Sheth Brothers Vs Joint Commissioner of Income Tax

Special Civil Application No''s. 1992 to 1994 of 2001

Court: Gujarat High Court

Date of Decision: June 22, 2001

Acts Referred:
Income Tax Act, 1961 â€" Section 22, 80, 80HH

Citation: (2001) 251 ITR 270

Hon'ble Judges: D.A. Mehta, J; B.C. Patel, J

Bench: Division Bench

Advocate: S.N. Soparkar, for the Appellant; Akil Qureshi, for Manish R. Bhatt, for the Respondent

Judgement

D.A. Mehta, J.
""It has been said that the taxes are the price that we pay for civilization. If so, it is essential that those who are entrusted

with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well-versed with the law

on the subject. Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue. At the

same time, we have to bear in mind that the policy of law is that there must be a point of finality in all legal proceedings, that stale issues should not

be reactivated beyond a particular stage and that lapse of time must induce repose in and set at rest judicial and quasi-judicial controversies as it

must in other spheres of human activity. So far as the Income Tax assessment orders are concerned, they cannot be reopened on the score of

income escaping assessment u/s 147 of the Act of 1961 after the expiry of four years from the end of the assessment year unless there be omission

or failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment."" This approach is propounded by the

apex court in the case of Parashuram Pottery Works Co. Ltd. Vs. Income Tax Officer, Circle I, Ward A, Rajkot, . We may examine the present

petition in the light of this proposition laid down by the apex court.

2.The petitioner is a registered partnership firm. The relevant assessment years are 1990-91.1991-92 and 1992-93. As the facts for all the three

years are similar, at the request of both the sides all the three petitions were heard together and are being disposed of accordingly by this common

judgment.

3. For assessment year 1990-91, the relevant previous year ended on March 51, 1990. On October 29, 1990, the return of income declaring

total income of Rs. 36.41,000 was filed by the petitioner firm, and after scrutiny an assessment was framed u/s 143(3) of the Act, on March 25,

1991, on a total income of Rs. 36,42,600. It appears that thereafter revisio-nary proceedings were initiated and the order u/s 263 of the Act was

passed on March 25, 1993, whereby the assessment order dated March 25, 1901 was set aside on the ground that deduction under Sections

80HH and 80-I had been erroneously allowed in the said assessment.

4. On March 29. 1994. a fresh assessment was framed u/s 143(3) read with Section 263 of the Act and the deductions under Sections 80HH and

80-I were withdrawn on the ground that the audit reports had not been filed along with the returns of income. The petitioner carried the matter in

appeal before the Commissioner of Income Tax (Appeals), Rajkot, who vide his order dated July 22, 1996, allowed the petitioner"s appeal

following the Gujarat High Court decision in the case of CIT v. Gujarat Oil and Allied Industries [1995] 201 ITR 325.

5. On February 5. 2001, the impugned notice (annexure A) u/s 148 of the Act, has been issued by the respondent stating that income of Rs.

27,13,558 in respect of which the petitioner is assessable/chargeable to tax for the assessment year 1990-91 has escaped assessment within the

meaning of Section 147 of the Income Tax Act, 1961. The said notice further states that the notice has been issued after obtaining necessary

satisfaction of the joint Commissioner of Income Tax, SR-2, Rajkot/Central Board of Direct Taxes. It is this notice which is under challenge in this

petition.

6. The petitioner"s case in brief is that as the reassessment is sought to be made beyond a period of four years, in view of the proviso to Section

147 of the Act. It is for the Assessing Officer to show that there is any failure or omission on the part of the petitioner to disclose fully and truly all

material facts necessary for the assessment for the assessment year in question. It is further contended that as the assessment was originally framed

u/s 143(3) of the Act and thereafter subjected to revisionary proceedings u/s 263 of the Act, the respondent cannot assume jurisdiction to issue the

impugned notice.

7. When the aforesaid petitions came up for hearing on March 19, 2001, the notice was made returnable on April 9, 2001, but as the aforesaid

petitions could not be taken up on April 9, 2001, the same were taken up on April 10, 2001. and in view of the affidavit-in-reply filed on behalf of

the respondent, it was felt necessary that the original file of assessment should be produced by the respondent. We shall advert to the facts in this

regard in detail a little later.

