

---

**(2010) 06 BOM CK 0183**  
**In the Bombay High Court**  
**Case No : Writ Petition No. 772 of 2010**

Prashant Projects Ltd.

APPELLANT

Vs

Assistant Commissioner of Income Tax, 10(3), Mumbai

RESPONDENT

---

**Date of Decision :** 25-06-2010

**Acts Referred:**

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 143(3), 147, 148, 80HHC, 80HHC(3)(a)

**Citation :** (2011) 238 CTR 289 : (2011) 335 ITR 368 : (2011) 201 TAXMAN 158

**Hon'ble Judges :** J.P. Devadhar, J; D.Y. Chandrachud, J

**Bench :** Division Bench

**Advocate :** R. Murlidhar and Atul K. Jasani, for the Appellant; Suchitra Kamble, for the Respondent

---

## Judgement

Dr. D.Y. Chandrachud, J.—Rule. With the consent of Counsel, rule is made returnable forthwith. By consent of Counsel for both the parties, the petition is taken up for hearing and final disposal. In these proceedings under Article 226 of the Constitution, the challenge by the assessee is to the reopening of an assessment for assessment year 2002-03 in purported exercise of powers conferred by section 147 of the income tax Act, 1961. A notice u/s 148 has been issued on 25-3-2009, beyond a period of four years of the end of the relevant assessment year. The issue that will fall for determination of the Court, as a result, is whether there was a failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for the assessment year in question.

2. The assessee filed a return of income on 29-10-2002 disclosing a nil total income. In the computation of its total income, the assessee disclosed a gross total income of Rs. 3.42 crores. A deduction was claimed u/s 80HHC in the amount of Rs. 6.02 crores but the extent of the total deduction was restricted to the gross total income of Rs. 3.42 crores. The Petitioner furnished the details of its domestic turnover and export turnover. A net profit of Rs. 8.60 crores was

claimed from the export turnover. In the report in Form 10CCAC, the assessee disclosed a profit from the export of trading goods of Rs. 8.60 crores and as against the adjusted profits of the business, reported a loss of Rs. 5.29 crores.

3. A notice was issued to the assessee on 16-8-2004 for reopening the assessment. The ground which was set out in the notice was that the assessee had in its return of income declared a nil total income after claiming a deduction u/s 80HHC of Rs. 3.42 crores. According to the Assessing Officer, the assessee had shown as against the adjusted profit of the business, a loss of Rs. 5.29 crores. As the assessee had allegedly incurred a loss on the export business, the Assessing Officer held that it was not entitled to a deduction u/s 80HHC. The assessee filed its objections to the reopening of the assessment on 27-9-2005 and contended that it qualified for a deduction under sub-section (3)(b) of section 80HHC for the export of trading goods. The profits of its business as a trading exporter were stated to be Rs. 8.60 crores whereas in its domestic operations, the assessee stated that it had incurred a loss of Rs. 5.29 crores. Consequently, the profit from the business, according to the books of account, was Rs. 3.31 crores. The gross total income under the Act was reported to be Rs. 3.23 crores.

4. The Assessing Officer passed an order u/s 143(3) on 31-3-2006 and came to the conclusion that the assessee was carrying on manufacturing activity during the course of the assessment year. The deduction u/s 80HHC was accordingly recomputed. The issue was carried in appeal by the assessee and by an order dated 20-3-2007, the Commissioner (Appeals) accepted the contention of the assessee that it was not a manufacturer exporter but a trader exporter. Before arriving at this conclusion, the Commissioner (Appeals) had called for a remand report from the Assessing Officer. By his remand report dated 8-2-2007, the Assessing Officer reiterated that the assessee was a trader exporter within the meaning of section 80HHC(3)(b). The conclusion that was arrived at by the Commissioner (Appeals) was as follows:

...After considering the entire facts and remand report, I am of the view that Assessing Officer was not justified in treating the appellant as a manufacturer exporter. The appellant has exported goods to Kenya for a project during the year under consideration. For this purpose, appellant purchased steel plates, angles, channels etc. from the market and exported the same to Kenya for the project. As per the evidences filed and examined by the Assessing Officer, no manufacturing work was done by the appellant and it has done simply trading export. The appellant had simply purchased the steel plates and exported the same either in the same condition or at the most after cutting to the size required by the purchaser. No new article or thing was brought into existence in this process. The appellant has submitted copies of drawings, purchase and sale invoices which have been examined by the Assessing Officer in remand proceedings. In view of these facts and remand report, I am of the view that Assessing Officer was not correct in treating the appellant as manufacturer and

calculating the deduction u/s 80HHC(3)(a) of the Act as against section 80HHC(3)(b) as claimed by the assessee. In view of the aforesaid detailed facts and various case laws relied by the appellant and the fact that on the similar fact in assessment year 2003-04, the Assessing Officer has treated the appellant as trader exporter, the Assessing Officer is directed to allow deduction u/s 80HHC by treating the assessee as trader exporter as per section 80HHC(3)(b) of the Act.

