

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC
&
THE HONOURABLE MR. JUSTICE DAMA SESHADRI
NAIDU

TUESDAY, THE 10TH DAY OF OCTOBER 2017/18TH ASWINA,
1939

ITA. No. 47 of 2015 ()

AGAINST THE ORDER IN ITA 97/2014 of I.T.A.TRIBUNAL,COCHIN
BENCH DATED

APPELLANT:

THE COMMISSIONER OF INCOME TAX
THIRUVANANTHAPURAM.

BY ADVS.SRI.P.K.R.MENON,SR.COUNSEL, GOI(TAXES)
SRI.JOSE JOSEPH, SC, FOR INCOME TAX

RESPONDENT/APPELLANT:

M/S FLYTXT TECHNOLOGY P. LTD.
TECHNOPARK CAMPUS, KARIAVATTOM,
THIRUVANANTHAPURAM 695 581.

R1 BY ADV. SRI.V.ABRAHAM MARKOS
R1 BY ADV. SRI.ABRAHAM JOSEPH MARKOS
R1 BY ADV. SRI.ISAAC THOMAS
R1 BY ADV. SRI.HARAN THOMAS GEORGE
R1 BY ADV. SRI.GOVIND VIJAYAKUMARAN NAIR

THIS INCOME TAX APPEAL HAVING BEEN FINALLY HEARD
ON
10-10-2017 ALONG WITH ITA No. 77/2015, THE COURT ON THE
SAME

DAY DELIVERED THE FOLLOWING:

ITA No. 47/2015

APPENDIX

APPELLANT'S ANNEXURES:

ANNEXURE A TRUE COPY OF THE ORDER U/S 143(3) OF THE INCOME TAX ACT OF THE ASSESSING OFFICER DTD.17.12.2012.

ANNEXURE B TRUE COPY OF THE ORDER U/S 263 OF THE INCOME TAX ACT OF THE COMMISSIONER OF INCOME TAX, THIRUVANANTHAPURAM DTD.22.1.2014.

ANNEXURE C ORDER OF THE ITAT IN ITA NO.97/COCH/2014, FOR THE AY 2010- 2011 DTD. 28.8.2014

TRUE COPY

P.S.TO JUDGE

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JUDGMENT

Antony Dominic, J.

These appeals are filed by the revenue challenging the common order passed by the Income Tax Appellate Tribunal, Cochin Bench in ITA No. 97 of 2014 and 39 of 2014 respectively, concerning the assessment year 2010-2011. By the said order, the Tribunal directed the Assessing Officer to consider the claim of the assessee for the benefit of Section 10A of the Income Tax Act.

2. We heard the learned Senior Counsel for the revenue and the learned Senior Counsel appearing for the respondent assessee.

3. The facts of the case are that the the assesseees in these cases, claiming to the benefit of Section 10B was allowed by the Assessing Officer and on that basis the assessment was completed. However, the Commissioner of Income Tax invoked his jurisdiction under Section 263 of the Act on the ground that the assessment orders were erroneous and prejudicial to the interest of the revenue. Before the Commissioner, the assesseees raised an alternative contention that they were entitled to the benefit of Section 10A. However, in the order passed the Commissioner did not consider the claim of the assesseees for the

benefit of Section 10A and instead directed the Assessing Officer to withdraw the exemption under Section 10B. This order was challenged by the assessee in the appeals filed by them before the Tribunal. The appeals were disposed of by the Tribunal directing to decide the issue afresh including the claim of the assessee for the benefit of Section 10A. It is this common order which is under challenge and common questions of law framed read as under:

1. Whether, on the facts and in the circumstances of the case and while exercising suo moto revision of an assessment order by the Commissioner, is the assessee entitled to raise an alternative claim before the Commissioner?
2. Whether, on the facts and in the circumstances of the case and while setting aside the claim of the assessee under Sec. 10B erroneously allowed by the Assessing Officer, the assessee is entitled to alternatively claim a deduction Section 10A before the Commissioner under Section 263 of the Income Tax Act?
3. Whether, on the facts and in the circumstances of the case and in the light of the grounds raised is the interference of the Tribunal with the suo moto revisional order of Commissioner against law?
4. According to the learned Senior Counsel for the revenue, the Commissioner having found that the benefit of section 10B granted to the assessee being erroneous and prejudicial to the interest of the revenue, it was not opened to the assessee to claim the benefit of Section 10A either before the Commissioner or the Tribunal. In support of this plea, the counsel placed reliance in the judgment of the High Court of Delhi in Commissioner of Income Tax v Regency Creations Ltd. (2013) ITR 326. However, this contention of the learned senior counsel for the revenue was contradicted by the learned senior counsel appearing for the assessee and according to him, the assessee could not have been deprived of the statutory benefit it was entitled to under section 10A on the ground that it had made a wrong claim under Section 10B.
5. Counsel invited our attention to the judgment of the Apex Court in National Thermal Power Co.Ltd. v Commissioner of Income Tax (1998) 229 ITR 383 laying down that it was opened to the parties to raise for the first time the questions having a bearing on tax liability of the assessee before the Tribunal. The learned senior counsel also brought to our notice the order of the Tribunal clarifying the judgment in the case of Regency Creations (supra) giving liberty to the assessee to claim the benefit of Section 10A after the court upheld the rejection of claim under Section 10B.
6. We have considered the submissions made. Admittedly, the assessee initially claimed the benefit of Section 10B which was allowed by the

Assessing Officer. Only when the Commissioner was seized of the proceedings under Section 263, the assessee raised an alternative claim for the benefit of Section 10A. The Commissioner did not examine that plea and on the other hand, directed the Assessing Officer to withdraw the exemption under Section 10B. It was this order which was challenged by the assessee in the appeals filed by them before the Tribunal. Such an appeal filed by the assessee is liable to be considered by the Tribunal exercising its power under Section 254 of the Act which obliged the Tribunal to consider the appeal and pass such orders thereon as it thinks fit. It was this power of the Tribunal which was considered by the Apex Court in NTPC's case (supra) which held that where the Tribunal is only required to consider the questions of law arising from the facts which are on record, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee. Even if the contention raised by the learned Senior Counsel for the revenue that the power conferred on the appellants under Section 263 only authorized him to examine whether the order passed by the Assessing Officer is erroneous and prejudicial to the interest of the revenue, that restriction of power cannot affect the powers of the Tribunal which is bound to exercise under Section 254 of the Act. In such a situation, having regard to the language of Section 254 and as interpreted by the Apex Court in NTPC's case (supra), we do not see any reason to think that the Tribunal has committed an illegality by directing the Assessing Officer to decide the matter afresh duly advertent to the claim of the assessee for the benefit of Section 10A.

7. Though the learned Senior Counsel for the revenue relied on the judgment of a Delhi High Court in Regency Creations Ltd. (supra), a reading of the judgment shows that the Delhi High Court set aside the order of the Tribunal granting the benefit of Section 10B to the assessee therein. However, the subsequent order passed by the Delhi High Court, a copy of which has been made available by the learned senior counsel appearing for the assessee, shows that the High Court itself directed that when the matter is reconsidered by the Tribunal as directed in the judgment above, the Tribunal shall examine the claim of the assessee for the benefit of Section 10A. Therefore, in fact, this order of the Delhi High Court supports the claim of the assessee.

In the aforesaid circumstances, we do not find any illegality in the order passed by the Tribunal. Therefore, the questions of law framed have to be answered in favour of the assessee and against the revenue. Accordingly, the appeals are dismissed.

Sd/- Antony Dominic, Judge

sd/- Dama Seshadri Naidu, Judge

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