

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12673 of 2011

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

&

HONOURABLE MS JUSTICE SONIA GOKANI

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 civil judge ?

GUJARAT TEA PROCESSORS & PACKERS LTD. - Petitioner(s)

Versus

DEPUTY COMMISSIONER OF INCOME-TAX - Respondent(s)

Appearance :

MR MANISH J SHAH for Petitioner

MRS MAUNA M BHATT for Respondent

CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS JUSTICE SONIA GOKANI

31st August 2012

CAV JUDGMENT (Per : HONOURABLE MS JUSTICE SONIA GOKANI)

Petitioner is a public limited company dealing in

manufacture and sale of Tea. The petitioner submitted return for the AY 2006-07 on 26th December 2006. A revised return was filed on 26th October 2007 alongwith computation of the total income which was picked up for scrutiny assessment by the respondent. A letter was addressed on 18th December 2008 calling for certain information – one of which was with regard to clarification of various kinds of tea sold in terms of quantity and amount, and the details of selling and distribution expenses of Rs. 3,27,65,760/= and the details of the persons to whom it is paid and whether there was a deduction of tax at source. This was replied to on 26th December 2008. Further details were called for with regard to the discount paid amounting Rs. 22,70,869/=. Eventually, the Assessing Officer passed scrutiny assessment order dated 30th December 2008 determining total income at Rs. 24,18,14,000/=.

In the present petition, challenge is to the communication dated 4th March 2011 whereby notice issued under Section 148 of the Income Tax Act, 1961 [**“Act”** for short] for the year 2006-07 for re-opening of the assessment on the ground of escapement of income.

The reasons for re-opening were recorded on 4th March 2011, which reads, thus :

“On verification of the records for the above

assessment year, it is noticed that the assessee company had paid discount as trade incentive slab scheme – Garma Garam offer to the extent of Rs. 22,70,869/= to various parties. The above payment is in fact commission paid against the sale and hence, covered under the provisions of Section 194C of the Act. However, no TDS has been deducted. Therefore, the expenditure of Rs. 22,70,869/= was required to be disallowed u/s. 40(a)(ia) of the Act. During the course of assessment proceedings, the assessee failed to disclose the full and true material facts before the Assessing Officer.

In view of the above, I have reason to believe that the income chargeable to tax to the above extent of Rs. 22,70,869/= has escaped assessment.”

The objections to the reasons recorded for re-opening of the assessment under Section 147 of the Act were furnished on 29th April 2011 wherein it was emphasized all along that the re-assessment on the change of opinion was barred by the law and the same has been also reiteratively laid down by various decisions of the High Court and the Apex Court. It was contended that the Assessing Officer, for the year under consideration, had issued notice under Section 142 (1) of the

Act and at serial no. 8 (12) of the said notice, had asked the petitioner to provide details of the nature of expenses debited under the head, "*Selling & Distribution Expenses*" and also had called for details of the persons to whom amount had been paid. The sales discount given under the trade incentive slab scheme "Garma Garam" was provided by way of submissions dated 26th December 2008 and on thorough examination, scrutiny assessment was finalized under Section 143 (3) of the Act whereunder disallowances under Section 40(a)(ia) was made. The assessee emphasized in the said objections that a mere change of opinion does not justify initiation of re-assessment proceedings. The objections raised, read thus -

"13. We find from the reasons that your goodself believe that discount given in trade incentive scheme is in fact commission paid against the sale and hence covered under the provisions of section 194C of IT Act and tax ought to have been deducted which is not done and therefore expenditure of Rs. 22,70,869 was required to be disallowed u/s. 40a(ia) of the Act."

"14. In this connection, we may invite your attention to provisions of Section 194C, which reads as under.It may be seen from above

that section applies for payment for carrying out any work in pursuant of contract. In our case, there is no case of carrying out any work. You will please appreciate that we have sold goods to super-stockist, who has in turn sold it to retailer and as per the sales promotion scheme introduced, based on the quantity purchased, the retailer is given discount as per the scheme. Thus, it is not a case of contract for service but contract for goods which is not covered under section 194C of the Act. Further, as per the reasons recorded, even as per your version, it is in the nature of commission which in our respectful submissions, not liable for TDS u/s. 194C of I.T Act.

“15. We would like to submit that the relationship between the assessee company and the persons to whom the amount has been credited is that of principal to principal and not that of principal to agent. Further, the credit note which is there on record clearly shows that the same is given for 'discount' which is based on quantity sold by them. Thus, the same is in the nature of quantity discount and not in the nature of commission as alleged and therefore the question of deduction of tax does not arise either under section 194C or any other provisions of Chapter XVII.”

