

(2010) 05 BOM CK 0057

Bombay High Court (Goa Bench)

Case No: Writ Petition No. 848 of 2009

Sociedade De
Formento Industrial (P)
Ltd.

APPELLANT

Vs

Assistant
Commissioner of
Income Tax and
Another

RESPONDENT

Date of Decision: May 7, 2010

Acts Referred:

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1961 - Section 10B, 139, 142(1), 143(3), 147

Citation: (2010) 235 CTR 322 : (2011) 339 ITR 595 : (2011) 197 TAXMAN 178

Hon'ble Judges: U.D. Salvi, J; S.J. Vazifdar, J

Bench: Division Bench

Advocate: S.E. Dastoor, Nishant Thakkar and Sudin Usgaonkar, for the Appellant; Asha Dessai, for the Respondent

Final Decision: Dismissed

Judgement

S.J. Vazifdar, J.

The Petitioner has challenged the orders/communications pertaining to the reopening of its assessment for the asst. yr. 2002-03.

2. The Petitioner had filed a return u/s 139 of the IT Act, 1961 on 31st Oct., 2002 declaring an income of Rs. 15,25,960.

The Asstt. CIT passed an assessment order dt. 31st March, 2005 u/s 143(3). The assessment order records that the Petitioner consists of two divisions, one of which is M/s Ferromet Concentrates which derives an income totally from export and is therefore

eligible for exemption u/s 10B from the asst. yr. 1999-2000. The assessment order further records that the exemption u/s 10B was not claimed as the Petitioner had not derived any taxable income during the period 1999-2000 to 2001-02. However, during the assessment year under consideration, the Petitioner had made a profit.

Subsequently after issuing a notice dt. 12th May, 2006, an order u/s 154 dt. 25th May, 2006 was passed rectifying the assessment order by disallowing the deduction u/s 80HHC. We however, are not concerned with the same.

3. The present petition requires a consideration of the subsequent orders. A notice dt. 1st April, 2008 was issued by the Respondent to the Petitioner u/s 148 stating that the Respondent had reason to believe that the Petitioner's income chargeable to tax for the asst. yr. 2002-03 has escaped the assessment within the meaning of Section 147. The Respondent therefore proposed reassessment of the income for the said assessment year and called upon the Petitioner to deliver a return. The notice stated that it was being issued after obtaining necessary sanction of the CIT, Karnataka (Central), Bangalore.

4. The Petitioner by a letter dt. 8th May, 2008 stated that the regular assessment for the said assessment year was completed on 31st March, 2005 after calling for the details from time to time and after necessary scrutiny. It was therefore contended that no income had escaped the assessment within the meaning of Section 147. The Petitioner, however filed the return disclosing a total income of Rs. 27,71,708. The Petitioner requested the Respondent to furnish the reasons as recorded by him for reopening the assessment, so as to enable it to make further submissions. The Petitioner filed the return without prejudice to its contention that the notice was bad in law having been issued without assuming the proper jurisdiction.

5. The Respondent thereafter furnished the reasons under cover of a letter dt. 21st Aug., 2009.

6. The Petitioner thereafter by a letter dt. 2nd Oct., 2009, raised various objections as to the jurisdiction of the Respondent for issuing such notice u/s 148. By a letter dt. 23rd Oct., 2009, the Petitioner called upon the Respondent to deal with the same.

7. By the impugned order dt. 10th Nov., 2009, the Respondent rejected the contention. The Respondent held that the Department was justified in reopening the assessment of re-examining the issue and to consider fresh arguments put-forth by the Petitioner which are required to be examined to ascertain the correct facts. The Respondent held that the same was done after due application of mind and upon his subjective satisfaction for doing so. The Petitioner was directed to co-operate by furnishing the information called for in the assessment proceedings.

