

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 16265 of 2019****With****R/SPECIAL CIVIL APPLICATION NO. 16266 of 2019**

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M R ORGANISATION
Versus
INCOME TAX OFFICER

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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

CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA
and
HONOURABLE MR. JUSTICE ILESH J. VORA

Date : 07/01/2021**COMMON ORAL ORDER****(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)**

1. Since the subject matter of both the writ applications is the same and the assessee is also the same, those were taken up for hearing analogously and are being disposed of by this common order.
2. For the sake of convenience, we treat the Special Civil Application No.16265 of 2019 as the lead matter.
3. By this writ application under Article 226 of the Constitution of India, the writ applicant – a partnership firm has prayed for the following reliefs:

“(a) To issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, orders or directions

quashing and setting aside the impugned notice dated 30.03.2019 [Annex.A] issued by the Respondent proposing to reopen the completed assessment of the Petitioner for A.Y. 2012-13 and the order of objection dt.23-7-2019 (Annexure-B) as well as the reassessment order, if any passed in consequence to the impugned notice.

(b) 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 as well as the order of objection dt.23-7-2019 (Annex.-B).

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

(d) To allow this Petition with cost."

4. The subject matter of challenge in this writ application is the impugned notice dated 30.03.2019 (Annexure A to this writ application) issued by the Income Tax Department under Section 148 of the Income Tax Act, 1961 (for short "the Act, 1961") for re-opening of the assessment for the years 2012-2013 as the authority has reason to believe that the income chargeable for the assessment years 2012-13 has escaped assessment within the meaning of Section 147 of the Act, 1961. The reasons assigned for re-opening of the assessment are as under:

"3. The information has been personally analyzed along with all relevant date/documents. From the information received, it is seen that the assessee has booked expenses in the names of various entities such as Sew Commercial Co. Ltd. Saytam Steel Industries, Krishna Industries, Krunal Industries (to name a few) etc. As per the

information, the assessee has also claimed bogus commission expenses.

4. On receipt of the information, necessary verification/inquiry has been made with the return of income filed by the assessee. ITS data available on ITBA/ITD for A.Y. 2012-13. It is seen from the profit and loss account forming part of return of income filed by the assessee that the assessee has claimed huge commission expenses of Rs.85,72,637/- and other expenses of Rs.1,15,26,078/- whereas the sundry creditors reflected in the balance sheet is to the extent of Rs.1,74,17,702/-. These figures disclosed in the profit and loss account and balance sheet buttress the information that the assessee has been inflating its expenses by booking bogus expenses without receiving any actual goods/services.

5. In view of above findings, I have reasons to believe that this is a case where income chargeable to tax has escaped assessment by an amount of more than Rs.1 lakh and it is a fit case for reopening the assessment as the income chargeable to tax has escaped within the meaning of section 147 of the Act.

6. In this case, a return of income was filed for the year under consideration, but no scrutiny assessment u/s. 143(3) of the Act was made. Accordingly, in this case, the only requirement to initiate proceedings u/s. 147 is reason to believe which has been recorded above in above paras. It is pertinent to mention here that in this case, the assessee has filed return of income for the year under consideration, but no assessment as stipulated u/s. 2(4) of the Act was made and the return of income was only processed u/s. 143(1) of the Act. In view of the above, provisions of clause (b) of explanation 2 to Section 147 are applicable to the facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.

7. In this case, more than four year have lapsed from the end of the assessment year under consideration. Hence, necessary sanction to issue notice u/s. 148 of the Act has been obtained separately from the Principal Commissioner of Income Tax-5, Ahmedabad, as per the provisions of Section 151 of the Act."

5. It appears that the writ applicant lodged its objections as under:

"1. On the basis of which material /data you have relied to say that various entities such as Sew Commercial Co. Ltd. Satyam Steel Industries, Krishna Industries, Krunal Industries are not genuine ?

