

IN THE HIGH COURT OF BOMBAY AT GOA
TAX APPEALS NO.23 & 25 OF 2012 & 69 to 74 OF 2014

The Commissioner of Income Tax,
“Aaykar Bhavan”,
Patto, Panaji, Goa.

....Appellant

V/s

M/s. Sociedade De Fomento
Industrial Pvt. Ltd.,
Villa Flores Da Silva,
Erasmoo Carvalho Street,
P.O. Box No.31, Margao-Goa.
PAN No.AABCS8860Q

.... Respondent

Ms. Susan Linhares, Standing Counsel for the Appellant.
Shri S.S. Kantak, Senior Advocate with Ms. Vinita Palyekar, Shri Nishant
Thakkar & Shri P. Talaulikar, Advocates for the Respondent.

Coram :- M.S. SONAK &
DAMA SESHADRI NAIDU, JJ.
Reserved on : 30 September 2020
Pronounced on : 22 October 2020

JUDGMENT : (*Per Dama Seshadri Naidu, J.*)

Introduction:

All these appeals are at the Revenue’s behest. In this batch, an identical question of law calls for consideration. That concerns the exemption under section 10B of the Income Tax Act (“IT Act”). In a couple of appeals, an additional issue has arisen, though. So we have taken up Tax Appeal No.23 of 2012 for discussion and applied the decision in that case to other appeals, too, where the question under section 10B of the IT Act is common. The additional issue—about the disallowance under section 14A of the IT Act read with Rule 8D of the Income Tax Rules (“IT Rules”)—has been dealt with separately.

(I) Tax Appeal No.25 of 2012:**Facts:**

2. The Respondent-Assessee has set up a 100% Export Oriented Unit (EOU) with the approval of all the ministries and departments concerned. It was in 1985. The company claimed exemption under section 10B of the IT Act from the Assessment Year (AY) 1990-91 onwards. This company has been engaged in the business of extraction, processing, and sale of iron ore. For the AY 2006-2007, the company claimed tax exemption on the income of ₹90,75,14,396/-. So it declared a total income of ₹43,05,76,415/- through its return of income.

3. After that, in March 2008, the Assessee filed its revised return of income, declaring total income of ₹51,07,81,675/-. But later, the case was selected for scrutiny assessment. In December 2008, the assessment was completed under section 143(3) of the IT Act, on a total income of ₹141,87,780,771/-.

4. The Assessing Authority disallowed deductions under these heads of expenditure: (a) expenditure of ₹64,000 incurred on repairs to bungalow; (b) donations and charities of ₹312,700/-; (c) claim for deduction under section 10B amounting to ₹90,75,14,396/-.

5. Aggrieved, the Assessee appealed to the Commissioner of Income Tax (Appeal). That authority has partly allowed the Assessee's appeal. Not fully satisfied, the Assessee approached the Income Tax Appellate Tribunal ("Tribunal"). In April 2011, the Tribunal allowed the ITA No. 42/PNJ/2010 (AY 2006-2007) in the Assessee's favour. So the Revenue has filed the Tax Appeal before this Court.

Substantial Questions of Law:

6. On 22 March 2012, this Court admitted the appeal after framing these substantial questions of law:

(1) Has the ITAT been justified in allowing the deduction of

₹90,74,14,396/- under section 10B of the IT Act, though the Assessee Company has expanded its existing processing capacity with the new plant and machinery installed in the factory?

(2) Has the ITAT been right in holding that the requirement of explanation to section 10B (7) of the IT Act [originally mentioned as "explanation 2(iv) of section 10B"] has been satisfied and that no separate approval of the Board appointed by the Central Government, in the exercise of powers conferred by section 14 of the Industrial (Development and Regulation) Act 1951 and the Rules made thereunder, needs to be obtained or granted?

7. Heard Ms. Susan Linhares, the learned Standing Counsel for the Revenue, and Shri S.S. Kantak, the learned Senior Counsel for the Assessee.

