(2013) 04 GUJ CK 0006

In the Gujarat High Court

Case No : Tax Appeal No. 154 of 2013

CIT APPELLANT

Vs

Fag Bearing India Ltd. RESPONDENT

Date of Decision : 01-04-2013

Acts Referred:

Citation : (2013) 215 TAXMAN 387

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

Bench : Division Bench

Advocate : K.M. Parikh, for the Appellant;

Judgement

Akil Kureshi, J.—Revenue is in appeal against the judgment of the Income tax Appellate Tribunal dt. 6-7-2012. Following question is presented for our consideration:

Whether, on the facts and in the circumstances of the case, the ITAT was right in quashing the reassessment on the ground that the assessing officer has reopened the assessment on the same material which were in the records during the course of the original assessment proceedings, without appreciating that the assessees case is fully covered under the provisions of section 147 r.w. Explanation 2(c)(iii)?

As is apparent from the question framed, the issue pertains to validity of a notice of reopening u/s 148 of the Income Tax Act, 1961 within a period of four years from the end of relevant assessment year. The assessment year in question is 2001-02. The assessment of the respondent-assessee for the said assessment year was taken in scrutiny. Assessment u/s 143(3) of the Act was framed on 30-3-2004. Subsequently, notice u/s 148 of the Act was issued on 29-3-2006, assessing officer had recorded the following reasons for issuing such a notice:

In this case the assessee filed the return of income for assessment year 2001-02. It is noticed that the assessee has not apportioned the depreciation on residential building, motor cars and data processing machines between its DTA and EOU in the ratio of their turnover for the purpose of computation of benefit u/s 10B and the entire amount has been charged to the DTA only and the assessee has charged depreciation on data processing machines of 10,528 only in respect of its EOU. The amount of depreciation on residential building Rs. 2,92,645, the depreciation on motor car is Rs. 7,16,656 and the depreciation on data processing machines is Rs. 50,21,626. It is also noticed that the assessee has claimed the entire amount of Rs. 84.85 lakh on account of advertising expenses to the DTA unit only. During the course of assessment proceedings for assessment year 2003-04, it was found and held that the above mentioned expenses and depreciation in respect of the above assets are to be charged to the EOU also in order to compute the benefit u/s 10B in the ratio of turnover of EOU and DTA because these expenses and these assets is relatable for the EOU also. As per submission of the assessee, the turnover of the EOU is approximately 1/5th of the total turnover during the assessment year 2001-02 hence it is clearly that the assessee has claimed more benefits u/s 10B than it is entitled to, by no claiming these expenses and depreciation in respect of its EOU. At the same time, by indulging into this exercise the assessee has reduced its taxable profit to the extent as discussed above......... In view of these facts, then the income to the extent as discussed above has escaped assessment.

2. The assessee contested the validity of the notice on the ground that the claim of the assessees benefit u/s 10B of the Act was examined thoroughly by the assessing officer in the original scrutiny assessment, assessing officer, however, ignored such plea and proceeded to pass a fresh order of assessment in the reopened proceedings. The issue was carried in appeal by the assessee. The Commissioner (Appeals) reversed the decision of the assessing officer. Upon the department appeal to the Tribunal, the Tribunal noted that the assessee had two manufacturing units; one was in existence since 1962 and the other 100 per cent export oriented unit was established in the year 1966-67. In the scrutiny assessment, the assessing officer had raised queries with respect to allocation of expenses between the DTA (Domestic Tariff Area) Unit and E.O.U. (Export Oriented Unit) and thereby questioned the assessees computation of benefit u/s 10B of the Act. He was prima facie of the opinion that the expenses should be allocated in the ratio of the turnover of the two units because such expenses relate also to the EOU. In para 13 of letter dt. 18-3-2004, the assessing officer required the assessee to furnish certified copy of the profit and loss accounts and the balance-sheet of the EOU claiming exemption u/s 10B of the Act and to furnish the same along with the details of sales/purchases, other income and major expenses etc. In such letter it was conveyed that, in case of failure to supply such information, the assessing officer proposed to disallow the claim and considered the income as taxable income. In response to such communication, the assessee vide its letter dt. 25-3-2004, furnished the details along with working of profit and loss accounts for the year under consideration for the EOU. Such details included allocation of common expenses along with the basis of allocation for the EOU. Complete break-up of the profit and loss account as per

Schedule 6 of the Companies Act showing separately for EOU and other unit was already furnished. The assessee, therefore, contended, as per the Tribunal, that only after examining such detailed reply, the assessing officer did not make any disallowance though in the assessment order no detailed discussion was made.

3. It was, in this context, that the Tribunal referred to and relied upon the decision of Apex Court in case of Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, and provided to dismiss the revenues appeal in following terms:

11. The fact that in the body of original assessment order the assessing officer did not give any specific finding accepting the claim of the assessee makes no difference if the issue was processed at the time of original assessment proceedings. It is well settled that if the entire material has been placed by the assessee before the assessing officer at the time when the original assessment was made and the assessing officer applied his mind to that material and accepted the view taken by the assessee. Merely because he did not express this in the assessment order that by itself would not come as a ground to conclude that assessee has escaped assessment and therefore, the assessment needed to be reopened. On the other hand, if the assessing officer did not apply his mind and omitted a lapse, there is no reason why the assessee should be made to suffer the consequence of that lapse.

