
(2000) 03 GUJ CK 0081
In the Gujarat High Court
Case No : Tax Appeal No. 121 of 1999

Income Tax Officer

APPELLANT

Vs

Gujarat Power Corp. Ltd.

RESPONDENT

Date of Decision : 16-03-2000

Acts Referred:

Income Tax Act, 1961 — Section 143(1)

Citation : (2002) 254 ITR 217

Hon'ble Judges : M.S. Shah, J; Anil R. Dave, J

Bench : Division Bench

Advocate : B.B. Naik and Manish R. Bhatt, for the Appellant; J.P. Shah, for the Respondent

Final Decision : Dismissed

Judgement

1. This tax appeal has been filed at the instance of the Revenue setting out the following question of law :

"Whether the Appellate Tribunal is right in law and on facts in holding that the addition of Rs. 1,90,299 being pre-operative interest is not permissible within the provisions of Section 143(1)(a) of the Income Tax Act, 1961 ?"

2. The brief facts pertaining to the case are as under :

3. The respondent-assessee had filed a return of income for the assessment year 1991-92 showing "nil" income as the company had commissioned its business during the relevant assessment year. Along with the return, a note was filed to the effect that during the said assessment year the respondent-assessee had received a sum of Rs. 5.50 crores from the Government of Gujarat and from the Gujarat Electricity Board as an advance towards the share capital and as the said amount was not required by the respondent-company immediately, the respondent-company had deposited the same with a scheduled bank in short-term deposit and the company had earned Rs. 1,90,299 by way of interest. It was further stated that the said amount of interest which was received was not a

revenue income as the company had not commenced business during the relevant assessment year and, therefore, the respondent-company had deducted the said amount from the expenditure of Rs. 11,26,347 which was an expenditure pertaining to pre-operative project expenditure and it had pleaded that a sum of Rs. 1,90,299 which was received as interest was not taxable. It was further stated in the said note that the said amount of interest was not income and that it would reduce the cost of the project, on the basis of the judgment delivered in the case of Commissioner of Income Tax Vs. Nagarjuna Steels Ltd., . The said return was filed on December 31, 1991, and the assessment was made on October 19, 1992.

4. The appellant received a notice under the provisions of Section 143(1)(a) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), that adjustment of interest on the loss which was declared was not proper as the amount of Rs. 1,90,230 was in fact income of the respondent-assessee for the assessment year 1991-92 and, therefore, the said amount ought not to have been deducted from the cost of the project and should have been treated as an income and, accordingly additional tax was levied. Being aggrieved by the said order, the respondent-assessee challenged the order before the Commissioner of Income Tax (Appeals). After hearing the respondent-assessee, the appeal was dismissed by the order dated August 12, 1993. Being aggrieved by the order, respondent-assessee filed an appeal before the Income Tax Tribunal and the said appeal was allowed by an order dated November 19, 1998.

5. The Revenue has been aggrieved by the said order passed in appeal and therefore has approached this court with a prayer that the appeal be admitted and be heard on the question referred to hereinabove.

6. We have heard the learned advocate, Shri Naik, appearing for the appellant. It has been submitted by the learned advocate, Shri Naik, appearing for the appellant, that, in the instant case, the Tribunal had clearly erred by allowing the appeal for the reason that the Supreme Court had decided in Commissioner of Income Tax Bihar-II Patna Vs. Bokaro Steel Limited, Bokaro, that whenever any amount in the nature of revenue is received by a company before it commences its business, the income so earned cannot be treated as a capital receipt but it would be treated as an income of the assessee from any independent source and the said income becomes taxable. It has also been submitted by Mr. Naik that in view of the law laid down by the Supreme Court, the Tribunal was in error while permitting the assessee to deduct the amount of interest from the cost of the project. It has been submitted by him that looking to the facts of the case an important and a substantial question of law has arisen and, therefore, the appeal deserves to be admitted.

7. In pursuance of the notice issued by this court, Shri J.P. Shah, the learned advocate, has appeared for the respondent-assessee. It has mainly been submitted by him that at the time when the respondent-company had filed its return, the respondent-assessee was not aware of the law which was declared by

