IN THE INCOME TAX APPELLATE TRIBUNAL

"G" BENCH, MUMBAI

BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND

SHRI ASHWANI TANEJA, ACCOUNTANT MEMBER

ITA no.3970/Mum./2010
(Assessment Year : 2001–02)

ITA no.3971/Mum./2010
(Assessment Year : 2002–03)

Shri Sunil Gavaskar
8–A, Sportsfield
Khan Abdul Gaffor Khan Road ……. Appellant
Worli, Mumbai 400 018
PAN – AAAPG0001B

v/s

Income Tax Officer (I.T)
Ward–3(1), Mumbai ……. Respondent

Assessee by : Shri D.V. Lakhani
Revenue by : Shri Nitin Waghmade

Date of Hearing – 21.01.2016	Date of Order – 16.03.2016

O R D E R

PER ASHWANI TANEJA, A.M.

These appeals have been filed by the assessee against separate orders of the learned Commissioner (Appeals)–10,

Mumbai, passed against the separate assessment orders under section 143(3) r/w section 147 of the Income Tax Act, 1961 (for short *"the Act"*) for the assessment year 2001–02 and 2002–03.

2. Since both the appeals pertain to same assessee and involve identical issues, therefore, these were heard together and are being disposed of by this common order for the sake of convenience.

3. We first take up appeal in ITA no.3970/Mum/2010, for the assessment year 2001–02. Assessee has raised following grounds:–

> *"1. On the facts & circumstances of the case the Learned Commissioner of Income tax (Appeals) has erred in concluding that notice issued u/s 148 is valid and the reassessment proceedings are validly initiated. He has also erred in holding that reopening the assessment was in order. The appellant prays that the notice issued u/s 148 is bad in law. The conditions stipulated u/s 147 are not satisfied. The reassessment order passed by the Learned AO may be treated as invalid. The appellant prays that reassessment order passed by the Learned AO may be cancelled.*
>
> *2. Without prejudice to ground No.1 the Learned Commissioner of Income Tax (Appeals) has erred in rejecting the claim of the appellant u/s 8ORR amounting to Rs.97,71,079/-. On the facts & circumstances of the case the appellant submit that he is entitled to deduction u/s 8ORR at Rs.97,7 1,079/-*

as all the conditions stipulated u/s 80RR are satisfied.

3. On the facts & circumstances of the case the appellant prays that deduction u/s 8ORR may be granted at Rs.97,71,079/-.

4. On the facts & circumstances of the case the Learned Commissioner of Income tax (Appeals) has erred in confirming the levy of interest u/s 234B at Rs. 38,07,838/-. The appellant denies the liability for payment of interest u/s 234B and prays that the interest levy at Rs.38,07,838/- may be deleted."

4. During the course of hearing, detailed arguments have been made by both the sides on the grounds raised before us. It is noted from the perusal of the record that on an earlier date, it was pointed out by the learned Counsel for the assessee that an inspection of assessment record was carried out by him wherein it was noted that there were certain glaring discrepancies in compliance of the law to be followed for the reopening of the already concluded assessment. Accordingly, the Bench had directed the Ld. DR to produce the assessment records. In accordance with the same, learned DR produced before us assessment records containing, *inter–alia*, documentation work done by the Department for reopening of the case, which was examined by us. Ld. DR submitted copies of *"reasons"* recorded by the AO and other supporting material to the Bench with one copy to the counsel of the assessee. The case was adjourned to next date to enable both the parties to file their respective replies. Accordingly, on the date of hearing,

parties made their respective submissions on the jurisdictional and other legal aspect of the reopening as well as on the merits of the case.

5. The learned Counsel for the assessee has made detailed arguments to assail the reopening done by the AO as well as merits of additions/disallowances. He relied upon various judgments to argue that reopening was illegal and the disallowance was also bad in law and factually incorrect. He took us through these judgments in support of his argument that assessee is very much eligible as per law to claim deduction under section 80RR and inconsistent stand of the Revenue is not only legally invalid but also causing undue hardship to a tax payer whose services have brought fame to the entire country. Before concluding his argument he also drew our attention upon the advisory issued by the Ministry of Finance, Department of Revenue, dated 24th June 1982, wherein it was opined that audit objection should not be formed the basis of reopening of an assessment. He also relied upon the circular of the CBDT no.554 dated 13th February 1990. Thus, he concluded his argument by submitting that neither the reopening nor the addition made by the AO was valid and, therefore, reopening should be quashed and additions should be deleted.

6. Per–contra, the learned DR appearing on behalf of the Revenue has also made detailed arguments. He was fair enough to accept that two sets of *"reasons"* were available in records. Undated *"reasons"* were approved / sanctioned by the Additional DIT and then also by the DIT on 25th May 2007. He fairly admitted that nothing was available in assessment record to show any approval / sanction of a competent authority with regard to the 'reasons' dated 6th June, 2007. It has been argued by him that variance in the *"reasons"* does not have any material effect. It was further submitted that the Additional DIT as well as the DIT have gone through the entire records before granting their approval and thus due procedure was followed before reopening of the assessment. It was further submitted that the AO did not form any specific opinion during the course of original assessment proceedings and, therefore, there arises no question of any change of opinion. On merits, it was submitted by the learned DR that in section 80RR, what has been envisaged is a sportsman, and assessee was not a sportsman during the year. It was further submitted that cricket commentary is not an art. In support of his arguments, he placed reliance upon the judgment of the Tribunal in Harsha Bhogle, 114 TTJ 266.

7. In reply to the argument of the learned DR, learned Counsel for the assessee has submitted that the learned DR has not been able to meet or counter various arguments of learned

Counsel for the assessee with respect to jurisdiction lapses committed by the AO before reopening of the assessment as well as on merits of the case.

8. We have carefully gone through the orders of the lower authorities, arguments made, evidences shown and judgments relied upon before us, by both the parties.