4. Having heard learned counsel for the revenue and having perused the documents on record, we are of the opinion that the Tribunal was perfectly justified in coming to the above noted conclusion. As already recorded, the Tribunal found that the claim of the assessee for exemption u/s 10B of the Act was scrutinized by the assessing officer in detail in the original assessment. Pointed question with respect to allocation of the expenditure to the E.O.U. and the D.T.A. unit was raised. Assessee supplied detailed materials justifying the allocation already made. In the final order of assessment, no additional expenditure was diverted to the assessees E.O.U. In other words, the claim of exemption u/s 10B of the Act was not disturbed. Of course, this was done without giving detailed reasons for the same. However, in our opinion, this would not be of any consequence once the assessing officer examined the claim, called for details and raised queries which the assessee replied at length. The mere fact that the assessing officer did not give reasons for not disturbing the claim made by the assessee in the final order of assessment would not authorize the assessing officer to reopen the same issue even within a period of four years from the end of relevant assessment year. This is precisely what a Division Bench of this Court in case of Gujarat Power Corporation Ltd. Vs. Assistant Commissioner of Income Tax, has held in such decision. It was observed as under:

27. From the above discussion, it will emerge that when in an assessment framed by the assessing officer, if a certain claim of the assessee is not examined, no queries raised, no answers elicited, it can not be stated that

merely because the assessing officer did not reject such a claim in the final order of assessment he should be deemed to have expressed an opinion with respect to such a claim and any reopening of an assessment of this nature even within a period of four years from the end of relevant assessment year would amount to change of opinion. We are further of the opinion that in any such case, as long as there is some tangible material on the basis of which the assessing officer can form a belief that the income chargeable to tax has escaped assessment it would be permissible to reopen the assessment in exercise of powers u/s 147 of the Act particularly after the amendments made with effect from 1-4-1989. Such tangible material need not be alien to the record.

41. The powers u/s 147 of the Act are special powers and peculiar in nature where a quasi-judicial order previously passed after full hearing and which has otherwise become final is subject to reopening on certain grounds. Ordinarily, a judicial or quasi-judicial order is subject to appeal, revision or even review if statute so permits but not liable to be reopened by the same authority. Such powers are vested by the Legislature presumably in view of the highly complex nature of assessment proceedings involving large number of assessees concerning multiple questions of claims, deductions and exemptions, which assessments have to be completed in a time frame. To protect the interest of the revenue, therefore, such special provisions are made u/s 147 of the Act. However, it must be appreciated that an assessment previously framed after scrutiny when reopened, results into considerable hardship to the assessee. The assessment gets reopened not only qua those grounds which are recorded in the reasons, but also with respect to entire original assessment, of course at the hands of the revenue. This obviously would lead to considerable hardship and uncertainty. It is precisely for this reason that even while recognizing such powers, in special requirements of the statute, certain safeguards are provided by the statute which are zealously guarded by the courts. Interpreting such statutory provisions courts upon courts have held that an assessment previously framed cannot be reopened on a mere change of opinion. It is stated that power to reopening cannot be equated with review.

42. Bearing in mind these conflicting interests, if we revert back to central issue in debate, it can hardly be disputed that once the assessing officer notices a certain claim made by the assessee in the return filed, has some doubt about eligibility of such a claim and therefore, raises queries, extracts response from the assessee, thereafter in what manner such claim should be treated in the final order of assessment, is an issue on which the assessee would have no control whatsoever. Whether the assessing officer allows such a claim, rejects such a claim or partially allows and partially rejects the claim, are all options available with the assessing officer, over which the assessee beyond trying to persuade the assessing officer, would have no control whatsoever. Therefore, while framing the assessment, allowing the claim fully or partially, in what manner the assessment order should be framed, is totally beyond the control of the assessee. If the assessing officer, therefore, after scrutinizing the claim minutely during the

assessment proceedings, does not reject such a claim, but chooses not to give any reasons for such a course of action that he adopts, it can hardly be stated that he did not form an opinion on such a claim. It is not unknown that assessments of larger corporations in the modern day, involve large number of complex claims, voluminous material, numerous exemptions and deductions. If the assessing officer is burdened with the responsibility of giving reasons for several claims so made and accepted by him, it would even otherwise cast an unreasonable expectation which within the short frame of time available under law would be too much to expect him to carry. Irrespective of this, in a given case, if the assessing officer on his own for reasons best known to him, chooses not to assign reasons for not rejecting the claim of an assessee after thorough scrutiny, it can hardly be stated by the revenue that the assessing officer can not be seen to have formed any opinion on such a claim. Such a contention, in our opinion, would be devoid of merits. If a claim made by the assessee in the return is not rejected, it stands allowed. If such a claim is scrutinized by the assessing officer during assessment, it means he was convinced about the validity of the claim. His formation of opinion is thus complete. Merely because he chooses not to assign his reasons in the assessment order would not alter this position. It may be a non-reasoned order but not of acceptance of a claim without formation of opinion. Any other view would give arbitrary powers to the assessing officer.

5. Delhi High Court in a Full Bench Decision in case of Commissioner of Income Tax-VI, New Delhi Vs. Usha International Limited, also has come to similar conclusion. In the result, tax appeal is dismissed.