

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 17885 of 2011****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE VIJAY MANOHAR SAHAI****and****HONOURABLE MR.JUSTICE N.V.ANJARIA**

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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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AGRAWAL JV....Petitioner(s)

Versus

INCOME TAX OFFICER & 1....Respondent(s)

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Appearance:

MR RK PATEL, ADVOCATE for the Petitioner(s) No. 1

MS PAURAMI B SHETH, ADVOCATE for the Respondent(s) No. 1 - 2

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CORAM: HONOURABLE MR.JUSTICE VIJAY MANOHAR SAHAI

and

HONOURABLE MR.JUSTICE N.V.ANJARIA

Date : 09/08/2012

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE N.V.ANJARIA)

1. The challenge in the present petition under Article 226 is directed against notice dated

30.12.2010 of the respondent No.1-Income Tax Officer issued under Section 148 of the Income Tax Act, 1961 whereby respondent No.1 has sought to reopen the assessment in case of the petitioner for the Assessment Year 2007-08. The petitioner has prayed for a mandamus to get the said notice quashed and set aside. The petitioner has also prayed to set aside order dated 05.12.2011 whereby respondent No.1 rejected the objections of the petitioner to the reopening of the assessment.

2. Learned advocate Mr.R.K. Patel appears for the petitioner, and learned advocate Ms.Pauromi B. Sheth is for the respondents-Income Tax Authorities.

2.1 With consent of both the learned advocates, the petition is taken up for final hearing today. Therefore, **Rule.** Learned advocate Ms.Sheth waives service of notice of Rule on behalf of respondent Nos.1 and 2.

3. The facts involved in the case are as under:

3.1 The petitioner is a consortium of companies, which has come into existence due to Joint Venture of two companies. The petitioner is engaged in the business with the consortium of two companies. A separate agreement in the form of Joint Venture, which is entered into and share of profits are separately determined. In such capacity, the petitioner is engaged and

undertakes the work of civil construction, viz. constructions of roads, bridges, canals, etc. The petitioner filed its return of income for the Assessment Year 2007-08 accompanied by relevant documents such as Profit and Loss Account, Balance-Sheet, Audited Report, etc. In the return of income, the petitioner-assessee claimed deduction under Section 80 IA(4) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

3.2 The Assessing Officer issued notice under Section 143(2) of the Act and thereupon scrutiny assessment was framed under Section 143(3). The assessment was finalised under Section 139(1) by order dated 13.04.2009. By way of impugned notice, the said completed assessment was sought to be reopened by the Assessing Officer in exercise of powers under Section 147 of the Act.

3.3 The petitioner replied to the said notice on 13.01.2010 and also requested to furnish in writing the reasons recorded for reopening the case. The Income Tax Officer supplied the reasons by forwarding letter dated 22.11.2011. The assessee filed objections in detail on 29.11.2011, raising various contentions against re-opening of his assessment. The Assessing Officer disposed of the objections as per his order dated 05.12.2011, rejecting the same.

4. Learned advocate for the petitioner submitted with reference to the reasons recorded

by the Assessing Officer for assessment that respondent No.1 while issuing the impugned notice under Section 148 of the Act, acted on a wrong premise inasmuch as it was mentioned in the reasons that the assessee's return of income for the Assessment Year in question showed that the Net Profit was Rs.02,43,21,076/-, which was not the correct figure and the Net Profit for the relevant Assessment Year Rs.03,61,74,866/-. Therefore, it was submitted that re-opining was upon a misconception of facts. It was submitted that the Assessing Officer acted on the ground that deduction under Section 80 IA(4) was wrongly granted and that he wanted to verify the factum of ownership. Learned advocate further submitted that the deduction under the said provision was considered and the assessment order was passed. The same was passed after scrutiny assessment, thus the Assessing Officer closely verified the material before him.

