

In the High Court of Judicature at Madras

Dated : 23.07.2020

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

and

The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Tax Case Appeal Nos.278 and 279 of 2018

The Commissioner of Income Tax
Chennai.

...Appellant in
both appeals/Respondent

Vs

M/s.Oliver Valves India Pvt. Ltd.,
No.6, First Cross Street,
SIDCO Industrial Estate,
Ambattur, Chennai - 600 098.
PAN: AAAC06874B

...Respondent in
both appeals/Appellant

Appeals filed under Section 260A of the Income Tax Act, 1961 against the common order dated 20.09.2017 in ITA Nos.1055 & 1056/Mds/2017 on the file of the Income Tax Appellate Tribunal Chennai 'C' Bench for the assessment year 2009-10 and 2010-11 against the order of the Commissioner of Income Tax (Appeals) 3 Chennai 34 dated 28/02/2017 and made in ITA No.82 & 83/2015-16/CIT(A)-3 and against the order of the Deputy Commissioner of Income Tax Corporate Circle 5(1) Chennai-34 dated 17/3/2015 made in PA/GIR No.AAAC06874B to the Assessment year 2009-10-2010-11.

For Appellant : M/s.R.Hemalatha
Senior Standing Counsel

For Respondent : Mr.G.Baskar

Common Judgment was delivered by T.S.SIVAGNANAM, J

We have elaborately heard M/s.R.Hemalatha, learned Senior Standing Counsel appearing for the appellant/revenue and Mr.G.Baskar, learned counsel appearing for the respondent/assessee.

2.These appeals, filed by the revenue under Section 260A of the Income Tax Act, 1961 ("the Act" for brevity), are directed

against the common order dated 20.09.2017 passed by the Income Tax Appellate Tribunal, Chennai 'C' Bench (for brevity, the Tribunal) in ITA Nos.1055 & 1056/Mds/2017 for the assessment year 2009-10 and 2010-11.

3. These appeals were admitted on 28.06.2018 on the following substantial questions of law:

"1. Whether the Tribunal was right in allowing the claim of assessee in respect of management fee while dealing with Section 10B especially when the service income was received from the Associate Enterprises which is not for any technical services rendered by the assessee?

2. Whether the income from Management fee could be treated as profit derived from export of valves and no deduction could be allowed to the Assessee under Section 10B since the Associate Enterprise has its own expertise to assemble the valves and therefore cannot be construed as technical services rendered by the assessee?"

4. The assessee is a 100% Export Oriented Unit [EOU] engaged in the business of assembling valves in India and exporting the same to M/s. Oliver Valves Limited, UK. The raw material is stated to be procured locally. The assessee had stated that a technical support team of Engineers providing "on-demand" technical support and service for the product range supply and this technical support does an array of services that are intricately linked to the business of the assessee. The assessee states that this includes services like provision of technical assistance for product enrichment, product service, minor repairs and also extend maintenance support for the broken-down products. Further assessee states that the service corresponds with the customers, replies to their queries and also educates them about the product if they have any doubts. It also suggests periodic corrections, updates, changes, improvements and/or enhancement to the product apart from email and telephone support. The assessee filed return of income for the assessment years under consideration returning a loss. The case was selected for scrutiny under Section 143(3) of the Act and an assessment order was passed on 13.03.2012 (2009-10) and 27.10.2012 (2010-100), accepting the return of income filed by the assessee. The case was reopened by issuing notice under Section 148 of the Act dated 06.01.2014. Notice under Section 143(2) of the Act was issued and the reasons for reopening were also furnished to the assessee. The Assessing Officer proposed to deny the claim of deduction under Section 10B of the Act. Objection was filed by the assessee which was disposed of by order dated 09.02.2015. Subsequently, a show cause notice was issued calling upon the assessee to explain as to why the other

income should not be excluded from the business income, then it would result in loss and therefore, the assessee was not eligible to claim deduction under Section 10B of the Act. The assessee's explanation was that they are 100% EOU and eligible undertaking engaged in the export of valves and earned management fee in the nature of export services which is incidental to business of export of valves; the management fee partake the character of profit and gain from business. The Assessing Officer did not accept the reply on the ground that initially the assessee stated that the management fee was in the nature of rendering technical services and subsequently while filing the revised return, they have stated it to be in the nature of export services which is incidental to the business of export of valves. The Assessing Officer took into consideration Form No.3CEB, wherein, in one of the columns, the nature of service provided to the Associate Enterprise [AE] were indicated and concluded that the AE does not require any technical service as the AE has its own expertise to assemble the valves. Thus, the Assessing Officer concluded that the management fee does not relate to export of valves and was not derived from export of articles and was to be excluded from the profit of the business. With this reasoning, the Assessing Officer added back the Section 10B deduction amount to the total income of the assessee and arrived at the assessed income for both the assessment years.

