

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14.12.2016

CORAM

THE HONOURABLE MR.JUSTICE HULUVADI G. RAMESH

&

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

Tax Case Appeal Nos.386 to 389 of 2008

Commissioner of Income Tax,

Chennai

..Appellant in all the appeals

Vs

Vijayshree Spinning Mills Ltd.,

36, Archbishop Mathias Avenue,

Chennai 600 028

.. Respondent in all the appeals

Prayer: Tax Case Appeals filed under Section 260A of the Income Tax Act, 1961 against the common order passed by the Income Tax Appellate Tribunal Madras 'C' Bench, dated 19.07.2007 in I.T.A.Nos.1043/Mds/1995, 1044/Mds/1995, 1243/Mds/1998 and 1843/Mds/1998

For Appellant in all appeals: Mr.M.Swaminathan

For Respondent in all appeals: No appearance

JUDGMENT

(Judgment of the Court was delivered by Dr.Anita Sumanth, J.)

These appeals come to us at the instance of the Revenue raising the following substantial questions of law:

Assessment Years 1990-91 and 1991-92:

'1. Whether in the facts and circumstances of the case, the Tribunal was right in cancelling the order passed by the CIT(A) under section 263?

2. Whether in the facts and circumstances of the case, where the assessee had commenced the manufacture on November, 1989, the Tribunal was right in holding that the assessee had to opt for scheme of section 10B and scheme of the section 10B does not apply to the assessee automatically by operation of laws as per the section 10B(5)?

3. Whether in the facts and circumstances of the case, the Tribunal was right in holding that having not opted to the scheme of the Section 10B by intimation, the assessee need not intimate opting out of the scheme of section 10B?'

2. Heard Mr. M.Swaminathan, learned counsel appearing for the Revenue. Notice has been served upon the assessee, but none appears on its behalf.

3. The assessee/respondent is a 100% export oriented undertaking, located in the Madras Export Processing Zone, that had commenced a Textile unit in November 1989 (in short 'yarn division'). The assessee was already engaged in managing a division engaged in the manufacture of rubber gloves (in short 'latex division'). Returns of income had been filed and orders of assessment dated 13.01.1993 and 09.03.1994 under Section 143(3) of the Income Tax Act, 1961 (in short 'Act'), were passed in respect of assessment years 1990-91 and 1991-92. The assessee had, inter alia, sought the set off of expenditures/loss relating to the latex division against other business income and the claim had been accepted by the assessing officer.

4. The provisions of section 10B(1) of the Act grant a tax holiday with respect to 100% of the profits from the activity of manufacture and export. Section 10B(3) provides for an exclusion of the profits and gains referred to in sub-section (1) from the total income of the assessee in respect of any five consecutive assessment years, 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 its option.

5. The grant of relief is conditional upon the exercise of option by the assessee in terms of section 10B(3). The exercise of option is to be in the form of a declaration stipulated under section 10B (5) of the Act extracted below:

' (5) Where the undertaking has begun to manufacture or produce articles or things in any previous year relevant to the assessment year commencing before the 1st day of April, 1989, the assessee may, at his option, before the due date for furnishing the return of his income under sub-section (1) of section 139 for the assessment year commencing on the 1st day of April, 1989, furnish to the Assessing Officer a declaration in writing that the provisions of sub-section (1) may be made applicable to him for any five consecutive assessment years falling within a period of eight years beginning with the assessment year commencing on the 1st day of April, 1989, and if he does so, then, the provisions of sub-section (1) shall apply to him for each of such assessment years and the provisions of sub-section (4) shall also apply in computing the total income of the assessee for the assessment year immediately succeeding the last of such assessment years and any subsequent assessment year.

6. The assessee had proposed initially to claim relief under section 10B of the Act in respect of the income from the export unit, but did not exercise the option, since the division had

been shut down within a period of 3 months from commencement thereof.

7. The Commissioner of Income Tax (CIT) in exercise of suo moto jurisdiction under section 263 of Act revised the assessments being of the view that the assessments were erroneous and prejudicial to the interests of Revenue. The CIT noted that the unit had closed down within three months of commencing business, and was of the view that the assessee ought to have specifically opted out of the scheme of assessment under section 10B of the Act. Having not done so, the loss incurred in respect of the latex division could not, according to the CIT, be carried forward to be set off against other business income. The assessments were thus set aside vide order dated 15.03.1995 directing the assessing officer to recompute the total income.

