

आयकर अपीलीय अधिकरण, 'ए' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL

'A' BENCH : CHENNAI

श्री जॉर्ज माथन, न्यायिक सदस्य के समक्ष

एवं एस जयरामन, लेखा सदस्य

BEFORE SHRI GEORGE MATHAN, JUDICIAL MEMBER &
SHRI S.JAYARAMAN, ACCOUNTANT MEMBER

I.T.A.Nos.2113 & 2114/Chny/2012

निर्धारण वर्ष /Assessment years : 2008-09 & 2008-09

The Assistant Commissioner of
Income Tax,
Company Circle 1(3),
Chennai 600 034.

Vs.

**M/s.Beach Mineral Co. Pvt
Ltd.,**
BMC House,32/2,Halls Road,
Chennai 600 008.

[PAN AADCB 3450 D]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

I.T.A.Nos.1904/Chny/2012 & 2002 & 2003/Chny/2014

निर्धारण वर्ष /Assessment years : 2008-09 & 2009-10 & 2009-10

**M/s.Beach Mineral Co. Pvt
Ltd.,**
BMC House,32/2,Halls Road,
Chennai 600 008.

Vs.

The Assistant Commissioner of
Income Tax,
Company Circle 1(3),
Chennai 600 034.

[PAN AADCB 3450 D]

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

Assessee by
Revenue by

: Mr.S.Sridhar,Advocate
: Mr.AR.V.Sreenivasan,JCIT,DR

सुनवाई की तारीख/Date of Hearing

: 04-11-2019

घोषणा की तारीख /Date of Pronouncement

: 07-11-2019

आदेश / ORDER

PER GEORGE MATHAN, JUDICIAL MEMBER

I.T.A.No.2113/Chny/2012 is an appeal filed by the Revenue
against the order of the Commissioner of Income-tax(Appeals)-IX,

Chennai in ITA No.50/11-12 dated 08.08.2012 for assessment year 2008-09, and **I.T.A.No.2114/Chny/2012** is an appeal filed by the Revenue against the order of the Commissioner of Income-tax(Appeals)-III, Chennai in ITA No.56/11-12/A-III dated 21.08.2012 for assessment year 2008-09 against the partial cancellation of penalty levied u/s.271(1)(c) of the Income Tax Act, 1961 (in short "the Act"). **I.T.A.No.1904 /Chny/2012** is an appeal filed by the assessee against the order of the Commissioner of Income-tax(Appeals)-III, Chennai in ITA No.56/11-12/A-III dated 21.08.2012 for assessment year 2008-09 against the confirmation of penalty levied u/s.271(1)(c) of the Act. **I.T.A.No.2003/Chny/2014** is an appeal filed by the assessee against the order of the Commissioner of Income-tax(Appeals) (A/C)-II, Chennai in ITA No.341/13-14 dated 28.03.2014 for assessment year 2009-10 against the confirmation of action of the Assessing Officer in denying the exemption claimed by the assessee u/s.10B of the Act and in respect of disallowance u/s.14A of the Act. **I.T.A.No.2002 /Chny/2012** is an appeal filed by the assessee against the order of the Commissioner of Income-tax(Appeals)(A/C)-II, Chennai in ITA No.342/13-14 dated 28.03.2014 for assessment year 2009-10 against the confirmation of penalty levied u/s.271(1)(c) of the Act.

2. Mr.S.Sridhar represented on behalf of the Assessee and Mr.AR.V.Sreenivasan represented on behalf of the Revenue.

3. Since the issues raised in all these appeals of assessee as well as Revenue are interconnected, these appeals are heard together and dispose of by this common order.

4. At the time of hearing, it was submitted by Id.AR that for the assessment years 2008-09 & 2009-10, the main issue is related to denial of exemption u/s.10B of the Act on account of belated filing of the return of income for the relevant assessment years. It was submitted that for assessment year 2008-09, the return had been filed belatedly on 07.01.2009, on which date the return was filed with the delay of 4 months. It was submitted that for assessment year 2009-10, the return had been filed belatedly on 20.11.2009, on which date the return was filed with the delay of 50 days. It was a submission that the denial of exemption u/s.10B of the Act had been made on account of the 4th proviso to section 10B of the Act, which required that the assessee should file its return of income within the time prescribed u/s.139(1) of the Act. The assessee has submitted that he had filed an application u/s.119(2)(b) of the Act before Central Board of Direct Taxed(CBDT) seeking to condone the delay in filing of returns belatedly and allow deduction u/s.10B of the Act. It was submitted

that the application has been rejected by the CBDT vide order dated 09.10.2015 and the same has been challenged before the Hon'ble Jurisdictional High Court in Writ Petition No.38208/2015 & 39209/2015 for assessment year 2008-09 & 2009-10. The learned Counsel submitted that the writ petition was pending disposal on account the non-filing of the counter-affidavit by the Revenue, which was filed on 25.10.2019 and the WP was posted for hearing on 19.11.2019. It was a prayer that the appeals may be adjourned to await the decision of the Hon'ble jurisdictional High Court in the W.Ps.

