

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 1118 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE S.H.VORA

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 ?	

SAI CONSULTING ENGINEERS PVT LTD....Petitioner(s)

Versus

DEPUTY COMMISSIONER OF INCOME TAX - CIRCLE 4 (1)

(1)....Respondent(s)

Appearance:

MR B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1

MR NITIN K MEHTA, ADVOCATE for the Respondent(s) No. 1

CORAM: **HONOURABLE MR.JUSTICE M.R. SHAH**
and
HONOURABLE MR.JUSTICE S.H.VORA

Date : 29/04/2015

ORAL JUDGMENT

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

1. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed to quash and set aside the impugned notice under section 148 of the Income Tax Act (for short "the Act") dated 27.3.2014 issued by the respondent herein, by which the assessment for AY 2009-2010 is sought to be reopened in exercise of powers under section 147 of the Act.

2. That by impugned notice at Annexure A to the petition, the assessment for AY 2009-2010 is sought to be reopened on the reasons to believe that the income chargeable to tax for AY 2009-2010 has escaped assessment within the meaning of section 147 of the Act. On the reasons recorded for reopening asked by the assessee, the petitioner has been served with the reasons recorded for reopening the assessment for AY 2009-2010 by communication dated 28.4.2014. The petitioner submitted objections to the reassessment proceedings vide objection dated 3.12.2014. While communication dated 5.1.2015, the Assessing Officer has disposed of the said objection and has overruled the said objection. Hence, the petitioner has preferred the present Special Civil Application under Article 226 of the Constitution of India for the aforesaid relief.

3. Shri BS Soparkar, learned advocate appearing on behalf of the petitioner has vehemently submitted that the impugned notice of reopening the assessment for AY 2009-2010 issued

under section 148 of the Act is absolutely illegal, wholly without jurisdiction and invalid.

3.1 It is further submitted that as such, the reasons recorded for reopening the assessment is nothing but a change of opinion by the Assessing Officer, which is not permissible.

3.2 It is vehemently submitted by Shri Soparkar, learned advocate appearing on behalf of the petitioner that at the time of original assessment proceedings, the petitioner attended the case from time to time and forwarded details as required. It is submitted that specific queries were raised with respect to the issue involved vide letters dated 18.1.2011, 15.7.2011 and 14.10.2011 and the petitioner furnished the information asked vide letters dated 20.10.2011 and 11.11.2011. It is submitted that only thereafter, the Assessing Officer framed the assessment. It is submitted that the issue with respect to non-deduction of tax on the amount paid to the foreigners was already deliberated by the Assessing Officer during the original assessment proceedings and specific queries were raised to which the petitioner furnished the relevant documents/evidences including the certificate of the concerned chartered accountant.

3.3 It is further submitted that even the amendment to section 195 of the Act, which was amended by section 9 of the Finance Act, 2010 was very much there before the Assessing Officer at the time when the original assessment was framed. It is submitted that therefore, when the reassessment proceedings are initiated solely on "change of opinion", the

same is not permissible and therefore, the impugned notice to reopen the assessment for AY 2009-2010 is invalid and deserves to be quashed and set aside.

3.4 Shri Soparkar, learned advocate appearing on behalf of the petitioner has heavily relied upon the decision of the Division Bench of this Court in the case of Cliantha Research Ltd. Vs. Deputy Commissioner of Income Tax, Ahmedabad Circle – I reported in [2013] 35 taxmann.com 61 (Gujarat) as well as the decision of the Division Bench of this Court in case of Classic Network Ltd. Vs. Deputy Commissioner of Income Tax, Circle -1 reported in [2014] 45 taxmann.com 234 (Gujarat) in support of his above submissions and in support of his prayer to allow the present Special Civil Application and to quash and set aside the impugned notice of the reassessment proceedings.

4 Present petition is opposed by Shri Nitin Mehta, learned advocate appearing on behalf of the revenue. An Affidavit-in-reply is filed opposing the present Special Civil Application and justifying the initiation of the reassessment proceedings.

