

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION NO. 1715 of 2015**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE M.R. SHAH** sd/-

**and**

**HONOURABLE MR.JUSTICE S.H.VORA** sd/-

|   |   |    |
|---|---|----|
| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ?  | NO |
| 2 | To be referred to the Reporter or not ?   | NO |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ?   | NO |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | NO |

JIVRAJ TEA COMPANY....Petitioner(s)

Versus

ASSTT. COMMISSIONER OF INCOME TAX....Respondent(s)

Appearance:

MR. HARDIK V VORA, ADVOCATE for the Petitioner(s) No. 1

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

CORAM: **HONOURABLE MR.JUSTICE M.R. SHAH**

and

**HONOURABLE MR.JUSTICE S.H.VORA**

Date :12/06/2015

CAV JUDGMENT

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

1.0. By way of this petition under Article 226 of the Constitution of India, the petitioner- assessee -Jivraj Tea Company has prayed for an appropriate writ, direction and order to quash and set aside the impugned notice under Section 30.3.2014 (Annexure C) issued under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the "Act") for the AY 2009-10, by which, in exercise of powers under Section

147 of the Act the AO has reopened the assessment for AY 2009-10 and the petitioner – assessee is called upon to deliver / file return / revised return in the prescribed format for the AY 2009-10.

2.0. The facts leading to the present Special Civil Application in nutshell are as under:

2.1. That the petitioner firm- assessee is engaged in the business of trading of tea, sugar & milk powder, letting out of property on hire and generation of electricity. That the assessee filed return of income for AY 2009-10 declaring total income at Rs. 30,75,229/-. That the case was selected for scrutiny assessment by issuing notice under Section 143(2) of the Act. That thereafter, and after detailed questionnaire, AO finalized the assessment for AY 2009-10 and made the addition of Rs. 2,56,52,410/- and assessed the income at Rs.2,87,27,710/-. That the AO passed the assessment order on 26.12.2011. That thereafter and within a period of four years from the date of relevant assessment year, the AO has issued and served the notice under Section 148 of the Act dated 30.3.2013 upon the petitioner assessee whereby the respondent has assumed the jurisdiction on re-assessed income for AY 2009-10. That having been served with the notice under Section 148 of the Act, the petitioner-assessee vide communication / letter dated 3.4.2014 asked for / requested for copy of the reasons recorded to reopen the assessment and also requested the respondent to treat original income as return of income in response to the above notice. That vide communication dated 16.5.2014, the petitioner-assessee has been served with the copy of reasons recorded for reopening of the assessment for AY 2009-10.

2.2. That the petitioner submitted objections vide communication / letter dated 12.09.2014 raising objections against

reopening of the assessment for AY 2009-10.

2.3. That by vide communication / order dated 2.1.2015, the AO has overruled the objections raised by the petitioner.

2.4. Hence, at this stage, petitioner has preferred present Special Civil Application under Article 226 of the Constitution of India challenging the impugned notice under Section 148 of the Act and challenging the reopening of the assessment for AY 2009-10.

3.0. Shri Hardik Vora, learned advocate for the petitioner has vehemently submitted that impugned notice under Section 148 of the Act and reopening of the assessment for AY 2009-10 is absolutely illegal and contrary to Section 147 of the Act. It is vehemently submitted that assumption of jurisdiction by the respondent authority to reopen concluded and completed assessment for AY 2009-10 is absolutely illegal, arbitrary and contrary to the provision and statute, which cannot be sustained and same deserves to be quashed and set aside.

3.1. It is vehemently submitted by Shri Vora, learned advocate for the petitioner that on the reasons recorded to reopen the concluded assessment, reopening of the assessment is not permissible and same cannot be sustained.

3.2. It is vehemently submitted by Shri Vora, learned advocate for the petitioner that as such reopening of the assessment for AY 2009-10 is nothing but a change of opinion of the AO. It is submitted that mere change of opinion of the AO, reopening of the concluded assessment is not permissible.

