

* **HIGH COURT OF DELHI : NEW DELHI**

+ **ITA No. 950/2007**

% **Decided on: 14th May, 2008**

THE COMMISSIONER OF INCOME TAX,
DELHI-III, NEW DELHI Appellant
Through : Mr. R.D. Jolly, Adv.

versus

MOSER BAER INDIA LTD.
63, RING ROAD,
LAJPAT NAGAR,
NEW DELHI-110024 Respondent
Through : Mr. Ajay Vohra with Ms. Kavita Jha,
Advs.

Coram:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE MANMOHAN SINGH

- 1. Whether the Reporters of local papers may
be allowed to see the judgment? Yes
- 2. To be referred to Reporter or not? Yes
- 3. Whether the judgment should be reported
in the Digest? Yes

MADAN B. LOKUR, J. (ORAL)

The Revenue is aggrieved by an order dated 30th November, 2006
passed by the Income Tax Appellate Tribunal, Delhi Bench 'D' in ITA
No. 1343/Del/2000 relevant for the Assessment Year 1996-97; ITA No.
3093/Del/2003 relevant for the Assessment Year 1997-98; and ITA No.
3094/Del/2003 relevant for the Assessment Year 1998-99.

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2. After hearing learned counsel for the parties, we frame the following substantial question of law for consideration:-

“Whether the Income Tax Appellate Tribunal was correct in law in coming to the conclusion that the requirement of Section 10B(7) of the Income Tax Act, 1961 that a declaration for withdrawal of exemption under Section 10B(1) read with Section 10B(3) of the Act should be filed before the due date of furnishing the return of income under sub-section (1) of Section 139 of the Act is directory?”

3. Filing of paper books is dispensed with.
4. Since we have heard learned counsel for the parties in detail, we are disposing of the appeal on the existing papers.
5. At the outset, learned counsel for the Assessee has pointed out that Section 10B of the Act has undergone several changes. As on the relevant date, the provisions of Section 10B(1), 10B(3) and 10B(7) of the Act, which we are concerned with, read as follows:-

“10B. (1) Subject to the provisions of this section, any profits and gains derived by an assessee from a hundred per cent export-oriented undertaking (hereinafter in this section referred to as the undertaking) to which this section applies shall not be included in the total income of the assessee.

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(3) The profits and gains referred to in sub-section (1) shall not be included in the total income of the assessee in respect of any five consecutive assessment year, falling within a period of eight years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things, specified by the assessee at his option:

Provided that nothing in this sub-section shall be construed to extend the aforesaid five assessment

years to cover any period after the expiry of the said period of eight years.

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(7) Notwithstanding anything contained in the foregoing provisions of this section, where the assessee, before the due date for furnishing the return of his income under sub-section (1) of Section 139, furnishes to the Assessing Officer a declaration in writing that the provisions of this section may not be made applicable to him, the provisions of this section shall not apply to him for any of the relevant assessment years."

6. In respect of the Assessment Year 1996-97, which is taken as the main case, the Assessee was required to file its return of income by 30th November, 1996. There is no doubt that the Assessee filed its return of income before the due date. Earlier, in accordance with Section 10B(1) and Section 10B(3) of the Act, the Assessee had obtained an exemption for the Assessment Year 1994-95 and therefore, it was entitled to claim exemption for a period of five consecutive years thereafter.

7. However, since the Assessee suffered a loss in the Assessment Year 1996-97, it sought to withdraw its claim for exemption under the provisions of Section 10B(7) of the Act in respect of one of its units that is Floppy Unit II. In this regard, the Assessee admittedly filed a declaration as required by Section 10B(7) of the Act, on 8th February, 1999 which is after the due date of filing the return. This declaration was by way of a letter and was filed during the assessment proceedings because the assessment was framed on 8th March, 1999.

8. The Assessing Officer was of the view that since the claim for withdrawal was made after the due date of filing the return, the Assessee was not entitled to withdraw the claim for exemption.

9. Feeling aggrieved by the Assessment Order, the Assessee preferred an appeal before the Commissioner of Income Tax (Appeals) who upheld the view taken by the Assessing Officer and came to the conclusion that the provisions of Section 10B(7) of the Act were mandatory in nature to the extent that the claim for withdrawal should be made before the due date of filing the return.

