IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

ITR No. 15 of 1995.

Judgment reserved on: 20.11.2007

Date of Decision: November 28, 2007

Commissioner of Income Tax … Applicant.

Versus

M/s Jagish Ram Krishan Chand … Respondent.

Coram:

The Hon'ble Mr. Justice Deepak Gupta, Judge.

The Hon'ble Mr. Justice V.K.Ahuja, Judge.

Whether approved for reporting?

For the Applicant. : Ms Vandana Kuthiala, Advocate.

For the Respondent(s) : Mr. K.D. Sood, Advocate.

Deepak Gupta, J

The following questions have been referred for opinion of this Court under Section 256 of the Income Tax Act, 1961:-

"1. Whether on facts and in the circumstances of the case, the ITAT was right in law in holding the view of the CIT(A) that the assessee is entitled to the benefits of sections 80HH and 80J when it was not claimed in the original return and where no audit report was enclosed?

2. Whether on facts and circumstances of the case, the ITAT was right in law in allowing the claim of the assessee which was made after completion of original assessment in the revised return?"

As far as the first question is concerned, there is no longer any dispute with regard to the fact that an assessee can file a revised return and can claim the benefit under Section 80HH and 80J, even if, the said benefits were not claimed in the original return.

By now it is well settled law that filing of the audit report is not necessary with the return itself. In case there is sufficient material before the Assessing Authority at the time of finalization of the return and the audit report has been filed, he can do so even if the audit report has been filed at a later stage.

The Madhya Pradesh High Court in **Commissioner of Income Tax** v. **Panama Chemical Works** [2000] 245 ITR 684, held that filing of the audit report even during the assessment proceedings amounted to substantial compliance with the statutory requirement of the Act. The Punjab and Haryana High Court in **Commissioner of Income Tax** v. **Gupta Fabs** [2005] 274 ITR 620 also held that the filing of the audit report along the return is not mandatory and not a condition precedent for grant of the relief. Similarly, the Madras High Court in **Commissioner of Income Tax** v. **Valli Cotton Traders P.Ltd**. [2007] 288 ITR 400, held that mere non-filing of the audit report along with return was not a ground to reject the claim of the assessee in case audit report had been placed on record during the assessment period.

Section 139(5) of the Act as it stood at the relevant time, reads as follows:-

> "(5) If any person having furnished a return under sub-section (1) or sub-section (2) discovers any omission or any wrong statement therein, he may furnish a revised return at any time before the assessment is made."

A bare perusal of the aforesaid relevant provisions shows that any assessee who had furnished a return under sub-section (1) or sub-

section(2), discovers any omission or any wrong statement, he can file a revised return at any time before the assessment was made. In this case, as the assessment had not been finalized, the assessee was well within his rights to file a revised return.

In view of the above position of law, question No.1 is answered in favour of the assessee and against the revenue.

As far as the second question is concerned, in our considered opinion, the same does not even arise for consideration in the present case.

It would be pertinent to mention that for the assessment year 1979-80, a return was filed by the assessee and assessment was completed under Section 144 on 25.3.1982. Thereafter the assessee moved an applications under Section 146 of the Income Tax Act as it then stood for recalling the assessment order passed under Section 144 on the ground that his counsel was out of station and could not appear on the said date. This application was allowed and the order dated 25.3.1982 was recalled. In the meantime, the assessee filed a revised return on 19.3.1983. As far as the assessment year 1980-81 is concerned, the original return was filed on 18.8.1980. The assessment under Section 144 was completed on 24.3.1983 and the return was finalized on the said date. An application under Section 146 was moved on behalf of the assessee for re-opening the assessment and the assessment was re-opened vide order dated 31.3.1983. It is thus apparent that for both the assessment years though the order was first finalized on an application being filed by the assessee the orders of assessment were recalled and the returns were re-opened. Therefore, it is apparent that the returns had not been finalized when the revised returns were filed. Question No.2, therefore, does not arise at all and the order of reference is held to be invalid and the question is returned un-answered.

In view of the above discussion, question No.1 is answered in favour of the assessee and against the revenue and question No.2 is not answered since the reference in this behalf is found to be totally misconceived. A copy of this judgment duly signed by the Registrar General of this Court be sent to the Tribunal.

(Deepak Gupta), J.

November 28, 2007 (V.K.Ahuja), J.

s.