IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 12TH DAY OF OCTOBER 2011

PRESENT

THE HON'BLE MR.JUSTICE N.KUMAR

AND

THE HON'BLE MR.JUSTICE RAVI MALIMATH

ITA.NO.462 OF 2007

BETWEEN:

1. THE COMMISSIONER OF INCOME-TAX
ARA CENTRE, 3RD FLOOR,
E-2, JHANDEWALAN EXTENSION
NEW DELHI - 110 055.

2. THE ASSISTANT COMMISSIONER OF INCOME-TAX
CIRCLE4-11(2), C.R.BUILDING,
QUEENS ROAD,
BANGALORE. ...APPELLANTS

(BY SRI K.V.ARAVIND FOR SRI M.V.SESHACHALA, ADVS)

AND:

M/S.DSL SOFTWARE LTD.,
LEELA GALARIA COMMERCIAL BLOCK,
NO.23, AIRPORT ROAD,
BANGALORE.
NOW: AMALGAMATED WITH HCL TECHNOLOGIES LTD
NO.806, SIDDARTH, 96, NEHRU PLACE,
NEW DELHI - 19. ...RESPONDENT

(BY SRI A.SHANKAR & SRI M.LAVA, ADVOCATES)

*****

This ITA filed under section 260-A of I.T.Act, 1961 arising out of order dated 28.09.2006 passed in ITA.No.602/Bang/2005, for the Assessment year 2001-02, praying to formulate the substantial questions of law stated therein, allow the appeal and set aside the order passed by the ITAT, Bangalore in ITA.No.602/Bang/2005 dated 28.09.2006 confirming the order of the Appellate Commissioner & confirm the order passed by the Asst.Commissioner of Income Tax, Circle-11(2), Bangalore.

This ITA coming on for admission this day, *KUMAR J.*, delivered the following :-

JUDGMENT

This is an appeal filed by the revenue challenging the order passed by the Income Tax Appellate Tribunal, Bangalore Bench-B, upholding the order passed by the Commissioner of Income Tax (Appeals) who held that the assessee is entitled to the benefit of the extended period of ten consecutive years under Section 10B of the Act though prior to coming into force of the amended provision, he had the benefit of five years period of exemption from payment of income tax as per the amended provision.

2. The assessee is engaged in the business of software development and exports. The assessee is recognized as a 100% export oriented undertaking. Therefore, the respondent/assessee is entitled to the benefit of the tax holiday under Section 10B of the Income Tax Act (for short hereinafter referred to as the Act). Initially, Section 10B conferred a tax holiday for a period of 5 years out of a band of 8 years. The band of 8 years was to commence from the date the eligible unit commenced software development. The respondent claimed the benefit of tax holiday in accordance with the un-amended provision of 10B for a period of 5 years. The said 5 years period ended in the assessment year 1997-98 as the production commenced from 1993-94.

3. The Income Tax (Second Amendment) Act 1998 amended Section 10A and 10B. The amendment extended the tax holiday period to 10 years. The period of 10 years was to be reckoned from the date, the eligible unit started software development. Therefore, the

assessee claimed the benefit from payment of tax for the years 1999-2000, 2000-01 and 2001-02 as the amended provision came into force from 01.04.1999. In so far as assessment year 2001-02 is concerned, the assessee was denied the exemption under Section 10B of the Act on the ground that the assessee had already exhausted its claim under Section 10B prior to the amendment. Therefore, the question of allowing the claim for the remaining part of the 10 years period or the extension of the claim does not apply. According to the Assessing Authority, the assessee's case gets covered by the clause *'The undertaking shall be entitled to the deduction referred to in the sub-section only for the unexpired period of aforesaid ten consecutive years'*. The understanding of the Assessing Authority is that in the assessee's case, there was no unexpired period left because the claim has got exhausted in the assessment year 1997-98 itself. The second amendment provision has no application. Aggrieved by the said order, the assessee preferred an

