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

WRIT PETITION NO. 2016 OF 2000

ICICI Ltd. .. Petitioner

v/s.

V. Nagaprasad
Jt. Commissioner of Income Tax,
Range 28 and 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 five Notices all dated 11th January, 2000 issued by the Assessing Officer under Section 148 of the Income Tax Act, 1961 (the Act). The impugned notices seek to reopen assessments for A.Y. 1989-90, 1990-91, 1991-92, 1992-93 and 1993-94.

2. This petition was admitted on 11th December, 2000 and the respondent Revenue were restrained from proceeding further with the impugned Notices dated 11th January, 2000.

3. In its return of income filed for all the five assessment years, the petitioner had claimed deduction under Section 80-M of the Act in respect of gross dividend received. In its return of income it had claimed expenses for earning the dividend at Rs.20,000/- per year. The Assessing Officer in his orders passed under Section 143(3) of the Act in regular assessment proceedings, on consideration as reflected in his orders, while allowing the claim for deduction under Section 80-M of the Act, reduced the deduction by increasing the expenses to 1% to gross dividend income.

4. Being aggrieved, the petitioner carried the issue in appeal to CIT(A) in all the five assessment years. The CIT(A) in orders passed for all the five assessment years reduced the expenditure to earn the dividend income from 1% of gross dividend to an average salary of one employee. Thus, allowing the deduction under Section 80-M of the Act on an higher amount than that allowed by the Assessing Officer. The petitioner accepted the orders of the CIT(A) for all the five assessment years. The Revenue filed appeals to the ITAT and at the time of issuing the five impugned notices, the appeals of the Revenue were pending.

5. The reasons in support of the impugned Notices dated 11th January, 2000 are identical in respect of all the five assessment years, save and except the difference in amounts for each of the years. In the above view, we are reproducing herein the reasons recorded in issuing the impugned Notice dated 11th January, 2000 for A.Y. 1989-90, which read as under :-

> *"The assessee filed its return of income for A.Y. 1989-90 on 29.12.1989 declaring total income at Rs.28.27 crores. The return was processed u/s 143(1)(a) on 23.03.1990. The assessment was completed u/s 143(3) on 23.03.1992 determining total income at Rs.83.51 crores.*
> *During the F.Y. 1988-89 relevant to the A.Y. 1989-90 the assessee earned dividend income of Rs.6.61 crores. As on 30.03.1989 the assessee had investments in equity and preference shares to an extent of Rs.114.43 crores.*
> *The assessee incurred interest expenditure of Rs.33.71 crores during the year ending 31.03.1989 as against Rs.308.41 crores during the year ending 31.03.1988. The interest payment was made in respect of interest bearing borrowed fund of Rs.4141.82 crores.*
> *The assessee had non interest bearing fund in the form of paid up share capital of Rs.80.05 crores besides reserves and surplus of Rs.304.52 crores totaling to Rs.384.57 crores as on 31.03.1989 against Rs.320.85 crores as on 31.03.1988.*
> *In the computation of income under the head "Income From Other Sources" the gross dividend income of Rs.6.61 crores was offered without reducing any expenditure either in the form of interest expenditure or administrative cost incurred for the purpose of earning dividend. Accordingly, it claimed deduction of Rs.3.97 crores u/s 80M @ 60% on the gross dividend income of Rs.6.61 crores. In the assessment order the A.O. had determined the administrative expenditure incurred for earning dividend income at Rs.6.61 lakhs, being 1% of the gross dividend on estimate basis and reduced the same from gross dividend income to arrive at the net dividend income on which*

deduction u/s 80M was allowed of Rs.3.92 crores.
It is seen from the record that the assessee has been borrowing funds from the market in various forms by paying substantial interest. During the A.Y. 1989-90, loan funds have gone up to Rs.4141.82 crores from Rs.3322.62 crores as on 31.03.1989 showing an increase of Rs.226.99 crores. Part of the borrowed funds were utilized for making investments in shares, debentures, bonds, units etc. Total investments made during the year ending 31.03.1989 have gone up to Rs.226.99 crores from Rs.163.96 crores showing an increase of Rs.63.03 crores.
The assessee earned profit of Rs.93.70 crores before providing for the tax. After tax payment of Rs.15.00 crores it is left with a surplus of Rs.78.70 crores. It is an admitted fact (confirmed by the assessee in writing in course of assessment proceedings for A.Y. 1997-98) that the assessee does not maintain separate books and records for various sources of fund and investments made out of the borrowed funds. It is a common pool into which the borrowed fund is deposited and investments are made and loans are advanced to various customers in various forms out of such fund. The assessee claimed entire interest expenditure of Rs.330.71 crores u/s 36(1)(iii) on the plea that it was incurred for the purpose of business. This action of the assessee resulted in claiming interest on borrowed fund which was utilized for the purpose of making investments in shares and units of mutual funds, income from which is assessable under the head "Income from other sources" u/s 36(1)(iii).
The Honourable Bombay High Court in its judgment in the case of Commissioner of Income Tax Vs. Manganlal (P) Ltd. 236 ITR 456 held that the deduction under section 80M has to be calculated with reference to amount of dividend computed in accordance with provisions of the Act and forming part of gross total income i.e. after deduction of interest on money borrowed for earning such income and not with reference to full amount of dividend received by assessee. This decision corroborated and clarified the Honourable Supreme Court decision in the case of Distributors (Baroda) P. Ltd. Vs. Union of India 155 ITR 120.
In the case of Kota Co-operative Marketing Society Ltd. Vs. Commissioner of Income Tax (207 ITR 608), the Honourable Rajasthan High Court held that proportionate share of expenses attributable to earning income entitled to special deduction should be deducted in computing such income. This decision

