

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 16846 of 2011

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS.JUSTICE HARSHA DEVANI

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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, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?
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CHIMANLAL AND SONS - Petitioner(s)
Versus
DY. COMMISSIONER OF INCOME TAX - Respondent(s)

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Appearance :

MR TUSHAR P HEMANI for Petitioner(s) : 1, MS VAIBHAVI K PARIKH for
Petitioner(s) : 1,
MR MANAV A MEHTA for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 08/10/2012

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1) Rule. Learned counsel Mr.Manav A. Mehta waives service of notice of Rule on behalf of the respondent.

2) The petition is taken up for final hearing forthwith.

3) The petitioner is a partnership firm and is regularly assessed to tax. The petitioner has challenged a notice dated 28th March 2011 issued by the respondent-Assessing Officer under section 148 of the Income Tax Act, 1961 (hereinafter to be referred to as "the Act"). By such notice, he desired to reopen the assessment of the petitioner for the assessment year 2004-05. At the request of the petitioner, the respondent supplied reasons recorded for such reopening, which read as under:-

"2. In relation to the re-assessment proceedings in your case for the A.Y. 2004-05, the reasons for the re-opening of the proceedings, as recorded earlier during the course of initiation of relevant proceedings, are supplied in detail below:

3. In this case, during the relevant A.Y. 2004-05, the assessee has been engaged in the business of texturising of yarn. It has been found that in the relevant A.Y., the assessee has received

subsidy of Rs.17,33,554/- from the Government which has been subsequently distributed among the partners instead of any utilization for business. The return of income in the relevant year has been processed under section 143(1) of the assessee. The aforesaid subsidy of Rs.17,33,554/- from the Government, which has been subsequently distributed among the partners instead of any utilization for business by the assessee is required to be considered as business income and the taxable income is to be re-computed accordingly.

4. Hence, on the facts of the case, ensuring subsidy of Rs.17,33,554/- has been wrongly distributed amongst the partners instead of being utilized for business purpose. The original assessment has resulted in escapement of such income and consequent short levy of tax and interest the tune of Rs.6,65,445/-. Such an income is liable to be added back to the taxable income for the relevant A.Y.

5. Thus, on the facts of the case, the under-signed is also reasonably satisfied and has the relevant reasons to believe that there has been escapement of income on account of original assessment whereby income chargeable to tax has been assessed at too low a rate, which requires reconsideration and re-assessment. Therefore, on the facts of the case, the case of your concern for **A.Y.2004-05** has been re-opened for reassessment of such income chargeable to tax, which has escaped assessment."

4) The petitioner raised objections to such proposal for reopening under communication dated 20th June 2011. Such objections, however, were rejected by the respondent under order dated 30th August 2011. The petitioner has, therefore, filed this petition

challenging such notice of reopening of assessment.

5) From the record, it can be seen that the reopening is proposed beyond a period of four years from the end of relevant assessment year. In the reasons recorded by the Assessing Officer, though it is stated that the assessment of the petitioner for the year under consideration was accepted under section 143(1) of the Act, it is a common ground that such narration is a mere oversight and, in fact, the return was taken in scrutiny and a scrutiny assessment under section 143(3) of the Act was framed. We have, therefore, proceeded on such basis.

6) Mr. Tushar P. Hemani, learned counsel for the petitioner, drawing our attention to the reasons recorded, submitted that the the petitioner-assessee had setup a texturising plant. Under the State Subsidy Scheme, it received subsidy of Rs.17,33,554/- at the rate of 30% of the investment in the eligible assets which included the building, plant and machinery. Such subsidy was released under a sanction order dated 5th September 1995 and was paid shortly thereafter. Since then, the petitioner has been reflecting such subsidy

in its balance-sheet in the subsidy account. During the year under consideration, such amount was transferred to the partners' capital account. The subsidy account was reduced by such amount, that is, Rs.17,33,554/-, making the reserve and surplus subsidy nil. Correspondingly, the partners' capital was increased by such amount making a grand total of Rs.71,12,365/- as on 31st March 2004. He, however, did agree that in the partners' capital, the breakup of transfer of reserve and surplus state subsidy amount of Rs.17,33,554/- was not specifically mentioned.

7) Be that as it may, counsel challenged the impugned notice on the following contentions:-

7.1) That there was no concealment on the part of the petitioner in furnishing truly and fully all material facts. Reopening for assessment beyond a period of four years from the end of relevant assessment year was not permissible.

7.2) No taxing event took place during the year under consideration. The petitioner had received such subsidy of Rs.17,33,554/- way back in the year 1995.

The income if at all accrued and was actually received thus nearly ten years back.

7.3) Counsel submitted that mere accounting entry would not make such sum exigible to tax, that too during the year under consideration. The subsidy was given for having set up the plant and machinery, the cost for which the petitioner had already incurred. Diverting such amount for the business of the partnership, therefore, did not make any change insofar as the taxability is concerned.

7.4) Counsel also submitted that the subsidy was a capital receipt in the nature. The same was, even otherwise, not taxable.

8) On the other hand, learned counsel Mr. Manav A. Mehta for the Department opposed the petition contending that the petitioner did not disclose truly and fully all material facts. The partners' capital in the balance sheet did not indicate the transfer of such sum of Rs.17,33,554/-. When such amount was distributed amongst the partners, petitioner was liable to pay tax on the same.

9) Notice for reopening having been issued beyond a period of four years from the end of relevant assessment year, the requirement that the income chargeable to tax should have escaped assessment, for the reasons of the assessee to fail to furnish truly and fully all material facts for assessment, would become relevant. In the present case, however, we are not inclined to terminate the proceedings on the ground that there was no such failure on the part of the petitioner. This we record because though, in the balance sheet, the petitioner did diminish the reserve and surplus state subsidy amount by a such sum of Rs.17,33,554/-, it was not immediately apparent where this amount was shifted. It is true that, as pointed out by the counsel for the petitioner, such amount was taken into partners' capital account but without any specific mention of this amount in the break up given. Without, therefore, basing our conclusion on the question of failure on the part of the petitioner to disclose truly and fully all material facts, we are inclined to consider the question whether the notice was otherwise valid on the basis of the reasons recorded. In this context, we would examine whether

the Assessing Officer could form a reasonable belief that income chargeable to tax have escaped assessment.

10) In this respect, we find that admittedly the petitioner received subsidy from the State Government at the rate of 30% of the investment in the eligible assets which included building, plant and machinery. Such amount was sanctioned and paid in the year 1995. We are not called upon to decide whether such receipt of subsidy was taxable or, as contended by the petitioner being in the nature of capital receipt, was not exigible to tax. Suffice it to say either on accrued or actual receipt, the taxable event did not arise during the year under consideration. If such subsidy receipt invited tax, the petitioner ought to have been taxed at the relevant time in the previous assessment year corresponding to the previous year when such subsidy was paid. In the previous year relevant to assessment year 2004-05, to our mind nothing has happened which would permit the department to collect tax on such receipt. Because the petitioner changed the nature of treatment for accounting purpose to such subsidy amount received in the year 1995, would not permit the Revenue to examine the taxability

of such receipt in the assessment year 2004-05. Only on this ground, we hold that the Assessing Officer's belief that income chargeable to tax during the year under consideration had escaped assessment, lacks validity.

11) In the result, impugned notice dated 28th March 2011 is hereby quashed. Rule is made absolute accordingly with no order as to costs.

(AKIL KURESHI, J.)

(HARSHA DEVANI, J.)

Vahid