5.The assessee preferred appeals to the Commissioner of Income Tax (Appeals)-3 [CIT(A)], who dismissed the appeals by common order dated 28.02.2017. Aggrieved by the same, the assessee preferred appeals before the Tribunal. The assessee had also challenged the reopening of the assessment before the CIT(A) as well as before the Tribunal. The Tribunal accepted the assessee's case holding that the management fee is in relation to export of valves and cannot be reduced from the profit of undertaking. Aggrieved by such finding, the revenue is before us by way of these appeals. Though the reopening of the assessment was held to be valid by the Tribunal, the assessee having succeeded on merits before the Tribunal has not preferred any appeal before this Court.

6.The undisputed fact is that the assessee is a 100% Export Oriented Unit was entitled to claim deduction under Section 10B of the Act. The revenue does not dispute the fact that the assessee is an "eligible undertaking". The dispute is with regard to the management fee received by the assessee from the AE and how it has to be treated in the hands of the assessee. The Assessing Officer points out that the assessee has taken contrary stand with regard to the receipt. Initially the assessee had stated that it is fee received for rendering technical service in connection with the export of valves, therefore forms part of profit and gains from business.

Subsequently they took a stand that management fee is in the nature of export of services which is incidental to the business of export of valves. After stating that this is an inconsistent stand the Assessing Officer examines Form 3CEB, more particularly, the information provided in column No.10 under the heading "particulars in respect of providing services". The information furnished is that they provide management service to the AE at UK, the amount paid is INR 56,52,503/- and the method used for determining the Arms Length price is TNMM. On perusal of this Form, the Assessing Officer holds that the assessee has earned the service income only from its AE and that is for providing management service and not for technical service or service incidental to the business of export of valves. Further, the Assessing Officer holds that the AE has its own expertise and therefore the service rendered by the assessee cannot be termed as technical service. With the above finding, the case of the assessee stood rejected.

7.The CIT(A) confirmed the order and agreed to whatever recorded by the Assessing Officer and also pointed out that the management fee has been received in Indian rupees as could be seen from Form No.3CEB. The CIT(A) further holds that the Assessing Officer was right in holding that the receipts are income from other sources but not business income as the amount was not received in foreign currency but in Indian rupees. The Tribunal over turned the finding of the CIT(A) and allowed the assessee's appeal. In the considered view of this Court, the assessee cannot be non-suited on the ground of inconsistent stand, in the original return of income which was processed under Section 143(3) of the Act, the assessee took a particular stand. On the assessment being reopened and notice under Section 148 of the Act being issued and the assessee having been called upon to file a revised return, they stated that the receipt is in the nature of management fee for export of service which is incidental to the business of export of valves. There can be no estoppel on this aspect and the assessee's stand cannot be brushed aside as being inconsistent, more particularly, because the revised return was filed pursuant to notice issued under Section 148 of the Act. In the considered view of this Court, the crucial test which had to be applied to the instant case has not been applied by the Assessing Officer as well as by the CIT(A). In terms of the provisions of Section 10B(1), deduction shall be allowed for profits and gains derived by a 100% EOU from the export of articles or things from the total income of the assessee. The method of computation is in terms of sub-section (4) of Section 10B which states that for the purpose of sub-section (1), 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. It has not been disputed by the revenue that the only source of income for the assessee is through export being a 100% Export Oriented Unit. The test to be applied is whether there is nexus between this income/management fee and the income from the business of the undertaking. In fact there are several decisions which have pointed out that there is no requirement for the purposes of Section 10B to establish the direct nexus between the income and the undertaking and the entire business income of the 100% EOU will be the profits of the business of the undertaking.

8. Identical issue was considered by the Hon'ble Division Bench of this Court in the case of Camiceria Apparels India (P) Ltd., vs. Assistant Commissioner of Income Tax [(2019) 103 taxmann.com 238 (Madras)]. The assessee therein was 100% Export Oriented Unit and during the relevant year, the assessee claimed exemption under Section 10A of the Act in respect of the income arising out of manufacturing and export of garments. After noting the decisions cited, it was held that the basis of computation of the deductions enumerated under Chapter VI A is different from that set out for special deductions like Sections 10A and 10B. Section 80IA provides for a deduction of profits and gains derived by an undertaking or an enterprise from an eligible business. The provisions of Section 80IA(1) states that where the gross total income of an assessee includes profits and gains derived from an undertaking or an enterprise from any eligible business, there shall, in accordance with and subject to the provisions be allowed, in computing the total income of the assessee, a deduction an equivalent amount to 100% of the profits and gains derived from such business for a demarcated period. It was further held that the relief under Section 10A on the other hand is granted in respect of profits derived from eligible activity of export, computed as a proportion of the profits of the business of the undertaking.

