

**THE HIGH COURT OF DELHI AT NEW DELHI**

% Judgment delivered on: 22.01.2013

+ **WP(C) 13838/2009**

REPLIKA PRESS PRIVATE LIMITED AND ANR ... Petitioners

versus

**ASSISTANT COMMISSIONER OF
INCOME TAX CIRCLE 15(1) NEW DELHI** ... Respondents

Advocates who appeared in this case:

For the Petitioners : Mr S. Krishnan

For the Respondents : Mr Kamal Sawhney

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE R.V.EASWAR

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition impugns the notice dated 24.02.2009 issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the said Act') seeking to re-open the assessment for the assessment year 2005-06.

2. The learned counsel for the petitioner submitted that the provisions of Section 147 have been wrongly invoked by the revenue inasmuch as the Assessing Officer is seeking to merely change his opinion which is



not permissible in law. In order to examine this plea of the learned counsel for the petitioner, it would be necessary to refer to some facts.

3. The petitioner had filed its return of income for the relevant assessment year on 29.10.2005. In the said return under Schedule K, the petitioner claimed a sum of ₹ 2,61,41,144/- as being exempted under Section 10B of the said Act. The nature of income was described as a business income of a 100% export oriented unit. Alongwith the income tax return, the petitioner had given a break-up of the export turnover and the local turnover. The calculations for deduction under Section 10B for the assessment year 2005-06 were, *inter alia*, as under:-

“CALCULATION OF DEDUCTION U/S 10B FOR THE ASSESSMENT
YEAR 2005-2006

A.	<u>EXPORT TURNOVER</u>	
	FOB value of Export including DTA Supply	134305284.00
	Add: Income from Typesetting & Scanning	3126484.00
	Add: Exchange Fluctuation Gain	842763.00
		<u>188274511.00</u>
	<u>LOCAL TURNOVER</u>	
	Sale	30529807.00
	Add: Sale of wastage	2002090.00
B.		<u>32531897.00</u>
	<u>TOTAL TURNOVER</u>	
	Sale Export Turnover	188274511.00
	Add: Local Turnover	32531897.00
C.		<u>220806408.00</u>
	<u>PROFIT OF THE UNDERTAKING</u>	
	Profit as per Computation of Assessable Income	30868064.00
	Business Profit	<u>30658064.00</u> ”

(emphasis supplied)



It should be noted that under export turnover, the petitioner clearly mentioned the FOB value of exports including DTA supply. DTA supply essentially meant supplies to the domestic tariff area. The printed books, which the petitioner was producing on behalf of its overseas publishers, were being supplied to parties in India on the instructions of the overseas publishers, wherever required. The payment in respect of the same was received from the overseas publishers in convertible foreign exchange.

4. Alongwith the return of income, was also annexed an annexure to the notes on accounts, where, also, the DTA sales were mentioned. What is more important is the fact that the Assessing Officer issued a questionnaire on 22.08.2007 in respect of the said assessment year 2005-06. Question No.11(b) of the questionnaire reads as under:-

“11(b). Please give a note on DTA supply and why it has been included in export turnover.”

In response, the petitioner submitted a reply on 13.09.2007. As regards question No. 11(b), the reply given by the petitioner was as under:-

“11.(b) The summary of sales is as follows.

1.	Physical Export as per chart enclosed	90030302
2.	Constructive Export	94274982
3.	Typesetting & scanning	3126464



4.	Exchange Fluctuation Gain	<u>842763</u>
	(A)Export Turnover	<u>188274511</u>
5.	Domestic Sales	30529807
6.	Wastage Sales	<u>2002090</u>
	(B) Local Turnover	<u>32531897</u>
	(A) Export Turnover	188274511
	(B) Local Turnover	32531897
	Total Turnover (A) + (B)	<u>220806408</u>

Brief Note on Constructive Exports

Regarding constructive Sales purchase order is received from overseas publishers.

