

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1150 OF 2010
WITH
INCOME TAX APPEAL NO. 1200 OF 2010
WITH
INCOME TAX APPEAL NO. 1269 OF 2010

The Commissioner of Income Tax-2,
Aayakar Bhavan, M.K.Road,
Mumbai-400020.

..Appellant.

Vs.

Western Outdoor Interactive Pvt. Ltd.
7th floor, Nanavati Mahalaya,
18, Homi Mody Street,
Mumbai-400001.

..Respondent.

Mr. Vimal Gupta for the Appellant.

Mr. Percy Pardiwalla, Sr.Counsel along with Mr. Atul K. Jasani i/by
Mr.Atul K.Jasani for the Respondent.

**CORAM : S.J.VAZIFDAR &
M.S. SANKLECHA, JJ.**

DATE : 14th August, 2012.

JUDGMENT : (Per M.S. SANKLECHA, J.s)

These appeals by the revenue under Section 260A of the Income Tax Act, 1961 ("the Act") are against the common order dated 12/8/2009 of the Income Tax Appellate Tribunal ("the Tribunal") in relation to assessment years 2002-2003, 2003-04 and 2004-05.

2) Being aggrieved by the order dated 12/8/2009, the appellant revenue has formulated the following identical question of law for the three assessment years for the consideration of this Court.

Whether on the facts and in the circumstances of the case and in law the Tribunal was justified in allowing exemption to the assessee company u/s. 10A of the Income Tax Act in respect of its unit at SEEPZ Mumbai even though it has not complied with the requirements of the sub section 10A(2)(ii) of the Income Tax Act?

3) The facts are similar in all the three appeals. However, for the sake of convenience, we are setting out the facts stated in appeal No.1150 of 2010 pertaining to the assessment year 2002-03 as under:

a) The respondent-assessee is engaged in the business of development of software for in-flight entertainment for aircrafts. The software developed by the respondent-assessee is exported to one M/s. MAS Ltd. USA. The respondent-assessee has two divisions one in Fort, Mumbai which commenced its operation in 1997-98 and the other at Santacruz Export Processing Zone(SEEPZ) which commenced operation during 2000-2001.

b) In respect of its unit at SEEPZ, the respondent-assessee has claimed the benefit of Section 10A of the Act from assessment year 2000-2001 onwards. The Income Tax

Department allowed the claim for exemption of SEEPZ unit under Section 10A for the assessment year 2000-01,2001-02 and 2002-03. However, for the assessment year 2003-04 and 2004-05 the benefit of Section 10A of the Act was not extended to the SEEPZ unit on the ground that the same was formed by splitting of the Fort unit.

c) Consequent to the above, the assessment for the assessment year 2002-03 was reopened under Section 147/148 of the Act. The Assessing officer by his order dated 24/7/2007 for the assessment year 2002-03 rejected the appellant's claim for exemption for SEEPZ unit under section 10A of the Act on the ground that it was formed by splitting the Fort unit as is evident from the fact that same kind of software is being exported by both units and export realization was received by single payment in many cases and many expenses like foreign travel expenses were incurred by the Fort unit and transferred to the SEEPZ unit.

d) In appeal, the Commissioner of Income Tax (Appeals) by an order dated 24/3/2008 set aside the order dated 24/7/2007 for the assessment year 2002-03 disallowing the claim of exemption under Section 10A of the Act to SEEPZ unit. The order dated 24/3/2008 while holding that benefit of Section 10A is available to SEEPZ unit records that the order for the assessment year 2003-04 and 2004-05 by the Assessing officer denying the benefit of Section 10A of the Act had been set aside by his predecessor.

Therefore, the Assessing officer was directed to grant relief under Section 10A of the Act to the respondent-assessee in respect of its SEEPZ unit.

e) Being aggrieved, the revenue filed an appeal before the Tribunal. The Tribunal by its common order dated 12/8/2009 dismissed the revenue's appeal for the assessment years 2002-03, 2003-04 and 2004-05 by holding that the respondent's SEEPZ unit is entitled on merits to the benefit of Section 10A of the Act. The Tribunal records a finding that for the assessment year 2000-01 and 2001-02 the claim of the respondent under Section-10A of SEEPZ unit was allowed in scrutiny assessment under Section 143(3) of the Act. Further, on merits, it was held that two units were functioning at different location and were functioning independently. Further, nothing has been brought on record to suggest that any plant, machinery or equipments of the existing unit was transferred to the new unit. Further there were separate books of accounts and bank accounts for both the units. The Tribunal also held that merely because the two units manufactured the same product it cannot lead to a conclusion that they are not two separate units. Thus, the grant of benefit of Section 10A of the Act was upheld.

