

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION NO. 187 of 2015

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE M.R. SHAH Sd/-
and
HONOURABLE MR.JUSTICE S.H.VORA Sd/-

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| 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 |

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TIRUPATI FOAM LIMITED....Petitioner(s)

Versus

DEPUTY COMMISSIONER OF INCOME TAX OR HIS SUCESSOR TO
OFFICE & 1....Respondent(s)

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Appearance:

MR RK PATEL, ADVOCATE for the Petitioner(s) No. 1

MR NITIN K MEHTA, ADVOCATE for the Respondent(s) No. 1 - 2

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

Date : 07/04/2015

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 issued under section 148 of the Income Tax Act, 1961 dated 23/1/2014 for the A.Y. 2009-2010, by which the Assessing Officer has reopened the assessment for the A.Y. 2009-2010. The petitioner assessee has also prayed to quash and set aside the communication / order dated 28/10/2014 (Annexure-P), by which the Assessing Officer has overruled/rejected the objections raised by the petitioner - assessee, raised against reopening of the proceedings for A.Y. 2009-2010.

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

2.01. That the petitioner - assessee filed return of income for A.Y. 2009-2010 on 29/9/2009 declaring total income at Rs.2,12,24,180/-. The same was process under section 143(1) of the Income Tax Act.

2.02. That the case was selected for scrutiny and notices under section 142(2) of the Income Tax Act was issued by the assessee on 25/9/2010. The petitioner - assessee was called upon to furnish necessary details / documents as mentioned in the communication dated 4/2/2011, which include underutilized balance of Modvat. The petitioner assessee replied to the same vide communication dated 19/9/2011 and furnished explanation as to why underutilized balance of Modvat of Rs.9.53 Lacs should not be added back. It was submitted that they have followed exclusive method of

accountancy wherein purchase cost of raw materials were shown net of excise duty. It was submitted that if they added Modvat credit of Rs.39.53 Lacs to the valuation of raw materials then the same has to be added to purchase cost of raw-materials and consequently net profit remains unchanged. It was the case on behalf of the assessee that if they follow either of the method, taxable income will remain the same. They also relied upon Guidance Note on accounting treatment for Modvat issued by the Institute of Chartered Accountant of India, wherein the Institute prefer two alternative method treatment of Modvat Credit in accounts i.e. exclusive Method and Inclusive Method. The assessee also furnished / produced detailed Write-up on account treatment for Modvat as per the Guidance Note issued by the Institute of Chartered Accountant of India. That thereafter the Assessing Officer framed the assessment and passed assessment order accepting exclusive method of accounting adopted by the assessee of utilizing balance of MODVAT credit relating to the relevant previous year.

2.03. That thereafter, after a period of four years, by the impugned notice under section 148 of the Income Tax Act the Assessing Office has reopened the assessment for A.Y. 2009-2010. At the request of the assessee, Assessing Officer, vide communication dated 22/7/2014 has served the assessee reasons recorded for reopening of the assessment for A.Y. 2009-2010.

2.04. To the aforesaid, the assessee raised objections which have been overruled / rejected by the Assessing Officer, vide communication dated 28/10/2014. Hence, the petitioner

has preferred the present Special Civil Application under Article 226 of the Constitution of India requesting to quash and set aside the impugned reassessment proceedings for A.Y. 2009-2010.

3.00. Mr.R.K. Patel, learned advocate appearing on behalf of the petitioner - assessee has vehemently submitted that initiation of the impugned reassessment proceedings for A.Y. 2009-2010 which is beyond 4 years, is absolutely illegal, invalid and without jurisdiction.

3.01. Mr.R.K. Patel, learned advocate appearing on behalf of the petitioner - assessee has further 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.

3.02. Mr.R.K. Patel, learned advocate appearing on behalf of the petitioner - assessee has further submitted that in the present case, as such there was no failure on the part of the assessee to disclose truly and fully material facts necessary for assessment.

3.03. Mr.R.K. Patel, learned advocate appearing on behalf of the petitioner - assessee has further submitted that as such the case was selected for scrutiny assessment under section 143(3) of the Income Tax Act and before finalization of the assessment by the Assessment Officer, detailed query was sent to the assessee to submit the documents as required

including the question with respect to unutilized balance of Modvat. It is submitted that thereafter the Assessing Officer framed the assessment accepting the method of accounting adopted by the assessee. It is submitted that therefore, reopening after a period of 4 years is nothing but change of opinion which is not permissible.

3.04. Mr.R.K. Patel, learned advocate appearing on behalf of the petitioner - assessee has further submitted that in any case condition precedents for initiation of the reassessment proceedings beyond the period of four years, are not satisfied. It is submitted that as there was no failure on the part of the assessee to disclose truly and fully material facts necessary for the purpose of assessment, assumption of jurisdiction for the purpose of reopening of the assessment beyond the period of 4 years is illegal.

