

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No.652 of 2005

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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SUN PHARMACEUTICAL INDUSTRIES LTD. - Petitioner(s)
Versus

DY.COMMISSIONER OF INCOME-TAX - Respondent(s)

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Appearance :

MR SN SOPARKAR, SR. ADV. WITH MRS SWATI SOPARKAR for Petitioner(s)
MR KM PARIKH for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 06/08/2012

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Petitioner has challenged notice dated
25.2.2004 issued by respondent, Deputy Commissioner of

Income Tax under section 148 of the Income Tax Act, 1961 ('the Act' for short) by which he seeks to reopen the assessment of the petitioner for the assessment year 1999-2000.

2. The petition arises in following factual background. The petitioner is a company registered under the Companies Act and is regularly assessed to tax. For the assessment year 1999-2000, the petitioner Company filed its return of income on 27.12.99 declaring total income of Rs.3,63,23,970/- under section 115JA of the Act. Such return was taken in scrutiny by the Assessing Officer. He framed assessment under section 143(3) of the Act on 28.3.2002 computing total income at Rs.5,10,02,030/-

3. It is this assessment which the respondent Assessing Officer seeks to reopen for which the impugned notice came to be issued on 25.2.2004. Present is therefore a case where the assessment previously framed after scrutiny is reopened within a period of four years from the end of relevant assessment year.

4. At the request of the petitioner, the Assessing Officer supplied reasons recorded by him, for reopening such assessment. Such reasons read as under:

"I. The scrutiny assessment U/s.143(3) was completed in this case on 22.03.2000. While scrutinizing the return of income for assessment of subsequent years, it is seen that the

assessee's claims are not proper. It is seen that the assessee has submitted voluminous details along with the return of income which are not at all required to be filed along with the return of income. What is required is the Tax Audit Report, Profit and Loss Account and Balance Sheet, Other Statutory Reports pertaining to deductions u/s.80HHC and 80IA, Computation of income, Proof of payment of Advance Tax and TDS Certificates. The various details submitted by the assessee are very confusing and complicate the matter pertaining to the assessment. The details filed by the assessee are such as filing of which are necessitated with the object to create confusion in the matter and frustrate quick understanding. The assessee has furnished the branches details. The statements furnished are not straight forward e.g. Please refer to the profit calculation sheet/statement u/s.80IA (copy enclosed) for a period of April,1998 to March 1999. Though the name of the statement is profit calculation u/s.80-IA, but I do not find anywhere figure of the profit which has been determined for the purpose of 80-IA. Thus the assessee has deliberately presented the facts in such a manner so Audit Report, the R&D expenses are as under:-

Capital Expenses	Rs.4,49,49,374/-
Revenue Expenses	Rs.3,74,13,840/-
Revenue Exp. Debited Into P&L Account	Rs.1,54,35,300/-

Total	Rs.9,77,98,514/- .
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The Schedule 17 of the Annual Account shows R & D expenses of Rs.104.22 lacs whereas in the Tax Audit Report, the assessee has claimed R & D capital expenses of Rs.4,49,49,474/- and R & D revenue expenses of Rs.3,74,13,840/- . Thus, it is not clear which figure is correct.

II. While completing the assessment u/s.143(3) of the act in the case of Aditya Medisales Ltd., a sister concern of the Sun Group, it was found

that the profit of the Industrial Unit of Silvasa of the assessee has been inflated because the same is exempt u/s.80IA, by giving more interest on overdue bills by Aditya Medisales Ltd. Aditya Medisales Ltd. has been given the task of distributing the formulation drugs produced by the units of Silvasa and Vapi on Sun Pharma Industries Ltd. It pays the interest @ 24% to the latter on the overdue bills which is much more than the prevailing market rate of interest in this line of business which varies from 15% to 18%. By adopting this modus operandi, the Sun Group has reduced the taxable profit of M/s. Aditya Medisales Ltd. and at the same time it has increased the profit of Silvasa Unit because the interest income is directly added to the sales figure, on which the deduction u/s 80IA is available. These facts are not clear from the working of deduction u/s.80IA given by the assessee along with the return of the income. This is not permissible as per the provisions of Section 80IA(10) of the Act and the rate of interest payable to SPIL has to be restricted @ 15% to 18% which will automatically reduce the profits of units entitled for 80IA deduction and consequently the deduction u/s.80IA claimed by the assessee will be reduced.

