

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

TUESDAY, THE 12TH DAY OF JULY 2016/21ST ASHADHA, 1938

ITA.No. 91 of 2010

AGAINST THE ORDER IN I.T.A.696/2008 of I.T.A.Tribunal,
COCHIN Bench dated 10-08-2009

APPELLANT/RESPONDENT:

THE COMMISSIONER OF INCOME TAX,
KOTTAYAM.

BY ADV. SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT/RESPONDENT:

M/S D.C MILLS PVT. LTD.,
VALAVANAD,
ALAPPUZHA.

R1 BY ADV. SRI.SUKUMAR NAINAN OOMMEN
R1 BY ADV. SRI.SHERRY SAMUEL OOMMEN

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD ON
31-5-2016, THE COURT ON 12-7-2016 DELIVERED THE FOLLOWING:

I.T.A.No.91 of 2010

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE A: ASSESSMENT ORDER U/S 143(3)
DATED 23.3.2006.

ANNEXURE B: ORDER UNDER SECTION 263 OF THE
CIT, KOTTAYAM DATED 18-3-2008.

ANNEXURE C: ITAT'S ORDER IN ITA
NO.696/COCH/2008 DATED 10-8-2009.

// TRUE COPY //

P.S. TO JUDGE

ANTONY DOMINIC & DAMA SESHADRI NAIDU, JJ.

I.T.A.No.91 of 2010

Dated this the 12th day of July, 2016

JUDGMENT

Antony Dominic, J.

1. This appeal is filed by the Revenue calling in question the order passed by the Income Tax Appellate Tribunal, Cochin Bench in ITA.696/08.
2. The respondent assessee owns three 100% export oriented units, viz., PVC Unit, Traditional Mats Unit and Pathirapally Unit. All the three units, being 100% export oriented units, were eligible for the benefit provided under section 10B of the Income Tax Act, 1961.
3. In the assessment year 2003-04, the PVC unit and Traditional Mats unit returned profit while the Pathirapally Unit returned loss. While completing the assessment, the assessing officer permitted the assessee to set off the loss incurred at the Pathirapally Unit against the profit of the PVC Unit and the Traditional Mats Unit. On the basis that the said order was erroneous and prejudicial to the

interests of the Revenue, the Commissioner of Income Tax assumed jurisdiction under section 263 of the Income Tax Act and passed Annexure B order, holding that the assessee was not entitled to set off loss of one 100% export oriented unit against the profit of two other 100% export oriented units. According to the Commissioner, such set off would result in giving the assessee 100% deduction from the profit of the profit earning units and that such deduction would go against the intention of the legislature as envisaged in the second proviso to sub-section (1) of section 10B.

4. The assessee challenged this order of the Commissioner before the Income Tax Appellate Tribunal in ITA.696/08 and the Tribunal held that the order of the assessing officer was not erroneous and prejudicial to the interests of the Revenue and that, therefore, in the facts and circumstances of the case, the assumption of jurisdiction under section 263 of the Act by the Commissioner was held to be improper. Reading of the order shows that the reasoning adopted by the Tribunal is that the view

taken by the assessing officer is one of the possible views and that in such a case, the power of revision under section 263 of the Act could not have been invoked.

5. Aggrieved by the aforesaid order of the Tribunal, the Revenue has filed this appeal and the substantial question of law raised is whether, on the facts and circumstances of the case and on interpretation of section 10B of the Act, the Tribunal is right in law in holding that the order of the assessing officer is not erroneous and prejudicial to the interest of the Revenue.

6. We heard senior counsel for the Revenue and the learned counsel for the assessee.

7. Section 10B incorporates special provisions in respect of 100% export oriented units and in so far as the assessment year 2003-04 is concerned, as per the proviso to sub-section (1), for the assessment year beginning from 1st April, 2003, the deduction under the section shall be 90% of the profits and

gains derived by an undertaking from export of such articles or things. While the entitlement of the units of the assessee for the benefit of the section is not disputed by the Revenue, its contention is that for the purpose of section 10B, each unit should be separately treated since the word used in the section is 'an undertaking' and that, therefore, set off of loss of one unit against the profit of another is not permissible.

8. However, the question that is required to be considered is whether, in the facts of this case, the Commissioner was justified in assuming jurisdiction under section 263 of the Act. Section 263 of the Act empowers the Commissioner to call for and examine the record of any proceeding under the Act, and if he considers that any order passed therein by the assessing officer is erroneous in so far as it is prejudicial to the interest of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such enquiry as he deems necessary, pass such order thereon as the circumstances of the case justify.

