IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.06.2007

Coram :

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN

AND

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) No.586 of 2007

Commissioner of Income-tax,
Chennai. ..Appellant

Vs

M/s.Sak Soft Ltd.,
38, V.K.Iyer Road,
Mandaveli,
Chennai-600 028. ..Respondent

Appeal under Section 260A of the Income-tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Bench 'B', Chennai in I.T.A. No.1374/Mds/04 dated 13.10.2005 for the assessment year 2001-02.against the order of the Commissioner of Income Tax Officer, Chennai III made in C NO. 3033/24/111/2003-04 dated 16.3.2004 for the Assessment year 2001-02 against the order of the Income Tax Officer Company Ward VI (1) Chennai dated 30.01.2003 made in PAN/GIR NO. WSA 213/AADC S9979 E for the assessment year 2001-02

For Appellant : Mr.J.Narayanaswamy,
Standing Counsel for
Income-tax Department

JUDGMENT
(Judgment of the Court was delivered by
P.P.S.Janarthana Raja, J.)

This appeal is filed under Section 260A of the Income Tax Act, 1961 by the Revenue, against the order of the Income Tax Appellate Tribunal, Bench 'B', Chennai in I.T.A. No.1374/Mds/04 dated 13.10.2005 raising the following substantial questions of law:-

1. Whether in the facts and circumstances of the case, the Tribunal was right in holding that the Commissioner was not justified in revising the assessment order under section

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263, as the order was not erroneous and prejudicial to the interest of the revenue?
2. Whether in the facts and circumstances of the case, the Tribunal was right in holding that where a provision is capable of one interpretation, the order of the assessing officer cannot be said to be erroneous?

2. The facts leading to the above substantial questions of law are as under:

The assessee is a company incorporated under the Companies Act. The assessee-company is registered with Software Technology Park of India and carries on business in export of computer software. The relevant assessment year is 2001-2002 and the corresponding accounting year ended on 31.03.2001. The assessee filed Return of income admitting "nil" income after claiming exemption on the entire profit of Rs.34,91,520/- under Section 10B of the Income-tax Act ("Act" in short). The Return was processed under Section 143(1) of the Act on 20.08.2002. Later, the assessment was taken up for scrutiny and notice under Section 143(2) of the Act was issued. The assessee furnished details of realisation of the outstanding export proceeds of Rs.1,30,98,807/-. All the payments were received within six months from the end of the year required under Section 10B of the Act. The assessee's local sales did not exceed 25% of the total sales and therefore the assessee is considered as 100% Export Oriented Undertaking as per the provisions of Section 10B of the Act. The Commissioner of Income-tax issued Show Cause Notice requiring the assessee to explain as to why the assessment order should not be revised under Section 263 of the Act. The assessee replied to the Show Cause Notice. After considering the reply, the Commissioner of Income-tax revised the order of assessment on the ground that the same is erroneous and prejudicial to the interests of the Revenue. Aggrieved by the order, the assessee filed an appeal to the Income-tax Appellate Tribunal ("Tribunal" in short). The Tribunal allowed the appeal and set aside the order of the Commissioner of Income-tax. Hence the present appeal by the Revenue.

3. Learned Standing Counsel appearing for the Revenue submitted that the export turnover so arrived, has to be divided by the total turnover of the business carried on by the Undertaking and this ratio is to be multiplied by the profits of the business of the Undertaking. This formula has not been applied by the Assessing Officer while working out the deduction available under Section 10B of the Act. Hence the order passed by the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. Hence the Commissioner of Income-tax is right in setting aside the order of assessment under Section 263 of the Act.

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4. Heard the counsel. Section 263 of the Act can be invoked only if the order of the Assessing Officer is erroneous and prejudicial to the interests of the Revenue. The said two conditions must be satisfied before assuming jurisdiction under Section 263 of the Act. It is seen from the records that the domestic sales of Rs.78,01,754/- did not exceed 25% of the total turnover of Rs.3,48,84,904/-. As per second proviso to Section 10B applicable for the assessment year, the profits and gains derived from such domestic sales of computer software which did not exceed 25% of total sales shall be deemed to be the profits and gains from the export of computer software. The statement of computation in accordance with the proviso which would result in entire income being eligible for deduction under Section 10B was placed before the Tribunal and on this basis the Tribunal held that the assessment was neither erroneous nor prejudicial to the interests of the Revenue. The Tribunal, in its order, held as follows:-

> "5. CIT in his order took into consideration language of this proviso as clarified in circular No.794 dated 9-8-2000 (245 ITR 36 St.). It was concluded that this proviso was enacted for a limited purpose. It clarifies that if domestic sales are less than 25% of the total sales including export sales, in that eventuality income derived from domestic sales shall be treated as export profits. If the domestic sales exceed 25% of the total sales, then two possible situations which may arise are not clear from the statute, viz. (a) the excess above 25% should not be treated as export profits or (b) the entire profits from domestic sales have to be ignored.
>
> 6. The analysis made by the CIT shows that the provision is capable of more than one interpretation. Ex consequenti, the view adopted by the AO could be construed to be a possible view. Once this finding is arrived at, the matter can be decided in the light of the ratio laid down in the case of CIT v. Max (India) Ltd. (268 ITR 128) (P&H). In this case Hon'ble High Court has held that the view expressed by the AO was a possible view and since the AO had taken a possible view, CIT had no jurisdiction to interfere by exercising his power under section 263 of the Act. In deciding this issue, the ratio of the decision laid down by the Hon'ble Supreme Court in the case of Malabar Industrial Co. v. CIT (243 ITR 83) (S.C.) was followed wherein at page 130 Hon'ble Supreme Court has held as under:

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> "The phrase 'prejudicial to the interests of the Revenue' has to be read in conjunction with an erroneous order passed by the Assessing Officer. Every loss of revenue as a consequence of an order of the Assessing Officer cannot be treated as prejudicial to the interests of the Revenue. For example, when an Income-tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue; or where two views are possible and the Income-tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an erroneous order prejudicial to the interests of the Revenue, unless the view taken by the Income-tax Officer is unsustainable in law..."
>
> In view of the above, in my opinion conditions precedent for invoking the jurisdiction under section 263 did not exist inasmuch as the order passed by the AO was neither erroneous nor prejudicial to the interests of the Revenue. Accordingly, I quash the order passed under section 263 of the Act."

From a reading of the above, it is clear that two views are possible in the above matter. The Assessing Officer preferred one view against the another view. The Assessing Officer followed a particular view and hence it cannot be said that the order is erroneous or prejudicial to the interests of the Revenue. The Tribunal correctly followed the principles enunciated in the Supreme Court judgment in the case of Malabar Industrial Co. Vs. C.I.T. reported in 243 ITR 83, wherein the scope of Section 263 was considered. In view of the same, we find no error or illegality in the order of the Tribunal so as to warrant interference.

5. Under the circumstances, no substantial questions of law arise for consideration of this Court and accordingly the tax case is dismissed. No costs.

km

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Assistant Registrar,
   Income-tax Appellate Tribunal, Bench "B",
   Chennai.

2. The Secretary,
   Central Board of Direct Taxes,
   New Delhi.

3. The Income-tax Officer,
   Company Ward VI(1),
   Chennai-34.

4. The Commissioner of Income-tax, Chennai-III,
   Chennai.

+ one cc to Mrs. Pushya Sitaraman, Advocate sr no. 34592

rs(co)
nm(02.07.07)

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