

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12907 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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ASHOKJYOT OXYGEN PVT.LTD. - Petitioner(s)

Versus

H.N.PATEL INCOME TAX OFFICER WARD 1(1) - Respondent(s)

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Appearance:

MR SN DIVATIA 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: 18/06/2012

ORAL JUDGMENT

(Per: HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. The petitioner, a private limited company, engaged in the business of Industrial Gases has challenged the notice dated 4.2.2003 issued by respondent under section 148 of the Income Tax Act, 1961 (hereinafter referred to as “the Act”) seeking to reopen the assessment of the petitioner for the assessment year 1996-1997.
2. The petitioner filed its return of income for the assessment year 1996-1997 on 30.11.1996 declaring total loss of Rs.9,08,820/- which was accompanied by the statement of income, audited annual accounts, depreciation statement and other enclosures. The return was processed under section 143(1)(a) accepting the returned income. Thereafter, on 30.3.2001 assessment came to be framed under section 143(3) of the Act by the then Assessing Officer at a loss of Rs.6,12,316/-. By the impugned notice dated 4.2.2003, the assessment is sought to be reopened under section 147 of the Act. In response to the said notice, the petitioner filed fresh return of income on 3.3.2003 declaring loss of Rs.7,24,810/- stating that the impugned notice is bad in law and called upon the respondent to furnish the reasons for reopening the assessment. After a second request to furnish the reasons, the respondent vide letter dated 5.8.2003 furnished the reasons. The petitioner by a letter dated 25.8.2003 submitted its objections to the reopening. Meanwhile, the assessment proceedings commenced and though the petitioner sought for a speaking order disposing of its objections, the respondent called upon the petitioner to file details called for by him. Apprehending that the assessment would be finalized without disposing of its objections, the petitioner has filed the present petition challenging the reopening of the assessment.

3. By an order dated 2.9.2003, this court while issuing notice had granted ad interim relief restraining the Assessing Officer from completing the process of reassessment. It was, however, observed that it would be open for the Assessing Officer to decide the objections raised by the petitioner vide his letter dated August 25, 2003 and a pass speaking order thereon, pursuant to which, the Assessing Officer, by an order dated 29.9.2003 rejected the objections filed by the petitioner.
4. Assailing the impugned notice, Mr. S. N. Divetia, learned advocate for the petitioner submitted that the impugned notice has been issued on 4.2.2003 in relation to assessment year 1996-1997 which is clearly beyond the period of four years from the end of relevant assessment year and as such, in the absence of any failure on part of the petitioner to disclose fully and truly all material facts, assumption of jurisdiction by the Assessing Officer under section 147 of the Act, is invalid. Referring to the reasons recorded by the Assessing Officer for reopening the assessment, it was submitted that there is no allegation therein to the effect that there was any failure on part of the petitioner to disclose full and true particulars, in the absence of which the requirements of the proviso to section 147 of the Act are not satisfied and as such, the impugned notice is rendered unsustainable.

It was also contended that at the time of framing the assessment under section 143(3) of the Act, all necessary particulars had been furnished to the Assessing Officer, who while issuing notice under section 142(1) of the Act had specifically called upon the petitioner to furnish the details in respect of the

expenditure incurred in relation to the project in question. Under the circumstances, the Assessing Officer had framed the original assessment after due application of mind in respect of the issue on which the assessment is sought to be reopened and as such, the impugned notice which seeks to reopen the assessment is based on mere change of opinion on the part of the successor Assessing Officer and as such, on this count also, the reopening of assessment is invalid.

5. On the other hand, Mr. K.M. Parikh, learned Standing Counsel for the respondent placed reiterated the stand adopted by the respondent in the affidavit-in-reply as well as in the order disposing of the objections and submitted that action taken by the Assessing Officer is just, legal and proper and does not warrant any interference by this court.
6. Before advertng to the merits of the case, the legal position in this regard may be noted. In view of the proviso to section 147 of the Act, in case where earlier an assessment has been framed under section 143(3) of the Act, for the purpose of exercising powers under section 147 of the Act, after the expiry of a period of four years from the end of the relevant assessment year, the Assessing Officer has to form a belief that income chargeable to tax has escaped assessment by reason of failure on part of the assessee (i) to furnish a return under section 139 or pursuant to a notice under section 142(1) or section 148 or (ii) to disclose fully and truly all material facts necessary for his assessment for that assessment year.
7. In facts of the present case, undisputedly the assessment is sought

to be reopened after the expiry of a period of four years from the end of relevant assessment year and as such, the conditions precedent for exercise of powers under section 147 of the Act as postulated under the proviso thereto are required to be satisfied before the Assessing Officer assumes jurisdiction thereunder.

8. In the present case, it is not the case of the Assessing Officer that the petitioner has failed to furnish return under section 139 or in response to a notice under section 142(1) or under section 148. Under the circumstances, the Assessing Officer is required to record satisfaction that income chargeable to tax has escaped assessment by reason of failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the assessment year under consideration. Sub-section (2) of section 148 of the Act imposes an obligation upon the Assessing Officer to record reasons for reopening the assessment prior to issuing a notice under sub-section(1) thereof. It is a settled legal position that for the purpose of reopening the assessment beyond a period of four years from the end of the relevant assessment year, the reasons recorded should reflect that there is failure on the part of the assessee to disclose fully and truly all material facts. It may be therefore, necessary to refer to the reasons recorded, which read as under:

“The assessee company incurred expenses on various heads amounting to Rs.84,32,127/- which has been claimed as revenue e expenditure. The expenditure was incurred before the commencement of production pre-operative expenditure under capital work in progress is of capital nature and not revenue expenditure. This expenditure needs to be disallowed accordingly.”

9. On a plain reading of the reasons recorded, it is evident that there

is no allegation to the effect that there is any failure on part of the petitioner to disclose true and correct facts. According to the Assessing Officer, the expenditure incurred by the petitioner before the commencement of production was pre-operative expenditure under capital work in progress was, therefore, of capital nature and not revenue expenditure as claimed by the petitioner and as such, the same was required to be disallowed. From the reasons recorded there is nothing which is indicative of any default on the part of the petitioner in furnishing any material particulars leading to income chargeable to tax having escaped assessment. Under the circumstances, the conditions precedent for exercise of powers under section 147 of the Act after the expiry of a period of four years from the end of the relevant assessment are clearly not satisfied.

10. Another aspect of the matter is that even in the order disposing of the objections, all that has been stated by the respondent is that the expenditure claimed as revenue expenditure in the computation of income remained unconsidered by the Assessing officer during the course of assessment proceedings which was capital in nature. It is also recorded that though the material was available on record at the time of first assessment, no conscious consideration of the material was made by the Assessing Officer and the mistake had been committed. Thus it is the specific case of the Assessing Officer that though there was material on record, it was on account of a mistake on part of the then Assessing Officer that the allowance had been made. Thus, it is apparent that it is not even the case of the Assessing Officer that there is any default on the part of the petitioner as envisaged under the proviso to section 147 of the Act. Under the circumstances, the impugned

notice under section 148(1) of the Act assuming jurisdiction under section 147 of the Act after the expiry of a period of four years from the end of the relevant assessment is clearly without authority of law and as such cannot be sustained.

11. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dated 4.2.2003 issued by the respondent under section 148(1) of the Act is hereby quashed and set aside. Rule made absolute accordingly with no order as to costs.

(Akil Kureshi, J.)

(Harsha Devani, J.)

(raghu)

