

(2014) 04 GUJ CK 0136
In the Gujarat High Court

Case No : Special Civil Application Nos. 16559, 16560 and 16563 of 2010

Classic Network Ltd.

APPELLANT

Vs

Dy. CIT

RESPONDENT

Date of Decision : 09-04-2014

Acts Referred:

Constitution of India, 1950 — Article 226 — Income Tax Act, 1961 - Section 143(3), 147, 148, 271(1)(c), 80IA

Citation : (2014) 04 GUJ CK 0136

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

Bench : Division Bench

Advocate : B.S. Soparkar and Swati Soparkar, for the Appellant; M.R. Bhatt and Mauna M. Bhatt, for the Respondent

Judgement

1. Since all these petitions involve common questions of fact and law, by way of this common judgment, they are being disposed of.
2. Facts necessary to be stated for the purpose of adjudication of these petitions shall be drawn from Special Civil Application No. 16560 of 2010.
3. This petition preferred under Article 226 of the Constitution challenges the notice of reopening issued under section 148 of the Income Tax Act, 1961 (the Act hereinafter) for the assessment year 2006-07. Return of income filed by the petitioner-assessee came to be determined by way of scrutiny assessment under section 143(3) of the Act on 26-12-2008.
4. The petitioner aggrieved by the decision of the assessing officer challenged such order before the Commissioner (Appeals) which partly allowed such appeal. The Revenue challenged the order of the Commissioner (Appeals) and the Revenues appeal came to be allowed by the Tribunal.
5. Notice of reopening in the meantime was issued on the ground that with effect from 1-4-2000, as per the amendment in the Finance Act, 2009, an Explanation to sub-section (13) of section 80IA has been inserted and the petitioner does not

fulfill the conditions laid down in section 80IA(4) of the Act. The reasons recorded on 10-3-2010 requires reproduction:

"On perusal of the assessment records, it is noticed the assessee is a contractor engaged in the business of construction activities. The assessee has claimed deduction of Rs. 64086418 under section 80IA of the Income Tax Act, 1961 in its return of income.

2. As per the amendment by Finance Act, 2009, with effect from 1-4-2000, as per the Explanation to sub-section (13) of section 80IA, the assessee company does not fulfill all the conditions, as laid down in section 80IA(4) of the Income Tax Act, therefore, the assessee is not entitled for the deduction of Rs. 64086418 claimed under section 80IA of the Income Tax Act, 1961.

3. In view of the above, I have reasons to believe that the income chargeable to tax has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961.

Issue notice under section 148 of the Income Tax Act, 1961."

6. Objections were raised to such reasons by communication dt. 15-9-2010, which have been disposed of by an order dt. 4-9-2010 reiterating the ground of amendment by way of Explanation after sub-section (13) of section 80IA(4), with retrospective effect from 1-4-2000 by holding that the reassessment proceedings have rightly been initiated. The petitioner, therefore, challenged the proceedings of reopening on such disposal of the objections by way of present petition.

7. The petitioner has been protected by way of interim relief while admitting the matter on issuance of Rule. The respondent filed its affidavit in reply in response to service of such order. Details provided therein contain, inter alia, that the notice of reassessment under section 148 of the Act is within four years from the end of the relevant assessment year and there is an under-assessment on account of wrong claim of deduction allowed under section 80IA(4) of the Act. Further affidavit has also been filed by the respondent stating therein that the assessee is only a works contractor and not a developer as per the requirement of the provision of law and such details being the exclusive knowledge of the assessee, his claim for deduction as developer when he in fact was a works contractor has also given rise to reassessment proceedings.

8. Learned counsel Mr. Bandish Soparkar has been heard for and on behalf of the petitioner and learned Senior Advocate Shri Manish Bhatt has made his detailed submissions for and on behalf of the Revenue.

