

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL No.104 of 2000****For Approval and Signature:****HONOURABLE MR. JUSTICE AKIL KURESHI
HONOURABLE MS. JUSTICE HARSHA DEVANI**

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the civil judge?

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EXPO PACKAGING - Appellant(s)**Versus****ACIT - Opponent(s)**

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Appearance:

MR RK PATEL for Appellant(s): 1,
MR MANISH BHATT for Opponent(s): 1,

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CORAM : HONOURABLE MR. JUSTICE AKIL KURESHI**and****HONOURABLE MS. JUSTICE HARSHA DEVANI****Date : 25/06/2012****ORAL JUDGMENT
(Per : HONOURABLE MS. JUSTICE HARSHA DEVANI)**

1. The appellant – assessee has challenged the order dated 15th December, 1999 passed by the Income Tax Appellate Tribunal, Rajkot Bench (hereinafter referred to as 'the Tribunal') in ITA No.1382/Ahd/93.

2. Having regard to the controversy involved in the present case, it would be necessary to refer to the facts in some detail including the facts relating to the previous assessment years. The assessment year is 1990-91 and the relevant accounting period is the year ended on 31st March, 1990. The assessee, a partnership firm, is engaged in the manufacture of corrugated boxes having its factory in the Kandla Free Trade Zone. The assessee firm was formed on 21st October, 1981 and commenced manufacturing activities on 20th July, 1982. Its first previous year was the year that ended on 31st December, 1981. The assessee filed its return of income for assessment year 1982-83 declaring nil income. Since the assessee had not commenced manufacture or production of articles or things, the provisions of section 10A of the Act were not applicable to it in the said assessment year. By an application dated 1st February, 1983, the assessee applied for permission to change the previous year and to complete the books of accounts on 30th June, 1983 relevant to the assessment year 1984-85. Thereafter, the assessee filed its return of income for assessment year 1984-85 on 30th June, 1984 declaring loss of Rs.1,69,890/-. On 24th November, 1986, during the course of the assessment proceedings, the assessee gave a declaration in writing to the effect that the provisions of section 10A of the Act may not be made applicable for the previous year ending on 30th June, 1983, that is, for assessment

year 1984-85 and also for assessment year 1985-86 ending on 30th June, 1984 and that the same may be made applicable for assessment years 1986-87 to 1990-91. The Assessing Officer observed that a declaration under section 10A(7) of the Act has to be filed before the expiry of the time allowed under sub-section (2) of section 139 of the Act and that the assessee had not filed such declaration alongwith the return of income but had filed the same on 24th November, 1986, after a period of more than two years. The Assessing Officer held that section 10A of the Act was applicable to the initial assessment year that is, 1984-85, viz., the year under consideration and four subsequent years and framed assessment under section 143(3) read with section 10A of the Act. The assessee carried the matter in appeal before the Commissioner (Appeals) contending that the return showing loss was filed by the assessee and that the assessee did not derive any profit or gain during the previous year relating to assessment year 1984-85 and as such, the Assessing Officer was not justified in treating the return of the assessee as one under section 10A of the Act. The Commissioner (Appeals) held that the Assessing Officer was not justified in applying the provisions of section 10A to the case of the assessee for assessment year 1984-85. Revenue preferred appeal before the Tribunal which held that the assessee had filed a declaration in writing on 26th November, 1986 before the assessment was completed which was to be taken as if the assessee had utilised the option provided under section 10A(7) of the Act and as such, the Assessing Officer was not justified in framing assessment order under section 10A of the Act. It was, however, observed that the observations made by the Commissioner (Appeals) that the

assessee shall be entitled to the benefit of section 10A for five years from assessment year 1986-87 to 1990-91 was uncalled for as the claim of the assessee for those years was not a matter in issue before him.

3. For the assessment year 1985-86, the assessee filed its return of income on 9th September, 1985 declaring the total income at nil. In the statement of income filed with the original return, the assessee had shown the total income at Rs.1,05,564/- and the entire income was claimed as exempt under section 10A of the Act. Subsequently, pursuant to a notice dated 28th January, 1991 issued under section 148 of the Act, the assessee filed return of income on 28th February, 1991 in which it withdrew its claim for exemption under section 10A of the Act and declared total income of Rs.1,05,564/-/. The Assessing Officer, however, made assessment on protective basis as the assessee had offered the entire income to tax.

