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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P. (C) No. 3935/2015**

M/S FIBERFILL ENGINEERS .....Petitioner

Through: Mr. Gautam Jain & Mr. Piyush Kumar, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX ..... Respondent

Through: Mr. Rahul Chaudhary, Senior Standing Counsel with Mr. Sanjay Kumar, Junior Standing Counsel for the Revenue.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% 10.08.2017

Dr. S. Muralidhar, J.:

1. The Petitioner, M/s Fiberfill Engineers, has filed this petition under Article 226 of the Constitution of India challenging an order dated 17th March, 2015 passed by the Respondent/Deputy Commissioner of Income Tax [hereafter the Assessing Officer ('AO')] under Section 147 of the Income Tax Act, 1961 ('Act') for Assessment Year ('AY') 2011-12.

Background facts

2. The background to the present petition is that the Petitioner is a partnership firm engaged in the business of execution of works contracts and manufacture of various kinds of signages/sign boards/panels and their

components, various kinds of MS/SS/Sheet Metal fabricated structures and frames, Aluminium structures, Canopy/Building fascia and cladding components and panels etc. It has a manufacturing unit set-up at Sitarganj, District Uddham Singh Nagar, Uttarakhand. It is stated that the profits from the said unit are eligible for 100% deduction under Section 80IC of the Act from AY 2010-11.

3. The Petitioner states that for the AY in question, the return in terms of Section 139 (1) of the Act ought to have been filed by it by 30th September, 2011. However, the return was filed with a delay of 46 days on 16th November, 2011. The reason furnished by the Petitioner for the delay is that a majority of the contract receipts was subject to deduction of tax at source under Section 194C of the Act and there was a delay in receiving TDS certificates. It is also claimed that there was a TDS mismatch inasmuch as the TDS appearing in its records was different from the TDS appearing in Form 26AS. The reconciliation of the TDS involving Government contract was stated to be "an extremely time consuming exercise."

4. The Petitioner states that no intimation under Section 143 (1) of the Act about filing of the above return was received by it from the Income Tax Department within the prescribed time period. However, on 12th November, 2013 a notice was issued to the Petitioner under Section 221 (1) of the Act asking it to show cause why a penalty should not be levied on it for failure to pay a demand of Rs.81,32,850 plus interest.

5. In reply to the above notice, the Petitioner pointed out that it had not yet

been served with intimation under Section 143 (1) of the Act for the relevant AY before expiry of one year from the end of the financial year in which the return was filed. Accordingly, it was contended that the demand was time-barred.

Reasons for reopening of assessment

6. On 25th March, 2014 a notice was issued to the Petitioner under Section 148 of the Act by the AO stating that there were reasons to believe that the Petitioner's income chargeable to tax for AY 2011-12 had escaped assessment within the meaning of Section 147 of the Act. Pursuant to the request made by the Petitioner by the letter dated 17th April, 2014 its counsel was supplied the reasons for reopening the proceedings under Section 148 of the Act on 26th May, 2014. The said reasons read thus:

> "Reasons for Re-opening the case of M/s Fiberfill Engineers
>
> ....
>
> Date of filing of return:- filed as per record on 16-11-2011 belatedly.
>
> For the AY 2011-12, it is seen from the records that the Assessee has declared income of Rs.4,86,l6,350/- from business, out of which Rs. 2,62,49,797/- has been claimed exempt by the assessee u/s 80IC of the Act. However, this claim of the assessee is not correct, because assessee has filed his return of income on 16-11-2011 after due date (30.09.2011) of filing the return, In view of the provisions of section 80AC of the Income Tax Act which is reproduced as under:-
> .....
>
> It is quite apparent that the provisions contained in section 80AC are mandatory in nature. Also it specifically provides for consequences that would follow if the return of Income is not furnished, within the

time limit specified in section 139(1) of the Act.