9. Having heard both the sides and having considered the material on record, at the outset, it needs to be noted that in the reasons recorded, the assessing officer has made a mention of the amendment brought by Finance Act, 2009 with effect from 1-4-2000 by which an Explanation to sub-section (13) of section 80IA has been inserted. The requirement of law since is not fulfilled by the assessee for being the work contractor and not the developer, according to the assessing

officer, he is found not entitled to claim deduction under section 80IA of the Act and therefore huge sum of Rs. 6.40 crores claimed by way of deduction escaped the assessment. It needs to be mentioned at this stage that there is nothing to indicate that there was any suppression on the part of the petitioner-assessee though contended by way of an additional affidavit that the petitioner claimed deduction giving wrong particulars of his status. Moreover, the reasons recorded are totally silent on such aspect and do not indicate any suppression. This of course is the notice of reopening issued within the period of four years from the end of relevant assessment year and hence criteria of non-disclosing fully and truly all materials facts as such even otherwise is not the requirement of law. However, simultaneously, when the original return filed by the petitioner-assessee had been scrutinized by the assessing officer, it would be necessary to refer to the original assessment order in context of such contention of non-revelation. In the order dt. 26-12-2008, the assessing officer having noted that the assessee is in the business of developing and constructing infrastructural projects as assigned by the Government and other agencies, in detail and also discussed the various provisions and in particular, the claim made for the deduction under section 80IA(4) available to any enterprise carrying on developing or developing and maintaining or developing, maintaining and operating infrastructural facility, as under:

"It was noticed from the submission of the assessee filed during the course of assessment proceedings that for the EPC Turnkey contract for Rapar Taluka Rural Water Supply Scheme the assessee has contract with Electrosteel casting Ltd., Kolkata, which is a private limited company. As discussed earlier, an enterprise engaged in developing any infrastructure facility is eligible for deduction only if it has entered into an agreement with the Central Government or a State Government or a local authority or any other statutory body for developing of any infrastructure facility. It has further been clarified by way of Explanation to section 80IA(4), with effect from 1-4-2000, that deduction will not be available to a sub-contractor carrying out such work of infrastructural development as per agreement with an enterprise which may be eligible for deduction. This fact was brought to the notice of the Authorised Representative of the assessee during the course of hearing on 24-12-2006. He was, however, not able to furnish any Explanation or produce any documentary evidence to disprove the above. Moreover, in case of deduction onus is on the assessee to prove that the project-in-question satisfies all the conditions laid down in the statute so as to be eligible for claiming deduction. In this case, since, the assessee failed to discharge this onus and from the details submitted during the course of assessment proceedings, it transpires that the assessee has contract with a private company and hence, it does not satisfy the condition of having agreement with Central Government or a State Government or a local authority or any other statutory body for developing the project, it is held that deduction under section 80IA(4) is not available to the assessee to the extent of income (profit) of this project. Further it was found from the work orders in respect of SH-21 Budheal -

Faridabad Road Project and Bhavnagar Tropoj Road site that, these projects are not for developing any infrastructural facility but for carrying out repairing works which amounts to only maintaining the infrastructure facility. As discussed earlier, an enterprise engaged in developing any infrastructure facility is eligible for deduction but in the case of maintenance of infrastructure facility deduction is available only if the assessee is engaged in either operating and maintaining or developing, operating and maintaining the infrastructure facility. Hence, deduction is not available to the assessee in respect of these projects also for the reason that the assessee is involved in only maintaining these projects. It is accordingly, held that income of the assessee amounting to Rs. 4878968 (4126686+ 734951+17331) in respect of the above projects are not eligible for deduction under section 80IA and the claim of the assessee for deduction to this extent is denied and the Rs. 48,78,968 is accordingly, added back to the total income of the assessee. Penalty proceedings under section 271(1)(c) is initiated separately for filing inaccurate particulars of income."

10. From the discussion made in the original assessment order and as rightly not reflected in the reasons recorded, it does not appear to be a case of the assessee not having disclosed its true activities.