2. By merely saying assessee has been inflating its expenses by booking bogus expenses without receiving any actual goods/service is not valid ground for re-opening of case.

3. How you can you say without any evidence or material that assessee has claimed bogus commission expenses or other expenses ?"

6. The objections came to be disposed of vide order dated 23.07.2019 holding as under:

"3.1 During the course of inquiries conducted by the Investigating Wing of the Income Tax Department, it was found that the assessee has booked bogus expenditure in the name of various bogus entities such as Sew Commercial Co., Satyam Steel Industries, Krishna Industries, Krunal Industries etc. From verification of return of income also revealed that the assessee has claimed huge commission and other expenses and most of such expenses have shown as sundry creditors in the balance sheet. It was on the basis of such information received and data reflected in the return of income, the Assessing Officer has formed a prima facie satisfaction regarding existence of 'live link' in respect of the information received. Therefore, there was tangible material available with the Assessing Officer to prima facie form an opinion/belief that the income chargeable to tax has escaped assessment. In the wake of information received by the Assessing Officer, when the Assessing Officer formed a belief that the assessee had booked bogus expenditure, the Assessing Officer has rightly assumed the jurisdiction of initiating the reassessment proceedings. It is also pertinent to mention here that in the objections, the assessee has not denied

booking of expenditure against the names mentioned in the reasons. In the present case, since the necessary conditions to reopen the assessment have been duly fulfilled, sufficiency of the reasons is not to be gone into at this stage. Reliance is placed on the recent decision of Hon. Gujarat High Court in **Aaspas Multimedia Ltd. Vs. DCIT [2017] 249 Taxman 568**. At the time of recording of reasons for reopening the assessment, the Assessing Officer is expected to form only a prima facie opinion or belief regarding the applicability of the provision in question. At that stage, it was not necessary for AO to conclusively establish that his belief or opinion is correct even on the merits. At the time of recording the reasons, the AO had strong prima facie opinion that the income chargeable to tax has escaped assessment. It being a case where return was accepted under section 143(1) without scrutiny, the only requirement to be fulfilled for issuing notice for reopening was that the Assessing Officer must have reason to believe that income chargeable to tax had escaped assessment. IN this case, as per the information received, the assessee has booked bogus expenditure in the name different parties. In the objections raised, the assessee itself has not denied transactions with such entities.

3.2 In view of the above facts, the AO has rightly formed a prima-facie opinion that the income chargeable to tax has escaped assessment after independently verifying all the details of available on record. Thus, it is on the basis of tangible material available with the Assessing Officer, he has formed a prima facie opinion/belief that the income chargeable to tax has escaped assessment. In the present case, since the necessary conditions to reopen the assessment have been duly fulfilled, sufficiency of the reasons is not to be gone into at this stage. Reliance is placed on the decision of Hon. Gujarat High Court in **Aaspas Multimedia Ltd. Vs. DCIT [2017] 249 Taxman 568**.

7. The Revenue has filed affidavit-in-reply opposing this writ application making the following averments:

"5.2 with reference to para 3.6 it is submitted that eh same are baseless and contrary to the facts on record. The petitioner has made false apprehensions to justify the writ petition filed by abandoning the statutory remedies available. As can be seen from the documents furnished by the petitioner as part of the petition, the notice under Section 148 of the Act was issued on 30.03.2019; the petitioner – assessee has filed the return of income in response to the notice on 19.04.2019; the reasons recorded by the Assessing Officer for reopening the assessee was provided on 16.05.2019; the petitioner assessee raised objections against reopening vide email received on 17.06.2019; the objections raised by the petitioner was disposed on 23.07.2019; notice under section 143(2) of the Act along with notice under Section 142 (1) of the Act calling for details and information were issued on 14.10.2019. Thus, it can be seen that there was no undue haste on part of the respondent assessing Officer in finalizing the assessment proceedings. From the time gap between every step in the proceedings, it cannot be said that the Assessing Officer was about to finalize the proceedings without allowing sufficient opportunity to the petitioner. On the other hand, the petitioner is trying to avoid the legally initiated proceedings and till date has not furnished the details called for under section 142(1) of the Act. ON perusal of the annexure to notice under section 142(1) of the Act dated 14.10.2019, it can be seen that the petitioner assessee was not show-caused about any proposed additions, but only asked to furnish certain details in connection with the facts disclosed in the return of income, and now the assessee has filed part-submission in this office on 25.10.2019 through online ITBA Portal /module vide letter undated. Copy of notice under Section 142(1) of the Act dated 14.10.2019 along with its annexures and reply filed vide submission/forwarding letter are annexed herewith as Annexure-A & B.

