IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 5848 of 2010
TO
SPECIAL CIVIL APPLICATION NO. 5850 of 2010

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS JUSTICE SONIA GOKANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SADBHAV ENGINEERING LTD....Petitioner(s)

Versus

DEPUTY COMMISSIONER OF INCOME-TAX (OSD), CIRCLE-8 & 1....Respondent(s)

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Appearance:

MR RK PATEL, ADVOCATE for the Petitioner(s) No. 1

MRS MAUNA M BHATT, ADVOCATE for the Respondent(s) No. 1 - 2

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CORAM: **HONOURABLE MR.JUSTICE AKIL**

KURESHI
and
HONOURABLE MS JUSTICE SONIA GOKANI

Date : 09/04/2014

COMMON ORAL JUDGMENT

(PER : HONOURABLE MS.JUSTICE SONIA GOKANI)

1. All the three petitions since involve common questions of facts and grounds, they are being decided by this common judgment.

2. The facts as may be necessary for the purpose of determination shall be drawn from Special Civil Application No.5848 of 2010, which in brief are as under :

2.1 The petitioner-Company is regularly being assessed. For the assessment year 2005-06, the return of income was filed which was taken under scrutiny assessment under section 143(1) of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') and the same was framed under section 143(3) of the Act. One of the disallowances was a part of deduction under

section 80IA(4) of the Act.

2.2 The petitioner challenged such order of scrutiny before the Commissioner of Income-tax (CIT) (Appeals) and such appeal was partly allowed. Both the sides challenged the same before the Tribunal and the Tribunal has already adjudicated upon the issue in a recent past.

3. By way of these petitions, the challenge is made to the notice issued under section 148 read with section 147 of the Act. On the basis of retrospective amendment, the explanation given under sub-section (13) of section 80IA of the Act is substituted by the Finance (No.2) Act, 2009. On March 15, 2010, the reasons recorded by the Deputy Commissioner of Income-tax state as follows :

> *"1. The assessment order u/s.143(3) was passed on 29/06/2007, assessing the total income at Rs.6,06,14,076/- wherein the claim of deduction u/s.80IA of Rs.1,42,20,515/-*

allowed against the claim of Rs.4,81,64,760/-.

2. As per explanation given below to sub-section (13) of section 80IA of the Act, which has been substituted by the Finance (No.2) Act, 2009 w.r.e.f. 01.04.2000, deduction u/s.80IA shall not be admissible to an assessee who carries on a business which is in the nature of a works contract. The relevant explanation is reproduced below for the sake of ready reference :

"Explanation : For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section (4) which is in the nature of a works contract awarded by any person (including the central or state Government) and executed by the undertaking or enterprise referred to in sub-section-1".

3. Due to insertion of the explanation to section 80IA w.r.e.f. 01.04.2000, the assessee is not eligible for deduction u/s.80IA as claimed by the assessee as the assessee is a Civil Contractor working for Government. Therefore, I have reason to believe that income chargeable to tax has escaped assessment for the Assessment Year

2005-06.

4. Issue notice u/s.148 of the I.T. Act."

4. The petitioner objected to reassessment proceedings vide its communication dated May 03, 2010 contending *inter alia* that this is nothing but a change of opinion. The Assessing Officer on due scrutiny on the basis of the material available before it, allowed deduction under section 80IA of the Act. The reopening is only on account of amendment to the explanation under sub-section (13) of section 80IA of the Act, which was substituted by the Finance (No.2) Act, 2009 with effect from April 01, 2000, on the ground of retrospective effect from April 01, 2000. The assessee would not be eligible for deduction under section 80IA of the Act for the assessee being a civil contractor for the Government. When the notice had been issued, such notice is impermissible. Relying on various decisions, a request was made to drop the proceedings.

5. The objections came to be disposed of by the Assessing Officer on May 04, 2010, reiterating the fact that the amendment introduced by way of Finance Act, 2009 would permit such reassessment proceedings.

6. In the interregnum, the petitioner also challenged the *vires* of section 80IA(4) of the Act by way of Special Civil Application No.11287 of 2009 and such petition came to be decided in a group of petitions on February 28, 2013/ March 04, 2013, which shall be referred to at a later stage in this judgment.

