

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 17728 of 2014

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 ?	

MITUL GEMS....Petitioner(s)

Versus

ASSISTANT 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 : 28/04/2015

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 – assessee has prayed for an appropriate writ, order or direction to quash and set aside the impugned notice dated 17.03.2014 issued under Section 148 of the Income Tax Act (hereinafter referred to as the 'Act') for A.Y.2007-2008 by which, in exercise of powers under Section 147 of the Act, the assessment for A.Y.2007-2008 is sought to be reopened.

2. At the outset, it is required to be noted that the assessment for A.Y.2007-2008 is sought to be reopened beyond the period of 4 years from the relevant assessment year on the following reasons recorded under Section 148(2) of the Act:-

“As per section 40(a) of the I.T. Act, 1961 any interest, commission or brokerage, fees or any amount payable to resident contractor or sub-contractor for carrying out any work (including labour supply) on which tax is deductible at source under chapter XVII-B and such tax has not been deducted or after deducted or after deduction has not paid into Central Government's account during the previous year or in subsequent year before expiry of the time prescribed u/s 200(1), will not be allowed for computing the income chargeable under the head “profits and gains of the business or profession”.

During the financial year 2006-07 relevant to A.Y.2006-07 relevant to A.Y.2007-08, the assessee firm had incurred labour expenses (outside labour) amounting to Rs.1,38,26,488/- (Total Mfg.&Labour expenses: Rs.1,60,13,090/-). The work was done by six outside parties. However, no TDS was deducted from payment of Rs.22,65,048/- made to one party-Mitul Gems/SSI unit, 28, Saurashtra Diamond, B/H Gitanjali

Cinema, Varachha road, Surat. Since, no TDS was deducted from the payment, the amount of Rs.22,65,048/- is not an allowable deduction in terms of section 40(a)(ia) above, however the assessee had claimed this expenditure and this resulted under assessment of income to the tune of Rs.22,65,048/- in the case of assessee due to the failure on the part of the assessee to disclose truly all material facts necessary for his assessment.”

2.1. It is required to be noted that when the petitioner raised the objections against the reopening of the assessment for A.Y.2007-2008, by communication dated 19.09.2014, the Assessing Officer has disposed of/overruled the said objections by observing in paragraph Nos.7.2 and 7.3 as under:-

“7.2. During the period under consideration, the assessee firm had incurred labour expenses (outside) amounting to Rs.1,38,26,488/- out of total manufacturing and labour expenses of Rs.1,60,13,090/-. However, no Tds was deducted from payment of Rs.22,65,048/- made to M/s.Mithul Gems(SSl Unit), 28, Saurashtra Diamond, B/h.Gitanjali cinema, Varachha road, Surat on grounds that the said unit is a division of the main firm M/s.Mithul Gems and hence, no TDS is deductible on inter divisional transfer of payments. However, this argument of the assessee is found not acceptable, since, a SSI unit is a separate entity and requires separate registration and cannot be a part of another business concern. The assessee firm has a turnover of Rs.23.64 crore and even if the assessee firm claims the SSI unit is a division of the firm, it has no legal backing. SSI benefits will be available to a SSI unit when it is a separate entity and registered as an independent unit. A SSI unit ceases to be a SSI unit when it exceeds certain prescribed limits like turnover, plant & machinery, location etc., Even if the firm controls the SSI unit, the SSI unit being a distinct entity, separate identity in regards to PAN/TAN are required to be obtained.

7.3. It would also be pertinent to mention here that it was only for examining the said issue notice u/s.148 of the Act has been issued and this should not cause any grievance or hardship to the assessee. In light of the above, if the assessee is confident that, his business

activities have been genuine and onboard, no grounds for raising a objection against such examination should arise with the assessee.”

3. Under the circumstances, while dealing with the objections raised by the petitioner and disposing of the same, the Assessing Officer has considered altogether a different issue than the reasons for which, the reassessment proceedings are initiated. From the reasons recorded, it appears that the assessment for A.Y.2007-2008 was sought to be reopened on the ground that during the financial year 2006-2007 relevant to A.Y.2007-2008, the assessee firm had incurred labour expenses (outside labour) amounting to Rs.1,38,26,488/- (Total Manufacturing-Labour expenses: Rs.1,60,13,090/-). The work was done by six outside parties, however, no tax was deducted from payment of Rs.22,65,048/- made to one party - Mitul Gems/SSI unit and, therefore, since, no TDS was deducted from the payment, the amount of Rs.22,65,048/- is not an allowable deduction in terms of Section 40(a)(ia). The assessee has claimed the said expenditure and said had resulted under assessment of income to the tune of Rs.22,65,048/- in the case of assessee due to the failure on the part of the assessee to disclose truly all material facts necessary for his assessment. However, from the communication dated 19.09.2014 disposing of the objections raised by the petitioner – assessee, it appears that the Assessing Officer had considered altogether a different and new issue with respect to the status of the petitioner-assessee as SSI unit. It is also required to be noted at this stage and from the profit and loss accounts, it appears that as such, the petitioner-assessee never claimed any deduction with respect to the payment of Rs.22,65,048/-. Therefore, the ground on which, the Assessing Officer has tried to reopen the

assessment i.e. the assessee had claimed Rs.22,65,048/- as expenditure which was not allowable and, therefore, the said has resulted under assessment, is absolutely and factually incorrect. Therefore, as such, the formation of opinion by the Assessing Officer while reopening the assessment has been vitiated.

3.1. Even otherwise, it is required to be noted that while disposing of the objections raised by the petitioner raised against the reopening of the assessment, the Assessing Officer in paragraph No.7.3 has specifically stated that it was only for examining the issue mentioned in paragraph No.7.2 with respect to the petitioner's claim/status as SSI unit, the notice under Section 148 of the Act has been issued. For examining the particular issue, the assessment cannot be reopened and that too beyond the period of 4 years. An assessment can be reopened on the reasons recorded and after the detailed examination, the Assessing Officer forms an opinion that there is any under assessment of the income and that too, due to failure on the part of the assessee to disclose truly and fully all the material facts necessary for the assessment, in case, the assessment proceedings are initiated beyond the period of 4 years.

4. Under the circumstances, the formation of opinion without examining the issue (as according to the Assessing Officer, the issue is yet to be examined and the notice under Section 148 of the Act has been issued for examining the issue mentioned in paragraph No.7.2.) has been vitiated. Under the circumstances also, the impugned notice under Section 148 of the Act and opening of the assessment for A.Y.2007-2008

deserve to be quashed and set aside.

5. In view of the above and for the reasons stated above, the present petition succeeds. The impugned notice dated 17.03.2014 (at Annexure-C) issued under Section 148 of the Act for A.Y.2007-2008 is hereby quashed and set aside. Consequently, reassessment proceedings for A.Y.2007-2008 are hereby quashed and set aside on the aforesaid ground.

6. With the above, the present petition is allowed. Rule is made absolute accordingly. However, in the facts and circumstances of the case, there shall be no order as to costs.

(M.R.SHAH, J.)

Hitesh

(S.H.VORA, J.)