Discussion:

The Scrutiny Assessment:

8. The Assessee company initially filed its return of income for AY 2006-2007 on 30/10/2006, declaring total income of ₹43,05,76,415/- Later, the Assessee filed its revised return of income on 31/03/2008, reporting total income of ₹51,07,81,675/-. The same year, the case was selected for scrutiny assessment, which was completed in December 2008 under section 143 (3) of the IT Act. The Assessing Officer held the total income as ₹1,41,87,780,771/-, by making these additions:

- (a) Disallowance of ₹ 64,000/-, said to have been the expenditure incurred on repairs to the bungalow.
- (b) Disallowance of retainer fee of ₹1,08,000/-
- (c) Disallowance of ₹3,12,700/- out of Donations and charities.
- (d) Disallowance of ₹90,75,14,396, claimed as deduction

under section 10B.

Statutory Appeal:

Aggrieved by the assessment order, dated 30/12/2008, the Assessee appealed to the CIT (A), who has dismissed the appeal.

The Findings of the CIT (A):

Disallowance (a):

On the disallowance of ₹64,000/- said to be the expenditure incurred on repairs to the bungalow, the CIT (A) has upheld the AO's view. The addition was sustained.

Disallowance (b):

On the question of retainer fee ₹1,08,000/-, the addition was upheld.

Disallowance (c):

On the question of donations and charities of ₹3,12,700/-, again the addition was upheld.

Disallowance (d):

On the question of exemption of ₹90,75,14,396/- under section 10B of the IT Act, the CIT (A) concurred with the AO. The appellate authority split this question into three issues and answered all against the Assessee.

So, further, aggrieved, the Assessee has filed the second appeal before the ITAT.

Before the ITAT:

Disallowance (a):

On the disallowance of ₹64,000/-, the expenditure incurred on repairs to the bungalow, the Tribunal has noted that earlier it considered

a similar issue in Assessee's own case for AYs 2001-02 and 2002-03. It has further noted that on 21 January 2011, by order in the appeals for the AYs, 21-1-2011, it set aside the order of the CIT (A) and remitted the matter to the assessing authority "for making necessary inquiries and reach independent findings of fact concerning the ownership as well as the use of the building named 'Samudra Darshan'". The Tribunal followed the same course in this appeal, too. It remanded that issue to the AO with a similar observation.

Disallowance (b):

On the question of retainer fee ₹1,08,000/-, the Tribunal has noted in all the previous years, the Assessee paid the retainership fees to one Smt. Timblo "for the work done". For those years, the Tribunal allowed the deductions. So it has not found any good reason to depart from "the earlier settled position without any just and reasonable cause".

Disallowance (c):

On the question of donations and charities of ₹3,12,700/-, the Tribunal has concluded that the Assessee made those contributions "for commercial expediency and thus are allowable as business expenditure". To conclude thus, the Tribunal relied on the judgments of two of the High Courts: Madras and Karnataka.

Disallowance (d):

On the question of exemption of ₹90,75,14,396/- under section 10B of the IT Act, the Tribunal has held that the Assessee set up a new unit in 1999-2000. The Assessee has also, according to the Tribunal, secured all the necessary approvals required under section 10B of the Act. So, to conclude, the Tribunal has held that the Assessee is entitled to the benefit under that provision for the next ten years from the year the Assessee's new unit began its manufacturing. As a result, on the last and substantial issue of exemption under section 10B of the IT Act, too, the findings went against the Revenue.

Under the above circumstances, the Revenue has filed this Tax Appeal before this Court.

The Appeal before This Court:

9. As we have already noted, before us there are two substantial questions of law. According to the Revenue, the Assessee merely expanded the capacity of an existing unit; it has "installed new plant and machinery". Then, can the Assessee be allowed the deduction of ₹90,74,14,396/- under section 10B of the IT Act?