III. In the assessment order passed, the A.O. had not added the following amounts.

a) The assessee has shown export of Rs.80.09 lacs out of the goods produced from the Silvasa Unit. This amount has been considered for working out the deduction u/s.80HHC. Again, deduction u/s.80IA has been claimed on this amount. This means that more than 100% deduction has been claimed on the export of Rs.69.09 lacs from the Silvasa Unit, which is not correct as per the provisions of section 80AB.

b) The assessee has claimed that it has two businesses viz. Pharmaceutical and finance. The assessee has set off interest payment against the gross interest receipt. This netting off is not proper. The details of interest paid clearly indicates that borrowed funds for which

interest has been paid were utilised for the purpose of pharmaceutical business. Therefore, interest paid has to be considered against the receipt from pharmaceutical business and gross interest has to be taxed under the head "income from other sources". Please refer ACIT vs. South India Produce Co. - 262 ITR 20 (Ker.); CIT v. Rain Ratan Exports (P) Ltd. - 246 ITR 443 (Bom.). If gross interest received is taxable under the head of income from other sources, the same has to be excluded from the business profit for the purpose of 80HHC - South India Produce Co. 262 ITR 20 (Ker.) & CIT v. AS Nizar Ahmed & Co. 259 ITR 244 (Madras). Thus, whole gross interest has to be excluded from the profit of the business for the purpose of 80HHC. Principle of netting off applies only when there is direct nexus between earning of the interest income and interest paid. Please refer Madras High Court decision in the case of South India Shipping Corporation Ltd. 240 ITR 24 and also Kerala High Court decision in the case of Vai Kumdam Rao Co. 241 ITR 50 (Kerala).

V. In view of the above, I have reasons to believe that the above incomes chargeable to tax have escaped assessments. Hence, notice u/s.148 of the Act is issued."

5. The petitioner raised objections to such notice for reopening under its communication dated 25th May 2004. Such objections, however, were rejected by the Assessing Officer, by his order dated 16.11.04. At that stage, the petitioner has approached this Court by filing the present petition challenging the notice for reopening on various grounds.

6. Learned counsel Shri Soparkar for the petitioner contended that the notice for reopening is without jurisdiction. He submitted that the reasons recorded by the Assessing Officer would not give him

jurisdiction to reopen the assessment previously framed after scrutiny. He pointed out that out of the four reasons separately enumerated by the Assessing Officer, in the order disposing of the objections of the petitioner, he sustained only one reason. Drawing our attention to the details of such reasons recorded, objections of the petitioner and the order passed by the Assessing Officer disposing of such objections, counsel contended that the Assessing Officer himself having given up other grounds, the entire scrutiny in the present petition be limited to the sole surviving ground of charging higher rate of interest to the sister concern of the petitioner, namely, Aditya Medisales Ltd. With respect to this ground, counsel submitted that full facts were available on record before the Assessing Officer. While, framing the original assessment, he made no disallowance for such alleged higher rate of interest under section 80IA(10) of the Act or under any other provision. Any attempt on his part now to reopen the assessment would only amount to change of opinion.

7. We have perused the documents on record. As noted, the reasons recorded by the Assessing Officer for reopening the assessment contained several grounds. There were as many as 4 different grounds on which the Assessing Officer desired to reopen the assessment previously framed after scrutiny. However, while disposing of the objections of the petitioner with respect to such grounds, the Assessing Officer, in his order specifically rejected only one of them, viz. the action on the part of the assessee to have

charged 24% interest on the overdue payments from its sister concern. Quite apart from this significant development, we had, in the case of this very assessee, an occasion to examine the remaining three grounds recorded by the Assessing Officer in his reasons. We had found that none of the grounds were valid. In our order dated 31st July 2012 passed in Special Civil Application No.12468 of 2004, we have given detailed reasons for coming to such conclusion. It is not necessary, therefore, to go into the validity of such grounds or to give separate detailed reasons for the same. We may, however, record that such proceedings involved a case of reopening where notice was issued beyond the period of four years from the end of relevant assessment year.

8. Under the circumstances, the sole surviving issue for our consideration is whether on the basis of ground No.2 of the reasons recorded by the Assessing Officer, reopening would be permissible in the present case. In this respect also, we may notice that this very ground came up for consideration in Special Civil Application No.12468 of 2004 wherein we have upheld the right of the Assessing Officer to reopen the assessment making following observations :

"24. We may now refer to ground No.3. In this respect, the stand of the Assessing Officer is that the assessee had sold certain goods to its sister concern Aditya Medisales during the year under consideration. On delayed payments of such goods, Aditya Medisales paid interest at the rate of 24% which was much higher than the prevailing market rate of interest which varies

between 15% to 18%. By adopting such modality, the assessee had reduced the taxable profit of Aditya Medisales and at the same time increased the profit of Silvasa unit of the assessee company which was eligible for deduction under section 80-IA of the Act. These facts were not clear from the working out of deductions under section 80IA of the Act along with the return of income. According to the Assessing Officer, case of the petitioner would be covered under section 80IA(10) of the Act. Therefore, interest payable to the petitioner company should be restricted to 15% to 18% which would reduce the profit of the said unit and resultantly deduction under section 80IA of the Act would also be reduced.

