HIGH COURT OF JUDICATURE AT BOMBAY
सत्यमेव जयते



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.762 OF 2006

**WITH**

**WRIT PETITION NO.763 OF 2006**

| | | | |
|---|---|---|---|
| Sadhna Nitro Chem Ltd.<br>a company incorporated and registered<br>under the Companies Act, 1956 and<br>having its registered office at 207,<br>Kakad Chambers, 2nd Floor, 132,<br>Dr. Annie Besant Road, Worli,<br>Mumbai 400 018. | ]<br>]<br>]<br>]<br>]<br>]<br>] | .. | Petitioner. |

V/s.

| | | | | |
|---|---|---|---|---|
| 1 | A. B. Koli<br>Assistant Commissioner of Income<br>Tax, Circle 7(2), having his office<br>at Room No.62A, Aayakar Bhavan,<br>Maharshi Karve Road, Mumbai 20. | ]<br>]<br>]<br>]<br>] | | |
| 2 | Commissioner of Income Tax,<br>Bombay City VII having his office<br>at Aayakar Bhavan, Maharshi Karve<br>Road, Mumbai 400 020. | ]<br>]<br>]<br>] | | |
| 3 | Union of India<br>through the Ministry of Law,<br>Aayakar Bhavan, 2nd Floor,<br>Marine Lines, Mumbai 400 032. | ]<br>]<br>]<br>] | .. | Respondents. |



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Mr. Farrokh Irani with Mr. J. Dastur i/b. M/s. Hariani & Co., for the Petitioner in both the matters.
Mr. Arvind Pinto,for the Respondents in both the matters.

**CORAM: M.S.SANKLECHA, &**
**N.M.JAMDAR, JJ.**

**DATE : 17th SEPTEMBER, 2014.**

**JUDGMENT (Per M. S. Sanklecha,J.):-**

These two Petitions under Article 226 of the Constitution of India, challenge:-

(a) two separate notices dated 25th January, 2006 issued under Section 148 of the Income Tax Act, 1961 (the Act), seeking to re-open the assessment for the Assessment Years 1998-99 and 1999-2000; and

(b) two separate re-assessment orders passed on 7th March, 2006 by the Assessing Officer under Section 143(3) read with Section 147 of the Act for Assessment Years 1998-99 and 1999-2000 respectively.

2 Originally, the challenge in both the Petitions was the non-disposal of the Petitioner's objections to the reasons in support of the impugned notices dated 25th January, 2005. However, pending the admission of the Petition, the Assessing Officer without disposing of the objections of the petitioner to the reasons in support of the impugned notices, passed two separate re-assessment orders dated 7th March, 2006 for Assessment Years 1998-99 and 1999-2000. This led to the Petitioner to amending both the Petitions to also mount a challenge to the two



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re-assessment orders dated 7th March, 2006 in these Petitions. Both the petitions were admitted on 28 April, 2006.

3 We are informed that the Petitioner has not challenged the re-assessment orders dated 7th March, 2006 passed for Assessment Year 1998-99 and 1999-2000 before the Appellate Authorities under the Act.

4 It is agreed between the Counsel that the issues involved in both the Petitions are identical. Therefore, for the sake of convenience, we shall refer to the facts in Writ Petition No.762 of 2006 relating to Assessment Year1998-99 for disposal of both these Petitions.

5 On 30th November, 1998, Petitioner filed its return of income for the Assessment Year 1998-99, declaring the total income of Rs.25.45 lakhs. In its return of income, the Petitioner had claimed deduction of Rs.1.66 Crores under Section 80HHC of the Act. On 23rd November, 2000 notice under Section 143 (2) of the Act, inter alia, calling upon the petitioner to furnish details of its claim for deduction under 80HHC of the Act. The Petitioner by its letters dated 20th December, 2000 and 13th February, 2001 responded by furnishing details. Consequent thereto, on 28th February, 2001, the Assessing Officer passed an order under Section 143(3) of the Act for the Assessment Year 1998-99 assessing the petitioner to an income of Rs.72.12 lakhs while reducing the Petitioner's claim for deduction under Section 80HHC from Rs.1.66 Crores to Rs.1.64 Crores.

