

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 17893 of 2018****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE J.B.PARDIWALA****and****HONOURABLE MR. JUSTICE BHARGAV D. KARIA**

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 or any order made thereunder ?	

AMRISHBHAI HASMUKHLAL PARIKH
Versus
INCOME TAX OFFICER WARD 2(1)(3), AHMEDABAD

Appearance:

MR B S SOPARKAR(6851) for the Petitioner(s) No. 1

MRS MAUNA M BHATT(174) for the Respondent(s) No. 1

CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA**and****HONOURABLE MR. JUSTICE BHARGAV D. KARIA****Date : 19/03/2021****ORAL JUDGMENT****(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)**

1. Rule, returnable forthwith. Ms.Mauna Bhatt, the learned Standing Counsel, waives service of notice of rule for and on behalf of the respondent.

2. By this Writ Application under Article 226 of the Constitution of India, the writ-applicant has prayed for

the following reliefs:

“(a) quash and set aside the impugned notice at Annexure-‘A’ to this Petition;

(b) pending the admission, hearing and final disposal of this petition, to stay implementation and operation of the notice at Annexure-‘A’ to this petition and stay further proceedings for assessment for A.Y.2013-14;

(c) any other and further relief deemed just and proper be granted in the interest of justice;”

3. The facts giving rise to this Writ Application may be summarized as under:

3.1) The writ-applicant filed his return of income for the Assessment Year 2013-14 on 30th July, 2013, disclosing the total income at Rs.29,72,118/-. The revised return of income was filed on 26th February, 2014, disclosing the income at Rs.29,72,118/-.

3.2) Thereafter, the case of the writ-applicant was selected for scrutiny assessment and notices dated 23.6.2015, 6.8.2015 and 18.8.2015 respectively under section 142(1) of the Income Tax Act, 1961 (For short “the Act, 1961”) were issued calling upon the writ-applicant to furnish the proof of claims under Chapter-VI of the Act, 1961 with regard to the donation made to the Gujarat Cancer Society and also to furnish a copy of the ledger accounts of Hiramoti Texchem Pvt. Ltd. and Helios & Matherson IT Ltd. regarding the interest paid on capital. The writ-applicant submitted his replies dated 1.7.2015, 17.8.2015 and 1.9.2015 respectively.

3.3) The Assessing Officer passed the assessment order dated 15.10.2015 accepting the returned income. Thereafter, notice under section 148 of the Act, 1961 dated 28.3.2018 came to be issued for reopening calling upon the assessee to show cause why the reassessment should not be carried out as the Assessing Officer had reasons to believe that income had escaped assessment for the assessment year 2013-2014 within the meaning of section 147 of the Act, 1961.

3.4) The reasons recorded by the Assessing Officer, under Section 148(2) of the Act, are as under:

"Reasons recorded u/s. 148(2) of the I.T.Act

The return of income was filed on 30.07.2013 declaring total income of Rs.29,72,118/-. Thereafter, the case was selected for scrutiny and order u/s. 143(3) of the Act was passed on 15.10.2015 assessing the total income at Rs.29,72,118/-.

On verification of the record, the assessee had received and repaid loan from and to Hiramoti Tex Chem P. Ltd. From the records it is observed that the assessee was having 34% shareholding in the Company. From the ledger account of Sh.Amrish H. Parikh in the books of company Hiramoti Tex Chem P. Ltd. it is seen that as on 01.04.2012 the assessee was having credit balance of Rs.9,54,058/- in the books of company. However, on 03.09.2012, there was a debit balance of Rs.64,59,942/-. As the assessee fulfills all the conditions laid down in section 2(22)(e) of the Act, therefore, Rs.64,59,942/- was required to be treated as deemed

dividend in the hands of assessee. But as per provisions of section 2(22)(e) of the Act, amounts to the extent of accumulated profits are treated as deemed dividend. Therefore, following calculations are done:

1. The accumulated profits of company Hiramoti Tex Chem P. Ltd as on 01.04.2012 was Rs.44,65,899/-.
2. Profit of current year- Rs.13,90,434/-.
3. Total turnover upto 03.09.2012-Rs.20,25,30,046/- (including tax as per VAT return).
4. Total turnover for full year- Rs.46,29,94,607/-(including tax)
5. Profit of company as on 03.09.2012 (Rs.13,90,434 x 20,25,30,046/ 46,29,94,607)=Rs.6,08,225/-.

