

(2012) 01 GUJ CK 0007
In the Gujarat High Court

Case No : Tax Appeal No's. 2139, 2140 and 2143 of 2009 (A.Y. 2001-02)

CIT

APPELLANT

Vs

Gujarat Ports Infrastructure and Development Co. Ltd.

RESPONDENT

Date of Decision : 31-01-2012

Acts Referred:

Citation : (2012) 206 TAXMAN 35

Hon'ble Judges : S.G. Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : M.R. Bhatt and Mauna M. Bhatt, for the Appellant; Saurabh N. Soparkar, Bhoomi M. Thakore and Swati Soparkar, for the Respondent

Final Decision : Dismissed

Judgement

1. Revenue is in appeal against the judgment of the Tribunal dt. 27.2.2009. Since similar issues arise in all Tax Appeals, we may record facts as emerging from Tax Appeal No. 2139 of 2009. The assessment year under consideration is year 2001-02. The respondent assessee is a Government company and is engaged in the business of promoting and organizing minor ports in the State of Gujarat.

2. For the assessment year under consideration the assessing officer basing reliance on the decision of the Apex Court in the case of Tuticorin Alkali Chemicals and Fertilizers Ltd., Madras Vs. Commissioner of Income Tax, Madras, disallowed the entire expenditure incurred by the assessee during the year and held that the income of Rs. 19.79 lakhs received by the assessee during the same period would be taxed. This was on the basis of the opinion of the assessing officer that the business of the assessee had not yet commenced.

3. The assessee carried the matter in appeal. Commissioner (Appeals) dismissed the assessee's appeal observing inter alia that from the record it emerges that there was hardly any activity on the part of the assessee during the year under consideration which could be treated as business activity. It was further observed that :--

It is thus apparent that the activity of the appellant in the relevant previous year was only of a pre-operative nature and appellant had not yet started actual work of promoting, organizing and developing any minor or major port, CRP etc. with the aim of generating regular business income. It also did not undertake any other work related to docks/jetties etc. A mere investment of the appellant corporation in GAPL obviously cannot be treated as business activity for the reason that this activity by no means can be treated as an adventure in the nature of trade.

4. The assessee carried the matter further in appeal before the Tribunal. The Tribunal, by the impugned order, allowed the appeal observing:--

6. We have carefully considered the rival submissions and perused the material on record. We find that in this, case the Revenue has already accepted, during the assessment year 1998-99 that the set up its business. The main objects of the assessee have set up its business. The main objects of the assessee are as under :--

3.2 Main objects v. Income/Expenditure Pattern : As per the Memorandum of Article, the company is authorized to carry out activities related to its main objectives such as :

(a) To undertake and carry on business of promoters, organizers and developers, all kinds and forms of minor and major ports, shipyards etc.

(b) To plan, erect, work, contract etc., all types of works and appliances related to docks, stages, jetties etc.

(c) To undertake, promote, develop all kinds of port-related activities and rendering all types of services related thereto.

(d) To import, provide consultancy service in area of finance including foreign exchange/collaboration etc.

(e) To enter into negotiation and contract or collaboration with foreign financial institution and foreign bank etc.

Apart from the main objectives there are certain Incidental and ancillary objects also incorporated which are meant to the attainment of main objects. These ancillary objects are general in nature and normally form the part of Memorandum of Understanding of all the corporate entities. Out of such objectives one of the ancillary objects has been mentioned as to invest and deal with the fund of the company which are not immediately required in the manner decided by the Board of Directors". This particular clause is a standard ancillary object in the Memorandum of Association of assessee which empowers the Board of Directors to utilize their surplus fund to earn interest income as and when they are not required to be invested in the core activities related to main objects.