3.3. It is submitted that in the present case the AO passed original order of assessment after holding due inquiry and after questionnaires which were replied by the petitioner assessee and thereafter AO has made addition of Rs.2,56,52,410/- and had determined the assessed income at Rs. 2,87,27,710/-. It is submitted that after the petitioner- assessee filed return of income the case was selected for scrutiny assessment under Section 143(2) of the Act. The AO thereafter and during the scrutiny proceedings, inquiry in detail, each and every aspect of the claim, more particularly, the amount advanced to the partners and more particularly, with respect to non charging of the interest by the firm from the partners. It is submitted that while replied dated 14.11.2011 to the notice dated 28.11.2011 the assessee specifically replied vide point no.2 and point no.6.

3.4. It is submitted that the assessment is reopened for the reason that amount is advanced to partners and no interest has been charged by the firm from the partners and on the other side, firm has paid the interest on interest bearing fund available with it. It is submitted that during the scrutiny proceedings, the AO has inquired in detail each and every aspect of the said claim.

3.5. It is submitted that vide reply dated 14.11.2011 to notice dated 28.10.2011 assessee has replied vide point no.2 as, "in respect of your query as why capital is shown under "application of funds" we would like to submit that since partner's closing capital balance is in debit, the same has been shown under "Application of funds" in the balance sheet of the firm."

3.6. It is further submitted that in the same reply vide point no.6, assessee has submitted as, 'As desired by your goodself, the copy of

ledger account of Jivraj Tea Limited appearing in our books of accounts for the period from AY 2006-07 to AY 2009-10 and also for the AY 2010-11 and 2011-12 are enclosed.

3.7. It is further submitted that in the further clarification and to the query of assessing officer vide reply dated 17.11.2011 assessee has replied as, "in regards to the non charging of interest on the negative capital of partners, we have to submit that our deed of partnership dated 1.10.2005 does not contain any enabling clause to charge the the interest on the debit balances of the partners. It is submitted that in view of the above fact, it is requested that your goodselves proposal for charging interest on the debit balances of the partners be dropped.

3.8. It is submitted that AO has also proposed to disallow interest paid to Jivraj Tea Limited vide show cause notice dated 5<sup>th</sup> December 2011, point no.2 as " you have claimed interest expense of Rs.82,88,631/- on account of creditor which is your related concerned Jivraj Tea Ltd. It is submitted that but till date you have not submitted any written agreement for charging of interest by the creditor. It is submitted that payment to creditor is outstanding since very long and in the any previous year you have not paid any interest on it. It is submitted that then what was the need to pay interest to the creditors on his outstanding payment when you have not paid the interest in any earlier year's outstanding. Therefore, you are requested to show cause why the interest paid to Jivraj Tea Limited should not be disallowed.

3.9. It is submitted that however after considering the reply of the assessee dated 16<sup>th</sup> December 2011, AO has accepted the claim of assessee and decided not to make any disallowance on this count.

3.10. It is submitted that hence on which reassessment is sought for, is already discussed by the same AO on the same facts in detail during scrutiny assessment. It is submitted that after specifically asking the number of queries on the issue and after satisfying himself on genuineness of claim of assessee, AO has passed assessment order u/s 143(3) without making any addition / disallowance on the same count.

3.11. It is submitted that therefore, now issuing any notice under Section 148 of the Act with an intention to reopen the already concluded assessments would be beyond the shadow of any doubt, tantamount to “change of opinion” for which AO is not at all empowered to reopen the concluded assessments. It is submitted that therefore, assumption of jurisdiction by the AO to reopen the concluded assessment for AY 2009-10 while issuing impugned notice under Section 148 of the Act is absolutely illegal and same shall be wholly without jurisdiction, which deserves to be quashed and set aside.

