

(2008) 09 GUJ CK 0033

In the Gujarat High Court

Case No : Special Civil Application No. 1245 of 1993

Gujarat Petrosynthese Ltd. and Another	APPELLANT
Vs	
P.L. Rungta and Others	RESPONDENT

Date of Decision : 22-09-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 115J, 115J(1), 115J(2), 143(1), 143(1A)

Citation : (2008) 220 CTR 584 : (2009) 316 ITR 282

Hon'ble Judges : D.A. Mehta, J; Bankim N. Mehta, J

Bench : Division Bench

Advocate : S.N. Soparkar, for the Appellant; Manish R. Bhatt, R.P. Bhatt and Bharat J. Shelat, for the Respondent

Final Decision : Allowed

Judgement

D.A. Mehta, J.—Petitioner No. 1 herein, a limited company, has challenged the action of the respondent authorities, more particularly order dt. 31st Dec, 1992 made by respondent No. 1 u/s 264 of the IT Act, 1961 (the Act), and intimations dt. 8th July, 1992 u/s 143(1)(a) of the Act issued by respondent No. 2, and orders dt. 22nd Sept., 1992 u/s 154 of the Act made by respondent No. 2.

2. The assessment years in question are 1990-91 and 1991-92. It is the case of the petitioner that respondent No. 2, by making disallowance of carried forward unabsorbed depreciation and unabsorbed investment allowance relatable to asst. yrs. 1988-89 and 1989-90 by way of prima facie adjustment u/s 143(1)(a) of the Act for the two years under consideration, has acted without jurisdiction and contrary to the provisions of the Act. That the returns which were filed on 20th Dec, 1990 and 30th Dec, 1991 respectively for the two assessment years claiming set off of unabsorbed depreciation and unabsorbed investment allowance have been disallowed in purported exercise of powers u/s 143(1)(a) of the Act vide two intimations dt. 8th July, 1992.

3. The petitioner therefore moved respondent No. 2 by applications u/s 154 of

the Act. Vide two orders dt. 22nd Sept., 1992 the rectification applications came to be rejected by respondent No. 2 holding that no change was required to be made in the adjustments made to the returns of income. The petitioner carried the matter before respondent No. 1 by way of applications u/s 264 of the Act seeking revision of intimations u/s 143(1)(a) of the Act as well as setting aside orders dt. 22nd Sept., 1992 u/s 154 of the Act. Vide impugned order dt. 31st Dec, 1992 respondent No. 1 rejected applications made u/s 264 of the Act.

4. The case of the petitioner in brief is that by virtue of operation of Section 115J of the Act carried forward unabsorbed depreciation and unabsorbed investment allowance for earlier assessment years cannot be treated to be available only to the extent such amounts remain to be set off in the regular assessment made u/s 143(3) of the said two assessment years, namely, 1988-89 and 1989-90. That in fact the petitioner is entitled to have entire unabsorbed depreciation and unabsorbed investment allowance treated as not having been set off of in the earlier two assessment years and was entitled to carry forward and set off the entire amount of such unabsorbed depreciation and unabsorbed investment allowance. It was further submitted that, in any event, u/s 143(1)(a) of the Act what was permissible was accept the return and either raise a demand as per the said return or grant refund on the basis of such return. That the only exception was available in the proviso to Section 143(1)(a) of the Act which permits adjustment of arithmetical errors in the return, accounts or documents accompanying the return; allowance of any loss carried forward, deduction, allowance or relief which is not claimed in the return but which, on the basis of information available in such return, accounts or documents, is prima facie admissible; and disallowance of any loss carried forward, etc. which is similarly prima facie inadmissible. That in the present case the respondent authorities had committed error in law in placing reliance on the circular of CBDT for the purposes of coming to the conclusion that carried forward unabsorbed depreciation and unabsorbed investment allowance had to be restricted to the extent the said amount was not considered while computing minimum alternate tax (MAT) u/s 115J of the Act. That in any event the issue was highly debatable and could not have been considered to be prima facie inadmissible. In support of the submissions made the learned advocate for the petitioner has placed reliance on the following decisions:

