(2014) 02 GUJ CK 0158

In the Gujarat High Court

Case No : Special Civil Appln. No. 13825 of 2009

Gujarat Paguthan Energy Corporation (P.) Ltd. APPELLANT

Vs

Dy. CIT RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226 — Income Tax Act, 1961 - Section 115JB, 139(1), 143(3), 147, 148

Citation : (2014) 02 GUJ CK 0158

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

Bench : Division Bench

Advocate : S.N. Soparkar and Bandish Soparkar, for the Appellant; Mauna M. Bhatt, for the Respondent

Judgement

Sonia Gokani, J.?Present petition is preferred under Article 226 of the Constitution challenging the notice of reopening under section 147 read with section 148 of the Income Tax Act, 1961 ("the Act" hereinafter).

2. Brief facts necessary for the determination of issues presented before us are as follows:

2.1. The petitioner, a private limited company, had filed its return of income on 30-10-2004, claiming a deduction under section 80-IA(iv) of the Act of Rs. 4,69,73,55,657 on generation of electricity and of Rs. 3,96,90,05,846 for offering book profit.

2.2. The same was selected for scrutiny. Queries were raised and the assessing officer had called upon the assessee to submit various details. After the replies were furnished, the assessing officer in the original assessment did not make any additions. The assessment was framed under section 143(3) on 25-4-2006 determining the total income at Rs. 14,29,18,700 and Rs. 4,54,65,63,744.

2.3. The impugned notice came to be issued on 27th March, 2009 seeking to reopen the assessment for the assessment year 2004-05.

2.4. The petitioner requested for copy of reasons recorded for the reopening of the assessment and also requested that the original return filed under section 139(1) be treated as return filed under section 148 of the Act.

2.5. The reasons furnished for reopening of the assessment read as follows:

"1. The return of income, declaring total income of Rs. nil was filed by the assessee company on 30-10-2004 claiming deduction of Rs. 469,73,55,657 under section 80-IA(iv) of the on generation of electricity. Assessee-company paid tax under section 115JB of the Act. The assessment was finalized at an income of Rs. 14,29,18,700 under section 143(3) of the Act dt. 25-4-2006.

2. As per the Notification No. 240 of 2002, dt. 6-9-2002 whereby it is stated that in exercise of power conferred by section 295 read with sub-section (7) of s. 80-1 of the Income Tax Act, amendment is made to IT Rules from 1-4-2002 whereby it is stated that a separate report is to be furnished by each undertaking or enterprise of the assessee claiming deduction. However on verification of the records it is seen that no separate report is furnished for each undertaking of the assessee for claiming deduction.

3. Further it is seen that from the records of the assessee-company that the assessee company has received an interest of Rs. 21,761.41 lakhs from GEB for late payment of its sale price i.e., interest from trade debtors. Thus, the deduction of Rs. 21,761.41 lakhs on interest from trade debtors is not qualified for the deduction under section 80-IA.

4. In view of the above, I have reason to believe that income to the extent of Rs. 469,73,55,657 (including Rs. 21,761.41 lakhs) has escaped assessment by way of under assessment to that extent within the meaning of section 147 of the Income Tax Act, 1961."

2.6. The objections were raised vide communication dt. 13-7-2009 inter alia contending that the assessee had duly submitted the separate reports for all the undertakings claiming deduction under section 80-IA during the course of proceedings, as the main contention and allegation on part of the Revenue is that the separate report as required to be submitted by each undertaking and enterprise of the petitioner claiming deduction has not been furnished.

2.7. With regard to the second allegation, it pertains to interest received from GEB for late payment of its sale price which according to the Revenue would not qualify for deduction under section 80-IA. It was contended that Gujarat High Court in case of Nirma Industries Limited Vs. Deputy Commissioner of Income Tax, , had rejected the plea of Department that income received from trade debtors towards late payment of sales consideration is required to be excluded from the profits of the industrial undertaking as the same cannot be stated to have been derived from the business of the industrial undertaking and therefore, after taking into consideration, the objections raised against the reasons recorded, the Dy. CIT vide its order dt. 9-12-2009 rejected such objections and directed the petitioner to furnish submissions on merits of the case. In the said order, it was held inter alia that it was necessary for the petitioner to furnish copy of audit report in the prescribed Form No. 10CCB along with the return of income and as the audit reports were not attached with the return of income, deduction claimed under section 80-IA from the profit and gains derived from an undertaking would not be admissible. It was further held in the said order that deduction under section 80-IA is available only in respect of such profit and gain which have a direct or proximate nexus with the activity of manufacture of production and same must have accrued to the assessee in the course of or arising from the manufacture or production of the industrial undertaking. Interest though had its origin in sale, same was not on account of sale of goods of industrial undertaking and, therefore, interest on late payment of sale proceedings would not be eligible for deduction under section 80-IA.

