

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION No. 16385 of 2017
 With
 R/SPECIAL CIVIL APPLICATION No. 21593 of 2017
 With
 R/SPECIAL CIVIL APPLICATION No. 21594 of 2017
 With
 R/SPECIAL CIVIL APPLICATION No. 21595 of 2017
 With
 R/SPECIAL CIVIL APPLICATION No. 21597 of 2017
 With
 R/SPECIAL CIVIL APPLICATION No. 21598 of 2017
 With
 R/SPECIAL CIVIL APPLICATION No. 21599 of 2017
 With
 R/SPECIAL CIVIL APPLICATION No. 21601 of 2017
 With
 R/SPECIAL CIVIL APPLICATION No. 21602 of 2017
 With
 R/SPECIAL CIVIL APPLICATION No. 22937 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE Mr. JUSTICE AKIL KURESHI

and

HONOURABLE Mr. JUSTICE B.N. KARIA

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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 ?	

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KIRAN RAVJIBHAI VASANI

Versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE5(3)

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Appearance :

Mr S.N SOPARKAR, Sr Advocate with Mr B S SOPARKAR, Advocate for the PETITIONERS

Mr MANISH R BHATT, Sr Advocate with Mrs MAUNA M BHATT, Advocate for the RESPONDENTS

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CORAM: HONOURABLE Mr. JUSTICE AKIL KURESHI
and
HONOURABLE Mr. JUSTICE B.N. KARIA
2nd April 2018

COMMON JUDGMENT (PER : HONOURABLE Mr. JUSTICE AKIL KURESHI)

These petitions arise in similar background involving same group of assessee. For the convenience, we may record the facts from Special Civil Application No. 16385 of 2017.

The petitioner is an individual. For the Assessment Year 2010-2011, the petitioner had filed return of income on 30th September 2010 declaring total income of Rs. 8,85,260/=. The return was accepted without scrutiny under Section 143 [1] of the Income-tax Act, 1961 [**“the Act”** for short]. To reopen such assessment, the Assessing Officer issued the *impugned* notice dated 31st March 2017. In order to do so, he had recorded the following reasons :

“A search u/s. 132 of the Income Tax Act, 1961 was conducted in the case of Venus Group of Ahmedabad on 10.03.2015. Various premises were covered u/s. 132/133A of the Act during the search. During the search action at various premises various incriminating documents were seized. On

the terrace of Crystal Arcade, CG Road, Ahmedabad, which was also covered u/s. 132 of the Income Tax Act, documents related to unaccounted cash transactions of the Venus Group were seized. On analysis of documents seized and their correlation, it was found that unaccounted cash transactions were first recorded on cash vouchers. On the basis of recording made on these cash vouchers, the entries were recorded on the day cash book.

In this connection information was received from Central Circle-1(1), Ahmedabad and photocopies of following documents/loosed papers recovered and seized from the premise at Terrace of Crystal Arcade, CG Road, Ahmedabad were forwarded to this office :-

Annexure No.	Page No.	Remarks
A-2	155	Summary Sheet
A-76	185, 111, 110, 109, 108, 106, 105, 66, 98, 79, 77, 70	Daily Cash Book Entry
A-70	105, 98, 125, 155, 197	
A-2	143 to 165	
A-67	133, 153, 155 and 173	Daily Cash book Entry

On analysis of above documents and correlating them, it was found that unaccounted cash transactions were first recorded on cash vouchers. On the basis of recording made on these cash vouchers, the entries were recorded on the day cash book. The unaccounted cash book has transaction recorded in continuous manner without any gap. The continuity of recording of unaccounted

cash transaction indicates that entries are made to record all unaccounted cash transactions of Venus Group and Vaswani family member. The cash book is written in corded form for names, amount, dates etc.

On analysis of seized evidences found during the search, it has also been noticed that the Venus group was engaged in huge land dealings. Upon correlation of cash books/cash vouchers/day books with the sale deeds of land transactions, it has been noticed that there are huge transactions of unaccounted cash in these land dealings. Such cash transactions are recorded in the name of different entries in the seized cash vouchers. The amount which is legally paid for the purchase/sale of the land has been paid through banking channels. Only this amount is mentioned as the total consideration of deals in the registered sales/purchase deed of the lands. This amount paid through banking channels and mentioned as the total consideration of land dealing in sales/purchase deeds, is also party/wholly entered with a noting as "Against EC" in the seized papers.