Hence, total accumulated profit of company as on 03.09.2012 was Rs.50,74,123/- (44,65,899 + 6,08,225). Therefore, Rs.50,74,123/- was required to be taxed as deemed dividend in the hands of assessee which was not done.

Further, on verification of the assessment records it is noticed that the assessee had claimed and was allowed deduction u/s. 80GGA of Rs.15,75,000/- (175% of donation made to Gujarat Cancer Soc. Ltd. of Rs.9,00,000/-). As the assessee was earning only Salary income, STCG on sale of shares and other income, deduction u/s. 80GGA was required to be allowed at 100% of the total donation made to Gujarat Cancer Soc. Ltd. not 175% of the donation made. However, the assessee on a later date i.e. on 26.02.2014 revised the return and income shown in original return of Rs.5,64,062/- as other income was received as business income. Thereafter, assessee claimed deduction u/s.35(1)(ii) of the I.T.Act and requested the A.O. to allow 175% deduction. The intention of the assessee to revise the return was to

claim of his business income, the assessee had produced only a statement of Commodity income (unsigned and self-prepared). The assessee failed to produce any other proof such as bills of commodity income or the Dmat Account. Hence, assessee had changed the nature of other income to business income only to avail enhanced deduction, that too without any proof. Further, on verification of the revised return, it is noticed that the assessee did not claimed deduction u/s. 35(1)(ii) in the revised return too. On further verification of revised return it is noticed that the assessee had again claim deduction under Chapter VI-A i.e. the Chapter in which section 80GGA falls. Therefore, deduction at 100% only was allowable as against 175% allowed and as such 75% of deduction was required to be disallowed.

In view of the above, I have reasons to believe that the income chargeable to tax to the extent of Rs.57,49,123/- (Rs.50,74,123/- + Rs.6,75,000/-) has escaped assessment by reason of failure on part of the assessee to disclose fully and truly all material facts necessary for that assessment year. Therefore, this is a fit case for initiating proceedings u/s.147 of the Act for A.Y.2013-14. Accordingly, notice u/s.148 of the I.T.Act is issued for AY 2013-14."

3.5) The writ-applicant filed his objections dated 23rd October, 2018. The objections are as under:

"2) The assessee filed the return of income of AY 2013-14 on 30.07.2013 disclosing income at Rs.29,72,118/-. The return was thoroughly scrutinized by the then Assessing Officer and assessment was framed u/s 143(3) at Rs.29,72,118/-. Thereafter on 28.03.2018 you have issued notice u/s. 147 to reopen the assessment, the reasons for which are supplied

vide letter dated 26.04.2019. The perusal of reasons suggest the following:

i. The assessee received holds substantial shareholding in the company (34%) and the assessee has received Rs.64,59,942/- from the company which is required to be taxed as deemed dividend.

ii. The assessee has revised the return only with intention of claiming higher deduction u/s. 80GGA.

3) It is submitted that the reasons recorded and the consequent notice issued suffer from severe flaws. Firstly it is submitted that the return of AY 2013-14 was scrutinized thoroughly and assessment order was passed u/s.143(3) on 15.10.2015. Therefore this is case of change of opinion once already formed by the then assessing officer which is not allowed. It is further submitted that it is recovered in the reasons only that the assessee has revised the return claiming Rs.5,64,062/- to take benefit of the higher deduction u/s 80GGA. It is submitted that the information regarding such claim was available and was scrutinized by the then Assessing Officer. Once a view is taken on the matter the same cannot be revised. It is further submitted that as stated in the reasons, you want to examine the proof such as bills of commodity income or the demat account. It is submitted that the same amount to fishing and roving inquiry which is also not permissible under law. The Assessee has submitted all the details that were asked for and the assessment was adequately scrutinized. Now the same cannot be relooked in the absence of any new "fresh tangible" material. It is

further submitted that the revision of the income was bonafide. There is nothing on record of your goodself to come to a conclusion (that a prudent man could take) that the revision income was only for the purpose of claiming higher deduction. It is submitted that the reasons are erroneous and no income has escaped assessment.

4) It is further submitted that where transactions between shareholder and company were in nature of current account, provisions of section 2(22)(e) would not be applicable. The case of the assessee is identical to that decided by the High Court of Calcutta in Gayatri Chakraborty [2018] 94 taxmann.com 244 (Calcutta). It is submitted that the assessee has also paid and received interest on such current account transactions with the company. Even the Jurisdictional High Court in GOLDJYOTI POLYMERS (TAX APPEAL NO.455 of 2017) has decided the issue on identical grounds against the revenue. It is therefore submitted that the reasons recorded are erroneous and therefore no income has escaped assessment. (Copy of ledger account showing movement of Funds, Copy of ledger account interest and copy of judgement of Calcutta High Court and Gujarat High Court are attached herewith).