8. The Income Tax Act, 1961, provides for the machinery in Chapter XIV under Sections 147 to 153 for the assessment of escaped income in

certain circumstances. The fundamental underlying these provisions of the Act is to see that the entire income of an assessee assessable in respect

of a particular assessment year is subjected to one single assessment for that particular year. Income which is assessable in one assessment year

cannot be brought to tax in another assessment year for any reason. The Act does not contemplate piecemeal assessment ; one assessment in

relation to a portion of the income and another in respect of another portion. However, it is possible that no assessment for a particular year has

been completed by the Assessing Officer on the assessee within the period of limitation resulting into escapement of income. Moreover, even

where assessment has been made on an assessee, it is found that certain income has escaped assessment therefrom. In order to bring such

escaped income to tax, the completed assessment is required to be reopened and it has to be redone in order to include the escaped income so

that the income of that particular year is assessed accordingly.

9. Before the Assessing Officer can initiate any proceedings u/s 147 of the Act. he is required to establish existence of jurisdictional facts. The

Supreme Court in the case of Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, has stated thus

(headnote) :

That to confer jurisdiction u/s 34 to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from

the end of the relevant year, two conditions had to be satisfied. The first was that the Income Tax Officer must have reason to believe that income,

profits or gains chargeable to Income Tax had been underassessed. The second was that he must have also reason to believe that such

''underassessment'' had occurred by reason of either (1) omission or failure on the part of an assessee to make a return of his income u/s 22, or (2)

omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these

conditions were conditions precedent to be satisfied before the Income Tax Officer could have jurisdiction to issue a notice for the assessment or

reassessment beyond the period of four years but within the period of eight years, from the end of the year in question.

10. This court in the case of P. DOSHI Vs. COMMISSIONER OF Income Tax, GUJARAT, stated (headnote) :

The conditions precedent for initiating reassessment proceedings are : (i) reasonable belief reached by the Income Tax Officer under Clause (a) or

Clause (b) of Section 147 : (ii) recording of reasons by the Income Tax Officer u/s 148(2) ; (iii) sanction before issuing the notice of reassessment

by the higher authorities u/s 151. These three conditions have been introduced by way of safeguards in public interest so that the finally concluded

proceedings, which at the time of the original assessment could be reopened through the initial procedure of appeal, revision or rectification before

the assessment became final, could not be lightly reopened with the consequent hardship to the assessee and also unnecessary waste of public time

and money in such proceedings. These conditions have, therefore, to be treated as being mandatory . . .

11. Apart from the factor of recording of reasons being mandatory, this aspect has been explained from a different perspective in a recent decision

rendered by the Gujarat High Court in the case of Desai Brothers Vs. Deputy Commissioner of Income Tax, , the necessity of recording reasons

has been elaborately explained in the following terms (headnote) :

The requirement of recording of reasons before issuance of notice is to provide a safeguard against the arbitrary action that may be taken by

reopening a completed assessment time and again on irrelevant considerations. Recording of reasons unfolds the process by which the Assessing

Officer was led to the formation of his belief about escapement of income. If the action of the Assessing Officer is founded on some material or

ground that has no nexus to the formation of reason to believe or is not founded on any existing material the same is liable to be interfered with. The

correctness of his tentative opinion is not to be tested on the anvil of the final decision which may be reached after considering rival contentions and

weighing them through the process of reasoning. But at the same time, if it appears from the reasoning which has been adopted by the Assessing

Officer that no inference of escapement of income from assessment can at all be drawn therefrom, it must be held that the action is ultra vires the

statute and does not confer jurisdiction on the Assessing Officer.

