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Court : Mumbai

Decided On : Sep-17-2014

Judge : M.S. Sanklecha & N.M. Jamdar

Appeal No. : Writ Petition Nos. 877 & 878 of 2006

Appellant : Aventis Pharma Ltd.

Respondent : Assistant Commissioner of Income-tax 8 (1), Mumbai

Judgement :

M.S. Sanklecha, J.

1. Both these two Petitions under Article 226 of the Constitution of India, challenge:

(a) Notices dated 2nd February, 2005 and 3rd February, 2005 both issued under Section 148 of the Income Tax Act, 1961 (the Act), seeking to re-open the assessment for the Assessment Years (A.Y.) 1999-2000 and 1998-1999 respectively; and

(b) Two orders dated 10th March, 2006 (one for each assessment year) rejecting the Petitioners objections to the issue of the impugned notices dated 2nd and 3rd

February, 2005 for A.Y. 1998-99 and 1999-2000.

2. It is an admitted position between the parties that the facts and the issues involved in both the Petitions are identical, save and except change in the quantum of figures being different in two Assessment Years involved. Therefore, for the sake of convenience, we shall refer to the facts stated in Writ Petition No.877 of 2006 relating to A. Y. 1998-99 which are as under:

(a) The Petitioner, inter alia, carried on business of export. In the course of its business of export, it became entitled to Duty Entitlement Passbook Scheme (DEPB) benefit under the Export and Import Policy of India and also the benefit of deduction under Section 80HHC of the Act;

(b) On 30th November, 1998, the Petitioner filed its Return of Income for the A. Y. 1998-99 declaring a total income of Rs.30.73 Crores. In its Return of Income, Petitioner claimed benefit of deduction under Section 80HHC of the Act to the extent of Rs.9.13 Crores;

(c) On 28th February, 2001, the Assessing Officer passed an assessment order under Section 143(3) of the Act, determining the Petitioner's income at Rs.63.04 Crores. This after enhancing the deduction from Rs.9.13 Crores to Rs.14.63 Crores under Section 80HHC of the Act;

(d) On 3rd February, 2005, the Assessing Officer issued the impugned notice under Section 148 of the Act, seeking to re-open the assessment for A. Y. 1998 - 1999. The reasons in support of the impugned notice dated 3rd February, 2005 are as under:-

" The assessee has filed return of income on 30.11.1998 disclosing gross total income of Rs.30.37 crores. Further, deduction u/s. 80HHC amounting to Rs.9,13,06,349/- has been claimed. On perusal of the 10CCAC report furnished along with the return of income, it is observed that the assessee has claimed deduction u/s. 80HHC on DEPB receipts of Rs.6,26,72,241/-. The assessee treated the DEPB receipts as a part of the export incentives and claimed the deduction u/s. 80HHC on the same.

2. It is observed that in the assessment order, the issue whether the assessee is entitled to claim deduction u/s. 80HHC on DEPB receipts or not, was not dealt.

3. DEPB receipts are covered u/s. 28(iv) of the I.T. Act. In this regard, the Central Board of Direct Taxes vide its Circular Vide F. No.153/93/2004/TPL dated 08.09.2004 has stated as under:-

" It has been concluded that section 80HHC provides for deduction from the total income in respect of profits derived from the export of goods or merchandise which are realized in convertible foreign exchange and not in respect of incidental income arising through a Government Scheme. Further, the elaborate scheme of computation of the deduction provided u/s. 80HHC(3) of the I. T. Act does not cover profit on sale of DEPB credits. Such profits are therefore, not eligible for deduction under Section 80HHC."

4. Therefore, in view of the circular of the CBDT, the assessee is not entitled to claim deduction u/s. 80HHC on the DEPB receipts.

5. In view of the above, I am satisfied that the income has escaped assessment to the extent of Rs.1,15,24,463/- within the meaning of provision of section 147 of the Income Tax Act, 1961. The tax effect comes to Rs.40,33,562/-.

6. Hence, notice u/s. 148 of the I.T. Act, 1961 is required to be issued after taking approval of the Commissioner of Income Tax-8, Mumbai."

(SUJIT KUMAR)

Asst. Commissioner of Income Tax 8(1)

Mumbai.