10. And for the second substantial question of law, the Revenue relies on explanation to section 10B (7) of the IT Act. It insists that the Assessee did not secure separate approval from the Board appointed by the Central Government. Then, has the approval from an official amounted to approval from the Central-Government appointed Board under section 14 of the Industrial (Development and Regulation) Act 1951 and the Rules made thereunder?

The First Substantial Question of Law:

11. Simply stated, has the Assessee increased the production capacity of the existing unit or as he established a new unit? We reckon the answer to this question is factual. Let us see how the Tribunal dealt with this issue. Undisputed is the fact that the Assessee set up a 100% EOU in 1985-86. The Ministry of Industry, Department of Industrial Development approved that EOU through the licence, dt.26.12.1985. It was for ten years. The Assessee claimed exemption under section 10B of the IT Act from the AY 1990-91 onwards.

12. Since the quality of ore deteriorated and was not saleable, the Assessee decided to set up "a new unit"; so it applied for modernization and substantial expansion of the undertaking with an initial investment of ₹20 crore. It wanted to increase the annual production capacity to 15 lakh tons. In November 1994, the Ministry of Industry approved the proposal, and that led to an agreement between the Assessee and the Government

of India in June 1995. The Assessee is said to have spent an additional ₹5 crore for importing the state-of-the-art capital goods.

13. In essence, the Ministry of Industry acceded to the Assessee's request and "communicated extension of 100% EOU status to the new unit under the same industrial license of 1985... making it valid up to 31 March 2001". That means the Assessee was permitted to set up a new unit with 100% EOU initially up to March 2001, with a total capital cost of ₹25.25 crore. The export obligation was to commence from the date it would commence the commercial production in the new unit and would continue for the next five years.

14. As a matter of fact, the Tribunal has found that the Assessee set up a new unit adjacent to the old one with a cost of over ₹30 crore. The Assessee has, in fact, raised the annual production capacity to 15 lakh tons from the previous 2 lakh tons. But throughout, the Revenue has contended that the Assessee established no new unit but increased the capacity. In the face of the Revenue's contention, the Tribunal recorded a finding that "the Assessee was permitted to set up a new unit which was approved as 100% EOU". Besides, the Department of Industrial Policy and Promotion, through the letter, dated 5 October 2001, extended the exemption for five more years. Eventually, through another communication, dated 20 April 2006, the Ministry extended the period once again by five more years. That is, totally ten years: from 1999-2000 to 2008-09.

15. After referring to certain precedents, the ITAT has observed that, to be deprived of the benefit, the new undertaking must have been a simple reconstructed old unit, with at least 20% of the assets from the old unit transferred to the new unit. But the Assessee did not face any allegation of transferring the assets from the old unit to the new unit. It did construct a new unit adjacent to the old unit. And the Tribunal refused to accept the Revenue's contention that the adjacent unit should

be termed an expanded old unit.

16. We find no reason to disagree. We reckon the Tribunal's findings are in accord with the established industrial practice. In fact, the Revenue argued that the Assessee has installed "new plant and machinery". Regrettably, plant and machinery are not synonymous; the plant is where machinery is installed. And the plant is erected, not installed. In the end, whether the new plant erected and the new machinery installed amounts to adding to an existing unit or amounts to a separate unit on its own is a matter of fact. On that, the Tribunal supplied cogent reasons and concluded in a particular way: The unit is separate, distinct, and new. The old unit has not been expanded; a new unit was established. We agree.

Second Substantial Question of Law:

Has the approval from an official amounted to approval from the Central-Government appointed Board under section 14 of the Industrial (Development and Regulation) Act 1951 and the Rules made thereunder?

17. First, let us examine section 10B of the IT Act, to the extent relevant for us. That provision, as it was existing then, reads thus:

10B. Special Provision in respect of newly established hundred per cent export-oriented undertakings.

(1) Subject to the provisions of this section, any profits and gains derived by an Assessee from a hundred per cent export-oriented undertaking (hereafter in this section referred to as the undertaking) to which this section applies shall not be included in the total income of the Assessee.

