

(2006) 02 DEL CK 0170

In the Delhi High Court

Case No : Writ Petition (C) No"s. 14376 and 14377 of 2005

Techspan India (P.) Ltd.

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 24-02-2006

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 10A, 10A(1), 10B, 139(1), 143(1)

Citation : (2007) 158 TAXMAN 182

Hon'ble Judges : T.S. Thakur, J;Badar Durrez Ahmed, J

Bench : Division Bench

Advocate : C.S. Aggarwal and Prakash Kumar, for the Appellant; R.D. Jolly, for the Respondent

Judgement

Badar Durrez Ahmed, J.—With the consent of the parties this writ petition is taken up for final disposal at the admission stage itself. This writ petition is directed against the notice dated 10-2-2005, issued u/s 148 of the income tax Act, 1961 (hereinafter referred to as "the said Act"), issued by the income tax Officer in respect of the assessment year 2001-02. It is also directed against the order dated 17-8-2005, passed by the income tax Officer in response to the objections to the said notice of 10-2-2005, filed by the assessee (petitioner No. 1). By virtue of this order dated 17-8-2005, the assessee's objections have been overruled and its request to drop the proceedings u/s 147/148 of the said Act have been rejected and the reassessment has been directed to be proceeded with. At the outset, it may be mentioned that two issues arise for our consideration in this writ petition. The first issue relates to the maintainability of the writ petition for quashing a notice u/s 148 of the Act and/or a speaking order disposing of the objections filed thereto. It is the contention of the petitioners that if the initiation of proceedings u/s 147, by issuance of a notice u/s 148, is itself without jurisdiction then, they are entitled to challenge the same by way of a writ petition both at the stage of the issuance of the notice u/s 148 as well as at the stage after the speaking order is passed disposing of the assessee's

objections to such notice and the assessee need not wait for the completion of the reassessment and challenge the order of reassessment by way of an appeal. On the other hand, it was contended on behalf of the revenue that a writ petition would not be maintainable in view of the fact that the assessee would have the remedy of appeal available to it once the reassessment order is passed and in such appeal the assessee can take all the grounds of challenge as have been taken in the present writ petition. The second issue is on the merits of the matter. According to the writ petitioners, before proceedings u/s 147 of the said Act can be initiated, it is imperative that the Assessing Officer must have "reason to believe" that income chargeable to tax has escaped assessment. This belief must be a genuine belief and must be based on something new that has come to the notice of the Assessing Officer and must not represent a mere change in opinion. In the present case, the impugned notice dated 10-2-2005, was issued on the premise that the deduction u/s 10A of the said Act had been allowed in excess and, accordingly, income had escaped assessment to the extent of Rs. 57,36,811. It was the case of the revenue that the deduction u/s 10A was allowable on the basis of profits of the whole business and not on the basis of the profits of the undertaking eligible for deduction u/s 10A. The assessee's contention is that the deduction u/s 10A has to be computed on the basis of profits of the eligible undertaking and not on the basis of the profits of the whole business particularly in view of the amendment of sub-section (4) of section 10A of the Act with effect from 1-4-2001. It was further submitted on behalf of the petitioners that when the original assessment was done all these factors were examined in detail and the deduction u/s 10A was computed on the basis of profits of the eligible undertaking. The subsequent view sought to be taken by the Assessing Officer while issuing the notice u/s 148 of the said Act, therefore, represented a mere change of opinion on the same set of facts. Therefore, it was contended that the initiation of proceedings u/s 147/148 of the said Act was without jurisdiction and was liable to be set aside. The revenue, on the other hand, contended that the deduction had been allowed in excess and the Assessing Officer was within his rights to reopen the assessment as he had reason to believe that income had escaped assessment.

