dhruva

Direct Tax Alert

July 13, 2022

Supreme Court holds filing of declaration within time limit mandatory for foregoing benefit under section 10B

The Hon'ble Supreme Court, in a recent ruling in case of *M/s. Wipro Limited*[1] ('the taxpayer'), denied the option of foregoing the benefit under section 10B by holding that section 10B, being an exemption section, was to be strictly construed and the declaration under section 10B(8) need to be filed on or before the due date of filing return of income.

Background and facts of the case

- Section 10B of the Income-Tax Act, 1961 ('the Act') provides for deduction of profits and gains derived by a 100% Export Oriented Unit from the export of article or things or computer software for a period of ten consecutive assessment years. The deduction under section 10B is no longer available from Assessment Year ('AY') 2012-13. Section 10B(8) of the Act provides that the taxpayer can choose to not apply the provisions of section 10B for any assessment year by filing a declaration to this effect with the Assessing Officer ('AO') before the due date of furnishing return of income under section 139(1) of the Act. In such a case the provisions of section 10B shall not apply to him for that year.
- The taxpayer filed its return of income on October 31, 2001 for AY 2001-02,

[1] Civil Appeal No. 1449 OF 2022 (arising out of Special Leave Petition (Civil) No. 7620/2021)

declaring a loss of INR 15,47,76,990 and claiming exemption under section 10B of Act. The taxpayer, along with the original return filed on October 31, 2001, annexed a note to the computation of income wherein it was stated that the company is a 100% export-oriented unit and is entitled to claim exemption under section 10B of the Act and therefore no loss was being carried forward.

- The taxpayer subsequently filed a declaration dated October 24, 2002 before the AO stating that it does not want to avail the benefit under Section 10B of the Act for AY 2001-02 as per section 10B(8) of the Act. The taxpayer thus filed a revised return of income on December 23, 2002, wherein the taxpayer did not claim exemption under section 10B of the Act but did make a claim for carry forward of tax losses.
- The withdrawal of claim of exemption under Section 10B of the Act was rejected by the AO on the ground that the declaration was not furnished before the due date of filing of return of income (viz, October 20, 2001). Consequently, the AO denied the claim of carrying forward of tax losses under section 72 of the Act.
- The Income-tax Appellate Tribunal and the Karnataka High Court adjudicated this issue in favour of the taxpayer by holding that while the requirement to file the declaration was mandatory, the time limit within which it was to be filed was directory. Aggrieved by the order of the Karnataka High Court, the Revenue filed an appeal before the Supreme Court which has adjudicated the issue in favour of the Revenue.

Contention of the Revenue

- The conditions mentioned in section 10B(8) of the Act are not complied with, as the declaration for not availing benefit under section 10B was not filed before the due date of filing of return under section 139(1), being October 31, 2001.
- As the declaration under section 10B of the Act was not filed within the due date, the taxpayer cannot be allowed to not claim the benefit under section 10B and consequently no losses should be allowed to be carried forward.
- The High Court has erred in observing that the requirement under Section 10B(8) of the Act is a procedural requirement. If the view taken by the High Court is accepted, it shall nullify the provisions of Sections 10B(5) (furnishing report by an accountant certifying the correctness of claim of deduction under section 10B) and 10B(8) of the Act.
- The taxpayer filed a revised return of income on December 23, 2002 wherein it did not claim exemption under section 10B of the Act but made a claim to carry forward the tax losses under section 72 of the Act. A revised return of income under Section 139(5) of the Act can be filed only to remove any omission or mistake and/or correct the arithmetical error and such return cannot be filed for making a new claim altogether.

- The taxpayer has filed the declaration under section 10B(8) beyond the prescribed due date as an afterthought with an intention to frustrate the provisions of section 10B of the Act.
- The finding of the High Court that the time limit for filing the declaration is directory and not mandatory is erroneous. The non-filing of declaration before the due date, i.e., filing of the return of income would prohibit the taxpayer from making a claim of carry forward of losses.
- Section 10B is an exemption section and the conditions laid down in this section need to be strictly construed.