8. Thereafter on 28.2.1997, the Assessing Officer passed consequential orders disallowing the loss and adding the same back to the income returned adopting the rationale set out by the CIT in the order under section 263 of the Act.

9. Against the orders of assessment, the assessee preferred appeals before the Commissioner of Income Tax (Appeals) (in short CIT(A)) who allowed the same vide orders dated 27.2.1998 and 31.7.98. The CIT(A) noticed the provisions of section 10A since the assessee was located in the Free Trade Zone, particularly section 10A(7) that reads thus:

" (7) Notwithstanding anything contained in the foregoing provisions of this section, where the assessee, before the due date for furnishing the return of 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."

10. According to the CIT(A) the provisions of 10A(7) extracted above, would apply only if the assessee had specifically opted for the scheme which it had not done. He thus concluded that the provisions of the scheme were inapplicable and as such the claim of the assessee was in order.

11. Against the order of the CIT(A), the Department preferred second appeals before the Income Tax Appellate Tribunal (in short 'Tribunal').

12. The assessee also challenged the order of the CIT under section 263 of the Act dated 15.3.1995 before the Income Tax Appellate Tribunal, which, on a consideration of the legal issues, allowed the appeal vide order dated 19.07.2007. Consequently, the appeals filed by the Revenue were dismissed as infructuous. The common order of the Tribunal dated 19.7.2007 is assailed in the appeals before us by the Revenue.

13. The provisions of section 10B(8) that are analogous to section 10A(7) stood introduced upon substitution of section 10B with effect from 01.04.2001. Prior thereto, the scheme of the section only required the assessee to specifically opt for the scheme in the required year, nothing further.

14. If the assessee wished to opt out of the scheme having opted for the same, it was required to file a declaration in terms of section 10 B (7) in cases where a return has been filed before the due date for furnishing return of income under section 139(1) and the provisions of section 10B would consequently not be made applicable to it.

15. Mr.Swaminathan argues that the provisions of section 10B(5) of the Act cast a mandate on an assessee both for opting in as well as opting out of the scheme of deduction provided.

16. We are unable to accept the said contention as it seeks to introduce a condition that is not envisaged from an apparent reading of the provision. The relief provided is available to an assessee for a block of any 5 out of 8 years and as such the assessee has the option to select the years for which the deduction is sought to be availed. The purpose is clearly to enable an assessee to choose the specific 5 years when it wishes to opt for scheme within the block of 8 years provided.

17. Reliance is placed by the Revenue by an order of this Court in *Commissioner of Income Tax Vs. Tamilnadu Jai Bharath Mills Ltd* ((2006) 287 ITR 512). This was a matter where an option exercised in terms of section 10B(5) was sought to be revoked by a declaration filed in terms of section 10B(8) of the Act. The assessee therein had initially opted for availing the benefit of the scheme of deduction under section 10B(5). Subsequently, the declaration filed was sought to be withdrawn in terms of section 10B(8) of the Act. The Revenue sought to insist that the initial

availment of the deduction under section 10B could not be reversed. This contention was not accepted by the Bench noticing the provisions of section 10B(8) of the Act reading thus:

"(8) Notwithstanding anything contained in the foregoing provisions of this section, where the assessee, before the due date for furnishing the return of 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 year."

18. Section 10B(8) opens with a non-obstante clause and permits an assessee to withdraw an option exercised under section 10B(5), provided the right of withdrawal is exercised prior to filing of return of income under section 139 of the Act. Sub-section (8) is thus relevant only in a situation where the assessee has exercised an option under sub-section (5) and cannot be pressed into service in isolation, to contend that the deduction under section 10B would be thrust upon an assessee in every case, unless opted out of in terms of section 10B(8). The provisions of section 10B(8) are to be applied only in conjunction with the right of option granted under section 10B(5) and not independent thereof. In any event, since we are concerned with Assessment Years 1990-91 and 1991-92, when section 10B did not contain sub-section (8), reliance on the

aforesaid case-law does not advance the case of the department.

