

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 14446 of 2018****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 ?	

M/S ADANI ENTERPRISE LIMITED**Versus****THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 1(1)(1)****Appearance:****MR B S SOPARKAR(6851) for the PETITIONER(s) No. 1****MRS MAUNA M BHATT(174) for the RESPONDENT(s) No. 1****CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI****and****HONOURABLE MR.JUSTICE B.N. KARIA****Date : 16/10/2018****ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)****1. Petitioner has challenged a notice for reopening**

of the assessment issued by the respondent-Assessing Officer on 27.03.2018. Brief facts are as under.

2. Petitioner is a limited company. For the assessment year 2011-12, the petitioner had filed the return of income on 26.11.2011 declaring total income of Rs.44.69 crores under regular computation and Rs.145.70 crores under section 115JB of the Income Tax Act, 1961 ('the Act' for short). The return of the petitioner was taken in scrutiny. Assessing Officer passed order under section 143(3) of the Act on 25.05.2015. During the assessment proceedings several issues arising out of the return came up for consideration, one of them being the applicability of section 145A of the Act to the petitioner's method of valuation of closing stock. Assessing Officer had raised queries in this respect. In particular, under a notice dated 22.08.2014, the Assessing Officer called upon the assessee to provide the following details:

"17. Please state whether you have followed the method of valuation as prescribed in S 145A of the IT Act in the valuation of raw materials, work in progress, finished products and closing stock. If you have not followed the inclusive method as prescribed u/s 145A, please show how the method adopted

by you is neutral with respect to profit and hence, tax. Do this by showing detailed calculations using the exact figures from your financial statement and not by citing examples."

3. In a further letter dated 19.01.2015, the Assessing Officer asked the petitioner to supply the following details:

"19. It is observed from Annexure-XIV of Tax Audit Report that the opening balance of Modified VAT Credit Rs.6,56,96,786/- while closing balance Modified VAT Credit is Rs.9,13,65,897/-. Thus, there is a positive balance of Rs.2,56,69,111/-. Please explain as to why this amount is not added following provision u/s.145A of the Act."

4. In reply to such queries, the petitioner answered to the Assessing Officer under communication dated 28.01.2015 and 04.03.2015, in which, it was conveyed as under:

"17. In so far as valuation of inventories by following inclusive method of accounting as prescribed u/s 145A of the Act vis-a-vis exclusive method of accounting as prescribed in Accounting Standard is concerned kindly refer to clause no. 12(b) of the tax audit report, on perusal of the same your good self will find that there is no deviation in method of closing stock employed from Accounting Standard prescribed u/s 145A of the Act. The detailed working for the same will be provided in next submission."

"19. Your good self has observed that opening balance of CENVAT Credit IS OF Rs.9,13,65,897 and accordingly, there is a

positive balance of Rs.2,56,69,111. Your good self has sought an explanation as to why the said positive balance should not be added u/s 145A of the IT Act. At the outset, we submit that the said positive balance of Rs 2,56,69,111 of CENVAT Credit is of SERVICE TAX RECEIVABLE ON SERVICES AVAILED during the year as is evident on perusal of Annexure-XII of Tax Audit Report submitted to your good self. In this context, the provisions of Section 145A are worth referring which read as under:

145A. Notwithstanding anything to the contrary contained in section 145,-

(a) **the valuation of purchase and sale of goods and inventory** for the purposes of determining the income chargeable under the head "Profits and gains of business or profession" shall be—

(i) in accordance with the method of accounting regularly employed by the assessee; and

(ii) further adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation.

Explanation.— For the purposes of this section, any tax, duty, cess or fee (by whatever name called) under any law for the time being in force, shall include all such payment notwithstanding any right arising as a consequence to such payment.]

5. In the final order of assessment, the Assessing Officer under this head made limited additions to the tune of Rs.2.56 crores in relation to unutilized CENVAT credit.

6. To reopen such assessment, the Assessing Officer has issued the impugned notice, for which purpose, he had recorded following reasons:

"Reasons for reopening of the assessment in the case of M/s. Adani Enterprise Ltd.

