(2013) 08 MAD CK 0235

Madras High Court

Case No: T.C. (A.) No. 625 of 2009

Commissioner of Income Tax		APPELLANT
	Vs	
Heartland Kg Information Ltd.		RESPONDENT

Date of Decision: Aug. 19, 2013

Citation: (2014) 266 CTR 199 : (2013) 359 ITR 1

Hon'ble Judges: K.B.K. Vasuki, J; Chitra Venkataraman, J

Bench: Division Bench

Advocate: N.V. Balaji, for the Appellant; C.V. Rajan for P.J. Rishikesh, for the Respondent

Final Decision: Dismissed

Judgement

Chitra Venkataraman, J.

The above tax case appeal is filed at the instance of the Revenue as against the order of the income tax Appellate Tribunal for the assessment year 2004-05. The tax case appeal was admitted on the following substantial questions of law:

1. Whether, on the facts and in the circumstances of the case, the income tax Appellate Tribunal was right in law in sustaining the order of the Commissioner of Income Tax (Appeals) and granted deduction u/s 10A of the income tax Act, 1961, even though the assessee claim deduction u/s 10B of the income tax Act 1961?

2. Whether, on the facts and in the circumstances of the case, the income tax Appellate Tribunal was right in law in sustaining the order of the Commissioner of Income Tax (Appeals) even though the assessee does not satisfy the provisions of section 10A(2)(iii) of the income tax Act, 1961?

3. Whether, on the facts and in the circumstances of the case, the income tax Appellate Tribunal was right in law in granting deduction u/s 10A of the income tax Act, even though the assessee is entitled to deduction u/s 80HHE of the income tax Act, 1961, and the same was granted by the Assessing Officer?

The assessee herein is an industrial undertaking engaged in medical transcription business. It is seen from the facts narrated that one M/s. KGISL got approval as a 100 per cent. EOU in the year 1998 from the Software Technology Park of India and started its new business of medical transcription during the financial year 1999-2000. It is stated that it also had another undertaking engaged in the business of development of software exported outside India. To that end it is stated to have imported machinery, during the assessment years 2000-01 and 2001-02. In respect of business income earned from export, the said undertaking claimed for exemption u/s 10A of the income tax Act. In July, 2001, the said company transferred the entire undertaking engaged in the export business of medical transcription along with all transcriptions contracts, books, records, all rights, all permits, all warranties, including computer software to the assessee-company by letter dated May 28, 2001, and June 28, 2001. The transfer was recognised and allowed by the Software Technology Park of India. It is a matter of record and not in dispute that the vendor company transferred its export obligation to the assessee-company. By reason of transfer of the entire business, the employees of the vendor company engaged in medical transcription were also transferred and employed by the assessee-company. In the background of the income on export, originally, the assessee claimed deduction u/s 10B of the Act. The Officer, however, rejected the said claim on the ground that when the assessee had filed approval obtained from the Software Technology Park of India for the purpose of section 10B, the same would not be sufficient to grant the relief. The Assessing Officer further viewed that the assessee had not satisfied the conditions on account of the transfer of business. The officer further pointed out that the transfer related only to machinery. Consequently, the claim could not be sustained. Thus, the claim was rejected. However, on the claim u/s 80HHE as an alternative claim, the officer granted 30 per cent deduction on the profit as allowable u/s 80HHE.

2. Aggrieved by this, the assessee went on appeal before the Commissioner of Income Tax (Appeals). The assessee took a specific stand therein that it had taken an alternative plea for granting relief u/s 10A of the Act, which was rejected by the Assessing Officer on the ground that the claim was hit by section 80I(2) Explanation 2 of the Act. The assessee pointed out that contrary to the view of the officer, the vendor company had transferred the entire business. Consequently, the claim of exemption/deduction u/s 10A of the Act which was already granted to the vendor company would be available to the assessee too. Considering the contentions raised by the assessee as regards the transfer of the entire assets to its favour, the Commissioner of Income Tax (Appeals) sought for detailed report. Accordingly, the Assessing Officer submitted his report, wherein, in paragraph 8, it was pointed out that though the assessee''s balance-sheet showed transfer of business and for that, there was corresponding deduction in the balance-sheet of the vendor company, the approval by the STPI was not sufficient for claiming the benefit u/s 10B of the Act and that the assessee having failed to show that it was 100 per cent. EOU, the