7. This is the settled law that if the assessee does first activity towards the attaining its main object, business shall be deemed to have been set up. The

assessee has submitted the return for assessment year 1998-99 on 30-11-1998 wherein the basic pattern of investments and operations were the same as in assessment year 2001-02 and the subsequent year. The set up of the business has been accepted during the assessment year 1998-99, the assessing officer in our opinion, cannot again go back and say that the business has not been set up during the year. The learned DR although by referring to Note 3 of Part III of Note No. 26 of the statement tried to pursue that the business has not been commenced during the year. We may point out that for the purpose of ascertaining whether expenditure is of revenue nature or not, we have to see whether the business has been set up or not. We have not to see that the business has actually commenced. Once the business has been set up, all the expenses incurred after setting up of the business are the revenue expenditure. We have also gone through the decision of the ITAT Bench-D in the case of ACIT v. Gujarat State Road Development Corporation Ltd. [ITA No. 899/Ahd/2006, Order dt. 12-12-2008], in which facts involved are the same. In that case also the Tribunal Bench-D has taken a similar view. Therefore, we are of the view that the assessing officer was not correct in holding that the business has not been set up. The business in this case has duly been set up and the assessing officer is directed to treat all the expenses to be the revenue expenditure and allow set off of loss in accordance with law. Thus, all these appeals filed by the assessee are allowed to the extent hereinabove.

5. Revenue is, therefore, in appeal before us raising several contentions to question the legality of the decision of the Tribunal. In the appeal following question is raised for our consideration:--

Whether the Appellate Tribunal was justified in allowing business expenditure for non-commencement of business?

6. Issues are common in all Tax Appeals. We need not, therefore, separately record the facts from each of the appeals.

7. Counsel for the Revenue taking us through the materials on record submitted that no business activity was carried on during the year under consideration. Our attention was drawn to the objects of the company as contained in the Memorandum of Association. Our attention was also drawn to the statement of the Directors of the Company made to the shareholders as well as different documents produced by the assessee before the assessing officer during the course of the assessment to contend that the Tribunal committed a grave error in allowing the assessee's appeal. It was submitted that the assessing officer as well as Commissioner (Appeals) concurrently found that the assessee had not set up its business. No significant activities were undertaken. Tribunal thus committed an error in upturning such findings of the Revenue authorities.

8. On the other hand, learned counsel for the respondent assessee supported the Tribunal's view by pointing out that there was voluminous evidence on record to suggest that during the relevant period the assessee had set up the business and

large number of activities were undertaken. The Tribunal, therefore, correctly overruled the decision of the Revenue authorities.

9. Having thus heard learned counsel for the parties and having perused the documents on record, we find that the main objects outlined in the Memorandum of Association for which the respondent company was incorporated included besides others to undertake and carry on the business of promoting, organizing, managing and developing in the State of Gujarat and elsewhere minor and major ports, ship-yards, jetties, harbours and docks as well as to set up warehouses, godowns, open plots etc. appertaining to any dock. It also included the object of setting up infrastructural facilities, utilities, conveniences and amenities including roads, buildings, warehouses etc. relating to cargo-handling, ship-building, ship-repairing and ship-breaking. Besides these another main object for which the company was incorporated was to undertake, promote, develop, aid and assist all types, kinds and forms of port related activities and also to undertake, render and provide all types of services in all matters relating to ports, jetties, harbours, docks and ship-yards. It also included the object of promoting, developing, upgrading and assisting all types, kinds and forms of works, undertakings, projects or enterprises and carrying on port related activities in the State of Gujarat and elsewhere by investment in such bodies in the form of equity participation, preference participation, subscription of other securities or through any other form of financial assistance or participation and to invest the capital of the company; the money raised or borrowed by the company.

10. To achieve such main objects, the Articles of Association also listed objects incidental and ancillary to the attainment of the main objects, one of them being to work and act as agents of the Government, Municipal local Boards, Railway Contractors and suppliers.