(2) This section applies to any undertaking which fulfills all the following conditions, namely:—

- (i) it manufactures or produces any article or thing;
- (ii) it is not formed by the splitting up, or the reconstruction, of a business already in existence:

Provided that this condition shall not apply in respect of any industrial undertaking which is formed as a result of the re-establishment, reconstruction or revival by the Assessee of the business of any such industrial undertaking as is referred to in section 33B, in the circumstances and within the period specified in that section;

(iii) it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

Explanation.—The provisions of Explanation 1 and Explanation 2 to sub-section (2) of section 80-I shall apply for the purposes of clause (iii) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

(3) The profits and gains referred to in sub-section (1) shall not be included in 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 his option :

Provided that nothing in this sub-section shall be construed to extend the aforesaid five assessment years to cover any period after the expiry of the said period of eight years.

(4) ...

(5) ...

(6) ...

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

Explanation: For the purposes of this section,—

(i) *"hundred per cent export-oriented undertaking" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed in this behalf by the Central Government in the exercise of the powers conferred by s action 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act;*

(ii) "relevant assessment years" means the five consecutive assessment years specified by the Assessee at his option under sub-section (3) or sub-section (5), as the case may be;

(iii) "manufacture" includes any—

(a) process, or

(b) assembling, or

(c) recording of programmes on any disc, tape, perforated media or other information storage device.

(italics supplied)

18. If we keep the scope of this appeal in view, from Section 10B of the IT Act, the following aspects emerge:

- (a) It is a special provision that applies to a “newly established 100% export-oriented undertaking”;
- (b) the undertaking must be (i) manufacturing or producing an article or thing and (ii) must not have formed by splitting up or by reconstructing an existing business;
- (c) the undertaking must not have been formed by the transfer to a new business of machinery or plant previously used for any purpose;
- (d) the profits and gains shall not be included in the total income of the Assessee for any five consecutive assessment years, falling within the first eight years beginning with the assessment year when the undertaking begins to manufacture or produce articles or things, specified by the Assessee at his option;
- (e) the period beyond the first eight years should not be covered;
- (f) if the Assessee, before the due date for furnishing the return of his income, declares to the Assessing Officer that this section may not be made applicable to him, then it shall not apply to him for that assessment year;
- (g) this 100% export-oriented undertaking must have had its undertaking approved by the Board appointed by the Central Government under section 14 of the Industries (Development and Regulation) Act, 1951 (65 of 1951), and its Rules.

19. In the second substantial question of law, only point (g) mentioned above requires to be considered. In this case, admittedly, the Board did not approve; instead, the Development Commissioner approved. Both in October 2001 and in April 2006, the approval was by the same Development Commissioner. In fact, as seen from Clause No. 9.37 of the Handbook of Procedures, the Board of Approval delegated its powers to the Development Commissioner. The CIT (A) has considered the approval by that delegated authority as improper. On the other hand, the Tribunal has held that the delegate has all the powers of the delegator. It has reasoned that an agent has no independent power but exercises the powers of his principal. So an act done by the delegate is nothing but the Act of the principal.

20. In *Roop Chand v. State of Punjab*¹, section 42 of Act 50 of 1948 allows the State Government to call for and examine the records of any case from an officer to satisfy itself as to the legality or propriety of any order passed by that officer under that Act. It is revisional power. Similarly, section 21 (4) of the Act confers appellate powers on the Government. But the Government delegated this appellate power to an officer. Once that officer passed an order in an appeal under section 21 (4), the Government wanted to exercise its revisional powers under section 42 of the Act. In that context, the Supreme Court by majority (3:2) has held that when the Government delegated its appellate power under section 21 (4) to an officer, an order passed by that delegate-officer is an order passed by the State Government itself. It is not an "order passed by any officer under this Act" within the meaning of section 42. In other words, the order contemplated by section 42 is an order passed by an officer in his own right and not as a delegate.

