

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 22523 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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AISHWARYA DYING MILLS PVT. LTD.

Versus

DY. COMMISSIONER OF INCOME TAX CIRCLE(1)(1)

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Appearance:

MR B S SOPARKAR(6851) for the PETITIONER**MR NIKUNT RAVAL FOR MRS KALPANAK RAVAL(1046) for the
RESPONDENT**

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CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 26/03/2018**ORAL JUDGMENT****(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. Draft amendment is allowed.

2. The petitioner-Aishwarya Dying Mills Pvt. Ltd. is a company registered under the Companies Act. For the assessment year 2010-11, the petitioner had filed the return of income on 30.09.2010 declaring total income of Rs. 2.42 crores. The return was taken in scrutiny. Assessing Officer passed the order of assessment on 25.02.2013 under section 143(3) of the Income Tax Act, 1961. To reopen such assessment, he issued the impugned notice on 31.03.2017. In order to do so, he had recorded following reasons:

“The assessee has filed its return of income for A.Y. 2009-10 on 30/09/2010 declaring total income at Rs. 24231670. The assessment u/s 143[3] of the Act was completed on 11/12/2012 and income was determined at Rs. 2,44,81,670/-.

In the case of the assessee, information have been received from the DDIT [Inv] Unit-3(1), Kolkata in reference to sharing of information of shell companies which have given accommodation entries for share premium in Surat based companies. Vide the referred communication, the DDIT [Inv] Unit 3-(1), Kolkata has provided list of 114 Kolkata based shell companies which have given accommodation entries in Surat based companies. It has also been stated by the DDIT [Inv] that master data of paper/shell companies maintained by the Kolkata Directorate which has been prepared/complied on the basis of statement of many entry operators/dummy directors recorded during various search & seizure operation/survey operations/investigations/inquiries was checked.

On perusal of data so provided by the DDIT[Inv] Unit 3(1) Kolkata, it is noticed that during the period under consideration, the assessee company has accepted share

capital/share premium from the following entries/parties which have been proved to be shell companies based on the investigation conducted by the DDIT(Inv) Unit-3(1), Kolkata:

Sr. No	Name of the Investor	Equity Shares	Share Capital	Share Premium
1	Achi Fin & Mgt Consul Pvt. Ltd., 6, Hanspukur Lane, 1 st Floor, Room No. 106, Kolkata	21000	210000	8190000
2	Adbhut Sales Pvt. Ltd, 11, Anjanganth, Po. Shyamnagar, 24, Parganas, Kolkata	9750	97500	3802500
3	Bakra Pratishthan Limited, Room No. 103, 1 st Floor, 7, Mangoelane, Kolkata	13500	135000	5265000
4	Chetna Suppliers Pvt. Ltd 2, Digamber Jain Temple Road, 1 st Floor, Kolkata	23000	230000	8970000
5	Confident Trade Link Pvt. Ltd., 6, Hanspukur Lane, 1 st Floor, Room No. 106, Kolkata	12250	122500	4777500
6	Elgin Sales Promotion Pvt. Ltd., 6, Hanspukur Lane, 1 st Floor, Room No. 106, Kolkata	7500	75000	2925000
7	Galore Suppliers Pvt. Ltd., 2, Digamber Jain Temple Road, 1 st Floor, Kolkata	20750	207500	8092500
8	MSV Fiscal Services Pvt. Ltd., 2, Digamber Jain Temple Road, 1 st Floor, Kolkata	24750	247500	9652500
9	Oleander Manufacturing & Credit Pvt. Ltd., 2, Digamber Jain Temple Road, 1 st Floor, Kolkata	25000	250000	9750000