appeal to the Commissioner of Income Tax (Appeals). The Appellate Commissioner held that there is nothing in the Act to provide that the units which have fully availed the benefit of exemption under Section 10B in accordance with the provisions of Section 10B(7) as it stood originally shall not get the benefit of amended provision introduced by Income Tax (Second Amendment) Act, 1998. Therefore, he held that the assessee is entitled for exemption under Section 10B in respect of its Leela Galleria Units for the assessment year under consideration. Aggrieved by the said order, the revenue preferred an appeal to the Tribunal. The Tribunal after taking note off the object with which the amendment was introduced as well as the amended provisions held that the provisions of Section 10B do not place the old and new EOU units on a different footing. If it were so, there would have been specific mention to the said effect. If the Legislature had intended to make a distinction between the old and new Section 10B there would have been a specific mention of the same. In

the absence of such a specific regimentation, all the 10B units would have to be similarly treated. Further it was held that the assessment for any year would depend upon the law in force on the first day of the relevant year. That the assessee claimed the benefit under Section 10B on the basis of the law as in force on the first day of the relevant year. Section 10B was amended which came into force from 01.04.2001, provided that the unit shall be eligible to the tax holiday under the new section for the unexpired period of 10 years beginning with the assessment year relevant to the previous year in which the said undertaking begins to manufacture. The reference in the proviso is to the unexpired period of 10 years without any qualification. It does not refer to the unexpired period of the tax holiday duration. The substituted section, being without any qualification is therefore to be held as applicable to the assessee. Therefore, it dismissed the appeal preferred by the revenue. Aggrieved by the said order, the revenue is in appeal.

4. The learned Counsel for the revenue assailing the impugned order contends that prior to the amendment the benefit of tax exemption was granted for a period of 5 years from the date of production. Admittedly, in the instant case, the assessee commenced production in the assessment year 1993-94 and therefore, he has availed the benefit of 5 years consecutively from that day, which ended in 1997-98. The amended provision came into force only in 1999 after the expiry of 5 years period. Therefore, as the assessee had already availed the benefit under the unamended provision, he is not entitled to the benefit of the amended provision. Therefore, the Assessing Authority was justified in denying the said benefit, which has been wrongly interfered with by the Appellate Authorities, and therefore, he submits that a case for interference is made out.

5. Per contra, the learned Counsel for the assessee supported the impugned order.

6. It is not in dispute that Section 10B prior to amendment granted a tax holiday for a period of 5 years from the date of commencement of production out of a band of 8 years. The section was amended by Income Tax (Second Amendment) Act, 1998 which came into effect from 01.04.1999. The amended provision reads as under:-

> *"10-B. Special provisions in respect of newly established hundred per cent export-oriented undertakings. - (1) Subject to the provisions of this section, a deduction of such profits and gains 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:*

Provided that where in computing the total income of the undertaking for any assessment year, its profits and gains had not been included by application of the provisions of this section as it stood immediately before its substitution by the Act 10 of 2000, the undertaking shall be entitled to the deduction referred to in this sub-section only for the unexpired period of aforesaid ten consecutive assessment years:

xxxx"

7. As it is clear from the aforesaid provision, the tax benefit or tax holiday is now extended for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the said undertaking begins to manufacture or produce articles or things or computer software, as the case may be. The object behind this amendment, which is extracted in the order of the Appellate Tribunal reads as under:-

"Clause 3 seeks to amend section 10A of the Income Tax Act. Under the existing

provisions, tax holiday is available to newly established industrial undertaking set up in free trade zones and to units set up in software technology parks for five years out of the block of initial eight years, subject to fulfillment of certain conditions. The proposed amendment seeks to extend the period of tax holiday from five years to ten years in order to give added thrust to exports. Clause-4 seeks to similarly extend the five year tax holiday period to ten years to the export oriented units under section 10B of the Income Tax Act."

