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

WRIT PETITION NO. 644 OF 2001

The Great Eastern Shipping Company Limited
a company incorporated under the Companies
Act, 1913 and having its registered office at
Ocean House, 134/A, Dr. Annie Besant Road,
Worli, Mumbai – 400 018. ….Petitioner

V/s.

1. K.C.Naredi, Additional Commissioner of
Income Tax, Special Range 31, Mumbai
having its office at Room No.556
Aayakar Bhavan, Maharshi Karve Road,
Mumbai – 400 020.

2. S. N. Mandal, Commissioner of Income
Tax, Mumbai City II having his office at
Aayakar Bhavan, Maharshi Karve Road,
Mumbai – 400 020.

3. Union of India …Respondents

Mr. P.J. Pardiwalla, Senior Advocate a/w Mr. Jitendra Jain and Mr. Ronak Desai i/b Rustomji and Ginwala for Petitioner.
Mr. Akhileshwar Sharma for Respondents-Revenue.

CORAM : K.R. SHRIRAM &
AMIT B. BORKAR, JJ.
DATED : 25th NOVEMBER 2021

ORAL JUDGMENT : (PER : K.R. SHRIRAM, J.)

1. This petition has been filed impugning a notice dated 30th November, 2000 issued by Respondent No.1 under Section 148 of the Income Tax Act, 1961 (the Act) on the grounds that there is no justification to reopen the assessment by petitioner for Assessment Year 1994-95. Petitioner also stated that in any event there has been no income

chargeable that has escaped assessment within the meaning of Section 147 of the Act.

2. Petitioner had filed its return of income for the Assessment Year 1994-95 and the assessment was completed on 31st March, 1997 wherein petitioner's total income was assessed at Rs.1,07,75,57,235/- before allowing deduction under Section 33AC of the Act. Subsequently, the total income was revised at NIL wherein deduction under Section 33AC of the Act was allowed to the extent of Rs.1,07,59,92,027/-. Petitioner received a communication dated 19th October, 2000 from respondents calling upon petitioner to explain why the items mentioned in the said communication should not be treated as income chargeable from other sources and deduction under Section 33AC of the Act be revised accordingly. Petitioner filed reply dated 30th October, 2000 explaining that the deduction under Section 33AC of the Act for Assessment Year 1994-95 was chargeable to the extent of total income provided the amount was credited to a reserve account and is utilised for the purchase of new ship within the specified period. Petitioner also explained that this position in law was amply clear because Section 33AC of the Act has been amended with effect from 1st April, 1996 to restrict deduction to 50% of the income derived from the business of operation of ships only which takes out the purview of deduction of any income arrived from the business other than shipping business or from the sources other than shipping business. Petitioner explained that the

amendment will not apply to the Assessment Year in question being 1994-95 and will apply only to Assessment Year 1996 and subsequent years because the amendment which has been clarified will take effect only from 1st April, 1996.

3. Petitioner thereafter received a notice dated 30th November, 2000 under Section 148 of the Act which is impugned in this petition. Immediately on receipt of notice petitioner addressed a communication to respondent calling upon respondent to furnish the reasons recorded prior to issue of notice under Section 148 of the Act. That was not provided and immediately petitioner approached this court by way of this petition.

4. This court by an order dated 18th December, 2001 issued Rule and granted interim relief. Respondent waived service and filed affidavit in reply. The reasons for re-opening is annexed to the affidavit in reply. There is nothing substantial in the affidavit in reply.

5. We have perused petition, reply, rejoinder and the documents annexed thereto with the assistance of Mr. Pardiwalla and Mr. Sharma.

6. Mr. Pardiwalla submitted that three conditions to issuing notice under Section 148 of the Act is provided in Section 147 of the Act. Mr.Pardiwalla submitted that if the Assessing Officer has reason to believe that any income chargeable to tax which has escaped assessment for any

Assessment Year he may assess or re-assess such income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of proceedings but where an assessment under Sub Section (3) of Section 143 or under Section 147 of the Act has been made for the relevant Assessment Year, no action shall be taken under Section 147 of the Act after expiry of four years from the end of relevant Assessment Year and if it is after expiry of four years then unless any income chargeable to tax has escaped assessment for such Assessment Year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment, for that Assessment Year.

