(2012) 08 GUJ CK 0016

In the Gujarat High Court

Case No : Special Civil Application No. 17885 of 2011

Agrawal J.V. APPELLANT

Vs

Income Tax Officer and Another RESPONDENT

Date of Decision : 09-08-2012

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 139, 139(1), 142, 143, 143(2)

Citation : (2013) 257 CTR 112

Hon'ble Judges : V.M. Sahai, J;N.V. Anjaria, J

Bench : Division Bench

Advocate : R.K. Patel, for the Appellant; Pauromi B. Sheth, for the Respondent

Final Decision : Allowed

Judgement

N.V. Anjaria, J.—The challenge in the present petition under Art. 226 is directed against notice dt. 30th Dec., 2010 of the respondent No. 1-ITO issued under s. 148 of the IT Act, 1961 whereby respondent No. 1 has sought to reopen the assessment in case of the petitioner for the asst. yr. 2007-08. The petitioner has prayed for a mandamus to get the said notice quashed and set aside. The petitioner has also prayed to set aside order dt. 5th Dec., 2011 whereby respondent No. 1 rejected the objections of the petitioner to the reopening of the assessment. Learned advocate Mr. R.K. Patel appears for the petitioner, and learned advocate Ms. Pauromi B. Sheth is for the respondents-IT authorities.

1.1 With consent of both the learned advocates, the petition is taken up for final hearing today. Therefore, rule. Learned advocate Ms. Sheth waives service of notice of rule on behalf of respondent Nos. 1 and 2.

2. The facts involved in the case are as under:

3.1 The petitioner is a consortium of companies, which has come into existence due to joint venture of two companies. The petitioner is engaged in the business with the consortium of two companies. A separate agreement in the form of joint venture, which is entered into and share of profits are separately determined. In such capacity, the petitioner is engaged and undertakes the work of civil construction, viz. construction of roads, bridges, canals, etc; The petitioner filed its return of income for the asst. yr. 2007-08 accompanied by relevant documents such as P&L a/c, balance sheet, audit report, etc. In the return of income, the petitioner-assessee claimed deduction under s. 80-IA(4) of the IT Act, 1961 (hereinafter referred to as ''the Act'').

3.2 The AO issued notice under s. 143(2) of the Act and thereupon scrutiny assessment was framed under s. 143(3). The assessment was finalised under s. 139(1) [sic--143(3)] by order dt. 13th April, 2009. By way of impugned notice, the said completed assessment was sought to be reopened by the AO in exercise of powers under s. 147 of the Act.

3.3 The petitioner replied to the said notice on 13th Jan., 2010 and also requested to furnish in writing the reasons recorded for reopening the case. The ITO supplied the reasons by forwarding letter dt. 22nd Nov., 2011. The assessee filed objections in detail on 29th Nov., 2011, raising various contentions against reopening of his assessment. The AO disposed of the objections as per his order dt. 5th Dec. 2011, rejecting the same.

3. Learned advocate for the petitioner submitted with reference to the reasons recorded by the AO for assessment that respondent No. 1 while issuing the impugned notice under s. 148 of the Act, acted on a wrong premise in as much as it was mentioned in the reasons that the assessee''s return of income for the assessment year in question showed that the net profit was Rs. 2,43,21,076. which was not the correct figure and the net profit for the relevant assessment year was Rs. 3,61,74,866. Therefore, it was submitted that reopening was upon a misconception of facts. It was submitted that the AO acted on the ground that deduction under s. 80-IA(4) was wrongly granted and that he wanted to verify the factum of ownership. Learned advocate further submitted that the deduction under the said provision was considered and the assessment order was passed. The same was passed after scrutiny assessment, thus the AO closely verified the material before him.

3.1 Learned advocate submitted that the necessary details were disclosed in the audit report and after considering all the materials, the AO was satisfied that the petitioner was entitled to deduction under s. 80-IA. It was submitted that no tangible material, much less new material, was with the AO for exercise of powers under s. 147 of the Act. It was submitted that the AO exceeded his jurisdiction in reopening of the assessment in absence of any material and that the action was based only on a mere change of opinion, which was impermissible in law. It was submitted also that the ground that whether assessee was the owner of the infrastructure facility or not, could not have been a valid ground for reopening, as the point has already been decided by the Hon''ble Supreme Court in Liberty India Vs. Commissioner of Income Tax, .

3.2 As against the above submissions on behalf of the petitioner, learned advocate for the respondents contend that with reference to the contents in the affidavit-in-reply filed on behalf of the respondents, that the reopening was justified as it was noticed that members of joint venture had made claim under s. 80-IA(4) in their own cases including the income coming from their share from the business of the petitioner joint venture. It was submitted that the assessee had wrongly claimed deduction on insurance claim receipt, which was also a ground for reopening.

