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

INCOME TAX APPEAL NO. 606 OF 2015

The Commissioner of Income Tax – 17, Mumbai … Appellant

Versus

Shri Rajan N. Aswani …Respondent

Mr. Prakash Chandra Chhotaray, for the Appellant.
Mr. Satish Mody, i/b. Aasifa K. Khan for the Respondent.

CORAM: M.S.SANKLECHA &
RIYAZ I. CHAGLA, JJ.
DATED: 24TH FEBRUARY 2018

PC:-

1. This Appeal under Section 260A of the Income Tax Act, 1961 ("***The Act***" for short), challenges the order dated 6 August 2014 passed by the Income Tax Appellate Tribunal ("***The Tribunal***" for short). The impugned order dated 6 August 2014 is in respect of Assessment Year 2004-05.

2. Mr. Chhotaray, the learned Counsel for the Revenue, urges only the following question of law for our consideration:-

> Whether on the facts and in the circumstances of the case and in law, the Tribunal was justified in quashing the reopening of the assessment particularly when the

assessment was reopened within a period of four years from the end of the assessment year?

3. Mr. Mody, the learned counsel appearing for the Respondent at the very outset point that the issue raised herein namely can a reopening be issued notice by the Assessing Officer on the very ground which he had opposed in response to the query from the Audit is no longer *res integra.* It is submitted that this issue stands concluded in favour of the Respondent – Assessee by the decisions of this Court in ***IL & FS Investment Managers Ltd. V/s. Income Tax Officer***[1] and ***The Commissioner of Income Tax Vs. M/s. Reliance Industries Ltd.***[2] To the same effect, he submits are the decisions of the Delhi High Court in ***AVETC Ltd. v. DCIT***[3] and the Gujarat High Court in the cases of ***Jagat Jayantilal Parikh v. Deputy Commissioner of Income Tax***[4] and ***Raajratna Metal Industries Ltd. v. Assistant Commissioner of Income Tax***[5]***.***

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1 298 ITR 32.

2 Income Tax Appeal No.200 of 2013 decided on 1st February 2016.

3 (2015) 370 ITR 611 (Delhi).

4 (2013) 355 ITR 400 (Guj.)

5 (2015) 371 ITR 222 (Guj.)

4. However, Mr. Chhotatry, the learned counsel for the Revenue submits that in the present case facts are completely distinguishable. Therefore, according to him, the aforesaid decisions will not govern this particular case. This primarily on the following grounds:-

a) The reasons recorded do not indicate that the same has been issued on the basis of audit objection. Therefore as held by this Court in ***Hindustan Lever Limited Vs. R.B. Wadkar***[6], one cannot go behind the reasons recorded in support of the notice to infer that he has acted on the basis of audit objection.

b) The response of non-acceptance by the Assessing Officer to the audit objection was in October 2007. It was almost one and half years thereafter i.e. 19th March 2009 that the reopening notice was issued. Therefore, it is possible for the Assessing Officer to have changed his mind in the interregnum and come to the conclusion that his earlier opposition to the audit objection was not justified. In support he relies upon the decision of the Apex Court in ***A.L.M. Firm V. CIT***[7]***.***

c) The impugned order of the Tribunal is perverse in as much as

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6 268 ITR 332.

7 (1991) 189 ITR 285.

without any basis it has come to the conclusion that the Assessing Officer had issued the notice on the basis of audit objection; and

d) The decision of the Apex Court in ***Liberty India v. CIT***[8] decides the issue in favour of the Revenue with regards to the merits of the issue viz. not entitled to duty drawback incentive deduction under Section 80IB (4) of the Act.

5. The first grievance of the Revenue that in view of the decision of this Court in ***Hindustan Lever (Supra),*** it is not open to go behind the reasons recorded by the Assessing Officer. The reasons as recorded by the Assessing Officer it is submitted by the Revenue nowhere indicates that it was issued by the Assessing Officer on account of the audit objection. We note that in ***Hindustan Lever (Supra)***, the Assessee had challenged a reopening notice which was issued beyond a period of four years from the end of relevant Assessment Year. The reasons in support of notice therein did not indicate any failure on the part of the Assessee to fully and truly disclose all material facts. In that context the Court observed that it is not open to the Assessing Officer to improve upon the reasons recorded at the time of issuing the notice. In that case it is observed that the Assessing

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8 (2009) 317 ITR 218 (SC).