2. Before we consider the two issues noted above, it would be pertinent to point out certain facts which are relevant. The assessee (petitioner No. 1) is a private limited company which was incorporated on 5-10-1998, under the Companies Act, 1956, and is engaged in the business of development and export of computer software and human resource services. The undertaking of the assessee engaged in the business of development and export of computer software is in a "software technology park" (STP) and is eligible for deduction u/s 10A of the Act. In respect of the assessment year 2001-02, the assessee filed a return of income u/s 139(1) of the said Act on 25-10-2001, declaring a loss of Rs. 3,31,301. The return was processed u/s 143(1) and an intimation dated 28-6-2002, u/s 143(1)(a) of the said Act was issued accepting the returned loss. Thereafter the return was selected for regular assessment u/s 143(3) of the said

Act and during the course of these proceedings, a show-cause notice dated 9-3-2004, was issued to the assessee regarding allocation of common expenses between the STP unit (software technology) and non-STP unit (human resource development). In the said show-cause notice dated 9-3-2004, it was specifically observed that the assessee was declaring income/receipts from two sources, namely, (1) software development and (2) human resources development. The assessee was required to show cause as to why the expenses not be allocated between the two divisions in a proportionate manner as indicated in the notice itself in view of the fact that the assessee was not maintaining separate books of account for each division. By a letter dated 12-3-2004, the assessee, through its chartered accountant, gave a detailed reply to the proposed allocation between the two divisions. Thereafter, assessment was completed and by the assessment order dated 23-2-2004, a total income of Rs. 44,78,231 was determined which was fully set off against the brought forward loss for the assessment year 2000-01. Subsequently, the assessment order was rectified u/s 154 by an order dated 29-11-2004, and the total income was computed at Rs. 31,63,570 which was fully set off against the brought forward loss for the assessment year 2000-01. Accordingly, the income was assessed at nil. The issue had rested there till 10-2-2005, when the Assessing Officer issued the impugned notice u/s 148 indicating that he had reason to believe that income chargeable to tax for the assessment year 2001-02 had escaped assessment within the meaning of section 147 of the said Act. And, therefore, the Assessing Officer proposed to reassess the income. By a letter dated 15-3-2005, the assessee requested for the reasons recorded for initiation of the reassessment proceedings. These reasons were supplied by a letter dated 16-3-2005. On the same date the assessee had filed his return of income, under protest declaring nil income, the reasons disclosed were that "thus, deduction u/s 10A have been allowed in excess and income escaped assessment works out to Rs. 57,36,811." The assessee, through its chartered accountant, submitted its objections to the reasons on 28-3-2005. The main thrust of the objections was that the deductions u/s 10A had been rightly claimed and rightly allowed in the original assessment and there was no question of any income escaping assessment. It was also urged that the issuance of the notice u/s 148 was without jurisdiction inasmuch as the reasons recorded reflected a mere change in opinion which was not permissible for reopening an assessment. In the objections, the assessee had also prayed that in view of the directions given in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, , the objections raised by the assessee be disposed of by a speaking order. It is in this background that the speaking order dated 17-8-2005, which is also impugned herein came to be passed. The objections of the assessee were rejected and it was directed that the assessment proceedings pursuant to section 148 notice be continued. The reason for rejecting the objections disclosed in the speaking order was as under:

The assessee-company was not maintaining any separate books of account from the very beginning of its business and for the period relevant to the assessment

year under consideration. In subsequent assessment years the assessee-company itself has computed the income/expenses on pro rata basis.

3. Aggrieved by the notice dated 10-2-2005, as well as the order dated 17-8-2005, and the continuation of the reassessment proceedings, the petitioners have approached this Court by way of this writ petition.

4. I, now take up the issue with regard to the maintainability of a petition under article 226 of the Constitution seeking issuance of a writ of certiorari quashing a notice u/s 148 and the speaking order passed by the Assessing Officer pursuant to the objections filed by the assessee. The leading case on the issue is the Constitution Bench decision of the Supreme Court in the case of Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, . The majority judgment was delivered by Das Gupta, J., the majority view of the Supreme Court was expressed in the following manner:

Mr. Sastri next pointed out that at the stage when the income tax Officer issued the notices he was not acting judicially or quasi-judicially and so a writ of certiorari or prohibition cannot issue. It is well-settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well-settled, will issue appropriate orders or directions to prevent such consequences.