This power includes the power to order enhancing or modifying the assessment or cancelling the assessment and directing fresh assessment.

9. The celebrated decision explaining the scope of section 263 of the Act is that of the Apex Court in *Malabar Industrial Co. Ltd. v. Commissioner of Income-tax* [243 ITR 83]. In that judgment, the meaning of the term 'prejudicial to the interest of the Revenue' and the cases where this power was invoked have been explained as follows:

"7. There can be no doubt that the provision cannot be invoked to correct each and every type of mistake or error committed by the Assessing Officer; it is only when an order is erroneous that the section will be attracted. An incorrect assumption of facts or an incorrect application of law will satisfy the requirement of the order being erroneous. In the same category fall orders passed without applying the principles of natural justice or without application of mind.

8. The phrase 'prejudicial to the interests of the revenue' is not an expression of art and is not defined in the Act. Understood in its ordinary meaning it is of wide import and is not conferred (confined) to loss of tax. The High Court of

Calcutta in *Dawjee Dadabhoy and Co. v. S. P. Jain*, (31 ITR 872) : (AIR 1957 Cal 244), the High Court of Karnataka in *Commissioner of Income-tax, Mysore v. T. Narayana Pai*, (1975) 98 ITR 422, the High Court of Bombay in *Commissioner of Income-tax v. Gabriel India Ltd.*, 203 ITR 108 : (1994 Tax LR 116) and the High Court of Gujarat in *Commissioner of Income-tax v. Smt. Minalben S. Parikh*, (1995) 215 ITR 81 treated loss of tax as prejudicial to the interests of the revenue.

9. Mr. Abaraham relied on the judgment of the Division Bench of the High Court of Madras in *Venkatakrishna Rice Company v. Commissioner of Income-tax*, (1987) 163 ITR 129 interpreting "prejudicial to the interests of the revenue". The High Court held, "In this context, it must be regarded as involving a conception of acts or orders which are subversive of the administration of revenue. There must be some grievous error in the Order passed by the Income-tax Officer, which might set a bad trend or pattern for similar assessments, which on a broad reckoning, the Commissioner might think to be prejudicial to the interests of Revenue Administration". In our view this interpretation is too narrow to merit acceptance. The scheme of the Act is to levy and collect tax in accordance with the provisions of the Act and this task is entrusted to the Revenue. If due to an erroneous order of the Income-tax Officer, the revenue is losing tax lawfully payable by a person, it will certainly be prejudicial to the interests of the revenue."

10. These principles have been re-iterated by the Apex Court in its judgment in Commissioner of Income Tax v. Amitabh Bachan [2016 (3) KLT SN.4 (C.No.3) SC], where the court inter alia held thus:

"There can be no doubt that so long as the view taken by the Assessing Officer is a possible view the same ought not to be interfered with by the Commissioner under S.263 of the Act merely on the ground that there is another possible view of the matter. Permitting exercise of revisional power in a situation where two views are possible would really amount to conferring some kind of an appellate power in the revisional authority. This is a course of action that must be desisted from."

11. Having regard to these principles, if, as found by the Tribunal, the assessing officer has adopted one of the courses permissible in law and it has resulted in loss of revenue or where two views are possible and the ITO has taken one view with which the Commissioner does not agree, such a case cannot be treated as an erroneous order prejudicial to the interest of the Revenue unless the view taken by the ITO is unsustainable in law. In so far as this case

is concerned, reading of the order passed by the Tribunal shows that it has concluded that the view taken by the assessing officer is one of the possible views. The Tribunal arrived at this conclusion relying on the judgment of the Bombay High Court in Hindustan Unilever Limited v. Deputy Commissioner of Income Tax and Union of India [325 ITR 102] where, on identical facts, the court has held thus:

"23. The fourth and final ground which has weighed with the Assessing Officer in re-opening the assessment is that the assessee claimed a deduction of Rs.14.53 crores under Section 10B. The deduction was restricted to Rs.11.11 crores in the order. While re-opening the assessment, the Assessing Officer has proceeded on the basis that Section 10B provides an exemption and that in respect of the Crab Stick Unit the assessee had suffered a loss of Rs.1.33 crores. The Assessing Officer has observed that since the income of the unit was exempt from taxation, the loss of the unit could not have been set off against the normal business income. However, this was allowed by the assessment order and it is opined that the assessee's income to the extent of Rs.1.33 crores has escaped assessment.

