IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.4569 of 2002

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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ASHANK D DESAI - Petitioner(s)
Versus
ASSISTANT COMMISSIONER OF INCOME - TAX - Respondent(s)

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Appearance :
MR SN SOPARKAR WITH MRS SWATI SOPARKAR WITH MRS BS SOPARKAR for Petitioner(s) : 1,
MR KM PARIKH for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 02/07/2012

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

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1. Petitioner has prayed for quashing and setting aside the notice dated 11.3.2002 as at Annexure A to the petition. By virtue of such notice, the Assessing Officer, sought to reopen the assessment of the petitioner for the assessment year 1995-96. Notice for reopening was thus beyond four years from the end of relevant assessment year. The assessee challenges such notice on various grounds, including that in absence of any failure on his part to disclose fully and truly all material facts for such assessment, reopening beyond the period of four years from the end of relevant assessment is not permissible. The assessee also contends that the reasons recorded by the Assessing Officer are not sufficient to permit reopening. It is the contention of the petitioner that the reasons recorded do not form sufficient basis to enable the Assessing Officer to hold a belief that income chargeable to tax has escaped assessment. Thus, the petitioner seeks to challenge the reopening of assessment on twin grounds of the reopening being beyond the period of four years without any failure on his part to truly and fully disclose all material facts and that there was no basis for the Assessing Officer to form an opinion that income chargeable to tax has escaped assessment.

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2. The reasons recorded by the Assessing Officer have been produced along with the affidavit in reply dated 28th June 2002, filed by one Shri Hemant Leuva, Assistant Commissioner of Income Tax.

3. The petitioner has filed a detailed rejoinder along with which several documents have been produced to establish that during the original assessment, which was framed under section 143(3) of the Income Tax Act, 1961 ('Act' for short) on 31st March 1998, several queries were raised by the Assessing Officer with respect to the investment of the petitioner in purchasing the shares of one company, viz. Mastek Ltd.

4. If we peruse the reasons recorded by the Assessing Officer, his principal objection is that on the funds borrowed for purchasing such shares, interest would not be deductible under section 57(iii) of the Act.

5. We would have given detailed reasons for our ultimate conclusion, but for the fact that identical issue has been decided by this Court. Such an issue of identical nature arose in the case of one Ketan B. Mehta in Special Civil Application No.4549 and 4551 of 2002. In that

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case also, under identical circumstances, the Assessing Officer, desired to reopen the assessment previously framed on identical ground, namely, regarding deduction under section 57(iii) of the Act for the interest paid on borrowed fund for making investments for purchase of shares of Mastak Ltd. When the issue was presented before the Division Bench, learned Members comprising the Bench had a difference of opinion. Such petitions were, therefore, referred to a third Member for his opinion. The third Member by his order dated 16.3.2012 concurred with the ultimate conclusion recorded by one of the two Members to the effect that the petitions are required to be allowed. This was primarily on the ground that there was no failure on the part of the assessee to disclose truly and fully all material facts necessary for assessment. In that view of the matter, considering proviso to section 147 of the Act, the Court held that reopening was not permissible. Relevant portion of such order reads as under:

> "34. To my mind, considering the facts emerging from the record, it cannot be stated that the assessee failed in his duty. His duty was to make the disclosure about the investments as well as the interest paid for borrowings for making such investments. On

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the basis of such material, if the Assessing Officer was of the opinion that any further inquiry was necessary to examine the nature of such investments and to ascertain whether the investment was made for the sole purpose of earning dividend income or was predominantly or exclusively for the purpose of acquiring controlling shares of the Mastek Limited, it was open to the Assessing Officer to make further inquires. To my mind, nothing is pointed out to suggest that the assessee owed such a duty to disclose further facts in this regard.

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36. As already noted, in both the assessments, the assessee had disclosed primary facts in the returns filed. Further, the Assessing Officer had raised certain queries about borrowings and the interest paid thereon and the dividend earned. The assessee, on both the occasions, supplied necessary material through letters and documents produced on record. Thus, during the scrutiny assessment proceedings, the Assessing Officer was actually aware about the claim of the assessee under Section-57(iii) of the Act. If, on the basis of such disclosures, the Assessing Officer was curious to verify the percentage shift in the holding of the assessee, in the company in question, it was well-within his powers to ask for such material during the assessment. However, primary onus to provide such details even if not disclosed cannot be shifted on the assessee.

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40. Such conclusion would not be fatal to the petitioners, when I hold that there was no failure on the part of the assessee to

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disclose fully and truly all material facts, necessary for assessment. The notices for reopening the assessments beyond a period of four years, from the end of relevant assessment years, must fail on that ground alone.

41. In the result, both the petitions are allowed. The impugned notices are quashed. Rule, in each petition, is made absolute."

6. In the result, without recording elaborate reasons, we uphold the petitioner's challenge to the impugned notice at Annexure A. The same is therefore quashed. Rule is made absolute accordingly. No costs.

(Akil Kureshi J.)

(Harsha Devani, J.)

(vjn)

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THE HIGH COURT OF GUJARAT
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