E-Infochips Limited Vs Deputy Commissioner of Income Tax

Court: Gujarat High Court

Date of Decision: April 7, 2015

Acts Referred: Constitution of India, 1950 - Article 226
Income Tax Act, 1961 - Section 10(B), 108, 10B, 10B(4), 139
Industries (Development and Regulation) Act, 1951 - Section 14

Citation: (2016) 380 ITR 449

Hon'ble Judges: M.R. Shah, J; S.H. Vora, J

Bench: Division Bench

Advocate: B.S. Soparkar, for the Appellant; Mauna M. Bhatt, Advocates for the Respondent

Judgement

M.R. Shah, J.

1.00. By way of this petition under Article 226 of the Constitution of India, the petitioner - assessee has prayed for appropriate writ, order and/or

direction to quash and set aside the impugned notice issued under section 148 of the Income Tax Act, 1961 dated 27/3/2014 for the A.Y. 2007-

2008. Thus, the petitioner has challenged reopening proceedings of the assessment for A.Y. 2008-2009 initiated in exercise of powers under

section 147 of the Income Tax Act.

2.00. Facts leading to the present Special Civil Application in nutshell are as under:-

2.01. That the petitioner is a Company engaged in I.T. Enabled Services and Software Development. The petitioner has filed its return of income

for A.Y. 2008-2009 declaring total income at Rs. 52,78,610/-.

2.02. That the case was selected for scrutiny and notices under section 142(1) and under section 143(2) of the Income Tax Act were issued and

served upon the petitioner - assessee. It appears that in the notice dated 28/7/2011, specific query regarding ""Software License Fees"" as well as

deduction under section 10(B), was raised. The petitioner assessee furnished details required vide communication dated 24/10/2011 and

8/11/2011.

2.03. That thereafter the assessing officer passed the assessment order under section 143(3) of the Income Tax Act on 9/12/2011, making several

additions to income under various heads of the income of the assessee.

2.04. That thereafter beyond the period of four years of the concerned assessment year, the assessing officer has issued the impugned notice under

section 148 of the Income Tax Act on 27/3/2014 reopening the assessment for the A.Y. 2008-2009.

2.05. That on receiving the notice, the assessee requested for the reasons recorded for reassessment the assessment vide letter/communication

dated 28/4/2014. That vide letter/communication dated 20/5/2014, the assessing officer recorded reasons for reopening of the assessment

(Annexure-E to the petition).

2.06. That it appears that on receipt of the reasons recorded for reassessment, the assessee raised various objections submitting that there was no

omission or failure on the part of the assessee to disclose truly and fully all material facts and therefore, the initiation of the reassessment

proceedings beyond four years, was not valid. The assessee also raised various objections on merits also.

2.07. That vide communication/letter dated 16/9/2014, the Assessing Officer disposed of the objections raised by the petitioner assessee against

the reopening of the assessment. Hence, the petitioner has preferred present Special Civil Application under Article 226 of the Constitution of

India challenging the impugned reassessment proceedings for the A.Y. 2008-2009.

3.00. Mr. B.S. Soparkar, learned advocate appearing on behalf of the petitioner - assessee has vehemently submitted that the ground for

reopening of the assessment is completely misconceived and baseless. It is submitted that in the present case reassessment proceedings have been

initiated after a period of four years. It is submitted that therefore, escapement of income must also be occasioned by a failure on the part of the

assessee to disclose fully and truly all the material facts.

3.01. Mr. B.S. Soparkar, learned advocate appearing on behalf of the petitioner - assessee has further submitted that in the present case, as such

there is/was no failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment. It is submitted that all details

of payment for Software License Fees were duly provided as and when sought and/or required by the Assessing Officer and the same was

scrutinized by the Assessing Officer. It is submitted that therefore, now having allowed the claim, it is not open to the respondent - Assessing

Officer to reopen the assessment, merely for the re-computation taking a different view on the same material available with him.

3.02. Mr. B.S. Soparkar, learned advocate appearing on behalf of the petitioner - assessee has further submitted that the only query which was

raised by the Assessing Officer at the time of framing the original assessment was whether the Software License Fees was revenue in nature or not.