9. We shall first deal with the arguments made by both the parties before us with regard to the reopening of the case. The foremost issue as was raised before us is with regard to existence of two sets of *"reasons"*. The assessment records were produced by the learned DR during the course of hearing before us. Surprisingly, there do exist two sets of *"reasons".* The first set of *"reasons"* is undated which is approved by the Additional-DIT(IT), Range–3, Mumbai, on 24th May 2007 and was forwarded for further approval by the DIT. Accordingly, DIT(IT), Mumbai, granted sanction of the same on 25th May 2007, by making detailed reasoning in his own handwriting. It is noted that while giving reasoning, the DIT had raised few new aspects which were not raised by the AO in the *"reasons"* recorded viz, some difference in income shown in the return of income and amount shown in the remittance certificate and a change in method of accounting by the assessee. It is noted that subsequent to the sanction granted by the DIT, the AO recorded another set of *"reasons"* dated 6th June 2007. This set of *"reasons"* appears to have been provided to the assessee

during the course of assessment proceedings for inviting his objections. But, we could not find anything in the assessment records and nothing was shown to us indicating any approval / sanction from the competent authority under section 151(1) with respect to this set of *"reasons"* dated 6th June 2007. Thus, admittedly, as per records, the reopening has been done without complying with the mandatory jurisdictional condition of section 151. Thus, reopening becomes bad on this ground itself. It is further noted by us that the first set of *"reasons"* (undated reasons) which were got sanctioned from the competent authority were neither furnished to the assessee nor these have been used / considered by the AO for reopening of the assessment and, therefore, these cannot be considered now at this stage for examining the validity of the reopening.

10. The second issue raised by the learned Counsel for the assessee is that there was some audit objection raised by the audit team in its draft review report on eligibility of the assessee to claim deduction under section 80RR. With the assistance of both the parties, it is noted that there is a letter dated 29th September 2006, returned by the Assessing Officer to the CIT, City–5, Mumbai, on the subject of *"Review on assessment of selected companies in selected sectors in the case of Shri Sunil Gavaskar – A.Y. 2000–01 to 2002–03 – comments reg".* One relevant para from the said letter is reproduced hereunder:–

> *"At the outset it is submitted that when the returns for A.Y. 2000–01 & 2002–03 are processed under section 143(1) of I.T. Act, 1961 and the adjustment pointed by the audit are not permissible while processing the return u/s 143(1), hence, in principle the objections raised by the audit are not acceptable for these two years. However, since the issue involved in all the three assessment years is of debatable in nature, further necessary action in this case will be taken after carrying out necessary verification. A final reply will be sent to the audit in due course."*

10.1. The perusal of the aforesaid paragraph would show that the AO himself found that the issue was debatable in nature. The requirement of law for reopening of the case is that the AO should be in a position to form a belief about escapement of income. Although, it is true that at the stage of reopening, the belief need not be conclusive, but it is equally expected that the position of law should be clear in the mind of the AO, at least prima–facie. The belief need not be conclusive but it should be firm and clear. No belief can be formed out of confusion and doubtful thoughts. If this kind of situation is allowed to be sustainable in law, then it is quite possible that there will be experiments by the revenue officials by reopening the case of any assessee at their whims and fancies and that too on the basis of doubts and suspicions and without complying with jurisdictional and other procedural requirements of law. The re–assessment proceedings are not meant to make fishing enquiries and to experiment with the legal issues. In this regard, the position of law is well settled by many judgments

coming from various High Courts. We find support of our view from the judgment of Hon'ble Jurisdictional High Court in IL And FS Investments Managers Ltd. v/s ITO, 298 ITR 32 (Bom.) wherein it was held by the Hon'ble Jurisdictional High Court that where the AO himself disagreed with the audit objection, under such circumstances, there could not have been valid basis to reopen the already concluded assessment. This judgment has been recently followed again by Hon'ble Bombay High Court to reiterate this point in the case of M/s Reliance Industries Ltd. (Dt. 1st FEBRUARY, 2016 in ITA 2000 of 2013). Some of the useful observations of Hon'ble jurisdictional High court are reproduced below:

> "*The jurisdictional requirements to reopen an assessment are:*
> *(i) the AO must have reason to believe that the income chargeable to tax escaped assessment;*
>
> *(ii) the AO in the regular assessment proceedings had not formed an opinion in regard to the issue on which the reopening notice is issued; and*
>
> *(iii) there has been a failure on the part of the Assessee to truly and fully disclose all necessary facts for the assessment.*
>
> *5. In this case, the CIT (A) as well as the Tribunal have, on consideration of the facts arising before them, have concluded that none of the three conditions precedent have been satisfied. The reason to believe that income chargeable to tax has escaped assessment on the part of*

the AO is a sine qua non for issue of a reopening assessment under section 148 of the Act as non-satisfaction of reason to believe would by itself make the notice fatal. In such a case, the satisfaction of other conditions would not even require examination.

6. Both the CIT(A) as well as the Tribunal, on the aforesaid basis came to the conclusion that in view of the fact that the AO himself has not accepted the audit objection, there could be no reason for him to believe that income chargeable to tax has escaped assessment. It is clear from Section 147 of the Act that the jurisdictional requirement to issue a notice for reopening the assessment is the satisfaction of the "AO." This satisfaction of the AO cannot be outsourced or arrived at on the basis of directions of his superiors. The Act requires his reason to believe that income chargeable to tax has escaped assessment. Thus, the impugned notice is not sustainable. In that view, the first condition precedent of reason to believe is that income chargeable to tax is escaped assessment being the primary requirement is not satisfied, the notice for reopening is without jurisdiction.

7. Mr. Malhotra, learned counsel for the Revenue, supports the appeal by stating that once an audit objection had been raised, then the AO is obliged to take remedial action, as in this case, by issuing a reopening notice. This for the reason he states that otherwise the revenue due to

the State would be lost even in case the audit objection is upheld.

8. We are unable to understand how the mandate of the Act requiring the AO to have reason to believe that income chargeable to tax has escaped assessment can be ignored on the altar of revenue collection. If such a submission is to be accepted, it would, be the beginning of the end of the Rule of Law."

The aforesaid judgment is squarely applicable upon the facts of this case before us. Thus, we find that the *"reasons"* recorded by the AO were not in accordance with law.

10.2. It is further noted by us that Para–2 of the *"reasons"* dated 6th June 2007, was modified at the instance of the DIT and Para–3 was added subsequent to the approval from DIT, that too at the instance of the DIT. Allegations made in both these paragraphs were found to be factually incorrect as no effect was given in the assessment order with respect to these issues raised in these two paragraphs. It indicates that firstly there was no independent application of mind of the AO and secondly, the *"reasons"* were factually incorrect, at least to this extent. Under these circumstances, these *"reasons"* cannot be held to be valid on law and facts.