According to copy right act the ownership & copy rights of the title book vests with overseas publishers. The same facts are stated on the front Page of the book photocopy of a sample is enclosed. Since the assessee company does not own copy rights therefore the company is not the owner of the books, hence they cannot make any sales. The assessee company is following the delivery instructions of the Foreign publishers & that too after the permission is granted by the Development Commissioner, NEPZ Noida (UP). Since the purchase order is received from Foreign publishers, payment is also received in convertible Foreign Exchange through banking channel. Subsequently on the basis of the permission granted by Development Commissioner the Foreign Exchange is sent to overseas publishers in Foreign Currency by the people to whom the company has made supplies.

Reliance is placed on the Hon'ble Supreme Court Judgment in the case of J.B. Boda & Co. Pvt. Ltd. Vs. Central Board of Direct Taxes, copy of the judgment is enclosed, where the Hon'ble Supreme Court has held that "A two way Traffic is unnecessary. To insist on a formal remittance first & thereafter



to receive the commission from the Foreign reinsure, will be an empty formality & a meaningless ritual on facts of the case.””

5. The learned counsel for the petitioner pointed out that the summary of sales given in the aforesaid reply referred to two different types of exports. The first kind was the physical export and the second was the constructive export. The brief note, which has been reproduced above, explains as to what is meant by constructive exports. These are those supplies in the domestic tariff area which have been made on the instructions of the publishers abroad and for which the petitioner has received payment in convertible foreign exchange through normal banking channels.

6. After having received the reply from the petitioner to the detailed questionnaire and in particular to question No. 11(b), the Assessing Officer framed the assessment under Section 143(3) of the said Act on 04.10.2007. It will be seen that the Assessing Officer specifically dealt with the issue of constructive exports and DTA supplies. This will be apparent from paragraphs 4 and 8 of the assessment order, which read as under:-

“4. The assessee company is an export oriented unit engaged in the business of export of printed books which has been



delivered as per instruction of the importer to parties situated outside India, as well as in India (i.e. constructive exports). It has also shown receipts in convertible foreign exchange, from export/transmission of customized electronic data by way of scanning and typesetting charges. During the year only the EOU has been in operation, as the domestic unit was stated to be closed down in A.Y.2004-05. The assessee has made domestic sales which has been shown as local turnover.”

“8. Export turnover as per section 1013 Explanation 2(iii) has to be worked out exclusive of freight, telecommunication charges or insurance attributable to the delivery of articles or things or computer software outside India. The telecommunication charges incurred on transmitting the electronic data (i.e. typesetting and scanning charges) have to be excluded from the gross receipts. Assessee has taken a leased inter-net connection from BSNL through which type-set and scanned data files are uploaded to the foreign publisher. During the year the assessee has paid Rs.2,01,632/- to BSNL for this facility, a per reply dated 28.9.07. Accordingly, an amount of Rs.2,01,632/- is excluded from total export turnover shown at Rs.18,82,74,51 II- as per report in Form 56G. So the revised total export turnover would be Rs.18,80,72,879/- which is worked out as under:

FOB value of exports including DTA (domestic tariff area) supply	:	Rs.184305284/-
Add: Income from typesetting & scanning	:	Rs. 3126464/
Add: Exchange fluctuation gain	:	Rs. 842763/-
Less: Telecommunication charges paid to BSNL:		Rs. 201632/-
Export Turnover		<u>Rs.188072879/-”</u>



Along with the assessment order, was appended the calculation sheet which also had reference to the export turnover which reads as under:-

“Annexure-A

Calculation of deduction u/s 10B for the AY 2005-06

Export turnover	:	Rs.188072879/-
Local turnover	:	Rs.32531897/-
Total turnover	:	Rs.220604776/-
Profit of the undertaking as per Computation of total income in para 10	:	Rs.30808337/-
Deduction : (Business profit) Export turnover/ Total turnover.		
Deduction u/S 10B = Rs.26265128/-”		

It will be seen that the figure of export turnover exactly matches the figure of export turnover as indicated in paragraph 8 of the assessment order which includes the FOB value of exports including DTA (domestic tariff area) supplies. From the aforesaid, it is apparent that the Assessing Officer had applied his mind to the question of supply to the domestic tariff area made by the petitioner on instructions from the publishers abroad.