3.12. In support of his above submissions, Shri Vora, learned advocate for the petitioner has heavily relied upon the following decisions of this Court.

1. **Sarla Rajkumar Varma vs. Assistant Commissioner of Income Tax** reported in (2014) 43 Taxmann.com 372 (Guj)
2. **Reckitt Benckiser Healthcare India Ltd vs. Assistant Commissioner of Income Tax (OCD), Circle 5,** reported in (2013) 35 Taxmann. Com 539 (Guj).
3. **Cliantha research Ltd. vs. Deputy Commissioner of Income Tax, Ahmedabad Circle-I** reported in (2013) 35 Taxmann. Com 61(Guj).

Making above submissions and relying upon the above decisions, it is requested to allow present Special Civil Application and quash and set aside the impugned notice under Section 148 of the Act and

consequently to quash and set aside the impugned reopening of the assessment for AY 2009-10.

4.0. Present petition is opposed by Shri Sudhir Mehta, learned advocate for the revenue. An affidavit in reply is filed opposing the present Special Civil Application.

4.1. It is vehemently submitted that the impugned notice under Section 148 of the Act – reopening of the assessment for AY 2009-10 is absolutely just and proper and in consonance with the provision of statute, more particularly, Section 147 of the Act. It is submitted that the impugned notice under Section 148 of the Act – reopening of the assessment for AY 2009-10 and assumption of jurisdiction by the AO to reopen the assessment for AY 2009-10 is neither illegal nor without jurisdiction as sought to be contended on behalf of the petitioner. It is vehemently submitted that reopening of the assessment for AY 2009-10 is not on a mere change of opinion by and of the AO as sought to be contended on behalf of the petitioner.

4.2. It is submitted that as income chargeable to tax has been escaped from assessment for AY 2009-10 and thereafter after recording the reasons as required and after obtaining the requisite approval from the appropriate authority and having satisfied with the reasons recorded the income chargeable to tax has escaped assessment, the AO has rightly issued the impugned notice under Section 148 of the Act.

4.3. It is further submitted by Shri Mehta, learned advocate for the revenue that issue and the reasons recorded while reopening of the assessment there was no application of mind by the AO at all while passing original order of assessment. It is submitted that during the

original assessment / scrutiny assessment proceedings there were no queries by the AO with respect to amount advanced to the partners and non charging of the interest on the said advances, by the assessee from the said partners.

4.4. It is submitted that while issuing the impugned notice under Section 148 of the Act the AO has observed and noticed that during AY 2009-10, the assessee had paid interest at the rate of 12% to the tune of Rs. 62,82,192/- and the assessee had paid interest bearing funds for non business purposes by giving interest free loans to its partners. It is submitted that it is also observed by the AO that on one hand, the credit balance of M/s. Jivraj Tea Ltd is increasing and on the other hand, amount advanced to partners is also increasing every year. It is submitted that in fact debit balance in capital amount is also increasing continuously . It is submitted that prima facie the sundry credit balance shown in the name of Jivraj Tea Ltd is actually an interest bearing loan, which has been reflected in the books under the guise of sundry credit balance. It is submitted that said loan has been diverted to partners for their personal purpose. Hence, interest borrowing fund have been utilized for non business purpose. It is submitted that moreover, the partners of assessee firm are share holders of M/s. Jivraj Tea Ltd and they could not have taken loans from the company directly as that would have attracted provision of Section 2(22)(e) i.e. Deemed Dividend. It is submitted that to circumvent such legal complications, arrangement had been made to route the funds from the company to the directors through assessee firm. It is submitted that therefore, having satisfied on the aforesaid , the income chargeable tax has escaped assessment for AY 2009-10, the AO / respondent has rightly issue the notice under Section 148 of the Act.