11. The third issue raised by the learned Counsel, which is also quite significant in law, is that the impugned reopening is

barred by limitation in view of the fact that reopening has been done after expiry of four years and original assessment having been done under section 143(3), reopening could not have been done as there was no failure on the part of the assessee in disclosure of material facts.

11.1. We have carefully examined the requisite facts required to address this issue also. It is noted that original return in this case was filed under section 139(1) on 30th October 2001, along with computation sheet, Balance Sheet and Profit & Loss account and tax audit report under section 44AB. All these facts are bone out and evident from the original assessment order passed under section 143(3) dated 25th August 2003. Detailed verification was done during the course of assessment proceedings, before passing the order under section 143(3). Relevant para from the assessment order under section 143(3) dated 25th August, 2003 is reproduced hereunder for the sake of ready reference:–

> *"Return declaring total income of Rs 12065650 was filed on 30.10.2001 along with copies of balance sheet and P&L account and Tax Audit Report u/s. 44AB. The return was processed u/s. 143(1) at the returned income. Notice u/s. 143(2) was issued on 01.10.2002 in response to which Shri. Dilip V. Lakhani - C.A. attended from time to time and necessary details called for were filed and placed on record.*
>
> *2.* ***The assessee is a well known erstwhile Cricketer*** *and who has also been conferred the RASHTRIYA SANMAN by the C.B.D.T on 7th April,*

> *2000, for being the highest taxpayers during the period AY 1994-95 to 1998-99. The assessee's is deriving his income by way of remuneration and interest from the partner firm M/s. PMG Exports in the capacity as a Partner. Salary and rent from M/s All Star Management Group.* ***The assessee has also received foreign remittance from ESPN Star Sports Ltd. for giving commentary****."*
>
> (Emphasis supplied)

11.2. While computing the income in the assessment order, income from business was computed by the AO under the head income from business or profession and deduction under section 80RR thereon was granted as was claimed by the assessee in its return of income. A perusal of the assessment order shows that complete facts have been narrated in the assessment order that assessee is a well known erstwhile cricketer. It has also been mentioned that assessee has also received foreign exchange remittance from ESPN Star Sports Ltd. for giving commentary. Further, perusal of the computation sheet enclosed with the return shown that complete facts have been narrated in the computation sheet wherein income has been shown under the head income tax from business and deduction under section 80RR has been claimed @ 60% of factual income describing the same as professional income from foreign sources. It is further noted that assessee had filed replies to the AO wherein various relevant facts have been mentioned. Some of the relevant points mentioned in the reply dated 22nd August, 2003 are reproduced below:–

"Our client Mr. Sunil Gavaskar has filed the return of income declaring the total income at ` 1,20,65,654. Our client has earned the income from salary of ` 6,00,000. The salary certificate is enclosed along with the return of income. The salary is received from M/s. All Star Management Group Pvt. Ltd."

.....

"8. Our client has received column writing fees from All Star Management Group Pvt. Ltd. for writing column on sports issues.

9. Our client has received professional fees from ESPN Software India Ltd., amounting to Rs 9,53,310, TDS Certificate received from company is enclosed along with return of income.

10. Our client has received foreign remittance from ESPN Star Sports Ltd., for giving commentary. The amount is received in convertible foreign exchange and our client has claimed deduction under section 80RR at 60% of the income received in convertible foreign exchange. The certificate in Form 10H is enclosed along with the return of income in support of the proof that amount is received in convertible foreign exchange."

11.3. It has also been mentioned in the said reply that assessee was conferred Sanman certificate as one of the top tax payer and copy of Sanman certificate was enclosed with the reply. It was also mentioned that assessee was prepared to give further details and evidences in support of income and expenditure claimed in the return of income. Perusal of the Income and Expenditure A/c again reveals that complete item–wise break–up of the income received by the assessee from

various sources has been given. These avenues of income include column writing and commentary, foreign remittances and honorariums and royalty on books. We find that as far as disclosures are concerned, the assessee had provided requisite information and details in his return of income and also furnished further details and evidences during the course of original assessment proceedings. It is not at all a case of failure on the part of the assessee in disclosure of material facts. If at all there was any failure, it would be on the part of the AO in not appreciating the facts and applicable legal position, in the manner as the AO and his DIT want now at the reassessment stage. The law in this regard is very clear. The AO cannot be given benefit of its own wrong, and particularly in those cases which are covered by the first proviso to section 147. The position of law in this regard is well settled on the basis of umpteen numbers of judgments from Hon'ble Jurisdictional High Court and various other Courts of the Country. For ready reference, we shall rely upon a judgment of Hon'ble Bombay High Court in the case of Hindustan Petroleum Corporation Ltd. v. DCIT 328 ITR 534 (Bom) and MAPS Enzyms Ltd. v. DCIT 41 taxmann.com 527 (Guj) wherein it was held that if the assessee had made disclosure of all material facts relating to its claim for the deductions in the return which were allowed by the AO, during the course of original assessment proceedings, then, reopening u/s 147 sought to be done beyond the period of 4 years from the end of the relevant assessment year, on the

ground that the assessee had wrongly been allowed deduction was not permitted under the law and barred by limitation, in view of first proviso to section 147 of the Act. Thus, in view of the above discussion, we find impugned reopening to be barred by limitation in terms of first proviso to section 147.

11.4. The fourth argument of Ld. Counsel was that in this case impugned claim was allowed on the basis of information and documents provided in return as well as original assessment proceedings completed u/s 143(3), and thus AO's attempt of reopening this case on the same set of facts and factual material is based upon change of his opinion and has amounted to review of the original assessment order. On the other hand, Ld DR submitted that no opinion was formed by the AO as no discussion was made by him on this issue in the original assessment order.

