

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 16680 of 2014

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 ?
 - 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 ?
- =====

PALADIYA BROTHERS AND CO....Petitioner(s)

Versus

ASSISTANT COMMISSIONER OF INCOME TAX - CIRCLE -
9....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

RULE SERVED for the Respondent(s) No. 1

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

Date : 08/04/2015

ORAL JUDGMENT

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

1.00. By way of this petition under Article 226 of the Constitution of India, the petitioner – assessee has prayed for appropriate writ, order and/or direction to quash and set aside the impugned notice dated 20/1/2014 issued under section 148 of the Income Tax Act, 1961 for the A.Y. 2007-2008, by which the reassessment proceedings have been initiated to reopen the assessment proceedings for the A.Y. 2007-2008 beyond the period of 4 years from the relevant year.

2.00. Facts leading to the present Special Civil Application in nutshell are as under :-

2.01. That the petitioner filed its return of income for A.Y. 2007-2008 declaring total income at Rs.87,66,926/-. That the petitioner assessee Company stated source of income from business of cutting and polishing of diamond. The case was selected for scrutiny assessment by issuing notice under section 143(2) of the Income Tax Act. That after making detailed inquiry, the Assessing Officer assessed the income at Rs.84,80,421/- after accepting the rectification application of the assessee for claim of deduction of respondents.

2.02. That thereafter the petitioner has been served with the impugned notice under section 148 of the Income Tax Act dated 20/1/2014 for reassessment of the income of the petitioner for A.Y. 2007-2008.

2.03. That at the request by the petitioner, vide letter dated 8/3/2014, the petitioner has been served with copy of the reasons recorded for reopening of the assessment for the

A.Y. 2007-2008 on 6/6/2014.

2.04. That thereafter the petitioner submitted detailed objections vide communication dated 27/6/2014 objecting to reassessment proceedings.

2.05. That by order / communication dated 25/9/2014, the assessing officer overlooked the objections raised by the petitioner against the impugned reassessment proceedings and hence the petitioner has preferred the present Special Civil Application under Article 226 of the Constitution of India challenging the impugned reassessment proceedings which are initiated beyond the period of 4 years of the relevant assessment year.

3.00. Mr.Hardik Vora, learned advocate appearing on behalf of the petitioner - assessee has vehemently submitted that the ground for reopening of the assessment is completely misconceived and baseless. It is submitted that in the present case reassessment proceedings have been initiated after a period of four years. It is submitted that therefore, escapement of income must also be occasioned by a failure on the part of the assessee to disclose fully and truly all the material facts.

3.01. Mr.Hardik Vora, learned advocate appearing on behalf of the petitioner - assessee has further submitted that in the present case, as such there is/ was no failure on the part of the assessee to disclose truly and fully material facts necessary for assessment. It is submitted that all details were duly provided as and when sought and/or required to the Assessing Officer and the same was scrutinized by the

Assessing Officer. It is submitted that therefore, now having allowed the claim, it is not open to the respondent – Assessing Officer to reopen the assessment, merely for the re-computation taking a different view on the same material available with him.

3.02. Mr.Hardik Vora, learned advocate appearing on behalf of the petitioner - assessee has further submitted that from the reasons recorded for reopening the assessment, it appears that the reassessment proceedings have been initiated on the ground that though additional depreciation was not available, additional depreciation was incorrectly claimed by the assessee and therefore, the claim of the additional depreciation, contrary to the provisions of the Act had resulted into escapement of income to the extent of Rs.14,77,669/-. It is submitted that on the aforesaid ground, reassessment proceedings cannot be initiated beyond the period of 4 years. It is submitted that when the Assessing Officer passed the assessment order and allowed the claim of additional depreciation claimed by the assessee, it cannot be said that there was any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment with respect to the additional depreciation claimed. It is submitted that, therefore, the reassessment proceedings, on the reasons recorded, is absolutely illegal and without jurisdiction and more particularly as conditions for initiation of the reassessment proceedings beyond the period of 4 years, are not satisfied.

