IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.
WRIT PETITION NO.2513 OF 2009

M/s. Hindustan Petroleum Corporation
Limited, Mumbai ..Petitioner.
Vs.
The Deputy Commissioner
Income Tax-1(1), Mumbai and another ..Respondents.

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Mr. Percy J. Pardiwala, Senior Advocate with Mr. Atul K. Jasani for the Petitioner.
Mr. Vimal Gupta for the Respondents.

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

18 June 2010.

ORAL JUDGMENT (Per DR.D.Y.CHANDRACHUD, J.) :

1. Rule, by consent returnable forthwith. With the consent of Counsel and at their request the Petition is taken up for hearing and final disposal.

2. An assessment for Assessment Year 2002-03 has been sought to be reopened under Section 147 of the Income Tax Act, 1961 beyond the period of four years of the end of the Assessment Year, by

the issuance of a notice of 23 March 2009. The issue which falls for determination in these proceedings is as to whether there was, within the meaning of the proviso to Section 147, a failure on the part of the assessee to "disclose fully and truly all material facts necessary for his assessment, for that assessment year".

3. For Assessment Year 2002-03 the Petitioner filed a return of income on 30 October 2002 by which it returned a total income of Rs. 739.35 Crores. An assessment order was passed under Section 143(3) on 21 March 2005 determining the total income at Rs.750.62 Crores. On 23 March 2009 a notice under Section 148 was issued to the Petitioner proposing to reopen the assessment. Reasons have been disclosed in support of the notice for reopening the assessment on 23 October 2009. Objections to the issuance of the notice were filed on 4 November 2009. The Assessing Officer rejected the objections by an order dated 4 December 2009.

4. The reasons which have been disclosed to the Petitioner for

reopening the assessment pertain to three issues. Firstly, the Petitioner had claimed a deduction under Section 80-IA on the generation of electricity by a Captive Power Plant ('CPP') in the amount of Rs.86.37 lacs. The Assessing Officer notes that a scrutiny of the Profit and Loss Account shows that the Petitioner claimed a saving in Low Sulphur Heavy Stock ('LSHS') due to the use of steam generated as a byproduct in the generation of electricity which was quantified at Rs.29.95 Crores. On the basis of this, a profit of Rs. 86.37 lacs was claimed by the Petitioner in respect of its CPP and a deduction was sought under Section 80-IA. According to the Assessing Officer there has been an escapement of income as a result. Secondly, the Petitioner claimed a deduction under Section 80-IB in respect of the Vizag Refinery Expansion Project (VREP-II). According to the Assessing Officer this project which was initiated to increase the capacity of the refinery did not constitute an independent undertaking but was a reconstruction of a business already in existence and hence the conditions prescribed by Section 80-IB(2) were not fulfilled. The conditions stipulate that an industrial

undertaking should not be formed by the splitting up or the reconstruction of a business already in existence. Thirdly, the Petitioner claimed a deduction under Section 80-IB(4) in respect of its Lube Blending Plant at Silvassa. According to the Assessing Officer the plant at Silvassa does not manufacture or produce any article or thing within the meaning of the statutory provision since it is engaged only in processing, involving the mixing of lube based stock and additives. Not being engaged in manufacture, the Petitioner is held not to be entitled to the deduction under Section 80-IB(4).

5. On behalf of the Petitioner learned counsel submitted that (i) The reopening of the assessment having taken place beyond the period of four years of the end of Assessment Year 2002-03 the validity of the action would depend upon whether there was a failure on the part of the Petitioner to disclose fully and truly all material facts necessary for the assessment; (ii) The record before the Court would show that on each of the three issues, the Petitioner had fully and truly disclosed all the material facts necessary for the assessment;

(iii) During the course of the assessment proceedings a notice was issued to the Petitioner under Section 142(1) on 19 February 2004 to which a detailed reply was submitted on 24 June 2004 and it was only thereafter that an assessment was framed under Section 143(3) on 21 March 2005; (iv) On each of the three issues the Petitioner had disclosed that a deduction was being claimed under Section 80-IA, or as the case may be, under Section 80-IB; the computation of profits was disclosed, the basis of the claim was set forth. There was a disclosure of all the primary facts necessary for the assessment. In these circumstances, the jurisdiction under Section 147 could not have been exercised in the present case where the assessment is sought to be reopened beyond four years of the end of the relevant Assessment Year.

