(2014) 03 GUJ CK 0129

In the Gujarat High Court

Case No : Special Civil Application No. 2160 of 2014

Ranjit Projects P. Ltd. APPELLANT

Vs

Deputy Commissioner of Income Tax RESPONDENT

Date of Decision : 18-03-2014

Acts Referred:

Income Tax Act, 1961 — Section 115JB, 139, 142, 143, 143(1A)

Citation : (2015) 372 ITR 529

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

Bench : Division Bench

Advocate : S.N. Soparkar, Senior Advocate and B.S. Soparkar, Advocate, for the Appellant; Sudhir M. Mehta, for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.?Heard learned counsel for the parties for final disposal of the petition. The petitioner has challenged a notice dated March 22, 2013, issued by the respondent-Assessing Officer seeking to reopen the assessment of the petitioner for the assessment year 2006-07, which was previously framed after scrutiny. At the request of the petitioner, the Assessing Officer supplied the reasons recorded by him for issuing such notice. The reasons read as under:

"In this case, the assessee engaged in infrastructure development projects in sector road, bridges and bypasses has filed its return for the assessment year 2006-07 on January 28, 2006, declaring ''nil'' income and paid tax of Rs. 35,46,507 under section 115JB. The income under the normal provisions of the Act was arrived at after claiming 100 per cent deduction of the profits and gains of the business of Rs. 3,52,02,368 under section 80-IA of the Act. the case was completed in scrutiny manner under section 143(3) of the Act on December 22, 2008, by accepting the income declared by the assessee in its return and tax was charged under section 115JB. On verification of the assessment records revealed that the assessee was allowed deduction under section 80-IA for development of four lane rail over bridge (ROB) in lieu of an existing under pass at Chhayapuri

(Near GSFC junction) on Mumbai-Delhi Broad Gauge Railway Line, Baroda. The project, as per the assessee was given to it on build operate and transfer (BOT) basis by the Gujarat State Road Development Corporation, a Government of Gujarat enterprise incorporated under the Companies Act, 1956. From the records, it was observed that the assessee has entered into a ''concession agreement'' with GSRDC on October 13, 2001, wherein the assessee was entitled to collect from ROB for 181 months and at the end of the stipulated period ROB was to be transferred to the Government of Gujarat. Based on the concession agreement between the assessee and GSRDC, the Government of Gujarat issued Notification No. Toll/102001 (20) Part 1 Prvt. Cell, dated March 7, 2003, authorising the assessee to collect toll from ROB. Thus, it was amply clear that the assessee had not entered into any agreement with the Central Government or the State Government or the local authority or any other statutory body as required in section 80-IA(4)(i)(a) of the Act. GSRDC was a company and not a statutory body nor local authority. Thus, the condition laid down in section 80-IA(4)(i)(a) of the Act was not fulfilled. The assessee was only sub-contracted the project allotted to GSRDC by the State . Government. Further, the Government notification authorising the assessee to collect toll was also issued to GSRDC with copy to the Collector and not to the assessee-company. Thus, in view of non-fulfillment of the conditions of section 80-IA of the Act the deduction allowed to the tune of Rs. 3,52,02,368 was irregular and liable to be disallowed. The underassessment of Rs. 3,52,02,368 involved income-tax as under:

In view of the above facts, I have reason to believe that short levy of income-tax is to the extent of Rs. 1,10,42,471. Accordingly, the assessment is reopened under section 147 of the Income-tax Act, 1961."

The petitioner, thereupon, raised objections to the proposal of the Assessing Officer to reopen the assessment under a communication dated November 26, 2013. Such objections, however, were rejected by the Assessing Officer by an order dated December 23, 2013. Hence, the petition.

2. Having heard the learned advocates for the parties and having perused the documents on record, we notice that the reasons recorded by the Assessing Officer pertain to the petitioner''s claim for deduction under section 80-IA of the Income-tax Act, 1961 ("the Act" for short). The Assessing Officer had objection to the petitioner claiming such deduction with respect to the petitioner''s income of toll collection from a four lane rail overbridge constructed by the petitioner in terms of the agreement with the GSRD Corporation. The petitioner had constructed the said overbridge on build, operate and transfer (BOT) basis. Under the agreement, the petitioner was allowed to collect toll at a specified rate for a certain period. The Assessing Officer held a belief that GSRDC was a company and not a statutory body or local authority, and, therefore, the condition laid down in section 80-IA(4)(i)(a) of the Act was not fulfilled. The Assessing Officer further observed that the petitioner had only sub-contracted the project allotted to the GSRDC by the State Government. The Government

had issued a notification authorising collection of toll, which is also issued in favour of the GSRDC and not the assessee-company. On such grounds, he held a reason to believe that the income chargeable to tax had escaped the assessment.

