(2011) 03 GUJ CK 0154

In the Gujarat High Court

Case No : Special Civil Application No. 3352 of 2001

United Phosphorus Ltd. APPELLANT

Vs

Addl. CIT RESPONDENT

Date of Decision : 08-03-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 143(3), 147, 148, 28, 80(1)

Citation : (2011) 03 GUJ CK 0154

Hon'ble Judges : Harsha Devani, J;H.B. Antani, J

Bench : Division Bench

Advocate : S.N. Soparkar, for the Appellant; Manish JR. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.—By this petition under Article 226 of the Constitution of India, the petitioner has challenged the notice dt. 29-3-2001 issued by the respondent u/s 148 of the IT Act, 1961 (the Act) reopening the assessment of the petitioner for the assessment'' year 1996-97.

2. The petitioner, a limited company filed its return of income for assessment year 1996-97 on 28-11-1995 (sic) declaring total income of Rs. nil. Subsequently, assessment came to be framed u/s 143(3) of the Act at an income of Rs. 19,84,30,202 on 24-3-1999. The petitioner carried the matter in appeal before the CIT(A), Surat who vide order dt. 13-3-2000 partly allowed the appeal. The order of the CIT(A) was carried further in appeal before the income tax Appellate Tribunal (the Tribunal) both by the petitioner as well as the IT Department which was pending at the time of filing the present petition. Thereafter, by the impugned notice dt. 31-3- 2001, the petitioners assessment for assessment year 1996-97 came to be reopened. The petitioner, therefore, vide letter dt. 3-4-2001, requested the respondent to furnish the reasons for issuing the notice u/s 148 of the Act. The respondent vide letter dt. 12-4-2001

informed the petitioner that there was no statutory provision for providing "reasons recorded for issuing notice u/s 148". Since the copy of the reasons was not provided to the petitioner and the proceedings were also not dropped, the petitioner has filed the present petition challenging the aforesaid notice u/s 148 of the Act.

3. In response to the petition, the respondent has filed an affidavit-in-reply annexing along therewith a copy of the reasons recorded, which read thus :

M/s United Phosphorous Ltd.--assessment year 1996-97

Reasons recorded for issue of notice u/s 148 read with section 147 of the Act

The assessee is a widely-held company engaged in the business of manufacturing of phosphorous and pesticides. The assessment u/s 143(3) have been finalized on 24-3-1999 on the total income of Rs. 19,84,30,202. The above total income arrived at after granting deduction u/s 80-IA of Rs. 12,56,03,453.

It is seen that the assessee has incorrectly claimed deduction u/s 80-I/80-IA on the total income, which inter alia includes income which was not derived from industrial undertaking. The income such as rent of Rs. 5,13,806, export incentive Rs. 1,15,58,523, advance licence benefit receivable of Rs. 7,92,37,763, passbook benefit receivable Rs. 10,60,44,183, exchange rate difference Rs. 2,20,58,829, refund of sales-tax Rs. 1,61,301, refund of electricity duty Rs. 30,77,171, excess provision in respect of earlier years written back Rs. 6,33,757, sundry credit balances written back Rs. 65,17,358, interest income Rs. 2,84,38,026, discount Rs. 25,18,702, miscellaneous receipts Rs. 49,83,867 were also considered for deduction u/s 80-IA, which has been held to be not coming within the purview of profit derived from industrial undertaking by applying the ratio of the decision given by Honble Supreme Court in the case of Commissioner of Income Tax, Karnataka Vs. Sterling Foods, Mangalore, and also in the case of Hindustan Lever Ltd. Vs. Commissioner of Income Tax, The deduction u/s 80-IA is also not allowable on income from other sources of Rs. 1,90,02,558.

Thus, the deduction u/s 80-IA have been allowed in excess to the extent of above and accordingly, income has escaped assessment within the meaning of provisions of section 147 of the Act in the assessment order u/s 143(3) dt. 24-3-1999.

Moreover, it is also seen that in the assessment order, excise refund, duty drawback and cash assistance receivable to the extent of Rs. 5,48,77,407 have been charged to tax vide section 28(iii) (c) but these are required to be excluded while working out deduction under sections 80/80-IA in view of aforesaid decisions of Honble Supreme Court.

