IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

FRIDAY, THE 13TH DAY OF NOVEMBER 2015/22ND KARTHIKA, 1937

WP(C).No. 15000 of 2015 (Y)

PETITIONER:

IBS SOFTWARE SERVICES PRIVATE LIMITED
521-524, NILA, TECHNOPARK CAMPUS
TRIVANDRUM
REPRESENTED BY ITS COMPANY SECRETARY MR.RAMESH BABU M

BY ADVS.SRI.M.GOPIKRISHNAN NAMBIAR
SRI.P.GOPINATH
SRI.P.BENNY THOMAS
SRI.K.JOHN MATHAI
SRI.JOSON MANAVALAN
SRI.KURYAN THOMAS

RESPONDENTS:
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1. UNION OF INDIA
   REPRESENTED BY THE SECRETARY
   MINISTRY OF FINANCE (DEPARTMENT OF REVENUE) NORTH BLOCK
   NEW DELHI 110001

2. COMMISSIONER OF INCOME TAX (APPEALS)
   AAYAKAR BHAVAN, KOWDIAR, THIRUVANANTHAPURAM-695003

3. ASSISTANT COMMISSIONER OF INCOME TAX
   CIRCLE-1(1), AAYAKAR BHAVAN, KOWDIAR
   THIRUVANANTHAPURAM-695003

R2 & R3 BY ADVS. SRI.K.M.V.PANDALAI, INCOME TAX DEPARTMENT
SRI. CHRISTOPHER ABRAHAM
R1 BY ADV. SRI.R.PRASANTH KUMAR, CGC

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 13-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 15000 of 2015 (Y)

APPENDIX

PETITIONER'S EXHIBITS

P1:- TRUE COPY OF THE ASSESSMENT ORDER DTD 28/12/2011 PASSED BY THE 3RD RESPONDENT

P2:- TRUE COPY OF THE JUDGMENT DTD 13/3/2015 IN WPC NO 1102/2012

P3:- TRUE COPY OF APPEAL MEMORANDUM (WITHOUT ANNEXURES)DTD 7/4/2015 FILED BY THE PETITIONER BEFORE THE 2ND RESPONDENT

P4:- TRUE COPY OF THE STAY PETITION DTD 29/4/2015 FILED BY THE PETITIONER BEFORE THE 2ND RESPONDENT

P5:- TRUE COPY OF THE BOARD'S LETTER F.NO.404/10/2009-ITCC DTD 1/12/2009

P6:- TRUE COPY OF COMMON ORDER DTD 13/7/2010 OF THE INCOME TAX APPELLATE TRIBUNAL KOCHI BENCH IN ITA NOS 855 TO 857/COCH/2007 AND 847/COCH/2007

P7:- TRUE COPY OF ORDER DTD 16/3/2015 PASSED BY THE JOINT COMMISSIONER OF INCOME TAX , SPECIAL RANGE, THIRUVANANTHAPURAM

P8:- TRUE COPY OF ORDER DTD 5/5/2015 PASSED BY THE 2ND RESPONDENT

P9:- TRUE COPY OF THE COVERING LETTER DATED 3.2.2006 SENT BY THE PETITIONER TO THE 3RD RESPONDENT

RESPONDENTS' EXHIBITS

NIL

//TRUE COPY//

P.A. TO JUDGE

JJJ

K. VINOD CHANDRAN, J.

W.P.(C) No. 15000 of 2015 (Y)

Dated this the 13th day of November, 2015

J U D G M E N T

The petitioner is before this Court challenging the interim order of the appellate authority in Ext.P8. The issue is whether the petitioner is entitled to the exemption available under section 10A of the Income Tax Act, 1961 (for brevity 'the Act').

2. The petitioner admittedly was granted exemption under Section 10A of the Act by the assessing authority in the assessment year 2000-2001 and the same was continued in all the subsequent years up to 2006-2007. The department attempted to re-open the assessments from 2004-2005 to 2006-2007, which were challenged in three separate writ petitions. With respect to the earlier years even the department conceded to the fact that they could effect no re-assessment for reason of the limitation; i.e., six years having elapsed.