3.05. Mr.R.K. Patel, learned advocate appearing on behalf of the petitioner - assessee has heavily relied upon the decision of this Court in the case of **Heavy Metal and Tubes Limited Versus Deputy Commissioner of Income Tax, Ahmedabad, Circle-4 & 1**, reported in **(2013) 35 Taxmann.com 288 (Gujarat)** by submitting that in the similar facts and circumstances of the case, the Division Bench had quashed and set aside the reassessment proceedings by observing that where the issue of accounting treatment in respect of utilized CENVAT credit for the purpose of valuing closing stock was already examined by the Assessing Officer during scrutiny assessment, reopening of assessment on same issue without any tangible material was mere change of opinion and hence not sustainable.

3.06. Mr.R.K. Patel, 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 **Lanxess ABS Limited Now known as INEOS ABS (India) Ltd. Versus Dy. Commissioner of Income Tax, rendered in Special Civil Application No.17530 of 2011** in support of his prayer to quash and set aside the impugned reassessment proceedings.

By making above submissions and relying upon the above decisions, it is requested to allow the present Special Civil Application and quash and set aside the impugned reassessment proceedings.

4.00. Present petition is opposed by Mr.M.R. Bhatt, learned counsel appearing on behalf of the revenue.

4.01. An Affidavit-in-reply is filed on behalf of the respondent justifying the reopening of the assessment for the A.Y. 2009-2010 in exercise of powers under section 147 read with section 148 of the Income Tax Act.

4.02. Mr.M.R. Bhatt, learned counsel appearing on behalf of the revenue has vehemently submitted that as such the present petition is filed at premature stage, as only 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.M.R. Bhatt, 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.

4.04. Mr.M.R. Bhatt, learned counsel appearing on behalf of the revenue has further submitted that it is not true that the petitioner had not defaulted in disclosing fully and truly all material facts necessary for the assessment. It is submitted that during the course of assessment proceedings under section 143(3) of the Income Tax Act, nowhere was the issue of inclusion of duty in the closing stock was discussed or details called for relating to this issue. It is submitted that therefore, the issue of non-inclusion of Modvat / Cenvat Credit in the closing stock was considered and allowed by the Assessing Officer. It is submitted that the reasons recorded for reopening the assessment are totally different issue discussed during the assessment proceedings under section 143(3) of the Income Tax Act. It is submitted that therefore, the initiation of the reassessment proceedings on the reasons recorded is absolutely just and proper and is not required to be set aside at this stage.

4.05. Mr.M.R. Bhatt, learned counsel appearing on behalf of the revenue has further submitted that the Assessing Officer has noticed possible escapement of income from

assessment and has recorded reasons thereof and provided the same to the petitioner and therefore, assumption of jurisdiction under section 147 read with section 148 is absolutely justified.

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. 2009-2010 and initiation of the reassessment proceedings for the A.Y. 2009-2010, in exercise of the powers under section 147 read with section 148 of the Income Tax Act.

5.02. It is required to be noted that in the present case initiation of reassessment proceedings is beyond 4 years from the relevant 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.

5.03. 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 remained no omission or failure on the part of the assessee to disclose truly and fully all material facts, initiation of reassessment proceedings beyond the period of 4 years is not permissible and shall be wholly without jurisdiction.

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

5.05. In the present case, reassessment proceedings initiated under section 147 of the Income Tax for the A.Y. 2007-2008 are initiated beyond the period of 4 years. The reasons recorded for reopening of the assessment for A.Y. 2009-2010, which are communicated to the petitioner - assessee vide communication dated 22/7/2014 are as follows :-

“The provisions of section 145A of the Act mandate inclusive method of accounting for the purpose of the Act in respect of duty, cess and taxes even though the assessee might be following exclusive method of accounting.

The assessee engaged in the business of manufacturing and sale of Flexible Polyurethane Foam filed return of income for A.Y. 2009-10 on 29.09.2009 declaring total income of 2,12,24,180/-. The income was assessed at 2,14,96,266/- u/s. 143(3) of I.T. Act on 31.10.2011.

As derived from the 'Schedule 'J' to the Profit and Loss account, it followed exclusive method of accounting CENVAT and VAT. As per Annexure E (Showing details required under Clause-22(a) the Auditors Report in Form 3CD the details of cenvat credit availed and utilized by the Company during the previous year relevant to A.Y. 2008-09 were as under :-

Particulars	Amount (Rs.)
Opening balance of Cenvat credit on inputs.	Rs.0,22,85,146
Add: Credit availed on inputs (including service tax credit & under claim credited.	Rs.5,77,07,821
Less : Credit utilized (excluding duty reversed Rs.1,93,507).	Rs.5,60,39,054
Closing balance.	Rs.0,39,53 913

The unutilized balance of cenvat credit was included in the Balance Sheet under the head 'Loans as Advances'. As per inclusive method of accounting u/s. 145A, this was to be shown as "closing stock unutilized Cenvat credit'.