5. The appeals pertaining to the years 2012 to 2014, are very old matters and there has been specific direction for the disposal of old matters. This being so, the adjournment sought by the assessee is rejected and the appeals disposed of on merits.

6. It was submitted by Id.DR that proviso to Section 10B of the Act, which required the filing of the return of income within the time prescribed u/s.139(1) of the Act, was not procedural, but was mandatory and on account of violation of the specific proviso, the denial of deduction u/s.10B of the Act had been rightly made. It was submitted that this issue was related to Ground Nos.2.1. to 2.21 in the appeal of Revenue for assessment year 2008-09 in ITA No.2113/Chny/2012. In regard to Grounds Nos.3.1 to 3.5 of Revenue's

appeal for assessment year 2008-09, it was submitted that the issue was against the action of the Id.CIT(A) in directing the Assessing Officer to alter the nomenclature of the addition from suppression in export turnover to increase in value of Closing Stock. In regard to Grounds Nos.4.1 to 4.2 of Revenue's appeal for assessment year 2008-09, it was submitted that the issue was against the action of the Id.CIT(A) in directing the Assessing Officer to exclude freight, insurance etc. from Export Turnover as well as Total Turnover while computing deduction u/s.10B of the Act. The Id.DR vehemently supported the order of the Assessing Officer. It was submitted that the order of Id.CIT(A) was liable to be reversed.

7. In reply, Id.AR submitted that the issue of deduction u/s.10B of the Act being pending before the Hon'ble Jurisdictional High Court, the issue may be restored to the file of Assessing Officer for re-adjudication after the receipt of the order of Hon'ble Jurisdictional High Court in respect to W.Ps filed by the assessee.

7.1 In respect of suppression of turnover, it was submitted by Id.AR that he had no objection, if the issue may be restored to the file of Assessing Officer for verification as to whether the said alleged turnover had been disclosed in the subsequent year. It was also a submission that in the event, assessee is granted the benefit of

exemption u/s.10B of the Act, the addition per se might not survive as the addition itself would become exempt income.

7.2 In respect of Ground Nos. 4.1 to 4.2 of Revenue's appeal, it was submitted by Id.AR that the issue was squarely covered by the decision of the Hon'ble Supreme Court in the case of C.I.T Vs. HCL Technologies Ltd., reported in 404 ITR 719(SC) wherein the Supreme Court has held that if a term is defined u/s.2 of the Act, then definition would be applicable to all provisions wherein same term appears; and the term 'total turnover' has been defined in Explanation to Sections 80HHC and 80HHE of the Act, wherein it has been clearly stated that 'for purposes of this section only', and not for purpose of section 10A of the Act. It was further submitted that the Special Bench of Chennai Tribunal in the case of ITO Vs. Sak Soft Ltd., reported in [2009] 30 SOT 55 (Chennai)(SB) held that expenses are to be excluded, both from export turnover and from total turnover, for purposes of computation of deduction u/s.10B(4) of the Act. It was submitted that Id.CIT(A) has followed the decision of the Special Bench of Chennai Tribunal in the case of Sak Soft Ltd., consequently no interference was liable to be made.

8. It was submitted by the Id.AR that in the appeal of assessee in ITA No.2003/Chny/2014 for assessment year 2009-10, the issue was against the action of Id.CIT(A) in denying the benefit of deduction claimed u/s.10B of the Act on account of delay in filing of the return by applying the proviso to Section 10B of the Act. It was submitted that the issue of Section 14A of the Act read with Rule 8D was also there in the assessee's appeal, as also the issue of the suppression of export turnover. It was submitted that as the issue of deduction u/s.10B of the Act was pending before the Hon'ble Jurisdictional High Court in W.Ps, the issue may be restored to the file of Assessing Officer for re-adjudication after the decision of Hon'ble Jurisdictional High Court in W.Ps filed by the assessee. In respect of disallowance u/s.14A of the Act, it was submitted that the assessee has not earned any exempt income and consequently, no disallowance u/s.14A was called for in view of the decision of the Hon'ble Delhi High Court in the case of Joint Investment Pvt. Ltd., vs CIT reported in 372 ITR 694, (Delhi). In respect of the issue of suppression in the export turnover, it was submitted that the issue may be restored to the file of Assessing Officer for verification. It was a submission that if the assessee is held to be entitled to deduction u/s.10B of the Act, then the addition on account of suppression of turnover would not lead to any taxable income.

