

Supreme Court rules that compliance with the twin preconditions to opt-out from tax holiday for 100% Export Oriented Units is mandatory

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Summary

The Supreme Court (SC), in a recent case¹, held that the condition to furnish a declaration for opting out of **exemption** under Section 10B of the Income-tax Act, 1961, before the tax officer within the due date of filing return of income is mandatory. It negated the contention that though the requirement of submission of declaration² is mandatory in nature, the time limit within which the declaration is to be filed is directory in nature.

Facts of the case

- The taxpayer, engaged in the business of running a call centre and IT-enabled and Remote Processing Services, filed its return of income on 31 October 2001 for assessment year (AY) 2001-02 declaring a loss, and claiming an exemption³ under the Income-tax Act, 1961 (Act).
- Taxpayer annexed a note to the original return stating that it is a 100% export-oriented unit (EOU) entitled to claim the exemption and hence no loss is being carried forward by it.
- On 24 October 2002, the taxpayer filed a declaration with the tax officer for opting out of the exemption claimed earlier.
- Subsequently, a revised return of income was filed (on 23 December 2002) without claiming the exemption³ and claiming carry forward losses (which were not claimed earlier).
- Tax officer denied the taxpayer's claim for opting out of the exemption and carry

forward of losses instead, since the taxpayer did not furnish the declaration before the due date of filing of return of income i.e., 31 October 2001.

- The Commissioner of Income Tax (Appeals) upheld the order of the tax officer. However, the Tribunal adjudicated in favour of the taxpayer.
- Revenue preferred an appeal against the Tribunal's order, however, the appeal was dismissed by the High Court.
- Aggrieved, the Revenue filed the present appeal before the SC.

Decision of the SC

The SC held that:

- In a taxing statute, the provisions are to be literally construed, more particularly in a case of exemption being sought by a taxpayer.
- A revised return⁴ can only substitute the original return⁵ but it cannot transform it

¹ Wipro Limited [2022] (140 taxmann.com 223) (SC)

² Under section 10B(8) of the Act

³ Under section 10B of the Act

⁴ Under section 139(5) of the Act

⁵ Under section 139(1) of the Act

into loss return⁶, to avail the benefit of carrying forward or set-off of any loss.

- A revised return can be filed only in case of an omission/mistake and not to withdraw a claim and to subsequently carry forward the claim or set off any loss. A revised return cannot be filed for taking a contrary stand or claiming exemptions not claimed earlier.
- The taxpayer must fulfill both the conditions for not availing the benefit of Section 10B of the Act:
 - (i) furnishing a declaration to the tax officer in writing that the provisions may not be applicable to the taxpayer; and
 - (ii) declaration must be furnished before the due date of filing the return of income⁷.
- The SC negated the taxpayer's submission that even without filing the revised return of income, the taxpayer could have submitted the declaration in writing to the tax officer during the assessment proceedings.
- It held that the argument of the taxpayer that it had a substantive statutory right⁸ to opt-out, which cannot be nullified by construing the purely procedural requirement of filing the declaration within the specified timeline, as being mandatory, also has no substance.
- Further, the SC remarked that subsequent withdrawal of the claim, i.e., after filing the return would falsify and nullify the

accountant's report⁸ filed along with the original return of income.

- SC factually distinguished its own decision in the case of **G.M. Knitting Industries**⁹, on the ground that the present case pertains to an exemption provision that cannot be compared with a claim for additional depreciation.
- It further observed that Chapter III and Chapter VIA of the Act operate on a different footing and hence principles for claiming an exemption cannot be equated with that of claiming a deduction.
- The High Court¹⁰ had placed reliance on the Delhi High Court's decision in the case of **Moser Baer**¹¹ wherein it was held that for opting out of exemption under Section 10B of the Act, submission of the declaration is mandatory, but the requirement of submission before the due date of the return is only directory and the declaration can be filed before the assessment was made.

The SC held that the withdrawal of the special leave petition against the decision of the Delhi High Court in the case of **Moser Baer (supra)** cannot be held against the revenue, since the same was withdrawn due to low tax effect.

- Accordingly, it held that the High Court has erred in holding that furnishing of declaration for not claiming exemption is mandatory while the time limit for furnishing it is directory.

6. Under section 139(3) of the Act

7. Under section 139(1) of the Act

8. Under section 10B(8) of the Act

9. Under section 10B(5) of the Act

10. GM Knitting Industries [2016] (71 taxmann.com 35) (SC)

11. Wipro Limited [2021] (123 taxmann.com 393) (Karnataka)

12. Moser Baer India Limited (ITA No. 950/2007) (Delhi)

Our comments

Taxpayers will need to keep track of how this decision and SC's observations regarding mistakes/omissions vis-a-vis change in stance in the revised returns, filing of declaration before tax officer during assessment proceedings and significance of procedural compliance, are applied in similar situations in tax proceedings.

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