4. In respect of assessment years 1987-88 and 1988-89, the income was assessed at nil. In respect of assessment year 1989-90, the Assessing Officer held that since the initial year for availing of exemption under section 10A of the Act was 1984-85, the period of five years came to an end in assessment year 1988-89 and hence, the assessee was not entitled to exemption under section 10A of the Act beyond assessment year 1988-89. The assessee carried the matter in appeal before the Commissioner (Appeals) who followed his earlier order and allowed the ground of appeal. Revenue went in appeal to the Tribunal. Before the Tribunal, the representatives of both the parties submitted that the

controversy involved stands covered in favour of the assessee by the order passed by the Tribunal in ITA No.3005/Ahd/1990 dated 11th November, 1994 in the assessee's own case. The Tribunal, accordingly, without discussing the merits of the case rejected the said ground of appeal by following its earlier order.

5. For assessment year 1990-91, which is the year under consideration in the present appeal, the assessee filed its return of income on 9th November, 1990 declaring total income of Rs.7,37,404/- and claimed the entire income as exempt under section 10A and consequently the return income was shown at nil. The Assessing Officer held that under section 10A of the Act, the initial assessment year is the year relatable to the previous year in which manufacture or production of articles or things is commenced. In the facts of the present case, the initial assessment year was 1984-85 and as such, the assessee was not entitled to the benefit of section 10A of the Act for the year under consideration. The Assessing Officer was further of the view that the exemption under section 10A would start automatically with the commencement of the initial assessment year and that the only way to change the year of commencement of exemption is by resorting to the option specified under section 10A(7) of the Act which has to be furnished in writing before the due date of filing of return for the initial assessment year. Since the assessee did not exercise such option for assessment year 1984-85, the contention that the income of assessment year 1986-87 to assessment year 1990-91 should be considered as exempt does not hold good and that the period of exemption is to be considered from assessment year 1984-85 itself. The Assessing Officer,

accordingly, disallowed the claim of the assessee for exemption under section 10A of the Act. The assessee carried the matter in appeal before the Commissioner (Appeals) who accepted the contention of the assessee that for assessment year 1984-85, the income was returned at loss and hence, no declaration was made in respect of that year and that for the year 1985-86, the assessee had made a declaration before the Income Tax Officer during the course of hearing of assessment proceedings for the year that it was desirous of getting tax benefits under section 10A of the Act for subsequent five years, that is, assessment years 1986-87, 1987-88, 1988-89, 1989-90 and 1990-91. That in view of the fact that it had commenced its manufacturing or production activity on 20th July, 1982, in terms of the amended provisions of section 10A of the Act, the eight years' block would be required to be worked out in such a manner so as to cover these five assessment years, that is, assessment years 1986-87 to 1990-91. The Commissioner (Appeals), accordingly, allowed the claim for exemption under section 10A of the Act.

6. Against the order of Commissioner (Appeals), the revenue went in appeal to the Tribunal. The Tribunal, in the impugned order has observed that the provisions of section 10A of the Act would apply to all industrial undertakings set up in the free trade zone, during the previous year relating to assessment year 1981-82 or any subsequent assessment year unless the assessee opts out of the scheme by making a declaration under sub-section (7) of section 10A within the time limit under that sub-section. That as per the amended Act with effect from 1st April, 1987, it has been provided in sub-section

(3) of section 10A that a tax payer would be entitled to avail of tax exemption, at his option, in respect of any five consequent assessment years falling within a period of eight years beginning with the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things. The Tribunal referred to the explanation to the section wherein the expression 'relevant assessment year' has been defined to mean five years or less consecutive assessment years specified by the assessee at his option, within a period of eight years commencing from the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things and observed that in the facts of the present case, for assessment year 1985-86, the assessee had shown total income at Rs.1,05,564/- and had claimed that the entire income was exempt under section 10A and, therefore, income was shown at nil. However, in response to a notice under section 148 of the Act, the assessee had withdrawn the claim of exemption under section 10A and the total income was returned at Rs.1,05,564/-. According to the Tribunal, once the option of five years has been exercised by the assessee, there is no provision in sub-section (3) or any other sub-section of section 10A which entitles the assessee to change his option. The assessee had claimed exemption under section 10A in the return filed for the assessment year 1985-86 and, therefore, the option was first exercised for the assessment year 1985-86 and was available to the assessee for the next four consecutive assessment years, that is, up to assessment year 1989-90. The Tribunal, accordingly, held that the assessee was entitled to exemption only till the assessment year 1989-90. As regards

