

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 16364 of 2021

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RACHNA INFRASTRUCTURE PVT. LTD.

Versus

PR. COMMISSIONER OF INCOME TAX 3 OR HIS SUCCESSOR

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Appearance:

MR SN DIVATIA(1378) for the Petitioner(s) No. 1

for the Respondent(s) No. 1

M R BHATT & CO.(5953) for the Respondent(s) No. 1

NOTICE SERVED for the Respondent(s) No. 2

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CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA

and

HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 15/02/2022

ORAL ORDER

(PER : HONOURABLE MS. JUSTICE NISHA M. THAKORE)

1. By this writ application under Article 226 of the Constitution of India, the writ applicant challenges the validity of the order dated 19.06.2020 passed by the Principal Commissioner of Income Tax – 3, Ahmedabad, under Section 264 of the Income Tax Act, 1961 (for short ‘the Act’) thereby rejecting the claim of deduction under Section 80IA(4) read with Section 80A(5) of the Act for the A.Y. 2015 - 16. The prayers sought for by the writ applicant are reproduced as under:

“(a) to issue a writ of certiorari or in the nature of certiorari or any other appropriate writ, orders or directions quashing and setting aside the impugned order dated 19.06.2020 [Annex.-A] passed by the Respondent No.1 rejecting the claim of deduction u/s. 80IA(4) r.w.s. 80A(5) of the Act for A.Y. 2015-16 and directing the Respondent No.1 allow the claim of deduction u/s. 80IA(4) r.w.s. 80A(5) of the Act.

(b) *to issue a writ of certiorari or in the nature of certiorari or any other appropriate writ, orders or directions holding the provisions of section 80A(5) as ultra-virus the Constitution of India or in alternative this provisions may be read down as applicable only during the assessment proceedings before the assessing officer and not restricting the powers of the Respondent No.1 or any appellate authority to consider the claim of deduction, relief which is not claimed in the return of income filed by the assessee.*

(c) *Pending the hearing and final disposal of this petition to maintain status quo in the matter and ask the Respondent No.1 and its subordinates not to take any action or to do anything in furtherance and pursuance of this impugned order.*

(d) *To allow this Petition with cost.*

(e) *To pass any further or other orders as the Hon'ble Court may deem proper in the interest of justice and in the circumstances of the case."*

2. The facts, which emerges from the record, are reproduce as under:

2.1 The writ applicant is a private limited company duly registered under the Companies Act and is engaged in the business of developing infrastructure facilities whereby the writ applicant company claims to have made huge investment towards the purchase of machinery, equipments, motor vehicles and hiring labour force etc.

2.2 The writ applicant company had filed return of income on 30.09.2015 for the annual A.Y. 2015-16 thereby declaring income to the tune of Rs.3,82,16,320/-. The case of the writ applicant was selected for scrutiny and notice was issued under Section 143(2) of the Act followed by notice under section 142(1) of the Act. Upon verification of the record of return of income as well as after examining documents filed by the writ applicant, the assessment order came to be passed on 09.11.2017 thereby making an addition under Section 36(1) (va) of the Act and interest thereon determining total income

to the tune of Rs.3,85,48,984/-.

2.3 Being aggrieved and dissatisfied by the aforesaid addition made by the Assessing Officer, the writ applicant preferred Revision before the Principal Commissioner of Income Tax-3, Ahmedabad by invoking section 264 of the Act essentially for the first time claiming deduction under section 80IA of the Act which otherwise was never claimed nor allowed by the Assessing Officer. The Principal Commissioner of Income Tax -3, Ahmedabad upon considering the aforesaid contention of the writ applicant, called for the report from the Assessing Officer. The report came to be submitted by the Assessing Officer on 31.01.2020 which was taken upon record of the revision and due opportunity of hearing was given to the writ applicant to respond to the same. Ultimately, after considering the facts of the case, the report of the Assessing Officer and upon careful consideration of the submissions made by the writ applicant, the Principal Commissioner of Income Tax -3, Ahmedabad, taking note of the various decisions of the High Courts and the provisions law, was pleased to dismiss the revision preferred by the writ applicant company vide order dated 19.06.2020.

