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No reassessment on basis of mere change of opinion by AO to deny exemption under sec. 10B

Summary – The High Court of Bombay in a recent case of Velingkar Brothers., (the Assessee) held that where while disposing of scrutiny proceedings, Assessing Officer after examining reply filed by assessee concluded that establishment of assessee was an export oriented unit and, thus, entitled for exemption under section 10B, subsequent notice under section 147 on ground that assessee was not entitled for said deduction was mere change of opinion

Facts

- The assessee was engaged in activity of extraction of iron ore. The assessee had filed return of income and claimed deduction under section 10B. Deduction was granted accordingly. Thereafter, a notice was issued under section 148 on the ground that the assessee was not entitled for deduction under section 10B as the activities carried out by the assessee were not 100 per cent export oriented unit. In response to said notice, assessee filed its return.
- The return filed by the assessee was taken up for scrutiny under section 143. During such scrutiny, the explanation given by assessee came to be accepted by the Assessing Officer by a reasoned order thereby granting deduction to the petitioners under section 10B.
- Thereafter, the Assistant Commissioner issue a notice under section 147 to reopen the assessment of the assessee on the ground that assessee was not entitled for deduction under section 10B on the ground that it was not carrying out manufacture or production business to avail the benefits of the said provisions. The assessee informed the revenue that the earlier return filed by the assessee be treated as a return under the said Act and called upon the revenue to furnish the reasons for such reopening of the assessment. But however, the department failed to furnish such reasons. Accordingly, the petitioners filed the instant petition challenging the notice under section 147. During the pendency of the petition, the revenue sought permission to complete the assessment and accordingly, the assessment order was passed thereby rejecting the claim of the assessee for deduction under section 10B and computing the taxable income of the assessee accordingly.
- In instant writ petition, the main crux of the grievance raised by the assessee was on the premise that the reassessment was on the basis that there was an escaped of income. However, the records would reveal that it was only a change of opinion which cannot be a ground for reopening of the assessment. It was further pointed out that in the order passed while disposing of scrutiny proceedings, the Assessing Officer after examining the reply filed by the assessee found that the assessee met the conditions as contemplated under section 10B and accordingly, allowed the deduction to the assessee. Once such a findings had attained finality as there was no challenge to such aspect before the Appellate Authority, it was not open to the revenue to issue a fresh notice under section 147 contending that the activities carried out by the assessee were not production in terms of section 10B. The revenue had not furnished the reasons and as such on this ground alone the alleged assessment carried out by the revenue stood vitiated.

Held

- It is undisputed fact that the above petitions were filed immediately after the notice under section 147 came to be served on the petitioners. At that stage the revenue had not proceeded to pass the impugned assessment order which came to be passed only subsequently upon seeking permission as stated above. The fact that there were scrutiny proceedings under the Act for the assessment year 2001-02 has not been disputed. On perusal of the findings by the Assessing Officer in the said order, it clearly reveals that the Assessing Officer after examining the reply filed by the petitioners and other material produced a definite finding was recorded that the petitioners were entitled for deduction under section 10B. While coming to such conclusion the Assessing Officer found that the establishment of the petitioners was a 100 per cent export oriented unit within the meaning of the provisions of section 10B.
- With regard to the assessment year 2000-01, the undisputed fact disclosed that there was an assessment notice under the said Act which came to be disposed of by regular assessment order after examining the reply filed by the petitioners by coming to the conclusion that the unit of the petitioners was 100 per cent export oriented. The Assessing Officer also came to the conclusion that the petitioners were entitled for relief under section 10B.
- Considering the said findings arrived at by the Assessing Officer in the earlier proceedings, the question of issuing a fresh notice under section 147 would not at all be justified. As rightly pointed out by the petitioners, this is not a case of an escape assessment but a clear case of difference of opinion which cannot be a ground for reopening under section 147. Apart from that, the undisputed fact of the case reveals that the revenue had not furnished the reasons for reassessment to the assessee after they were called upon to do so. On this ground also the subject proceedings under section 147 stands vitiated.
- With regard to the contention of the revenue that the assessee have an alternative remedy, in the present case the assessment order was passed only during the pendency of the above petitions which necessitated the petitioners to raise a challenge in the present petitions. Considering the view taken while examining the validity of the notice under section 147, the question of considering the correctness of the assessment order was not at all necessary. However, on perusal of the impugned assessment order pursuant to the subject notice under section 147, it is found that the deduction under section 10B was refused to the petitioners essentially on the ground that the iron ore extracted by the petitioners was not manufacture within the meaning of the provisions of section 10B. This aspect stands now concluded in view of the judgment of the Apex Court in the case of *CIT* v. *Sesa Goa Ltd.* [2005] 142 Taxman 16.
- Taking note of the said observations and considering the facts and circumstances of the present case, it is not disputed that the only ground on which the revenue was trying to sustain the impugned assessment after the notice under section 147 was on the basis that the assessee were not carrying out manufacturing activities, could not be a ground to refuse the benefits of deduction in terms of section 10B. The petitioners in fact as such were entitled for the said deduction which

otherwise stood concluded by the assessment order passed in the proceedings under section 143 in regular assessment order.

- In view of the above, the notice under section 147 for the assessment years 2000-01 and 2001-02 and the consequent assessment order are quashed and set aside.