10. The Assessee then took up the matter before the Income Tax Appellate Tribunal and by the order under appeal, the Tribunal came to the conclusion that the requirement of filing the declaration for withdrawing the claim for exemption before the due date of return was not mandatory but it was directory. In this regard, the Tribunal relied upon certain decisions rendered by other Benches of the Tribunal.

11. Learned counsel for the Revenue, in support of his case has relied upon *Goetze (India) Ltd. vs. Commissioner of Income Tax [2006] 284 ITR 323*. This case is not directly on the point since what was decided therein by the Supreme Court was that a claim for exemption can be made either in the return as originally filed or by filing a revised return under Section 139(5) of the Act. In the event an Assessee does not file a claim for exemption in the original return or the revised return, he cannot subsequently make a claim for deduction and the Assessing Officer can reject the claim for exemption.

12. This is not what has happened in the present case inasmuch as the Assessee has not made a claim for exemption but has made a claim for withdrawing an exemption which it would otherwise be entitled to claim in view of Section 10B(3) of the Act. *Goetze (India)* is not at all apposite.

13. Learned counsel for the Assessee has relied upon *Commissioner of Income Tax vs. Nagpur Hotel Owners' Association [2001] 247 ITR 201* in which the Supreme Court was concerned with Section 11(2) of the Act. What this provision postulates is that the Assessee shall give a notice in writing to the Assessing Officer 'in the prescribed manner' for accumulating or setting apart its income for a charitable purpose so as not to be liable to income tax. The 'prescribed manner' is provided for in Rule 17 of the Income Tax Rules, 1962. This requires a notice to be given in Form No. X and it also requires the delivery of the notice before the expiry of the time allowed under sub-section (1) of Section 139 of the Act for the purposes of furnishing the income tax return.

14. On an interpretation of the provisions, the Supreme Court came to the conclusion that what is really required is for the Assessee to file the requisite information before the Assessing Officer completes the assessment. It was held that this is necessary because in the absence of any such information, it would not be possible for the Assessing Officer to grant to the Assessee the benefit of such accumulation.

15. To this extent, the Supreme Court held that the requirement of giving the information is mandatory because without the requisite

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particulars, the Assessing Officer cannot entertain the claim of the Assessee under Section 11 of the Act. The Supreme Court did not directly deal with the question of what would happen if the information is not furnished by the assessee within the time prescribed under Rule 17 of the Income Tax Rules, 1962 read with Section 139 (1) of the Act.

16. Learned counsel for the Assessee clarified that he placed limited reliance on this decision to show that the requirement of furnishing the information is mandatory. It was submitted that similarly, for the purposes of Section 10B(7) of the Act, the furnishing of a declaration is mandatory.

17. The contention of learned counsel for the Assessee was that the second requirement under section 10B(7) of the Act namely the prescription of time or the happening of a particular event is only directory in nature. In support of this contention, learned counsel for the Assessee relied upon *Commissioner of Income Tax vs. Hardeodas Agarwalla Trust [1992] 198 ITR 511*. In this decision, the Calcutta High Court was concerned with the provisions of Section 12A(b) of the Act which prescribed the furnishing of audited accounts by a chartered accountant along with the return of income for the relevant assessment year.

18. While interpreting the above provision, the Calcutta High Court came to the following conclusion:-

“It is now well-settled that a procedural provision, ordinarily, should not be construed as mandatory, if the defect in the act done in pursuance of it can be

cured by permitting the appropriate rectification to be carried out at a subsequent stage. Procedural laws are devised and enacted for the purpose of advancing justice. It does not mean that the procedural laws should be brushed aside by the court. It depends on the facts and circumstances of a particular case as to whether a breach in the observance of any procedural law, if not excused or overlooked, would cause real and substantial injustice to the parties.”

19. Learned counsel for the Assessee also drew our attention to the decision of the Punjab and Haryana High Court in *Commissioner of Income Tax vs. Gupta Fabs [2005] 274 ITR 620* and *Commissioner of Income Tax vs. Punjab Financial Corporation [2002] 254 ITR 6*; and the decision of the Madhya Pradesh High Court in *Commissioner of Income Tax vs. Panama Chemical Works [2007] 292 ITR 147*. All these decisions are similarly in the context of filing of an audit report alongwith the return.