3. With respect to the later three years, the department's contention was that despite four years having elapsed the department could initiate such proceedings relying on the two year extension granted, which could be only on grounds of suppression. This Court in W.P.(C) No.27373/2011 and connected cases held that no such suppression could be discerned and hence, set aside the orders of reassessment. However, with respect to the assessment year 2008-2009, the petitioner was relegated to the appellate authority; by whom, the stay application was also directed to be considered. Ext.P8 is the consideration made, directing payment of 50% of the demand outstanding and keeping in abeyance the recovery of the balance 50% of the demand outstanding, till the disposal of the appeal.

4. I have heard the learned counsel appearing for the petitioner, the learned Standing Counsel (Taxes) appearing for respondents 2 and 3 and the learned Central

Government Standing Counsel appearing for the 1st respondent.

5. The entire issue revolves around whether the petitioner has satisfied the conditions for exemption. The learned counsel for the petitioner contends that the exemption having been allowed in the earlier years, cannot be declined in the later years, going by the decision of the **Commissioner of Income Tax v. Western Outdoor Interactive (P) Ltd. - (2012) 254 CTR (Bom) 593**. The learned counsel would further urge on the basis of the decision reported in **Commissioner of Income Tax v. Seeyan Plywoods - (1991) 190 ITR 564 (KER)** that even if the petitioner cannot satisfy the investments, having been made beyond the 80% limit in the first year, the petitioner could, for the later years. The petitioner, on facts, satisfies such condition and on the basis of the investments made even 80% has been exceeded in the very next year entitling

the petitioner for exemption at least from that year onwards; for the balance available in the 10 block year period of exemption.

6. The learned Standing Counsel (Government of India) (Taxes), however, contend that there should be a cumulative satisfaction of the conditions in clause (2) and (3) of sub section (2) of Section 10A of the Act and Section 80I of the Act would be applicable only insofar as clause (3) is concerned.

7. A reading of clauses (2) and (3) would indicate that the said conditions are to be satisfied separately and as stated by the learned Standing Counsel there has to be a cumulative satisfaction of such conditions. Clause (2) specifically refers to splitting up of or reconstruction of a business already in existence. The petitioner does not have any claim under the proviso to the said clause.

8. The contention of the petitioner is that the splitting up of an existing business has not been effected in the present case since the earlier business was with respect to rectification of software of airline companies, and when the new company was formed there is a totally different business, of development of software. The learned counsel for the petitioner further contends that the transfer of the existing business was only for the purpose of concluding the existing orders and after that it was necessarily a new business for which, in fact, there has been substantial investments made in the subsequent years.

9. The learned Standing Counsel (Government of India) (Tax), however, argues that the Business Corporation Agreement (BCA) would in fact indicate otherwise insofar as it deals with handing over the current business of the erstwhile company to the new company formed.

10. Essentially, it is to be noticed that exemption is available for a new business venture with the intention of promoting business and setting up of new ventures. By mere splitting up or reconstruction of an existing business, there could be no exemption claimed under Section 10A of the Act since that would go against the very intention of the legislature.

11. Evidently, there is some dispute as to whether the company set up and the business carried on was a newly established one, which alone would entitle the petitioner to claim exemption under Section 10A of the Act. The assessing officer has found the same on facts and on a re-examination of the BCA, that the condition at clause (2) of Subsection (2) of Section 10A of the Act has not been satisfied.

12. In the teeth of the controversies and considering the fact that the entire issue has been considered elaborately by the Commissioner of Income Tax (Appeals), prima facie this Court is of the opinion that the question has to be considered on merits. It is also to be noticed that it is on the basis of the BCA which was available in the files that the exemption was granted for the earlier years. In such circumstance, even if the assessment of every year gives rise to a fresh cause of action, it has to be considered whether the exemption granted in the earlier years would stand against the exemption being withdrawn in the later years, for reason only of there being a mere change of opinion. In fact, this Court while disposing of the earlier writ petition, against the very same assessment order, kept the question open.

13. Considering the rival contentions as also the facts which indicate that the petitioner had been enjoying such

exemption through the successive years before the present assessment year, this Court is of the opinion that there can be a modification made to Ext.P8 directing the petitioner to remit 25% of the amounts demanded by six equal monthly instalments starting from 17.12.2015 and continued on the 17th of every successive month.

Writ petition would stand disposed of with the above modification. No costs.

Sd/-
K.VINOD CHANDRAN,
JUDGE

jjj 16/11/15