was rendered in the context of deduction u/s 80P and the ratio is applicable in respect of deduction u/s 80M also.

In the case of Rajasthan State Warehousing Co-operation Vs. CIT (209 ITR 271) the Honourable Rajasthan High Court held that in a case where the entire business of the assessee is one and for earning income from different sources, the expenditure incurred which is relatable to that income which is taxable is allowable u/s 37. If the assessee had maintained separate accounts then expenditure has to be determined by the I.T.O. on the basis of such evidence which the assessee might have produced. In the absence of such evidence, there is no other option except to allocate the expenditure relating to taxable and non-taxable income on proportionate basis. Such apportionment was justified and held as in accordance with law. An identical decision was rendered by Honourable Calcutta High Court in the case of Indian City Properties Ltd. Vs. CIT (Central) Calcutta. In all above decisions, the courts held that where it is not possible to directly link the expenditure to specific income, proportionate expenditure attributable to earn such income is to be determined and apportioned for arriving at deduction that is to be allowed against the respective income.

Consequent to Honourable Bombay High Court judgment (236 ITR 456), the interest expenditure incurred on borrowed funds has to be proportionally apportioned against the dividend income as a part of the borrowed fund was utilized for investment in shares of other domestic companies. Thus, under the head "Income from Other Sources", only the net dividend income after reducing the proportional interest and administrative expenditure should be determined after allowing such expenditure u/s. 57(i) and 57(iii).

Cost of funds to the assessee works out to 7.30% being a proportion of interest expenditure to the total fund available including both interest bearing and non interest bearing fund (Rs.330.71 / 4526.39 crores). Thus on an investment of Rs.114.43 crores in shares the proportional interest cost works out to Rs.8.35 crores (@ 7.30%), much more than the dividend income of Rs.6.61 crores. Thus, the net dividend income under the head "Income from Other Sources" works out to loss of Rs.1.74 crores and deduction allowable u/s 80-M would be NIL.

In the return the assessee claimed deduction of Rs.3.97 crores

> *and the A.O. Allowed the same at Rs.3.92 crores u/s 80M. As discussed above the assessee is not entitled to any deduction u/s 80M. Thus, the assessee has been allowed excess deduction of Rs.3.92 crores and income to that extent escaped assessment within the meaning of Sec. 147."*

6. Mr. Suresh Kumar, learned Counsel for the Revenue supports the impugned notices and reasons recorded in support thereof.

7. From the reading of the reasons as a whole, it is very clear that the Assessing Officer has not alleged any failure on the part of the petitioners to disclose truly and fully all material facts necessary for assessment. In the above view and bearing in mind that the assessments were finalized for each of the five years under Section 143(3) of the Act, the proviso to Section 147 of the Act would be applicable. Therefore, in the absence of any allegations of failure on the part of the petitioner-assessee to disclose truly and fully all material facts necessary for the assessment, the impugned Notices are without jurisdiction.

8. Further, our attention was invited to the assessment orders passed in regular assessment proceedings in each of the five assessment years. We find that each of them discusses the issue raised in the reasons in support of the impugned notices namely, the quantum

of expenses to be deducted from the gross dividend for allowing the benefit of Section 80M of the Act. It was on consideration of this very issue that the Assessing Officer in all the five assessment years held that 1% of the gross dividend received would be deductible for the purposes of claiming benefit under Section 80M of the Act. Therefore, in view of the aforesaid fact, it is very clear that the impugned Notices seeking to reopen the assessment is only on account of change of opinion. Thus, the impugned notices are without jurisdiction on the above count also.

9. Lastly, it may also be pointed out that the issue of quantum of expenses to be reduced from gross dividend for allowing deduction under Section 80M of the Act was also a subject matter of consideration in appeal for all five assessment years by the CIT(A), who partly allowed the petitioners' appeal. Thus, issuing of the impugned notices cannot also be sustained as it would amount to the Assessing Officer seeking to review the order of the Appellate Authority on the very issue which was considered by the Appellate Authority. Thus, on the above ground also the five impugned notices are without jurisdiction.

10. In the above view, Rule is made absolute in terms of prayer clause (a). No order as to costs.

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