4.1 It is submitted that it was noticed by the Assessing Officer from the profit and loss account, 3CD and details regarding project work expenditure that the assessee had paid a total sum of Rs.396.93 lac to 5 companies as fees for technical service. However, it did not deduct TDS under section 195 on the plea that the said companies were registered outside India and did not have permanent establishment in India and services rendered and utilized were outside India. It is submitted that the Assessing Officer

also similarly noticed that payment of Rs.25.29 lac to one Bhupendra Singh was not subjected to TDS on the plea that he is non resident in India and his services rendered were utilized outside India. It is submitted that the Assessing Officer found that as per the amended provision of section 9 vide Finance Act, 2010, which came into force w.e.f. 1.6.1976, income of a non resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub section (1) shall be included in the total income of the non resident whether or not; (1) the non resident has a residence or place of business connection in India; or (2) the non resident has rendered services in India. It is submitted that therefore, the Assessing Officer found that the amount paid to the aforesaid 5 companies as well as Bhupendra Singh had accrued in India and therefore, on the aforesaid amount, TDS under section 195 of the Act was liable to be deducted, which the assessee did not deduct and therefore, considering the provisions of section 40(a)(i) of the Act, said amount of expenditure was liable to be disallowed due to failure on the part of the assessee to deduct tax at source. It is submitted that the aforesaid aspect was neither considered by the Assessing Officer nor the Assessing Officer addressed itself on the aforesaid aspect. It is submitted that as such, there was no query raised by the Assessing Officer on the aforesaid aspect, more particularly, with respect to section 195 of the Act and/or disallowance of the expenses under section 40(a)(i) of the Act due to failure on the part of the assessee to deduct tax at source. It is submitted that even the Assessing Officer also did not address itself and/or did not raise any question whether the payment made to the aforesaid 5 companies and Bhupendra Singh for the services provided by them was

technical service or not. It is submitted that therefore, when they have reasoned to believe that the amount of income has escaped assessment and they have formed an opinion and by recording reasons when the reassessment proceedings have been initiated, the same is absolutely just and proper. It is submitted that in view of the above, it cannot be said that the reassessment proceedings have been initiated, which is on change of opinion by the Assessing Officer.

4.2 It is submitted that therefore, in the facts and circumstances of the case, none of the above decisions relied upon by Shri Soparkar, learned advocate appearing on behalf of the petitioner shall be applicable to the facts of the case on hand.

4.3 Making above submissions, it is requested to dismiss the present Special Civil Application with costs.

5 Heard learned advocates appearing on behalf of the respective parties at length.

5.1 At the outset, it is required to be noted that the reassessment proceedings have been initiated by the Assessing Officer and the assessment for AY 2009-2010 is sought to be reopened in exercise of powers under section 47 of the Act within a period of four years from the date of relevant assessment year for the reasons recorded as under:

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Name	:	Sai Consulting Engineers P Ltd
PAN	:	AADCS0481P

A.Y.	:	2009-10
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As per section 195(1) of the Act. any person responsible for paying to a non-resident, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment, thereof, deduct income-tax thereon at the rates in force. Failure to deduct tax at source make the expenditure disallowable u/s 40(a)(i). Besides this, mandatory penalty equal to amount of tax is also leviable u/s 271C. Further, as per amended provision of section 9 vide Finance Act, 2010, w.r.e.f. 1-6-1976 explanation was amended read as "For the removal of doubts, it is hereby declared that for the purposes of this section, income of a non-resident shall be deemed to accrue or arise in India under clause (v) or clause (vi) or clause (vii) of sub-section (1) and, shall be included in the total income of the non-resident. whether or not, - (i) The non-resident has a residence or place of business connection in India; or

(ii) The non-resident has rendered services in India".

As such by amendment with retrospective effect of 1 June 1976, any payment in the form of interest, royalty and technical services to any non resident (i.e an NRI or foreign company) is income accrued in India and liable to TDS u/s 195 of the Act.'

The assessee company of Consulting Engineers & filed its return of income for AY 2009~10 on 09.07.2009 declaring income of Rs.4,91,50.842. The same was assessed u/s 143(3) and income was assessed at Rs.5,55,76,400 vide order dated 07.12.2011.