As well as in view of the decision of the Amritsar bench of the ITAT in *Bal Kishan Dhawan HUF v. Income tax Office, Ward 5(1) [2012] 18 taxamn.com 234 (Asr.)* held that "Where an assessee wants to avail deduction under section 80-IB, he has to necessarily furnish return of income before the due date specified in section 139 (1)".

It is well settled principle that if the assessee wants to avail deduction u/s. 80IC he has to necessarily furnish his return of income containing such claim before he due date specified in section 139(1). Hence, the claim of deduction u/s. 80IC on the income of the assessee, amounting to Rs.2,62,49,797/- is not allowable and has to be taxed as income under the head business income of the assessee.

In view of the foregoing facts and observations, I have reason to believe that income has escaped assessment within the meaning of the provisions of section 147 of the Act. Further, this case has not been assessed u/s. 143 (3) of the Act and as such the provisos to section 147 are in applicable in this case."

Further proceedings

7. The Petitioner states that even as it was preparing to file objections to the re-opening of the assessment, it was served a further notice dated 18th June, 2014 under Section 142 (1) of the Act calling for information. This was followed by a show cause notice dated 26th June, 2014 issued by the AO seeking to levy a penalty under Section 271 (1) (b) of the Act.

8. It is also stated by the Petitioner that at the hearing before the AO on 18th July, 2014 it was handed over the intimation under Section 143 (1) of the Act showing that Petitioner was liable to pay further tax of Rs.81,32,850. On 4th August 2014, the Petitioner filed an application before the AO under Section 154 of the Act seeking rectification of what the Petitioner

considered to be a mistake in the intimation under Section 143 (1) of the Act. According to the Petitioner, the deduction of the sum of Rs.2,62,49,792 under Section 80IC of the Act ought to have been allowed.

9. Meanwhile, on 16th September, 2014 the Petitioner filed its objections to the assumption of jurisdiction under Section 148 of the Act wherein it was contended that the reopening was based on a mere change of opinion as to whether the return filed by the Petitioner was within time. The Petitioner claimed that on merits that it was entitled to the deduction under Section 80IC of the Act. On 25th February 2015, the Petitioner's objections were rejected by the AO.

The first writ petition

10. At that stage the Petitioner filed its first writ petition in this Court on 19th March, 2015 challenging the notice dated 25th March, 2014 issued under Section 148 of the Act and the order dated 25th February, 2015 rejecting the objections filed by the Petitioner thereto. However, this writ petition was not numbered as it was lying in defect and, therefore, was not immediately listed before the Court.

The present writ petition

11. Even before the above writ petition was numbered, the AO proceeded with the re-assessment proceedings and passed the order dated 17th March, 2015 adding to the returned income the sum claimed as deduction under Section 80 IC of the Act. This order dated 17th March 2015 was then challenged by the Petitioner by filing the present writ petition on 16th April, 2015.

12. The writ petition filed earlier by the Petitioner on 19th March, 2015 was numbered as W. P. (C) No. 4109 of 2015 whereas the present writ petition, which was filed subsequently was numbered as W.P. (C) No.3935/2015. This is because, as pointed out earlier, the writ petition filed on 19th March, 2015 was lying in defect and perhaps the defects were cured and the said petition was re-filed only after the filing and numbering of the present writ petition. By a separate order passed today W.P. (C) 4109 of 2015 has been disposed of as having become infructuous on account of the subsequent developments.

Orders in the writ petitions

13. Be that as it may, in both the writ petitions for the first time on 27th April, 2015, notice was issued by this Court. Since the assessment order had already been passed by this time, which is challenged in the present writ petition, the Court observed in the said order that "The pendency of these writ petitions shall not come in the way of the petitioner to file an appeal against the assessment order. In the meanwhile, no coercive measures be taken."

14. On 15th March, 2017, the Court recorded the submission of the counsel for the Respondent that "there is no need for counter in view of the fact that deduction under Section 80IC was not given in the first instance, when intimation was given to the assessee under Section 143(1) of the Income Tax Act, 1961. In the circumstance, it appears that notice under Section 148, was redundant."