It is submitted that at the relevant time, no query was raised at all with respect to Tax Deducted at Source (""TDS"" for short) deducted on the

Software License Fees. It is submitted that thereafter when the Assessing Officer passed the assessment order and that as such there was no

failure on the part assessee to disclose fully and truly all material facts, the initiation of reassessment proceedings on the reasons recorded, is

absolutely invalid, illegal and without jurisdiction and more particularly, the condition precedent for initiation of the reassessment proceedings

beyond the period of four years are not satisfied. It is submitted that even the Assessing Officer accepted the claim of the assessee for deduction

under section 10(B) of the Act after raising specific query. It was submitted that therefore, as such there was no failure on the part of the assessee

in not disclosing the truly and fully all material facts for assessment.

3.03. Mr. B.S. Soparkar, learned advocate appearing on behalf of the petitioner - assessee has further submitted that on perusal of the reasons

supplied, it appears that reopening for the issue of deduction under section 10(B) is made due to the decision of the Delhi High Court in the case of

Commissioner of Income Tax Versus Regency Creations Limited, reported in [2012] 27 taxmann.com 322 (Delhi). It is submitted that reopening

of the assessment, on the basis of the decision of any Court after expiry of four years from the relevant assessment year, is not justified merely

because court pronounced the law to be otherwise than on the date of filing of the return of income when the assessee made a claim for deduction.

It is submitted that in the case of Pune unit, relief of deduction was granted to the petitioner Company since the A.Y. 2005-06 and therefore, the

assessee was entitled to continuation of that relief for the subsequent years.

3.04. Mr. B.S. Soparkar, learned advocate appearing on behalf of the petitioner - assessee has further submitted that even in the case of KASEZ

unit, the petitioner assessee had obtained relevant approval of the Development Commissioner and the same was submitted to the Assessing

Officer during the assessment and hence the petitioner was entitled to deduction under section 10(B) of the Income Tax Act. It is submitted that

therefore, initiation of reassessment proceedings on the reasons recorded is absolutely illegal and invalid.

3.05. Mr. B.S. Soparkar, learned advocate appearing on behalf of the petitioner - assessee has heavily relied upon the decision of this Court in the

case of Niko Resources Ltd. Versus Assistant Director of Income Tax, reported in (2014) 51 Taxman.com 568 (Gujarat) in support of his above

submissions and request to quash and set aside the impugned reassessment proceedings.

3.06. Mr. B.S. Soparkar, learned advocate appearing on behalf of the petitioner - assessee has also heavily relied upon the decision of the

Division Bench of this Court in the Case of Gujarat Lease Financing Limited Versus Deputy Commissioner of Income Tax, Circle-IV, Ahmedabad

dated 24/6/2013 passed in Special Civil Application No. 3048 in support of his submissions that the initiation of the impugned reassessment

proceedings are absolutely illegal and without jurisdiction.

4.00. Present petition is opposed by Mr. M.R. Bhatt, learned counsel appearing on behalf of the revenue.

4.01. An Affidavit-in-reply is filed on behalf of the respondent justifying the reopening of the assessment for the A.Y. 2008-2009, in exercise of

powers under section 147 of the Income Tax Act.

4.02. Mr. M.R. Bhatt, learned counsel appearing on behalf of the revenue has vehemently submitted that as such the present petition is filed at

premature stage, as only a notice under section 148 read with section 147 of the Income Tax Act has been issued. It is submitted that in the event,

the petitioner assessee is aggrieved by the reassessment order, alternative efficacious remedy is available by way of an appeal to the CIT(A) and

thereafter to the learned tribunal as per the provisions of the Act. Therefore, it is requested not to entertain the present petition.

4.03. On merits, Mr. M.R. Bhatt, learned counsel appearing on behalf of the revenue has vehemently submitted that the impugned reassessment

proceedings are absolutely just and proper and in accordance with the provisions of the Act, more particularly section 147 read with section 148

of the Income Tax Act.