19. The legal position in the present assessment years is to the effect that the provisions of section 10B(5) requiring an assessee to exercise its option availing the scheme were not invoked. The question of opting out does not arise in the present period as the provisions of section 10B(8) providing for the same were introduced only later, i.e. on 1.4.2001. Even assuming that the same were in force, the question of opting out would apply only if a declaration under section 10B(5) had been filed and not otherwise. The order of the Tribunal is confirmed and the substantial questions of law answered in favour of the assessee and against the department.

20. The substantial question of law relating to the carry forward and set off loss lose consequence in view of our confirmation of the order of the Tribunal quashing the order of the CIT under section 263 of the Act.

21. TCA.No.389 of 2008 raises the following substantial question of law:

Assessment Year 1991-92:

'Whether in the facts and circumstances of the case, the Tribunal was right in cancelling the 263 order of the CIT in toto and thereby nullifying the CIT's direction to the assessing officer to take up the issue relating the closing stock afresh for re conciliation without dealing with the said issue?'

22. Mr.Swaminathan would point out that the departmental ground relating to the valuation of stock has not been adjudicated upon by the Tribunal. We thus remand the issue to the file of the Tribunal for consideration. This question is allowed by way of remand.

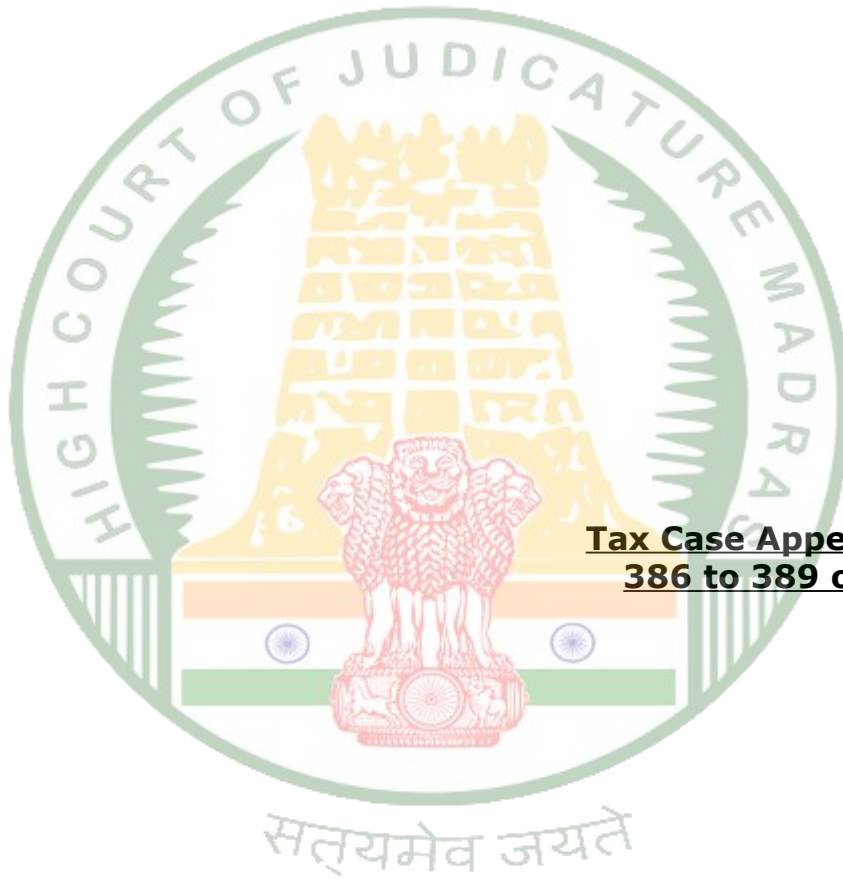
23. In fine, TC(A).Nos.386 to 388 of 2008 are dismissed with the Substantial questions of law being answered against the Revenue and in favour of the assessee. TC(A) No.389 of 2008 is allowed by way of remand to the Tribunal. No costs.

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[H.G.R., J.] & [A.S.M.,J.]
14.12.2016

msr/sl

HULUVADI G. RAMESH, J.
&
DR. ANITA SUMANTH, J.
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