2.4 The Tribunal ultimately hold that the assessee had failed to make a claim for deduction under Section 80IA(4) in the original return of income and having raised the claim for the first time in revision under Section 264 of the Act, the deduction cannot be allowed to the writ applicant – assessee in view of sub section (5) of Section 80A of the Act. Hence, the writ applicant company has approached this Court essentially challenging the aforesaid order dated 19.06.2020 passed by

the Principal Commissioner of Income Tax-3, Ahmedabad.

3. Before adverting to the principle relief sought for by the writ applicant company, at the outset, we would like to first deal with the second relief sought for by the writ applicant as regards the challenge to section 80A(5) as ultra-virus the Constitution of India with a prayer to read down the aforesaid provision. This Court, upon hearing Mr. S.N.Divatia, the learned counsel appearing for the writ applicant, vide order dated 15.11.2021 was pleased to issue Notice calling upon the respondents to respond to the various contentions raised by the writ applicant. The order dated 15.11.2021 reads thus:

"1. The petitioner is before this Court by way of the petition under Article 226 of the Constitution of India, it challenges the validity of the order passed under Section 264 of the Income Tax Act, 1961, whereby the respondent No.1 rejected the revision petition seeking the relief by way of deduction under Section 801 IA (4) of the Income Tax Act, 1961 on the ground that in the original assessment this was not claimed.

2. The grievance on the part of the petitioner is that no restrictions could be put by the Commissioner to its own revisional powers for giving succour to the assessee, where there are clear mistakes after the assessment is completed and because of which the assessee is over assessed.

3. Prayers sought for are as follow: "10.0...

(a) to issue a writ of certiorari or in the nature of certiorari or any other appropriate writ, orders or directions quashing and setting aside the impugned order dated 19.06.2020 (Annex.A) passed by the Respondent No.1 rejecting the claim of deduction u/s. 80IA (4) r.w.s. 80A(5) of the Act for A.Y. 2015-2016 and directing the Respondent No.1 allow the claim of deduction u/s. 80IA(4) r.w.s. 80A(5) of the Act.

(b) to issue a writ of certiorari or in the nature of certiorari or any other appropriate writ, orders or directions holding the provisions of section 80A(5) as ultra-virus the Constitution of India or in alternative, this provisions may be read down as applicable only during the assessment proceedings before the assessing officer and not restricting the powers of the Respondent No.1 or any appellate authority to consider the claim of deduction, relief which is not claimed in

the return of income filed by the assessee.

(c) Pending the hearing and final disposal of this petition to maintain status quo in the matter and ask the Respondent No.1 and its subordinates not to take any action or to do anything in furtherance and pursuance of this impugned order.

(d) To allow this Petition with cost.

(e) To pass any further or other orders as the Hon'ble Court may deem proper in the interest of justice and the circumstances of the case."

*4. We have extensively heard the learned advocate, Mr.S.N.Divatia, who has also sought to rely on the decision of the **Hitech Analytical Services vs. Principal Commissioner of Income Tax**, reported in (2017) 100 CCH 0174 (Guj.HC) and the decision of the Bombay High Court rendered in case of **EBR Enterprises & Anr. vs. Union of India & Anr.**, reported in (2019) 105 CCH 0086 (MumHC) and other decisions.*

5. Issue Notice, returnable on 07.12.2021. Over and above the regular mode of service, direct service is permitted through speed post as well as e-mode.