4.04. Mr. M.R. Bhatt, learned counsel appearing on behalf of the revenue has further submitted that in the case of the petitioner, the assessment

was completed under section 143(3) of the Income Tax Act assessing total income at Rs. 2,41,81,079 on 9/12/2011. It is submitted that it was

noticed that the income of Rs. 22,56,752/- and Rs. 4,69,56,816/- chargeable to tax has been under-assessed and therefore, the aforesaid amount

had escaped assessment. It is submitted that thereafter recording the reasons for reopening and after taking necessary administrative approval,

notice under section 148 of the Income Tax Act has been lawfully issued.

4.05. Mr. M.R. Bhatt, learned counsel appearing on behalf of the revenue has further submitted that even with respect to deduction claimed under

section 10(B) to the tune of Rs. 4,69,56,816/-, it was found that the assessee Company had not obtained approval of the Board as ""hundred per

cent export oriented"" for deduction under section 10(B) of the Income Tax Act and despite the same, claimed deduction under section 10(B) of

the Income Tax Act and therefore, the assessee did not disclose fully and truly all material facts necessary for the assessment which resulted into

excess allowance and therefore, notice under section 148 of the Income Tax is legally issued.

4.06. Mr. M.R. Bhatt, learned counsel appearing on behalf of the revenue has further submitted that mere production of Balancesheet and P&L

Account Books will not amount to disclosure within the meaning of proviso to section 147 of the Income Tax Act. It is submitted that opinion can

only be formed on the issues which are disclosed and thereafter considered. It is submitted that in the present case, payment in nature of royalty

was not disclosed by the assessee. It is submitted that though foreign remittance was in nature of royalty, on which tax was to be deducted at

source, the assessee failed to do so.

4.07. Mr. M.R. Bhatt, learned counsel appearing on behalf of the revenue has further submitted that in the present case deduction of TDS under

section 195 of the Income Tax Act on foreign remittance on ""Software License Fees"" was not scrutinized during the assessment proceedings under

section 143(3) of the Income Tax Act. It is submitted that the Assessing Officer in the assessment proceedings under section 143(3) did not gave

any opinion regarding non-deduction of TDS under section 195 of the Income Tax Act on foreign remittance on ""Software License Fees"". It is

submitted that the assessee had incurred expenditure on ""Software License Fees"" for an amount of Rs. 22,56,752/- and claimed the same as

revenue expenditure. It is submitted that the payment was made to the foreign companies without withholding the tax at source though the payment

was exclusively in the nature of ""Royalty"".

4.08. Mr. M.R. Bhatt, learned counsel appearing on behalf of the revenue has further submitted that the assessee company simply availed the

Software Services"" from the foreign companies and these Companies granted the assessee company only right to use ""Software License"", as the

Software was owned by the parent Company itself. It is submitted that it is an admitted fact that the payment made by the assessee as Software

License Fees is in the nature of ""Royalty"" and the same was not disclosed in the original return filed. It is submitted that nature of foreign remittance

attracts the provisions of section 95 read with section 40(A)(i) of the Act and therefore, the income had escaped the assessment on account of the

assessee not disclosing the full facts. It is submitted that therefore initiation of opening of the assessment and initiation of the reassessment

proceedings are absolutely just and proper and in accordance with the provisions of law, more particularly section 147 read with section 148 of

the Income Tax Act.

Submitting accordingly it is requested to dismiss the present Special Civil Application.

5.00. Heard the learned advocates appearing on behalf of the respective parties at length.

5.01. At the outset, it is required to be noted that what is challenged in the present Special Civil Application by the petitioner - assessee is the

reopening of the assessment for the A.Y. 2008-2009 and initiation of the reassessment proceedings for the A.Y. 2008-2009, in exercise of the

powers under section 147 read with section 148 of the Income Tax Act. It is required to be noted that in the present case initiation of

reassessment proceedings is beyond 4 years from the assessment year. Therefore, unless and until it is observed and found that the income has

escaped assessment due to the failure on the part of the assessee to disclose truly and fully all material facts for the assessment, the Assessing

