

(2012) 01 GUJ CK 0001

In the Gujarat High Court

Case No : Special Civil Application No. 18574 of 2011

Doshion Ltd.

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 16-01-2012

Acts Referred:

Income Tax Act, 1961 — Section 80IA, 80IA(4), 80IB

Citation : (2012) 342 ITR 6 : (2012) 208 TAXMAN 127

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

Bench : Division Bench

Advocate : Saurabh N. Soparkar with Mr. Monaal J. Davawala and Mrs. Swati Soparkar, for the Appellant; Mauna M. Bhatt, for the Respondent

Judgement

Honourable Mr. Justice Akil Kureshi

1. Rule. Mrs. Mauna M. Bhatt waives service of rule on behalf of Respondent.
2. Looking to the controversy involved, we have heard Learned Counsel for the parties for final hearing of the petition today itself.
3. The petitioner is a company registered under the provisions of the Companies Act. It is regularly assessed to tax under the Income Tax Act, 1961. For the assessment year 2005-06, the assessee filed its return of income declaring total income of Rs.2.04 crores(rounded off). In the return filed, the assessee had claimed deduction of Rs.2.22 crores u/s 80IA of the Act and also of Rs.3.82 crores u/s 80IB of the Act. The petitioner, however, subsequently filed a revised return and revised its total income to Rs.2.87 crores claiming deduction of Rs.2.11 crores u/s 80IA of the Act and Rs.3.10 crores u/s 80IB of the Act.
4. Such return of the income filed by the assessee was taken in scrutiny by the Assessing Officer. It is the case of the petitioner that besides others, claim of deduction u/s 80IA and Section 80IB of the Act came up for consideration before the Assessing Officer during such scrutiny. After thorough scrutiny the Assessing Officer granted the deduction, particularly, that claimed by the assessee in its

revised return with respect to Section 80IA of the Act.

5. The Assessing Officer thereafter issued a notice on 16.3.2011 stating that he had reason to believe that income chargeable to tax for the assessment year 2005-06 has escaped assessment. He, therefore, proposed to reopen assessment for the said year and that therefore the assessee should file return within 30 days from the date of receipt of the notice.

6. The Assessing Officer also supplied the reasons recorded for reopening the assessment in which it is stated that :-

2. On verification of the records, it is noticed that the assessee has filed form No.10CCB showing the total sale of Rs.5,76,29,462/- and the profit derived on it is Rs.2,11,87,992/- and the assessee has claimed deduction u/s 80IA @ 100% of the profit of the industrial undertaking at TWAD, Tamilnadu. The explanation to Section 80IA has been substituted by the Finance (No.2) Act, 2009, w.e.f. 01.04.2000 which is as under:-

For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to business referred to in subsection(4) which is the nature of a work contract awarded by any person (including the central and State Government) and executed by the undertaking for enterprise referred to in subsection.

As per agreement vide No.CEQ/SR/MDU/25/2003-04 dated 27.02.2004, clause 26 of page No.38 the assessee is not the owner of the plant, it is just carrying out the work as per the contract awarded by TWAD. In view of the substituted Explanation to section 80IA, the condition laid down in Sec. 80IA(4)(a) of the Act, are not fulfilled by the assessee. Therefore, the entire deduction claimed u/s. 80IA is not allowable.

7. The petitioner raised objection to such proposal of the Assessing Officer to reopen the assessment previously framed after scrutiny. The Assessing Officer, however vide his order dated 14.12.2011 disposed of such objections. Shortly thereafter, the Assessing Officer also passed a fresh order of assessment on 20.12.2011. He disallowed the entire deduction claimed by the assessee u/s 80IA of the Act. At that stage, the petitioner has approached this Court challenging the very reopening of the assessment and making grievance that the Assessing Officer consumed nearly 6 months time for disposing of the objections raised by the petitioner and thereafter proceeded to pass the final order of assessment in less than 2 weeks, thereby giving no opportunity to the petitioner to avail of its legal remedies.

