

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

WRIT PETITION NO.2663 OF 2007

The Great Eastern Shipping Co. Ltd.

...Petitioner

vs.

V. V. Shastri and Ors.

...Respondents

Mr. P. J. Pardiwalla, Senior Advocate a/w. Mr. Atul K. Jasani for the
Petitioner.

Mr. Sham V. Walve for the Respondent/Revenue.

**CORAM : K. R. SHRIRAM AND
AMIT B. BORKAR, JJ.**

DATE : 16 DECEMBER 2021.

P. C. :

On 23/1/2008 Rule was issued and interim relief in terms of
prayer clause (b) was granted.

2. The same has been in force since then.

3. Petitioner aggrieved by notice dated 20/3/2007 issued under
Section 148 of the Income Tax Act, 1961 (said Act) for Assessment Year
2002-2003 approached this Court praying for a Writ of Certiorari to quash

the said notice dated 20/3/2007 and order dated 30/11/2007 rejecting Petitioner's objections to the issuance of notice.

4. Assessment order for Assessment Year 2002-2003 had been passed on 6/12/2004.

5. Reasons for reopening are as under:

"Recording of Reasons for initiating proceedings under Section 148 of the Income-Tax Act, 1961.

The Great Eastern Shipping Co. Ltd.

A. Y. 2002-03

Under the provisions of Section 14A of the Income-tax Act, 1961, no deduction shall be allowed in respect of expenditure incurred in relation to the income which does not form part of the total income.

2. In this case, the assessee has received dividend income of Rs.3,05,17,219/- on its total investment in shares to the extent of Rs.108,57 Lakhs. The assessee has also paid interest of Rs.50,27 Lakhs during the previous year relevant for A. Y. 2002-03 on the loans payable of Rs.933,93 Lakhs. Under the provisions of Section 14A, the expenditure incurred in relation to the income not includible in total income should not be allowed. Therefore, interest attributable to the borrowed funds used for investments in shares has to be brought to tax.

3. Therefore, I have reason to believe that the interest, attributable to the borrowed funds used for investments in shares, to be disallowed to the extent of atleast Rs.228.16 Lakhs has escaped from assessment for A.Y. 2002-03.

4. Issue notice under Section 148 of the Income-tax Act, 1961."

6. Aggrieved by certain additions made in the Assessment order, Petitioner had filed an appeal before the Commissioner of Income Tax (Appeals) (CIT(A)). Before the CIT(A) the applicability of the provisions of Section 14A of the said Act which is also the subject matter of the reasons for reopening came up for consideration. CIT (A) after hearing and considering the submissions of Petitioner directed disallowance of Rs.1,82,207/- under Section 14A of the said Act. Paragraph No.10 and 10.1 of the order of CIT (A) reads as under:

"10. During the course of appeal hearing the appellant was required to explain why some notional expenditure for earning tax free dividend should not be disallowed in view of the provision of Section 14A of the said Act. It was submitted that the company had a separate treasury department engaged in the business of carrying out deals in inter-corporate deposits/ loans and money market operations. This department carried on various financial activities and there was direct cost incurred by the department, specifically for earning dividend income. It was also submitted that no expenses allocation was ever made by the AO in the past.

10.1 I have gone through the facts and I find that in view of the specific provision of Section 14A, certain disallowance is called for. The total cost incurred by the treasury department during the period under consideration was Rs.36,44,142/- The expenditure relatable to earning of dividend income can reasonably be estimated at 5% of total expenditure incurred i.e. Rs.1,82,207/-. The AO is directed to disallow Rs.1,82,207 under Section 14A."

7. Against this order Petitioner had preferred an appeal before Income Tax Appellate Tribunal (ITAT). During pendency of that appeal this notice under Section 148 of the said Act has been issued.

8. Shri Pardiwalla submitted that as per 3rd proviso in Section 147 of the said Act, the Assessing Officer cannot assess or reassess any income when the income involving matters are the subject matter of any appeal, reference or revision. He submitted that when the disallowance under Section 14A of the said Act by the CIT(A), is the subject matter of appeal pending before the ITAT, the impugned notice under Section 148 of the said Act could not have been issued.

9. Mr. Walve of course strongly supported the action of the Assessing Officer.

10. After hearing Shri Pardiwalla and Shri Walve and having considered pleadings before us, in our view the impugned notice under Section 148 of the said Act has to be set aside. We have arrived at this conclusion because Third proviso to section 147 of the said Act (as it was then in force) reads as under:

"Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

11. Therefore when the appeal had been preferred by Petitioner before the ITAT, and disallowance under Section 14A of the said Act is the

subject matter of that appeal, the Assessing Officer could not have assessed or reassessed such income. Moreover by issuing the notice under Section 148 of the said Act as quoted above, the Assessing Officer in fact is sitting in appeal over the decision of CIT(A) to disallow only Rs. 1,82,207/- under Section 14A of the said Act. If he was aggrieved by the decision of CIT(A) to disallow only Rs.1,82,207/- under Section 14A of the said Act, Revenue could have filed an appeal before ITAT. Having missed the bus, the Assessing Officer cannot adopt the route of re-opening and issue notice under Section 148 of the said Act.

12. In the circumstances, Rule is made absolute in terms of prayer clause (a) which reads as under:

"a) 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's case and after examining the legality and validity thereof quash and set aside the notice dated 20th March, 2007 (Exhibit "F") issued by Respondents under section 148 of the Act seeking to reopen the assessment for the assessment year 2002-03, and order rejecting objections (Exhibit "K") dated 30th November, 2007."

13. Petition disposed.

(AMIT B. BORKAR, J)

(K. R. SHRIRAM, J.)