11.5. We have considered arguments of both sides. It is noted that a general practice which is uniformly followed in the income tax department by the assessing officers is that the assessment orders are drafted in a manner that these are negatively worded i.e. these contain only adverse observations against the claims made by the assessee in the return of income, and no positive findings are discussed therein. For the sake of brevity and feasibility, only those issues are discussed in the order, on which some disallowance/additions are made in

the order. Thus, to decide whether the AO had actually applied mind upon an issue for which no addition/disallowance was made in the assessment order, we may be required to examine and go through entire relevant material held on assessment record of the AO. If, during the course of original assessment proceedings, pertinent queries were raised by the AO and their replies were given by the assessee or if requisite facts and connected material is held on record of the AO which were relevant to decide an issue, then under these circumstances, a natural inference can be drawn that the AO had applied his mind before framing the assessment order while deciding that issue in favour of the assessee, and an opinion was formed by him in favour of the assessee.

11.6. With the assistance of both the parties, we have gone through the "reasons" recorded. We have already discussed in detail in earlier part of our order that complete facts with regard to work profile and status of the assessee, nature of receipt and particulars of deductions claimed in the return were provided along with return and further supported by further information and documents submitted during the course of original assessment proceedings. The AO had examined these documents and he was aware of complete facts, and thus, apparently, an opinion was formed by the AO while granting the benefit of deduction u/s 80RR.

11.7. Subsequently, at the stage of reopening, the AO has alleged in the "reasons" recorded that the deduction was wrongly granted. In our opinion, it is clearly a case of change of opinion by the AO. The law in this regard is also well settled, i.e., the reopening of an assessment cannot be done on the basis of change of opinion by the AO. This issue has been settled by Hon'ble Supreme Court in the case of Kelvinator of India Ltd. in 320 ITR 561 (SC) and has been followed regularly. Subsequently, in many judgments including various judgments from Hon'ble Bombay High Court also, e.g. in the case of Direct Information Pvt. Ltd. vs. ITO 349 ITR 150 (Bom), a similar view has been taken by the jurisdictional high court. We shall also like to rely upon a very recent judgment from Hon'ble Bombay High Court in the case of Nirmal Bang Securities Pvt. Ltd. v/s ACIT, W.P. No. 2665/2007, order dated 18th January, 2016, in support of our view, wherein it was held that when the assessment order was passed by the AO after due application of mind, after considering that dividend income earned from the mutual funds are exempt from tax u/s 10(33), subsequent initiation of reassessment proceedings would be considered merely on the basis of a change of opinion.

12. Before we conclude and wind up the issue of reopening, we find it appropriate to refer and discuss here that the Government of India had constituted Income-Tax Simplification Committee under the chairmanship of Justice R.V. Easwar,

Former Judge, Delhi High Court. Recently, the Committee has submitted its first report containing first batch of recommendations to be put up in public domain. The Committee seriously considered the problems faced by the taxpayers because of reopening of the assessment in various undeserving cases. Thus, some suggestions have been given by the committee which we find relevant for deciding the issue of reopening in the given facts of the case before us, i.e. where the reopening is done influenced by the audit objections. The relevant part of the suggestion given by the committee is reproduced hereunder for the sake of ready reference:

> *"**RE-OPENING OF ASSESSMENT ON ACCOUNT OF AUDIT OBJECTIONS:***
>
> *One of the key sources of dispute is the existing arrangement for follow up on audit objections by Internal Audit Party and the Revenue Audit Party. In terms of the existing arrangement, the AO is required to take corrective steps following audit objections. The corrective measures take the form of rectification or reassessment (by reopening the case under section 147 or revision by the Principal Commissioner or Commissioner under section 263). In the case of rectification, these are general in the nature of correction for arithmetical errors and other mistakes which are apparent from the record. The problem arises when the AO seeks to take corrective measures by invoking the provisions of section 147 or 263 of the Income tax Act. Since the audit objections are based on material on record and there is no occasion for new material to be brought on record in the course*

of audit, any reopening of assessment or review by the Principal Commissioner constitutes "change of opinion" in the eyes of the law. This being so, the corrective measure under section 147 or section 263 of the Income tax Act is held to be invalid by Courts.

In Indian & Eastern Newspaper Society vs CIT (1979) 119 ITR 996 the Supreme Court extensively considered the powers and duties of both the internal audit party of the Income-tax Department (prior to 1960) and those of the C & AG under the Comptroller & Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 and opined that neither statute recognises the power on such authorities, to pronounce on the law and that their pronouncements on law cannot amount to "information" on the basis of Which assessments can be reopened under Section 147. The same principle in our opinion should hold good for Section 263. It is also noticed that often the income-tax authorities are not in a position to overlook the audit objection on a point of law though they have taken a view after due application of mind to the legal position, due to several reasons. This has led to avoidable litigation, even though the ruling of the Supreme Court is clear and categorical.

Moreover, the Ministry of Law by its advice dated 24th June, 1982 to the Ministry of Finance (Department of Revenue) has opined, after referring to the ruling of the Supreme Court, that the ' .....audit objection as well as the note of the Ministry of Law cannot be the basis for the re-opening of the assessments made under section 59 of the Estate Duty Act. Therefore, the instructions referred to by the Department in para (a) of their note based on the audit objection

directing the reopening of the assessments already concluded runs counter to the decision of the Supreme Court referred to above' *(Source: Page No. 9961 of Volume 6, 11th Edn. Law of Income Tax by Sampath Iyengar)*

In spite of several court judgments to this effect, the CBDT has issued a circular to the effect that in all cases of audit objections, the AO should initiate corrective steps irrespective of whether the objection is valid or not in the eye of law. Consequently, steps are initiated by the AO to reopen the completed assessment or by the Principal Commissioner for revision of assessment orders. These steps give rise to several rounds of litigation; first the assessee challenges the very act of reopening or revision, as the case may be, and upon losing, the Department files appeal before the higher Courts thereby clogging the judicial system. While this process is on, the AO proceeds to complete the assessment on merit leading to another round of litigation. In large number of cases, the assessments on merit are completed even though the Department is in disagreement with the audit objection. This Committee was informed that more than 25% of the litigation in the Department is on account of mandatory corrective measures initiated following audit objections.

