IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 4054 of 2016

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MR.JUSTICE A.J. SHASTRI

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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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HVK INTERNATIONAL PVT LTD....Petitioner(s)

Versus

DEPUTY COMMISSIONER OF INCOME TAX - CENTRAL CIRCLE - 3....Respondent(s)

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Appearance:

MR.S.N.SOPARKAR, LD. SENIOR ADVOCATE with MR B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1

MR SUDHIR M MEHTA, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE A.J. SHASTRI

Date : 12/07/2016

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged a notice dated 27.03.2015 annexed at Annexure:A to the petition, under which, the respondent Assessing Officer desired to reopen the assessment of the petitioner for the assessment year 2008-09. Brief facts are as under.

2. The petitioner is currently a company, registered under the Companies Act. At the relevant time, the petitioner was a partnership firm. The petitioner is engaged in the business of manufacturing, trading, exports and imports of diamonds. For the assessment year 2008-09, the petitioner had filed return of income, declaring total income of Rs.7.52 crores (rounded off). Such return was taken up for scrutiny by the Assessing Officer. He passed order of assessment under section 143(3) of the Income Tax Act, 1961 ('the Act' for short) on 16.12.2010, making certain additions to the income of the assessee. To reopen such assessment, the Assessing Officer issued the impugned notice. He had recorded following reasons for issuing the notice for reopening.

"During the course of search proceedings backup of the computers and server installed at the main factory premise of HVK International Pvt. Ltd. was taken in the hard disks and were seized as per Annexure A-50 to A-53. From the backup of the PC of Shri Dharmesh R. Lad, accountant of the HVK, a list of Labour Contractor in excel sheet form have been found along with the amount of work done in the period of last several years. The pre-decided limit of the expenses to be booked in account of each labour contractor in last several years was found in these excel sheets. Wherein the details of limit fixed against the name of each impugned labour contractor and actual amount debited from books of HVK was given. It meant that it was pre-decided that the expense to be claimed in the case so called labour contractor should not exceed the pre-fixed limit for that particular year. The veracity of these excel sheets get proved from the fact that the debit amount given matches with the actual amount debited in the books of impugned labour contractor for the respective periods.

Further, the evidences found and detailed analysis made by the Investigation wing, the most of these labour contractors have been proved to be the employees of HVK and bogus labour expenses were debited against their names by HVK. Moreover, HVK debited these bogus expense for the last seven financial years including the current year. Further, it was found that such labour expenses against these parties have been booked in the financial year 2007-08 also. The information of such labour contractors and total amount debited by H. Vinodkumar & Company against their name during the financial year 2007-08 is provided by the DDIT (Investigation Wing) vide letter No. DDIT(Inv)-III/SRT/TB-2008-09/2014-15 dated 17/03/2015.

Moreover, evidences found by the

Investigation wing that these employees were working from the outside premises controlled and managed by HVK and hence the turnover was booked in the books of the labour contractors against the work done at these premise to disguise the authorities. At these outside premises some of the labour contractors were working as the main manager, others as the manager of some process and the remaining were either working at the main factor premise or were not working at all. Moreover, in detailed investigation which was carried out by investigation wing regarding the labour contractor and most of the labour contractor have accepted the fact.

Hence, from the above explanation it clearly indicates that the claims of the expenses in the case of these bogus labour contractors are not genuine and are also fabricated. Thus, it appears that there are sufficient grounds/reasons to believe that income has escaped. Therefore I have reason to believe that the assessee has concealed the income to extent of Rs.31,83,20,477/- which is an escaped assessment within the meaning of provision of section 147 of the I.T. Act, 1961."

3. Upon being supplied the reasons, the petitioner raised objections to the reopening of the assessment under a letter dated 02.11.2015. Such objections were however, rejected by the Assessing Officer by an order dated 04.01.2016. In this background, the petitioner has challenged the notice for reopening, which as can be seen, was issued beyond a period of four years from the end of relevant assessment year.

4. Counsel for the petitioner raised the following contentions.

I. There was no failure on part of the assessee to disclose truly and fully all material facts. Notice of reopening beyond a period of four years from the end of relevant assessment year was therefore, issued without authority.