8. From the aforesaid object behind the amendment, it is clear that the period of 5 years is extended to 10 years in order to give added thrust to exports. It is because the Parliament felt that the tax holiday of 5 years is not having the desired result and therefore, they extended the benefit of tax holiday from 5 years to 10 years. If it is a case of extension from 5 years to 10 years, the unit, which had the benefit of 5 years automatically, should get the benefit of 10 years if other

conditions are fulfilled. The other condition to be fulfilled is ten consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture. Therefore, the object with which this amendment was introduced is to extend the benefit of tax holiday for a period of 10 consecutive years from the date of commencement of manufacture or production. Before an assessee can claim the benefit of tax holiday, the said law governing the tax holiday should be in force on the first day of the relevant year. Then only he would be entitled to the said benefit. On 01.04.1999 when the amended provision came into force by virtue of said provision the assessee would be entitled to the benefit of tax holiday for 10 consecutive years from the date of production. If the assessee already availed the benefit under the unamended provision and the 10 consecutive years would fall prior to 01.04.1999, then the assessee would not be entitled to the said benefit. If the said 10 consecutive years from the date of production has not

expired, prior to 01.04.1999, for the remaining unexpired period, he would be entitled to the benefit. On the ground that he had the benefit of unamended provision and the 5 years period has expired on the day amended provision came into force, he cannot be denied the benefit. If that is done, it would run counter to the intention with which the amended provision was brought on the statute book. It would negate the amended provision.

9. In the instant case, the assessee has commenced production in the year 1993-94. He enjoyed the benefit of 5 years from 1993-94 to 1997-98. The amended provision came into force on 01.04.1999. He is entitled to the tax holiday under the amended provision i.e. from 1993-94 to 2002-03. He claimed benefit from 1999-2000, 2000-01 and 2001-02. It is for the period 2001-02, the benefit is denied. The said denial of the benefit runs counter to the spirit of Section 10B and it would negate the object with which the amended provision

was brought in. The assessee is entitled to the benefit of extension from 5 years to 10 years tax holiday as provided under the amended provision for 10 consecutive years from the date of commencement of production. In that view of the matter, the order passed by the Tribunal as well as the First Appellate Authority is strictly in accordance with law and do not suffer from any legal infirmity, which calls for interference. No substantial question of law arises for consideration in this appeal.

10. This case brings to the fore the way in which the Income Tax Department, without a proper application of mind, are filing appeals against the orders of the Tribunal and thus, wasting the precious time of this Court and wasting the tax payer's money. Even if the Assessing Authority for want of experience or has overzealously tried to protect the interests of the revenue, which runs counter to the express provision and when the two Appellate Authorities interpret the said provision, point out the law

declared by various forums and grant relief to the assessee, we fail to understand how the department has taken a decision to prefer an appeal in this case, where there is absolutely no error in the order passed by the Appellate Authorities. It only shows the lack of application of mind and it is our experience that it is not an isolated case. It seems that the department is filing these appeals mechanically either for the purpose of statistics or to save their skins without application of mind. In the process, a person who is eligible to a tax holiday has not only been denied the benefit, but made him to contest the proceedings in three forums. If the object of extending these benefits is to give added thrust to exports, the assessee is made to unnecessarily waste his time in fighting the dispute in different forums. The only way to bring reason to the department, is by imposing costs, so that appropriate action may be taken against the person who has taken a decision to prefer an appeal and recover the same after enquiry. Having regard to the facts of the

case, the Parliamentary intention and the object sought to be achieved and the way the two Appellate Authorities have pointed out the express provision, the view of the department is contrary to law, unsustainable and cannot be countenanced. Hence, we are of the view that the appellants are liable to pay costs of Rs.One lakh for making the assessee to contest the cases in three forums and wasting the tax payer's money. It is open to the authorities to recover the money from the person who has taken a decision to prefer the frivolous appeal. Ordered accordingly.

Sd/-
JUDGE

Sd/-
JUDGE

Prs*