7. Aggrieved by rejection of the objections raised, the petitioner preferred present petitions seeking the following reliefs :

> *"(A) Issue a writ of certiorari and/or a writ of mandamus and/or any other writ direction or order to quash and set aside the impugned notice dated 17.03.2010 under section 148 of the Income-tax Act, 1961 annexed hereto at Annexure-'D' along with preliminary order dated 4.05.2010 annexed*

hereto at Annexure 'H' for proceeding and completing Reassessment proceedings.

(B) Pending admission, hearing and disposal of this petition, ad-interim relief be granted and the Respondent be ordered to restrain from enforcing compliance of the impugned notice dated 17.03.2010 at Annexure 'defendant' and/or taking any other steps in this regard including ex.parte order or implementation of Preliminary order dated 04.05.2010 at Annexure 'H'.

(C) Pending admission, hearing and till final disposal of this petition, stay the implementation/ operation of the notice and orders to restrain the Respondent from taking any further proceedings pursuant to the impugned notices at Annexure 'D' including stay of operation of Preliminary order at Annexure 'H'.

(D) Award the cost of this petition.

(E) Grant such other and further relief as this Hon'ble Court deems fit."

8. The petitioner was protected at the time of admitting the petition and the respondent No.1 was permitted to proceed further pursuant to the

impugned notice, however, the assessment order was not to be passed till final disposal of the petition.

9. On due service, the respondent appeared and filed affidavit-in-reply contending *inter alia* that the assessment for the year 2004-05 came to be framed on June 29, 2007. On having realised that the income chargeable to tax has escaped assessment, after recording the reasons, a notice under section 148 came to be issued on March 17, 2010, which is within a period of four years from the end of relevant assessment year as all requirement of law are fully complied with. The assumption of jurisdiction on the part of the Assessing Officer would not require any indulgence. It is further contended that there was no conscious consideration with regard to allowability of the deduction, taking into consideration the amendment to section 80IA(4) of the Act at the time of scrutiny assessment, and, therefore, this is not a case of change of opinion on the part of the Assessing Officer. It

is also the averment of the respondent that the assessee is a Civil Contractor working for the Government and is not a Developer and, therefore, the deduction under section 80IA(4) of the Act would not be admissible to him in view of the explanation given below sub-section (13) of section 80IA of the Act, which has been substituted by the Finance (No.2) Act, 2009 with retrospective effect from April 01, 2000. Since in the explanation, it is clarified that the deduction under section 80IA of the Act would not be admissible to an assessee who carries on a business which is in the nature of works contract, such deduction was not admissible to the assessee and, therefore, the income chargeable to tax escaped the assessment.

10. Heard learned counsel Mr.R.K. Patel appearing with learned counsel Mr.B.D. Karia for the petitioner, who has fervently submitted that the Assessing Officer cannot assume the jurisdiction merely because the amendment has been brought making it effective from April 01,

2000, even if it is held to be clarificatory in nature. It is further held that this Court in the case of ***Parikshit Industries v. Assistant Commissioner of Income-tax, reported in 352 ITR 349***, has decided the issue in favour of the assessee. This has been challenged before the Apex Court by way of Special Leave Petition and the said decision has been upheld. He further submitted that the Court in ***Karita Construction Ltd. v. Union of India and others, reported in 352 ITR 513 (Guj.***) has held that introduction of the explanation in question did not amount to introduction of a new provision of law with retrospective operation. The Court also has held that the explanation to sub-section (13) of section 80IA of the Act with retrospective effect from April 01, 2000 was introduced by the legislature for clarifying certain doubts for removing confusions and such explanation was to fill in the gap left in the statute to suppress the mischief. The Court at the relevant time also had referred to the decision in the case of ***Parikshit Industries Pvt. Ltd. (supra).*** Yet

another decision sought to be relied on is rendered by the Division Bench of this Court in the case of ***Agrawal J.V. v. Income Tax Officer and another, rendered while dealing with Special Civil Application No.17885 of 2007, reported in 83 DTR 101.***

11. The learned senior counsel Mr.Bhatt appearing for the respondent-Revenue has urged that at the time of issuance of notice for reassessment, there was no change of opinion on the part of the Assessing Officer, however, counsel could not controvert the decision rendered in the case of ***Parikshit Industries Pvt. Ltd. (supra).***

