

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 2527 of 2017****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE BIREN VAISHNAV**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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E-INFOCHIPS LIMITED....Petitioner(s)

Versus

DEPUTY COMMISSIONER OF INCOME TAX, CIRCLE 2(1)

(1)....Respondent(s)

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Appearance:

MR B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1

MRS MAUNA M BHATT, ADVOCATE for the Respondent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI**and****HONOURABLE MR.JUSTICE BIREN VAISHNAV****Date : 12/06/2017****ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. This petition is filed by the assessee challenging a notice dated 28.03.2016 issued by the respondent-Assessing Officer seeking to reopen the petitioner's assessment for the assessment year 2011-12. The original assessment was framed after scrutiny. The impugned notice is thus, issued within a period of four years from the end of the relevant year in a case, where the scrutiny assessment was framed. To issue such notice, the Assessing Officer had recorded following reasons:

“Reasons recorded for initiation of assessment proceedings”

In this case, the assessee company filed its return of income for A.Y. 2011-12 at Rs. (-) 34,08,157/- on 29/11/2011. The case was finalized u/s. 143(3) determining the total income at Rs. (-)34,08,157/- on 28/02/2014.

a) The company acquired 100% Software Development EOU status after registering with Software Technology Parks of India [STP], Pune. Hence, the assessee was eligible to claim exemption u/s. 10A. For the purpose of eligibility of deduction u/s. 10B of the Income Tax Act, the competent authority for approval is the Board appointed by the Central Government in this behalf. However, it was seen from the assessment records for A.Y. 2008-09 to A.Y. 2010-11 i.e. three years that the assessee had claimed exemption u/s. 10B of the Act, without getting registered with the Board appointed by the Central Government u/s 14 of the Industries Development and Regulation Act, 1951.

Since, assessee had not fulfilled the condition for eligibility of deduction u/s. 10B of the Act, in respect of STPI unit at Pune, the deduction of Rs. 10,55,64,382/- claimed and allowed u/s. 10B in respect of the above unit was irregular and was required

to be disallowed.

b. It was observed from the submission dated 13/09/2013 that an amount of Rs. 63,00,000/- were debited as Managing Directors Remuneration and TDS was not deducted from the expenditure booked. In view of the above, this expenditure was required to be disallowed under the provisions of section 40(a) (ia) of the Income Tax Act, 1961 and the same was required to be added to income of the assessee.

c. It was observed from the assessment records that assessee had earned exempted income u/s. 10 of the Act. However, from the assessment records, it was seen that expenses deemed to have been incurred for earning the income exempt from income tax was not disallowed in terms of provisions of section 14A read with rule 8D.

2. In view of the above, I have reason to believe that the assessee has concealed the income to extent of Rs. 11,30,80,042/- within the meaning of the provision of section 147 of the I.T.Act 1961. Hence it is a fit case for issuing notice u/s. 148 of the I.T.Act, 1961 to M/s. E infochips Limited for A.Y. 2011-12.”

2. Upon receipts of the reasons, the assessee raised objections to the notice of reopening under a communication dated 18.10.2016. Such objections were, however, rejected by an order dated 02.12.2016 by the Assessing Officer. At that stage, the assessee has filed this petition.
3. The reasons recorded show three separate grounds on which, the Assessing Officer desired to reopen the assessment. These grounds are as under:

- i. The assessee had claimed deduction under section 10B of the Act in respect of its software development unit situated at Pune. According to the Assessing Officer, in terms of section 10B of the Act, the unit had to be registered with the Board appointed by the Central Government under section 14 of the Industries Development and Regulation Act, 1951. The unit of the assessee was not so registered and that therefore, deduction under section 10B was not available.
- ii. The assessee had paid certain remuneration to its directors without deducting tax at source. Such expenditure therefore, had to be disallowed under section 40(a)(ia) of the Act.
- iii. The assessee had earned income which was exempt under section 10 of the Act. However, according to the Assessing Officer, matching disallowance for expenditure to earn such exempt income, as provided under section 14A of the Act and Rule 8D of the Income Tax Rules, 1961, was not made.
4. At this stage, we may record that on facts, Revenue was unable to press the second ground since it seems undisputed that the assessee had deducted tax at source while paying remuneration to its Managing Directors. On that basis, while disposing of the objections of the petitioner, Revenue had dropped this ground. This leaves us with two grounds for reopening the assessment.