4.5. It is submitted that thereafter the questions were asked by

the AO while holding the inquiry during the original assessment proceedings, the same were with respect to interest paid to the Jivraj Tea Limited and even in the communication / notice dated 5.12.2011 the petitioner -assessee was called upon to show cause as to why the interest paid to Jivraj Tea Ltd should not be disallowed. It is submitted that as such no question was asked at all with respect to interest free loan paid to the partners and in fact there was no application of mind by the AO with respect to issues / reasons recorded while reopening of the assessment for AY 2009-10. It is submitted that therefore, as such it cannot be said that there was any formation of opinion by the AO at the time of original assessment and therefore, re-assessment is merely a change of opinion of the AO. It is submitted that none of the decisions which have been relied upon by the learned advocate for the petitioner shall be applicable to the facts of the case on hand.

5.0. Heard the learned advocates for the respective parties at length. At the outset, it is required to be noted that what is challenged in the present Special Civil Application under Article 226 of the Constitution of India is the notice issued by the respondent, under Section 148 of the Act to reopen the assessment for AY 2009-10. The reasons recorded to reopen the assessment for AY 2009-10, reads as under:

*"In this case, the assessee filed its return of income for AY 2009-10 declaring total income at Rs. 30,75,299/- on 31.08.2009. Assessment u/s 143(3) of the Act was completed on 26.12.2011 and the income was determined at Rs. 2,87,27,709/-. The assessee firm was engaged in the business of trading, blending, packing and selling of tea and generation of electricity through wind mills.*

*During the assessment proceedings for AY 2009-10, it was noticed that the assessee was advanced total sums to the tune of Rs. 2.93 crores to two partners viz. Shri Vijay S Shah and Viren S Shah which had increased from Rs. 1.85 crores as on 31.3.2009. The assessee had paid interest @ 12% amounting to Rs. 82,28,679/- to M/s. Jivraj Tea Ltd, its sister concern on the credit balance of Rs. 7,02,45,077/-. It was*

noticed that the assessee is having huge credit balance against M/s. Jivraj Tea Limited on continuous basis for number of years and interest is paid @ 12% per annum as given below:

| FY      | Capital      | Credit Balance of Jivraj Tea Ltd as on 31 <sup>st</sup> March | Interest Paid | Amount advanced to partners as on 31 <sup>st</sup> March | Cumulative debit balance in capital account as on 31 <sup>st</sup> March |
|---------|--------------|---|---------------|--|--|
| 2007-08 | 18,594,986/- | 4,66,55,621   | 0             | 2,59,80,020  | 1,85,94,986  |
| 2008-09 | 29,365,542/- | 7,02,45,077   | 82,28,679     | 3,87,23,180  | 2,93,65,542  |
| 2009-10 | 44,019,886/- | 7,78,99,328   | 78,33,765     | 5,12,06,512  | 4,40,19,866  |

It was observed that at one hand, the credit balance of M/s. Jivraj Tea Ltd is increasing and on the other hand, amount advance to partners is also increasing every year. In fact, the debit balance in capital account is also increasing continuously. Prima facie the sundry credit balance shown in the name of Jivraj Tea Ltd is actually and interest bearing loan, which has been reflected in the books under the guise of sundry credit balance. This loan has been diverted to partners for their personal purpose. Moreover, the partners of the assessee firm are share holders of M/s. Jivraj Tea Ltd and they could not have taken loans from the company directly for avoiding legal complications. To circumvent such legal requirements, arrangement has been made to route the funds from the company to the directors through assessee firm. Further perusal of balance sheet revealed that the assessee was not having any interest free fund at all and part of the interest bearing funds have been utilized for making loan to partners i.e. for non business purposes.

Significantly, this issue was examined for AY 2010-11 and an addition of Rs. 52,52,215/- was made on account of disallowance of interest expenses incurred for non business purposes.

