

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****SPECIAL CIVIL APPLICATION NO. 20009 of 2015****With****SPECIAL CIVIL APPLICATION NO. 20010 of 2015****TO****SPECIAL CIVIL APPLICATION NO. 20012 of 2015****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS.JUSTICE HARSHA DEVANI****and****HONOURABLE MR.JUSTICE G.R.UDHWANI**

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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 ? |  |

**PAL GRAM HINDU SARVAJANIK TRUST....Petitioner(s)****Versus****INCOME TAX OFFICER (E)....Respondent(s)****Appearance:****MR JP SHAH with MR MANISH J SHAH, ADVOCATE for the Petitioner****MR MR BHATT, SR. ADVOCATE with MRS MAUNA M BHATT, ADVOCATE  
for the Respondent**

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

Date : 01/03/2016

**ORAL JUDGMENT**

**(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)**

1. By these petitions under Article 226 of the Constitution of India, the petitioner has challenged the notices 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 years 2008-09, 2009-10, 2010-11 and 2011-12 respectively.

2. Since the facts in all these petitions are common and the parties are also common, the same were taken up for hearing together and are decided by this common judgment.

3. These petitions relate to assessment years 2008-09, 2009-10, 2010-11 and 2011-12 respectively. In relation to assessment year 2002-03, the petitioner filed return of income on 22<sup>nd</sup> October, 2002 showing surplus of Rs.95,917/- and also filed therewith Form No.10 for accumulation. Subsequently, a notice dated 04.03.2015 came to be issued under section 148 of the Act for assessment year 2008-09. In respect of the assessment year 2003-04, the petitioner filed return of income on 09.11.2003 showing deficit of Rs.5,57,062/-. Subsequently, by the impugned notice dated 04.03.2015, the assessment for the assessment year 2009-10 is sought to be reopened under section 147 of the Act. For assessment year 2004-05, the

petitioner filed return of income on 19.01.2005 showing deficit of Rs.58,02,739/-. Subsequently, a notice dated 04.03.2015 came to be issued under section 148 of the Act seeking to reopen the assessment of the petitioner for assessment year 2010-11. In relation to assessment year 2006-07, the petitioner filed return of income on 28.12.2006 showing deficit of Rs.38,28,090/-. Subsequently, by the impugned notice dated 04.03.2015 issued under section 148 of the Act, the assessment for assessment year 2012-13 is sought to be reopened.

4. The reasons for reopening of assessments are that as per section 11(2)(a) of the Act, the trust is required to file Form No.10 prescribed under rule 17 along with the resolution of the trust passed by the trustees of the trust clearly mentioning the intention of the trust for which such an accumulation has been done before the Assessing Officer on or before the stipulated time allowed as per section 139(1) of the Act. For the above referred assessment years, the assessee had not filed Form No.10 resolution on or before the time allowed under section 139 of the Act. Moreover, the time of five years allowed under section 11(2) had also elapsed. In view of the aforesaid, the amounts as mentioned in the reasons recorded, have been treated as chargeable to tax under section 11(2) of the Act for the assessment years in relation to which the impugned notices under section 148 of the Act have been issued.

5. Upon receipt of the said notices, the petitioner submitted its objections to the reasons recorded for reopening the assessments which came to be rejected vide separate orders dated 22.09.2015.

6. Mr. J. P. Shah, learned advocate for the petitioner assailed the impugned notices by inviting the attention of the court to the reasons recorded for reopening the assessment for assessment year 2008-09 to submit that whereas the reasons state that Form No.10 is not filed, the fact is that it has been filed. It was pointed out that by a letter dated 24.10.2015 of the petitioner's Chartered Accountant addressed to the Assessing Officer, a copy of the return, Form No.10 and computation of surplus of Rs.95,917/- were again filed along with the letter. It was argued that the entire reasons show that the Assessing Officer had not taken the trouble of checking the record of assessment otherwise he could not have arrived at the figure of Rs.9,31,331/- and that Form 10 was not filed. It was urged that if there are governing facts for arriving at the belief recorded in paragraph 4, the reasons are factually incorrect. Reliance was placed upon a decision of this court in **Sagar Enterprises v. Assistant Commissioner**, (2002) 257 ITR 335 (Guj), for the proposition that it is settled legal position that when the officer concerned has taken into consideration an irrelevant fact, it cannot be said with certainty as to which factor would have weighed with him for the purpose of arriving at the belief that income chargeable to tax has escaped assessment.