3. The petitioner therefore, challenged the said notice. The Court issued notice on 29-12-2009. However, the reassessment order was passed by the assessing officer the very next day and therefore, the amendment was sought in the petition challenging such order dt. 30-12-2009 passed under section 143(3) read with section 147 of the Act. This Court permitted such amendment and also granted the ad interim relief staying implementation and operation of such reassessment order.

4. The affidavit in reply has been filed by the respondent wherein it is contended inter alia that statutory alternative remedies are available to the petitioner and as order of reassessment has been passed, the Commissioner (Appeals) could be approached and thereafter, the Tribunal. It is also contended that issuance of impugned notice for assessment year 2004-05 was within period of four years from the end of relevant assessment year and, therefore, also the Court ought not to have interfered.

4.1. It is also contended that the petitioners contention of reopening being invalid on the ground that same was at the instance of Revenue audit wing also has no basis in as much as the assessing officer on being convinced that income taxable has escaped assessment has given a proposal for initiating action under section 147 and thus he himself had the reason to believe that income had escaped the assessment and such reopening proceedings were not solely at the behest of audit parties.

5. We have heard learned senior counsel Shri S.N. Soparkar for the petitioner who has extensively urged before us that notice for reopening of the assessment issued under section 148 requires interference in as much as both the reasons recorded for reopening the assessment are not sustainable. He urged that the first ground raised concerns the separate report to be furnished for each undertaking. Such issue has already been concluded by this Court as also later on by the Apex Court by confirming the judgment of Delhi High Court.

5.1. He sought to rely upon the following judgments:

(i) Income Tax Officer Vs. VXL India Limited,

(ii) Commissioner of Income Tax Vs. Contimeters Electricals Pvt. Ltd., .

(iii) Commissioner of Income Tax Vs. Web Commerce (India) Pvt. Ltd., .

(iv) The decision of the Apex Court in case of CIT v. Web Commerce (India) (P.) Ltd. (supra) where Departments Special Leave Petition against the judgment of the Delhi High Court has been dismissed.

5.2. On the second reason, he urged the Court that the judgment rendered by this Court in case of Nirma Industries Ltd. v. Dy. CIT (supra) clinches the issue. The issue according to the learned counsel has been decided in favour of the assessee and the SLP preferred by the Department also has been dismissed by the Apex Court and thus on both the counts, notice is not sustainable and therefore, the assessing officer had no jurisdiction either to issue the notice or to frame reassessment.

6. Learned senior counsel Shri Manish Bhatt appearing for the Revenue has urged that when the reasons were recorded by the assessing officer, he had the reason to believe and the law that was prevalent at the relevant point of time permitted him to hold such a reason and therefore, any subsequent change by way of pronouncement of judgment would not invalidate the reasons nor the process of reopening and the Court need not interfere.

6.1. On the contention raised of issuance of the notice of reopening exclusively at the behest of communication received from the audit wing, he urged that the assessing officer had applied his own mind as the only objection raised by the audit wing was in respect of interest from the trade debtors as not having been qualified for deduction under section 80-IA and directed revivification of the papers. He further contended that the communication from the audit wing was also received with respect to non filing of separate reports for each undertakings. However, on both the counts, the assessing officer himself had formed his belief independently as well and therefore, on that count alone no interference is desirable.

7. Having thus heard both the sides and having considered the material on record at the outset, it needs to be noted that challenge to the notice impugned and subsequently to the order of reassessment, passed consequent upon such issuance of the notice is essentially on two grounds.

8. First ground raised is in respect of requirement of filing separate reports to be submitted by each undertaking of the petitioner. It is to be noted that the fact is not in dispute that the report was in three parts for each of the undertakings of the petitioner. However, at the time of assessment proceedings for each undertaking, a separate report had already been furnished.

9. This Court in case of ITO v. VXL India Ltd. (supra), held and observed that provision of s. 80HHC of the Income Tax Act requires that the report of a

chartered accountant in the prescribed form should be attached along with the return of income, certifying that the deduction has been correctly claimed in accordance with the provisions of this section, but, that would not mean that such report if is not attached along with the return of income and if is produced before the assessing officer during the course of assessment proceedings, the entitlement of the assessee for deduction under section 80HHC would go away. It further held that to obtain the report of the chartered accountant is a condition precedent and it is mandatory in nature. However, non-furnishing of such report at the time of filing the return of income but at a subsequent stage before the assessment proceedings get completed, would not result in denial of such benefit.

