

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 20994 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE B.N. KARIA

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

GATEWAY TECHNOLABS PVT. LTD.....Petitioner(s)

Versus

ASST. COMMISSIONER OF INCOME TAX CIRCLE 2(1)(1)....Respondent(s)

Appearance:

MR MANISH J SHAH, ADVOCATE for the Petitioner(s) No. 1

MRS MAUNA M BHATT, ADVOCATE for the Respondent(s) No. 1

CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 20/02/2018

ORAL JUDGMENT**(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. The petitioner has challenged a notice dated 6.5.2016 issued by respondent Assessing Officer for reopening the assessment of the petitioner for the assessment year 2010-2011.
2. Brief facts are as under. The petitioner is a company registered under the Companies Act and has established an undertaking in Software Technology Park of India. The petitioner claims to be exporting computer software. For the assessment years 2002-2003 to 2007-2008, the petitioner had claimed deduction under section 10B of the Income Tax Act. From the year 2008-2009, the petitioner claimed under section 10A of the Act. For the assessment year 2010-2011 also, such claim was made in the return filed by the assessee. On 25.9.2010, such return was accepted under section 143(1) of the Act without scrutiny. To reopen such assessment, the Assessing Officer has issued the impugned notice. In order to do so, he has recorded the following reasons :

“The assessee filed its return of income for AY 2010-11 on 25/9/2010 declaring total taxable income of Rs.124732161/- after claiming deduction of Rs.21740010/- u/s.10A of the Act. The return was processed on 08/07/2011 u/s.143(1) of the Act. On verification of the record it was noticed that the date of

commencement of production/manufacture was 01.07.2001. The date of registration in FTZ/EPZ/SEZ of the company was of 18.09.2001 and the same was renewed on 08.09.2006 by the Director STPL. The assessee was claiming deduction u/s.10B of the Act for the period from A.Y. 2003-04 to 2007-08 though the assessee company was not found eligible for the same. In the A.Y. 2008-09, the assessee has switched the deduction under the provisions of section 10A of the Act. The provisions and conditions for claiming such deductions are different and switching over the claim is not permissible without establishing the fulfilment of conditions/provisions. For the A.Y.2009-10 and 2011-12 the assessee was not found eligible for the claim of section 10A and the claim was rejected while passing the order and the matter is pending with the Hon'ble Gujarat High Court. The case for AY 2010-11 was not selected for scrutiny in which the assessee has claimed deduction of Rs.21740010/- u/s.10A of the Act. Though in AY 2009-10 the claim was rejected in totality and the matter was pending before the Hon'ble High Court of Gujarat, the assessee wilfully made a wrong claim of deduction u/s. 10A of the Act in the return of income filed for the AY 2010-11.

In view of the above, I have reason to believe that income of Rs.21740010/- has escaped assessment because of the failure on the part of the assessee, it is a fit case for initiating action u/s. 147 of the I.T. Act.”

3. The petitioner raised objections to the notice of reopening under communication dated 14.10.2017. Such objections were rejected by the Assessing Officer on 3.11.2017. Hence this petition.
4. Learned counsel Shri J.P. Shah for the petitioner raised the following two grounds in support of the challenge of the petitioner. His first contention was that in the reasons

recorded, the Assessing Officer has proceeded on erroneous footing when he has recorded that issue is pending before the High Court. He submitted that the reasons are the basis for issuance of notice dated 6.5.2016 on which date the issue was pending before the Tribunal and not the High Court. The Tribunal gave its judgment only on 14.3.2017 after which the department has filed appeal before the High Court which is pending. Assessing Officer therefore, proceeded on wrong footing. His second contention was that the assessee had changed the claim of deduction from section 10B to section 10A. There is no impediment in law in permitting such change. He drew our attention to the circular of the CBDT dated 11.4.1955 in which it was observed that the officers of the department must not take advantage of ignorance of an assessee as to his rights. It is the duty of the officer to assist a taxpayer in every reasonable way, particularly, in the matter of claiming and securing reliefs.

5. On the other hand, learned counsel Ms. Mauna Bhatt for the department opposed the petition contending that the original assessment was done under section 143(1) of the Act without scrutiny. The Assessing Officer has recorded proper reasons. Reopening should therefore, be permitted.
6. Few undisputed facts emerging from the record are that the assessment in question was framed without scrutiny when the assessee's return was accepted under section 143(1). The Assessing Officer had objections to the assessee's claim of deduction under section 10A of the Act. Similar claims made by the assessee for the assessment years 2009-2010 and 2011-2012 were not accepted by the

Assessing Officer. CIT(Appeals) in both cases did allow the assessee's appeal upon which the Revenue had filed the appeals before the Tribunal and such appeals were pending when the Assessing Officer recorded the reasons and issued the impugned notice for reopening.

7. As held by the Supreme Court in case of Assistant **Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.** reported in (2007) 291 ITR 500(SC), in case where the original assessment is not framed after scrutiny, Assessing Officer cannot be stated to have formed any opinion and therefore, the concept of change of opinion would not apply. It is undisputedly true that despite such wider latitude available to the Assessing Officer to reopen the assessment, the requirement that he had reason to believe that income chargeable to tax had escaped assessment must still be fulfilled. In this context, Revenue's stand is that assessee's claim for deduction under section 10A is not eligible. That is how the Assessing Officer had framed the assessments for the assessment years 2009-2010 and 2011-2012 that is immediately preceding and succeeding the assessment years. When the Tribunal has allowed such claim of the assessee, Revenue is in appeal before the High Court.
8. For the present year, under such circumstances, the reopening would have to be allowed. Mere ground that the Assessing Officer made a wrong reference to the issue before the High Court instead of Tribunal, would not shake the very foundation of the reasons recorded by the Assessing Officer. It was obviously and apparently an inadvertent error in referring to the forum before which

such issue is pending.

9. In the result, petition is dismissed. Interim relief stands vacated.

(AKIL KURESHI, J.)

(B.N. KARIA, J.)

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