21. In the above context, *Roop Chand* has held that the word 'delegate' means little more than an agent. An agent exercises no powers of his but only the powers of his principal. Therefore, an order passed by an officer on a delegation to him is an order by the principal himself.

22. Here, under the statutory scheme, the Development Commissioner, on his own, has no power to act but for the power delegated to him by the Board or Government. Thus, the Development Commissioner has acted as the Board's delegate. Once we have accepted that the Assessee established a new unit and secured all permissions from a competent authority, then section 10B of the IT Act springs into operation on its own.

23. If we summarise, the Assessee, to begin with, had the approval in December 1985 as 100% EOU to claim deduction under section 10B of the Act. That approval held the field from 1990-91 to 1994-95. After that,

¹AIR 1963 SC 1503

the Assessee had the approval renewed, and the period stood extended by five more years—up to March 2001. Finally, in October 2001, the Assessee had the approval renewed once again for another five years. The Tribunal has held that though it was termed "a renewal", the benefit was applied to a new unit. And the Ministry has been well aware of that. Within the given window of the extended period, the Assessee claimed the exemption for the first time in AY 2002-03.

24. In the above context, the Tribunal has quoted with approval its own earlier ruling that it is not a statutory requirement that there has to be separate permission for each unit. Just because the Government granted permission by amending the original permission letter, it does not affect the eligibility for deduction under section 10B in any manner. In our considered opinion, the Tribunal's conclusions that (1) the unit is new, (2) the permission has been duly granted, and (3) the period of exemption has still been subsisting call for no interference.

25. We, therefore, find no merit in the Revenue's appeal. Accordingly, we dismiss it. No order on costs.

(II) Tax Appeal No.71 of 2014 (AY 2002-03):

26. The Assessee filed its return of income in October 2002 for the AY 2002-03, declaring its income of ₹15,25,960/-. In March 2003, the AO completed the assessment under section 143(3) of the Act and determined the total income as ₹15,25,960/-. But, later in May 2006, the AO passed an order under section 154, withdrawing the excess deduction claimed. Finally, he assessed the income as ₹27,71,710/-, thus raising demand of ₹6,63,743/-.

27. The AO, in April 2008, issued a notice under section 148 and, in response, the Assessee filed a revised return for ₹27,71,710/-. In October 2010, the Assessee objected to the reopening, but the AO rejected the objections and completed the assessment on the total income of

₹3,40,76,813/-. On appeal, the CIT(A), through order, dated 27.09.2013, partly allowed the appeal. Still aggrieved, in March 2014, both the Assessee and the Revenue filed appeals before ITAT. The Tribunal, through its order, dated 28 March 2014, dismissed the Revenue's appeal and allowed the Assessee's appeal in part. So the Revenue has filed this Tax Appeal.

While admitting the Tax Appeal, this Court has noted thus:

“[W]e find it appropriate to defer the hearing of the above appeal on admission as the appeals in connection with the other Assessment Years of the respondents have been admitted.

2. The above appeal shall as such be considered for admission only after the said appeals are decided.

3. To be placed along with Tax Appeal Nos. 69, 70, 73 and 74 of 2014.

28. In view of the judgment in Tax Appeal No.25 of 2012, we need not adjudicate separately the issues raised in this Tax Appeal.

(III) Tax Appeal No.72 of 2014 (AY 2002-03):

The same as above.

(IV) Tax Appeal No.23 of 2012 (AYs 2003-04 to 2005-06):

29. This appeal covers three AYs: 2003-04, 2004-05, and 2005-06. If we briefly note the facts, the Commissioner of Income Tax called and examined the records of the Assessee for these three years. In February 2008, he noticed, as the record reveals, that the AO had allowed the exemption under section 10B of the Act “without examining the allowability”.

30. The exemption for AY 2003-04 was ₹6,02,76,566/-; for AY 2004-05, ₹28,27,75,770/-; and for AY 2005-06, ₹54,46,45,124/-. The Commissioner of Income Tax prima facie felt that the AO's assessment orders for all these three years were erroneous and prejudicial to the Revenue's interest. So, in February 2008, he issued notices to the Assessee

asking it to show cause why the exemption should not be disallowed.