From analysis of the seized material, it has been found that there are various transaction recorded towards transaction in land. These are independently correlated and verified from various other seized documents. The details of the land transactions have been obtained from the respective Sub Registrar offices. The registered documents show the counter party to the entries of Venus group

and Vaswani family members in each transaction. The actual value of the transaction is much more than that has been reflected in the registered documents. The actual value of each transaction, including, cash and cheque is found duly recorded in form of a summary sheet, supported by duly authenticated vouchers. The cash payments which are shown in the summary sheet (seized as page no. 155 of Annexure A-2) and vouchers (page No. 150, 151 and 153 of Annexure A-2) are properly recorded in the daily cash book. The entries of date and amounts in these vouchers and sheet etc. are in coded form, *ie.*, the date of transaction has been pre-dated by 10 years and the actual amount has been represented in the cash book by taking (1/100th) of the actual value.

On the basis of the seized material, it has been found that the assessee, Shri Kiran Ravjibhai Vasvani-PAN: AAQPV1065N is one of the parties to the transactions in several land properties with the Venus Group during the financial year 2009-10 relevant to A.Y. 2010-11. The value of the transaction for the land as per the registered documents is as under:

Land At	Survey No.	Registered Number	Amount (in Rs.)	Type of Transaction
Sargasan	428/16	10476/2009	13,81,100/-	Purchase
Sargasan	430/3	10487/2009	29,03,600/-	Purchase
Sargasan	430/B	10486/2009	18,76,700/-	Purchase
Sargasan	430/J	10474/2009	14,16,450/-	Purchase
		Total Amount	75,77,850/-	

The total amount of unaccounted cash transaction includes in the sale of land at Tarapur/Sargasan carried out by the group as found recorded in cash book and summary sheet is Rs. 33,24,89,500/-. This involves various survey numbers of land at Sargasan. The total area of land involved in the transaction of Tarapur/Sargasan with different entries of Venue Group and members of Vaswani Family is 84,732/- sqr. meters. Total area of lands which the assessee has purchased as joint owner at Tarapur/Sargasan is 21,651/- sqr. mtr which comes to 25.555% of total land area at Tarapur/Sargasan sold by the Venus Group. Thus the proportionate amount of cash transactions made in respect of the lands mentioned in above table comes to Rs. 8,49,58813/-. Further, in all these properties there are 10 joint purchasers and there is no mention of their shares in registered documents. Therefore, taking equal share for all co-purchasers assessee's share comes to 10% in all the transactions. Thus, the assessee's share is the unaccounted portion of each transaction is Rs. 84,95,881/-.

5. From the above it can be seen that the transactions of land at various survey number at Sargasan in which the assessee is a co-purchaser with 10% share involves unaccounted cash and assessee's proportionate share in this unaccounted cash is Rs. 84,95,881/- over and above the document price.

From the above it becomes very clear that the assessee has made out of books investment for Rs. 84,95,881/- in land during the F.Y. 2009-10 relevant to A.Y. 2010-11. The invested amount has not been recorded in the regular books of the assessee and is out of undisclosed income of the assessee which has not been brought to tax.

In view of the above it can be seen that amount of Rs. 84,95,811/- is unaccounted investment of the assessee for the A.Y. Which has been made out of assessee's undisclosed income which has not been brought to tax. Therefore, I have reason to believe that income of Rs. 84,95,881/- has escaped assessment due to failure on part of the assessee in making true and full disclosure of all material facts relevant for assessment. And therefore, the case needs to be reopened for reassessment by issue of notice u/s. 148 of the I.T. Act, 1961.”

Armed with the reasons recorded by the Assessing officer, the petitioner raised objections to the notice of reopening under a communication dated 15th June 2017. Such objections were however rejected by the Assessing Officer by an Order dated 6th July 2017, upon which, this petition came to be filed. Facts are similar in all cases.

Learned counsel for the petitioners raised the following contentions.

