Legal Decisions[1]

Income-tax Act

LD/61/1

CIT
Vs.
Cargil Global Trading I.P. Ltd.
May 10, 2012 (SC)
[Assessment Years 2004-05 & 2005-06]

Section 2(28A) read with section 37(1) and section 195 of Income-tax Act, 1961 - Interest

Bills of exchange were discounted by assessee from a Singapore financial company, which on discounting bills immediately remits discounted amount to assessee; thereafter, it was obligations of said company to release amounts of those buyers to whom goods were exported and bills were drawn by assessee, such discounted charges could not be held to be payment of interest

The respondent assessee was in the export business. CFSA, the assessee's associate company in Singapore underwrite or otherwise acquire, own, hold, sell or exchange securities or investments of any kind including negotiable instruments, commercial paper etc. Accordingly, as a part of its aforesaid business, it draws, makes, accepts, endorses, discounts, executes and issues promissory notes, BE, etc. Further CFSA does not have a permanent establishment (PE) in terms of Articles 5 of the India Singapore Treaty.

On the exports made by the assessee to its best buyers outside India, the assessee drew bills of exchange on those buyers located outside India. These bills of exchange were discounted by the assessee from CFSA who on discounting the bills immediately remitted the discounted amount to the assessee. Thereafter, it was the obligations/headaches of CFSA to release the amounts of those buyers to whom the goods were exported and bills were drawn by the assessee. It was the said discounted charges which were claimed by the assessee as expenses under section 37(1). The discounting facilities were offered by the CFSA to the assessee after charging its aforesaid discounted commission.

According to the Assessing Officer, the aforesaid discounted charges by the assessee to CFSA were 'interest' within the meaning of section 2 (28A) on payment of which TDS was required to be deducted by the assessee.

The Delhi Court held that before any amount paid is construed as interest, it has to be established that the same is payable in respect of any money borrowed or debt incurred. The discount charges paid were not in respect of any debt incurred or money borrowed. Instead, the assessee had merely discounted the sale consideration respectively on sale of goods.

For such cases of immediate discounting the net payment made to the supplier was in the nature of a price paid for the bill. Such payment could not technically be held as including any interest and therefore, no tax was required to be deducted at source from such payment by the bank.

The Supreme Court dismissed the Special Leave Petitions filed by the Department against the order of the High Court.

Note: The judgment and order dated 17-02-2011 in ITA No.331/2011 of the High Court of Delhi, upheld.

LD/61/2

Maral Overseas Ltd.
Vs.
Additional CIT, Range 5, Indore
March 28, 2012 (ITAT-Indore-SB)
[Assessment Years 2001-02 & 2002-03]

Section 10B of the Income-tax Act, 1961 – Export Oriented Undertaking (EOU)

Where assessee EOU had not availed section 10B deduction for first three years of operation and it was entitled to said deduction for five years up to assessment year 1999-2000, in view of amendment extending benefit up to 10 years available from assessment year 1999-2000 onwards, assessee would be entitled to benefit for total period of 10 years

The assessee is a company engaged in the manufacture and mainly export of cotton yarn, grey & finished knitted cotton fabrics & readymade garments. In the first year of operation of original unit, there was loss. As per provisions of section 10B(3), the assessee company exercised its option not to avail exemption under section 10B, for assessment years 1992-93, 1993-94 and 1994-95. As such, the first year of its claim under section 10B was assessment year 1995-96 and the same was admissible up to assessment year 1999-2000 only since the assessee was entitled for deduction only for five consecutive years out of eight years. The assessee went ahead further and claimed

[1] *Readers are invited to send their comments on the selection of cases and their utility at eboard@icai.org.*

exemption under section 10B for assessment year 2000-01 and assessment year 2001-02 also. As per the Assessing Officer, the assessee company exceeded its claim beyond permissible limit of 5 consecutive years out of eight years.

However, the Commissioner (Appeals) allowed assessee's claim after observing that section 10B was amended with effect from 1-4-1999, thereby extending the period of exemption from 5 years to 10 years and accordingly benefit of 10 year exemption is available from assessment year 1999-2000 onwards as the assessee had not exhausted benefit of 5 years exemption on the basis of relevant and operative provisions.

The Indore Special Bench of Tribunal held that with effect from 1.4.2001, the entire section 10B has been substituted by the Finance Act, 2000, sub-section (1) of which provides for deduction of profits for 100% EOU for a period of 10 consecutive years beginning with the assessment year relevant to the previous year in which the undertaking starts its production.

This substitution lays down the clear intention of the legislature to provide the benefit of extended period of ten years to all the units, existing or new. When this amendment was brought into effect, the appellant was still eligible for exemption under section 10B for two assessment years and as such qualified for exemption for the unexpired period of ten years.