Contention of the Taxpayer

- The taxpayer contended that while the requirement to file the declaration is mandatory, the time limit within which it had to be filed is directory. Several judicial precedents in this regard were relied upon.
- It was not open to the Revenue to raise the issues of validity of the revised return of income as these were not raised by the Revenue before the High Court.
- As the original return was filed in time, the requirement of section 80 which mandates a taxpayer to file their tax returns on time to be entitled to carry forward the losses stands fulfilled.
- Even otherwise, it was not necessary for the taxpayer to file a revised return of income once the declaration for foregoing the benefit under section 10B has been filed before the AO. Therefore, the issue regarding validity of the revised return is wholly immaterial and irrelevant.
- The Accountant's certificate is required only if the taxpayer claims the deduction under Section 10B. The certificate, if already submitted, becomes irrelevant if the claim is withdrawn subsequently. In any event, the contents of the certificate regarding profit/loss are not in any way affected by the withdrawal of claim of section 10B.
- The principles emerging from the decision of the Supreme Court in *CIT, Maharashtra v. G.M. Knitting Industries Pvt. Ltd.*[2] wherein the taxpayer was allowed additional depreciation upon filing of Form 3-AA for claim of additional depreciation before passing of the assessment order (though such form was required to be filed with the return of income) would equally apply in this case of furnishing of declaration under section 10B(8) of the Act.
- A substantive claim, which the taxpayer considers to be more beneficial, must be allowed to be made until the conclusion of assessment and the timelines within which any form which enables such claim should be filed, is only directory.
- Section 10B is a deduction provision and not an exemption provision as held by the Supreme Court in *CIT v. Yokogawa India Ltd*[3].

Ruling of the Supreme Court

- The Supreme Court observed that the wordings of section 10B(8) are very clear

[2] (2016) 12 SCC 272

[3] (2017) 391 ITR 274 (SC)

and unambiguous. The Supreme Court held that for claiming the option under section 10B(8) (for not availing benefit under section 10B), the twin conditions of furnishing the declaration to the AO in writing and furnishing of such declaration before the due date of filing the return of income under sub-section (1) of section 139 of the Act are required to be fulfilled.

- A revised return can only be filed in a case of an omission or a wrong statement. However, a revised return of income cannot be filed to withdraw a claim made in the original return of income or to make fresh claim not made in the original return of income.
- Where the taxpayer has furnished the declaration under section 10B(8) in the revised return of income (which was filed after the due date of filing the original return of income under section 139(1) of the Act), it cannot be said that the taxpayer has complied with the condition of furnishing the declaration before the due date of filing the original return of income under section 139(1) of the Act.
- The taxpayers' contention of there being no requirement for filing revised return of income for exercising the option to not claim benefit under section 10B has no substance. Further, the contention that the declaration under section 10B(8) can also be filed subsequently during the assessment proceedings cannot be accepted.
- The significance of filing a declaration under section 10B(8) is co-terminus with filing of a return under section 139(1), as a check has been put in place by virtue of section 10B(5) to verify the correctness of claim of deduction at the time of filing the return. If a taxpayer claims an exemption under the Act by virtue of Section 10B, then the correctness of claim has already been verified under section 10B(5). Therefore, if the claim is withdrawn post the date of filing of return, the accountant's report under section 10B(5) would become falsified and would stand to be nullified.
- Section 10B is an exemption provision and a taxpayer claiming exemption has to strictly and literally comply with the exemption provisions.
- Reliance placed on the decision of *G.M. Knitting Industries Pvt. Ltd. (supra)* is incorrect as the said decision deals with claim of additional depreciation and is not applicable to facts of the instant case which is in the context of an exemption provision.
- Other decisions relied upon by the taxpayer on interpretation of Chapter VIA shall not be applicable while considering the claim under section 10B(8) of the Act. Chapter III (exemption provisions) and Chapter VIA (deduction provisions) of the Act operate in different realms and principles of Chapter III, which deals with "incomes which do not form a part of total income", cannot be equated with mechanism provided for deductions in Chapter VIA, which deals with "deductions to be made in computing total income"

- The argument of the taxpayer that it had a substantive statutory right under section 10B(8) to opt out of section 10B and such right cannot be nullified by holding the time limit for filing of the declaration under Section 10B (8) as being mandatory has no substance, as section 10B is an exemption provision and such provision has to be strictly and literally complied with.

Dhruva Comments

- In this case, the Supreme Court again emphasized the importance of literal interpretation of statutory provisions where the language of the underlying provision is clear and unambiguous. The Supreme Court has struck down High Court's observations that filing of declaration under section 10B(8) before the due date of filing return of income under section 139(1) is directory in nature, by holding that section 10B(8) clearly and literally provides for filing of declaration within due date and such requirement is mandatory in nature.
- The Supreme Court applied the principle that exemption provisions should be strictly construed and a taxpayer claiming exemption should strictly and literally comply with the exemption provisions. The Supreme Court in its earlier ruling in the case of *Dilip Kumar and Company & Others*[4] has held that an exemption notification should be interpreted strictly and any ambiguity in such exemption notification should be interpreted in favour of the Revenue. It must be noted that this decision was rendered in the context of Customs law. Interestingly, in the context of income-tax law, the Supreme Court in the case of *Bajaj Tempo Ltd*[5] had held that the provision of a taxing statute granting incentive for promoting growth and development should be construed liberally.
- The Supreme Court in this ruling has held section 10B to be an exemption section. It must be noted that the Supreme Court in an earlier ruling in the case of *Yokogawa (supra)*, in the context of section 10A of the Act, has held that section 10A is in the nature of a 'deduction' although the section is placed in Chapter III (exemption provisions) of the Act. Interestingly, the current ruling does not provide any basis or justification for departing with its earlier decision while holding section 10B to be an exemption provision.
- The observations of the Supreme Court that a revised return of income can be filed only for any error or omission and cannot be filed for making a fresh claim or withdrawing of a claim made in the original return of income would have a direct bearing on taxpayers making such additional claims/ withdrawing claims by way of a revised return. However, the position of allowability of additional/ fresh claim before appellate authorities remains unaffected by this ruling. For