In view of the above, it is recommended that to the extent the audit objections are mistakes apparent from record, it should be mandatory for the AO to take corrective steps. ***However, where the correction of the audit objections require re-opening or revision of completed assessments, the same should not be permitted since it amounts to change of opinion and creates uncertainty for the taxpayer.*** *Such audit objections may be used*

> *as material for knowledge dissemination and system improvement. In other words, such audit objections may be given prospective effect by amending the law or issuing circular, as the case may be, to remove ambiguity and eliminate all scope for litigation."*

12.1. Thus, from the above, it is clear that the Committee, after considering entire gamut of circumstances faced by the revenue as well as assessees, suggested that reopening, merely on the basis of audit objections and in absence of any new material indicating escapement of income, amounts to change of opinion and creates uncertainties for taxpayers. Thus, our view is in line with ideal position of law as envisaged by a competent body.

13. The fifth argument of the Ld. Counsel is for assailing the "reasons" on its merits. It has been argued that on the facts of the case and law applicable, no *prima facie* belief could have been formed about escapement of income in the hands of the assessee.

14. The sixth and last argument of the assessee was that disallowance was incorrect as per law and facts on merits also. We shall deal with both of these arguments together, as these are interconnected with each other.

14.1. It has been submitted that even, if more comprehensive "reasons" i.e. "reasons" dated 06.06.2007 are taken into consideration, it can be seen that all the three allegations made in the "reasons" are factually incorrect and legally invalid. We have gone through the "reasons" recorded. The first allegation of the AO is with regard to wrong claim of deduction u/s 80RR, which we shall deal and discuss in detail, little later.

14.2. The second allegation is that there was difference to the tune of Rs.1,94,362/- in the income shown as per remittance certificate for Rs.1,60,90,500/- whereas, as per computation of income the assessee has show income of Rs.1,62,85,132/-. Thus, according to AO there was difference of Rs.1,94,632/-. We have gone through the requisite facts of this case. It is noted that allegations made in the 'reasons' are found to be not only factually incorrect but of no implication also. It has been alleged in the "reasons" that income shown by the assessee in its computation sheet is more by a sum of Rs.1,94,632/- as compared to the amount of receipts shown in the remittance certificate. Even, this allegation is factually correct; it does not prove any escapement of income. Rather, it shows excess assessment of income. Even, otherwise no addition has been made in the assessment order on this ground and this ground was dropped being factually and legally incorrect.

14.3. The third para of the "reasons" states that there was some change in method of accounting by the assessee during the year as compared to the preceding year. From the perusal of the assessment, it is noted that no cognizance has been taken by the AO even for this allegation while computing income in the assessment order by the AO. It is, thus, apparent that even this allegation was without any substance and real implication upon the assessment of income of the assessee.

15. Now, we are left with the assertion made in the first para of the 'reasons' about alleged wrong claim of the assessee for claiming deduction u/s 80RR of Rs.97,71,079/- being 60% of the professional income from foreign sources amounting to Rs.1,62,85,132/-. It has been stated in the 'reasons' that deduction u/s 80RR is allowable in respect of professional income from foreign sources where the total income of an individual being *inter-alia* sportsman, includes an income derived by him in the exercise of his profession from any person not resident in India, but, in this case the assessee was neither a sportsman nor an athlete. According to AO, the assessee did not exercise any of the professions covered in definition of section 80RR, and thus the assessee had wrongly claim deduction u/s 80RR.

15.1. We have examined entire gamut of facts of this case and judgments placed before us on this issue by both the sides.

Admitted facts on record, which are in public domain also, are that the assessee has been a cricketer of international stature and has been always playing for the country in domestic as well as international cricket tournaments. The perusal of the Income Tax Expenditure account of the assessee for the year under consideration reveals that the assessee has received income *inter alia* from following sources:

(i) Column writing and commentary

(ii) Royalty on books

(iii) Honorarium

(iv) Foreign Remittances (received from M/s. ESPN Star Sports Ltd., Singapore.

15.2. The assessee had received income in the form of foreign remittances, on which deduction was claimed u/s 80RR, in pursuance to an agreement, dated 10th May, 1999 with M/s ESPN Star Sports for rendering services on an exclusive basis as a presenter, reporter and commentator and various other allied services described in the said agreement. Ld. CIT(A) examined and discussed about clause 2(a) of the agreement, but after discussing about the same, claim of the assessee was rejected on the ground that this deduction is available to a person who is sportsman or a person belonging to any one of the categories as mentioned in the said section and the income must be derived as a result of carrying out that very activity only. But in the case of assessee, since assessee was no more a sportsman or a cricketer and in any case since the impugned

income was not earned as a result of playing cricket, and therefore, in view of requirement of section 80RR, the assessee was not eligible to claim the deduction u/s 80RR. We have carefully considered the contention of the revenue, but do not agree with the contentions raised before us for denying the benefit of section 80RR to the assessee by the AO, Ld. CIT(A) or even Ld. DR, for various reasons as are discussed in following paragraphs.

15.3. In this regard, before interpreting the provisions of section 80RR, we shall like to discuss a little background as to why this provision was brought on the statute, and for this purpose we need not go too far as the object of this section was again clarified by Central Board of Direct Taxes vide its circular no.281 dated 22nd September, 1980 while explaining rationale of the amendment made in section 80RR by Finance Act, 1980 for including few more categories of persons eligible to claim benefit of deduction u/s 80RR. The relevant para of this circular is reproduced hereunder:

> *"**23.1: Extension of the benefit of deduction in respect of professional income for foreign sources to sportsmen and athletes- section 80RR-***
> *Under section 80RR, a resident individual being an author, playwright, artist, musician or actor, who derives income in the exercise of his profession from foreign sources and receives such income in India or beings it into India in foreign exchange, it entitled to deduct 25 per cent of the income so received or brought into India in computing his total income. This provision is designed to encourage authors, playwrights, artists, musicians and actors in our*

> *country to project their activities outside India with a view to contributing to greater understanding of our country and its culture abroad and also for augmenting our foreign exchange resources.* ***With a view to encouraging our sportsmen and athletes to compete in international events****, the Finance Act has amended section 80RR to include them in the category of persons entitled to the benefit of that section."*

15.4. The perusal of the above said circular clearly shows that section 80RR is a beneficial provision intended to provide benefits of tax concessions to those persons who can contribute to greater understanding of our country and its culture abroad and also for augmenting our foreign exchange resources. The circular clearly lays down that aim of section 80RR is to encourage our sportsman, and athletes and persons of other categories as mentioned in the section 80RR.