6.1 Next, it was submitted that as per the reasons recorded for reopening the assessment in each of the assessment years, on the one hand it is the case of the Assessing Officer that the petitioner had not filed Form No.10 in assessment years 2002-03, 2003-04, 2004-05 and 2006-07, whereas on the other hand he seeks to tax such amount in assessment years 2008-09,

2009-10, 2010-11 and 2012-13 respectively on the ground that the accumulated income had not been used within five years of such accumulation. Referring to the provisions of sub-section (2) to section 11 of the Act, it was pointed out that it is only if any amount is accumulated as contemplated therein by filing Form No.10 that an obligation arises to spend such amount within the next five year. It was submitted that in the absence of any Form No.10 having been filed, there was no corresponding obligation to spend such amount within the next five years; and if there was no obligation to spend within the next five years, nothing is taxable in law in the assessment years under consideration because of non-spending within the five years. It was reiterated that in relation to assessment year 2008-09, the Assessing Officer has proceeded on the basis of wrong facts for the purpose of being satisfied that income has escaped assessment. Under the circumstances, issuance of notice for reopening the assessment is bad in law.

6.2 In relation to the subsequent assessment years, it was pointed out that in the computation of income the net result is not surplus but deficit and therefore, the provisions of section 11(2) of the Act would not apply. It was further submitted that the assessment is sought to be reopened on the ground that in the relevant year, the petitioner (assessee) had not filed Form No.10. According to the learned counsel, if Form No.10 has not been filed in respect of accumulated income, then there was no question of complying with the conditions of section 11(2) of the Act and hence, on the grounds stated in the reasons recorded, the Assessing Officer could not have formed the opinion that any income chargeable to tax has escaped. It was, accordingly, urged that assumption on the part of the

Assessing Officer by issuance of notices under section 148 of the Act is, therefore, without jurisdiction.

7. Opposing the petitions, Mr. M. R. Bhatt, Senior Advocate, learned counsel for the respondents, invited the attention of the court to the averments made in the memorandum of petitions, to submit that the petitioner has, in relation to assessment year 2002-03, admitted having filed Form No.10 for accumulation. It was submitted that in terms of the provisions of section 11(2) of the Act, such amount was required to be utilized within a period of five years, whereas such accumulated fund has not been utilized and therefore, the same is required to be taxed in the sixth year. Referring to the reasons recorded, it was submitted that there is no room for doubt about the ground of formation of belief that the income chargeable to tax has escaped assessment inasmuch as, the ground for formation of such belief is that the accumulated fund has not been utilized. It was submitted that the Assessing Officer is clear that there are accumulated funds in relation to each of the assessment years in question which have not been utilized, and in relation to assessment year 2002-03, the petitioner has also agreed that there were accumulated funds. It was argued that the basis for reopening the assessment is that the accumulated funds have not been utilized and not that the Form No.10 has not been filed. It was contended that recording of facts regarding section 11(2) of the Act in the reasons is only an information and that the gist of the reasons is the applicability of sub-section (3) of section 11 of the Act. Therefore, on the reasons recorded, the formation of the belief that the income chargeable to tax has escaped assessment for the assessment years under

consideration is wholly justified. Under the circumstances, there is no lack of jurisdiction on the part of the Assessing Officer, warranting interference by this court.

8. Before advertng to the rival submissions, it may be germane to refer to the reasons recorded by the Assessing Officer for the purpose of reopening the assessments for the assessment years under consideration. Since the reasons recorded for reassessment in relation to each of the assessment years are more or less similar, for the sake of convenience reference may be made to the reasons recorded for reopening the assessment for assessment year 2008-09 which read thus:

*“During the course of assessment proceedings pertaining to A.Y. 2011-12, on verification of the submission made by the A.R. of the assessee trust, it came to notice that assessee trust has filed return of income for A.Y. 2002-03 declaring income of Rs.10,77,884/-. Computation of income for the said A.Y. 2002-03 reveals that total income of the trust is of Rs.10,77,884/-, out of which an amount of Rs.9,31,331/- was accumulated and shown as an amount to be accumulated/set apart for future application towards the object of the trust.*

*As per section 11(2)(a) of the Income Tax Act, the trust is required to file Form No.10 prescribed under Rule 17 along with the resolution of the trust passed by the trustees of the said trust clearly mentioning the intention of the trust for which such an accumulation has been done before the Assessing Officer on or before stipulated time allowed as*

