IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 20109 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

==========

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 ?	

==========

MOTTO TILES PVT LTD....Petitioner(s)

Versus

ASSISTANT COMMISSIONER OF INCOME TAX - MORBI CIRCLE....Respondent(s)

==========

Appearance:

MR MANISH J SHAH, ADVOCATE for the Petitioner

MR PRANAV G DESAI, ADVOCATE for the Respondent

==========

CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MR.JUSTICE G.R.UDHWANI

Date : 06/05/2016

ORAL JUDGMENT
(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. Rule. Mr. Pranav Desai, learned Senior Standing Counsel waives service of notice of rule on behalf of the respondent.

2. Having regard to the nature of the controversy involved in the present case and with the consent of the learned counsel for the respective parties, the matter was taken up for final hearing today.

3. By this petition under Article 226 of the Constitution of India, the petitioner has challenged the notice dated 02.03.2015 issued by the respondent under section 148 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”), seeking to reopen the assessment of the petitioner for assessment year 2011-12.

4. The petitioner, a Private Limited Company, was incorporated on 15.01.2010. For assessment year 2011-12, the petitioner submitted its return of income on 19.09.2011 showing total loss of Rs.77,51,810/- and a book profit of Rs.35,96,518/-. The case was processed under section 143(1) of the Act. Thereafter, the petitioner received a notice dated 02.03.2015 issued under section 148 of the Act from the respondent. In response to the same, the petitioner requested for a copy of the reasons recorded for issuing the notice under section 148 of the Act, which came to be furnished to the petitioner. In response to the reasons recorded for reopening the assessment, the petitioner filed its objections by a letter

dated 14.09.2015, which came to be rejected by the respondent by an order dated 05.10.2015.

5. Mr. Manish Shah, learned advocate for the petitioner invited the attention of the court to the reasons recorded for reopening the assessment to submit that on the reasons recorded, the Assessing Officer could not have formed the belief that income chargeable to tax has escaped assessment. It was submitted that there is no new tangible material on record and even in a case covered under section 143(1) of the Act, the Assessing Officer should have fresh tangible material on hand for forming the belief as regards escapement of income. It was submitted that the petitioner company had commenced commercial production on 27.12.2010 and hence, it was practically impossible to earn such an undisclosed income within a period of three months. According to the learned counsel, except suspicion, there was no tangible material before the Assessing Officer at the time of recording the reasons to support his belief that the income chargeable to tax has escaped assessment. It was submitted that in the present case, the petitioner has been assessed at book profit of Rs.35,96,518/- under section 115JB of the Act, and that in the normal computation of income the petitioner has shown a total loss of Rs.77,51,810/-. Therefore, even if the total amount of Rs.81,18,000/- which is alleged to have escaped assessment is added, there would still be no additional tax liability on the part of the petitioner and that the petitioner would still be taxed on the book profit. Under the circumstances, the question of any income having escaped assessment would not arise.

5.1 In support of his submissions, the learned counsel placed reliance upon the decision of this court in the case of ***PKM Advisory Services P. Ltd. v. Income Tax Officer****, (2011) 339 ITR 585 (Guj.),* wherein, the court had recorded that when the tax payable as per the reasons recorded is less than the tax paid by the petitioner under the assessment framed under section 143(3) of the Act, the question of any income having escaped assessment does not arise. The court recorded that the order recording reasons itself indicates that in fact no income has escaped assessment and as such, there is no basis for the formation of belief that income has escaped assessment. Reliance was also placed upon the decision of this court in the case of ***India Gelatine and Chemicals Ltd. v. Assistant Commissioner of Income Tax (No.1)****, (2014) 364 ITR 649 (Guj.),* wherein, the court had recorded that even if the addition proposed by the Assessing Officer is sustained, it would make no difference to the ultimate tax liability of the assessee since on the computation of book profit under section 115JA of the Act, the assessee had paid tax on much higher income of Rs.2.89 crores. The court recorded that under the normal computation, the assessee had declared a loss of Rs.1.44 crores (rounded off). Even if the disallowance of Rs.116.86 lakhs is made, there would be no difference in the assessee's tax liability under section 115JA of the Act. The court, placing reliance upon the decision of this court in the case of *PKM Advisory Services P. Ltd. v. Income Tax Officer* (supra), held that in the original assessment order, against the loss of Rs.1.44 crores under the normal computation, the assessment was framed on book profit of Rs.2.89 crores under section 115JA of the Act. Therefore, even if the expenditure of Rs.116.86 lakhs is disallowed, there would be no resultant

change in the petitioner's tax liability since the petitioner has already paid much higher tax. The court, accordingly, quashed the notice under section 148 of the Act. It was submitted that the above decisions would be squarely applicable to the facts of the present case and hence, since the tax liability even if the addition proposed to be made by the Assessing Officer is sustained, would not increase, there is no reason for formation of belief on the part of the Assessing Officer that income chargeable to tax has escaped assessment. It was accordingly, submitted that the assumption of jurisdiction on the part of the Assessing Officer is, therefore, without authority of law.