12. The Income Tax Act is a taxing statute. The provisions of the Act will have to be construed strictly, therefore, unless there is a clear case which

would give the Assessing Officer jurisdiction to reopen a completed assessment as per the provisions of Section 148 read with Section 147, it

would not be valid and proper to reopen an assessment, and in the case of an assessment which is sought to be reopened otherwise, the same is

liable to be struck down. In the case of Desai Brothers Vs. Deputy Commissioner of Income Tax, the phrase ""reason to believe"" has been

explained with reference to a decision of the apex court in the case of The Barium Chemicals Ltd. and Another Vs. The Company Law Board and

Others, , whereby it is stated thus (page 124) :

Undoubtedly, the Word ''reason to believe'' relates to process of entertaining an opinion which is subjective in nature and is not liable to be

scrutinised by the objective test of judicial scrutiny as in appeal. However, even in the case where an action is founded on subjective satisfaction,

the process of entertaining such belief is not bereft of any minimum safeguard against arbitrariness.

13. The limitation of judicial review where the act is to be founded on subjective opinion on the part of the authority has been succinctly stated by

the apex court in Barium Chemicals Ltd, v. Company Law Board [1966] 36 Comp Cas 639. The court did not approve the unbridled and

unguided operation of the freedom from judicial scrutiny of acts which are founded on formation of subjective satisfaction of the authority

empowered to take such action. His Lordship Mr. Justice Shelat (as his Lordship then was) in his opinion stated (pages 688-89) :

''The words, ""reason to believe"" or ""in the opinion of"" do not always lead to the construction that the process of entertaining ""reason to believe"" or

the opinion"" is an altogether subjective process not lending itself even to a limited scrutiny by the court that such ""a reason to believe"" or ""opinion

was not formed on relevant facts or within the limits or ... restraints of the statute as an alternative safeguard to rules of natural justice where the

function is administrative ... It is hard to contemplate that the Legislature could have left to the subjective process both the formation of opinion and

also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the authority to say that it

has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful

purpose. It is equally unreasonable to think that the Legislature could have abandoned even the small safeguard of requiring the opinion to be

founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of

circumstances from which it is to be formed to a subjective process ... If it is shown that the circumstances do not exist or that they are such that it

is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non-

application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute''.

14. His Lordship Mr. Justice Hidayathullah (as his Lordship then was) in his concurring opinion stated (page 661) :

No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be

demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section

exists, the action might be exposed to interference unless the existence of the circumstances is made out . . .

15. The Supreme Court in the case of Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, has

pointed out that 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.

16. The opinion of an internal audit party of the Income Tax Department may or may not be an ""information"", depending on the nature of opinion

and the factual matrix in which it is set out. At present, the settled legal position is that although an audit party does not possess the power to

pronounce on the law, it nevertheless may draw the attention of the Assessing Officer to it. Moreover, an audit party is empowered to point out the

facts which may not have been taken into consideration by the Assessing Officer. However, no reappraisal of the same material which had been

considered earlier and where an opinion had been formed would be permissible basis to reassess as it would be a case of ""bare or mere change of

opinion"".

17. On a reading of a recent decision of this court in the case of Adani Exports Vs. Deputy Commissioner of Income Tax, , it is seen that the

Central Board of Direct Taxes has issued some internal directions to the Assessing Officers to initiate remedial measures by way of reassessment in

all cases where audit objections are raised. While dealing with such a situation, the court referred to and applied the ratio of the Supreme Court

decision in the case of Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, and emphasised :

More importantly, the court said (headnote) :

... In every case, the Income Tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and

whether in consequence of the law which has now come to his notice he can reasonably believe that income has escaped assessment. The basis of

his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot, for the purpose

of such belief, add to or colour the significance of such law. The true evaluation of the law in its bearing on the assessment must be made directly

and solely by the Income Tax Officer."" .

18. After extracting the relevant portion from the apex court decision, this court has referred to the facts in detail. Thereafter, the court went on to

deal with the Central Board of Direct Taxes instructions as under (page 231):

Notwithstanding this clear position of law emerging from the decision of the Supreme Court, the instructions of the Board still persisted that as

soon as audit objections are raised, prompt remedial action in the nature of reassessment should be taken even if objection is not accepted by the

Income Tax Officer. The instructions are being taken for remedial action, viz., remedial action should invariably be initiated as a precautionary

measure in respect of audit objections, even if the objection is not accepted by the Income Tax Officer or without the assessing authority applying

his mind to such information for reaching his own conclusion. Once the remedial action is initiated, it can be dropped with the approval of the

Commissioner of Income Tax if the objection raised is one of facts and the facts stated to the audit are found to be incorrect.

