

Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

TAX APPEAL NO.44 OF 2008

The Commissioner of Income Tax,
having office at Aayakar Bhavan,
Patto Plaza, Panaji, Goa. Appellant.

Versus

M/s. Narcissus Investments Pvt. Ltd.,
Gabmar Apartments,
Vasco Da Gama, Goa. Respondent.

Ms. Amira Abdul Razaq, with Ms. Tanya Ferreira, Advocate for the
Appellant.

Mr. Mihir Naniwadekar, with Ms. Vinita Palyekar, Advocate for the
Respondent.

***Coram : M.S. Sonak &
Nutan D. Sardesai, JJ.***

***Reserved on : 23/07/2019.
Pronounced on : 31st July, 2019.***

JUDGMENT : (Per M.S. Sonak, J.)

Heard Ms. Amira Razaq with Ms. Tanya Ferreira for the
Appellant and Mr. Mihir Naniwadekar with Ms. Vinita Palyekar for
the Respondent.

2. By order dated 2nd June, 2008 this Tax Appeal was admitted
on the following substantial questions of law :

“A) Whether on the facts and in the circumstances of the case the ITAT was justified in law in upholding the order of the CIT(A) in cancelling the income escaping assessment passed by the Assessing Officer through the provisions of Sec. 147 was rightly invoked to bring the escaped income to tax ?

B) Whether on the facts and in the circumstances of the case, the ITAT was justified in holding that the AO reopened the assessment on the basis of change of opinion, without appreciating the fact that the reopening of assessment was within four years from the end of the relevant assessment year and therefore falls within expression "income escaping assessment", under clause (c) of Explanation 2, to section 147 of the IT Act ?

C) Whether on the facts and in the circumstances of the case, the ITAT was justified in law in not answering the substantial question whether the assessee an investment company was justified in making claim of deduction u/s. 80HHC on the sale proceeds received in convertible foreign exchange on the sale of 1,70,032 shares of M/s. Chowgule Steamships Ltd. to M/s. International Finance Corporation, Washington, USA, though the business of the assessee company is only buying and selling of shares and not involved in any trading or manufacturing of goods or merchandise as per the provisions of Sec. 80HHC?

3. The challenge in this Tax Appeal is to the Judgment and Order dated 3rd August, 2007 made by the Income Tax Appellate Tribunal (ITAT) in proceedings ITA No.228/PNJ/2002 (impugned Judgment and Order). By the impugned Judgment and Order, the ITAT has confirmed the order dated 5/8/2002 made by the

Commissioner (Appeals) quashing the re-opening of assessment by the Assessing Officer in respect of the return of income filed by the Respondent-Assessee for the Assessment Year 1995-96.

4. In this case, the Respondent-Assessee filed return of income for the Assessment Year 1995-96 on 29/3/1996. By order dated 2nd June, 1997, the Assessing Officer completed the assessment under Section 143(3) of the Income Tax Act, 1961 (IT Act). However, on 17/2/2000, a notice was issued to the Respondent-Assessee under Section 148 of the IT Act, seeking to reopen the assessment. The Respondent-Assessee filed its return on 31/3/2000 in response to the notice dated 17.2.2000, *inter alia*, protesting the reopening of assessment.

5. By order dated 21st November, 2001, the Assessing Officer completed the assessment under Section 143(2) of the IT Act, disallowing the Assessee's claim for deduction under Section 80 HHC in respect of export of shares and determined the total income of the Respondent-Assessee at ₹ 1,22,60,230.

6. The Respondent-Assessee appealed to the Commissioner (Appeals), who, vide order dated 5th August, 2002, quashed the reopening of the assessment. The Appellant, thereupon, appealed to the ITAT, which has, vide the impugned Judgment and Order,

dismissed the Appeal and confirmed the Commissioner (Appeals) order dated 5th August, 2002. Hence, the present the present Appeal under Section 260A of the IT Act.

