

(2004) 07 GUJ CK 0048

In the Gujarat High Court

Case No : Special Civil Application No. 5447 of 1994

Denish Industries Ltd.

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 15-07-2004

Acts Referred:

Income Tax Act, 1961 — Section 147, 148, 149, 43(1)

Citation : (2004) 190 CTR 485 : (2004) 271 ITR 340 : (2004) 140 TAXMAN 456

Hon'ble Judges : M.S. Shah, J;D.A. Mehta, J

Bench : Division Bench

Advocate : Tushar P. Hemani, for S.N. Soparkar, for the Appellant; Manish R. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

M.S. Shah, J.—This petition under Article 226 of the Constitution challenges the notice dt. 31st March, 1994 issued by the ITO (Annex.-A) u/s 148 of the IT Act, 1961 (hereinafter referred to as "the Act"), r/w Section 147 thereof proposing to reopen assessment of Denish Syntex (P) Ltd. for asst. yr. 1983-84 on the ground that on account of insertion of Expln. 8 to Section 43(1) as introduced by the Finance Act, 1986, with retrospective effect from 1st April, 1974, the assessee was not entitled to claim depreciation or investment allowance on the capitalisation of interest paid prior to (sic-after) the date on which the machinery was first installed and put to use.

2. The facts leading to filing of the present petition are as under :

For asst. yr. 1983-84 Denish Syntex (P) Ltd. (DSPL) which was subsequently amalgamated with the petitioner-company filed its return of income claiming loss of Rs. 55,82,920. In the said return, the DSPL had stated that the DSPL had calculated investment allowance and depreciation on capitalisation of interest payable on Rs. 33,87,725 over contracted periods on term loans received from the GIIC and GSFC. The DSPL had inserted the following note as Note No. (2)

below statement of computation of assessable loss :

"(2) The company has calculated investment allowance and depreciation on capitalisation of interest payable of Rs. 33,87,725 (including paid during the year Rs. 8,03,435) over contracted periods on term loans received from GIIC and GSFC, utilised on fixed assets calculated on proportion of term loan and fixed assets, as liabilities accrue or arise at the time of availment of loans".

3. The assessment of DSPL was framed u/s 143(3) r/w Section 144B of the Act, Against the assessment order dt. 28th Jan., 1984 (Annex.-C), the DSPL preferred an appeal before the first appellate authority, insofar as the assessment order was against DSPL and DSPL succeeded in those proceedings but the same has nothing to do with the controversy involved in the present petition. Thereafter, on 31st March, 1994 the respondent-ITO issued the impugned notice under Sections 147 and 148 of the Act.

4. In response to the notice issued by this Court, affidavit-in-reply dt. 29th April, 1994 came to be filed by the respondent-officer stating that the assessee had capitalised an amount of Rs. 33,87,725 being the interest paid to GIIC and GSFC for the acquisition of fixed assets. The value of the assets was overstated by this extent. The petitioner-company claimed depreciation and investment allowance on the cost of the assets which included the interest capitalised as above. The claim of the assessee was allowed without touching the aspect of capitalisation of interest. This resulted into excess allowance of depreciation and investment allowance. After taking the aforesaid stand, the deponent of the affidavit-in-reply stated as under :

"I submit that upto 1986, there were different views expressed by the Hon"ble Courts on the aspect as to whether the interest in connection with the acquisition of an asset, is to be included in the cost of the assets or to be allowed as revenue expenditure. It is submitted that Explan. 8 to Section 43(1) was introduced by the Finance Act, 1986, with retrospective effect from 1st April, 1974. The Explanation reads as under :

"For the removal of doubts, it is hereby declared that where any amount is payable as interest in connection with the acquisition of an asset, so much of such amount as is relatable to any period after such asset is first put to use shall not be included, and shall be deemed never to have been included in the actual cost of such asset."