It was noticed from P/L, 3CD and details regarding project work expenditure that assessee had paid a total sum of Rs. 396.93

lakh to 5 companies as fees for technical services. It did not deduct TDS u/s 195 on the plea that these companies were registered outside India and did not have permanent establishment in India and services rendered and utilized were outside India. Similarly, payment of Rs. 25.29 lakh to Bhupendra Singh was not subjected to TDS on the plea that he is Non Resident in India and his services rendered were utilized outside India.

In view of amended provision with effect from 1st June 1976, the Income was required to be treated as income accrued in India and TDS was required to be deducted u/s 195 of the Act. Failure to do so resulted in wrong allowance of expenditure of Rs. 422.52 lakh and consequent short levy of tax of Rs.191.01 lakh.

3. In view of the above {acted have reason to believe that the income chargeable to tax has escaped assessment.”

5.2 Thus, from the aforesaid, it appears that the Assessing Officer has reopened the assessment for AY 2009-2010 on the ground that in view of the amended provisions w.e.f. 1976, the income was required to be treated as income accrued in India i.e. with respect to amount paid to 5 companies and one Bhupendra Singh and therefore, TDS was required to be deducted under section 195 of the Act and the petitioner assessee failed to deduct the TDS on the aforesaid payment made to the 5 companies and Bhupendra Singh, which was required to be deducted under section 195 of the Act and therefore, the aforesaid expenditure was liable to be disallowed under section 40(a)(i) of the Act and therefore, failure to deduct the TDS on the payment made to the aforesaid 5 foreign companies and Bhupendra Singh had resulted into wrong allowance of expenditure of 422.52 lac

and consequent short levy of tax of Rs.191.01 lac. It is required to be noted that when the petitioner – assessee filed return of income for AY 2009-10, it declared income of Rs.4,91,50,842/-. The petitioner assessee in the return of income specifically claimed deduction with respect to the payment made to the aforesaid 5 foreign companies as well as Bhupendra Singh including other expenses also. The case was selected for scrutiny and the notice under Sections 142(1) and 143(2) were issued and served upon the petitioner from time to time. It is required to be noted that vide letters dated 18.1.2011, 15.7.2011 and 14.10.2011, the petitioner was served with the questionnaires by the Assessing Officer and specific queries with respect to the issue involved i.e. with respect to the payment made to the foreign parties as well as known particulars with respect to TDS deducted and if the TDS is not deducted, the reasons for not deducting the TDS with supporting documents including the certificate of the concerned chartered accountant.

5.3 That during the course of assessment proceedings, the Assessing Officer asked the following question/particulars from the assessee.

“2. Expenditure in foreign currency (Point No.8 of Schedule – 21)

It is observed from audited balance sheet that during the year under consideration, the assessee Company has incurred the following foreign expenditure-

Nature of expenses	Amt
Management Fee/ Prof Fees	73,12,708
Project Work Exp	3,96,93,457
Travelling Expenses	8,98,113

Subscription Expenses	30,448
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In this regard, the assessee company is required to submit the following details:-

- i. Name, address of party and amount incurred.
- ii. Chartered accountant certificate for foreign remittance.
- iii. Details of Tax deducted on aforesaid expenses.
- iv. Bank details in respect of foreign remittance.
- v. Reason for non deduction of tax with supporting evidence."

5.4 In response to the above, vide communication/reply dated 20.10.2011, the assessee produced before the Assessing Officer necessary documents including the particulars with respect to name, address of party and amount; chartered accountant certificate for no deduction of tax with reasons and the bank details of foreign remittance. That thereafter, the Assessing Officer finalized the assessment and allowed the expenses as claimed including the amount paid to the aforesaid 5 companies as well as Bhupendra Singh and did not make any addition by disallowing the expenses under section 40(a)(i) of the Act on the ground that with respect to the amount paid to the aforesaid 5 companies as well as Bhupendra Singh, the income had accrued in India and there was a failure on the part of the assessee to deduct TDS on the aforesaid payment of expenditure and consequently, liable to be added into the income of the assessee by disallowing the expenditure under section 40(a)(i) of the Act. Now, subsequently, the reassessment proceedings have been initiated and/or the assessment for AY 2009-10 has been reopened by the impugned notice on the ground that in view