5. Learned counsel for the petitioner submitted that both the heads of income were scrutinized by the Assessing Officer during the original assessment. Any attempt on his part to make additions on these grounds would be based on mere change of opinion. Counsel further submitted that the deduction under section 10B of the Act is available for ten years from the year of setting up of the industry. In case of the assessee assessment year 2005-06 was the first year. Without disturbing the first year of the assessment the Revenue tried to withdraw the deduction in the present year i.e. assessment year 2011-12 which was the seventh year. According to the counsel this is wholly impermissible.
6. On the other hand learned counsel Ms. Bhatt contended that the requirement of registration of a unit for deduction under section 10B of the Act was not examined during the original assessment. This claim was therefore, not scrutinized. The Revenue had issued notice for earlier years to the extent it was permissible looking to the limitation provision.
7. We may first advert to the question of deduction under section 10B of the Act. In this context, the Assessing Officer had during the original assessment raised certain queries. These queries were replied by the assessee under a communication dated 20.01.2014. The answers furnished by the assessee were in response to the Assessing Officer's requirement for furnishing complete details with respect to the claim of exemption under

section 10B of the Act. The information supplied by the assessee under the said communication was as under:

“24. Furnish complete details with respect to the claim of exemption u/s. 10B. (Para 35 of notice):

We have enclosed two Audit Reports in Form 56G in support of our claim u/s. 10B for our Pune Unit and Kasez Unit (Annexure 'petitioner'). Please note that we have claimed the deduction u/s. 10B as under:

Unit Name	Consecutive year of claim	Deduction Rs.
Pune Unit	7 th	10,66,05,096
Kasez Unit	4 th	56,51,508

Similar claims of deduction have been allowed in all the earlier years. The details of party wise foreign currency sales and receipts are enclosed in a chart format. (Annexure P-1).

It will be found that in the Audit Report in from 56G the auditor has given details of unrealized sales bills. We give in the table below the details of subsequent receipts or non receipts of the said outstanding sales bills. We have enclosed herewith in Annexure P-2, the copies of FIRC (Foreign Inward Remittance certificates) issued by Indian Bank in respect of realization of such bills.

In the chart enclosed (Annexure P-3). We have given the details of subsequent realization which is within the time of six months (and further extended), from the date of Invoice, as per Reserved Bank of India guidelines. However, we are unable to realize value of following Invoices as a result of which amount of deduction will be reduced by Rs. 10,40,714/- as calculated below:

Amount of Total Export Turnover: Rs. 19,45,07,450/-

Amount of Export Turnover as Reduced by Unrealized
 Amount: Rs. 19,26,08,605/-
 Profits of the Business: Rs. 10,66,05,096/-
 Amount of Deduction as claimed in Form 56G:
 Rs. 10,66,05,096/-
 Revised Amount of Deduction:
 Rs. 19,26,08,605
 ----- x Rs. 10,66,05,096/-=Rs.10,55,65,382/-
 Rs. 19,45,07,450/-

Please note the business of both the Pune and Kasez Units is the same as in earlier years i.e. computer software (as defined in section 10B) and Hardware. The sales Invoices are produced before Your Honour of Both the periods in support of the above.

We have also enclosed the Unit wise statement of Income (Annexure P-4).

The unit wise Statement of Income shows the computation of Profits of the business qua each Unit separately. It will be found that M.D.salary etc. has been allocated over all the units in equal proportion. The unit wise Profits and Gains of business has been arrived at after deducting the allocated M.D.Salary. The unit wise Profits and Gains of business so arrived at has been considered for computing the deduction u/s. 10B(4).

The computation of deduction has to be made as per section 10B(4) i.e.

Profits of the business of unit x Export Turnover

 Total Turnover

The computation of Export Turnover and Total Turnover has been given in the Audit Report u/s. 56G. The Audit report carries the computation of deduction as per section 10B(4). We have claimed the deduction u/s. 10B as per the amount mentioned in Audit Report in Form 56G.

As such we comply with all the conditions mentioned in section 10B.

In view of the above, our claim of deduction u/s. 10B is justified to the extent of amount realized from the seller.”