11. Bearing in mind these main and ancillary objects of the company, we would need to peruse the materials on record. We have perused the company's profile presented by the company before the assessing officer during the course of the assessment. It emerges that the company entered into collaboration with Adani Port Limited ("APL" for short) and set up a joint venture company called Gujarat Adani Port Limited in which the respondent company had 26% equity share. General public, foreign investors etc. held 49% equity share, remaining 25% equity share was held by APL. During the year relevant to assessment year 2001-02, the company had investment of Rs. 15 crores in APL. Besides thus carrying out joint venture activities with APL, the assessee had also undertaken various other activities, as can be seen from its communication dt. 26-5-2004 to the Commissioner (Appeals) and had actively participated in the management of the said company.

12. From the documents on record, we further notice that the respondent company had, in consultation with the Government, participated in development of Mundra Port.

13. On the basis of such materials, if we revert back to the decision of the Tribunal under challenge we notice that the Tribunal had come to the conclusion that the assessee had set up its business. We are of the opinion that the Tribunal committed no error. As already noted, the main objects of the company included wide variety of subjects principally concerned with the development of minor ports in and outside State of Gujarat. This could be done by acting as promoters, organizers, managers and developers of the ports or also through entering into joint venture undertaking. The subsidiary objective, incidental to the main objects also envisaged the company to work and act as agent of the Government, Municipal Local Boards, Railway Contractors etc.

14. In furtherance of such objects, principal as well as ancillary, the assessee company having entered into a joint venture with another company, which was developing ports at Mundra, it cannot be stated that the business of the company was not set up.

15. It is not in dispute that any expense incurred prior to the setting up of a business would not be a permissible deduction. In the case of Prem Conductors Pvt. Ltd. Vs. Commissioner of Income Tax, Gujarat-I, , the Division Bench of this Court relying on and referring to the decision of the Bombay High Court in the case of Western India Vegetable Products Ltd. Vs. Commissioner of Income Tax, Bombay City, observed that for deciding when a company could be said to have set up its business, what the Court has to consider is whether the business of the assessee consists of different categories and whether the activity, which was started earlier is said to have been the essential part of the business activity of the assessee. The Court held and observed as under :--

Thus, it is clear in the light of the decisions of this High Court in Commissioner of Income Tax, Gujrat I Vs. Saurashtra Cement and Chemical Industries Ltd., and Sarabhai Management Corporation Ltd. Vs. Commissioner of Income Tax, Gujarat, that what the court has to consider is, whether the business of the assessee consists of different categories and whether the activity which was started earlier than the actual commencement of the production in the instant case could be said to have been an essential part of the business activity of the assessee. The company can be said to have set up its business from the date when one of the categories of its business activity is started and it is not necessary that all the categories of its business activities must start either simultaneously or that the last stage must start before it can be said that the business was set up. Again, as Bhagwati C.J. Has emphasized in Commissioner of Income Tax, Gujrat I Vs. Saurashtra Cement and Chemical Industries Ltd., , the test to be applied is as to when a businessman would regard a business as being commenced and the approach must be from a commonsense point of view.

16. In view of the above judicial pronouncement, the findings of the Tribunal and our observations made hereinabove, we see no reason to interfere. We may also notice that in the earlier years, the case of the assessee that it had set up the business was not questioned by the assessing officer.

17. We may also notice that the Tribunal had, in the impugned judgment, relied on the decision of Commissioner of Income Tax, Gandhinagar v. Gujarat State Road Development Corporation Ltd., which decision was carried by the Revenue in appeal. Said appeal was dismissed on 18-4-2011 making following observations:--

5. Before the authorities, assessee had presented necessary material to establish that the company was fulfilling its objectives and Government had formulated policy regarding construction, maintenance, etc. of the road. The Company had started activities relating to technological evolution of various projects during the year in question. These objectives had been put into action right from the initial assessment year. The income has also been generated. By very nature of activities carried out, major part of the income was to be received in the subsequent years on developing the projects into execution stage. We find that the Tribunal also relied on principle laid down by the Gujarat High Court in the case of Commissioner of Income Tax, Gujrat I Vs. Saurashtra Cement and Chemical Industries Ltd., .

In the result, Tax Appeals are dismissed.