of the amendment in section 195 of the Act, which had come into force w.e.f. 1.6.1976 (explanation to section 195(1) of the Act), the income of a non-resident shall be deemed to have accrued or arise in India under clause (v), clause (vi) and clause (vii) of sub section (1) of section 195 and shall be included in the total income of non resident whether or not; (1) the non resident has a residence or place of business connection in India; or (2) the non resident has rendered services in India and therefore, the amount paid to the aforesaid 5 companies and one Bhupendra Singh, who are non resident were deemed to have accrued in India and therefore, the TDS was liable to be deducted on the aforesaid and failure to do so resulted into wrong allowance of expenditure of 422.52 lac and consequent short levy of tax of Rs.191.01 lac. Considering the aforesaid facts and circumstances noted herein above with respect to the question asked by the Assessing Officer during the original assessment proceedings referred herein above and only thereafter, the Assessing Officer finalized the assessment and did not make any addition by disallowing the expenses under section 40(a)(i) of the Act on the ground that there was a failure on the part of the assessee not to deduct the TDS on the amount paid to the aforesaid 5 companies and Bhupendra Singh, it can safely be said that it is nothing, but a change of opinion by the Assessing Officer. It is required to be noted that when the Assessing Officer passed original assessment order, by the time, section 9 already amended by Finance Act, 2010 w.e.f. 1.6.1976 was very much there.

5.5 Identical question came to be considered by the Division Bench of this Court in the case of classic Network Limited

(supra) and the Division Bench of this Court quashed and set aside the reopening of the assessment, which was within the period of four years on the ground that reopening was nothing but change of opinion on the part of the Assessing Officer. In the case before the Division Bench also, the provision, which was consequently relied upon by the Assessing Officer while reopening the assessment was very much there and therefore, the Division Bench observed and held that such provision being always there on record and the Assessing Officer having already scrutinized the entire issue threadbare, even though notice is issued within four years from the end of the relevant assessment years, issuance of such notice has to be held as nothing but a change of opinion on the part of the Assessing Officer.

5.6 Now, so far as the submission of Shri Mehta, learned advocate appearing on behalf of the revenue that the Assessing Officer while finalizing the original assessment, did not address itself and/or did not ask any question to the assessee, particularly with respect to the provisions of section 195(1) or even the expenditure disallowable under section 40(a)(i) of the Act on failure to deduct the tax at source with respect to the payment made to the aforesaid 5 companies and Bhupendra Singh and therefore, it cannot be said to be a change of opinion is concerned, the aforesaid cannot be accepted. As observed herein above, specific questions were asked by the Assessing Officer regarding the expenditure in foreign currency, which shall be inclusive of the amount paid to the aforesaid 5 companies and Bhupendra Singh and even the reasons for non-deduction of tax with supporting evidence and the petitioner assessee furnished necessary documents

with supporting reasons why the tax at source has not been deducted and only thereafter, the Assessing Officer finalized the assessment proceedings. In the case of Clantha Research Ltd (supra), the Division Bench of this Court has specifically observed and held that during the original assessment, assessee's claim was processed at length and after calling for detailed explanation from him, same was accepted, mere because a certain element or angle was not in mind of Assessing Officer while accepting such a claim, could not be a ground for issuing notice under section 148 for reassessment.

5.7 Considering the aforesaid facts and circumstances of the case, we are of the opinion that the initiation of the reassessment proceedings is nothing but a mere change of opinion by the Assessing Officer and as per the catena of decision of this Hon'ble Court as well as the aforesaid decisions, which have been relied upon by Shri Soparkar referred to herein above, the impugned notice under section 148 of the Act to reopen the assessment even within a period of four years is not permissible, but deserves to be quashed and set aside.

6 For the reasons stated above, the petition succeeds. The impugned notice at Annexure A to the petition issued under section 148 of the Act to reopen the assessment for AY 2009-10 is hereby quashed and set aside and consequently, the reassessment proceedings for AY 2009-10 is also hereby quashed and set aside on the aforesaid ground alone. Rule is made absolute to the aforesaid extent. In the facts and circumstances, there shall be no order as to costs.

(M.R.SHAH, J.)

(S.H.VORA, J.)

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