1. **Brief details of Assessee:** In this case, the assessee company M/s Adani Enterprise Limited engaged in the business of Export and Import/Domestic Trading & Manufacturing in various commodities filed its return of income for A.Y.2011-12 on 26.11.2011 declaring total income of Rs.44,69,74,307/-. The same was processed u/s.143(1) of the Act and subsequently order u/s 143(3) of the Act was passed on 25.05.2015 determining total income at Rs.69,22,75,577/.

2. **Brief details of information collected/received by the AO:** On perusal of the assessment records for the year under consideration, it is noticed that the assessee is following exclusive method of accounting and the unutilized Cenvat Credit has not been included in the closing stock in the Profit and Loss account. During the year ended on 31.03.2011, the assessee had unutilized Cenvat Credit of Rs.9,13,65,897/-. During the course of assessment proceedings, proper and necessary enquiry on the issue involved could not be made due to which income was underassessed. In terms of the provisions u/s 145A of the Act, this unutilized Cenvat Credit shall form part of the closing Stock. Despite the fact that, inclusive method of accounting as per the provision of section 145A has mandatorily to be followed, the assessee has adopted exclusive method of accounting and thus the assessee has violated the provision of section 145A of the Act.

3. Analysis of information collected/received: As per the section 145A of the Act, notwithstanding anything to the contrary contained in section 145:

(a) the valuation of purchase and sale of goods and inventory for the purposes of determining the income chargeable under the head "Profits and gains of business or profession" shall be—

(i) in accordance with the method of accounting regularly employed by the assessee; and

(ii) further adjusted to include the amount of any tax, duty, cess or fee (by whatever name called) actually paid or incurred by the assessee to bring the goods to the place of its location and condition as on the date of valuation.

Explanation.— For the purposes of this section, any tax, duty, cess or fee (by whatever name called) under any law for the time being in force, shall include all such payment notwithstanding any right arising as a consequence to such payment.

In view of the above provision, it is evident that the Unutilized Cenvat Credit must be included in the closing stock as the Unutilized Cenvat Credit shall form part of closing stock in view of provision of section 145A of the Act. However, the assessee has not included the Unutilized Cenvat Credit in the closing stock though it was mandatorily required to be included. Non inclusion of Unutilized Cenvat Credit in the closing stock attracts the provision of section 145A of the Act.

4. Enquiries made by the AO as sequel to information collected/received: The facts enumerated above have been found out on examination on the case records of the assessee and are self explanatory. Therefore, no further enquiry is required in

this case. On the basis of the same there are reasons to believe that the income chargeable to tax has escaped assessment.

5. Findings of the AO: In view of the provision of section 145A of the Act, the unutilized Cenvat Credit should have been included in closing stock; however, the assessee has failed to include the same in the closing stock. The assessee had followed exclusive method for accounting CENVAT as against inclusive method mandated u/s 145A of the Act and the total income was determined without the statutory adjustment of the cost of raw materials and work in progress by unutilized CENVAT credits at the beginning and end of previous year as stipulated in section 145A of the Act. It is well settled position that unutilized Cenvat Credit shall form part of closing stock and therefore the unutilized Cenvat Credit is mandatorily required to be included in Closing Stock.

6. Basis for forming reason to believe and details of escapement of income: On perusal of the assessment records for the year under consideration, it is noticed that the assessee is following exclusive method of accounting instead of inclusive method and the unutilized Cenvat Credit has not been included in the closing stock in the Profit and Loss account whereas as per section 145A of the Act, unutilized Cenvat credit had to be included in closing stock but the assessee had followed exclusive method which violates the provision of section 145A of the Act. Therefore, I have reasons to believe that income chargeable to tax to the extent of Rs.6,56,96,786/- has escaped the assessment within the meaning of section 147 of the I. T. Act for AY 2011-12 and it is a fit case to issue notice u/s 148 of the Act.

7. Seventh paragraph will include escapement of income chargeable to tax in

relation to any assets (including financial interest in any entity) located outside India: Not Applicable.

8. Findings of the AO on true and full disclosure of the material facts necessary for assessment under Proviso to section 147: On perusal of the assessment records for the year under consideration, it has been observed that the assessee is following exclusive method of accounting instead of mandatory inclusive method which is not permissible as per the provision of section 145A of the Act. As per section 145A of the Act, the assessee is mandatorily required to follow inclusive method of accounting and non-inclusion of unutilized Cenvat Credit in closing stock leads to underassessment. During the course of assessment proceedings, necessary and adequate enquiries on the issue involved could not be made as a result the assessee enjoyed the benefit by not furnishing true and full disclosure of the facts in respect of unutilized Cenvat Credit.