Mr. Sastri mentioned more than once the fact that the company would have sufficient opportunity to raise this question, viz., whether the income tax Officer had reason to believe that underassessment had resulted from non-disclosure of material facts, before the income tax Officer himself in the assessment proceedings and, if unsuccessful there, before the Appellate Officer or the Appellate Tribunal or in the High Court u/s 66(2) of the Indian income tax Act. The existence of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action.

In the present case the company contends that the conditions precedent for the assumption of jurisdiction u/s 34 were not satisfied and came to the Court at the earliest opportunity. There is nothing in its conduct which would justify the refusal of proper relief under article 226. When the Constitution confers on the High Courts the power to give relief it becomes the duty of the Courts to give such relief in fit cases and the Courts would be failing to perform their duty if relief is refused without adequate reasons. In the present case we can find no reason for which relief should be refused. (p. 207)

5. The Supreme Court, as is clear from the aforesaid, repelled the argument that a writ petition would not lie inasmuch as the question whether the income tax Officer had reason to believe that underassessment had resulted from non-

disclosure of material facts could be agitated before the income tax Officer in the assessment proceedings and, if unsuccessful there, before the Appellate Officer or the Appellate Tribunal. This decision which was rendered as far back as in 1961 holds good even today inasmuch as no contrary decision of a larger Bench has been brought to our notice. On the contrary, there is affirmation by the Supreme Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , wherein with reference to, inter alia, the Constitution Bench decision in Calcutta Discount Co. Ltd.'s case (supra), the Supreme Court held:

20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation. (p. 11)

6. The procedure to be followed when a notice u/s 148 of the said Act is issued has been settled by the decision of the Supreme Court in the case of GKN Driveshafts (India) Ltd. (supra) in the following words:

We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice u/s 148 of the income tax Act is issued, the proper course of action for the noticee is to file a return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years. (p. 20)

7. A similar question as the one posed before us arose for consideration before the Gujarat High Court in the case of Garden Finance Ltd. Vs. Assistant Commissioner of Income Tax, . When the matter first came up before a Division Bench (D.H. Waghela and D.A. Mehta, JJ.), there was a difference of opinion amongst the two Hon'ble Judges. Waghela, J., took the view that in view of the Supreme Court decision in GKN Driveshafts (India) Ltd.'s case (supra), the petitioner had an efficacious alternative remedy and, therefore, the petition could not be entertained at this stage. Mehta, J., however, took the view that in the case of GKN Driveshafts (India) Ltd. (supra) the Supreme Court did not lay down the law that in no case the assessee could move the Court under article 226 for challenging the reassessment notice. In view of the difference of opinion amongst the two Judges of the Division Bench, the same was referred to a Third Judge (M.S. Shah, J.) who agreed with the view taken by Mehta, J., on the maintainability of a writ petition. The view taken by him was:

What the Supreme Court has now done in the GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, is not to whittle down the principle laid down by the Constitution Bench of the Apex Court in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, but to require the assessee first to lodge preliminary objection before the Assessing Officer who is bound to decide the preliminary objections to issuance of the reassessment notice by passing a speaking order and, therefore, if such order on the preliminary objections is still against the assessee, the assessee will get an opportunity to challenge the same by filing a writ petition so that he does not have to wait till completion of the reassessment proceedings which would have entailed the liability to pay tax and interest on reassessment and also to go through the gamut of appeal, the second appeal before the income tax Appellate Tribunal and then reference/tax appeal to the High Court.

Viewed in this light, it appears to me that the rigour of availing of the alternative remedy before the Assessing Officer for objecting to the reassessment notice u/s 148 has been considerably softened by the Apex Court in GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, in the year 2003. In my view, therefore, the GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, does not run counter to the Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, but it merely provides for challenge to the reassessment notice in two stages, that is,--

(i) raising preliminary objections before the Assessing Officer and in case of failure before the Assessing Officer,

(ii) challenging the speaking order of the Assessing Officer u/s 148 of the Act.

