IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 12770 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI Sd/-
and
HONOURABLE MR.JUSTICE B.N. KARIA Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	**NO**
2	To be referred to the Reporter or not ?	**NO**
3	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	**NO**

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HITECH OUTSOURCING SERVICES
Versus
COMMISSIONER OF INCOMEX TAX 3, AHMEDABAD

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Appearance:
MR B S SOPARKAR(6851) for the PETITIONER(s) No. 1
MRS MAUNA M BHATT(174) for the RESPONDENT(s) No. 1
NOTICE SERVED BY DS(5) for the RESPONDENT(s) No. 2

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 18/09/2018
ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1.00. The petitioner has challenged an order dated 09/03/2017 passed by the Principal Commissioner of Income

Tax under section 264 of the Income Tax Act, 1961 (“the Act” for short).

2.00. Brief facts are as under :-

2.01. The petitioner is a partnership firm and is engaged in the business of software development. The petitioner had filed returns of income tax for the Assessment Year 2002-03 onward claiming deduction under section 10B of the Act which grants benefit to a newly established 100% Export Oriented Undertaking (“EOU” for short). The returns so filed by the petitioner for the Assessment Year 2002-03 till 2006-07 were accepted without any scrutiny.

2.02. The return for the Assessment Year 2007-08 was taken in scrutiny. Even in such scrutiny assessment, the petitioner’s claim for deduction under section 10B was granted. This return was, however, subjected to reassessment. During such reassessment proceedings, the Assessment Officer objected to petitioner’s claim of deduction under section 10B of the Act on the ground that the petitioner did not have approval from the prescribed authority. It appears that the petitioner had put up an alternative claim under section 10A of the Act. The petitioner also filed a petition before this Court, being Special Civil Application No.12767 of 2017 and disputed the very reopening of the assessment. This petition was allowed by a judgment dated 04/09/2017 holding the reassessment to be bad.

2.03. For the Assessment Year 2008-09, deduction under section 10B was claimed and granted after scrutiny. For the

Assessment Year 2009-10, deduction under section 10B of the Act was claimed in the return filed, but during the assessment, the case was put up for deduction under section 10A of the Act which was granted. Likewise, in the Assessment year 2010-11 in the return filed, claim was made under section 10B of the Act. During the assessment proceedings, the case was set up for deduction under section 10A of the Act which was also accepted after scrutiny. To reopen such assessment, Assessing Offer issued a notice on 05/03/2015 which, as can be gathered, was within a period of four years from the end of relevant assessment year.

2.04. The petitioner objected to such process of reopening, but still participated in the reassessment and tried to justify the claim of deduction under section 10A of the Act. The Assessing Officer was not convinced. He withdrew the deduction originally granted, upon which the petitioner filed a revision petition before the Commissioner under section 264 of the Act, such revision came to dismissed by the impugned order, against which this petition is filed.

3.00. Prime challenge of the petitioner in the present petition is with respect to the very reopening of the assessment. According to the petitioner, the notice of reopening of reassessment was invalid. Counsel for the petitioner submitted that the entire claim of deduction under section 10A of the Act was throughly examined by the Assessing Officer during the original scrutiny assessment. The notice of reopening, which is based on his doubt about validity of such claim can, at the best, be said to be a change of opinion. He pointed out that under similar circumstances, the

petitioner's writ petition challenging reassessment for the Assessment Year 2007-08 came to be allowed by this Court in the above referred judgment dated 04/09/2017. He further pointed out that the Assessing Officer has selectively issued notices for reassessment for the AY 2007-08 and in the present case, for the Assessment Year 2010-11, though the facts are similar in relation to and in-between these assessment years also.

4.00. Counsel for the Department on other hand submitted that there are serious objections to the petitioner's claim for deduction under section 10A or 10B of the Act. The Assessing Officer had recorded proper reasons and exercised powers of reopening the assessment. She further submitted that the reopening of assessment was valid and the petition should, therefore, be dismissed.

