

IN THE HIGH COURT OF BOMBAY AT GOA**TAX APPEALS NO.6 & 7 OF 2008**

The Commissioner of Income Tax,
Having office at Aayakar Bhavan,
Patto-Plaza, Panaji-Goa.

.... Appellant

V/s

M/s. Chowgule & Company Ltd.,
Having office at Chowgule House,
Marmugao-Harbour,
Marmugao, Goa.

.... Respondent

Ms. Asha Desai, Advocate for the Appellant.

Mr. Mihir Naniwadekar with Ms. Vinita Palyekar, Advocate for the Respondent.

**Coram:- MOHIT S. SHAH, C.J. &
SMT. ANUJA PRABHUDESSAI, J.**

Date:- 20th August, 2015

ORAL JUDGMENT : (Per Mohit S. Shah, C.J.)

Both the above Tax Appeal No.6 of 2008 and Tax Appeal No.7 of 2008 under Section 260-A of the Income Tax Act, 1961 challenge the orders dated 12/07/2007 and 19/07/2007, respectively of the Income Tax Appellate Tribunal, Panaji Bench. The relevant Assessment Year is 2002-03 in Tax Appeal No.6/2008 and 2003-2004 in Tax Appeal no.7/2008.

2. In view of the order which will be passed today, it is not necessary to set out all the facts in detail. By order dated 27/02/2008, both the

appeals were admitted on the following substantial questions of law:

(A) Whether the assessee is entitled to claim benefit of 10 years exemption by amendment to sub-section (3) of section 10B by Finance Act, 2001, with effect from 1/4/1994 or benefit of 8 years exemption under amendment by the Finance Act, 1988, with effect from 1/4/1989, particularly, when assessee commenced manufacturing/production from the year 1993 ?

(B) Whether on the facts and in the circumstances of the case, the ITAT was justified in deleting the exclusion made by the AO in respect of amount received towards uptopping vessel income, machinery hire income, barge management expenses. Being not having any nexus with the export activity of the assessee under clause (baa) of Explanation to the purpose of determining profits of the business u/s 80HHC ?

(C) Whether on the facts and in the circumstances of the case, the ITAT was justified in deleting the exclusion made by the AO in respect of amount received towards miscellaneous income, sale of scrap, service charges, grant-in-aid for medical expenses, recovery of fuel, group insurance, deptch money, being not having any nexus with the export activity of the assessee under clause (baa) of Explanation for the purpose of determining profits of the business u/s 80HHC ?

3. As far as question no.A is concerned, the learned Counsel for the respondent-Assessee invites our attention to the judgment dated 12/10/2011 of the Division Bench of the Karnataka High Court in the

case of ***Commissioner of Income Tax V/s. DSL Software Ltd.*** reported in ***(2013) 351 ITR 0385.***

4. In the said decision, the Karnataka High Court considered the object behind the amendment extending the period of exemption under Section 10B from 5 years out of 8 years to a period of 10 years with effect from 1/04/1999. The Karnataka High Court considered the object behind the amendment which read as under:

Clause 3 seeks to amend section 10A of the Income Tax Act. Under the existing provisions, tax holiday is available to newly established industrial undertaking set up in free trade zones and to units set up in software technology parks for five years out of the block of initial eight years, subject to fulfillment of certain conditions. The proposed amendment seeks to extend the period of tax holiday from five years to ten years in order to give added thrust to exports. Clause-4 seeks to similarly extend the five year tax holiday period to ten years to the export oriented units under, section 10B of the Income Tax Act.

5. Relying on the aforesaid object set out in the Statement of objects and reasons, Karnataka High Court further made following observations:

From the aforesaid object behind the amendment, it is clear that the period of 5 years is extended to 10 years in order to give added thrust to exports. It is because the Parliament felt that the tax holiday of 5 years is not having the desired result and therefore, they extended the benefit of tax holiday from 5 years to 10 years, If it is a case of extension from 5 years to 10 years, the unit, which had the benefit of 5 years automatically, should get the benefit of 10 years if other conditions are fulfilled. The other condition to be fulfilled is ten

consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture. Therefore, the object with which this amendment was introduced is to extend the benefit of tax holiday for a period of 10 consecutive years from the date of commencement of manufacture or production. Before an assessee can claim the benefit of tax holiday, the said law governing the tax holiday should be in force on the first day of the relevant year. Then only he would be entitled to the said benefit. On 01.04.1999 when the amended provision came into force by virtue of said provision the assessee would be entitled to the benefit of tax holiday for 10 consecutive years from the date of production. If the assessee already availed the benefit under the unamended provision and the 10 consecutive years would fail prior to 01.04.1999, then the assessee would not be entitled to the said benefit. If the said 10 consecutive years from the date of production has not expired, prior to 01.04.1999, for the remaining unexpired period, he would be entitled to the benefit. On the ground that he had the benefit of unamended provision and the 5 years period has expired on the day amended provision came into force, he cannot be denied the benefit. If that is done, it would run counter to the intention with which the amended provision was brought on the statute book. It would negate the amended provision.

6. The learned Counsel for the appellant-Revenue is not in a position to dispute the above proposition of law, but submits that the question whether the respondent-Assessee is entitled to receive the benefit of the amended provision would depend upon the date of commencement of the manufacturing operation of the respondent-Assessee and, since the impugned order of the Tribunal does not throw any light on the said factual issue, the matter may be remanded to the Assessing Officer to

decide the question in light of the aforesaid decision of the Karnataka High Court, after considering the date from which the appellant started its manufacturing operations.

