IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 20820 of 2018

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JIVRAJ TEA LIMITED

Versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 1(1)(2)

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Appearance:
MR. HARDIK V VORA(7123) for the Petitioner(s) No. 1
MRS KALPANAK RAVAL(1046) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 27/01/2020

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1 Rule returnable forthwith. Ms. Kalpanak Raval, the learned standing counsel waives service of notice of rule for and on behalf of the Revenue.

2 By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

> *"a. A writ of certiorari or any other writ, order or direction in the nature of certiorari quashing the impugned notice dated 26.03.2018 issued under Section 148 of the Act for the assessment year 2011-12.*
>
> *b. Pending the admission, hearing and final disposal of this petition, restrain the respondent from passing the order of re-assessment.*
>
> *c. Pass any other order(s) as this Hon'ble Court may deem fit and more appropriate in order to grant interim relief to the petitioner.*
>
> *d. Any other and further relief deemed just and proper be granted in*

the interest of justice.

e. To provide for the cost of this petition."

3 Thus, it appears that the writ applicant seeks to challenge the impugned notice of reopening dated 26th March 2018 issued under Section 148 of the Income Tax Act, 1961 [for short, 'the Act, 1961'] for the assessment year 2011-12 beyond the four years.

4 The writ applicant filed his return of income for A.Y. 2011-12 declaring gross total income at Rs.11,89,58,848/-.

5 The case was selected for scrutiny. The assessee replied to the specific queries raised by the Assessing Officer. The scrutiny assessment was completed under Section 143(3) vide order dated 30th March 2014 assessing the income at Rs,15,07,12,217/- after making disallowance of Rs.5,77,70,489/- on different counts.

6 It appears that the writ applicant being dissatisfied with the aforesaid addition preferred an appeal before the Commissioner of Income Tax (Appeals). The CIT(A) deleted the disallowance made by the Assessing Officer. The Revenue preferred appeal against the CIT(A)'s order before the Income Tax Appellate Tribunal. The Tribunal dismissed the appeal preferred by the Revenue.

7 Later, the impugned notice under Section 148 of the Act, 1961 came to be issued for reassessing the income. The reasons assigned for reopening are as under:

"In the present case, assessment u/s. 143(3) of the Act was completed on 30.03.2014 for A.Y.2011-12 by determining total income of

Rs.15,07,12,212/-. On perusal of records, following facts of concealment of income are observed.

It was notice that the assessee company had engaged in two lines of business i.e. trading in tea and generations of electricity which generate from windmill division. Tea business is subjected to normal taxation and power generation business is eligible for deduction. It was also seen that the assessee has also distributed the relevant manufacturing expenses such as machine insurance charge, machinery operating, maintenance & repair charges, and the transmission, wheeling and operating charges, between the respective line of business. As per law, the expenses which have direct nexus with any line of business should be debited to such respective business, where the indirect expenditure needs to be split between the different line of business.

However regarding the administrative expenses it was found after analysis that the assessee had debited the sum of Rs.3,57,75,237/-on this account of which only 4,71,843/- (only 1.3%) has been debited to wind mills division claiming deduction u/s. 80IA. This expense of Rs.4,71,843/- also includes a amount of Rs.4,29,273/- on account of legal & professional charges relating to Jodha wind mill division which was sold off. Hence, the balance amount of administrative expenses shown for all four windmill division is only abut Rs.40,000/-. It was also seen that the assessee company has not debited a single rupee spent on Directors Remuneration the establishment expenses of the head office like electricity, vehicles, rates and taxes, rent Telephone, stationery etc and staff expenses. No expenses had been debited to the windmill divisions at Jodha and Chitradurvga.

The assessee company debited only direct expenses to wind mill division, where all the common expenses had been debited to the tea division, thereby artificially pumping its income eligible for deduction u/s 80IA, leading lower returned income and consequently lower taxes.

Hence, the common expenses, in nature of administrative expenses need to be allocated between both theline of business ni order to arrive at true picture. Since one line of business is a trading concern (tea division) and other is manufacturing concern (general of electricity), the ratio of turnover cannot be a correct ratio owning in the difference in their basic character. Turnover of a trading concern can be high, without requirement of higher capital and efforts, but the profit percentage is low, as compare to manufacturing concern. Hence the allocation of common cost, owning to difference is character of both lines of business, the average of profit of ratio and the gross assets ratio.