In light of the above facts, the interest on the amount advanced to partners, is required to be disallowed @ 12% per annum, as shown below:

| Name of the partner | Opening Balance as on 1.4.2008 | Closing Balance as on 31.3.2009 | Rate of Interest | Amount of Interest |
|---------------------|--------------------------------|---------------------------------|------------------|--------------------|
| Shri Viren S Shah   | 62,73,975/-                    | 2,38,54,760/-                   | 12%              | 42,07,724/-        |

|                   |               |               |     |             |
|-------------------|---------------|---------------|-----|-------------|
| Shri Vijay S Shah | 1,97,06,045/- | 1,48,68,428/- | 12% | 20,74,468/- |
| Total             |               |               |     | 62,82,192/- |

*In view of the above, I have reason to believe that the assessee had used interest bearing funds for non business purpose by giving interest free loans to its partners. Therefore, the interest expenses corresponding to the interest chargeable on the amount so diverted to the partners of the assessee firm for non business purposes amounting to Rs. 62,82,192/- has escaped assessment in the hands of the assessee firm within the meaning of Section 147 of the I.T. Act. I am satisfied that the case of the assessee is a fit case for action u/s 147 of the Act.”*

5.1. It is the case on behalf of the petitioner that reopening of the assessment for AY 2009-10 is nothing but a change of opinion by / or the AO and therefore, reopening of the assessment for AY 2009-10 is not permissible. It is the case on behalf of the petitioner that after original return of income was filed, the case was selected for scrutiny and notice under Section 143(2) of the Act and thereafter inquiry was held by the AO with respect to claim made by the assessee and after specific queries and questionnaires, AO passed the order of assessment and assessed the income at Rs.2,87,27,710/- after making addition of Rs.2,56,52,410/-.

5.2. However, from the document / material on record, more particularly, the question / questionnaire / notice sent by the AO during the course of original assessment proceedings, it cannot be said that reopening of the assessment for AY 2009-10 is a mere change of opinion of the AO, as sought to be contended on behalf of the petitioner. Considering the reasons recorded for reopening of the assessment for AY 2009-10, it appears that assessment for AY 2009-10 is reopened with respect to interest free loan to the partners who were also partners of

Gujarat Tea Limited. From the material on record and even show cause notice / queries / questionnaires and the reply of the assessee, it appears that as such there was no inquiry and / or application of mind by the AO with respect to interest free loan to the partners and / or any query with respect to the interest on the amount advance to the partners, more particularly, with respect to reasons recorded while reopening of the assessment. Whatever the question that was with respect to interest paid to Jivraj Tea Limited and the petitioner assessee was requested to show cause as to why the interest paid to Jivraj Tea Limited disallowed and even assessee also replied to the same. The AO at the time of framing original assessment did not address himself with respect to interest free loan paid to the partners and with respect to the case on the disallowance to the interest at the rate of 12% p.a. on the amount advance to the partners. Under the circumstances, it cannot be said that reopening of the assessment for AY 2009-10 is mere change of opinion of the AO. It is required to be noted that reopening of the assessment is within the period of four years. Having reasons to believe that assessee had used interest bearing funds for non business purpose by giving interest free loans to its partners and therefore, interest expenses corresponding to the interest chargeable on the amount so diverted to the partners of the assessee firm for non business purposes amounting to Rs. 62,82,192/- has escaped assessment in the hands of the assessee firm within the meaning of Section 147 of the Act and having so satisfied when the impugned notice under Section 148 of the Act has been issued, it cannot be said that the AO has committed any error and / or illegality and / or assumption of jurisdiction by the AO to reopen the assessment for AY 2009-10, is invalid and / or not justified.

6.0. In view of the above, decisions which has been relied upon by the learned advocate for the petitioner referred to herein above, shall

not be applicable to the facts of the case on hand, as observed herein above, it cannot be said reopening of the assessment is on mere change of opinion of the AO.

7.0. In view of the above and for the reasons stated above, petition fails and same deserves to be dismissed and is accordingly dismissed. Notice discharged. Ad-interim relief granted earlier, if any, stands vacated forthwith.

Kaushik