claim was rejected. The assessee contested the report, that considering the vendor company being 100 per cent approved EOU, the benefit that the vendor had would be available to the assessee too. The Commissioner of Income Tax (Appeals) pointed out that as per the deed of transfer, the entire undertaking engaged in the business of medical transcription which was functioning in third and fourth floor of vendor company was transferred with all assets and liabilities to the assessee-company. Referring to the Board''s circular in F. No. 15/5/63-IT(A. 1), dated December 13, 1963, the Commissioner of Income Tax (Appeals) held that the benefit that the vendor company had in respect of the individual undertaking engaged in the manufacture of articles could be claimed by successor company for the remaining tax holiday period since the entire undertaking in the business of medical transcription was transferred to the assessee. Thus, the assessee would be entitled to have the benefit u/s 10A of the Act for the remaining period. The Commissioner further pointed out that for the assessment year 2001-02, M/s. KGISL was granted deduction in respect of medical transcription business commenced during that year. Thus, when the company had the benefit of deduction u/s 10A, on the transfer of the entire business to the assessee-company, the benefit u/s 10A could not be denied to the assessee. The Commissioner of Income Tax (Appeals) further pointed out that even though the assessee had made the claim originally u/s 10B, yet, the relief being one to be considered u/s 10A, and the said claim being already allowed at the hands of the vendor company, the same would be available to the assessee-company too as the alternative claim made before the officer. Thus, the assessee''s appeal was allowed. In the light of the reasoning the Commissioner of Income Tax (Appeals) held that the relief u/s 80HHE would not be available to the assessee.

3. The Revenue went on appeal before the income tax Appellate Tribunal challenging the order of the Commissioner of Income Tax (Appeals) on the aspect of relief granted u/s 10A of the Act. The Tribunal pointed out that the circular issued by the Board clearly supported the case of the assessee. In so holding it referred to the decision of the Gujarat High Court in the case of Chokshi Metal Refinery Vs. Commissioner of Income Tax, Gujarat-II, and held that when the assessee had made alternative claim u/s 10A before the Assessing Officer, it could not be held that the claim was not made before the Assessing Officer. Referring to the provisions u/s 10A of the Act, the Tribunal further held that admittedly the unit is located in the Software Technology Park of India and the copy of the approval letter dated April 25, 2001, clearly showed the status of the assessee-company. The Tribunal referred to the decision of this court reported in A.G.S. Tiber and Chemicals Industries (P) Ltd. Vs. Commissioner of Income Tax, and held that the assessee was entitled to the relief u/s 10A.

4. As regards the objection of the Department that there was only transfer of machinery, the Tribunal pointed out that the letter dated May 28, 2001, from the Software Technology Park of India showed that there was transfer of the whole business of the undertaking on the medical transcription. Thus, it cannot be said

that it was a case of formation of an undertaking by using assets previously used, as contended by the Revenue. In the background of the said factual position, the Tribunal held that the order of the Commissioner of Income Tax (Appeals) merited to be confirmed. Thus, the Tribunal rejected the Revenue''s appeal. Aggrieved by this, the present appeal before this court by the Revenue.

5. As far as the first question raised as regards the claim of the assessee originally made u/s 10B of the income tax Act is concerned, we do not think, the said question can be answered in favour of the Revenue. A reading of the order of the Assessing Officer as well as the Commissioner of Income Tax (Appeals) shows that even though the assessee originally claimed relief u/s 10B, it was cautious enough to make an alternative plea u/s 10A in view of the fact that the assessee''s vendor had the benefit u/s 10A. It is not denied by the Revenue that the assessee had the whole business transferred to its favour and that the factum of transfer was also intimated to the Software Technology Park of India. Thus, as a software technology park, the assessee is entitled to place his claim u/s 10A. In any event, even assuming for a moment, the assessee had not referred to the section correctly, the fact remains that if the claim could be favourably be considered under any of those special deduction provisions and on the conditions specified therein being satisfied, we do not think that there exists any justifiable ground for the Revenue to contend that the assessee shall not be entitled to have the benefit of section 10A.

6. Given the fact that the findings of the Tribunal is that the entire business of M/s. KGISL stood transferred to the assessee and that the assessee is also recognised to have had its industrial unit, in the software technology park, we have no hesitation in confirming the order of the Tribunal in granting the relief to the assessee u/s 10B. Consequently, the first question of law is answered against the Revenue.

