

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 8858 of 2003****With****SPECIAL CIVIL APPLICATION No. 8857 of 2003****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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ARVIND MILLS LTD. - Petitioner(s)**Versus****ASSISTANT COMMISSIONER OF INCOME TAX - Respondent(s)**

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Appearance :

MRS SWATI SOPARKAR for Petitioner(s) : 1,
MRS MAUNA M BHATT for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI**and****HONOURABLE MS.JUSTICE HARSHA DEVANI****Date : 04/09/2012****COMMON ORAL JUDGMENT****(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. These petitions arise in common factual and legal background. They have been heard together and are

being disposed of by this common judgement. Facts as arising in Special Civil Application No 8858 of 2003 be noted:

1.1 The petitioner is a company registered under the Companies Act and is regularly assessed to tax. For the assessment year 1999-2000, the petitioner filed its return of income on 20.12.1999 declaring loss. Such return was selected for scrutiny and assessment under Section 143(3) of the Income Tax Act, 1961 ('the Act' for short) was framed on 29.03.2001.

1.2 The petitioner had purchased certain machineries from a German company namely M/s. A Monforts Textilmachinen Gmbh and Co. (hereinafter to be referred to as the 'foreign company'). As per the contract between the petitioner and the foreign company, the petitioner had to pay the contract price for supply, installment and erection of the machinery. For the purpose of erection of the machinery, the foreign company deputed one Mr. Ivo Perica, one of its employees for supervising the work. It is the case of the petitioner that no payment was made by the petitioner-company to said Mr. Ivo Perica towards such services rendered by him.

1.3 On 19.11.2001, the petitioner addressed a letter to the Assistant Commissioner of Income Tax regarding the payments made by the foreign company to Mr. Ivo Perica in connection with the work done for erection of the machinery and the question of deduction of tax at source by the petitioner-company and conveyed

as under:

"In this connection, we bring to your kind notice that to the best of our knowledge, the assessee company had not made any payment referred to herein above in the name of Mr. Ivo Perica during C.Y. 1998 and C.Y.1999. It may be appreciated that the assessee company had entered into contract with M/s. A Monforts Textilmachinen GmbH and Co. for supply of machineries and spares and the prices of machinery was inclusive of erection charges."

1.4 Not satisfied with such representation, the Assistant Commissioner wrote a letter on 12.12.2001 and called for various details from the petitioner with respect to payments made to Mr. Ivo Perica. The petitioner wrote further letters and reiterated its stand that no payment was ever made by the petitioner-company to Mr. Ivo Perica.

1.5 The Assistant Commissioner of Income Tax, however, holding a prima facie belief that the petitioner was liable to be treated as an agent of Mr. Ivo Perica in terms of Section 163(1) of the Act, issued a show-cause notice on 15.03.2002 to file reply within seven days why the petitioner should not be treated as an agent of Mr. Ivo Perica under Section 163 of the Act and the tax liability of such person be not recovered from the said petitioner. In such notice, it was mentioned that the payments made by the petitioner-company to the foreign company included the cost of the personnel. It was pointed out that Mr. Ivo Perica had not offered the income earned by him arising in India for taxation in Germany. Since Mr. Ivo Perica was employed in India, on such receipts, he was

liable for taxation and since the petitioner-company was liable for paying taxes connected with execution of the order, it was also liable for paying taxes on behalf of Mr. Ivo Perica.

1.6 The petitioner-company opposed such notice by filing a detailed reply dated 25.03.2002. In such reply, it was stated that even if Mr. Ivo Perica's salary during employment in India, may be taxable in India, the petitioner-company cannot be held liable for the same as he was not an employee of the company.

1.7 It is not in dispute that pursuant to the above noted show-cause notice dated 15.03.2002, the Assessing Officer passed no order under Section 163(2) of the Act. Instead, he issued a notice dated 28.03.2003 under Section 148 of the Act indicating that he had reason to believe that income chargeable to tax for the assessment year 1999-2000 has escaped assessment within the meaning of Section 147 of the Act. He, therefore, required the petitioner to file a return in response to such a notice. Significantly, in such notice, the petitioner was described as "the Principal Officer, Arvind Mills Ltd. as an agent of M/s. A Monforts Textilmachinen Gmbh and Co."

1.8 At this stage that the petitioner filed the present petition. In the connected petition being Special Civil Application No. 8857 of 2003, on similar grounds, in connection with the salary payments to very same Mr. Ivo Perica, the petitioner was visited with a separate notice also dated 28.03.2003 under Section 148 of the Act,

whereby the Assessing Officer desired to reopen the assessment for the year 2000-01 in case of the petitioner as the agent of the foreign company.

