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

WRIT PETITION NO.2158 OF 2012

Bharat Petroleum Corporation Limited, Mumbai Petitioner
versus
Income Tax Appellate Tribunal, Mumbai & ors. Respondents

Mr.Jehangir D. Mistri, Sr.Advocate with Mr.Atul K. Jasani for Petitioner.
Mr.Suresh Kumar for Respondents.

CORAM : DR.D.Y.CHANDRACHUD AND
A.A.SAYED, JJ.

DATE : 10 April 2013

JUDGMENT -(PER : DR.D.Y.CHANDRACHUD, J.) :

1. In these proceedings, which have been lodged on 1 October 2012, the Petitioner has sought to question the legality of an order which was passed over five years ago on 28 May 2007 by the Income Tax Appellate Tribunal. In the alternative, the Petitioner seeks a writ of Mandamus ordering and directing the Assistant Commissioner of Income Tax, Range-2(I), Mumbai to give effect to the order of the Tribunal as if all the grounds of appeal have been set aside for fresh adjudication.

2. The assessment year to which the dispute relates is 1998-99. On 30 November 1998, the Petitioner filed a return of income declaring a total income of Rs.513.51 crores after claiming a deduction under Sections 80HH, 80I and 80IA of the Income Tax Act, 1961 (`the Act').

On 9 February 2001, the Assessing Officer passed an order of assessment under Section 143(3) determining a total income of Rs.580.50 crores. The A.O. denied the benefit of a deduction under Sections 80HH, 80I and 80IA in respect of certain plants and added back prior period expenses. The Commissioner of Income Tax (Appeals) by an order dated 8 January 2002 disposed of the appeal.

3. Before the Income Tax Appellate Tribunal, the Appellant formulated three grounds of appeal which were as follows :

> "1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) (CIT(A)) erred in rejecting the claim of the Appellant for deduction under Section 80HH, 80I and 80IA of the Income Tax Act (`the Act') on LPG Plants on the grounds that activities undertaken in the LPG Plant would only amount to processing, the LPG Plants are not `industrial undertakings' engaged in `manufacture of production of any article or thing' and therefore, the Appellant is not entitled to claim any deduction in respect of its LPG plants under aforesaid Sections of the Act.
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> 2. On the facts and in the circumstances of the case and in law, the learned CIT(A), erred in rejecting the claim of the appellant for deduction under Section 80HH, 80I and 80IA of the Act on its LPG Plants, Special Cut Naptra (SCN) plant and C3C4 plant on the ground that separate working of profit of each plant was not furnished by the assessee and therefore, the Appellant is not entitled to claim any deduction in respect of its said plants under aforesaid Sections of the Act.
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> 3. On the facts and in the circumstances of the case and in law, the learned CIT(A), erred in rejecting the claim of the appellant for deduction of prior period expenses ascertained/crystalised during the assessment year 1998-99."

4. The Tribunal was seized of appeals filed by the Petitioner for A.Ys. 1994-95, 1995-96, 1996-97, 1997-98, 1998-99 and 1999-2000. In its judgment dated 28 May 2007, the Tribunal noted that the only issue involved in the appeals related to the denial of the claim of the assessee under Sections 80HH, 80I and 80IA. The Tribunal noted that the claim of the assessee was denied by the department on the basis of a decision of the Tribunal in the case of Indian Oil Corporation in which it had been held that the mere filing up of gas in cylinders did not amount to an activity of manufacture as a result of which a deduction under these provisions could not be allowed. The Tribunal set aside the order of the Commissioner of Income Tax (Appeals) and restored the matter for fresh adjudication before the A.O.

5. After the order of remand, the A.O. passed an order on 14 November 2008 for giving effect to the order of the Tribunal. The A.O., according to the Petitioner, only dealt with the issue of the allowability of a deduction in respect of LPG bottling units and not with the other issues which were the subject matter of the appeal before the Tribunal. The Petitioner filed an appeal against the order of the A.O. The appeal was dismissed by the CIT (Appeals) on 26 October 2010. The Petitioner has filed an appeal before the Tribunal which is pending.

