IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1400 OF 2022

Diamond And Gem Development
Corporation Ltd. ….Petitioner

V/s.

The Assistant Commissioner of
Income Tax Central Circle 3(1)(1)
and Ors. …Respondents

Mr. Mandar Vaidya a/w Mr. Dhaval Shah for Petitioner.
Mr. Akhileshwar Sharma a/w Ms. Shilpa Goel for Respondents-Revenue.

CORAM : K.R. SHRIRAM &
FIRDOSH P. POONIWALLA, JJ.
DATED : 18th AUGUST 2023

P.C. :

1. Petitioner filed return of income for Assessment Year 2013-14 on 26th September 2013 disclosing total income of Rs.2,52,58,880/- under normal provisions and under Section 115 JB of the Income Tax Act, 1961 (the Act) at Rs.6,77,49,226/-. The assessment was completed under Section 143(3) of the Act on 28th March 2016 declaring total taxable income as per the returns filed by petitioner.

2. Petitioner received a notice dated 31st March 2021 under Section 148 of the Act stating that there were reasons to believe that petitioner's income chargeable to tax for the Assessment Year 2013-14 has escaped assessment within the meaning of Section 147 of the Act.

Petitioner was provided with the reasons to believe in which it is recorded as under :

> *ii. On perusal of record it is found that, the assessee company had established a Diamond Industrial Park in Sachin District, Surat. This park in the year 1994 was made into Export Processing Zone. Government of India, Ministry of Commerce & Industry Vide Notification dated 01.11.2000 granted approval to convert the Surat Export Zone into Surat Special Economic Zone (SURSEZ), which is the first private – owned SEZ in India. Further, on perusal of 10 CCB it is found that, the assessee had stated to have commenced its operation from date of GOI's notification dated 1st November 2000 and stated to claim deduction u/s 80IA from A.Y. 2005-06 onwards. Thus, as per the Form 10CCB the assessee had claimed to have commenced its business in November 2000 much before the date of recognition to 80IA(4)(iii) since commencement of operating and maintain SEZ was Nov. 2000 (as per Form 10CCB), not after the effective date 1st April 2001 as per the provisions of section 80IA(4)(iii) r.w.r. 18C of IT Rules. It is evident from the above, though the assessee had set up and established the Diamond Industrial Park in Sachin District, Surat in the year 1994, it started claimed deduction from 2005-06 which is much beyond the 15 years from the commencement of the business. For the year under consideration assessee claimed the deduction 80IA(4)(iii) at Rs.4,42,65,519/- which was allowed based on the Form 10CCB submitted which resulted in under assessment of taxable income to this extent. The Statutory Tax Audit report filed in Form No.10CCB submitted by assessee provides incorrect dates of establishment of Industrial Park. Therefore, the reason for under assessment of taxable income is attributable to assessee and such under assessment occurred by the reason of omission on part of the assessee to disclose true and correct facts of the case.*
>
> *iii. Therefore, I have reason to believe that taxable income by virtue of incorrect claim of ineligible deduction from income u/s. 80IA(4)(iii) of the Act of an amount as stated in para ii above has escaped assessment by the reason of omission on part of the assessee within the meaning of section 147 of the IT Act, 1961. Further this case is squarely covered under the provisions of Explanation 1 to section 147 of the Act. Therefore, I am satisfied that this is a fit case to issue notice u/s. 148(1) r.w.s. 147 of the IT Act, 1961.*

3. Petitioner filed its objections by a letter dated 8th July 2021. The objections were rejected by an order dated 4th February 2022. It is this notice and the order rejecting objections which are impugned in this petition.

4. Since pleadings are completed, with the consent of the counsel we decided to dispose this petition at this stage itself.

