Export Incencitve: Can Assessee Opt-in and Opt-out at will?

267 ITR (Jour.) p.23 (Part-3)

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The provisions of Section 10A and Section 10B of the IT Act, 1961, provide incentive deduction in respect of profits and gains derived by an undertaking from the export of articles or things or computer software for a period of ten consecutive assessment years, beginning with the assessment year relevant to the previous year in which the undertaking begins to manufacture and produce such articles or things or computer software.

However, if for certain reasons, viz. losses, etc., the assessee does not wish to avail of the deduction under Section 10A or Section10B, then as provided in sub-Section (8) of Section 10A or Section 10B, the assessee will be required to furnish a declaration in writing to the Assessing Officer (AO), before the due date for furnishing the return of income under Section 139(1), that the provisions of this Section may not be made applicable to him. If the assessee makes such a declaration then the provisions of Section 10A or Section 10B shall not apply to him for any of the relevant assessment years.

The language of Section 10A (8) or Section 10B (8) has generated a lot of controversy, particularly in regard to the issue as to whether an assessee after having opted-out of the benefit of Section 10A or Section 10B for a certain number of assessment years, may again avail of the benefit for the unexpired period of ten assessment years. Another query which is often faced by the IT experts in this respect is whether an assessee may, at his will, opt-in and opt-out of the provisions of Section 10A or Section 10B of the IT Act, 1961. It may be stated here that the provisions of Section 10A and Section 10B are exactly the same inthis regard and therefore, what is applicable to the provisions of Section 10A, will equally apply to the provisions of S.10B

In order to answer the aforesaid queries, it would be necessary to closely examine the relevant provisions of Section 10A of the IT Act, meanings of certain words and the relevant case-law. The same are dealt with as follows:-

1. **Section 10A is a part of Chapter - III of the I.T. Act**

   Section 10A falls under Chapter-III of the I.T. Act, 1961. The heading of Chapter-III is – 'Incomes which do not form part of total income'. Thus, it is clear that income of a unit eligible for deduction under Section 10A will not form part of the total income of the assessee. This will be so, inspite of the fact that with effect from the assessment year (AY) 2001-02, the erstwhile sub-Section(3) of S.10A has been omitted. As per erstwhile sub-Section (3) of S.10A, the profits and gains referred to in sub-Section (1) would not be included in the total income of the assessee.

2. **Section 10A is an incentive provision**

There is no dispute about the fact that S.10A is an incentive provision which has been brought on the statute for promoting export of articles or things or computer software etc.

3. **Provisions of S.10A (8)**

Section 10A(8), as inserted by the Finance Act, 2000, with effect from 1.4.2001, reads as follows:-

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(8) Notwithstanding anything contained in the foregoing provisions of this Section, where the assessee, before the due date for furnishing the return of income under sub-Section (1) of Section 139, furnishes to the Assessing Officer a declaration in writing that the provisions of this Section may not be made applicable to him, the provisions of this Section shall not apply to him for any of the relevant assessment years.

Thus, an option is given to an assessee to opt out of the provisions of S.10A, viz. to be governed by the relevant provisions of the Act, subject to the compliance with the following conditions:-

(i) The assessee should furnish to the A.O., a declaration in writing stating that the provisions of S.10A may not be made applicable to him, and

(ii) Such declaration should be furnished before the due date for furnishing the return of income under Section 139(1) of the I.T. Act.

As per the provisions of S.10A(8), once the assessee furnishes the aforesaid declaration, the provisions of S.10A shall not apply to him for any of the relevant assessment years.

The term 'relevant assessment year' is defined under Explanation 2 (vi) to S.10A, according to which 'relevant assessment year' means any assessment year falling within a period of ten consecutive assessment years referred to in this Section.

4. **Meaning of the word 'any'**

The word 'any' has not been defined in S.10A. As per Para(10) of the Preamble to the General Clauses Act, 1897, where the definition of a word has not been given, it must be construed in its 'popular sense' a term which is synonymous with 'common parlance'. As per the judgement of the Apex Court in the case of *State of Orissa Vs. Titaghur Mills Co. Ltd., AIR 1985 S.C. 1293*, an effort should be made to take the aid of dictionaries to ascertain the meanings of a word in common parlance, but nevertheless to bear in mind to select a particular meaning which is relevant to the context in which the Court has interpreted the word. Therefore, we have to find the meaning of the word 'any' from the law-lexicon, dictionaries and case-law, if any. The various meanings of the word 'any' are discussed as follows:-

(i) *The Law Lexicon by P.R. Aiyer*

The meaning of the word 'any' has been given on pp.116 and 117. The various definitions of the word 'any', therein, are as follows:-

(a) The word 'any' has the following meaning – *some, one out of many; and infinite number etc*. It may also mean - *all or every as well as some or one*. The aforesaid view is supported by *Shri Balagansan Metals Vs. M.N. Shanmugam Chetty, AIR 1987 S.C. 1668, 1674.*

(b) The word 'any' means – *one or some or all – Lucknow Development Authority Vs. M.K. Gupta, AIR 1994 S.C. 787, 793.*

(ii) *The Law Lexicon Vo.1 by T.P. Mukherjee*

The meaning of the word 'any' has been given on pp.142 and 143 of the aforesaid Law Lexicon.

The various definitions of the word 'any' therein are as follows:-

(a) *The word 'any' may have one of the several meanings according to the circumstances; it may mean – all, each, every, some or one or more out of several.*

(b) As per Concise Oxford Dictionary, 'any' means – one, some (no matter which), as have you any wool?