Gross Block as per schedules – 5 of audit report	*Total assets value*	*Windmill assets value*	*Percentage of windmill block to total blok*

	327360474	*243954661*	*74.52%*

C. Average of A and B above: (74.52 + 28.58)/2 = 51.58%

Hence 51.55% of the administrative expenses, amounting to Rs.1,84,42,135/- should be debited to the Windmill division, thereby reducing their total income and the income eligible for deduction u/s. 80IA by an equivalent amount the tax effect of which amounts to Rs.61,26,016/-.

In view of the above, I, as an assessing officer have reason to believe that the income to the

B. Calculation of profit ratio:

Total business income	*Income from windmill*	*Percentage of windmill income to total business income*
80175510	*22917100*	*28.58%*

Figure taken from computation of income enclosed as Exhibit -III

extent of Rs.1,84,42,135/- during the year has escaped assessment within the meaning of Sec. 147 of the I.T. Act 1961. Hence it is a fit case for issuing notice u/s. 148. Necessary sanction to issue notice u/s 148 has been obtained separately from Pr. Commissioner of Income Tax Act, 1961 as per the provisions of Section 151 of the Income Ta Act."

8 The writ applicant tendered his objections to the reopening in writing dated 15th October 2018. Apart from many objections raised by the writ applicant, the writ applicant pointed out that for the very same grounds for the assessment year 2008-09, notice for reopening was issued and the same was questioned by the writ applicant by filing the Special Civil Application No.4005 of 2016 in this Court. The writ applicant further pointed out that the said writ application came to be allowed vide judgement and order dated 19th July 2016. On the very same grounds, the notice under Section 148 of the Act, 1961 for reopening, later, could not have been issued. The objections raised by the writ applicant to the notice of reopening came to be rejected by the

Assistant Commissioner of Income Tax vide order dated 24th December 2018. The manner in which the objections have been dealt with by the Assistant Commissioner of Income Tax is quit disturbing. We are saying so because we find that in para 4 of the order passed by the Assistant Commissioner of Income Tax, the judgement of this Court rendered in the Special Civil Application No.4005 of 2016 has been referred to and discussed. It is always open for the Assistant Commissioner to distinguish the judgement of this Court on facts, but, while doing so, it cannot comment on the same as regards the manner in which the petition came to be disposed of. It is too much on the part of the Assistant Commissioner to say that the High Court, without discussing merits of the case, allowed the petition on technical grounds.

9 At this stage, we may refer to the decision of this Court rendered in the Special Civil Application No.4005 of 2016. The same reads thus:

> 1. *"The petitioner has challenged a notice dated 30.03.2015 issued by the respondent Assessing Officer for reopening the assessment of the petitioner for the assessment year 2008-09.*
>
> 2. *Brief facts are as under.*
>
> 3. *The petitioner is a company registered under the Companies Act. For the assessment year 2008-09, the petitioner filed return of income declaring total income of Rs.3.75 crores (rounded off). The return was taken in scrutiny. The Assessing Officer passed order under section 143(3) of the Act on 22.12.2012 assessing assessee's total income at Rs.13.16 crores. To reopen such assessment, impugned notice came to be issued. The Assessing Officer had recorded following reasons for issuing the notice.*
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> *In the present case, assessment u/s. 143(3) of the Act was completed on 22.12.2010 by making following additions / disallowances:*
> *(i) Disallowance u/s.40A(2)(b) of the Act.*
> *(ii) Disallowance of deduction claimed u/s. 80IA(4) of the Act.*
> *(iii) Disallowance u/s.14A of the Act.*
>
> *During the year under consideration, the assessee company has shown*

turnover of Rs.79,19,95,350/- & the Gross profit of Rs.13,24,86,180/- (GP margin 16.73%) from Tea Division and turnover of Rs.3,51,63,701/- & the Gross profit of Rs.3,22,03,435/- (GP margin 91.58%) from Windmills division.
The assessee has two lines of business i.e. trading in the tea (income of which are subject to normal provisions of taxation) and generation of power (the income of which is eligible for deduction). The assessee has debited the financial charges between the respective lines of business, as per the loans taken. It is also seen that assessee has also distributed the relevant manufacturing expenses. As per law, the expenses which have direct nexus with any line of business should be debited to such respective business, whereas the indirect expenditure (or common expenditure needs to be split between the different lines of business.

However, regarding the administrative expense and the other expenses, it is evident that the assessee company has debited a sub of Rs.1,72,48,250/- and Rs.58,43,886/- respectively on these account, out of which only Rs.1,36,829/- (only 0.59%) has been debited to the wind mills division, claiming deduction u/s.80IA. It is seen that the assessee company has not debited a single rupee, spent on Directors remuneration, the establishment expenses of the head office like electricity, vehicles, rates and taxes etc and staff expenses in the windmill division. No such office expenses has been debited to the windmill divisions.

