IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO. 24 OF 2011

Sesa Goa Limited, Sesa Ghor, 20 EDC Complex, Patto, Panjim, Goa 403 001. .... Appellant

Versus

The Additional Commissioner of Income-Tax, Range 1, Panaji, Goa. .... Respondent

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Mr. R.G. Ramani, Senior Advocate with Mr. Pranav Shenvi Kakodkar, Advocate for the Appellant.

Ms. Susan Linhares, Standing Counsel for the Respondent.

Coram:- M.S. SONAK &
SMT. M.S. JAWALKAR, JJ.

Date:- 12th March, 2020

ORAL JUDGMENT: (Per M. S. Sonak, J.)

Heard Mr. Ramani, the learned Senior Counsel along with Mr. Pranav Kakodkar, the learned Counsel for the appellant and Ms. Susan Linhares, the learned Standing Counsel for the respondent.

2. This Appeal was Admitted vide order dated 25.01.2012 on the following substantial questions of law:

(1) *Whether in the facts and in the circumstances of the case and in law and in the light of Circular No. 14 (XL-35) of 1955 dated 11th April, 1955 issued*

by the Central Board of Direct Taxes, the Assessing Officer is duty bound to consider a claim for deduction under Section 10B of the Act made during the assessment proceedings ?

(2) Whether on the facts and in the circumstances of the case and in law and without prejudice, the Commissioner of Income-tax (Appeals) in exercise of his plenary/co-terminus powers ought to have entertained the claim for deduction under Section 10B of the Act as all necessary facts were already on record ?

(3) Whether on the facts and in the circumstances of the case and in law and without prejudice, the Tribunal ought to have entertained the claim for deduction under Section 10B of the Act as all necessary facts were already on record ?

(4) Whether sub-Section (5) of Section 80A of the Act as inserted by the Finance (No.2) Act, 2009 with retrospective effect from 1st April 2003 should be interpreted so as (i) to have only prospective effect and/or (ii) not to adversely affect vested rights existing on the date of enactment of the Finance (No.2) Act, 2009 ?

3. In this Appeal, we are concerned with assessment proceedings for the assessment year 2005-06. The appellant filed income tax returns for this assessment year declaring income of Rs.609,37,94,550/- and revised returns declaring income of

Rs.609,31,94,550/- respectively. However, it is the case of the appellant that the appellant inadvertently omitted to make claim for deduction under Section 10B of the Income Tax Act, 1961 (IT Act) in respect of two 100% of Export Oriented Undertakings referred to as "Cudnem Unit" and the "Gadia Sodo – Codli Unit", which according to them, was eligible for deduction under Section 10B of the IT Act.

4. The appellant, during the assessment proceedings, filed letters dated 22.10.2008 and 01.12.2008, claiming for deduction under Section 10B of the IT Act in respect of the aforesaid units. The Assessing Officer vide assessment order dated 16.12.2008, however, refused to consider this claim for deduction, on the ground that such claim was not raised by filing the revised returns.

5. The assessee appealed to the Commissioner of Income Tax (Appeals), who, called for a remand report from the Assessing Officer. This remand report was furnished by the Assessing Officer on 23.03.2010. The Commissioner of Income Tax (Appeals) after affording an opportunity of hearing to the parties, passed judgment and order dated 31.03.2010, upholding the order made by the Assessing Officer regards non consideration of the claim for deduction under Section 10B of the IT Act.

