

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

D. B. Income Tax Appeal No. 109/2018

M/s. Village Antique & Ethnic, B-141, Vidhyut Nagar, Queens Road,
Jaipur.

.....Appellant

Versus

Income Tax Officer, Ward-3(1), Jaipur.

.....Respondents

For Appellant(s) : Mr. Sarvesh Jain.

For Respondent(s) : Mr. Anuroop Singhi with Mr. Aditya
Vijay, Mr. N.S. Bhati.

**HON'BLE MR. JUSTICE MOHAMMAD RAFIQ
HON'BLE MR. JUSTICE GOVERDHAN BARDHAR**

Judgment

REPORTABLE

26/09/2018

(Per Hon'ble Mr. Justice Mohammad Rafiq)

This is assessee's appeal against the judgment dated 16.06.2017 passed by the Income Tax Appellate Tribunal, Jaipur Bench (SMC), Jaipur (for short 'the ITAT'), dismissing the appeal filed by it against the order dated 10.03.2016 passed by the Commissioner of Income Tax (Appeals), Aligarh at Jaipur (Camp Office), [for short 'the CIT(A)'], whereby also the appeal filed by the appellant-assessee was dismissed, confirming the order dated 08.03.2013 passed by the Income Tax Officer, Ward-3(1), Jaipur (for short 'the Assessing Officer').

The appellant is engaged in the business of manufacturing and exports of wooden handicraft items. During the Assessment Year 2008-09, the appellant filed the returns claiming deduction of Rs. 46,77,076/- under Section 10BA of the Income Tax Act, 1961 (for short 'the Act'), which was allowed by the Assessing Officer. The

case was selected for scrutiny and the original assessment was completed under Section 143(3) of the Act on 19.11.2010 at the returned income. Later on, it was noticed that the assessment under Section 143 (3) of the Act was completed for the Assessment Year 2008-09 on 19.11.2010 at the total income of Rs. 8,46,320/- by allowing deduction under Section 10BA of the Act at Rs. 46,77,076/- as claimed by the assessee. The total business income was computed at Rs. 50,11,332/- before allowing the said deduction. Thus, 93.33% of the total income was allowed as deduction. Perusal of the assessment records revealed that Duty Draw Back amounting to Rs. 17,02,681/- was included in the business income of Rs. 50,11,332/-. The Assessing Officer, therefore, issued notice under Section 148 of the Act on 29.03.2012 to the appellant-assessee. The appellant-assessee through its authorised representative vide letter dated 03.04.2012 stated that the original return filed on 30.09.2008 may be treated as the return filed in response to the notice under Section 148 of the Act. Subsequently, on change of incumbent, notices under Sections 143(2) and 142(1) of the Act were issued on 26.12.2012 along with the show cause letter requiring the assessee to show cause as to why the deduction under Section 10BA of the Act claimed and allowed at Rs. 46,77,076/- instead of Rs. 30,86,971/-, which was in excess of Rs. 15,88,601/- may not be disallowed and added to total income of the appellant-assessee. The appellant-assessee through its authorised representative submitted letter dated 16.01.2013 stating that there is no restriction in any of the sub-sections of Section 10BA of the Act while working out the profits of the business, the amounts received on account of Duty Draw Back (DDB) and Duty Entitlement Pass

Book (DEPB) are to be excluded for allowing the deduction under this Section. It was further stated that the profits of the business were derived from the export of eligible articles. A request was made to drop the proceedings initiated under Section 148 read with Section 147 of the Act. It was also submitted that the benefit under Section 10BA of the Act was also allowable as certified by the auditors and the same may be allowed and not be added to the taxable income.