5. Effect was given to the order passed by the Commissioner (Appeals) on 28-1-2009. It is thereafter that the assessment has been sought to be reopened on 25-3-2009. The reasons on the basis of which the assessment is sought to be reopened have been furnished to the assessee on 18-6-2009 and they read as follows:

From the return of income, it is noticed that the assessee has claimed deduction u/s 80HHC of Rs. 1,28,85,916. However, on perusal of the case records, it is seen that the assessee is engaged in design & construction of Oil Gas Petroleum Storage Terminals on turnkey basis and is, therefore, manufacturer. It is seen from the P & L Account that exports out of India were manufactured goods. It is noticed from the Form No. 10CCA that the adjusted profit of the business is a loss to the extent of Rs. 5 29,77,712 and the assessee is not entitled for any deduction u/s 80HHC.

Thus, there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for the said assessment year, I have reasons to believe that the income to the extent of Rs. 1,28,85,916 has been escaped the assessment.

6. The learned Counsel appearing on behalf of the assessee urged four submissions in support of the petition: (i) There was a full disclosure by the assessee of all the material facts in relation to the assessment and the assessee had specifically claimed a deduction as a trader exporter u/s 80HHC(3)(b); (ii) There was a due application mind by the Assessing Officer. The Assessing Officer had initially rejected the contention of the assessee that he was a trader exporter and came to the conclusion that the assessee was a manufacturer exporter. On appeal, when a remand report was called by the Commissioner (Appeals), the Assessing Officer after considering the evidence produced by the assessee accepted that the assessee was a trader exporter. The Commissioner (Appeals) affirmed that the assessee was a trader exporter within the meaning of section 80HHC(3)(b); (iii) In the circumstances, the Assessing Officer could not have had reason to believe that income had escaped assessment or that the assessee was a manufacturer as distinguished from a trader in relation to the claim for deduction; (iv) In any event, in view of the second proviso to section 147, the Assessing Officer could not have had reason to believe that income had escaped assessment since the specific issue on the basis of which the assessment is sought to be reopened was governed by proceedings in appeal before the Commissioner (Appeals).

7. On the other hand, Counsel appearing on behalf of the revenue has supported the notice that was issued for reopening of the assessment on the grounds which are set out in the notice.

8. The reopening of the assessment has taken place after a period of four years of the end of the relevant assessment year. The assessment in the present case had taken place u/s 143(3). The validity of the notice reopening the assessment would depend upon whether within the meaning of the proviso to section 147, there was a failure on the part of the assessee to disclose fully and truly all material facts relating to the assessment for that assessment year. Now the record before the Court discloses that the assessee had furnished, together with its return, details of the gross total income (Rs. 3.42 crores); the claim for the deduction u/s 80HHC; details of the profit and loss account pertaining to the export and domestic turnover and relevant information in the report contained in Form 10CCAC. The information provided in Form 10CCAC was to the effect that profits from the export of trading goods were Rs. 8.60 crores while there was a loss from domestic operations amounting to Rs. 5.29 crores. The Assessing Officer, obviously applied his mind to the issue because when he passed an order of assessment on 31 March, 2006, he specifically held that the assessee was carrying on manufacturing activity and having exported manufactured goods could claim a deduction u/s 80HHC only as a manufacturer. During the course of the appellate proceedings before the Commissioner (Appeals), a remand report was called for and the Assessing Officer after considering the material which was produced by the assessee concluded that goods have been purchased by the assessee which were then exported and that the case of the assessee fell within the purview of sub-section (3)(b) of section 80HHC. The Commissioner (Appeals) accepted the contention of the assessee. This shows that there was both a full and true disclosure of the facts by the assessee and that there was a due application of mind by the Assessing Officer. Hence, the condition precedent to the exercise of the jurisdiction to reopen the assessment beyond four years of the end of the relevant assessment year has not been fulfilled in this case. There was no failure on the part of the assessee to disclose fully and truly all material facts. The Assessing Officer could not have formed a reason to believe that income has escaped assessment. That apart, there is merit in the contention that in terms of the second proviso to section 147, the assessment could not have been reopened. The second proviso to section 147 provides that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment. The very issue on which the assessment is sought to be reopened was canvassed in appeal and was determined in the appellate proceedings by the Commissioner (Appeals). The same issue could not lawfully form the basis of the notice for reopening the assessment. For all these reasons, the petition would have to be allowed and is accordingly allowed. Rule is made absolute by setting aside the notice issued by the first Respondent on 25-3-2009 purporting to reopen the assessment for

assessment year 2002-03 u/s 148. There shall be no order as to costs.