10	Radiant Mechandise Pvt. Ltd., 2, Digamber Jain Temple Road, 1 st Floor, Kolkata	26250	262500	10237500
11	Redstrip Merchants Pvt. Ltd., 2, Digamber Jain Temple Road, 1 st Floor, Kolkata	7500	75000	2925000
12	S.K. Stock Dealers Pvt. Ltd., 2, Digamber Jain Temple Road, 1 st Floor, Kolkata	26350	263500	10276500
13	Slow & Sound Electronic Pvt. Ltd., 2, Digamber Jain Temple Road, 1 st Floor, Kolkata	15500	155000	60645000
14	Banphool Sales Pvt. Ltd., 70, Cotton street, 2 nd Floor, Kolkata	5750	0	2242500
15	Dhanvirdhi Fiancial Consultants Pvt. Ltd., 6, Hanspukur Lane, 1 st Floor, Room No. 106, Kolkata	9250	92500	3607500
16	Landmark Suppliers Pvt. Ltd., 6, Hanspukur Lane, 1 st Floor, Room No. 106, Kolkata	5000	50000	1950000
17	Onkar Supply Pvt. Ltd., 6, Hanspukur Lane, 1 st Floor, Room No. 106, Kolkata	9750	97500	3802500
18	Potential Trade Link Pvt. Ltd., 6, Hanspukur Lane, 1 st Floor, Room No. 106, Kolkata	9750	97500	3802500
19	Pratisthan Pvt. Ltd., 6, Hanspukur Lane, 1 st Floor, Room No. 106, Kolkata	2500	25000	975000
20	Subhrekha Vyapar Pvt. Ltd., 6, Hanspukur Lane, 1 st Floor, Room No. 106, Kolkata	17000	170000	6630000

21	Sumangal Investment Consul.Pvt. Ltd., 6, Hanspukur Lane, 1 st Floor, Room No. 106, Kolkata	5000	50000	1950000
22	Twinkle Merchants Pvt. Ltd., 6, Hanspukur Lane, 1 st Floor, Room No. 106, Kolkata	7500	75000	2925000
	Total	304600	2988500	118794000

On verification of the materials available on record and facts and circumstances of the case, it is seen that the assessee has shown to have received share capital/share premium amounting to Rs. 12,17,82,500/-. Since, the investor companies have been proved to be shell companies indulged in providing accommodation entries, the share capital/share premium claimed to have been received, from such companies by the assessee company is not genuine. Therefore, this amount is nothing but assessee company's own money introduced in the grab of share capital/share premium from the shell company and as such liable for taxation under the provisions of section 68 of the I.T.Act.

In view of the above facts, since the above companies are proved to be bogus/paper companies and were given accommodation entries to the assessee company by way of share capital and share premium during the F.Y. 2009-10. I have reason to believe that the share capital/share premium received to the extent of Rs.12,17,82,500/- (share capital Rs. 29,88,500 +Rs. 11,87,94,000 share premium) has escaped the assessment for A.Y. 2010-11 and the assessee company had failed to disclose full and true facts of tis case, within the meaning of provisions of sec 174 of the I.T.Act. Therefore, I am satisfied that this is a fit case for issue of notice u/s. 148 r.w.s. 147 of the Act for action u/s. 147 of the Act for the A.Y. 2010-11.”

3. Such reasons were supplied to the petitioner upon which, objections for notice of reopening were raised on 05.09.2017. Such objections were rejected by the Assessing Officer on 26.10.2017. Thereupon, this petition has been filed.
4. On the basis of the reasons recorded and other materials on record, counsel for the petitioner raised following contentions:
- (i) The sanction under section 151 of the Act of the Commissioner before issuance of notice of reopening was not obtained;
 - (ii) There are number of factual discrepancies and inaccuracies in the notice and the reasons recorded;
 - (iii) The Assessing Officer has acted on borrowed satisfaction without independent application of mind;
 - (iv) Before issuance of notice, the Assessing Officer had carried out fishing and roving inquiries. Elaborating this last contention counsel submitted that unlike in number of other cases of similar nature, the basic information suggesting that certain shell companies had supposedly made investments in the share capital of the assessee company, did not come from the Investigation Wing of the Income Tax department. Instead, in the present case, the Assessing Officer contacted the Investigation Wing of the Income Tax department, Kolkata seeking out information with respect to the assessee-company.

