
(2014) 08 MAD CK 0078

In the Madras High Court

Case No : Tax Case (Appeal) No. 1328 of 2009

Commissioner of Income Tax

APPELLANT

Vs

Live Connection Software Solutions Pvt. Ltd.

RESPONDENT

Date of Decision : 25-08-2014

Acts Referred:

Income Tax Act, 1961 — Section 10B, 10B(1), 143(1), 33B
Industries (Development and Regulation) Act, 1951 — Section 14

Citation : (2015) 280 CTR 109 : (2015) 370 ITR 356

Hon'ble Judges : R. Sudhakar, J;G.M. Akbar Ali, J

Bench : Division Bench

Judgement

R. Sudhakar, J.—This Tax Case (Appeal) filed by the Revenue as against the order of the Income Tax Appellate Tribunal for the assessment year 2005-06 was admitted by this Court on the following substantial question of law:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the registration with STPI is not a pre-requisite for grant of deduction under Section 10B of the Income Tax Act?"

2. The brief facts are as follows:

The respondent/assessee is a company engaged in software development. The assessee company was incorporated on 19.12.2003 and started business operations from January, 2004. The assessee prepared accounts for the period 19.12.2003 to 31.3.2005. For the first time, for the assessment year 2005-06, the assessee claimed deduction under Section 10B of the Income Tax Act and filed return of income declaring total income of Rs. 38,430/- on 19.10.2005. The said return was processed under Section 143(1) of the Income Tax Act on 18.3.2006 and subsequently, the case was taken up for scrutiny. The Assessing Officer, while dealing with the claim of deduction under Section 10B of the Income Tax Act, found that the assessee had applied for registration as 100% EOU to Software Technology Parks of India (STPI) on 24.3.2005 and obtained approval only in May, 2005; hence, as per Circular No. 1 of 2005 dated

06.01.2005 of the CBDT, the assessee was not eligible for the benefit under Section 10B of the Act. Accordingly, the Assessing Officer disallowed the entire claim of deduction under Section 10B of the Income Tax Act on the ground that the assessee had obtained approval from STPI only in May, 2005, which was after the end of the previous year relevant to the assessment year 2005-06.

3. Aggrieved by the order of the Assessing Officer, the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), who partly allowed the appeal holding as follows:

"It is settled proposition of law that an exemption has to be granted as and from the assessment year in which the conditions prescribed in the section have been satisfied until the end of the holiday period. Commissioner of Income Tax Vs. Gopal Plastic (P.) Ltd., . This view is also supported by the decision of the Hon"ble Supreme Court in the case of Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal, . In the case of the appellant it is found that the appellant is engaged in the manufacturing and export of computer software and has commenced hundred percent export of computer software during the A.Y. 2005-06.

7.2. It will not be out of place here to mention that it is a settled proposition often reiterated by the Hon"ble Apex Court that in cases where two views are possible, the one favourable to the assessee should be adopted. Commissioner of Income Tax, Bombay etc. Vs. M/s. Podar Cement Pvt. Ltd. etc., and M/s Mysore Minerals Limited, M.G. Road, Bangalore Vs. The Commissioners of Income Tax, Karnataka, Bangalore,

7.3 In view of the above facts and in the circumstances of the case, it is held that the appellant has fulfilled all the conditions specified u/s. 10B and has correctly claimed deduction under that section. The Assessing officer, therefore was not justified in denying the claim of deduction, consequently, he is directed to allow the same as per the claim made by the appellant in the return of income. This ground of appeal is allowed."

4. Aggrieved by the order of the Commissioner of Income Tax (Appeals), the Revenue preferred an appeal before the Income Tax Appellate Tribunal.

5. The Tribunal, after referring to the provision under Section 10B of the Income Tax Act and the Explanation to Section 10-B came to hold that if the assessee satisfies the below mentioned three conditions they will be granted the benefit under Section 10B of the Income Tax Act

"if the assessee company

i) manufactures or produces any article or things or computer software mentioned below;

ii) was not formed by the splitting up, or the reconstruction, of a business already in existence subject to the provisions of section 33B of the Act and

iii) is not formed by the transfer to a new business of machinery or plant previously used for any purpose"

The Tribunal also held that there is no pre-condition that the assessee company has to obtain registration from STPI before making a claim under Section 10B of the Act; the Circular of the CBDT could not override the plain provisions of the Act and the circulars of the CBDT were either in the nature of clarification or rather explanatory in nature. The Tribunal further held that the STPI agreement/certificate nowhere mentioned that it was for claiming deduction under Section 10B of the Act. The Tribunal also held "a claim which is allowed by the plain provisions of the Act cannot be restricted by imposing conditions which cannot be carried out". The Tribunal also held that beneficial, promotional and incentive provisions like the provisions of Section 10B of Act, which was aimed at promoting software industry in India, should be liberally construed and should not be defeated on technical grounds. The Tribunal also held that from a reading of Section 10B of the Act, approval or registration under STPI have not been mandatory and the same could not be read in a different manner and the CBDT circulars are binding on the Department alone.

