
(2013) 04 GUJ CK 0004
In the Gujarat High Court
Case No : Tax Appeal No. 351 of 2013

Commissioner of Income Tax

APPELLANT

Vs

P.G. Foils Ltd.

RESPONDENT

Date of Decision : 15-04-2013

Acts Referred:

Income Tax Act, 1961 — Section 115W, 115WA, 115WB, 115WC, 115WD

Citation : (2013) 356 ITR 594

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

Bench : Division Bench

Advocate : Varun K. Patel, for the Appellant;

Final Decision : Dismissed

Judgement

Akil Kureshi, J.—The Revenue is in appeal against the judgment of the income tax Appellate Tribunal ("the Tribunal" for short) dated October 5, 2012, raising the following question for our consideration:

Whether, in the facts and in the circumstances of the case, the learned income tax Appellate Tribunal has erred in law in confirming the order of the Commissioner of income tax (Appeals) in holding the reopening of assessment u/s 147 by issuing notice u/s 148 of the income tax Act as invalid?

As can be seen from the question itself, the issue pertains to validity of a notice issued by the Assessing Officer u/s 148 of the income tax Act, 1961 ("the Act" for short). Through such notice issued within a period of four years from the end of the relevant assessment year, he sought to reopen the scrutiny assessment of the respondent-assessee for the assessment year 2008-09.

2. The assessee throughout opposed the validity of notice itself. The Assessing Officer, however, discarded such objection and proceeded to make additions particularly in respect of fringe benefits paid by the respondent as an employer, in the final order of assessment. The assessee, therefore, carried the matter in appeal. The Commissioner of income tax (Appeals) allowed the assessee's

appeal. He was of the opinion that on the two issues forming part of the reasons recorded by the Assessing Officer, viz., disallowances of expenses u/s 14A of the Act and addition of unutilized cenvat on raw materials in the valuation of the closing stock, the Assessing Officer in the original assessment had already examined the issues. No such addition could be made in reassessment proceedings. With respect to the question of fringe benefits tax, he was of the opinion that the Assessing Officer could not have issued notice u/s 148 of the Act in view of the specific provisions contained in the Act. He also recorded that the assessment was reopened on the basis of audit objections raised by the audit party, though issues were already considered by the Assessing Officer in original assessment.

3. The Revenue carried such matter in appeal before the Tribunal. The Tribunal, by the impugned judgment, rejected the Revenue's appeal making the following observations:

13. From the above paragraphs of the Tribunal's decision, we find that in that case it was held by the Tribunal that if no fresh fact has come to the knowledge of the Assessing Officer between the date of order of the assessment sought to be reopened and the date of forming opinion by the Assessing Officer then it is mere change of opinion and on that basis, reopening is not justified. The Tribunal considered various judgments of various High Courts including the judgment of the hon''ble Gujarat High Court rendered in the case of Garden Silk Mills (P) Ltd. Vs. Deputy Commissioner of Income Tax, and also the judgment of the hon''ble apex court rendered in the case of Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, . In the present case also, we find that there are only three objections of the Assessing Officer from the reasons recorded by him for reopening out of which, the third objection is regarding fringe benefits tax which cannot be the ground for issuing notice u/s 148 because for issuing notice in respect of escaping of fringe benefits tax, there is a separate section 115WG in the income tax Act and, therefore, no notice can be issued u/s 148 of the income tax Act. Regarding the first two objections we find that in the course of original assessment proceedings, the Assessing Officer has made proper queries regarding valuation of closing stock as well as regarding disallowance to be made u/s 14A and on both the counts, reply were submitted by the assessee before the Assessing Officer in course of original assessment proceedings and thereafter, the assessment was completed by the Assessing Officer u/s 143(3) and, therefore, it is abundantly clear that opinion was made by the Assessing Officer in course of original was made by the Assessing Officer in course of original assessment proceedings on the basis of queries and its reply and no new material has been indicated which has come to the notice of the Assessing Officer for reopening. Hence, in our considered opinion, in the facts of the present case, the reopening is on the basis of mere change of opinion which is not permissible as per law. It has been so held by the hon''ble apex court in the case of Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, . It is held by hon''ble apex court in that if the concept of change of opinion is removed as

contended on behalf of the Department, then, in the garb of reopening the assessment, the review would take place but the Assessing Officer has no power to review and, therefore, by respectfully following this judgment of hon'ble apex court and also the Tribunal decision cited by learned authorised representative, we decline to interfere in the order of the learned Commissioner of income tax (Appeals) considering the facts of the present case. Accordingly, we quash the reassessment order. The reopening is held to be not valid.

4. From the above, it clearly emerges that the Assessing Officer had recorded three reasons for issuing notice u/s 148 of the Act. Two of such reasons pertained to the extent of earnings exempt from income tax, which the Revenue contended should have been disallowed u/s 14A of the Act and the addition of unutilized cenvat in valuation of the closing stock. Both these issues were examined by the Assessing Officer in original assessment. Such are factual findings concurrently arrived at by the Commissioner of income tax (Appeals) as well as the Tribunal. The Commissioner of income tax (Appeals), in particular, noted that the Assessing Officer had raised several queries with respect to these issues. In that view of the matter, in our opinion, the Tribunal correctly held that any attempt on the part of the Assessing Officer to re-examine such issues would only amount to a change of opinion.

