

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI SANDEEP SINGH KARHAIL (JUDICIAL MEMBER)**

**ITA No. 2714/MUM/2024
Assessment Year: 2021-22**

Shree Pushkar Foundation,
301/302, 3rd Floor,
Atlanta Centre,
Near Udyog Bhavan,
Sonawala Road, Goregaon East,
Mumbai-400063.

PAN NO. AAWTS 2303 N
Appellant

Vs.

ITO (Exemption) – Ward 2(3),
Cumbala Hill Tele Exchange
(MTNL), Peddar Rd, Tardeo,
Mumbai-400026.

Respondent

Assessee by : Mr. Sandip S. Nagar, &
Mr. Vipul Jain

Revenue by : Mr. Ashok Kumar Ambastha, Sr. DR

Date of Hearing : 24/07/2024
Date of pronouncement : 30/08/2024

ORDER

PER OM PRAKASH KANT, AM

The assessee preferred this appeal against the order dated 12.04.2024 passed by the Ld. Additional Commissioner of Income-tax (Appeals) – 1, Chandigarh [in short 'the Ld. CIT(A)'] for assessment year 2021-22, raising following grounds:



1. That on the facts and in the circumstances of the case, the order passed by Ld. Joint Commissioner of Income Tax (Appeals) [here-in-after referred to as Ld. Jt. CIT (Appeals)] is bad in law and not as per the provision of the Income-tax Act.

2. That on the facts and in the circumstances of the case, the Ld. Jt. CIT(Appeal) disallowed the claim of an exemption of Rs 51,21,991 u/s 11(2) as the trust has not filed Form No. 10 within the due date specified u/s 139(1) due to technical issues.

2.1 That on the basis of facts and in the circumstances of the case, the Ld. Jt. CIT(Appeal) has erred in upholding the adjustments in the intimation order u/s 143(1) of the Act disregarding the fact that the said adjustment made is not covered u/s 143(1)(a) of the Act.

2.2 That on the basis of facts and in the circumstances of the case, the Ld. Jt. CIT (Appeal) failed to consider that the provisions in law requiring to file Form No. 10 within the specified due date of return filing under section 139(1) is directory and not mandatory.

2.3 That on the basis of facts and in the circumstances of the case, the Ld. It. CIT(Appeal) erred in upholding the disallowance pertaining to accumulation u/s 11(2) of Rs. 51,21,991/- despite all the conditions stipulated u/s 11(2) were satisfied.

2.4 That on the basis of facts and in the circumstances of the case, the Ld. It. CIT(Appeal) erred in upholding the Ld. AO-CPC jurisdiction u/s 143(1) to disallow the exemptions u/s 11 & 12 of the Income Tax Act, 1961, when the issue is debatable.

2. Briefly stated, facts of the case are that the assessee is a trust registered under the Provisions of the Income-tax Act and is engaged in providing education, medical relief and relief to the poor etc. The assessee, for the first time accumulated its income and claimed exemption u/s 11(2) of the Income-tax Act, 1961 (in short 'the Act'). The assessee filed return of income on 14.03.2022 declaring Nil income as against the due date prescribed on 15.03.2022. Further, the assessee filed audit report u/s 12A of the



Act and prescribed Form No. 10B on 15.02.2022 (on the due date). Further, the assessee was required to file Form No. 10, which is a statement to be furnished to the Assessing Officer for claiming exemption u/s 11(2) of the Act. However, the assessee submitted due to technical problem on the Income-tax Portal, the said form was filed belittling on 09.02.2023 as against the due date on 15.03.2022. The return of income filed by the assessee was processed u/s 143(1) of the Act on 25.11.2022 wherein the claim of exemption u/s 11(2) of the Act amounting to Rs.51,21,991/- was disallowed and corresponding adjustment was made in order passed u/s 143(1)(a)(ii) of the Act.