7. The impugned notice under Section 148 was followed by the supply of the purported reasons, which read as under:-

“2005-06

Reasons: The assessment of M/s Replika Press Pvt. Ltd. For the assessment year 2005-06 was completed after scrutiny in October, 2007 at an income of Rs.149.66 lacs. The assessee, which had 100% export-oriented unit status, was engaged in the business of manufacturer and export of printed books. Audit noticed that the assessee was allowed deduction under section 106 for sales of printed books, which was delivered as per instruction of the foreign buyers to parties situated in India (sales Rs.9,42,74,982), Since the supply to Domestic Tariff Area (DTA) in India does not constitute export out of India, these sales also do not constitute export turnover of the assessee. In a similar case of Indian Delco (Pvt.) Ltd. Vs. DCIT [59 ITD 268], ITAT Delhi bench had rejected the claim of assessee for considering such domestic sales as export. Thus, the allowance of deduction under section 106 for DTA sales resulted in excess allowance of the deduction by Rs.1,31,65,878/-.

On the facts and in the circumstances of the case as discussed above & for the reason of failure on the part of the assessee to disclose fully & truly all material facts necessary for assessment and in view of sub-clause (c) of Expl.2 below section 147, I have reason to believe that income of Rs.1,31,65,878/- chargeable to tax in A.Y.2005-06 has escaped assessment.”

8. On going through the purported reasons, it is apparent that the assessment is being re-opened on the ground that the supply to domestic tariff area did not amount to exports. The learned counsel for the



petitioner has contended that this would amount to a mere change of opinion and that it is also based on an audit note. The learned counsel for the petitioner also pointed out that the audit personnel could not comment on an interpretation of Section 10B of the Income Tax Act as that would be a comment on a point of law, which is not permissible in view of the Supreme Court decision in the case of *Indian and Eastern Newspaper Society v. CIT: 119 ITR 996 (SC)*.

9. For the sake of completing the facts, we may point out that the petitioner had filed his return pursuant to the notice and had also given his objections to the said notice which had been disposed of by an order dated 07.12.2009, rejecting the petitioner's objections. The said order dated 07.12.2009 is also impugned in this writ petition.

10. We have heard the counsel for the parties and we may straightaway state that this is a clear case of change of opinion as also a case which was beyond the jurisdiction of the revenue audit which had pointed to the so-called discrepancies on points of law, particularly, on an interpretation of Section 10B of the said Act.



11. Insofar as the change of opinion is concerned, it is writ large from the records of the case. The Assessing Officer had specifically raised a query with regard to the supplies made in the domestic tariff area and the petitioner / assessee had given a detailed reply to the same. The Assessing Officer, after considering the reply furnished by the assessee, framed the assessment order in which, as we have pointed out above, he made specific references to exports in the domestic tariff area and / or constructive exports. While computing the claim for exemption under Section 10B, the Assessing Officer has included the supply made in the domestic tariff area, both in the main body of the assessment order as also in Annexure-A thereto, which was the calculation of the deductions. Therefore, it is absolutely clear that the Assessing Officer had applied his mind to the very issue which is now sought to be raised under Section 147 of the said Act. That would mean that the present venture of invoking Section 147 is nothing but a mere change of opinion, which is impermissible in law, as is well settled by a long line of decisions. The second point of the petitioner is also well taken that an audit party could not have commented on a point of law and, particularly, on an interpretation of Section 10B of the said Act.



12. Therefore, on both points, the petitioner is liable to succeed. The impugned notice dated 24.02.2009 and all proceedings pursuant thereto, including the order dated 07.12.2009, are quashed and / or set aside. The writ petition is allowed, as above. There shall be no order as to costs.

BADAR DURREZ AHMED, J

R.V.EASWAR, J

JANUARY 22, 2013
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