5. The notice dated 31st March 2021 issued under Section 148 of the Act being for the Assessment Year 2013-14, more than four years have expired since the end of the relevant Assessment Year. Therefore, the provisio to Section 147(1) of the Act would apply. As per the proviso no such reopening of assessment is permissible after expiry of four years from the end of the relevant assessment year unless there has been failure on the part of assessee to truly and fully disclose all material facts required for the assessment. Having considered the reasons to reopen in our view there is no failure on the part of petitioner to truly and fully disclose any material facts. We say this because during the course of the original assessment proceedings the Assessing Officer (A.O.) by a communication dated 16th February 2016 had specifically raised nine queries and the first three of them are related to the provisions of Section 80 IA of the Act and Form 10CCB. The queries read as under :

> *1. On perusal of the form 10CCB, it has been noticed that date of commencement of operation/activity is 01.11.2000. Please explain, how you are eligible for deduction u/s 80IA as per the provision of I.T. Act with all supporting documents.*
>
> *2. In respect of Deduction claimed u/s 80 IA of the Act. Please submit the details notes on your industrial activity, which come u/s 80 IA.*
>
> *3. Please submit the details working of deduction u/s 80 IA.*

6. Assessee responded vide its letter dated 25th February 2016 and also annexed to the said letter the approvals that it had received from Ministry of Commerce and Industry. The A.O. considered these explanations and proceeded to pass the Assessment Order. It is true that there is no discussion on this in the Assessment Order. The Division Bench of this court in ***Aroni Commercials Ltd. vs. Deputy Commissioner of Income Tax 2(1)***[1] held that once a query is raised during the assessment proceedings and assessee has replied to it, it follows that the query raised was a subject of consideration of the A.O. while completing the assessment. It is not necessary that the assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised.

7. We should also note that a notice to reopen had been issued even for Assessment Year 2006-07 and the reasons recorded therein are identical to the reasons recorded for reopening for the year at hand, i.e., for Assessment Year 2013-14. In those reasons for Assessment Year 2006-07 it is stated that assessee was not eligible for deduction under Section 80IA as the company had set up the EPZ notified by notification dated 31st May 1994. As a background we must note that assessee had established business and had received approval to set up EPZ, i.e., Export Processing Zone vide notification dated 31st May 1994. The Government of India, Ministry of Commerce and Industry vide its letter dated 3rd March 2004 had informed

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assessee that the EPZ was converted into a Special Economic Zone (SEZ) vide resolution dated 1st November 2000 but all the terms and conditions mentioned in the Notification dated 31st May 1994 remained unchanged. Assessee under Section 80IA was entitled to claim deduction for any ten consecutive assessment out of the period of 15 years commencing from the date the Notification dated 1st November 2000 was issued and assessee has been claiming such deduction. In Assessment Year 2006-07 when the reasons to reopen was issued the A.O. had formed an opinion that assessee was entitled to claim for 15 years only from 31st May 1994 and not from 1st November 2000. Assessee had filed the petition challenging the reopening for Assessment Year 2006-07 being Writ Petition No. 1915 of 2011. During pendency of this Writ Petition assessee received an order dated 13th December 2011 stating that the proceedings that were initiated under Section 147 of the Act for Assessment Year 2006-07 were dropped. In view thereof assessee withdrew Writ Petition No. 1915 of 2011. Mr. Vaidya therefore is justified in submitting that there can never be a case of incorrect dates being stated in Form 10CCB by assessee as regards establishment of Industrial Park.

8. We agree with Mr. Vaidya that this is nothing but a case of change of opinion by the A.O. from that held earlier during the course of assessment proceedings and this change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

9. We should also note that in the affidavit in reply filed through one Ms. Jyothi Sharma affirmed on 24th April 2023 it is stated that the reassessment proceedings have been initiated in view of the objections/ observations raised by the revenue audit. The law on that is quite settled. In every case the Income Tax Officer must determine for himself what is the effect and consequences of the law mentioned in the audit note and whether in consequence of the law which has come to his notice that he can reasonably believe that income has escaped assessment. The basis of his belief must be the law on which he has now become aware and the opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, colour the significance of such law. The true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income Tax Officer. We have to note that the Income Tax Officer who has issued the notice to reopen and who has recorded the reasons to believe based on which we would assume he has obtained approval under Section 151 of the Act has chosen to suppress the fact that there were audit objections raised. In the reasons to believe there is not even a whisper that there was any audit objection. He was duty bound to disclose that there were audit objections and that he has now become aware of the law based on which he can reasonably believe that income had escaped assessment.

10. In the circumstance, in our view the notice dated 31st March 2021 and the order on objections dated 8th July 2021 are to be quashed and set aside which we hereby do.

11. Petition disposed.

(FIRDOSH P. POONIWALLA, J.) **(K.R. SHRIRAM, J.)**