Mr. Pardiwalla submitted that in this case the Assessment Year was 1994-95 and the notice to re-open is dated 30th November, 2000 and therefore, it is after expiry of four years from the end of the relevant Assessment Year and unless respondents are able to show that escapement of assessment has happened due to assessee's failure to disclose fully and truly all material facts necessary for its assessment, the Assessing Officer cannot exercise jurisdiction.

Mr. Pardiwalla submitted that even in the reasons given for re-opening, a copy whereof is annexed to the affidavit in reply, there is not even an attempt made by respondent, let alone disclosing which are the material facts which have not been disclosed fully and truly, to even allege that there has been failure on the part of petitioner to disclose fully and truly all material facts.

7. Mr. Sharma submitted that petitioner should have filed its return pursuant to the notice under Section 147 of the Act and on that basis should have sought reasons for issuing such notice as laid down by the Hon'ble Apex Court in the case of ***GKN Driveshafts (India) Ltd. vs. ITO***[1] and as that has not been done in this case, petition should be rejected.

8. In rejoinder, Mr. Pardiwalla relying upon a judgment of Division Bench of this Court in ***Caprihans India Ltd. vs. Tarun Seem, Deputy Commissioner of Income-tax*** [2] submitted that there is no hard and fast rule that the assessee should first file its return pursuant to the notice under Section 148 of the Act, more so when the reasons do not disclose on the face of it any failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The court should certainly entertain the petition and set aside the notice. Mr. Pardiwalla also submitted that notwithstanding petitioner not filing return in response to notice under Section 148 of the Act, the court in its wisdom thought it fit to issue rule and also grant interim relief on 18th December, 2001.

9. We would agree with the submissions made by Mr. Pardiwalla and we are not inclined to dismiss the petition. In fact, the Division Bench of this court in ***Commissioner of Income-Tax vs. Trend Electronics*** [3] held :

1 [2003] 259 ITR 19
2 [2003] 132 Taxman 123 (Bombay)
3 [2015] 379 ITR 456 (Bom)

> *"We find that the impugned order merely applies the decision of the Apex Court in GKN Driveshafts (India) Ltd. (supra). Further, it also follows the decision of this Court in Videsh Sanchanr Nigam Ltd. (supra) in holding that an order passed in reassessment proceedings are bad in law in the absence of reasons recorded for issuing a reopening notice under Section 148 of the Act being furnished to the assessee when sought for. It is axiomatic that the power to reopen a completed assessment under the Act is an exceptional power and whenever the Revenue seeks to exercise such power, they must strictly comply with the pre-requisite conditions, viz., reopening of reasons to indicate that the Assessing Officer had reason to believe that income chargeable to tax has escaped assessment which would warrant the reopening of an assessment. These recorded reasons as laid down by the Apex Court must be furnished to the assessee when sought for so as to enable the assessee to object to the same before the Assessing Officer. Thus, in the absence of reasons being furnished, when sought for would make an order passed on reassessment bad in law. The recording of reasons (which has been done in this case) and furnishing of the same has to be strictly complied with as it is a jurisdictional issue. This requirement is very salutary as it not only ensures reopening notices are not lightly issued. Besides in case the same have been issued on some misunderstanding/misconception, the assessee is given an opportunity to point out that the reasons to believe as recorded in the reasons do not warrant reopening before the reassessment proceedings are commenced. The Assessing Officer disposes of these objections and if satisfied with the objections, then the impugned reopening notice under Section 148 of the Act is dropped/withdrawn otherwise it is proceeded with further. In issues such as this, i.e., where jurisdictional issue is involved the same must be strictly complied with by the authority concerned and no question of knowledge being attributed on the basis of implication can arise. We also do not appreciate the stand of the Revenue, that the respondent-assessee had asked for reasons recorded only once and, therefore, seeking to justify non-furnishing of reasons. We expect the State to act more responsibly.*

The reasons disclosed by the Assessing Officer, on the face of it, does not indicate any failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. It is settled law that in view of the proviso to Section 147 of the Act no action for re-opening after four years could be taken unless the Assessing Officer has reason to believe

that income has escaped assessment by reason to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Admittedly, the period of four years has expired. As noted above, even the reasons do not disclose any finding that petitioner had failed to disclose fully and truly all material facts necessary for assessment. The reasons, in fact shows that the conclusion have been drawn from the case record of assessee itself. The entire reasons proceeds on the basis of "perusal of details" and on "perusal of records". It also says that the assessee has wrongly claimed certain amounts as deducted taxable income which has been accepted by the Assessing Officer.