For deduction u/s 80HHC, 90 per cent of above was to be excluded, which has not been done. Moreover, excise duty paid and collected of Rs. 28,80,09,917 was not included in total turnover while calculating deduction u/s 80HHC.

Failure on the part of the assessee to disclose full and true income resulted into underassessment/ excess deduction under sections 80-I/80-IA and 80HHC. Accordingly, I have reason to believe that income chargeable to tax has escaped assessment at least to the above extent, without prejudice to any other point noticed afterwards. Accordingly, notice u/s 148 read with section 147 is issued in this case.

4. The petitioner has, thereafter, filed a rejoinder affidavit wherein it has been stated that the petitioner has not claimed any deduction under sections 80-1 and 80-IA of the Act on other income. It is further averred that along with the return, the petitioner had filed a copy of the statement showing calculation of deduction under sections 80-1 and 80-IA of the Act. The total eligible profit shown therein exactly tallies with the total eligible profit shown in Annexure F as annexed to the rejoinder affidavit. It is further averred that there was a true and full disclosure and that deduction under sections 80-1 and 80-IA of the Act is claimed only on the profits of the eligible units. It is also averred that deduction u/s 80HHC of the Act was calculated by the respondent himself and, therefore, the petitioner claiming deduction u/s 80HHC of the Act on the amount of duty drawback and cash assistance does not arise. In any case, on both the issues of exclusion of duty drawback and cash assistance and inclusion of excise duty in total turnover, the respondent had applied his mind and himself calculated the deduction u/s 80HHC of the Act available to the petitioner. It is submitted that there is no new information or fresh evidence, in possession of the respondent, which was not there before him at the time of framing of original assessment and that the proceedings for reassessment are being undertaken for re-appreciating the evidence and the material which was available to the then AO and as such, the assessment is sought to be reopened merely on a change of opinion.

5. The respondent has filed affidavit-in-reply to the rejoinder affidavit filed by the petitioner denying the averments made in the affidavit-in-rejoinder.

6. Mr. S. N. Soparkar, learned senior advocate appearing on behalf of the petitioner has invited attention to the reasons recorded, to submit that the assessment is sought to be reopened on the ground that deduction u/s 80-IA of the Act has been allowed in excess of what was admissible to the petitioner, which has resulted into escapement of income. It is pointed out that according to the AO, the petitioner had availed of deduction u/s 80-IA of the Act in respect of the income from other sources of Rs. 1,90,02,558. Inviting attention to the statement showing allocation of income and expenses to eligible units and non-eligible units for deduction under sections 80-1 and 80-IA of the Act (Annexure "F" to the rejoinder affidavit), it is pointed out that the reasons recorded are factually erroneous in as much as, the petitioner has not claimed deduction under the said provisions in respect of other income amounting to Rs. 1,03,36,210 as is evident from the said statement. It is submitted that insofar as the second reason for reopening the assessment viz., inclusion of excise refund, duty drawback and cash assistance to the extent of Rs. 5,48,77,407 charged to

tax u/s 28(iiic) while working out deduction u/s 80-I/80-IA of the Act is concerned, the AO while framing assessment has applied his mind to the said issues arid as such, this is only a case of the successor AO holding a different opinion from that of his predecessor on the same set of facts. It is submitted that there is nothing to indicate that the AO, in consequence of information in his possession, had reason to believe that income had escaped assessment.

7. It is further submitted that the order made by the AO was subject-matter of appeal before the CIT(A) and as such, the said order having merged with the order of the CIT(A), there was no question of reopening assessment on an issue which had merged with the order of the CIT(A).

8. In support of his submissions, the learned senior advocate has placed reliance upon the following decisions :

(a) Commissioner of Income Tax Vs. Nirma Chemicals Works P. Ltd.,

(b) Rajesh Babubhai Damania Vs. Commissioner of Income Tax,

9. Resisting the petition, Mr. M. R. Bhatt, learned senior advocate has submitted that in the present case, the reopening is within a period of four years from the end of the relevant assessment year, hence, the AO can assume jurisdiction u/s 147 of the Act if he has reason to believe that income chargeable to tax has escaped assessment. Inviting attention to the reasons recorded, it is submitted that the AO has clearly recorded that deduction u/s 80-IA of the Act has been allowed in excess of what was admissible to the petitioner. It is further submitted that excise refund, duty drawback, cash assistance to the extent of Rs. 5,48,77,407 were required to be excluded while working out deduction. Moreover, excise duty to the tune of Rs. 28,80,09,917 was not included while calculating turnover u/s 80HHC of the Act which has resulted in escapement of income chargeable to tax and as such, the AO is justified in initiating proceedings u/s 147 of the Act. It is submitted that the reassessment proceedings have been initiated in respect of the issues which were not decided by the appellate authorities and as such, the contention that the assessment order has merged with the order of the appellate authorities is misconceived. It is, accordingly, submitted that the assumption of jurisdiction by the AO is valid and proper and as such, there is no warrant for any intervention by this court.

