**(2011) 11 GUJ CK 0091**

**In the Gujarat High Court**

**Case No :** Special Civil Application No. 15351 of 2011

Aquafil Polymers Co. Pvt. Ltd. APPELLANT

Vs

Income Tax Officer RESPONDENT

**Date of Decision :** 28-11-2011

**Acts Referred:**

Income Tax Act, 1961 — Section 143(3), 147, 148, 80IA, 80IA(10)

**Citation :** (2011) 11 GUJ CK 0091

**Hon'ble Judges :** Sonia Gokani, J;Akil Kureshi, J

**Bench :** Division Bench

**Advocate :** Saaurabh Soparkar with Mrs. Swati Soparkar for Petitioner, for the Appellant; Mauna M. Bhatt for Respondent : 1, for the Respondent

## Judgement

Honourable Mr. Justice Akil Kureshi

1. Rule. Learned advocate Mrs. Bhatt waives service of rule on behalf of the respondent.

2. Petitioner has challenged notice dated 15.3.2011 as at Annexure A to the petition by which the Assessing Officer proposed to reopen the assessment for the assessment year 2004-05 in following factual background.

3. The petitioner is a private limited company. It is engaged in the business of construction. The petitioner claimed deduction u/s 80IA(10) of the Income Tax Act, 1961 for the assessment year 2004-05. The petitioner filed its return of income on 1.11.04 declaring income of Rs.7.77 lacs (rounded off). The petitioner had claimed deduction u/s 80IA in the said return. The return filed by the assessee was taken in scrutiny. The Assessing Officer made certain queries. Eliciting response from the petitioner, the Assessing Officer framed scrutiny assessment on 21.12.06. The claim of the assessee for deduction u/s 80IA was allowed in part. On certain grounds, the claim was restricted. However, it is significant to note that the Assessing Officer did not hold that the assessee was not entitled to deduction u/s 80IA of the Act at all. The assessee approached the

 

CIT (Appeals) against the disallowance made by the Assessing Officer. It is the case of the petitioner that the CIT (Appeals) allowed the appeal and granted deductions in toto.

4. Subsequently, the Assessing Officer issued the impugned notice dated 15.3.2011 and sought to reopen the asessment. Upon the request of the petitioner, reasons for such reopening were supplied to the petitioner, which read as under:

The assessment in this case was finalized u/s.143(3) on 21.12.2006 determining total income at Rs.11,96,500/- as against returned income of Rs.7,77,180/-. It was noticed that the assessee had incorrectly claimed deduction u/s.80IA to the tune of Rs.44,88,708/- in respect of two projects viz GWSSB (Modhuka) Project and SADA - Gwalior Project. It has been noticed that the assessee has worked as a contractor and not as a developer. Further, infrastructure facilities were also not owned by the assessee. In view of the latest amendment made. In view of the explanation to section 80IA made by the Finance Act, 2009; retrospectively made in the section 80IA, assessee''s claim for deduction is disallowable.

As such income to that extent has escaped assessment within the meaning of section 147 of the Act. The case is therefore reopened u/s.147 of the Act. A notice u/s.148 is issued to the assessee.

5. The petitioner raised objections to such reopening under communication dated 13.4.2011. Such objections were, however, disposed of by the Assessing Officer vide his order dated 26.9.2011. At that stage, the petitioner has approached this Court by filing the present petition challenging the notice for reopening the assessment.

6. Counsel for the petitioner submitted that the assessment which was previously framed after scrutiny is sought to be reopened beyond the period of four years from the end of relevant assessment year. In the reasons recorded, there is not even an allegation that any income chargeable to tax has escaped assessment on account of the assessee failing to disclose truly and fully all material facts for such assessment. Counsel submitted that even otherwise, there was full disclosure. The Assessing Officer had examined all aspects and after scrutiny, accepted the assessee''s claim for deduction u/s 80IA of the Act to a limited extent. The Assessing Officer was of the opinion that claim had to be restricted. He had passed order accordingly. This would demonstrate that all aspects were not only on record but were examined by the Assessing Officer before framing the assessment.

6.1 Counsel further submitted that the order of the Assessing Officer was carried in appeal. The CIT (Appeals) had allowed the claim of the assessee for deduction u/s 80IA of the Act in its entirety. Thus the assessing order had merged with the order of the CIT(appeals) and on the principle of merger also, reopening is not permissible.

 

6.2 Counsel for the petitioner relied on a decision of Division Bench of this Court in the case of Aayojan Developers Vs. ITO, wherein under similar circumstances, reopening notice was quashed.

7. On the other hand, learned counsel for the Revenue submitted that the assessee was acting only as a contractor and not as a developer and by virtue of the amendment to section 80IA(10) of the Act, the assessee was not entitled to claim any deduction. He drew our attention to th explanation introduced in the statute by Finance Act, 2009 with retrospective effect from 1.4.2000. 11. Having thus heard the learned counsel for the parties and having perused the record, we may recall that the assessment which was previously framed u/s 143(3) of the Act is sought to be reopened beyond four years from the end of relevant assessment year. To enable the Assessing Officer to do so, there had to be some material to indicate that the income chargeable to tax had escaped assessment on account of failure on the part of the assessee to disclose truly and fully all material facts for such assessment. In the present case, in the reasons recorded, no such indication is made. We have perused the order passed by the AO disposing of the objections of the assessee as also the affidavit filed before us. Even in these documents, we do not find any material to even prima facie hold that the Assessing Officer could have held a belief that income chargeable to tax had escaped assessment on account of the assessee failing to disclose fully and truly all material facts. In fact, the Assessing Officer seems to be solely relying on the explanation added to section 80IA of the Act by virtue of Finance Act, 2009, which reads as under :

Explanation - For removal of doubt, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in subsection (4) which is in the nature of works contract awarded by any person (including the Central Government or State Government) and executed by the undertaking or enterprise referred to in sub-section (1).

It may be that such explanation was added with retrospective effect. For the purpose of this petition, we are also prepared to accept the stand of the counsel for the Revenue that explanation in any case is only in the nature of clarification or a declaration. Nevertheless, to give the Assessing Officer jurisdiction to reopen the assessment previously framed after scrutiny beyond four years, necessary requirement that income chargeable to tax had escaped assessment due to reason of the assessee failing to disclose truly and fully all material facts is required to be fulfilled. In the present case, we do not find any such material or even suggestion by the Assessing Officer. It was further noticed that under similar circumstances, this Court in the case of Aayojan Developers (supra) had quashed the notice for reassessment.

Under the circumstances, without going into the other questions raised before us, we are satisfied that the notice for reopening lacks jurisdiction. The same is therefore quashed. Rule is made absolute accordingly.

 