3. Aggrieved, the assessee filed appeal before the Tribunal and claimed that in view of decision of the Hon'ble Supreme Court in the case of CIT v. Nagpur Hotel Owners' Association (114 Taxman 255) even if Form No. 10 is not filed along with the ITR but it has been filed subsequently before the Assessing Officer at the time of completion of assessment proceedings, then the exemption u/s 11(2) of the Act cannot be denied merely because the form was filed after due date of filing of return of income u/s 139(1) of the Act. The Ld. counsel relied on the other decisions of various High Courts. However, the Assessing Officer rejected the contention on the ground that Form No. 10 has been filed after completion of the assessment u/s 143(1) of the Act and therefore, the decisions relied upon by the assessee were not applicable over the facts of the case.



4. We have heard rival submission of the parties and perused the relevant material on record. Under the provisions of section 11(2) of the Act, any charitable trust has to apply certain specified percentage of income (which was 85% during relevant period) for charitable purpose, but if income to that extent is not applied to the prescribed percentage, then the assessee can accumulate or set apart said income for application to such purposes in India subject to the conditions prescribed in section 11(2) of the Act. For ready reference, section 11(2) of the Act is reproduced as under:

(2) [Where [eighty-five] per cent of the income referred to in clause (a) or clause (b) of sub-section (1) read with the Explanation to that sub-section is not applied, or is not deemed to have been applied, to charitable or religious purposes in India during the previous year but is accumulated or set apart, either in whole or in part, for application to such purposes in India, such income so accumulated or set apart shall not be included in the total income of the previous year of the person in receipt of the income, provided the following conditions are complied with, namely:—]

(a) such person furnishes a statement in the prescribed form and in the prescribed³⁵ manner to the Assessing Officer, stating the purpose for which the income is being accumulated or set apart and the period for which the income is to be accumulated or set apart, which shall in no case exceed five years;

(b) the money so accumulated³⁶ or set apart is invested or deposited in the forms or modes specified in sub-section (5);

(c) the statement referred to in clause (a) is furnished on or before the due date specified under sub-section (1) of section 139 for furnishing the return of income for the previous year:

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4.1 Thus, one of the conditions for getting benefit of section 11(2) is that an assessee is required to furnish a statement in the



prescribed form No. 10, on the due date specified for filing return of income. In the instant, the due date for filing the prescribed form No. 10 was 15th of March, 2022, but the assessee filed said form on 09/01/2023 on the income tax Portal. It is submitted by the assessee the delay was due to technical glitches on the income tax Portal, for which the assessee had filed grievances on 31/03/2022, for which no proper solution was provided. Before us, the assessee has filed a copy of acknowledgement for such grievance filed on Income-tax Portal. Before us, the learned counsel for the assessee has referred to various decisions, which were cited before the Ld. CIT(A) and submitted that requirement to prescribe the time limit for filing the prescribed form is only directory and not mandatory and non-compliance of filing the prescribed form within the stipulated time should not disentitle the assessee from exemption of income, which he is otherwise entitled. The CIT(A), however, rejected the contentions of the assessee.

4.2 Therefore, the issue which arises in the case of the assessee is whether for availing exemption under section 11(2) of the Act, the requirement of furnishing statement in prescribed form No. 10 on or before the due date of the filing of the return of income is mandatory in nature or directory in nature. We find that in judgement of the Hon'ble SC in the case of **PCIT Vs Wipro Ltd. dated 11th July 2022 in Civil appeal no. 1449 of 2022**, the Hon'ble Supreme Court has held that for claiming the benefit



under Section 10B(8) of the IT Act, the following twin conditions are Mandatory, firstly, furnishing a declaration to the assessing officer in writing that the provisions of Section 10B (8) are applicable to him; and secondly, the said declaration has been furnished on before the due date of filing the return of income under sub-section (1) of Section 139 of the IT Act. The Hon'ble Supreme Court observed that the wording of the Section 10B (8) is very clear and unambiguous, therefore the audit report prescribed in form 10CCB of the Income-tax Rules, 1962 must be furnished before the due date of filing the return of income under sub-section (1) of section 139 of the IT Act. The relevant finding of Hon'ble Supreme Court is reproduced as under:

“5. We have heard Shri Balbir Singh, learned ASG appearing on behalf of the Revenue and Shri S. Ganesh, learned Senior Advocate appearing on behalf of the assessee at length and perused the material on record.