5.00. To judge the validity of notices for reopening, we may first refer to the reasons recorded by the Assessing Officer for issuing such notices. The reasons read as under :-

> "2. In this connection, the reasons for reopening are as under :-
>
> In this case the assessee filed return of income for the A.Y. 2010-11 assessment year on 28.09.2010 declaring total income of Rs.3522840/- after claiming the deduction u/s. 10A of the Act of Rs.34292151/- in respect of its Ahmedabad unit of Rs.15347631/- in respect of its Chandkheda unit and Rs.35,19,956/- Cochin unit. The said return was processed u/s.143(1) of the Act on 12/02/2009. Order u/s. 143(3) of the Act was passed on 02/06/2010 determining the income of the assessee at Rs.3522840/-. On verification it is

seen that units of the assessee firm are not situated in STP. STPI Gandhinagar is located at Infocity, Gandhinagar. An STPI is established to provide various facilities to 100% computer software exporting units situated in the STP centre as well as to standalone units can get registration from the STPI for getting various benefits under the STP scheme. However, 100% deduction from tax u/s.10A(2)(i)(b) is not available as standalone units. Further, if a unit has claimed deduction u/s. 10B at the start of claiming deduction it cannot switchover to section 10A in midway as both sections stipulates continuous period of deduction starting from year of commencement of production. The assessee is engaged in software development data processing and other computer related services. The first two units are registered with STPI, Gandhinagar. As these units were stipulated outside the STPI, Gandhinagar, these were not eligible for deduction under section 10A(2)(i)(b) of the Act. It is also noticed that the assessee has in A.Y. 2002-03 to 2008-09, claimed deduction u/s.10B as per report filed in Form 56G. Moreover, as the unit has claimed deduction u/s.10B at the start of claiming deduction, it cannot switch over to section 10A in midway as both sections stipulates continuous period of deduction starting from year of commencement of production.

It was, however, noticed that income of Rs.3,42,92,151/- and Rs.1,53,47,631/- respectively were claimed as exempted income u/s 10A(2)(i)(b) and same was allowed by the AO. Moreover, the assessee does not fulfill the criteria for claiming deduction u/s.10B also in view of Honourable High Court of Delhi decision in the case of Commissioner of Income Tax V/s. Regency Creation Ltd. IT Appeal No.69 of 2008, 783 of 2009 & 1239 of 2011.

Thus, failure to disallow the claim of exemption u/s.10A(2)(i)(b) has resulted in the income chargeable to tax not being brought to tax in terms of explanation 2(i) and (ii) of Sec.147 of the Act which reads as under :

(i) the income chargeable to tax has being under assessed and

(ii) Such income has been made the subject of excessive relief under this Act since the Assessee was not eligible for deduction u/s 10B of the Act.

Hence, I have reason to believe that the income chargeable to tax to the extent of at least Rs.2,04,00,460/- has escaped assessment within the meaning of Sect.147 of the I.T. Act for the A.Y. 2010-11.

3. This office is intimating you regarding the directions issued by the Hon'ble High Court of Gujarat in the case of Sahkari Khand Udhyog Mandal Ltd. Vs. ACIT,Navsari Circle in Special Civil Application No.3955 of 2014. The directions are reproduced hereunder:-

(i) Once the Assessing Officer serves to an assessee a notice of reopening of assessment under section 148 of the Income Tax Act, 1961, and within the time permitted in such notice, the assessee files his return of income in response to such notice, the Assessing Officer shall supply the reasons recorded by him for issuing such notice within 30 days of the filing of the return by the assessee without waiting for the assessee to demand such reasons.

(ii) Once the assessee receives such reasons, he would be expected to raise his objections, if he so desires, within 60 days of receipt of such reasons.

(iii) If objections are received by the Assessing Officer from the assessee within the time permitted hereinabove, the Assessing Officer would dispose of the objections, as far as possible, within four months of date of receipt of the objections filed by the assessee.

(iv) This is being done in order to ensure that sufficient time is available with the Assessing Officer to frame the assessment after carrying out proper scrutiny. The requirement and the time-frame for supplying the reasons without being demanded by the assessee would be applicable only if the assessee files his return of income within the period permitted in the notice for reopening. Likewise the time frame for the Assessing Officer to dispose of the objections would apply only if the assessee raises objections within the time provided hereinabove. This, however, would not mean that if in either case, the assessee misses the time limit, the procedure provided by the Supreme Court in the case of GKN Driveshafts (India) Ltd (supra) would not apply. It only means that the time frame provided hereinabove would not apply in such cases."

