IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 714 of 2012
With
TAX APPEAL NO. 715 of 2012
With
TAX APPEAL NO. 716 of 2012

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COMMISSIONER OF INCOME TAX....Appellant(s)

Versus

BLUE OCEAN SEA TRANSPORT LTD....Opponent(s)

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Appearance:

MR PRANAV G DESAI, ADVOCATE for the Appellant(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MS JUSTICE SONIA GOKANI

Date : 01/03/2013

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Revenue is in appeal against the judgement of the Income Tax Appellate Tribunal dated 22.05.2012 raising following questions for our consideration:

"A. Whether in the circumstances and the facts of the case and in law, the Appellate Tribunal is justified in deciding that the provisions of Section 115VP(2) of the Act with regard to time stipulation for exercising the option of Tonnage Tax Scheme is not mandatory but directory and directing the department to consider the application made by the assessee opting for Tonnage Tax Scheme belatedly?

B. Whether in the circumstances and the facts of the

case and in law, the Appellate Tribunal is justified in setting aside the order passed by the CIT(A) as well as the A.O. and restoring the matter back to the file of A.O. for fresh consideration?"

2. In brief, the issue is whether the time limits specified in Section 115VP(2) of the Income Tax Act, 1961 is mandatory? Briefly stated facts are that Section 115VP was introduced for regulating method and time of opting for tonnage tax scheme. Such provision was in relation to Chapter XII-G pertaining to special provisions relating to income of shipping companies. Clause (m) of Section 115V defines "tonnage tax scheme" as to scheme for computation of profits and gains of business of operating qualifying ships under the provisions of that Chapter.

3. Sub-section (1) of Section 115VP enable a qualifying company to opt for the tonnage tax scheme by making an application to the Joint Commissioner in the manner that may be prescribed. Sub-section (2) of Section 115 VP provided for time limit for making such an application. For existing companies, such application had to be any time after 31.09.2004 but before 01.01.2005. Assessee's case fell in the said time period. Though assessee contended that such application was dispatched through ordinary post on 27.12.2004, the Tribunal did not accept such contention and came to the conclusion that as rightly pointed out by the revenue, such application was made only on 04.01.2005. The question, therefore, arose whether the application was invalid in view of the time limit prescribed for making such an application. The Tribunal held that the period prescribed under such sub-section (2) of Section 115VP was primarily a directory

provision and not a mandatory. The Tribunal held and observed as under:

"39. It is the case of the assessee that the time limit for making an application u/s. 115VP(2) is directory and not mandatory and therefore an order in terms of section 115VP(3) ought to have been passed ignoring delay of four days in making the said application. The case of the Department, on the other hand, is that the time provision of section 115VP(2) is mandatory and therefore its non-adherence would disentitle the assessee from opting for the tonnage tax scheme. Under a general classification, time provisions are either mandatory or directory, and, if mandatory, they prescribe, in addition to requiring the doing of the things specified within the stipulated period, the result that will follow if they are not done within that period, whereas, if directory, their terms are limited to what is required to be done. A statute is mandatory when the provision of the statute is the essence of the thing required to be done; otherwise, when it relates to form and manner, and where an act is incident, or after jurisdiction acquired, it is merely directory. A provision in a statute, rule of procedure, or the like, which is a mere direction or instruction of no obligatory force, as opposed to an imperative or mandatory provision, which must be followed, is generally directory. When a statute requires something to be done, and prescribes the way in which it is to be done, it may either be an absolute enactment or a directory enactment. The difference between the two is that an absolute enactment must be obeyed or fulfilled exactly in the manner prescribed, but it is sufficient if a directory enactment is obeyed or fulfilled substantially.

40. Keeping the aforesaid principles in view, we have carefully perused the provisions of section 115VP (2) to ascertain as to whether specification of time in that provision is directory or mandatory. Section 115VP deals with procedure for exercising the option of tonnage tax scheme. Neither section 115VP(2) nor any other provision in this behalf provides for the consequences that will follow in the event of non-submission of application between 01.10.2004 and 31.12.2004. It merely requires an assessee opting for tonnage tax scheme to make an application between 01.10.2004 and

31.12.2004. Keeping the aforesaid aspects in view, the time stipulation in section 115VP(2) is held to be directory and therefore it would be sufficient if it is substantially complied with by the assessee. No prejudice, in our view, would be caused if the Revenue is directed to consider the application made by the assessee on 04.01.2005 and dispose off the same as per the provision of section 115VP(3). We order accordingly. In this view of the matter, the order passed by the CIT(A) and the AO in this behalf is set aside and the matter is restored to the file of AO for a fresh decision in conformity with law. He will place the matter before the JCIT for passing requisite orders in conformity with law. Ground No.2 taken by the assessee is treated as allowed for the statistical purposes."

4. Having heard learned counsel for the revenue, we are broadly in agreement with view expressed by the Tribunal. We notice that the statute did not provide for any adverse or penal consequences, if the prescription of sub-section (2) of Section 115VP was not fulfilled. More importantly, we do not find the issue as a recurring one and further that, in any case, the application was made only 4 days after the last date prescribed. Such being the facts, in our view, there was substantial compliance with the procedural requirements. These tax appeals are, therefore, dismissed.

(AKIL KURESHI, J.)

(MS SONIA GOKANI, J.)

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