

IN THE HIGH COURT OF ORISSA AT CUTTACK

ITA No. 3 of 2017

AFR

***M/s. Discoverture Solutions (India) Pvt. Appellant
Ltd., Bhubaneswar***

Mr. Sidhartha Ray, Advocate

-versus-

***Dy. Commissioner of Income Tax, Respondents
Circle 2(1), Bhubaneswar and another***

Mr. T.K. Satapathy, Senior Standing Counsel
For the Income Tax Department

**CORAM:
THE CHIEF JUSTICE
JUSTICE M.S. RAMAN**

**ORDER
08.12.2022**

Order No.

Dr. S. Muralidhar, CJ.

04. 1. This appeal filed under Section 260A of the Income Tax Act, 1961 (Act) by the Appellant/Assessee is directed against the order dated 26th April, 2017 passed by the Income Tax Appellate Tribunal, Cuttack Bench, Cuttack (ITAT), in ITA No.50/CTK/2015 for the Assessment Year (AY) 2011-12.
2. While admitting the present appeal on 27th November, 2017 the following questions were framed for consideration by this Court:
- “(i) Whether under the facts and circumstances of the case, the appellant even being under Software Technology Part (defined in Section 10(A)(2) (6) of I.T. Act, the learned Tribunal was justified to reject the Tax Exemption claimed U/s.10(A) of the Act stating the

reason that the appellant is not a unit under Special Economic Zone.

(ii) Whether under the facts and circumstances there exists any issues to be decided by the Appellant Tribunal when the respondent himself settles the issue revising the Original assessment and original demand (U/s.156 of I.T. Act) and in such circumstances whether the 2nd Appeal No.I.T.A.-50/CTK/2015 do not become infructuous.

3. On the same date, an interim order was passed staying the impugned demand under Annexure-8.

4. The background facts are that the Appellant/Assessee filed its E-return for the AY in question on 27th September, 2011 showing an income of Rs.14,80,454 claiming deduction of Rs.3,93,09,436 under Section 10A of the Act. While picking up the return for scrutiny, the Assessing Officer (AO) noticed that the Assessee had in fact claimed deduction under Section 10B of the Act. A mandatory requirement under Section 10B(5) of the Act was the filing of Form-56G in terms of Rule-16D of the Income Tax Rules (IT Rules). However, the Assessee was found to have filed Form-56F which was relatable to deduction claimed under Section 10A of the Act. In the assessment order dated 31st January, 2014 the AO noted that since the Assessee had not furnished the audit report in Form 56G, no deduction can be allowed under Section 10B of the Act. It was further noted that the Assessee had not even claimed the deduction under Section 10B of the Act in the income tax return.

5. As regards the claim under Section 10A of the Act as claimed in the return, the AO held that such a deduction was allowable for ten

consecutive AYs beginning with the AY relevant to the previous year in which the undertaking begins to manufacture or produce articles or things or computer software. The Assessee Company was incorporated in the financial year 2003-04 and had not claimed deduction under Section 10A since then. According to the AO, it could not claim deduction under Section 10A “all of a sudden after 5-6 years of its incorporation”. Therefore, the amount of Rs.3,67,15,136.09 claimed by the Assessee under Section 10A of the Act was disallowed and added back.

6. The appeal filed by the Assessee against the above assessment order was allowed by the Commissioner of Income Tax (CIT) (Appeals) by an order dated 13th November, 2014. According to the CIT(A), the Assessee, which had initially claimed deduction under Section 10A of the Act was “forced to change tack” and claimed exemption under Section 10B of the Act since Software Technology Park (STP) Units in order to avail the exemption would have to have approval of the Inter-Ministerial Standing Committee of the Department of Electronics. It was held that the error committed by the Auditor of the Assessee in filing the wrong Form-56F was at best a technical error and there was no bar on the Assessee correcting a wrong claim made during the assessment proceedings and for the AO to accept such correction. According to the CIT (A), since the Assessee was prevented by a reasonable cause for filing a revised return to correct the anomaly pointed out, it was the AO’s duty to assist the Assessee in a reasonable way to enable him to make the correct claim of exemption. Accordingly, the appeal was allowed and the AO was directed “to allow the

claim of exemption made.... after considering the relative merits of its applicability under Section 10A or 10B of the Act and the according of fair and reasonable opportunity.” It was further directed that “Form-56F/56G is to be admitted and taken on record in the interest of justice” since “contents of Forms 56F and 56G are largely similar.”

7. Aggrieved by the above order of the CIT(A), the Revenue went in appeal before the ITAT. By the impugned order dated 27th April, 2017 the ITAT allowed the Revenue’s appeal agreeing with the AO that the Assessee was not entitled for deduction under Section 10B of the Act since the audit report mandatorily required in Form-56G was not filed along with the return of income. The ITAT further held that the Assessee would not be entitled for deduction under Section 10A of the Act since it is not a unit established under the Special Economic Zone (SEZ).

8. This Court has heard the submissions of Mr. Sidhartha Ray, learned counsel appearing for the Appellant/Assessee and Mr. T.K. Satapathy, learned Senior Standing Counsel appearing for the Respondent/Department.