8. It can thus be seen that the Assessing Officer was acutely conscious of the assessee's claim of deduction under section 10B of the Act during the original assessment. To verify such claim, the Assessing officer had raised certain queries and asked the assessee to provide complete details with respect to such a claim. It was in response to these queries that the assessee supplied a detailed reply, as noted above. Along with the reply, assessee had annexed documents giving further details. It was after undertaking such exercise, the Assessing Officer by his order of assessment dated 28.02.2014, made a minor disallowance of a sum of Rs. 10,40,714/- out of the claim of deduction made by the assessee under section 10B of the Act.
9. It can thus be seen that the assessee's claim of deduction under section 10B of the Act was part of the original assessment proceedings. Only after being satisfied about the validity of the claim that the same was substantial, accepted by the Assessing Officer. Any attempt on his part to reopen this claim would be based on mere change of opinion. It is well settled that the concept of change of opinion is relevant even after the amendment in the statute w.e.f. 01.04.1989 as held by the

Supreme Court in case of *Commissioner of Income Tax vs. Kelvinator of India Ltd.* reported in *320 ITR 561*. Division Bench of this Court in case of *Sarla Rajkumar Varma vs. Assistant Commissioner of Income Tax* reported in *231 Taxmann.com 889* has observed as under:

“14. It can thus be seen that the claim of deduction under section 80IB(10) of the Act came up for scrutiny minutely by the Assessing Officer in the original assessment proceedings. He disallowed the claim to the extent he was convinced that the same was exaggerated. He allowed only part of the claim.

15. It is true that this pointed element of the housing project not having been completed within 10 years of the date of development permission granted by the local authority was not raised by the Assessing Officer. However, in the return filed, this was virtually the only claim of the petitioner. The petitioner had declared gross total income of Rs.22,85,259/and claimed deduction under section 80IB(10) of the Act of Rs.Rs.21,59,675/. If the Assessing officer had any doubt about the basis of claim itself, the same could have been examined. On the basis of the same material, it would now not be open for the Assessing Officer to reexamine the claim on the premise that a certain element of the claim was not gone into at the time of original assessment proceedings.

16. In case of Gujarat Power Corporation Ltd.(supra), this Court did leave some room for the Revenue to argue that if a certain element of claim was not gone into by the Assessing Officer in the original assessment, reopening may still be permissible. The Court observed as under :

“48. Before closing this issue, we would like to clarify one aspect. We have expressed our opinion on the question framed by us. In a given case, it may so happen that a particular claim may have many facets. For example, a claim of deduction under section 80HHC of the Act would have various parameters. If

one of the parameters is scrutinized or accepted either with or without reasons, that by itself may not mean that the entire claim of deduction under section 80HHC of the Act stood verified and accepted by the Assessing Officer. We hasten to add that each case must depend on facts individually and in a given case, it may be possible for the assessee to argue that all aspects of the claim were examined or that different facets of the claim were so inextricably interlinked that the assessing officer must be taken to have examined the entire claim. We only clarify that our answer to the second question must be seen within the limited scope of the question itself.”

17. In the said decision itself, the Court observed that each case must depend on facts individually and in a given case, it may be possible for the assessee to argue that all aspects of the claim were examined or that different facets of the claim were so inextricably interlinked that the assessing officer must be taken to have examined the entire claim. This precisely is the situation in the present case. As noted claim under section 80IB(10) of the Act was the sole claim of the petitioner in the return filed. The entire claim was examined at length. To the extent the Assessing Officer thought the same was not allowable, after hearing the petitioner and inviting her response, he disallowed the substantial portion of the claim. It is now therefore, not possible for the Revenue to canvas that yet another element of the claim was not gone into by the Assessing Officer and that therefore, fresh look would be permissible.”

10. Similar observations have been made in case of ***Clantha Research Limited vs. Dy. Commissioner of Income Tax*** reported in ***35 Taxmann.com 61***.

11. Regarding the second ground of disallowance under section 14A read with Rule 8D of the Rules, the same is possible of a summary disposal. During the original assessment,

this very question came up for consideration. Having taken note of the evidence on record, the Assessing Officer enlarged the disallowance voluntarily made by the assessee from Rs. 3,66,749/- to Rs. 1,72,648/- and, in the process, made a further disallowance of Rs. 1,35,899/-. This ground for the reopening of the assessment, therefore, is not available to the Revenue.

12. In the result, impugned notice dated 28.03.2016 is set aside. Petition is allowed and disposed of.

(AKIL KURESHI, J.)

(BIREN VAISHNAV, J.)

Jyoti

