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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 04th December, 2018

+ ITA No.824/2018

THE PR. COMMISSIONER OF INCOME TAX -6 Appellant

Through: Mr.Ruchir Bhatia, Sr. St. Counsel
with Mr. Sanampreet Singh, Adv.

versus

MACQUARIE GLOBAL SERVICES PVT. LTD.Respondent

Through: Mr.Salil Kapoor, Mr.Shivansh
Pandya, Ms.Soumya Singh and Ms.
Ananya Kapoor, Adv.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

SANJIV KHANNA, J. (ORAL):

This appeal by the Revenue under Section 260A of the Income Tax Act, 1961 ('the Act', for short) in the case of M/s. Macquarie Global Services Pvt. Ltd. relates to the assessment year 2013-14 and arises from order of the Income Tax Appellate Tribunal ('Tribunal', for short) dated 23.01.2018.

2. The respondent-assessee had 100% Export Oriented Unit (EOU unit) income from which was entitled to exemption under Section 10A of the Act upto the assessment year 2011-12.

3. The respondent-assessee had set up a new unit in Special Economic Zone (SEZ) income from which was claimed as exempt under Section 10AA of the Act for a period of ten years commencing from the Assessment Year 2010-11. Exemption was allowed in the Assessment Years 2011-12 and 2012-13 but was disallowed by the Assessing Officer in the Assessment



Year 2013-14, citing clause (ii) to sub-section (4) to Section 10AA of the Act.

4. The issue and question raised by the Revenue in this appeal relates to satisfaction of conditions mentioned in clause (ii) to sub-section (4) to Section 10AA of the Act.

5. Sub-section 4 to Section 10AA reads as under:-

This section applies to any undertaking, being the Unit, which fulfils all the following conditions, namely:—

(i) *it has begun or begins to manufacture or produce articles or things or provide services during the previous year relevant to the assessment year commencing on or after the 1st day of April, 2006 in any Special Economic Zone;*

(ii) *it is not formed by the splitting up, or the reconstruction, of a business already in existence:*

Provided that this condition shall not apply in respect of any undertaking, being the Unit, which is formed as a result of the re-establishment, reconstruction or revival by the assessee of the business of any such undertaking as is referred to in [section 33B](#), in the circumstances and within the period specified in that section;

(iii) *it is not formed by the transfer to a new business, of machinery or plant previously used for any purpose.*

Explanation.—The provisions of Explanations 1 and 2 to sub-section (3) of section 80-IA shall apply for the purposes of clause (iii) of this sub-section as they apply for the purposes of clause (ii) of that sub-section.

6. Sub-section (4) stipulates the conditions which an undertaking as a unit must fulfill to get benefit under Section 10AA of the Act. Thus the eligibility requirements are unit specific and not assessee specific.



Conspicuously, the legislature in Section 10AA of the Act has referred to the ‘unit’ of the assessee as a person eligible and entitled to exemption. Each unit in the SEZ must meet the conditions specified in clauses (i) to (iii) of sub-section (4) to Section 10AA of the Act. In case there are multiple units in the SEZ, each unit would, on satisfaction of the conditions, be entitled to exemption. Thus, the eligibility requirements in clauses are unit specific and not, unless so stipulated, assessee specific.

7. There is no dispute that the respondent-assessee fulfils the conditions in clauses (i) and (iii) of sub-section (4) of Section 10AA of the Act. We have to therefore examine whether the respondent-assessee satisfies the condition stipulated in clause (ii) to sub-section 4 of Section 10AA of the Act.

8. Negative stipulation in Clause (ii) to sub-section (4) of Section 10AA mandates that to claim exemption the unit should not be formed by ‘splitting up’ or ‘reconstruction’ of a business already in existence. The words and terms ‘splitting up’ or ‘re-construction’ used in clause (ii) to sub-section (4) to Section 10AA reflect a deliberate forethought in the choice of words. Plain as well as intelligible legislative mandate is not to disqualify existing assessee in the same line of business, albeit the unit set up should not be by way of ‘splitting up’ or ‘reconstruction’. Any other interpretation would defeat the purpose and objective behind Section 10AA which was to encourage setting up of new units in the SEZ, and thereby create and add jobs, contribute to growth of the economy and earn foreign exchange. Choice of words in clause (ii) is therefore of great significance. Proviso restricts the scope and ambit of the clause (ii) in certain situations, with



which we are not concerned in the present case. Clause (iii) in a way exposit and affirms that the negative ambit of clause (ii) would not encompass to include a new unit in SEZ. It stipulates that the unit in SEZ should not be formed by transferring machinery or plant previously used for any purpose to the new unit/business. Clause (iii) therefore accepts that there could be similar business already in existence. However, a scrutiny and verification must be made to ensure that the unit set up in the SEZ is not created by "splitting up" or "reconstruction" of the existing business. The restriction given in the second clause is not to deny any benefit to new unit being set up in the SEZ. Income earned by the new unit on satisfaction of the statutory conditions is exempt under Section 10AA, notwithstanding that the assessee, who has set up the new unit, had availed of benefit under Section 10A of the Act.

