

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1444 OF 2016

Hubtown Limited

...Petitioner

Versus

Deputy Commissioner of Income-tax,
Central Circle – 5(1) & Anr.

..Respondents

.....

Mr.J.D. Mistri, Senior Advocate with Mr.Neeraj Sheth with Mr.Atul Jasani
for Petitioner.

Mr.N.C. Mohanty for Respondent – Revenue.

.....

**CORAM: M. S. SANKLECHA &
S.C. GUPTE, JJ.**

DATE : 24 AUGUST 2016

P.C. :

Heard. Rule.

2 The challenge in this petition is to notice dated 27 March 2015 issued by the Assessing Officer under Section 148 of the Income-tax Act, 1961 (“the Act”). The impugned notice seeks to reopen an assessment for Assessment Year 2008-09.

3 The reasons recorded in support of the impugned notice, which have been upheld in the order disposing of the objections of the Petitioner, are as under :

(i) The Petitioner is not entitled to the benefit of Section 80IB(10) of the Act, as the notification dated 3 August 2010 issued by the Central Board of Direct Taxes (CBDT) read with the Corrigendum dated 5 January 2011 would not entitle the Petitioner to the benefit of the proviso to Section 80IB(10)(a) and (b) of the Act;

(ii) There has been an under assessment of income in view of the fact that the transfer of goods and services were to related parties and for purpose of deduction under Section 80IA of the Act, it has not been taken at market value for the purposes of computing the profits and gains available for deduction; and

(iii) The confirmations for unsecured loans were signed by persons other than the directors / partners / proprietors of the entity giving the loan confirmations.

4 This clearly is a case of seeking to reopen an assessment beyond the period of four years from the end of the relevant assessment year. The condition precedent to assume jurisdiction in such case is the failure of the assessee to disclose fully and truly all material facts necessary for assessment.

(i) The benefit of Section 80IB of the Act was denied in regular assessment proceedings by order dated 24 December 2010 after consideration of the Notification dated 3 August 2010 issued by the CBDT. The Petitioner thereafter filed a rectification application on 14 February

2011 placing reliance upon the corrigendum dated 5 February 2011 issued by the CBDT to the Notification dated 3 August 2010. The Assessing Officer, on consideration of the notification dated 3 August 2010, as amended by the corrigendum dated 5 February 2011, granted the benefit of Section 80IB(10) of the Act to the Petitioner. The reasons in support of the impugned notice do not allege that there was any failure on the part of the Petitioner to disclose the notification or any other material fact while claiming the benefit of Section 80IB of the Act. Therefore, so far as this issue is concerned, the Assessing Officer has not satisfied the jurisdictional requirement by showing that there was failure to disclose fully and truly material facts on the part of the assessee necessary for assessment.

(ii) So far as the second issue with regard to deduction under Sections 80IA of the Act is concerned, it is an agreed position between the parties that an identical issue was raised in a reopening notice issued by the Assessing Officer in the Petitioner's own case for the Assessment Year 2009-10. The same was challenged by the Petitioner in Writ Petition No.1055/2015 before this Court. By an order dated 2 July 2015, the above petition was admitted and interim relief was granted. No change in any material facts in the present assessment year has been brought to our notice. Consequently, the re-opening notice, to the extent it relies on this ground, is *prima facie* not sustainable.

(iii) So far as the loan confirmation being signed by persons other than directors / partners / proprietors of the entity issuing the same is concerned, it is not the case of the Assessing Officer that the same was not produced before him during the assessment proceedings. Thus, this is also

a case where the Respondent has *prima facie* not been able to establish any failure on the part of the Petitioner to fully and truly disclose all material facts necessary for assessment.

5 In our *prima facie* view, as the reasons in support do not satisfy the requirement of the proviso to Section 147 of the Act, the impugned notice is unsustainable. Therefore at this stage, we are not considering the second submission on the part of the Petitioner that this is a case of change of opinion and therefore without jurisdiction.

6 Mr.Mohanty, learned Counsel for the Respondent, states that on merits, the Petitioner was not entitled to the benefit of Section 80IB of the Act. This by itself would entitle the Respondent to issue a re-opening notice. In support, he placed reliance on the decision of this court in support of **Export Credit Guarantee Corporation of India Ltd. vs. Additional Commissioner of Income-tax**¹ to contend that where a provision of law has been clearly overlooked or ignored in the assessment order, it would be open to the Assessing Officer to issue a re-opening notice. This decision relied upon by the Respondent has been rendered in the context of assessment being re-opened within a period of four years from the end of the relevant assessment years. In such cases of reopening of assessment in less than four years, the jurisdiction is not dependent upon failure to disclose fully and truly all material facts necessary for assessment as in this case, where the reopening is for a period beyond a period of four years from the end of the relevant assessment year.

7 In the facts of this case, *prima facie* we find absence of any

1 [2013] 350 ITR 651 (Bom)

failure to disclose all the material facts truly and fully which were necessary for assessment. Therefore, the impugned notice is *prima facie* without jurisdiction,

8 Accordingly, interim relief in terms of prayer clause (d).

(S.C. GUPTA, J.)

(M. S. SANKLECHA, J.)