7. Ms. Razaq, learned Counsel for the Appellant submits that there was absolutely no infirmity on the part of the Revenue in seeking to reopen the assessment. She submits that this was not at all a case of '*change of opinion*' as has been held by the Commissioner (Appeals) and confirmed by the ITAT. She submits that the issue as to whether sale of shares of an Indian company to a foreign company amounts to '*export*' or not under the relevant provisions of the Customs Act, 1962 was not at all adverted to by the Assessing Officer at the stage when the assessment was finalised in the first instance sometime in the year 1997.

8. Ms. Razaq submits that the reopening of assessment has no nexus with the audit objections, because in the present case, the Assessing Officer has independently applied his mind and only thereafter issued the notice of reassessment. She submits that merely because the Assessing Office had replied to the audit objection and maintained his earlier stance, there can be no statutory bar to such Assessing Officer issuing a notice for reassessment.

9. Ms. Razaq submits that even, otherwise, the audit objection can also be construed as '*information*', on the basis of which notice

for reassessment can always be issued. She submits that if the Assessing Officer derives information from an external source concerning the facts or even as to law relating to and/or having a bearing on the assessment, the Assessing Officer is perfectly competent to reopen the assessment. She submits that this is the view taken by the Hon'ble Supreme Court in the case of ***Larsen and Toubro Limited vs. State of Jharkhand and others***¹.

10. Ms. Razaq submits that this Court in the case of ***IPCA Laboratories Ltd. vs. Gajanand Meena, Deputy Commissioner of Income-tax***² had sustained a notice for reopening of assessment where the Assessee had claimed excessive deduction under Section 80HHC. She submits that the view taken by the Commissioner (Appeals) and the ITAT is contrary to the law laid down by the Hon'ble Supreme Court in ***Larsen and Toubro Limited*** (supra) and by this Court in ***IPCA Laboratories Ltd.*** (supra). For all these reasons, she submits that the substantial questions of law at (A) and (B) are liable to be answered in favour of the Revenue and against the Respondent-Assessee.

11. Ms. Razaq submits that in the present case, the ITAT has not even adverted to the issue as to whether the Assessee, who is admittedly an investment company, was justified in claiming a

¹ 2017 (13) SCC 780

² [2001] 251 ITR 420 (Bombay)

deduction under Section 80HHC on the sale proceeds received in convertible foreign exchange on the sale of ₹ 1,70,032 shares of M/s. Chowgule Steamship Limited to M/s. International Finance Corporation, Washington, USA even though the business of the Assessee company was only of buying and selling of shares and the Assessee company was not at all involved in trading or manufacturing goods or merchandise as contemplated by Section 80HHC of the IT Act. She submits that should this Court answer the substantial questions of law at (A) and (B) in favour of the Revenue, then, the matter may be remanded to the ITAT in order to consider this issue, since this issue was never even considered by the ITAT, though the same was specifically raised.

12. Mr. Mihir Naniwadekar, learned Counsel for the Respondent-Assessee defended the impugned Judgment and Order on the basis of the reasoning reflected therein. He submits that in the present case both, the Commissioner (Appeals), as well as the ITAT have recorded a finding of fact that the Assessing Officer in reopening the assessment has acted under the dictation of the Commissioner of Income Tax. He submits that there is no reason to disturb this concurrent finding of fact. He relies upon the case of *Sheo Narain Jaiswal vs. Income-tax Officer*³ and *CIT vs. T.R. Rajakumari*⁴

³ [1989] 176 ITR 352 (Patna)

⁴ [1974] 96 ITR 78

13. Mr. Naniwadekar submits that in the present case, the Assessing Officer had, in fact, rejected the objections raised in the audit report. Thereafter, by changing his opinion, the Assessing Officer has issued the reassessment notice. He relies upon *Commissioner of Income Tax -17, Mumbai vs. Rajan N. Aswaní*⁵ to submit that such a course of action is clearly impermissible in law.

14. Mr. Naniwadekar submits that in the reasons indicated by the Assessing Officer for reassessment there is really no reference to the issue of transaction not being 'export' for the purposes of the Customs Act. He submits that the Revenue is not entitled to add or supplement such reasons, but has to stand or fall on the reasons set out in the notice seeking to reopen the assessment. He submits that this is clear case of change of opinion based merely upon the audit objection. Accordingly, he submits that the impugned Judgment and order warrants no interference whatsoever.