6. On behalf of the Revenue it has been submitted that where the reopening of an assessment takes place after the expiry of four years from the end of the relevant Assessment Year, the validity of the action would depend upon whether there was a full and true

disclosure of the material facts. In the present case, it was urged that the issue relating to the entitlement of the claim of the Petitioner to a deduction under Section 80-IA in respect of the CPP was not considered by the Assessing Officer. The Assessing Officer having failed to consider the ground on which the assessment is sought to be reopened, the action must be held to be lawful and proper.

7. The parameters of the enquiry of the Court in the present case would be defined by the circumstance that the assessment for Assessment Year 2002-03 is sought to be reopened beyond a period of four years. Consequently, the test to be applied is as to whether the assessee had failed to disclose fully and truly all material facts necessary for the assessment. Under the proviso to Section 147 where an assessment has been made under Section 143(3), no action can be taken under the Section after the expiry of four years from the end of the relevant Assessment Year unless the income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his

assessment for that Assessment Year. Now it is in the background of the legal position as it emerges from section 147 that the facts of the case would have to be scrutinized.

8. In the computation of income, the Petitioner computed its taxable income under the head of profits and gains of business at Rs. 899.48 Crores. Deductions were claimed under Section 80-IA and 80-IB in the amount of Rs.157.09 Crores. In the notes appended to the computation the Petitioner disclosed that a claim for relief under Section 80-IA/IB has been made in respect of the newly established industrial undertakings commissioned from financial year 1992-93 to the financial year 2001-02. During the year 1999-2000 a major expansion took place of the Vizag refinery by which the capacity of the refinery was expanded. The Petitioner claimed that the profits made by the expanded unit were eligible for deduction for seven consecutive years under Section 80-IB(a). No claim was made for Assessment Years 1999-2000 and 2000-01 since the expanded unit did not generate profits. During the year in question the expanded

unit had contributed to the profits to the extent of Rs.138.47 Crores and accordingly a deduction was claimed. The tax audit report under Section 44-AB was annexed to the return as is mandatorily required by law. The nature of the deductions claimed under Section 80-IA and 80-IB was explained in the annexures. The deduction under Section 80-IA on the CPP was claimed at Rs.86.37 lacs, on the Lube Blending Plant at Silvassa under Section 80-IB at Rs. 14.44 Crores and under Section 80-IB on the VREP-II project of Rs.138.47 Crores.

9. For facilitating exposition, it would now be appropriate to deal with each one of the three issues on which the assessment is sought to be reopened, by considering the nature of the disclosures made by the assessee : The first issue on which the assessment is sought to be reopened is that in respect of its CPP at Vizag, the assessee claimed a profit of Rs.86.37 lacs in respect of which a claim for deduction was made under Section 80-IA. The profit and loss account of the Gas Turbine generators discloses an income from the

generation of electricity of Rs.56.43 lacs. In addition, the assessee computed a saving in LSHS of Rs.29.95 Crores, thus reflecting an income of Rs.86.39 Crores. The expenses being to the extent of Rs. 85.53 Crores the assessee reported a profit of Rs.86.37 lacs. The bone of contention relates to the saving in LSHS of Rs.29.95 Crores. According to the Assessing Officer, but for the aforesaid item, the operations of the CPP would have actually reported a loss for the Assessment Year and this was obviated by the savings in LSHS which as noted above is reported at Rs.29.95 Crores. Together with its profit and loss account for the unit, the assessee in its working notes disclosed (i) the computation of profits and (ii) the break up on the basis of which the computation was arrived at. The assessee disclosed that the income was broken up into two components – (1) the value of the electricity generated was computed at the rate at which electricity could be purchased from the Andhra Pradesh Electricity Board and (2) the value of the steam generated from the CPP was computed in terms of the value of LSHS saved while generating steam. According to the assessee, the captive power unit generated

electricity and, based on the co-generation of power steam generation is also unavoidable. Two options would have been available to the assessee in the computation of the income arising out of the steam generation. These would be either by taking the price in the open market if the product was saleable or was actually sold or in the alternative by considering the savings in the cost of the alternative use made of the product. In the case of the steam generated, the possibility of the use of the steam in the refinery process ruled out, according to the assessee, the possibility of sale in the open market. Since the consumption of LSHS to that extent as fuel would have increased the cost of fuel / raw material in the refinery operations and since the generation of steam in the co-generation of power and steam in the captive power unit resulted in savings, the assessee considered that to be its income in the profit and loss account of the CPP at the Vizag refinery.

