# THE HIGH COURT OF DELHI AT NEW DELHI

WP (C) 6911/2004

Judgment delivered on: 27.05.2004

**SITA WORLD TRAVEL (INDIA) LTD.** ...Petitioner

- versus -

**COMMISSIONER OF INCOME TAX DELHI AND ANOTHER** ...Respondents

**Advocates who appeared in this case:**

For the Petitioner : Mr M.S. Syali, Sr. Advocate with Mr Satish Khosla and Mr Manu K. Giri.

For Respondents : Mr Sanjeev Sabharwal with Ms Rashmi Chopra.

**CORAM:-**

**HON'BLE MR JUSTICE B.C. PATEL, CHIEF JUSTICE**
**HON'BLE MR. JUSTICE BADAR DURREZ AHMED**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in Digest?

## CHIEF JUSTICE (ORAL)

1. This writ petition has been filed by the petitioner, *inter alia*, challenging the action of the respondent, whereby in exercise of powers under Section 147 of the Income-tax Act, 1961 (hereinafter referred to as the `Act'), the Assessing Officer reopened the assessment, and ultimately, made the reassessment for years



1996-97 and 1997-98.

2. The petitioner is a company which is engaged in the business of travel agency as a tour operator and is providing related services. The service rendered by the petitioner includes booking with hotels, airlines, railways and other transporters for tourists. For rendering such services, the petitioner receives commission from airlines.

3. For the year ending on 31.3.1996 as also 31.3.1997, returns declaring income of Rs. 2,63,32,380/- and Rs. 3,18,17,220/- were filed on 29.11.1996 and 28.11.1997 respectively. In computation of the income for the aforesaid assessment years, claim was made under Section 80-HHD of the Act. For Assessment Year 1996-1997 a deduction of Rs. 7,12,62,547/- and for the Assessment Year 1997-1998 deduction of Rs. 7,90,29,899/- was claimed.

4. It is the case of the petitioner that the returns as required by sub-section (6) of section 80-HHD were accompanied by the report of the Chartered Accountant and the said claim was in conformity with the amendment made by the Finance Act, 1994. It was indicated as to on what items deductions are claimed. On the

basis of the returns submitted by the assessee for the relevant years, the assessments were made under section 143(3) of the Act, after examining various issues including the claim of deduction under Section 80-HHD of the Act. For the assessment year 1996-97 against the claim of Rs.7,12,62,527/- under Section 80-HHD, deduction was allowed at Rs. 2,50,46,133/- . In the assessment order for the year 1996-97 at page 46 of the paper book, there is a discussion with regard to the claim under Section 80-HHD. The discussion for claim made for the aforesaid year in the assessment order is as under:

> " Now, a most important point of the case is discussed. This is with regard to the claim of deduction claimed by the assessee u/s 80-HHD. During the year the assessee has claimed a total sum of Rs.7,12,62,527/- as deduction u/s 80-HHD. The assessee has following a peculiar method of accounting for the purpose of computation of deduction u/s 80-HHD. The assessee has taken the advances for providing the services to the foreign tourist as part of the total receipt in foreign exchange receipt of Rs. 64.70 crores. Out of this amount, the assesee has passed on Rs. 24.83 crores to other concerns who have provided services to the foreign tourists. For Rs. 24.82 crores, Forms 10 CCAE have been issued. Therefore, the total receipt of foreign exchange during the year is Rs. 39.87 crores which includes substantial amount of advances in foreign exchange for which services have not been provided so far during the year by

> the assessee to the foreign tourists. The entire amount of Rs. 39.87 crores has not been included as gross income of the assessee in the P & L Account."

The same discussion is found for the other assessment year as well.

5. The matter was carried in appeal and what the CIT(Appeals) has noted is as under:

> " Total convertible foreign exchange from foreign tours received during the year (-) amount of convertible foreign exchange received on account of exchange rate fluctuation (-) payments referred to in section 80-HHD(2A) (+) customers at credit at the beginning of the year (-) customers at credit at the closing of the year."

