IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 2000 OF 2013

The Commissioner of Income Tax
(Large Tax Payer Unit), Mumbai 400 005 … Appellant
v/s
M/s Reliance Industries Ltd.,
Mumbai 400 021 … Respondent

Mr A.R. Malhotra with Mr N.A. Kazi for Appellant.
Mr J.D. Mistry, Sr. Counsel with Mr Raj Darak and Mr P.C. Tripathi for Respondent.

CORAM : M.S. SANKLECHA AND
B.P. COLABAWALLA JJ.

DATE : 1st FEBRUARY, 2016

P.C.:-

1. This Appeal under section 260A of the Income Tax Act 1961 (Act) takes exception to the order dated 28th February 2013 passed by the Income Tax Appellate Tribunal (Tribunal). The impugned order is a common order for AYs 2003-04, 2004-05 amd 2005-06. This Appeal relates to AY 2004-05.

2. Although the Revenue has formulated multiple questions of law for our consideration, the only question arising from the impugned order is as under :-

> “ Whether on the facts and circumstances of the case, the Tribunal was correct in taking a view that the Assessing Officer did not have jurisdiction to issue the reopening notice dated 30th March 2010 seeking to reopen assessment for AY 2004-05 ?”

3. Facts :-

(a) Respondent – Assessee had established captive power plants / units which generate and supply power to its manufacturing units. The captive power units are entitled to deduction under Section 80IA of the Act in respect of its profits on account of generation and distribution of power. For the subject Assessment Year, the Appellant filed its return of income claiming the benefit of Section 80IA of the Act. The Assessing Officer, on examining the same, by an order dated 27th November 2006 passed under section 143(3) of the Act inter alia allowed the benefit as available under Section 80IA of the Act.

(b) On 30th March 2010, a notice under Section 148 of the Act was issued by the Assessing Officer seeking to reopen assessment for AY 2004-05. This notice for reopening of assessment beyond the period of four years from the end of the relevant assessment year was issued in view of Revenue's audit objection. This audit objection had been resisted to by the Assessing Officer. Nevertheless the Assessing Officer issued the reopening notice and communicated the following reasons as recorded in support of the reopening notice :-

> "Reasons for reopening under section 148
>
> 1. Assessee company filed return of income on 01/11/2004 declaring total income of Rs.898,19,32,151/- under normal provisions of the Income Tax Act 1961 and book profit of Rs.4264,14,81,346/- u/s 115JB. Order u/s 143(3) was passed on 27/11/2006 assessing the total income of Rs.16,46,57,20,196/- under normal provisions of the Income Tax Act 1961 and book profit of Rs.5748,58,77,147/- u/s 115JB.
>
> Thereafter order u/s 250 dt. 29/01/2009 was passed to give effect to CIT(A) order dt. 31/10/2008 and total income was revised at Rs.1060,60,50,316/- under normal provisions of the Income Tax Act 1961 and book profit of Rs.5428,02,97,561/- u/s 115JB.
>
> 2. Sub-section (10) to 80IA provides that
>
> "where it appears to AI that owing to the close connection between assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to assessee more than the ordinary profits which might be expected arise in such eligible business, the Assessing Officer shall, in computing the profits and gains of such eligible business for the purpo0ses of the deduction under this section take the amount of profits as may be reasonably deemed to have been derived there from."
>
> Explanation to section B defines that Market value means the price that such goods or services would ordinarily fetch in the open market. The market value cannot be the purchase value of electricity but the price of the electricity, which the assessee can fetch in the open market. There was no open market for electricity during the period under review and regulatory bodies fixed the price of electricity

during the period under.

Regulatory bodies in respective states regulate the sale of electricity. The tariff fixed for sale by the State Power Distribution Agency for industrial consumers cannot be called as market price as the regulatory fixes the tariff considering the wheeling charges, transmission losses due to leakage, past losses of the distribution agency, standby charges as well as Grid Support Charges. Tariff for purchase of power from the independent Power Producers by State Distribution Agency is determined on the basis of the normative parameters determined by the Government of India under its Notification No.SO251(E) dt. 30th March 1992. The Tariff structures, both for the Central Sector and IPPs are on COST PLUS BASIS, Ministry of power has fixed the 16 % rate of return of investment as reasonable rate of return and 0.50% on loan funds. All regulatory bodies to fix tariff chargeable by State Electricity Boards as well as independent power suppliers follow this principle. Hence, the profit of the generating station cannot exceed the reasonable return of investment. Considering the above tariff policy adopted for fixing tariff for supply of electricity the profit cannot exceed 16 percent of the investment of capital base.