15. When the matter was listed next on 17th May, 2017, the Court's attention

was drawn to Section 119 (2) (b) of the Act, which enabled the Central Board of Direct Taxes ('CBDT') "if it considers it desirable or expedient so to do for avoiding genuine hardship in any case or class of cases" to grant relief, *inter alia*, regarding delayed filing of the return. This Court then passed the following order:

> "1. After hearing the submissions of learned counsel for the parties for some time, the following directions are issued:
>
> (a) The Petitioner will, not later than one week from today, make an application before the Central Board of Direct Taxes ('CBDT') under Section 119(2)(b) of the Income Tax Act, 1961 for condonation of delay in filing the Income Tax Returns for the Assessment Year 2011-12;
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> (b) Such application, if filed as directed, will be considered by the CBDT on its merits without any reference to the proceedings that have ensued after such delayed filing which is the subject matter of the present writ petitions;
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> (c) The CBDT will pass a reasoned order on such application and communicate it to the Petitioner not later than eight weeks thereafter.
>
> 2. By the next date of hearing, a copy of the said decision of the CBDT be placed on record by the Petitioner or the Respondent.
>
> 3. List on 10th August, 2017."

The order of the CBDT

16. Today, the Court has been shown by the counsel for the Petitioner a copy of the order dated 9th August, 2017 passed by the CBDT on the application filed by the Petitioner pursuant to the above order dated 17th May, 2017. The CBDT has declined to condone the delay of 46 days in the Petitioner filing its income tax return for AY 2011-12. One reason noted by

the CBDT in the said order are that the Petitioner did not make an effort to file the return in time although, the audit report, the profit and Loss (P&L) Account, the balance sheet and computation of income were ready by 28th September, 2011 i.e. much before the due date of filing of return and even the TDS certificates were all dated much earlier than September, 2011. Further, the TDS mismatch amount was only Rs.14,067 whereas the refund claimed in the return was Rs.14,82,945. Thirdly, the specific details regarding the Petitioner not having received the confirmation from the parties about the TDS deducted, were not mentioned and, therefore, could not be verified. The CBDT noted in the said order dated 9th August 2017 that even for AY 2010-11 the Petitioner had failed to file its return by the due date and had rather filed it after a delay of 116 days citing similar reasons.

17. With the consent of both the parties, the Court has permitted the Petitioner to challenge the said order dated 9th August, 2017 passed by the CBDT declining to condone the delay of 46 days in filing the return for AY 2011-12 in this petition itself. Accordingly, learned counsel for the parties have been heard on this challenge as well.

Submissions of counsel for the Department

18. It was pointed out by Mr. Rahul Chaudhary, learned Senior Standing Counsel for the Department that a Division Bench of this Court in ***Nath Brothers Exim International Ltd. v. Union of India (2017) 394 ITR 577 (Del)*** had negated the challenge to the constitutional validity of Section 80AC of the Act which stipulates the time limit within which the return has

to be filed if deduction under Sections 80 IB and 80 IC is claimed. Mr Chaudhary submitted the question of delay in filing a return where deduction under Section 80IC of the Act is claimed has been viewed differently from a case where such deduction is not claimed. Mr. Chaudhary further sought to explain that Circular No.9/2015 dated 9th June, 2015 issued by the CBDT regarding condonation of delay in filing returns was not meant to apply to returns where a deduction was claimed under Section 80 IC of the Act.

Submissions of counsel for the Assessee

19. On the other hand Mr. Gautam Jain, learned counsel appearing for the Petitioner, pointed out that the Petitioner's claim on merits for the deduction under Section 80 IC of the Act for AY 2010-11 was already allowed by the Income Tax Appellate Tribunal ('ITAT') by the order dated 25th February, 2016 in the appeal, ITA No. 1853/Del/2015 filed by the Petitioner. He further pointed out that in the consequential appeal being ITA No. 405 of 2016 filed by the Department in this Court, no challenge was raised in the grounds concerning the entitlement of the Petitioner to the deduction under Section 80IC of the Act. Further, while admitting the said appeal this Court by the order dated 15th May 2017 framed two questions only and both were in respect of the time limit within which the return had to be filed by an Assessee. The second question was whether the time limit under Section 80AC of the Act would override Section 139 (4) of the Act.

