalesh

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai**