IN THE INCOME TAX APPELLATE TRIBUNAL,
SPECIAL BENCH, RAJKOT
Before Shri G. C. GUPTA, HON'BLE VICE PRESIDENT,
Shri D K TYAGI, JUDICIAL MEMBER and
Shri A. K. GARODIA, ACCOUNTANT MEMBER

I.T.A. No. 397/ RJT/2009
(Assessment year 2006-07)

M/s. Saffire Garments, Plot No.434, Sector 3, KSEZ, Gandhidham	Vs.	ITO, Ward 2, Gandhidham

PAN/GIR No. : AAVFS9521R

(APPELLANT) .. (RESPONDENT)

Appellant by:	S/Shri Sanjay P. Shah & Vimal Desai, CAs
Respondent by:	Shri Ankur Garg, DR

Date of hearing: 10.09.2012
Date of pronouncement: 30.11.2012

O R D E R

PER SHRI A. K. GARODIA, AM:-

This special bench has been constituted by Hon'ble President, ITAT u/s 255(3) of the Income tax Act, 1961 to consider and decide the following questions, which relate to the solitary issue arising out of the appeal filed by the assessee for the assessment year 2006-07 being I.T.A.No. 397/RJT/2009:-

> "a) Whether the proviso to Sec.l0A(lA) of the Income Tax Act, which says that no deduction under Sec.10A shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under sec.139(l), is mandatory or merely directory?
> b) Whether, on a proper interpretation of the said proviso, it is permissible for the Tribunal to hold it to be merely directory and on that basis to hold that even if the return of income is not filed within the time-limit set by sec.139(l) the assessee cannot be denied the deduction u/s.l0A?

c) If the answer to question (b) is in the affirmative, would it not amount to conferring a power on the Tribunal to extend the time-limit for filing the return u/s.139(1) or to condone the delay in filing the same, when no such power is expressly conferred upon it by the Act?"

2. The assessee is a partnership firm. The assessee filed return of income declaring total income of Rs.2,72,730/- on 31.01.2007 which was processed u/s 143(1) of the Income tax Act, 1961. Thereafter, the case was selected for scrutiny and notice u/s 143(2) of the Income tax Act, 1961 was issued and served on 23.01.2008. The assessee had claimed deduction u/s 10A of the Income tax Act, 1961. When asked to explain this claim, the assessee submitted before the A.O. that it derived profit from export of articles produced in SEZ and the sale proceeds were brought in India in convertible foreign exchange and, therefore, deduction u/s 10A of the Income tax Act, 1961 is allowable to it. Thereafter, it is noted by the A.O. in the assessment order that the assessee had filed its return of income on 31.01.2007 and the extended due date for filing return of income for the assessee's, being a firm, as per the provisions of Section 139(1) of the Act was 31.12.2006. The A.O. also observed that the assessee failed to file its return of income on or before the due date specified under sub-section (1) of Section 139 of the Income tax Act, 1961. He further noted that as per the newly inserted proviso appended to section 10A of the Income tax Act, 1961, no deduction should be allowed to an assessee who does not furnish return of income on or before the due date specified under sub – section (1) of Section 139 of the Income tax Act, 1961. He also noted that the proviso was introduced by the Finance Act 2005 which came into effect from 01.04.2006. The A.O. held that this proviso is applicable to the case of the assessee and hence, the assessee's claim for deduction u/s 10A of the Income tax Act, 1961 is to be disallowed. In this manner, the A.O. disallowed the claim of the assessee for deduction u/s 10A of the Income tax Act, 1961. Being

aggrieved, the assessee carried the matter in appeal before Ld. CIT(A) but without success and hence, the assessee is in further appeal before the Tribunal.

3. The questions referred to the special bench are already reproduced above. The first question is that the proviso to Section 10A(1A) is mandatory or merely directory. Further two questions are interrelated to question No.1.

4. In the course of hearing before us, both the sides agreed that there is no dispute about the facts because, admittedly, due date for filing the return of income in the present case was 31.12.2006 and the return of income was filed by the assessee on 31.01.2007. It was submitted by the Ld. A.R. before us that the audit report was filed within the due date allowed u/s 139(1) of the Income tax Act, 1961. He placed reliance on the following judicial pronouncements, copies of which are given in paper book III:-

a) CIT Vs Hardeodas Agarwala Trust 198 ITR 511
b) Church's Auxiliary for Social Action and Anr Vs DGIT(Exemption) & Ors 325 ITR 362
c) CIT Vs Gujarat Oil & Allied Industries 201 ITR 325
d) CIT vs. Shivanand Electronics (supra) 209 ITR 63
e) ITO Vs VXL India Ltd. 312 ITR 187
f) Bajaj Tempo Ltd. 196 ITR 188

4.1 Synopsis of contentions of the assessee was also filed and the same was also duly considered.

5. As against this, it was submitted by the Ld. D.R. that the fourth proviso to section 139(1) is specific which shall prevail on general provisions. He also placed reliance on the judgement of Hon'ble Apex Court rendered in the case of Prakash Nath Khanna Vs CIT as reported in 266 ITR 01 (S.C.). Reliance was also placed on the Tribunal decision rendered in the case of Balkishan Dhawan HUF Vs ITO as reported in 50 SOT 49 (ASR)(URO)/18 Taxman.com 234 (ASR). He also submitted that remedy lies with the Board and not before the Appellate Authorities. He also submitted that there is difference between the provisions of Section 139(1) and Section 139(4) and, therefore, the proviso to section 139(1) should prevail.

5.1 Written submissions were filed by the Ld. D.R. and the same were also duly considered.

6. In the rejoinder, it was submitted by the Ld. A.R. that the judgement cited by the Ld. D.R. are not applicable in the present case because in those cases, the dispute was regarding substantial aspect and not to the procedural aspect. He also placed reliance on the judgement of Hon'ble Bombay High court rendered in the case of CIT Vs Shivanand Electronics as reported in 209 ITR 63 and submitted that this judgement supports the case of the assessee. He also submitted that relevant explanatory note on the provisions of Finance Act 2005 Circular No.3/2006 dated 27.02.2006 is available on page 47A of the paper book III filed by the assessee and as per the same, this provision was inserted with a view to widen the tax base and hence, it is a procedural provision and not substantive provision.

7. Regarding the reliance placed by the Ld. D.R. on the judgement of Hon'ble Apex Court rendered in the case of Prakash Nath Khanna (supra), it was submitted that this judgement is not applicable in the present case because in that case, the issue involved was with regard to offences and prosecution u/s 276CC and, therefore, the facts are different in the present case. Regarding the Tribunal decision rendered in the case of Balkishan Dhawan HUF Vs ITO (supra), it was submitted that this is a division bench decision and, therefore, not binding on the Special Bench.

8. We have considered the rival submissions and have gone through the judgements cited by both the sides. In our considered opinion, we have to decide regarding proviso to section 10A (1A) and hence, it should be reproduced. The proviso to Section 10A(1A) is reproduced below:

> "[(1A) Notwithstanding anything contained in sub-section (1), the deduction, in computing the total income of an undertaking, which begins to manufacture or produce articles or things or computer software during the previous year relevant to any assessment year commencing on or after the 1st day of April, 2003, in any special economic zone, shall be,—

(i) hundred per cent of profits and gains derived from the export of such articles or things or computer software for a period of five consecutive assessment years beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture or produce such articles or things or computer software, as the case may be, and thereafter, fifty per cent of such profits and gains for further two consecutive assessment years, and thereafter;

(ii) for the next three consecutive assessment years, so much of the amount not exceeding fifty per cent of the profit as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account (to be called the "Special Economic Zone Re-investment Allowance Reserve Account") to be created and utilised for the purposes of the business of the assessee in the manner laid down in sub-section (1B) :

Provided that no deduction under this section shall be allowed to an assessee who does not furnish a return of his income on or before the due date specified under sub-section (1) of section 139."

9. We are also required to consider Section 139(1) and the 4th proviso to Section 139(1) of the Income tax Act, 1961 which read as under:-

Section 139(1)

"Every Person – (a) being a company or a firm or

b) being a person other than a company or a firm, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income tax,

shall, on or before the due date, furnish a return of his income o the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed."

4th Proviso;

Provided also that every person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, whether incorporated or not, or an artificial juridical person, if his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year, without giving effect to the provisions of section 10A or section 10B or section 10BA or Chapter VI-

> A exceeded the maximum amount which is not chargeable to income-tax, shall, on or before the due date, furnish a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed."

10. When, we go through the provisions of Section 10A(1A) and its proviso along with the provisions of Section 139(1) and its 4th proviso, we find that the case of the revenue is this that as a consequence of assessee's failure to file the return of income within the time prescribed u/s 139(1), deduction is not allowable to the assessee u/s 10A of the Act.

11. The 1st question raised before us is this as to whether this proviso to Section 10A(1A) of the Income tax Act, 1961, is mandatory or merely directory. In order to decide this issue, we feel that we have to consider the whole scheme of the Act. The assessee is required to file the return of income within the prescribed time as per the provisions of Section 139(1). This provision of Section 139(1) is applicable to all companies and firms irrespective of the fact as to whether they are earning taxable income or not for the current year i.e. from 01.04.2006. In respect of other persons such as individual, HUF, AOP or BOI and Artificial Judicial Person, the requirement is this that if such a person is having taxable income before giving effect to the provisions of Section 10A, then also, he is required to file return of income before the due date even if this person is not having taxable income after giving effect to the provisions of Section 10A. We find that the provisions of the proviso to Section 10A(1A) is nothing but a consequence of failure of the assessee to file the return of income within the due date prescribed u/s 139(1) of the Income tax Act, 1961. For such a failure of the assessee to file his return of income within the due date prescribed u/s 139(1) of the Income tax Act, 1961, this is not the only consequence. One consequence of such failure is prescribed in Section 234A of the Income tax Act, 1961 also as per which, the assessee is liable to pay interest on the tax payable by him after reducing advance tax and TDS/TCS if

any paid by him apart from some other reductions. Such interest is payable from the date immediately following the due date for filing return of income and is payable up to the date on which such return of income was furnished by the assessee and if the assessee has not furnished any return of income then the interest is payable till the date of completion of the assessment u/s 144. In our considered opinion, this is also one of the consequences of not filing return of income by the assessee within the due date. One may raise this argument that interest u/s 234A is payable only if the assessee has not paid his advance tax and, therefore, this is interest for the failure of the assessee to pay advance tax as per the requirement of the Act and not for the delay in filing return of income. But in our considered opinion, this is not so. For the failure of the assessee to pay advance tax as per the requirement o the Act, interest is chargeable u/s 234B of the Income tax Act, 1961 if such advance tax paid by the assessee is less than 90% of the assessed tax. Such interest u/s 234B is payable from the first day of April of the relevant assessment year till the date of determination of the total income either u/s 143(1) or u/s 143(3) of the Act. The interest u/s 234A is payable from a date after the due date for filing the return of income and is payable up to the date on which the return of income is furnished by the assessee and if no return is furnished by the assessee at all then only, the interest is payable till the date of completion of the assessment u/s 144 of the Act. Under this factual and legal position, we have no hesitation in holding that the interest payable by the assessee u/s 234A is for his failure to file the return of income within the due date prescribed u/s 139(1) of the Income tax Act, 1961. This is by now a settled position of law that charging of interest under various sections including u/s 234A of the Income tax Act, 1961, is mandatory. When one of the consequences for not filing return of income within the due date prescribed u/s 139(1) of the Income tax Act, 1961 is mandatory then, other consequence of the same failure of the assessee cannot be directory and the same is also mandatory. In our considered opinion and in

view of our above discussion, the provisions of the proviso to Section 10A(1A) is mandatory and not directory and, therefore, question (a) referred to us is answered in negative and it is held that this proviso to Section 10A(1A) of the Income tax Act, 1961 is mandatory.

12. We now examine and discuss other consequences also for the failure of the assessee to file the return of income within the due date as required u/s 139(1) of the Income tax Act, 1961. One of such consequence is the provisions of Section 276CC as per which if the assessee fails to file the return of income within the due date prescribed under sub-section (1) of Section 139 of the Act then he shall be punishable for rigorous imprisonment along with fine and the quantum of such imprisonment and fine is dependent on the amount of tax which would have been evaded if the failure had not been detected. This issue was examined by Hon'ble Apex Court in the case of Prakash Nath Khanna (supra) as cited by the learned DR and it was held by the Hon'ble Apex Court in that case that even if the return of income is filed in terms of sub-section (4) of Section 139 and it does not dilute infraction in not furnishing return in due time as prescribed u/s 139(1) of the Act. This judgement also supports the view taken by us while answering question NO.1 as per above paras. When even for the purpose of prosecution also, it was held by the Hon'ble Apex Court that even if the return of income furnished by the assessee within the time allowed u/s 139(4), it does not dilute infraction in not furnishing the return in due time as prescribed under sub-section(1) of Section 139, then it cannot be accepted that such furnishing of return of income within time allowed u/s 139(4) will dilute the provisions contained in the proviso to Section 10A(1A) of the Income tax Act, 1961.

13. Regarding various submissions of the Ld. A.R. and various judgements on which reliance has been placed by the Ld. A.R., we would like to observe that these submissions do not have merit in view of our above discussion. The first submission is this that the provision of Section 139(4) are considered as

proviso to Section 139(1) and if the assessee has filed return of income u/s 139(4), the same should be considered as return filed u/s 139(1) of the Income tax Act, 1961. On this aspect, we have already seen the judgement of Hon'ble Apex Court cited by the Ld. D.R. having been rendered in the case of Prakash Nath Khanna (supra), where it was held by Hon'ble Apex Court that the filing of return of income within the time allowed u/s 139(4) of the Income tax Act, 1961 cannot dilute the infraction in not furnishing return in due time as prescribed u/s 139(1) of the Income tax Act, 1961. In view of this judgement of Hon'ble Apex Court in this regard, the judgments cited by the Ld. A.R. i.e. CIT Vs Jagariti Agrawal (supra) and Trustees of Tulsidas Gopalji Charitable & Chaleshwar Temple Trust (supra) are of no relevance because these judgements are of two different High Courts but this aspect of the matter is covered against the assessee by the judgement of Hon'ble Apex Court cited by the Ld. D.R.

14. The 2nd submission of the Ld. A.R. in the written submission is this that requirement of filing of return of income is procedural aspect and, therefore, it should be considered as directory and not mandatory. In support of this contention also, reliance has been placed on various decisions submitted by the assessee in the paper book II and III. We do not find any merit in these submissions of the assessee also because when consequences of not filing the return of income within the due date prescribed u/s 139(1) of the Income tax Act, 1961 are so grave i.e. charging of interest u/s 234A, possibility of prosecution u/s 276CC and denial of various deductions u/s 10A, 10B, 10BA and various sections under Chapter VIA, it cannot be said that this requirement of filing return of income is a procedural aspect.

15. Regarding various judgments cited by the Ld. A.R. in this regard, we find that some of these judgments are rendered by the division bench of the Tribunal and hence not binding on us. Regarding other judgements of various High Courts and Hon'ble Apex Court, we find that the same are not in respect of

failure of the assessee for filing the return of income within the due date prescribed u/s 139(1) of the Income tax Act, 1961 and hence not applicable. Still, we discuss, each of those judgments cited before us as under :

- The first judgement submitted in paper book II is the judgement of Hon'ble Apex Court rendered in the case of Director of Inspection of Income Tax Vs Pooran Mall & Sons (96 ITR 390). In that case, the issue involved was regarding the validity of the order passed by the A.O. u/s 132(5) for retaining the seized assets and hence, this judgement is not relevant in the present case.

