IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 3626 of 2014

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

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N H KAPADIA EDUCATION TRUST
Versus
ASSISTANT DIRECTOR OF INCOME TAX

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Appearance:
MR SN DIVATIA(1378) for the Petitioner(s) No. 1
MRS MAUNA M BHATT(174) for the Respondent(s) No. 1
RULE SERVED(64) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 03/03/2020

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. By this petition under Article 226 of the Constitution of India, the petitioner has prayed for the following reliefs:

"10.0 (a)to issue a writ of certiorari or in the nature of certiorari or any other appropriate writ, orders or directions quashing and setting aside the impugned notice dated 27/09/2012 ***[Exhibit-A]*** *issued by the Respondent proposing to reopen the completed assessment of the Petitioner for A.Y. 2006-07 and the consequential re-assessment order u/s.147 of the Act, passed, if any, by the Respondent pursuant to his notice u/s.147.*

(b) to issue a writ of certiorari or in the nature of certiorari or any other appropriate writ, orders or directions quashing and setting aside the impugned order dated 11/02/2014 ***[Exhibit-B]*** *passed by the Respondent rejecting the objections of the Petitioner and upholding the validity of the impugned reassessment proceedings u/s 147 of the Act for A.Y. 2006-07.*

(c) to call for the records of the proceedings, look into them and be pleased to issue a writ of certiorari or any other appropriate writ, order or direction quashing the impugned notice and order.

(d) ***Pending the hearing and final disposal of this petition*** *to maintain status quo in the matter and ask the Respondent and its subordinates not to take any action or to do anything in furtherance and pursuance of this impugned notice.*

(e) To allow this Petition with cost.

(f) To pass any further or other orders as the Hon'ble Court may deem proper in the interest of justice and in the circumstances of the case.

2. The facts in brief giving rise to this petition are that the petitioner is a charitable institution

registered under the provisions of the Bombay Public Trust Act, 1950. The petitioner is imparting education by running School/Educational Institution. The petitioner filed its return of income for A.Y. 2006-07 on 31.12.2006 declaring deficit of Rs.70,09,380 after claiming expenses incurred for the objects of the Trust. The petitioner also filed its audited annual accounts and tax audit report along with the return of income.

3. It is the case of the petitioner that regular assessment was completed under Section 143(3) of the Income Tax Act, 1961 (for short "the Act 1961") after calling for and detailed scrutiny of the accounts and the documents submitted by the petitioner and after issuing the notice under Sections 142(1) and 143(2) of the Act, 1961.

4. The Assessing Officer passed an assessment order under Section 143(3) of the Act, 1961 accepting the return of income filed by the petitioner vide assessment order dated 31.03.2008. It appears that thereafter, notice under Section 148 of the Act, 1961, dated 27.09.2012 was issued for re-opening of

the assessment for the A.Y. 2006-07. The Assessing Officer recorded the following reasons for re-opening of the assessment :

> *"During the course of assessment proceedings in A.Y.2008-09 it was observed that the asessee had collected fees from the students at the time of Admission and credited the same directly to the Balance Sheet but this amount was not credited to the income and expenditure account. Furthermore, its activities were ascertained to have been carried out on commercial lines and assessed accordingly.*
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> *Moreover, the registration procured u/s.12 AA of the Income Tax Act too had been cancelled by the DIT (E), Ahmedabad w.e.f. 21/03/1990 i.e. from A.Y.1990-91 onwards, vide his order dated 17/03/2011. Hence, the assessee is not eligible for deduction u/s.11 of the I.T. Act and the income of the assessee ought to be computed in normal commercial manner as per the provisions of section 28 to section 44D of the I.T. Act.*
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> *In view of the aforesaid facts, I have reason to believe that in this year too the income of the Trust has escaped form being assessed to tax under the normal commercial manner."*

5. The petitioner filed objections to the Notice for re-opening on 11.11.2013 pointing out as under :

> *"2.3. The assessee-trust begs to submit that the reopening of concluded asstt. is wholly illegal and unlawful for the following reasons:-*
>
> *(i) **Firstly,** you will appreciate that as on the date on which reasons for reopening were recorded, i.e. 18.8.2012,*

the order for cancellation of registration dated 17.3.2011 was not in force because appellate tribunal vide its order dated 3.2.2012 had already restored the registration w.e.f. 21.3.1990. Therefore, no reasonable man could have formed a belief that the assessee was not registered and the exemption u/s. 11 was not admissible.