15. The rival contentions now fall for our determination.

16. In the present case, as noted earlier, return filed by the Assessee claiming deduction under Section 80HHC of the IT Act was initially accepted by the Assessing Officer in terms of Section 143(1) (a) of the IT Act. The return was, thereafter, selected for scrutiny by

⁵ Income Tax Appeal No.606/2015 decided on 24/2/2018

issuing notice under Section 143(2) and Section 142(1) of the IT Act. In fact, notice dated 21.06.1996 was issued to the Assessee under Section 142(1) of the IT Act, by which the Assessing Officer required the Assessee to justify its claim of sale of shares to parties outside India as qualifying to be regarded as '*export*' and consequently deductible under Section 80HHC of the IT Act. The Assessing Officer required the Assessee to furnish details along with receipt of convertible foreign exchange, details of custom clearance, Reserve Bank of India clearance, if any, in relation of the transactions in question. By a further letter dated 27th June, 1996, the Assessing Officer also required the Assessee to furnish particulars, including the name and other details of the foreign company to whom the shares were sold and the value of the shares so sold.

17. The record indicates that the Assessee, by a letter dated 31.12.1996, responded to the notice/letter and justified its claim for deduction under Section 80HHC. The Assessee also furnished the details as called for by the Assessing Officer, including the correspondence with the Reserve Bank of India giving approval for the transfer of shares.

18. The Assessing Officer, only after due consideration of the Assessee's response dated 31.12.1996, completed the assessment under Section 143(3) on 2nd June, 1997, accepting return of the

income. Therefore, this is really not a case where we can accept the contention of Ms. Razaq that the Assessing Officer had not even adverted to the aspect of the transaction not amounting to '*export*'. Once this issue was squarely considered, it was not open to the Revenue to indulge into further hair-splitting by urging that some facet of this issue remained to be considered.

19. The record indicates that even the issue of impact of the Customs Act upon the transaction in question was raised and considered by the Assessing Authority. In this case, the Assessing Authority was quite alive to this issue. There is not even any allegation that the Assessee had failed to disclose all the material facts in relation to the transaction in question. In such circumstances, permitting the Revenue to reopen the assessment would amount to permitting the Revenue to review its earlier order, which jurisdiction is clearly not vested in the Revenue while exercising powers under under Sections 147 and 148 of the IT Act.

20. In this case, after the audit raised its objection, the Assessing Officer submitted reply to the same in which the Assessing Officer resisted the audit objection and defended the completion of assessment. From the perusal of the reply, which is at Annexure 'B' (pages 67 to 79 of the paper book), it is very apparent that the Assessing Officer, at the stage of finalisation of assessment, had very

clearly addressed the issue as to whether the transaction of sale of shares of an Indian company to a foreign company, in the facts and circumstances of the present case, constituted an export and consequently the proceeds were deductible under Section 80HHC of the IT Act.

21. From the reply, it is evident that the transaction was screened not only in the context of the Companies Act, 1956, but also from the context of Foreign Exchange Regulation Act, 1973 since, there was no definition of '*export*' under the IT Act. Despite a strong reply to the audit objection, the Assessing Officer, upon receipt of letter dated 16th February, 2000 from the Commissioner of Income Tax requiring him to take '*remedial action forthwith*', vide notice dated 17th February, 2000 i.e. on the very next day, issued a notice under Section 148 of the IT Act, seeking to reopen the assessment.

22. Both, the Commissioner (Appeals), as well as the ITAT, have recorded concurrent findings of fact that the aforesaid action on the part of the Assessing Officer amounts to '*acting under dictation*'. The material on record does indicate that there was no independent application of mind on the part of the Assessing Officer and the notice proposing reassessment was issued reeling under the dictation from the Commissioner of Income-tax who was, admittedly, his

superior officer. In such circumstances, there is no good ground to interfere with the impugned Judgment and Order.