5.01. The reasons are somewhat lengthy, however, in nutshell the stand of the Assessing Officer which can be gathered from such reasons is that petitioner's Unit is not situated in the Software Technology Park, Gandhinagar and the petitioner's claim, therefore, for deduction under section 10A for its standalone unit was not valid.

5.02. His further stand was that the petitioner cannot midway changed claim of deduction from section 10B to 10A of the Act, both being entirely separate and distinct provisions.

5.03. In this context, the contention of Mr. Soparkar, learned advocate for the petitioner was that the petitioner is 100% EOU and is also engaged in software development. The petitioner's unit is, therefore, entitled to deduction - both under Sections 10B or 10A of the Act. His further stand is that the requirement that a unit must be situated within the Software Development Park, is not one of the essential conditions of deduction under section 10A of the Act. We are, however, not required to comment finally on these aspects of the matter, since in our opinion, reopening was impermissible and bad in law on the other grounds.

5.04. In this context, we may recall that the return filed by the petitioner was scrutinized before the order of assessment was passed. During such scrutiny assessment, detailed correspondence took place between the petitioner and the Assessing Officer. The petitioner’s principal claim of deduction under section 10A came up for specific attention of the Assessing Officer. From the petitioner’s letter written during the assessment proceedings it would reveal that the petitioner had given detailed reply with respect to the query raised by the Assessing Officer with respect to his claim. A portion of the letter, relevant for our purpose may be reproduced as under:-

> “1. Regarding Board Approval to claim 10A and 10B Claim:
>
> With respect to above subject matter and reference, we have enquired about the details in respect of matter as mentioned about the contained mentioned in your show cause notice dated 15/12/2011. And we also

read about the respective policy, acts and rules as lay down by respective Ministry while framing the scheme of the development of the Unit established under the Software Park of India and Special Economic Zone. And in respect of the same our submissions are as under :-

1. According to them the approval to set up a unit at SEZ and STPI are under Automatic Route. No specific reply or approval letter they have forwarded to the unit established under the specified STP/SEZ Act/Rules. We herewith submitting the Rules specified under the respective Act/Rules.

2. It is further state that the assessee gets its renewal in both units and hence it is established that the unit already gets the approval of Board. Further the Board as per rules laid down if not ratify the Development Commissioner permission in that case Development Commissioner either cancel its registration or will not renew the permission. Further under the respective act unit is not enjoying any right to get ratification letter from the respective board and the ratification letter is the matter between the Development Commissioner and respective Board. Hence it is easily presumed that Development Commissioner will take necessary action and ratification required by board is the administrative matter of STP/SEZ office.

3. Since the unit has no right enjoyed the get any letter in accordance with the respective law except if there any modification or cancellation of the proposal by the Board containing the reasons for that. So we herewith request you to kindly call the details from the respective office. The address of the Software Technology Park of India, Gandhinagar office (Zone for

– Gujarat, Goa, Diu and Daman) :

Director, Software Technology Partks of India
01/B, Info Tower-1,
Infocity, Airport Road,
Near Indroda Circle,
Gandhinagar-382007 (Gujarat) India.

4. All the units have necessary custom bonding notified area and document of the same submitted earlier.

5. The revenue department already verified and approved the claim under the relevant section 10A and 10B of the Act in all the previous preceding.

6. It is further noted that the Hon'ble Apex Court in the case of Bajaj Tempo Ltd. Vs. CIT (1992) 104 CTR (SC) 116 : (1992) 196 ITR 188 (SC) has held that the provision for incentive for growth and development should be interpreted liberally. It should be construed so as to advance objective and not frustrate it. Similar view has been taken in the case of CIT V/s Gwalior Rayon Silk Mtg. Co. Ltd. (1992) 104 CTR (SC) 243 : (1992) 196 ITR 149 SC. In this case it has been held that the provision in the taxing statute for deduction exemption or relief should be construed reasonably. It is trite law that the expression used in taxing statute would ordinarily be understood in the sense in which it is harmonious with the object of the statute to effectuate the legislative intention. It is equally settled law that if the language is plain and unambiguous, one can only look fairly at the language use and interpret to give effect to the legislative intention. Nevertheless tax laws have to be interpreted reasonable and in consonance with justice adopting a purposive approach. The contextual meaning has to be