5.3 With reference to para 4.1 to 4.4, it is submitted that the petitioner assessee has alleged that the notice issued under Section 148 of the Act and order disposing of the objections raised are patently illegal, bad in law and without jurisdiction. The assessee has also quoted various conditions required to be satisfied by the Assessing Officer while reopening the assessment made u/s. 143 (3) of

the Act.

The allegations of the petitioner assessee in these paras are denied. In para 4.2, the petitioner has totally misplaced in referring to various conditions which are to be satisfied while reopening the assessment made u/s. 143 (3) of the Act. It is an admitted and undisputed fact that the case of the petitioner for assessment year 2012-13 was not subjected to scrutiny assessment under section 143 (3) of the Act, but the returned income was accepted u/s. 143(1) of the Act without scrutiny of the claims made in the return. Thus, the main condition precedent for reopening in the case of the petitioner assessee is that the Assessing Officer should have reason to believe that income chargeable to tax has escaped assessment. Such belief was formed by the Assessing Officer on the basis of specific information received through the Investigating Wing that the assessee had suppressed its taxable income by booking bogus expenditure against different parties without receipt of any goods or providing any services. Such information was considered by the Assessing Officer vis-a-vis the immediate verifiable source i.e. facts disclosed by the petitioner in the return of income and formed a prima facie velied that income chargeable to tax has escaped assessment. Therefore, tangible material was available with the AO to form an opinion that the income chargeable to tax has escaped assessment for the year under consideration. Thus, the case of petitioner was covered under the provisions of Clause (b) of Explanation 2 to Section 147 of the Act. The respondent rely on the order dated 23.07.2019 passed for disposing of the objections raised by the assessee at Annexure-C as annexed above.

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It is pertinent to mention here that in catena of judgments, various courts have held that for the purpose of re-opening all that is required is recording of reasons. The final ascertainment of the quantum or establishment of income and the source for the escaped income etc. need not be conclusively proved in the reasons recorded. A bona fide act done by the Assessing Officer which has legal sustainability would very much be adequate for re-opening of the assessment. The petitioner has relied on judgments of various courts. However, the respondent place reliance on the judgments mentioned in the order

dated 23.07.2019 passed by the respondent for disposing of the objection of the petitioner – assessee, more particularly the judgment of Hon. Apex Court in ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 291 ITR 500.

5.4 With reference to para 4.5 to 4.8, it is submitted that as per the information received through the Investigating Wing of the Income Tax Department, it was found that the assessee had booked bogus expenditure in the name of various bogus entities such as Shreeji Trading Co. Harsh Industries, Satyam Steel, Evershine Industries, Mayur Textile Industries, Krunal Industries etc. The information was regarding booking of bogus expenses without receipt of any goods or services and verification of return of income also revealed that the assessee had claimed huge expenses and a good part of such expenses was shown as Sundry Creditors in the balance sheet. It was on the basis of such information received and date reflected in the return of income, that the Assessing Officer had formed a prima facie satisfaction regarding existence of 'live link' in respect of the information received. Therefore, there was tangible material available with the Assessing Officer to prima facie form an opinion/belief that the income chargeable to tax has escaped assessment.

