

United Phosphorous Ltd. Vs. Additional Commissioner of Income Tax

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Court : Gujarat

Decided On : Jun-18-2011

Judge : Harsha Devani; H.B.Antani, Jj.

Acts : [Constitution of India](#) - Article 226; The Income Tax Act 1961 - Sections 148, 143(3), 80(I), 80(I)(A), 139, 142, 147

Appeal No. : SPECIAL CIVIL APPLICATION No. 3355 of 2001

Appellant : United Phosphorous Ltd.

Respondent : Additional Commissioner of Income Tax

Advocate for Def. : MR. MANISH R. BHATT; MR. B.B. NAIK, Adv.

Advocate for Pet/Ap. : MR. S.N. SOPARKAR, Adv.

Judgement :

1. By this petition under Article 226 of the [Constitution of India](#), the petitioner has challenged the notice dated 30.3.2001 issued by the respondent under section 148 of the Income Tax Act, 1961 (the Act) reopening the assessment of the petitioner for the assessment year 1995-96.

2. The petitioner, a limited company, filed its return of income for assessment year 1995-96 on 29.11.1995 declaring total income of Rs.3,84,97,110/-. Subsequently, assessment came to be framed under section 143(3) of the Act at an income of

Rs.16,21,60,213/- on 30.3.1998. The petitioner carried the matter in appeal before the Commissioner of Income Tax (Appeals), Surat who vide order dated 28.10.1999 partly allowed the appeal. The order of the Commissioner (Appeals) was carried further in appeal before the Income Tax Appellate Tribunal (the Tribunal) both by the petitioner as well as the Income Tax Department which were pending at the time of filing the present petition. Thereafter, by the impugned notice dated 30.3.2001, the petitioner's assessment for assessment year 1995-96 came to be reopened.

The petitioner, therefore, vide letter dated 4.4.2001, requested the respondent to furnish the reasons for issuing the notice under section 148 of the Act. The respondent vide letter dated 12.4.2001 informed the petitioner that there was no statutory provision for providing "reasons recorded for issuing notice under section 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 under section 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 Limited - A.Y. 1995-96

Reasons recorded for issue of notice u/s 148 r.w.s. 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 30.3.98 on the total income of Rs.16,21,60,213/-. The above total income arrived after granting deduction u/s 80IA of Rs.5,42,48,162/-.

It is seen that the assessee has incorrectly claimed deduction u/s 80I/80IA on the total income, which inter-alia includes income which was not derived from industrial undertaking. The

income such as rent of Rs.5,07,996/-, export incentive Rs.42,77,111/-, advance licence benefit receivable of Rs.8,02,38,750/-, interest income of Rs.3,59,06,421/-, discount of Rs.47,55,384/-, misc. receipts of Rs.29,63,468/-, technical know-how fees of Rs.31,48,000/-, insurance claim of Rs.21,42,509/-, refund of sales tax of Rs.19,600/-, refund of electricity duty of Rs.14,54,798/- and excess provision in respect of earlier years written back Rs.64,02,452/-, were also considered for deduction u/s 80IA, 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 Hon. Supreme Court in the case of CIT v. Sterling Foods 237 ITR 579 [SC] and also in the case of CIT v. Hindustan Lever Ltd. 239 ITR 297 [SC]. The deduction u/s 80IA is also not allowable on "Income from other sources" of Rs.5,13,19,084/-. The assessee has not disclosed fully and truly the exact nature and details of such above referred income, which is the material facts for completion of assessment.

Thus, the deduction u/s 80IA 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) dated 30.3.98 due to failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment.

Accordingly, notice u/s 148 r.w.s. 147 is issued in this case, which is to be issued after obtaining satisfaction of CIT."

4. The petitioner has, thereafter, filed a rejoinder affidavit wherein it has been stated that the petitioner has not claimed any deduction under section 80I and 80IA 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 80I and 80IA 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 80I and 80IA of the Act is claimed only on the profits of the eligible units. It is also averred that for the year under challenge, the issue of quantification of deduction under section 80I and 80IA of the Act has already been adjudicated by the ITAT wherein the ITAT very categorically stated that the respondent has not pointed out any mistake or discrepancy in the calculation of deduction under section 80I and 80IA of the Act as submitted by the petitioner.

