

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**ORDINARY ORIGINAL CIVIL JURISDICTION**

**WRIT PETITION NO.2331 OF 2007**

United Shippers Limited, a company }  
 incorporated under the Companies Act, }  
 1956 and having its registered office at }  
 United India Building, 2nd Floor, }  
 Sir P.M.Road, Fort, Mumbai-400 001 } .. Petitioner

vs

1. The Assistant Commissioner of Income Tax }  
 Central circle-21, Mumbai having his office }  
 at Room No.404, 4th Floor, Aayakar }  
 Bhavan, M.K.Rd, Mumbai-400 020 }

2. The Commissioner of Income Tax }  
 having his office at Central II, }  
 Aayakar Bhavan, 4th Floor, M.K.Rd }  
 Mumbai-400 020 }

3. The Union of India through Secretary }  
 Ministry of Finance, Government of India, }  
 North Block, New Delhi-110 001. } .. Respondents

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Mr.P.J.Pardiwalla, Sr.Advocate a/w Mr.Nilesh Joshi  
 i/b Mr.Atul K.Jasani for Petitioner  
 Mr.Suresh Kumar for Respondents

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**CORAM: M.S.SANKLECHA &  
G.S.KULKARNI, JJ.**

**DATE: 5th JANUARY, 2015**

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**Oral Judgment:- (Per G.S.Kulkarni, J.)**

1. The petitioner has sought to question the legality of a notice dated 15.3.2007 issued by the Assessing Officer under section 148 of the Income Tax Act, 1961 (for short 'the Act') seeking to re-open assessment for A.Y.2000-01. There is also a challenge to the order of the Assessing Officer disposing of the objections raised by the petitioner to the re-opening of the assessment. As the re-opening pertains to the A.Y.2000-01 the impugned notice is admittedly issued beyond a period of four years from the end of the relevant Assessment year.

2. For the Assessment Year 2000-01 the petitioner filed a return of income on 30.11.2000 declaring a total income of Rs.2,15,82,750/-. An order of assessment was made on 27.1.2003 under section 143 (3) of the Act by which the total income was determined at Rs.2,56,02,060/- after making certain disallowances. One of the partial dis-allowances was a deduction under section 33AC of the Act which was claimed by the petitioner on the ground that the petitioner is engaged in the business of 'Operation of Ships.' On this count the petitioner had interalia claimed a deduction of Rs.2,1594,598/- however the Assessing officer allowed the same to an extent of Rs. 1,82, 28,205/- only.

3. The Assessing Officer issued to the Petitioner a notice dated 15.3.2007 under section 148 of the Act seeking to re-open the assessment for A.Y.2000-01 on the ground that the income had escaped assessment within the meaning of section 147 of the Act. The notice recorded that it was issued after obtaining necessary satisfaction of the Commissioner of Income Tax. The petitioner by its letter dated 17.4.2007 informed the Assessing Officer that the return dated 30.11.2000 filed by the petitioner for A.Y.2000-01 be treated to be a

return filed in response to the notice issued under section 148 of the Act. The petitioner also demanded reasons for re-opening of the assessment.

4. The Assessing Officer accordingly furnished to the petitioner reasons for re-opening of the assessment which read thus :-

*“ The assessment in this case was completed on 27.1.2003 determining the total income at Rs.2,56,02,060/- while computing the total income claim of the assessee u/s.33AC of Rs.182,28,705/- was allowed accepting the nature of business as “operation of ships” as claimed in the return of income in Column 11.*

*Subsequently an intimation has been received from CIT(C)-IV vide letter dated 13.2.2007 informing the nature of actual business activities of the assessee as submitted by the assessee before CIT(A)(C)-IV while hearing the appeal against order for the block period. The various business activities carried out by the assessee and submitted before CIT(A)(C)-IV are as under:-*

*The appellant is engaged in providing lighterage services to the ships of national and international lines calling on Ports like Bedi, Sikka, Navlakhi, Okha, Magdalla, Dahanu, Dharamtar etc. These services include handling of various cargo such as coal, cement, clinker, salt extraction etc. from ships to shore/shore to ships and clients destination to the mother vessel/mother vessel to the client destination. The company also owns barges, onshore, equipments and dumpers for its business. The appellant either taps its own sources or appoints or looks for agents who can get business for it. The agents appointed by the appellant assist the appellant to achieve large revenue by increasing its turnover.*

