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

WRIT PETITION NO. 2428 OF 2001

The Great Eastern Shipping Company Ltd.
a company incorporated under the Companies
Act, 1913 and having its registered office at
Ocean House, 134-A, Dr. A.B.Road,
Worli, Bombay – 400 018. ….Petitioner

V/s.

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

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

P.C. :

1. Respondent No.1 issued a notice dated 21st March, 2001 under Section 148 of the Income Tax Act, 1961 (the Act) calling upon petitioner to deliver to him a return in the prescribed form of petitioner’s income in respect of Assessment Year 1992-93 because he had reasons to believe that

petitioner’s income in respect of which petitioner was assessable has escaped assessment within the meaning of Section 147 of the Act.

2. Petitioner had filed its return of income for the Assessment Year 1992-93 and the assessment was completed on 12th January, 1995 wherein petitioner’s total income was assessed at Rs.10,91,11,300/- before allowing deduction under Section 80 I 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.9,68,45,988/-. Petitioner received a communication dated 7th September, 1994 from respondents calling upon petitioner to furnish, inter-alia, ship-wise working of deduction under Section 80 I of the Act. Petitioner filed reply dated 22nd November, 1994 answering all the queries along with the return as well as in the course of the assessment proceedings has furnished fully and truly all material facts necessary for the purpose of its assessment.

3. Respondent No.1 by an order dated 12th January, 1995 made under Section 143 (3) of the Act completed petitioner's assessment and determined petitioner's gross total income at Rs.10,31,67,156/-. From the figures that was arrived allowance for deduction under Section 80M of the Act of Rs.63,21,168/- was allowed and the deduction that was allowable under Section 80 I of the Act was restricted to Rs.9,68,45,988/- in accordance with Section 80A (2) of the Act and accordingly assessed petitioner to NIL income. Subsequently, Respondent No.1 rectified the

assessment by passing an order dated 30th November, 1995 under Section 154 of the Act. Pursuant to this order petitioner was assessed to a gross total income of Rs.14,21,66,516/- and was allowed deduction under Chapter VI-A aggregating to Rs.11,56,93,468/-, which include deduction under Section 80 I of the Act of Rs.10,91,11,300/- and assessed petitioner to a total income of Rs.2,64,73,048/-. Petitioner impugned this assessment order before the Commissioner of Income Tax (Appeals) which appeal was disposed by an order dated 28th September, 1998 by partly allowing petitioner's appeal. As Respondent No.1 did not give effect to the order of Commissioner of Income Tax (Appeals), petitioner requested Respondent No.1 to give effect to the order and also brought to the notice of Respondent No.1 that petitioner will be entitled to refund of Rs.1,67,76,418/-. Respondent No.1 by an order dated 1st July, 1999 give effect to the order of Commissioner of Income Tax (Appeals) and determined a refund of sum of Rs.2,29,74,211/- as being due to petitioner. It is petitioner's case that the internal audit department had raised an objection in respect of claim for deduction under Section 80 I of the Act that petitioner had made in its return of income. Accordingly, Respondent No.1 by his letter dated 14th December, 2000 pointed out that certain issues had arisen which required to be clarified. The issues in respect of which clarification was sought for were as under :

(i) furnish the working of the deduction under Section 80 I of the Act in respect of each ship and how profit before depreciation in respect of each ship is assessed ;

(ii) why the deduction under Section 80 I of the Act be allowed only on the profit available after deduction under Section 33AC of the Act ;

(iii) why brought forward investment allowance should not be set off before allowing deduction under Section 80 I of the Act.

4. Petitioner thereafter received a notice dated 21st March, 2001 under Section 148 of the Act stating that Respondent No.1 had reason to believe that petitioner's income for the Assessment Year 1992-93 had escaped assessment and Respondent No.1 proposed to reassess petitioner's income. Petitioner requested Respondent No.1 to furnish reasons recorded but it appears it was never provided. Petitioner therefore approached this court by way of this petition and petitioner has proceeded on the assumption that reassessment has been initiated as petitioner has been allowed deduction under Section 80 I of the Act which is not in accordance with law and this assessment is in view of a letter dated 14th December, 2000 from Respondent No.1 seeking clarification in respect of the claim for deduction under Section 80 I of the Act.

5. This court by an order dated 25th February, 2002 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 dated 5th November, 2011. There is nothing substantial in the affidavit in reply.