9. It must be noted at the outset that even before the AO, there was considerable confusion whether the Assessee was in fact claiming deduction under Section 10A of the Act or Section 10B of the Act. Apparently, in the earlier AYs, the Assessee had claimed exemption only under Section 10B of the Act. However, for the AY in question, according to the Appellant, its Auditor wrongly filed

Form-56F and thereby claiming deduction under Section 10A of the Act.

10. During the assessment proceedings, the Assessee was asked by the AO to file the tax computation sheet and also file a copy of the income tax return of the year from which it started claiming exemption under Section 10A of the Act. When those details were filed by the Assessee, the AO noticed that the Assessee had been claiming 100% deduction under Section 10B of the Act since AY 2004-05.

11. In its submission dated 30th December, 2013 the Assessee stated that it was 100% Export Oriented Unit (EOU) and that “there is a typo error in our part, we wrongly mentioned deduction u/s 10A instead of Sec.10B in the computation sheet”. A Show Cause Notice (SCN) was issued by the AO to the Assessee on 30th December, 2013 pointing out that while in the return, it had claimed deduction under Section 10A of the Act and it had also filed Form 56F, in its submission dated 30th December, 2013 it was claiming exemption under Section 10B of the Act. The Assessee was asked to show cause why the exemption under Section 10A of the Act should not be disallowed since such exemption was available “only to units established under SEZ”.

12. The Assessee again replied on 7th January, 2014 where *inter alia* it is stated as under:

“The assessee company, since approved as 100% EOU, was claimed deduction/exemption u/s. 10B and our claim has been not made incorrectly. Though a wrong form has been filed for claiming the exemption/deduction, the

assessee-company has not committed any mistake, rather the mistake has been committed by the auditor, who instead of issuing certificate in form 56G, has been issued certificate in form 56F leading to filling of ITR under different heads.

Madam, for technical mistake committed by the auditor and at the time of filling ITR which was done by outsider, the assessee company or its promoters/directors are not supposed to be penalized.

Therefore, the assessee company sincerely requesting you to kindly considers the deduction/exemption u/s. 10B on the basis of the facts and objective of the company and not on the basis of technical mistake committed at the time filling of ITR and auditor certificate.”

13. In other words, before the AO, the Assessee maintained that it was claiming exemption only under Section 10B of the Act and not Section 10A of the Act.

14. This claim of deduction under Section 10B of the Act by the Assessee was disallowed by the AO for non-compliance of the mandatory requirement of filing Form-56G. This conclusion of the AO has been concurred with by the ITAT.

15. Before this Court, although Mr. Sidhartha Ray, learned counsel appearing for the Appellant began his arguments by trying to justify how the Assessee would in fact be entitled to claim deduction under Section 10A of the Act, it became plain that throughout the assessment proceedings, the Appellant/Assessee had claimed exemption only under Section 10B of the Act.

16. Even from the order of the CIT(A) which was in favour of the Assessee, it is seen that the Assessee maintained its entitlement to claim deduction under Section 10B of the Act. The decision of the CIT(A) was also to the same effect as can be seen from the following conclusion in Para-7(b) of the order of the CIT(A):

“(b) However, as the AO did not correctly consider the claim as above, the Appellant was forced to change tack and argued for a claim of exemption u/s 10B of the Act. It is again clear that the Appellant is entitled to the claim of exemption/deduction u/s 110B and had also been claiming the same for the several preceding assessment years which claim has remained uncontested by the Department till date.”

17. With the Assessee having throughout maintained that its claim for deduction only under Section 10B of the Act, it cannot be allowed now to turn around and ask that its claim for deduction should be considered under Section 10A of the Act.

18. Therefore, the Question No.(i) framed by this Court which proceeds on the basis of the Assessee's claim under Section 10A of the Act has not been correctly framed. In terms of the Proviso to Section 260A of the Act, this Court considers it necessary to reformulate Question No.(i) as under:

“Whether the Assessee was entitled to exemption under Section 10B of the Act as claimed by it?”

19. As far as the above question is concerned, there can be no doubt that with the Assessee not having satisfied the mandatory requirement under Section 10B(5) of the Act of filing Form-56G, the exemption under Section 10B of the Act cannot be allowed. The

question is accordingly answered in the negative, i.e., in favour of the Revenue and against the Assessee.

20. As regards the second question framed by this Court, Mr. Ray submitted that the Revenue had in fact given appeal effect to the order of the CIT(A) but failed to bring this to the notice to the ITAT when the appeal was argued. According to Mr. Ray, having accepted the verdict of the CIT(A), the Revenue could not have gone in appeal to the ITAT.

21. The Court is unable to accept the above submission. The mere fact that the computation giving appeal effect to the order of the CIT(A) may have been prepared by the Revenue does not mean that it is precluded from challenging that order before the ITAT. Such computation by way of giving appeal effect would obviously be subject to the result of the Revenue's appeal before the ITAT. Consequently, the second question is answered in the negative, i.e., in favour of the Revenue and against the Appellant/Assessee.

22. As a result of the above discussion, the appeal is dismissed. The interim order passed earlier is hereby vacated.

(Dr. S. Muralidhar)
Chief Justice

(M.S. Raman)
Judge