May be in a given case, the exercise of the powers u/s 148 may be so arbitrary or mala fide that the court may entertain the petition without requiring the assessee to approach the Assessing Officer but such cases would be few and far between. For instance, in Mohinder Singh Malik Vs. Chief Commissioner of Income Tax and Others, , the Punjab and Haryana High Court was concerned with the challenge to the notice u/s 148 of the Act where the grievance of the petitioner was that the notice was issued with an ulterior motive and that the Assessing Officer had been demanding illegal gratification from the assessee, failing which the Assessing Officer was threatening that the assessment would be reopened and that it was because of non-compliance with such demand that the impugned notice came to be issued. It was in the context of such facts that, although the court did not record any positive finding against the Assessing Officer, looking to the reasons recorded and the circumstances in which the notice was issued, the court raised its eyebrows and looked into the merits of the matter and held that the issuance of the notice was not at all justified. (p. 87)

8. A similar view was expressed by a Division Bench of the Allahabad High Court in the case of Indra Prastha Chemicals (P) Ltd. and Others Vs. Commissioner of Income Tax and Another, held:

The Constitution Benches of the Hon'ble Supreme Court, in *K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc.*, ; *Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya*, ; *Union of India (UOI) Vs. T.R. Varma*, ; *State of U.P. v. Mohammad Nooh* AIR 1958 SC 86 and *K.S. Venkataraman and Co. Vs. State of Madras*, , held that article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision could not be adopted.

In *Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others*, , the Hon'ble Supreme Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is failure of principle of natural justice or where the orders of proceedings are wholly without jurisdiction or the vires of an Act is challenged.

As held by the Apex Court in the case of *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, and *Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Special Investigation Circle "B", Nagpur*, this Court under article 226 is entitled to go into the relevancy of the reasons as also to scrutinize as to whether there was reasonable belief or not. Thus, the writ petition under article 226 is maintainable.

In view of the foregoing discussion, we are of the considered opinion that the notice issued u/s 148 of the Act for the assessment years 1993-94 and 1994-95 and the entire proceedings taken pursuant thereto are wholly without jurisdiction and hereby quashed. (p. 122)

9. Having considered the arguments of counsel and the aforesaid decisions, I am of the opinion that the Supreme Court in the case of *Discount Co. Ltd.* (supra) had clearly indicated that a writ petition would be maintainable to challenge invocation of proceedings for reassessment even though it was also open to the assessee to challenge the same before the Assessing Officer during the assessment as also challenge the same before the appellate authorities after the reassessment proceedings were completed. This well-settled position of law has held the field since 1961 and, as indicated by the Supreme Court itself in the case of *Whirlpool Corpn.* (supra), although much water has flown under the bridge, there has been no corrosive effect on this position of law. The decision of *GKN Driveshafts (India) Ltd.*'s case (supra) also gives an indication that the requirement of passing the speaking order would provide an opportunity to the assessee to challenge the same by way of a writ petition under article 226. This

interpretation finds favour with the Division Benches of other High Courts including the Gujarat High Court and the Allahabad High Court, as indicated above, and, in my view, is the correct position in law. As indicated in *Whirlpool Corpn.*'s case (supra), the jurisdiction of the High Court in entertaining a writ petition under article 226 of the Constitution would not be affected although there exist alternative statutory remedies particularly in cases where the authority against whom the writ has been filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation. It, however, remains a matter of discretion with the court as to whether in a particular case, it ought to interfere or not. But, a writ petition such as the one with which we are dealing, cannot be thrown out at the threshold on the ground that it is not maintainable.

