(2009) 09 BOM CK 0037

In the Bombay High Court

Case No : IT Appeal No. 1356 of 2007

Zycus Infotech (P) Ltd. APPELLANT

Vs

Commissioner of Income Tax RESPONDENT

Date of Decision : 08-09-2009

Acts Referred:

Companies Act, 1956 — Section 86
Finance Act, 2000 — Section 10A
Income Tax Act, 1961 — Section 10A, 10A(1), 10A(9), 10B, 260A

Citation : (2010) 235 CTR 113 : (2011) 331 ITR 72 : (2010) 191 TAXMAN 13

Hon'ble Judges : V.C. Daga, J;J.P. Devadhar, J

Bench : Division Bench

Advocate : B.V. Jhaveri, for the Appellant; J.S. Saluja, for the Respondent

Final Decision : Allowed

Judgement

V.C. Daga, J.—This appeal was admitted on 21st July, 2008 to consider following substantial questions of law:

(a) Whether on the facts and in the circumstances of the case the Tribunal was right in applying the provisions of Expln. 1 to Section 10A(9) in the present case ?

(b) Whether on the facts and in the circumstances of the case, Expln. 1 to Section 10A(9) of the IT Act, 1961 was at all applicable to the facts of the present case as the Expln. 1 to Section 10A(9) has been inserted w.e.f. 1st April, 2001 and will apply only to those entities which for the first time got entitled to exemption u/s 10A of the Act w.e.f. 1st April, 2001 and if will not apply to those entities which have become entitled to explanation (sic-exemption) u/s 10A of the Act on the date prior to Ist April, 2001, as in the present case, the exemption has been available to the appellant from the asst. yr. 1998-99. In other words, whether the Expln. 1 has retrospective operation as held by the Tribunal or whether it has prospective operation as contended by the appellant ?

The facts:

2. The appellant is a private limited company which has been treated as a newly established undertaking in free trade zone in accounting period relevant to asst. yr. 1997-98 and is enjoying deduction of its profits and gains as are derived by the undertaking as provided u/s 10A of the IT Act, 1961 ("the Act" for short). There was a change in the shareholding pattern of the company which has been reproduced by the AO. In the assessment order reading as under:

3. Before the issue of new shares, Shri Aatish N. Dedhia and Shri Nanji N. Dedhia were having 100 per cent of voting power in respect of the shares held by them. After the issue of shares to NRIs, after obtaining the approval of the RBI, the voting powers in respect of shares held by Shri Aatish Dedhia and Shri Nanji Dedhia were reduced to 51.42 per cent. The AO held that the percentage of shares of the company held by shareholders in the year in which the undertaking was set up, were reduced to less than 51 per cent i.e. 42.63 per cent (in the year under consideration) of the shares as against 100 per cent held previously by the Dedhia Group. He, as such, held that it is clearly established that the beneficial interest in the undertaking is transferred. He applied the provisions of Expln. 1 to Section 10A of the Act.

4. Being aggrieved by the aforesaid order of the AO, an appeal was preferred before the CIT(A) wherein the CIT(A) confirmed the order of the AO. Consequently, an appeal came to be filed before the Tribunal against the order of the CIT(A) whereby, the Tribunal has concurred with the findings of the CIT(A) and disallowed the exemption by invoking the provisions of Section 10A(9) of the IT Act. Aggrieved thereby, the appellate jurisdiction of this Court is invoked by the appellant u/s 260A of the Act for consideration of substantial question of law framed in the opening part of this judgment.

Submissions:

5. learned Counsel for the appellant submits that the provisions of Section 10A(9) r/w Expln. 1 are not applicable to the facts of the case because shares having more than 51 per cent of voting power still continue to be held by the Dedhia Group after the issue of new shares to the NRI entities, even though the number of shares held by the promoters are less than 51 per cent of the total shares issued by the appellant company. According to learned Counsel for the appellant, the Tribunal has committed a serious error in coming to the conclusion that the focus of the Explanation is on the holding of the shares carrying not less than 51 per cent of the voting power and not on the holding of 51 per cent of the voting power.

6. The learned Counsel for the appellant further submits that the Expln. 1 to Section 10A(9) of the Act requires the original holders of shares of the appellant company to keep control and management of the appellant company by holding 51 per cent of the voting power irrespective of the number of shares held by them. It is thus submitted that the promoters of the appellant company viz. Shri Aatish Dedhia and Shri Nanji Dedhia are continuing to have 51.42 per cent of the

voting power even though the number of shares held by them are 42.63 per cent of the total shares issued by the appellant company.

7. Learned Counsel for the appellant further submitted that during the previous year relevant to the asst. yr. 2001-02 the ownership of the beneficial interest in the appellant company is not transferred by any means and therefore, the appellant company is entitled to deduction u/s 10A(1) of the Act.