the contention of the assessee that it had withdrawn its claim under section 10A of the Act in respect of assessment year 1985-96, the Tribunal observed that the scheme of section 10A is that the assessee who avails of the benefit of the concession thereunder will not be eligible for the other tax concessions in relation to the industrial undertakings in the free-trade zone either during the course of the five year tax-holiday period or at any time after the end of the tax-holiday period. A special provision has been made under sub-section (7) of section 10A of the Act, to give an option to an assessee who derives profits and gains from an industrial undertaking situated in a free trade zone not to avail of this concession. Such an assessee will be required to furnish a declaration in writing before the expiry of the time allowed under section 139(1) or under section 139(2) of the Act, whether fixed originally or on extension, to furnish the return of income for the first assessment year for which the tax-holiday under the new scheme is available to him, that the provisions of the section may not be made applicable to him and if he does so, the provisions of section 10A will not apply to him for any of the five assessment years for which the tax-holiday provision would be normally applied to him. The Tribunal, accordingly, was of the view that if it was the case of the assessee that it had exercised option under section 10A(7) during the course of assessment for assessment year 1985-86, the assessee would have opted out of the scheme of section 10A of the Act and would not be entitled to exemption thereunder for any of the assessment years and, accordingly, held that the assessee was entitled to exemption under section 10A of the Act for the assessment years 1984-85 to 1988-89 only and accordingly

dismissed the ground of appeal. The assessee is, therefore, in appeal before this court.

7. While admitting this appeal, this court had, by an order dated 4th September, 2000, formulated the following substantial question of law:-

“Whether on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the exemption under section 10A of the I.T. Act is to be given for initial five years and the assessee cannot exercise its option for any five consecutive years within the statutory period of eight years in view of the amendment to section 10A(3) of the Act with effect from 1.4.1987.”

8. Assailing the impugned order, Mr. R.K. Patel, learned advocate for the appellant invited the attention of the court to the provisions of section 10A of the Act as it stood with effect from 1st April, 1987, to submit that by the Taxation Laws (Amendment and Miscellaneous Provisions) Act, 1986, sub-section (3) of section 10A came to be substituted with effect from 1st April, 1987 whereby the assessee was given a choice of opting for any five consecutive assessment years falling within a period of eight years beginning with the assessment year relating to the previous year in which the industrial undertaking begins to manufacture or produce articles or things, specified by the assessee at his option. It was submitted that the assessee had opted for exemption under section 10A of the Act for the assessment years 1986-87 to 1990-91 which was in consonance with the provisions of

section 10A of the Act and as such, the Tribunal had erred in disallowing the exemption for the year under consideration. It was further submitted that the Tribunal was not justified in denying exemption under section 10A of the Act only for assessment year 1990-91 ignoring the fact that the assessee had already been granted exemption for the period under 1986-87 to 1989-90. It was urged that the amendment whereby sub-section (3) of section 10 came to be substituted with effect from 1st April, 1987 pertains to procedural law and is, therefore, applicable retrospectively. The Tribunal was, therefore, not justified in ignoring the findings recorded by it in the assessee's own case for assessment year 1984-85. It was submitted that section 10A is a beneficial provision and as such, has to be construed liberally. Accordingly, sub-section (3) of section 10A of the Act as amended with effect from 1st April, 1987 is required to be given retrospective effect. In support of his submission, the learned counsel placed reliance upon the decision of the Supreme Court in the case of **Commissioner of Income Tax vs. Alom Extrusions Ltd.**, (2009) 319 ITR 306 (S.C.,) wherein the court was called upon to decide as to whether omission (deletion) of the second proviso to section 43B of the Act, by the Finance Act, 2003, operated with effect from April 1, 2004 or whether it operated retrospectively with effect from April 1, 1998. The court held that when a proviso in a section is inserted to remedy the unintended consequences and to make the section workable, a proviso which supplies an obvious omission in the section and which proviso is required to be read into the section to give the section a reasonable interpretation, it could be read as retrospective in operation, particularly to give effect to the section as a whole.

8.1 Referring to the contents of the Departmental Circular No.469 dated 23rd September, 1986, it was pointed out that the amendment in sub-section (3) of section 10A was brought about in view of representations made by various trade associations that such undertakings in the free trade zones do not always earn profit during all the five initial years. In such cases they cannot avail of the full tax benefit and in order to get over the problem, the exemption for five years has been permitted to be availed of within a longer time framed as per the Amending Act by providing in sub-section (3) that a tax payer would be entitled to avail of the exemption, at his option, 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 industrial undertaking begins to manufacture or produce articles or things. It was submitted that considering the object behind the amending provision, it is apparent that the intention of the legislature is to make it effective retrospectively right from the inception of the scheme, and as such, the appellant was entitled to avail of the benefit of the amended sub-section (3) of section 10A and opt for the five consecutive assessment years in relation to which it desired to avail of exemption. Reliance was also placed upon the decision of the Supreme Court in the case of **Commissioner of Income Tax, Amritsar v. Strawboard Manufacturing Co. Ltd.**, (1989) 177 ITR 431, wherein the court has held that when a provision is made in the context of a law providing for concessional rates of tax for the purpose of encouraging an industrial activity, a liberal construction should be put upon the language of the statute.

