

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.12.2018

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI  
AND  
THE HON'BLE DR.JUSTICE ANITA SUMANTH

Tax Case Appeal No.390 of 2009

Commissioner of Income Tax  
Chennai.

..... Appellant/Appellant

Vs.

M/s.Maars Software International Ltd.,  
East Coast Chambers II Floor,  
92, G.N.Chetty Road, T.Nagar,  
Chennai - 600 017. .... Respondent/ Respondent

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras 'B' Bench, Chennai, dated 12.06.2008 made in ITA No.196/Mds/2008 for the assessment year 2001-02, against the order of the Commissioner of Income Tax (Appeals)-V, Chennai dated 24/10/2007 in ITA Nos.94/2006-07 against the assessment order, dated 27/03/2006 in AAACM 4725H/MA71 of the Assistant Commissioner of Income Tax, Company Circle IV(1)I/C, Chennai for the assessment year 2001-02.

For Appellant : Mr.Karthik Renganathan  
Standing Counsel

For Respondent : Mr.N.V.Balaji  
for Mr.Krishna Ravindran

J U D G M E N T  
(Delivered by DR.ANITA SUMANTH,J)

The Revenue is in appeal before us challenging an order of the Income Tax Appellate Tribunal dated 12.06.2008 in relation to the assessment year 2001-02.

2. The assessee/respondent is a Software Technology Park engaged in the business of manufacture and export of software. The sole issue raised relates to the exclusion of unrealised sale proceeds from 'total turnover' in the formula for computation of relief under section 10A of the Income Tax Act, 1961 (in short 'Act').

3. The assessee filed a return of income returning a loss that was initially accepted under section 143(1). The assessment was taken up for scrutiny and completed under s.143(3) on 27.12.2002. A notice for re-assessment was issued thereafter on the ground that income had escaped assessment. The reasons for re-assessment were two pronged, both relating to the computation of eligible deduction under section 10A.

4. The assessee had included two amounts, Rs.16,50,75,000/- being sales effected to one M/s.AI Yusuff and Rs.2,89,96,894/- being sales proceeds not realised prior to the due date in the 'export turnover'. The Assessing Officer was of the view that the aforesaid two amounts ought to be reduced from 'export turnover' but retained as part of the 'total turnover' and thus re-worked the computation for deduction under section 10A. We are, in this case, only concerned with the second issue, being the exclusion of an amount of Rs.2,89,96,894/-, unrealised export proceeds, from the ambit of 'total turnover'. The assessment resulted in a demand of a sum of Rs.84,83,898/-.

5. In first appeal, the issue was allowed by the Commissioner of Income tax (Appeals) following the judgment of the Supreme Court in the case of Commissioner of Income Tax V. Lakshmi Machine Works (290 ITR 667) and the decision of the Kerala High Court in the case of Commissioner of Income Tax V. Abad Fisheries (258 ITR 641). The rationale of the aforesaid decisions was that parity ought to be maintained as between the numerator and denominator in the formula while computing relief under section 80HHC and 10A/B of the Act respectively.

6. The order of the Commissioner of Income Tax (Appeals) was confirmed by an order of the Income tax Appellate Tribunal dated 12.06.2008, as against which, the present appeal has been filed by the revenue.

7. The following substantial question of law (reframed by us) is raised for resolution:

'Whether on the facts and circumstances of the case, the Tribunal was right in holding that unrealised sale proceeds in foreign exchange within the prescribed period amounting to Rs.2,89,96,894/- had to be included in the total turnover while computing the deduction under Section 10A of the

I.T. Act?'

8. Section 10A of the Act is a special provision enacted to provide for a deduction in respect of income derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins the eligible activity.

9. In the present case, the eligibility of the assessee to this relief is not disputed. The mode of computation of the relief is set out in terms of sub-section (4) of section 10A by way of a formula.

10. Sub-section (4) is extracted below:

(4) For the purposes of sub-sections (1) and (1A), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking.