2. Mr. Bandish Soparkar, counsel for the petitioner submitted that in Special Civil Application No. 8858 of 2003, impugned notice was clearly time barred. He pointed out that the notice was issued on 28.03.2003. Under Section 149(3) of the Act, such notice could be issued only within a period of two years from the end of relevant assessment year. The time limit for issuance of notice, thus expired on 31.03.2001.
3. With respect to both the petitions, counsel vehemently contended that before notice under Section 148 of the Act could be issued, the Assessing Officer was required to pass an order under Section 163(2) of the Act holding that the petitioner be treated as an agent of the principal, whose income, the Assessing Officer desired to tax in the hands of the assessee. Counsel submitted that in the present case, without passing any order under Section 163(2) of the Act, notice under Section 148 came to be issued which was wholly without jurisdiction.
4. In this context, counsel relied on the following decisions:
 1. In case of **Commissioner of Income-Tax, Patiala Vs. Kanhaya Lal Gurmukh Singh** reported in **87 ITR 476** wherein Punjab and Haryana High Court considered the following question of law:

"1. Whether a person should first be treated as an

agent of a non-resident by an order under Section 163 of the Income-Tax Act, 1961, before a notice under Section 148 can be validly issued against him?"

There was difference of opinion between two learned members of the Bench, upon which reference was made to the third Judge. Opinion of the third Judge was that after the introduction of the Income Tax, 1961 in supersession of the Income Tax Act of 1922 and changes in the corresponding provisions between the two statutes, it was necessary that the Assessing Officer should pass an order under Section 163(2) of the Act before issuing notice under Section 148 against a representative assessee.

2. In case of **Commissioner of Income-Tax, Bombay City-III Vs. Belapur Sugar and allied Industries Ltd.** reported in **141 ITR 404** wherein, the Bombay High Court followed the decision of the Punjab and Haryana High Court in case of Commissioner of Income-Tax, Patiala Vs. Kanhaya Lal Gurmukh Singh (supra.) and held as under:

"In our opinion, it is necessary to concur with the view taken by the majority of the judges in Kanhaya Lal's case [1973] 87 ITR 476 (P & H). This view appears to be in accord with the plain language of the statutory provisions, and we are inclined to agree with the majority view that the decision of the Privy Council in Nawal Kishore's case [1938] 6 ITR 61, is no longer applicable to the I.T. Act, 1961, by reason of the specific statutory changes, which the Division Bench of the said court has noted in extenso. If the right of appeal of the assessee is to have any real meaning then the decision under Section 163 must be given previous to the notice under Section 148 being issued to an assessee on the basis that alleged income which had escaped assessment is the income on which the assessee is liable as a

representative assessee being the agent of a non-resident covered by Section 163. We are also in agreement with the approach indicated by one of the judges of the said High Court in the passage which we have fully extracted. As the passage indicates, the matter is not free from doubt, and, indeed, there was initially a difference of opinion between the two judges, but then it would appear that if two views are possible, the view which ultimately found favour with the majority will be required to be upheld inasmuch as it is the view in favour of the assessee. If the period of limitation of two years prescribed under Section 149(3) creates a difficulty for the working out of these provisions, it is for the Revenue to seek an amendment of those provisions."

3. In case of **Commissioner of Income Tax Vs. S.G.Sambandam and co.** reported in **242 ITR 708** wherein Madras High Court observed that in absence of any notice to the assessee treating him as an agent under Section 163 of the Act, it was not open to the Income Tax Officer to treat the assessee as an agent of a non-resident. Finding that notice was not issued under Section 163 of the Act but issued under Section 148 of the Act; the Court held that it was impermissible to straightaway treat the assessee as an agent of a non-resident.
5. Our attention was also drawn to the decision of Division Bench of this Court in case of **Commissioner of Income Tax Vs. Mukesh B. Shah** reported in **2010 195 Taxman 15** wherein in the context of the provisions of Section 163 of the Act, the Court observed that it is apparent that the statute contemplates making of an order under Section 163 of the Act treating a person as an agent of a non-resident, against which the concerned person has remedy by way of an appeal. In absence of

any order made under Section 163 of the Act, the concerned person is deprived of his right to challenge the same.

6. The next contention of the counsel was that the notice under Section 163 was issued proposing to treat the petitioner as an agent of Mr. Ivo Perica. The reasons recorded by the Assessing Officer for issuing notice under Section 148 of the Act also proceeded along the same line. The impugned notice under Section 148 of the Act, however, was issued treating the petitioner as an agent of the foreign company. He submitted that the notice was, thus defective. Such defect goes to the root of the matter.