5. It is therefore submitted that the reasons recorded and the subsequent notice issued are bad and illegal and therefore may be dropped at once."

3.6) The objections lodged by the writ-applicant came to be disposed of by the Assessing Officer vide order dated 29th October 2018. The order reads thus:

"3. The objections raised by the

assessee against issue of notice u/s. 148 and re-assessment proceedings have been considered carefully. As per the settled position of law, reasons for re-opening of the assessment have been recorded before issue of notice u/s 148 of the Act, in accordance with the provision of law. The reasons recorded for re-opening assessment were supplied to the assessee. The reasons recorded specifically speak above escapement has elaborately been made. There are clear evidences which show that the case is of escapement of income and therefore the notice u/s. 148 of the Act issued on 30.03.2018 has been issued legally and correctly as per I.T.Act.

4. The issue in question are not at all any subject to review not any change of opinion. The assessee in its objections has stated that the transactions between shareholder and the company were in the nature of current account. This contention of the assessee couldn't be accepted in absence of any underlying fact. By stating so, the assessee has made a vague and general objection. As per Board's Circular no.F.No.279/Misc/140//2015/ITJ dated 12.06.2017, there are certain events/illustrations and examples of trade advances/commercial transactions held to be not covered under section 2(22)(e) of the Act. As stated in the objections, the case of the assessee doesn't fall under any of it.

5. Further reliance is placed on the decision of Hon'ble Kerala HC in the case of CIT Vs. Popular Vehicles Services Ltd. in ITA no.628 of 2009 delivered vide its order dated 07.01.2010, in which the Hon'ble HC has extensively dealt with the explanation 2 to section 147 and has held that scope of section 147 after the amendment is large to cover the situation whereby deduction have been wrongly or excessively granted. At the stage of issue of reopening notice what is

required is 'reason to believe' and not established fact of escarpment of income, therefore reopening of assessment on basis of certain tangible material is valid.

6. In view of the above mentioned facts of the case, the assessee's objections raised against the reopening proceedings are not acceptable as the case warrants scrutiny on the same lines. Accordingly, the objections so raised are hereby disposed off accordingly."

3.7 Being dissatisfied with the order of the Assessing Officer rejecting the objections raised by the writ applicant to reopen the assessment for the assessment year 2013-2014, the writ-applicant is here before this Court with the present Writ Application.

4. Mr. B.S. Soparkar, the learned counsel appearing for the writ-applicant invited the attention of this Court to the details called for by the Assessing Officer during the course of the scrutiny assessment proceedings to point out that in respect of both the issues for which the impugned notice for re-opening is issued, the Assessing Officer at the time of framing the assessment under section 143(3) of the Act, 1961, had raised specific queries and the writ-applicant had answered the same and on being satisfied, the Assessing Officer did not add any income as deemed income while allowing deduction under section 35(1)(ii) of the Act, 1961. Mr. Soparkar further submitted that with regard to the issue of deemed income under section 2(22)(e) of the Act, pursuant to the queries raised by the Assessing Officer at the time of scrutiny assessment, the writ-applicant

had submitted the ledger accounts of Hiramoti Texchem Pvt. Ltd. which indicated continuous movement of funds. Mr. Soparkar has placed reliance upon the decision of the Calcutta High Court in the case of **Commissioner of Income-tax, Kolkatta-1 v. Gayatri Chakraborty** reported in 303 CTR 541 (Calcutta), wherein in the facts of the said case, the mutual transactions went on throughout the previous year and as on the last date of previous year, the accounts were squared off, the Court held that the transactions between the shareholder and the company were in the nature of current account and therefore, the provisions of section 2(22)(e) of the Act, 1961 would not be applicable.

5. Mr. Soparkar would further submit that mere change of opinion is not sufficient to reopen the assessment proceedings in view of the fact that both the issues raised in the reasons assigned for reopening of assessment were already considered during the scrutiny assessment. It is pointed out that three notices were replied by the writ-applicant by furnishing requisite materials on record and considering the same the Assessing Officer took a conscious decision not to add any deemed income or disallow the donation. It is argued that in such circumstances it is now not open to reopen the assessment merely on change of opinion on the same set of facts.