25. In the objections raised, the petitioner contended that details of interest charged on overdue sale proceeds were on record. In the original assessment, the assessee had dealt with such interest for the purpose of computation of deduction under section 80HHC of the Act. Thus there was no non-disclosure on the part of the assessee. It was further contended that interest was not on higher side looking to the fact that the debt was unsecured and the Company was exposing itself to higher risk. It was lastly contended that even if the interest was charged at a higher rate, the resultant income earned by the assessee was offered to tax.

26. Such objections of the petitioner were disposed of by the Assessing Officer in following manner :

"2.3 Regarding the claim of higher deduction u/s.80IA by recovering higher interest from M/s.Aditya Medisales Ltd., it is stated that all the details are on record and there is no non-disclosure on this account. However, this is not correct. M/s.Aditya Medisales Ltd., a group concern, had paid interest @24% on the overdue bills, which is much more than the prevailing market rate of interest in in this line of business which varies from 15% to 18%. By adopting this modus operandi, the taxable

profits of M/s.Aditya Medisales Ltd. on the one hand has been reduced and the profits of 'Silvasa Unit' of M/s.Sun Pharmaceuticals Industries Ltd. has been inflated which is exempt u/s.80-IA. This is a clear cut violation of section 80-IA(10) of the Act. The fact that M/s.Aditya Medisales Ltd. had paid interest @24% on over due bills is not available from the record of M/s.Sun Pharmaceuticals Industries Ltd. The interest component has been merged in the figure of sales of the Silvasa Units making it difficult for the A.O. to discover this modus operandi. This fact could be detected while verifying/examining the records for Assessment Year 2001-02 of M/s.Aditya Medisales Ltd. This issue is discussed in detail in the Assessment Order u/s.143(3) in the case of M/s.Aditya Medisales Ltd."

It is not in dispute that Aditya Medisales is the sister concern of the petitioner Company. It is also not in dispute that on the delayed payments of sales proceeds, Aditya Medisales paid interest at the rate of 24% to the petitioner Company. Section 80IA of the Act, as is well known, pertains to deduction in respect of profits and gains from industrial undertakings engaged in infrastructural development. Section 80-IA(10) reads as under:

"(10) Where it appears to the Assessing Officer, that owing to the close connection between the assessee carrying on the eligible business to which this section applies and any other person, or for any other reason, the course of business between them is so arranged that the business transacted between them produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer, shall in computing the profits and gains of such eligible business for the purposes of the deduction under this section, take the amount of profits as may be reasonably deemed to have been derived

therefrom."

Under section 80IA(10) of the Act, thus, if it appears to the Assessing Officer that owing to the close connection between the assessee carrying on the business eligible for deduction under such section, and any other person or for any other reason, the course of business between them is so arranged that the business transacted produces to the assessee more than the ordinary profits which might be expected to arise in such eligible business, the Assessing Officer shall in computing the profits and gains of such eligible business for deduction, take the amount of profits as may be reasonably deemed to have been derived therefrom. Under the circumstances, if it is found that the assessee had charged higher rate of interest from the sister concern and thereby, arranged its business in such a way that the eligible profit for deduction under section 80IA of the Act was exaggerated, it was within the power of the Assessing Officer while computing the deduction to take amount of profit as may be reasonably deemed to have derived from such dealing. In exercise of such powers, therefore, when the Assessing Officer finds that there is exaggeration of income by an assessee, which is eligible for deduction 80IA of the Act dealing with closely associated entity, he would make necessary adjustments in this regard.

27. Thus, it cannot be said that belief of the Assessing Officer that income chargeable to tax had escaped assessment is baseless. As noted, at this stage, it is not necessary for this Court to ascertain whether such addition would ultimately succeed or not. Sufficiency of the reason on which the Assessing Officer forms such belief is also not for the Court to decide.

28. In the case of **Sri Krishna Pvt. Ltd. v. I.T.O.**, 221 ITR 538, the Apex Court reiterated the ratio laid down in the case of **Phool Chand Bajrang Lal** and observed that inquiry at the stage of finding out whether the reassessment

notice is valid is only to see whether there are reasonable grounds for the Income Tax Officer to believe and not whether the omission/failure and the escapement of income is established. Since the belief is that the Income Tax Officer, the sufficiency of reasons for forming the belief is not for the court to judge.

29. In the case of **I.T.O. v. Selected Dalurband Coal Co. P. Ltd.**, 217 ITR 597, the Apex Court held that the formation of belief by the Income Tax Officer is essentially within his subjective satisfaction. At the stage of issue of notice, the only question is whether there was relevant material on which the reasonable person could have formed the requisite belief.

30. In the case of **Raymond Woollen Mills Ltd. v. ITO**, 236 ITR 34, the Apex Court observed that "in this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the reopening of the case in the facts of this case".

