

2017 (7) TMI 499 - GUJRAT HIGH COURT**Nabros Pharma Pvt. Ltd. Versus Deputy Commissioner of Income Tax**

SPECIAL CIVIL APPLICATION NO. 18772 of 2014

Dated: - 12 July 2017

Reopening of assessment - the audit party had raised an objection of the freight and insurance charges being included in the export turnover for computation of benefit under Section 10A - Held that:- Notice for reopening came to be issued which was passed solely on the ground of the assessee's claim of deduction under Section 10A of the Act and reduction of the freight and insurance charges from the export turnover. Thus, clearly the notice for reopening was issued under the directives and compulsion of the audit party, a mode which is not permissible as held by the decision of this Court in the case of Adani Exports vs. Deputy Commissioner of Income Tax (Assessments) [1998 (12) TMI 51 - GUJARAT High Court] . - Decided in favour of assessee.

Judgment / Order**MR. AKIL KURESHI AND MR. BIREN VAISHNAV, JJ.****For The Petitioner : Mr B S Soparkar, Advocate****For The Respondent : Mr Nitin K Mehta, Advocate****ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. Petitioner has challenged the notice dated 27.01.2014 as at Annexure 'A' to the petition issued by the respondent – Assessing Officer for reopening the petitioner's assessment for the assessment year 2009-10.

2. Brief facts are as under:

2.1 Petitioner is a company registered under the Companies Act and is engaged in the business of manufacturing pharmaceuticals and formulations. The company has manufacturing units located in Kheda and Kazipura. For the assessment year 2009-10, the petitioner had filed its return of income declaring total income of ₹ 14.75 crores (rounded off) under the normal provisions of the Income Tax Act, 1961 ('the Act' for short). The book profit of the assessee computed under section 115JB of the Act came to ₹ 47.98 crores. The Assessing Officer took the return in scrutiny. Various claims of the company were examined which included the assessee's claim of deduction under Section 10A of the Act. The Assessing Officer passed order under Section 143(3) of the Act on 29.12.2010 making certain additions. The claim of deduction under Section 10A of the Act was, however, accepted.

2.2 To reopen such assessment, the Assessing Officer issued impugned notice which, as can be seen, was done within a period of four years from the end of the relevant assessment year. In order to issue the notice, the Assessing Officer had recorded various reasons :

"It is seen that the assessee had claimed exemption of ₹ 33,47,92,754/- u/s. 10A of the Act. Perusal of record, it is found that assessee was allowed exemption u/s. 10A of the Act amounting to ₹ 31,20,06,199/- in respect of its 100% E.O.U. unit as per the following working:

Profit of the business(Rs.334792754/-)	x	export turnover (Rs.416114637/-)
		Total turnover (Rs.446504479/-)
		= ₹ 31,20,06,199/-

However, it was noticed from assessment records that the assessee had included 'Freight & Insurance amounting to ₹ 15253173/- (15047262+205911) in the 'export turnover' which resulted in over statement of export turnover to that extent and incorrect computation of deduction u/s.10A. Statement showing the details of Freight & Insurance included in enclosed. The correct computation of exemption u/s.10A, would be as under: Profit of business(33,47,92,754/-) X Export Turnover (Rs 416114637-Rs15253173) Total Turnover (Rs 44,65,04,479/-) =Rs.30,05,46,749/-

Thus there was excess allowance of deduction to the tune of ₹ 1,14,59,450/- The irregular deduction resulted in short levy of tax of ₹ 38,95,067/- plus interest u/s 234B of ₹ 8,17,950/- (i.e. 21% of 38,95,000/-) aggregating to ₹ 47,13,017/-

2. Therefore, I have reason to believe that income of the assessee has escaped assessment for A.Y 2009-10 within the meaning of u/s.147 of the I.T.Act, 1961. Issue Notice u/s 148 of the Income Tax Act, 1961 for the A.Y. 2009-10."

2.3 Armed with the copy of the reasons, the assessee raised objections to the notice of reopening under a communication dated 05.11.2014 in which the assessee interalia took the following objections:

- (i) That the claim of deduction under Section 10A of the Act which is the subject matter of reopening was scrutinized during the original assessment. Reassessment would, therefore, amount to change of opinion;
- (ii) The entire issue of the deduction in view of the Act is subject matter of appeals before the Commissioner of Income Tax (Appeals) (CIT(A)) and the Tribunal. On the ground of merger, therefore, no reassessment be permissible;
- (iii) The notice for reopening of assessment has been issued at the behest of the revenue audit party of the department.

2.4 Ignoring such objections, the Assessing Officer rejected the prayer for dropping the notice by an order dated 12.12.2014 at which stage the petitioner filed this petition.

5. Taking us to the record of the case, counsel for the petitioner raised the following contentions:

/(I) In the reasons recorded, the Assessing Officer has objected to the freight and insurance charges forming part of the numerator in the formula for working out deduction under Section 10A of the Act. If at all, such amount would have to be removed both from the export turnover i.e. the numerator and from the total turnover i.e. the denominator. He submitted that this principle is laid down through series of judgements of different courts. The reason on which the notice for reopening is issued, lacks validity.

(II) The claim of deduction under Section 10A of the Act was examined by the Assessing Officer during original scrutiny assessment. Any re-examination of the claim would amount to change of opinion.

(III) The claim in question was subject matter of appeals before CIT(A) and the Tribunal. On the ground of merger, therefore, reassessment would not be permissible.