Thus, contrary to the decision of the Supreme Court, the instruction of the Board directs that merely on raising of audit objection remedial action

by initiating proceedings of reassessment be taken, notwithstanding that the authority vested with power to exercise jurisdiction for issuing notice is

not satisfied about existence of such circumstances which may warrant exercise of such power. To say the least, such ultra vires instructions cannot

be pressed into service to save the initiation of proceedings u/s 147, in the absence of holding of any belief by the Assessing Officer, by arrogating

the power to itself by the Board by issuing such directions contrary to the provisions of law at the pain of subjecting the officer to pain of exposing

him to charge of insubordination.

19. Thus, the settled legal position can be summarised, that :

(a) There must be material for the belief.

(b) Circumstances must exist and cannot be deemed to exist for arriving at an opinion.

(c) Reason to believe must be honest and not based on suspicion, gossip, rumour or conjuncture.

(d) Reasons referred to must disclose the process of reasoning by which he holds ""reasons to believe"" and change of opinion does not confer

jurisdiction to reassess.

(e) There must be nexus between material and belief.

(f) The reasons referred to must show application of mind by the Assessing Officer.

20. The validity of initiation of reassessment proceedings has to be judged with regard to the material available with the officer at the point of time

of issue of the notice u/s 148 and cannot be sought to be substantiated by reference to material that may have come to light subsequently in the

course of reassessment proceedings.

21. If the aforesaid principles are applied to the facts of the present case it becomes amply clear that the impugned notices have been issued

without jurisdiction, the Revenue having failed to establish the jurisdictional fact of there being any omission or failure on the part of the petitioner-

asses-see in disclosing full and true particulars of income necessary for the assessment of the assessment year under consideration. The petitioner

was granted deduction of Rs. 24,95,064 in the aggregate under Sections 80HH and 80-I of the Act in the assessment framed on March 25, 1991.

Thereafter, vide order dated March 24, 1993, the said assessment was set aside directing the Assessing Officer to carry out the necessary inquiry/

verification and frame the assessment afresh on the merits according to law after affording due opportunity to the assessee of being heard. We may

note that the revisional proceedings initiated u/s 263 of the Act were for the reasons which may be reproduced from the Commissioner''s order

dated March 24, 1993.

2. On examination of the case records, it has been found that the Assessing Officer allowed deduction erroneously on account of the following :

(i) The Assessing Officer has allowed deduction u/s 80HH to the tune of Rs. 12,47,532 though the assessee has not filed Form No. 10C.

Moreover, the business of the assessee is also not falling in the backward area.

(ii) The Assessing Officer has allowed deduction u/s 80-I to the assessee even though the assessee has failed to file Form No. 10CCB along with

the return. Moreover, none of the conditions prescribed in Clauses I and II of Sub-section (2) are fulfilled. The assessee has also not furnished the

details as per Clause IV of Sub-section.

22. After referring to the reply of the petitioner, the Commissioner held that the audit reports in necessary forms had not been filed along with the

return. Thereafter, in para. 5 it was stated thus :

5. As regards the other issues raised, it is mentioned here that the same have been dealt with in detail in my order dated March 24, 1993, passed

in the case of the assessee for the assessment years 1988-89 and 1989-90 and in the light of that further enquiries/verification need to be made on

the issues involved . . .

23. In pursuance of the aforesaid order a fresh assessment was framed on November 29, 1994, whereby the deductions allowed in the original

assessment under Sections 80HH and 80-I were withdrawn to the extent of Rs. 24,95,064 in aggregate. As already stated hereinbefore the

petitioner carried the matter in appeal and vide the appellate order dated July 22, 1996, the appeal was allowed and the Assessing Officer was

directed to allow deduction under Sections 80HH and 80-I in the following terms by the Commissioner of Income Tax (Appeals-II), Rajkot :

He is directed to allow deductions under Sections 80HH and 80-I, if the appellant fulfils other conditions for admissibility of these deductions.