6. The CIT (Appeals) disposed of the appeal on 28.08.2001 and, thereafter, no further appeals have been preferred on this issue by either side. It is, thereafter, on 24.3.2003 i.e., after expiry of more than four years from the end of the relevant assessment year, that notices were issued under section 148 of the Act for the assessment years, *inter alia*, stating that the Assessing Officer had reason to believe that the petitioner's income for respective years has escaped assessment within the meaning of section 147 of the Act. The notices are produced at annexure P-8. In response to the same, the petitioner on or about 10.04.2004 refiled a copy of the

original income tax return, inter *alia*, requesting the same may be treated in compliance with the notices. The request was also made to furnish the reasons recorded. On 19.05.2003, the respondent furnished the reasons. For the assessment year1996-97, the reasons recorded are as under:

> " During the financial year relevant to assessment year 1996-97, the assessee had received foreign exchange receipts of Rs. 86.97 crores out of which Rs. 24.88 crores were in respect of receipts, for which certificates were given to other hoteliers and transporters. The amount of Rs. 24.88 crores was excluded by the assessee from total receipt of the business while computing deduction under section 80-HHD of the I.T. Act. In the order under section 143(3) as also before the CIT(A), this amount was not included in total receipts for computing deduction under section 80-HHD.
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> However, as per sub-section (3) of section 80-HHD, the deduction equals [eligible foreign exchange/total receipts of the business] x business income. Total receipts (which forms the denominator in the above formula) should include the foreign exchange receipts of Rs. 24.82 crores, since it is very much a part of the total receipts of the business carried on by the assessee. However, the assessee had excluded it from total receipts and in the order under section 143(3) as well, this position did not change. This matter was also not before the CIT(A) and is also not presently before the Tribunal. Had this amount of Rs. 24.82 crores been included in the total receipts, the deduction under section 80-HHD would have been much

lower than that claimed by the assessee and determined in the various orders passed, as mentioned above. This would go to increase the total income of the assessee.

I, therefore, have reason to believe that income chargeable to tax has escaped assessment within the meaning of clause (c) to Explanation 2 of Section 147 of the I.T. Act."

7. Identical reasons were recorded for assessment year 1997-98. The petitioner vide its letter dated 16.6.2003 objected to the assumption of jurisdiction, *inter alia,* pointing out that there was full and complete disclosure on the basis of computation of the deduction under section 80-HHD and that the deduction was allowed on the basis of figures of profit shown in the Profit and Loss Account. Whereas the petitioner claimed deduction on the actual foreign exchange and actual receipt. It was also contended that merely on the change of opinion, the proceedings cannot be initiated for re-assessment.

8. The petitioner approached this court by preferring a writ petition, *inter alia,* requesting the court to quash the notices issued for the assessment years 1996-97 and 1997-98. However, a Division Bench of this court in WP(C) No. 4487/2003 by an order dated 18.7.2003 issued direction in view of the decision of the

Supreme Court in the case of ***GKN Driveshafts (India) v Income-tax Officer & Ors*** **(2003) 259 ITR 19** to dispose of the objections filed by the petitioner with regard to his jurisdiction to reopen the assessment under Section 147/148 of the Act, by a speaking order, before proceeding with the re-assessment proceedings.

9. It is required to be noted that instead of passing a separate speaking order on objections raised, in gross violation of the order made by this court a regular order of assessment was passed. The said assessment orders were again challenged by the petitioner since the assessing officer, instead of passing a speaking order before proceeding with the re-assessment proceedings in respect of assessment of the relevant years, made the assessment and passed the order. The court on 10.03.2004 disposed of the writ petition by setting aside the assessment orders with the direction to the assessing officer to pass a speaking order within a period of eight weeks. It is, thereafter, the assessing officer made the speaking order and that is under challenge before this court. The said order was made on 27.4.2004. Immediately after passing the aforesaid speaking order, the Assessing Officer made assessment orders also. In fact, after filing of the writ petition, the assessment orders were

made and with the permission of the court the assessee has also challenged the said assessment orders. It was contended on behalf of the learned counsel for the petitioner that this is a case of change of opinion only and all the material was placed on the record and no new or other material has been placed on record.