It is submitted that with the introduction of the Explanation, the controversy as regards interest, vis-a-vis the actual cost was set at rest. As per the Explanation, any amount which is paid or payable as interest in connection with acquisition of the asset, so much or such amount as is relatable to any period after such asset put to use shall not be included and shall be deemed never to have been included in the actual cost of such asset. In the present case, the petitioner-company had capitalised the interest relevant to the entire contracted period as a result of which the cost of assets is overstated to the extent of Rs. 33,87,725.

Because of this overstatement of actual cost, excess depreciation and investment allowance has been allowed to the petitioner-company. In view of these reasons, after obtaining prior approval, I have issued the notice u/s 148 which is legal and valid."

5. At the hearing of the petition, Mr. Tushar Hemani, learned advocate for the petitioner, has submitted that the impugned notice for reopening of the assessment came to be issued on the last day of the 10th year from the expiry of the assessment year.

It is submitted that the AO can issue notice for reassessment u/s 147 of the Act if the AO has reason to believe that any income chargeable to tax has escaped assessment for the relevant year and escapement of such income is by reason of the failure on the part of the assessee to make a return u/s 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for the assessment for that assessment year. The assessee had made return u/s 139 and there was no notice issued under Sub-section (1) of Section 142 or Section 148 of the Act and the only provision invoked by the AO was that, in view of the statutory amendment with retrospective effect, the assessee had failed to disclose fully and truly all material facts necessary for the assessment for that assessment year. However, when the assessee had filed the return for asst. yr. 1983-84 in the year 1983, apart from the fact that Expln. 8 was not in existence, the deponent-AO has admitted in his affidavit-in-reply that there was controversy as to whether the interest paid after the date on which the machinery was installed and first put to use is required to be capitalised or is to be treated as revenue expenditure. The assessee is claiming depreciation allowance and investment allowance on capitalisation of interest for the post-installation period. In this view of the matter, there was no culpability on the part of the assessee. On the contrary, by capitalising such interest the assessee did not claim the same as revenue expenditure which the assessee otherwise could have claimed and obtained 100 per cent deduction of the amount as revenue expenditure. Instead the assessee restricted its claim to investment allowance and depreciation allowance on capitalisation of that interest which taken together was much less than the benefit which the assessee would have got as revenue expenditure.

Strong reliance is placed on the decision of this Court in Commissioner of Income Tax Vs. Bipin Vadilal, wherein the Court was concerned with a similar controversy arising from declaration of law by the Supreme Court. It is submitted that since the law declared by the Supreme Court also relates back to the date on which the relevant provision was enacted, retrospective effect given by the statutory amendment will also operate on the same principle and, therefore, notice for reopening of assessment u/s 147 or 148 cannot be issued beyond the period of four years on the ground of failure to disclose material facts.

6. On the other hand, Mr. M.R. Bhatt, learned standing counsel for the Department, has submitted that since Expln. 8 was inserted w.e.f. 1st April,

1974, the said statutory amendment must apply and operate with full force and vigour and that if the assessee's contention were to be accepted, it would amount to giving only prospective effect to the legislative amendment.

7. Having heard the learned counsel for the parties, we are of the view that there is considerable substance in the submissions made on behalf of the petitioner.

Sections 147 and 149 of the Act at the relevant time read as under :

"If--

(a) the AO has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return u/s 139 for any assessment year to the AO or to disclose fully and truly all material facts necessary for his assessment for the year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in Clause (a) on the part of the assessee, the AO has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereinafter in Sections 148 to 153 referred to as the relevant assessment year).

149. (1) No notice u/s 148 shall be issued,--

(a) in cases falling under Clause (a) of Section 147 :

(i) for the relevant assessment year, if eight years have elapsed from the end of that year, unless the case falls under Sub-clause (ii);

(ii) for the relevant assessment year, where eight years, but not more than sixteen years, have elapsed from the end of that year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year;

(b) in cases falling under Clause (b) of Section 147, at any time after the expiry of four years from the end of the relevant assessment year."