Since the assessee followed exclusive method of

accounting, the unutilized balance of Cenvat Credit relating to the relevant Previous Year amounting to 16,68,767/- (Closing Balance: Rs.39,53,913/- less Opening Balance: Rs. 22,85,146/-) was required to be part of the closing stock in terms of 145. But the same was not considered for computation of income and the income was arrived at without including the unutilized cenvat credit. Non-observance of the provisions of Section 145A of the Act resulted in under-assessment of income of Rs.16,68,767/-.

In view of the above facts, I have reason to believe that income chargeable to tax has escaped assessment within the meaning of section 147 of the Act. As per the provisions of section 149(l)(b), the income chargeable to tax, which has escaped assessment for the AY 2009-10 is likely to amount more than Rs.1 lakh. The assessee has also not made full and true disclosure of all material facts necessary for his assessment ”

5.06. Thus, from the aforesaid it appears that the assessment for the A.Y. 2009-2010 is sought to be reopened on the ground that since the assessee followed exclusive method of accounting system and unutilized balance of Cenvat credit relating to the relevant previous year amount to Rs.16,68,767 (Closing Balance : Rs.39,53,913/- less Opening Balance: Rs.22,85,146/-) was required to be part of the closing stock in terms of section 145 but the same was not considered for computation of income and the income was arrived at without including underutilized Cenvat credit and therefore,

non-observation of the provisions of section 145(A) of the Act has resulted in under-assessment of income of Rs.16,68,767/-.

5.07. However, it is required to be noted that at the time of scrutiny assessment, a notice was issued upon the assessee under section 143(3) of the Income Tax Act and vide communication dated 4/2/2011, the Assessing Officer called upon the assessee to furnish necessary informations / details.

5.08. That the assessee replied to the same vide communication dated 19/9/2011 in which in para 11, the petitioner assessee has stated as under :-

“With regard to explanations as to why unutilized balance of Modvat of Rs.39.53 lacs should not be added back, the company followed exclusive method of MODVAT wherein purchase cost of raw materials are shown net of excise duty. Hence in our case, if we add MODVAT credit of Rs. 39.53 lacs to the valuation of Raw Materials then the same has to be added to purchase cost of raw materials and consequently the net profit remains unchanged. Hence if we follow either of the method the net profit and therefore the taxable income will remain same.

We refer to the Guidance Note on Accounting Treatment for MODVAT issued by the Institute of Chartered Accountants of India wherein the institute has prescribed two alternative methods of treatment of MODVAT credit in accounts i.e. exclusive method and inclusive method.

For more clarifications, we enclose herewith the detailed write up on Accounting Treatment for MODVAT as per the Guidance Note issued by the ICAI in the Annexure- A for your kind reference.”

5.09. Not only that even subsequently and during the scrutiny assessment, vide communication dated 15/10/2011, the petitioner assessee also furnished the details of utilisation of unutilised Modvat. That thereafter, while framing the assessment, the Assessing Officer accepted the accounting system forwarded by the assessee, more particularly exclusive method of accounting. 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 assessment. Under the circumstances, now, the reasons to reopen the assessment can be said to be a mere change of opinion. Therefore, when there was no failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment, condition precedent for initiation of reassessment proceedings under section 147 of the Income Tax Act beyond the period of four years are not satisfied.

5.10. Identical question came to be considered by the Division Bench of this Court in the case of 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)** 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.”

5.11. Identical question came to be considered by the Division Bench of this Court in the case of **Heavy Metal and Tubes Limited** (supra) and in identical facts and circumstances of the case, the Division Bench quash and set aside the reassessment proceedings which were sought to be initiated on the very grounds on which the impugned reassessment proceedings are initiated against the petitioner – assessee, by observing that where the issue of accounting treatment in respect of unutilized Cenvat credit for the purpose of valuing closing stock was already examined by the Assessing Officer during the scrutiny assessment, reassessment proceedings on the same issue without any tangible material was mere a change of opinion and hence not sustainable.

5.12. Applying the decision of the Division Bench of this Court in the case of **Heavy Metal and Tubes Limited** (supra) as well as **Lanxess ABS Limited Now known as**

INEOS ABS (India) Ltd. (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, the initiation of the impugned reassessment proceedings which are initiated beyond the period of four years, are not permissible and the same cannot be sustained 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. 2009-2010 is hereby quashed and set aside and the impugned reassessment proceedings of reopening assessment for the A.Y. 2009-2010 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.

THE HIGH COURT
OF GUJARAT

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

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

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