8. So far as question (b) referred to hereinabove is concerned, learned Counsel for the appellant submits that Sub-section (9) of Section 10A which was inserted w.e.f. asst. yr. 2001-02 but omitted from asst. yr. 2004-05 would apply prospectively i.e. the undertaking to which Section 10A applies w.e.f. 1st April, 2000. It is submitted that in Sections 10A and 10B, there is a block concept for 10 years, the transfer that may forfeit relief has to be considered with reference to the last day of the previous year, when the claim for relief is made and "the last day of the year in which undertaking was set up". Learned Counsel for the appellant thus submits that, it is the block concept, which holds the key to the reference to "the year of setting up", therefore, the provision will apply only for those whose block of 10 years starts w.e.f. 1st April, 2000 and it cannot apply to those undertakings which had commenced production before 1st April, 2000. It is also submitted that Section 10A has been substituted by a new Section 10A by the Finance Act, 2000 whereby Sub-section (9) has been inserted for the first time w.e.f. 1st April, 2000 and therefore, the new section cannot impair the right already acquired prior to the introduction of Section 10A(9) unless specifically stipulated.

9. In reply, the learned Counsel for the Revenue tried to support the impugned order and reiterated the observations made therein and prayed for dismissal of appeal with costs.

Consideration:

10. Having heard rival parties, before considering the rival submissions, it is necessary to turn to Expln. 1 of Section 10A(9), which provides that the promoters of the appellant company should continue to hold shares of the company carrying not less than 51 per cent of the voting power. The said Explanation reads as under:

Explanation 1 For the purpose of this section, in the case of a company, where on the last day of any previous year, the shares of the company carrying not less than 51 per cent of the voting power are not beneficially held by persons who held the shares of the company carrying not less than 51 per cent of the voting power on the last day of the year in which the undertaking was set up, the company shall be presumed to have transferred its ownership or the beneficial interest in the undertaking.

11. At this juncture, it would also be useful to turn to para No. 15.9 of the circular of the CBDT bearing No. 794, dt. 9th Aug., (2000) 162 CTR 9], which

explains the insertion of Sub-section (9) and Expln. 1 thereto by the Finance Act, 2000 which reads as under:

15.9 Sub-section (9) provides that in case there is a transfer of ownership or the beneficial interest in the undertaking by any means, the deduction under Sub-section (1) shall not be allowed to the assessee for the assessment year relevant to such previous year in which the transfer takes place and in the subsequent years. Explanation 1 further provides that in the case of a company where on the last date of any previous year the shares of the company carrying not less than 51 per cent of the voting power are not beneficially held by persons who held the shares of the company carrying not less than 51 per cent of the voting power on the last day of the year in which the undertaking was set up, the company shall be deemed to have transferred its ownership or the beneficial interest in the undertaking.

12. Having examined the aforesaid provisions of the IT Act and the sweep of circular issued by the CBDT, it is necessary to take stock of the provisions of the Companies Act, 1956.

13. Section 86 of the Companies Act has been substituted by the Companies (Amendment) Act, 2000 w.e.f. 13th Dec., 2000 whereby a company incorporated under the Companies Act, 1956 has been allowed to issue two kinds of shares viz., ''equity shares'' and ''preference shares'' and the equity shares can be with voting rights or with differential rights as to dividend, voting or otherwise in accordance with such rules as may be prescribed. Accordingly, Company (Issue of Shares Capital with Differential Voting Rights) Rules, 2001 have been framed, which permits the issuance of equity shares with differential voting rights. Accordingly, the appellant company has issued shares without voting rights. In the result, the original promoters i.e. Shri Aatish Dedhia and Shri Nanji Dedhia continue to hold shares of the appellant company carrying not less than 51 per cent of the voting power. It is thus clear that during the previous year relevant to asst. yr. 2001 -02 the ownership of the appellant company was not transferred by any means and therefore, the appellant company is right in claiming entitlement to deduction u/s 10A(1) of the Act.

14. So far as second question is concerned, one has to keep in mind the settled principle of interpretation that retrospectivity cannot be lightly inferred unless it is clearly provided for in the statute. The first proviso to Section 10A implies continuity. If the intention was to deprive the existing industries or to impose a condition, which is not capable of being fulfilled in the context of transfer having already occurred prior to the statute, it would have been specifically made clear. Under these circumstances, keeping in mind the general principle that vested right cannot be divested, one cannot assume retrospectivity to a greater extent than what the section intends.

15. At this juncture, it is needless to mention that, where the words used are "has made, has ceased, has failed and has become", they were found to be

words which can be understood as happening both prior and after coming into force of the statute, as it was understood from the words "if a person has been convicted" to include anterior conviction. In the Expln. 1, present tense is used with an injunction that the shares "are not beneficially held by the persons who hold the shares in company." The present tense cannot be assumed to describe the status of the shareholder as the owner, but the status of the shares which are beneficially held. On this interpretation the language of the section can only be understood to describe "the date on which the undertaking was set up" as applicable only for those who are setting up the undertaking after the new provision, so that in case of others, the date has to be understood at best, as on 1st April, 2000, the date on which the law was brought in the statute.

16. In the aforesaid view of the matter and the findings recorded, both the questions stand answered in negative i.e. in favour of the assessee and against the Revenue. Appeal is allowed with no order as to costs.