- (i) Khatau Junkar Ltd. and another Vs. K.S. Pathania and another,
- (ii) Coates of India Ltd. Vs. Deputy Commissioner of Income Tax and Others (No. 1),
- (iii) Gujarat Poly-Avx Electronics Ltd. Vs. Deputy Commissioner of Income Tax,
- (iv) Lallacherra Tea Co. (P.) Ltd. Vs. Commissioner of Income Tax,
- (v) Commissioner of Income Tax Vs. Hindustan Electro Graphites Ltd.,
- (vi) Commissioner of Income Tax Vs. Malabar Building Products Ltd.,

(vii) Samtel Color Ltd. v. Union of India and Ors. (2002) 177 CTR 289 (Delhi): (2002) 258 ITR 1 ;

(viii) Karnataka Small Scale Industries Development Corporation Ltd. Vs. Commissioner of Income Tax, Bangalore, [2002]258ITR770(SC) ;

(ix) Commissioner of Income Tax Vs. Shikharchand Jain,

(x) Denish Industries Ltd. Vs. Income Tax Officer,

(xi) Kvaerner John Brown Engg. (India) (P) Ltd. v. Asstt. CIT rendered by the apex Court in Civil Appeal No. 3073 of 2008 on 29th April, 2008 [reported at (2008) 6 DTR (SC) 289 : (2008) 216 CTR 193 (SC)]

5. It was, therefore, submitted that the subsequent orders made u/s 154 of the Act and u/s 264 of the Act were also bad in law and had to be quashed and set aside.

6. As against that on behalf of the respondent authority it was submitted that in the first instance the Court was only required to consider whether the order made by respondent No. 1 u/s 264 of the Act could be treated to be bad in law in light of the settled position in law. That the Court in exercise of jurisdiction vested under Article 226 of the Constitution was not required to go into the correctness of the order on the basis of the correctness of intimations issued by respondent No. 2 authority, but the Court was only required to consider whether the decision making process while making the orders u/s 264 of the Act was one which could be interfered with. That even if on merits a different view was possible the Court should not disturb the order made u/s 264 of the Act.

7. Alternatively, it was pleaded that the issue stood concluded by a decision of the apex Court in the case of Karnataka Small Scale Industries Development Corporation Ltd. v. CIT (supra) to submit that by virtue of Sub-section (2) of Section 115J of the Act only to the extent of unabsorbed depreciation, unabsorbed investment allowance and unabsorbed business loss not set off would such amounts be available for set off in the regular assessments of subsequent years. That therefore, even if a debate could be said to exist at a given point of time when the apex Court has pronounced the scope of operation of Sub-section (2) of Section 115J of the Act such declaration of law had to be treated as being the law right from inception and, therefore, there was no error in the impugned orders so as to warrant interference. Referring to unreported decision in the case of Kvaerner John Brown Engg. (India) (P) Ltd. (supra) which had been relied upon by the petitioner it was pointed out that what was material for the purposes of working out additional tax u/s 143(1A) of the Act was the date on which the returns of income were taken up for being considered u/s 143(1)(a) of the Act. That in the present case on the date when the intimations for the two years under consideration were issued CBDT Circular No. 495 was in operation and the said circular in effect stated what the apex Court had stated subsequently and, therefore, respondent No. 2 was justified in making the

adjustments of unabsorbed depreciation and unabsorbed investment allowance which had already been considered in earlier assessment years while working out the profit for the purposes of MAT u/s 115J of the Act.

8. On behalf of the respondent authorities reliance was also placed on the apex Court decision in the case of Assistant Commissioner of Income Tax Vs. J.K. Synthetics Ltd., to submit that the earlier decision of apex Court in the case of CIT v. Hindustan Electro Graphites Ltd. (supra) had been distinguished and doubted by the subsequent Bench and, therefore, the said judgment could not be considered to be a good law.