- The 2nd judgement cited is the judgement of Hon'ble Madhya Pradesh High court rendered in the case of CIT Vs Panama Chemical Works (113 Taxman 717). In that case, the issue involved was regarding filing of audit report in Form 10CCB. The same was required to be filed along with the return of income filed by the assessee but in that case, the same was filed during assessment proceedings. Under these facts, it was held that the claim of the assessee regarding deduction u/s 80-I cannot be rejected if the required report in Form 10CCB was filed in the course of assessment proceedings. In the present case, the dispute is not regarding filing of some report along with return of income but the dispute is regarding filing of return of income itself within due date and hence, this judgment is also not relevant in the present case.

- The 3rd judgement cited is the judgement of Hon'ble Delhi High court rendered in the case of CIT Vs Axis Computers (India) (P) Ltd. (178 Taxman 143). In that case also, the dispute was regarding the requirement of filing of audit report along with return of income and not regarding filing of return of income within the due date and hence, this judgement of Hon'ble Delhi High Court is also not applicable in the present case.

- The next judgement cited is the judgement of Hon'ble Apex Court rendered in the case of CIT Vs National Taj Traders (2 Taxman 546). In that case, the dispute was regarding passing of order by CIT u/s33B of 1922 Act

corresponding to Section 263 of the present Act and hence, this judgement is also not relevant in the present case.

- The next judgement cited before us is the judgement of Hon'ble Delhi High court rendered in the case of CIT Vs Web Commerce (India) (P) Ltd. (178 Taxman 310). The dispute in that case is also similar to the dispute in the earlier decision of Hon'ble Delhi High Court rendered in the case of Axis Computers (India) (P) Ltd. (supra) and for the same reasons, this judgement is also not applicable in the present case.

- The next judgement cited before us is the judgment of Hon'ble Apex Court rendered in the case of Bajaj Tempo Ltd. Vs CIT (62 Taxman 480). In that case, the dispute before the Hon'ble Apex Court was regarding allowability of deduction u/s 15C of 1922 Act corresponding to Section 80J of Income tax Act, 1961 and the facts were that the industrial undertaking was established in a building taken on lese, which was used previously for other business. Under these facts, it was held that the assessee was entitled to deduction. Since the facts are different, this judgement of Hon'ble Apex Court is also not relevant in the present case.

- The next judgement cited before us is the judgement of Hon'ble Calcutta High court rendered in the case of CIT Vs Hardeodas Agarwala Trust (198 ITR 511). In that case, the issue in dispute was regarding furnishing of audit report along with return of income for the purpose of claiming exemption u/s 11 of the Income tax Act, 1961 and not the dispute was not regarding filing of return of income u/s 139(1) of the Act and hence, this judgement of Hon'ble Calcutta High Court is also not applicable in the present case.

- The next judgement cited before us is the judgement of Hon'ble Delhi High Court rendered in the case of Church's Auxiliary for Social Acton and Anr Vs Director General of Income Tax (Exemption) & Others (325 ITR 362). In that case, the dispute was regarding deduction u/s 80G of the Income tax Act, 1961 and as per the facts of that case, the objection was regarding failure of

assessee in rendering accounts to the competent authority within the prescribed period and it was held that such a requirement is directory and not mandatory. In the present case, the dispute is regarding filing of return of income itself within the due date and hence, this judgement of Hon'ble Delhi High Court is also not relevant in the present case.

- The next judgement cited before us is the judgment of Hon'ble Gujarat High Court rendered in the case o CIT Vs Gujarat Oil and Allied Industries (201 ITR 325). In that case also, the dispute was regarding the requirement of filing of audit report as to whether the same is mandatory or directory and as discussed in above paras, this judgment is also not relevant in the present case.