7. Learned senior counsel, Mr. Bhatt for the department opposed the petition raising following contentions:

1. Drawing our attention to the reasons recorded by the Assessing Officer for issuing notice under Section 148 of the Act, counsel submitted that the petitioner-company had made payments to a foreign-company for purchase of machinery which contract included the erection work also. The foreign company had deputed one of its employees for supervising such erection work. Such person had received payment for the work done in India. He was liable, therefore to pay tax. Not having done so, the petitioner, as an agent of Mr. Ivo Perica, was liable to pay tax in terms of Section 160 of the Act.

2. Counsel contended that the reasons recorded would

show the decision taken by the Assessing Officer to reject the assessee's opposition to be treated as an agent of the non-resident. Same should be treated as an order envisaged under Section 163(2) of the Act.

3. Counsel further submitted that any defect or inconsistency in the notices would not vitiate the entire proceedings. He relied on Section 292-B of the Act to contend that the notice issued should not be held to be invalid merely by reason of any defect, mistake or omission in issuing such a notice.
8. Having thus heard the learned counsel for the parties, the first contention of the counsel for the petitioner which is peculiar only to Special Civil Application No. 8858 of 2003, is required to be accepted. Such contention, we may be recall, pertains to the impugned notice under Section 148 of the Act being time barred. The notice is issued seeking to reopen the assessment for the year 1999-2000. As per Section 149(3) of the Act, such notice could be issued only within a period of two years from the end of relevant assessment year. Section 149(3) of the Act reads as under:

"149(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year."

Such period thus ended on 31.03.2002. The notice which was issued on 20.03.2003 was thus clearly barred by limitation. On this ground alone notice impugned in Special Civil Application No. 8858 of 2000 is required to be quashed.

We may at this stage, notice certain statutory provisions relevant for our discussion. Section 160 of the Act pertains to “representative assessee” relevant provision thereof reads as under:

“160(1) For the purposes of this Act, “representative assessee” means-

(i) *in respect of the income of a non-resident specified in sub-section (1) of section 9, the agent of the non-resident, including a person who is treated as an agent under section 163;*

Section 161 pertains to liability of the representative assessee. Relevant portion thereof reads as under:

“161.(1) *Every representative assessee, as regards the income in respect of which he is a representative assessee, shall be subject to the same duties, responsibilities and liabilities as if the income were income received by or accruing to or in favour of him beneficially, and shall be liable to assessment in his own name in respect of that income; but any such assessment shall be deemed to be made upon him in his representative capacity only, and the tax shall, subject to the other provisions contained in this Chapter, be levied upon and recovered from him in like manner and to the same extent as it would be leviable upon and recoverable from the person represented by him.*

Section 163 of the Act pertains to who may be regarded

as agent and reads as under:

“163. (1) For the purposes of this Act, “agent” in relation to a non-resident, includes any person in India-

- (a) who is employed by or on behalf of the non-resident; or
- (b) who has any business connection with the non-resident; or
- (c) from or through whom the non-resident is in receipt of any income, whether directly or indirectly; or
- (d) who is the trustee of the non-resident;

and includes also any other person who, whether a resident or non-resident, has acquired by means of a transfer, a capital asset in India:

Provided that a broker in India who, in respect of any transactions, does not deal directly with or on behalf of a non-resident principal but deals with or through a non-resident broker shall not be deemed to be an agent under this section in respect of such transactions, if the following conditions are fulfilled, namely:-

- (i) the transactions are carried on in the ordinary course of business through the first mentioned broker; and
- (ii) the non-resident broker is carrying on such transactions in the ordinary course of his business and not as a principal.

[Explanation.-For the purposes of this sub-section, the expression “business connection” shall have the meaning assigned to it in Explanation 2 to clause(i) of sub-section(1) of section 9 of this Act.]

(2) No person shall be treated as the agent of a non-resident unless he has had an opportunity of being heard by the [Assessing] Officer as to his liability to be treated as such.”

9. We may now deal with the third contention of the petitioner which is common for both the petitions. Here we may recall the challenge to the notice is on the ground of incongruity in the impugned notice itself. We may peruse the material on record more closely in this connection. The Assessing Officer issued a notice under Section 163(1) of the Act to the petitioner on 15.03.2002 and called upon the petitioner to show cause why the petitioner in terms of Section 163 be not treated as an agent of Mr. Ivo Perica and his tax liability be not recovered from the petitioner. The entire proceedings including the contents of the show cause notice proceeded on such basis.