*per section 139(1) of the Act.*

*The information mentioned in the reply received during the assessment proceeding for A.Y. 2011-12 from the assessee trust on 19.03.2014 in response to notice u/s 142(1) dated 18.03.2014 reveals that trust has not filed Form No.10 resolution on or before time allowed u/s 139. Moreover, time of five years allowed u/s 11(2) has also elapsed. In view of these, an amount of Rs.9,31,331/- is required to be treated as chargeable income u/s 11(2) of the Act in A.Y. 2008-09.*

*As there is an under assessment of income to the tune of Rs.9,31,331/- within the meaning of section 147 of the Income Tax Act, 1961 on account of accumulated funds not utilized by the assessee trust within the prescribed time limit which is now treated as an income in the hands of the trust. With a view to bring the above escaped income of Rs.9,31,331/- under tax, I am satisfied that action u/s 148 is required to be initiated in respect of the above mentioned assessee for A.Y. 2008-09."*

9. On a bare reading of the reasons recorded, it is evident that it is the case of the Assessing Officer that the petitioner being a trust, was required to file Form No.10 prescribed under rule 17 along with a resolution of the trust passed by the trustees of the trust clearly mentioning the intention of the trust for which the accumulation had been done, before the Assessing Officer on or before the stipulated time allowed as per section 139(1) of the Act. It is further the case of the Assessing Officer that the amount as mentioned in the reasons

recorded had been accumulated and set apart for future application towards the object of the trust. It is also the case of the Assessing Officer that as per the information received by him, the assessee (petitioner) had not filed Form No.10, resolution on or before the time allowed. Since five years allowed under section 11(2) of the Act have elapsed, according to the Assessing Officer, such amount has become chargeable to income under section 11(2) of the Act in the assessment years under consideration.

10. At this juncture reference may be made to the relevant statutory provisions. Section 11 of the Act makes provision for "Income from property held for charitable or religious purposes". Sub-section (2) of section 11, as it stood at the relevant time, provided that where seventy-five per cent of the income referred to in clause (a) or clause (b) of sub-section (1) read with the Explanation to that sub-section is not applied, or is not deemed to have been applied, to charitable or religious purposes in India during the previous year but is accumulated or set apart, either in whole or in part, for application to such purposes in India, such income so accumulated or set apart shall not be included in the total income of the previous year of the person in receipt of the income, provided the conditions stipulated thereunder are complied with, namely: (a) such person specifies, by notice in writing given to the Assessing Officer in the prescribed manner, the purpose for which the income is being accumulated or set apart and the period for which the income is to be accumulated or set apart, which shall in no case exceed ten years; (b) the money so accumulated or set apart is invested or deposited in the forms or modes specified in sub-section (5). Sub-section (3) of

section 11 of the Act, *inter alia*, provides that any income referred to in sub-section (2) which is not utilized for the purpose for which it is so accumulated or set apart during the period referred to in clause (a) of that sub-section or in the year immediately following the expiry of such period, shall be deemed to be the income of such person in the previous year in which it ceases to be so accumulated or set apart.

11. In the facts of the present case, the Assessing Officer has reopened the assessment under the belief that the petitioner in the financial year relevant to assessment years 2002-03, 2003-04, 2004-05 and 2006-07, had set apart/accumulated the amounts mentioned in the reasons recorded in relation to the corresponding assessment years for future application towards the object of the trust. However, in the very reasons recorded, the Assessing Officer has also recorded that the assessee has not filed Form No.10 on or before the time allowed under section 139 of the Act. Thus, it is the categorical case of the Assessing Officer that the petitioner has not complied with the requirements of clause (a) of sub-section (2) of section 11 of the Act. Nonetheless, it is the case of the Assessing officer that since the amount so accumulated or set apart has not been utilized within the period of five years as stipulated under the Act, the same is deemed to be the income of the petitioner in the assessment years under consideration. Thus, there is a basic contradiction in the reasons recorded.