9. In reply, the Id.DR submitted that he had no objections, if the issues are restored to the file of Assessing Officer to await the decision of the Hon'ble Jurisdictional High Court regarding allowability of assessee's claim u/s.10B of the Act. It was a submission that in respect of disallowance u/s.14A of the Act, the issue may be restored to the file of Assessing Officer for verification as to whether the assessee has earned any exempt income. It was submitted that it is recorded by Id.CIT(A) at para 10.1 of his order that the assessee has not earned any dividend income.

10. In respect of Revenue's Appeal in ITA No.2114/Chny/2012, the issue was against the action of Id.CIT(A) in deleting the levy of penalty u/s.271(1)(c) of the Act. It was submitted by Id.DR that Id.CIT(A) had deleted the levy of penalty in respect of additions towards staff welfare expenses capitalized and suppressed export turnover. It was submitted that this was a clear case of concealment and the penalty was liable to be confirmed. It was a prayer that the order of the Id. CIT(A) to be reversed. The same was opposed by the Id.AR.

10.1. It was submitted by Id.AR that Id.CIT(A) had considered the facts and come to a conclusion that factually there was no

concealment of income. It was a prayer that the order of the Id.CIT(A) was liable to be upheld on the said issues.

11. It was submitted by the Id.AR in respect of the appeal of assessee in ITA No.1904/Chny/2012 for assessment year 2008-09, that the penalty had been levied by the Assessing Officer on account of disallowance of the assessee's claim of deduction u/s.10B of the Act, which had resulted in assessee's income being liable to tax under the proviso to section 115JB of the Act. It was submitted that if the issue u/s.10B of the Act was restored to the file of Assessing Officer for re-adjudication, then the penalty would no more survive.

11.1 In reply, the Id.DR vehemently supported the order of the Assessing Officer and the Id.CIT(A).

12. It was submitted by the Id.AR that the appeal of assessee in ITA No.2002/Chny/2014 for assessment year 2009-10, the issue was against the action of the Id.CIT(A) in confirming the penalty levied u/s.271(1)(c) of the Act on account of denial of deduction u/s.10B of the Act. It was submitted that this penalty would not survive, if the assessee is granted benefit u/s.10B of the Act. It was a prayer that the penalty has been levied and confirmed on account of denial of debatable issue regarding the allowance of deduction u/s.10B of the Act. It was a prayer that the penalty was liable to be cancelled.

12.1 In reply, the Id.DR vehemently supported the orders of the authorities below.

13. We have heard the rival contentions and perused the material available on record. Admittedly, the main crux of the issue in all appeals is related to denial of deduction u/s.10B of the Act. The fact remains that the assessee company is engaged in the manufacturing, processing and exporting of Pulverized Garnet, an essential raw material in the manufacture of Abrasives, paints etc. It has its manufacturing unit at Radhapuram Taluk, Tirunelveli District, which is an 100% EOU as recognized by the Development commissioner, MEPZ,Chennai-45. It had been granted deduction u/s.10B of the Act on the profits from the export of business and the same was granted to the assessee till the assessment year 2007-08. The facts remain that there was a survey on the premises of the assessee on 23.03.2010. For the assessment years 2008-09 and 2009-10, there was a delay in filing of the return on account of the Accountant of the company turning against the company and thereby causing loss of data, which had to be sorted out by sending the main server of the assessee to software engineers for retrieval of the original data. Though the reasons had been mentioned for the delay, and though such reasons do at the outset, seem to be reasonable, no evidence with supporting evidence has been placed before the Tribunal. In any

case, the matter of the reasonable cause in respect of the delay in filing of the returns is before the Hon'ble Jurisdictional High Court in the appropriate W.P Nos.39208 & 39209/2015 for assessment years 2008-09 & 2009-10 respectively. The issue is *sub judice* before the Hon'ble Jurisdictional High Court and it is not appropriate for this Tribunal to decide on the said issue. However, considering the fact that, these are old appeals, and they need to dispose off the issues in the quantum appeals being appeal in ITA No.2113/Chny/2012 by the Revenue for assessment year 2008-09 and ITA No.2003/Chny/2014 by the assessee for assessment year 2009-10 are restore to the file of Assessing Officer for denovo re-adjudication after granting the assessee adequate opportunity of being heard and after receipt of the decision of the Hon'ble Jurisdictional High Court in Writ Petition in respect of condonation of delay in filing the return referred to supra for assessment years 2008-09 and 2009-10.