9. Vehemently opposing the appeal, Mr. Manish Bhatt, Senior Advocate, learned counsel for the respondents invited the attention of the court to the scheme of section 10A of the Act to submit that the provision as it stood at the relevant time when the appellant-assessee commenced manufacturing or production activities, did not make any provision for opting for any particular assessment year or for opting out of the scheme for a particular year. Under sub-section (7) of section 10A of the Act, the assessee, if it did not desire to avail of the exemption under section 10A, was required to file a declaration within the time stipulated thereunder to the effect that it did not desire to avail of the benefit under the scheme. If such option was exercised, the assessee, thereafter, would not be entitled to the benefit of exemption under section 10A of the Act for any of the relevant assessment years. In the facts of the present case, as the assessee had not opted out of the scheme by making a declaration under section 10A(7) of the Act, the provisions of section 10A would become applicable with effect from assessment year 1984-85 which was the assessment year relatable to the year in which the assessee firm started its manufacturing activities. Therefore, the period of five assessment years is required to be computed from assessment years 1984-85 and as such, the assessee was entitled to exemption only till the year 1988-89 and no further. It was submitted that in the year 1989-90, the entire block of five years had been exhausted and as such, the assessee having once availed of the benefit under section 10A of the Act for the initial assessment years, cannot now be permitted to push back the years of exemption. Reliance was placed upon the

decision of this court in the case of **Saurashtra Cement & Chemical Industries Ltd. vs. Commissioner of Income-Tax, Gujarat-V**, (1980) 123 ITR 669, for the proposition that without disturbing the relief granted in the initial year, the Income Tax Officer cannot examine the question and decide to withhold or withdraw the relief already granted. It was submitted that in the facts of the present case, the amendment in sub-section (3) of section 10A was brought into force with effect from 1st April, 1987 and as such, the assessee prior to such amendment, having already availed of the benefit under section 10A of the Act in respect of the earlier years, it is now not open to it to contend that it would give up the relief granted in the earlier years and avail of the benefit in the subsequent years. The exemption for the subsequent years from 1986-87 to 1990-91 as claimed by the assessee cannot be granted without disturbing the relief granted in the initial year. It was submitted that prior to substitution of sub-section (3) with effect from 1st April, 1987, there was no provision which permitted the assessee to opt for a particular assessment year from which it could avail of the benefit of section 10A of the Act. The assessee could either claim exemption from the initial assessment year for a period of five years or totally opt out of the scheme under sub-section (7) of section 10A of the Act. However, there was no provision akin to sub-section (3) of section 10A at the relevant time permitting the assessee to choose the five years within which it desired to claim exemption under section 10A of the Act. It was, accordingly, urged that the interpretation put forth by the Tribunal is in consonance with the statutory provisions and as such, the appeal being devoid of merit deserves to be dismissed.

10. Before adverting to the merits of the case, the relevant provisions of the Act may be referred to. Section 10A of the Act which bears the heading “Special provision in respect of newly established industrial undertakings in free trade zones” as it stood prior to 1st April, 1997 and insofar as the same is relevant for the present purpose reads thus:-

10A(1) Subject to the provisions of this section, any profits and gains derived by an assessee from an industrial undertaking to which this section applies shall not be included in the total income of the assessee.

(2) This section applies to any industrial undertaking which fulfils all the following conditions, namely:-

(i) it has begun or begins to manufacture or produce articles or things during the previous year relevant to the assessment year commencing on or after the 1st day of April, 1981, in any free trade zone;

(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 the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things (such assessment year being hereafter in this section referred to as the initial assessment year) and each of the four assessment years immediately succeeding the initial assessment year.

(4) Notwithstanding anything contained in any other provision of this Act, in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding the last of the relevant assessment years, or of any previous year, relevant to any subsequent assessment year,-

- (i) section 32, section 32A, section 33, section 35 and clause (ix) of sub-section (1) of section 36 shall apply as if every allowance or deduction referred to therein and relating to or allowable for any of the relevant assessment years, in relation to any building, machinery, plant or furniture used for the purposes of the business of the industrial undertaking in the previous year relevant to such assessment year or any expenditure incurred for the purposes of such business in such previous year had been given full effect to for that assessment year itself and accordingly sub-section (2) of section 32, clause (ii) of sub-section (3) of section 32A, clause (ii) of sub-section (2) of section 33, sub-section (4) of section 35 or the second proviso to clause (ix) of sub-section (1) of section 36, as the case may be, shall not apply in relation to any such allowance or deduction:*
- (ii) no loss referred to in sub-section (1) of section 72 or sub-section (1) or sub-section (3)] of section 74 and no deficiency referred to in sub-section (3) of section 80J, in so far as such loss or deficiency relates to the business of the industrial undertaking, shall be carried forward or set off where such loss, or, as the case may be, deficiency relates to any of the relevant assessment years;*
- (iii) no deduction shall be allowed under section 80HH or section 80HHA or section 80-I or section 80J in relation to the profits and gains of the industrial undertaking; and*