The first proviso to the newly substituted section 10B(1) categorically allows exemption to the existing units for the unexpired period of ten years. Even the Explanatory note relating to the said enactment states that an undertaking set up before 31.03.2000 shall be entitled to the deduction for a period of ten years. Though this amendment is effective from 01.04.2001, it specifically allows exemption to existing unit for a period of ten years.

In the assessee's case, the amended law became applicable during the period in which the assessee was otherwise eligible for claiming deduction under section l0B under the pre amended law. Thus, as a necessary corollary and applying the amended law, the assessee was clearly eligible for deduction under section l0B for the extended period.

As the period of ten years from the year of start of manufacture has not expired as on the date when the amended provision came into force, the assessee is entitled to the benefit of tax holiday for the remaining period of ten years.

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Section 10B of the Income-tax Act, 1961 – Export Oriented Undertaking (EOU)

Export incentives received by 100 per cent EOU is eligible for deduction under section 10B

The export entitlement was allotted by the competent authority in respect of export undertaken by the assessee during the year. The assessee off-loaded the entitlement which was unusable and bought quota/ entitlements which was required for procuring the required material necessary for its production purpose. Similarly, special import licence was allotted to the assessee by the designated authority as per Export Import Policy And Procedure 1997 – 2002. Income arising out of sale of export entitlement and special import licence was assessed as income from business. However, on such business income, the assessee is entitled to claim of deduction under section 10B in respect of such income.

The assessee was in receipt of export entitlement of ₹1.65 crores and special import licence of ₹4.47 lacs. The Assessing Officer declined the claim of deduction by holding that such income was not derived from 100% export oriented undertaking, therefore, not eligible for claim of deduction under section 10B(1) read with section 10B(4). The Commissioner (Appeals), by following the order of the Tribunal in the assessee's own case, held that the assessee was eligible for exemption in respect of export entitlement and special import licence as the income of EOU eligible for exemption under section 10B.

The Tribunal held that the provisions of sub-section (4) of section 10B mandate that deduction under that section shall be computed by apportioning the profits of the business of the undertaking in the ratio of export turnover by the total turnover. Thus, even though sub-section (1) of section 10B refers to profits and gains as are derived by a 100% EOU, the manner of determining such eligible profits has been statutorily defined in sub-section (4) of that section. Both sub-sections (1) and (4) are to be read together while computing the eligible deduction under section 10B. Sub-section (4) of section 10B provides specific formula for computing the profits derived by the undertaking from export. As per the formula so laid down, the entire profits of the business are to be determined which are further multiplied by the ratio of export turnover to the total turnover of the business.

Section 10B(1) allows deduction in respect of profits and gains as are derived by a 100% EOU. Section 10B(4) lays down special formula for computing the

profits derived by the undertaking from export. The formula is as under:-

$$\text{Profit of the business of the Undertaking} \times \frac{\text{Export turnover}}{\text{Total turnover of business carried out by the undertaking}}$$

Thus, sub-section (4) of section 10B stipulated that deduction under that section shall be computed by apportioning the profits of the business of the undertaking in the ratio of turnover to the total turnover. Thus, not-with-standing the fact that sub-section (1) of section 10B refers the profits and gains as are derived by a 100% EOU, yet the manner of determining such eligible profits has been statutorily defined in sub-section (4) of section 10B of the Act. As per the formula stated above, the entire profits of the business are to be taken which are multiplied by the ratio of the export turnover to the total turnover of the business. Sub-section (4) does not require an assessee to establish a direct nexus with the business of the undertaking and once an income forms part of the business of the undertaking, the same would be included in the profits of the business of the undertaking. Thus, once an income forms part of the business of the eligible undertaking, there is no further mandate in the provisions of section 10B to exclude the same from the eligible profits. The mode of determining the eligible deduction under section 10B is similar to the provisions of section 80HHC inasmuch as both the sections mandates determination of eligible profits as per the formula contained therein. The only difference is that section 80HHC contains a further mandate in terms of *Explanation* (baa) for exclusion of certain income from the "profits of the business" which is, however, conspicuous by its absence in section 10B. On the basis of the aforesaid distinction, sub-section (4) of section 10A/10B is a complete code providing the mechanism for computing the "profits of the business" eligible for deduction under section 10B. Once an income forms part of the business of the income of the eligible undertaking of the assessee, the same cannot be excluded from the eligible profits for the purpose of computing deduction under section 10B. As per the computation made by the Assessing Officer himself, there is no dispute that both these incomes have been treated by the Assessing Officer as business income.

In view of the above discussion, the assessee is eligible for claim of deduction on export incentive received by it in terms of provisions of section 10B(1) read with section 10B(4).