4. Mr. S.N. Divatia, the learned counsel appearing for the writ applicant has tried to persuade this Court by emphasizing that the disallowance of the claim of deduction under Section 80A(5) of the Act is patently illegal, bad in law and without jurisdiction. Mr. Divatia, has submitted that the insertion of Section 80A(5) has resulted into giving unequal treatment to one set of assesseees in similar situated facts in the sense that the class of assesseees, who are otherwise eligible for deduction, by virtue of insertion of sub section (5) of Section 80A would made the claim of deduction redundant, though such assesseees may otherwise fulfill all the other conditions required to get deduction. Mr. Divatia, has tried to persuade this Court by referring to Article 14 of the Constitution of India vis-a-vis the amendment brought in the statute book more particularly, by referring to explanatory notes to the provisions of the Finance(2) Act, 2009 dated 03.06.2010.

5. We may note that so far as the aspect of determination of constitutionality of statutory provision is concerned, it has been held in number of decisions rendered by this Court as well as the Supreme Court that in determining the constitutionality of the provision, the Courts would be reluctant to declare a law invalid or ultra-virus on account of unconstitutionality. The Courts would accept an interpretation which would be in favour of the constitutionality rather than the one which would render the law unconstitutional. It is settled legal position of law that declaring law unconstitutional is one of the last recourse which the Court may opt for. At this stage, it would be germane to mention that the Court would preferably follow the principle of 'reading down' or 'reading into' in order to make the provision effective, workable and ensure the attainment of the object of the Act. The aforesaid broad principles as regards the determination of the constitutional validity of statutory provision has been consistently followed in canon of judgments. Few pronouncement on the above principles as regards the determination of constitutionality of the statutory provision can be illusinated in the case of ***D.S. Nakara and Ors. v. Union of India (UOI)***, reported in ***(1983) 1 SCC 305***, a Constitution Bench of Supreme Court elucidated upon the practice of reading down statutes as an application of the doctrine of severability while answering in affirmative the question whether differential treatment to pensioners related to the date of retirement qua the revised formula for computation of pension attracts Article 14 of the Constitution. Some of the observations made in that judgment are extracted below:

"66. If from the impugned memoranda the event of being in service and retiring subsequent to specified date is severed, all pensioners would be governed by the liberalised pension scheme. The pension will have to be recomputed in accordance with the provisions of the liberalised pension scheme as salaries were required to be recomputed in accordance with the recommendation of the Third Pay Commission but becoming operative from the specified date. It does therefore appear that the reading down of impugned memoranda by severing the objectionable portion would not render the liberalised pension scheme vague, unenforceable or unworkable.

67. In reading down the memoranda, is this Court legislating? Of course 'not' When we delete basis of classification as violative of Article 14, we merely set at naught the unconstitutional portion retaining the constitutional portion.

68. We may now deal with the last submission of the learned Attorney General on the point. Said the learned Attorney-General that principle of severability cannot be applied to augment the class and to adopt his words 'severance always cuts down the scope, never enlarges it'. We are not sure whether there is any principle which inhibits the Court from striking down an unconstitutional part of a legislative action which may have the tendency to enlarge the width and coverage of the measure. Whenever classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down words of limitation, the resultant effect may be of enlarging the class. In such a situation, the Court can strike down the words of limitation in an enactment.

That is what is called reading down the measure. We know of no principle that 'severance' limits the scope of legislation and can never enlarge it." The basis of the practice of reading down was succinctly laid down in Commissioner of Sales Tax, Madhya Pradesh, Indore Ors. v. Radhakrishan and Ors. MANU/SC/0334/1978 (1979) 2 SCC 249 in the following words:

"In considering the validity of a statute the presumption is in favour of its constitutionality and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles. For sustaining the presumption of constitutionality the Court may take into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived it must always be presumed that the Legislature understands and correctly appreciates the need of its own people and that discrimination, if any, is

based on adequate grounds. It is well settled that courts will be justified in giving a liberal interpretation to the section in order to avoid constitutional invalidity. These principles have given rise to rule of reading down the section if it becomes necessary to uphold the validity of the sections." In Minerva Mills Ltd. and Ors. V. Union of India (UOI) and Ors. MANU/SC/0075/1980 : (1980) 3 SCC 625, the Court identified the limitations upon the practice of reading down:

