

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.06.2012

Coram

The Honourable Mrs.Justice CHITRA VENKATARAMAN

and

The Honourable Mr.Justice K.RAVICHANDRABAABU

TC(A). No. 1282 of 2005

Commissioner of Income Tax

Chennai

... Appellant

-vs-

Shri Renuga Textiles Mills Limited

Regd. Office, 87 Cumbum Road

Theni

... Respondent

Tax Case Appeal against the order of the Income Tax Appellate Tribunal, Madras 'C' Bench dated 28.2.2005 in ITA.No. 2128/Mds/97 for the assessment year 1994-95.

For Appellant : Mr.T. Ravikumar
Standing Counsel

For Respondent : Dr.Anitha Sumanth

JUDGMENT

(Judgment of the Court was made by CHITRA VENKATARAMAN,J)

The Revenue is on appeal as against the order passed by Income Tax Appellate Tribunal relating to the assessment year 1994-95. Following are the questions of law raised for consideration:-

(i) Whether in the facts and circumstances of the case, the Appellate Tribunal was right in holding that the amalgamated company is eligible for the benefit of exemption under Section 10B which was granted to the amalgamating company in respect of an export oriented unit set up by it?

(ii) Whether in the facts and circumstances of the case, the Appellate Tribunal was right in holding that development of software is a revenue expenditure and not a capital expenditure?"

2. As far as the second question of law involved in development of software is concerned, in the decision reported in 304 ITR 84- CIT v. SOUTHERN ROADWAYS LIMITED, this Court considered the similar question. In the said decision, following the decision of the Apex Court reported in 177 ITR 377 ALEMBIC CHEMICAL WORKS CO., LTD, this Court held that upgradation of computers by changing certain parts, thereby enhancing the configuration of

the computers for improving their efficiency, was only a revenue expenditure. The said view was again followed by this Court in 288 ITR 15 CIT v. SOUTHERN ROADWAYS LIMITED. Following the above decisions, we confirm the order of the Tribunal in respect of second question of law.

3. As far as the first question of law on the claim on Section 10B of the Income Tax Act, is concerned, following details need to be seen. The assessment year under consideration is 1994-95. The assessee herein was the holding company and Renuga Soft-X Towels Private Limited was a 100% subsidiary of the holding company. By a scheme of merger effective from 1.1.1993, the subsidiary company stood merged with the assessee company herein. The scheme of amalgamation was sanctioned by this Court under order dated 7.4.1993. Consequent to the merger, Renuga Soft X Towels Limited continues to have the 100% EOU status as an undertaking of the assessee company vide E.O.254/92 dated 8th April 1994 received from Government of India, Ministry of Industry, Department of Industrial Development, Secretariat for Industrial Approvals (EOU Section). Based on the said recognition granted, the assessee sought for exemption of income earned by 100% EOU under Section 10B of the Act. The Income Tax Officer rejected the contention of the assessee for claim of exemption under Section 10B of the Act on the ground that there were no provision for granting of the allowance on the basis of the ownership of the new undertaking. Further, the subsidiary company had opted out the exemption granted under Section 10B of the Act for the assessment year 1993-94. Thus, when once the assessee claimed deduction under Section 80-I, there could be no further claim under Section 10B. Thus the claim of the assessee was rejected. Aggrieved by this, the assessee went on appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) pointed out that consequent on the amalgamation, the EOU status has passed on from the amalgamating company to the hands of the amalgamated company. This arrangement was approved by the Government by its order dated 8.4.94. Referring to Section 10B (2)(iii) of the Act, the Commissioner of Income Tax (Appeals) held that there was no violation of the said provision. Hence, the only question was as to whether the assessee was granted deduction under Section 80-I of the Act. The Commissioner of Income Tax (Appeals) directed the Assessing Officer to verify the same. Otherwise it agreed with the assessee's contention that it was entitled to claim under Section 10B of the Act. Aggrieved by this, the Revenue went on appeal before the Income Tax Appellate Tribunal, which upheld the order of the Commissioner of Income Tax (Appeals). The Tribunal pointed out that Renuga Soft X Towels Private Limited had amalgamated with the assessee company. The amalgamating company was 100% EOU and after amalgamation, Ministry of Industries, Government of India recognised the status of the assessee as 100% EOU. Considering the fact that the relief was attached to the industrial undertaking, there being no violation of the provision of Section 10B of the Act too, the Tribunal allowed the claim. Apart from that, it also referred to the CBDT circular No. 378 dated 3.3.84 and held that benefit was attached to the undertaking and not to the ownership, thus, the claim was allowed. Aggrieved by this, present appeal by the Revenue.

4. As far as the grant of relief under Section 10B of the Act is concerned, sub section (2) of Section 10B as it stood at the relevant time, gives the conditions to be fulfilled to get the exemption. The said section reads as under:-

"10(B)(2) This section applies to any undertaking which fulfils all the following conditions namely:-

- (i) it manufactures or produces any articles or things or computer software;
- (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 undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such 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."

5. As far as the present case is concerned, there is no denial of the fact that the assessee is engaged in the manufacture of cotton yarn which is not formed by splitting up or reconstruction of business already in existence. The second requirement which is emphasised by the Revenue is that the assessee must show that it is not formed by the transfer to a new business of machinery or plant previously used for any purpose.