Further ITAT accepted the claim as well as the working of deduction under section 80I and 80IA of the Act as submitted by the petitioner and directed the respondent to allow the same without any further reduction in the quantum of deduction. It is submitted that once the calculation of the deduction is accepted and approved by the ITAT which is the highest fact finding authority so far as the Income Tax Act, 1961 is concerned, the respondent has no jurisdiction to disturb the same. The original assessment order, after its approval from ITAT on the issues before it, has merged with the order of the ITAT and therefore the respondent has lost all the power to disturb the same.

5. The respondent has filed an affidavit in reply to the rejoinder affidavit submitting that the petitioner has claimed deduction under section 80I and section 80IA of the Act on the net profit of different products such as Trimethyl Phosphate (2000MT), Phosphorous Tri Chloride, etc. and not on the net profit of industrial undertaking and that net profit of each product was arrived after taking into consideration advance licence benefit receivable and pass book credit benefit receivable for assessment year 1995-96. That the claim of the assessee for deduction under sections 80I and 80IA of the Act on such income is bad in law.

6. Mr. S. N. Soparkar, learned Senior Advocate appearing on behalf of the petitioner, has submitted that in the present case the original assessment was framed under section 143(3) of the Act and that the notice under section 148 of the Act has been issued beyond a period of four years from the end of the relevant assessment year. An assessment framed under section 143(3) of the Act can be reopened beyond the prescribed period of four years if and only if an income

chargeable to tax has escaped assessment by reason of failure on the part of the assessee to

(i) 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) disclose fully and truly all material facts necessary for his assessment for that assessment year. It is submitted that in the present case admittedly the first situation does not exist. It is further submitted that in the facts and circumstances of the present case it cannot be alleged that there was any failure on the part of the petitioner to disclose fully and truly all material facts necessary for his assessment for the assessment year. Inviting attention to the reasons recorded it is submitted that the assessment is sought to be reopened on the ground that deduction under section 80I/80IA 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 Assessing Officer, the petitioner had availed of deduction under section 80IA 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 section 80I and 80IA of the Act (Annexure "F" to the rejoinder affidavit), it is pointed out that the reasons recorded are factually erroneous inasmuch as, the petitioner has not claimed deduction under the said provisions in respect of other income amounting to Rs.115,019 ,560/- as is evident from the said statement. The learned counsel further submitted that there is nothing on record to show that the Assessing Officer, in consequence of information in his possession, had reason to believe that income chargeable to tax had escaped assessment.

7. On behalf of the petitioner, the learned counsel also submitted that for the year under consideration the quantification of deduction under section 80I and 80IA of the Act has already been adjudicated by the Tribunal vide order dated 22.05.2001 in I.T.A. No.35/Ahmedabad/2000 whereby the Tribunal has accepted the claim and working of deduction under section 80I and 80IA of the Act as submitted by the petitioner, hence the respondent has no jurisdiction to disturb the same.

8. In support of his submissions, the learned counsel has placed reliance on the following decisions :

[a] The decision of this High Court in the case of ***Commissioner of Income Tax v. Nirma Chemicals Works P. Ltd.***, 309 ITR 67 (Guj.).

[b] The decision in the case of ***Rajesh Babubhai Damania v. Commissioner of Income Tax***, (2001) 251 ITR 541.

9. Resisting the petition, Mr. M. R. Bhatt, learned Senior Advocate appearing on behalf of the respondent, invited attention to the reasons recorded to submit that the Assessing Officer has clearly recorded that deduction under section 80IA of the Act has been allowed in excess of what was admissible to the petitioner which has resulted in escapement of income chargeable to tax and as such, the Assessing Officer is justified in initiating proceedings under section 147 of the Act. It is submitted that the point regarding the claim of deduction under section 80I and 80IA of the Act on other income was not the issue before the appellate authorities, including the Tribunal, hence it cannot be said that the Tribunal has allowed the deduction under section 80I and 80IA of the Act on other income. It is, accordingly, submitted that the assumption of jurisdiction by the Assessing Officer is valid and proper and as such, there is no warrant for any intervention by this Court.