69. The learned Attorney General and the learned Solicitor General strongly impressed upon us that Article 31C should be read down so as to save it from the challenge of unconstitutionality. It was urged that it would be legitimate to read into that Article the intendment that only such laws would be immunised from the challenge Articles 14 and 19 as do not damage or destroy the basic structure of the Constitution. The principle of reading down the provisions of a law for the purpose of saving it from a constitutional challenge is well-known. But we find it impossible to accept the contention of the learned Counsel in this behalf because, to do so will involve a gross distortion of the principle of reading down, depriving that doctrine of its only or true rationale when words of width are used inadvertently. The device of reading down is not to be resorted to in order to save the susceptibilities of the law makers, nor indeed to imagine a law of one's liking to have been passed. One must at least take the Parliament at its word when, especially, it undertakes a constitutional amendment." This further clarified in Delhi Transport Corporation v. D.T.C. Mazdoor Congress and Ors. MANU/SC/0031/1991 : 1991 Supp (1) SCC 600. In his concurring opinion, Ray, J. observed:

"On a proper consideration of the cases cited hereinbefore as well as the observations of Seervai in his book 'Constitutional Law of India' and also the meaning that has been given in the Australian Federal Constitutional Law by Coin Howard, it is clear and apparent that where any term has been used in the Act which per se seems to be without jurisdiction but can be read down in order to make it constitutionally valid by separating and excluding the part which is invalid or by interpreting the word in such a fashion in order to make it constitutionally valid and within jurisdiction of the legislature which passed the said enactment by reading down the provisions of the Act. This, however, does not under any circumstances mean that where the plain and literal meaning that follows from a bare reading of the provisions of the Act, Rule or Regulation that it confers arbitrary, uncanceled, unbridled, unrestricted power to terminate the services of a permanent employee without recording any

reasons for the same and without adhering to the principles of natural justice and equality before the law as envisaged in Article 14 of the Constitution, cannot be read down to save the said provision from constitutional invalidity by bringing or adding words in the said legislation such as saying that it implies that reasons for the order of termination have to be recorded. In interpreting the provisions of an Act, it is not permissible where the plain language of the provision gives a clear and unambiguous meaning can be interpreted by reading down and presuming certain expressions in order to save it from constitutional invalidity.

31. *From the above noted judgments, the following principles can be culled out:*

(i) The High Court and Supreme Court of India are empowered to declare as void any law, whether enacted prior to the enactment of the Constitution or after. Such power can be exercised to the extent of inconsistency with the Constitution/contravention of Part III.

(ii) There is a presumption of constitutionality in favour of all laws, including pre-Constitutional laws as the Parliament, in its capacity as the representative of the people, is deemed to act for the benefit of the people in light of their needs and the constraints of the Constitution.

iii) The doctrine of severability seeks to ensure that only that portion of the law which is unconstitutional is so declared and the remainder is saved. This doctrine should be applied keeping in mind the scheme and purpose of the law and the intention of the Legislature and should be avoided where the two portions are inextricably mixed with one another.

iv) The court can resort to reading down a law in order to it from being rendered unconstitutional. But while doing so, it cannot change the essence of the law and create a new law which in its opinion is more desirable."

6. In light of the aforesaid legal position as regards the determination of constitutionality of statutory provision is concerned, we are not inclined to go into the aspect of the validity of Section 80A(5) of the Act.

7. So far as the first relief which is sought for by the writ

applicant as regards the challenge to the impugned order dated 19.06.2020 passed by the Principal Commissioner of Income Tax-3, Ahmedabad is concerned, in our view, the same is squarely covered by the decision of the Bombay High Court in the case of ***EBR Enterprises vs. Union of India***, reported in ***[2019] 107 taxmann.com 220***. The question for consideration which arose before the Bombay High Court in the aforesaid case was that whether the Commissioner was justified in exercise of powers conferred under Section 264 of the Act in rejecting the revision application more particularly, when the assessee had failed to raise the claim of deduction under Section 80-IB(10) and subsequently being raised before the Commissioner for the first time in revision. It appears that the attention of the Court was drawn to Section 80A(5) of the Act and similar contention was raised by the assessee therein. The Bombay High Court after considering the submissions of the assessee therein as well as taking note of sub section (5) which was inserted in Section 80A of the Act by Finance(2) Act, 2009 with retrospective effect from 01.04.2003, ultimately held as under:

"5. As per this provision, where the assessee fails to make a claim in his return of income for any deduction under Section 10A or Section 10AA or Section 10B or Section 10BA or under any provision of the said Chapter – VI A under the heading "C.- Deduction in respect of certain incomes", no deduction would be allowed to him under the said provision. In plain terms, this Sub Section (5) of Section 80A of the Act imposes an additional condition for claim of deduction in relation to income under any of the provisions mentioned therein. Apart from the requirement of fulfillment of individual set of respective conditions for the purpose of claiming the concerned deduction, this plenary condition requires that the claim ought to have made in the return of income by the assessee and if the assessee fails to make such claim in the return of income, such deduction shall not allowed to him under the relevant provision. Admittedly, in the present case, the Petitioners had not raised any such claim in the return of income. In plain terms, the claim of the Petitioners under Section 80-IB (10) of the Act would be hit by Sub Section

(5) of Section 80A of the act.

6. We are conscious that in absence of the provision contained in Section 80A (5) of the Act, the Petitioners could have maintained the claim of deduction even before the CIT for the first time in Revision Application, though no such claim was made before the Assessing Officer, if from the facts on record, the Petitioners could sustain the said claim in law. This is very clear from the series of Judgments of various High Courts. Reference can be made to the decision of High Court of Gujarat in case of *C. Parikh & Co. v. CIT* [1980] 4 Taxman 224/122 ITR 610. In the said decision, the Court held that:

“it is clear that under Section 264, the CIT is empowered to exercise revisional powers in favour of the assessee. In exercise of this power, the CIT may, either of his own motion or on an application by the assessee, call for the record of any proceeding under the Act and pass such order thereon not being an order prejudicial to the assessee, as he thinks fit. Sub – ss. (2) and (3) of Section 264 provide for limitation of one year for the exercise of this revisional power, whether suo motu, or at the instance of the assessee. Power is also conferred on the CIT to condone delay in case he is satisfied that the assessee was prevented by sufficient cause from making the application within the prescribed period. Sub-s. (4) provides that the CIT has no power to revise any order under S. 264 (1) : (i) while an appeal against the order is pending before the AAC, and (ii) when the order has been subject to an appeal to the Tribunal. Subject to the above limitation, the revisional powers conferred on the CIT under S. 264 are very wide. He has the discretion to grant or refuse relief and the power to pass such order in revision as he may think fit. The discretion which the CIT has to exercise is undoubtedly to be exercised judicially and not arbitrarily according to his fancy. Therefore, subject to the limitation prescribed in S. 264, the CIT in exercise of his revisional power under the said section may pass such order as he thinks fit which is not prejudicial to the assessee. There is nothing in S. 264 which places any restriction on the CIT’s revisional power to give relief to the assessee in a case where the assessee detects mistakes on account of which he was over assessed after the assessment was completed. We do not read any such embargo in the CIT’s power as read by the CIT in the present case. It is open to the CIT to entertain even a new ground not urged before the lower authorities while exercising revisional powers. Therefore, though the Petitioner had not raised the grounds regarding under-totalling of purchases before the ITO, it was within the power of the CIT to admit such a ground in revision. The CIT was also not right in holding that the over-assessment did not arise from the order the assessment. Once the Petitioner was able to satisfy that there was a mistake in totaling purchases and that there was under- totalling of purchases to the tune of Rs.20,000, it is obvious that there was over-assessment. In other words, the assessment of the total income of the assessee is not correctly made in the assessment order and it has resulted in over-assessment. The CIT would not be acting de hors the IT Act, if he gives relief to the assessee in a case where it is proved to his satisfaction that there is over-