10. In the reasons recorded also, the Assessing officer elaborated his stand with respect to the petitioner's liability to pay tax as an agent of Mr. Ivo Perica who, though had earned income for the work done in India, had paid no tax. In such context in the reasons, he recorded as under:

“ The income of Mr. Ivo Perica, non-resident German Engineer, during his stay in India has taxable income in India. India has right to tax this income under Indo-German-Dual Taxation Avoidable Agreement. Thus, income has to be taxed in India in AY 1999-2000. Mr. Ivo Perica was responsible for payment of taxes in this respect. He was the employee of German Company and the said German company has made agreement for supply of machinery and commissioning to the Arvind Mills Ltd. The Arvind Mills Ltd. had made payment for supply of machinery and its erection and commissioning to the German Company as per terms and conditions.

In this connection, a notice u/s. 163(1) of the Act

was issued and served to the Arvind Mills Ltd. A'bad for payment of taxes as an agent of Mr. Ivo Perica. In response to this notice, the Arvind Mills Ltd. has stated it has not paid any fees, salary charges etc to Mr. Ivo Perica, Engineer of the German company. Therefore, it is not an agent of Mr. Ivo Perica and not liable for payment of taxes, if any.

The contention of the Arvind Mills Ltd. has not been accepted and it has been held that the Arvind Mills Ltd has business connection with the non-resident German Company and Mr. Ivo Perica was the employee of the German company. Therefore, in terms of provisions of section 163(1) of the IT Act 1961, the Arvind Mills Ltd. is the agent of Mr. Ivo Perica and liable for the payment of taxes due from him."

11. From the above documents it becomes absolutely clear that as per the Assessing Officer, the petitioner should be treated as an agent of Mr. Ivo Perica. For the salary income that Mr. Ivo Perica received for the work done in India having not paid tax, such tax could be recovered from the petitioner. For some strange reason, however, when the impugned notice was issued, the petitioner was described as an agent of M/s. A Monforts Textilmachinen Gmbh and Co. i.e. the foreign company. This, in our view, is a vital defect in the notice itself. Mr. Ivo Perica and the foreign company were two different entities. The terms of payment between the petitioner and the foreign company were vitally different from those between the petitioner and Mr. Ivo Perica. It is the case of the petitioner that it paid no salary directly to Mr. Ivo Perica. The foreign company, under the contract, had charged full fees to the petitioner for installation and erection of the machinery. In the process, if Mr. Ivo Perica received any salary from the foreign company, it is the firm stand of the petitioner that

petitioner company cannot be treated as an agent of Mr. Ivo Perica. We are in the present petition not concerned with the validity of such a stand of the petitioner-company. It can, however, not be denied that the foreign company and Mr. Ivo Perica were legally completely in different position vis a vis the petitioner-company. Under the circumstances, the impugned notice, in our opinion, was wholly defective. The defect cannot be treated as one of curable nature. The same goes to the very root of the matter and would strike at the Assessing Officer's jurisdiction to issue the notice.

12.If we now deal with the second contention, as noted, the Punjab and Haryana High Court in case of Commissioner of Income-Tax, Patiala Vs. Kanhaya Lal Gurmukh Singh Kaniyalal (supra) and Bombay High Court in case of Commissioner of Income-Tax, Bombay City-III Vs. Belapur Sugar and allied Industries Ltd. have held that before issuing notice under Section 148 of the Act, the Assessing Officer must pass an order under Section 163(2) of the Act treating the assessee as an agent. In the present case, we may not go to such a length, since we have already held that the Assessing Officer had not even issued a notice under Section 163 of the Act insofar as the foreign company is concerned and without any such notice, notice under Section 148 of the Act came to be issued treating the petitioner as an agent of the foreign company. We are unable to accept the contention of the counsel for the revenue that the observation made in the reasons recorded to the effect that the petitioner company's contention i.e. he is not an agent of Mr. Ivo

Perica has not been accepted could be treated as an order envisaged under Section 163(2) of the Act. Order that the Assessing Officer is required to pass under Section 163(2) of the Act is made appealable under Section 246(A) of the Act. Mere passing reference or remark in the reasons recorded which ordinarily unless the assessee demands, are not supplied to the assessee, cannot be seen as a formal order against which the assessee could exercise his right of appeal. In any case, as we have already recorded, such discussion was with respect to Mr. Ivo Perica and not the foreign company. Ultimate notice under Section 148 of the Act refer to the petitioner as an agent of the foreign company.

13. On these grounds therefore, the impugned notices are required to be and hereby quashed. Both the petitions are allowed. Rule is made absolute.

[AKIL KURESHI, J.]

[HARSHA DEVANI, J.]

JYOTI