“17. Without prejudice to the above,we would

like to submit that the assessee has floated sales promotion scheme for traders in the Jodhpur region namely 'Garma Garam offer' according to which based on lifting of the quantity, they are allowed discount as specified in the scheme by the super-stockist and company reimburses to super-stockist the said discount by issue of credit note. The assessee had issued credit note for the discount to three persons namely M/s. Meenakshi Enterprise, M/s. Krishna Udhyog & M/s. Amber Marketing, all of whom are super-stockists of the assessee company. The amount had been credited in consideration of the discount given by the aforesaid persons in accordance with the trade incentive slab scheme to various traders who had sold the company's product and had met with the criteria as specified in the scheme. The aforesaid payment does not fall within the purview of Section 194H of the Act since as per Section 194H any person responsible for paying to a resident any income by way of commission or brokerage is liable to deduct tax at source from such payment or credit. However, the nature of payment / credit made by the assessee company is that of reimbursement of the discount given by the aforesaid three persons to the various traders meeting the criteria specified in the scheme and therefore, the amount is not in the nature of income by way of commission or brokerage liable to

deduction at source u/s. 194H. Therefore also, Section 194H is not applicable in respect of the aforesaid payment made by the assessee company and therefore the question to deduct tax at source from the aforementioned payment does not arise.”

Objections raised were rejected by the Assessing Officer *vide* its order dated 17th August 2011, relying on the judgment of this Court in case of **M/s. Dishman Pharmaceuticals & Chemicals Limited** [SCA No. 15304/2010] wherein it has been held that the assessee himself has not declared any details which is affecting the calculation of income of the assessee and the income is under assessed, then, assessee cannot take objection that he had disclosed all the facts during the course of assessment proceedings. According to the Assessing Officer, after insertion of Clause (c) to Explanation 2 of Section 147 of the Act, even if the Assessing Officer has considered the same issues and allowed certain reliefs; which are otherwise not allowable as per the provisions of the Act, the same amounts to deemed concealment, and therefore, even where there is a change of opinion, on same set of facts, if the original opinion formed by the Assessing Officer is not as per law, re-opening is permissible. Relying on the judgment of Kerala High Court in

case of **CIT v. Popular Vehicle Service Limited** [ITA No. 1628 of 2009], it is stated that the scope of Section 147 of the Act, after amendment, is large enough to cover the situation whereby deductions have been granted wrongly or excessively. Reliance is also placed on the decision of the Apex Court in case of **Rajesh Jhaveri Stock Brokers (P) Limited**, reported in [(2001) 161 TAXMAN 316] to hold that, *"..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 and whether the material would conclusively prove the escapement is not the concern at that stage."* On the basis of this, it is held that the formation of belief by the Assessing Officer was within the realm of subjective satisfaction, and therefore, objections filed were rejected.

On issuance of the notice, on the lines of rejection of objections, affidavit-in-reply has been filed reiterating those aspects. It is reiteratively emphasized that as per the provisions of Section 194H, the assessee has to deduct tax on said payments and to deposit the same in the Government account. As deduction at source is not made, it is violative of provisions of Section 40(a)(ia) of the Act. Thus, the income needed to be assessed has escaped the assessment in the present case. Moreover, the discount paid to various parties

under the trade incentive slab “Garma Garam” offer is in fact the commission paid against the sale and as the nature of discount was not correctly disclosed in the original return of income, there was no possibility of any opinion to be expressed by the Assessing Officer. For not having disclosed fully and truly all material aspects and the income having escaped the assessment, notices are held to be justified

We have heard learned Sr. Counsel Shri J.P Shah for the petitioner-Company, who in detail, has taken us through the material presented in this petition as also the proceedings which, according to him were produced earlier after the return of the petitioner was taken in scrutiny assessment. He emphasized that this was a case of quantity discount and not the commission, and therefore, Section 194H of the Act would not come into play. Moreover, the entire issue was examined very closely and adjudicated by the Assessing Officer, and therefore, the very basis of this notice is shaky and not sustainable. Learned counsel further urged that the decision of this Court given in case of M/s. Dishman Pharmaceuticals & Chemicals {*Supra*} though has been relied upon, it has been permitted to be reviewed by the Supreme Court. Some of the other authorities for substantiating the submissions are as follows :-

- [1] **Commissioner of Income Tax v. Gordhanbhai Jethabhai**
[205 ITR 279];
- [2] **Rayon Silk Mills v. Commissioner of Income Tax**
[221 ITR 155];
- [3] **Commissioner of Income Tax v. Nirma Chemicals Works Private Limited**, [309 ITR 67].

He emphasized that entire material that was required for the purpose of assessment was on record and yet, if there was any doubt, further details could have been asked for. Though the re-opening is within four years and when all requisite details were sufficiently provided and disclosed in original income according to Learned Counsel and there is no new material available with the Assessing Officer, this is a mere change of opinion.