4.1 Learned advocate submitted that the necessary details were disclosed in the Audit Report and after considering all the materials, the Assessing Officer was satisfied that the petitioner was entitled to deduction under Section 80 IA. It was submitted that no tangible material, muchless new material, was with the Assessing Officer for exercise of powers under Section 147 of the Act. It was submitted that the Assessing Officer exceeded his jurisdiction in re-opening of the assessment in absence of any

material and that the action was based only on a mere change of opinion, which was impermissible in law. It was submitted also that the ground that whether assessee was the owner of the infrastructure facility or not, could not have been a valid ground for reopening, as the point has already been decided by the Hon'ble Supreme Court in Liberty India Vs Commissioner of Income Tax [(2009) 317 ITR 218 (SC)].

4.2 As against the above submissions on behalf of the petitioner, learned advocate for the respondents contend that with reference to the contents in the affidavit-in-reply filed on behalf of the respondents, that the re-opening was justified as it was noticed that members of Joint Venture had made claim under Section 80 IA(4) in their own cases including the income coming from their share from the business of the petitioner Joint Venture. It was submitted that the assessee had wrongly claimed deduction on insurance claim receipt, which was also a ground for reopening.

4.3 Learned advocate for the respondent submitted that the contention of the assessee that for the Assessment Year 2008-09, relief under Section 80 IA(iv) was granted by the Commissioner of Income Tax cannot be accepted because the Department has preferred Appeal against the order of the Appellate Commissioner. He further submitted that as per Section 80

IA(iv)(i) as amended with effect from 01st April, 2002, deduction can be allowed only to a person who makes investment and himself execute a development work. According to him, assessee was a civil contractor and he having not done any development work himself but carried out contract for National Highway Authority, he is not entitled to seek benefit under the said provision.

4.4 Learned advocate for the respondents submitted that as there was enough material with the Assessing Officer indicating that the income chargeable to tax had escaped, the Officer was justified in exercising his powers under Section 147 read with Section 148 of the Act. It was submitted that the re-opening was within four years and therefore, once it was discovered from the relevant material that there was an escapement of income, the action of re-opening could not be faulted.

5. At this stage, in order to properly appreciate the controversy and the contentions canvassed by the respective parties, it is useful to look into the reasons recorded by the Assessing Officer whereon he has sought to re-open the assessment. The Assessing Officer's reasons for re-opening, as reproduced, are as under:

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|------------------|-------------------------------------|
| Name of Assessee | Agrawal J.V. Near Lions Hall, Deesa |
|------------------|-------------------------------------|

| | |
|-----------------|--------------|
| Status | A.O.P. |
| PAN | AAAAA 5696 F |
| Assessment Year | 2007-08 |

07.04.2010 The assessee is an A.O.P has filed its return of income on 26.10.2007 declaring total income of Rs. NIL. As per profit and loss the assessee, It had declared the net profit of Rs.2,43,21,076/- and the same has been allocated amongst the members of the J.V.(Joint Venture). The assessee engaged in Road Construction work and it had executed the work contract of the Government and had received the cost of work from the National Highway Authority of India.

It is further noted at the foot note of computation of total income that it has submitted the audit report u/s.80IA(4) form no.10CCB and it is also mentioned that this year there is eligible claim under this section, as the members of J.V. have made claim u/s.80IA(4) in its own cases including the income coming to their share as member of Agrawal J.V. are assessed with the ACIT, B.K. Circle, Palanpur and ACIT, Calcutta respectively. As per the above remarks, the profit have been taxed in the hands of members and members have claimed the deduction u/s.80IA(4) of the Act. The tax benefit was introduced for industrial modernization required a massive expansion and quantities improvement in infrastructure i.e. express ways, highways, airports, urban development and repaid rail transport systems. The provision of section 80IA(4) shall not apply to a person who execute a work contract entered into with the undertaking or enterprises referred to in that section.

Thus, when a person makes the investment and himself execute the development work will be eligible for tax benefit

u/s.80IA(4). In this case, the assessee has executed the contract work with the National Highway Authority in India. The execution of work contract will not be eligible for the tax benefit u/s.80IA. Apart from this angle, other criteria in respect of the ownership of the development project etc. are requires to be verification.