The short question which is posed for consideration of this Court is, whether, for claiming exemption under section 10B (8) of the IT Act, the assessee is required to fulfil the twin conditions, namely, (i) furnishing a declaration to the assessing officer in writing that the provisions of section 10B(8) may not be made applicable to him; and (ii) the said declaration to be furnished before the due date of filing the return of income under sub-section (1) of section 139 of the IT Act.

6. In the present case, the High Court as well as the ITAT have observed and held that for claiming the so-called exemption relief under section 10B (8) of the IT Act, furnishing the declaration to the assessing officer is mandatory but furnishing the same before the due date of filing the original return of income is directory. In the present case, when the assessee submitted its original return of income under section 139(1) of the IT Act on 31-10-2001, which was the due date for filing of the original return of income, the assessee specifically and clearly stated that it is a company and is a 100% export-oriented unit and entitled to claim exemption under section 10B of the IT Act and therefore no loss is being carried forward. Along with the original return filed on 31-10-2001, the assessee also annexed a note to the computation of income clearly stating as above. However, thereafter the assessee filed the revised return of income under section 139(5) of the IT Act on 23-12-



2002 and filed a declaration under section 10B (8) which admittedly was after the due date of filing of the original return under section 139(1), i.e., 31-10-2001.

7. It is the case on behalf of the Revenue that as there was a non-compliance of twin conditions under section 10B (8) of the IT Act, namely, the declaration under section 10B (8) was not submitted along with the original return of income, the assessee shall not be entitled to the exemption/benefit under section 10B (8) of the IT Act. According to the Revenue, furnishing of declaration under section 10B (8) before the due date of filing original return of income is also mandatory. On the other hand, it is the case on behalf of the assessee, which has been accepted by the High Court, that the requirement of submission of declaration under section 10B (8) is mandatory in nature, but the time limit within which the declaration is to be filed is directory in nature.

8. While considering the issue involved, whether the time limit within which the declaration is to be filed as provided under section 10B (8) is mandatory or directory, Section 10B (8) is required to be referred to, which reads as under:

"10B (8) Notwithstanding anything contained in the foregoing provisions of this section, where the assessee, before the due date for furnishing the return of income under sub-section (1) of Section 139, furnishes to the Assessing Officer a declaration in writing that the provisions of this section may not be made applicable to him, the provisions of this section shall not apply to him for any of the relevant assessment years."

On a plain reading of section 10B (8) of the IT Act as it is, i.e., "where the assessee, before the due date for furnishing the return of income under sub-section (1) of section 139, furnishes to the Assessing Officer a declaration in writing that the provisions of section 10B may not be made applicable to him, the provisions of section 10B shall not apply to him for any of the relevant assessment years", we note that the wording of the section 10B (8) is very clear and unambiguous. For claiming the benefit under section 10B (8), the twin conditions of furnishing the declaration to the assessing officer in writing and that the same must be furnished before the due date of filing the return of income under sub-section (1) of section 139 of the IT Act are required to be fulfilled and/or satisfied. In our view, both the conditions to be satisfied are mandatory. It cannot be said that one of the conditions would be mandatory and the other would be directory, where the words used for furnishing the declaration to the assessing officer and to be furnished before the due date of filing the original return of income under sub-section (1) of section 139 are same/similar. It cannot be disputed that in a taxing statute the provisions are to be read as they are and they are to be literally construed, more particularly in a case of exemption sought by an assessee.

9. In such a situation, filing a revised return under section 139(5) of the IT Act claiming carrying forward of losses subsequently would not help



the assessee. In the present case, the assessee filed its original return under section 139(1) and not under section 139(3). Therefore, the Revenue is right in submitting that the revised return filed by the assessee under section 139(5) can only substitute its original return under section 139(1) and cannot transform it into a return under section 139(3), in order to avail the benefit of carrying forward or set-off of any loss under section 80 of the IT Act. The assessee can file a revised return in a case where there is an omission or a wrong statement. But a revised return of income, under section 139(5) cannot be filed, to withdraw the claim and subsequently claiming the carried forward or set-off of any loss. Filing a revised return under section 139(5) of the IT Act and taking a contrary stand and/or claiming the exemption, which was specifically not claimed earlier while filing the original return of income is not permissible. By filing the revised return of income, the assessee cannot be permitted to substitute the original return of income filed under section 139(1) of the IT Act. Therefore, claiming benefit under section 10B (8) and furnishing the declaration as required under section 10B(8) in the revised return of income which was much after the due date of filing the original return of income under section 139(1) of the IT Act, cannot mean that the assessee has complied with the condition of furnishing the declaration before the due date of filing the original return of income under section 139(1) of the Act. As observed hereinabove, for claiming the benefit under section 10B (8), both the conditions of furnishing the declaration and to file the same before the due date of filing the original return of income are mandatory in nature.