12. On thus hearing both the sides and considering the material on record, we notice that in the reasons recorded by the Assessing Officer, the sole ground while initiating reassessment is the explanation to section 80IA of the Act with effect from April 01, 2000. As per explanation given below sub-section (13) of

section 80IA of the Act substituted by the Finance (No.2) Act, 2009, it has explained that the deduction under section 80IA of the Act would not apply in relation to a business referred to in sub-section (4) which is in the nature of works contract. This Court in the case of ***Katira Construction Ltd. (supra)***, where challenge was made to the provision of sub-section (4) of section 80IA of the Act, has held thus :

> *"34. Clearly, thus, post 1.4.2002 also, the involvement of the enterprise in developing infrastructure facility when the claim was covered under such expression was essential. In the same context, we must understand the expression "developing or operating and maintaining or developing, operating and maintaining". Keeping in mind the new areas where such private participation would be required and therefore had to be encouraged and keeping in mind that such areas, such as, surface transport, water supply, water treatment system, irrigation project, etc. would necessarily be highly investment intensive, the Legislature provided for a tax break of 10 consecutive years out of a total of 20 years period and also proposed to do away*

with the requirement of such infrastructure facility being transferred to the Central or the State Government or the local authority.

35. In 2007, the explanation below sub-section (13) of section 80IA came to be added which clarified that nothing contained in the said section shall apply to a person who executes a works contract entered into with the undertaking or enterprise, as the case may be. In clear terms, this explanation targeted the second level works contractor who might have been employed by the enterprise developing the infrastructure facility. However, this was not found to be sufficient explanation clearing doubts with respect to the exclusion of the enterprise engaged in execution of a works contract. It was, therefore, that the impugned explanation came to be introduced substituting the existing explanation below sub-section (13) to section 80IA. The explanatory memorandum recorded that profit linked deductions were prone to considerable misuse. With a view to preventing such misuse of the tax holiday under section 80IA, it was proposed to amend the explanation to the said section to clarify that nothing contained in the section shall apply in relation to a business which is in the nature of a works contract executed by

an undertaking.

36. We, therefore, notice that from the inception, deduction was envisaged for development of infrastructure facilities with private participation. Of course, post 2002, certain relaxations were granted and in addition to extending tax holiday period, requirement for claiming such deduction was split into developing or operating and maintaining or developing, operating and maintaining infrastructure facility. The Revenue could therefore, legitimately contend that no such deduction was envisaged for mere execution of works contract. If this was the position, in our understanding, what the explanation, did was to clarify a statutory provision which was at best possible of a confusion. If that be so, the explanation must be seen as one being in the nature of plain and simple explanation and not either adding or subtracting anything to the existing statutory provision. When we hold that the impugned explanation was purely explanatory in nature and did not mend the existing statutory provisions, the question of levying any tax with retrospective effect would not arise. If we agree with the submission of the counsel for the petitioners that such explanation restricted or aimed to restrict the

provisions of deduction, certainly a question of reasonableness in the context of retrospective operation would arise. In the present case, however, we have come to the conclusion that the explanation only supplied clarity where, at best confusion was possible in the unamended provision. In that view of the matter, this cannot be seen as a retrospective levy even if we were to accept that withdrawal of a deduction would amount to a fresh levy.

37. Much stress was laid by the petitioners on the decision of this Court in the case of Parixit Industries Pvt. Ltd. (supra) to contend that the impugned explanation did not in any manner alter the statutory provisions contained in section 80IA(4) of the Act and therefore, deductions which were previously available cannot be withdrawn. We have already expressed our opinion on the effect of the explanation under challenge. In our understanding, we have not taken any stand different from the decision of this Court in the case of Parixit Industries Pvt. Ltd. (supra). We must appreciate that such decision was rendered in the background of the assessee's challenge to a notice for reopening of the assessment which was previously framed after scrutiny. The assessment pertained to the assessment year

2006-07 and the notice for reopening was issued within four years from the end of the relevant assessment year. Revenue relied on the impugned explanation which substituted the previous explanation introduced with effect from 1.4.2007. This change was also given retrospective effect of 1.4.2000. In this context, this Court held and observed as under:

"25. It is now a settled law that if an explanation is added to a section of a statute for the removal of doubts, the implication is that the law was the same from the very beginning and the same is further explained by way of addition of the Explanation. Thus, it is not a case of introduction of new provision of law by retrospective operation. We have found that the petitioner had disclosed all the materials regarding its activities and there was no suppression of materials. In spite of such disclosure, the Assessing Officer gave benefit of the provision by considering the then Explanation which was substantially the same and thus, it could not be said that any income escaped assessment in accordance with the then law. We have already pointed out that the Assessing Officer has now given a second thought over the same materials and according to him, as the assessee is a

contractor or supplier of irrigation products, it cannot be called a developer of any new infrastructural facility.