12. In the opinion of this court, insofar as the controversy involved in the present case is concerned, a condition precedent for invoking the provisions of sub-section (3) of section 11 of the Act in the year in which the amount set apart

or accumulated ceases to be set apart or accumulated for the application thereto, is that such amount should have been set apart or accumulated in terms of clause (a) of sub-section (2) of section 11. In the present case, in the reasons recorded for reopening the assessments, it is the specific case of the Assessing Officer that the petitioner has not filed Form No.10 in the prescribed manner and that the petitioner has not complied with the requirements of clause (a) of sub-section (2) of section 11 of the Act. As a necessary corollary it follows that no amount had been accumulated or set apart in assessment years 2002-03, 2003-04, 2004-05 and 2006-07. Thus, when no amount has been accumulated as required under clause (a) of sub-section (2) of section 11 of the Act, the question of non-utilization of such amount within a period of five years and consequently taxing the same in the sixth year by considering the same to be the deemed income of the trust would not arise. As rightly submitted by the learned counsel for the petitioner, if at all, in assessment years 2002-03, 2003-04, 2004-05 and 2006-07, the petitioner had not utilized the sums referred to in the reasons recorded by the Assessing Officer, without following the procedure prescribed under section 11(2) (b) of the Act for setting apart or accumulation of funds, such amounts would be the income of the said assessment years and ought to have been taxed in those assessment years. This view is fortified by the decision of the Supreme Court in **Commissioner of Income-tax, Vidarbha, Nagpur v. Nagpur Hotel Owners' Association, Nagpur**, (2001) 2 SCC 128, wherein the court has held thus:

*“6. It is abundantly clear from the wordings of sub-section (2) of Section 11 that it is mandatory for the person claiming the benefit of Section 11 to intimate to the*

*assessing authority the particulars required, under Rule 17 in Form 10 of the Act. If during the assessment proceedings the Assessing Officer does not have the necessary information, question of excluding such income from assessment does not arise at all. As a matter of fact, this benefit of excluding this particular part of the income from the net of taxation arises from Section 11 and is subject to the conditions specified therein. Therefore, it is necessary that the assessing authority must have this information at the time he completes the assessment. In the absence of any such information, it will not be possible for the assessing authority to give the assessee the benefit of such exclusion and once the assessment is so completed, in our opinion, it would be futile to find fault with the assessing authority for having included such income in the assessable income of the assessee."*

13. Thus, for the assessment years under consideration, viz. assessment years 2008-09, 2009-10, 2010-11 and 2012-13 respectively, in the absence of any funds having been set apart or accumulated in terms of sub-section (2) of section 11 of the Act in assessment years 2002-03, 2003-04, 2004-05 and 2006-07, the question of invoking sub-section (3) to section 11 of the Act and taxing such amount after the lapse of a period of five years would not arise. In view of the clear language of sub-sections (2) and (3) of section 11 of the Act, sub-section (3) of section 11 of the Act would be applicable only in case certain funds have been set apart or accumulated in terms of the provisions of clauses (a) and (b) of sub-section (2) of section 11 of the Act. In the absence of any funds having been set apart under rule 17 of the Income Tax Rules, 1962 by filing

Form No.10 in assessment years 2002-03, 2003-04, 2004-05 and 2006-07, such amount cannot be considered to be the deemed income of the petitioner after the lapse of a period of five years thereof in the assessment years under consideration. In the aforesaid premises, in the opinion of this court, on the reasons recorded by the Assessing Officer, he could not have formed the belief that income chargeable to tax has escaped assessment in the assessment years under consideration. The assumption of jurisdiction by the Assessing Officer under section 147 of the Act by issuing the impugned notices under section 148 is, therefore, without any authority of law. Consequently, the impugned notices cannot be sustained.

14. Insofar as assessment year 2008-09 is concerned, there is an additional factor which renders the impugned notice unsustainable. As pointed out by the learned counsel for the petitioner, for assessment year 2002-03, the petitioner had filed computation showing surplus of Rs.95,917 only and for this it had filed Form No.10. Evidently, therefore, the Assessing Officer has not properly verified the facts from the record of assessment. This court in **Sagar Enterprises v. Assistant Commissioner** (supra) has held that when the officer concerned has taken into consideration an irrelevant fact, it cannot be said with certainty as to which factor would have weighed with him for the purpose of arriving at the belief that income chargeable to tax has escaped assessment and to what extent the decision is vitiated. The Assessing Officer, having taken into consideration facts which are contrary to the record for the purpose of forming the belief that income chargeable to tax has escaped assessment, for this reason

also it cannot be said that he could have formed the belief that income chargeable to tax has escaped assessment so as to assume jurisdiction under section 147 of the Act.

15. The upshot of the above discussion is that the petitions succeed and are, accordingly, allowed. The impugned notices issued under section 148 of the Income Tax Act, 1961 (Annexure-B) to each of the petitions are hereby quashed and set aside. Rule is made absolute, accordingly in each of the petitions, with no order as to costs.

(HARSHA DEVANI, J.)

(G.R.UDHWANI, J.)

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