

(2014) 05 GUJ CK 0007

In the Gujarat High Court

Case No : Special Civil Application No. 3289 of 2014

Synbiotics Ltd.

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 06-05-2014

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 147, 148, 32, 32(2)

Citation : (2015) 370 ITR 119

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

Bench : Division Bench

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

Judgement

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Akil Abdul Hamid Kureshi, J.—Heard learned advocates for the parties for final disposal of the petition. The petitioner has challenged a notice dated March 26, 2013, issued by the respondent-Assessing Officer under section 148 of the Income-tax Act, 1961 ("the Act" for short).

2. Brief facts are as under:

The petitioner is a company registered under the Companies Act, 1956. For the assessment year 2008-09, the petitioner filed its return of income on March 31, 2010, declaring a total income of Rs. 1.77 crores (rounded off). In such return, the petitioner had claimed set off of brought forward unabsorbed depreciation allowance of Rs. 4.26 crores (rounded off) pertaining to the period between the assessment year 1984-85 and the assessment year 2007-08 against the petitioner's income from long-term capital gains arising during the year under consideration. Such return was taken in scrutiny by the Assessing Officer. He framed the assessment on December 29, 2010, assessing the total income of the petitioner at Rs. 13.52 crores (rounded off). He, however, made no disallowances on the set off claimed by the assessee of the brought forward unabsorbed

depreciation allowances of Rs. 4.26 crores. It is this scrutiny assessment which the respondent desired to reopen and for which the impugned notice came to be issued. The notice thus was issued within a period of four years from the end of the relevant assessment year.

3. At the request of the petitioner, the respondent supplied reasons recorded by him for issuing such a notice. The reasons read as under:

"With reference to your requirement of reasons for reopening, it is stated that you had filed your return of income for the assessment year 2008-09 on March 31, 2010, declaring a total income of Rs. 177.43 lakhs. Further, assessment order under section 143(3) of the Act was finalised in your case on December 29, 2010, determining a total income at Rs. 1352.69 lakhs.

As per the record, it is revealed that brought forward depreciation of Rs. 77.10 lakhs pertaining to earlier years was to be set off in the assessment year 2008-09, however, as per the assessment order set off of unabsorbed depreciation of earlier years amounting to Rs. 426.57 lakhs had been allowed. Thus, there was excess set off of depreciation to the tune of Rs. 349.47 lakhs.

The irregular set off of depreciation resulted in underassessment of Rs. 349.47 lakhs.

Thus, the income chargeable to tax had escaped assessment within the meaning of section 147 of the Income-tax Act, 1961. And accordingly your case was reopened by issue of notice under section 148."

4. The petitioner raised detailed objections to the Assessing Officer reopening the assessment under his letter dated December 16, 2013. The Supreme Court in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, , while providing for a mechanism for supplying the reasons recorded for reopening the assessment has further provided that the assessee would be entitled to file objections to issuance of notice and the Assessing Officer would be bound to dispose of the same by passing a speaking order. In the case before the Supreme Court, it was provided that as the reasons have been disclosed in the proceedings, the Assessing Officer would have to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment.

5. In view of the decision of the Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra), therefore, the Assessing Officer was required to dispose of the objections of the petitioner before finalising the assessment. In the present case, however, he passed an order of reassessment on January 22, 2014, and disposed of the objections by an order dated January 17, 2014, but the copy of which was served on the petitioner on January 23, 2014. At that stage, the petitioner approached this court challenging the very notice of reopening on various grounds.

6. Counsel for the petitioner has raised the following contentions in support of the petition--(i) that the Assessing Officer breached the directives of the

Supreme Court given in case of GKN Driveshafts (India) Ltd. (supra). Under such mechanism, the Assessing Officer was not only required to supply reasons recorded for issuing notice for reopening but also dispose of the objections raised by the assessee before finalising the assessment. If the decision of the Assessing Officer is adverse, the assessee could take recourse to remedies under the law. In the present case, though the objections were disposed of shortly before the final order of assessment, the same was served only after framing the assessment. In the facts of the case, however, the learned counsel stated that he would not like to go back to the Assessing Officer on this ground and pressed his challenge for reopening itself in this petition. (ii) that the Assessing Officer had issued notice for reopening at the instance of the audit party. To the audit objection so raised with respect to this very item, the petitioner had made a representation pointing out why such objection was not valid. Thereafter, the Assessing Officer issued the notice recording reasons same as those mentioned by the audit party. (iii) In any case, the reasons recorded lack validity.

7. Our attention was drawn to a decision of this court in the case of General Motors India (P) Ltd. Vs. Deputy Commissioner of Income Tax, to contend that on the very same grounds, where in case of another assessee, assessment was sought to be reopened, this court quashed the reopening holding that the very ground was not legally tenable.