[4] Civil Appeal No. 3327 OF 2007
[5] Bajaj Tempo Ltd v. CIT [1992] 196 ITR 188 (SC)

example, the Supreme Court in case of *National Thermal Power Co Ltd v. CIT*[6], Bombay High Court in case of *CIT v. Pruthvi Stock Brokers & Shareholders*[7] and several other precedents have held that the taxpayer has a right to make an additional claim by way of additional grounds not pressed earlier at the time of appellate proceedings.

- A closer analysis of the recent Supreme Court decisions may suggest an emerging trend of the Hon'ble Court interpreting the taxing statute more strictly and against the taxpayers. More rigor and careful consideration of finer aspects of law would be necessary especially when there is ambiguity in the law.

Contributors:

Saurabh Shah (Principal)

Aditya Raipuria (Principal)

For any queries in relation to this tax alert, please feel free to reach out.

[6] [1998] 229 ITR 383 (SC)

[7] [2012] 349 ITR 336 (Bom)

ADDRESSES

Mumbai
1101, One World Center, 11th floor,
Tower 2B, 841 Senapati Bapat Marg,
Elphinstone Road (West),
Mumbai 400 013
Tel: +91 22 6108 1000 / 1900

Ahmedabad
B3, 3rd Floor, Safal Profitaire,
Near Auda Garden,
Prahladnagar, Corporate Road,
Ahmedabad 380015
Tel: +91-79-6134 3434

Bengaluru
Prestige Terraces, 2nd Floor
Union Street, Infantry Road,
Bengaluru 560001
Tel: +91-80-4660 2500

Delhi / NCR
101 & 102, 1st Floor, Tower 4B
DLF Corporate Park
M G Road, Gurgaon
Haryana 122002
Tel: +91-124-668 7000

Pune
305, Pride Gateway, Near D-Mart, Baner,
Pune 411 045
Tel: +91-20-6730 1000

Kolkata
4th Floor, Unit No 403, Camac Square,
24 Camac Street, Kolkata
West Bengal 700016
Tel: +91-33-66371000

Singapore
Dhruva Advisors (Singapore) Pte. Ltd.
20 Collyer Quay, #11-05
Singapore 049319
Tel: +65 9105 3645

Dubai
WTS Dhruva Consultants
Emaar Square Building 4, 2nd Floor,
Office 207, Downtown,
P.O. Box 127165
Dubai, UAE
Tel: +971 4 240 8477

KEY CONTACTS

Dinesh Kanabar
Chief Executive Officer
dinesh.kanabar@dhruvaadvisors.com

Punit Shah (Mumbai)
punit.shah@dhruvaadvisors.com

Mehul Bheda (Ahmedabad)
mehul.bheda@dhruvaadvisors.com

Ajay Rotti (Bengaluru)
ajay.rotti@dhruvaadvisors.com

Vaibhav Gupta (Delhi/NCR)
vaibhav.gupta@dhruvaadvisors.com

K. Venkatachalam (Pune)
k.venkatachalam@dhruvaadvisors.com

Aditya Hans (Kolkata)
aditya.hans@dhruvaadvisors.com

Mahip Gupta (Singapore)
mahip.gupta@dhruvaadvisors.com

Nimish Goel (Dubai)
nimish.goel@dhruvaadvisors.com

Dhruva Advisors has been consistently recognised as the **"India Tax Firm of the Year"** at the ITR Asia Tax Awards in 2017, 2018, 2019, 2020 and 2021.

Dhruva Advisors has also been recognised as the **"India Disputes and Litigation Firm of the Year"** at the ITR Asia Tax Awards 2018 and 2020.

WTS Dhruva Consultants has been recognised as the **"Best Newcomer Firm of the Year"** at the ITR European Tax Awards 2020.

Dhruva Advisors has been recognised as the **"Best Newcomer Firm of the Year"** at the ITR Asia Tax Awards 2016.

Dhruva Advisors has been consistently recognised as a **Tier 1 Firm in India for General Corporate Tax** by the International Tax Review's in its World Tax Guide.

Dhruva Advisors has also been consistently recognised as a **Tier 1 Firm in India for its Transfer Pricing** practice ranking table in ITR's World Transfer Pricing guide

Dhruva Advisors has been consistently recognised as a **Tier 1 Firm in India for Indirect Taxes** in International Tax Review's Indirect Tax Guide.