3. In the entire reasons recorded, the Assessing Officer did not point out that such income chargeable to tax had escaped assessment due to failure on the part of the assessee to disclose truly and fully all material facts. Quite part such narration being simply absent from the reasons recorded, no such conclusion can be reached on the basis of the material emerging either from the reasons recorded, or even outside of it. In fact, the reasons recorded suggest that it was on verification of the assessment records by the Assessing Officer that it was revealed to him the facts noted above. Thus, the entire formation of belief is founded on the material already on the record. Therefore, in addition to there being no suggestion by the Assessing Officer that income chargeable to tax had escaped assessment for the reason of the assessee failing to disclose truly and fully all material facts, demonstrably, from the record it emerges to the contrary. The notice for reopening having been issued beyond the period of four years from the end of the relevant assessment year and the original assessment having been completed after scrutiny, this additional requirement emerging from the proviso to section 147 of the Act that income chargeable to tax had escaped assessment for the failure of the assessee to disclose truly and fully all material facts must be satisfied. In that view of the matter, we are of the opinion that the notice for reopening lacks validity.

4. Counsel for the Revenue, however, raised an unusual contention. He submitted that section 80-IA of the Act was amended by the Finance Act of 2009 with retrospective effect from April 1, 2000, and to such amendment, an Explanation was added to the said section under which a person acting as a works contractor would not be eligible for deduction under section 80-IA(4) of the Act.

5. Without expressing any opinion on the true interpretation of the said Explanation, in our opinion, any amendment in law, even with retrospective effect, would not authorise the Assessing Officer to reopen the assessment previously framed after scrutiny beyond the period of four years from the end of the relevant assessment year unless the conditions laid down under the proviso to section 147 of the Act are fulfilled. This is what was held by this court in the case of Denish Industries Ltd. Vs. Income Tax Officer, in the following terms (page 345):

"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 not 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.

The same reasoning would apply for holding that for the purpose of deciding the question under section 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.

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 under section 147 read with sections 148 and 149 was not fulfilled. The impugned notice is, therefore, without any authority of law."

6. In case of Sadbhav Engineering Ltd. Vs. Deputy Commissioner of Income Tax (OSD), , the court held and observed as under (page 486):

"In the facts of the present case, relevant assessment years are 2003-04 and 2004-05. The notice under section 148 of the Act relating to assessment year 2003-04 has been issued on March 29, 2010, whereas the notice under section 148 of the Act relating to the assessment year 2004-05 has been issued on April 29, 2010. Computing the period between the end of the relevant assessment years and the date of issuance of the notices under section 148, it is evident that both the notices have been issued beyond a period of four years from the end of the relevant assessment years. The first proviso to section 147 of the Act lays down that where an assessment under sub-section (3) of section 143 or the said section has been made for the relevant assessment year, no action shall be taken under the section after expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to make a return under section 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 his assessment. Thus, for the purpose of invoking section 147 after the expiry of four years from the end of the relevant assessment year, the income chargeable to tax should have escaped assessment by reason of failure on the part of the assessee either (i) to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148, or (ii) to disclose fully and truly all material facts necessary for his assessment. In the facts of the present case, it is an undisputed position that there is no failure on the part of the assessee in so far as the first condition is concerned. In so far as the second condition, viz., failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment is concerned, on a plain reading of the reasons recorded, it is apparent that the same are totally silent as regards any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the relevant assessment years. From the reasons recorded it is apparent the assessments are sought to be reopened on the ground that as per the explanation given below sub-section (13) of section 80-IA of the Act, which has been substituted by the Finance (No. 2) Act of 2009 with retrospective effect from April 1, 2000, deduction under section 80-IA would not be admissible to an assessee who carries on business which is in the nature of works contract. That the petitioner assessee being a civil contractor working for the Government is not eligible for deduction under section 80-IA as claimed by the assessee, hence, there was reason to believe that income chargeable to tax has escaped assessment for the assessment years under consideration. The record of the case does not in any manner indicate that proceedings under section 147 are sought to be reopened by reason of failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for assessment years under consideration. The respondent in its affidavit-in-reply also has not disputed the fact that there is no failure on the part of the petitioner to disclose fully and truly all material facts. Only by way of Submission advanced before the court it is contended that in the light of the amendment of section 80-IB, it is deemed that the petitioner has failed to disclose the correct facts. As to whether or not there is any failure on the part of the assessee in disclosing fully and truly all material facts necessary for his assessment, is a matter of fact and there can be no deemed failure as is sought to be contended on behalf of the respondents. In the circumstances, in absence of any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the assessment years under consideration, the notices under section 148 of the Act having been issued after the expiry of a period of four years from the end of the relevant assessment years, the very initiation of proceedings under section 147 of the Act stand vitiated and as such cannot be sustained."

7. Counsel for the Revenue, however, relied on the Division Bench decision of the Bombay High Court in case of Commissioner of Income Tax, Bombay City Vs. Bai Navajbai N. Gamadia, in which it was observed that an amendment in law with retrospective effect what form information on the basis of which it would be open for the Assessing Officer to reopen the assessment. The question of such assessment being reopened beyond the period of four years, in the said case did not arise. The additional requirement of the tax escaping assessment for the

reason of the assessee failing to disclose truly and fully all material facts was not a question needed to be gone into by the court. In the result, the impugned notice dated March 22, 2013, is quashed. The petition stands disposed of accordingly.