

**IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA 'SMC' BENCH, KOLKATA**

[Before Sri J. Sudhakar Reddy, Accountant Member]

I.T.A. No. 2390/Kol/2016

Assessment Year: 2011-12

M/s. Madura Stones Pvt. Ltd.....Appellant
5, Clive Row
6th Floor
Room No. 6A
Kolkata - 700 001
[PAN : AAECM 6774 G]

Income Tax Officer, Ward-9(1).....Respondent
P-7, Chowringhee Square
Kolkata - 700 069

Appearances by:

Shri Miraj D. Shah, A.R., appeared on behalf of the assessee.

Shri Alok Nag, Addl. CIT, DR appearing on behalf of the Revenue.

Date of concluding the hearing : February 6th, 2018

Date of pronouncing the order : March 16th, 2018

O R D E R

Per J. Sudhakar Reddy :-

This appeal filed by the assessee is directed against the order of the Id. Commissioner of Income Tax (Appeals)-2, Kolkata, (hereinafter the 'Id. CIT (A)'), passed u/s 250 of the Income Tax Act, 1961 (the 'Act'), dt. 22/09/2016.

2. The assessee is a company and is in the business of manufacturing of marbles and granites and export of the same. It claimed deduction u/s 10B of the Act, as a 100% Export Oriented Unit (EOU). The Assessing Officer held as follows:-

"The CBDT has vide instruction number 02/2009 dated 09.03.2009 and corrigendum dated 08.05.2009 issued the following Circular:

"section 10B of the Income Tax Act provides for exemption of income in case of hundred percent export oriented undertaking subject to prescribed conditions. Explanation 2(iv) below to the said section defines a "hundred percent export oriented undertaking" as a undertaking so approved by the Board appointed in this behalf by the Central Government under Section 14 of the Industries Development and Regulation 1951. Subsequent to the delegation of this power by the Ministry of Commerce and Industries to the Development Commissioners, such approvals to 100% EOUs are now being granted by the Development Commissioners which are later ratified by the Board of approval".

From the submission of the AR, it was seen that no supporting documents submitted regarding the CBDTs Instruction number 02/2009 dated 09.03.2009

and corrigendum dated 08.05.2009. Finally, a show-cause letter dated 12/03/2014 was issued as below :-

"It is found from your return of Income and Accounts as submitted by you, that you have claimed exemption u/s 10B of Rs. 1,60,92,202/-. You are requested to furnish the copies of documents to substantiate your claim of exemption u/s 10B of the I. T. Act. As required as per the Instruction No. 02/2009, dated 09.03.2009, Corrected by (F.No. 178/19/2008-ITA-I) dated 08.05.2009.... In absence of the above documents you are requested to explain, why your claim of exemption u/s 10B will not be disallowed".

The AR vide his letter dated 27.03.2014 submitted as below:-

" ... As per your requirement, you had stated that the assessee had not followed the Instruction No. 02/2009 dated 09.03.2009. On reading the Instruction No. 02/2009 dated 09.03.2009, it states that approvals to hundred percent EOU's are now being granted by the Development Commissioners, which are later ratified by the Board of Approvals. In this Case the assessee had obtained the Approval of Development Commissioners, but it did not ratify it by the Board of Approvals. The assessee was not aware of such formality to be complied with. This Instruction is also not mentioned in the Income Tax Act, 1961. Therefore it did not ratify it by the Board of Approvals. There was no mala fide intention of the assessee to take unnecessary advantage of this fact.

The Instructions are issued for guide lining the provisions of Statute. But they are not binding on it. So, to claim deductions under section 10B, the Instruction which states that approvals to hundred percent EOU's are now being granted by the Development Commissioners, which are later ratified by the Board of Approvals cannot supersede the provisions of Income Tax Act, 1961. And the Income Tax Act, 1961 does not state that the approval of Development Commissioners, which should be later ratified by the Board of Approvals for claiming deduction u/s 10B of the Income Tax Act, 1961 is to be followed mandatorily.