9. Impugned order dt. 31st Dec, 1992 made u/s 264 of the Act for both the assessment years itself records. "The matter, in essence, pertains to the interpretation of Section 115J(2). For the sake of clarity, this Section is reproduced below". Therefore, even for testing the validity of order made u/s 264 of the Act one will have to consider as to whether interpretation of a provision can be considered to be within the scope of requirement of the proviso to Section 143(1)(a) of the Act. Therefore, the contention on behalf of the respondent authorities that the Court is not required to consider the scope of provisions of Section 143(1)(a) of the Act, and more particularly proviso thereunder, cannot be accepted. Once the revisional authority has himself recorded that the issue pertains to interpretation of a provision whether such an exercise is permissible while processing a return u/s 143(1)(a) of the Act has to be considered and the Court cannot be oblivious of the said issue.

10. In fact when one reads entire order of respondent No. 1 authority it becomes clear that both the petitioner assessee and the respondent authority have read Sub-section (2) of Section 115J of the Act in a contrary manner, namely, both of them have interpreted the provisions differently. This becomes clear from the following extract from the order made u/s 264 of the Act after reproduction of Sub-section (2) of Section 115J of the Act:

The plain and simple meaning of the above Section would be that the application of the provisions of Sub-section (1) of Section 115J shall not affect the determination and carry forward of any unabsorbed depreciation, investment allowance, business loss etc. However, the assessee wants it to be interpreted to mean that wherever tax has been levied on total income as computed u/s 115J(1) for the reasons that 30 per cent of the book profit was higher than the total income computed under the normal provisions of the IT Act then irrespective of the fact that set off for depreciation, investment allowance and business losses, if any, has actually been allowed in computing the total income under the provisions of the IT Act, it should be deemed that no such set off has been allowed and the assessee will be entitled to carry forward such depreciation and investment allowance for set off in future....

Thereafter, respondent No. 1 authority goes on to refer to the Budget Speech of Hon"ble Finance Minister while moving the Finance Bill, 1997 as well as

Explanatory Notes on the Provisions of the said Finance Bill in support of the interpretation placed by the respondent authorities.

11. In the circumstances, one will have to consider as to the scope of powers available to an assessing authority under the proviso to Section 143(1)(a) of the Act. The said proviso reads as under:

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely:

(i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified;

(ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, is prima facie admissible but which is not claimed in the return, shall be allowed;

(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed.

On a plain reading it becomes clear that insofar as Clause (i) is concerned, the same is only in relation to arithmetical errors in the return, accounts or documents accompanying the return which can be rectified. Clauses (ii) and (iii) relate to what is prima facie admissible or what is prima facie inadmissible but this has to be decided on the basis of the information available in such return, accounts or documents. Therefore, for the purposes of determining prima facie admissibility or prima facie inadmissibility of any loss, deduction, allowance, etc. the same has to be on the basis of the information available in the return filed by the assessee, or the accounts and documents accompanying such return. The return in question herein is the return for the assessment year in consideration and cannot be considered to be return for any other assessment year. For this purpose the accounts and documents will also have to be understood as being relatable to the return for the year under consideration before the assessing authority. For ascertainment of this purpose the Court had called upon the learned advocate for the petitioner to place on record the returns for the two years under consideration. On going through the said documents prima facie it is not possible to accept the contention of the respondent authorities.

12. In the case of *Khatau Junkar Ltd.* (supra) Bombay High Court has stated "In its literal sense, "prima facie" means on the face of it. Hence, on the face of the return and the documents and accounts accompanying it, the deduction claimed must be inadmissible. Only then, can it be disallowed under the proviso to Section 143(1)(a)."

13. In the case of *CIT v. Malabar Building Products Ltd.* (supra) Kerala High Court has explained the phrase "prima facie inadmissible" in the following words:

"Prima facie inadmissible" means without much debate or on the face of the document itself it can be stated that a mistake has been committed by the assessee.