4) Mr. Vimal Gupta, Counsel appearing for the revenue in support of the appeal submits that SEEPZ unit is formed by splitting up Fort unit as is evident from the fact that both units develop the same software product, export it to the same party and many a times

common remittance is also received from the foreign party. It is his case that merely by opening a bank account, taking separate premises and purchasing of few computers would not result in an independent unit being set up. Mr. Gupta further submits that the Tribunal erred in proceeding on the basis that as the respondent-assessee had been granted benefit of Section 10A of the Act for assessment year 2000-01 and 2001-02, it is not open to take a contrary view for subsequent years. Mr. Gupta submits that each year is an independent year and there is no concept of res-judicata in tax matters. Therefore, the revenue is entitled to take a different view in subsequent year.

5) On the other hand, Mr. Percy Pardiwalla, Senior Counsel appearing on behalf of the respondent-assessee submitted that in view of the decision of this court in the matter of **Commissioner of Income Tax v. Paul Brothers reported in 216 ITR 548 and M/s.Direct Information Private Ltd. v. ITO dated 29/9/2011 in Writ Petition No.1479/2011**, the issue is no longer open to debate. In the above case, it is held that once a benefit of deduction was extended in respect of a provision for a particular number of years then unless the benefit is withdrawn for the first year it cannot be withdrawn for subsequent years, particularly, when there is no change in the facts. Therefore, he states that once a benefit of Section 10A was extended to the respondent-assessee for the assessment year 2000-01 and 2001-02 in respect of its claim for exemption under Section-10A of the Act and the same not having been withdrawn for those years it cannot be denied in the subsequent assessment years. This is for the reason that the benefit under Section 10A of the Act is available *inter alia* if the unit has not been formed by splitting up or reconstruction of

business already in existence. This aspect of the matter was examined while completing assessment under Section 143(3) for the assessment year 2000-01 and 2001-02 and the benefit was extended after reaching a conclusion that the same was not formed by splitting up or reconstruction of the business already in existence. Further, the benefit which is given to the respondent-assessee under Section-10A is for the period of 10 consecutive assessment years beginning with the assessment year in which the undertaking begins to export computer software. Besides the above, he submitted that both Commissioner of Income Tax (Appeals) and the Tribunal have concluded on examination of evidence that SEEPZ unit was an independent unit not formed by splitting up of the Fort unit. Therefore, this Court should not interfere with this finding of fact.

6) We have considered the submissions. We find that the submissions made by Mr. Pardiwalla on the basis of the decision of this Court in the matter of **Paul Brothers (supra)** and **Director of Information Pvt. Ltd. (supra)** merits acceptance. Therefore, in this case, it is not necessary for us to decide whether SEEPZ unit was set up/formed by splitting up of the first unit. In both the above decisions, this Court has held that where a benefit of deduction is available for a particular number of years on satisfaction of certain conditions under the provisions of the Income Tax Act, then unless relief granted for the first assessment year in which the claim was made and accepted is withdrawn or set aside, the Income Tax officer cannot withdraw the relief for subsequent years. More particularly so, when the revenue has not even suggested that there was any change in the facts warranting a different view for subsequent years. In this case for

the assessment years 2000-01 and 2001-02 the relief granted under Section 10A of the Act to SEEPZ unit has not been withdrawn. There is no change in the facts which were in existence during the assessment year 2000-01 vis a vis the claim to exemption under section 10A of the Act. Therefore, it is not open to the department to deny the benefit of Section 10A for subsequent assessment years i. e. assessment years 2002-03 and 2003-04 and 2004-05. Besides that, on consideration of the facts involved both the Commissioner of Income Tax (Appeals) and the Tribunal have recorded a finding of fact that the SEEPZ unit is not formed by splitting up of the first unit.

7) In view of the above, the question as formulated in the present facts, do not give rise to any substantial question of law. Therefore, appeal is dismissed. No order as to costs.

(M.S. SANKLECHA, J.)

(S. J. VAZIFDAR, J.)