Moreover, a provision in Income Tax Act granting incentives for promoting growth and development should be construed liberally and not stringently, Me restriction on it too has to be construed liberally so as to advance the objective of the provision and not to frustrate it.

The assessee had followed the Income Tax Act, 1961, and its provision for claiming Deduction u/s 10B. So it had obtained the Approval of the Board appointed in this behalf by the Central Government. We would like to inform you that non ratification by the Board of Approvals does not amount to disallowance of deduction u/s 10B of the Income Tax Act, 1961".

In view of the above and discussions made, it is concluded that the assessee is not entitled for exemption of its income under section 10B of the Act. In other words, the assessee was not approved by the concerned statutory Board of Approval, as required by the terms of the above Explanation to section 10B Commissioner in the case of an hundred percent export oriented unit will be considered valid, once such an approval is ratified by the Board of Approval for EOU Scheme. Hence exemption claimed of Rs. 1,60,92,202/- by the assessee u/s 10B is disallowed and added back to the total business income of the assessee. Penalty proceedings u/s 271(1)(c) of the Income-tax Act, 1961 is being initiated separately.

3. The assessee carried the matter in appeal before the Id. First Appellate Authority. The Id. First Appellate Authority rejected the contentions of the assessee that, the Act does not provide for ratification by Board and that the

approval granted by the Development Commissioner for and on behalf of the Board to be considered as fulfilling the requirements of law.

4. Further aggrieved, the assessee is in appeal before.

5. The sum and substance of the contention of the assessee is that, a plain reading of the Section provides that approval should be taken from the Board and that, the Board is represented by the Development Commissioner through whom it has granted approval. It was submitted that the fact that ratification of this order of the Development Commissioner by the Board is still pending does not lead to a conclusion that the approval granted by the Board through its Development Commissioner is either withdrawn or not ratified. It was submitted that the issue is covered in favour of the assessee by the decision of the ITAT Ahmedabad Bench of the Tribunal in the case of *ITO Ward-2(1)(4), Ahmedabad vs. Mednautix Outsourcing Pvt. Ltd. [2017] 59 ITR (Trib) 198*. He filed a paper book, containing copy of the application of the assessee dt. 01/08/2006, for setting up of a new undertaking in Madurai, in an EOU scheme 2004-2009, and the copy of the approval granted by the Development Commissioner and it was argued that delay in ratification by the Board should not result in the assessee suffering disallowance.

5.1. The ld. D/R, on the other hand submitted that, the order in the case of *ITO Ward-2(1)(4), Ahmedabad vs. Mednautix Outsourcing Pvt. Ltd. (Supra)*, is distinguishable on facts as it is a case where ratification was obtained from the Board at a later date. Reliance was placed on the judgment of the Hon'ble Delhi High Court in the case of *Commissioner of Income tax v. Regency Creations Ltd. [2012] 27 taxmann.com 322 (Delhi)*, for the proposition that grant of approval to an 100% EOU set up under Software Technology Park Scheme, cannot be deemed to be an approval under Section 10B of the Act.

In reply, the ld. Counsel for the assessee distinguished this decision and submitted that this was relevant for the earlier scheme which was in vogue for the Assessment Years 2003-04, 2004-05 & 2006-07, and not for the impugned Assessment Year 2011-12 and that it was for claim of deduction u/s 10A of the Act, which is admittedly different from the claim of deduction u/s 10B of the Act.

6. Rival contentions heard. On a careful consideration of the facts and circumstances of the case, perusal of the papers on record and order of the authorities below as well as case-law cited, I hold as follows:-

6.1. Section 10B of the Income Tax Act, 1961, reads as follows:-

“10B. (1) Subject to the provisions of this section, a deduction of such profits and gains as are derived by a hundred per cent export-oriented undertaking from the export of articles or 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 articles or things or computer software, as the case may be, shall be allowed from the total income of the assessee”

7. The assessee has been registered by F.No.A/2006/060/EOU-TN, dt. 15/09/2006, with the Officer of the Development Commissioner and HEOU, Government of India, Ministry of Commerce and Industry, Department of Commerce. In this letter, it is specifically stated at point **xi**, as follows:-