20. Mr. Jain contended that with the claim for deduction for AY 2010-11 under Section 80IC of the Act being allowed on merits, there would be no

justification to deny such deduction for the immediately following year, i.e., AY 2011-12. This was an additional factor which, according to Mr. Jain, ought to have been taken note of by the CBDT. Mr. Jain pointed out that the claim of the Petitioner for deduction under Section 80 IC of the Act was otherwise a *bona fide* one which could not be denied. He placed reliance on the decision of the Bombay High Court in ***Sitaldas K. Motwani v. Director General of Income Tax (International Taxation), New Delhi (2010) 323 ITR 223 (Bom)***.

Assessment proceedings for AY 2010-11

21. In the first place, it requires to be noticed that for AY 2010-11, during the assessment proceedings, the AO had called upon the Assessee to furnish the justification for the delay in filing the return. The Assessee had then contended that Section 139 (4) of the Act was nothing but an extension of Section 139 (1) and, therefore, compliance with the former should be taken as the compliance with the latter provision. The further reason given by the Assessee was that the partners were engaged in completing the job contracts and there was a delay for *bona fide* reasons.

22. The AO, in the assessment order for AY 2010-11, however, referred to Section 80AC of the Act and disagreed with the Assessee. The AO held that there was no justification for the delay in filing returns. On merits, the AO disallowed the claim of the Assessee under Section 80IC of the Act for two reasons. First that the Assessee was not manufacturing any article or thing as contemplated under Section 80IC of the Act. Secondly, no separate P&L Account and balance sheet regarding its unit at Sitarganj was produced by it

to justify the profit claimed.

23. The CIT (A) in the order dated 14th January, 2015 for AY 2010-11 agreed with the AO that the process adopted by the Assessee could not be termed as a manufacturing process as no new product had come into being. Also, the Assessee had failed to file the audit report within time. The CIT (A) too, therefore, held that the Assessee was not eligible for deduction under Section 80IC of the Act.

Order of the ITAT for AY 2010-11

24. The Assessee went in appeal to the ITAT against the aforementioned order of the CIT (A) dated 14th January, 2015 for AY 2010-11. The three issues considered by the ITAT in the said appeal ITA No. 1853/Del/2015, as noted in its order dated 25th February, 2016 as under:

> "(a) Whether any activity actually carried out by the Assessee at Sitarganj or not?
>
> (b) Whether such activity could be termed as manufacturing or producing of any article or thing as contemplated u/s 80IC?
>
> (c) Whether Assessee was entitled to deduction even though it filed the return belatedly in view of the provisions contained u/s 80AC?"

25. In its order dated 25th February, 2016 the ITAT answered the questions (a) and (b) above in favour of the Assessee after discussing the evidence. The ITAT and then turned to question (c) regarding the delay in filing the return in the context of Sections 80 AC and Section 139 (4) of the Act. In para 57 of the order the ITAT concluded:

> "57. A bare perusal of this section makes it clear that the legislature

itself has allowed the assessee to file return belatedly subject to fulfilment of conditions written in the said section. Therefore, once those conditions are met, then return filed by the assessee would for all technical purposes be considered being filed u/s 139(1). Thus, keeping in view the various decisions noted earlier, we do not find any reason to deny the claim of assessee on the ground of filing the return belatedly."

26. Thus, the ITAT allowed the appeal of the Assessee for AY 2010-11 both on merits as well as on the ground of the delay in filing the return.