6 On 25th January, 2005, the impugned notice under Section 148 of the Act was issued, seeking to re-open the assessment for the



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Assessment Year 1998-99. In support thereto, Petitioner furnished the following reasons for issuing of the impugned notice dated 25th January, 2005:-

> *"The undisputed basic facts of the case revealed that the assessee company, an exporter, filed its return of income for the Assessment Year 1998-99, declaring income at Rs. 25,45,970/- and claimed deduction of Rs.1,66,19,692/- u/s. 80HHC(1) of the Act therein. The assessment records showed loss / negative profit at Rs.47,75,729. The assessment has been completed u/s. 143/143(1) of the Act at Rs.72,12,960/- allowing deduction of Rs.1,64,26,974/- u/s.80HHC(1) of the Act. Thus, deduction u/s. 80HHC(1) of the Act has been claimed/allowed, contrary to the express provisions of the section, even in a situation where the assessee has suffered loss.*
>
> *2 The Hon'ble Supreme Curt in the case of IPCA Laboratory Ltd. vs. Deputy C.I.T. (2004) 266 ITR 521(S.C.) has categorically held that deduction u/s.80HHC(1) of the Act can be permitted only if there is positive profit in the exports of both self manufactured goods as well as trading goods. If there is loss in either of the two then the loss has to be taken into account for the purposes of computing the profits. If the net figure is positive profit then the assessee will be entitled to deduction; if the net figure is a loss then the assesee will not be entitled to deduction.*
>
> *3 Further, jurisdictional High Court in the case of Rohan Dyes Intermediater Ltd. vs. CIT (2004) 270 ITR 350(Bom.) has held that the meaning of the word "profit" in the proviso appended to sub section (3)(c) is the same as judicially interpreted by the Hon'ble Supreme Court in the case of IPCA Laboratories Ltd.(supra). It has no*



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*different meaning and carries the same meaning, i.e. the positive profit worked out after taking into consideration the losses. The proviso is not an independent provision. Thus, in the light of the basic facts of the case and the above discussed decisions of the Apex Court of the land and the jurisdictional High Court, there exists cogent and relevant material, forming basis for initiation of re-assessment proceedings, in the instant case, with in the meaning of section 147 read with section 148 of the Act. Further, Explanation-2 to Section 147 of the Act also confers jurisdiction to invoke the provisions of Section 147 of the Act, in the case, where the assessee has claimed excessive allowance or relief. In this case, there is a live link between the material on record and escapement of income chargeable to tax. Further, the decision of the Apex Court/High Court constitute valid basis for reopening of the assessment u/s. 147 read with Section 148 of the Act.*

*4 In view of this, I have reason to believe that the income chargeable to tax has escaped assessment with in the contemplation of Section147 read with Section 148 of the Act. Consequently, notice u/s.148 of the Act is issued to the assessee company."*

7 The Petitioner by their letters dated 29th March, 2005 and 2nd September, 2005 objected to the reasons furnished in support of the impugned notice. The Petitioner besides contesting the reasons on merits also pointed out that the impugned notice dated 25th January 2005 having been issued beyond a period of four years from the end of relevant Assessment Year 1998-99 without any failure to disclose fully and truly material facts for assessment on the part of the petitioner is without jurisdiction. The petitioner called upon the Assessing Officer to dispose of the objections in the light of the Supreme Court's decision



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in ***GKN Driveshits (India) Ltd. v/s. ITO 257 ITR 752***- before proceeding with the re-assessment for the Assessment Year 1998-99.

8 Thereafter, without disposing of the Petitioner's objections,, in spite of the Petitioner's request, the Assessing Officer on 23rd February, 2006 called upon the Petitioner to furnish various details so as to complete the re-assessment proceeding for Assessment Year 1998-99 and 1999-2000. In response, the Petitioner by its letter dated 24th February, 2006 sought time till 15th March, 2006 and the same was granted. In spite of having granted time, the Assessing Officer on 7 March 2006 passed the re-assessment orders for the Assessment Years 1998-99 and 1999-2000. The impugned reassessment orders dated 7th March, 2006 were both best judgment Assessment passed under Section 144 of the Act.