(c) *The word 'any' means – one or more out of several and includes all.*

As could be seen from the aforesaid definitions, the most appropriate definition of the word 'any' in the light of the context in which it is used in S.10A(8) would be one, some or one or more out of several.

This would clearly mean that an assessee may opt out of the provisions of S.10A for certain assessment years and later on he may re-enter the tax-holiday regime under Section 10A. The only other condition would be that the opting-out should be in accordance with the provisions of Section 10A(8). It may be clearly stated here that there is no specific requirement for opting in for tax-holiday regime under Section 10A, except complying with the provisions of Section 10A, in the return of income.

Once the assessee furnishes the aforesaid declaration, the crucial question that arises would be whether provisions of the Section would not be applicable for all the assessment years including the earlier assessment years for which the assessee has already availed of the benefit under Section 10A. Further, having opted out of the provisions of Section 10A, whether the assessee can re-enter the tax-holiday regime under Section10A, in any subsequent year falling within the period of ten consecutive assessment years referred to in Section 10A (i.e. eligible period).

In order to answer the aforesaid questions, it would be necessary to understand the meaning of the word 'any'.

5. **Contrary view expressed by some tax experts**

In this regard it may be stated that some of the tax experts, hold a different opinion regarding the meaning of the expression 'any of the relevant assessment years'. According to these experts, if one opts-out of the tax-holiday regime under Section 10A for anyone assessment year, then such benefit will not be available to him for any of the relevant assessment years, viz. for none of the ten assessment years.

However, as S.10A is an incentive provision and also an exemption provision, the same is required to be construed liberally and in favour of the assessee.

6. **An incentive provision needs to be liberally construed**

When the Legislature brings in the statute an incentive provision for the encouragement or advancement of a specific purpose, activity or objective, then such provision has to be liberally interpreted so as to advance the purpose behind it. In this context, one may rely on the following judgements:

(i) *CIT Vs. Bharat Sea Foods [1999] 237 ITR 46 (Ker.)(FB)*

The judgement in this case related to the interpretation of the provisions of Ss.80-J and 80-HH.

It was held that Ss.80-J and 80-HH of the I.T. Act, 1961, are intended to encourage the setting up of new industrial enterprises and must be construed liberally and in a manner that will promote the object of the Legislature.

(ii) *Bajaj Tempo Ltd. Vs. CIT [1992] 196 ITR.188 (SC)*

This judgement related to S.15C of the old Act (S.80J of the new Act). The relevant part of the of the judgement may be summarized, as follows.

A provision in a taxing statute granting incentives for promoting growth and development should be construed liberally; and since a provision for promoting economic growth has to be interpreted liberally, the restriction on it too has to be construed so as to advance the objective of the provision and not to frustrate it.[p.194 of the Report]

(iii) *AGS Timber and Chemicals Industries Pvt. Ltd. Vs. CIT [1998] 233 ITR 207 (Mad.)*

This judgement also related to the interpretation of S.80J.

It was held that the provision in a taxing statute granting incentive for promoting growth and development should be construed liberally.

From the aforesaid judgements, it is quite evident that an incentive provision like S.10A should be construed in a liberal and purposive manner, meaning thereby that the AO, in such cases, should adopt a liberal and broad-minded approach, so as to fulfil the objective of the legislation and not in a manner as to snatch away the benefit intended to be given by the Legislature.

7. **An exemption provision is required to be liberally construed**

As per *CIT Vs. Gujarat Aluminium Extrusions Pvt. Ltd. [2003] 263 ITR 453 (Guj.)*, it is a settled legal position that the provision for exemption or relief should be construed liberally and in favour of the assessee. As already pointed out, S.10A is an exemption provision and therefore, the same is required to be construed liberally and in favour of the assessee.

8. **Even if there is an ambiguity, a view favourable to the assessee must be accepted**

If there is any ambiguity regarding the interpretation of the statute, a view favourable to the assessee must be accepted. Reliance for this propostion is placed on the following decisions of the Apex Court.

(a) C.I.T Vs Vegetable Products Ltd, [1973] 88 I.T.R p.192 (S.C)

The relevant part of the judgement may be summarized, as follows :

If the court finds that the language of a taxing provision is ambiguous or capable of more meaning than one, then the court has to adopt that interpretation which favours the assessee

(b) C.I.T Vs Naga Hills Tea Co. Ltd, [1973] 89 I.T.R p.236 (S.C)

The relevant part of the judgement may be summarized, as follows :

If a provision of a taxing statute can be reasonably interpreted in two ways that interpretation which is favourable to the assessee has got to be accepted.

(c) C.I.T Vs Poddar Cement P Ltd, [1997] 226 I.T.R p.625 (S.C)

It was '*inter alia'* held in this case that in case of ambiguity, a construction of the statute, beneficial to the assessee has to be preferred.

Therefore, if there is any ambiguity regarding the meaning of the expression 'any of the relevant assessment years', a meaning favourable to the tax-payer must be accepted.

9. **Conclusion**

In the light of the aforesaid discussion, the meaning of the expression 'any of the relevant assessment years' in S.10A(8), would mean – one, some or one or more out of the relevant assessment years. It would imply that an assessee may opt-out of the provisions of S.10A for certain assessment years and re-enter the tax-holiday regime under Section 10A, thereafter and vice-versa.

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