6. The Tribunal relying upon the decision of this Court reported in Commissioner of Income Tax Vs. Gopal Plastic (P.) Ltd., held as follows:

"The Hon"ble Madras High Court while deciding the case in Commissioner of Income Tax Vs. Gopal Plastic (P.) Ltd., has clearly observed that when an exemption is granted by any provision of the Act, from its very inception, and the conditions laid down therein are fully satisfactory until the end of the holiday period, the same has to be allowed. This view has been fortified by the Hon"ble Supreme Court in the case of Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal, . In any worst situation, when from the analysis of any provision two view are possible, the one which favours the assessee has to be adopted. In this regard, the decision of the Hon"ble Supreme Court in M/s Mysore Minerals Limited, M.G. Road, Bangalore Vs. The Commissioners of Income Tax, Karnataka, Bangalore, can be referred to. Hence the claim of the assessee correctly fits in the jacket formula laid down by section 10-B and the assessee is entitled to the impugned deduction. In our considered opinion, the learned Commissioner (A) has committed no error in directing the Assessing Officer to allow the claim of the assessee made under section 10-B of the Act. Accordingly, we do not find any merit in the grounds of this appeal. Hence we dismiss the same."

7. Aggrieved by the order of the Tribunal, the Revenue has preferred the present Tax Case (Appeal) raising the substantial question of law referred supra.

8. Learned Standing Counsel appearing for the Revenue submits that Explanation 2 (iv) of Section 10B of the Income Tax Act defines 100% EOU as one approved by the Board. The ten year period commences from the date of such approval. She further submits that when the STPI registration itself was beyond the

financial year, the assessee is not entitled to the benefit of exemption prior to the date of approval and the assessee is entitled to the benefit of exemption from the next assessment year only. Also the circular of the CBDT is not contrary to the statute but it is only clarified the position. Hence, the order of the Tribunal is liable to be set aside and this appeal may be allowed.

9. Per contra, learned counsel appearing for the assessee submits that the assessee had fulfilled the conditions prescribed under Section 10B of the Income Tax Act and hence eligible for exemption. The provision does not make it mandatory that STPI registration should be obtained before making a claim under Section 10-B of the Income Tax Act. Hence, the Tribunal is correct in granting benefit of exemption under Section 10-B of the Act to the assessee.

10. Heard learned Standing Counsel appearing for the Revenue and the learned counsel appearing for the assessee and perused the materials placed before this Court.

11. It is seen that the respondent/assessee, which is a company engaged in software development, has applied for registration as 100% Export Oriented Unit on 24.3.2005 before the competent authority and got the approval in May, 2005. The assessee claimed benefit of exemption under Section 10-B of the Act, which falls under Chapter IV, for the assessment year 2005-06. What is relevant for seeking benefit under Section 10-B is deduction of profits or gains as are derived by a hundred per cent export-oriented undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee. Clause (iv) of Explanation 2 to Section 10B of the Act defines 100% Export Oriented Unit, which reads as follows:

Explanation 2.-For the purposes of this section,-

(i).....

(ii).....

(iii).....

(iv) "hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act.

12. A reading of the above provision makes it clear that a 100% EOU as provided under Section 10B(1) will be one that is approved by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by Section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and

the Rules made under that Act. Admittedly, in this case, such approval was granted during May, 2005 only and therefore, prior to that date or the assessment year, relevant to the date of registration, the benefit of Section 10-B would not be available as the requirement of approval by the competent authority is not available as on the date, from which the assessee claimed exemption. Hence, we have no hesitation to hold that Section 10B is very clear and unambiguous that approval by the competent authority is pre-requisite for grant of benefit under Section 10-B. Hence, it will not be appropriate for the Tribunal to hold that there is no pre-condition that the assessee should have obtain STPI registration before making the claim under Section 10-B of the Income Tax Act. That finding of the Tribunal is totally wrong and contrary to the provisions of the Act.

13. The provisions of Section 10-B of the Income Tax Act make it clear that the benefit will flow if there is a certificate of approval issued by the Board appointed in this behalf, namely, STPI. Hence, we find that the Tribunal is not justified to hold that the claim allowed by the provision of Section 10B cannot be restricted by imposing certain conditions. We hold that this finding of the Tribunal is totally contrary to Clause (iv) to Explanation (2) of Section 10B of the Income Tax Act. The Department, no doubt, clearly states that for the next assessment year the benefit would automatically flow. We do not find any justification to be swayed by the view of the Tribunal that the promotion of software industry should not be scuttled by technicalities.

14. We are also aware of the fact that the benefit granted under Section 10B is more in the nature of exemption, for which certain pre-requisite conditions, namely, approval by the appropriate Board, have to be complied with in the manner prescribed. Unless and until the assessee gets an approval in the manner prescribed under Section 10-B, the question of granting the benefit does not arise. The Tribunal's opinion that if there are two views, then the view in favour of the assessee should be accepted is fully inadmissible on the facts of the present case. We hold that the Circular is nothing but clarification of what the Section 10B really provides for. It is of no avail either to the assessee or to the Department when the provisions of Section 10-B is clear.

15. It is to be noted that there is no second opinion on the facts of the ratio decided by this Court in the case of Commissioner of Income Tax Vs. Gopal Plastic (P.) Ltd., that exemption will be available from the inception if the conditions are fully satisfied, which fact is not available to the facts of the present case. We hold that the assessee in this case will be entitled to the benefit of Section 10-B only on complying with the conditions contained prescribed in Section 10-B of the Income Tax Act, and it does not enure to the benefit for the assessment year in question, namely, 2005-06. The decisions relied on by the Tribunal have no relevance to the facts of the present case. We, therefore, hold that the question of law raised by the Revenue is answered in favour of the Revenue and against the assessee. Accordingly, the order of the Tribunal stands

set aside and the Tax Case (Appeal) stands allowed. No costs.

16. Learned counsel appearing for the assessee submits that if there is any material to show that the assessee has got the approval earlier, the assessee may be given liberty to produce the same before the Assessing Officer for availing the benefit. It is open to the assessee to submit the certificate of approval, if any, to show that on earlier date, it has obtained approval and seek rectification in accordance with law.