5.2 The learned counsel also placed reliance upon the decision of this court in the case of ***Siddhi Vinayak Transport v. Assistant Commissioner of Income Tax***, *(2014) 362 ITR 72*.

6. Vehemently opposing the petition, Mr. Pranav Desai, learned Senior Standing Counsel for the respondent placed reliance upon an unreported decision of this court in the case of ***Olwin Tiles (India) Pvt. Ltd. v. Deputy Commissioner of Income Tax – Morbi Circle*** rendered on 05.01.2016 in Special Civil Application No.17307 of 2015 and allied matters, wherein, the court in a case where similar reasons had been recorded for reopening the assessment, had upheld the reopening of assessment and had dismissed the petitions. It was submitted that on the merits of the reopening, the above decision would be squarely applicable to the facts of the present case and hence, the Assessing Officer was wholly justified in forming the belief that income chargeable to tax has escaped assessment for the year under consideration.

6.1 Insofar as the second contention raised on behalf of the petitioner that even if the total amount as proposed to be added by the Assessing Officer is sustained, there would be no increase in the tax liability of the petitioner, the learned counsel submitted that this is a case where no scrutiny assessment has been made under section 143(3) of the Act and that the petitioner had declared income of Rs.35.96 lacs under section115JB of the Act. It was submitted that in the present case, the tax levied under section 115JB of the Act is on the book profit. Even if any addition is made to the total income shown in the return of income filed, the same results into reduction of loss to be carried forward to subsequent years. In case of reduction in loss in the year under consideration, the revenue effect will be in the year in which the assessee claims such set off. Therefore, the contention of the petitioner that there will be no revenue effect in its case is not correct. It was submitted that the tax payable/paid by the assessee under section 115JB of the Act is only the minimum alternative tax payable during the year under consideration and that the assessee is eligible to get the credit of such tax paid against the tax liability of the assessment year in which the tax becomes payable on the total income computed in accordance with the provisions of law. It was submitted that therefore, the plea taken by the petitioner that there would be no difference in tax liability deserves to be rejected.

6.2 In support of his submissions, Mr. Desai placed reliance upon the decision of the Supreme Court in the case of ***Deputy Commissioner of Income Tax v. Zuari Estate Development & Investment Co. Ltd.***, *(2015) 373 ITR 661*

(SC), for the proposition that where the assessee's return is accepted under section 143(1) of the Act, there is no question of change of opinion, inasmuch as, while accepting the return under the said provision, no opinion is formed. The learned counsel also placed reliance upon the decision of the Supreme Court in the case of ***Commissioner of Income Tax (Central), Delhi v. Harprasad and Co. (P) Ltd.****, (1975) 99 ITR 118*, for the proposition that income also includes loss.

6.3 It was further submitted that the petitioner in the computation of his income, has claimed loss which will be set off in the subsequent years. Hence, despite the fact that for the year under consideration, he may be assessed on the book profit under section 115JB of the Act, the loss claimed under the regular computation would remain and the petitioner would get the benefit thereof in subsequent years. Therefore, the income chargeable to tax has escaped assessment, though it may not have any effect on the tax liability in the year under consideration. It was submitted that here, there is a loss on which a right accrues as there is carry forward effect which would have a direct impact on future years. Benefit accrues to the assessee which is to the detriment of the revenue. It was, accordingly, urged that at the threshold, at the stage of notice under section 148 of the Act, the revenue should not be precluded from examining the issues. It was contended that the decision of this court in the case of ***PKM Advisory Services P. Ltd. v. Income Tax Officer*** (supra), would not be applicable to the facts of the present case, inasmuch as, in the said case, it was not a case where the assessee had declared a loss. It was submitted that insofar as the decision of this court in the case of ***India Gelatine and Chemicals Ltd. v. Assistant Commissioner of Income Tax (No.1)*** (supra)

is concerned, though the same has been rendered in a similar set of facts, such decision has to be reconsidered.

7. Before adverting to the merits of the case, it may be germane to refer to the reasons recorded for reopening the assessment, which read thus:

> *"**Reasons for reopening of assessment**:*
> *In this case, on verification of records, it is found that the Assessee is a Private Ltd. Company engaged in the business of manufacturing of Ceramic Tiles. On the basis of the information available with this office,assessee company had issued its shares at huge premiums during F.Y. 2010-11. On verification of "PART-A – BS" of return of income filed by the assessee company, it is found that the assessee company has shown "Issued, Subscribed and Paid-up" share capital of Rs.75,91,600/=. During the F.Y. 2010-11, the assessee had issued 9,000 shares at a face value of Rs.10 per share with a premium of Rs.990/- per share. Hence, the premium received by the assessee per share is Rs.990 for the share of face value of Rs.10/-. On the basis of the assets and liabilities furnished by the assessee company in its balance sheet, and computing the net worth of the company, per share valuation of the assessee company comes out to be Rs.98/-. Hence, the shares of the company have been subscribed by the shareholders at a premium which is very high in comparison to the real worth of the shares. Further, assessee company has shown total income of Rs. NIL for A.Y. 2011-12.*

It is difficult to accept the fact that a person will invest in the share capital of a Private Limited Company at such a huge premium which is even higher than the real worth of the share. In fact, a sound investor will never subscribe to the shares of a company with such meager profits at such high premiums. A detailed analysis of the data furnished by the assessee with its return shows that whereas the net worth of the shares issued is Rs,98/-, the same have been allotted for Rs.1000/- i.e. an excess of Rs.902/-.