It is seen from the records that the assessee has so arranged the affairs as to show extra ordinary profits from generation of electricity to avail higher 80IA deduction than admissible. The estimated excess profit shown was as follows :-

Generation plant	Capital base	16% return on capital base	80IA deduction claimed by assessee	Excess deduction claimed by assessee u/s 80IA
GTG1PG	6,67,64,153	1,06,82,264	38,62,84,451	37,56,02,187
GTG2PG	14,94,89,585	2,39,18,334	18,79,38,426	16,40,20,092
GTGAHD	21,96,29,982	3,51,40,797	14,63,32,788	11,11,91,991
CPP III/IV	40,41,19,289	6,46,59,086	104,30,98,240	97,84,39,154
CPP V	19,45,18,197	3,11,22,912	32,06,25,859	28,95,02,947
CPP VI	21,54,86,481	3,44,77,837	37,98,08,864	34,53,31,027
STG	61,52,73,587	9,84,43,774	46,34,67,685	36,50,23,911
Total	186,52,81,275	29,84,45,004	292,75,56,313	262,91,11,309

> This has resulted in excess profit being exhibited for the purpose of claiming deduction to the extent of Rs.262.29 crores.
>
> Assessee faded to disclose in its return of income that the power transferred to non-80IA units was at a price more than the tariff fixed by regulatory authorities and the same was not allowable as this inflates the profits eligible for deduction u/s 80IA.
>
> As there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment, I have reason to believe that income chargeable to tax has escaped assessment for this assessment year, coming within the meaning of section 147 of the Income Tax Act 1961 on this issue.
>
> Thus, as above, total estimated income that has escaped assessment is Rs.262,91,1,309/-. In view of the same, notice u/s 14B is issued after approval of CIT-LTU, vide CIT(LTU)/41/Reopening 147/2009-10/694 dt. 30/03/2010."

(c) Thereafter, the Assessing Officer by order dated 30th November 2010 passed under Section 143(3) r/w section 147 of the Act determined the Respondent's income at Rs.1,323.51 crores under the normal provisions of the Act. This after reducing the deduction available to the eligible profits under Section 80IA of the Act and sustaining the reopening of the assessment.

(d) In Appeal, the CIT(A) held that the reopening notice dated 30th March 2010 is without jurisdiction. This is the ground that the Assessing Officer could never have reason to believe that income chargeable to tax has escaped assessment. This for the reason that he had himself resisted the Revenue's audit objection on the issue of market value of the power generated. Besides, holding that there was no failure to disclose all material facts necessary for assessment and that the Assessing Officer had applied his mind to the issue of Section 80IA, benefit claimed during the regular assessment proceedings. On appeal, the Tribunal by the impugned order upheld the order of the CIT(A) and held the reopening notice to be without jurisdiction. In the above view, the merits of the claim for deduction under Section 80IA of the Act was not examined.

4. It is undisputed position that the impugned reopening notice dated 30th March 2010 was seeking to reopen the assessment for the AY 2004-05 which is beyond the period of four years from the end of the relevant assessment year. In such a case, the jurisdictional requirements to reopen an assessment are

(i) the Assessing Officer must have reason to believe that the income chargeable to tax escaped assessment;

(ii) the Assessing Officer in the regular assessment proceedings had not formed an opinion in regard to the issue on which the reopening notice is issued; and

(iii) there has been a failure on the part of the

Assessee to truly and fully disclose all necessary facts for the assessment.