He had no basis for doing so. His action amounted to carrying out fishing inquiries which would not be permissible.

5. On the other hand, learned counsel for the department opposed the petition contending that the sanction was granted by the Commissioner prior to issuance of notice of reopening. In this respect, he relied on the original files of the department concerning the present case. On the basis of such original documents, he also contended that the Assessing Officer had sufficient material at his command to form a belief that income chargeable to tax had escaped assessment. Such information included the details of shell companies whose directors, in various statements recorded during search, seizure and similar other actions, had admitted to have provided bogus accommodation entries. Counsel lastly contended that merely because such information was received by the Assessing Officer upon his queries breverseeing made with the Investigation Wing rather than the sequence being reverse would not vitiate the notice of reopening. The concept of impermissibility of roving or fishing inquiry cannot be attached to the stage prior to issuance of notice of reopening. In this context, he referred to section 133 of the Income Tax Act which vests the Assessing Officer with certain powers even when the assessment is not pending.
6. We have perused materials on record including the original files of the department with special focus on the four

contentions raised by the counsel for the petitioner. One of them is possible of summary disposal. None of the alleged inaccuracies or the errors are demonstrated to be so fundamental as to vitiate the very proceeding for reassessment. No further discussion on this ground is needed.

7. Coming to the question of lack of sanction as required under section 151 of the Act before issuance of notice of reopening, we have perused the original files which would show that the Assessing Officer having recorded the reasons for reopening, presented the same for approval of the Principal Commissioner in prescribed format on 29.03.2017. On 30.03.2017, the Joint Commissioner of Income Tax as an intermediary officer, processing such reasons and opining whether it was a fit case for reopening of the assessment under section 147 of the Act, in his own handwriting put the remarks “ I am satisfied” that it was a fit case for reopening under section 147 of the Act. On 31.03.2017, the Principal Commissioner of Income Tax put his remarks that based on the reasons recorded by the Assessing Officer, he was satisfied that it was a fit case for reopening the assessment under section 147 of the Act. Thus, the sanction for reassessment was granted on 31.03.2017 i.e. the date on which such notice was issued. It was faintly argued before us, without supporting averments in the petition by the counsel for the petitioner that even though the sanction for reassessment and the notice of reopening may be both dated 31.03.2017, as per the instructions of the petitioner, the notice came to be

issued prior to grant of sanction. There is nothing on the record to substantiate this allegation. In fact, the petitioner has not even gone on oath to make any such assertion. There is nothing on the file to suggest that such allegation is even otherwise correct. This issue therefore, must rest here.

8. The contention with respect to the borrowed satisfaction and fishing inquiry overlap. We would address these contentions commonly. In the recent past, we have come across several cases where the assessing officer has sought to reopen the assessments, the common thread being the revenue's belief that several Surat based companies had received bogus share application or share premium money in disguise from Kolkata based shell companies. It appears that the Investigation Wing of the Income Tax Department at Kolkata had carried out detailed investigation. Stemming from recording of various statements of Directors of different companies pursuant to search and seizure and such other actions, the department claims that in many of these statements such Directors had admitted to be in control of various companies which were mere shell companies and had provided accommodation entries to range of companies. Such investigation reports based on the material collected by the Investigation Wing of the Income Tax department, Kolkata were supplied to the concerned Assessing Officers of beneficiary companies of such accommodation entries who happened to be stationed at Surat. Large number of reassessment notices were issued.

Many of them were challenged before us. On the basis of multiple factual and legal aspects emerging, we have given our judgements in different cases from time to time.

