

## AO couldn't reopen case merely on basis of opinion of audit party that there was discrepancy in turnover

**Summary – The High Court of Gujarat in a recent case of Reckitt Benckiser Healthcare India (P.) Ltd., (the Assessee) held that where Assessing Officer did not hold an independent belief that income chargeable to tax had escaped assessment, but had acted under compulsion of audit party which held a belief that discrepancy in turnover figures, resulted into excess claim of deduction under section 80-IC on account of which income chargeable to tax had escaped assessment, reopening of assessment was not justified**

### Facts

- The assessee-company was engaged in manufacturing and sale of pharmaceutical drugs. It filed its return of income for relevant year declaring total income of Rs. 25.17 crores and book profit under section 115JB at Rs. 96.65 crores.
- On scrutiny assessment the Assessing Officer observed that one of the major claims of the assessee was deduction under section 80-IC of Rs.72.67 crores. Such claim was examined and eventually the order of assessment was passed.
- Thereafter, the Assessing Officer noticed from records that the assessee had furnished a turnover of Rs.247.87 crores in profit and loss account for claiming such deductions in respect of unit eligible for exemption. However, on verification of these figures with the Central Excise Authorities., it was found that the assessee had shown a turnover of Rs.219.42 crores to the Excise Department in respect of the same unit. Thus, according to the Assessing Officer this difference in turnover of Rs.28.41 crores resulted into excess claim of deduction under section 80-IC and accordingly assessment was required to be reopened under section 147. He thus issued notice to reopen assessment.
- The assessee raised detailed objections in which it contended that the discrepancy was on account of discounted price being shown for excise clearances which came close to 35 per cent of the MRP price. If such discounted price was taken into consideration, there would be no mismatch between the excise turnover and the turnover reflected in the profit and loss account of the company. Thus, there was no escapement of income chargeable to tax.
- The Assessing Officer by order rejected the objections.
- On writ:

### Held

- The law on the question is sufficiently clear. The Supreme Court in case of *Indian and Eastern Newspaper Society v. CIT* [1979] 119 ITR 996/2 Taxman 197, held and observed that the statute does not support the conclusion that an audit party can pronounce on the law and that such pronouncement amounts to information within the meaning of section 147(d). In every case, the Income-tax Officer must determine for himself what is the effect and consequence of law

mentioned in the audit note and whether any consequence of the law which has now come to his notice, he can reasonably believe that income has escaped assessment. The basis of this 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 law. The true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income-tax Officer.

- In case of *Adani Exports v. Dy. CIT (Assessment)* [\[1999\] 240 ITR 224](#) Division Bench of Gujarat High Court noted from the record that right from the beginning when the Assessing Officer was apprised of the audit objection, at no point of time, he betrayed any suggestion or holding any doubt about the correctness of his earlier decision in the assessment proceedings. Despite holding such a view, he suggested to the superior officer that if the view is not acceptable, recourse may be had to section 147 or section 263. In such background, the Court relying upon and referring to the decision of Supreme Court in case of *Indian and Eastern Newspaper Society (supra)* observed that it was a colourable exercise of jurisdiction by the Assessing Officer by recording reasons for holding a belief which in fact demonstrably he did not hold that income of assessee has escaped assessment due to erroneous computation of deduction under section 80HHC, for the reasons stated by the audit.
- In case of *CIT v. P.V.S. Beedies (P.) Ltd.* [\[1999\] 237 ITR 13/103 Taxman 294](#), the Supreme Court found that the audit party had merely pointed out a fact which was overlooked by the Assessing Officer in the assessment. In such background, it was observed that there can be no dispute that the audit party is entitled to point out a factual error or omission in the assessment.
- In view of above legal position, it was observed that in instant case as per the reasons recorded by the Assessing Officer, the assessee had claimed deduction under section 80-IC of Rs.72.67 crores. The record showed that the assessee had furnished a turnover of Rs.247.87 crores in profit and loss account for claiming such deductions in respect of unit eligible for exemption. These figures were not verified with the Central Excise Authorities. On verification, it was found that the assessee had shown a turnover of Rs.219.42 crores to the Excise Department in respect of the same unit. According to the reasons, it is this difference in turnover of Rs.28.41 crores resulted into excess claim of deduction under section 80-IC. In the objections raised by the assessee, it was contended that the discrepancy was on account of discounted price being shown for excise clearances which came close to 35 per cent of the MRP price. If such discounted price is taken into consideration, there would be no mismatch between the excise turnover and the turnover reflected in the profit and loss account of the company.
- The original departmental files reveal that the audit party had brought such discrepancy to the notice of the department under a letter dated 23-12-2014. The Assessing Officer however, replied to such audit objection that the turnover of the unit of the assessee which was eligible for deduction under section 80-IC, had been verified from the available records. Thus, from the beginning the Assessing Officer was reluctant to accept point of view of the audit party. It appears that despite such reluctance, he was compelled to issue notice for reopening. What exactly happened after

replying to the audit objection as mentioned above and the date of issuance of notice, is not immediately clear from the documents made available. The files made available show a letter dated 13-7-2015 which was written by the Assessing Officer after the issuance of notice for reopening, nevertheless, reflects his consistent thought process leading to only one possible conclusion *viz* that at no point of time, he agreed with the point of view of the audit party that on account of discrepancy in the two sets of turnover data, there had been under-assessment of income. In the said letter, the Assessing Officer after reproducing the opinion of the audit party regarding escapement of income, conveyed that the objection was not acceptable in principle but the remedial action had been initiated in consonance of CBDT instruction No.6 of 2006. Subsequently, new facts have come to the knowledge of this office, in light of which the non-acceptance of the objection is reiterated. Thus, objection should be dropped and an acknowledgment regarding same may be sent to office immediately.

- Thus, from the above it is abundantly clear that the Assessing Officer was not agreeable to the objection of the audit party from the beginning and even during the process between issuance of notice for reopening and rejecting the objections of the assessee, he had satisfied himself about the correctness of the assessee's contention in this regard. The explanation of the assessee in objections to the discrepancy in the turnovers convinced the Assessing Officer that there had been no escapement of income chargeable to tax. He accepted the assessee's ground that the excise turnover would show MRP price less 35 per cent discount. If the turnover figures are adjusted accordingly, there would be hardly a discrepancy of 8 per cent which in case of such a large turnover could easily occur. He in fact argued that if such discrepancy of 8.42 per cent is extrapolated over the total turnover; the assessee's turnover from the eligible unit would match the correct figures.
- Therefore, neither the reasons recorded by the Assessing Officer, nor the decision to issue notice for reopening were those of the Assessing Officer himself. He had acted under the compulsion of the audit party which held a belief that on account of discrepancy in the turnover figures, income chargeable to tax had escaped assessment. The Assessing Officer was inclined to believe the assessee's explanation that such discrepancy could be reconciled. If the department was not convinced about the opinion of the Assessing Officer, it was always open for the Commissioner to take the order of assessment in revision. The action of reopening of assessment however, stands on entirely different footing and as per settled law, can be resorted to by the Assessing Officer only if he has tangible material at his command to form a reasonable belief that income chargeable to tax had escaped assessment. Such belief of the Assessing Officer cannot be substituted by that of the opinion of the audit party.
- In the result, impugned notice is set aside. The petition is allowed.