(IV) The entire exercise of reopening of the assessment has been undertaken at the behest of the revenue audit party of the department. Though the Assessing Officer was not inclined to accept such a stand, he was compelled to issue notice for reopening the assessment.

6. On the other hand, learned counsel Shri Nitin Mehta submitted that the issue of removing freight and insurance charges from the export turnover was never examined by the Assessing Officer in the original assessment proceedings. He, therefore, had not formed any opinion on this aspect. The principle of change of opinion would, therefore, not apply. This issue was therefore also not subject matter of appeal before CIT(A) since it did not arise out of the order of assessment. On the issue of audit objection, counsel submitted that no such contention was raised in the petition and therefore not dealt in the affidavit-in-reply.

7. It is true that in the present petition, the petitioner has not specifically taken the contention regarding the reopening notice being issued at the instance of the audit party. However, as noted earlier, such contention was very much taken in the objections raised by the petitioner and the order passed by the Assessing Officer rejecting such objection did not deal with this ground at all. Therefore, we had called upon the counsel for the revenue to produce the original file to put this factual aspect beyond controversy. Upon perusal of the file, we notice that the audit party had raised an objection of the freight and insurance charges being included in the export turnover for computation of benefit under Section 10A of the Act. We may recall, this was the sole ground on which notice for reopening of the assessment has been issued. In response to such audit query, the then Assessing Officer under his letter dated 29.02.2012 had conveyed to the Commissioner of Income Tax as under:

“3. The assessee claimed exemption u/s.10A of the Act for A.Y.2009-10 of ₹ 33,47,92,754/-. The claim of deduction u/s.10A by the assessee is as per Form 56G, has been worked out by including the actual amount of Freight and insurance in the export turnover and total turnover. The RAP has adopted the figure of ₹ 1,52,53,173/- as the amount of freight and insurance included in the export turnover. It is observed that the said figure is the difference of export turnover and FOB value mentioned in note No.10 forming the part of the audited financial statement. This amount is not the actual amount of freight and insurance because the FOB value mentioned in the notes is a consolidated amount of the 100% EOU and the non-EOU unit. The actual working of claim of deduction u/s.10A after excluding the freight and insurance from the export turnover and the total turnover is as under:

<i>Profit of business(33,47,92,754/-)</i>	<i>X</i>	<i>Export Turnover (Rs.44,64,84,215 – 1,52,53,173)</i>
<i>Total Turnover</i>		<i>(₹ 44,65,04,479 – 1,52,53,173)</i>
		<i>= ₹ 33,47,77,022/-</i>

3.1 It is to be mentioned that the assessee has credited to the P&L account, the amount of sales including the freight and insurance and debited the P&L account the amount of freight and insurance

expenditure incurred on the sales. Therefore, profit of the eligible business remains unaffected. Also if the freight and insurance is excluded from E.T.O., the same should be excluded from the T.T.O, as the ETO & TTO of the eligible undertaking being the same, as the undertaking is a 100% EOU and the freight and insurance is included in both the ETO and TTO. Therefore, if the freight and insurance is to be excluded from the export turnover the same should also be excluded from the total turnover to arrive at the actual claim of deduction u/s.10A. Therefore, the objection raised by the RAP is not acceptable.

4. However, in view of instruction No.9 of CBDT, remedial action may be taken. In this case, the assessment proceedings have been finalized on 14/12/2009 u/s143 of the Act and hence the time limit for various remedial actions is as under:-

u/s. 263 of the Act -31.03.2013

u/s. 147 of the Act -31.03.2013

(under the main provisions of s.147) Considering the facts of the case, the most appropriate remedial action to set-right RAP Audit objection is to take action u/s.263 of the Act. However, kind instructions in the matter, if any, are solicited.”

8. It can, thus, be seen that the Assessing Officer, then incharge of the assessment of the petitioner, did not accept the audit objection. In fact he gave detailed reasons why the stand was incorrect. He pointed out that the amount in question is really not in the nature of freight and insurance charges. In any case, if such amount is to be deducted from the export turnover forming the numerator part of the formula the same will also have to be deducted from the total turnover forming the denominator part. On such grounds, he opposed the audit objection. He, however, lastly conveyed that in any case this would be a case where exercise of revisional powers would be appropriate.

9. Once again, the Assessing Officer wrote to the Deputy Accountant General of Audit on 02.01.2013 and conveyed as under:

“Therefore, if the freight and insurance is to be excluded from the export turnover the same should also be excluded from the total turnover to arrive at the actual claim of deduction u/s.10A. Therefore, the objection raised by the RAP is not acceptable and the same needs to be dropped.”

10.1 The Assessing Officer in the meantime changed. The new Assessing Officer also asserted that the audit objection is not valid.

11. Despite such internal correspondences, apparently the notice for reopening came to be issued which was passed solely on the ground of the assessee's claim of deduction under Section 10A of the Act and reduction of the freight and insurance charges from the export turnover. Thus, clearly the notice for reopening was issued under the directives and compulsion of the audit party, a mode which is not permissible as held by the decision of this Court in the case of **Adani Exports vs. Deputy Commissioner of Income Tax (Assessments) reported in [1999] 240 ITR 224.**

12. In the result, the impugned notice dated 27.01.2014 is set aside. Petition is allowed and accordingly disposed of.

Citations: in 2017 (7) TMI 499 - GUJRAT HIGH COURT

1. [Adani Exports Versus Deputy Commissioner Of Income-tax \(Assessments\) - 1998 \(12\) TMI 51 - GUJARAT High Court](#)