Challenging this, learned counsel Shri Manish R Bhatt urged that this re-opening is since within four years, it is not only the non-disclosure which is criteria for re-opening. He urged that the issue that this is not a commission but a discount given to the sellers, is not the question to be gone into by the Assessing Officer and there are powers available with the Assessing Officer in post 1st April 1989 period, when amendment to clause [c] to explanation 2 of Section 147 has come into being. Reliance is placed on the following decisions

for getting support to the submissions made :-

[1] **Commissioner of Income-tax vs. Kelvinator India Limited,** reported in [320 ITR 561];

[2] **Praful Chunilal Patel v. M.J Makwana, Asstt. Commissioner of Income Tax,** reported in 236 ITR 832.

On having considered rival contentions raised by the parties and on having closely examined the material on record, it needs to be mentioned at the outset that the challenge in this petition is to the re-opening of assessment within four years from the end of the relevant Assessment Year, which was finalized on a scrutiny assessment under Section 143 (3) of the Act. As the assessment is being re-opened within four years from the end of the relevant assessment year, the requirement of income chargeable to tax having escaped assessment on account of failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessment could not be warranted. If such re-opening is based on mere change of opinion, the same would be impermissible even if the re-opening of the assessment is done within four years. Reference will have to be made to the judgment in case of M/s.

Kelvinator India Limited [*Supra*] where noticing the amendment in Section 147, from time to time, the concept of change of opinion was examined. After 1st April 1989, even though as held in this decision, the income chargeable to tax whether has escaped the assessment due to failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment, though does not survive, that would not mean that same can be re-opened within four years on mere change of opinion. This amendment in Section 147 of the Act has made change in the expression viz., "Assessing Officer is of the opinion" to "Assessing Officer has reason to believe". On the basis of tangible material, the Assessing Officer needs to re-open the assessment and the reason must have a live link with the formation of the belief.

By virtue of amendment brought in by the insertion of Explanation 3 to Section 147 by the Finance Act [No.2] of 2009, the effect of the explanation is that once on Assessing Officer has formed a reason to believe that income chargeable to tax has escaped assessment and has proceeded to issue a notice under Section 148 of the Act, it is open to him to assess, or re-assess income in respect of any other issue, though the reasons for such income had not been included in the reasons recorded under Section 148 (2) of the Act.

It needs to be noted here that the return was taken in scrutiny assessment. At the time of original assessment made u/s. 143 (3) of the Act, there was already a query raised and the assessment was finalized, and therefore, the question that would arise is whether there is a change of opinion on the part of the Assessing Officer when the *impugned* notice under Section 148 of the Act was issued. Under these circumstances, the only query that requires to be made is – whether in the present proceedings, the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment and whether such satisfaction of the Assessing Officer gets reflected in the form of reasons recorded.

The Assessing Officer noted as mentioned hereinabove that the assessee-company had paid discount under the trade incentive slab scheme “Garma Garam” offer to three different parties. According to the Assessing Officer, this payment was in fact the commission paid against sale and there was no TDS deducted. The amount of Rs. 22,70,869/= which was expenditure, the same was required to be disallowed under Section 40A(ia), such a transaction gets covered under Section 149(c) of the Act.

As can be noted from communication dated 18th December 2008, wherein the present respondent had called for

certain details under Section 142 (1) of the Income Tax Act, 1961, there were certain details already furnished by the present petitioner, pursuant thereto, this communication is sent calling for details and nature of various types of expenses debited under the head, "Selling & Distribution Expenses" and furnish the details of persons to whom the amount was paid and also the details of TDS. The total amount for which the inquiry had been raised is Rs. 3,27,65,760/= which is at serial 8.12 of this correspondence seeking justification of disproportionate increase/ decrease in expenses in comparison to the immediate preceding year. By return communication dated 26th December 2008, with respect to this query at para 8.12, the petitioner enclosed statement reflecting details of sales discount given by way of credit notes in respect of sum of Rs. 22,70,869/=. This statement reflects credit notes with date and number issued in respect of trade incentive slab "Garma Garam" offer to three different parties who are termed as "Super Stockists" with city details and the total amount comes to Rs. 22,70,869/=. The assessment order for the said A.Y 2006-07 does not reflect anywhere this amount of trade incentive of Rs. 22,70,869/=. However, when one looks at the total income disclosed by the appellant-assessee in its e-return of income dated 26th December 2006 to the tune of Rs.