During the course of assessment it is remained to be Verified, whether the assessee was the owner of the infrastructure facility or not. In case, the assessee is in operation and maintaining infrastructure facility, the assessee needs to secure operation as well as maintenance contract and concerned assets has to be transferred to the assessee for such purpose. The intention behind this provision was to give a fillip of deduction against the total income of the assessee derived from the infrastructure project as the entire cost of the infrastructure was being born by the assessee.

On verification of the profit and loss account of Baroda Padra (GSHP-9A) accounts, the assessee has disclosed the insurance accounts of Rs.50,95,854/-. The assessee has claimed the deduction on the insurance claim receipt also. The same are also requires to be Verified the applicability of the deduction.

During the assessment proceedings it is remained to be Verified the expenses incurred by the A.O.P. which are liable for the TDS and disallowances u/s.40A(ia) for violation of provision of Chapter XVII of the Act.

Looking to the above circumstances, the order passed u/s.143(3) dated 13.4.2009, is prejudicial to the interest of revenue.

Therefore I have reason to believe the income chargeable to tax have been escaped assessment for A.Y.2007-08 within the meaning of section 147 of the I.T.Act.

I.T.O."

5.1 The powers to reopen the assessment are derived by virtue of Section 147 of the Act, which reads as under:

"Section 147 - Income escaping assessment -

If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-

matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1 : Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2 : For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(a) Where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) Where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) Where an assessment has been made, but -

(i) Income chargeable to tax has been under-assessed; or

(ii) Such income has been assessed at too low a rate; or

(iii) Such income has been made the subject of excessive relief under this Act; or

(iv) Excessive loss or depreciation allowance or any other allowance under this Act has been computed."

5.2 Since the reopening in the present case is

within four years from the end of the relevant assessment period, the first part of Section 147 would apply. The essential conditions are firstly that the Assessing Officer has reason to believe that the income chargeable to tax has escaped assessment. Secondly, the fact that the income chargeable to tax escaped assessment has come to his notice subsequently. The third requirement could be, of course, that there is an escapement of income. The first Proviso deals with the cases wherein the assessment is sought to be re-opened after expiry of five years, in which cases further fetters are provided. However, as noted above, the Proviso part does not apply, since the impugned notice is within four years. It is well settled principle that exercise of reopening powers has to be on the basis of some tangible material becoming available with the Assessing Officer. There has to be a rational connection and a line link between the material discovered and the formation of belief by the Assessing Officer.

6. Considering in the context of the facts of the present case, the petitioner-assessee was engaged in the civil construction business which was in the nature of construction of infrastructure facilities. The provision of Section 80 IA of the Act deals with respect to deduction of profits and gains from industrial undertaking or enterprises engaged in infrastructure development. Sub-section (4) inter

alia provides that the said Section applies to any enterprise carrying on business of developing or operating and maintaining infrastructure and fulfills the conditions mentioned in various sub-clauses of the said sub-section (4).

6.1 Now adverting to the material which the Assessing Officer had before him, firstly the return of income filed by the assessee was accompanied by Auditor's Report in Form No.3CA and 3CD. With reference to claim under Section 80 IA by the assessee, the Report mentioned as under:

"The Assessee Joint Venture (Consortium of Companies) is engaged in the business of Development of Infrastructure project and satisfy all the conditions laid down by the section 80IA of the Act. In order to take 100% Tax Exemption available for Development of Infrastructure facility u/s.80IA of the Income Tax Act, the Assessee maintained books of accounts for such eligible project as an independent entity and got audited its books of account as required by the said section & obtained audit report in Prescribed Form No.10CCB, from a firm of Chartered Accountants."

6.2 The Assessing Officer before finalizing the assessment, carried out the proceedings under Section 143 and scrutiny was undertaken. The assessment so culminated into the Assessment Order, in which the aspect of deduction in question was discussed and dealt with. The relevant parts from the Assessment Order dated

13.04.2009 are extracted hereinbelow.

"The A.R. Of the assessee has furnished the copy of audit report u/s.44AB and u/s.80IA(4) of the I.T. Act in Form No.3CB and 3CD of and 10CCB of the I. T. Rules duly, audit the books of accounts in both the set separately. The A R of the assessee and account are attends along with the books of accounts and relevant records for verification. He furnished the further details as called for.