6. The relevant portion of appellate order dated 31.03.2010 is to be found in para 6.7, which reads as follows:

> *"6.7 The AO has also mentioned that the assessee has all along been claiming deduction uls 8OHHC in respect of the exports made by EOUs and it is only in the tenth year that it has chosen to claim deduction u/s 10B. So consistency in claiming deduction is also absent in the appellant's case. Notwithstanding the above facts, the appellant has not claimed the deduction uls 103 in respect of its two 100% EOUs neither in the original return nor in the revised return and subsequent claim for deduction u/s 10B is an after thought which cannot be entertained in view of the reasons given above and relying on various decisions discussed above. Hence, without going into the merits of the appellant's claim that extraction and processing of iron ore amounts to production, the claim is not admissible as the appellant has not made the claim in the original or revised returns. Accordingly, appellant's claim uls 10B is rejected."*

7. The appellant-assessee, then, appealed to the Income Tax Appellate Tribunal (ITAT), which too, vide judgment and order dated 10.03.2011upheld the order of the Appellate Authority.

8. The relevant discussion in the ITAT's order dated 10.03.2011 is to be found in para 11, which reads as follows:

> *11. We have heard the rival contentions of both the parties. The learned Authorised Representative submitted that extraction and processing of iron ore amounting to*

> *production prior to A.Y. 2005-06, the deduction under Section 10B was not claimed by the assessee. The assessee was claiming deduction under Section 8OHHC. The learned Authorised Representative submitted that the claim of 100% EOU has not been mentioned in the original return. The assessee is entitled for such claim, when the assessee has filed revised return, the assessee has not made this claim. The CIT(A) has not allowed the claim on the decision relying on the decision of Hon'ble Supreme Court in the case of Goetze (India) Ltd. Vs. CIT 284 ITR 323 wherein the Court has held that when an assessee has claimed deduction after return has been filed, the assessing authority has no power to entertain such claim made otherwise than by way of revised return. Respectfully following the decision of Hon'ble Supreme Court, we are of the view that CIT(A) is justified in not allowing the claim of deduction otherwise by then the revised return. Therefore in our opinion, learned CIT(A) is justified in his action and our interference is not required. This ground of appeal raised by the assessee is dismissed.*

9. The first substantial question of law, to a certain extent, can be said to be covered by the decision of the Hon'ble Apex Court in the case of **Goetze (India) Ltd. Vs. Commissioner of Income Tax [2006] 284 ITR 323 (SC)**. However, according to us, both, the Commissioner of Income Tax (Appeals) and the ITAT have erred in relying upon **Goetze (India) Ltd.** (supra) and holding that even the Appellate Authorities under the IT Act could not have entertained the assessee's claim for deduction, *inter alia*, under Section 10B of the IT Act.

10. According to us, the approach of the Commissioner of the Income Tax (Appeals) and the ITAT is contrary to the law laid down by this Court in **Commissioner of Income Tax Vs. Pruthvi Brokers & Shareholders P. Ltd., [2012] 349 ITR 336 (Bom)**, which decision has been followed in Tax Appeal No. 17 of 2013 and Tax Appeal No. 18 of 2013 decided on 28.02.2020, wherein it has been held thus:

> *39. In CIT Vs Pruthvi Brokers & Shareholders Pvt. Ltd. 349 ITR 336, one of the questions of law which came to be framed was whether on the facts and circumstances of the case, the ITAT, in law, was right in holding that the claim of deduction not made in the original returns and not supported by revised return, was admissible. The Revenue had relied upon Goetze (supra) and urged that the ITAT had no power to allow the claim for deduction. However, the Division Bench, whilst proceeding on the assumption that the Assessing Officer in terms of law laid down in Goetze (supra) had no power, proceeded to hold that the Appellate Authority under the IT Act had sufficient powers to permit such a deduction. In taking this view, the Division Bench relied upon the Full Bench decision of this Court in Ahmedabad Electricity Co. Ltd Vs CIT 199 ITR 351 to hold that the Appellate Authorities under the IT Act have very wide powers while considering an appeal which may be filed by the Assessee. The Appellate Authorities may confirm, reduce, enhance or annul the assessment or remand the case to the Assessing Officer. This is because, unlike an ordinary appeal, the basic purpose of a tax appeal is to ascertain the correct tax liability of the Assessee in accordance with law.*