- (iv) *in computing the depreciation allowance under section 32, the written down value of any asset used for the purposes of the business of the industrial undertaking shall be computed as if the assessee had claimed and been actually allowed the deduction in respect of depreciation for each of the relevant assessment years.*

(5) xxx xxx xxx

(6) xxx xxx xxx

- (7) *Notwithstanding anything contained in the foregoing provisions of this section, where the assessee, before the expiry of the time allowed under sub-section (1) or sub-section (2) of section 139, whether fixed originally or on extension, for furnishing the return of income furnishes to the Income-tax Officer a declaration in writing that 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) *“free trade zone” means the Kandla Free Trade Zone and the Santacruz Electronics Export Processing Zone and includes any other free trade zone which the Central Government may, by notification in the Official Gazette, specify for the purposes of this section;*

- [ii. *“relevant assessment years” means the five consecutive assessment years specified by the assessee at his option under sub-section (3).*

- [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.*

11. Thus, section 10A of the Act as it stood at the relevant time prior to its amendment in 1986 was applicable in respect of profits and gains derived by an assessee from an

industrial undertaking in any free trade zone as described under clause (i) of the Explanation thereto, which commenced manufacture or production of articles or things during the previous year relevant to the assessment year commencing on or after the first day of April, 1981. Sub-section (2) thereof, made provision for the conditions precedent for being entitled to the benefits under the said section. Sub-section (3) of section 10A, postulated that the profits and gains referred to in sub-section (1) of section 10A shall not be included in the total income of the assessee in respect of the assessment year relevant to the previous year in which the industrial undertaking began to manufacture or produce articles or things and each of the four assessment years immediately succeeding such assessment year. The assessment year relevant to the previous year in which the manufacturing commenced was termed as "the initial assessment year". Thus, under sub-section (3) of section 10A there was a concept of initial assessment year which was the assessment year corresponding to the previous year in which the unit starts manufacturing or producing articles or things, which was the starting point for availing the exemption provided under the said section. Under the scheme of section 10A of the Act, an assessee who avails of the benefit of tax concession thereunder will not be eligible for the other tax concessions in relation to industrial undertakings in the free trade zone either during the course of the 5 years' tax holiday period or at any time after the end of the tax holiday period. To secure the said objective, sub-section (4) of section 10A provided that in computing the total income of the assessee of the previous year relevant to the assessment year immediately succeeding

the last of the relevant assessment years, or of any previous year relevant to any subsequent assessment year (i) by virtue of a deeming fiction every allowance or deduction under section 32, section 32A, section 33, section 35 and clause (ix) of section 36 is deemed to have been given full effect to for that assessment year itself; (ii) the assessee shall not be entitled to carry forward loss referred to in sub-section (1) of section 72 or sub-section (1) or sub-section (3) of section 74 or deficiency referred to in sub-section (3) of section 80J; (iii) shall not be allowed deduction under section 80HH or section 80HHA or section 80I or section 80J in relation to such industrial undertaking; and (iv) shall not be entitled to claim depreciation under section 32 of the Act in respect of the assets of the industrial undertaking.

12. Sub-section (7) of section 10A of the Act makes provision for opting out of the scheme where an assessee does not want the provisions of section 10A to be made applicable to him in which case, the assessee is required to file a declaration in writing to the Income Tax Officer before the expiry of the time allowed under sub-section (1) or sub-section (2) of section 139 whether fixed originally or on extension, for furnishing the return of income for the initial assessment year. To put it differently, if the assessee wanted to opt out of the exemption under section 10A, it was required to make a declaration under section 10A(7) of the Act before the expiry of the time for furnishing a return for the initial assessment year. Clause (ii) of the Explanation to section 10A defines “relevant assessment years” to mean the initial assessment year and four assessment years immediately succeeding the initial

assessment year. Thus, on a reading of section 10A of the Act as it stood at the relevant time as a whole, it is apparent that the same contemplated that the assessee should avail of the benefit of exemption from “the initial assessment year” namely the assessment year relevant to the previous year in which the manufacture or production of articles or things commenced and for four assessment years immediately succeeding the said assessment year.