The resultant formula is thus: 
$$\frac{\text{export profits}}{\text{total turnover}} \times \text{export turnover}$$

11. Sub-section (3) stipulates that the foreign exchange derived from eligible activity be brought into the country within a specified period, i.e., six (6) months from the end of the previous year or within such period as the competent authority may allow in this behalf. In the present case, admittedly, foreign exchange to the extent of Rs.2,89,96,894/- has not been received in India within the stipulated statutory period.

12. Mr. Karthik Ranganathan, learned Standing Counsel appearing for the Revenue would thus contend that the amount of Rs.2,89,96,894/-, admittedly not brought into the country within the prescribed time limit would automatically have to stand excluded from the numerator, i.e. export turnover. However, according to him, the amount constitutes turnover of the assessee and should be included in the denominator, 'total turnover'. He would argue that this treatment was in keeping with the scheme of the section that is intended to provide a benefit only for those engaged in the activity of export and gaining foreign exchange.

13. He points out that the very object of the section is to improve foreign exchange inflows into the Country and thus in a situation where an assessee is unable to bring into the Country

foreign exchange by way of export turnover, such non-realisation should not only stand excluded from the numerator, but also be deemed to be part of turnover and included in the denominator, i.e. total turnover of the company.

14. He relies on two decisions of this Court in the case of Galaxy Granites (P) Ltd. V. Commissioner of Income-tax ((2012) 27 taxmann.com) 31 (Mad) which relates to computation of deduction under Section 80 HHC of the Act and Pentasoft Technologies Ltd. V. The Deputy Commissioner of Income Tax (T.C. (A)Nos.1135 and 1196 of 2008 dated 25.11.2013).

15. In the case of Galaxy Granites (supra) the Bench considers the following question:

'Whether the Appellate Tribunal is right in law in holding that unrealised export turnover should be included in the "Total Turnover" while it is not treated as "Export Turnover" for purposes of computing the allowable deduction under Section 80HHC?'

16. In answering the question, the Division Bench took into account the definitions of 'export turnover' as well as 'total turnover' under section 80 HHC of the Act. The definition of 'export turnover' in Section 80HHC was amended by Finance Act 1990 to provide that what would be included within its ambit would only be sale proceeds 'received' as against sales proceeds 'receivable' till the date of amendment. Thus, with effect from 01.04.1991, only sales proceeds actually 'received' would stand included in the ambit of 'export turnover'. However, the corresponding amendment was not made in the definition of 'total turnover'. In the aforesaid circumstances, the intention of the Legislature was clear to the effect that it would be only sale proceeds actually 'received' that would be included within the ambit of 'export turnover' in the numerator whereas, in addition to actual receipts, what was 'receivable' or 'not actually received' would also stand included within the ambit of denominator i.e. 'total turnover'.

17. This position hinges on the scheme of deduction under section 80HHC, which is specific to the provisions set out therein. The provisions of section 10B do not contain a definition of 'total turnover' and therefore the interpretation of the Court in the context of section 80HHC would not advance the case of the Revenue as far as the scheme of section 10A or 10B is concerned.

18. In the case of Pentasoft (supra), the Bench decided the claim for exclusion of unrealised sales proceeds against the assessee since no such claim had been made at the time of assessment, and the assessee therein had raised the claim only by way of additional ground at the stage of first appeal. Since there was no challenge to the exclusion of unrealised sale proceeds from 'export turnover' but inclusion of the same in

'total turnover' at the time of assessment, the Bench held that it was not open to the assessee to question the interpretation of the formula at a later stage.

19. The assessee therein had also raised alternate grounds by way of a claim towards bad debt/business loss that were negatived by the Division Bench. The facts in that case are distinguishable from the one on hand. Moreover, the claim in the present case has been made at the time of assessment itself and thus the decision in the case of Pentasoft (supra) is of no assistance to the revenue.