Officer speaks through his reasons and these reasons cannot be improved upon by the Assessing Officer. No substitution or deletion is permissible nor inferences therefrom are permitted. This is completely different from the present facts where an Assessee points out that the reasons recorded by the Assessing Officer are not his own reasons and therefore, the reopening notice issued under Section 148 of the Act on the basis of such reasons are without jurisdiction. In such cases one would necessarily have to look at the surrounding circumstances which led to the issue of the reopening notice and recording of the reasons. Thus it is not a case of adding to the reasons and / or varying the reasons recorded by the Assessing Officer but pointing out how the Assessing Officer having himself concluded that no income chargeable to tax has escaped assessment, on the very ground has now issued the reopening notice. Thus there is no merit in this objection of the Revenue.

6. The second grievance of the Revenue is that there is a time gap between the Assessing Officer's response to the audit objection contesting that any income chargeable to tax has escaped audit and his issuing the reopening notice. This according to the Revenue would indicate that the Assessing Officer has possibly applied his mind, in the interregnum once

again to the facts and has now come to the conclusion independently of the audit objection, that the income chargeable to tax has escaped assessment. There is no evidence of the same on record. In any event in such a case the least that is expected of the Assessing Officer is to record in his reasons that he had earlier opposed the objection of the audit and the reason for the change of view on his part. It cannot be that passage of time would alone by itself indicate that there has been a fresh application of mind to the order passed under Section 143 (3) of the Act leading to his reason to believe that the income chargeable to tax has escaped assessment. One more fact that must not be missed is that reasons recorded itself indicates that "it is noticed from the Assessment records that the Assessee….". On being specifically asked, Mr. Chhotaray very fairly informed us that the audit objection would be a part of the assessment records. Therefore, there is evidence on record that the audit objection was considered while issuing the reopening notice and there is nothing on record to even remotely suggest that in view of the delay in issuing the notice, the Assessing Officer applied his mind afresh (without being influenced by audit objection) to come to the same view as indicated in the audit objection. The reliance upon ***A.L.A. Firm (Supra)*** of the Apex Court is inappropriate as it was not

rendered in the context of any audit objection or any issue of non-application of mind by the Assessing Officer to issue the reopening notice. Thus there is no merit in this objection.

7. The third grievance of the Revenue is that the impugned order is perverse in as much as it holds that the Assessing Officer did not apply his mind is without any basis. This we do not accept. The impugned order records the fact that it had examined the Assessing Officer's letter to the audit objection in respect of grant of deduction under Section 80IB (4) of the Act. The response of the Assessing Officer's as contained in letter dated 29 October 2007 was before the Tribunal as a part of the paper book and in that letter, it has been mentioned at length on the basis of case law as existing in the relevant time that in his understanding of law the Respondent was entitled to the deduction under Section 80 IB (4) of the Act in respect of duty drawback incentive. Further the impugned order of the Tribunal also reproduced the audit objections as well as the reasons recorded and on comparing the two comes to a view that in substance both of them are identical. In the above view, it cannot even be remotely suggested that the impugned order of the Tribunal is perverse. Thus there is no merit in this objection of the Revenue.

8. The last submission on behalf of the Revenue was that the decision of the Apex Court in ***Liberty India (Supra***) has finally settled the issue of entitlement of deduction under Section 80 IB (4) of the Act viz. duty drawback claim in favour of the Revenue. Thus no fault can be found with the reopening notice as Apex Court order merely clarifies what the law always was and does not make the law. There can be no quarrel with the above proposition that the Supreme Court only declares the law. However, the decision of the Apex Court in ***Liberty India (Supra)*** was rendered on 31st August 2009 and the notice seeking to reopen the Assessment year for Assessment Year 2004-05 was issued on 18th March 2009. Therefore, at the time when the reasons for issue of reopening notice was recorded by the Assessing Officer, he could not have had any reasonable belief on the basis of Apex Court decision in ***Liberty India (Supra)*** to come to a *prima facie* view that income chargeable to tax has escaped assessment. In this appeal we are concerned with the issue of jurisdiction of the Assessing Officer to issue the reopening notice and not with the merits of the dispute. Thus when the reopening notice was issued in March 2009, the Apex Court decision was not available and there was a divergence of views. This has to be read in the context of the Assessing Officer's response to the audit objection

on the above issue duly supported by case law. In the above view, we find no merit in this grievance of the Revenue also.

9. According to us, the issue is concluded by the decisions of this Court in ***Reliance India Ltd. (Supra) and IL &FS Investment (Supra)*** as well as the Gujarat and Delhi High Court ***Jagat Parikh (Supra)*** and ***Raajratna Metal (Supra)*** and ***AVTEC (Supra)*** in favour of the Respondent – Assessee. Therefore in the present facts the view taken by the Tribunal is a possible view and does not give rise to any substantial question of law.

10. Accordingly, the Appeal dismissed. No order as to costs.

(RIYAZ I. CHAGLA J.) **(M.S.SANKLECHA, J.)**