9. The present is, however, a peculiar case where, instead of Investigation Wing of the Income Tax department at Kolkata providing any report or information, it was the Surat Unit of the Income Tax Department which apparently contacted the Investigation Wing at Kolkata and sought information whether there was any material to link the assessee companies at Surat with such bogus accommodation entry transactions. The modality for seeking such information was, we are informed, worked out on the basis of certain parameters and criteria with which we are not concerned. The fact remains that it was the Surat unit of the Income Tax department which got in touch with the Kolkata Investigation Wing of the Income Tax department and sought certain information and clarifications with respect to various assessee companies who are assessed at Surat. The information, as requested, was provided. In the present case, the DDIT [Investigation] Kolkata in his email dated 27.03.2017 informed Income Tax department at Surat that master data of paper/shell companies maintained by Kolkata Directorate has been prepared on the basis of statements of money entry operators or dummy Directors which were recorded during various search and seizure operation/survey operations/investigations/inquiries which were checked. It was found that there are 114 shell companies

which were controlled and managed by various Kolkata based entry operators for providing accommodation entries. Details of these companies along with their operators were annexed with this email. It was further conveyed that as far as rest of 274 and odd companies are concerned, which do not form part of the data base so prepared, time was insufficient to make full verification. Such material was placed before the Assessing Officer. On the basis of such information, he found that the petitioner had received share application money from as many as 22 such shell companies during the year under consideration. A total of 3.47 lacs shares were allotted to these companies for raising share capital of Rs. 29,88,500/- and share premium of Rs. 11,87,94,000/-. On the basis of such information, he recorded his satisfaction that income chargeable to tax had escaped assessment. He recorded that he had reason to believe that share capital and share premium of Rs. 12,17,82,500/- [Rs. 29,85,500/-+Rs. 11,87,94,000] had escaped assessment.

10. It can thus be seen that the Assessing Officer had specific and definite information at his command to form a belief that income chargeable to tax had escaped assessment. He found that the assessee had received sizeable amount of share application and share premium monies from various companies which were found to be shell companies and whose Directors' statements were recorded confirming this aspect. This is, therefore, not a case where the Assessing Officer was

proceeding on borrowed satisfaction or that it had dearth information at his command to enable him to form a belief that income chargeable to tax had escaped assessment.

11. Counsel for the petitioner, as noted earlier, had raised a somewhat different contention with respect to the exercise undertaken by the Assessing Officer. His view was that in the present case, the Assessing Officer initiated the inquiries at the Investigation Wing of the Income Tax department, Kolkata. He had no sound basis or reason to initiate such inquiry. According to the counsel therefore, the exercise undertaken by the Assessing Officer was vitiated on two grounds:

- (i) on initiating a roving inquiry and;
- (ii) asking for information wholly arbitrarily without having reason to believe that the assessee company had received bogus share application money.

12. It is by now well settled that for reopening of the assessment by issuing notice under section 148 of the Act, even in a case where previously no scrutiny assessment was carried out, the Assessing Officer must have reasons to believe that income chargeable to tax had escaped assessment. This aspect has been elaborated by this Court in case of **Inductotherm (India) P. Ltd vs. M. Gopalan, Deputy Commissioner of Income Tax** reported in 356 ITR 481 making following observations:

“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.”

13. In this context, it is also equally well settled that term “reason to believe” is vitally different from reason to suspect. We may recall, for a brief while, section 147 of the Act contained the expression “if the Assessing Officer for the reasons to be recorded by him in writing is of the opinion”. However, it was soon realized that this expression “is of the opinion” would be

too wide giving excessive powers to the Assessing Officer to resort to reopening of assessment. This expression was, therefore, quickly changed to bring back the expression “if the Assessing Officer has reason to believe”. This aspect was highlighted by the Supreme Court in case of **Commissioner of Income Tax vs. Kelvinator of India Ltd.** reported in **320 ITR 561**. In context of section 147 of the Act post its amendment w.e.f. 01.04.1989, the Supreme Court held that Section 147 does not vest arbitrary power in the Assessing Officer and held that even post amendment of 01.04.1989 in section 147, concept of change of opinion would apply. It was observed as under:

“6. On going through the changes, quoted above, made to [Section 147](#) of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in [section 147](#) of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re- open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, [Section 147](#) would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the

concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to [Section 147](#) of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in [Section 147](#) of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

"7.2 Amendment made by the [Amending Act](#), 1989, to reintroduce the expression 'reason to believe' in [Section 147](#).--A number of representations were received against the omission of the words 'reason to believe' from [Section 147](#) and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from [section 147](#) would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the [Amending Act](#), 1989, has again amended [section 147](#) to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new [section 147](#), however, remain the same."