15.5. In the backdrop of aforesaid object of this section, it can be clearly said that object of the law was to incentivize and encourage persons in the field of sports, author, artists, and other categories as mentioned therein. It is well settled law that beneficial provisions of the law must be construed liberally. While interpreting a beneficial legislation, rule of liberal construction should be preferred over the rule of strict interpretation, and therefore an effort must be made to see how the benefit can be provided to the persons who are claiming it sincerely and genuinely. The interpretation that enables us to achieve its object should be preferred over the one that tend to frustrate it, and the one which takes us in a

direction to find out how the benefit can be denied. Thus, for appreciating the true meaning of the terms used in the section, an expression of wider amplitude may be preferred in comparison to a narrower one while defining scope and boundaries of the benefits intended to be provided by the legislature. Any type of narrow minded approach or myopic view while examining the eligibility of deduction may cause undue hardship to eligible persons and may frustrate the object of legislation. Purposive Construction is a well accepted rule of interpretation which says that the courts must look upon the object which the statute seeks to achieve, especially while interpreting any beneficial legislation. If there is an ambiguity, a purposive approach for interpreting the Act is necessary. If two views are possible, one effectuates the purpose or intendment of the provision and the other frustrates it, the former must be preferred. Every effort should be made to make a purposive construction with a view to effectuate the purpose and object of the statutory provision.

15.6. In the case of Smt. Saroj Aggarwal vs. CIT 156 ITR 497 (SC), Hon'ble Supreme Court has set out certain tests for interpretation of statutes. It was observed that facts should be viewed in natural perspective, having regard to the compulsion of the circumstances of a case. Where it is possible to draw two inferences from the facts and where there is no evidence of any dishonest or improper motive on the part of the assessee, it would be just and equitable to draw such inference in such a

manner that would lead to equity and justice. Too hyper-technical or legalistic approach should be avoided in looking at a provision which must be equitably interpreted and justly administered. Courts should, whenever possible, unless prevented by the express language of any section or compelling circumstances of any particular case, make a benevolent and justice-oriented inference. Facts must be viewed in the social milieu of a country.

15.7. Further, the apex Court in the case of CIT vs. Gwalior Rayon Silk Manufacturing Co. Ltd. 196 ITR 149 (SC) has held with regard to the interpretation of statute granting deduction, exemption, or relief to the taxpayer that it is settled law that the expression used in the taxing statute would ordinarily be understood in the sense in which it is harmonious with the object of statute to effectuate the legislative intention. It is equally settled law that, if the language is plain and unambiguous, one can only look fairly at the language used and interpret it to give effect to the legislative intention. Nevertheless, tax laws have to be interpreted reasonably and in consonance with justice adopting purposive approach. The contextual meaning has to be ascertained and given effect to. A provision for deduction, exemption or relief should be construed reasonably and in favour of the assessee.

15.8. In the case CIT vs. Sultan & Sons Rice Mill 272 ITR 181 (All), Hon’ble Allahabad High Court observed that it is said that a statute is best understood if we know the reason for it. The reason for a statute is the safest guide to its interpretation. The

words of a statute take their colour from the reason for it. No provision in the statute and no word of the statute may be construed in isolation. Every provision and every word must be looked at generally before any provision or word is attempted to be construed. The setting and pattern are important.

15.9. Hon'ble Supreme Court in the decision reported in CIT vs. J.H. Gotla 156 ITR 323 (SC), has observed that if a strict and literal construction of the statute leads to an absurd result, i.e., a result not intended to be sub-served by the object of the legislation ascertained from the scheme of the legislation then if another construction is possible apart from the strict literal construction, then that construction should be preferred to the strict literal construction. Where the plain literal interpretation of a statutory provision produces a manifestly unjust result which could never have been intended by the legislature, the Court might modify the language used by the legislature so as to achieve the intention of the legislature and produce a rational result. What is even more significant is the observation of the Court in this case wherein it was observed that though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice, then such construction should be preferred to the literal construction.

15.10. In aforesaid legal background, let us further analyse the provisions of section 80RR in the light of the facts of this case.

16. For better appreciation of law and facts, it is necessary to first analyse the relevant provisions of section 80RR as they stood in the relevant Assessment Year, which read as under:

> *"Where the gross total income of an individual resident in India, being an author, playwright, artist [musician, actor or sportsman (including an athlete)] includes any income derived by him in the exercise of his profession from the Government of a foreign State or any person not resident in India, there shall be allowed in computing the total income of the individual, a deduction from such income of an amount equal to*
>
> *(i) Sixty per cent of such income or an assessment year beginning on 1st day of April, 2001;*
>
> *……..*
>
> *As is brought into India by, or on behalf of, the assessee in convertible foreign exchange within a period of six months from the end of the previous year or within such further period as the competent authority may allow in this behalf and no deduction shall he allowed unless the assessee furnishes a certificate in the prescribed form, along with the return of income, certifying that the deduction has been correctly claimed in accordance with the provisions of this section.*
>
> ……

16.1. The plain reading of above provisions shows that the following conditions needs to be satisfied for the purpose of the above section :-

(a) The individual must be a resident in India;

(b) He should be an author, playwright, artist, musician and actor or sportsman (including an athlete);

(c) The income should be derived by him in the exercise of his

profession;

(d) The income should be received from the Government of a foreign State or any person not resident in India.

If all the four conditions are satisfied, an amount equal to 60% of such income so received or brought into India during the year under consideration by the assessee in convertible foreign exchange within a period of six months from the end of the previous year or within such further period as the competent authority may allow, is deductible from such gross total income.

16.2. According to the lower authorities conditions mentioned in clause a) and d) are duly complied with, as the assessee is resident individual in India and received income from a person not resident in India. The revenue has disputed compliance of the conditions mentioned only in clauses (b) and (c) above. According to the AO, the assessee was neither a sportsman nor an artist nor an author, and thus not eligible to claim benefit of this deduction. It was further held by the revenue that the impugned income was not derived from exercise of his profession by the assessee as sportsman. Therefore, we need to analyse whether the assessee has fulfilled both of these conditions in the given facts or not.