8. The main point pertained to a deduction u/s 10B. There is no doubt that the exemption u/s 10B had been claimed for the period 1991 to 1995. What is important to note is that the exemption had also been granted for the said period. Section 10B was thereafter

amended. The Petitioner once again claimed exemption u/s 10B contending that the same was not in respect of the same unit but in respect of a new unit. Mr. Dastoor submitted that all the information and material in connection with the submissions had been supplied and was available to the Department before the assessment was made. He submitted that the Department was therefore conscious of the material necessary to adjudicate as to whether the unit in respect of which exemption was now claimed for the said assessment order was a new unit or not. The Petitioner claimed that it was a new unit. It is however contended on behalf of the Department that it is not as the Petitioner had only expanded the existing unit in respect of which the benefit u/s 10B had already been claimed, granted and availed of.

9. Mr. Dastoor placed strong reliance essentially upon the judgment of a Division Bench of this Court in [Hindustan Lever Ltd. Vs. R.B. Wadkar, Assistant Commissioner of Income Tax and Others \(No. 1\)](#), , and in particular upon the following observations:

17. Having heard the parties-length, we are of the opinion that the petition can be disposed of on the first contention raised by the Petitioner wherein the Petitioner has contended that the notice issued u/s 148 is without jurisdiction being hit by the proviso to Section 147 of the Act as such not within the prescribed period provided under proviso to Section 147 of the Act. In the circumstances, it would be necessary to turn to Section 147 of the Act, which reads as under:

147. Income escaping assessment.-If the AO has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to the provisions of Sections 148 - 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereinafter in this section and in Sections 148 - 153 referred to as the relevant assessment year):

Provided that where an assessment under Sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the Assessee to make a return u/s 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

18. Reading of proviso to Section 147 makes it clear that if the AO has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 - 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings u/s 147, or recompute

the loss or the depreciation allowance or any other allowance, as the case may be, for the concerned assessment year. However, where an assessment under Sub-section (3) of Section 143 has been made for relevant assessment year, no action can be taken u/s 147 after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reasons of the failure on the part of the Assessee to disclose all material facts necessary for his assessment for that assessment year.

19. In the case in hand it is not in dispute that the assessment year involved is 1996-97. The last date of the said assessment year was 31st March, 1997 and from that date if four years are counted, the period of four years expired on 1st March, 2001. The notice issued is dt. 5th Nov., 2002 and received by the Assessee on 7th Nov., 2002. Under these circumstances, the notice is clearly beyond the period of four years.

20. The reasons recorded by the AO nowhere state that there was failure on the part of the Assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the AO to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the AO to reach to the conclusion as to whether there was failure on the part of the Assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the AO to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the AO. The reasons recorded should be self-explanatory and should not keep the Assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The AO, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the Assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the AO cannot be supplemented by filing affidavit or making oral submissions, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.

21. Having recorded our finding that the impugned notice itself is beyond the period of four years from the end of the asst. yr. 1996-97 and does not comply with the requirements of proviso to Section 147 of the Act, the AO had no jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment u/s 143(3) of the Act. On this short count alone the impugned notice is liable to be quashed

and set aside.

There indeed cannot be any dispute as far as this Court is concerned on the above propositions. The same are binding on us. The question is whether the jurisdiction was wrongly assumed or not.

10. Mr. Dastoor submitted that none of the conditions justifying reassessment proceedings as specified are present in the present case. He submitted that there is no allegation recorded in the reasons to the effect that there has been a failure on the part of the Assessee to disclose fully and truly all material facts. Nor do the reasons specify the failure. In other words, the reasons do not furnish any details of the facts which are not recorded. It was submitted that there is nothing in the orders/reasons which indicate that there was escapement of income on account of the failure on the part of the Petitioner to disclose fully and truly all material facts. It was also submitted that the validity of the order has to be judged only on the basis of the reasons recorded and that the same cannot be supplemented subsequently.

11. The writ petition is indeed maintainable. However, in our opinion, in the facts of this case, the questions raised herein will be more conveniently decided not at this stage in this petition but by requiring the Petitioner to raise the same in appeal provided under the IT Act. It is made expressly clear that we do not express any opinion as to the validity of the impugned order. We further make it expressly clear that the contentions raised by Mr. Dastoor and all other contentions that may be open to the Petitioner, may be raised in the appeal, if any, filed from the final order reassessing the Petitioner's income.