In my opinion, this excess premium amount of Rs.902/- is unexplained cash-credit in the hands of the assessee. Hence, I have reasons to believe that income to the extent of Rs.81,18,000/- has escaped assessment in the hands of the assessee for A.Y. 2011-12.

I have, therefore, reasons to believe that income/gain chargeable to tax has escaped assessment for the A.Y. 2011-12. The above income / gain chargeable to tax has escaped assessment by reason of the failure on the part of the above named assessee who failed to disclose fully and truly all material fact necessary for the assessment for the A.Y. 2011-12 within the meaning of explanation 2(b) of section 147 of the I.T. Act, 1961.

Hence, it is a fit case for re-opening the assessment for A.Y. 2011-12.

Issue Notice under section 148 of the I. T. Act, 1961."

8. On a perusal of the reasons recorded it can be seen that

the Assessing Officer has sought to reopen the assessment on the ground that the shares of the company have been subscribed by the shareholders at a premium which is very high in comparison to the real worth of the shares. According to the Assessing Officer, per share valuation of the assessee company comes to Rs.98/-, whereas the shares having face value of Rs.10/- were sold with a premium of Rs.990/- per share. Insofar as the basis for reopening the assessment is concerned, on similar grounds, the concerned Assessing Officer had sought to reopen the assessment in the case of *Olwin Tiles (India) Pvt. Ltd. v. Deputy Commissioner of Income Tax – Morbi Circle* (supra). In the said case, the court, for the detailed reasons recorded in the judgement and order dated 05.01.2016, had upheld the reopening and had dismissed the petitions. The court did not find the reasons to be perverse or so untenable as to terminate the assessment on the ground that the Assessing Officer could not be stated to have any reason to believe or tangible material to form such an opinion that income chargeable to tax had escaped assessment. Therefore, on the merits of the reopening, the present case is squarely covered by the above decision against the petitioner.

9. However, on behalf of the petitioner, it has been pointed out that in terms of the reasons recorded, the income chargeable to tax to the extent of Rs.81,18,000/- has escaped assessment. In the return of income filed by the petitioner, the petitioner has disclosed loss of Rs.77,51,810/- and the petitioner has been assessed at an income of Rs.35,96,518/- on the book profit under section 115JB of the Act. It has, accordingly, been contended that even after making the proposed addition, there would be no difference in the taxable

income of the petitioner and it will still be governed by the provisions of section 115JB of the Act.

10. The learned counsel for the petitioner has also drawn the attention of the court to the provisions of section 152(2) of the Act, which provides that where an assessment is reopened under section 147, the assessee may, if he has not impugned any part of the original assessment order for that year either under sections 246 to 248 or under section 264, claim that the proceedings under section 147 shall be dropped on his showing that he had been assessed on an amount or to a sum not lower than what he would be rightly liable for even if the income alleged to have escaped assessment had been taken into account, or the assessment or computation had been properly made. It was submitted that in view of the above provision, the proceedings are even otherwise required to be dropped because even if the income which is alleged to have escaped assessment is taken into account, the petitioner would not be assessed at a higher amount.

11. Insofar as the second contention raised on behalf of the petitioner is concerned, the controversy stands squarely concluded by the decision of this court in the case of ***India Gelatine and Chemicals Ltd. v. Assistant Commissioner of Income Tax (No.1)*** (supra) wherein, the court in a case where the assessee had declared a loss of Rs.1.44 crores under the normal computation and the assessment was framed on book profit of Rs.2.89, had held that even if the expenditure of Rs.116.86 lakhs is disallowed, there would be no resultant change in the petitioner's tax liability since the petitioner had already paid much higher tax and had allowed

the petition. It appears that the revenue has accepted the said decision and has not challenged the same before the higher forum. The learned counsel for the respondent has urged that the decision requires reconsideration. Having regard to the facts and circumstances of the case, as well as the fact that the revenue has accepted the said decision, the court does not find any reason to refer the matter for consideration to a Larger Bench.

12. In the light of the decision of this court in the case of ***India Gelatine and Chemicals Ltd. v. Assistant Commissioner of Income Tax (No.1)*** (supra), having regard to the fact that even if the entire amount which is proposed to be added by the Assessing Officer is sustained, there would be no addition to the tax liability of the petitioner and the petitioner would still be governed by the provisions of section 115JB of the Act and assessed on the same book profit, it cannot be said that there was sufficient material before the Assessing Officer to form the belief that income chargeable to tax has escaped assessment. The impugned notice issued under section 148 of the Act, therefore, cannot be sustained.

13. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dated 02.03.2015 issued by the respondent under section 148 of the Income Tax Act, 1961 is hereby quashed and set aside. Rule is made absolute, accordingly, with no order as to costs.

(HARSHA DEVANI, J.)

(G.R.UDHWANI, J.)

parmar*