ascertained and given effect. The provisions of s.10A/10B of the Act are intended to confer a benefit to the assessee. The special provisions cannot be used as a lever to the disadvantage of the assessee by thrusting exemption under the said section eve though declaration to opt out of the same is specifically filed by the assessee. No requirement can be read into the provision of s.10A/10B of the Act to the effect that exemption, once claimed has to be necessarily thrust on the assessee in subsequent years. To read such restriction would be doing violation of the language of the section. A reliance in this regard can be placed on the decision of Supreme Court in the case of CIT V/s. Mahendra Mills (2000) 159 CTR (SC) 381 : 243 ITR 56 (SC) wherein it has been held that depreciation cannot be thrust upon the assessee in the absence of the claim made by the assessee in this behalf or on the assessee having withdrawn the claim by filing a revised return.

7. Software Technology Parks are required to be approved by inter ministerial standing committee of Development of Electronics as per STPI Scheme Notification No.4 (RE 95/92-97) dated 30.04.1995. But due to automatic route of approval of the STPI unit according to section the CBDT issued by the instruction No.1 of 31.03.2006 clarifies that STP is unit approved by Directors of STPIs should not be denied only for the above reasons.

8. In the case of Infotech Enterprises Ltd. v. JCIT (2003) 85 ITD 325 (Hyd) it was held that for the purpose of sec.10B, 100% EOU is only that which is so approved by Board approved by the Central Government in exercise of powers conferred under sec.14 of the Industrial Development and Regulation

Act, 1951 and a 100% EOU under the STP Scheme could not be equated with 100% EOU approved by the Board under sec.14. It was further noted that the conditions that govern units set up under ETP scheme are different from those that governed the units set up as 100% EOUs and so approved by the Board. Though some of the conditions are common and overlapping, other conditions like the satisfaction of the employment criteria, foreign exchange etc. are apparently different.

9. We further submitting the respective rules and guidelines issued by the Government of India while introducing the STP/SEZ Scheme to promote industries development in the country.

Ia. Regarding of Units at Ahmedabad establishment and registered under the Software Technology Park of India:

Software Technology Parks of India (STPI) was established and registered as an autonomous society on 6th June, 1991 under the Society Registration Act, 1860, under the Development of Information Technology, Ministry of Communication and Information Technology, Government of India.

As per the guidelines issued the Software Technology Park of India in respect of establishment of a unit in the STPI zone are as under:

xxx xxx xxx"

5.05. In a further letter which is found at page 66 along with the petition, during such assessment proceedings, the petitioner had made further submissions with respect to such claim, which are as under :-

"1. Regarding 50% claim u/s 10A for SEZ Unit :

Regarding Unit established in S3Z, Cochin covered u/s 10A (1A).

As submit earlier reply w.r.t. for claiming deduction under section10A (1A) in respect of our Kakkanad, Cochin Unit. The commercial production and LOP issued on 9/19/2003.IL: CSEZ dated 6th December, 2003. Our Commercial Production started w.e.f. 01.04.2004. Hence, accordingly Asst. Year 2005-06 was our first year for claiming exemption for 100% exemption and from the Asst. Year 2010-11 the 6th year where we claiming the 50% exemption u/s 10A sub-section (1A) clause (I) of the Act from the date of begins to manufacturing or produce articles or things or provide any services.

Regarding two units established in STPI, Gandhinagar covered u/s 10A (2)(i)(b):

As submitted earlier reply w.r.t. documents for claiming deduction under section 10A w.r.t. sub-section (1) and (2) both the unit newly established i.e. Ahmedabad (Main) and Chandkheda Unit started its production on 14.01.2002 and 01.04.2007. It is further stated the letter of approval (LOPs) from STPI issued on 8.01.2002 and 12.06.2006. Hence the all units qualifies under section 10A.

According to section 10A(5) we herewith attached the report certified by Kishor Goyal & Co. Chartered Accountant firm for your kind perusal.