3.3 Learned advocate for the respondent submitted that the contention of the assessee that for the asst. yr. 2008-09, relief under s. 80-IA(iv) was granted by the CIT(A) cannot be accepted because the Department has preferred appeal against the order of the CIT(A), He further submitted that as per s. 80-IA(4)(i) as amended w.e.f. 1st April, 2002, deduction can be allowed only to a person who makes investment and himself executes a development work. According to him, assessee was a civil contractor and he having not done any development work himself but carried out contract for National Highway Authority, he is not entitled to seek benefit under the said provision.

3.4 Learned advocate for the respondents submitted that as there was enough material with the AO indicating that the income chargeable to tax had escaped, the officer was justified in exercising his powers under s. 147 r/w s. 148 of the Act. It was submitted that the reopening was within four years and therefore, once it was discovered from the relevant material that there was an escapement of income, the action of reopening could not be faulted.

4. At this stage, in order to properly appreciate the controversy and the contentions canvassed by the respective parties, it is useful to look into the reasons recorded by the AO whereon he has sought to reopen the assessment. The AO''s reasons for reopening, as reproduced, are as under:

7th April, 2010--The assessee is an AOP has filed its return of income on 26th Oct., 2007 declaring total income of Rs. nil. As per P&L a/c of the assessee, it had declared the net profit of Rs. 2,43,21,076 and the same has been allocated amongst the members of the JV (joint venture). The assessee engaged in road construction work and it had executed the works contract of the Government and had received the cost of work from the National Highway Authority of India.

It is further noted at the footnote of computation of total income that it has submitted the audit report under s. 80-IA(4) Form No. 10CCB and it is also mentioned that this year there is eligible claim under this section, as the members of JV have made claim under s. 80-IA(4) in its own cases including the income coming to their share as member of Agrawal JV are assessed with the Asstt. CIT, B.K. Circle, Palanpur and Asstt. CIT, Calcutta respectively. As per the above remarks, the profits have been taxed in the hands of members and members have claimed the deduction under s. 80-IA(4) of the Act, The tax benefit was introduced for industrial modernization required a massive expansion and quantities improvement in infrastructure i.e. express ways, highways, airports, urban development and repaid rail transport systems. The provision of s. 80-IA(4) shall not apply to a person who executes a works contract entered into with the undertaking or enterprises referred to in that section.

Thus, when a person makes the investment and himself executes the development work will be eligible for tax benefit under s. 80-IA(4). In this case, the assessee has executed the contract work with the National Highway Authority in India. The execution of works contract will not be eligible for the tax benefit under s. 80-IA. Apart from this angle, other criteria in respect of the ownership of the development project etc. are required to be verification.

During the course of assessment it is remained to be verified, whether the assessee was the owner of the infrastructure facility or not. In case, the assessee is in operation and maintaining infrastructure facility, the assessee needs to secure operation as well as maintenance contract and concerned assets has to be transferred to the assessee for such purpose. The intention behind this provision was to give a fillip of deduction against the total income of the assessee derived from the infrastructure project as the entire cost of the infrastructure was being borne by the assessee.

On verification of the P&L a/c of Baroda Padra (GSHP-9A) accounts, the assessee has disclosed the insurance accounts of Rs. 50.95,854. The assessee has claimed the deduction on the insurance claim receipt also. The same are also required to be verified for the applicability of the deduction.

During the assessment proceedings it is remained to be verified the expenses incurred by the AOP which are liable for the TDS and disallowances under s. 40(a)(ia) for violation of provision of Chapter XVII of the Act.

Looking to the above circumstances, the order passed under s. 143(3) dt. 13th April, 2009, is prejudicial to the interest of Revenue.

Therefore. I have reason to believe the income chargeable to tax have been escaped assessment for asst. yr. 2007-08 within the meaning of s. 147 of the IT Act.

ITO.

4.1 The powers to reopen the assessment are derived by virtue of s. 147 of the Act, which reads as under:

Sec. 147, Income escaping assessment--If the AO has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to the provisions of ss. 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in ss. 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub-s. (3) of s. 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under s. 139 or in response to a notice issued under sub-s. (1) of s. 142 or s. 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year:

Provided further that the AO may assess or reassess such income, other than the income involving matters which are the subject-matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.--Production before the AO of account books or other evidence from which material evidence could with due diligence have been discovered by the AO will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the AO that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but--

(i) income chargeable to tax has been under-assessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Art; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

4.2 Since the reopening in the present case is within four years from the end of the relevant assessment period, the first part of s. 147 would apply. The essential conditions are firstly that the AO has reason to believe that the income chargeable to tax has escaped assessment, Secondly, the fact that the income chargeable to tax escaped assessment has come to his notice subsequently. The third requirement could be, of course, that there is an escapement of income.