14. This Court on number of occasions has held that reopening of assessment cannot be done for carrying out roving or fishing inquiries. In case of ***Bakulbhai Patel vs. Income Tax Officer*** reported in **2011 56 DDR (Guj) 212** Division Bench of this Court finding that the reasons recorded by the Assessing Officer for reopening of the assessment only provided that the Assessing Officer desiring to carry out a detailed investigation or verification to bring the assessee in the tax net held that notice of reopening of assessment was not valid.
15. The principle, that the notice of reopening can be issued only upon the Assessing Officer bona fide forming a belief that income chargeable to tax had escaped assessment is thus, well settled. Reassessment cannot be resorted to on mere suspicion or for carrying out fishing or roving inquiries. This is so for many reasons. Reopening of a completed assessment is a serious issue. Once an assessment is reopened on a certain ground, entire assessment at the hands of revenue would be at large. This Court in case of **Gujarat Power Corporation Ltd vs. Assistant Commissioner of Income Tax** reported in **350 ITR 266** had observed as under:

“41. The powers under section 147 of the Act are special powers and peculiar in nature where a quasi-judicial order previously passed after full hearing and which has otherwise become final is subject to reopening on certain grounds. Ordinarily, a judicial or quasi-judicial order is subject to appeal, revision or even review if statute so permits but not liable to be re-opened by the same authority. Such powers are

vested by the Legislature presumably in view of the highly complex nature of assessment proceedings involving large number of assessees concerning multiple questions of claims, deductions and exemptions, which assessments have to be completed in a time frame. To protect the interest of the revenue, therefore, such special provisions are made under section 147 of the Act. However, it must be appreciated that an assessment previously framed after scrutiny when reopened, results into considerable hardship to the assessee. The assessment gets reopened not only qua those grounds which are recorded in the reasons, but also with respect to entire original assessment, of course at the hands of the revenue. This obviously would lead to considerable hardship and uncertainty. It is precisely for this reason that even while recognizing such powers, in special requirements of the statute, certain safeguards are provided by the statute which are zealously guarded by the courts. Interpreting such statutory provisions courts upon courts have held that an assessment previously framed cannot be reopened on a mere change of opinion. It is stated that power to reopening cannot be equated with review.”

16. However, we see no fetters on an Assessing Officer carrying out preliminary inquiries even before issuance of notice of reopening in order to collect information on the basis of which, he may either form a belief that income chargeable to tax had escaped assessment or abandon any further inquiry, upon being satisfied that no such belief could be formed. We find no statutory backing to import the concept of impermissibility of a roving or a fishing inquiry at a stage prior to issuance of notice of reopening. In this context, reference may be made to section 133 of the Act. Chapter XIII of the Act pertains to Income Tax Authorities. Part A of

Chapter XIII concerns appointment and control of the Income Tax Authorities, Part B to the Jurisdiction and Part C with their powers. Section 133 is included in Part C and reads as under:

“133. Power to call for information.- The [Assessing] Officer, the [Deputy Commissioner (Appeals)], [the Joint Commissioner] or the Commissioner (Appeals)] may, for the purposes of this Act,—