9. Applicability of the provisions of section 147/151 to the facts of the case: In this case a return of income was filed for the year under consideration and assessment u/s 143(3) of the Act was completed on 25.05.2015. **Since 4 years from the end of the relevant year has expired in this case,** the requirements to initiate proceedings u/s 147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above (para 3 & 4). I have carefully considered the assessment records containing the

submissions made by the assessee in response to various notices issued during the assessment proceedings and have noted that the assessee has not fully and truly disclosed the facts in respect of Non-Inclusion of Unutilised Cenvat Credit in closing stock during the year under consideration.

It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for his assessment for the year under consideration thereby necessitating reopening u/s 147 of the Act.

It is true that the assessee has filed a copy of annual report and audited P&L A/c and balance sheet along with return of income where various information/material were disclosed. However, the requisite full and true disclosure of all material facts necessary for assessment has not been made as noted above. It is pertinent to mention here that even though the assessee has produced books of accounts, annual report, audited P&L A/c and balance sheet or other evidence as mentioned above, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by the AO and could have been discovered with due diligence, accordingly attracting provisions of Explanation 1 of section 147 of the Act.

It is important to highlight here that material facts relevant for the assessment on the issue under consideration embedded in annual report, audited P&L Account, balance sheet and books of account in such a manner that it would require due diligence by the Assessing Officer to extract these information. For aforesaid reasons, it is not a case of change of opinion by the AO.

In this case more than four years have lapsed from the end of assessment year under consideration. Hence necessary sanction to issue notice u/s 148 has been obtained separately from Pr.CIT-I, Ahmedabad as per the provisions of section 151 of the Act."

In view of above, it is evident that Section 145A of the IT Act refers to taxes paid/payable and CENVAT on the same in respect of purchases, sales and inventory of GOODS. As submitted herein above, the positive balance of Rs.2,56,69,111 of CENVAT credit is of SERVICE TAX RECEIVABLE ON SERVICES AVAILED during the year & accordingly the provisions of Section 145A are not apply and therefore, the question of addition of the same does not arise."

7. Having heard learned counsel for the parties and having perused the documents on record, it emerges that the sole ground on which the Assessing Officer desired to reopen the assessment was in relation to the assessee's valuation of closing stock. According to the Assessing Officer, unutilized CENVAT credit should have been included in the closing stock which would alter the assessee's profit for the year under consideration. He relied on the provisions contained in section 145A of the Act for this purpose.

8. The documents on record would however show that the entire issue of assessee's treatment of such unutilized CENVAT credit while computing the

valuation for the closing stock had come up for minute scrutiny during the original assessment proceedings. The Assessing Officer was conscious of the methodology adopted by the assessee. He had raised multiple queries which we have reproduced. The assessee had replied to such queries. The replies of the assessee have already been reproduced. It was only after such scrutiny that the Assessing Officer had passed the order of assessment, in which, after recording detailed reasons, he made limited disallowance in relation to the unutilized CENVAT credit. We are informed that even this disallowance is a subject matter at the ends of the assessee. With this aspect we are however not directly concerned.

9. It was therefore simply not open for the Assessing Officer to reexamine the entire issue which would be merely on the change of opinion. It is well-settled as held by the Supreme Court in case of **CIT Vs. Kelvinator of India Limited** reported in **[2010] 320 ITR 561 (SC)**. Even post 01.04.1989, amendments in section 147, the concept of change of opinion prevented the Assessing Officer to reopen the assessment still holds good.

10. This quite apart, the impugned notice has been issued beyond a period of four years from the end of relevant assessment year. Clearly, there was no failure on the part of the assessee to disclose truly and fully all material facts necessary for assessments. The Assessing Officer in the reasons recorded, referred to the material which was already on record during the course of assessment. On this ground also, notice must be quashed.

11. In the result, impugned notice is set aside. Petition is allowed and disposed of.

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(AKIL KURESHI, J)

THE HIGH COURT
OF GUJARAT

(B.N. KARIA, J)

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