24. There is merit in the submission which has been urged on behalf of the assessee that the Assessing Officer has while re-opening the assessment ex-facie proceeded on the erroneous premise that Section 10B is a provision in the nature of an exemption. Plainly, Section 10B as it stands is not a provision in the nature of an exemption but provides for a deduction. Section 10B was substituted by the Finance Act of 2000 with effect from 1 April 2001. Prior to the substitution of the provision, the earlier provision stipulated that any profits and gains derived by an assessee from a 100 per cent Export Oriented Undertaking, to which the section applies "shall not be included in the total income of the assessee". The provision, therefore, as it earlier stood was in the nature of an exemption. After the substitution of Section 10B by the Finance Act of 2000, the provision as it now stands provides for a deduction of such profits and gains as are derived by a 100 per cent Export Oriented Undertaking from the export of articles or things or computer software for ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce. Consequently, it is evident that the basis on which the assessment has sought to be re-opened is belied by a plain reading of the provision. The Assessing Officer was plainly in error in proceeding on the basis that because the income is exempted, the loss was not allowable. All the four

units of the assessee were eligible under Section 10B. Three units had returned a profit during the course of the assessment year, while the Crab Stick unit had returned a loss. The assessee was entitled to a deduction in respect of the profits of the three eligible units while the loss sustained by the fourth unit could be set off against the normal business income. In these circumstances, the basis on which the assessment is sought to be re-opened is contrary to the plain language of Section 10B. "

12. This judgment was followed by the Bombay High Court in *The Commissioner of Income Tax v. Galaxy Surfactants Ltd.* [343 ITR 108] and it was held thus:

"5. At the outset, while dealing with the submission which has been urged on behalf of the Revenue, it must be noted that Section 10B when it was originally introduced by the Finance Act, 1988, with effect from 1 April 1989, provided for an exemption of the profits and gains derived by the assessee from a hundred percent export oriented undertaking. The earlier provision specifically stipulated that profits and gains derived by an assessee from a hundred percent export oriented undertaking to which the section applies shall not be included in the total income of the assessee. Section 10A as at present stands,

came to be substituted by the Finance Act, 2000 with effect from 1 April 2001. The section as it now stands, is not a provision for exemption, but a provision which enables an assessee to claim a deduction. As it now stands, the section contemplates a deduction of such profits and gains as are derived by a hundred per cent export oriented undertaking from the export of articles and things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be. The deduction has to be allowed from the total income of the assessee. In *Hindustan Lever Ltd. vs. Deputy Commissioner of Income Tax [(2010) 325 ITR 102 (Bom)]* a Division Bench of this Court considered the provisions of Section 10B, while considering a petition challenging the action of the Assessing Officer in purport to reopen the assessment under Section 148. The Division Bench noted that upon the substitution of the provision by the Finance Act, 2000, Section 10B was no longer a provision for exemption, but a provision for deduction. The Division Bench observed as follows:

Plainly, section 10B as it stands is not a provision in the nature of an exemption but provides for a deduction. Section 10B was substituted by the Finance Act of 2000 with effect from April 1, 2001. Prior to the substitution of the provision, the earlier provision stipulated that any profits and

gains derived by an assessee from a 100 per cent export oriented undertaking, to which the section applies "shall not be included in the total income of the assessee". The provision, therefore, as it earlier stood was in the nature of an exemption. After the substitution of section 10B by the Finance Act of 2000, the provision as it now stands provides for a deduction of such profits and gains as are derived by a 100 per cent export oriented undertaking from the export of articles or things or computer software for ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce. Consequently, it is evident that the basis on which the assessment has sought to be reopened is belied by a plain reading of the provision. The Assessing Officer was plainly in error in proceeding on the basis that because the income is exempted, the loss was not allowable. All the four units of the assessee were eligible under Section 10B. Three units had returned a profit during the course of the assessment year, while the Crab Stick unit had returned a loss. The assessee was entitled to a deduction in respect of the profits of the three eligible units while the loss sustained by the fourth unit could be set off against the normal business income. In these circumstances, the basis on which the assessment is sought to be reopened is contrary to the plain language of Section 10B.

This decision of the Division Bench has been followed by another Division Bench of this Court in the case of Commissioner of Income Tax II vs.

Patni Computers Systems Ltd. Income Tax Appeal
2177/10 decided on 1 July 2011."

13. Reading of the judgments of the Bombay High Court certainly will lead to the conclusion that the view taken by the assessing officer allowing set off is one of the possible views. In such a case, having regard to the principles laid down by the Apex Court in its judgment in Malabar Industrial Co. Ltd. (supra), the Commissioner could not have assumed jurisdiction under section 263 of the Act. Therefore, we confirm the order of the Tribunal.

Answering the question of law framed in favour of the assessee and against the Revenue, the appeal is dismissed.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
DAMA SESHADRI NAIDU, Judge.

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