10. Even the submission on behalf of the assessee that it was not necessary to exercise the option under section 10B(8) of the IT Act and even without filing the revised return of income, the assessee could have submitted the declaration in writing to the assessing officer during the assessment proceedings has no substance and the same cannot be accepted. Even the submission made on behalf of the assessee that filing of the declaration subsequently and may be during the assessment proceedings would have made no difference also has no substance. The significance of filing a declaration under section 10B(8) can be said to be co-terminus with filing of a return under section 139(1), as a check has been put in place by virtue of section 10B (5) to verify the correctness of claim of deduction at the time of filing the return. If an assessee claims an exemption under the Act by virtue of Section 10B, then the correctness of claim has already been verified under section 10B (5). Therefore, if the claim is withdrawn post the date of filing of return, the accountant's report under section 10B (5) would become falsified and would stand to be nullified.

11. Now so far as the reliance placed upon the decision of this Court in the case of G.M. Knitting Industries (P.) Ltd. (supra), relied upon by the learned counsel appearing on behalf of the assessee is concerned, section 10B (8) is an exemption provision which cannot be compared with claiming an additional depreciation under section 32(1) (ii-a) of the Act. As per the settled position of law, an assessee claiming exemption has to strictly and literally comply with the exemption provisions. Therefore, the said decision shall not be applicable to the facts of the



case on hand, while considering the exemption provisions. Even otherwise, Chapter III and Chapter VIA of the Act operate in different realms and principles of Chapter III, which deals with "incomes which do not form a part of total income", cannot be equated with mechanism provided for deductions in Chapter VIA, which deals with "deductions to be made in computing total income". Therefore, none of the decisions which are relied upon on behalf of the assessee on interpretation of Chapter VIA shall be applicable while considering the claim under section 10B(8) of the IT Act.

12. Even the submission on behalf of the assessee that the assessee had a substantive statutory right under section 10B(8) to opt out of section 10B which cannot be nullified by construing the purely procedural time requirement regarding the filing of the declaration under section 10B(8) as being mandatory also has no substance. As observed hereinabove, the exemption provisions are to be strictly and literally complied with and the same cannot be construed as procedural requirement.

13. So far as the submission on behalf of the assessee that against the decision of the Delhi High Court in the case of Moser Baer India Ltd. (supra), a special leave petition has been dismissed as withdrawn and the revenue cannot be permitted to take a contrary view is concerned, it is to be noted that the special leave petition against the decision of the Delhi High Court in the case of Moser Baer India Ltd. (supra) has been dismissed as withdrawn due to there being low tax effect and the question of law has specifically been kept open. Therefore, withdrawal of the special leave petition against the decision of the Delhi High Court in the case of Moser Baer (supra) cannot be held against the revenue.

14. In view of the above discussion and for the reasons stated above, we are of the opinion that the High Court has committed a grave error in observing and holding that the requirement of furnishing a declaration under section 10B(8) of the IT Act is mandatory, but the time limit within which the declaration is to be filed is not mandatory but is directory. The same is erroneous and contrary to the unambiguous language contained in section 10B(8) of the IT Act. **We hold that for claiming the benefit under section 10B(8) of the IT Act, the twin conditions of furnishing a declaration before the assessing officer and that too before the due date of filing the original return of income under section 139(1) are to be satisfied and both are mandatorily to be complied with.** Accordingly, the question of law is answered in favour of the Revenue and against the assessee. The orders passed by the High Court as well as ITAT taking a contrary view are hereby set aside and it is held that the assessee shall not be entitled to the benefit under section 10B(8) of the IT Act on non-compliance of the twin conditions as provided under section 10B(8) of the IT Act, as observed hereinabove. The present Appeal is accordingly Allowed. However, in the facts and circumstances of the case, there shall be no order as to costs."