(e) The Petitioner filed its objections on 3rd March, 2006 to the reasons furnished for re-opening of the Assessment for A. Y. 1998-99. In particular, the Petitioner pointed out that the impugned notice was issued beyond a period of four years from the end of the relevant Assessment Year. Thus the condition precedent to issue a notice under Section 148 of the Act is not satisfied, as the reasons furnished do not disclose any failure on the part of the Petitioner to disclose fully

and truly all material facts necessary for assessment. Besides, it was submitted that the claim for deduction under Section 80HHC of the Act with reference to the DEPB entitlement, was a subject matter of examination while passing the Assessment Order dated 28th February, 2001. Thus, the exercise of re-opening the Assessment was on mere change of opinion. It was, therefore, submitted that the notice was without jurisdiction and same be withdrawn;

(f) However, the Assessing Officer by an order dated 10th March, 2006, rejected the Petitioner's objections to reasons for re-opening of Assessments. The Assessing Office held that, prima facie, it appears that the Petitioner had failed to disclose fully and truly all details of the nature, character and the modus of earning DEPB entitlement in its return of income.

3. The Petitioner's challenge to the above proceedings for re-opening of assessments for A. Y. 1998-99 and 1999-2000 is that, the same are without jurisdiction.

4. Mr. J. D. Mistry, learned Sr. Counsel appearing with Mr. Kudalkar, for the Petitioner in support, submits as under:

(a) The impugned notice dated 2nd and 3rd February, 2005, seeking to re-open the assessment for A. Y. 1999-2000 and 1998-99 respectively, have been issued beyond a period of four years from the end of the relevant Assessment Year without alleging any failure on the part of the Petitioner to disclose fully and truly all material facts necessary for assessment. Thus both the notices are without jurisdiction;

(b) The impugned notices are based on mere change of opinion as the Petitioner's claim for deduction under Section 80HHC of the Act was examined and enhanced from Rs.9.13 Crores as claimed to Rs.14.63 Crores. Therefore, the impugned notices are without jurisdiction as it amounts to a mere change of opinion;

(c) The reasons recorded for issue of the impugned notices only indicates the Circular dated 8th September, 2004 issued by CBDT as the basis for the impugned notices. The Circular merely gives an interpretation of the CBDT on

Section 80HHC (3) of the Act that the deduction provided therein would not cover profit on sale of DEPB credit. It is submitted that the opinion/ interpretation of a statutory provision by the CBDT can not be the basis for re-opening of assessment as the view has to be of the Assessing Officer on material not considered earlier; and

(d) In any view of the matter, the issue on merits now stands concluded by the decision of the Apex Court in *Topman Exports v. CIT* [2012] 342 ITR 49/205 Taxman 119/18 taxmann.com 120 in favour of the Petitioner. Consequently, the entire exercise of re-assessment proceedings would be an academic exercise in view of the law declared by the Supreme Court in *Topman Exports* (supra).

5. As against the above, Mr. Pinto, learned Counsel appearing for Respondent-Revenue in support of the impugned notices submit as under:

(a) There has been a failure on the part of the Petitioner to disclose fully and truly all material facts necessary for the assessment, inasmuch as, the nature and character of the DEPB entitlements had not been disclosed during the assessment proceeding. Therefore, the impugned notices are valid; and

(b) The fact that the decision of the Supreme Court in *Topman Exports* (supra) would conclude the issue in favour of the Petitioner today is not disputed. However, it is submitted that the same is not material as on the date when the impugned notices were issued, the decision of the Supreme Court in *Topman Exports* (supra) was not available. Therefore, on the date the impugned notices were issued on the basis of reasons recorded, in support thereof, they were valid. Thus, the impugned notices should not be disturbed and the Petitioner be directed to cooperate with the re-assessment sought to be done by the Respondent-Revenue.