8. Counsel for the petitioner submitted that the assessment previously framed was reopened beyond the period of 4 years. The reasons recorded do not even suggest that the Assessing Officer had reason to believe that income chargeable to tax had escaped assessment for the reason of the assessee failing to disclose truly and fully all material facts. He submitted that the sole ground on which the

assessment is sought to be reopened is the retrospective amendment in Section 80IA of the Act by virtue of the Finance Act of 2009 which amendment is brought into effect from 1.4.2000.

9. On the other hand, counsel for the Revenue submitted that the assessment was correctly reopened. That by virtue of the Explanation added to Section 80IA of the Act, no deduction could be claimed in relation to any business referred to in sub-Section (4) which is in the nature of works contract. Counsel submitted that vires of such statutory provision is called in question and petitions in this regard are pending before this Court.

10. Counsel further submitted that the fact that the petitioner executed the works as a contractor and not as a developer was not disclosed in the original return.

11. Having thus heard Learned Counsel for the parties and having perused the documents on record, it clearly emerges that the assessment previously framed after scrutiny is sought to be reopened beyond the period of 4 years from the end of relevant assessment year. In the reasons recorded, the Assessing Officer has not suggested that such income escaped assessment for the failure on the part of the assessee to disclose truly and fully all material facts. In fact the sole ground on which such scrutiny assessment is sought to be reopened beyond 4 years is that by virtue of Explanation to Section 80IA added with retrospective effect from 1.4.2000, income derived from the works contract would not qualify for deduction u/s 80IA of the Act. Firstly, we are of the opinion that by virtue of such retrospective amendment assessment previously framed after scrutiny could not have been reopened beyond the period of 4 years without any thing on record to suggest that the income chargeable to tax had escaped assessment for the failure on the part of the assessee to fully and truly disclose all material facts. We may notice that the Explanation in question, which was introduced in the year 2009 but with retrospective effect from 1.4.2000 reads as under:-

Explanation- For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section (1).

12. It may be that in a given case on account of such Explanation, the assessee may be disentitled to claim deduction u/s 80IA of the Act. However, this is not the same thing to suggest that assessment previously framed that too after scrutiny could be reopened beyond the period of 4 years without any failure on the part of the assessee to disclose truly and fully all material facts.

13. Similar view was taken by this Court in the case of *Sadbhav Engineering Ltd. Vs. Deputy Commissioner of Income Tax (OSD)*, .

14. The fact that vires of such Explanation is questioned by some of the

assessee and such challenge is pending, should not detain us from disposing of the present petition. We have proceeded on the basis that such statutory amendment is valid. Despite such presumption, we are unable to uphold the notice for reopening for the reasons already recorded.

15. The suggestion that the assessee failed to disclose the nature of works executed and that the same was executed only as works contractor and not as a developer, cannot be accepted for two reasons. Firstly, the reasons recorded do not refer to such a ground. Secondly, when the assessee filed the return of income, the Explanation in question was not in picture. It would not be possible to expect the assessee to comply with the requirements of such Explanation by making disclosures in this regard which Explanation did not form part of the statute book when he filed his return.

16. In the result, we have no hesitation in quashing the notice for reopening. The subsequent order of assessment which is based on such reopening also therefore stands invalidated.

17. Before closing we would recall that the objections raised by the assessee against the notice for reopening remained pending with the Assessing Officer for nearly 6 months. Sometime in the middle of December, 2011 the Assessing Officer disposed of such objections and, thereafter proceeded to pass the final order of assessment in less than two weeks. Had this been an isolated case of such nature, we would have passed it off as one-off instance. However, such tendency to delay disposing of the objections and, thereafter at the fag end of final time limit, to frame the assessment, is noticed in more cases than one. We cannot approve of such tendency. This we are sure was not the intention of the Apex Court when the decision in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, was rendered. We are sure this would be brought to the notice of the Assessing Officers by the Department so that such instances do not recur in future. Petition is disposed of accordingly.