

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION NO. 17223 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH
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 ?	

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SANDIP BHIKHUBHAI PADSALA....Petitioner(s)
 Versus
 INCOME TAX OFFICER & 1....Respondent(s)

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Appearance:

MR RK PATEL, ADVOCATE with MR DARSHAN R PATEL, ADVOCATE for the Petitioner(s) No. 1
 MR MANISH R BHATT, SENIOR ADVOCATE for MRS MAUNA M BHATT, ADVOCATE for the Respondent(s) No. 1 - 2

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CORAM: HONOURABLE MR.JUSTICE M.R. SHAH
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 29/11/2016

**ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE M.R. SHAH)**

1. **RULE.** Ms. Mauna Bhatt, learned advocate waives service of notice of rule on behalf of the respondents.
2. In the facts and circumstances of the case and with the consent of the learned advocates appearing on behalf of the respective parties, the present petition is taken up for final hearing today.
3. By way of this petition under Article 226 of the Constitution of India the petitioner – assessee has challenged the impugned notice dated 16/03/2016 issued under Section 148 of the Income Tax Act by which for the Assessment Year 2011-12 the assessment is sought to be reopened for the reasons recorded in the communication dated 27/06/2016.
4. The petitioner – assessee filed the return of income for the Assessment Year 2011-12. After filing of the return of income, the petitioner – assessee was served with the notice under Section 143(2) of the Income Tax Act. In the scrutiny assessment vide notice dated 07/03/2014 the petitioner – assessee was called upon to furnish necessary information /details, more particularly, with respect to the sale transaction of shares of Unitech International Ltd. The petitioner – assessee replied to the same vide reply dated 08/01/2014 as well as 18/03/2014. It was the case on behalf of the petitioner – assessee that the aforesaid shares were acquired by him in the year 2007-08 and were subsequently transferred in his name, which were demated. It was also the case on behalf of the petitioner – assessee that the shares in question were in

fact shown in his books of accounts in the earlier Assessment Years, more particularly, Assessment Year 2008-09 and 2009-10. Considering the material on record, the Assessing Officer accepted the claim of the petitioner – assessee of long term capital gains of Rs.287,81,495/- as exempted under the provisions of the Income Tax Act. Thereafter, the petitioner was served with the notice under Section 148 of the Income Tax Act dated 16/03/2016 by which the assessment for the Assessment Year 2011-12 is sought to be reopened. On the petitioner asking the reasons recorded to reopen the assessment the petitioner vide communication dated 27/06/2016 has been served with the reasons recorded, which reads as under;

“In this case, assessee is same and assessment year is also same i.e. 2011-12. However, both the issues are separate and therefore reasons recorded for reopening of assessment separately are as under;

The case was selected for scrutiny. The assessment was finalized under Section 143(3) of the I.T. Act determining total income of Rs.69,01,855/- vide order dated 28/03/2014.

Issue No.1:

As per Section 2(42A) of the Act, in the case of a share held in a company as capital asset for not more than 12 months is required to be treated as short term capital assets. If holding period is more than 12 months, it is considered as long term capital assets. As per Section 10(38) of the Act,

any income arising from the transfer of a long term capital asset, being an equity share in a company where any income arising from the transfer of a long-term capital asset, being an equity share in a company or a unit of an equity oriented fund where the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No.2) Act, 2004 comes into force; and such transaction is chargeable to securities transaction tax under that Chapter is exempted from payment of tax. As per Section 111A of the Act, any income arising from the transfer of a short-term capital asset, being an equity share in a company where any income arising from the transfer of a short-term capital asset, being an equity share in a company or a unit of an equity oriented fund where the transaction of sale of such equity share or unit is entered into on or after the date on which Chapter VII of the Finance (No.2) Act, 2004 comes into force; and such transaction is chargeable to securities transaction tax under that Chapter is chargeable to tax @ 15 percent. The assessee is engaged in dealing in shares, income from salary, long term capital gain and short term capital gain. The assessee filed return of income for AY 2011-12 on 17/10/2011 declaring income of 49,28,380. Thereafter, assessee had filed revised return of income on 26/12/2011 declaring total income of 68,84,660. The same was assessed under Section 143(3) and income was assessed at 69,01,800 vide

order dated 28/03/2014. Audit Scrutiny of P & L account, balance sheet, computation of income details submitted in respect of exempted income claimed under Section 10(38) of the Act revealed that assessee has claimed exempted long term capital gain of Rs.2,87,81,495/- under Section 10(38) of the Act on account of sale of 3,10,000 share of United International Ltd as under;