10. In the present case, notice u/s 148 of the Act has been issued on 29-3- 2001 in relation to assessment year 1996-97. Hence, the reopening of assessment is within a period of four years from the end of the relevant assessment year and therefore, the proviso to section 147 of the Act would not be attracted in the facts of the present case. In the circumstances, while considering the challenge to the very initiation of proceedings u/s 147 of the Act, all that the court is required to examine as to whether any income chargeable to tax has escaped assessment. Since the belief is that of the AO, the sufficiency of the reasons for forming such belief is not for the court to judge but it is open to the assessee to establish that there in fact existed no belief or that the belief was not at all a

bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the court may look into the conclusion arrived at by the AO and examine whether there was any material available on record from which the requisite belief could be formed by the AO and further whether that material had any rational connection or a live link for the formation of the requisite belief. (See M/s. Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another, Since earlier assessment had been framed u/s 143(3) of the Act for the assessment year under consideration, another aspect that has to be kept in mind is as to whether the reopening is based upon any tangible material which has come to the knowledge of the AO subsequent to the framing of the earlier assessment or whether the same is merely a change of opinion on the part of the AO.

11. In this regard, it may be pertinent to refer to the reasons recorded which read as under :

The assessee is a widely-held company engaged in the business of manufacturing of phosphorous and pesticides. The assessment tinder section 143(3) have been finalized on 24-31999 on the total income of Rs. 19,84,30,202. The above1 totel income arrived at after granting deduction u/s 80-IA of Rs. 12,56,03,453.

It is seen that the assessee has incorrectly claimed deduction u/s 80-I/80-IA on the total income, which inter alia includes income which was not derived from industrial undertaking. The income such as rent of Rs. 5,13,806, export incentive Rs. 1,15,58,523, advance licence benefit receivable of Rs. 7,92,37,763, passbook benefit receivable Rs. 10,60,44,183, exchange rate difference Rs. 2,20,58,829, refund of sales-tax Rs. 1,61,301, refund of electricity duty Rs. 30,77,171, excess provision In respect of earlier years written back Rs. 6,33,757, sundry credit balances written back Rs. 65,17,358, interest income Rs. 2,84,38,026, discount Rs. 25,18,702, miscellaneous receipts Rs. 49,83,867 were also considered for deduction u/s 80-IA, which has been held to be not coming within the purview of profit derived from industrial undertaking by applying the ratio of the decision given by Honble Supreme Court in the case of Commissioner of Income Tax, Karnataka Vs. Sterling Foods, Mangalore, and also in the case of Hindustan Lever Ltd. Vs. Commissioner of Income Tax, The deduction u/s 80-IA is also not allowable on income from other sources of'' Rs. 1,90,02,558.

Thus, the deduction u/s 80-IA have been allowed in excess to the extent of above and accordingly, income has escaped assessment within the meaning of provisions of section 147 of the Act in the assessment order u/s 143(3) dt. 24-3-1999.

Moreover, it is also seen that in the assessment order, excise refund, duty drawback and cash assistance receivable to the extent of Rs. 5,48,77,407 have been charged to tax vide section 28 (iiic) but these are required to be excluded while working out deduction u/s 80/80-IA in view of aforesaid decisions of

Honble Supreme Court.

For deduction u/s 80HHC, 90 per cent of above was to be excluded, which has not been done. Moreover, excise duty paid and collected of Rs. 28,80,09,917 was not included in total turnover while calculating deduction u/s 80HHC.

Failure on the part of the assessee to disclose full and true income resulted into underassessment/ excess deduction under sections 80-I/80-IA and 80HHC. Accordingly, I have reason to believe that income chargeable to tax has escaped assessment at least to the above extent, without prejudice to any other point noticed afterwards. Accordingly, notice u/s 148 read with section 147 is issued in this case.

