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Court : Mumbai

Decided On : Mar-23-2001

Reported in : (2002)74TTJ(Mumbai)404

Appeal No. : ITA Nos. 396/Mum/1998 & 3069/Mum/2000 23 March 2001 A.Y. 1994-95

Appellant : Arvind Gore

Respondent : ito

Advocate for Pet/Ap. : Dr. P. Daniel, *for the Assessee* Mudit Nagpal, *for the Revenue*

Judgement :

ORDER

M.A. Bakshi, V.P.

We find it convenient to dispose of these two appeals of the assessee for assessment year 1994-95 by this consolidated order. Rival contentions have been heard and record perused.

2. We first take up the appeal in respect of an order under section 143(1)(a). The relevant facts in this case are that the assessee was an employee of Cadbury India Ltd. He had availed of voluntary retirement scheme benefits during the previous year relevant to assessment year 1994-95 and had received a sum of Rs.

4,64,402. The certificate issued by the employer company in Form No. 16 granted exemption in respect of sum of Rs. 3,79,965 and deducted tax inter alia in the sum of Rs. 84,437. However, the assessee while filing the return of income claimed exemption in respect of the entire sum of Rs. 4,64,402 under section 10(10C). The assessing officer made an adjustment of Rs. 84,440 disallowing the claim of the assessee. The assessee appealed to the Commissioner (Appeals) but did not succeed before him.

3. The learned counsel for the assessee claimed the orders of the revenue authorities on two grounds. One is that the assessing officer had issued a notice under section 143(2) on 26-6-1995, and thereafter issued the intimation on 3-8-1995. Relying upon the following authorities it was contended that the order under section 143(1)(a) passed after the issue of notice section 143(2) was invalid :

(1) Asstt. CIT v. M. Srinivasulu ;

(2) Gujarat Poly-Avx Electronics Ltd. v. Dy. CIT : [1996]222ITR140(Guj) ;

(3) Modern Fibotex India Ltd. v. Dy. CIT : [1995]212ITR496(Cal) ;

(4) Thermax Babcock & Wilcox Ltd. v. Dy. CIT ; and

(5) CIT v. Hindustan Electrographite Ltd. : [1998]229ITR16(MP) .

4. On the basis of the above-mentioned decisions, it was contended that the intimation under section 143(1)(a) is liable to be cancelled.

5. Even on merits, it was contended that the assessing officer was not justified in making the adjustment on a debatable issue. It was pointed out that whether exemption under section 10(10C) was available to the extent of Rs. 5 lakhs or was to be restricted in accordance with rule 2BA was highly debatable issue. In this connection, reference was made to the CBDT Circular No. 640, dated 26-11-1992 (published at (1992) 108 CTR (St) 17), and several other decisions taking a divergent view in regard to exemption under section 10(10C). It was accordingly contended that the assessing officer was not justified in making the adjustment and the Commissioner (Appeals) was also wrong in confirming the same.

6. The learned Departmental Representative on the other hand relied upon the orders of the revenue authorities.

7. We have given our careful consideration to the rival contentions. The issue as to whether the intimation issued under section 143(1)(a) in a case a notice under section 143(2) has been issued is covered by the following decision :

(1) M. Srinivasulu (supra);

(2) Gujarat Poly-Avx Electronics Ltd. (supra);

(3) Modern Fibotex India Ltd. (supra);

(4) Thermax Babcock & Wilcox Ltd. (supra); and

(5) Hindustan Electrographite Ltd. (supra).

8. Respectfully following the said decisions we hold that the intimation issued by the assessing officer under section 143(1)(a) after the issue of notice under section 143(2) is illegal. The intimation issued by the assessing officer is accordingly cancelled. Even otherwise the assessing officer was not justified in making the adjustment in respect of a debatable issue. The assessee had made a claim, which could be decided on merits after giving an opportunity of being heard to him. When the assessee makes the claim, it is the duty of the assessing officer to consider the same in accordance with law. In respect of contentious issues adjustment under section 143(1)(a) is not permissible. This has been held by the Bombay High Court in the case of Khatau Junkar Ltd. v. K.S Pathania : [1992]196ITR55(Bom) . On this ground also, the assessee succeeds. The intimation under section 143(1)(a) is accordingly cancelled.

9. We now take up the appeal relating to assessment under section 143(3). The limited issue is relating to exemption under section 10(10C). The assessee was an employee of Cadbury India Ltd. During the previous year relevant to the year under appeal he opted for voluntary retirement under voluntary retirement scheme formulated by the company and approved by the Chief Commissioner. The assessee received a compensation of Rs. 4,64,402. The company in its TDS

certificate had treated as sum of Rs. 3,79,965 as exempt. In respect of the remaining amount of Rs. 84,437 tax was deducted at source. The assessee in his return of income claimed exemption in respect of the entire sum of Rs. 4,64,402. The assessing officer restricted the exemption to the extent of Rs. 3,79,965 and the remaining sum of Rs. 84,437 was taxed.