8. On the other hand, learned counsel, Shri K.M. Parikh, for the Revenue opposed the petition contending that (i) the Assessing Officer had independently applied his mind on the issue raised by the Revenue audit party and only upon being satisfied that income chargeable to tax had escaped assessment, he issued the impugned notice by recording his reasons. (ii) The notice has been issued within a period of four years from the end of the relevant assessment year. In the original assessment, this issue was not examined. Within four years, therefore, the Assessing Officer must be allowed to reassess the income which had escaped the assessment. The decision of this court in the case of General Motors India P. Ltd. (supra) was carried in appeal before the Supreme Court. While dismissing the special leave petition, the Supreme Court observed that, "the question of law is kept open".

9. Since learned counsel, Shri Soparkar, has given up challenge to the order of assessment, without following the mechanism provided by the Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra), we would examine the substantive challenges in the petition. However, we cannot help deprecate the action of the Assessing Officer of framing the assessment almost simultaneously with rejection of the objections raised by the assessee. It may be that the order rejecting the objections was passed a couple of days before passing of the assessment order. The fact remains that such order of rejection was served on the petitioner after the assessment order was passed. This completely denies the assessee an opportunity to study the grounds of rejection of his objections and to take further measures, if so advised. This court, in the case of Garden Finance

Ltd. Vs. Assistant Commissioner of Income Tax, repelled the contention of the Revenue that after the decision of Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra), it would not be open for the assessee to challenge a notice under section 148 of the Act. The Third Member to whom, upon a difference of opinion between the two members of the Bench was made, observed as under (page 87 of 268 ITR):

"What the Supreme Court has now done in the GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, is not to whittle down the principle laid down by the Constitution Bench of the apex court in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, but to require the assessee first to lodge preliminary objection before the Assessing Officer who is bound to decide the preliminary objections to issuance of the reassessment notice by passing a speaking order and, therefore, if such order on the preliminary objections is still against the assessee, the assessee will get an opportunity to challenge the same by filing a writ petition so that he does not have to wait till completion of the reassessment proceedings which would have entitled the liability to pay tax and interest on reassessment and also to go through the gamut of appeal, the second appeal before the Income-tax Appellate Tribunal and then reference/tax appeal to the High Court.

Viewed in this light, it appears to me that the rigour of availing of the alternative remedy before the Assessing Officer for objecting to the reassessment notice under section 148 has been considerably softened by the apex court in GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, in the year 2003. In my view, therefore, the GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, does not run counter to the Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, but it merely provides for challenge to the reassessment notice in two stages, that is--

- (i) raising preliminary objections before the Assessing Officer and in case of failure before the Assessing Officer,
- (ii) challenging the speaking order of the Assessing Officer under section 148 of the Act.

May be in a given case, the exercise of the powers under section 148 may be so arbitrary or mala fide that the court may entertain the petition without requiring the assessee to approach the Assessing Officer but such cases would be few and far between. For instance, in Mohinder Singh Malik Vs. Chief Commissioner of Income Tax and Others, , the Punjab and Haryana High Court was concerned with the challenge to the notice under section 148 of the Act where the grievance of the petitioner was that the notice was issued with an ulterior motive and that the Assessing Officer had been demanding illegal gratification from the assessee, failing which the Assessing Officer was threatening that the assessment would be reopened and that it was because of non-compliance with such demand that the impugned notice came to be issued. It was in the context of such facts that

although the court did not record any positive finding against the Assessing Officer, looking to the reasons recorded and the circumstances in which the notice was issued, the court raised its eyebrows and looked at the merits of the matter and held that the issuance of the notice was not at all justified."

10. We do not elaborate on this issue since in our judgment dated March 31, 2014, in case of Sahkari Khand Udyog Mandal Ltd. v. Asst. CIT (Special Civil Application No. 3955 of 2014) [2015] 370 ITR 107 (Guj.) we have provided detailed mechanism for curtailing the time lags at different stages of reassessment proceedings.