7. Having heard the learned Counsel for the parties, we find substance in the submissions made by the learned Counsel for the Assessee that an Assessee would be entitled to get the benefit of the amended provisions of Section 10B extending the period of exemption to 10 years from the date of the relevant assessment year in which the manufacturing operations commenced. Hence, the matter is remanded to the Assessing Officer to decide the question on the basis of the aforesaid decision of the Karnataka High Court in ***Commissioner of Income Tax V/s. DSL Software Ltd.*** (supra).

8. As far as questions B and C are concerned, our attention has been invited to the recent decision dated 7/05/2015 of this Court in ***Tax Appeal No.53/2006 (Sesa Goa Ltd. V/s. The Commissioner of Income Tax, Panaji)***. In the said appeal, this Court considered the following substantial questions of law and answered them as set out herein below:

Questions	Answers
A) Whether on the facts and	(I) Question “A” so far as

in the circumstances of the case, the receipts forming part of the Appellant's turnover in its accounts under the head (i) hire of barges; (ii) proceeds of services; (iii) repairs of vessels, which receipts have substantial costs, and arise from the main business activity of the Appellant, could be considered as similar to the specific receipts referred to it in the said clause (baa)?	hire of barges is concerned is answered in the affirmative i.e in favour of the Revenue and against the Appellant/Assessee. So far as Proceeds of services and repairs of vessels are concerned, impugned order records a finding of fact that they have nexus to exports, therefore the same are answered in the negative i.e in favour of the Appellant/Assessee and against the Respondent /Revenue;
B) Whether on the facts and in the circumstances of the case, receipts by way of sale proceeds from (i) sale of pig iron, (ii) sale of vessels, (iii) sale of engineering products, (iv) sale of material, and (v) sale of coke breeze could be considered as similar to the specified receipts referred to in the said clause (baa) ?	(II) Question “B”, is answered in the affirmative i.e in favour of the Respondent/ Revenue and against the Appellant/Assessee;
C) Whether on the facts and circumstances of the case, the receipts under the head “extraction charges” could be considered as part of the “total turnover” as defined in the said clause (baa), for the purpose of computation of deduction under section 80 HHC of the Act ?	(III) Question “C” is answered in the affirmative i.e. in favour of the Respondent/Revenue and against the Assessee subject to the authorities under the Act while giving effect to this order ensure that the extraction charges are in effect not included twice while computing the

	appellant's total turnover.
--	-----------------------------

9. Questions B and C involve the interpretation of the provisions of Section 80HHC, particularly, the following provisions:

80HHC (1) Where an assessee, being an Indian company or a person (other than a company) resident of India, is engaged in the business of export out of India of any goods or merchandise to which this section applies, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of the assessee (a deduction to the extent of profits, referred to in sub-section (1B), derived by the assessee from the export of such goods or merchandise.

(baa) “profits of the business” means the profits of the business as computed under the head “Profits and gains of business or profession” as reduced by-

- (1) ninety per cent of any sum referred to in clauses (iiia), (iiib) [(iiic),(iiid) and (iiie)] of section 28 or of any receipts by way of brokerage, commission, interest, rent, charges or any other receipt of a similar nature included in such profits; and
- (2) the profits of any branch, office, warehouse or any other establishment of the assessee situate outside India. (emphasis supplied)

10. In **Sesa Goa Ltd.** (supra) this Court considered the expression "any other receipt of a similar nature" (emphasis supplied). This Court considered the decision of the Supreme Court in **Commissioner of Income Tax V/s. Ravindranathan Nair 295 ITR 228** along with the earlier decision of this Court in **Commissioner of Income Tax V/s. Dresser Rand India (P) Ltd. 323 ITR 429** and the subsequent decision of this Court in **Commissioner of Income Tax V/s. Pfizer Ltd. 330 ITR**

62. After considering the aforesaid decisions, the Division Bench in Sesa Goa case held as under:

14. Therefore, the test has necessarily to be whether or not 90% sought to be excluded is independent income having no nexus with export and therefore similar to the income described in sub clause (baa) of the Explanation to Section 80HHC of the Act. It must also be noted that in Pfizer Ltd. (supra), this Court has not stated that the stock in trade which was indemnified was not for exports. In the above view, we see no contradiction between the above decisions. In fact both the decisions of this Court in **Pfizer Ltd.** (supra) and **Dresser Rand Ltd.** (supra) are not at variance with each other in fact both of them are in line with the decision of the Apex Court in **Ravindranathan Nair** (supra). (emphasis supplied)

11. Having gone through the impugned order of the Tribunal, we do not find any detailed discussion about the test applied by the Tribunal. It appears that for the Assessment Year under consideration, the Tribunal relied on its order for the Assessment Year 2001-02 and held that the items under consideration are either operational or reimbursement of expenses and, therefore, the Tribunal held that all these items are not falling under explanation.

12. In view of the aforesaid decision of this Court in Sesa Goa Ltd. (supra), we are inclined to remand the matter.

13. Having regard to the law laid down by this Court by judgment

dated 7/05/2015 in Sesa Goa Ltd. in Tax Appeal No.53/2006, we remand the matter to the Assessing Authority, also for considering the questions B and C in light of the said decision.

14. For the reasons aforesaid, we remand the matter to the Assessing Authority for deciding all the three questions in the light of the aforesaid decisions.

SMT. ANUJA PRABHUDESSAI, J. MOHIT S. SHAH, C.J.
NH/-