We need not discuss these judicial pronouncements in view of the clear exposition of law by the Calcutta High Court, with which we agree.

20. We may, however, notice *Kailash vs. Nanhku and Ors. (2005) 4 SCC 480* in the context of the interpretation of the Order VIII Rule 1 of the Code of Civil Procedure. One of the questions that arose for consideration was: Whether the time limit of 90 days as prescribed by the proviso appended to Rule 1 of Order VIII of the Code of Civil Procedure is mandatory or directory in nature?

21. While concluding that the provision is directory, the Supreme Court held in paragraphs 30 and 33 as follows:

“30. It is also to be noted that though the power of the court under the proviso appended to Rule I Order 8 is circumscribed by the words “shall not be later than ninety days” but the consequences flowing from non-extension of time are not specifically provided for though they may be read in by necessary implication. Merely because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

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33. As stated earlier, Order 8 Rule 1 is a provision contained in CPC and hence belongs to the domain of procedural law. Another feature noticeable in the language of Order 8 Rule 1 is that although it appoints a time within which the written statement has to be presented and also restricts the power of the court by employing language couched in a negative way that the extension of time appointed for filing the written statement was not to be later than 90 days from the date of service of summons yet it does not in itself provide for penal consequences to follow if the time schedule, as laid down, is not observed. From these two features certain consequences follow.”

22. The Supreme Court summed up its conclusion in the following words:

“46 (iv) The purpose of providing the time schedule for filing the written statement under Order 8 Rule 1 CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the court to extend the time. Though the language of the proviso to Rule 1 Order 8 CPC is couched in negative form, it does not specify any penal consequences flowing from the non-compliance. The provision being in the domain of the procedural law, it has to be held directory and not mandatory. The power of the court to extend time for filing the written statement beyond the time schedule provided by Order 8 Rule 1 CPC is not completely taken away.”

23. On a reading of all the decisions mentioned above, we find that the purpose of filing a declaration under Section 10B(7) of the Act is to enable the Assessee to bring to the knowledge of the Assessing Officer the desire of the Assessee to withdraw the claim for exemption. To that extent, therefore, the requirement of filing a declaration is of course mandatory because without such a declaration, the Assessing Officer cannot even consider the claim for withdrawal. However, the question which we are required to consider is whether the declaration is mandatorily required to be filed before the due date of filing the return.

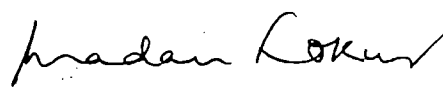
24. We find from the decisions that we have discussed above, that first of all the time prescription is a procedural requirement and, therefore, cannot be read to the disadvantage of the Assessee, particularly if he is entitled to withdraw the claim for exemption. Moreover, the statute does not specifically provide the consequence of not filing the declaration before the due date of return. It is only by implication that one may reach the conclusion that if the declaration is filed after the due date of filing the return, then it is liable to be rejected. As mentioned above, there is no such specific sanction or adverse consequence so far as the Assessee is concerned if the declaration is filed after the due date of filing the return.

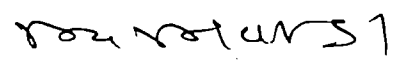
25. Therefore, it must be held that the second requirement of Section 10B(7) of the Act is only directory but the declaration must obviously be filed before the assessment is completed by the Assessing Officer.

26. We are also of the opinion that it is not as if the Assessing Officer cannot proceed to frame the assessment if the declaration is after the due date. If he can proceed with the assessment proceedings without the declaration being on record, then, the deadline for filing the declaration must necessarily be just before the assessment is actually framed. Even if the Assessee exceeds the time limit but is still within the deadline, then he cannot be disadvantaged.

27. Under these circumstances, we are of the opinion that the substantial question of law is required to be answered in the affirmative, in favour of the Assessee and against the Revenue and it must be held that the requirement under Section 10B(7) of the Act whereby the assessee must file a declaration for withdrawing a claim for exemption is mandatory, but the time limit prescribed for filing the declaration before the due date of filing the return is only directory.

28. The appeal is disposed of accordingly.


MADAN B. LOKUR, J


MANMOHAN SINGH, J

MAY 14, 2008
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