

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.10.2018

CORAM :

**THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN**

Tax Case Appeal No. 1916 of 2008

Commissioner of Income Tax
Chennai III, Chennai – 600 034.

... Appellant

-VS-

M/s. S.R.A. Systems Ltd.,
No.100, Valluvarkottam High Road,
Nungambakkam, Chennai – 600 034.

... Respondent

This Tax Case Appeal is filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal Chennai 'C' Bench, dated 16.05.2008 in ITA No.2255/Mds/2006 for the assessment year 2002-03.

For Appellant : Mr.T.R.Senthil Kumar

For respondent : Mr.R.Sivaraman

JUDGMENT

[Judgement of the Court was delivered by T.S.Sivagnanam, J.]

This appeal by the Revenue, filed under Section 260A of the Income Tax Act, 1961 (the 'Act' for brevity) is directed against the order passed by the Income Tax Appellate Tribunal, Chennai 'C' Bench (the 'Tribunal' for brevity), dated 16.05.2008 in ITA No.2255/Mds/2006 for the assessment year 2002-03.

2.This appeal was admitted on 25.11.2008 on the following Substantial Questions of Law:

“ 1.Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in setting aside the order of the Commissioner of Income Tax under Section 263, holding that there was no violation of the conditions stipulated under Section 10A(2)(ii) and (iii) in the matter of the assessee's undertaking claiming exemption for the first time under Section 10A for the assessment year 2000-2001?

2. Whether on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in

setting aside the order of the Commissioner of Income Tax without observing that the assessment order and the appellate order of the Commissioner of Income Tax (Appeals) dealt with only the restriction in the quantum of deduction under Section 10A allowable and not with the eligibility of the assessee for deduction under Section 10A as such in the light of the conditions under Section 10(A)(2)(ii) and (iii) or the Income Tax Act?"

3. There are two issues arise for consideration. Firstly, whether the Commissioner of Income Tax (Appeals) ('CITA' for brevity) could have invoked his power under Section 263 of the Act, when he had passed an order, on 25.10.2005, granting relief to the assessee. The second issue is whether there was any violation of conditions stipulated under Section 10A(2)(ii) and (iii) of the Act in the matter of assessee's undertaking claiming exemption for the first time under Section 10A for the assessment year 2000-01.

4. The above issue is the first Substantial Question of Law. We need not labour much to decide this question, as it has been decided by the Division Bench of this Court in the case of **Super Auto Forge Ltd., Vs. Additional Commissioner of Income Tax [2014] 365 ITR 318(Mad)**. In the said case, the assessee was engaged in

the business of manufacturing of Auto parts and it has four units. One of the units was registered as Domestic Tariff Area Unit with the Central Excise Authorities during November, 1999. Subsequently, an application was submitted by the assessee therein before the Madras Export Processing Zone (MEPZ) to treat the Domestic Tariff Area unit as 100% Export Oriented Unit. Permission was granted and the Unit came into existence from 31.03.2000 as an Export Oriented Unit. For the assessment year 2001-02, the assessee showed net profit and claimed exemption under Section 10B of the Act, in respect of the 100% Export Oriented Unit. The claim was rejected by the Assessing Officer and the Tribunal. On appeal to this Court, the appeal filed by the assessee was allowed and it was held that the assessee was entitled to the exemption in respect of 100% Export Oriented Unit. The finding rendered in the said decision reads as follows:

"15. On the question as to whether by the grant of EOU status, there was formation of new business by a transfer, this Court considered the said issue in the decision reported in (2013) 359 ITR 1 ([Commissioner of Income Tax V. Heartland KG Information Ltd.](#)). The issue arose as regards the grant of exemption under [Section 10A](#) of the Income Tax Act. The facts therein were that in 2001, KGISL, which enjoyed exemption under [Section 10A](#) of the Income

Tax Act transferred its entire undertaking engaged in the export business of Medical Transcription along with all transcriptions contracts, books, records, all rights, all permits, all warranties, including computer software to the assessee company Heart Land KG Information Limited by letter dated 28.5.2001 and 28.6.2001. The transfer was recognised and allowed by Software Technology Park of India. The transferee company claimed exemption under [Section 10B](#) of the Income Tax Act. The Assessing Officer rejected the claim that the assessee had not satisfied the conditions on account of transfer of business. On appeal, the claim of the assessee was allowed by the Tribunal. On appeal to the High Court, the question arose as to whether the assessee was entitled to the relief that it did not satisfy the provisions of [Section 10A\(2\)\(iii\)](#) of the Income Tax Act.