The Assessing Officer had no tangible material to form a belief that income chargeable to tax has escaped assessment. There was no material having a live link with formation of such belief. Under the circumstances, even in a case where the return was originally accepted without scrutiny, reopening of the assessment would not be permissible. Elaborating these contentions, counsel submitted that the reasons recorded nowhere demonstrate that during the search operations at the premises of Venus Group from whom the petitioners had purchased lands, had received any on-money or cash money for such purchases. Merely because the seized documents and other materials *prima facie* suggest cash transactions in some of the lands were sold by Venus Group, would not automatically imply that the petitioners had paid such on-money. He submitted that the Assessing Officer has thus proceeded on conjectures and surmises. In view of the fact that there is no material on record with the aid of which the Assessing Officer can form a belief that income chargeable to tax has escaped assessment, the question of sufficiency of the material would not arise. Counsel submitted that as per the settled law, the notice of reopening has to be evaluated on the basis of reasons recorded. The Assessing Officer cannot improve upon such reasons or deviation from such reasons to support the notice.

On the other hand, learned counsel Shri Bhatt appearing for the Department opposing the petitions contended that the Assessing Officer has recorded proper reasons. There was sufficient material collected during the search operations in case of Venus Group *prima facie* demonstrating that huge cash transactions had taken place in sale of certain parcels of land. The petitioners had purchased four separate parcels of land from Venus group during the same period. There was further material *prima facie* suggesting that even in the case of such sales, there were cash transactions.

At the outset, we may record three settled principles of law which would have some bearing in the present set of cases. First is that in a case where the return filed by the assessee is accepted under Section 143 [1] of the Act without scrutiny, since the Assessing Officer had not formed any opinion, principle of change of opinion would not apply. This has been made sufficiently clear in the case of **Assistant Commissioner of Income-Tax v. Rajesh Jhaveri Stock Brokers Private Limited**, reported in [2007] 291 ITR 500 [SC] in which it was held and observed as under :-

“One thing further to be noticed is that intimation under section 143(1)(a) is given without prejudice to the provisions of section 143(2). Though technically the intimation issued was deemed to be a demand

notice issued under section 156, that did not per se preclude the right of the Assessing Officer to proceed under section 143(2). That right is preserved and is not taken away. Between the period from April 1, 1989 to March 31, 1998, the second proviso to section 143(1)(a), required that where adjustments were made under the first proviso to section 143(1)(a), an intimation had to be sent to the assessee notwithstanding that no tax or refund was due from him after making such adjustments. With effect from April 1, 1998, the second proviso to section 143(1)(a) was substituted by the Finance Act, 1997, which was operative till June 1, 1999. The requirement was that an intimation was to be sent to the assessee whether or not any adjustment had been made under the first proviso to section 143(1) and notwithstanding that no tax or interest was found due from the assessee concerned. Between April 1, 1998 and May 31, 1999, sending of an intimation under section 143(1)(a) was mandatory. Thus, the legislative intent is very clear from the use of the word intimation as substituted for assessment that two different concepts emerged. While making an assessment, the Assessing Officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first *proviso* to section 143(1)(a), no addition which is impermissible by the information given in the return could be made by the Assessing Officer. The reason is that under section 143(1)(a) no opportunity is granted to the assessee and the Assessing Officer proceeds on his opinion on the basis

of the return filed by the assessee. The very fact that no opportunity of being heard is given under section 143(1)(a) indicates that the Assessing Officer has to proceed accepting the return and making the permissible adjustments only. As a result of insertion of the Explanation to section 143 by the Finance (No. 2) Act of 1991 with effect from October 1, 1991, and subsequently with effect from June 1, 1994, by the Finance Act, 1994, and ultimately omitted with effect from June 1, 1999, by the Explanation as introduced by the Finance (No. 2) Act of 1991 an intimation sent to the assessee under section 143(1)(a) was deemed to be an order for the purposes of section 246 between June 1, 1994, to May 31, 1999, and under section 264 between October 1, 1991, and May 31, 1999. It is to be noted that the expressions intimation and assessment order have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the tax payer. In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under section 143(1)(a) as it stood prior to April 1, 1989, the Assessing Officer had to pass an assessment order if he decided to

accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, *i.e.*, to minimize the departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D. K. Jain J) in *Apogee International Limited v. Union of India* [(1996) 220 ITR 248]. It may be noted above that under the first *proviso* to the newly substituted section 143(1), with effect from June 1, 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any assessment is done by them? The reply is an emphatic no. The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise.”