(ii) ***Secondly,*** *it will also be appreciated that the registration u/s.12(a) or 12AA is not sine qua non for allowing exemption u/s. 11 or 12. The said exemptions are admissible once the conditions provided therein are fulfilled.*

(iii) ***Thirdly,*** *the present case falls under the proviso to Section 147 and as such twin conditions required to be fulfilled for reopening the asstt. validly or legally, (a) there has to be a reason to believe on the part of the AO (b) the said belief should have been formed either for non-filling of return or failure to furnish fully and truly all material facts necessary for assessment. But, in the present case, the perusal of reasons shows that no such failure has been alleged by AO for resorting to reopening of assessment.*

In view of above, we have to request you to kindly drop the reasstt. Proceedings and oblige."

6. The Assessing Officer disposed of the objections raised by the assessee by order dated 11.02.2014, which read thus :

"4. Submission of the assessee is kept on record and not tenable for the following reasons Objections have been raised by the assessee against reopening proceedings mainly on these

grounds:

> *1) It is seen from your reply that, the objections raised by you only relates of registration u/s.12AA of the Trust. In this regard, it is to state that in the reasons recorded for re-opening of the assessment, there were two grounds. The primary reason for reopening relates to the one time admission fees which was credited directly to the Balance Sheet instead of the same is to be credited to the income and expenditure account.*
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> *2) Out of the above two grounds, you are taking shelter of with the grounds relates to the cancellation of registration u/s. 12AA of the Act. The restoration of registration u/s 12AA / 12A which is secondary reason for reopening may not exist anymore but the primary reason still exist and addition in A.Y.2009-10 and 2010-11 were made by the Assessing Officer on the primary reason i.e. one time admission fees credited directly to the Balance Sheet instead of the same is to be credited to the income and expenditure account.*

5. In view of above mentioned facts of the case, the assessee's objections raised against the reopening proceedings so far as the issue relates to the cancellation of registration u/s.12AA is acceptable. But, the one time admission fees income was not taken to Income & Expenditure account which leads to escapement of income for A.Y.2006-07. Accordingly, the objection so raised is hereby disposed off."

7. The Assessing Officer accepted the objections with regard to the issue of cancellation of Registration under Section 12 AA of the Act, 1961

raised by the petitioner, but so far as the reasons for reopening with regard to crediting the fees collected from the students to corpus in the balance-sheet instead of crediting the same to the income and expenditure account was concerned, Notice for re-opening was sustained.

8. The assessee therefore, being aggrieved by the order of rejection passed by the Assessing Officer has preferred this petition with the aforesaid prayers.

9. Mr.S.N. Divatia, the learned advocate for the petitioner submitted that there is no failure on the part of the assessee to declare truly and fully all the material facts at the time of scrutiny of assessment.

9.1. It was submitted that the proviso to Section 147 of the Act would be applicable in the facts of the case as notice for re-opening was issued beyond the period of 4 years from the end of relevant assessment year.

9.2. Learned advocate for the petitioner further invited the attention of the Court to the replies given by the petitioner pursuant to the Notice under Section 142(1) of the Act and Notice under Section 143 (2) of the Act, 1961 during the course of the regular assessment proceedings. It was pointed out that the assessee has furnished the details with regard to the donation received from hundred of the guardians, by Cheques only, and the receipt are issued to them. The said funds are received as the corpus of Trust and therefore, the same was reflected in Schedule VII in Audited Accounts under the Title of "Other Earmarked Funds" in the balance-sheet of the petitioner.

9.3. It was also pointed out that the reply submitted on 24.01.2008 during the course of regular assessment with regard to scrutiny of issue of donation received from students which read thus :

> *"10. The details of addition in various funds A/c is reflected in the extract of account appended hereto. It may be noted that donations towards the corpus of the Trust are not received in excess of Rs. 15,000/- from any of the donor. The consent letter of several donors to appropriate the donation in the several*

*corpuses maintained by the Trust is appended hereto and the same are collectively marked as **Annexure "B".** The extract of Accounts of the corpus of the Trust is appended hereto and are collectively marked as **Annexure "B-1".**"*

9.4. It was therefore, submitted that during the course of the regular assessment, the issues raised by the Assessing Officer for re-opening of the assessment were already scrutinized and therefore, it cannot be said that there is a failure on the part of the assessee to disclose truly and fully all material facts.

10. On the other hand, Mrs. Mauna M. Bhatt, the learned advocate appearing on behalf of the respondent submitted that it is not in dispute that the Assessing Officer has formed the reasons to believe that the income escaped the assessment and that the Assessee in spite of taking fees from the students as donation has credited the same to the balance-sheet, instead of crediting the same to the income and expenditure account.