The Assessing Officer did not find the explanation furnished by the appellant-assessee as convincing and maintained that the receipts of Duty Draw Back were not eligible for deduction under Section 10BA of the Act as the same were not derived from the export of eligible articles or things which was the prime condition of eligibility for such deduction. The appellant-assessee had claimed deduction under Section 10BA of the Act at Rs. 46,77,076/-. The total business income was computed at Rs. 50,11,332/- before allowing the said deduction. Thus, 93.33% of total income was allowed as deduction. However, on verification of the assessment records, it was found that the Duty Draw Back amounting to Rs. 17,02,681/- were included in the total business income of Rs. 50,11,332/-. The receipts on Duty Draw Back were not eligible for deduction under Section 10BA of the Act as per the judgment rendered by the Supreme Court in ***Liberty India Vs. Commissioner of Income Tax, (2009) 9 SCC 328***, as the same were not derived from the export of eligible articles or things. Therefore, while allowing deduction under Section 10BA of the Act, the profit and gain from export of eligible articles is to be determined at Rs. 33,08,651/- by reducing the amount of Duty Draw Back of Rs.

17,02,681/- from total business income of Rs. 50,11,332/- and 93.33% thereof, which worked out at Rs. 30,86,971/-, is eligible for allowing the deduction under Section 10BA of the Act as against Rs. 46,77,076/- as claimed by the appellant-assessee. It was further noted that since the appellant-assessee had willfully concealed its income and given inaccurate particulars of income by way of claiming excess deduction under Section 10BA of the Act, the penal provisions envisaged under Section 271 (1) (c) of the Act were clearly attracted in the case and the penalty proceedings were ordered to be initiated separately.

Being aggrieved, the appellant-assessee filed appeal before the CIT(A) against the aforesaid order passed by the Assessing Officer. The first argument of the appellant-assessee was that the Assessing Officer had erred in law as well as in facts in initiating the proceedings under Section 148 read with Section 147 of the Act on the strength of subsequent judgment of the Supreme Court without forming requisite belief "as to escapement of income". This argument was rejected by the CIT(A) holding that the Assessing Officer in its earlier order had not considered issue of allowability of deduction under Section 10BA of the Act in respect of Duty Draw Back because had he considered this issue, there would have been some query in this regard but no such query has been indicated by the appellant-assessee. The Assessing Officer could not apply his mind as there was no evidence that he had formed his opinion on this issue. It cannot be alleged that the re-assessment proceedings have been initiated on the basis of change of opinion.

The second argument of the appellant-assessee before the CIT(A) was that the Assessing Officer had erred in law as well as

in facts in treating the benefit of Rs. 15,88,601/- on DEPB and DDB not allowable under Section 10BA of the Act to the assessee firm. Even this argument was rejected by the CIT(A) by relying upon the judgment of the Supreme Court in **Liberty India (supra)**, holding that duty draw back and such other incentives are not profits derived from the eligible business and accordingly exemption under Section 10BA of the Act cannot be allowed in respect of Duty Draw Back and other export incentives. The argument of the appellant-assessee was that the judgment of the Supreme Court in **Liberty India (supra)** was in respect of deduction under Section 80IA of the Act and the same cannot be applied to the case of exemption under Section 10BA of the Act, was not accepted by the CIT(A), which in taking that view relied upon the judgment of ITAT Bench Mumbai in the case of **Tessitura Moti India Pvt. Ltd. Vs. ITO, 2013 TIOL 56 ITAT-Mum**, which was delivered in the context of Section 10B of the Act and the judgment of the ITAT Bench Jodhpur in the case of **ITO Vs. V.J. Home Pvt. Ltd. 125 TTJ 215 (Jodh)** wherein the judgment of the Supreme Court in the case of **Liberty India (supra)** was relied and held that Duty Draw Back and DEPB incentives are not profit and gains derived by the industrial undertaking and hence no exemption is available under Section 10BA of the Act on such incentives. The appeal of the appellant-assessee was dismissed by the CIT(A) vide judgment dated 10.03.2016.