Any line of business cannot function on its own. The assessee company seems to have debited only direct expenses to the windmill divisions. Where all the common expenses have been debited to the tea division, thereby artificially pumping its income eligible for deduction u/s.80IA leading to lower returned income and consequently lower taxes.

Hence, the common expenses, needs to be allocated between both lines of business in order to arrive at true picture. Since, one line of business is a trading concern (tea division) and other is manufacturing concern (generation of electricity), the ratio of turnover cannot be a correct ratio owing in the difference in their basic character. Turnover of a trading concern can be high, without requirement of higher capital and efforts, but the profit percentage is low, as compared to a manufacturing concern. Hence, for allocation of common costs, owing to difference in character of both lines of business, the average of profit ratio and the gross asset ratio.
A. Calculation of gross asset ratio:

Gross Block as per schedule-5 of audit report	*Total assets value*	*Windmill asset value*	*Percentage of windmill block to total block*
	2,75,86,028	*8,02,87,769*	*74.42%*

B. Calculation of profit ratio.

Total business income	*Income from windmill*	*Percentage of windmill income to total business income*
5,76,55,839	*1,81,96,506*	*31.56%*

C. Average of A and B above: (74.42 + 31.56)/2 = 52.99%

Hence, 52.99% of the administrative expenses and the other expenses amounting to Rs.2,30,92,136/- should be debited to the windmill divisions thereby reducing their total income and the income eligible for deduction u/s.80IA by an equivalent amount and conversely the income of the other business other than windmill would accordingly increase. An amount of Rs.1,22,36,522/- is to be debited to the windmill division and thereby reducing the total income eligible for deduction claimed u/s. 80IA(4) of the Act.

In view of the above facts, the undersinged have reason to believe that the amount of Rs.1,22,36,522/- is required to be taxed in the tea division of the assessee company as well as excessive deduction was allowed u/s.80IA(4) of the Act. Hence, there is escaped assessment within the meaning of section 147 of the Act. Thus, it is a fit case for issuing notice u/s. 148 of the Act.

4. *The petitioner raised detail objections to the notice for reopening under letter dated 24.12.2015, in which, with respect to the true and full disclosures, the assessee had contended as under:*

In respect of the aforesaid reason for re-opening, we would like to submit that the nature of administrative expenses and other expenses already stands verified and accepted in the original assessment proceedings and there is no doubt as regards the claim thereof as made in the respective divisions, which stands established from the following facts.

(a) First of all, ***our company has maintained separate books of accounts for the tea division as well as windmill division.***

(b) Secondly, in the separate books of accounts ***there is clear bifurcation of all the expenses in the nature of manufacturing expenses,***

administrative expenses, financial expenses, financial expenses and depreciation for all the divisions *and thus, there is no question of there being any common expenses for both the divisions.*

Thirdly, on the basis of maintenance of separate books of accounts, ***the statutory auditor has also prepared separate audit reports for both the divisions*** *wherein also; all the expenses stands clearly categorised under the head, Manufacturing, administrative, Financial and Other expenses.*

(d) Fourthly, ***our company has also prepared separate divisionwise computation of Income*** *for each of the windmills installed by it and the said separate computation of income also stand furnished during the course of the original assessment proceedings and are forming part of the original assessment record.*

(e) Fifthly, ***during the course of the original assessment proceedings, the then learned AO had also called for detail of various expenses*** *like staff salary and incentive, bonus and boni expenses, donation, advertisement and sales promotion expenses, commission and brokerage expenses, etc., which have duly furnished and are forming part of the original assessment record.*

Here it is pertinent to note that ***during the course of original assessment proceedings, the then learned AO had even called for explanations in respect of variation in certain*** *expenses and these explanations also stand furnished by us and accepted by the then learned AO.*

(f) Lastly but most importantly, it is very pertinent to note that ***the other expenses of Rs.58,43,886/- which have been held to be in the nature of common expenses and which are proposed to be bifurcated between the 2 divisions of the company, already stands fully disallowed*** *in the computation of income except an amount of Rs.36,812/-, as being in the nature of donation, interest on late payment of TDS, loss on sale of assets, etc. and hence, there is no question of these expenses being wrongly claimed in the tea division instead of the windmill division, to claim higher deduction u/s. 80IA and therefore, the impugned re-opening has been clearly made without proper verification of facts or application of mind.*

From the aforesaid facts there remains no doubt that all the expenses for each of the divisions stands verified and accepted by the then learned AO and ***therefore, it gets established that there is no failure on the part of our company to disclose fully and truly all the material facts necessary for assessment.***

Thus, in the absence of any failure on the part of our company to disclose fully and truly all the material facts necessary for the assessment the impugned notice being issued after the statutory period of 4 yeas is time-barred and is required to be quashed outrightly as being bad-in-law.