10. The learned counsel for the assessee contended that section 10(10C) provides for exemption in respect of the amount received under the voluntary retirement scheme formulated by the company subject to the conditions provided under rule 2BA. It was contended that said rule provides two conditions. The first condition is that the amount receivable on account of voluntary retirement does not exceed the amount equivalent to one and one-half months' salary for each completed year of service or salary at the time of retirement multiplied by the balance months of service left before the date of his retirement on superannuation. The second condition is that the amount receivable does not exceed Rs. 5 lakhs in the case of each employee. It was contended that since the words 'whichever is less' have not been used in the said rule, the assessee is entitled to exemption to the extent of Rs. 5 lakhs. Reliance has been placed on the CBDT Circular No. 640, dated 26-11-1992, in particular question No. 3, in support of the contention that the limit of Rs. 5 lakhs alone is applicable and other limits are not applicable. It was also contended that provisions relating to exemptions are to be considered liberally in favour of the assessee. Reliance has been placed on the following decisions of the Supreme Court in support of the contention :

(1) CIT v. South Arcot District Co-operative Marketing Society Ltd. : [1989]176ITR117(SC) at page 119;

(2) Broach Dist. Co-operative Cotton Sales, Ginning and Pressing Society Ltd. v. CIT : [1989]177ITR418(SC) at page 422;

(3) CIT v. Strawboard . : [1989]177ITR431(SC) at page 434.

11. It was accordingly contended that exemption may be allowed to the assessee to the extent of Rs. 4,62,406 and the addition of Rs. 84,437 may be deleted.

12. The learned Departmental Representative on the other hand, relied upon the finding of the Commissioner (Appeals) in para No. 6, page 4 of his order. It was further contended that if the interpretation advanced on behalf of the assessee is accepted then rule 2BA would be rendered redundant. Our attention was also invited to the CBDT Circular No. 640, dated 26-11-1992, relied upon by the learned counsel for the assessee, in particular question No. 7 in support of the contention that the claim has got to be allowed subject to the conditions under rule 2BA being satisfied and to the extent of Rs. 5 lakhs only. Rebutting the contentions on behalf of the assessee that the other conditions in rule 2BA are not to be satisfied it was contended that Board circular does not support the contention advanced on behalf of the assessee. It was accordingly contended that the appeal of the assessee may be dismissed.

13. We have given our careful consideration to the rival contentions. The limited issue to be decided in this case is relating to the quantum of exemption allowable under section 10(10C) of the Act. The said section reads as under :

Section 10 : In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included

(10C) : Any amount received by an employee of a public sector company or of any other company at the time of his voluntary retirement or termination of his service in accordance with sub-clause (v) of voluntary retirement to the extent such amount does not exceed five lakh rupees.

14. The conditions for grant of exemption under section 10(10C) are laid down in rule 2BA. The rule as applicable for the assessment year 1994-95 is reproduced hereunder :

2BA. Guidelines for the purposes of section 10(10C).The amount received by an employee of a public sector company or of any other company at the time of his voluntary retirement shall be exempt under clause (10C) of section 10 only if the scheme of voluntary retirement framed by the aforesaid company is in accordance with the following requirements, namely :

- (i) it applies to an employee of the company who has completed 10 years of service or completed 40 years of age;
- (ii) it applies to all employees by whatever name called including workers and executives of the company excepting directors of the company;
- (iii) the scheme of voluntary retirement has been drawn to result in overall reduction in the existing strength of the employees of the company;
- (iv) the vacancy caused by voluntary retirement is not to be filled up nor the retiring employee is to be employed in another company or concern belonging to the same management;
- (v) the amount receivable on account of voluntary retirement of the employee, does not exceed the amount equivalent to one and one-half month's salary for each completed year of service or salary at the time of retirement multiplied by the balance months of service left before the date of his retirement on superannuation. In any case, the amount should not exceed rupees five lakhs in case of each employee;
- (vi) the employee has not availed in the past, the benefit of any other voluntary retirement scheme.'

15. It is observed from rule 2BA(v) that two conditions are provided-(a) that the amount receivable on account of voluntary retirement does not exceed the amount equivalent to one and one-half months, pay for each completed year of service or salary at the time of retirement multiplied by the balance months of service left before the date of his retirement on superannuation. The rule also provides that in any case the amount receivable should not exceed Rs. 5 lakhs in the case of each employee. The sum as per condition No. 1 of rule 2BA(v) works out to Rs. 3,79,965 and as per condition No. 2 the amount of Rs. 5.00 lakhs is provided. The learned counsel for the assessee has pointed out elsewhere in this order that in the absence of words, whichever is lower, in rule 2BA(v) in respect of the two conditions the exemption is available to the assessee to the extent of Rs. 5 lakhs. We do not find any substance in this contention on behalf of the assessee. There

are two conditions provided under rule 2BA(v). In our considered view, both these conditions are applicable independently. If the amount under condition No. 1 of the said rule works out to more than Rs. 5 lakhs, then condition No. 2 will operate and the exemption will be limited to Rs. 5 lakhs. However, if as per condition No. 1 the amount works out to less than Rs. 5 lakhs, then the exemption has got to be restricted to the amount as workable under condition No. 1. There is no warrant for the contention that in the absence of the words 'whichever is lower' condition No. 1 will not operate. The conditions have been provided under the rule and all the conditions are applicable depending upon the facts and circumstances of each case. In this case, the assessee's receipt is hit by condition No. 1 and the exemption has got to be limited by application of the said condition. There is no justification for granting exemption in excess of the condition provided under rule 2BA(v).

16. The CBDT Circular No. 640, dated 26-11-1992, also does not support the claim of the assessee. The decision of the Supreme Court relating to interpretation of statutes also do not support the case of the assessee. Section 10(10C) provides exemption to the extent of Rs. 5 lakhs subject to the rules and since the rule provides a limitation of exemption there is no room for any doubt or ambiguity. The revenue was, therefore, justified in restricting the exemption to Rs. 3,79,965.

17. Finding no merit in the appeal of the assessee, the same is dismissed.

18. In the result, whereas the appeal of the assessee in ITA No. 3069/Mum/2000 is allowed, the appeal in ITA No. 396/Mum/1998 is dismissed.