6. Mr. Soparkar further submitted that the revised return filed by the writ-applicant was accepted without raising any objections by the Assessing Officer and

merely stating that a particular inquiry was not undertaken, is not a sufficient ground to reopen the assessment when the issues were otherwise examined and a particular opinion was formed during the course of the scrutiny assessment. Mr. Soparkar invited the attention of this Court to the ledger accounts of Hiramoti Texchem Pvt. Ltd. submitted before the Assessing Officer during the scrutiny assessment to point out that the petitioner had a current account with the said firm reflecting frequent transactions and movement of funds and therefore, the provisions of section 2(22)(e) of the Act, 1961 would not be applicable. It was therefore submitted that the Assessing Officer had rightly not made any addition in the original assessment order.

7. On the other hand, Ms. Mauna Bhatt, the learned senior standing counsel appearing for the Revenue submitted that the assessment is sought to be reopened after taking recourse to all the administrative and legal procedures and after duly recording the reasons for income escaping the assessment. It was further submitted that the record was verified with respect to both the issues and the Assessing Officer being thoroughly satisfied that income has escaped assessment, thought fit to issue the impugned notice.

8. Ms. Bhatt would submit that although the writ-applicant had filed the copy of annual reports, audited Profit and Loss account and balance sheet along with the return of income, yet the requisite, full and true disclosure of all the material facts necessary for

assessment was not disclosed and therefore, the writ-applicant could be said to have failed to disclose his holding in the company as also the accumulated profit received by him resulting into escapement of income chargeable to tax. It was submitted that since there was no business income shown in the original return, the writ-applicant was not eligible for deduction at the rate of 175% of the donation amount under section 35(1)(ii) of the Act, 1961 and the deduction of donation ought to have been restricted upto 100% only. In such circumstances referring to above Ms.Bhatt prays that there being no merit in this writ application the same be rejected.

9. Having heard the learned advocates appearing for the respective parties and having gone through the materials on record, the only question that falls for our consideration is whether we should quash the impugned notice.

10. We are of the view that the impugned notice for reopening could be said to have been issued without there being any tangible material to come to the conclusion that there is escapement of income. There is no live link to form a belief, more particularly, when the Assessing Officer during the course of the original assessment had raised queries with regard to both the issues by issuing notices under section 142(1) of the Act, 1961 which were duly replied by the petitioner.

11. The Assessing Officer, during the course of the regular assessment proceedings, had passed the

assessment order, under Section 143(3) of the Act after due consideration of the replies filed by the writ-applicant, wherein, the details of donation given by the petitioner to the Gujarat Cancer Society Limited has been disclosed together with the photographs of the receipts dated 30th March, 2013, to claim the allowance under Section 35 read with Section 80GGA of the Act.

12. The writ-applicant claimed the deduction under Section 35(1)(ii) of the Act in the revised return dated 26.02.2014, and the assessment order, under Section 143(3) of the Act was passed on 15.10.2012 considering the revised return. Therefore, it cannot be said that the writ-applicant had failed to disclose, truly and fully, all the material facts so as to claim the deduction of 175% by showing the income as the business income.

13. On perusal of the reasons recorded, it appears that the Assessing Officer has changed his opinion with regard to the claim of assessee without considering the provisions of Section 80GGA read with Section 35(1)(ii) which provides deduction in respect of certain donation for the scientific research or rural development to any research association or institution, approved for the purpose of clause (ii) of Sub-section (1) of Section 35 of the Act. The writ-applicant has claimed deduction under Section 35(1)(ii) of the Act and not under Section 80GGA of the Act. This fact is also disclosed by the assessee in the revised return.

14. We may refer to and rely upon the decision of the

Supreme Court in the case of **Commissioner of Income Tax V/s. Kelvinator of India Ltd.**, reported in [2010] 320 ITR 561 (SC), wherein, it is held as under:

"6. On going through the changes, quoted above, made to [Section 147](#) of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment 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 from 1st April, 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 re-open the assessment. Therefore, post-1st April, 1989, power to re-open 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. 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 1st April, 1989, Assessing

Officer has power to re-open, 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 re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 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 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."

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

15. In view of the above dictum of law, when there is no failure on the part of the petitioner-assessee to disclose, truly and fully, material facts, the Assessing Officer cannot reopen the assessment on the basis of "mere change of opinion", as there is no tangible material to come to the conclusion that there is escapement of income from assessment.

16. In the aforesaid view of the matter, we have reached to the conclusion that the impugned notice under Section 148 of the Act for reopening of the assessment is not sustainable in law. The impugned notice is hereby, quashed and set aside. The Writ Application stands allowed. Rule is made absolute with no order as to costs.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

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