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Section 10B of the Income-tax Act, 1961 – Export Oriented Undertaking (EOU)

An undertaking means a unit/business which has a separate and independent existence distinct from other units/business having independent infrastructure, separate plant and machinery being set up with substantial capital investment and having an identifiable output and profits attributable thereto

The expression "undertaking" has not been defined under section 10B but has been explained by the Courts. The Supreme Court in the case of *Textile Machinery Corporation Limited v. CIT*, 107 ITR 195 held that the true test is whether the unit claiming deduction is a new and identifiable undertaking separate and distinct from the existing business. It was further held that manufacture or production of articles yielding additional profit attributable to the new outlay of capital is a separate and distinct unit is the heart of the matter, to earn benefit from the exemption of tax liability.

Section 10B does not stipulate for issue of separate approval for each unit from the competent authority. The only requirement under the said section is that the undertaking should be approved.

Where fresh permission was granted for a new unit where the competent authority extended the benefit available to 100% export oriented unit for substantial extension of the existing undertaking, same would be entitled to section 10B exemption.

The manner of granting approval/licence for new unit is not relevant and even the endorsement on the existing licence/approval would be sufficient for considering the unit as distinct and separate undertaking, where the assessee fulfilled all the conditions, namely,

(a) Business has separate and independent existence, separate and distinct from other units/business
(b) Employment of independent infrastructure and separate plant and machinery etc.
(c) Substantial capital investment
(d) New employees and
(e) Identifiable output (even though same product) and profits thereto can be determined.

An EOU will not disentitle the assessee from claiming deduction under section 10B in respect of two new units where these units were set up in a newly constructed building by installing, new plant and machinery, new power plant and new manufacturing facilities which resulted into increased turnover by almost double, recruitment of new manpower/ employees, manufacturing of new identifiable and

marketed products, maintenance of separate books of account for each unit, obtaining separate approvals for new spinning units and permission for enhanced capacity. It is pertinent to mention here that new, separate and independent units were set up which were distinct from other existing unit eligible for deduction under section 10B.

LD/61/3

North Eastern Electric Power Corporation Employees Provident Fund Trust (NEEPCO EPF Trust)
Vs.
Union of India
December 16, 2011 (Gauhati)
[Assessment Years 1995-96 to 1998-99]

Section 239 read with Section 119 of Income-tax Act, 1961 – Refunds – Time Limits to Claim

As all income generated by a recognised employees provident fund, was not chargeable to income-tax, it was not required to submit or file any return of income-tax, however, in order to claim refund of TDS erroneously deducted by financial institutions in which funds were invested, petitioner-Trust filed returns; belated filing of return can be no ground for denying refund

The income of the petitioner recognised employees PF Trust, was exempted from payment of income-tax under section 10(25)(ii) and it was not required to file return. The funds of the petitioner-Trust were invested as per the instructions of the Government of India in various financial institutions. These financial institutions deducted the income-tax at source from the incomes earned from such fixed deposits. In order to claim refund of the said TDS erroneously deducted by the financial institutions, the petitioner-Trust filed the returns.

The Assessing Officer passed the order that the return had been filed beyond the time-limit and hence they were invalid. He rejected the application for the TDS refunds. On filing an application under section 119, before the Chief Commissioner, concerned officer instructed the petitioner to submit comprehensive note to establish on record that it was prevented by reasonable cause from filing of return within the statutory time-limit. The petitioner-Trust submitted that the delay in filing the returns to the office of the CCIT was caused by the bifurcation of employer company with consequential bifurcation of the PF fund, stabilisation of computerised system, delay in audit of the account, non-issue of IT exemption certificate under section 10(25) by the income-tax authorities, etc. After much delay, the Commissioner by his order refused to condone the delay in filing the return on ground that it was not a case of genuine hardship as envisaged under section 119(2)(b).

The writ petition filed by the assessee was opposed by the respondent, on the ground that under section 239(2)(c), the claim of refund can be allowed only if such claim is made within one year from the last date of assessment year for which such claim is made. As the petitioner-Trust had failed to comply with section 239(2)(c), the Commissioner had rightly disallowed the claim of refund.

The question to be decided then was, whether the revenue authorities could take the shelter of technicalities to deny refund of the income-tax deductions made at source, which did not legitimately belong to them.

