

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

WRIT PETITION NO.1387 OF 2010

M/s. Transchem Limited

...Petitioner

vs.

Assistant Commissioner of Income Tax -8(3)

...Respondent

**VISHAL
SUBHASH
PAREKAR**

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VISHAL SUBHASH
PAREKAR

Date: 2022.02.05
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Mr. Nishit Gandhi a/w. Ms. Usha Dalal and Ms. Akshita Bhandari,
for the Petitioner.

Mr. Suresh Kumar, for the Respondent.

CORAM :

**K.R. SHRIRAM &
N. J. JAMADAR, JJ.**

DATE :

FEBRUARY 03, 2022

P.C.:

. This Petition was admitted by an order dated 6th September, 2010. Petitioner is seeking setting aside of notice dated 29th March, 2010 issued under section 148 of the Income Tax Act, 1961 (the said Act) and also the approval granted by Respondent No. 3 under section 151 of the Act. By the order dated 22nd June, 2010 passed by Respondent No. 1 rejected Petitioner's objections to the reopening.

2. Admittedly, in this case, a notice to reopen has been issued more than four years after the end of the relevant assessment year and assessment under section 143(3) of the Act has also been completed. Therefore, in view of the proviso to section 147 of the Act, Respondent has to show failure on the part of Petitioner to

disclose truly and fully material facts required for assessment for the assessment year. The reasons recorded for reopening read as under:

“Reasons recorded for reopening the assessment u/s.147 of the I.T. Act, 1961

The return of income was filed by the assessee company on 31.10.2003, declaring total income at Rs. 71,27,071/- after claiming deduction u/s. 80 HHC amounting to Rs. 71,27,071/-. The case was scrutinized u/s. 143(3) of the Income Tax Act, 1961 on 29.11.2005, assessing the total income at Rs. NIL after allowing deduction u/s. 80 HHC of the I.T. Act amounting to Rs. 30,48,339/- and set-off of brought forward losses to the extent of available income of Rs. 1,54,98,742/-. In the assessment order, the Book Profit was determined at Rs. 47,91,480/- u/s. 115JB of the I.T. Act after allowing deduction u/s.80 HHC of the Act amounting to Rs. 30,48,339/-.

2. It is now observed that the qualifying amount for deduction u/s.80 HHC ought to have been determined after allowing set-off of brought forward losses against the adjusted profit of the business of Rs. 1,01,05,832/-. If the brought forward loss of Rs. 1,54,98,742/- is adjusted against the adjusted profit of business, it would result into a negative figure, thereby disentitling the assessee from allowance of deduction u/s.80 HHC. Further, while computing the Book Profit u/s. 115 JB of the Act, also, the deduction u/s. 80 HHC amounting to Rs. 30,48,339/- has been wrongly allowed in the assessment order. Thus , the sum of Rs. 30,48,339/- has escaped assessment as the assessee has failed to disclose fully and truly all material facts necessary for its assessment.

3. In view of the above facts, I am satisfied that this is a fit case for issue of Notice u/s.148 of the Income Tax Act, 1961.”

3. At the outset, these reasons do not indicate that there was failure on the part of Petitioner to truly and fully disclose any material fact. The Assessing Officer is relying on the same material facts already filed and considered by the Assessing Officer who passed the original assessment order. Moreover, the entire basis for reopening as could be seen from the reasons is change of opinion and as has been held time and again by various Courts, Respondent can not propose to reopen assessment on the basis of change of opinion. Moreover, it is quite clear that the Assessing Officer has passed assessment order considering materials on record and taken a conclusive view. To reopen the assessment based on same material with a view to take another view, is not permissible. Moreover, in this case, there is simply a general statement in the reasons that assessee has failed to disclose fully and truly all material facts necessary for its assessment. In our view, this statement is clearly made only as an attempt to take the case out of the restrictions imposed by proviso to section 147 of the Act.

4. Further according to the reasons recorded, there was an error on the part of Assessing Officer because the qualifying amount for deduction under section 80HHC ought to have been determined after allowing set-off of brought forward losses against the adjusted

profit of the business. An error discovered on a reconsideration of the same material does not give power to the Assessing Officer to re-open the assessment.

5. This Court in the case of **CEAT Ltd. vs. Assistant Commissioner of Income Tax Circle 6(2) (1) and Ors.**¹ in paragraph Nos. 3 and 4 has held as under:

3. The Hon'ble Apex Court in **Indian & Eastern Newspaper Society vs. Commissioner of Income-tax**² has held that an error discovered on a reconsideration of the same material (and no more) does not give power to the Assessing Officer to re-open the assessment. Paragraph no.14 of the said judgment read as under :

14. Now, in the case before us, the Income-tax Officer had, when he made the original assessment, considered the provisions of Sections 9 and 10. Any different view taken by him afterwards on application of those provisions would amount to a change of opinion on material already considered by him. The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under Section 147 (b). Reliance is placed on Kalyanji Mavji and Co. v. CIT, (1976) 102 ITR 287, where a Bench of learned Judges of this Court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the Income- tax Officer must fall within Section 34 (1) (b) of the Indian Income Tax Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels further than the statute warrants insofar as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the ITO discovers that he has

1. W.P.No. 3363 of 2019 Dt.22-12-2021.

2. [1979] 119 ITR 996.

committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this Court in Maharaj Kamal Kumar Singh's case (supra), A. Raman and Co.'s case (supra) and Bankipur Club Ltd. v. CIT, (1971) 82 ITR 831, and we do not believe that the law has since taken a different course. Any observations in Kalyanji Mavji's case (supra) suggesting the contrary do not, we say with respect, lay down the correct law.

4. This view has been followed by a Full Bench of the Karnataka High Court in **Dell India (P.) Ltd. vs. Joint Commissioner of Income Tax, LTU, Bangalore.**³

6. Petition therefore allowed in terms of prayer clause (a) which read as under:

(a) "That this Court may be pleased to issue a writ of certiorari or 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 insofar as they relate to the impugned notice dated 29th March, 2010 being Exhibit H hereto, the impugned alleged approval of Respondent No. 3 under section 151 of the Act, and the impugned order dated 22.06.2010 passed by Respondent No. 1 being Exhibit N hereto and impugned reassessment proceedings of the Petitioner for the assessment year 2003-04 and after going through the same and examining the question of legality thereof, to quash and cancel the same."

7. Petition disposed.

(N. J. JAMADAR, J.)

(K. R. SHRIRAM, J.)

³ (2021) 432 ITR 212.