The assessee derived income from Road construction work secured from the National High Way Authority. On scrutiny of the details, various issues have been raised and verified. During the year, the assessee has claimed the deduction u/s.80IA(4) of the Income-tax Act. During the year under consideration, the assessee has not received any new contract work.

The assessee is doing a business with construction of two companies with a separate agreements in the form of Joint Venture with the separate determined the share of profit in both the venture. Both the companies engaged in the business of civil contracts, i.e. in work of construction of roads, bridges, canals etc. During the year the assessee was engaged in the business activity of construction of infrastructure for Swaroopganj-Pindware of NH-14 in the state of Rajasthan and Vadodara - Padra - Jambusar Road, from the National Highway Authority of India, New Delhi and National Highway Circle, Vadodara respectively. The work was allotted by the Government authorities. The contention of the assessee is that all the construction work of the road and other facilities were infrastructure project and the assessee developed the same and therefore the assessee has claimed the deduction u/s.80IA(4) of the Income tax Act in respect of profit earned from the execution/development of civil work. The assessee has claimed the deduction in the preceding year on the same contact work. After discussion with the representative of the

assessee, and replying on the decision of the jurisdictional ITAT, the deduction u/s.80IA(4) is allowed on the profit earned from the infrastructure work.

The assessee failed to furnish any supporting evidence, as it is financial institute and TDS provisions are not applicable. In view of the above, the interest payment of Rs.13,38,811/- has been disallowed u/s.40A(ia) and added to the total income of assessee out of interest payment. The disallowance so made will become the income derived from the infrastructure work, and relying on the decision of the jurisdictional ITAT, the deduction u/s.80IA(4) is allowed on the profit earned from the infrastructure work.

The assessee has claimed the deduction u/s.80IA(4) in respect of Insurance claim received of Rs.50,95,854/-. The assessee has furnished the evidence in support of its claim. The same evidence are found in order and accordingly no addition is made on this count.

After discussion and keeping in mind the submission of the assessee, total income is computed as under:

Reg: Agrawal JV (AOP) Deesa A.Y. 2007-08.

| | |
|---|------------------|
| Net profit as per statement | Rs.3,68,91,167/- |
| Add: Disallowance as discussed above out of interest exp. | Rs. 13,38,811/- |
| | ----- |
| | Rs.3,82,29,978/- |
| Less: Deduction u/s.80IA(4) | Rs.3,82,29,978/- |
| | ----- |
| Total assessed income | Rs. NIL |
| | ----- |

6.3 From the above facts and material on record, which was also before the Assessing Officer, it is evident that the necessary facts and material relating to the claim for deduction by the

assessee under Section 80IA(4) made in the return of income were considered by the Assessing Officer. He applied his mind to those materials and allowed deduction as per his Assessment Order. It could neither be demonstrated, nor it is revealed that the Assessing Officer had any tangible material with him so as to validly exercise the powers of reopening. Once the Assessing Officer on the basis of material before him had applied his mind and granted deduction in the Assessment Order, it was not permissible for him to exercise powers under Section 147 on the same material on the ground that certain aspects were not considered or that they were overlooked.

7. A change of opinion is no ground for exercise of powers under Section 147, as is reiterated and emphasized in the celebrated decision in Commissioner of Income Tax Vs Kelvinator of India [(2010) 320 ITR 561 (SC)], which held as under:

"The concept of change of opinion on the part of the Assessing Officer to reopen an assessment does not stand obliterated after the substitution of section 147 of the Income Tax Act, 1961, by the Direct Tax Laws (Amendment) Acts, 1987 and 1989. After the amendment, the Assessing Officer has to have reason to believe that income has escaped assessment, but this does not imply that the Assessing Officer can reopen an assessment on mere change of opinion. The concept of "change of opinion" must be treated as an in-built test to check the abuse of power. Hence after April 1, 1989, the Assessing Officer

has power to reopen an assessment, provided there is "tangible material" to come to the conclusion that there was escapement of income from assessment. Reason must have a link with the formation of the belief."