II. During the scrutiny assessment, the issue of labour charges was examined by the Assessing Officer in detail and any attempt of reopening on his part on this ground would be based on change of opinion.

III. The reasons do not disclose any material on the basis of which, a belief can be formed that income chargeable to tax has escaped assessment. In any case, the Assessing Officer has relied solely on the report of the investigation wing of the department without applying his mind to such material. In short, it is his borrowed satisfaction and not his own satisfaction which has been recorded in the reasons.

5. On the other hand, learned counsel Shri Sudhir

Mehta for the department opposed the petition, contending that there is *prima-facie* material suggesting that bogus labour charges were claimed by the assessee to increase the expenditure. These materials came to light during a search operation. Such material was not before the Assessing Officer during the original assessment. The Assessing Officer after having applied his mind to the material brought to his notice by the investigation wing, has recorded proper reasons and thereafter, issued notice for reopening.

6. We may recall in the present case, notice for reopening has been issued beyond the period of four years from the end of relevant assessment year. In addition to, therefore, the Assessing Officer forming a belief that income chargeable to tax has escaped assessment, the additional condition that such escapement of income is due to the failure on part of the assessee to disclose truly and fully all material facts, must also be satisfied. We may peruse the reasons recorded and other materials on record with this background in mind.

7. In the reasons, the Assessing Officer has pointed out that the assessee company was subjected to search action, during which, the back up of the computer and the server installed in the main factory were accessed. The material was downloaded in the hard-disks and seized, from which, it was found that the assessee had set pre-decided limits of the expenses to be booked in the accounts of various labour contractors for last several years. Details of limits fixed against each contractor was compared with the actual amount debited in the books of accounts of the assessee firm. When compared to the actual amounts debited by the assessee in the books of accounts, concerning these labour contractors, the same matched the pre-set limits.

On the basis of evidence analyzed by the investigation wing, it was found that almost all these labour contractors were the employees of the assessee and that bogus labour expenses were debited against their names. This was going on since last several years including during the year under consideration.

Investigation wing noted that these employees

were working from outside premises controlled and managed by the assessee and the turnovers booked in the books of the labour contractors against the work done at these premises for disguise. At outside premises, some of the labour contractors were working as main managers, some as managers of some of process and the remaining were either working at the main factory premises or were not working at all. During the investigation, almost all the labour contractors, accepted such facts.

On the basis of such materials placed by the investigation wing before the Assessing Officer, he recorded that *"Hence, from the above explanation it clearly indicates that the claims of the expenses in the case of these bogus labour contractors are not genuine and are also fabricated. Thus, it appears that there are sufficient grounds/reasons to believe that income has escaped."*

8. The reasons can be analyzed. In short, the case of the department is that the assessee had claimed bogus labour contract charges paid to these contractors to inflate the expenses and thereby

deflate the profit. Reference to the data collected from the backup and server of the computer regarding pre-set limit of such expenditure, must be seen in light of the entire reasons recorded and cannot be seen in isolation. This first part which has reference to the pre-set limit for claiming expenditure, which also matched with the actual booking of expenditure for labour charge paid to these contractors, does not, when seen in light of later portion of the reasons recorded suggest that in fact, the expenditure was slashed off and artificial limit or ceiling was applied against a larger sum actually paid by the assessee, contrary to what strenuously argued before us by the learned counsel for the petitioner. The later portion of the reasons recorded amply clarify the case of the Assessing Officer viz. that these labour contract charges were completely bogus and almost all the labour contractors were, in fact, the employees of the assessee. To disguise detection, these labour charges were booked in relation to the work done at the premises outside that of the assessee firm, but controlled and managed by the assessee. The investigation further revealed that

almost all these so called labour contractors had accepted such facts.

9. In view of such reasons, we may examine the contentions raised by the counsel for the petitioner. He had drawn our attention to several queries raised by the Assessing Officer during the original assessment. For example, in a letter dated 21.07.2010, the Assessing Officer had called upon the assessee to provide following details:

> *"22) Details of Labour charges and if the work is done by other parties, party wise details alongwith the details of work, details of TDS deducted and deposited on these payments.*
>
> *23)Please furnish monthly Labour charges and purchases made for the months of January to March 2007."*

In response to such queries, the assessee had under letter dated 17.10.2010, provided following data.