Department's appeal for AY 2010-11

27. A perusal of the memorandum of ITA No. 405 of 2016 filed by the Department in this Court against the abovementioned order of the ITAT dated 25th February, 2016 shows that there were four questions urged by it. All these questions pertained to the non-filing of the return by the Petitioner within time with reference to Section 80 AC and Section 139 (4) of the Act. No question was urged by the Department regarding the entitlement of the Petitioner to the deduction under Section 80 IC of the Act on merits. When the said appeal of the Department was admitted by this Court on 15th May, 2017 only two questions of law were framed. Both pertained to the delay in filing of the return by the Assessee for AY 2010-11. Therefore, the decision of the ITAT that the Petitioner was entitled on merits to the deduction under Section 80 IC of the Act in the first year of its claim, i.e., for AY 2010-11, attained finality.

CBDT's order set aside

28. Mr. Chaudhary is unable to dispute the above position. He, however, suggested that in the event the Department is able to succeed in

demonstrating in ITA No. 405 of 2016 that the delay in the Petitioner filing its return for AY 2010-11 could not have been condoned, the Petitioner's claim for deduction under Section 80 IC of the Act for that year would automatically fail.

29. It is not for this Court to speculate what might happen in ITA No. 405 of 2016. Nevertheless, it is undeniable that the Department has even for AY 2010-11 accepted that on merits the Petitioner's claim for deduction under Section 80 IC of the Act was justified. With there being no change in the circumstances, the Petitioner's claim for deduction under Section 80 IC of the Act on merits for the next year i.e. AY 2011-12 cannot possibly be denied.

30. The above facts were not considered by the CBDT when it rejected the Petitioner's application under Section 119 (2) (b) of the Act. The application made by the Petitioner before the CBDT pursuant to the order passed by this Court was a detailed one. The Petitioner pointed out that in all the subsequent years, i.e., AY 2012-13 up to 2016-17, there was no delay whatsoever in the filing of the returns. It also pointed out that since the Petitioner was an eligible undertaking it could not be denied the deduction under Section 80IC of the Act. The above factors do not appear to have been taken into account by the CBDT.

31. The Court is unable to agree with Mr. Chaudhary that Circular No.9/2015 dated 9th June, 2015 of the CBDT would not apply to the belated filing of a return where deduction is claimed under Section 80 IC of the Act. The said circular does not expressly say so. As explained by the Bombay

High Court in ***Sitaldas K. Motwani v. Director General of Income Tax (International Taxation), New Delhi*** (*supra*), the phrase "genuine hardship" in Section 119 (2) (b) of the Act ought to be construed liberally. As observed by the said High Court "when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred, for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay."

32. In the present case, since the entitlement of the Petitioner to the deduction under Section 80 IC of the Act even for AY 2010-11 has not been questioned by the Department on merits, there is no justification for not viewing the delay of 46 days in filing the return to be *bona fide*. It is not one of those cases where the delay is so extraordinary so as to not be condoned.

33. Consequently, the Court sets aside the order dated 9th August, 2017 passed by the CBDT under Section 119 (2) (b) of the Act. The result is that the claim of the Petitioner for deduction under Section 80IC of the Act cannot be defeated on the ground of delay in filing the return.

Conclusion

34. Since this was the principal reason for reopening of the assessment, the notice dated 25th March 2014 issued by the AO under Section 148 of the Act and the order dated 25th February 2015 passed by the AO rejecting the Petitioner's objections to the reopening of the assessment are set aside. The consequential impugned assessment order dated 17th March, 2015 passed by the AO under Section 147 of the Act is also therefore set aside. Any order

by the CIT (A) in the further appeal filed against the said order by the Assessee will also therefore not survive. If any further appeal has been filed before the ITAT, then appropriate orders will accordingly be passed in the said appeal.

35. The writ petition is allowed in the above terms but in the circumstances with no orders as to costs.

S. MURALIDHAR, J.

PRATHIBA M. SINGH, J.

AUGUST 10, 2017
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