It is also pertinent to mention here that either in the objections raised or in the present petition, the petitioner assessee has not denied booking of expenditure against the names mentioned in the reasons. The final ascertainment of the quantum or establishment of income that escaped income etc. need not be conclusively proved in the reasons recorded. It being a case where return was accepted under section 143 (1) of the Act without scrutiny, the only requirement to be fulfilled for issuing notice for reopening was that the Assessing Officer must have reason to believe that the income chargeable to tax had escaped assessment."

8. Mr. S.N.Divatia, the learned counsel appearing for the writ applicant vehemently submitted that the decision to re-open the assessment is merely on a doubt expressed by the authority that the writ applicant has been suppressing its taxable income by

booking bogus expenditures and by making payments against the bills raised by different parties without the receipt of any goods or services. He would submit that there is no material worth the name to indicate any of such bogus transactions with the entities namely Sew Commercial Co. Ltd., Satyam Steel Industries, Krishna Industries and Krunal Industries. He would submit that by merely alleging that the writ applicant has been inflating its expenditure by booking bogus expenses without receiving any actual goods/services is not a valid ground for the re-opening of the assessment. He would argue that there is not an iota of materials to indicate that the assessee had claimed bogus commission expenses or other expenses. Mr. Divatia in support of his submissions has placed reliance on the decisions of this Court rendered in the case of (1) **Pushpak Bullion Pvt Ltd. Vs. Deputy Commissioner of Income Tax- Circle 3** [SCA/18513/2015, decided on 27.06.2016] and **Varshaben Sanatbhai Patel Vs. Income Tax Officer & Anr.** [SCA/12873 to 12875/2014, decided on 13.10.2015, reported in (2016) 282 CTR Reports].

9. On the other hand, Mrs. Mauna M. Bhatt, the learned Sr. Standing Counsel appearing for the Revenue has vehemently opposed this writ application. She would submit that, Section 147 of the Act authorizes and permits the Assessing Officer to assess or reassess the income chargeable to tax, if he has reason to believe that income for any assessment year has escaped assessment. She would submit that the word "reason" in the phrase "reason to believe" would

mean the 'cause' or 'justification'. If the Assessing Officer has a cause or justification to know or suppose that the income has escaped assessment, it can be said to have "reason to believe" that an income has escaped assessment. She further submits that, the said expression cannot be read or understood to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. She further submits that in the case on hand, there was no scrutiny assessment under Section 143(3) of the Act and only an intimation under Section 143(1) of the Act was issued. She pointed out that the belief formed by the Assessing Officer is on the basis of the specific information received through the Investigation Wing. The Investigation Wing has informed that the assessee has suppressed its taxable income by booking bogus expenses against different parties without receipt of any goods or providing any services. She would argue that some tangible materials could be said to be before the Assessing Officer in the form an information that the income chargeable to tax has escaped assessment for the year under consideration. She would argue that the case of the writ applicant could be said to be covered under the provisions of the Clause (b) of Explanation 2 to Section 147 of the Act.

10. In such circumstances referred to above, Mrs. Mauna Bhatt submits that, their being no merits in this writ application, the same may be rejected.

11. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is, whether the decision to re-open the assessment for the year under consideration is justified ? The following principles of law are discernable from the various decisions of the Supreme Court and this Court on the subject of reopening of the assessment under Section 147 of the Act, 1961 :

"(i) The Court should be guided by the reasons recorded for the reassessment and not by the reasons or explanation given by the Assessing Officer at a later stage in respect of the notice of reassessment. To put it in other words, having regard to the entire scheme and the purpose of the Act, the validity of the assumption of jurisdiction under Section 147 can be tested only by reference to the reasons recorded under Section 148(2) of the Act and the Assessing Officer is not authorized to refer to any other reason even if it can be otherwise inferred or gathered from the records. The Assessing Officer is confined to the recorded reasons to support the assumption of jurisdiction. He cannot record only some of the reasons and keep the others upto his sleeves to be disclosed before the Court if his action is ever challenged in a court of law.