Such objections came to be rejected by the Assessing Officer by an order

dated 29.02.2016.

5. From the above materials, it can be seen that the notice for reopening came to be issued beyond the period of four years from the end of relevant assessment year. The requirement of the income chargeable to tax having escaped assessment for the failure on the part of the assessee to disclose truly and fully all material facts, would therefore, have to be satisfied.

6. With this background, we may revert back to the reasons recorded. The reasons point out that the assessee company is engaged in two businesses viz. of trading in tea, income from which is taxed under normal provisions and in generation of power through windmills, income from which is exempt under section 80IA of the Act. According to the Assessing Officer, the assessee had not correctly apportioned the expenditure between these two businesses and thereby artificially inflated the income of the eligible businesses to gain larger deduction.

7. We are not on validity of the Assessing Officer's contention. We are concerned only with the question of failure on part of the assessee to disclose fully and truly all material facts.

8. It is not even the case of the Assessing Officer that he noticed the disproportionate allegation/allocation of expenditure in the accounts of non eligible business through any material extraneous to the assessment records. In fact, his entire observations contained in the reasons recorded are borne out from the data available in the assessment records. Further, as pointed out by the assessee in the objections, full separate accounts of both divisions were maintained and also presented before the Assessing Officer during the course of assessment. This is therefore, a clear case where, there was no failure on part of the assessee to disclose truly and fully all material facts necessary for assessment. Notice for reopening which was issued beyond a period of four year must therefore, fail. The same is therefore quashed.

9. Petition is allowed and disposed of."

10 The Coordinate Bench, while allowing the writ application, has observed in clear terms that full separate accounts of both the divisions were maintained and also presented before the Assessing Officer during the course of assessment. This Court recorded a clear finding that there was no failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment. In such circumstances, the

Coordinate Bench, ultimately, held that the notice for reopening which was issued beyond a period four years should fail.

11 The writ applicant pointed out while raising his objections that there was no failure on his part to disclose truly and fully any material fact. He pointed out that his assessments were being examined by the Assessing Officer for the original assessment. The reopening on the basis of re-analysis of the existing material was nothing, but a change of opinion and the same is not permissible. He pointed out that no specific information has been received by the Assessing Officer to firmly believe that the income chargeable is escaped the assessment and as noted above, at the cost of repetition, he pointed out that reassessment was sought for in the assessee's own case for A.Y. 2008-09 which came to be questioned by this Court in the Special Civil Application No.4005 of 2016.

12 Having heard the learned counsel appearing for the parties and having gone through the materials on record, we are of the view that the case on hand is one of change of opinion. There is hardly anything on record to indicate that there was failure on the part of the assessee to disclose truly and fully all material facts. There was no tangible material available for the purpose of issuing the notice for reopening beyond the period of four years.

13 In the overall view of the matter, we hold that the impugned notice under Section 148 of the Act, 1961 is not sustainable in law. We take notice of the order passed by this Court dated 27th December 2018. The order reads thus:

"1. Mr. Hardik Vora, learned advocate for the petitioner, submitted that

the impugned notice under section 148 of the Incometax Act, 1961 has been issued on 26.03.2018 in relation to Assessment Year 201112, which is clearly beyond the period of four years from the end of relevant Assessment Year. Referring to the reasons recorded for reopening the assessment, it was pointed out that in the entire reasons, there is not even a whisper as regards any failure on the part of the petitioner to disclose truly and fully all material facts relevant for its assessment. It was submitted that therefore, the first proviso to section 148 of the Act would be attracted and the assumption of jurisdiction on the part of the Assessing Officer under section 147 of the Act is invalid. Reliance was placed upon the judgment and order dated 19.07.2016 passed by this Court in the petitioner's own case in Special Civil Application No.4005 of 2016 wherein on identical facts, the Court had set aside the identical notice.

2. *Having regard to the submissions advanced by the learned advocate for the petitioner, issue Notice returnable on 19.02.2019. By way of adinterim relief, the respondent is permitted to proceed further pursuant to the impugned notice; he, however, shall not pass the final order without the prior permission of this Court.*

Direct service is permitted today."

14 As we are allowing this writ application, the impugned notice will have to be quashed.

15 In the result, this writ application succeeds and is hereby allowed. The impugned notice for reopening of assessment under Section 148 of the Act, 1961 is hereby quashed. All consequential proceedings pursuant thereto stand terminated. Rule is made absolute.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

CHANDRESH