These principles were reiterated by the Supreme Court in the latter judgment in case of **Deputy Commissioner of Income-Tax & Anr. vs. Zuari Estate Development & Investment Company Limited**, reported in [2015] 373 ITR 661 [SC].

Despite this position, even in a case where the return of the assessee is accepted without scrutiny under Section 143 [1] of the Act, in order to reopen the assessment, the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment. This issue has been discussed at considerable length by this Court in the case of **Inductotherm [India] Private Limited v. M. Gopalan, Deputy Commissioner of Income-Tax**, reported in [2013] 356 ITR 481 [Guj].

“13. Despite such difference in the scheme between a return which is accepted under section 143(1) of the Act as compared to a return of which scrutiny assessment under section 143(3) of the Act is framed, the basic requirement of section 147 of the Act that the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment is not done away with. Section 147 of the Act permits the Assessing Officer to assess, re-assess the income or re-compute the loss or depreciation if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. This power to reopen assessment is available in either case, namely, while a return has been either accepted under section 143(1) of the Act or a scrutiny assessment has been framed under section 143(3)

of the Act. A common requirement in both of cases is that the Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment.

16. It would, thus, emerge that even in case of reopening of an assessment which was previously accepted under section 143(1) of the Act without scrutiny, the Assessing Officer would have power to reopen the assessment, provided he had some tangible material on the basis of which he could form a reason to believe that income chargeable to tax had escaped assessment. However, as held by the Apex Court in the case of *Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.*, (supra) and several other decisions, such reason to believe need not necessarily be a firm final decision of the Assessing Officer.”

The requirement, thus for reopening of assessment, is “reasonable belief”. This expression is not synonymous with Assessing Officer having finally ascertained the fact by any legal evidence or conclusion. In this context, the Supreme Court in the case of *Rajesh Jhaveri Stock Brokers Private Limited* [Supra] had observed as under :-

“Section 147 authorizes and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had

escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in *Central Provinces Manganese Ore Co. Ltd. v. ITO* [1991 (191) ITR 662], for initiation of action under section 147 (a) [as the provision stood at the relevant time] fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is reason to believe, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see *ITO v. Selected Dalurband Coal Co. Pvt. Ltd.* [1996 (217) ITR 597 (SC)]; *Raymond Woollen Mills Ltd. v. ITO* (236) ITR 34 (SC)].”

In the case of **Raymond Woollen Mills Limited v. Income Tax Officer & Ors.** [Supra], the Apex Court held and observed as under :-

“In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was *prima facie* some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts came to the knowledge of the Income-tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing authority. The appeals are dismissed. There will be no order as to costs.”

Lastly, it is well settled that the validity of the notice of reopening would be judged on the basis of reasons recorded by the Assessing Officer for issuance of such notice. It would not be permissible for the Assessing Officer to improve upon such reasons or to rely upon some extraneous material to support his action. Reference in this respect can be made to the decision of this Court in the case of **Aayojan Developers v. Income-tax Officer**, reported in [2011] 335 ITR 234 [Guj].

Keeping in mind these legal principles which are firmly anchored through series of judgments, we may revert to the facts of the case on hand.

From the reasons recorded by the Assessing Officer, we gather that various premises of Venus Group were subjected to search operations conducted on 10th March 2015. During such search operations, various incriminating documents were seized. One of the premises searched was terrace of one Crystal Archade, a building situated on C.G Road, Ahmedabad. Number of documents relating to unaccounted cash transactions were seized from such premises. These seized documents were analyzed and co-related. It was found that unaccounted cash transactions were first recorded in the cash vouchers. On the basis of such cash vouchers, entries were recorded in the day cash-book. Further, photocopies of documents and loose papers recovered during search operations were forwarded to the Assessing Officer which contained Summary-Sheet; Daily Cash-book entries, etc. According to the Assessing Officer, analyzing all these documents and by co-relating them, it was found that unaccounted cash transactions were first recorded in the cash vouchers. On the basis of recording made in these cash vouchers, entries were recorded in the day cash-book. Continuity of recording of unaccounted cash transactions indicated