10. It is contended by the learned counsel for the petitioner that the assessing officer had formed an opinion when the assessment was made under section 143(3) on 25.02.1999, that the deduction was to be allowed by dividing turnover as reduced by turnover passed to others under section 80-HHD (2A) by the total turn over as reduced by the same figure. It is also pointed out that the fact of deduction is noted by the assessing officer in the assessment order itself. This clearly indicates that the assessing officer while framing the assessment had examined the factual aspect as well as applicability of the provisions of the Act and, particularly, section 80-HHD of the Act and had, thereafter, arrived at a conclusion about the extent of availability of the benefit under Section 80-HHD of the Act.

11. Learned counsel for the assessee has relied on the decision in the case of **Jindal Photofilms** 234 ITR 172(Delhi) for

the proposition that change of opinion cannot be the basis of a re-assessment even in the context of the law as changed from 01.04.89. It was further contended that to confer the jurisdiction under Section 147 of the Act and for issuance of notice in respect of the assessment beyond the period of four years from the end of the relevant assessment year, it must be shown that there was an escapement of income on account of failure of the petitioner to disclose fully and truly all primary facts. It was contended before us that no such allegations were made in the reasons recorded while issuing the notices under Section 147 of the Act, but in the counter affidavit filed before this court it was alleged that there was a failure on the part of the assessee to disclose fully and truly all primary facts.

12. From the original assessment orders as well as order made by the appellate authority, it is very clear that the assessing officer was well aware about the primary facts, namely, the claim made by the assessee, the circumstances under which the claim was made and the provisions of law which could be applied while granting the benefits. A decision may be wrong or right is none of the concern of the subsequent officer. If the primary facts were not

available or there was concealment or there was no application of the mind at all then, a case for reopening the assessment could be made out. But, when all the facts were placed before the Assessing officer and the assessing officer consciously considered the facts and arrived at a decision then can it be reopened merely because subsequently he changes his opinion or some other officer takes a different view? We think not.

13. Our attention was invited to the decision of the case, namely, ***Sheth Brothers v Joint Commissioner of Income Tax*** **251 ITR 270** which points out as to the manner in which the assessing officer is required to proceed while making an assessment. While allowing the petition in the case of Sheth Brothers (supra), the court pointed out the decision of the Supreme Court in the case of ***Calcutta Discount Co. Ltd v. IOT*** **41 ITR 191 (SC)** wherein it was pointed out as under:

> "There are three stages involved in every assessment, (i) disclosure of primary facts; (ii) inferences of facts to be drawn from the primary facts disclosed and (iii) legal inferences to be drawn from the primary facts disclosed and the inferences of facts drawn from them. The duty of the assessee relates to disclosure of primary facts alone. The duty to find the inferential facts from the primary facts disclosed as well as the duty of

> drawing inferences of law from the facts found are both on the Assessing Officer. The disclosure which is required to be made by the assessee should not only be full but also true. The conjunction "and" is an important one and has been interpreted as a strict prescription of law. In case of absence of one of the elements, either in part or in whole, it will grant jurisdiction to the officer."

14. Giving this decision, the court pointed out in the facts of that case that the petitioner had disclosed all the primary facts necessary for the purpose of the assessment, (ii) on the facts there was no material for holding a belief and the respondent could not have reason to believe that there was any escapement of income chargeable to tax, (iii) the reasons recorded showed that instead of independent application of mind, the Assessing Officer merely chose to adopt the line of action pointed out by the internal revenue audit (iv) the entire affidavit-in-reply goes to show that though the respondent was aware that there was no omission or failure on the part of the petitioner, the recording of reasons was a colourable exercise for assumption of jurisdiction. The relevant facts were taken into consideration by the Assessing Officer while making the assessment which we have indicated hereinabove and, therefore, there is no question of any escapement of income chargeable to

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income tax. Therefore, in our opinion, this is a case of wrongful assumption of jurisdiction and as such the notices, the speaking orders and the assessment orders made in pursuance to the notices are required to be quashed and set aside and are accordingly set aside.

The petition is allowed with no order as to costs.

Bolaeil.

**CHIEF JUSTICE**

**BADAR DURREZ AHMED, J**

**May 27, 2004**
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