14. Thus, it cannot be stated that the amount of unabsorbed depreciation and unabsorbed investment allowance to the extent considered for working out book profits for the purposes of Section 115J of the Act for earlier assessment years, namely asst. yrs. 1988-89 and 1989-90 can be treated to be prima facie inadmissible on the basis of the information available in the return, accounts, or documents accompanying the return for the two years under consideration. Record of any other assessment year cannot be considered. The Court is not required to consider whether such an exercise of disallowance is permissible in regular assessment proceedings u/s 143(3) of the Act.

15. There is another angle to the issue in question. As contended by the learned advocate for the petitioner, in any view of the matter, the issue is highly debatable and cannot be considered to be prima facie inadmissible in exercise of powers u/s 143(1)(a) of the Act. In support of this proposition the decision in case of Gujarat Poly-avx Electronics Ltd. (supra) was relied upon. In case of Gujarat Poly-avx Electronics Ltd. (supra) this High Court explained the word "prima facie" and stated as to in what circumstances the powers can be exercised in the following words:

Powers to make assessment in terms of its proviso can be invoked and when the claim is prima facie inadmissible or prima facie admissible, as the case may be, adjustment is to be made. The word "prima facie" clearly indicates that it must be first evidenced. A decision on the debatable issue is not envisaged....

16. The apex Court in the case of Commissioner of Income Tax, Uttar Pradesh Vs. Manmohan Das (Deceased), stated in the following words:

Whether the loss of profits or gains in any year may be carried forward to the following year and set off against the profits and gains of the same business, profession or vocation u/s 24 has to be determined by the ITO who deals with the assessment of the subsequent year. It is for the ITO dealing with the assessment in the subsequent year to determine whether the loss of the previous year may be set off against the profits of that year. A decision recorded by the ITO who computes the loss in the previous year u/s 24 that the loss cannot be set off against the income of the subsequent year is not binding on the assessee.

17. Therefore, even if for the sake of argument it could be considered that u/s 115J(2) of the Act a provision was made and the said provision was in operation in asst. yrs. 1988-89 and 1989-90, the same would not be binding on the AO while making assessment for the subsequent year as laid down by the apex Court. But the Court is not required to record any final opinion on merits of the issue. However, this proposition of law laid down by the apex Court at least indicates that the issue would be highly debatable. Even if the operation of Section 115J(2) of the Act for earlier years is applicable may be accepted for the

sake of argument, then to what extent the same could have bearing for the purposes of processing of return u/s 143(1)(a) of the Act in subsequent years cannot be considered to be free from doubt. In case of T.S. Balaram, Income Tax Officer, Company Circle IV, Bombay Vs. Volkart Brothers, Bombay, the apex Court has stated that:

It was not open to the ITO to go into the true scope of the relevant provisions of the Act in a proceeding u/s 154 of the IT Act, 1961. A mistake apparent on the record must be an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions....

18. As can be seen from the decisions cited on behalf of the petitioner and cited on behalf of the respondent authority as well as what is noted hereinbefore, on the date when the returns of income for the two years under consideration were filed and the returns taken up for processing u/s 143(1)(a) of the Act there was no finality as to the true scope of provisions of Section 115J(2) of the Act so as to warrant disallowance of carried forward unabsorbed depreciation and unabsorbed investment allowance by reducing the figure on the basis of only CBDT circular.

19. In result, it is apparent that the respondent authorities could not have undertaken the exercise of disallowance of carried forward unabsorbed depreciation and unabsorbed investment allowance of earlier years by way of prima facie adjustment for the two years in question. Once that exercise was not permissible the consequential orders made u/s 154 of the Act and Section 264 of the Act cannot be sustained.

Accordingly, intimations u/s 143(1)(a) of the Act both dt. 8th July, 1992 (Exhs. A and B), orders u/s 154 of the Act dt. 22nd Sept., 1992 (Exhs. D and E), and order u/s 264 of the Act dt. 31st Dec, 1992 (Exh. I) are hereby quashed and set aside. In light of the view that the Court has taken it is not necessary to deal with the relief prayed vide prayer Clause 29(c). The petition is accordingly allowed in the aforesaid terms. Rule made absolute. There shall be no order as to costs.