11. We now come to the challenge to the notice for reopening itself. We have noted the reasons recorded by the Assessing Officer for issuing such notice. His objection is with respect to the assessee setting off the brought forward depreciation loss pertaining to earlier years against the income of the current year. In his opinion, such set off was irregular. Though no specific ground is mentioned why he holds a belief that the set off claimed was irregular, it appears that his reference is to the provisions of section 32(2) of the Act and he objects to the loss being carried beyond eight years. We, however, find on similar issue when in the case of General Motors India P. Ltd. (supra), the Assessing Officer had issued notice for reopening, this court quashed the same, inter alia, on the ground that the reason itself was not valid. The court held that the unabsorbed depreciation could be allowed to be carried forward and set off for a period beyond eight years also, without any reference to the time limit. It was held and observed as under (page 266 of 354 ITR):

"The Central Board of Direct Taxes Circular clarifies the intent of the amendment that it is for enabling the industry to conserve sufficient funds to replace plant and machinery and accordingly the amendment dispenses with the restriction of 8 years for carry forward and set off of unabsorbed depreciation. The amendment is applicable from the assessment year 2002-03 and subsequent years. This means that any unabsorbed depreciation available to an assessee on 1st day of April, 2002 (assessment year 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001 and not by the provisions of section 32(2) as it stood before the said amendment. Had the intention of the Legislature been to allow the unabsorbed depreciation allowance worked out in the assessment year 1997-98 only for eight subsequent assessment years even after the amendment of section 32(2) by Finance Act, 2001 it would have incorporated a provision to that effect. However, it does not contain any such provision. Hence keeping in view the purpose of amendment of section 32(2) of the Act, a purposive and harmonious interpretation has to be taken. While construing taxing statutes, rule of strict interpretation has to be applied, giving fair and reasonable construction to the language of the section without leaning to the side of assessee or the Revenue. But if the Legislature fails to express clearly and the assessee becomes entitled for a benefit within the ambit of the section by the clear words used in the

section, the benefit accruing to the assessee cannot be denied. However, Circular No. 14 of 2001 ([2001] 252 ITR (St.) 65) had clarified that under section 32(2), in computing the profits and gains of business or profession for any previous year, deduction of depreciation under section 32 shall be mandatory. Therefore, the provisions of section 32(2) as amended by Finance Act, 2001, would allow the unabsorbed depreciation allowance available in the assessment years 1997-98, 1999-2000, 2000-01 and 2001-02 to be carried forward to the succeeding years, and if any unabsorbed depreciation or part thereof could not be set off till the assessment year 2002-03 then it would be carried forward till the time it is set off against the profits and gains of subsequent years.

Therefore, it can be said that, current depreciation is deductible in the first place from the income of the business to which it relates. If such depreciation amount is larger than the amount of the profits of that business, then such excess comes for absorption from the profits and gains from any other business or business, if any, carried on by the assessee. If a balance is left even thereafter, that becomes deductible from out of income from any source under any of the other heads of income during that year. In case there is a still balance left over, it is to be treated as unabsorbed depreciation and it is taken to the next succeeding year. Where there is current depreciation for such succeeding year the unabsorbed depreciation is added to the current depreciation for such succeeding year and is deemed as part thereof. If, however, there is no current depreciation for such succeeding year, the unabsorbed depreciation becomes the depreciation allowance for such succeeding year. We are of the considered opinion that any unabsorbed depreciation available to an assessee on 1st day of April 2002 (assessment year 2002-03) will be dealt with in accordance with the provisions of section 32(2) as amended by Finance Act, 2001. And once the Circular No. 14 of 2001 clarified that the restriction of 8 years for carry forward and set off of unabsorbed depreciation had been dispensed with, the unabsorbed depreciation from the assessment year 1997-98 up to the assessment year 2001-02 got carried forward to the assessment year 2002-03 and became part thereof, it came to be governed by the provisions of section 32(2) as amended by Finance Act, 2001 and were available for carry forward and set off against the profits and gains of subsequent years, without any limit whatsoever."

12. On such basis, the notice for reopening was quashed.

13. Our attention was also drawn to a decision of this court in the case of CIT v. Integra Engineering India Ltd. dated December 9, 2013, in Tax Appeal No. 380 of 2013. Of course in the context of tax appeal, the decision in case of General Motors India P. Ltd. (supra) was followed. Under the circumstances, the very basis for the Assessing Officer to uphold a belief that income chargeable to tax had escaped assessment lacks validity. On this ground itself, we are inclined to quash the impugned notice. The reference to the order of the Supreme Court would be of no avail to the Revenue since in such order all that was provided was that the question of law was kept open. This, however, does not mean that the

decision of this court was reversed or that the decision by a cognate Bench would not continue to bind us.

14. Under the circumstances, we do not find it necessary to enter into the arena of judging whether the Assessing Officer had issued notice on the strength of his own belief that income chargeable to tax had escaped assessment upon the issue being pointed out by the Revenue audit party or that in the plain terms, it was the opinion of the Revenue audit party upon which the Assessing Officer had acted without independent application of mind. The impugned notice dated March 26, 2013, is quashed. Resultantly, all consequential actions also do not survive. The petition is allowed and disposed of accordingly.