7. As far as the second question of law as to whether the Tribunal was right in sustaining the order of the Commissioner of Income Tax (Appeals), that the assessee had not satisfied the provisions u/s 10A(2)(iii) of the Act to claim the deduction u/s 10A, is concerned, the factual position has already been pointed out that the assessee had the entire medical transcription transferred to its favour, a fact which would not be controverted by the Revenue at any stage. Contrary to the assertion of the Revenue that what was transferred was only machinery, we find that the officer himself had accepted that the balance-sheet of the assessee reflected the transfer of the entire business and to that extent, it was removed in the vendor''s balance-sheet.

8. As to the eligibility of the assessee to claim deduction, section 10A(2) of the Act assumes significance, which reads as follows:

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

(i) it has begun or begins to manufacture or produce articles or things or computer software during the previous year relevant to the assessment year--

(a) commencing on or after the 1st day of April, 1981, in any free trade zone; or

(b) commencing on or after the 1st day of April, 1994, in any electronic hardware technology park, or, as the case may be, software technology park;

(c) commencing on or after the 1st day of April, 2001, in any special economic 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 undertaking which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertakings 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 80I 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.

9. A cursory reading of the above section shows that where an undertaking is formed by splitting up or reconstruction of business already in existence then the said undertaking would not be entitled to claim deduction u/s 10A. The other conditions is that the industrial undertaking should not be formed by transfer of plant and machinery already used for any purpose. Thus, what is prohibited in section 10A(2)(iii) is that the transfer of the used machinery and plant to a new business undertaking and forming of an industrial undertaking by splitting or reconstruction of the existing industrial undertaking. The intention thus u/s 10A being clear and that there is no specific prohibition or even by inference to an industrial unit formed by transfer of the entire business, we have no hesitation in rejecting the Revenue''s plea that by transfer of machinery, the assessee would be disentitled to the relief u/s 10A. As already pointed out, the fact herein is that the transfer was not that of plant and machinery alone but of sale of the whole business unit to the transferor company which was primarily only of export of articles or things. In the circumstances, going by the clear provisions of the Act, we reject the Revenue''s plea.

10. In this regard, learned counsel for the assessee placed reliance on the decision of the Bombay High Court reported in The Commissioner of Income Tax, City-VII, Mumbai Vs. M/s. Sonata Software Ltd., , wherein, the Bombay High Court held that the sale of business was not reconstruction. The issue therein arose in the context of section 10A of the income tax Act. Referring to the decision of the Supreme Court

reported in Textile Machinery Corporation Limited, Calcutta Vs. The Commissioner of Income Tax, West Bengal, , the Bombay High Court held that where a running business is transferred lock, stock and barrel by one assessee to another assessee, the principle of reconstruction, splitting up and transfer of plant and machinery could not be applied.

11. Going by the decision of the Bombay High Court and the decision of the Supreme Court, we hold that the contention of the Revenue based on section 10A(2)(ii) of the Act cannot be sustained. In the circumstances, we reject the Revenue''s plea, in particular, question No. 2, on the factual finding that the sale is of the business as a whole and not just the machinery alone.

12. Learned counsel for the assessee also placed reliance on the decision of the Allahabad High Court reported in Commissioner of Income Tax Vs. Bullet International, , wherein the Allahabad High Court considered the case of proprietorship business transferred to partnership, claiming the benefit of exemption u/s 10A The Allahabad High Court pointed out that there was no dispute that for the earlier assessment year exemption was granted to the proprietary business. The denial of exemption on the ground that conversion of the proprietorship into the partnership to result in the dis-entitlement of the benefit u/s 10A is not borne out either by the plain language of section 10A or in view of Circular No. 7 of 2003, dated September 5, 2003. Thus, the successor in business would be entitled to have the benefit u/s 10A. Thus, referring to sub-sections (9) and (9A) of section 10A, which were no longer in existence with effect from April 1, 2004, the Allahabad High Court held against the Revenue that the benefit would be available to the partnership concern too, which was formed out of conversion of the proprietorship concern.

13. This takes us to the third question of law, viz., as to whether the Tribunal was right in granting deduction u/s 10A, although the assessee was entitled to deduction u/s 80HHE of the income tax Act. We do not find that the said question survives for any consideration, for the simple reason, that this court accepts the plea of the assessee that the assessee would be entitled to the claim u/s 10A Having thus granted relief to the assessee u/s 10A, the Tribunal rightly held that the assessee was not entitled to the relief u/s 80HHE. Having regard to the above fact, we do not find that question No. 3, in this case survives for consideration and the same is rejected. In the circumstances, the above tax case (appeals) stands dismissed. No costs.