10. Petitioner had claimed deduction under Section 33AC of the Act in the sum of Rs.1,05,87,89,309/-. The Assessing Officer had rightly allowed the deduction at Rs.1,07,75,57,235/- having regard to the dis-allowances made by him while computing the assessable income. Section 33AC of the Act as it was then in force provided that in the case of assessee being a public company formed and registered in India with the main object of carrying on business of operation of ships, it would be allowed a deduction of an amount not exceeding the total income (computed before making deduction under Section 33AC and Chapter VIA) as is debited to the Profit and Loss Account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account to be utilised in the manner laid down in Sub-Section (2). Section 33 AC (1) of the Act as it

was in force in 1994-95, provides

> *33AC. Reserves for shipping business – (1) In the case of an assessee, being [a Government company or] a public company formed and registered in India with the main object of carrying on the business of operation of ships, there shall, in accordance with and subject to the provisions of this section, be allowed a deduction of an amount not exceeding the total income (computed before making any deduction under this section and Chapter VI-A), as is debited to the profit and loss account of the previous year in respect of which the deduction is to be allowed and credited to a reserve account to be utilised in the manner laid down in sub-section (2).*
>
> *Provided that where the aggregate of the amounts carried to such reserve account from time to time exceeds twice the amount of the paid up share capital (excluding the amounts capitalised from reserves) of the assessee, no allowance under this sub-section shall be made in respect of such excess.*

It is clear from reading of the provisions of Section 33AC of the Act that the deduction was to be allowed on the basis of total income and not on the income chargeable to tax under the head "Profits and gains of business or profession". Therefore, the view of Respondent No.1 for the reasons that excess deduction has been allowed to petitioner under Section 33AC of the Act in respect of the dividend income, the long term capital gains and interest income is not valid.

11. In our view, the deduction under Section 33 AC of the Act as it stood in the relevant year was to be allowed on the basis of total income. The Finance Act, 1995, amended the said provisions with effect from 1st April, 1996 to provide that the deduction is to be allowed at 50% of the profits derived from the business of operation of ships (computed under the head "Profits and gains of business or profession" before making a deduction

under that section). This subsequent amendment made to the section clearly reflects that prior to the amendment the deduction was to be allowed on the basis of total income and not on the basis of income chargeable to tax under the head "Profits and gains of business or profession". No doubt this matter has also been set to rest by Circular No.717 issued by the Central Board of Direct Taxes wherein the Board explained the provisions of the amendment made to Section 33AC of the Act. It is clearly stated therein that the deduction prior to the amendment was available to the extent of the total income provided the amount was credited to reserve account and was utilised for the purchase of a new ship within the specified period. The circular further goes to state that it was noticed that shipping companies had diversified into other activities and are claiming deduction under Section 33AC of the Act even in respect of their income for the activities other than shipping for which there is no justification. Accordingly, it was decided to amend the provisions with effect from 1st April, 1996 to restrict deduction to 50% of the income derived from the business of operation of ships. Therefore, the fact that petitioner has been allowed a deduction under Section 33AC of the Act in respect of income from dividends, long term capital gains and interest, in our view is no ground for initiating proceedings under Section 148 of the Act.

12. In the circumstances and for the reasons given herein above, Rule is made absolute in terms of prayer clause (a) with no order as to costs.

For ease of reference prayer clause (a) reads as under :

> *(a) that this Hon'ble Court may be pleased to issue a writ of Certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner' case and after examining the legality and validity thereof to quash and set aside the impugned notice dated 30th November 2000 being Exhibit "E" hereto.*

13. Petition disposed.

(AMIT B. BORKAR, J.) (K.R. SHRIRAM, J.)