24. The respondent has filed affidavit-in-reply dated March 28, 2001. and annexed the reasons recorded for arriving at the belief that income has

escaped assessment, which are in the following terms :

The assessee-firm is engaged in the manufacture of ayurvedic medicine. The factory of the assessee-firm is located at Nanbha Sheri, Bhav-nagar.

The assessee has claimed and was allowed deduction of Rs. 12,47,512 u/s 80HH for the assessment year 1990-91. On a careful study of the

Notification No. S, O. 165, dated December 12, 1986 [1987] 165 ITR 294) , and the Board''s Circular No. 484 (para. 4), dated May 1, 1987

[1987] 166 ITR 120, it is noticed that Bhavnagar Urban Agglomeration is excluded from the list of eligible backward areas for deduction u/s

80HH. Therefore, the incorrect allowance of deduction has caused underassessment to the extent of Rs. 12,47.512. Reopening of assessment on

the basis of factual error pointed out by the audit was held to be valid as reported in Commissioner of Income Tax Vs. P.V.S. Beedies Pvt. Ltd., ;

Commissioner of Income Tax Vs. Hindustan Teleprinters Ltd., ; Commissioner of Income Tax Vs. Assembly Rooms, and Smt. Indira Devi Vs.

Commissioner of Income Tax, .

25. In the affidavit-in-reply the respondent has vide para. 4 stated that the petitioner had overlooked the provisions of Section 147, in its entirety

and thereafter Explanation 1 to Section 147 has been reproduced and it is stated :

Thus, in the present case, the Assessing Officer has not been able to detect from material on record that the assessee"s production unit is located

in an area which is not industrially backward and vide notification read with the circular mentioned above the assessee was not eligible for

deduction u/s 80HH of the Income Tax Act. Therefore, it is respectfully submitted that the conditions laid down in Section 147 have been

satisfied.

26. On a careful consideration of the reasons recorded as well as the averments made in the affidavit-in-reply the following undisputed facts

emerge :

(a) The assessment has been reopened at the behest of the internal revenue audit party.

(b) The petitioner started production relevant to the assessment during the financial year 1983-84 and claimed deduction for the first time u/s

80HH in the assessment year 1986-87.

27. The internal revenue audit party brought to the notice of the Assessing Officer that the production unit of the petitioner is located within the city

of Bhavnagar and hence the condition of industrial undertaking being situate in backward area was not satisfied vide Notification No. 165, dated

December 19, 1986 (see [1987] 165 ITR 294) ; the same has also been annexed whereby it is stated that the eligible area for the district of Bhav-

nagar for the purpose of being considered as backward area will be the entire district excluding Bhavnagar Urban Agglomeration and lastly

Circular No. 484, dated May 1, 1987 (see [1987] 166 ITR 120). has been annexed.

28. When the matter was taken up for hearing on April 10, 2001, on the basis of the aforesaid notification, the reasons recorded and the

averments made in the affidavit-in-reply, it was contended on behalf of the Revenue that the petitioner was aware that its factory was situated in the

Urban Agglomeration Area of Bhavnagar City and, hence, the petitioner was not entitled to claim deduction u/s 80HH as the necessary conditions

were not fulfilled by the petitioner, and in such circumstances, the claim made by the petitioner was not a true claim even if there was full disclosure,

and hence reassessment proceedings were rightly initiated.