20. While the scheme of Section 10A does not provide for a definition of the term 'total turnover', Explanation 2(iv) defines 'export turnover' in the following terms:

'(iv) "export turnover" means the consideration in respect of export by the undertaking of articles or things or computer software received in, or brought into, India by the assessee in convertible foreign exchange in accordance with sub-section (3), but does not include freight, telecommunication charges or insurance attributable to the delivery of the articles or things or computer software outside India or expenses, if any, incurred in foreign exchange in providing the technical services outside India;

21. The issue of whether the items reduced from 'export turnover', such as freight, telecommunication charges or insurance as provided for in the definition would also stand reduced from 'total turnover' was the subject matter of consideration by the Supreme Court in the case of CIT V. HCL Technologies [2018] (404 ITR 719) and the issue was held in favour of the assessee. The conclusion of the Bench was to the effect that items excluded/reduced from the numerator would stand excluded/reduced from the denominator as well. Paragraphs 18 to 21 of the judgement are relevant and are extracted below:

'18) Accordingly, the formula for computation of the deduction under Section 10A of the Act would be as follows:

|                                                                                                      |                                          |
|------------------------------------------------------------------------------------------------------|------------------------------------------|
| Explanation 2<br>Section 10A of IT Act                                                               | Export turnover as defined in<br>(IV) of |
| Export Profit                                                                                        | = total Profit                           |
| of the Business                                                                                      | X                                        |
| turnover as defined in Explanation<br>2(IV) of Section 10A of the IT Act + domestic<br>sale proceeds | Export                                   |

19) In the instant case, if the deductions on freight, telecommunication and insurance attributable to

the delivery of computer software under Section 10A of the IT Act are allowed only in Export Turnover but not from the Total Turnover then, it would give rise to inadvertent, unlawful, meaningless and illogical result which would cause grave injustice to the 19 Respondent which could have never been the intention of the legislature.

20) Even in common parlance, when the object of the formula is to arrive at the profit from export business, expenses excluded from export turnover have to be excluded from total turnover also. Otherwise, any other interpretation makes the formula unworkable and absurd. Hence, we are satisfied that such deduction shall be allowed from the total turnover in same proportion as well.

21) On the issue of expenses on technical services provided outside, we have to follow the same principle of interpretation as followed in the case of expenses of freight, telecommunication etc., otherwise the formula of calculation would be futile. Hence, in the same way, expenses incurred in foreign exchange for providing the technical services outside shall be allowed to exclude from the total turnover.'

22. Learned Counsel for the Revenue seeks to distinguish the above judgment stating that the rationale thereof would be applicable only to the items of exclusion at issue before the Supreme Court and cannot be extended to the question of unrealised sale proceeds, which is the issue in the present case.

23. We see no valid distinction as sought to be pointed out before us. The components of the total turnover/denominator in the formula would be the quantum of export turnover/numerator plus proceeds from domestic sales. Thus what is 'export turnover' for the purpose of the numerator would have to be the 'export turnover' for the purpose of denominator as well and 'export turnover' cannot assume two different characteristics for two parts of the same formula.

24. In the present case, the quantum of 'export turnover' has been taken to be the actual remittances of foreign exchange after excluding the unrealised foreign exchange. This then would be the same figure to be adopted so far as the denominator is concerned as well. In fine, 'total turnover' for purposes of the formula would be the actual sale receipts excluding unrealised foreign exchange as adopted for 'export turnover'. This conclusion is also supported by the reasoning that the provisions of Section 10A/10B are beneficial in nature and seek to encourage an assessee engaging in a prescribed activity.

25. In the light of the discussion as above, we answer the question of law in the negative, in favour of the assessee and against the Revenue. The Tax Case (Appeal) is dismissed. No costs.

Sd/-  
Assistant Registrar (CS-VI)

//True copy//

Sub Assistant Registrar

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To

1.The Income Tax Appellate Tribunal, Madras 'B' Bench, Chennai.

2. The Commissioner of Income Tax (Appeals)-V,  
121, M.G.Road, Chennai - 600 034.

3. The Assistant Commissioner 06 Income Tax,  
Company Circle, IV(1) (I/C), Chennai-34

+1cc to Mr.Krishna Ravindran, Advocate SR.No.83953

+1cc to Mr.Krishna Ravindran , Advocate SR.No.84148

TCA No.390 of 2009

GP (CO)  
GMY (11/01/2019)

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