9 Mr. F.V. Irani, learned Counsel appearing for the Petitioner in support submits as under:-

(a) Both the impugned notices dated 25th January, 2005, seek to re-open assessment beyond a period of four years from the end of the relevant Assessment Years 1998-99 and 1999-2000. The jurisdictional requirement to issue a notice for re-assessment is failure on the part of the Petitioner to truly and fully disclose all material facts necessary for assessment. It is submitted that the grounds furnished to the Petitioner in support of the impugned notice nowhere indicates any failure on the part of the Petitioner to disclose truly and fully all material facts necessary for assessment. Thus, the notices are without jurisdiction;



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(b) The entire issue with regard to the Petitioner's claim for deduction under Section 80HHC of the Act was subject of examination during scrutiny proceeding leading to the Assessment Orders dated 28th February, 2001 and 13th February 2002 for Assessment Year 1998-99 and 1999-2000 respectively. Therefore, issuing the notices impugned herein on the same ground is clear case of change of opinion. Therefore, the proceedings of reassessment are without jurisdiction; and

(c) The Assessing Officer has passed the re-assessment orders dated 7th March, 2006 for both Assessment Years 1998-99 and 1999-2000 without disposing of the Petitioner's objections to the grounds in support of the impugned notices dated 25th January, 2005. This is contrary to decision of the Apex Court in GKN Drivshifts (supra).

Therefore, it is on the basis of the above, it is submitted that the impugned notices for re-assessment being without jurisdiction the consequent re-assessment orders passed on 7th March, 2006, also do not survive.

10 As against the above, Mr. Arvind Pinto, learned Counsel appearing for the Respondent-Revenue submits opposing both the Petitions submits as under :-

(a) The Assessment Orders dated 7th March, 2006 on re-assessment has already been passed for Assessment Year 1998-99 and 1999-



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2000.Therefore, the petitioners have an efficacious alternative remedy of filing an appeal under the Act which they must be relegated to adopt;

(b) In any view of the matter, the Petitioner had submitted to the jurisdiction of the Assessment Officer for the purpose of re-assessment leading to the order dated 7th March, 2006. In support, reliance is placed upon the letter dated 23rd February, 2006 issued by Assessing Officer to the Petitioner, calling for certain information for completing the re-assessment proceeding. Thus it is not open to the petitioner to challenge the same by way of this writ petition.

(c) In view of the decision of the Apex Court in ***IPCA Laboratory Ltd. V/s. Deputy Commissioner of Income Tax (2004) 266 ITR 521-*** the position in law was settled and this declaration of law by the Supreme Court would apply even for the Assessment Year 1998-99. Thus, the Assessing Officer was entitled to re-open assessment and examine the facts in the light of the Supreme Court's decision; and

(d) There is no change of opinion in issuing the impugned notices dated 25th January, 2005 as the earlier opinion was formed in the absence of the decision of the Supreme Court in IPCA Laboratory (supra). Therefore, it is submitted that the change in law warrants issuing of the impugned notices.

11 The contention of Mr. Pinto, learned Counsel appearing for the Respondent-Revenue that the Petitioner should be relegated to the



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alternative remedy of filing an appeal, as the assessment order has already been passed at the final hearing of both the petitions, without examining the challenge to jurisdiction of the Assessing Officer, is strange. These Petitions have been pending in this Court since 2006. Although, at the time of admitting the Petition, on 28th April, 2006, none appeared on behalf of the Revenue to oppose the admission, the Respondent-Revenue had filed its affidavit in reply on 25 April 2006, taking the same objection of alternative remedy and yet the Petition was admitted on 28th April, 2006. Thereafter, no application for vacating the order of admission or for early hearing of the Petitions was made by the Respondent-Revenue. They choose to await the Petitions reaching their turn for final hearing and now raise a plea of alternative remedy. These Petitions deal with the Assessment Years 1998-99 and 1999-2000. Therefore, it is too late for the Respondent-Revenue to seek dismissal of the Petitions on the plea of the alternate remedy without examining the merits of the petitioner's challenge to jurisdiction. Indubitably, in case the petitioner fail in its challenge to the jurisdiction to issue the impugned notices, the petition would be dismissed and the petitioner would be left to avail of the remedies, if any available under the Act.