The first proviso deals with the cases wherein the assessment is sought to be reopened after expiry of five (sic--four) years, in which cases further fetters are provided. However, as noted above, the proviso part does not apply, since the impugned notice is within four years. It is well settled principle that exercise of reopening powers has to be on the basis of some tangible material becoming available with the AO. There has to be a rational connection and a live link between the material discovered and the formation of belief by the AO.

5. Considering in the context of the facts of the present case, the petitioner-assessee was engaged in the civil construction business which was in the nature of construction of infrastructure facilities. The provision of s. 80-IA of the Act deals with respect to deduction of profits and gains from industrial undertaking or enterprises engaged in infrastructure development. Sub-s. (4) inter alia provides that the said section applies to any enterprise carrying on business of developing or operating and maintaining infrastructure and fulfills the conditions mentioned in various sub-clauses of the said sub-s. (4).

5.1 Now adverting to the material which the AO had before him, firstly the return of income filed by the assessee was accompanied by auditor''s report in Form Nos. 3CA and 3CD. With reference to claim under s. 80-IA by the assessee, the report mentioned as under:

The assessee joint venture (consortium of companies) is engaged in the business of development of infrastructure project and satisfy all the conditions laid down by the s. 80-IA of the Act. In order to take 100 per cent tax exemption available for development of infrastructure facility under s. 80-IA of the IT Act. the assessee maintained books of accounts for such eligible project as an independent entity and got audited its books of account as required by the said section and obtained audit report in prescribed Form No. 10CCB, from a firm of chartered accountants.

5.2 The AO before finalizing the assessment, carried out the proceedings under s. 143 and scrutiny was undertaken. The assessment so culminated into the assessment order, in which the aspect of deduction in question was discussed and dealt with. The relevant parts from the assessment order dt. 13th April, 2009 are extracted hereinbelow:

The Authorised Representative of the assessee has furnished the copy of audit report, under s. 44AB and under s. 80-IA(4) of the IT Act in Form Nos. 3CB and 3CD and 10CCB of the IT Rules duly, audit the books of accounts in both the sets separately. The Authorsied Representative of the assessee and account are attached along with the books of accounts and relevant records for verification. He furnished the further details as called for.

The assessee derived income from road construction work, secured from the National Highway Authority. On scrutiny of the details, various issues have been raised and verified. During the year, the assessee has claimed the deduction under s. 80-IA(4) of the IT Act. During the year under consideration, the assessee has not received any new contract work.

The assessee is doing a business with construction of two companies with a separate agreement in the form of joint venture with the separate determined the share of profit in both the venture. Both the companies engaged in the business of civil contracts, i.e. in work of construction of roads, bridges, canals etc. During the year the assessee was engaged in the business activity of construction of infrastructure for Swaroopganj-Pindware of NH-14 in the State of Rajasthan and Vadodara--Padra-- Jambusar Road, from the National Highway Authority of India, New Delhi and National Highway Circle, Vadodara respectively. The work was allotted by the Government authorities. The contention of the assessee is that all the construction work of the road and other facilities were infrastructure project and the assessee developed the same and therefore the assessee has claimed the deduction under s. 80-IA(4) of the IT Act in respect of profit earned from the execution/development of civil work. The assessee has claimed the deduction in the preceding year on the same contact work. After discussion with the representative of the assessee, and relying on the decision of the jurisdictional Tribunal, the deduction under s. 80-IA(4) is allowed on the profit earned from the infrastructure work.

The assessee failed to furnish any supporting evidence, as it is financial institute and TDS provisions are not applicable. In view of the above, the interest payment of Rs. 13,38,811 has been disallowed under s. 40(a)(ia) and added to the total income of assessee out of interest payment. The disallowance so made will become the income derived from the infrastructure work, and relying on the decision of the jurisdictional Tribunal, the deduction under s. 80-IA(4) is allowed on the profit earned from the infrastructure work.

The assessee has claimed the deduction under s. 80-IA(4) in respect of insurance claim received of Rs. 50,95,854. The assessee has furnished the evidence in support of its claim. The same evidence are found in order and accordingly no addition is made on this count, After discussion and keeping in mind the submission of the assessee, total income is computed as under:

Reg; Agrawal JV (AOP) Deesa asst. yr. 2007-08

5.3 From the above facts and material on record, which was also before the AO, it is evident that the necessary facts and material relating to the claim for deduction by the assessee under s. 80-IA(4) made in the return of income were considered by the AO. He applied his mind to those materials and allowed deduction as per his assessment order. It could neither be demonstrated, nor it is revealed that the AO had any tangible material with him so as to validly exercise the powers of reopening. Once the AO on the basis of material before him had applied his mind and granted deduction in the assessment order, it was not permissible for him to exercise powers under s. 147 on the same material on the ground that certain aspects were not considered or that they were overlooked.