10. This brings us to the issue of whether the reassessment proceeding initiated in the present case is without jurisdiction. It is to be remembered that the assessee had contended that the reasons recorded for issuance of a notice u/s 148 of the Act merely disclosed that there was a change in opinion. It is clear from the decision of this Court in *Jindal Photo Films Ltd. Vs. The Deputy Commissioner of Income Tax*, that (headnote) "where the income tax Officer attempts to reopen an assessment because the opinion formed earlier by him was in his opinion incorrect, the reopening could not be done." This Court clearly held that (headnote) "the power to reopen an assessment was conferred by the Legislature not with the intention to enable the income tax Officer to reopen the final decision made against the revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods." It was also held that (headnote) "if an expenditure or deduction was wrongly allowed while computing the taxable income of the assessee, the same could not be brought to tax by reopening the assessment merely on account of the Assessing Officer subsequently forming an opinion that earlier he had erred in allowing the expenditure or the deduction." Again in *Transworld International Inc. Vs. Jt. Commissioner of Income Tax*, this Court held (page 255) "hence, on the same material a different view was sought to be taken and that was nothing but a mere change of opinion and that would not amount to escapement of income. Mere change of opinion would not confer jurisdiction upon the Assessing Officer to initiate proceedings u/s 147."

11. In this context, we have to examine as to whether the facts of the present case disclose that the reopening of the assessment was based upon a mere change of opinion. It has already been noted above that during the original assessment proceedings a detailed inquiry was conducted by the Assessing Officer. The Assessing Officer even issued a show-cause notice on 9-3-2004, requiring the assessee to indicate the allocation of expenses to the software division and the fulfilment division and even suggested a proposed working of the allocation on proportionate basis. The suggestion was made on the premise

that the assessee had not maintained separate books of account for each division. The assessee, as indicated above, had given a detailed reply justifying the allocation made by it. After a detailed examination of the same, the assessment was completed and a deduction u/s 10A to the extent of Rs. 4,86,62,452 was allowed. In the reasons given for reopening, all that is indicated, is that the deduction u/s 10A had been allowed in excess and, therefore, income had escaped assessment to the tune of Rs. 57,36,811. In the said reasons it was indicated that the deduction u/s 10A ought to be only Rs. 3,73,77,462 as that would be derived from the formula:

Business profits

?

Total export of computer software

Total business turnover

12. In the speaking order, however, the only reason purportedly given for rejecting the objections raised by the assessee was that the assessee was not maintaining any separate books of account. But this was clearly considered by the Assessing Officer during the original assessment proceedings. In fact, this was expressly stated in the show-cause notice dated 9-3-2004, itself. It is evident that no new material came to light and on the same set of facts, the subsequent Assessing Officer merely had a change of opinion with regard to the deduction u/s 10A allowed to the assessee. In this view of the matter, the reopening of the assessment would not be justified and would be without jurisdiction. Accordingly, the reopening of the assessment by issuance of the notice u/s 148 as well as the speaking order dated 17-8-2005, and proceedings pursuant thereto are liable to be quashed.

13. It must also be pointed out that the argument raised by the assessee in his objections with regard to the amendment of sub-section (4) to section 10A was not at all taken into account by the Assessing Officer in the impugned speaking order dated 17-8-2005. The specific argument raised by the assessee in the objections was as under:

4. The relevant provisions of section 10A (as applicable for the assessment year 2001-02) read as follows:

(1) Subject to the provisions of this section, any profits and gains derived by an assessee from an industrial undertaking to which this section applies shall not be included in the total income of the assessee....

(4) For the purposes of sub-section (1), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business of the undertaking, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the undertaking.

14. The abovementioned sub-section (4) was substituted by the Finance Act, 2001, with effect from 1-4-2001. The sub-section (4) prior to the amendment was as follows:

For the purposes of sub-section (1), the profits derived from export of articles or things or computer software shall be the amount which bears to the profits of the business, the same proportion as the export turnover in respect of such articles or things or computer software bears to the total turnover of the business carried on by the assessee.

15. The relevant extract of the Memorandum explaining the Finance Bill, 2001 is as follows:

Under section 10A of the income tax Act, newly established undertakings in free trade zones are entitled to a tax holiday for a ten years period. Similarly, section 10B of the income tax Act provides for a ten years tax holiday in respect of newly established hundred per cent export oriented undertakings. The Finance Act, 2000, substituted sections 10A and 10B of the income tax Act. The newly substituted provisions of sections 10A and 10B provide for deduction from profits and gains of business derived by an undertaking engaged in the manufacture or production of articles or things or computer software for a period of ten consecutive assessment years in a manner that the deductions are gradually phased out over the subsequent period.