“Exemption under Section 10-B of the income tax act will be subject to interpretations of the activity of the unit as manufacturing activity by the income tax department”

8. Thus, the Government of India has granted the necessary approval to the assessee for exemption under section 10B of the Act. In our view, the exemption cannot be denied solely because, an approval granted by the Officer of the Development Commissioner is yet to be ratified by the Board of Approvals. This is an internal matter of the Department of Commerce on which the assessee has no control. Admittedly, there is no rejection by the Board of Approval and the status is that such ratification is pending. In the case of *Mednautix Outsourcing Pvt. Ltd. (Supra)*, at para 11, it is held as follows:-

“11. We have carefully considered the rival submissions. We observe at the outset that a clarification instruction has been issued by the CBDT being instruction No.02/2009 dated 09/03/2009 corrected by (F.No.178/19/2008 - ITA - I, dated 08/05/2009) to bring an end to ongoing raging controversy. By virtue of this instruction, it stands clarified that the powers vested with Board have been recognized to be delegated to the Development Commissioner concerned for granting approvals to 100% EOUs for the purposes of s.10B of the Act. It is the case of Assessee that in view of the aforesaid express CBDT instruction, the approval of Development Commissioner is now sufficient for purpose of tax holiday under s.10B of the Act. We find force in the contention on behalf of the assessee that it has no control over the internal mechanism and procedure prescribed for ratification in appropriate cases by the Board of Approval. As a corollary, we find force in the argument of the assessee that any delay in ratification of the action of the Development Commissioner as per prescribed procedure by the Board appointed under s.14 of Industries (Development and Regulation) Act 1951, will not mar the claim of

deduction by the assessee altogether. Once, the permission granted by the office of Development Commissioner stands ratified, the ratification would relate back to the date of permission. It is not the case of the AO that other terms and conditions for availing exemption under s.10B of the Act has not been complied with. In the instant case, it appears from the communication letter dated 14/03/2013 that letter of permission dated 25/05/2007 issued in favour of the assessee for registration as 100% EOU under STPI Scheme was stated to be ratified in the first meeting of Inter-Ministerial Standing Committee (IMSC) on 2-6-2008 constituted by Central Government for such purposes. As noted, the ratification subsequently carried out and communicated will operate from the date of letter of permission issued by the Development Commissioner. Therefore, in our considered view, the action of the AO and CIT(A) in denying the claim of deduction under s.10B of the Act requires to be set aside as unsustainable in law. Consequently, the Cross Objection filed by the assessee requires to be viewed favorably on merits. As a corollary, we do not consider it expedient to deal with the correctness of action of CIT(A) in allowing the alternate claim of assessee under s.10A on merits." (Emphasis Ours)

9. Respectfully following the judgment of the Co-ordinate Bench of the Tribunal, I find that the contentions of the assessee has merits and this ground has to be allowed. The judgment of the Hon'ble Delhi High Court in the case of *Commissioner of Income tax v. Regency Creations Ltd. (supra)*, clearly notes that benefits of deduction u/s 10B of the Act, is radically different from the one envisaged u/S 10A of the Act. That was not a case where approval was specifically granted u/s 10B of the Act. In the case on hand, vide communication dt. 15/09/2006, exemption was specifically granted by the Office of the Development Commissioner for claim of exemption u/s 10B of the Act. In view of the above discussion, Ground No. 2 of the assessee is allowed.

10. In the result, appeal of the assessee is allowed.

Kolkata, the 16th day of March, 2018.

Sd/-

[J. Sudhakar Reddy]
Accountant Member

Dated : 16.03.2018
{SC SPS}

Copy of the order forwarded to:

1. M/s. Madura Stones Pvt. Ltd

5, Clive Row

6th Floor

Room No. 6A

Kolkata - 700 001

2. Income Tax Officer, Ward-9(1)

P-7, Chowringhee Square

Kolkata - 700 069

3. CIT(A)-

4. CIT- ,

5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By order

Senior Private Secretary
Head of Office/ D.D.O. ITAT, Kolkata Benches