31. In the case of **Asstt. CIT v. Rajesh Jhaveri Stock Brokers P. Ltd.**, 291 ITR 500 (SC), the Apex Court observed as under :

"Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by

legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in *Central Provinces Manganese Ore Co. Ltd. v. ITO* [1991 (191) ITR 662], for initiation of action under Section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is reason to believe, but not the established fact of escapement of income. 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. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see *ITO v. Selected Dalurband Coal Co. Pvt. Ltd.* [1996 (217) ITR 597 (SC)]; *Raymond Woollen Mills Ltd. v. ITO* [1999 (236) ITR 34 (SC)]."

32. In the case of Phool Chand Bajrang Lal (supra), the Apex Court observed as under :

"From a combined review of the judgments of this Court, it follows that an Income-tax Officer acquires jurisdiction to reopen assessment under S. 147(a) read with S. 148 of the Income-tax Act, 1961 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income-tax has escaped assessment. He may start reassessment

proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since, the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief."

33. In view of the above settled legal position, at this stage, we do not find that the reasons recorded lack validity. The above observations of various decisions noted would also be relevant when we examine whether such escapement of income was due to failure on the part of the assessee in truly and fully disclosing all material facts. In this respect, the assessee had disclosed that it had received interest of Rs.3,03,48,973/-. It is an admitted position that in the return filed, the assessee did not indicate whether the entire interest or part thereof was received from Aditya Medisales. Further, there is no indication that from Aditya Medisales, which was a sister concern, the assessee had received interest at the rate of 24% on the outstanding amounts. Counsel for the petitioner, however, submitted that in the tax

audit report, the petitioner had disclosed that the petitioner company and Aditya Medisales are closely associated. In our opinion, this would not be a sufficient disclosure. From the facts on record, it was not possible for the Assessing Officer to ascertain that the petitioner received interest from Aditya Medisales which was higher than the normal rate of interest. Three essential facts, namely, that the petitioner received interest on overdue payments from Aditya Medisales, that Aditya Medisales was a sister concern of the petitioner Company and that such interest was charged at the rate of 24% per annum, were not discernible from the record at all.

34. Under the circumstances, from the material on record, it was not possible for the Assessing Officer to make adjustment under section 80IA(10) even if it was required. It may be that the petitioner did give the total figure of interest received. However, from such figures, it was not possible for the Assessing Officer to ascertain these vital facts. Section 147 of the Act, explanation 1 provides that "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 foregoing proviso". In the present case, even from the account books and other evidence which the assessee had produced, even after due diligence, it was not possible for the Assessing Officer to discover these three vital facts.

35. In the case of **Sri Krishna Pvt. Ltd.** (supra), the Apex Court observed that obligation of the assessee is to disclose all material facts necessary for his assessment for that year fully and truly. It was further observed that the idea is to save the assessee from harassment resulting from mechanical reopening of reassessment. This protection avails only to those assessees who disclose all material facts truly and fully.

36. In the case of Phool Chand Bajrang Lal (supra), the Apex Court held as under:

"Where the transaction itself, on the basis of subsequent information was found to be a bogus transaction, mere disclosure of that transaction at the time of original proceedings could not be said to be a disclosure of true and full facts and officer would have jurisdiction to reopen the concluded assessment in such a case."

37. In the present case, as already noted, the only disclosure was that the assessee had earned interest income of Rs.3,03,48,973/-. There was no further information available on record that such interest included overdue payment charges at the rate of 24% received from the sister concern, viz. Aditya Medisales. Even without the aid of explanation (1) to proviso to section 147, therefore, it was perhaps open for the Assessing Officer to contend that there was no true and full disclosure on the part of the assessee in this respect. At any rate, by applying such explanation, it can be easily gathered that the assessee failed to disclose fully and truly all material facts. Counsel for the petitioner, however, vehemently contended that these were not primary facts. Only primary fact was that the assessee had earned interest income. We are, however, of the opinion that in the context of the close connection between the petitioner and Aditya Medisales, the fact that the assessee was eligible for deduction under section 80IA of the Act and the interest income received from the sister concern had relevance to the provisions of section 80IA(10) of the Act, primary facts were not on record.

38. Under the circumstances, in so far as ground No.3 is concerned, we find that the same cannot be stated to be invalid."

The issue being common, we see no reason to take a different view. In fact, we may notice that the above

decision was rendered by us in a case where notice for reopening of the assessment was issued beyond the period of four years from the end of the relevant assessment year whereas in the present case, such notice is issued within four years. In that view of the matter, the contention of the counsel for the petitioner that full facts were available on record before the Assessing Officer when the assessment was previously framed after scrutiny would be of no avail.

9. In the result, the petition fails and is dismissed. Rule is discharged. Interim relief, if any, is vacated.

(Akil Kureshi, J.)

(Harsha Devani, J.)

(vjn)

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THE HIGH COURT
OF GUJARAT

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