13. By the Taxation Laws (Amendment & Miscellaneous Provisions) Act, 1986, with effect from 1st April, 1987, sub-section (3) of section 10A came to be substituted. The amended sub-section (3) of section 10A reads as under:-

(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 industrial undertaking begins to manufacture or produce articles or things, specified by the assessee at his option.”

The said Amendment Act also amended the definition of “relevant assessment years” under clause (ii) of the Explanation to section 10A to mean the five consecutive assessment years specified by the assessee at his option under sub-section (3).

14. By virtue of the amended sub-section (3), the assessee was given a choice of opting for 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 industrial undertaking begins to manufacture or produce articles or things, specified by the assessee at his option. According to the appellant-assessee, it is entitled to the benefit of the amended provisions of sub-section (3) of section 10A of the Act. The core question that, therefore, arises for consideration is as to whether the assessee is entitled to the benefit of the sub-section (3) of section 10A as amended with effect from 1st April, 1987.

15. As noticed earlier, the assessee commenced its manufacturing activities in the previous year relevant to assessment year 1984-85. At the relevant time, the old sub-section (3) was in force under which, an industrial undertaking falling within the ambit of sub-section (2) of section 10A of the Act was entitled to avail of the benefit of section 10A from “the initial assessment year” namely, the assessment year relatable to the previous year in which the manufacturing commenced. Thus, by operation of the provisions of sub-section (3) of section 10A of the Act as it stood at the relevant time, the initial assessment year in the case of the assessee would be 1984-85 and accordingly the assessee was entitled to the benefit of exemption under section 10A for the initial assessment year and the four immediately succeeding assessment years, that is 1984-85 to 1988-89. The application of section 10A of the Act in the case of such an undertaking meeting with the requirements of sub-section (2) of section 10A of the Act was automatic, that is by the operation of law the assessee would be entitled to the benefit of exemption

under the said provision from the initial assessment year. However, if the assessee did not desire to avail of the exemption under section 10A of the Act, it was required to file a declaration under section 10A(7) of the Act within the period prescribed therein. In the present case, it is an admitted position that no such declaration was filed by the assessee within the prescribed period. For the assessment year 1984-85, the assessee had claimed that since it had declared a loss, the provisions of section 10A would not be applicable to the relevant assessment year and had succeeded till the Tribunal. For the assessment year 1985-86, the assessee had initially filed a return of income claiming exemption under section 10A of the Act on 9th September, 1985 but later on had given a declaration in writing on 24th November, 1986 to the effect that the provisions of section 10A may not be made applicable for the previous year ending on 30th June, 1983, that is, for 1984-85 and also to assessment year 1985-86 ending on 30th June, 1984 and that the same may be applicable for assessment years 1986-87 to 1990-91. Thereafter, pursuant to a notice issued under section 148 of the Act, the assessee filed its return of income on 28th February, 1991 in which it withdrew its claim for exemption under section 10A of the Act and declared total income of Rs.1,05,564/-. Before the Assessing Officer it was the case of the assessee that it had made a declaration under sub-section (7) of section 10A of the Act, claiming that the provisions of section 10A should not be made applicable for the assessment year 1984-85 and 1985-86. In this regard it may be noted that sub-section (7) of the Act does not make provision for opting for the assessment years in relation to which an assessee desires to avail of the benefit of exemption

under section 10A of the Act. The same makes provision for totally opting out of the scheme to section 10A of the Act. The object behind the said provision appears to be that an assessee availing of exemption under section 10A of the Act would, in view of the provisions of sub-section (4) of section 10A of the Act, not be entitled to deduction under sections 32, 32A, 33, 35 and clause (ix) of section 36, carry forward or set off losses under the provisions of sub-section (1) of section 72, sub-section (1) or sub-section (3) of section 74, or deficiency under sub-section (3) of section 80J, deductions under section 80HH, section 80HHA, section 80I and section 80J of the Act etc. in relation to the industrial undertaking for any assessment year. Thus, if an assessee is of the view that availing of exemption under section 10A is less beneficial than the tax concessions under the aforesaid provisions of the Act, he may make a declaration under sub-section (7) within the time prescribed for furnishing the return under sub-section (1) or sub-section (2) of section 139 as originally fixed or on extension, of the initial assessment year. Thus, such declaration was required to be made in respect of the initial assessment year. If no such declaration was made in the initial assessment year, section 10A would automatically operate and the profits and gains derived by the assessee from the industrial undertaking for the initial assessment year and four immediately succeeding assessment years would be exempt from income tax. Under the circumstances, if the said declaration made by the assessee as aforesaid, were to be treated as having been made under section 10A(7) of the Act, then the assessee would have totally opted out of the scheme of section 10A and would thereafter not be entitled for the benefit there under for any of

the relevant assessment years. However, except for sub-section (7) of section 10A of the Act which gave an option to the assessee to opt out of the scheme of section 10A of the Act, at the relevant time there was no provision under section 10A of the Act akin to the substituted sub-section (3) which permitted the assessee to choose the assessment years in respect of which it desired to avail of exemption under section 10A of the Act. Thus, the declaration made by the assessee did not have any statutory basis.

