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

WRIT PETITION NO. 1886 OF 1996

Afcons Infrastructure Ltd. (Formerly)
Asia Foundations and Constructions Ltd.
Mumbai .. Petitioner

v/s.

Shri Kailash Naredi, Dy. C.I.T.
Special Range 5, Mumbai & Anr. .. Respondents

Ms. Aarti Vissanji a/w Mr. S.J. Mehta for the petitioner
Mr. Suresh Kumar a/w Ms. Samiksha Kanani for the respondent

CORAM : M.S. SANKLECHA &
A.K. MENON, J.J.

DATED : 14th JULY, 2016.

P.C.

1. This petition under Article 226 of the Constitution of India challenges Notice dated 4th July, 1994 issued by the Assessing Officer under Section 148 of the Income Tax Act, 1961 (the Act) seeking to reopen the assessment for A.Y. 1986-87. This petition was admitted on 18th September, 1996 by this Court. On 7th November, 1996, this Court directed that it would be open to the Assessing Officer to finalise the assessment, but not serve it upon the petitioner.

2. During the subject assessment year, the petitioner had claimed

investment allowance under Section 32A of the Act. This was in respect of additions made to its plant and machinery during the previous year relevant to the subject assessment year. However, the Assessing Officer rejected the petitioner's claim for investment allowance by considering it in the assessment order dated 20th February, 1989 passed under Section 143(3) of the Act in regular assessment proceedings. This rejection of the claim was by following its order in earlier assessment years.

3. Being aggrieved, the petitioner preferred an appeal to the Commissioner of Income Tax (Appeal) [CIT(A)]. By an order dated 14th September, 1989, the CIT(A) allowed the claim of the petitioner for grant of investment allowance by following the order of the Tribunal in respect of A.Y. 1978-79 and 1979-80. It further directed the Assessing Officer to treat the respondent assessee as an Industrial Company and allow the benefit after due verification of the claim. The aforesaid order dated 14th September, 1989 of the CIT(A) was accepted by the Revenue.

4. Thereafter, in 1993 the Apex Court in the case of ***Commissioner of Income Tax Vs. N.C. Bhudhiraja 204 ITR 142*** held that the benefit

of investment allowance would not be available in case of construction companies undertaking irrigation projects etc. Consequent to the aforesaid decision of the Apex Court in *N.C. Bhudhiraja (supra)*, the impugned Notice was issued to the petitioner as is evident from the reasons recorded in support of the impugned notice, which read as under :-

> *"The Supreme Court in the case of N.C. Budhiraja, 204 ITR 412, has held that investment allowance is not allowable in the case of construction companies under taking dams, irrigation projects etc. and in case of companies doing execution of civil engineering and structural work on contract basis.*
>
> *Since these activities are associated with your company, this constitutes reason to believe for reopening of assessment for the A.Y.s 86-87 and 89-90,"*

5. The impugned notice is admittedly beyond the period of 4 years from the end of the relevant assessment year. The reasons as produced hereinabove do not disclose any failure on the part of the petitioner to truly and fully disclose all material facts necessary for assessment, even when the reasons are read as a whole. Accordingly, the impugned notice would be hit by the first proviso to Section 147 of the Act and, therefore, without jurisdiction. This is for the reason that even though a decision of a Court merely declares the law and it would apply

retrospectively yet the sine qua non of failure to disclose all material facts to invoke the extended period as provided in proviso to Section 147 of the Act is not satisfied. Thus, the notice is without jurisdiction.

6. Moreover, as pointed out by Counsel for the petitioner from the assessment order as well as from the order of the CIT(A), the issue of investment allowance was a subject matter of consideration by the Authorities who had applied their minds to it and have taken a view. However, we need not dilate upon this submission for it is an admitted position between the parties that the decision of the Apex Court in ***Deputy Commissioner of Income Tax Vs. Simplex Concrete Piles (India) Ltd. 358 ITR 129*** would cover the issue herein in favour of the petitioner.

7. The decision of the Apex Court in *Simplex Concrete Piles (India) Ltd. (supra)* upheld the Calcutta High Court decision in ***Simplex Concrete Piles (India) Ltd. Vs. Deputy Commissioner of Income Tax & Ors. 262 ITR 605.*** The facts in *Simplex Concrete Piles (India) Ltd. (supra)* were identical to facts herein. The assessee therein had *inter alia* claimed the benefit of Section 32A of the Act during the Assessment Years 1984-85 to 1989-90. The same was granted.

Thereafter, consequent to the decision of the Apex Court in *N.C. Bhudhiraja (supra),* reopening notice was issued beyond the period of four years from the end of the relevant Assessment Year. No allegation of any failure to disclose fully and truly all material facts in the reasons recorded. On the aforesaid facts (identical to the present facts), the Apex Court held that a subsequent reversal of the legal position by the Apex Court will not authorize the Revenue to reopen an assessment beyond a period of four years from the end of the Assessment Years in the absence of failure to disclose truly and fully all material facts necessary for assessments. In passing we may point out that the Calcutta High Court in *Simplex Concrete Piles (India) Ltd.* had considered the effect of amendment to Section 147 and 149 of the Act in 1989. Placing reliance upon the Circular No.549 dated 31st October, 1989 (182 ITR 31) it had held that though the new provisions of Section 147 and 149 of the Act were introduced w.e.f. 1st April, 1989, they would have retrospective effect and govern a notice issued post 1st April, 1989 for reopening the assessment for a period prior to 1st April, 1989. Besides, on facts (similar to the present facts) it found that even under the unamended provisions, the notice for reopening is without jurisdiction.

8. In the above view, we find that it is an agreed position that the issue stands concluded in favour of the petitioner by the decision of the Apex Court in *Simplex Concrete Piles (India) Ltd.* on identical facts. Thus the petition has to be allowed.

9. Rule made absolute in terms of prayer clause (a). No order as to costs.

(A.K. MENON, J.) **(M.S. SANKLECHA, J.)**