16.3. Since, the term sportsman has not been defined in the Act and the impugned provisions are beneficial provisions

intending to provide the benefits to the public at large, therefore, it would be appropriate to analyse the expression sportsman as is used commonly by the society in generic sense. We have referred to the meaning of the term sportsman in Wikipedia, and meaning explained therein is reproduced below:

> *"Sportsperson*
> *From Wikipedia, the free encyclopedia*
> *Jim Thorpe at the 1912 Summer Olympics*
>
> *A sportsperson, also known as sportsman or sportswoman, is a man or woman who is involved in sports. It may mean someone who is known for the promotion of sport or athletic activities.*
> *A sportsperson can be a man or a woman who is person trained to compete or interested in a sport involving physical strength, speed or endurance. A sportsman is a player in a sport, but the term also means someone who plays sport in a way that shows respect and fairness towards the opposing player or team.*
>
> *The term sportsman can also be used to describe a former competitor who continues to promote the sport in later years. For example, Tsunekazu Takeda is a sportsman who competed in two Summer Olympic Games and who was the International Olympic Committee (IOC) in 2012."*

From the above definition, it is noted that the term sportsman may also be used to describe a former player who continues to remain associated and engaged, for the promotion of the related sport activities. The facts of the case are that the assessee has been undoubtedly a cricketer of international stature. He was honoured with 'Arjun Award' by the

Government of India and 'Maharashtra Bhushan' by the Government of Maharashtra as life time achievement award for his sporting excellence. It has been shown to us that the assessee has been playing cricket matches in India and abroad, even after he had stopped playing tournaments of international and national levels. The evidences of such district level and other smaller level matches participated and played by the assessee were brushed aside by the AO on the ground that such kind of tournaments and matches are of no relevance. In our view action of the AO is not justified.

16.4. It is further noted by us from the certificate dated 21st May, 2009 issued by ICC Cricket Committee that assessee was nominated by the Board of Control for Cricket In India (BCCI) as Indian representative and accordingly the ICC Executive, Board elected the assessee as the chairman of 'Cricket Committee- Playing' at its meeting in June, 2000. This committee was subsequently renamed as ICC Cricket Committee. The assessee remained its chairman until his resignation in May, 2008. We shall further like to state the broad intention of section 80RR, as was discussed in detail in earlier part of this order also, is to promote the sports and persons associated with it for the sake of building up greater understanding of the country and augmenting foreign resources. Thus, if we adopt a broader definition of the term sportsman, as we should, in view of the legal discussion made

in earlier paragraphs, then, we can certainly consider to include therein not only a persons who actively played in the field in the impugned year but also a person who had been actively playing in the field in earlier years and thereafter, he continued to remain associated with the related sport and promoted the same sport, but from outside the field. Our view gets further strengthened from this fact that in section 80RR, it has been no where mentioned that the sportsman should be the person who is currently playing in the field or the person earning income directly from playing in the field only. Thus, we find that the broader objective of section 80RR is met if we define the term sportsman in a wider sense, as seems to have been intended by the legislature also. In this backdrop, it can certainly be said that the assessee was a sportsman during the year for the purpose of section 80RR.

17. After deciding the above issue, let us now, see compliance of the other condition i.e. whether the assessee's income includes any income derived by him in the exercise of his profession.

17.1. If, we carefully go through section 80RR, we find that this section has been drafted by the legislature in such a manner that it has apparently intended to include wider range of income derived by a sportsman (or a person belonging to any one or more of the categories as prescribed in the section) in

the exercise of his profession. It has not been stated in section that the income should be derived by the person from playing in the 'field' or directly exercising the core activity pertaining to the category to which that person belongs. If the legislature would have stated so, in that case the intention of the legislature would have been narrower in terms of nature of income to be considered as eligible for deduction under this section. Thus, what we understand from the reading of the section is that any income derived by the sportsman during the course of his profession which arise out of core activity (i.e. activity of playing in the field), and also other subsidiary & allied activities which are linked to and have nexus with the core activity of the sports, should also be included in the scope of the income eligible for deduction u/s 80RR. We do **not** mean to say that any type of income which has remote connection or no connection with or which are independent of the core activity would also be covered in this section. Further, those activities which go beyond the parameters of profession and take the shape of business activities shall also not fall in the scope of income derived during the course of profession in the context of section 80RR.

17.2. The legislature has clearly abstained from using the expressions like income derived from playing cricket (or sports), or participating in the game, or writing of books or literature, or say income derived from acting or performing

some art work etc etc. Rather, the legislature was careful and conscious in using the expressions i.e. '……income derived by him in the exercise of his profession……'. Thus, in our view, clear intention of the legislature is to include the incomes of the eligible persons earned from all the closely connected allied activities in addition to the core activity.

17.3. In the case of Milind C. Shrivastava v. JCIT, (96 ITD 284 (Mum.), Hon'ble Bombay Bench of the Tribunal held that under sections 80HH, 80I, 80IA, and other similar sections, the mandatory requirements of the law is that income should be derived from an industrial undertaking, whereas, on the other hand, u/s 80RR, income has to be derived in the exercise of profession. Thus, language used by the legislature in section 80RR is to be liberally interpreted. If any income is derived by the assessee in the exercise of his carrying on his profession, the assessee would be eligible for deduction u/s 80RR. Thus, it was held that assessee, being a music director fall in the category of an 'artist' and would be eligible to claim deduction u/s 80RR. In the said case the amount was received as an advance by the said assessee for performing music shows abroad. But his music shows got cancelled due to certain uncontrollable reasons. The AO denied the benefit of deduction on the ground that the income was not earned from performing any shows and therefore, assessee did not exercise his profession in earning the eligible income. The bench analysed

the provisions of section 80RR and held that provisions of section 80RR should be liberally interpreted as the word used in this section are 'any income derived in the exercise of profession', in contra-distinction to sections 80HH, 80I, 80IA and to other similar sections where the mandatory requirement of the law is that the gross total income of the assessee includes income derived from any industrial undertaking. Under these circumstances, it was held by the Hon'ble bench that even, if the shows were not performed by the assessee but since the section has to be liberally interpreted, therefore, it can be said that income was derived by the assessee in the course of his profession.