16. Referring to [Section 10A\(2\) \(iii\)](#), which is similar to [Section 10B\(2\)\(iii\)](#), this Court pointed out that what is prohibited in [Section 10\(A\)\(2\)\(iii\)](#) is the transfer of used machinery and plant to a new business undertaking and forming of an industrial undertaking by splitting or reconstruction of the existing industrial undertaking. There was no specific prohibition either express or inference to an industrial unit formed by transfer of entire business. This Court pointed out that

the transfer was not that of plant and machinery alone but of sale of whole business unit to the transferee company which was only of export of articles or things. In this regard, this Court referred to the decision reported in [2012] 343 ITR 397 ([CIT v. SONATA SOFTWARE LIMITED](#)), which in turn referred to the decision of the Supreme Court reported in [1997] 107 ITR 195 ([TEXTILE MACHINERY CORPORATION LIMITED v. CIT](#)), wherein, it was held that where a running business was transferred lock, stock and barrel by one assessee to another assessee, the principle of reconstruction, splitting up and transfer of plant and machinery could not be applied. This Court further pointed out that there could be no denial of exemption on the conversion of the proprietorship business into the partnership to result in the disentitlement of the benefit under [Section 10A](#) of the Income Tax Act. On a reading of [Section 10A\(2\)](#), particularly clause (iii), this Court held that an undertaking would be disentitled to claim exemption, if it is formed by splitting up or reconstruction of business already in existence.

17. We find [Section 10B\(2\)](#) is no different from [Section 10A\(2\)](#).....

21. Going by the reasoning given under the decision reported in (2013) 359 ITR 1 ([Commissioner of Income Tax V. Heartland KG Information Ltd.](#)), we

hold that when a DTA unit is converted into 100% EOU unit, there is neither a transfer nor a creation of a new business to attract Clause (iii) to sub-section (2) of [Section 10B](#) of the Income Tax Act. As pointed out by this Court in the reported decision, there is no specific prohibition to an industrial unit formed by transfer of entire business and more so, on the facts of the case herein, strictly speaking, there is no transfer at all to a new business and what was already in existence as a DTA unit, by reason of the recognition granted by the statutory authority, it became a 100% EOU unit. Thus the status granted to a DTA unit as a 100% EOU unit does not result in a transfer or splitting up or reconstruction of a business already in existence so as to fall under Clause (iii) of sub-section (2) of [Section 10B](#) of the Income Tax Act.

22. In fact, the Board itself has clarified the position in the circular issued by it in Circular No.1 of 2005 dated 06.01.2005. The Department of Revenue (Central Board of Direct Taxes) clarified the question as to whether an undertaking set up in Domestic Tariff Area, which is subsequently approved as 100% EOU by the Board appointed by the Central Government in exercise of powers conferred under [section 14](#) of the Industries (Development and Regulation) Act, 1951, is eligible for deduction under [Section 10B](#) of the Income-tax Act. On the

representation received from various quarters, the Board clarified as follows:

"The matter has been examined and it is hereby clarified that an undertaking set up in Domestic Tariff Area (DTA) and deriving profit from export of articles or things or computer software manufactured or produced by it, which is subsequently converted into a EOU, shall be eligible for deduction u/s 10B of the IT Act, on getting approval as 100% export oriented undertaking. In such a case, the deduction shall be available only from the year in which it has got the approval as 100% EOU and shall be available only for the remaining period of ten consecutive assessment years, beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software, as a DTA unit. Further, in the year of approval, the deduction shall be restricted to the profits derived from exports, from and after the date of approval of the DTA unit as 100% EOU. Moreover, the deduction to such units in any case will not be available after assessment year 2009-10."

5.Thus, by applying the said decision in the case of **Super Auto Forge Ltd.,(Supra)** the Substantial Question of Law No. 1 is decided in favour of the assessee and against the Revenue.

6. So far as, the second question is concerned, we are called upon to decide as to whether the Commissioner of Income Tax lacked jurisdiction to exercise his powers under Section 263 of the Act on account of the Doctrine of merger.

7. Mr. T.R. Senthil Kumar, learned counsel appearing for the Revenue strenuously contended that the Assessing Officer, while completing the assessment under Section 143(3) of the Act, vide order dated 31.03.2005, did not consider this aspect and in the regular appeal before the CITA, the matter was not taken into consideration. Therefore, the Commissioner of Income Tax Act (Appeals) was justified in invoking the power under Section 263 of the Act.

8. This very issue was considered by the Division Bench of the High Court of Gujarat in the case of **Commissioner of Income Tax Vs. Nirma Chemicals Works (P.) Ltd., [2009] 182 Taxman 183 (Gujarat)**, wherein an identical contention was raised by the Revenue stating that the power under Section 263 of the Act could be exercised. The Court rejected the contention on the following lines:

"22.The contention on behalf of the revenue that the assessment order does not reflect any application of mind as to eligibility or otherwise under [Section 80-I](#) of the Act requires to be noted to be rejected. An assessment order cannot incorporate reasons for making/granting a claim of deduction. If it does so, an assessment order would cease to be an order and become an epic tome. The reasons are not far to seek. Firstly, it would cast an almost impossible burden on the Assessing Officer, considering the workload that he carries and the period of limitation within which an order is required to be made; and, Secondly, the order is an appealable order. An appeal lies, would be filed, only against disallowances which an assessee feels aggrieved with.