assessment, whether such over-assessment is due to a mistake detected by the assessee after completion of assessment or otherwise. In our opinion, the CIT has misconstrued the words "subject to the provisions of this Act" in S. 264 (1) and read a restriction on his revisional power which does not exist. The CIT was, therefore, not right in holding that it was not open to him to give relief to the Petitioner on account of the Petitioner's own mistake which it detected after the assessment was completed. Once it is found that there was a mistake in making an assessment, the CIT had power to correct it under S. 264 (1). In our opinion, therefore, the CIT was wrong in not giving relief to the Petitioner in respect of over-assessment as a result of under-totalling of the purchases to the extent of Rs.20,000."

7. *This was reiterated in case of Ramdev Exports v. CIT [2002] 120 Taxman 315/[2001] 251 ITR 873 (Guj.). This Court also in case of Danny Denzongpa v. CIT [2010] 7 taxmann.com 81/194 Taxman 415 [2012] 344 ITR 166, has taken a similar view.*

8. *However, the Petitioners are faced with the statutory provision contained in Sub Section (5) of Section 80A of the Act. The Petitioners' claim cannot therefore be accepted de hors the said statutory provision and ordinary principle of the wide powers of the CIT exercising revisional jurisdiction under Section 264 of the Act cannot be imported. What Sub Section (5) of Section 80A of the Act mandates is that, if the assessee fails to make a claim in his return of income for any deduction under the provisions specified therein, the same would not be granted to the assessee. This condition or restriction is not relatable to the Assessing Officer or the Income Tax Authority. This condition attaches to the claim of the assessee and has to be implemented by the Assessing Officer, CIT or the Appellate Tribunal as the case may be. There is no indication in Sub Section (5) of Section 80A of the Act as to why the restriction contained therein amounts to limiting the power of Assessing Officer but not that of Commissioner.*

9. *This issue can be looked from slightly different angle. In absence of the provision contained in Sub Section (5) of Section 80A of the Act has held by various decisions of the High Courts noted above, the CIT could entertain a fresh claim in Revision Application even if the claim was not made previously before the Assessing Officer. Provision contained in sub-section (5) of Section 80A is a statutory interdict which would prevent the CIT from granting any such claim in exercise of his revisional jurisdiction under Section 264 of the Act. As is often times stated, even High Court in exercise of Writ jurisdiction under Article 226 of the Constitution of India would not issue directions contrary to statutory provisions. Width of the powers of the CIT under Section 264 of the Act would not permit him to ignore the requirement of Section 80A(5) of the Act or allow the claim of an assessee in breach of the condition contained therein. We are therefore not in agreement that the expression given by the Income Tax Tribunal in case of Madhav Construction (supra) holding that the restriction contained in Sub Section (5) of Section 80A of the Act is to restrict the power of Assessing Officer and not higher*

Income Tax Authorities.

10. *The Petitioners having given up the challenge to the constitutionality of the retrospectivity to Section 80A (5) of the Act, cannot bring in the concept of the reading down of the provision in order to save it from unconstitutionally. In plain terms, our duty would be to enforce the provision contained in Sub Section (5) of Section 80A of the Act, as it stands in the statute book. The decision in case of Goetze (India) Limited (supra) was rendered in different background. The Supreme Court did not have any occasion to interpret the provision of Section 80A (5) of the Act in the context of the power of the CIT or the Appellate Tribunal.*

11. *In the result, we do not find any merit in the Writ Petition, the same is therefore dismissed."*

8. In light of the aforesaid decision rendered by the Bombay High Court in similar facts and circumstances of the case, we find no error of law in the impugned order dated 19.06.2020 passed by the Principal Commissioner of Income Tax-3, Ahmedabad.

9. In the result, this writ application fails and is hereby dismissed. Notice discharged.

सत्यमेव जयते

(J. B. PARDIWALA, J)

THE HIGH COURT
OF GUJARAT

(NISHA M. THAKORE,J)

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