8. There is no dispute about the fact that the impugned notice has not been issued on the ground of failure on the part of the assessee to make return u/s 139 because the return was already filed in the year 1983 nor is it the case of the Department that there was failure on the part of the assessee to make return in response to the notice u/s 142 or 148. The only clause invoked by the Department is that on account of the statutory amendment w.e.f. 1st April, 1974, the assessee was not entitled to capitalise the interest paid after the date of installation of the machinery and first put to use and, therefore, the assessee had failed to disclose fully and truly all material facts.

9. It is true that when there is a statutory amendment with retrospective effect,

the statutory amendment has to operate as if the law as amended was there on the statute book. However, as per the settled legal position the fiction is to operate within the field for which it is meant. Hence, if the proceedings were pending on 1st April, 1986 when the statutory amendment was made, whether assessment proceedings or proceedings by way of appeal or revision or reference, Explan. 8 would have certainly operated. However, on the question whether the assessee had failed to disclose fully and truly all material facts necessary for assessment, it is obvious that when the assessee had filed its return in 1983 it could not have assumed that such a legislative amendment was going to be made in the year 1986 with retrospective effect from the year 1974. In the facts of the present case, it could never be said by any stretch of imagination that in the year 1983 when the assessee filed return claiming investment allowance on the capitalisation of interest paid after the date on which the machinery was first installed and put to use, the assessee had failed to disclose all material facts. On the contrary, the assessee would have got the benefit of the entire interest amount for the post-installation period as revenue expenditure which would have been much higher than the amount of investment allowance and depreciation allowance taken together.

10. In Commissioner of Income Tax, Gujarat -I Vs. Navnitlal Sakarlal, this Court held that when the assessment was opened on the ground of declaration of law by this Court, it cannot be said that the plea as to escapement of income chargeable to tax from assessment was not entertained by the AO on the ground that there had been failure on the part of the assessee to disclose truly and fully all material facts necessary for the assessment. Hence, no proceedings could have been initiated u/s 148 of the IT Act beyond the expiry of four years from the end of the relevant assessment year. This case is squarely covered by Clause (b) of Section 147 and not by Clause (a) of Section 147.

11. In Commissioner of Income Tax Vs. Hindustan Electro Graphites Ltd., in the context of applicability of the provisions of Section 143(1A) of the Act, the apex Court quoted with approval the following observations of the Calcutta High Court in Modern Fibotex India Ltd. and Another Vs. Deputy Commissioner of Income Tax and Others,

"An assessee cannot be imputed with clairvoyance. When the return was filed, the assessee could not possibly have known that the decision on the basis of which cash compensatory support had been claimed as not amounting to the assessee's income ceased to be operative by reason of retrospective legislation."

In the above decision, the apex Court also followed its decision in Cement Marketing Co. of India Ltd. Vs. Assistant Commissioner of Sales Tax, Indore and Others, under the sales-tax law where the Court said that a return cannot be said to be "false" unless there is an element of deliberateness in it. It is possible that even where the incorrectness of the return is claimed to be due to want of care on the part of the assessee and there is no reasonable explanation forthcoming from the assessee for such want of care, the Court may in a given

case, infer deliberateness and the return may be liable to be branded as a false return. But where the assessee does not include a particular item in the taxable turnover under a bona fide belief that he is not liable so to include it, it would not be right to condemn the return as a "false" return...

12. The same reasoning would apply for holding that for the purpose of deciding the question u/s 147 whether the assessee had disclosed fully and truly all material facts necessary for the relevant assessment year, the law applicable would be the law as it stood on the date of filing of the return.

13. In view of the above discussion, we are of the view that there was no failure on the part of the assessee to disclose truly and fully all material facts. Therefore, the condition precedent for invocation of the powers u/s 147 r/w Sections 148 and 149 was not fulfilled. The impugned notice is, therefore, without any authority of law.

14. The petition is allowed. The impugned notice dt. 31st March, 1994 issued by the ITO (Annex.-A) u/s 148 r/w Section 147 of the IT Act, 1961, is quashed and set aside.

Rule is made absolute with no order as to costs.