> *40. The decision in Goetze (supra) upon which reliance is placed by the ITAT also makes it clear that the issue involved in the said case was limited to the power of the assessing authority and does not impinge on the powers of the ITAT under section 254 of the said Act. This means that in Goetze (supra), the Hon'ble Apex Court was not dealing with the extent of the powers of the appellate authorities but the observations were in relation to the powers of the assessing authority. This is the distinction drawn by the division Bench in Pruthvi Brokers (supra) as well and this is the distinction which the ITAT failed to note in the impugned order.*

11. Accordingly, the substantial questions of law at (2) and (3) are required to be answered in favour of the Assessee and against the Revenue.

12. According to us, substantial question no. (4) as framed in our order dated 25.01.2012 does not arise or in any case, is not required to be decided at the present stage. This is because neither the Commissioner of Income Tax (Appeals) nor the ITAT have adverted to the provisions of Section 80A(5) of the IT Act. There is no discussion as to whether this provision is required to be interpreted in order to have prospective effect and/or not to adversely affect vested rights existing on the date of enactment of the Finance (No. 2) Act of 2009.

13. Similarly, at this stage, we are really not required to go into the issue as to whether the activities undertaken by the appellant -assessee amounts to production or not, under Section 10B of the I.T. Act.

14. Both the aforesaid issues along with other issues, which may arise in the context of entitlement of the appellant/assessee's claim for deduction under Section 10B of the I.T. Act will have to be decided by the Commissioner of Income Tax (Appeals), which, in our opinion, has undoubted power to consider the claim for deduction in terms of the law laid down by this Court in **Pruthvi Brokers** (supra).

15. The circumstance that we have observed that the Appellate Authorities have the power to consider the claim for deduction in terms of Section 10B of the IT Act, is not to be construed as some observations in the context of the provisions of Section 80A(5) of the IT Act. All that we have said is that generally, the Appellate Authorities may not be justified in refusing to even consider the assessee's claim for deduction on the ground that such claim was not made in the original returns or the revised returns filed before the Assessing Officer. If any contention based upon the provisions of Section 80A(5) of the IT Act is raised by the Revenue, then, obviously, such contention will have to be considered by the Appellate Authority

in accordance with law. Further the appellant-assessee will have the liberty to meet such contentions, including by way of urging the very grounds raised in the present Appeal on the aspect of prospectivity etc. We, therefore, clarify that we leave all such issues open for the decision of the Commissioner of Income Tax (Appeals) and thereafter, if the need be, the ITAT.

16. Accordingly, we answer the first substantial question of law against the appellant and in favour of the respondent-Revenue. Further, we answer the second and the third substantial questions of law in favour of the appellant-assessee and against the respondent-Revenue. However, for reasons indicated earlier, we refrain from answering the fourth substantial question of law, leaving the same open for the present.

17. Based upon the aforesaid, however, we set aside the judgments and orders dated 31.03.2010 and 10.03.2011, made by the Commissioner of Income Tax (Appeals) and the ITAT respectively, insofar as they concern the issue of deductions under Section 10B of the IT Act and we restore the appellant-assessee's Appeal bearing ITA No. 158/PNJ/08-09 to the file of the Commissioner of Income Tax (Appeals) for fresh adjudication on the issue of deductions under Section 10B of the IT Act, in accordance with law and on its own

merits.

18. We request the Commissioner of Income Tax (Appeals) to dispose off the Appeal, which we have now restored to its file, as expeditiously as possible and in any case, within a period of four months from the date the parties appear and file the authenticated copy of this judgment and order.

19. We direct the parties to appear before the Commissioner of Income Tax (Appeals) on 07.04.2020 at 11:00 a.m. and file authenticated copy of this judgment and order.

20. The Appeal is disposed off in the aforesaid terms. There shall be no order as to costs.

21. All concerned to act on the basis of an authenticated copy of this Order.

SMT. M. S. JAWALKAR, J. ***M. S. SONAK, J.***

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