The Bill proposes to amend the definition of "export turnover" to clarify that the working of the proportionate deduction on export profits are meant to be of the undertaking, and not for the business, as a whole and to further clarify that in the event of conversion of a Free Trade Zone into Special Economic Zone the period of ten years shall be reckoned from the date the unit first began to manufacture or produce articles or things or computer software.

The proposed amendment being clarificatory, will take effect from 1-4-2001, and will, accordingly, apply in relation to the assessment year 2001-02 and subsequent years.

16. The relevant extracts of the Central Board of Direct Taxes Circular No. 14 [2001] 252 ITR (St.) 65, explaining the amendments made by the Finance Act, 2001, is as follows:

21. Rationalization of provisions related to undertakings in Free Trade Zone, Export Processing Zones, Special Economic Zones and Export Oriented Units.

21.1 u/s 10A of the income tax Act, newly established undertakings in free trade zones are entitled to a tax holiday for a ten years period. Similarly, section 10B of the income tax Act provides for a ten years tax holiday in respect of newly established, hundred per cent export oriented undertakings. The Finance Act, 2000, substituted sections 10A and 10B of the income tax Act. The newly substituted provisions of sections 10A and 10B provide for deduction of profits and gains of business derived by an undertaking from export of products or

articles or things or computer software for a period of ten consecutive assessment years in a manner that the deductions are gradually phased out over the subsequent period. The definition of "export turnover" has been amended to clarify that the working of the proportionate deduction on export profits are meant to be of the undertaking, and not of the business, as a whole.

From a bare perusal of the difference between the language of old and new sub-section (4), the Memorandum explaining the Finance Bill, 2001, and the Central Board of Direct Taxes Circular, it can be observed that after the amendment the deduction u/s 10A shall be computed in respect of the profits of the business of the undertaking and not in respect of the profits of the whole business. (p. 83)

17. It is clear that the profits derived from export of computer software for the purposes of section 10A(1) of the said Act, insofar as the assessment year 2001-02 is concerned, would have to be computed using the following equation:

Profits derived from export of computer software

=

Profits of the undertaking ? Export turnover

Total turnover of business of the undertaking

18. This is exactly what the assessee had done and this is how it was originally assessed. The Assessing Officer now proposes to assess petitioner No. 1 on the basis of the equation:

Profits derived from export of computer software

=

Profits of the business ? Export turnover

Total turnover of business

19. This is based on the old provision and cannot be applied to the assessee for the assessment year 2001-02. This aspect of the matter was not at all considered by the Assessing Officer and it is clear that the deduction claimed by the assessee and granted during the original assessment on the basis of profits of the undertaking and not profits of the whole business cannot be said to be contrary to the provisions of law as applicable for the assessment year 2001-02.

20. Considering all these aspects, I have no hesitation in allowing the writ petition and in quashing the impugned notice u/s 148 of the Act dated 10-2-2005, as well as the order dated 17-8-2005. I also quash all proceedings initiated in pursuance of the said notice dated 10-2-2005. No costs.

T.S. Thakur, J.

21. I have had the advantage of reading the order proposed by my esteemed Brother, Badar Durrez Ahmed, J. I agree with the conclusion drawn by his

Lordship that the writ petition deserves to be allowed and the impugned notice u/s 148 of the income tax Act, quashed. I would, however, add a few lines of my own on two distinct aspects that arise for consideration and that have been dealt with in the draft judgment authored by my noble Brother.