6. A change of opinion is no ground for exercise of powers under s. 147, as is

reiterated and emphasized in the celebrated decision in Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, , which held as under:

The concept of change of opinion on the part of the AO to reopen an assessment does not stand obliterated after the substitution of s. 147 of the IT Act, 1961, by the Direct Tax Laws (Amendment) Acts, 1987 and 1989, After the amendment, the AO has to have reason to believe that income has escaped assessment, but this does not imply that the AO can reopen an assessment on mere change of opinion. The concept of ''change of opinion'' must be treated as an in-built test to check the abuse of power. Hence, after 1st April, 1989, the AO has power to reopen an assessment, provided there is ''tangible material'' to come to the conclusion that there was escapement of income from assessment. Reason must have a link with the formation of the belief.

6.1 In Gujarat Narmada Valley Fertilizers Co. Ltd. Vs. Dy. Commissioner of Income Tax, , it was observed that on a plain reading of s. 147 of the Act, it becomes apparent that the AO is vested with jurisdiction to reopen a completed assessment if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. It is held that the basic requirement is that there has to be material before the AO at the time when reasons are recorded and it is shown from such material that income chargeable to tax has escaped assessment.

6.2 In other words, "the reason to believe" and the "opinion" to be formed by the AO for the purpose of exercise of powers under s. 147 have to be guided by the tangible material available with him at the time of proceeding to reopen and to record reasons for reopening and that such material was not with him when he undertook the original assessment.

6.3 It is further stated in the reasons recorded that what was remained to be verified was whether the assessee was owner of the infrastructure facility for which the deduction in question was claimed. Learned advocate for the petitioner rightly submitted that the issue is answered in Liberty India (supra) wherein it is held that in order to be eligible for deduction of profits from industrial undertaking under ss. 80-I, 80-IA, 80-IB of the Act it is generation of profits from infrastructural activity that attracts incentives under the said provisions, and not ownership in the business. The relevant observations are as under.

6.4 If the reasons recorded in the present case are attentively read, it is mentioned, "during course of assessment it is remained to be verified, whether the assessee was the owner of the infrastructure facility or not". In the next also it was stated "on verification of P&L a/c". It was further stated "during the assessment proceedings it is remained to be verified the expenses incurred". Thus, what can be figured out from the reasons recorded is that the AO wanted to reopen the assessment as according to him certain aspects remained to be verified. It cannot be gainsaid that reopening of assessment for the purpose of "verifying" or "verification" will be necessarily an action based on a mere change of opinion. The connotation of word "to be verified", "verification" is to re-examine the existing material. Verification is always with reference to the details already considered once. When one wants to verify his decision, it means that one reviews the decision. Reassessment powers cannot be exercised to merely review the earlier assessment on the special ground that something was omitted from consideration or particular conclusion was imprecisely or wrongly arrived at. Formation of such belief by the AO has to satisfy the requisite parameters which are conditions precedent to examine the provision under s. 147. The necessary conditions being satisfied. From the reasons recorded themselves, therefore, it was seen that the AO proceeded to exercise the powers since he wanted to verify certain aspects of the assessment already completed.

7. It may be noted that in the subsequent asst. yr. 2008-09, similar claim was made by the assessee in its return of income. The CIT(A) allowed the deduction for the same projects under s. 80-IA(4) as per order dt. 13th Oct., 2011, which is on record of the petition. In the subsequent financial year 2009-10, the petitioner-assessee did not claim the deduction in view of amendment in s. 80-IA in the Finance Act, 2009. It is, however, stated in the memorandum of petition that the vires of amending Explanation to s. 80-IA retrospectively is under challenge before this Court in Special Civil Appln. No. 12233 of 2009. The aforesaid facts are noted only because they are connected facts. The fact that the appellate authority has granted relief in the subsequent year is not taken into consideration for reaching conclusion in this petition. The impugned notice for reopening is held to be illegal on the ground that it is based on a mere change of opinion and therefore, amounted to erroneous and illegal exercise of power under s. 147 of the Act.

8. For the foregoing reasons and discussions, respondent No. 1-AO has clearly exceeded his jurisdiction under s. 147 of the Act in issuing the impugned notice. The impugned notice dt. 30th Dec., 2010 under s. 148 of the IT Act, 1961 (Annex. B to the petition) as well as the order dt. 5th Dec., 2011 of the AO rejecting objections of the petitioner (Annex. J to the petition) are set aside. The petition is accordingly allowed. Rule is made absolute without any order as to the costs.