The appellant-assessee thereafter filed second appeal before the ITAT assailing the aforesaid judgment passed by the CIT(A). The ITAT concurred with the view taken by the CIT(A) and dismissed the appeal of the appellant-assessee vide impugned

judgment dated 16.06.2017. Thereafter, the appellant-assessee filed an application before the ITAT seeking recall/rectification of aforesaid judgment, but that application was also dismissed by the ITAT vide order dated 16.01.2018. Hence, this appeal.

This Court vide order dated 24.04.2018 admitted the present appeal on the following substantial questions of law:

“i) Whether learned ITAT were right in upholding the action of assessing officer in initiation of re-assessment proceedings u/s 148 of the IT Act, 1961 and consequent assessment made u/s 143(3)/147 of the IT Act, 1961?

ii) Whether learned lower authorities were justified in holding that deduction u/s 10BA of the IT Act, 1961 is not available to the appellant on DEPB and DDB received by appellant and thereby confirming disallowance of deduction to the extent of Rs. 15,88,601/- u/s 10BA of the IT Act, 1961?”

Mr. Sarvesh Jain, learned counsel for the appellant-assessee argued that Section 147 of the Act empowers the Assessing Officer to reopen an assessment if he has “reason to believe” that income has escaped assessment. However, in the present case, the appellant-assessee had furnished all the details as per query raised by the Assessing Officer, which was duly considered by him during the course of original assessment. In the audit report, the claim was made in Form 56H which revealed that the profit of the assessee firm was eligible for deduction under Section 10BA of the Act. The Assessing Officer, during the course of the assessment proceedings under Section 143(3) of the Act, vide questionnaire issued to the appellant-assessee, had asked to explain whether conditions as laid down for claiming of deduction under Section 10BA of the Act were fulfilled to which a detailed reply was submitted by the appellant-assessee and the Assessing Officer, after

considering the reply, allowed the deduction under Section 10BA of the Act. The Assessing Officer therefore on the basis of mere change of opinion could not have reviewed the assessment in the garb of re-assessment. Learned counsel, in support of this argument, relied upon the judgment of the Supreme Court in **Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, (2010) 2 SCC 723** and **Indra Company Limited Vs. ITO, (1971) 80 ITR 559 (Cal.)**, wherein it was held that where the assessee had disclosed all the material facts and the revenue did not file any appeal against the order of the assessment granting relief to the assessee, the assessment cannot be reopened on the same issue following a later Supreme Court judgment. It is argued that in fact in the present case, the judgment of the Supreme Court in **Liberty India (supra)** was pronounced on 31.08.2009 which was prior to passing of assessment order under Section 143(2) on 19.11.2010. There was thus no material with the Assessing Officer to reopen the assessment and he erred in law in reopening the assessment only on the basis of mere change of opinion.

Mr. Sarvesh Jain, learned counsel submitted that the Assessing Officer has failed to appreciate the fact that the DEPB and DDB are inextricably linked to the export business of the appellant-assessee and they have to be regarded as part of profits from export business only. The main object of DEPB/DDB is to neutralize the incidence of input cost of raw material and other manufacturing costs. It is basically part and parcel of trading and manufacturing activity and can be considered as part of trading activity of exports only, reducing the cost of raw material and production expenses. It is in the nature of a rebate or remission on the purchase price of raw

material and cost of manufacturing expenses and production. The handicraft industry has to survive in global competition and has to compete with dealers and manufacturers of various other countries. For this purpose, DEPB and DDB have been granted to exporters like the appellant to reduce the cost of production/manufacturing so that their handicraft articles can be exported in the global market at competitive rates. It is argued that the lower authorities have failed to appreciate that the said amounts of DEPB and DDB have been separately disclosed in the Profit and Loss Account with a view to make a true and full disclosure of the relevant facts to the concerned outside world. Therefore, the said amounts of DEPB and DDB are parts of profits of the export business carried on by the assessee and the same have rightly been considered as eligible for grant of deduction under Section 10BA of the Act. It is argued that grant of deduction under Section 10BA of the Act to the appellant-assessee has been accepted by the Assessing Officer himself who has accepted such claim on the entire income except on the amount of DEPB and DDB.