12. From the reasons recorded, it is apparent that the AO has reopened the assessment mainly on three grounds. Firstly, that the income referred to in the said ground viz., income from rent, export incentive, advance licence benefit receivable, passbook benefit receivable, exchange rate difference, refund of sales-tax, refund of electricity duty, excess provision in respect of earlier years written back, sundry credit balances written back, interest income, discount, miscellaneous, which had been taken into consideration for deduction u/s 80-IA of the Act, does not fall within the purview of "profit derived from industrial undertaking" in view of the decision of the Supreme Court in the cases of Commissioner of Income Tax, Karnataka Vs. Sterling Foods, Mangalore, and Hindustan Lever Ltd. Vs. Commissioner of Income Tax, and as such the assessee has incorrectly claimed deduction u/s 80-I/80-IA of the Act. Further that deduction u/s 80-IA is not allowable on "income from other sources". The second ground is that the excise refund, duty drawback and cash assistance which have been charged to tax vide section 28(iiic) were required to be excluded while working out deduction u/s 80-I/80-IA of the Act In the light of the aforesaid decisions of the Supreme Court. The third ground is that for deduction u/s 80HHC of the Act, 90 per cent of the above income was required to be excluded which had not been done. Moreover, the excise duty paid and collected was not included in the total turnover while calculating deduction u/s 80HHC of the Act.

13. In the light of the reasons recorded it may be germane to refer to the assessment order framed u/s 143(3) of the Act in relation to the year under consideration which indicates that insofar as deduction u/s 80HHC of the Act is concerned, the AO after due application of mind as per the separate working enclosed as Annexure A with the assessment order giving reasons as per the note computed the allowable deduction. As regards the deduction under sections 80-I and 80-IA of the Act, the AO has placed reliance upon the certificate issued by the chartered accountants and allowed deduction of Rs. 12,56,03,453. Thus, both the issues have been specifically considered by the AO while framing the original assessment. Against the order of the AO, the assessee had preferred appeal before the CIT(A) on various grounds, wherein addition of excise duty refund receivable, duty drawback receivable and cash assistance receivable, the reduction of claim of deduction u/s 80HHC of the Act as well as deduction under

section'' 804 and 80-IA of the Act were also subject-matter of appeal. The CIT (A) by an order dt. 15-3-2000 allowed some of the grounds of appeal. Thus, the order of the AO stood merged with the order of CIT(A) and had no independent existence of its own and as such the assessment could not have been reopened in respect of the said items.

14. Apart from the aforesaid position, a perusal of the statement showing allocation of income and expenses to eligible units and non-eligible units for deduction under sections 80-I and 80-IA of the Act (Annexure "F" to the rejoinder affidavit) clearly shows that the other income to the tune of Rs. 10,103,36,210 had not been taken into consideration while computing deduction u/s 80-I and 80-IA of the Act. Thus, the reasons recorded proceed on an erroneous factual premise that the other income had been included while allowing deduction u/s 80-I of the Act. The third ground for reopening viz., that deduction u/s 80-IA of the Act is not allowable on "income from other sources" also proceeds on a factually erroneous basis as aforesaid. As regards the second ground for reopening viz., excise duty refund, duty drawback and cash assistance receivable have been charged to tax vide section 28(iic) and were required to be excluded while working out deduction u/s 80-I/80-IA, the said issue had been duly considered at the time of framing the original assessment and was also subject-matter of appeal before the CIT(A).

15. In the light of the aforesaid discussion it is apparent that the assessment order in respect of the items for which assessment is sought to be reopened has merged with the order of CIT(A) and as such has no independent existence and therefore the assessment could not be reopened in respect of the said items. Moreover, the reopening of assessment apart from being based on a factually erroneous premise, is also based upon a mere change of opinion without there being any tangible material to come to the conclusion that there is escapement of income from assessment. Hence in view of the law laid down by the Supreme Court in the case of Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, the condition precedent for reopening of assessment has not been fulfilled and as such, the assumption of jurisdiction u/s 147 of the Act is not valid. The impugned notice issued u/s 148 of the Act, therefore, cannot be sustained.

16. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dt. 29-3-2001 issued u/s 148 of the Act (Annexure A to the petition) is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.