24. There is another aspect of the matter. The assessee had challenged jurisdiction of the CIT to exercise powers under [Section 263](#) of the Act. For an order of the Assessing Officer to be interfered with in exercise of revisional powers the CIT has to find in the first instance that the order is erroneous and secondly, the order is prejudicial to the interest of revenue. The conditions are twin conditions as held by the Apex Court and both of them have to be fulfilled before CIT can exercise jurisdiction under [Section 263](#) of the Act. In the case of - [Malabar Industrial Co. Ltd. v. CIT](#) (2000) 243 ITR 83 the Apex Court has held The phrase prejudicial to the interests of the Revenue; has to be

read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of Revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law."

9. In the case of **Principal Commissioner of Income Tax Vs. H.Nagaraja [2018] 94 taxmann.com 464 (Karnataka)**, the assessee contended that there was no scope for the Revisional Authority to exercise jurisdiction under Section 263 of the Act to proceed to re-examine the purchase made by them in respect of lands in question. The contention advanced by the assessee was accepted by the Court and held that the conclusion reached by the Commissioner, while exercising revisional jurisdiction, tantamount to directly interfering with the conclusions reached by the appellate Commissioner and such power of the Revisional authority cannot be conceded to enable him to interfere with the orders passed by the

appellate Commissioner, in view of the doctrine of merger and therefore, it was held that the Revisional Authority acted without jurisdiction in passing the said order.

10. In the light of the above decisions and factual position, we concur with the view taken by the Tribunal in holding that the Revisional Authority has exceeded in jurisdiction in invoking the provisions of Section 263 of the Act when the assessment order with regard to claim of deduction under Section 10A of the Act has merged with the order passed by the CIT(A) dated 25.10.2005.

11. Thus, for all the above reasons, the Revenue has not made any good ground to interfere with the order of the Tribunal.

12. In the result, the appeal fails and the same is dismissed and the Substantial Questions of Law, framed for consideration, are answered against the Revenue. No costs.

[T.S.S., J.] & [V.B.S., J.]
26.10.2018

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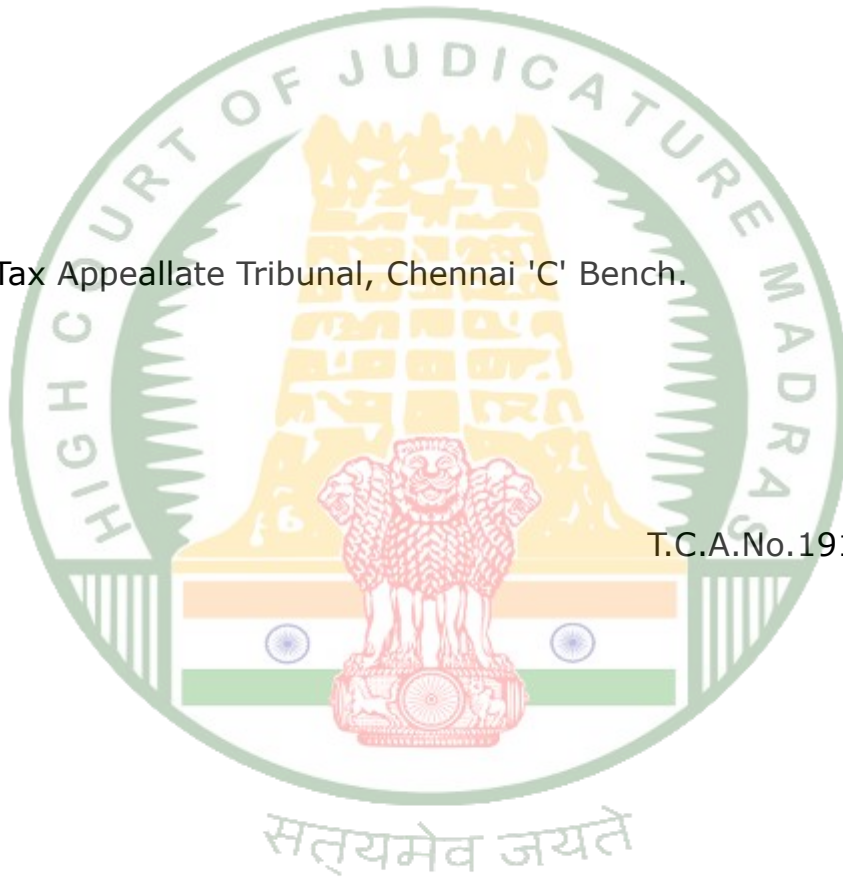
Index: Yes/No

**T.S.Sivagnanam, J.
and
V.Bhavani Subbaroyan, J.**

msk/mrm

To

Income Tax Appeallate Tribunal, Chennai 'C' Bench.



T.C.A.No.1916 of 2008

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