Officer is not authorized to make reassessment even in the event of his having reasonable belief that any income chargeable to tax has escaped

assessment for any assessment year. As per the first proviso to section 147, assessment can be reopened under section 147 after expiry of 4 years

only if (1) assessee failed to make a return under section 139 or in response to the notice under section 142(1) or under section 148 and he failed

to disclose truly and fully all material facts necessary for the assessment. Once the case of the assessee is not covered by the first proviso to section

147, reassessment proceedings beyond the period of four years from the end of the relevant assessment year would be without jurisdiction and

bad in law. If all material facts are furnished by the assessee and there remained no omission or failure on the part of the assessee to disclose truly

and fully all material facts, initiation of reassessment proceedings beyond the period of 4 years is not permission and shall be wholly without

jurisdiction.

5.02. Now, in the backdrop of the above legal provisions, challenge to the impugned reassessment proceedings are required to be considered.

5.03. In the present case, reassessment proceedings under section 147 of the Income Tax for the A.Y. 2008-2009 are initiated beyond the period

of 4 years. The reasons recorded for reopening of the assessment for A.Y. 2008-2009, which are communicated to the petitioner - assessee vide

communication dated 20/5/2014 are as follows:--

As desired by you, the relevant extract of the reasons recorded for initiating the re-assessment proceedings under section 147 of the Act is

reproduced, as under for your reference;

...It has been observed that assessee has incurred expenditure of Rs. 22,56,752/- - on account of "software license fee". Assessee"s contention

of being consideration of expenditure as "revenue", has been accepted. It has been noted that the payment was made without withholding of tax at

source though the payment is exclusively in nature of "royalty". Assessee Company has simply availed "software services" from M/s. Megrna

Design Automation Inc, USA. Magma has granted the company the only right to use software license purchased from Magma the software was

owned by Magma Design and is protected by Copyright laws of USA.

2.1. In view of the above, though the nature of foreign remittance clearly attracts the provisions of Section 195 of the Act, nor the deduction of tax

seems to have been made before payment credit of Rs. 22,56,752/- to foreign companies, on account of "software services". Hence. by not

making disallowance u/s. ""40(A)(i) of the Act, order passed is tantamount to under-assessment to the extent of Rs. 22,56,752/- under the Act. It

is further to be noted that, in the assessee"s own case for A.Y. 2008-09 an order u/s. 201(1) and 201(1A) r.w.s. 195 of the Act dated

:2/12/2011 was passed wherein remittance to the tune of Rs. 23,07,240/- to one M/s. Magma Design Automation Inc., USA was considered.

This resulted into demand of Rs. 3,61,463/-, which is paid by the assessee company and even its appeal was dismissed by the CIT(A).

3. Further, to state that the deduction u/s. 108 of the IT Act, 1961 is available to newly established hundred percent export-oriented undertakings

subject to fulfillment of certain conditions mentioned in the said section. As per definition given under section 10-8, ""hundred per cent export-

oriented undertaking"" means an undertaking which has been approved as a hundred per cent export-oriented undertaking by the Board appointed

in this behalf by the Central Government in exercise of the powers conferred by section 14 of the Industries (Development and Regulation) Act,

1951 (65 of 1951), and the rules made under that Act"". Thus the approval of the undertaking from the Board appointed in this behalf by the

Central Government is the first and foremost condition for eligibility u/s. 10B of the Act.

3.1. Verification of assessment records revealed that the assessee had not received approval of the Board for the above units. For KASEZ unit,

approval had been obtained from the Development Commissioner, Kandla Special Economic Zone and in respect of Pune Unit, approval had

been obtained from, Director, Software Technology Park of India, Pune Infotech Park, Hinjawadi, Pane. These approvals may suffice for setting

up a unit in the Special Economic Zone or in the Software Technology Park, but for the purpose of eligibility of deduction u/s. 10B of the IT Act,

the competent authority for approval is the Board appointed by the Central Government in this behalf, in view of judgment in case of CIT v.

Regency Creations Ltd. ET App. 59/2008, 783/2009 and 1230/2011 dtd. 4/11/08 is not allowable if 100% EOU is not rectified by the BOA.