16. As noted earlier, upon its substitution with effect from 1st April, 1987, the concept of “initial assessment year” as envisaged under sub-section (3) of section 10A, which prior to such substitution was the starting point for getting the benefit of exemption under section 10A of the Act, came to be done away with. Prior to the substitution of sub-section (3), the benefit of section 10A of the Act was available for the initial assessment year namely, the assessment year relatable to the previous year in which the manufacturing or production had commenced and four immediately succeeding years, whereas after the substitution, the concept of initial assessment year was done away with and the benefit of section 10A was available for any five consecutive years within a period of eight years beginning with the assessment year relevant to the previous year in which the industrial undertaking begins to manufacture or produce articles or things.

17. A common thread which runs through sub-section (3) before and after its substitution is that exemption under section 10A was available for five consecutive years.

Previously, exemption under section 10A of the Act was available for the assessment year relatable to the previous year when the manufacturing commenced and four immediately succeeding assessment years, whereas after its substitution such benefit was available for any five consecutive years within a period of eight years beginning with the assessment year relevant to the previous year in which the manufacture or production commenced. What is significant is that sub-section (3) either before or after its substitution, does not contemplate any break in the period of five assessment years. In both the cases, the period of five years is consecutive, namely once it starts running it has to run the full course of five years without any break.

18. In the present case, undisputedly, the assessee did not file any declaration as contemplated under sub-section (7) of the Act within the time limit prescribed thereunder or even thereafter during the initial assessment year choosing to opt out of the scheme. Moreover, it is not even the case of the assessee that it had any intention of not availing the benefit under section 10A of the Act. The case of the assessee is that it had made a declaration that it would not like to avail of the benefit of section 10A of the Act for assessment years 1984-85 and 1985-86 but would prefer to avail of the said benefit for the subsequent five assessment years. However, as noticed earlier, at the relevant time no such option was available to the assessee inasmuch as there was no provision which permitted the assessee to choose the assessment years in relation to which it desired to avail of the benefit under section 10A of the Act. Hence, the provisions of section 10A would automatically

apply from the initial assessment year being the assessment year relevant to the previous year in which the manufacturing had commenced and the four immediately succeeding years, that is, the assessment year 1984-85 being the initial assessment year and assessment years 1984-85, 1986-87, 1987-88 and 1988-89 being the four immediately succeeding assessment years. However, on facts, insofar as the assessment year 1984-85 is concerned, the assessee had succeeded till the Tribunal, though on a wrong interpretation of section 10A(7) of the Act. Under the circumstances, the said order of the Tribunal has attained finality and as such, assessment year 1984-85 cannot be taken into consideration for the purpose of computing the period of five assessment years for the purpose of availing of benefit under section 10A of the Act. In relation to assessment year 1985-86, the assessee withdrew the claim of exemption made by it while filing return in pursuance of notice under section 148 of the Act, which admittedly was not within the time limit prescribed under sub-section (7) of section 10A. Even otherwise, the same appears to have been filed under a misconception of law inasmuch as as noted earlier, the assessee did not desire to opt out of the scheme but merely wanted to postpone the assessment year in which it wanted to claim exemption under section 10A of the Act.

19. As discussed earlier, having regard to the scheme of section 10A of the Act as it stood prior to the substitution of sub-section (3) of section 10A with effect from 1st April, 1987, in case of those assesseees who satisfied the requirements of sub-section (2) of section 10A of the Act, the provisions of section

10A would be automatically applicable to them from the assessment year relevant to the previous year in which the manufacture or production of articles or things commenced. At the relevant time, there was no provision for choosing the block of five years in relation to which the assessee desired to avail of the benefit of exemption. Under the circumstances, in the present case, the period for availing benefit under section 10A of the Act would begin to run from assessment year 1984-85 namely the assessment year relatable to the previous year in which manufacturing had commenced and the immediately succeeding four years. However, once the period started to run, there could be no break therein and the same would be required to be permitted to run its full course. Thus, the view taken by the Tribunal is in consonance with the provisions of section 10A of the Act.