- The next judgement cited before us is the judgement of Hon'ble Delhi High Court rendered in the case of Continental Contraction Ltd. Vs Union of India and others (185 ITR 230). This judgement is also not applicable in the present case because in that case, the issue was this as to when CBDT had approved agreement for such a project for the purpose of Section 80 - O while in fact Section 80HHB was found applicable and it was held that assessee has to be given an opportunity for complying with the provisions of sub-section (3) of Section 80HHB. Since the facts are different, this judgement is also not relevant in the present case.

- The next judgement cited before us is the judgement of Hon'ble Bombay High court rendered in the case of CIT vs. Shivanand Electronics (209 ITR 63). Very strong reliance was placed by the learned AR on this judgment but we find that for the same reasons as discussed above in respect of various judgements, this judgement is also not applicable in the present case because in that case also, the issue in dispute was regarding requirement of filing of audit report along with return of income for deduction u/s 80J(via) and it was held that it is not mandatory in strict sense. In the present case, the dispute is regarding filing of return of income within due date prescribed u/s 139(1) of the Income tax Act, 1961 and hence, this judgement is also not relevant in the present case.

- The next judgment is the judgement of Hon'ble Gujarat High Court rendered in the case of ITO Vs VXL India Ltd. (312 ITR 187). In that case also, dispute was regarding filing of audit report and hence, this judgement is also not relevant.

- The next judgement cited before us is the judgement of Hon'ble Calcutta High court rendered in the case of Presidency Medical Centre (P) Ltd. Vs CIT (108 ITR 838). The conclusion as per this judgment is reproduced below from the Head notes:

> "Loss return can be filed within time specified by s.139(4) and once that return is filed within time it would be deemed to be in accordance with law and loss had to be determined and carried forward."

In view of this conclusion in this judgment that loss return can be filed within time specified u/139(4), this judgement is also not applicable in the present case because in the present case, the dispute is regarding filing of return of income within time allowed u/s 139(1) of the Income tax Act, 1961 and not u/s 139(4) of the Income tax Act, 1961 and hence, this judgement is also not applicable in the present case.

16. We have discussed all the judgments which were cited by the Ld. A.R. in the synopsis as well as copies of which are submitted in the paper book II and III and we have seen that none of these judgments is relevant in the present case.

17. In view of our above discussion, we have no hesitation in holding that the provisions of proviso to Section 10A(1A) is mandatory and not merely directory.

18. Now, we examine the 2nd question (b). In our considered opinion, since we have answered the 1st question (a) against the assessee and held that the provisions of the proviso to Section 10A(1A) is mandatory and not merely directory, the 2nd question (b) is not required to be answered because the same would have been required to be answered if we would have found that those

provisions are not mandatory but merely directory. Hence, we do not answer the 2nd question.

19. The 3rd (c) question is also not required to be answered by us because the same is to be required to be answered only if our reply to 2nd question would have been in affirmative. Since we have found that this question is not required to be answered in the facts of the present case as per which we have decided the first question against the assessee by holding that the provisions of the proviso to Section 10A(1A) is mandatory and not merely directory, the 3rd question is also not required to be answered by us.

20. The only issue raised in this appeal is the one which we have considered in the question No.(a). We have held that the provisions of the proviso to Section 10A(1A) are mandatory and not directory i.e. in favour of the revenue and against the assessee. Therefore, we find that the order of Ld. CIT(A) is just and in accordance with law and the ground raised by the assessee is liable to be dismissed.

21. As no other issue is involved, it is not necessary for us to send back the case to the Division Bench. We dispose of the appeal as such.

22. In the result, the appeal of the assessee is dismissed.

23. Order pronounced in the open court on the date mentioned hereinabove.

Sd./-	SD./-	Sd./-
(D.K.TYAGI)	G.C.GUPTA)	(A. K. GARODIA)
JUDICIAL MEMBER	VICE PRESIDENT	ACCOUNTANT MEMBER

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Copy of the Order forwarded to:

1. The applicant
2. The Respondent
3. The CIT Concerned
4. The Ld. CIT (Appeals)
5. The DR, Rajkot
6. The Guard File

By order

AR,ITAT,Ahmedabad