5. In this case, the CIT (A) as well as the Tribunal have on consideration of the facts arising before them have concluded that none of the three conditions precedent have been satisfied. The reason to believe that income chargeable to tax has escaped assessment on the part of the Assessing Officer is a sine qua non for issue of an reopening assessment under section 148 of the Act as non-satisfaction of reason to believe would by itself make the notice fatal. In such a case, the satisfaction of other conditions would not even require examination. In this case, the Respondent – Assessee had claimed the benefit of deduction under Section 80IA of the Act in respect of its captive power plants which were supplying power to other units of the Respondent – Assessee. The benefit of Section 80IA of the Act was in respect of its profits for the captive power plant units. The Assessing Officer during the regular assessment proceedings granted the benefit as claimed on examination of the record in an order passed under Section 143(3) of the Act. Thereafter, a query was raised by the Revenue Audit to the effect that the rates at which the electricity were sold by the captive power generating units of the Respondent – Assessee's other units was

inflated as they were not comparable to its market value. This inflation as alleged was as to claim higher deduction under Section 80IA of the Act. The Assessing Officer disputed the same in his response to the audit party inter alia stating categorically as under :-

> “the power generating eligible undertaking of RIL has transferred the electricity at the rate which is well comparable at the rate which the electricity board sells to an industrial undertaking for its consumption. Under the circumstances the profit eligible for deduction under section 80IA has been rightly computed and allowed taking into account the market value of such goods as contemplated in section 80IA of the Act.”

6. Both the CIT(A) as well as the Tribunal, on the aforesaid basis came to the conclusion that in view of the fact that the Assessing Officer himself has not accepted the audit objection, there could be no reason for him to believe that income chargeable to tax has escaped assessment. It is clear from Section 147 of the Act that the jurisdictional requirement to issue a notice for reopening the assessment is the satisfaction of the “Assessing Officer.” This satisfaction of the Assessing Officer cannot be outsourced or arrived at on the basis of directions of his superiors. The Act requires his reason to believe that income chargeable to tax has escaped assessment. Thus, the impugned notice is not sustainable. In that

view, the first condition precedent of reason to believe is that income chargeable to tax is escaped assessment being the primary requirement is not satisfied, the notice for reopening is without jurisdiction.

7. Mr Malhotra, learned counsel for the Revenue, supports the appeal by stating that once an audit objection had been raised, then the Assessing Officer is obliged to take remedial action, as in this case, by issuing a reopening notice. This for the reason he states that otherwise the revenue due to the State would be lost even in case the audit objection is upheld.

8. We are unable to understand how the mandate of the Act requiring the Assessing Officer to have reason to believe that income chargeable to tax has escaped assessment can be ignored on the altar of revenue collection. If such a submission is to be accepted, it would, be the beginning of the end of the Rule of Law. In fact, a Division Bench of this Court in IL & FS Investment Managers Ltd. v/s Income Tax Officer, (Bom), reported in 298 ITR 32 has concluded the issue by pointing out that where the Assessing Officer in response to the query from the Revenue audit has opposed the reopening, it cannot be said that the Assessing Officer has formed his opinion that

income has escaped assessment for the purpose of the reopening notice. In the above view, the question as framed does not give rise any substantial question of law.

9. In fact, though on the above issue itself, the appeal is not being entertained, it may be pointed out that none of the other two conditions precedent viz. no change of opinion and failure to disclose all material facts are satisfied in this case to sustain reopening of the assessment for AY 2004-05.

10. So far as the change of opinion is concerned, both the CIT(A) as well as the Tribunal have rendered a finding of fact that there is a change of opinion. In fact, the CIT(A) has recorded as under :-

> "It is also on record that the AO had asked for the details of deduction u/s 80IA claimed alongwith unit wise P & L A/c which was submitted by the assessee. The assessment was completed u/s 143(3) of the I.T. Act 1961 wherein adjustments were made by the Assessing Officer of the deductions claimed by the assessee."

It is thus clear that necessary enquiry was made into the profits claimed by the eligible unit for the purpose of benefit under Section 80IA of the Act during regular assessment proceedings.

11. So far as failure to disclose fully and truly all facts are concerned, it is noticed from the reasons recorded that its basis for issuing the reopening notice is the records of the Assessee in possession of the Assessing Officer during regular assessment proceedings. It is noticed from those records that the Assessee had claimed excess profits in respect of its power generating units. The obligation of the Assessee under the Act is only to disclose primary facts necessary for assessment. The application of law and the determination of the market value of the electricity sold by the eligible units under Section 80IA to the other units of the Respondent – Assessee is a subject matter of enquiry by the Assessing Officer while passing an order under Section 143(3) of the Act in regular assessment proceedings. Thus, there is no failure on the part of Respondent to disclose truly and fully all material facts which would warrant reopening of an assessment.

12. In view of the above, Appeal dismissed. No order as to costs.

(B.P.COLABAWALLA, J.) **(M.S. SANKLECHA, J.)**

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