10.1. It was submitted that as there is a failure on the part of the assessee-petitioner to disclose

fully and truly all material facts during the course of assessment in view of the reasons recorded by the Assessing Officer, the Notice for re-opening was valid and no interference is required to be made by this Court while exercising powers under Article 226 of the Constitution of India.

11. Having heard the learned counsel for the respective parties and having gone through the materials on record, it appears that during the course of regular assessment, the petitioner-assessee has furnished requisite details sought for by the Assessing Officer in the form of details of the donation received by the petitioner as corpus credited to the “Earmarked Funds” being part of the balance-sheet. It is also not in dispute that during the course of the scrutiny assessment, the Assessing Officer has inquired about the donation received by the petitioner, which was forming part of the corpus and thereafter, the assessment order under Section 143(3) of the Act, 1961 was passed.

12. In such circumstances, it cannot be said that there is any failure on the part of the petitioner to

disclose truly and fully all material facts during the course of assessment.

13. The co-ordinate Bench of this Court in the case of **Ganesh Housing Corporation Ltd vs. Dy.Commissioner of Income-Tax, Circle 4 & Anr.** in SCA No.15067 of 2011 rendered on 12.03.2012 has held as under :

> "14. At this stage, we may rather aptly refer to a latest three-judge-bench decision of the Supreme Court in the case of COMMISSIONER OF INCOME TAX VS. KELVINATOR OF INDIA LTD. reported in (2010) 2 SCC 723 where the said court after taking into consideration the effect of Direct Tax Laws (Amendment) Act, 1987 on section 147 made the following observations while dismissing the appeals preferred by the Revenue:
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> > "***5.*** *On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in Section 147 of the Act (with effect from1-4-1989), they are given a go-by and only one condition has remained viz. that where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to*

reopen.

6.** We must also keep in mind the conceptual difference between power to review and power to reassess. **The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, the assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer.

***8.** We quote hereinbelow the relevant portion of Circular No. 549 dated 31-10-1989, which reads as follows:*

"7.2. Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.—A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It

was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended Section 147 to reintroduce the expression 'has reason to believe' in the place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new Section 147, however, remain the same."

(emphasis supplied)

9. *For the aforestated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."*

(Emphasis given by us).

20. In the case of ***CIT VS. EICHER LTD.*** *reported in* ***(2007) 294 ITR 310(DELHI)****, which was also the subject-matter of appeal before the Supreme Court in the case of* ***Commissioner of Income tax vs. Kelvinator of India Ltd****. (supra), Delhi High Court dealt with the similar point as would appear from the following observations quoted below:*

> *"Applying the principles laid down by the Full Bench of this court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the assessee before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessee, then merely because he did not express this in the assessment order, that by itself would*

not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened. On the other hand, if the Assessing Officer did not apply his mind and committed a lapse, there is no reason why the assessee should be made to suffer the consequences of that lapse.

In so far as the present appeal is concerned, we find that the assessee had placed all the material before the Assessing Officer and where there was a doubt, even that was clarified by the assessee in its letter dated November 8, 1995. If the Assessing Officer, while passing the original assessment order, chose not to give any finding in this regard, that cannot give him or his successor in office a reason to reopen the assessment of the assessee or to contend that because the facts were not considered in the assessment order, a full and true disclosure was not made. Since the facts were before the Assessing Officer at the time of framing the original assessment, and later a different view was taken by him or his successor on the same facts, it clearly amounts to a change of opinion. This cannot form the basis for permitting the Assessing Officer or his successor to reopen the assessment of the assessee."

14. In view of above dictum of law the issue of reopening in the facts of the present case is no more res-integra. Therefore, the impugned notice is required to be quashed and set aside, as none of the reasons assigned by the Assessing Officer for re-

opening the assessment was tenable in the eye of law, the conditions precedent to invoke the powers for re-opening assessment as provided in Section 147 of the Act is absent, therefore we find that the Assessing Officer acted illegally and issued Notice of re-assessment on the self same material forming second opinion without having any tangible material to exercise jurisdiction.

15. In view of the foregoing reasons, this petition succeeds and is accordingly allowed. The notice dated 27.09.2012 for re-opening the assessment for A.Y. 2006-07 under Section 148 of the Act, 1961 is hereby quashed and set aside. Rule is made absolute to the aforesaid extent. No order as to costs.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

KUMAR ALOK