Ms. Dessai conceded that these very questions can also be raised in the appeal provided for under the IT Act.

12. For the purpose of this order, we proceed on the basis that all the facts had been furnished by the Petitioner to the Department. The responsibility of the Petitioner/Assessee is not merely to disclose all material facts but to disclose them fully and truly. The term "truly" prima facie indicates that a full disclosure is not sufficient and that the Assessee must also disclose the material truly. The ambit of the expression "fully and truly" is wider than the term "fully". There may therefore be a case where a full disclosure may have been made by the Assessee but the same may not have been made truly. It is neither possible nor appropriate to categorise or limit the type of the cases which fall within the mischief of that expression. This would necessarily involve a consideration not merely of the material furnished to the Department but the manner in which it is furnished to the Department. In the present case for instance, along with the return of the income, the Petitioner had filed a certificate of its chartered accountant pursuant to Rule 16E in Form No. 56G. The certificate states "In our opinion and to the best of my knowledge and according to the explanations given to us the particulars given in the Annex. "A" subject to the notes contained in the statement of notes thereon in Enclosure-I are true and correct." Annex. "A" furnishes the details as to the date of

registration of the unit as 100 per cent EOU, date of the commencement of manufacture or production by that unit and the number of consecutive years for which the deduction was claimed. The annexure in turn encloses "Annex. I". Annex. I states that Ferromet Concentrates was a 100 per cent EOU of the Petitioner set up in the financial year 1985-1986 and that the Petitioner had claimed exemption u/s 10B in respect of this unit from the asst. yr. 1990-91. The enclosure thereafter refers to the formation of the alleged new unit in respect of which the deduction u/s 10B was claimed for the said assessment year in question. In other words, according to the Petitioner, these are two separate EOUs and therefore the benefit u/s 10B could have been claimed. However, neither Annex. "A", nor Enclosure-I disclosed the fact that admittedly the exemption claimed by the Ferromet Concentrates division u/s 10B had been granted and availed of by the Petitioner. It is a moot point as to whether in view of the failure to mention the same, the disclosure can be said to be a true disclosure even assuming that all the facts pertaining to the setting up of the alleged new unit were disclosed.

13. In the case of [Kantamani Venkata Narayana and Sons Vs. First Additional Income Tax Officer, Rajahmundry](#), the Supreme Court held as under:

9. The ITO had therefore prima facie reason to believe that information material to the assessment had been withheld, and that on account of withholding of that information income liable to tax had escaped assessment. From the mere production of the books of account it cannot be inferred that there had been full disclosure of the material facts necessary for the purpose of assessment. The terms of the Explanation are too plain to permit an argument being reasonably advanced, that the duty of the Assessee to disclose fully and truly all material facts is discharged when he produces the books of account or other evidence which has a material bearing on the assessment. It is clearly implicit in the terms of Sections 23 and 34 of the IT Act that the Assessee is under a duty to disclose fully and truly material facts necessary for the assessment of the year, and that the duty is not discharged merely by the production of the books of accounts or other evidence. It is the duty of the Assessee to bring to the notice of the ITO particular items in the books of account or portions of documents which are relevant. Even if it be assumed that from the books produced the ITO, if he had been circumspect, could have found out the truth, the ITO may not on that account be precluded from exercising the power to assess income which had escaped assessment.

14. We hasten to add that we do not suggest that the Petitioner has not disclosed all necessary facts truly merely because the same have not been stated by the chartered accountant's certificate or the enclosure and attachment thereto. It may well have been done even otherwise. Such questions however would require to be considered in detail. The entire record may have to be considered. They would more conveniently be dealt with in proceedings under the IT Act rather than in a writ petition under Article 226 of the Constitution of India.

15. It is only for this reason that we are not inclined to entertain the writ petition at this stage. All the contentions of the parties are kept open.

16. With the above clarifications, the writ petition is dismissed. The interim order shall continue up to and including 16th Aug., 2010.