12 The contention of the Respondent-Revenue that the Petitioner had submitted itself to the jurisdiction of the Assessing Officer during re-assessment proceeding leading to the orders dated 7th March, 2006 on is not correct. We find that a notice was issued on 23rd February, 2006 by the Assessing Officer, calling upon the Petitioner to furnish certain details for the purpose of re-assessment. Petitioner by its letters dated 24th February, 2006 recorded that at a meeting held on 23rd February,



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2006 with the Assessing Officer, the Assessing Officer agreed to adjourn the hearing of the notice dated 23 February 2006 till 15th March, 2006. In spite of the above, Assessing Officer passed best judgment assessment order on 7th March, 2006 without any notice to the petitioner. Thus, there is no submitting to the jurisdiction of the Assessing Officer for re-assessment proceedings by the petitioner.

13 We find that the reasons in support of the impugned notices do not in any manner indicate failure on the part of the Petitioner to fully and truly disclose all material facts necessary for assessment. In fact, the reasons recorded that the original claim for deduction made by the Petitioner for Assessment Year 1998-99 was for Rs.1.66 Crores and the Assessing Officer allowed deduction of only Rs.1.64 Crores while the claim for deduction in Assessment Year 1999-2000 was Rs.2.69 Crores and the Assessing Officer allowed deduction of Rs.2.39 Crores. However, it is submitted on behalf of the Respondent-Revenue that the examination at the time of Assessment of the Petitioner's disclosure was without the aid of the subsequent decision of the Apex Court in IPCA Laboratory (supra). Thus, the revenue is entitled to re-examine the Petitioner's accounts in the light of the subsequent demand. However, even if one accepts this submission, yet where assessments are sought to be opened beyond a period of four years from the end of the relevant assessment year before a notice to reopen can be issued, the condition precedent must be satisfied i.e. failure on the part of the Petitioner to disclose fully and truly all material facts necessary for assessment.

14 This Court had occasion to consider an identical submission



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in ***Sesa Goa Ltd. v/s. CIT (2007) 294 ITR 101*** to hold that a subsequent decision cannot justify re-opening of an assessment beyond a period of four years from the end of the relevant Assessment Year unless there is a failure to disclose fully and truly all facts necessary for Assessment. This is a jurisdictional requirement. Similarly in ***Voltas India Ltd v/s. Assistant Commissioner of Income Tax – 349 ITR 656-*** our Court has observed as under:-

> *" .... .... ....*
> *While a subsequent decision of a court or a legislative amendment enforced after the order of assessment may legitimately give rise to an inference of an escapement of income, before the Assessing Officer proceeds to reopen an assessment after the expiry of four years of the end of the relevant assessment year, he must none the less apply his mind to the fundamental question as to whether there has been a failure to disclose on the part of the assessee. In the present case, ex facie there is no such allegation. Moreover, the return of income and the material placed on the record by the assessee together with the return would make it abundantly clear that the assessee had set forth the basis of its claim and there was no suppression of material facts. In these circumstances, and for the reason that are stated herein above, we are of the view that the fundamental condition for re-opening the assessment beyond a period of four years has not been fulfilled."*

15 Therefore, on the aforesaid ground alone viz. No failure on the part of the petitioner to disclose fully and truly all facts for assessment, the petitions have to be allowed. This is a jurisdictional issue. In the light of the above, it was not felt necessary to deal with other submissions of the Petitioner and the Respondent- Revenue.



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16 In view of the above, the impugned notices dated 25th January, 2006 and subsequent impugned orders dated 7th March, 2006 for Assessment Years 1998-99 and 1999-2000 are not sustainable.

17 Therefore, the Rule is made absolute in terms of prayer clause (a) in both the Petitions. No order as to costs.

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



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