31. After hearing the Assessee, the Commissioner of Income Tax set aside the assessment orders and directed the AO to consider all the issues afresh and pass the assessment orders in accordance with the law. Aggrieved, the Assessee appealed to the Tribunal. Then, through the impugned judgment, dated 24 March 2011, the Tribunal allowed the appeal. According to it, for the Commissioner of Income Tax to exercise the powers under section 263 (1) of the Act, the twin conditions laid in the provision have not been satisfied. According to it, a mere change of opinion cannot be a ground for the Commissioner to invoke that provision. Under these circumstances, the Revenue has filed the appeal before this Court. While admitting the Tax Appeal, this Court framed the following issue:

“In the facts and circumstances, has the ITAT been justified in holding that the essentials for invoking the jurisdiction under section 263 (1) were not found satisfied and, as such, the Commissioner of Income Tax could not have quashed the order of the Assessing Officer for the AYs 2003-04 to 2005-06?”

32. In fact, in this Tax Appeal alone, the invocation of section 263(1) of the IT Act comes into play. It presents a threshold issue. And its adjudication, we reckon, stands obviated because we have already held that the Assessee has been entitled to the benefit under section 10B of the Act for a certain window of time—a decade to be precise. And the assessment year in this appeal falls within that period. Simply stated, once the issue has been decided on the merits, the threshold technical issue renders itself academic and calls for no specific adjudication.

(V) Tax Appeal No.70 of 2014 (2007-08):

33. The Assessee filed its return of income in October 2007 for the AY 2007-08, declaring its income of ₹57,26,22,760/-. The Assessee

claimed exemption of ₹131,18,76,592/- under section 10B of the Act. Besides, it also claimed exemption over ₹5,13,22,125/- said to be the income from dividends from other companies and mutual funds. In February 2009, the assessment was processed under section 143(1), but no assessment was made under section 143(3) of the Act. Yet the AO felt that certain income chargeable to tax escaped assessment. So he initiated proceedings under section 147 of the Act and issued a notice under section 148. It was in January 2012.

34. In February 2012, the Assessee requested the AO to treat its return of income filed in September 2008 as the one submitted in response to notice under section 148. It has also objected to the reopening of the assessment. In March 2012, the AO rejected the objections and completed the assessment. He disallowed the following exemptions: ₹131,18,76,592/- under section 10B and ₹1,02,64,234/- expenses under section 14A read with Rule 8D.

35. Aggrieved, the Assessee appeal to the CIT (A). Through the order, dated 27 September 2013, the appellate authority partly allowed the appeal. Still aggrieved, in March 2014, both the Assessee and the Revenue filed appeals before ITAT. The Tribunal, through its order, dated 28 March 2014, dismissed the Revenue's appeal and allowed the Assessee's in part. So the Revenue has filed this Tax Appeal.

36. While admitting the Tax Appeal, this Court framed the following issues:

- "1. Has the ITAT been justified in allowing the deduction under Section 10B of the IT Act, particularly, in the light of the fact that the Assessee Company has expanded its existing processing capacity with new plant and machinery installed in the factory?
2. Was the ITAT right in holding that the requirement of explanation 2(iv) of Section 10B of the Act has been satisfied and no separate approval of the Board appointed by the Central

Government, in the exercise of powers conferred by Section 14 of the Industrial (Development and Regulation) Act 1951 and the Rules made thereunder, needs to be obtained or granted?

As we have already noted, these issues stand squarely answered in Tax Appeal No.25 of 2012.

(VI) Tax Appeal No.73 of 2014 (2007-08):

The same as above.