*From the elaborate details furnished by the assessee before CIT(A)(C)-IV, it is seen that assessee's main business is not operation of ships as claimed in the return of income but only ancillary services.*

*The deductions u/s.33AC is allowed to an assessee whose main business is operation of ships. The deduction u/s.33AC has been wrongly allowed to the assessee on the basis wrong facts submitted alongwith the return of income. I have, therefore, reason to believe that income chargeable to tax for AY 2000-01 has escaped assessment to the extent of Rs.182,28,705/- by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment in the return of income for AY 2000-01.”*

5. The petitioner by its letter dated 16.10.2007 recorded their objections to the notice issued by the Assessing Officer under section 148 of the Act. The petitioner raised the following objections :

(i) The return of income for A.Y.2000-01 was filed along with all supporting documents including those required for claiming under section 33AC of the Act;

(ii) On the scrutiny and examination of the material documentary evidence placed before the Assessing Officer in the assessment proceedings, the assessment was completed by an order dated 27-1-2013, passed under section 143 (3) of the Act wherein deduction under section 33AC was allowed at Rs.1,82,28,705/- against the petitioner claim of Rs.2,15,94,598/-.

(iii) In re-opening the assessment the conditions prescribed under section 147 conferring jurisdiction for re-opening the assessment are not satisfied before issuing of a notice under section 148 of the Act as there was no failure to disclose fully and truly all material facts.

(iv) Mere change of opinion without any fresh tangible material could not be a ground to re-open an assessment.

(v) The reopening could not have been at the suggestion of another authority.

(vi) The reasons as furnished by the Assessing Officer had no rational relationship with the belief of the Assessing Officer.

(vii) As regards the partial dis-allowance under section 33AC in the assessment order dated 27.1.2003, the petitioner had filed a First Appeal before the CIT (Appeals). The dis-allowance being maintained in the First Appeal the petitioner had approached the Tribunal. The Tribunal by an order dated 3.7.2007 had restored/remanded the issue in regard to the admissibility of the said deductions to be decided afresh by the Assessing Officer.

6. The Assessing Officer however by an order dated 23.10.2007 rejected the petitioner's objections to the re-opening of the assessment. The order records that objections are being rejected in view of the letter received from the CIT (Appeals). The relevant extract of the order reads thus:-

*“From the elaborate details furnished by the assessee before CIT(A)(C)-IV, it is seen that assessee's main business is not operation of ships as claimed in the return of income but only ancillary services.”*

*I, therefore, reject your submission for allowing of deduction u/s.33AC of the Income Tax Act,1961 and that reopening is valid.”*

7. Learned counsel appearing on behalf of the petitioner has made the following submissions in support of the petitioner's case:

(i) There was complete disclosure on the part of the assessee all material facts truly and fully during the course of assessment.

(ii) The fact that the petitioner is engaged in the business of 'Operation of Ships' was appropriately disclosed and on this basis the petitioner was claiming deduction under section 33AC of the Act and hence there was full and complete disclosure of the activity of the petitioner.

(iii) The petitioner being engaged in shipping operation was accepted in totality by the revenue.

(iv) It can be seen from the reasons as furnished by the as Assessing Officer it cannot be said that the Assessing Officer had any reason to believe that the income had escaped assessment nor it could be said that the petitioner had failed to disclose fully and truly any material which would warrant reopening of the assessment as per the provisions of section 147 of the Act.

(v) The impugned notice was issued on a mere change of opinion which can not be a ground to reopen the assessment.

(vi) The impugned notice was issued without being any opinion formed by the Assessing Officer as the Assessing Officer was acting on the recommendation of the CIT (appeals).

8. Learned Counsel for the petitioner, in support of his submissions, has drawn our attention to the following documents as were available before the Assessing Officer in the assessment proceedings placed on record:

(i) 47th Annual report of the petitioner for the year 1999-00. depicting, the following:-

(ii) profit and loss account for the year ended 31.3.2000 which indicated freight income of Rs.114,53,79,047/- for the said year.

(iii) Expenditure on vessels of Rs.89,75,43,318/- was shown in the Profit and Loss account.

(iv) Transfer of an amount of Rs.2,81,87,044/- to shipping reserves under section 33AC as shown in the schedule forming part of the Balance Sheet as on 31.3.2000.

(v) Entry in regard to vessels and barges showed value of the vessels post depreciation for Financial year 1999-00.