13.1 In respect of the issue of exclusion of freight, insurance from the export turnover as well as total turnover while computing deduction u/s.10B of the Act, as the Id.CIT(A) has followed the judicial discipline and has followed the decision of the Special Bench of Chennai Tribunal in the case of ITO Vs. Sak Soft Ltd., referred to supra, we find no reason to interfere in the order of the Id. CIT(A) on

this issue and consequently grounds Nos.4.1. to 4.2 in ITA No.2113/Chny/2012 of the Revenue's appeal stand dismissed.

13.2. In respect of Ground Nos.3.1. to 3.5 of the Revenue's appeal in ITA No.2113/Chny/2012,the issue was against the action of the Id.CIT(A) in directing the Assessing Officer to alter the nomenclature of the addition from suppression in export turnover to increase in value of Closing Stock. As the issue of deduction u/s.10B itself is pending before the Hon'ble Jurisdictional High Court and as the said issue has been restored to the file of Assessing Officer for re-adjudication after the decision of the Hon'ble Jurisdictional High Court in W.Ps filed by the assessee referred to supra, this issue is also restored to the file of Assessing Officer for re-adjudication after considering the directions issued by the Hon'ble Jurisdictional High Court in the W.P.s filed by the assessee. The Assessing Officer shall also verify as to whether the alleged suppressed turnover has been included in the turnover of the subsequent assessment years.

13.3. In respect of the assessee's appeal for the assessment year 2009-10, in ITA No.2003/Chny/2014, the issue of deduction u/s.10B of the Act is restored to the file of Assessing Officer on similar lines as in respect of the appeal of Revenue in ITA No.2113/Chny/2012 for assessment year 2008-09.

13.4 In respect of disallowance u/s.14A of the Act, the Assessing Officer is to verify as to whether the assessee has earned any exempt income from the said investments. If no exempt income is earned, then in view of the decision of the Hon'ble Delhi High Court in the case of Joint Investment Pvt. Ltd., Vs. C.I.T referred to supra, no disallowance is called for.

13.5 In respect of issue of suppression in export turnover, on similar directions as given in respect of Ground Nos.3.1. to 3.4 of the Revenue's appeal in ITA No.2113/Chny/2012, this issue is restored to the file of Assessing Officer for re-adjudication.

13.6 In respect of issue of computation of book profit u/s.115JB of the Act, the same is restored to the file of Assessing Officer for re-adjudication after deciding on the issue of deduction u/s.10B of the Act.

13.7 In respect of the penalty levied u/s.271(1)(c) of the Act in Revenue's appeal in ITA No.2114/Chny/2012 for assessment year 2008-09 and the assessee's appeal in ITA No.1904/Chny/2012 for assessment year 2008-09 and ITA No.2002/Chny/2014 for assessment year 2009-10, as the issue of deduction u/s/10B of the Act and various other deductions and additions have been restored to the file of Assessing Officer for re-adjudication denovo, the very foundation of

levy of penalty u/s.271(1)(c) of the Act would no more survive, consequently penalty imposed u/s.271(1)(c) of the Act stands deleted as the same has become infructuous.

14. To sum up, the appeal of Revenue in ITA No.2113/Chny/2012 stands partly allowed for statistical purposes, Assessee's appeal in ITA No.2003/Chny/2014 stands partly allowed for statistical purposes, Revenue's appeal in ITA No.2114/Chny/2012 stands dismissed as infructuous and the appeal of assessee in ITA No.2002/Chny/2014 & ITA No.1904/Chny/2012 stands allowed.

Order pronounced on 07th November, 2019, at Chennai.

Sd/-
(एस जयरामन)
(S. JAYARAMAN)
लेखा सदस्य/Accountant Member

Sd/-
(जॉर्ज माथन)
(GEORGE MATHAN)
न्यायिक सदस्य/JUDICIAL MEMBER

चेन्नई/Chennai

दिनांक/Dated: 07th November, 2019.

K S Sundaram

आदेश की प्रतिलिपि अग्रेषित/Copy to:

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|--------------------------|------------------------------|-------------------------|
| 1. अपीलार्थी/Appellant | 3. आयकर आयुक्त (अपील)/CIT(A) | 5. विभागीय प्रतिनिधि/DR |
| 2. प्रत्यर्थी/Respondent | 4. आयकर आयुक्त/CIT | 6. गार्ड फाईल/GF |