(VII) Tax Appeal No.69 of 2014 (AY 2008-09):

37. The Assessee filed its return of income in September 2008 for the AY 2008-09, declaring its income of ₹14,58,88,120/-. The Assessee claimed exemption of ₹272,29,91,220/- under section 10B of the Act. Besides, it also claimed exemption over ₹11,03,36,341/- said to be the income from dividends from other companies and mutual funds. The assessment was processed under section 143(1), but no assessment was made under section 143(3) of the Act. Yet the AO felt that certain income chargeable to tax escaped assessment. So he initiated proceedings under section 147 of the Act and issued a notice under section 148. It was in January 2012.

38. In February 2012, the Assessee requested the AO to treat its written of income filed in September 2008 as the written in response to notice under section 148. It has also objected to the reopening of the assessment. In March 2012, the AO rejected the objections and completed the assessment. He disallowed the following exemptions: ₹272,29,91,220/- under section 10B and ₹1,28,75,357/- expenses under section 14A read with Rule 8D.

39. Aggrieved, the Assessee appeal to the CIT (A). Through the order, dated 27 September 2013, the appellate authority partly allowed the appeal. Still aggrieved, in March 2014, both the Assessee and the Revenue filed appeals before ITAT. The Tribunal, through its order, dated 20 March 2014, dismissed the Revenue's appeal and allowed the Assessee's in

part. So the Revenue has filed this Tax Appeal.

40. While admitting the Tax Appeal, this Court framed the following issues:

“1. In the facts and circumstances, has the ITAT been correct in deleting the disallowance made under section 14A of the IT Act in accordance with Rule 8D of IT Rules, as provided by the decision by Income Tax Appellate Tribunal (the Mumbai Special Bench) in *ITO v. Daga Capital Management Capital Pvt. Ltd.*^{2?}

2. Has the ITAT been justified in allowing the deduction under Section 10B of the IT Act, particularly, in the light of the fact that the Assessee Company has expanded its existing processing capacity with new plant and machinery installed in the factory?

3. Was the ITAT right in holding that the requirement of explanation 2(iv) of Section 10B of the Act has been satisfied and no separate approval of the Board appointed by the Central Government, in the exercise of powers conferred by Section 14 of the Industrial (Development and Regulation) Act 1951 and the Rules made thereunder, needs to be obtained or granted?

41. This Tax Appeal presents an additional substantial question of law, besides those under section 10B of the IT Act. So we will address it. Among other things, the Assessee claimed exemption over ₹11,03,36,341/- said to be the income from dividends from other companies and mutual funds.

42. To rule in Assessee's favour, the Tribunal has relied on *Daga Capital Management Capital Pvt. Ltd.* In that case, the Special Bench of the Tribunal at Mumbai was asked to consider whether section 14A applies to dividends earned by an Assessee trading in

shares and holding shares as stock-in-trade. In answer, the Special Bench, by a majority, has held that section 14A has an overriding effect and applies to all expenditure in relation to exempt income even though such expenditure would have been allowable under other provisions such as 36 (1) (iii). It has also held that sub-sections (2) and (3) of s. 14A, though inserted by the F. A. 2006 w.e.f. 1.4.2007, read with Rule 8D, are procedural and clarificatory. So they apply even to pending matters.

43. In the process, *Daga Capital Management Capital Pvt. Ltd.* has observed that the words "in relation to" in s. 14A encompass not only the direct expense but also the indirect expense, which has any relation to the exempt income. The argument that the words contemplate a "direct and immediate connection" between the expenditure and the exempt income cannot be accepted. Accordingly, the argument that s. 14A cannot apply to shares held as stock-in-trade cannot be accepted. The fact that the dividend income is "incidental" to the purchase of shares is also irrelevant. The question as to whether the onus is on the Assessee or the AO for bringing an item of expenditure within s. 14A is also irrelevant because of Rule 8D.

44. If we peruse the ITAT's Order, dt.28.03.2014, it is an order that runs into 148 pages and covers these AYs: 2002-03, 2007-08, and 2008-09.