6. The Revenue contends that as far as this aspect is concerned, on the amalgamation, the amalgamating company is wound up and the entire business is transferred to the assessee's company. The machinery and plant previously used by the amalgamating company is used by the amalgamated company. The assessee, which actually engaged in the manufacture of cotton yarn, thus carrying on a new business is not entitled to relief under Section 10B of the Act.

7. Learned standing counsel for the Revenue also pointed out to Section 10B(7A) of the Act, inserted by the Finance Act, 2003 with effect from 1.4.2004 that in the case of amalgamation or the demerger, no deduction shall be admissible for the previous year in which the amalgamation or the demerger takes place and the provisions of Section 10B of the Act would apply to the amalgamated or resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or the demerger had not taken place. Having regard to the specific provisions thus introduced with effect from 1.4.2004 and the said provisions of law not being available to the assessee for the assessment year 1994-95, the Tribunal committed serious error in granting the relief to the assessee.

8. Per contra, learned counsel for the assessee referred to the CBDT circular which pointed out that the benefit attaches to the undertaking and not to the owner and the successor will be entitled to the benefit for the unexpired period of five years provided the undertaking is taken over as a running concern. Considering the fact that the amalgamating company is 100% subsidiary of the amalgamated company, in the case merger there being no transfer to new business, the relief is rightly granted to the assessee. Quite apart from that, the assessee is recognised as 100% EOU by the Central Government and after such recognition, it is not open to the Revenue to dispute the claim of the assessee.

9. Heard learned Standing Counsel for the Revenue as well as learned counsel for the assessee.

10. We agree with the contention of the assessee herein that it is entitled to get the benefit under Section 10B of the Act. As already seen in the preceding paragraph, the subsidiary company amalgamated with the holding company with effect from 1.1.93 and as a result of the merger, the business of the amalgamating company became the business of the assessee company. Given the fact that the assessee is a holding company of the subsidiary company, when the assets stood transferred to the amalgamated company, evidently, the export business done by the assessee is not a business formed by splitting up or reconstruction of a business already in existence. As far as sub clause (iii) of Section 10B(2) is concerned, the criteria for grant of the relief is that the undertaking is not formed by transfer to a new business of machinery or plant previously used for any purpose.

11. In the decision of the Apex Court reported in 186 ITR 278 SARASWATI INDUSTRIAL SYNDICATE LIMITED v. C.I.T, relied on by the Revenue, the Apex Court held that in order to attract the provisions of Section 41(1) of the Income Tax Act, 1961, the identity of the assessee in the earlier year in which deduction was granted in relation to a trading liability and in the subsequent year in which benefit is derived must be the same. In other words, if there is change in the identity of the assessee, Section 41 would not be applicable. As far as the fact therein was concerned, the assessee was a subsidiary of ISGEC, the holding company. On amalgamation, the holding company stood dissolved and ceased to be in existence and the subsidiary company was to meet the liabilities of the holding company. After amalgamation, the assessee company derived benefit of the sum which was claimed as trading liability at the hands of the amalgamated company. But, then it was not liable to tax under Section 41(1) of the Income Tax Act, 1961. The Apex Court pointed out that upon amalgamation, the amalgamating company ceased to exist and the assessee company was a separate entity. Hence, the amalgamating company would not be liable to pay tax under Section 41(1) on the benefit derived by it in relation to the deduction allowed to the amalgamated company. The Apex Court pointed out that when two companies are merged or so joined as to form a third company or one is absorbed into the other or blended with another, the amalgamating company loses its identity.

12. Extending the said decision to sub clause (iii) of Section 10B(2) of the Act, it is clear that as a result of the merger of the subsidiary company with the holding company, there is no new business formed by transfer of machinery or plant previously used for any business, as pointed out by the Apex Court that "strictly amalgamation does not cover the mere acquisition by a company of the share capital of the other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition", it is no doubt true as per the law laid down by the Apex Court that on merger, the amalgamating company loses its entity. But, then by such merger there is no formation of new business to disqualify the claim of the assessee for deduction under Section 10B of the Act. As already pointed out and rightly relied on by the assessee, the CBDT circular dated 13.12.1963, referred the benefit of Section 84 as available to successor for remaining years. In the said circular, the Board pointed out that the benefit under Section 84 is attached to

the undertaking and not to the owner and the successor would be entitled to the benefit for the unexpired period of five years provided the undertaking is taken over as a running concern and continues its business as an EOU.

13. After the deletion of Section 84 from the statute book, and insertion of 80J and thereafter benefit under Section 10B being attached to the undertaking, we do not find any ground to reject the assessee's claim for 100% deduction attached to the undertaking. Apart from the reason as stated above, as already seen, the assessee's status as 100% EOU was approved by the Government of India, Ministry of Industry, Department of Industrial Development, Secretariat for Industrial Approvals (EOU Section). In the background of the said recognition too, we agree with the assessee's counsel, thereby upheld the order of the Tribunal.

14. In the light of the above said view, it is not necessary for us to go into the question as to whether sub section 7A of Section 10B which is introduced subsequent to the assessment year under the Finance Act, would have relevance to understand the claim of the assessee's claim.

15. In the result, the Tax Case (Appeal) is dismissed. No costs.

(C.V.,J) (K.R.C.B.,J)
18.06.2012

Index : Yes/No
Internet : Yes/No
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CHITRA VENKATARAMAN,J
and
K.RAVICHANDRABAABU,J

bg/-

To

1. Commissioner of Income Tax, Chennai
2. Income Tax Appellate Tribunal, Madras 'C' Bench

TC(A). No.1282 of 2005

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