26. From the materials placed before him by the petitioner, the Assessing Officer earlier did not arrive at such conclusion and thus, the amended Explanation subsequently added cannot be of any help to him in arriving at the second opinion based on the alleged new law."

The Court was thus of the opinion that introduction of the explanation in question did not amount to introduction of a new provision of law with retrospective operation. The assessee was, therefore, given the benefit of deduction considering the then explanation which was introduced with effect from 1.4.2007, which according to the Court was substantially the same and any attempt on the part of the Revenue, therefore, to reopen the assessment would be in the nature of second opinion. Thus, we do not think that we have stated anything which runs contrary to the ratio in the case of Parixit Industries Pvt. Ltd (supra). In fact, the context of the said decision was entirely different from the challenge being considered by us in the present group of petitions."

13. While deciding the issue of *vires*, the judgment rendered in the case of ***Parikshit Industries Pvt. Ltd. (supra***) was taken note of. In ***Parikshit Industries Pvt. Ltd. (supra***), the challenge was made to the issue of reopening. The Court having noted that the claim made for deduction under section 80IA of the Act, which was allowed by the Assessing Officer in scrutiny assessment. However, later on the reassessment proceedings were initiated only on account of the addition of explanation. The Court held that it is a settled law that if the explanation is added to a statute for the removal of doubts, the implication is that the law was same from the beginning and the same is further explained by way of addition of the Explanation. Therefore, it is not a case of introduction of new provision of law by retrospective operation, but when all the materials regarding activities of the assessee if are available on record and the benefit of the provision is already made available to such assessee, reassessment proceedings cannot be

initiated only on account of addition of such Explanation. It would be profitable to reproduce relevant paragraph of the said decision as under :

> "25. It is now a settled law that if an explanation is added to a section of a statute for the removal of doubts, the implication is that the law was the same from the very beginning and the same is further explained by way of addition of the Explanation. Thus, it is not a case of introduction of new provision of law by retrospective operation. We have found that the petitioner had disclosed all the materials regarding its activities and there was no suppression of materials. In spite of such disclosure, the Assessing Officer gave benefit of the provision by considering the then Explanation which was substantially the same and thus, it could not be said that any income escaped assessment in accordance with the then law. We have already pointed out that the Assessing Officer has now given a second thought over the same materials and according to him, as the assessee is a contractor or supplier of irrigation products, it cannot be called a developer of any new infrastructural facility."

14. This was challenged before the Apex Court. The Apex Court dismissed the Special Leave Petition, which is reported in ***25 taxmann.com 301***.

15. In the case of ***Agrawal J.V. (supra)***, in respect of the reassessment proceedings initiated on account of introduction of explanation, the Court held the same in favour of the assessee by holding that all necessary facts and material relating to the claim for deduction under section 80IA(4) of the Act were already available in the return of income and the same was considered duly by the Assessing Officer. There was nothing to demonstrate or reveal that there was any reason for the reopening assessment on the identical material only on account of any introduction of such provision.

16. In the present case, as could be noted from the material on record, the Assessing Officer on a detailed scrutiny had explained the claim made

by the Assessing Officer under section 80IA(4) of the Act. This was also challenged further before the CIT (Appeals) and the Tribunal. The sole question, therefore, is whether the reassessment proceedings can be initiated only on the basis of insertion of Explanation which had been substituted by the Finance (No.2) Act, 2009 with retrospective effect from April 01, 2000. Such Explanation clarified that the deduction under section 80IA of the Act would not be admissible in the case of an assessee carrying on business in the nature of works contract. Such explanation having held to be clarificatory in nature, the ratio laid down in the case of ***Parikshit Industries Pvt. Ltd. (supra***) would apply. The Assessing Officer initiated such proceedings of reopening solely on such ground of insertion of explanation and, therefore, it needs to be held as mere change of opinion. Hence, the assumption of jurisdiction on the Assessing Officer shall need to be interfered by way of writ jurisdiction.

17. Resultantly, all the three petitions deserve to be allowed quashing the impugned notice issued under section 148 of the Act and all consequential proceedings emanating therefrom. Rule is made absolute. There shall be, however, no order as to costs.

(AKIL KURESHI, J.)

(MS SONIA GOKANI, J.)

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