

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.200 OF 2010

Godrej Agrovvet Limited

..Petitioner.

Vs.

The Deputy Commissioner of Income Tax, 10(2),  
Mumbai and another

..Respondents.

....

Mr. Percy J. Pardiwala, Senior Advocate with Mr. Jitendra Jain i/b Mr. Atul K.  
Jasani for the Petitioner.

Mr. J.S. Saluja for the Respondents.

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**CORAM : DR. D.Y.CHANDRACHUD &  
J.P. DEVADHAR, JJ.**

11<sup>th</sup> February, 2010.

**ORAL JUDGMENT (Per Dr. D.Y. Chandrachud, J.):**

1. Rule, made returnable forthwith. By consent of the learned counsel and at their request the matter is taken up for hearing and final disposal.

2. The assessee in the present case challenges the reopening of assessment for Assessment Year 2003-04 in pursuance of a notice dated 28<sup>th</sup> March, 2008 issued by the Deputy Commissioner of Income Tax, 10(2) Mumbai. The controversy in the petition under Article 226 falls in a narrow compass. During the course of Assessment Year 2003-04, Section 80-M of the Income Tax Act, 1961 was on the statute book and read thus :

“80M. Deduction in respect of certain inter-corporate dividends. - (1) Where the gross total income of a domestic company, in any previous year, includes any income by way of dividends from another domestic company, there shall, in accordance with and subject to the provisions of this section, be allowed, in computing the total income of such domestic company, a deduction of an amount equal to so much of the amount of income by way of dividends from another domestic company as does not exceed the amount of dividend distributed by the first-mentioned domestic company on or before the due date.

(2) Where any deduction, in respect of the amount of dividend distributed by the domestic company, has been allowed under subsection (1) in any previous year, no deduction shall be allowed in respect of such amount in any other previous year.

*Explanation* – For the purposes of this section, the expression “due date” means the date for furnishing the return of income under subsection (1) of section 139.”

3. For the purposes of these proceedings it is an admitted position before the Court that the assessee received a dividend income of Rs.5,59,02,672/- The dividend income which was received by the assessee company was in respect of the holdings of the assessee in other corporate entities. The assessee also declared and distributed an interim dividend on 26<sup>th</sup> March, 2003 in the amount of Rs.4.48 Crores and a final dividend on 26<sup>th</sup> June, 2003 in the amount of Rs. 1.13 Crores. The assessee filed a return of income on 27<sup>th</sup> November, 2003 declaring an income of Rs.1.61 Crores. In the computation of total income annexed to the return, the assessee disclosed the dividend of Rs.5.59 Crores under the head of income from other sources. In annexure 1.3 to the return, the details of the dividend received were provided. Against the income the assessee claimed

a deduction of Rs.5.59 Crores under Section 80-M in respect of the dividend declared and distributed. The return was accompanied by the audited accounts for the year ending 31<sup>st</sup> March, 2003 and the tax audit report. The First Respondent issued a notice on 5<sup>th</sup> October, 2005 under Section 142(1) to which a questionnaire was annexed seeking details of documents and explanations including in relation to the details of expenses relating to the earning of dividend. The Petitioner submitted a reply on 6<sup>th</sup> October, 2005 in justification.

4. On 20<sup>th</sup> February, 2006 an order of assessment was passed under Section 143(3) by which the total income of the assessee was determined at Rs. 2.77 Crores and the assessee was allowed a deduction to the extent of Rs.5.31 Crores under Section 80-M. Of the total dividend received in the amount of Rs. 5.59 Crores, the assessing officer made a disallowance of Rs.27.95 lacs, thus confining the deduction to an amount of Rs.5.31 Crores as noted above. The assessee filed an appeal before the CIT(A). The CIT(A) by an order dated 3<sup>rd</sup> November, 2006 restricted the disallowance of expenditure incurred for earning dividend income upto 2% of the dividend income. Both the assessee and the revenue carried the decision of the CIT(A), in appeal to the ITAT. In the meantime, the First Respondent passed an order on 17<sup>th</sup> October, 2008 to give effect to the order of the CIT(A) by which the disallowance under Section 80-M was restricted to Rs.11.18 lacs as against the original disallowance of Rs.27.95

lacs. The ITAT by its order dated 10<sup>th</sup> September, 2009 deleted the disallowance made with regard to the deduction claimed by the Petitioner under Section 80-M of the Act. Consequently, the Petitioner was held to be entitled to a deduction without any disallowance as had been made in the order of the CIT(A).

5. On 28<sup>th</sup> March, 2008 a notice was issued to the Petitioner under Section 148 in which the assessing officer furnished the following reasons for his belief that the income of the Petitioner chargeable to tax for Assessment Year 2003-04 has escaped assessment within the meaning of Section 147. The assessee having raised objections, the assessing officer by an order dated 16<sup>th</sup> December, 2009 rejected the objections inter alia with the following observations:

“The contention of the assessee that notice had been issued on a mere change of opinion is not correct. The issues involved as mentioned in the recorded reasons is that, the assessee claimed deduction u/s.80M of the Act in respect of dividend distributed by the assessee company, wherein the assessee failed to pay additional income-tax as per provisions of section 115-O within the stipulated time. Since the assessee has not complied the provisions of section 115-O of the Act, then the deduction u/s.80M is not allowable to the assessee.”