Since the assessee had not fulfilled the conditions for eligibility of deduction u/s. 10B of the Act, the deduction of Rs. 4,69,56,816/- was not in

order. The irregular deduction claimed resulted in under-assessment of Rs. 4,69,56,816/-

4. Accordingly, I have reason to believe that income to the tune of Rs. 4,69,56,816/- chargeable to tax has been under-assessed in the case of the

assessee M/s. E-Infochips Ltd. for the Assessment Year 2008-09 and is required to be reassessed as there was failure on the part of the assessee

to disclose fully and truly all material facts necessary for Assessment Year 2008-09.

5. In view of the above, I have reason to believe that income to the tune of Rs. 4,92,13,568/- (Rs. 22,56,752/- + 4,69,56,816/-) has escaped

assessment.....

5.04. Thus, from the aforesaid it appears that the assessment for the A.Y. 2008-2009 is sought to be reopened on the ground that the ""Software

License Fees"" paid to the foreign companies was in nature of ""Royalty"" and thus, ""Capital Expenditure"" and therefore, it attracts section 195 of the

Income Tax Act and therefore, TDS was required to be deducted. However, it is required to be noted that in the original assessment, full

particulars with respect to ""Software License Fees"" by the assessee to the foreign companies was disclosed. Not only that the assessee claimed the

same as revenue expenditure. The notice was issued under section 143(3) of the Act and the Assessing Officer also vide communication/notice

dated 28/7/2011 called upon the assessee to furnish necessary documents which include the complete details of ""Software License Fees"". The

assessee was also directed to furnish relevant documentary evidences to establish and prove that ""Software License Fees"" is in nature of revenue.

The assessee submitted complete details of ""Software License Fees"" and justified its claim that the ""Software License Fees"" is in the nature of

revenue expenditure and not capital expenditure. The assessee replied to the said query as under:--

5. Details of proportionate Disallowance u/s. 10B:--

Sir, please note that the amount of deduction claimed u/s. 10B has been correctly worked out as per Section 10B(4). The profit of each

undertaking is separately worked out and accordingly as per Section 10B(4), the deduction is claimed in proportion of Export turnover of

undertaking vis-Ã¯Â¿Â½-vis Total Turnover of Undertaking. The deduction is claimed as per Audit Report in Form 56G.

6. Explanation for Software License Fees Debited to P and L A/c. And Capitalised:

We enclose herewith explanation for the Software License Fees debited to Profit and Loss Account as expense and software charges capitalised

along with copy of relevant Ledger Account Annexure-D.

Only thereafter the Assessing Officer while framing the assessment, treated the payment of ""Software License Fees"" made to the Foreign

Companies as revenue expenditure and allowed the deductions claimed and also accepted the claim of the assessee of deduction under section

10(B) of the Income Tax Act.

5.05. Now, subsequently on reopening of the assessment, it is the case of the Assessing Officer that the payment of ""Software License Fees"" is in

the nature of ""royalty"" and thus in the nature of Capital Expenditure, as the assesses has simply availed the ""Software Services"" from the named

foreign companies and the said foreign companies have granted the assessee company the only right to use ""Software License"" as the Software

was owned by the parent company itself and also on the ground that the assessee had wrongly claimed deduction under section 10(B) of the

Income Tax Act of Rs. 4,69,56,816/- on the ground that the assessee had no recent approval of the Board for the units for KASEZ unit.

5.06. Considering the aforesaid facts and circumstances of the case it cannot be said that the assessee did not disclose fully and truly all material

facts necessary for the assessment with respect to Software License Fees paid to foreign companies and also with respect to deduction claimed

under sec. 10(B) of the Act, and therefore, the income chargeable to tax has been escaped due to the failure on the part of the assessee to disclose

fully and truly all material facts. Under the circumstances, the condition precedent for invoking powers under section 147 of the Income Tax Act to

initiate reassessment proceedings beyond the period of 4 years are not at all satisfied.