- (1) require any firm to furnish him with a return of the names and addresses of the partners of the firm and their respective shares ;
- (2) require any Hindu undivided family to furnish him with a return of the names and addresses of the manager and the members of the family ;
- (3) require any person whom he has reason to believe to be a trustee, guardian or agent, to furnish him with a return of the names of the persons for or of whom he is trustee, guardian or agent, and of their addresses ;
- (4) require any assessee to furnish a statement of the names and addresses of all persons to whom he has paid in any previous year rent, interest, commission, royalty or brokerage, or any annuity, not being any annuity taxable under the head “Salaries” amounting to more than one thousand rupees, or such higher amount as may be prescribed, together with particulars of all such payments made ;
- (5) require any dealer, broker or agent or any person concerned in the management of a stock or commodity exchange to furnish a statement of the names and addresses of

all persons to whom he or the exchange has paid any sum in connection with the transfer, whether by way of sale, exchange or otherwise, of assets, or on whose behalf or from whom he or the exchange has received any such sum, together with particulars of all such payments and receipts ;

(6) require any person, including a banking company or any officer thereof, to furnish information in relation to such points or matters, or to furnish statements of accounts and affairs verified in the manner specified by the Assessing Officer, the Deputy Commissioner (Appeals), the Joint Commissioner or the Commissioner (Appeals), giving information in relation to such points or matters as, in the opinion of the Assessing Officer, the Deputy Commissioner (Appeals), the Joint Commissioner or the Commissioner (Appeals), will be useful for, or relevant to, any enquiry or proceeding under this Act :

Provided that the powers referred to in clause (6), may also be exercised by the Principal Director-General, the Principal Chief Commissioner, the Principal Director or Director or the Principal Commissioner or Commissioner or the Joint Director or Deputy Director or Assistant Director:

Provided further that the power in respect of an inquiry, in a case where no proceeding is pending, shall not be exercised by any income-tax authority below the rank of Principal Director or Director or [Principal Commissioner or] Commissioner [other than the Joint Director or Deputy Director or Assistant Director] without the prior approval of the [Principal Director or Director or, as the case may be, the Principal Commissioner or Commissioner:

Provided also that for the purposes of an agreement referred to in section 90 or section 90A, an income-tax authority notified under sub-section (2) of section 131 may exercise all the powers conferred under this section, notwithstanding that no proceedings are pending before it or any other income-tax authority.”

17. Under this section thus, the Assessing Officer, the Deputy Commissioner of Appeals, Joint Commissioner or the Commissioner (Appeals) for the purposes of the Act could require furnishing of various documents, informations and materials as specified therein. In particular, as per clause (6) of section 133, he may require any person including a banking company or any officer thereof to furnish information in relation to such points or matters or to furnish statements of accounts and affairs verified in the specified manner in relation to such points or matters as in the opinion of the said authority will be useful or relevant to any inquiry or proceeding under the Act. The powers of the said specified authority under section 133 of the Act are thus quite wide. Such information and material can be called for, for the purpose of the Act. Pendency of an assessment is not a pre-condition for exercise of such powers. Even in absence of any pending assessment, such information or material may be summoned, not only from the assessee, being an individual HUF or a firm but also from any other person including a banking company or an officer thereof. Of course, these powers are not unguided or uncanalized and cannot be exercised at the whims of the assessing authority. For example, the powers specified under clause (6) of section 133 are hedged with such information which, in the opinion of the authority, would be useful or relevant to any proceedings under the Act. Thus, even in absence of any assessment, such

powers can be exercised of course subject to fulfillment of the conditions provided therein.

18. In case of **Pittambi Service Co-operative Bank Ltd and ors vs. Union of India and ors** reported in **274 ITR 254** constitutional validity of portion of section 133(6) of the Act was challenged before the Kerala High Court. The petition was filed by co-operative banks to whom notices were issued by the Income Tax Authorities asking them to furnish details of cash deposits in saving bank accounts aggregating Rs. 5 lacs during the financial years 2010-11 to 2012-13. Essentially, the under the challenge was the amendment to the said section w.e.f. 01.07.1995 pursuant to which, power to call for information could be called as part of an inquiry even though no proceeding was pending. Reference was made to the decision of Supreme Court in case of Kathiroor Service Co-operative Bank Ltd. vs. CIT and ors reported in 263 CTR 129 in which, following observations were made:

"The legislative intention was to give wide powers to the officers, of course with the permission of the CIT or the Director of Investigation to gather general particulars in the nature of survey and store those details in the compute so that the data so collected can be made use of for checking evasion of tax effectively. The assessing authorities are now empowered to issue such notice calling for general information for the purpose of any enquiry in both cases:(a) where a proceeding is pending and b) where proceedings is not pending against the assessee. However, in the latter case, the assessing authority must obtain the prior approval of the

Director or the Commissioner, as the case may be before issuance of such notice. The word "enquiry" would thus connote a request for information or questions to gather information either W.P.(C)Nos. 10334 OF 2014 & connected cases before the initiation of proceedings or during the pendency of proceedings; such information being useful for or relevant to the proceedings under the Act."

19. The Court rejected the challenge making following observations:

"28. Coming to the case in hand, it is only the first stage of the action that is being pursued by the respondent Department, i.e., as to the collection of data/material, before anybody is indicted. In so far as the said power is exercised to identify the culprits if any, it need not cause any headache to the petitioners. W.P.(C)Nos. 10334 OF 2014 & connected cases That apart, the information being collected by the Income Tax Department cannot be made use of by them, for any other purpose and the statute itself takes care of such situation, by virtue of the mandate under Section 138 of the Income Tax Act. The said provision reads as follows:"

20. The said judgement was challenged before the Division Bench of Kerala High Court. Division Bench in case of ***Pittambi Service Co-operative Bank Ltd & ors vs. Union of India and ors*** reported in **387 ITR 299** dismissed the appeal.

21. In case of ***Karnataka Bank Ltd vs. Secretary, Government of India and ors*** reported in **[2002] 255 ITR 508** the Supreme Court held and observed that it is not necessary that inquiry should have commenced with the issuance of notice or otherwise before section 133(6) could be invoked. It

is with a view to collect information that power is given under section 133(6) to issue notice, inter alia requiring a banking company to furnish information in this respect of such points of matters as may be useful or relevant. Such information can be sought even when no proceeding under the Act is pending. This aspect was reiterated in case of ***Kathiroom Service Co-operative Bank Ltd vs. Commissioner of Income Tax (CIB) and ors*** reported in ***360 ITR 243*** making following observations:

“In view of the aforesaid, we are of the view that the powers under section 133(6) are in the nature of survey and a general enquiry to identify persons who are likely to have taxable income and whether they are in compliance with the provisions of the Act. It would not fall under the restricted domains of being “area specific” or “case specific”. Section 133(6) does not refer to any enquiry about any particular person or assessee, but pertains to information in relation to “such points or matters” which the assessing authority issuing notices requires. This clearly illustrates that the information of general nature can be called for and names and addresses of depositors who hold deposits above a particular sum is certainly permissible.”

22. In the present case, the Assessing Officer has not even called for any information or document from the assessee or any other person in relation to the assessee's proposed assessments. He has, by all accounts, merely contacted the Investigation Wing of the Income Tax department at Kolkata and based on the process of shortlisting, has called for information with respect to dealings of such shortlisted

companies. If on the basis of the information so collected, no further information, is made available to the Assessing Officer which would enable him to form a belief that income chargeable to tax had escaped assessment, he would not be justified in issuing notice for reopening. Only in cases, where on the basis of such information he could bona fide form a belief that income chargeable to tax had escaped assessment, he could exercise powers for reassessment. Mere fact, that instead of such information being supplied to him by the Investigation Wing of the Income Tax Department at Kolkata he sought such information, would not be of any consequence.

23. In the result, petition is dismissed.

(AKIL KURESHI, J)

JYOTI V. JANI

(B.N. KARIA, J)

सत्यमेव जयते
THE HIGH COURT
OF GUJARAT

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