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

7. 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 1992-93 and the notice to re-open is dated 21st March, 2001 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.

8. 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.

9. 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 in the peculiar facts and circumstances of the case, the reasons do not disclose on the face of it any failure on the part

1 [2003] 259 ITR 19
2 [2003] 132 Taxman 123 (Bombay)

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 25th February, 2002.

10. As held by this court, the Hon'ble Apex Court and many other court, before proceedings under Section 148 of the Act can be validly initiated certain preconditions which have to be complied with by the Assessing Officer :

(a) First of all he must have reasons to believe that income chargeable to tax has escaped assessment.

(b) That the said escapement must be on account of failure on the part of assessee to disclose fully and truly all material facts necessary for its assessment for the said year when the proceedings have been initiated after a period of four years from the end of the Assessment Year to which they relate and in this case it has been initiated after expiry of period of four years.

(c) Prior to issuance of notice under Section 148 of the Act, the Assessing Officer has to record his reasons on the basis of which he forms an opinion that income chargeable to tax has escaped assessment.

(d) The sanction of the Commissioner of Income Tax is obtained on the basis of reasons recorded by the Assessing Officer.

(e) The notice is to be validly issued and served on the assessee.

It is settled law that these conditions are jurisdictional facts and are to be fulfilled prior to the initiation of the proceedings and if any of the conditions are not fulfilled the very initiation of the proceedings is bad in law and liable to be quashed wherein the satisfaction that in this case all these aforesaid conditions have been complied with and hence the notice dated 21st March, 2001 impugned in this petition is bad in law and must be set aside.

11. The burden is on the Assessing Officer to establish that the jurisdictional conditions which are to be satisfied in order to validly initiate reassessment proceedings have been fulfilled. The reasons to believe that the income chargeable to tax has escaped assessment prior to the issuance of the notice must be formed on the basis of certain material and the material which is relied upon which has some live link and rational nexus with the formation of the belief. The impugned notice has been issued on 21st March, 2001 after the expiry of period of four years from the end of the Assessment Year 1992-93. For the reasons recorded, there is nothing to

indicate that there has been no failure on the part of petitioner to disclose fully and truly all material facts during the course of initial assessment proceedings. The reasons are entirely based on the records and documents available with respondents and filed by petitioner. The reasons stated that on perusal of record it indicates that there has been escapement of income. Admittedly, petitioner alongwith its return of income filed its Profit and Loss Account as well as the balance sheet. The computation of income that was filed clearly showed the manner in which the deduction under Section 80 I of the Act was claimed. In the course of the assessment proceedings a specific issue was raised by respondent which was replied to. It was only thereafter that the deduction under Section 80 I of the Act was initially allowed by Respondent No.1. The duty of assessee is only to disclose fully and truly all primary facts and the duty ascertaining inferential facts as well as drawing necessary inference is on the Assessing Officer. We are satisfied that petitioner had discharged duty cast upon it and therefore even after there was failure on the part of Respondent No.1 to perform his duty, cannot justify initiation of proceedings under Section 147 of the Act.

12. It is also well settled that mere change in opinion by a succeeding Assessing Officer would not justify an exercise of jurisdiction under Section 148 of the Act. In the present case, the assessment for the Assessment Year 1992-93 was completed after due enquiry on 12th January, 1995. From the documents annexed to the petition, it is clear that petitioner's claim for deduction under Section 80 I of the Act was under

consideration by the Assessing Officer who had sought details as to how the same was computed and petitioner had furnished details. Petitioner has clarified that the profits to determine after deduction from the gross operating earnings direct operating expenses, standing expenses, depreciation and interest charged. It was only after considering the same that Respondent No.1 having been satisfied with the correctness of petitioner claim allowed the deduction. In our view, the exercise to reopen a validly framed assessment is merely on the basis of change of opinion by succeeding Assessing Officer and such a mere change of opinion cannot justify the exercise of jurisdiction under Section 148 of the Act.

13. We find for our view above, support in a judgment of this court in ***Ananta Landmark (P) Ltd. vs. Deputy Commissioner of Income Tax***[3].

14. 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

3 (2021) 132 taxmann.com 52 (Bombay)

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 is 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.

15. 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 21st March, 2001 being Exhibit "K" hereto.

15. Petition disposed.

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