Sr. No.	Particulars	Quantity	Sale Value	Sale date	Cost Value	Cost date	Gain
1	United International Ltd.	135000	12570335	18/03/2011	135000	06/02/07	12434835
2	United International Ltd.	124000	11518740	22/03/2011	124000	06/02/07	11394240
3	United International Ltd.	24000	2464560	18/02/2011	24000	06/02/07	2440560
4	United International Ltd.	26000	2537860	23/02/2011	26000	06/02/07	2511860
5	United International Ltd.	135000	12570335	18/03/2011	135000	06/02/07	12434835
6	United International Ltd.	124000	11518740	22/03/2011	124000	06/02/07	11384240
		310000	29091495		310000		28781495

The claim of the assessee was allowed by the Assessing Officer during the course of assessment proceedings on the basis of the assessee's submission filed vide letter dated 18/03/2014 and after verifying the entry in memorandum of transfer of share certificate. The shares were transferred in the name of assessee on 02/04/2008 as per entry noted on the back side of share certificate. It was noticed from assessment record that in respect of exempted share income, assessing officer vide his letter dated 07/03/2014 has inter alia asked the

assessee to furnish details of;

- 1. Full name & address alongwith copy of bills of through whom the shares were purchased,*
- 2. Address of Chabildas Vora and his confirmation about sale of shares to assessee,*
- 3. Copy of letter received from the company showing shares were transferred on 02/06/2007.*
- 4. Copy of de-mat account showing the details of shares inward and outward.*

In response of this letter, the assessee vide letter dated 18/02/2014 stated that;

- 1. At the time of acquisition of shares, the shares were traded on the stock exchange but subsequently trading in the shares were suspended due to non compliance of listing requirements and therefore I could not sell my shares. The trading suspension order was revoked in the month of September, 2010 and share price ranged between 61.30 and 134.70.*
- 2. The shares were acquired by me in physical form and subsequently got transferred in my name. The purchase consideration receipt and transfer intimation appears to have been lost during the course of search and seizure. It was further noticed from ledger account of shares furnished by assessee that assessee has claimed purchase of 4 lakh equity shares of Unitech International Ltd of face value Rs.10/- each for Rs.4 lakh @ 1 per share*

on 02/06/2007 by paying in cash. It was further noticed from the historic data available on website of Bombay Stock Exchange that shares of the company (then named as Uni-tech Poly Packaging Pvt. Ltd.) was last traded on 28/11/2000 with closing price of Rs.10.50. Trading restarted on 13/09/2010. It was also noticed from d-mat account maintained that there was no opening balance in that account and d-mat was accepted by depository on 02/12/2010 for 90,000 shares and on 16/03/2011 for 2,20,000 shares. There was off-take of 25,000 shares on 18.02.2011, 25,000 shares on 22/02/2011 and 2,60,000 shares on 18/03/2011 leaving no balance in that account. All these off-take were effected as delivery by off market trade.

However, on verification of records the date of acquisition of shares on 02/06/2007 should not be accepted due to following reasons;

1. The assessee could not produce the purchase bill /consideration receipt and transfer intimation from the company.
2. The payment of claimed purchase was not by cheque but in cash, hence evidence of purchase is not traceable.
3. The date on which the claimed purchase of shares is shown by assessee is not acceptable as listing of shares was suspended as evident from historic data of the company of BSE.
4. The last traded price recorded on BSE was

Rs.10.50 per share on 28/11/2000 whereas the assessee has claimed purchase of shares @ 1 per share.