3.03. Mr.Hardik Vora, learned advocate appearing on behalf of the petitioner - assessee has heavily relied upon the

decision of this Court in the case of **Niko Resources Ltd. Versus Assistant Director of Income Tax**, reported in **(2014) 51 Taxman.com 568 (Gujarat)** in support of his request to quash and set aside the impugned reassessment proceedings.

3.04. Mr.Hardik Vora, learned advocate appearing on behalf of the petitioner - assessee has also heavily relied upon the decision of the Division Bench of this Court in the Case of **Gujarat Lease Financing Limited Versus Deputy Commissioner of Income Tax, Circle-IV, Ahmedabad dated 24/6/2013 passed in Special Civil Application No. 3048** in support of his submission that the initiation of the impugned reassessment proceedings are absolutely illegal and without jurisdiction.

4.00. Present petition is opposed by Mr.Sudhir Mehta, learned advocate appearing on behalf of the revenue.

4.01 An Affidavit-in-reply is filed on behalf of the respondent justifying the initiation of the reassessment proceedings. It is submitted that as it was found that the assessee claimed additional depreciation incorrectly, though the additional depreciation was not allowable, as in view of the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax Versus Gem India Manufacturing Co.**, reported in **(2001) 249 ITR 307 (SC)**, cutting and polishing of diamond cannot be considered as business of manufacture or production and therefore, the assessee wrongly claimed additional depreciation of Rs.14,77,669/- and therefore, when it was found that the

aforesaid amount of Rs.14,77,669/- has been under-assessed and had escaped assessment, which was due to failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment, initiation of reassessment proceedings is absolutely just and proper and does not required to be set aside by this Court at this stage.

4.02. Mr.Sudhir Mehta, learned counsel appearing on behalf of the revenue has vehemently submitted that as such the present petition is filed at premature stage, unless and until a notice under section 148 read with section 147 of the Income Tax Act has been issued. It is submitted that in the event the petitioner assessee is aggrieved by the reassessment order, alternative efficacious remedy is available by way of an appeal to the CIT(A) and thereafter to the learned tribunal as per the provisions of the Act. Therefore, it is requested not to entertain the present petition.

4.03. On merits, Mr.Sudhir Mehta, learned counsel appearing on behalf of the revenue has vehemently submitted that the impugned reassessment proceedings are absolutely just and proper and in accordance with the provisions of the Act, more particularly section 147 read with section 148 of the Income Tax Act.

Submitting accordingly it is requested to dismiss the present Special Civil Application.

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

5.01. At the outset, it is required to be noted that what is

challenged in the present Special Civil Application by the petitioner - assessee is the reopening of the assessment for the A.Y. 2007-2008 and initiation of the reassessment proceedings for the A.Y. 2007-2008, in exercise of the powers under section 147 read with section 148 of the Income Tax Act. It is required to be noted that in the present case initiation of reassessment proceedings is beyond 4 years from the assessment year. Therefore, unless and until it is observed and found that the income has escaped assessment due to the failure on the part of the assessee to disclose truly and fully all material facts for the assessment, the Assessing Officer is not authorized to make reassessment even in the event of his having reasonable belief that any income chargeable to tax has escaped assessment for any assessment year. As per the first proviso to section 147, assessment can be reopened under section 147 after expiry of 4 years only if (1) assessee failed to make a return under section 139 or in response to the notice under section 142(1) or under section 148 and he failed to disclose truly and fully all material facts necessary for the assessment. Once the case of the assessee is covered by the first proviso to section 147, reassessment proceedings beyond the period of four years from the end of the relevant assessment year would be without jurisdiction and bad in law. If all material facts are furnished by the assessee and there remains no omission or failure on the part of the assessee to disclose truly and fully all material facts necessary for the assessment with respect to the additional depreciation claimed, initiation of reassessment proceedings beyond the period of 4 years is not permissible and shall be wholly without jurisdiction.