(emphasis supplied externally)



4.3 Thus, in view of the decision of Hon'ble Supreme Court, it is mandatory for the assessee to file the prescribed form No. 10 along with the return of income filed for the relevant year.

4.4 However, we noticed that the CBDT issued 3 circulars No. 15, 16 & No. 17 on 19th July 2020, whereby it authorized the Commissioners of Income-tax to admit applications for condonation of delay in filing Form 9A, Form 10, Form No. 10B & 10BB for AY 2018-19 or for any subsequent Assessment Years, where there is the delay of up to 365 days and decide on merits after considering reasonable cause for delay. The relevant circular in relation to form No. 10 is reproduced as under:

Circular No. 17/2022

*F.No.197/89/2022-IT A-I
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes*

New Delhi the 17th July, 2022

Sub: Condonation of delay under Section 119(2)(b) of the Income-tax Act, 1961 in filing of Form No. 9A and Form No. 10 for Assessment Year 2018- 19 and subsequent years-Reg.

In exercise of the powers conferred under section 11 9(2) of the Income-tax Act, 1961 (hereinafter referred to as 'Act') , the Central Board of Direct Taxes (CBDT) by Circular No . 3/ 2020 [F.No .1 97 / 55 / 20 18-ITA-I] dated 03.01.2020 authorized the Commissioners of Income-tax to admit applications of condonation of delay in filing Form No. 9A and Form No. 10 for A Y 2018- 19 or for any subsequent Assessment Years where there is delay of up to 365 days and decide on merits.



2. Further to the powers delegated to Commissioners of Income-tax as discussed above, the CBDT hereby directs that where there is delay of beyond 365 days upto three years in filing Form No. 9A and Form No. 10 for Assessment Year 20 18-19 or for any subsequent Assessment Years, the Pro Chief Commissioners of Income-tax 1 Chief Commissioners of Income-tax are authorized to admit such applications of condonation of delay under section 119(2) of the Act and decide on merits.

3. The Pr. Chief Commissioner 1 Chief Commissioner of Income-tax, as the case may be, while entertaining such applications for condonation of delay in filing form No. 9A and Form No. 10, shall satisfy themselves that the applicant was prevented by reasonable cause from filing such Form within the stipulated time. In respect of Form No. 10, the Pr. Chief

Commissioner 1 Chief Commissioner of Income-tax, as the case may be, shall also satisfy themselves that the amount accumulated or set apart has been invested or deposited in anyone or more of the forms or modes specified in sub-section (5) of section 11 of the Act.

4. Further, the Pr. Chief Commissioner 1 Chief Commissioner of Income-tax, as the case may be, shall preferably dispose the application within three months of receipt of the application.

4.6 In the instant case before us, the assessee has filed a copy of the grievance petition, which was filed on Income-tax Portal on 21.03.2022 where he has submitted that assessee could not file the form due to technical glitches on the portal of the Income-tax Department. Thus it is evident that delay is within the period of 365 days and the assessee was prevented by sufficient and reasonable cause in filing the Form No. 10. Thus, we set aside the order of the Ld. CIT(A) and restore the matter back to the file of the Assessing Officer with the direction to the assessee for applying to the concerned commissioner of Income-tax (Exemption) and seek condonation for delay in filing Form No. 10. After condonation of



delay in filing for No. 10 by the CIT (exemption), the AO shall decide the claim of exemption u/s 11(2) of the Act in accordance with law. The grounds No. 1 to 2.2 of the appeal are accordingly allowed for statistical purposes. The remaining grounds are rendered academic only since, we have already restored the issue back to the file of the Assessing Officer.

5. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open Court on 30/08/2024.

**Sd/-
(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER**

**Sd/-
(OM PRAKASH KANT)
ACCOUNTANT MEMBER**

Mumbai;
Dated: 30/08/2024
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,
(Assistant Registrar)
ITAT, Mumbai