(vi) Statement of particulars furnished under section 44 AB of the Act in Form No.3 C (D) the petitioner had shown the nature of business as 'Business of Operations of Ships'.

(vii) Statement of depreciation for the year ending 31.3.2000 the value of specific vessels and barges also was indicated.

(viii) Computation of deduction allowable under section 33AC the computation of deductions under section 33AC showing 50% amount of Rs.2,15,94,598/- as claimed by the petitioner.

(ix) Statement of computation of total income the claim of the petitioner for deductions under section 33AC arrived at an amount of Rs.2,15,94,598/- being incorporated.”

9. Learned Counsel for the petitioner has drawn our attention to the following documents :-

(I) Notice dated 4.1.2002 issued by the Assessing Officer under Section 142(1) of the Act which inter alia sought several details from the petitioner. One of the details as sought from the petitioner reads as under:-

*“Give a brief note on nature of business carried on by you and subsidiary company i.e. USL Shinrai Automobiles Limited for the year under consideration.”*

(II) Reply of the petitioner to the notice dated 4-1-2002 by its letter dated 12.2.2002 inter alia recording the nature of business as under:-

“1. *Brief Note regarding the Nature of Business:*

(a) *the company owns Barges, Onshore Equipments and dumpers. The Company provides the lighterage services to the ships of national and international lines calling on ports like Bedi, Sikka, Navlakhi, Okha, Magdalla, Dahanu, Dahej etc. These services includes handling of various cargo such as coal, cement, clinker, salt extraction etc. from ships to shore/ shore to ships and/or from clients' destination to the Mother vessels, Mother vessels to the client's destination.”*

(III) Letter of the petitioner dated 17.1.2003 being petitioner's reply to the notice under Section 143(2) of the Act, in which the petitioner recorded that the petitioner had a fleet of barges and tugs operating at the minor ports on the Western port of India such as Bedi, Sikka, Navlakhi, Okha, Magdalla and Dahanu.

(IV) Assessment order dated 27.1.2003 passed under Section 143(3) of the Act in which the Assessing Officer has recorded that the petitioner is engaged in the business of owning and operating ships and barges. The Assessment Order also takes into consideration the claim of the petitioner for deductions under Section 33AC which was partially disallowed. The claim of the petitioner for deduction under Section 33AC of the Act was for an amount of Rs.2.15 crores. The Assessing Officer, however, allowed the same to the extent of Rs.1.82 crores. The Assessing Officer in partially disallowing the claim furnished detail reasons.

(V) Order dated 21.3.2003 passed by the CIT (Appeals) sustaining the disallowance of deduction under Section 33AC of the Act and the order of the Tribunal passed on an appeal filed by the petitioner against the said order by

which the issue in regard to partial deduction under Section 33AC was restored to file of the Assessing Officer.

10. Learned counsel for the petitioner submits that the above documents clearly reveal that the petitioners had fully and truly disclosed all material facts which indicated that the petitioners were engaged in the business of operation of ships at all relevant times and were accordingly availing the deduction under Section 33AC of the Act. He submits that this disclosure of the true nature of the business was accepted by the revenue. It is submitted that despite this clear position, the Assessing Officer reopened the assessment only on the basis of the letter dated 13.2.2007 of the CIT (Appeals) to the Commissioner of Income Tax, Central-II, Mumbai.

11. To appreciate the submissions as made on behalf of the petitioner it would be necessary to note the contents of the said letter which reads thus :

*“No.CIT(A)-C-IV/Appeal/2006-07 Office of the Commissioner of  
Income Tax (Appeals)  
Central-IV Room no.631,  
Aayakar Bhavan, Mumbai.*

*Dated: 13.2.2007*

*The Commissioner of Income Tax  
Central-II, Mumbai*

*Sir,*

*Sub: Appeal against order u/s 158BC in the case of  
M/s United Shippers Ltd-Reg*

*Ref: No.CIT (A)/C-IV/IT-248/2004-05 dated 24.3.2005*

*The above mentioned appeal is pending for adjudication in  
this office. As per Ground No.10 of the above appeal, the*

appellant has contested the AO's action of not granting deduction u/s 33AC of the I.T.Act.