10. During the course of the assessment proceedings a notice was issued to the assessee under Section 142(1) on 19 February 2004

in which a specific disclosure was sought inter alia in respect of the following :

> "In Note no. 4 of the Notes to the return of income, you have claimed relief u/s. 80IA, 80IB on LPG Bottling Plants (Rs.297.70 lakh), Captive Power Plant (86.37 lakh), Propylene Recovery Unit (Rs.330.43 lakh) and Lube Blending Plant (Rs.144.87 lakh) and Visakh Refinery Expansion Phase II (Rs.13847.28). You are caused to justify the claim on LPG Bottling Plants and to how bottling plants are manufacturing units. Similarly, to justify your claim on Captive Power Plant, Propylene Recovery Unit, Lube Blending Plant and Visakh Refinery Expansion Phase II. In this regard you are also requested to furnish complete, working for deductions u/s. 80IA/80IB for each of the above units and method of allocation of H.O. Expenses including interest, R&D, etc. to all these units."

11. In response thereto the assessee submitted a reply on 24 June 2004 in which the claim to deduction under Section 80-IA on the profit made by the CPP was discussed. The assessee also noted that the deduction under Section 80-IA had been allowed in its own case during the course of the earlier Assessment Years.

12. The material which has been placed on the record would support the contention of the assessee that there was a full and true

disclosure of all material facts relating to the claim of the assessee for a deduction under Section 80-IA in respect of the profits made by the CPP at Vizag. In computing those profits, the assessee disclosed the two components which form a constituent element of the income of the unit. The assessee furnished a break up of the value which it placed on the generation of electricity and on the steam which had been generated as a byproduct. There was a disclosure that the basis for valuing the generation of electricity was the rate prescribed by the Andhra Pradesh State Electricity Board and that the basis for the valuation of the steam generated was the saving in LSHS which would otherwise be the raw material for the generation of the steam. Whether the assessee was correct or otherwise in adopting a particular method for valuation does not fall for determination in these proceedings since the question to which the Court has to address itself is as to whether there was a full and true disclosure by the assessee. The assessee disclosed that it claimed a deduction under Section 80-IA. The computation of profits was disclosed. The break up was explained. The assessee disclosed that its revenues

were determined by taking two components viz. (i) the revenues relating to the generation of electricity and (ii) the saving on the cost of LSHS that was utilized in valuing the steam generation. In these circumstances, the Revenue is not correct in its submission that there was a failure on the part of the assessee to fully and truly disclose all the material facts necessary for the assessment. As a matter of fact we must also note that the submission which has been urged on behalf of the Revenue is that the issue was not considered by the Assessing Officer when the order of assessment was passed. The question before the Court, however, is whether that in itself would justify the inference that a full and true disclosure was not made. Such an inference cannot be drawn since the record before the Court would show that as a matter of fact there was a full and true disclosure. Besides this, the attention of the Court has also been drawn to the circumstance that a similar claim of deduction under Section 80-IA has been consistently made and allowed in the case of the assessee since 1990-91. The record before the Court inter alia contains an application for rectification made by the assessee on 31st

March, 1999 in respect of a deduction inter alia under Section 80-IA on the CPP units of the Mumbai and Vizag refineries, the profit and loss account for the Vizag refinery for 1995-96 which contains a similar computation of income including the saving in LSHS and an order dated 6 April 1999 passed under Section 154 by the Joint Commissioner of Income Tax, Special Range -56 Mumbai. For all these reasons were are of the view that the first issue on which the assessment is sought to be reopened, the Revenue has failed to establish a case for the reopening of the assessment beyond four years.