11. Only on account of the introduction of Explanation by way of Finance Act, 2009 with retrospective effect from 1-4-2000 that the reassessment proceedings have been initiated.

12. It is incidental to mention that yet another such attempt of reopening of assessment on this very issue in case of the very assessee also failed for assessment year 2003-04 when Commissioner (Appeals) held such action of assessing officer as change of opinion.

13. Constitutional validity of retrospective amendment through Explanation below sub-section (13) of section 80IA by Finance Act, 2009 had been challenged before this Court and this Court in the case *Katira Construction Ltd. Vs. Union of India and Others*, has upheld the validity of the same. This Court held the same to be clarificatory in nature in the following manner:

"34. Clearly, thus, post 1-4-2002 also, the involvement of the enterprise in developing infrastructure facility when the claim was covered under such expression was essential. In the same context, we must understand the expression developing or operating and maintaining or developing, operating and maintaining. Keeping in mind the new areas where such private participation would be required and therefore had to be encouraged and keeping in mind that such areas, such as, surface transport, water supply, water treatment system, irrigation project, etc. would necessarily be highly investment intensive, the Legislature provided for a tax break of 10 consecutive years out of a total of 20 years period and also proposed to do away with the requirement of such infrastructure facility being transferred to the Central or the State Government or the local authority.

35. In 2007, the Explanation below sub-section (13) of section 80IA came to be added which clarified that nothing contained in the said section shall apply to a person who executes a works contract entered into with the undertaking or enterprise, as the case may be. In clear terms, this Explanation targeted the second level works contractor who might have been employed by the enterprise developing the infrastructure facility. However, this was not found to be sufficient Explanation clearing doubts with respect to the exclusion of the enterprise engaged in execution of a works contract. It was, therefore, that the impugned Explanation came to be introduced substituting the existing Explanation below sub-section (13) to section 80IA. The explanatory memorandum recorded that profit linked deductions were prone to considerable misuse. With a view to preventing such misuse of the tax holiday under section 80IA, it was proposed to amend the Explanation to the said section to clarify that nothing contained in the section shall apply in relation to a business which is in the nature of a works contract executed by an undertaking.

36. We, therefore, notice that from the inception, deduction was envisaged for development of infrastructure facilities with private participation. Of course, post 2002, certain relaxations were granted and in addition to extending tax holiday period, requirement for claiming such deduction was split into developing or operating and maintaining or developing, operating and maintaining infrastructure facility. The Revenue could therefore, legitimately contend that no such deduction was envisaged for mere execution of works contract. If this was the position, in our understanding, what the Explanation, did was to clarify a statutory provision which was at best possible of a confusion. If that be so, the Explanation must be seen as one being in the nature of plain and simple Explanation and not either adding or subtracting anything to the existing statutory provision. When we hold that the impugned Explanation was purely explanatory in nature and did not mend the existing statutory provisions, the question of levying any tax with retrospective effect would not arise. If we agree with the submission of the counsel for the petitioners that such Explanation restricted or aimed to restrict the provisions of deduction, certainly a question of reasonableness in the context of retrospective operation would arise. In the present case, however, we have come to the conclusion that the Explanation only supplied clarity where, at best confusion was possible in the unamended provision. In that view of the matter, this cannot be seen as a retrospective levy even if we were to accept that withdrawal of a deduction would amount to a fresh levy.

37. Much stress was laid by the petitioners on the decision of this Court in the case of Parixit Industries Pvt. Ltd. (supra) to contend that the impugned Explanation did not in any manner alter the statutory provisions contained in section 80IA(4) of the Act and therefore, deductions which were previously available cannot be withdrawn. We have already expressed our opinion on the effect of the Explanation under challenge. In our understanding, we have not taken any stand different from the decision of this Court in the case of Parixit