that the entries were made to record all unaccounted cash transactions of Venus Group and Vaswani family members [who were part of the group]. The cash book was written in coded form for names, amount, dates, etc. It was found that there were huge cash transactions in the land sales made by the said Venus Group. To avoid detection, the dates were ante-dated by ten years and figures in cash were recorded $1/100^{\text{th}}$ of the actual sum. The reasons further recorded that the assesseees were the purchasers of four parcels of land of village-Sargasan sold by the Venus Group, bearing Survey No. 428/16; 430/3; 430/B and 430/J. The total sale consideration, as per the registered documents for these four land transactions, comes to Rs. 75.77 lacs [rounded off]. It was recorded that as per the cash-book and the summary sheet, a total of Rs. 33.24 Crores [rounded off] was received towards sale of Tarapur and Sargasan lands by the said Venus Group for sale of a total area of 84,732 sq meters of land. The assesseees had purchased 21,651 sq meters out of the said land area which represented approximately 25.55% of the total land sold by Venus Group during the said period. The Assessing Officer for computation, therefore, apportioned proportionate amount of cash dealings. Copies of summary sheet and cash vouchers are produced in the Court. The summary sheet which was found during the search

operation shows a total amount of Rs. 33,24,89,500/= [other than EC] and an amount of Rs. 8,21,105/= [by EC]. The total of these two figures is also mentioned in the Summary Sheet as Rs. 41,46,000/=. The reasons recorded point out that the cash transactions are recorded in the name of different entities in the seized cash vouchers. Amount which is legally paid and which has been paid through banking channels, only such amount is mentioned in the sale deeds. This amount paid through bank channels and which is reflected in the total sale consideration in the sale deeds is also entered with a noting “against EC” in the seized papers. The Revenue would thus point out that the summary-sheet when indicated a figure of Rs. 8,21,105/= against EC, it reflected the total sale consideration, of course multiplied by 100, since all the figures are supposedly recorded 1/100th of the actual sum, which is received through banking channels towards the sale of lands and which is duly reflected in the sale deeds. According to the Revenue, thus, the total sale transactions reflected for sale of all these parcels of land would come to Rs. 8,21,10,500/= [approximately] which matches with the total sale consideration under different sale deeds. In this context, Revenue would point out that the remaining figure of Rs. 33,24,895/= [other than EC] found in the Summary-sheet reflects sale

consideration of Rs. 33,34,89,500/= received by Venus Group for sale of different lands at Sargasan and Tarapur during the same period and which was not accounted.

The Revenue would also rely on some of the specific entries in which reference has been made to the lands forming part of Survey No. 630. For example – in a daily voucher dated 23rd September 1999 there is an entry of receipt of Rs. 2 lacs in connection with Tarapur-Sargasan lands. Name of the person mentioned is “Bhuro”. On the debit side, there is a payment entry of Rs. 5,000/= to one Mr. Bhatia “on account” for Sargasan land, bearing Survey No. 430/6. In yet another voucher dated 28th September 1999, a sum of Rs. 5,000/= is on the credit side. Name of the person concerned is Mr. Bhatia. Land is Survey No. 430/6.

It can thus be seen that the Assessing Officer had analyzed the voluminous material collected by the Revenue during the search operations in connection with Venus Group. This material *prima facie* suggested huge cash transactions in connection with sale of lands against the total declared sale consideration of Rs. 8.21 Crores [rounded off]. The material *prima facie* suggests that the total cash transactions of Rs. 33.24 Crores had taken place. The Revenue argues that the entires in Summary-sheet and Vouchers carried dates which were deliberately put 10 years

backward to disguise and the figures were recorded by deleting two zeroes from the actual to avoid detection and co-relation.

At this stage, when we are concerned with re-opening of the assessment that too in a case where the original return filed by the assessee was accepted without scrutiny, the material at the command of the Assessing Officer is sufficient to permit the process of reopening. As held by the Supreme Court in the case of *ACIT v. Rajesh Jhaveri Stock Brokers Private Limited* [Supra] and *Raymond Woolen Mills Limited* [Supra], reason to believe cannot be equated with finally established fact that the income chargeable to tax having escaped assessment additions will invariably be made and further, sufficiency of reasons enabling the Assessing Officer to form such a belief would not be gone into.

In the result, all these *writ* petitions are dismissed.

[Akil Kureshi, J.]

[B.N Karia, J.]

Prakash