6. The Petitioner has now sought to challenge the order of the Tribunal dated 28 May 2007. The contention of the Petitioner is that though three grounds of appeal were raised before the Tribunal, the Tribunal had only dealt with the first ground relating to the rejection of the claim for a deduction under Sections 80HH, 80I and 80IA on the

LPG plants. The petition has been amended. The delay between the passing of the order of the Tribunal on 28 May 2007 and the filing of the petition before this Court on 3 October 2012, well over five years later, is sought to be explained by the following averment in paragraph 3(k) :

> "3(K) ... ... The petitioner says that as mentioned hereinabove it was only after holding conference with counsel for other assessment years in or about August 2012 and holding another conference on 25th September 2012 that the Petitioner was advised that its view that the remaining grounds would still be adjudicated upon by the Tribunal was erroneous and it was advised to take these proceedings. The Petitioner says that thereafter this petition has been filed immediately."

In the alternative, as noted earlier, the Petitioner seeks the issuance of a writ of Mandamus to the A.O. to give effect to the order of the Tribunal as if all grounds of appeal have been set aside for fresh adjudication.

7. At the outset it must be noted that it is impossible to construe the order of the Tribunal dated 28 May 2007 as having kept open all the grounds of appeal filed by the assessee for fresh adjudication by the A.O. Fairly, even learned Senior Counsel appearing for the assessee accepts this position during the course of the submissions. Of the grounds of appeal raised by the assessee, the Tribunal dealt with the ground relating to the denial of a deduction under Sections 80HH, 80I and 80IA. That was what was restored by the Tribunal for consideration by the A.O. upon remand.

8. The Petitioner had a remedy under Section 254(2) under which the Appellate Tribunal is empowered at any time, within four years from the date of its order, to amend any order passed by it under sub Section (1) with a view to rectify any mistake apparent on the record, if the mistake is brought to its notice by the assessee or the A.O. The Petitioner admittedly did not file any application under Section 254(2) and the period of four years for filing such an application has now elapsed. After the order of the Tribunal was passed, the A.O. passed an order to give effect to the order of the Tribunal on 14 November 2008 in which he only dealt with the issue of the allowability of the deduction in respect of the LPG bottling unit. The Petitioner was thus in any event aware on 14 November 2008 that the order of the Tribunal had been construed to restore not all the grounds of appeal but only the ground of the allowability of the deduction in respect of LPG bottling units. Thereafter the Commissioner of Income Tax (Appeals) dismissed the appeal filed by the Petitioner on 26 October 2010. At both these stages, namely when the order of the A.O. was passed on 14 November 2008 as well as when the order of the CIT (Appeals) was passed on 26 October 2010, the Petitioner was still within the period of four years stipulated in Section 254(2) for filing an application before the Tribunal for correcting a mistake apparent on the record. The Petitioner failed to adopt the remedy which the statute has provided under Section 254(2).

9. The only other explanation, to which the attention of the Court is drawn, is that in paragraphs 3(H)(iv) and (v) to the effect that the Assistant Manager (Taxation) who scrutinized the order "was about six months old in the taxation department and not very familiar with the subject and the appellate procedure". Moreover, it has been stated that

the Senior Officer handling income tax matters was transferred in the month of July 2007. This can be no justification for the Petitioner being negligent in not pursuing the remedy provided under Section 254(2) before the Tribunal within the stipulated period of four years. These proceedings have been instituted on 3 October 2012 nearly about five years and five months after the order of the Tribunal. There is no valid explanation for the delay in moving this Court either.

10. In the circumstances, we find no reason or justification to entertain the request for setting aside the order of the Tribunal dated 28 May 2007, particularly after the lapse of time that is prescribed in the statutory remedy available under Section 254(2). The petition has been filed almost five and a half years after the order of the Tribunal with no reasonable or cogent explanation for the delay. As we have noted already, there is no merit in the alternate submission that the order of the Tribunal dated 28 May 2007 left open all the grounds of appeal. Plainly that was not so.

11. For these reasons, no case for interference under Article 226 of the Constitution is made out. The petition is accordingly dismissed.

(DR.D.Y.CHANDRACHUD, J.)

(A.A.SAYED, J.)

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