Mr. Sarvesh Jain, learned counsel argued that the lower authorities have failed to appreciate the fact that the sale proceeds of DEPB licences are now treated as business income by virtue of amendment to Section 28 of the Act, especially Section 28(iii) (c), (d) of the Act which specifically states that income from DEPB and DDB will be income chargeable to income tax under the head profits and gains of business or profession. The Judgment of the Supreme Court in the case of ***Liberty India (supra)*** is in the context of deduction under Section 80IA whereas the claim of the appellant-assessee is in relation to deduction under Section 10BA of the Act.

Therefore, the ratio of the judgment in ***Liberty India (supra)*** would not be applicable to the present case. In ***Liberty India (supra)***, the Supreme Court dealt with provisions of Section 80IA of the Act wherein no formula was laid down for computing the profits derived by the undertaking whereas sub-section (4) of Section 10BA of the Act has provided formula for computation of profit derived by the undertaking from the export. Further sub-section (1) of Section 10BA of the Act specifies that the deduction under Section 10BA of the Act is allowed out of the profits and gains derived by the undertaking from the export out of India. It is, therefore, argued that the wordings used in this Section are, "profits of the business of the undertaking", which are always the net profit as declared by the undertaking and computed in terms of Section 28 of the Act. Learned counsel in support of this argument relied upon the judgment of this Court in the own case of the appellant-assessee being ***D.B. Income Tax Appeal No. 65/2011, Commissioner of Income Tax-I Vs. Village Antique and Ethnic decided on 22.08.2017***, though in respect of different assessment year where deduction under Section 10BA was allowed to the assessee by the Assessing Officer, which was reversed by the CIT(A) but the ITAT restored back the deduction and the Revenue filed appeal thereagainst before this Court. The aforesaid appeal was admitted on the substantial question of law that whether the view taken by the CIT(A) that the assessment order as regards deduction under Section 10BA of the Act was erroneous and prejudicial to the interest of the Revenue for having been made without proper verification and whether the ITAT was justified in setting aside the order passed by the CIT(A). The aforesaid question was answered by the Co-

ordinate Bench of this Court in favour of the appellant-assessee and against the Revenue vide judgment dated 22.08.2017. Learned counsel in support of his arguments relied upon the judgments of the Supreme Court in ***Topman Exports Vs. Commissioner of Income Tax, Mumbai, (2012) 3 SCC 593; Commissioner of Income Tax Vs. Meghalaya Steels Limited, (2016) 6 SCC 747.***

Mr. Anuroop Singhi, learned counsel for the respondent opposed the appeal and supported the judgment passed by the ITAT which has upheld the judgment of the CIT(A) and the view taken by the Assessing Officer and submitted that the appeal be, therefore, dismissed. In support of his arguments, learned counsel relied upon the judgments of the Supreme Court in ***Liberty India (supra); Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., (2008) 14 SCC 208; Raymond Woollen Mills Ltd. Vs. Income Tax Officer and Ors., (2008) 14 SCC 218; T.S. Balaram Vs. Volkart Brothers, Bombay, (1971) 2 SCC 526;*** judgments of this Court in ***CIT, Jaipur Vs. M/s. Nash Fashions (D.B. Income Tax Appeal No. 464/2009 along with other connected matter decided on 29.05.2007); Ranjana Johari Vs. Assistant Commissioner of Income Tax, Circle-6, Jaipur (D.B. Income Tax Appeal No. 61/2016 decided on 23.10.2017).***