Industries Pvt. Ltd. (supra). We must appreciate that such decision was rendered in the background of the assessee's challenge to a notice for reopening of the assessment which was previously framed after scrutiny. The assessment pertained to the assessment year 2006-07 and the notice for reopening was issued within four years from the end of the relevant assessment year. Revenue relied on the impugned Explanation which substituted the previous Explanation introduced with effect from 1-4-2007. This change was also given retrospective effect of 1-4-2000. In this context, this Court held and observed as under:

25. It is now a settled law that if an Explanation is added to a section of a statute for the removal of doubts, the implication is that the law was the same from the very beginning and the same is further explained by way of addition of the Explanation. Thus, it is not a case of introduction of new provision of law by retrospective operation. We have found that the petitioner had disclosed all the materials regarding its activities and there was no suppression of materials. In spite of such disclosure, the assessing officer gave benefit of the provision by considering the then Explanation which was substantially the same and thus, it could not be said that any income escaped assessment in accordance with the then law. We have already pointed out that the assessing officer has now given a second thought over the same materials and according to him, as the assessee is a contractor or supplier of irrigation products, it cannot be called a developer of any new infrastructural facility.

26. From the materials placed before him by the petitioner, the assessing officer earlier did not arrive at such conclusion and thus, the amended Explanation subsequently added cannot be of any help to him in arriving at the second opinion based on the alleged new law.

The Court was thus of the opinion that introduction of the Explanation in question did not amount to introduction of a new provision of law with retrospective operation. The assessee was, therefore, given the benefit of deduction considering the then Explanation which was introduced with effect from 1-4-2007, which according to the Court was substantially the same and any attempt on the part of the Revenue, therefore, to reopen the assessment would be in the nature of second opinion. Thus, we do not think that we have stated anything which runs contrary to the ratio in the case of Parixit Industries Pvt. Ltd. (supra). In fact, the context of the said decision was entirely different from the challenge being considered by us in the present group of petitions."

14. This Court in the case of Parixit Industries (P.) Ltd. Vs. Assistant Commissioner of Income Tax (OSD) Circle-5, in a challenge to the proceedings of reopening, had not permitted issuance of notice of reopening only on the ground of insertion of Explanation substituting earlier provision holding the provision of law retrospective with effect from 1.4.2000 when such amendment is held to be clarificatory in nature. Such clarificatory amendment since would be there on the statute book the same does not provide any new material to the assessing officer to assume jurisdiction. It would be profitable to reproduce the relevant

discussion:

"25. It is now a settled law that if an Explanation is added to a section of a statute for the removal of doubts, the implication is that the law was the same from the very beginning and the same is further explained by way of addition of the Explanation. Thus, it is not a case of introduction of new provision of law by retrospective operation. We have found that the petitioner had disclosed all the materials regarding its activities and there was no suppression of materials. In spite of such disclosure, the assessing officer gave benefit of the provision by considering the then Explanation which was substantially the same and thus, it could not be said that any income escaped assessment in accordance with the then law. We have already pointed out that the assessing officer has now given a second thought over the same materials and according to him, as the assessee is a contractor or supplier of irrigation products, it cannot be called a developer of any new infrastructural facility.

26. From the materials placed before him by the petitioner, the Assessing Officer earlier did not arrive at such conclusion and thus, the amended Explanation subsequently added cannot be of any help to him in arriving at the second opinion based on the alleged new law."

15. In the instant case, admittedly, the only ground which had made the assessing officer to initiate proceedings of reassessment is the insertion of Explanation to sub-section (13) of section 80IA which substituted earlier Explanation giving retrospective effect to the said provision from 1-4-2000. Such provision being always there on the record and the assessing officer having already scrutinized the entire issue threadbare, even though notice is issued within four years from the end of the relevant assessment year, issuance of such notice has to be held as nothing but a change of opinion on the part of the assessing officer. Therefore, assumption of jurisdiction itself is not permissible in the wake of judicial pronouncements discussed hereinabove, the challenge to the reassessment proceedings therefore needs to succeed.

16. In the result, all the petitions are allowed. The impugned notices as well as the consequential proceedings are hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.