the Supreme Court in Commissioner of Income Tax Bihar-II Patna Vs. Bokaro Steel Limited, Bokaro, . The sum and substance of his submission is that at the time when the return was filed by the respondent-assessee the view which was expressed by the Andhra Pradesh High Court in Commissioner of Income Tax Vs. Nagarjuna Steels Ltd., , was very clear to the effect that any income which a company receives before it commences its business would not become revenue income and, therefore, the income which the respondent-company had received by way of interest was not revenue income and was not taxable. It has further been submitted that there was no suppression on the part of the respondent-company as the said fact had clearly been stated in the note annexed to the return for the assessment year 1991-92 which has been reproduced at page No. 16 of the paper book. It has further been submitted by him that, at the time of filing of the return, the assessee is supposed to file his return as per the law prevailing at the relevant time. It has been submitted that at the time of filing of the return the respondent-assessee had no benefit of knowing the legal position which was pronounced by the Supreme Court at a subsequent point of time after the return had been filed and the assessee cannot be expected to know the law which is to be pronounced by the Supreme Court or any other court in future and in the circumstances the action of the respondent-authority under the provisions of Section 143(1)(a) was not called for. He has relied upon the judgment delivered in the case of Commissioner of Income Tax Vs. Nagarjuna Steels Ltd., to show that at the time when the return was filed one of the views with regard to treatment of income of an assessee-company which was earned before the commencement of its business. It has thereafter been submitted that whenever there are two views possible, it is open to the assessee to accept one of the views and he may file his return accordingly. In support of his above referred submission, he has relied upon certain circulars which have been issued by the Department from time to time. He has referred to a circular issued by the Central Board of Direct Taxes dated April 4, 1989. He has drawn our attention to paragraph No. 9 of the said circular which reads as under :

"In the context of the legal positions as outlined above, it follows that it will not be permissible for the Assessing Officer to disallow a claim for deduction, allowance or relief in cases where the claim is made on the basis of the decision of any High Court, the Appellate Tribunal or other appellate authority, even though a contrary view in the matter may have been expressed by another High Court or another Bench of the Tribunal or any other appellate authority. The fact that the claim is based on a decision which has not been accepted by the Board will also not make any difference to this position."

8. On a perusal of the said circular it is very clear that it would not be open to the Assessing Officer to disallow a claim for deduction, allowance or relief in cases where the claim is made on the basis of a decision of any High Court, the Appellate Tribunal or other appellate authority, even though a contrary view in the matter may have been expressed by another High Court or another Bench of the Tribunal or any other appellate authority. In the instant case according to him

the view expressed by the Andhra Pradesh High Court which has been referred to hereinabove was clearly in favour of the assessee and, therefore, the assessee was entitled to claim the said benefit. He has thereafter referred to a Circular No. 689 (see [1994] 209 ITR 75), dated August 24, 1994, issued by the Central Board of Direct Taxes giving guidelines with regard to disallowance of the claims made by the assessee. He has drawn our attention to para, and example (2) of the said circular which reads as under:

"Example :

Deductions of items like Income Tax, wealth-tax, personal expenses, depreciation claimed on conveyances under the head "Salary", depreciation claimed under the head "House property" and the like. The items of disallowance should be such that no two opinions are possible on their inadmissibility."

9. He has placed reliance also on Section 119 of the Act to the effect that it is open to the Central Board of Direct Taxes to issue such orders, instructions and directions to the Income Tax authorities which it may deem fit and as per the provisions of said section, the orders, instructions and directions given by the Central Board of Direct Taxes are binding upon the Income Tax authorities. In view of the said legal position, he has submitted that the instructions given by the Central Board of Direct Taxes under the circular referred to herein-above ought to have been followed by the Income Tax authorities and therefore initiation of proceedings under the provisions of Section 143(1)(a) of the Act were uncalled for by the Income Tax authorities.

10. He has relied upon the judgment delivered by the Supreme Court and other courts referring to the effect of retrospective amendments made in legal position, namely, *Modern Fibotex India Ltd. and Another Vs. Deputy Commissioner of Income Tax and Others*, , the ratio of which explains the limitation on the power u/s 143(1)(a) of the Act. He has similarly relied on *Commissioner of Income Tax Vs. Hindustan Electrographite Ltd.*, ; *Gujarat Poly-Avx Electronics Ltd. Vs. Deputy Commissioner of Income Tax*, and *S.M. Trivedi Vs. Addl. Commissioner of Income Tax*, .

11. The sum and substance of the judgments cited by the learned advocate, Shri J.P. Shah, is that the Assessing Officer and the Income Tax authorities have to consider the law which was prevailing at the time when the return was filed. Any subsequent amendment in the law or any pronouncement of law made subsequent to the filing of the return cannot be considered for the purpose of initiation of proceedings under the provisions of Section 143(1)(a) of the Act.

12. We have carefully gone through the judgment cited by the learned advocates and after hearing them we are of the view that in this appeal no substantial question of law has arisen. The law laid down by the Supreme Court is clear and it is to the effect that the law which was in force at the time of filing of the return is to be considered for the purpose of initiating proceedings under the provisions of Section 143(1)(a) of the Act. As the return was filed as per the legal position

prevailing at the relevant time and as the asses-see had revealed the relevant facts by way of a note, we are of the view that the order of the Tribunal is just and legal.

13. In the circumstances, we do not find any substance in the appeal. The appeal is dismissed with no order as to costs.