This Court vide order dated 24.04.2018, while admitting this appeal, framed the first question of law to the effect that whether learned ITAT was right in upholding the action of the Assessing Officer in initiation of re-assessment proceedings under Section 148 of the IT Act, 1961 and consequent assessment made under Section 143(3) /147 of the IT Act, 1961. On hearing learned

counsel for the parties and perusing the material on record, we find that the questionnaire issued to the appellant-assessee during the assessment proceedings and the assessment order dated 19.11.2010 passed on that basis make it clear that no information with regard to DEPB or Duty Draw Back was furnished by the appellant. There was indeed no adjudication on that aspect of the matter and, therefore, the concurrent view taken by the lower authorities cannot be faulted with. The appellant failed to show from the record whether the Assessing Officer has indeed considered the issue of allowability of deduction under Section 10BA of the Act in respect of Duty Draw Back. Had this issued been actually considered, some query would certainly have been raised on this aspect and reply thereto, if any, would also have been submitted by the appellant. Obviously, the Assessing Officer did not apply his mind to this aspect of the matter. Since the appellant failed to point out that the Assessing Officer formed any opinion on this issue, it cannot be held that initiation of re-assessment proceedings under Section 148 of the Act was based on mere change of opinion. It is only when the Assessing Officer later realised that the deduction under Section 10BA of the Act was not allowable in respect to Duty Draw Back and that exemption of Rs. 15,88,601/- was allowed on account of this mistake, he initiated re-assessment proceedings by recourse to Section 148 of the Act vide notice dated 29.03.2012. Thus, the aforesaid question of law is answered in favour of the Revenue and against the appellant-assessee.

Coming now to the second question of law framed by this Court that whether learned lower authorities were justified in holding that the deduction under Section 10BA of the IT Act, 1961 is not

available to the appellant on DEPB and DDB received by appellant and thereby confirming disallowance of deduction to the extent of Rs. 15,88,601/- under Section 10BA of the IT Act, 1961, we find that the CIT(A) relying upon the judgment of the Supreme Court in ***Liberty India (supra)*** held that Duty Draw Back and other such incentives are not profits derived from the eligible business and accordingly exemption under Section 10BA of the Act cannot be allowed in respect of Duty Draw Back and other export incentives. The argument of the appellant-assessee has been that the judgment of the Supreme Court in ***Liberty India (Supra)*** arose out of the deduction under Section 80IA and the same cannot be extended to the exemption under Section 10BA of the Act. The CIT(A), in this behalf, has relied on the judgment of the ITAT Bench Mumbai in the case of ***Tessitura Moti India Pvt. Ltd. (supra)***, judgment of the ITAT Bench Jodhpur in the case of ***ITO Vs. V.J. Home Pvt. Ltd. (supra)***. But the appellant has now before this Court relied on judgments of the Supreme Court in ***Topman Exports (supra)***; ***Commissioner of Income Tax Vs. Meghalaya Steels Limited (supra)***. In fact, the Co-ordinate Bench of this Court referring to aforesaid two judgments as also another judgment of this Court in ***CIT Jaipur Vs. Suresh Kumar Bajoria (D.B. Income Tax Appeal No. 294/2008 decided on 18.05.2017)*** remanded the matter back to the Assessing Officer to reconsider the entire material all over again. In yet another judgment in the case of ***M/s. Maharani Art Emporium Vs. Income Tax Officer, Ward-1(3), Jodhpur (D.B. Income Tax Appeal No. 151/2010 decided on 09.05.2018)***, the Co-ordinate Bench of this Court has followed the same course of action. Therefore, while not deciding second

substantial question of law framed in this appeal on merits, this Court deems it appropriate to adopt the same course of action.

In the result, the appeal is allowed in part. Impugned judgments are set aside to that extent and the matter is remanded back to the Assessing Officer to decide the same afresh in accordance with law, however, leaving it open for both the parties to raise all the contentions before the Assessing Officer. We make it clear that we have not expressed any opinion so far as the second substantial question of law is concerned.

Stay Application No. 1179/2018 stands disposed of.

(GOVERDHAN BARDHAR),J

(MOHAMMAD RAFIQ),J

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