5. D-mat account maintained by assessee showed that there was no opening balance in that account and d-mat share was accepted by depository on 02/12/2010 for 90,000 shares and on 16/03/2011 for 2,20,000 shares.

6. The assessee has d-mated shares numbering to 3,10,000 which were sold by off-market deal on later date.

In view of reasons mentioned above, the claim of assessee that shares were purchased on 02/06/2007 was not tenable. It was required to be treated as purchase on 02/12/2010 for 90,000 and on 16/03/2011 for 2,20,000 shares as evident from the d-mat account. As such, period of holding was less than 12 months, the assessee was not entitled of exemption under Section 10(38) of the Act and liable to tax under Section 111A. Failure to do so resulted in under assessment of income of Rs.2,87,81,495/-.

Issue No.2

As per Section 40(a)(ia) of the Act any interest payable to a person in excess of 5000 by an individual who was liable for tax audit in the immediately proceedings assessment year, on which tax is deductible at source under Section 194A and such tax has not been deducted or, after deduction, has not been paid within the prescribed

date are not allowable expenditure.

The assessee is engaged in dealing in shares, income from salary, long term capital gain and short term capital gain. The assessee filed return of income for AY 2011-12 on 17/10/2011 declaring income of 49,28,380. Thereafter assessee had filed revised return of income on 26/12/2011 declaring total income of 68,84,660. The same was assessed under Section 143(3) and income was assessed at 69,01,800 vide order dated 28/03/2014.

Audit scrutiny of P & L account, balance sheet, computation of income, and ledger of interest payment revealed that assessee had made the payment of Rs.90,00,000/- to Kapadia investment as interest without deducting TDS, even though it was noticed that assessee had deducted TDS on interest payment of Rs.24,12,172/- made to Ramesh Metal Industries Pvt. Ltd. It was noticed from the assessment records & submission of assessee in respect of income that; assessee has business income in form of sale of shares as submitted in submission dated 29/11/2013. It was also noticed that the assessee, having the total sale of shares in F.Y. 2009-10 (A.Y. 2010-11) of Rs.51,28,451/- and thus was liable for tax audit.

During the course of assessment proceedings the AO had not made the addition of Rs.90,00,000/- under Section 40(a)(ia) of Act. After verification of

record that while computing the total income assessee had not claimed interest expenses of Rs.90,00,000/- to the P & L A/c. and the assessee had shown gross income as total income in the return of income. Therefore, there is no impact on total income of non deduction of tax as per provisions of Section 40(a)(ia) of the Act when there is no claim of Interest Expenses of Rs.90,00,000/-.

However, on verification of record as per provisions of Section 40(a)(ia) any interest payable to a person in excess of Rs.5000/- by an individual who was liable for tax audit in the immediately preceding assessment year, on which tax is deductible at source under Section 194A, failure to do so make entire payment of Rs.90,00,000/- disallowable. Failure to do so resulted in under-assessment of income of Rs.90,00,000/-.

In view of the above, I have reason to believe that there is escapement of income of Rs.2,87,81,495/- for issue no.1 and escapement of income of Rs.90,00,000/- for issue no.2. Therefore, proceedings of Section 147/148 of the I.T. Act have been initiated.”

5. The petitioner - assessee submitted the objections against the reasons recorded for reopening the assessment, which have been disposed of by the Assessing Officer not agreeing with the objections raised by the petitioner – assessee. Hence, the petitioner – assessee has preferred the

present Special Civil Application under Article 226 of the Constitution of India challenging the impugned reassessment proceedings.