9. In the case of Principal Commissioner of Income Tax vs. Dishman Pharmaceuticals & Chemicals Ltd. [(2019) 112 taxmann.com 91 (Gujarat)], the Court pointed out that the Parliament intended to encourage the entrepreneurs to export the products from India; as part of that, it incorporated Section 10B of the Act. Explaining the scope of Section 10B, it was pointed out that the basic principle, namely, that the profit and gain must be derived from the concerned activity is a common feature. Noting that the assessee in the said case was undisputedly a 100% Export Oriented Unit, the provisions of Section 10B were held to be applicable. It was further pointed out that the methodology for computation as envisaged under sub-section (1) of Section 10B is by way of a mathematical formula set out in sub-section (4) whereby the profits derived from the exports of

articles or things or computer software is stated to 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/things/computer software bears to the total turnover of the business carried on by the undertaking.

10.M/s.R.Hemaltha, learned Senior Standing Counsel appearing for the appellant/revenue relied on the decisions of the Division Bench in the case of Commissioner of Income-tax vs. Menon Impex (P.) Ltd. ([2003] 128 Taxman 11 (Madras)), India Comnet International vs. Income-tax Officer ([2012] 26 taxmann.com 349 (SC)) and Commissioner of Income-tax, Cochin vs. Electronic Controls & Discharge Systems (P.) Ltd. ([2011] 13 taxmann.com 193 (Kerala)). The decision in Menon Impex (P) Ltd. and India Comnet International was placed for consideration before the Hon'ble Division Bench in Camiceria Apparels India (P) Ltd. and the same were distinguished and held to be not applicable to the facts on the following terms:

"21.The assessee before us has lost throughout in the proceedings before the lower authorities and the issue has been held against it based on a decision of the Tribunal in the case of ABI Showatech (India) Ltd. vs. DCIT that in turn relies on the judgment of this Court in the case of Menon Impex (supra) and other orders of the Tribunal itself.

22.In the case of Menon Impex (supra), the legal distinction argued before use and noted above has evidently not been placed for consideration before that Bench which decides the matter against the assessee following the judgment of the Supreme Court in the case of CIT vs. Sterlings Foods [1999] 104 Taxman 204/237 ITR 579, that has been rendered in the context of Section 80I of the Act.

23.As far as the decision of this Court in India Comnet (supra) is concerned, the matter travelled in appeal to the Supreme Court which has, in its judgment Indian Comnet (supra) remanded the matter to the Income Tax Appellate Tribunal for a decision afresh after detailed examination of the transaction in question."

11.The above reasoning would be a clear answer to the contention of the revenue that the decision will not be applicable. It was further argued by the revenue that the assessee has received the funds in Indian currency and therefore not eligible. This finding stems from the details furnished by the assessee in Form No.3CEB. Admittedly, the amount will be

received by the assessee through banking channels by way of convertible foreign exchange which has been defined in Section 10B(9A)(ii) which defines "convertible foreign exchange" to mean foreign exchange which is for the time being treated by the Reserve Bank of India as convertible foreign exchange for the purposes of the Foreign Exchange Management Act, 1999 and the Rules made thereunder or any other corresponding law for the time being in force. There is nothing on record to show that the convertible foreign exchange remittance did not fall within the definition as defined in Section 10B(9A)(ii). Therefore, in the considered view of this Court, the decision in the case of Electronic Control and Discharge System Private Ltd. does not render any assistance to the case of the revenue. Furthermore, on facts we are satisfied that the only activity of the assessee is export as admitted by the revenue and the income generated by the Export Unit would be eligible for the benefit of Section 10B of the Act. For all the above reasons, we find no ground to disturb the finding of the Tribunal.

12. In the result, the the tax case appeals are dismissed and the Substantial Questions of law are answered against the revenue. No costs.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar

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To

1. The Income Tax Appellate Tribunal,
Madras 'C' Bench.

2. The Commissioner of Income Tax (Appeals) 3,
Chennai-34

3. The Deputy Commissioner of Income Tax,
Corporate Circle 5(1) Chennai-34.

+1cc to Mr.G.Baskar, Advocate SR.No.25116

+1cc to Mr.T.Ravikumar, Advocate SR.No.25118

TCA.Nos.278 and 279 of 2018

PVS (CO)
GMY (28/08/2020)