22. The power of the High Court to issue prerogative writs under article 226, is untrammelled by any ordinary piece of legislation, whether enacted by Parliament or a State Legislature. The income tax Act, 1961, is one such piece of legislation which does not and cannot in the constitutional scheme of things affect the power of the superior courts in the country to issue appropriate writs in appropriate cases. Having said that, we need to remember that the writ jurisdiction is not only discretionary but equitable in nature. A court need not interfere, just because it is lawful to do so. The courts have, therefore, evolved certain self-imposed restrictions for the exercise of their power under article 226. A writ court would not interfere where the petitioner is not acting bona fide or where he has not come with clean hands. So also a court would not interfere where the grant of relief would involve investigation into disputed questions of fact. Availability of an equally efficacious alternative remedy is yet another situation where the court may refuse to step in, unless the case involves violation of the principles of natural justice or a palpable lack of jurisdiction on the part of the authority passing the order, or a challenge to the provisions of the statute under which the impugned order has been passed. Suffice it to say that while the jurisdiction of the court is discretionary, the exercise of discretion is not uncanalised or arbitrary. The discretion has to be exercised along judicial lines. Whether or not a case for interference has been made out, would, therefore, depend upon the facts and circumstances of each case. And since the facts of a case are rarely if ever similar to that of another case, the court will have to examine the matter each time its jurisdiction is invoked by a litigant. This is particularly so in cases where the assessee challenges notices issued u/s 148 of the income tax Act, proposing to reopen concluded assessments, on the ground that income that was taxable has escaped assessment for a given year or years. Just because the court has interfered in one case may not in such cases, be a reason enough to interfere in every case; nor can the colour of facts be matched between two cases to show that interference in one must necessarily justify interference in the other.

23. The other aspect regarding which I wish to strike a note of caution is that before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier concluded has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the Assessing Officer any opinion on the questions that are raised in the proposed reassessment proceedings. Every attempt to bring to tax income that has escaped assessment cannot be aborted by judicial intervention on an assumed

change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings. There may be cases where the material is available with the Assessing Officer but the same is either ignored or escapes his attention while making the assessment. There can be no legal impediment in the reopening of assessment in such cases, nor can it be said that the reassessment is based only on a change of opinion. A Division Bench of this Court of which I was a Member had in Consolidated Photo and Finvest Ltd. Vs. Asst. Commissioner of Income Tax, an occasion to deal with a somewhat similar situation. Relying upon the decisions of the Supreme Court in Calcutta Discount Co. Ltd.'s case (supra), Kantamani Venkata Narayana and Sons Vs. First Additional Income Tax Officer, Rajahmundry, , Malegaon Electricity Co. P. Ltd. Vs. Commissioner of Income Tax, Bombay, and Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, and the decision of the High Court of Gujarat in Praful Chunilal Patel Vs. M.J. Makwana, Assistant Commissioner of Income Tax, and Gruh Finance Ltd. Vs. Joint Commissioner of Income Tax, , this Court observed:

...The Assessing Officer has in the reasoned order passed by him indicated the basis on which income exigible to tax had in his opinion escaped assessment. The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the Assessing Officer proposes to examine in the course of reassessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the Assessing Officer and had been held in favour of the assessee is too far-fetched a proposition to merit acceptance. There may indeed be a presumption that the assessment proceedings have been regularly conducted, but there can be no presumption that even when the order of assessment is silent, all possible angles and aspects of a controversy had been examined and determined by the Assessing Officer. It is trite that a matter in issue can be validly determined only upon application of mind by the authority determining the same. Application of mind is, in turn, best demonstrated by disclosure of mind, which is best done by giving reasons for the view which the authority is taking. In cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that the authority has not applied its mind to the issue before it nor formed any opinion. The principle that a mere change of opinion cannot be a basis for reopening completed assessments would be applicable only to situations where the Assessing Officer has applied his mind and taken a conscious decision on a particular matter in issue. It will have no application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment, as is the position in the present case.... (p. 406)

The above passage in my opinion summarises the legal position as regards the approach that the court has to adopt while examining whether the proposed

reassessment is based only on a change of opinion or is founded on some other material that the Assessing Officer has noticed to initiate action against the assessee. With these observations, I agree with the order proposed by Brother Ahmed.