29. In response thereto, on behalf of the petitioner it was pointed out that the factual averments made in the affidavit-in-reply and the condition

based thereupon raised on behalf of the Revenue were not correct inasmuch as annextires, viz., notification, circular, etc., were part of written

submissions made by the petitioner-assessee before the Assessing Officer at the time when the fresh assessment was framed in pursuance of revi-

sional proceedings. It was further submitted that the Assessing Officer having applied his mind to the material on record, which was submitted by

the petitioner, it was not open to the Revenue to take a different view on reappraisal of the same material. It was in this context when it was

pointed out to the court that the annexures annexed to the affidavit-in-reply formed part of the petitioner''s written submissions before the

Assessing Officer (and this was prima facie shown from the paging/numbering which tallied) that the original file of assessment proceeding was

called for. At the time of hearing, on May 1, 2001, learned standing counsel for the Revenue, Mr. Akil Qureshi, very fairly stated that the say of

the petitioner was factually correct inasmuch as the annexures which formed part of the affidavit-in-reply were originally forming part of the

enclosures to the written submissions made on behalf of the petitioner before the Assessing Officer when the assessment proceedings in the wake

of the revisional order were taken on hand, and hence it could not be stated that the petitioner had not put forth its claim in the proper perspective

after full and true disclosure of all material facts.

30. As can be seen from the assessment order dated November 29, 1994, vide para. 2 the Assessing Officer has recorded that in response to the

notice u/s 143(2) of the Act, the petitioner''s advocate and partner appeared and filed written submissions vide letter dated September 7, 1994,

along with the evidences in support of the claim for allowability of the deduction under Sections 80HH and 80-I.

31. It has already been noted that the revisional proceedings were initiated on two-fold count, viz., (i) non-filing of audit report in the prescribed

form along with the return and (ii) that the business of the petitioner was not falling in the backward area. The Commissioner in his revisional order

u/s 263 of the Act had specifically found that the audit reports in the prescribed forms had not been filed along with the returns and in relation to

the other issues on the basis of which the revision was initiated, the Assessing Officer had been directed to make further inquiries/ verification and

pass a fresh assessment order in accordance with law. It was in this context that the petitioner-assessee had been called upon to substantiate its

claim for deduction under Sections 80HH and 80-I of the Act, and hence written submissions dated September 7, 1994.

32. Though it was not strictly necessary we have also gone through the Eighth Schedule as it was originally enacted, the notification dated

December 19, 1986 (see [1987] 165 ITR 294), which excluded Bhavnagar Urban Agglomeration Area from the district of Bhavnagar for the

purpose of being designated as backward area and Circular No. 484, dated May 1, 1987 (see [1987] 166 ITR 120) so as to ascertain whether

the petitioner was in fact entitled to deduction. Apparently, the entire Bhavnagar district was listed as backward area in the Eighth Schedule as it

originally stood and thereafter, vide Notification No. 165, dated December 19, 1986 (see [1987] 165 ITR 294), Bhavnagar Urban Agglomeration

was excluded from such notified area and hence, if only the said Notification is looked at, it may appear that the petitioner would not be entitled to

deduction as claimed. However, para. 2 of Circular No. 484. dated May 1, 1987 (see [1987] 166 ITR 120) which reads as under puts the entire

situation beyond the pale of controversy :

2. In the interest of administrative convenience, it has been decided that the benefit of Section 80HH in respect of any area will not be withdrawn

retrospectively. The Taxation Laws (Amendment and Miscellaneous Provisions) Bill, 1986, received the assent of the President on September 10,

1986. It is, therefore, clarified that notwithstanding the aforesaid notification, all areas specified in the Eighth Schedule will continue to enjoy the

benefit of Section 80HH in respect of an industrial undertaking which begins to manufacture or produce articles before September 10, 1986, or in

respect of the business of a hotel which starts functioning before September 10, 1986.

33. Thus, it can be seen that an undertaking which begins to manufacture or produce articles before September 10, 1986, even if it falls within

excluded area would be entitled to continue to claim deduction u/s 80HH of the Act. The facts as they existed on record are that the peti- tioner

had started production during the financial year relevant to the assessment year 1983-84, and hence it was an industrial undertaking which began

to manufacture before September 10, 1986. Thus, the petitioner had correctly claimed the deduction u/s 80HH of the Act.

34. However, the limited controversy before us was not as to whether the petitioner was entitled to deduction or not but whether there had been

any omission or failure on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment year under

consideration. In view of the facts and evidence which are already available on record, it is abundantly clear that there had been no failure or

omission on the part of the petitioner. The petitioner had already put forth its claim in entirety and supported the same on the basis of the circular

which formed part of the written submissions made before the Assessing Officer during the course of assessment proceedings which culminated in

the assessment order dated November 29, 1994. The Assessing Officer has also taken note of such written submissions in his assessment order

and thus it cannot be stated that there was any non-application of mind on the part of the Assessing Officer.