We herewith reproduce the section 10A for your kind appraisal.

xxx xxx xxx"

5.06. In the order of assessment that the Assessing Officer passed after such scrutiny on 20/12/2012 with respect to petitioner's claim of deduction under section 10A of the Act, with respect to its different Units, he made the following observations :-

> "2. The assessee has three units, two at Ahmedabad and one at Cochin. The turnover of the assessee firm is of Rs.12,84,08,375/-, Rs.1,95,41,341/- and Rs.6,34,97,979/- in respect of Ahmedabad branch, Chandkheda branch and Cochin branch respectively. The assessee started its commercial production at Cochin w.e.f. 01,04.2004 and A.Y. 2005-06 was the first year of claiming 100% exemption u/s.10A(IA) of the I.T. Act. Therefore, in the year under consideration, i.e. in the 6th year, the assessee has offered 50% of profit from Cochin branch for taxation. The profits from both the Ahmedabad units have been claimed exempt u/s.10A(2)(i)(b) of the I.T. Act."

5.07. Thus, it was after a detailed scrutiny, the Assessing Officer had originally accepted the petitioner's claim for deduction under section 10A of the Act. Not only that he raised multiple queries, such queries were replied to by the petitioner. In the order of assessment also, he had given brief reasons for accepting the petitioner's claim.

5.08. It would now, therefore, not be open for the Assessing Officer to reopen such assessment on the principal claim of the petitioner for deduction on the ground that some other elements or aspects of the claim were not examined. This would clearly be a case of change of opinion. As held by the Supreme Court in the case of CIT Versus Kelvinator of India

Ltd. reported in [2010] 320 ITR 561 (SC), even post 01/04/1989 Amendment in section 147 of the Act, concept of change of opinion would be germane.

5.09. Under somewhat similar circumstances, in the case of the petitioner for Assessment Year 2007-08 in Special Civil Application No. 12767 of 2017, by a judgment dated 4/9/2017, we had quashed the reassessment, making the following observations :-

> "9. In the present petition, the petitioner having participated in the assessment proceedings and thereafter having challenged the order of assessment before the Commissioner in revision petition under section 264 of the Act, has filed the present petition. Nevertheless, the central issue is with respect to the validity of the reopening of the assessment by the Assessing Officer. In this context relevant facts are that the assessment for the assessment year 20072008 was completed after scrutiny. The notice for reopening of such assessment came to be issued beyond a period of four years from the end of assessment year in question.
>
> 10. In this context we have noticed that the Assessing Officer in th original assessment proceedings had examined the assessee's claim of deduction under section 10B of the Act. It is not as if such claim went unnoticed or unscrutinized. He wanted to be specific about the assessee's claim for deduction and therefore, he raised queries in respect to the same in response to which the assessee, as noted, placed number of

documents and materials on record. Principally, the assessee pointed out that it has been granted certification by STPI under the Software Technology Parks Scheme. The assessee also supported the claim on merits pointing out that the Development Commissioner had granted certificate of commencement and that foreign exchange remittances were made within six months from the end of the financial year. After such scrutiny, the Assessing Officer passed the original order of assessment in which he did not reject the claim of deduction under section 10B of the Act. In fact, he accepted the claim substantially making minor disallowance to the extent the assessee had not received foreign exchange payment within the prescribed period.

11. It can thus be seen that the assessee's claim of deduction under section 10B of the Act was examined minutely by the Assessing Officer. The assessee pointed out that it enjoyed certification under STPI. If the Assessing Officer was of the opinion that such certification was inadequate and did not substitute for the requirement of approval by the Board appointed by the Government of India, under the Industries (Development and Regulation) Act, 1961, it was always open for the Assessing Officer to examine this issue further or to reject the assessee's claim in its entirety. He however, accepted the claim accepting the assessee's certification as sufficient compliance with the statutory requirements. There was no failure on part of the assessee to disclose necessary facts. Both on the ground of the non failure of assessee to disclose necessary facts and on the ground of scrutiny during original assessment proceedings, notice of reopening on this issue was not permissible. The Assessing Officer as well as the Commissioner both failed to appreciate

this legal lacuna in the notice of reopening."

6.00. In the result, we hold that the notice for reassessment was invalid. Consequential order of assessment and the order of Principal Commissioner of Income Tax-3, Ahmedabad passed in revision petition for Assessment Year 2010-2011 dated 09/03/2017, are therefore, set aside. Present petition is accordingly allowed. Rule is made absolute.

Sd/-
(AKIL KURESHI, J)
Sd/-
(B.N. KARIA, J)

RAFIK