7.1 In Gujarat Narmada Velly Fertilizers Vs CAT [310 ITR 120], it was observed that on a plain reading of Section 147 of the Act it becomes apparent that the Assessing Officer is vested with jurisdiction to re-open a completed assessment if he has reason to believe that any income chargeable to tax has escaped for assessment for any Assessment Year. It is held that the basic requirement is that there has to be material before the Assessing Officer at the time when reasons are recorded and it is shown from such material that income chargeable to tax has escaped assessment.

7.2 In other words, "the reason to believe" and the "opinion" to be formed by the Assessing Officer for the purpose of exercise of powers under Section 147 have to be guided by the tangible material available with him at the time of proceeding to re-open and to record reasons for re-opening and that such material was not with him when he undertook the original assessment.

7.3 It is further stated in the reasons recorded that what was remained to be verified was whether the assessee was owner of the infrastructure

facility for which the deduction in question was claimed. Learned advocate for the petitioner rightly submitted that the issue is answered in Liberty India (supra) wherein it is held that in order to eligible for deduction of profits from industrial undertaking under Sections 80I, 80IA, 80IB of the Act itself generation of profits from infrastructural activity that attracts incentives under the said provisions, and not ownership in the business. The relevant observations are as under:

7.4 If the reasons recorded in the present case are attentively read, it is mentioned, "during course of assessment it is remained to be verified, whether the assessee was the owner of the infrastructure facility or not..." In the next also it was stated "on verification of profit and loss account..." It was further stated "during the assessment proceedings it is remained to be verified the expenses incurred ...". Thus, what can be figured out from the reasons recorded is that the Assessing Officer wanted to re-open the assessment as according to him certain aspects remained to be verified. It cannot be gainsaid that re-opening of assessment for the purpose of "verifying" or "verification" will be necessarily an action based on a mere change of opinion. The connotation of word "to be verified", "verification" is to reexamine the existing material. Verification is always with reference to the details already considered once. When one

wants to verify his decision, it means that one reviews the decision. Re-assessment powers cannot be exercised to merely review the earlier assessment on the special ground that something was omitted from consideration or particular conclusion was imprecisely or wrongly arrived at. Formation of such belief by the Assessing Officer has to satisfy the requisite parameters which are conditions precedent for examine of provision under Section 147. The necessary conditions being satisfied. From the reasons recorded themselves, therefore, it was seen that the Assessing Officer proceeded to exercise the powers since he wanted to verify certain aspects the assessment already completed.

8. It may be noted that in the subsequent Assessment Year 2008-09, similar claim was made by the assessee in its return of income. The Commissioner (Appeals) allowed the deduction for the same projects under Section 80 IA(4) as per order dated 13.10.2011, which is on record of the petition. In the subsequent Financial Year 2009-10 the petitioner-assessee did not claim the deduction in view of amendment in Section 80 IA in the Finance Act, 2009. It is, however, stated in the Memorandum of Petition that the virus of amending Explanation to Section 80 IA retrospectively is under challenge before this Court in Special Civil Application No.12233 of 2009. The aforesaid facts are noted only because they are connected facts. The fact that the

Appellate Authority has granted relief in the subsequent year is not taken into consideration for reaching conclusion in this petition. The impugned notice for reopening is held to be illegal on the ground that it is based on a mere change of opinion and therefore, amounted to erroneous and illegal exercise of power under Section 147 of the Act.

9. For the foregoing reasons and discussions, respondent No.1-Assessing Officer has clearly exceeded his jurisdiction under Section 147 of the Act in issuing the impugned notice. The impugned notice dated 30.12.2010 under Section 148 of the Income Tax Act, 1961 (Annexure-B to the petition) as well as the order dated 05.12.2011 of the Assessing Officer rejecting objections of the petitioner (Annexure-J to the petition) are set aside.

10. The petition is accordingly allowed. Rule is made absolute without any order as to the cost.

(V.M.SAHAI, J.)

(N.V.ANJARIA, J.)

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