As per the appellant's written submissions dated 22.11.2006 given to me in appeal proceedings, the nature of business carried out by the appellant is stated as under :-

“ The appellant is engaged in providing lighterage services to the ships of national and international lines calling on Ports like Bedim, Sikka, Navlakhi, Okha, Magdalla, Dahanu, Dharamtar etc. These services include handling of various cargo such as coal, cement, clinker, salt, extraction etc. from ships to shore/shore to ships and client's destination to the mother vessel/mother vessel to the client destination. The company also owns barges, onshore equipments and dumpers for its business. The appellant either taps its own sources or appoints or looks for agents who can get business for it. The agents appointed by the appellant assist the appellant to achieve large revenue by increasing its turnover.....”

A plain reading of section 33AC makes it abundantly clear that deduction u/s 33AC is available to an assessee which is a government company or a public company formed and registered in India with a main object of carrying on the business of operation of ship.....

As can be seen from the appellant's submissions, the appellant is not engaged in the business of operating ships but only providing ancillary services.

It is kindly requested that the AO (ACIT, CC-21) and Addl.CIT (Central Range-5) Mumbai should be directed to not only consider the claim of the appellant in light of above mentioned proposition but also to consider the possibility of re-opening of concluded assessments in the appellant's case.

This may be treated as MOST URGENT.

Thanking you,

Yours faithfully,

S/d  
(Anuradha Bhatia)

*Commissioner of Income Tax (Appeals)  
Central-IV Mumbai.”*

**(underlining is ours)**

12. Referring to the above letter of the CIT (Appeals) it is urged on behalf of the petitioner that the Assessing Officer in issuing the notice under section 148 of the Act was clearly acting at the dictates and /or recommendation of the CIT (Appeals). It is urged that even assuming that the Assessing Officer was to consider the aforesaid opinion of the CIT (Appeals) the Assessing Officer was required to form an independent opinion to come to a conclusion that income has escaped assessment on account of failure on the part of the petitioner to fully and truly disclosure of all material facts. It is then urged that in any case the reason given by the CIT (Appeals) in the letter dated 13.2.2007 in regard to the nature of business carried out by the petitioner was nothing but what the petitioner itself had disclosed to the revenue at all material times including in its return and in the information as sought by the Assessing Officer during the course of assessment proceedings. It is therefore, submitted that there was no material which can be said to be not fully and truly disclosed by the petitioner to the revenue during the course of assessment proceedings. It is thus , urged that action on the part of the revenue in reopening the assessment is wholly without jurisdiction and deserves to be quashed and set aside.

13. On behalf of the revenue, it is submitted that there was nothing inappropriate or illegal on the part of the Assessing Officer to re-open the assessment for the assessment year in question. It is submitted that the reopening was initiated on the basis of the information received from the CIT (Appeals) for the reasons as set out in the letter dated 13.2.2007 of the CIT (Appeals) addressed to the Commissioner of Income Tax making observations on the nature of business of the petitioner which justified the reopening of the assessment as could be very well inferred that the income had escaped assessment.

14. We have given our anxious consideration to the material as placed on record and the submissions as made on behalf of the learned counsel for the parties. It is an obligation on the assessee to disclose fully and truly all material particulars necessary for assessment in support of the return of income. In the case of the petitioner the Assessing officer had passed an order dated 27-01-2003 under Section 143(3) of the Act by which the total income was determined at Rs.2,56,02,060/- after making certain dis-allowances. One of the partial dis-allowances was a deduction under section 33AC of the Act which was claimed by the petitioner on the ground that the petitioner is engaged in the business of 'Operation of Ships.' On this count the petitioner had inter alia claimed a deduction of Rs.2,15,94,598/- however the Assessing officer allowed the same to an extent of Rs.1,82,28,205/-. It is an admitted position that the

notice in question issued under section 148 of the Act is issued by the Assessing Officer after expiry of a period of four years from the end of the relevant assessment year. When an assessment is sought to be re-opened after expiry of four years from the end of the relevant assessment year, the proviso to section 147 of the Act stipulates a requirement that there must a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of income for that year. This is the primary and jurisdictional requirement being the mandate of the proviso to provision of section 147 of the Act. A perusal of the reasons as recorded by the Assessing Officer, to reopen the assessment, even when they are read in its entirety do not indicate that the petitioner has not disclosed fully and truly all the material facts. We therefore see that ex facie on this ground alone the impugned notice can be said to lacking in its foundation for any further enforcement.