The Gauhati High Court held that the petitioner-Trust, in this case, was being deprived of a sum of ₹9 lakh which it could not be blamed at all. It had no liability whatsoever to pay this amount to the Revenue. Yet, the revenue had refused to refund the same by taking some hyper-technical view of the matter. If the petitioner-Trust was being deprived of a sum of ₹9 lakh which legitimately belonged to it due to perverse view taken by the revenue, there was no rational to say that no genuine hardship is being caused to the assessee. The revenue was acting like a small-time trader, and was in danger of being accused as interested in enriching itself unjustly at the expense of a citizen. This was another form of State extortion from a helpless taxpayer. The revenue also did not dispute that the petitioner-Trust had no liability whatsoever to it to pay the aforesaid amount. Therefore, it was to be concluded that the revenue had not properly applied its mind to the facts of the case and had in the process completely overlooked the provisions of section 119(1)(b). The attitude of the revenue, to say the least, was in defiance of logic or of accepted moral standards that no sensible person could have arrived at. True, no specific or express provision is engrafted in this section to deal with refund of TDS erroneously deducted when there is no due from the assessee. But then, this is precisely the reason, for enacting section 119(1)(b). This is in the nature of an inherent power granted to the Central Board of Direct Taxes to entrust any income-tax authority other than a Commissioner (Appeals) to admit an application or claim for exemption, refund even belatedly and dispose of the same in

accordance with law. The Parliament was obviously not unmindful of the possibility of future occurrence of innumerable situations which are likely to cause genuine hardships to citizens in course of collection of revenue such as the one herein but which could not be foreseen by it at the time of enacting the legislation, and it is apparently with view to meet such exigencies that section 119(1)(b) was engrafted. Section 119(1)(b) is the appropriate provision to deal with case of this nature.

The petitioner was entitled to condonation of the delay in filing the claim for refund. Resultantly, the respondent authorities should refund the amount along with interest.

LD/61/4
CIT
Vs.
Nalwa Sons Investment Ltd.
May 4, 2012 (SC)
[Assessment Year 2001-02]

Section 271(1)(c), read with section 115JB of the of Income-tax Act, 1961 – Penalty – For Concealment of Income

Where assessment as per normal procedure was not acted upon on contrary, it is deemed income assessed under section 115JB which has become basis of assessment as it was higher of two and tax is paid as a result of which concealment did not lead to tax evasion at all no penal consequences would follow

Judgment of the Supreme Court in *CIT v. Gold Coin Health Care Limited* clarifies that even if there are losses in a particular year, penalty can be imposed as even in that situation there can be a tax evasion. As per section 271(1)(c), the penalty can be imposed when any person has concealed the particulars of his income or furnished incorrect particulars of the income. Once this condition is satisfied, quantum of penalty is to be levied as per clause (3) of section 271(1)(c) which stipulates that the penalty shall not exceed three times " the amount of tax sought to be evaded". The expression "the amount of tax sought to be evaded" is clarified and explained in *Explanation* 4 thereto, as per which it has to have the effect of reducing the loss declared in the return or converting that loss into income.

Whether furnishing of such wrong particulars had any effect on the amount of tax sought to be evaded

Under the scheme of the Act, the total income of the assessee is first computed under the normal provisions of the Act and tax payable on such total income is compared with the prescribed percentage of the 'book profits' computed under section 115JB. The higher of the two amounts is regarded as total income and tax is payable with reference to such total income. If the tax payable under the normal provisions is higher, such amount is the total income of the assessee, otherwise, 'book profits' are deemed as the total income of the appellant in terms of section 115JB.

The income of the assessee-company computed as per the normal procedure was less than the income determined by legal fiction namely 'book profits' under section 115JB. On the basis of normal provision, the income was assessed in the negative i.e. at a loss of ₹37 crores. On the other hand, assessment under section 115JB resulted in calculation of profits at ₹4 crores.

The Delhi Court held that judgment in the case of *Gold Coins (Supra)*, obviously, does not deal with such a situation. What is held by the Supreme Court in that case is that even if in the income tax return filed by the assessee losses are shown, penalty can still be imposed in a case where on setting off the concealed income against any loss incurred by the assessee under other head of income or brought forward from earlier years, the total income is reduced to a figure lower than the concealed income or even a minus figure. The court was of the opinion that the tax sought to be evaded will mean the tax chargeable not as if it were the total income. Once, this rationale is applied to Explanation 4 given by the Supreme Court, in the present case, it will be difficult to sustain the penalty proceedings. Reason is simple. No doubt, there was concealment but that had its repercussions only when the assessment was done under the normal procedure. The assessment as per the normal procedure was, however, not acted upon. On the contrary, it is the deemed income assessed under section 115JB which has become the basis of assessment as it was higher of the two. Tax is thus paid on the income assessed under section 115JB. Hence, when the computation was made under section 115JB, the aforesaid concealment had no role to play and was totally irrelevant. Therefore, the concealment did not lead to tax evasion at all.

The Supreme Court dismissed the Special Leave Petitions filed by the Department against the order of the High Court.

Note: The judgment and order dated 26-08-2010 in ITA No.1420/2009 of the High Court of Delhi, upheld.