20. On behalf of the appellant it has been contended that the provisions of sub-section (3) of section 10A of the Act should be construed as having retrospective effect. Reliance has been placed upon the decision of the Supreme Court in the case of **Commissioner of Income-Tax vs. Alom Extrusions Ltd.** (supra) wherein the court was dealing with the question as to whether omission (deletion) of the second proviso to section 43B of the Income Tax Act, 1961 by the Finance Act, 2003, operated with effect from April 1, 2004, or whether it operated retrospectively with effect from April 1, 1988. The court observed thus:

“17. We find no merit in these civil appeals filed by the Department for the following reasons: firstly, as stated above, Section 43-B (main section), which stood inserted by the Finance Act, 1983, with effect from 1-4-1984, ex-

pressly commences with a non obstante clause, the underlying object being to disallow deductions claimed merely by making a book entry based on mercantile system of accounting. At the same time, Section 43-B (main section) made it mandatory for the Department to grant deduction in computing the income under Section 28 in the year in which tax, duty, cess, etc. is actually paid. However, Parliament took cognizance of the fact that accounting year of a company did not always tally with the due dates under the Provident Fund Act, the Municipal Corporation Act (octroi) and other tax laws. Therefore, by way of first proviso, an incentive/relaxation was sought to be given in respect of tax, duty, cess or fee by explicitly stating that if such tax, duty, cess or fee is paid before the date of filing of the return under the Income Tax Act (due date), the assessee(s) then would be entitled to deduction. However, this relaxation/incentive was restricted only to tax, duty, cess and fee. It did not apply to contributions to labour welfare funds. The reason appears to be that the employer(s) should not sit on the collected contributions and deprive the workmen of the rightful benefits under social welfare legislations by delaying payment of contributions to the welfare funds.

18. *However, as stated above, the second proviso resulted in implementation problems, which have been mentioned hereinabove, and which resulted in the enactment of the Finance Act, 2003, deleting the second proviso and bringing about uniformity in the first proviso by equating tax, duty, cess and fee with contributions to welfare funds. Once this uniformity is brought about in the first proviso, then, in our view, the Finance Act, 2003, which is made applicable by Parliament only with effect from 1-4-2004, would become curative in nature, hence, it would apply retrospectively with effect from 1-4-1988."*

21. The Supreme Court placed reliance upon its earlier decision in the case of *Allied Motors P. Ltd. v. Commissioner of Income-tax*, (1997) 224 ITR 677 wherein it had been held that when a proviso is inserted to remedy unintended consequences and to make the section workable, a proviso which supplies an obvious omission in the section and which proviso is required to

be read into the section to give the section a reasonable interpretation, it could be read as retrospective in operation, particularly to give effect to the section as a whole.

22. In ***Commissioner of Income-Tax, Amritsar vs. Strawboard Manufacturing Co. Ltd.*** (supra), it was held that when a provision is made in the context of a law providing for concessional rates of tax for the purpose of encouraging an industrial activity, a liberal construction should be put upon the language of the statute.

23. Examining the relevant statutory provisions involved in the present case in the light of the principles enunciated in the above decisions, the first question that arises for consideration is as to whether it is possible to give retrospective operation to sub-section (3) of section 10A of the Act as substituted with effect from 1st April, 1987. As noted earlier, in the present case, sub-section (3) of section 10A either before or after its substitution does not contemplate a break in the five succeeding assessment years in relation to which an assessee is entitled to avail of benefit under section 10A of the Act. Thus, in case of an assessee who had already started availing the benefit of section 10A of the Act in any assessment year prior to the coming into force of the substituted sub-section (3), there is no manner in which he could exercise option under section (3) of the Act inasmuch as there is no provision under the Act which permits the assessee to withdraw the benefit of concession already availed by it and claim the benefit under section 10A for the subsequent assessment years. Permitting an assessee to exercise option

even after he has started to avail of the benefit of section 10A of the Act would either amount to breaking the block of five consecutive assessment years or permitting the assessee to withdraw benefit granted in the earlier assessment years without there being any statutory basis therefor. Thus, on the contrary if sub-section (3) of section 10A of the Act is construed to be retrospective in effect it would make the provision unworkable which could never have been the intention of the legislature. Under the circumstances, reliance placed upon the aforesaid decisions of the Supreme Court does not, in any manner, carry the case of the appellant any further.

24. For the foregoing reasons, this court does not find any legal infirmity in the impugned order of the Tribunal so as to warrant interference. The question is, accordingly, answered in the affirmative, that is, in favour of the revenue and against the assessee. The appeal is, accordingly, dismissed with no order as to costs.

(Akil Kureshi, J.)

(Harsha Devani, J.)

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