13. The second issue on which the assessment is sought to be reopened is that a claim under Section 80-IB was made in respect of the VREP-II project. This according to the Assessing Officer did not constitute the establishment of a new unit but would constitute a splitting up or reconstruction of an existing business and therefore no deduction was allowable. The record before the Court shows that in response to the notice that was issued by the Assessing Officer under

Section 142(1) on 19 February 2004 the assessee by its response dated 24 June 2004 clarified that the Ministry of Petroleum and Natural Gas had granted its approval for treating the additional capacity of the expanded project at par with that of new refineries for the purpose of the payment of import parity price. A copy of a letter dated 17 June 2002 of the Petroleum Planning and Analysis Cell set up by the Government of India in the Ministry of Petroleum and Natural Gas was annexed. The assessee also made a further disclosure in the following terms :

> "Further, we submit that the eligibility of the expansion unit for deduction u/s. 80I was considered by the Assessing Officer for the Asst. Year 1990-91 when the first phase of expansion had eligible profits for deduction under the Section. Copy of the relevant paras of the assessment order for the Asst. Year 1990-91 accepting the claim of deduction u/s. 80I for Visakh Refinery expansion as well as Mumbai Refinery expansion is attached (Attachment 7). For the same Asst. Year the deduction under the Section including the marketing margin was adjudicated by the CIT(A) vide his order dated 15.9.93. The learned CIT(A) after examining the working of profit for the expanded unit in detail, has held that the profits made by the expanded unit should also include the marketing profits for computation of eligible profits of the Visakh Refinery Expansion unit and Mumbai Refinery Expansion unit.
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> The Dept. has accepted the learned CIT(A)'s order and no

> appeal has been preferred against the CIT(A)'s order. The issue of inclusion of marketing profit for computing the eligible profits for deduction under Section 80I therefore has reached finality."

14. The assessee therefore clearly disclosed the basis on which it was claiming a deduction under Section 80-IB in respect of the VREP-II project. The attention of the Assessing Officer was specifically drawn to the basis of the claim.

15. As regards the third ground on which the assessment is sought to be reopened, the Assessing Officer has in his notice of reopening stated that the Lupe Unit at Silvassa does not manufacture any article or thing, but merely carries out the activity of processing. Here as well, the assessee by its letter dated 24 June 2004 had explained before the Assessing Officer, the basis on which a deduction under Section 80-IB was claimed. The relevant disclosure in the letter dated 24 June 2004 was to the following effect :

> "We wish to submit that the activity of blending lubricating oils is an activity amounting to manufacture since the activity results in producing a new product different from the Base Oils used in the process. As per Central Excise Act

> and Rules even an activity of labeling, relabelling, repacking of lubricating preparations have been defined to amount to manufacture. ... We submit that our claim of deduction for the profits made by the Lube Blending Plants have been accepted by the Assessing Officer in the earlier Asst. Years."

16. The Assessing Officer while framing the issue under Section 143 had observed thus :

> "In respect of the Lube Blending Plant at Silvassa this is the third year of the claim. It is seen that deduction claimed on the Captive Power Plants product recovery units at the Mumbai and Vizag refineries and on the LPG Bottling Plants have been analysed in great detail during the course of assessment proceedings for A.Y. 1995-96 where it has already been held that the activity carried out by the company at its LPG bottling unit did not constitute manufacturing activity, as intended by the legislature since it did not bring into existence any new substance nor was the product, which was produced at the bottling plants is commercially different or distinct article, and the bottling activity has been described by the company itself as 'Marketing' and not as 'Manufacture'. The above stand of the revenue has also been upheld by the CIT(A) from A.Y. 1992-93 onwards including A.Y. 1997-98 by the CIT(A)-1, Mumbai in the order dated 1-1-2001."

17. Following his discussion the Assessing Officer allowed a deduction to the assessee only on the income from the CPP and

Propylene Recovery unit and the Lube Blending Plant at Silvassa and on a revised profit of the VREP-II unit which is thereafter computed in the order of assessment. These facts would show that there was a due application of mind by the Assessing Officer upon a full and true disclosure being made by the assessee of the relevant facts.

18. In these circumstances, we have arrived at a conclusion that the condition precedent to a valid exercise of the power to reopen an assessment beyond the period of four years from the end of the relevant year, Assessment Year 2002-03 has not been demonstrated to exist. The Petition would have to be allowed and is accordingly allowed by setting aside the notice issued by the Deputy Commissioner of Income Tax on 23 March 2009 under Section 148 of the Act seeking to reopen the assessment for Assessment Year 2002-03. Rule is made absolute in these terms. There shall be no order as to costs.

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

(J.P. Devadhar, J.)