9. Impugned order has referred to the decision of the Delhi High Court in *Commissioner of Income Tax vs. Heartland Delhi Transcription Services Pvt. Ltd.* (2014) 366 ITR 523 (Delhi) wherein interpreting an identical provision in Section 10B of the Act, it was observed that the objection under Clause (ii) should be taken in the first year when the new unit was set up and when exemption is for the first time claimed under Section 10B of the Act. Relying on the language of sub-section (1) to Section 10B and clause (ii) of sub-Section 2 of Section 10B, it was held:-

“Sub-section (1) refers to deduction of profit and gains of an undertaking. The deduction is to be allowed for a period of 10 years from the year in which undertaking begins to manufacture, produce etc. articles, things or computer software. The beginning and end points for claiming the



deduction are stipulated. These have reference to the eligible undertaking. Sub-clause (ii) to section 10B(2) incorporates a negative condition and states that the undertaking must not be formed by splitting up or reconstruction of business already in existence. Clause (ii) refers to the date on which the undertaking mentioned in sub-section (1) is created or formed. On the date of formation, the undertaking should not violate the condition stipulated in clause (ii) i.e. that it should not be created by splitting up or reconstruction of a business already in existence. Clause (ii) does not have any reference to the period of 10 years stipulated in sub-section (1) of Section 10B, after an undertaking is formed or created without violation of Clause (ii) to Section 10B(2). Clause (ii) to Section 10B(2) does not apply to the period, post formation of the undertaking, covered under sub-section (1), when the undertaking which at the time of formation meets the requirements of clause (ii) to section 10B(2). The undertaking, of course meet the requirements and fulfil the condition that it manufactures or produces articles, things or computer software during the assessment year. The proviso equally supports the said interpretation as it also refers to the date of formation of the undertaking, for seeking benefit under Section 10B(1). The requirements under clauses (ii) and (iii) in this manner do not relate to the subsequent period, i.e. post or after formation.”

10. An earlier decision of the Delhi High Court in ***Commissioner of Income Tax vs. Tata Communications Internet Services Ltd.*** (2012) 251 CTR 290 had interpreted sub-section (3) to Section 80IA of the Act, which bears similar language and negative stipulation to hold that the question of violation of sub-section (3) to Section 80IA is to be raised and considered in the first year of the claim for deduction. If the assessee was using new plant



and machinery that had not been previously used for any purpose and the new undertaking was not formed by ‘splitting up’ or ‘reconstruction’ of the business already in existence, the entitlement in deduction under Section 80IA cannot be denied in the subsequent year.

11. It is an accepted and admitted position that the unit in the SEZ had commenced business in the period relating to the Assessment Year 2011-12. The assessee had claimed and was allowed deduction under Section 10AA in the Assessment Years 2011-12 and 2012-13. The Assessing Officer did not disallow exemption claim under Section 10AA in the assessment orders passed after scrutiny under Section 143(3) of the Act.

12. The Tribunal has examined whether the SEZ unit was formed and set up by ‘splitting up’ or ‘reconstruction’ of existing business. The Tribunal has referred to the facts in the form of data and figures to hold that the new unit in the SEZ was a new unit and not set up by ‘splitting up’ or ‘reconstruction’ of existing business. Table drawn in para 7 of the impugned order quotes and refers to the revenue earned from the existing business i.e. EOU unit and new SEZ unit which was entitled to exemption under Section 10AA from Assessment Year 2011-12. The table is as under:-

FY	Revenue from taxable business	Growth %	Revenue from unit	Growth %	Total Revenue	Growth %
2009-10	48,93,15,919				48,93,15,919	
2010-11	64,21,36,965	31%	3,61,10,980		67,82,47,945	39%
2011-12	62,32,14,978	-3%	45,72,63,241	1166%	108,04,78,220	59%
2012-13	66,95,57,158	7%	60,88,25,616	33%	1,27,83,82,769	18%



2013-14	73,08,34,134	9%	89,68,09,135	47%	16,27,64,32,69	27%
2014-15	88,07,79,281	21%	1,24,18,87,704	38%	2,12,26,66,985	30%
2015-16	103,00,00,296	17%	1,40,43,25,578	13%	2,43,43,25,874	15%
Expansion of EOU-Additional area of 21817 sq. Ft. Taken for EOU						
2016-17	141,96,91,400	38%	1,23,61,22,529	-12%	2,65,58,13,929	9%

There was increase in revenue from taxable business of 31%, 7%, 9%, 21% and 17% in the assessment years 2011-12, 2013-14, 2014-15, 2015-16 and 2016-17 respectively. In the assessment year 2012-13, there was a small reduction in revenue by 3% from Rs. 64,21,36,965/- to Rs.62,32,14,978/-. Revenue from the new Unit in the said year was Rs.60,88,25,616/- which was ninety five percent of the revenue of the existing business. The increase in revenue in the new unit was 1166% higher. Obviously the existing business was not transferred and the new unit had generated revenue almost equal to the revenue earned by the existing business. Respondent-assessee had also carried out the expansion of the non-exempt EOU unit by adding additional area of 21817 sq. feet. There has been increase of 33%, 47%, 38% and 13% in the revenue earned by the exempt unit during the period relevant to the assessment years 2013-14 to 2016-17 respectively. However, the revenue earned by the non-exempt unit/business has not decreased and has shown increase as noted above between the financial years 2012-13 to 2015-16. The Tribunal had also examined technical manpower employed in the new unit and has noted that percentage of new employees in the SEZ unit was 83% and 64% during the period relevant to the assessment years 2011-12 and 2013-14. Clearly new employment opportunities and jobs were created. Business had grown and increased substantially on setting up of the



new unit, which was a legitimate and wise business decision and not subterfuge and an illegal act.

13. In the factual background, the Tribunal has accepted that the new unit was a separate identity for its income to qualify for exemption under Section 10AA for it was not formed and created by 'splitting up' or 'reconstructing' the existing business. The new unit was also not formed by transferring any machinery or plant previously used. Fresh investment was made in the new unit. The revenue earning and profits generated were clearly attributable to the new unit.

14. In view of the aforesaid factual background and the earlier decisions of this court, we do not find any substantial question of law arises for consideration. The appeal is dismissed with no order as to costs.

SANJIV KHANNA, J.

ANUP JAIRAM BHAMBHANI, J.

DECEMBER 04, 2018

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