6. Both the impugned notices for A. Y. 1998-99 and 1999-2000 have admittedly been issued beyond a period of four years from the end of the relevant Assessment Year. The statutory jurisdictional condition as provided in the proviso to Section 147 of the Act to be satisfied before issuing a notice beyond a period of four years from the end of the relevant Assessment Year, is failure on the part of

the Petitioner to disclose truly and fully all material facts necessary for assessment. We searched in vain for any averment in the reasons in support of the impugned notices, any facts which would indicate failure on the part of the Petitioner to submit truly and fully all material facts necessary for claiming the benefit of deduction under Section 80HHC of the Act in respect of DEPB receipts. All that the reasons in support of the impugned notices state is that the Petitioner's claim to deduction under Section 80HHC of the Act on DEPB receipts, was not dealt with in the Assessment Order.

7. Mr. Pinto, learned Counsel appearing for Respondent-Revenue urged that there was a failure on the part of the Petitioner and in support thereof places reliance upon the affidavit in reply dated 7th April, 2006 filed by the Assessing Officer. In the affidavit, it is stated that the assessee had failed to disclose whether the CBDT entitlements were utilized in business against import or sold in the market at the premium. The affidavit further alleges that the Petitioner has failed to disclose whether the DEPB entitlements on which the deduction was claimed was in fact received from the Directorate General of Foreign Trade or merely claimed on the basis of notional entitlement. Thus, it is submitted that there is a failure to disclose truly and fully all material facts necessary for assessment.

8. Our Court has time and again reiterated the view expressed in *Hindustan Lever Ltd. v. R.B. Wadkar*, Asstt. CIT [2004] 268 ITR 332/137 Taxman 479 (Bom.), that the reasons for re-opening of an assessment are required to be tested/examined as recorded at the time of issuing of notice under Section 148 of the Act. No substitution, deletion or addition to the reasons recorded at the time of issuing notice can be made to support the impugned notices either by affidavit or in the order disposing of objections. The re-opening notices would stand or fall by the reasons recorded at the time when the notices were issued. Therefore, the reliance being placed upon by the Respondent-Revenue on the affidavit in reply and/or the order dated 10th March, 2010 rejecting the objections to allege that there is a failure to disclose details cannot support the impugned notices. Thus the submission of Mr. Pinto that there is a failure on the part of the Petitioner to disclose truly and fully all material facts necessary for assessment cannot be accepted.

9. Further, the impugned notice have been issued as recorded in reasons in support only on the basis of CBDT circular dated 8th September, 2004 which is merely an opinion on the statutory provisions. The Assessing Officer has to apply his own mind to form a reasonable belief that income chargeable to tax has escaped the assessment. It is not open to the Assessing Officer to rely upon the opinion of CBDT to justify issuance of impugned notices. Moreover, reliance upon a subsequent opinion is itself evidence of change of opinion on the part of the Assessing Officer. In any case, the question of opinion on statutory provision is an issue which would only arise, if the statutory jurisdictional requirement of failure to disclose fully and truly all material facts necessary for assessment is satisfied. It is not so in these notices.

10. On the above basis, we would have allowed the Petition but Mr. Pinto, learned Counsel appearing for Respondent-Revenue insisted that his submission that the decision of the Apex Court in *Topman Export* (supra) while considering the Petition be ignored, as the same has been rendered only on 8th February, 2012, be dealt with. It is submitted that the decision in *Topman Exports* (supra) was not available when the impugned notices were issued. According to Revenue, the impugned notices have to be tested on the basis of the law as it stood on date the impugned notices were issued. This submission ignores the well known position in law that Courts do not make law when rendering decisions but they only declare what the law always was. Therefore, the decision of the Apex Court in *Topman Export* (supra) would be the correct position of law even when the impugned notices were issued and thus would suffer from failure of reasonable belief that income chargeable to tax has escaped assessment.

11. In any case, it is accepted by Mr. Pinto that as of today, the decision in *Topman Export* (supra) covers the issue in favour of the Petitioner. In that view of the matter, it would serve no useful purpose by allowing the Assessing Officer to proceed with re-assessment, as the issue would be concluded in favour of the Petitioner in view of the binding decision of the Apex Court in *Topman Export* (supra) on merits.

12. In view of the above, we allow both the Petitions and set aside the impugned notice dated 2nd and 3rd February, 2005, seeking to re-open the assessment for A. Y. 1999-2000 and 1998-99. Consequently, the order dated 10th March, 2006 rejecting the Petitioner's objections to the impugned notice also do not survive.

13. Both the Petitions are allowed in the above terms, with no order as to costs.

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