10. In the present case, notice under section 148 of the Act has been issued on 30.03.2001 in relation to the assessment year 1995-96. Hence, the reopening of assessment is clearly beyond a period of four years from the end of the relevant assessment year and therefore, the proviso to section 147 of the Act would clearly be attracted in the facts of the present case. Thus, for the purpose of assuming valid jurisdiction under section 147 of the Act, the Assessing Officer would be required to establish, firstly that income chargeable to tax has escaped assessment and secondly that such escapement is by reason of failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment.

11. A perusal of the reasons recorded shows that according to the Assessing Officer the petitioner was not entitled to deduction under section 80IA on income which was not derived from industrial undertaking. The Assessing Officer has referred to various incomes viz. rent, export incentive, advance licence benefit, miscellaneous receipts, technical know-how fees, insurance claim, refund of sales tax, refund of electricity duty etc., which in view of the ratio of the decisions of the Supreme Court in the case of *CIT v. Sterling Foods* (supra) and *CIT v. Hindustan Lever Ltd.* did not fall within the purview of profit derived from industrial undertaking. The Assessing Officer was also of the view that deduction was not allowable on income from other sources of Rs.5,13,19,084/-. According to the Assessing Officer the petitioner had not disclosed fully and truly the nature and details of the above referred income, which was a material fact for completion of assessment.

12. In this regard it may be pertinent to refer to the detailed statement bifurcating figures of Profit and Loss Account between eligible, that is units eligible for deduction under section 80I and 80IA of the Act and other units which clearly shows that the other income of Rs.11,50,19,560/- is not allocated to Eligible unit on which deduction under section 80I and section 80IA is available. Thus, it appears that the basic premise on which the assessment is sought to be reopened does not exist, inasmuch as the petitioner has not claimed deduction under section 80IA and 80I of the Act in respect of income from other sources as alleged by the respondent. Moreover, a perusal of the order made by the Tribunal in the appeal preferred by the petitioner shows that the Tribunal has observed that the Assessing Officer has not pointed out any mistake or discrepancy in the working of deductions under section 80IA and 80I of the Act claimed by the assessee.

13. In the light of the reasons recorded it may be germane to refer to the assessment order framed under section 143(3) of the Act in relation to the year under consideration which indicates that as regards the deduction under section 80I and 80IA of the Act, the Assessing Officer has placed reliance upon the certificate issued by the Chartered Accountants and allowed deduction of under section 80I and 80IA of the Act subject to over all 30% of total income computed under the provisions of the Act which came to Rs.54,248,162/-. Thus, the said

issue had been specifically considered by the Assessing Officer while framing the original assessment. Against the order of the Assessing Officer, the petitioner preferred appeal before the Commissioner (Appeals) and against the order of the Commissioner (Appeals) the petitioner preferred appeal before the Tribunal challenging the action of the Assessing Officer in restricting the deduction under section 80I and 80IA of the Act to 30% of total income computed under the provisions of the Act. The Tribunal in principle accepted the claim of the petitioner under sections 80I and 80IA of the Act as per the working made by the Chartered Accountants of the petitioner subject to verification of the figures by the Assessing Officer. The Tribunal has also clarified that in no case the deduction already allowed to the petitioner under sections 80I and 80IA of the Act by the Assessing Officer shall be reduced.

14. 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 Tribunal and as such has no independent existence and therefore the assessment could not be reopened in respect of the said items.

15. Last but not least, it is an admitted position that the impugned notice has been issued after the expiry of a period of four years from the end of the relevant assessment year. A perusal of the reasons recorded shows that all that has been stated therein, is that income has escaped assessment due to failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. However, there is nothing to indicate as to what is the nature of the failure on the part of the petitioner. From the affidavit-in-reply filed by the respondent it appears to be the case of the respondent that the petitioner had made a claim which it was not entitled to under section 80I/80IA of the Act which amounts to failure to disclose fully and truly all material facts. It is settled legal position that mere making of a claim cannot be deemed to be failure to disclose as envisaged under the proviso to section 147 of the Act. In the circumstances, in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment, the assumption of jurisdiction under section 147 of the Act by the Assessing Officer after the expiry of four years from the end of the relevant assessment year is without jurisdiction. The impugned

notice issued under section 148 of the Act, therefore, cannot be sustained.

16. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dated 30.03.2001 issued under section 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.

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