5.07. Identical question came to be considered by the Division Bench of this Court in the case of Niko Resources Ltd. (supra) and while

considering the scope and ambit of powers to be exercised under section 147 of the Income Tax Act by the Assessing Officer, while reopening the

assessment beyond the period of 4 years, the Division Bench of this Court while considering its decisions in the case of Gujarat Lease Financing

Limited (supra), has observed and held in paragraph Nos. 16, 17 and 27 as under:--

16. The Assessing Officer is authorized to make reassessment in the event of his having reasonable belief that any income chargeable to tax has

escaped assessment for any assessment year. As per the 1st proviso to section 147 of the Act, assessment can be reopened under section I47 of

the Act after expiry of 4 years only if (1) the assessee failed to make a return under section I39 of the Act or in response to notice issued under

section 142(1) or under section 148 of the Act, he failed to disclose truly and fully all material facts necessary for the assessment. Once all primary

facts are before the assessing authority, no further assistance is required by way of disclosure. All inferences of facts and legal inference need to be

drawn by the Assessing Officer. It is not for any one to guide the Assessing Officer in respect of inference ""factual or legal"", which requires to be

drawn by him alone.

17. Once the case of the assessee is covered by the 1st proviso to section 147 of the Act, the reassessment proceedings beyond the period of 4

years from the end of the relevant assessment year would be without any jurisdiction and bad in law, if all material facts are furnished and there

remained no omission or failure on the part of the assessee to disclose truly and fully all material facts. This Court, after extensively discussing law

on the issue in case of Gujarat Lease Financing Ltd. (supra), has held thus:

10. It can be clearly noted from the reasons recorded that there is no mention at all of the assessee having not disclosed fully or truly material facts

which were necessary for the purpose of computing the income of the assessee. Assuming that in the notice for reopening. such wordings are not

specifically mentioned and they can be supplemented either while rejecting the objections or by way of affidavit of the Assessing Officer, then also,

the revenue has failed to point out as to in what manner there has been non-disclosure on the part of the assessee.

27. From the ratio that can be culled out from all these decisions, it is amply clear that the Assessing Officer, who is authorized to issue notice

under section 148 of the Act for reassessment. on his having a reason to believe that income chargeable to tax had escaped assessment for any

assessment year, can assess or reassess such income and also any such other income chargeable to tax, which has escaped the assessment.

However, no such action is permissible after lapse of 4 years from the end of the relevant assessment year unless income chargeable to tax has

escaped assessment on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for the purpose of such

assessment. The onus is on the assessee to reveal the primary facts and to draw the inferential facts would be the responsibility of the Assessing

Officer. Once having revealed from the record that the assessee disclosed full and complete facts and on scrutiny, at the time of original assessment

all these details are examined, no change of opinion is permissible merely because there was some error earlier on the part of the Assessing Officer

himself or because he choose not to opine on the issue or even when he changes his mind and interprets the material or law otherwise than what

was done by him.

5.08. Applying the decision of the Division Bench of this Court in the case of Niko Resources Ltd. decision of this Court in the case of Niko

Resources Ltd. Versus Assistant Director of Income Tax, reported in (2014) 51 Taxman.com 568 (Gujarat) (supra) as well as Gujarat Lease

Financing Limited (supra), to the facts of the case on hand and as observed hereinabove, there does not appear to be failure on the part of the

assessee to disclose truly and fully all material facts necessary for assessment, the initiation of the impugned reassessment proceedings which are

initiated beyond the period of four years, are not permissible and the same cannot be sustained and on that ground alone, the impugned

reassessment proceedings deserve to be quashed and set aside.

6.00. In view of the above and for the reasons stated above, present petition succeeds. The impugned notice under section 148 of the Income Tax

Act for A.Y. 2008-2009 is hereby quashed and set aside and the impugned reassessment proceedings of reopening assessment for the A.Y.

2008-2009 are hereby terminated on the aforesaid ground alone. However, it is observed and made clear that this Court has not expressed any

opinion on merits as to whether the payment of ""Software License Fees"" to the foreign companies, can be said to be ""revenue expenditure"" as

claimed by the assessee or in the nature of ""capital expenditure"" as claimed by the revenue and the said question is kept open.

Rule is made absolute accordingly. In the facts and circumstances of the case, there shall be no order as to costs.