10. We notice that decision of this Court in case of ITO v. VXL India Ltd. (supra) was followed by the Delhi High Court in case of CIT v. Centimeters Electricals (P.) Ltd. (supra) and later on in case of CIT v. Web Commerce (India) (P.) Ltd. (supra).

11. It is to be mentioned at this juncture that the SLP preferred against judgment of the Delhi High Court rendered in case of CIT v. Web Commerce (India) (P.) Ltd. (supra) was dismissed by the Apex Court holding that once the audit report is filed before the framing of assessment, the provisions of s. 80-IA(7) would be complied with as furnishing of such report at the time of filing of return is directory in nature and not mandatory.

12. Reverting back to the facts of the instant case, in light of aforementioned decisions, the assessee had submitted a separate report for all the undertakings claiming deduction under section 80-IA, during the course of assessment proceedings. Therefore, the first ground of reopening, wherein it is alleged that interest from the trade debtors would be qualified for deduction under section 80-IA only on the furnishing of separate reports, cannot be upheld.

13. With regard to second ground, it is alleged that the assessee company had received an interest of Rs. 21,761.41 lakhs from GEB for late payment of its sale price. We notice that in case of Nirma Industries Ltd. vs. Dy. CIT (supra) the plea of the Department has been rejected holding that interest received from trade debtors towards the late payment of sale price, is required to be excluded from the profit of industrial undertaking as same cannot be said to be derived from industrial undertaking. This issue also stands concluded at the stage of Apex Court and therefore, such ground raised in the reasons recorded also in our opinion if allowed to be proceeded with, cannot be sustained.

14. At this stage, reference is needed of the fact that the petitioner has raised the ground that the notice impugned has been initiated at the behest of audit objections and accordingly has challenged the validity of the same. From the contentions raised in affidavit-in-reply and the submissions made before us, we are convinced that such challenge on the part of the petitioner deserves not to be sustained, as the assessing officer appears to have formed his own belief on the basis of reasons while issuing such notice and therefore, it cannot be said

that the notice was solely at the behest of audit party.

15. It is a settled position that once the notice for reopening is issued and is allowed to be proceeded, the assessing officer can also open other issues, other than those for which the reasons have been recorded and, therefore also, ordinarily in a writ petition, the Court would be slow in interfering with such notices. While so noting, we cannot be also oblivious to the decision of this Court in case of Commissioner of Income Tax-II Vs. Mohmed Juned Dadani, , where in relation to Explanation 3 to section 147 of the Act, it has been held that the assessing officer cannot make additions with respect to the grounds not raised in the notice and no fresh assessment making any additions on other issues which did not form part of the reasons recorded to be made, if additions with respect to the grounds raised in the impugned notice fail. Explanation 3 to section 147 as held in the said decision, provides that for the purpose of assessment or reassessment under this section, the assessing officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings, this would not be notwithstanding that the reasons for such issue have not been included in the reasons recorded under section 148(2). However, Explanation 3 would not and cannot be construed so as to provide that if the reason on which the assessment is reopened fails, the assessing officer still can proceed to assess some other income which according to him had escaped assessment and which came to his light during the course of the assessment. Accordingly, this Court had held for assuming jurisdiction under section 147 of the Act what is essential is a valid reopening of a previously closed assessment and if the very foundation of the reopening is knocked out, any further proceeding in respect to such assessment naturally would not survive.

16. In the case on hand thus, as both the grounds in respect of which the notice has been issued fall and both these reasons recorded in the reopening of the assessment when are held to be unsustainable, for the reasons detailed hereinbefore, we hold that the assessing officer would not be in a position to make any additions on some other grounds which never formed part of the reasons recorded by him and therefore, as the very foundation of reopening is gone, also the notice impugned and consequently passed order of reassessment must be interfered with.

17. We need to briefly touch the submission of learned counsel Mr. Bhatt that while the assessing officer recorded his reasons, his belief was sustainable and because of subsequent pronouncement of law changed the scenario, that may not be the ground for interference in a writ jurisdiction. As discussed, a valid reopening of previously closed assessment is a must for assuming jurisdiction under section 147 of the Act. When the very foundation of such reassessment are both the reasons recorded and by virtue of binding decisions, neither of the grounds is sustainable, permitting such notice to be pursued would be an exercise in futility and this Court cannot disregard such vital aspects while

addressing the challenge to the notice of reopening.

18. Petition deserves to be allowed quashing the impugned notice for reopening dt. 27-3-2009 so also the order of reassessment dt. 30th Dec, 2009 and any further consequential proceedings taken thereunder.

19. Petition stands disposed of accordingly with no order as to costs. Rule is made absolute to the extent above.