35. The respondent has stated in his affidavit-in-reply that the Assessing Officer has not been able to detect from the material on record that the

assessee''s production unit is located in an area which is not notified as backward. It is further stated in the affidavit-in-reply ""in the instant case, the

Assessing Officer has erred on facts as to whether the assessee''s production unit falls in a backward area eligible for deduction u/s 80HH and the

same was pointed out by the audit party and therefore his action is justified.

36. Therefore, even from the affidavit-in-reply it is absolutely clear that there had been no omission or failure on the part of the petitioner but it is

the say of the respondent that the Assessing Officer had committed an error. Without entering into the controversy as to whether there was any

error committed by the Assessing Officer or not, suffice it to state that as the assessment is sought to be reopened after a period of four years and

there is admittedly no omission or failure on the part of the petitioner, the Assessing Officer, i.e., the respondent, cannot assume jurisdiction u/s 147

of the Act.

37. There is one more aspect of the matter. As we have already stated the annexures to the affidavit-in-reply formed part of the petitioner''s written

submissions before the Assessing Officer. However, an impression was sought to be created that the relevant notification, etc., had not been taken

into consideration by the petitioner before making the claim for deduction u/s 80HH of the Act, and hence the audit party had pointed out a factual

omission or failure on the part of the petitioner which would entitle the respondent to assume jurisdiction to reopen the completed assessment. The

facts as they exist on record are otherwise and we strongly deprecate the attempt on behalf of the Revenue to support an action which is otherwise

not defendable at all. The action of the respondent in referring to the notification, etc., as if it was pointed out by the internal revenue audit party is

to say the least, an attempt to mislead the court and is not expected from an officer of the rank of Joint Commissioner of Income Tax.

38. At this juncture we may reiterate the settled legal position as regards the role of the Assessing Officer :

(i) Though the Income Tax Officer is not a court, and he is not bound to follow the procedure of a court yet he is to some extent party or judge in

his own case and hence is required to proceed in a judicial spirit and come to a judicial conclusion upon properly ascertained facts. (Harmukhrai

Dulichand v. CIT [1928] 3 ITC 198 (Cal)).

(ii) The fact that the Income Tax Officer is ""a judge in his own cause"" has at times and amongst certain sections of the general public caused

uneasiness and anxiety is felt lest the possession of such autocratic powers by officials of a Department may some times result in injustice or

hardship being done to those upon whom the assessments are made. (Abdul Baree Chowdhury v. CIT [1931] 5 ITC 352 (Rang) [FB]).

(iii) The Income Tax Department must always bear in mind that the normal presumption is in favour of good faith and not otherwise on -the part of

the assessee. That the proceedings before the Income Tax Officer are not judicial proceedings in the sense in which this term is ordinarily used, and

all that is required of him is to proceed without bias and give sufficient opportunity to the assessee to place his case before him, or in other words,

to conduct himself in accordance with the rules of justice, equity and good conscience. (1937) 5 ITR 464 .

39. The respondent instead of acting in a judicial spirit and in accordance with the rules of justice, equity and good conscience has proceeded to

act with bias and has adopted a role of prosecutor more than that of a judge. He should have refrained from doing so.

40. On behalf of the Revenue, Mr. Qureshi, relied upon the Supreme Court decision in the case of Commissioner of Income Tax Vs. P.V.S.

Beedies Pvt. Ltd., . On going through the said decision we find that in the said case the audit party had merely pointed out a fact which had been

overlooked by the Income Tax Officer in the assessment. As can be seen from the facts on record of the present case that is not the situation in the

present case.

41. To conclude : (i) 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 show 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.

42. In view of this fact situation, all the three petitions are allowed. We hereby quash and set aside the impugned notices dated February 5, 2001

(annexure A). Rule made absolute. The Revenue shall pay the costs of the petitions at Rs. 2,500 each.