6. Counsel appearing on behalf of the assessee has challenged the notice under Section 148 on the following grounds :

*Firstly*, it was urged that the assessing officer has no reason to believe that income had escaped assessment. Under Section 80-M the assessee was entitled, in the computation of its total income to a deduction of an amount

equal to the income received by way of dividends subject to a ceiling of the actual amount of dividend distributed by the assessee on or before the due date. The due date under the explanation to Section 80-M will be the date for furnishing the return of income under Section 139(1) and would be 30<sup>th</sup> November, 2003. On the admitted facts, it was submitted that the assessee had distributed both the interim and final dividend before 30<sup>th</sup> November, 2003, the interim dividend having been distributed on 26<sup>th</sup> March, 2003 and the final dividend on 26<sup>th</sup> June, 2003. On this basis, it was urged that no prudent person could have a reason to believe that the income of the assessee had escaped assessment. *Secondly*, it was submitted that the order of the assessing officer reopening the assessment constitutes an interference with the order of the CIT(A) and the ITAT by which the assessee was held entitled to a deduction in respect of the income received by way of dividend. *Thirdly*, it was submitted that the original order of assessment was in conformity with the decisions of the Tribunal in the case of **Silvassa Industries**<sup>1</sup> and in the case of **Kaikobad Byramjee & Sons**<sup>2</sup> dated 7<sup>th</sup> October, 2004. Learned counsel submitted that these decisions were followed and affirmed by the Tribunal on 18<sup>th</sup> July, 2007 in its decision in the case of **Castle Investment and Industries Pvt. Limited v. ITO**<sup>3</sup>. Consequently, the order of assessment was consistent with the law laid down by the Tribunal which had not been reversed or set

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1 Silvassa Industries Pvt. Ltd. v. DCIT as per ITA No.462/M/02 decided on 10<sup>th</sup> May, 2002.

2 ITO v. M/s. Kaikobad Byramjee & Sons Agency Pvt. Ltd. (ITA No.4102/Mum/2001).

3 ITA 1713/Mum/2006.

aside. In the circumstances, it was submitted that the assessee was entitled to a deduction under Section 80-M for Assessment Year 2003-04 but this would be restricted to the amount of the dividend declared upto the due date of the filing of the return.

7. Counsel appearing on behalf of the revenue on the other hand submitted that the assessee had distributed dividend after the due date of 1<sup>st</sup> April, 2003 under Section 115-O and was, therefore, liable to pay additional tax under that provision. In the circumstances, the reopening of the assessment was valid and there was reason to believe that the income of the assessee for Assessment Year 2003-04 had escaped assessment.

8. Section 80-M was part of the Income Tax Act 1961 during the course of Assessment Year 2003-04. Section 80-M applies where the gross total income of a domestic company includes any income by way of dividend from another domestic company during the previous year. In such a case, in computing the total income of the domestic company which is in receipt of dividend from another company, a deduction is allowable of an amount equal to the income received by way of dividend. However, Section 80-M imposed a ceiling on the extent of deduction that can be claimed by stipulating that this should not exceed the amount of dividend distributed by the company on or before the due date.

The due date under the explanation is the date for the furnishing of the return of income under sub section (1) of Section 139.

9. In the present case the admitted facts are that (i) The assessee company had received a dividend of Rs.5.59 Crores during Assessment Year 2003-04 which was declared in the computation of total income; (ii) The assessee had distributed an interim dividend of Rs.4.48 Crores on 26<sup>th</sup> March, 2003 and an amount of Rs.1.13 Crores on 26<sup>th</sup> June, 2003 so as to make a total amount of Rs. 5.61 Crores approximately; (iii) The due date for the furnishing of the return of income under sub section (1) of Section 139 was 30<sup>th</sup> November, 2003; (iv) The claim for deduction under Section 80-M was restricted to the amount of dividend distributed by the assessee before the due date and (iv) In appeals leading to the Tribunal from the order of assessment the disallowance made by the assessing officer in respect of the expenditure incurred in earning the dividend had been deleted by the Tribunal and the assessee was held to be entitled to a full deduction under Section 80-M, restricted to the amount of the dividend distributed. The issue before the CIT(A) and the Tribunal related only to the extent of the disallowance of expenditure.