> *"8) Party wise Labour Register with TDS deduction details for the year 2007-2008. (Question no.22)*
>
> *9) Labour Register for the period 01-01-2008 to 31.03.2008. (Question no.23)*

10. Later on, the Assessing Officer in connection with TDS on labour contract charges under letter dated

21.09.2010 had inquired as under:

"4) Copy of Lower rate certificates."

It was after such examination that the Assessing Officer had passed the order of assessment. According to the counsel for the petitioner since this claim was scrutinized, was not open for reexamination. However, this contention begs the issue of true and full disclosure by the assessee. If we proceed on the basis of the reasons recorded, which at this stage of examining validity of the notice for reopening, we are bound to do, the case of the department is, that substantial amount of labour charges were claimed though not incurred. In this respect, the department relies heavily on the material collected by the investigation wing pursuant to the search operation. This material *prima-facie* suggests that labour contractors were paid sizable amount of labour charges without such labour work having been taken by the assessee. Surely, these aspects were not at large before the Assessing Officer during the original assessment proceedings. Any examination by the Assessing Officer of the assessee's claim of labour expenses would be confined to the declarations made by

the assessee and the material produced by the assessee in response to the queries raised by the Assessing Officer. When later on, fresh material has come on record, which would *prima-facie* suggest claim of bogus labour charges, examination by the Assessing Officer at the time of scrutiny assessment, would not permit the petitioner to argue that such issue cannot be gone into again by reopening the assessment. The question of true and full disclosure and the issue having been examined during the original assessment proceedings substantially overlap in the present case.

11. Coming to the last contention of the petitioner, we have already perused the reasons recorded, which in our opinion, do not suggest either any inconsistency or absence of any material to enable the Assessing Officer to form a belief that income chargeable to tax has escaped assessment. If the allegations contained in the reasons recorded are ultimately established, which must depend on the nature of material that may ultimately be brought on record during the reassessment and with respect to which we obviously would not make any comment, it would certainly

indicate that the assessee had claimed bogus labour contract charges without incurring them. According to the department, in large number of cases, labour contractors who were in fact, the employees of the assessee, were paid labour charges without their being any such expenditure being incurred by the assessee. If these facts are ultimately established, it would only indicate that the assessee had claimed higher expenditure than what was incurred thereby suppressing the profit. It is true that the Assessing Officer had relied heavily on the investigation carried out by the investigation wing and the material collected during such process, which culminated into a final report submitted by the investigation wing. However, it is not impermissible for the Assessing Officer to rely on such material, as long as of course he has applied his mind to the materials on record and formed his own belief that on the basis of such material, it can be stated that income chargeable to tax has escaped assessment. It was in this context, we have reproduced the concluding portion of the reasons recorded by the Assessing Officer, which are in the nature of his observations on the basis of materials

supplied by the investigation wing collected during the search operations. These observations indicate the application of mind by the Assessing Officer and his own formation of belief that income chargeable to tax has escaped assessment. This is therefore, not a case of the Assessing Officer proceeding on a borrowed satisfaction of the investigation wing.

12. In a recent judgment on the issue of reliance on the inquiry or investigation carried on by one or the other department of the Government to enable the Assessing Officer to reopen the assessment, it was held and observed as under:

> *9. It can thus be seen that the entire material collected by the DGCEI during the search, which included incriminating documents and other such relevant materials, was alongwith report and show-cause notice placed at the disposal of the Assessing Officer. These materials prima facie suggested suppression of sale consideration of the tiles manufactured by the assessee to evade excise duty. On the basis of such material, the Assessing Officer also formed a belief that income chargeable to tax had also escaped assessment. When thus the Assessing officer had such material available with him which he perused, considered, applied his mind and recorded the finding of belief that income chargeable to tax had escaped assessment, the re-opening could not and should not have been declared as invalid, on the ground that he proceeded on the show-cause notice issued by the Excise Department*

which had yet not culminated into final order. At this stage the Assessing Officer was not required to hold conclusively that additions invariably be made. He truly had to form a bona fide belief that income had escaped assessment. In this context, we may refer to various decisions cited by the counsel for the Revenue.