24,18,14,000/=. In the final computation, the total taxable income comes to Rs. 24,15,13,018/=. Whereas, the expenditure on software was treated as capital expenditure and depreciation on software and other electric installations was permitted, and thereby, this amount of Rs. 24,15,13,018/= has been arrived at. It is mistakenly appearing from the assessment order that except specific query raised at serial no. 8.12 regarding sum of Rs. 22,70,869/=:, where is no reference of this amount anywhere in the entire assessment order. However, it can be said that when query was raised under the head "Selling & Distribution Expenditure", had there been insistence that TDS was required to be deducted and the amount specified to the tune of Rs. 22,70,869/= was not required to be allowed as Trade Incentive without deducting TDS, the same ought to have been reflected somewhere in the computation of income and that would have bearing on the computation itself. In absence thereof, even within four years the assessment when is sought to be re-opened, it is required to be seen as to whether the Assessing Officer has reason to believe that the income has escaped the assessment, particularly on having raised query at the time of original assessment and the assessee-appellant having fulfilled the obligation of furnishing the requisite details. The Assessing

Officer after the amendment *w.e.f* 1st April 1989 though is not constrained not to re-open the assessment, if he has a reason to believe that the income has escaped the assessment, but, at the same time, in wake of detailed scrutiny of the very same issue under Section 143 (3) at the time of original assessment, it shall have to be recorded by the Court as to whether this was not a mere change of opinion on the part of the Assessing Officer.

Section 194-H of the Act makes it obligatory on the part of any person, who is responsible for paying, on or after the 1st day of June 2001, to a resident, any income by way of commission or brokerage to deduct income-tax thereon at the rate of ten percent (10%), at the time of crediting such amount to the account of payee, or at the time of making payment of such income either in cash, or by way of cheque or draft, or by any other mode. This would apply where the amount exceeds a sum of Rs. 5,000/=. It would be relevant to make a mention of Section 194C of the Act, which also makes it obligatory on the part of the person to deduct an amount equal to 1 per cent, or 2 per cent of the payments being made to an individual or HUF at the time of crediting such amount to the account of contractor. It is rightly insisted by the petitioner that this is neither a contract for service, nor is it a case of paying of

commission or brokerage. This case would neither fall under Section 194C which covers the case of contract for service nor under Section 194H of the Act which covers the income by way of commission or brokerage. It is the case of contract for goods which is neither covered under Section 194C nor under Section 194H of the Act, and therefore, Section 40A [ia] will not be attracted in as much as this is neither a case for non-deduction of commission or brokerage, nor of an amount payable to the contractor or sub-contractor.

Section 40 [a] [ia] begins with non-obstinate clause and does not permit computation of income chargeable under the head "*profits and gains of business or profession*" - in case of an assessee in whose case any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, for carrying out any work, on which tax is deductible at source, has not been deducted.

In light of the discussion above, if one looks at the reasons recorded for re-opening of the assessment objection is raised, particularly with regard to the trade incentive slab discount of the sum of Rs. 22,70,869/= given to various parties. according to the Assessing Officer, it is in breach of the provisions of law in as much as the commission is covered

under Section 194C of the Act, however, no TDS has been deducted and therefore, expenditure of Rs. 22,70,869/= was required to be disallowed under Section 40 (a)(ia) of the Act, and hence, this income of Rs. 22,70,869/= has escaped the assessment.

We are conscious of the fact that this is not a case of re-opening beyond four years where the only requirement would be that either the return of income is not filed, or that there is no true and full disclosure by the assessee in the original assessment, resulting into escapement of the income in the year under consideration. It is demonstrated by the petitioner-assessee that at the time of original assessment, in reply to the specific query raised, specific reply had been furnished with regard to the amount of discount paid by way of trade incentive slab scheme and the query also was whether on the amount paid, tax was deducted at source or not. Having furnished all the requisite details, if the Assessing Officer chose not to deem it fit to reflect its consideration in the assessment order originally passed after scrutiny, on the very same grounds and materials when it seeks to reopen the assessment on the ground of escapement of income it is required of the respondent to point out as to how this is not a mere change of opinion and what are the cogent and relevant materials

available with it to form an opinion that the said expenditure was required to be disallowed under Section 40(a) (ia) of the Act, for not having deducted TDS. With the satisfactory details furnished by the petitioner and with the discussion of provisions hereinabove, it is neither possible to uphold that the income is under-assessed or in-allowable reliefs were permitted.

Even when the expanded scope of Section 147 of the Act, after the amendment is construed, from the material available on record and from the discussion made hereinabove, it can be held unfailingly that there appears no relevant material on which a reasonable person could have formed a requisite belief of reopening the assessment.

Resultantly, this petition succeeds, quashing the notice of re-opening dated 4th March 2011 issued under Section 148 of the Income Tax Act and consequently the order of rejection of objections.

Rule is made absolute to the extent above, with no order as to costs.

{Akil Kureshi, J.}

{Ms. Sonia Gokani, J.}

Prakash*