5. Learned counsel for the Revenue, however, submitted that the Assessing Officer may have raised queries during the assessment proceedings, but, he did not come to any definite conclusion in the assessment order with respect to these issues. He submitted that if the Assessing Officer had not carried out proper inquiries, it would be a case of income escaping assessment and reopening would be permissible.

6. With both these submissions, we have serious disagreement. Merely because after raising queries with respect to a proposed addition, the Assessing Officer in the final order of assessment does not give any reason for not making any additions, would not mean that the issue was not scrutinized. This is precisely what this court has held in the decision in case of Gujarat Power Corporation Ltd. Vs. Assistant Commissioner of Income Tax, , in which following observations were made (page 295):

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 cannot 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.

We are, therefore, of the opinion that in a situation where the Assessing Officer during scrutiny assessment, notices a claim of exemption, deduction or such like made by the assessee, having some prima facie doubt raises queries, asking the assessee to satisfy him with respect to such a claim and thereafter, does not make any addition in the final order of assessment, he can be stated to have formed an opinion whether or not in the final order he gives his reasons for not making the addition.

7. Equally, the contention that the Assessing Officer may not have made proper inquiry which would permit reopening of assessment must be rejected out of hand. In such circumstances, in a given case, the Commissioner may exercise revisional powers, but surely, the same authority cannot re-examine the issue under reopening.

8. The third issue included in the reasons recorded for reopening was with respect to short payment of fringe benefit tax. The Tribunal, while confirming the order of the Commissioner of income tax (Appeals) held that there is a separate provision u/s 115WG for reopening the assessment in respect of fringe benefits tax escaping assessment and that therefore, notice u/s 148 of the Act cannot be issued. With this conclusion, we are in respectful agreement. Chapter XII-H pertaining to income tax on fringe benefits was introduced by the Finance Act, 2005, with effect from 1st April 2006. Section 115W contains definition of the terms employer and fringe benefits tax. Section 115WA pertains to charge of

fringe benefit tax. Sub-section (1) thereof provides that in addition to the income tax charged under the Act, there shall be charged, additional income tax in respect of the fringe benefits provided or deemed to have been provided by an employer to his employees during the previous year at the rate of thirty per cent. on the value of such fringe benefits. Section 115WB pertains to fringe benefits which would invite such a tax. Section 115WC provides for ascertaining value of fringe benefits. Section 115WD requires every employer, who during a previous year has paid, or made provision for payment of fringe benefits to his employees to furnish a return of fringe benefits to the Assessing Officer in the prescribed form. Section 115WE pertains to the assessment of such returns of fringe benefits. Sub-section (2) of the said section authorizes the Assessing Officer to issue a notice requiring the assessee to attend to his office, or to produce or cause to be produced, any evidence on which the assessee may rely in support of the return. Section 115WG pertains to fringe benefits escaping assessment and reads as under:

115WG. Fringe benefits escaping assessment.--If the Assessing Officer has reason to believe that any fringe benefits chargeable to tax have escaped assessment for any assessment year, he may, subject to the provisions of sections 115WH, 150 and 153, assess or reassess such fringe benefits and also any other fringe benefits chargeable to tax which have escaped assessment and which come to his notice subsequently in the course of the proceedings under this section, for the assessment year concerned (hereafter referred to as the relevant assessment year).

Explanation.--For the purpose of this section, the following shall also be deemed to be cases where fringe benefits chargeable to tax have escaped assessment, namely:--

- (a) where no return of fringe benefits has been furnished by the assessee;
- (b) where a return of fringe benefits has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the value of fringe benefits in the return;
- (c) where an assessment has been made, but the fringe benefits chargeable to tax have been under-assessed.

9. Section 115WH pertains to issuance of notice where fringe benefits have escaped assessment. Sub-section (3) thereof provides that no notice under sub-section (1) shall be issued for the relevant assessment year after the expiry of six years from the end of the relevant assessment year. Sub-section (4) further provides that no such notice shall be issued after the expiry of four years from the end of the relevant assessment year, unless the Chief Commissioner or the Commissioner is satisfied, on the reasons recorded by the Assessing Officer that it is a fit case for the issue of such notice. From the above provisions, it could be seen that Chapter XII-H of the Act makes detailed and specific provisions pertaining to income tax on fringe benefits. Such provisions include those for

filing of returns, assessment of such returns and reassessment in case any tax on fringe benefit has escaped assessment. In particular, section 115WG makes detailed provisions for assessment of the fringe benefits escaping assessment. Correspondingly, section 115WH provides for issuance of notice for such purpose. Such provisions being special provisions, made especially for the purpose of fringe benefits tax, the Tribunal was perfectly justified in concluding that the general provisions contained in section 148 of the Act cannot be resorted to in such cases. Significantly, section 115WH; unlike the proviso to section 147 of the Act, does not recognize any distinction between notice for reopening issued within and beyond the period of four years from the end of relevant assessment year; except for requiring that in cases of notice issued beyond four years, there has to be a satisfaction of the Commissioner or the Chief Commissioner, arrived at on the reasons recorded by the Assessing Officer that it is a fit case for issuance of the notice. In other words, the crucial requirement under proviso to section 147 of the Act for issuing notice beyond four years from the end of relevant assessment year of income escaping the assessment due to the failure on the part of the assessee to disclose truly and fully all material facts in cases other than in case of non-filing of the returns, is absent. In view of such specific provisions, the Tribunal was correct in holding that notice u/s 148 of the Act could not have been issued for such purpose.

In the result, the tax appeal is dismissed.