10. On these facts as they stand, it is impossible to contend that the assessee was not entitled to a deduction under Section 80-M. Significantly, the

view of the assessing officer was consistent with the decision of the Tribunal in the case of **Castle Investment** (supra). The judgment in **Castle Investment** insofar as is material held that Section 115-O(5) does not in any way restrict the allowability of the claim under Section 80-M. Under Section 80-M what is claimed as a deduction is the dividend received by the company. Dividends declared, distributed or paid are not claimed as a deduction under Section 80-M though they constitute an out flow of funds from the company. Section 80-M imposes a monetary restriction on the amount that may be claimed by way of a deduction by providing that the amount of claim cannot exceed the dividend distributed by the assessee by the due date. Though the judgment of the Tribunal in **Castle Investment** was dated 18<sup>th</sup> July, 2007 (the order of assessment being dated 28<sup>th</sup> February, 2006) it is necessary to note that the decision followed the earlier decision of the Tribunal dated 10<sup>th</sup> May, 2002 in the case of **Silvassa Industries** and the decision dated 7<sup>th</sup> October, 2004 in **M/s. Kaikobad Byramjee** (supra). The decision of the Tribunal in **Castle Investment** (supra) was affirmed by a Division Bench of this Court on 22<sup>nd</sup> July, 2008 in ITA 1557 of 2007.

11. The provisions of Section 147 of the Act empower the assessing officer to reopen an assessment or issue a notice for reassessment provided that he has reason to believe that income has escaped assessment. In a judgment of a Division Bench of this Court in **German Remedies v. Deputy Commissioner of**



**Income Tax**<sup>4</sup> delivered by one of us, Shri Justice J.P. Devadhar, this Court held that though the power to reopen a concluded assessment under Section 147 is wide, the power cannot be exercised mechanically or arbitrarily. This Court held that even after the introduction of the concept of deemed escapement of income by explanation 2 to Section 147 with effect from 1<sup>st</sup> April, 1989 the belief that income had escaped assessment must be a prudent belief and not a mere change of opinion. This Court held that an assessment order passed after detailed discussion cannot be reopened within a period of four years from the end of the relevant assessment year unless the assessing officer has reason to believe that due to some inherent defect in the assessment the income chargeable to tax has been under assessed or assessed to a lower rate or excessive relief is granted or excessive loss or depreciation allowance or any other allowance under the Act has been computed. In the subsequent judgment of the Supreme Court in **CIT v. Kelvinator of India Ltd.**<sup>5</sup> the Supreme Court has held that wide as the power under Section 147 is after 1<sup>st</sup> April, 1989 a mere change of opinion cannot justify the reopening of an assessment and there must be tangible material before the assessing officer before he proceeds to exercise his powers under Section 147. In the judgment of this Court in **German Remedies** this Court, while setting aside the exercise of the power, adverted to the circumstance that the very same issue which was sought to be agitated by the assessing officer had been concluded by a

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4 (2006) 285 ITR 26 (Bom).

5 (2010) 320 ITR 561 (SC).

judgment of the Tribunal for an earlier assessment year. This Court deplored the conduct of the assessing officer in refusing to follow a binding decision of the Tribunal. The same view has been reiterated in the judgment of a Division Bench of this Court in **Asteroids Trading and Investments P. Ltd. v. Deputy Commissioner of Income Tax**<sup>6</sup>.

12. The assessing officer, in his reasons for reopening the assessment adverts to the circumstance that the assessee paid dividend tax after 1<sup>st</sup> April, 2003 under Section 115-O. It is on this basis that the inference is drawn that the assessee has forfeited the right to claim a deduction under Section 80-M. The reasons which have been recorded by the assessing officer are ex facie extraneous to the question as to whether the assessee would be entitled to a deduction under Section 80-M. Section 80-M, it may be noted, forms a part of the provisions of Chapter VI-A of the Income Tax Act, 1961. Chapter VI-A is distributed in several parts. Part A deals with the general provisions and consists of Sections 80-A and 80-B. Part B deals with deductions with respect to certain payments and comprises of Section 80-C to 80-GGC. Part C of Chapter VI-A provides for deductions in respect of certain incomes. Section 80-M as it then stood during the course of assessment year 2003-04 formed a part of Part C of Chapter VI-A. Under Section 80-M the deduction is not in respect of the amount declared or distributed by way of dividend. The deduction that was stipulated under Section

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6 [2009] 308 ITR 190 (Bom).

80-M was in respect of dividend received by a domestic company from another domestic company. The extent of the deduction was, however, subject to a monetary ceiling, the ceiling being that the deduction should not exceed the amount distributed by way of dividend on or before the due date for the filing of a return. The assessing officer by adverting to the provisions of Section 115-O has proceeded to reopen the assessment on a plainly extraneous ground.

13. For the aforesaid reasons, the assessing officer has clearly acted in excess of the restraints on his jurisdiction to reopen an assessment in exercise of the powers under Section 147 read with Section 148. The assessee would be entitled to succeed in these proceedings. Rule is accordingly made absolute by setting aside the notice dated 28<sup>th</sup> March, 2008. In the circumstances of the case, there shall be no order as to costs.

(Dr. D.Y.Chandrachud, J.)

(J.P. Devadhar, J.)