(ii) At the time of the commencement of the reassessment proceedings, the Assessing Officer has to see whether there is prima facie material, on the basis of which, the department would be justified in reopening the case. The sufficiency or correctness of the material is not a thing to be considered at that stage.

(iii) The validity of the reopening of the assessment shall have to be determined with reference to the reasons recorded for reopening of the assessment.

(iv) The basic requirement of law for reopening and assessment is application of mind by the Assessing Officer, to the materials produced prior to the reopening of the assessment, to conclude

that he has reason to believe that income has escaped assessment. Unless that basic jurisdictional requirement is satisfied—a postmortem exercise of analysing the materials produced subsequent to the reopening will not make an inherently defective reassessment order valid.

(v) The crucial link between the information made available to the Assessing Officer and the formation of the belief should be present. The reasons must be self evident, they must speak for themselves.

(vi) The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. To put it in other words, something therein, which is critical to the formation of the belief must be referred to. Otherwise, the link would go missing.

(vii) The reopening of assessment under Section 147 is a potent power and should not be lightly exercised. It certainly cannot be invoked casually or mechanically.

(viii) If the original assessment is processed under Section 143(1) of the Act and not Section 143(3) of the Act, the proviso to Section 147 will not apply. In other words, although the reopening may be after the expiry of four years from the end of the relevant assessment year, yet it would not be necessary for the Assessing Officer to show that there was any failure to disclose fully or truly all the material facts necessary for the assessment.

(ix) In order to assume jurisdiction under Section 147 where assessment has been made under sub-section (3) of section 143, two conditions are required to be satisfied;

(i) The Assessing Officer must have reason to believe that the income chargeable to tax has escaped assessment;

(ii) Such escapement occurred by reason of failure on the part of the assessee either (a) to make a return of income under section 139 or in response to the notice issued under sub-section (1) of Section 142 or Section 148 or (b) to disclose fully and truly all the material facts necessary for his assessment for that purpose.

(x) The Assessing Officer, being a quasi judicial authority is expected to arrive at a subjective satisfaction independently on an

objective criteria.

(xi) While the report of the Investigation Wing might constitute the material, on the basis of which, the Assessing Officer forms the reasons to believe, the process of arriving at such satisfaction should not be a mere repetition of the report of the investigation. The reasons to believe must demonstrate some link between the tangible material and the formation of the belief or the reason to believe that the income has escaped assessment.

(xii) Merely because certain materials which is otherwise tangible and enables the Assessing Officer to form a belief that the income chargeable to tax has escaped assessment, formed part of the original assessment record, per se would not bar the Assessing Officer from reopening the assessment on the basis of such material. The expression "tangible material" does not mean the material alien to the original record.

(xiii) The order, disposing of objections or any counter affidavit filed during the writ proceedings before the Court cannot be substituted for the "reasons to believe."

(xiv) The decision to reopen the assessment on the basis of the report of the Investigation Wing cannot always be condemned or dubbed as a fishing or roving inquiry. The expression "reason to believe" appearing in Section 147 suggests that if the Income Tax Officer acts as a reasonable and prudent man on the basis of the information secured by him that there is a case for reopening, then Section 147 can well be pressed into service and the assessments be reopened. As a consequence of such reopening, certain other facts may come to light. There is no ban or any legal embargo under Section 147 for the Assessing Officer to take into consideration such facts which come to light either by discovery or by a fuller probe into the matter and reassess the assessee in detail if circumstances require.

(xv) The test of jurisdiction under Section 143 of the Act is not the ultimate result of the inquiry but the test is whether the income tax officer entertained a "bona fide" belief upon the definite information presented before him. Power under this section cannot be exercised on mere rumours or suspicions.