17.4. We have carefully gone through facts relating to impugned income received by the assessee from M/s. ESPN Star Sports. For properly appreciating the facts, we have referred to some of the relevant clauses of the agreement of the assessee with M/s. ESPN Star Sports, reproduced hereunder:

> *"2(a) ESPN STAR Sports hereby engages you to render services on an exclusive basis as a presenter, reporter and commentator for its sports programming service (the "Programming") and such other services as described herein and you agree to render such services. You shall perform the services, under ESPN STAR Sports direction and control, as a presenter and commentator, including but not limited to on the air appearances, voice over announcements, commentary, interviews, ESPN STAR Sports commercials and promotions, radio*

appearances, audio recordings, narration, hosting rehearsals, vocal recordings (looping, post-synching and the like), costume fitting and other pre- and post-production activities, and related services as well as such programs as ESPN STAR Sports may from time to time elect to produce for or exhibit on ESPN STAR Sports. In addition, You shall also be available for sales functions, cross-channel promotions, photography sessions, publicity and promotional appearances, appearances for marketing and advertising purposes on other channels owned or operated by ESPN STAR Sports and any of their associated companies, radio appearances and off-the-air personal appearances for promotional purposes as ESPN STAR Sports may require (the "Project Services")

(b) For the purposes of this Agreement, sports programming shall consist of commentating, presenting or being an expert guest on any cricket tournaments being broadcast by ESPN STAR Sports, contributing to any magazine or news' shows broadcast including "Inside Cricket" by ESPN STAR Sports and any specific ancillary programming for a Cricket World Cup, mini World Cup or test championships. Any studio show of thirty (30) minutes or more in duration, such as stumped, shall not be included in this Agreement and You shall be reimbursed separately, the terms of which shall he mutually agreed upon.....

17.5. In the facts of the case before us, it is noted that the assessee has derived its income as a result of his agreement with M/s ESPN Star Sports for the services provided by the assessee as a presenter and commentator and other allied activities which have been discussed in the relevant clauses of the agreement. Thus, assignment has been given to the assessee and this role has been performed by him effectively,

because of his having been a cricketer of international stature and he was chosen for the skill and knowledge he possessed and the delivery he could have given because of this skill and experience. We can, unhesitatingly, say that the contribution for promotion to the game of cricket is possible not only while playing in the field but also outside the field while performing various other crucial roles, like that of a coach, empire and commentator etc. The entire role of the assessee and the activity performed by him for which he was remunerated, have a direct and proximate link with the game of cricket. In the given facts of this case, one cannot visualise earning of this income, de-horse the assessee having been a cricketer and a sportsman and nor can it be visualised independent of the game of cricket. We have already held in earlier part of our order that assessee falls in the category of a 'sportsman'. Thus, in our considered opinion, the facts of this suggest that the impugned income has been derived by the assessee in the exercise of his profession as a 'sportsman'.

17.6. During the course of hearing, ld. DR had relied upon the decision of tribunal in the case of Harsha Bhogle vs ITO 114 TTJ 266, and submitted that Mr. Bhogle was also commentator and claimed deduction u/s 80RR, which was denied by the AO and his action was confirmed by the tribunal. We have gone through this decision and find that Mr. Bhogle had claimed deduction u/s 80RR as an actor/artist. He never made a claim

as a 'sportsman'. Thus issue before the bench was different and the facts of the said case and ratio decided therein are not applicable on the facts of the case before us.

18. The assessee had made another alternative argument, on without prejudice basis that if assessee is not treated as a 'sportsman', then he shall fall in another category namely 'artist'. It has been contended that while performing the role of commentator and presenter, there was an element of art involved in the performance of the assessee, and Assessee's performance was like that of an artist, and therefore, viewed from this angle also the impugned income derived by the assessee in the exercise of his profession as an 'Artist' is eligible for deduction u/s 80RR, and in support of his argument Ld Counsel relied upon the judgments of CIT vs. Tarun R.Tahiliani, 328 ITR 629 (Bom), Amitabh Bachchan v. DCIT (12 SOT 95 ITAT-Mum.), Prem Prakash v. ITO, (ITAT-Delhi in ITA 60/Del/1989), Sachin Tendulkar v. ACIT (ITAT-Mumbai in ITA no.428 to 430/Mum/2008)and DCIT v. M/s. Preeti Vyas, (314 ITR (AT) 69 (Mum). He had also referred to various clauses of agreement between assessee and ESPN Star to support his claim. But, since we held that assessee's case falls in the category of a 'sportsman', therefore we are not going into this aspect, and leaving it open at this stage.

19. Thus, the facts of this case suggest that the assessee is eligible to claim deduction u/s 80RR, and therefore no belief could have been formed for escapements of his income. The claim is allowable on merits also, as discussed above in detail. Thus, the benefit of deduction claimed u/s 80RR was in accordance with law, and therefore, disallowance made by the AO in this regard is directed to be deleted.

20. As a result Ground nos. 1, 2 & 3 are allowed and Ground no.4 is consequential, therefore, dismissed and Ground no.5 is general and does not need any specific adjudication.

Now we shall take up assessee's appeal for AY 2002-03 in ITA No.3971/Mum/2010:

21. In this appeal also the issue involved and the facts are identical to A.Y. 2001-02. The grounds raised by the assessee are also identical. The reopening has been done on the same reason that deduction u/s 80RR was wrongly claimed by the assessee. In the A.Y. 2001-02, we have held that in the given facts of the case, no belief could have been formed about escapement of income and it has also been held that assessee had rightly made a claim as per law, and therefore, we have quashed the reopening on various grounds and also held the claim u/s 80RR as allowable to the assessee. Thus, our order for A.Y. 2001-02 shall apply *mutatis mutandis* on the facts of this year as well as on the issues raised by the assessee in the appeal of this year. Accordingly, ground nos. 1, 2, & 3 are

allowed, Ground no.4 is consequential and therefore, dismissed, and ground no.5 is general and does not need any specific adjudication.

22. As a result, both the appeals are partly allowed.

Pronounced in the open Court on 16th March, 2016.

Sd/-	Sd/-
(Saktijit Dey)	(Ashwani Taneja)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

MUMBAI, DATED: 16th March, 2016.

Patel, P.S.

Copy of the order forwarded to:

(1) The Assessee;
(2) The Revenue;
(3) The CIT(A);
(4) The CIT, Mumbai City concerned;
(5) The DR, ITAT, Mumbai;
(6) Guard file.

By Order
(Dy./Asstt. Registrar)
ITAT, Mumbai