45. Before we appreciate the Tribunal's reasoning, we may note down certain facts. During the previous year relevant to the assessment year under consideration, the Assessee has earned exempted income under section 10(35) of the IT act. That was ₹11,03,36,341/- from the investments made in mutual funds. The Assessee has not disallowed any expenses under section 14 A of the IT Act. As on 31 March 2008, the Assessee's investments in various mutual funds was ₹353,64,17,461/-; and as on 31 March 31 2007, it

was ₹161,37,25,618/-. True, the Assessee has not disallowed any common indirect expenditure to earn such exempted income as required under section 14 A read with Rule 8D of the IT Rules, 1962.

46. In the above context, the AO has called for the Assessee's objections why a portion of the common indirect expenditure should not be disallowed as per the principal provided in Rule 8 D. The Assessee replied. It has contended that during the year under reference, the Assessee had received dividend income of ₹13,85,03,376/- from various mutual funds. The Assessee has, indeed, stressed that it earned the dividend by investing "surplus money" on the advice of various mutual fund managers who are normally attached to the banks with whom the Assessee deals. It has also maintained that "the said mutual fund officials/managers used to come to the doorstep of our company and do all the required formalities and also used to collect the cheques for the purpose of such investments". Besides, the dividend amounts received from various mutual funds were said to have been directly credited to the Assessee's bank account.

47. As seen from the record, the Assessee has also filed a working of expenditure disallowable under section 14 A of the IT Act. As for the Assessee, these elements of expenses under section 14 A of the IT Act read with Rule 8D of the IT Rules come to ₹3,552,524/-. But the AO rejected the Assessee's contentions. He has disallowed ₹1,28,75,357/- under sub-rule (2) of Rule 8 D of IT Rule.

48. Undisputed are the facts that the Assessee invested certain funds in exempted categories such as mutual funds; it has earned income. During the assessment year, income from such sources stood exempted under section 10(35) of the IT Act. The only issue is whether the Assessee incurred any expenditure while earning that exempted income and whether he included that expenditure in the common indirect expenditure of its own. First, the AO noted, rather guessed, that the Assessee

borrowed funds to invest and that there ought to be an interest element. But the Assessee asserts that it utilized its surplus funds. We reckon there is no material for the AO to conclude that the Assessee borrowed the funds. Second, given the volume of investment, the Assessee is said to have received charge-free services from the managers of the banks and other financial institutions with whom they have invested. So the Assessee has insisted that it has not incurred any expenditure.

49. On the contrary, the AO reasons that whenever those managers of the banks and other financial institutions came to the Assessee company, its personnel must have spent time with them, in assisting them. According to him, at least that amounts to an indirect expenditure in relation to exempted income. We are afraid the reasoning is far-fetched.

50. In *CIT v. Calcutta Knitweaves*³, the Supreme Court has observed that the language of a taxing statute should ordinarily be read and understood in the sense in which it is harmonious with the object of the statute to effectuate the legislative animation. A taxing statute should be strictly construed; common-sense approach, equity, logic, ethics and morality have no role to play. Nothing is to be read in; nothing is to be implied; one can only look fairly at the language used and nothing more and nothing less. In fact, *Calcutta Knitweaves* echoes the King's Bench decision in *Cape Brandy Syndicate v. IRC*⁴, which has felicitously held that in a taxing statute, one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax.

51. So, in the face of the above facts and in the light of the above-quoted judicial dicta, we reckon the Tribunal has correctly held that the Assessee has been entitled to the exemption under section 14A of the IT Act, read with Rule 8D of the IT Rules, as well.

³(2014) 6 SCC 444

⁴(1921) 1 KB 64

(VIII) Tax Appeal No.74 of 2014 (AY 2008-09):

The same as above.

Result:

52. For the reasons mentioned above, we answer all the substantial questions of law in the Assessee's favour and against the Revenue. As a result, all the appeals are dismissed.

No order on costs.

DAMA SESHADRI NAIDU, J.

M.S. SONAK, J.

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