5.02. Now, in the backdrop of the above legal provision, challenge to the impugned reassessment proceedings are required to be considered.

5.03. In the present case, reassessment proceedings under section 147 of the Act for A.Y. 2007-08 are initiated beyond the period of four years. The reasons recorded for reopening of the assessment for A.Y. 2007-2008, which are communicated to the petitioner assessee vide communication dated 6/6/2014 are as follows :-

“Reasons recorded under section 148(2) of the Income Tax Act:

Section 32(1) provides that in the case of new machinery of plant (other ships and aircraft acquired and installed after 31-3-2005, by an assessee engaged in the business of manufacture or production of any article or thing, additional @ 20% of the actual cost of such machinery or plant will be allowed as deduction u/s.31(1)(ii).

The assessee firm engaged in the business of manufacturing, import and export of diamonds filed its return of income for the A.Y. 2007-08 on 24/9/2007 declaring total income of Rs.87,66,926/-.

Scrutiny of depreciation statement revealed that in respect of Laser machine, Lathe & Ghanti A/c. and plant and machinery depreciation worked out includes depreciation at 15% / 7.5% and additional depreciation at 20% / 10%. The assessee was engaged in the manufacturing of

diamond cutting and polishing. The cutting and polishing of diamond cannot be considered as a business of manufacturing of production as held by Hon'ble Supreme Court in the case of CIT Vs. Gem India Mftg. Co. (2001) 249 ITR 307 (the Hon'ble Supreme Court). Accordingly additional depreciation was not allowable but the additional depreciation was incorrectly claimed by the assessee. Total depreciation claimed as Rs.14,77,669/- as under :-

Asset	OB	Additional 1 st half	Additional 2 nd half	Depre- ciation allowed	Depre- ciation allowable	Excess Depre- ciation claimed
1	2	3	4	5	6	
Laser Machine	4778650	1516700	3341805	1832458	2-716798 3-227505 4-250635 1194838	637520
Lathers & Ghanti	92312		819800	157312	2-13847 4-67485 81332	75980
Plant & Machin- ery	5510710	2925786	1790122	2163903	15%- 826607 3-438868 4-134259 1399734	764169
TOTAL				4153673	2676004	1477669

The claim of additional depreciation contrary to the provisions of the Act had resulted into the escapement of income to extent of (Rs. 14,77,669/-) due to the failure on the part of the assessee to disclose truly all material facts necessary for his assessment."

Thus, from the aforesaid, it appears that the assessment

for A.Y. 2007-2008 is sought to be reopened on the ground that in view of the decision of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax Versus Gem India Manufacturing Co.**, reported in **(2001) 249 ITR 307 (SC)**, cutting and polishing of diamond cannot be considered as business of manufacture or production and therefore, the additional depreciation claimed by the assessee was not allowable and therefore, the assessee claimed additional depreciation incorrectly and therefore, there is under-assessment of Rs.14,77,669/-. However, it is required to be noted and it appears from the original assessment order that while submitting the original return of income, the assessee claimed depreciation at 20% / 10% in respect of Lesser Machine, Leth, Ghanti and Plant & Machinery which came to be considered and granted by the A.O. Therefore, as such it cannot be said that there was any failure on the part of the assessee to disclose truly and fully all material facts necessary for the assessment with respect to the additional depreciation claimed.

5.04. The reasons for reopening of the assessment as mentioned in the communication dated 6/6/2014 is nothing but a change of opinion of the A.O. and that too, without any new material, which is not permissible.

5.05. Considering the aforesaid facts and circumstances of the case it cannot be said that the assessee did not disclose fully and truly all material facts necessary for the assessment and therefore, the income chargeable to tax has been escaped due to the failure on the part of the assessee to disclose fully and truly all material facts with respect to the

additional depreciation claimed. Under the circumstances, the condition precedent for invoking powers under section 147 of the Income Tax Act to initiate reassessment proceedings beyond the period of 4 years are not at all satisfied.