10. In case of Central Provinces Manganese Ore Co. Ltd. vs. Income Tax Officer, Nagpur (supra) the Supreme Court noted that in case of the assessee which had an office in London, this Customs authority had come to know that the assessee had declared very low price in respect of the consignment of Manganese exported by them out of India. After due inquiries and investigations, the Customs authorities found that the assessee was systematically under-voicing the value of Manganese as compared with the prevailing market price. The Income Tax Officer on coming to know about the proceedings before the Customs Collector in this respect issued notice for reopening of the assessment. In the reasons that the Assessing Officer relied on the facts as found by the Customs Authorities that the assessee had under-voiced goods during export. Under such circumstances, upholding the validity of the notice for reopening, the Supreme Court held and observed as under:

> *"So far as the first condition is concerned, the Income Tax Officer, in his recorded reasons, has relied upon the fact as found by the Customs Authorities that the appellant had under invoiced the goods it exported. It is not doubt correct that the said finding may not be binding upon the income tax authorities but it can be a valid reason to believe that the chargeable income has been under assessed. The final outcome of the proceedings is not relevant. What is*

relevant is the existence of reasons to make the Income Tax Officer believe that there has been under assessment of the assessee's income for a particular year. We are satisfied that the first condition to invoke the jurisdiction of the Income Tax Officer under Section 147(a) of the Act was satisfied."

11. In case of Income Tax Officer vs Purushottam Das Bangur (supra) after completion of assessment in case of the assessee, the Assessing Officer received letter from Directorate of Investigation giving detailed particulars collected from Bombay Stock Exchange which revealed earning of share and price of share increased during period in question and quotation appearing at Calcutta Stock Exchange was as a result of manipulated transaction. On the basis of such information, the Assessing Officer issued notice for reopening of the assessment. The question, therefore, arose whether the information contained in the letter of Directorate of Investigation could be said to be definite information and the Assessing Officer could act upon such information for taking action under Section 147(b) of the Act. In such background, the Supreme Court observed as under:

"12. Ms. Gauri Rastogi, the learned counsel appearing for the respondents, has urged that the letter of Shri Bagai was received by the Income tax Officer on March 26, 1974 and on the very next day, that is, on March 27, 1974, he issued the impugned notice under Section 147(b) of the Act and that he did not have conducted any inquiry or investigation into the information sent by Shri Bagai. Merely because the impugned notice was sent on the next day after receipt of the letter of Shri Bagai does not mean that the Income Tax Officer did not

apply his mind to the information contained in the said letter of Shri Bagai. On the basis of the said facts and information contained in the said letter, the Income Tax officer, without any further investigation, could have formed the opinion that there was reason to believe that the income of the assessee chargeable to tax had escaped assessment. The High Court, in our opinion, was in error in proceeding on the basis that it could not be said that the Income Tax Officer had in his possession information on the basis of which he could have reasons to believe that income of the assessee chargeable to tax had escaped assessment for the relevant assessment years. For the reasons aforementioned, we are unable to uphold the impugned judgment of the High Court. The appeal is, therefore, allowed, the impugned judgment of the High Court is set aside and the Writ Petitions filed by the respondents are dismissed. No order as to costs."

12. In case of Income Tax Officer vs Selected Dalurband Coal Co. Pvt. Ltd.(supra), the assessment was reopened on the basis of the information contained in letter from Chief Mining Officer that the colliery of the assessee had been inspected and there had been under reporting of coal raised. Upholding the validity of re-opening of assessment, the Supreme Court held and observed as under:

"After hearing the learned counsel for the parties at length, we are of the opinion that we cannot say that the letter aforesaid does not constitute relevant material or that on that basis, the Income Tax Officer could not have reasonably formed the requisite belief. The letter shows that a joint inspection was conducted

in the colliery of the respondent on January 9,1967, by the officers of the Mining Department in the presence of the representatives of the assessee and according to the opinion of the officers of the Mining Department, there was under reporting of the raising figure to the extent indicated in the said letter. The report is made by a Government Department and that too after conducting a joint inspection. It gives a reasonably specific estimate of the excessive coal mining said to have been done by the respondent over and above the figure disclosed by it in its returns. Whether the facts stated in the letter are true or not is not the concern at this stage. It may be well be that the assessee may be able to establish that the facts stated in the said letter are not true but that conclusion can be arrived at only after making the necessary enquiry. At the stage of the issuance of the notice, the only question is whether there was relevant material, as stated above, on which a reasonable person could have formed the requisite belief. Since we are unable to say that the said letter could not have constituted the basis for forming such a belief, it cannot be said that the issuance of notice was invalid. Inasmuch as, as a result of our order, the reassessment proceedings have not to go on we don not and we ought not to express any opinion on the merits."

13. In case of AGR Investment Ltd. vs. Additional Commissioner of Income Tax and anr (supra), a Division Bench of Delhi High Court considered the validity of reopening of assessment where the notice was based on information received from Directorate of investigation that the assessee was beneficiary of bogus accommodation entries.

The Court while upholding the validity of reopening observed that sufficiency of reason cannot be considered in a writ petition. It was observed as under:

> *"23 The present factual canvas has to be scrutinized on the touchstone of the aforesaid enunciation of law. It is worth noting that the learned counsel for the petitioner has submitted with immense vehemence that the petitioner had entered into correspondence to have the documents but the assessing officer treated them as objections and made a communication. However, on a scrutiny of the order, it is perceivable that the authority has passed the order dealing with the objections in a very careful and studied manner. He has taken note of the fact that transactions involving Rs.27 lakhs mentioned in the table in Annexure P-2 constitute fresh information in respect of the assessee as a beneficiary of bogus accommodation entries provided to it and represents the undisclosed income. The assessing officer has referred to the subsequent information and adverted to the concept of true and full disclosure of facts. It is also noticeable that there was specific information received from the office of the DIT (INV-V) as regards the transactions entered into by the assessee company with number of concerns which had made accommodation entries and they were not genuine transactions. As we perceive, it is neither a change of opinion nor does it convey a particular interpretation of a specific provision which was done in a particular manner in the original assessment and sought to be done in a different manner in the proceeding under Section 147 of the Act. The reason to believe has been*

appropriately understood by the assessing officer and there is material on the basis of which the notice was issued. As has been held in Phool Chand Bajrang Lal (supra), Bombay Pharma Products (supra) and Anant Kumar Saharia (supra), the Court, in exercise of jurisdiction under Article 226 of the Constitution of India pertaining to sufficiency of reasons for formation of the belief, cannot interfere. The same is not to be judged at that stage. In SFIL Stock Broking Ltd. (supra), the bench has interfered as it was not discernible whether the assessing officer had applied his mind to the information and independently arrived at a belief on the basis of material which he had before him that the income had escaped assessment. In our considered opinion, the decision rendered therein is not applicable to the factual matrix in the case at hand. In the case of Sarthak Securities Co. Pvt. Ltd. (supra), the Division Bench had noted that certain companies were used as conduits but the assessee had, at the stage of original assessment, furnished the names of the companies with which it had entered into transactions and the assessing officer was made aware of the situation and further the reason recorded does not indicate application of mind. That apart, the existence of the companies was not disputed and the companies had bank accounts and payments were made to the assessee company through the banking channel. Regard being had to the aforesaid fact situation, this Court had interfered. Thus, the said decision is also distinguishable on the factual score."

14. Learned Single Judge of Madras High Court in case of ***Sterlite Industries (India) Ltd. vs. Assistant Commissioner of Income***

Tax *reported in* ***[2008] 302 ITR 275 (Mad)*** *upheld the notice for reopening which was based on information from enforcement directorate showing possible inflation of purchases made by the assessee."*

13. Before parting, we may clarify that the Assessing Officer shall carry out the reassessment on the basis of material that may come on record during the assessment, unmindful of any of the observations made herein above.

14. In the result, the petition fails and is dismissed.

(AKIL KURESHI, J.)

(A.J. SHASTRI, J.)

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