15. Indisputedly the Assessing Officer had passed an assessment order under section 143 (3) of the Act. In the course of assessment proceedings the Assessing officer by notice dated 4. 1.2002 called upon the petitioner to submit a brief note on the nature of its business. The petitioner by its letter dated 12.2.2002 had categorically disclosed the nature of its business activity as being engaged in 'shipping operations.' The petitioner in various documents as sought by the assessing officer in the course of assessment proceedings had disclosed nature of its activity to be operation of ships. On the basis of this material the

petitioner had made a claim for deduction under Section 33AC of the Act justifying its claim being engaged in shipping operations. This claim was supported by material made available to the Assessing Officer. The Assessing Officer had thus applied his mind to the key facts which form the basis of reopening of the assessment and recorded an opinion that the petitioner is engaged in shipping operations so as to make it eligible for deduction under Section 33AC of the Act. Thus the reopening of the assessment is bad in law as there is no reason to believe that the income chargeable to tax has escaped assessment. This is so as the entire exercise for reopening of the assessment emanates from a change of opinion.

16. It is quite clear to us that the re-opening notice in question is issued by the Assessing Officer on the basis of the letter dated 13.2.2007 of the CIT (Appeals) (supra), wherein the CIT (Appeals) has extracted the very information as furnished by the petitioner in regard to the nature of its business in shipping. What we find is that this disclosure is in fact identical to the disclosure as made by the petitioner in response in its letter dated 12.2.2012 to the notice of the Assessing Officer under section 142(1) of the Act which raised various queries in the course of assessment proceedings for the assessment year in question. In our opinion the assessing officers attempt to reopen the petitioner's assessment on the petitioner's own disclosure can in no manner be termed as an appropriate exercise of his jurisdiction and authority under Section

147 so to reopen the assessment beyond the period of four years as this can in no manner be said to be any failure on the part of the petitioner to disclose fully and truly all the facts necessary for assessment.

17. Thus the issue which goes to the root of the matter is the jurisdictional requirement the assessing officer was required to be satisfy before issuing the notice in question under section 148 to reopen an assessment after expiry of four years from the end of the relevant assessment year. The jurisdictional requirement would be whether the petitioner had failed to fully and truly disclose all material facts necessary for his assessment for the relevant assessment year. This would form the very foundation for the Assessing Officer to exercise jurisdiction so as to come to a definite conclusion that income has escaped assessment. The reasons as furnished by the Assessing Officer to reopen the assessment do not indicate that there was failure on the part of the petitioner to fully and truly disclose any material fact in regard to the nature of its business so as to claim deductions under section 33 AC of the Act. The entire basis of reopening the petitioner's assessment is the opinion of the CIT (Appeals) as contained in his letter dated 13.2.2007 which is nothing but the petitioner's own disclosure in regard to the nature of the petitioner's business. This assertion of the Assessing Officer thus in no manner can legally justify reopening of the assessment after four years from the end of the relevant assessment year. Moreover, an action to reopen the assessment on a mere

change of opinion is wholly impermissible in law. We are therefore of the clear opinion that the Assessing Officer has acted without application of mind and wholly without jurisdiction in issuing the impugned notice to reopen the assessment of the petitioner.

18. We may usefully refer to the decision of the Division Bench of this Court in case of ***Hindusthan Lever Ltd Vs.R.B.Wadkar Assistant Commissioner of Income Tax reported in 268 ITR 332*** in which case this Court was dealing with an issue pertaining to a notice to re-open the assessment after four years after completion of the assessment under section 143 (3) of the Act. The Division Bench has made the following observations :

*“The reasons recorded must be based on evidence. The Assessing Officer in the event of challenge to the reasons must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment.....”*

*(emphasis supplied)*

In the present case, the reasons as furnished by the Assessing Officer to reopen the assessment does not indicate any material which the petitioner has not fully and truly disclosed in the assessment proceedings.

19. In the light of the aforesaid deliberation, we may observe with certitude that the Assessing Officer in issuing the impugned notice under section 148 of the Act has acted without jurisdiction and merely on a change of opinion and in the absence any material which could be said to be not disclosed fully and truly by the petitioner to the Assessing Officer so as to come to a conclusion that there is escapement of income from assessment. The petitioner has made full and true disclosure during the course of assessment proceedings in regard to the nature of its business. In the absence of these jurisdictional requirements the impugned notice is rendered wholly arbitrary and thus deserved to be quashed and set aside.

20. Accordingly the writ petition deserves to be allowed and is allowed in terms of prayer clause (a). Rule is accordingly made absolute. No order as to costs.

**(G.S.KULKARNI, J)**

**(M.S.SANKLECHA, J)**