6. Shri R.K. Patel, learned advocate appearing on behalf of the petitioner – assessee has vehemently submitted that in the present case in the scrutiny assessment the Assessing Officer considered the claim of the petitioner – assessee in detail and considering the details furnished by the petitioner – assessee, which were called by the Assessing Officer, the Assessing Officer finalized the original assessment. It is submitted that therefore reopening of the assessment would be nothing but change of opinion of the subsequent Assessing Officer, which is not permissible. In support of his above submissions, Shri R.K. Patel, learned advocate appearing on behalf of the petitioner – assessee has heavily relied upon the decision of the Division Bench of this Court in the case of **H.K. Buildcon Ltd. Vs. Income-tax Officer** reported in **[2012] 21 Taxmann.com 83 (Gujarat)** . It is submitted by Shri Patel, learned advocate appearing on behalf of the petitioner – assessee that in fact the equity shares of Unitech International Ltd. were purchased by the petitioner – assessee on 02/06/2007 and the same was also reflected in his books of accounts / return of income in the subsequent years and more particularly prior to the Assessment Year 2010-11. It is submitted that therefore even on merits also there is no reason for the Assessing Officer to form and opinion that the petitioner – assessee had purchased 90,000 shares as on 02/12/2010 and 2,20,000 shares on 16/03/2011. It is submitted that therefore on the aforesaid, the Assessing Officer is not right in observing that the petitioner – assessee

was not entitled to exemption under Section 10(38) of the Income Tax Act and was liable to tax under Section 11 of the Act. It is submitted that so far as ground no.2, on which assessment is sought to be reopened, is concerned, it is submitted that as such the petitioner – assessee did not claim interest under Section 40(a)(ia) of the Income Tax Act, and therefore, there was no question of reopening of the assessment on the aforesaid ground no.2.

Making the above submissions, it is requested to allow the present petition and quash and set aside the impugned notice under Section 148 of the Income Tax Act.

7. Shri Manish Bhatt, learned Counsel appearing on behalf of the revenue has tried to support the impugned notice by submitting that on the basis of the subsequent inquiry carried out by the Assessing Officer and as thereafter on the basis of the material on record collected during subsequent inquiry and having been satisfied that the income has escaped the assessment and thereafter when the assessment has been reopened, it is requested to dismiss the present petition.

8. Heard the learned advocates appearing on behalf of the respective parties at length. The reasons to reopen the scrutiny assessment for the Assessment Year 2011-12 are reproduced hereinabove. From the assessment order passed by the Assessing Officer, which was passed after scrutiny assessment and which was passed after calling for the relevant materials from the petitioner – assessee, the Assessing Officer considering the purchase of shares of Unitech International Ltd. purchased in the year 2007 granted the exemption accordingly, and therefore, the subsequent reopening would

tantamount to change of opinion and as held by the Hon'ble Supreme Court and this Court in catena of decisions mere on change of opinion the reopening of the assessment is not permissible. At this stage, it is required to be noted that as such there is no tangible material available with the Assessing Officer in support of the claim to treat the purchase of the shares in the year 2010-11. On the contrary it is evident from the record that the petitioner – assessee purchased the shares of Unitech International Ltd. in physical form in the year 2007 and the same were reflected /disclosed in his books of accounts produced with return of income in the earlier years, more particularly, in the preceding year of Assessment Year 2011-12. The aforesaid is evident from the material produced on the query raised by the Assessing Officer in the scrutiny proceedings. Under the circumstances also the impugned notice to reopen the assessment cannot be sustained.

9. Now, so far as ground no.2 on which the assessment is sought to be reopened is concerned, it is an admitted position that the petitioner – assessee did not claim any interest under Section 40(a)(ia) of the Income Tax Act, and therefore, on the aforesaid ground the Assessing Officer is not justified in reopening the assessment.

10. In view of the above and for the reasons stated hereinabove, the impugned notice under Section 148 of the Income Tax Act to reopen the assessment for the Assessment Year 2010-11 for the reasons recorded in the communication dated 27/06/2016 cannot be sustained and the same deserves to be quashed and set aside and is accordingly quashed and set aside. Consequently, the reassessment order, which has

been passed after the notice was issued by this Court in the present proceedings deserves to be quashed and set aside and is also accordingly quashed and set aside. Rule is made absolute accordingly to the aforesaid extent. No order as to costs.

(M.R. SHAH, J.)

(B.N. KARIA, J.)

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