(xvi) The concept of "change of opinion" has been treated as a built in test to check abuse. If

there is tangible material showing escapement of income, the same would be sufficient for reopening the assessment.

(xvii) It is not necessary that the Income Tax Officer should hold a quasi judicial inquiry before acting under Section 147. It is enough if he on the information received believes in good faith that the assessee's profits have escaped assessment or have been assessed at a low rate. However, nothing would preclude the Income Tax Officer from conducting any formal inquiry under Section 133(6) of the Act before proceeding for reassessment under Section 147 of the Act.

(xviii) The "full and true" disclosure of the material facts would not include that material, which is to be used for testing the veracity of the particulars mentioned in the return. All such facts would be expected to be elicited by the Assessing Officer during the course of the assessment. The disclosure required only reference to those material facts, which if not disclosed, would not allow the Assessing Officer to make the necessary inquiries.

(xix) The word "information" in Section 147 means "instruction or knowledge derived from the external source concerning the facts or particulars or as to the law relating to a matter bearing on the assessment. An information anonymous is information from unknown authorship but nonetheless in a given case, it may constitute information and not less an information though anonymous. This is now a recognized and accepted source for detection of large scale tax evasion. The non-disclosure of the source of the information, by itself, may not reduce the credibility of the information. There may be good and substantial reasons for such anonymous disclosure, but the real thing to be looked into is the nature of the information disclosed, whether it is a mere gossip, suspicion or rumour. If it is none of these, but a discovery of fresh facts or of new and important matters not present at the time of the assessment, which appears to be credible to an honest and rational mind leading to a scrutiny of facts indicating incorrect allowance of the expense, such disclosure would constitute information as contemplated in clause (b) of Section 147.

(xx) The reasons recorded or the material available on record must have nexus to the subjective opinion formed by the A.O. regarding the escapement of the income but then, while

recording the reasons for the belief formed, the A.O. is not required to finally ascertain the factum of escapement of the tax and it is sufficient that the A.O had cause or justification to know or suppose that the income had escaped assessment [vide Rajesh Jhaveri Stock Brokers (P.) Ltd.'s case (supra)]. It is also well settled that the sufficiency and adequacy of the reasons which have led to the formation of a belief by the Assessing Officer that the income has escaped the assessment cannot be examined by the court.

12. Having regard to the materials on record, it cannot be said that there is total non-application of mind on the part of the Assessing Officer while recording the reasons for re-opening of the assessment. It also cannot be said that his conclusion was merely based on the observations and information received from the Investigation Wing as the Assessing Officer could be said to have applied his mind to the same. The Assessing Officer could not be said to have merely concluded without verifying the fact that it is the case of re-opening of the assessment.

13. We do not find merit in the submission of Mr. Divatia, the learned counsel appearing for the writ applicant that the contents of the reasons recorded by the Assessing Officer for re-opening of the assessment is merely an introduction to the investigation conducted by the Investigation Wing, the sum-up of inquiry of the investigation wing or the information received from the Investigation Wing etc.

14. We have examined the belief of the Assessing Officer to a limited extent to look into whether there was sufficient or any tangible materials available on

the record for the Assessing Officer to form the reasonable belief and whether there was 'live link' existing of the material and the income chargeable to tax that escaped assessment. The case on hand is not one, where it can be argued that the Assessing Officer on absolutely vague or unspecific information, initiated the proceedings of re-assessment without taking pains to form his own belief in respect of such materials.

15. In overall view of the matter, we are convinced that we should not interfere in this matter. In the result, present writ application fails and is hereby rejected.
16. In view of the above, connected writ application i.e. Special Civil Application No.16266 of 2019 also fails and is hereby rejected. Notice in both the writ applications stand discharged. Ad-interim relief, granted earlier, stand vacated.

THE HIGH COURT
OF GUJARAT

(J. B. PARDIWALA, J)

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(ILESH J. VORA, J)

SUCHIT