5.06. Identical question came to be considered by the Division Bench of this Court in the case of **Niko Resources Ltd.** (supra) and while considering the scope and ambit of powers to be exercised under section 147 of the Income Tax Act by the Assessing Officer, while reopening the assessment beyond the period of 4 years, the Division Bench of this Court while considering its decisions in the case of **Gujarat Lease Financing Limited** (supra), has observed and held in paragraph Nos.16, 17 and 27 as under :-

“16. The Assessing Officer is authorized to make reassessment in the event of his having reasonable belief that any income chargeable to tax has escaped assessment for any assessment year. As per the 1st proviso to section 147 of the Act, assessment can be reopened under section 147 of the Act after expiry of 4 years only if (1) the assessee failed to make a return under section 139 of the Act or in response to notice issued under section 142(1) or under section 148 of the Act, he failed to disclose truly and fully all material facts necessary for the assessment. Once all primary facts are before the assessing authority, no further assistance is required by way of disclosure. All inferences of facts and legal inference need to be drawn by the Assessing Officer. It is not for any one to guide the Assessing Officer in respect of inference "factual or legal", which requires to be drawn by him

alone.

17. Once the case of the assessee is covered by the 1st proviso to section 147 of the Act, the reassessment proceedings beyond the period of 4 years from the end of the relevant assessment year would be without any jurisdiction and bad in law, if all material facts are furnished and there remained no omission or failure on the part of the assessee to disclose truly and fully all material facts. This Court, after extensively discussing law on the issue in case of Gujarat Lease Financing Ltd. (supra), has held thus:

"10. It can be clearly noted from the reasons recorded that there is no mention at all of the assessee having not disclosed fully or truly material facts which were necessary for the purpose of computing the income of the assessee. Assuming that in the notice for reopening, such wordings are not specifically mentioned and they can be supplemented either while rejecting the objections or by way of affidavit of the Assessing Officer, then also, the revenue has failed to point out as to in what manner there has been non-disclosure on the part of the assessee."

27. From the ratio that can be culled out from all these decisions, it is amply clear that the Assessing Officer, who is authorized to issue

notice under section 148 of the Act for reassessment. on his having a reason to believe that income chargeable to tax had escaped assessment for any assessment year, can assess or reassess such income and also any such other income chargeable to tax, which has escaped the assessment. However, no such action is permissible after lapse of 4 years from the end of the relevant assessment year unless income chargeable to tax has escaped assessment on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for the purpose of such assessment. The onus is on the assessee to reveal the primary facts and to draw the inferential facts would be the responsibility of the Assessing Officer. Once having revealed from the record that the assessee disclosed full and complete facts and on scrutiny, at the time of original assessment all these details are examined, no change of opinion is permissible merely because there was some error earlier on the part of the Assessing Officer himself or because he choose not to opine on the issue or even when he changes his mind and interprets the material or law otherwise than what was done by him."

5.07. Applying the decision of the Division Bench of this Court in the case of **Niko Resources Ltd.** (supra) as well as **Gujarat Lease Financing Limited** (supra), to the facts of the case on hand and as observed hereinabove, there does not appear to be failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment with respect to the additional depreciation claimed, the initiation of the impugned reassessment proceedings which are initiated

beyond the period of four years, are not permissible and the same cannot sustain and on that ground alone, the impugned reassessment proceedings deserve to be quashed and set aside.

6.00. In view of the above and for the reasons stated above, present petition succeeds. The impugned notice under section 148 of the Income Tax Act for A.Y. 2007-2008 is hereby quashed and set aside and the impugned reassessment proceedings of reopening assessment for the A.Y. 2007-2008 are hereby terminated on the aforesaid ground alone.

Rule is made absolute accordingly. In the facts and circumstances of the case, there shall be no order as to costs.

Sd/-
(M.R.SHAH, J.)

Sd/-
(S.H.VORA, J.)

Rafik.