23. In the case of *Larsen and Toubro Limited* (supra), the Hon'ble Supreme Court has held that the expression 'information' in the context of the provisions which permit reopening of assessment, means instruction or knowledge derived from an external source concerning facts or parties or as to law relating to and/or having a bearing on the assessment. This expression is required to be given widest amplitude and should not be construed narrowly. It comprehends not only a variety of factors, including information from external sources of any kind, but also the discovery of new facts or information available in the record of assessment not previously noticed or investigated. In this case, the Apex Court has also noted that there are a catena of judgments holding that the assessment proceedings can be reopened if audit objection points out the factual information already available in the records and that it was overlooked or not taken into consideration. Similarly, if audit points out some information or facts available outside the record or any arithmetical mistake, assessment can be reopened.

24. In the present case, as noted earlier, it cannot be said that the audit objection had pointed out some factual information which had been overlooked or not taken into consideration by the

Assessing Officer, not only at the stage when the Assessing Officer accepted the Assessee's return in the first instance, but also when the Assessing Officer accepted the Assessee's return after the case was taken up for scrutiny. As noted earlier, a detailed set of questions were posed to the Assessee and information called for, in order to determine as to whether the transaction, in question, amounted to 'export' or not. It is only after a detailed consideration of such material, that the Assessing Officer accepted the return of the Assessee and allowed the deduction as claimed.

25. Even in reply to the audit objection, the Assessing Officer maintained that the deduction was rightly granted after taking into consideration all the material on record and after adverting to the facts and law, relevant to the issue. Thereafter, on the basis of the reasons, which are mostly vague, the Assessing Officer upon being directed by the Commissioner of Income Tax to take remedial action, issued a notice for reassessment. In such facts, it cannot be said that the observations in *Larsen and Toubro Limited* (supra), upon which considerable emphasis was placed by Ms Razaq, would assist the case of the Revenue. In fact, in paragraph 21 of the report relied upon by Ms. Razaq, the Apex Court has noted that mere change of opinion or having second thought about it by the competent authority on the same set of facts and materials on record does not constitute information for the purposes of reopening of assessment.

This, according to us, is a clear case of the Assessing Officer merely changing his opinion or having a second thought on the basis of materials on record and that too reluctantly and reeling under the dictation from the superior officer. Accordingly, we are satisfied that there is no case made out to interfere with the impugned Judgment and Order.

26. The decision of this Court in the case of *IPCA Laboratories Ltd.* (supra) also turns on its own facts, where the Assessing Officer had overlooked the meaning of the word '*profit*' as appearing in Section 80HHC(3)(c) of the IT Act. It is in that context that the Division Bench of this Court held that reopening of the assessment was not based upon a mere change of opinion. The facts in the present case, as noticed earlier, are quite different.

27. Since, on the basis of the material on record we are satisfied that there was no case made out for reopening of the assessment, we do not deem it necessary to go into the larger issue as to whether the Assessing Officer is precluded from issuing a notice for reassessment where such Assessing Officer has already replied to the audit objection justifying his earlier position. No doubt, in *Rajan N. Aswani* (supra) there are some observations to this effect as urged by Mr. Naniwadekar. However, Ms. Razaq did make attempts to distinguish the said decision. According to us, it is really not

necessary to go into this larger issue, since, based upon the discussion as aforesaid, we are satisfied that there was no case made out for reopening of the assessment.

28. On the basis of the aforesaid discussion, we answer the substantial questions of law at (A) and (B) against the Revenue and in favour of the Respondent-Assessee. Since these two substantial questions of law are being answered against the Revenue, there is no case made out to remit the matter to the ITAT for deciding the issue raised in the substantial question of law at (C). In fact, there is no necessity of deciding the substantial question of law at (C), because, even if such question were to be decided in favour of the Revenue, the same would make no difference to the final conclusion in the matter.

29. Accordingly, this Appeal is dismissed. There shall be no order as to costs.

Nutan D. Sardesai, J.

M.S. Sonak, J.