

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 21929 of 2019**

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NISHANT VILASKUMAR PAREKH
Versus
THE INCOME TAX OFFICER WARD 1(3)

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Appearance:
MR TUSHAR HIMANI, LD SENIOR ADVOCATE WITH MS VAIBHAVI K
PARIKH(3238) for the Petitioner(s) No. 1
MRS MAUNA M BHATT(174) for the Respondent(s) No. 1

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

Date : 13/05/2021

ORAL ORDER
(PER : HONOURABLE MR. JUSTICE ILESH J. VORA)

1. This writ application was notified for hearing before this Bench on 15th March, 2021 along with the allied writ applications filed by the very same writ applicant. We may clarify that the only distinguishing feature in the present writ application and the other Batch of the writ applications is that the present matter relates to scrutiny assessment under Section 143(3) of the Act, whereas the other matters are with respect to Section 143(1) of the Act. The present writ application was not to be disposed of along with the other writ applications having regard to the distinguishing feature noted above. However, inadvertently, the very same order as passed in the other cognate writ applications was transferred in the computer. The concerned stenographer was confronted in this regard and he offered his explanation stating that inadvertently the order in the present writ application also came to be

transferred and that too without obtaining the signatures of the judges on the order. It appears that since the order came to be inadvertently transferred, the Revenue also obtained the certified copy of the same.

2. In fact, the present writ application was to be reheard on certain issues and when the same came to be notified once again for rehearing, the aforesaid fact came to our notice.
3. In such circumstances, referred to above, the present writ application was once again notified for hearing on 11th May, 2021 and was heard for some time. Thereafter, it was once again ordered to be notified today, i.e, on 13th May, 2021. We once again gave an opportunity of hearing to Mr. Tushar Hemani, the learned senior counsel appearing for the writ applicant and Mr. M.R. Bhatt, the learned senior counsel appearing for the Revenue and concluded the hearing.
4. By filing this writ application under Article 226 of the Constitution of India, the writ applicant, seeks to challenge the Notice dated 26.03.2019, issued by the respondent under Section of the Income Tax Act, 1961 ('the Act' for short), seeking to reopen the writ applicant's income tax assessment for the A.Y. 2012-13.
5. The writ applicant being individual assessee, filed return of income on 25.03.2013, declaring total income of Rs12,26,170/-. The assessee sold 40,000/- shares of Tuni Textiles Limited and earned long term capital gain of Rs.35,72,261/- and claimed it as 'exempt income' under Section 10(38) of the Act. The case of the assessee was selected for scrutiny assessment and after considering the various details furnished by the assessee, the

Assessing Officer had passed assessment order under Section 143 of the Act, vide order dated 30.10.2014.

6. The Assessing Officer, reopened the assessment under Section 147 of the Act by issuing impugned notice dated 26.03.2019 under Section 148 of the Act. The writ applicant filed return of income in response to the notice and requested the respondent to supply copy of the reasons for reopening and same was supplied vide communication dated 22.04.2019. The writ applicant vide letter dated 13.05.2019, raised objections and same came to be disposed of by the revenue vide order dated 11.10.2019.
7. The Assessing Officer before issuing the notice has recorded the following reasons for reopening of the assessment.

“Reasons recorded :

1. *Brief details of the Assessee: Assessee has filed the Return of income for A.Y. 2012-13 declaring gross total income at Rs 1226170/-on 25-03-2013.*

2. *Brief details of information collected/received by the AO:The information in respect of the penny stock transaction made in FY 2011-12 was made by the assessee as per AIMS module ITS/ITBA data available with this office. The said scrips are found to be penny stocks and has been used by beneficiaries (seller of shares) to launder money in the garb of LTCG while claiming the exemption u/s.10(38) of the I.T. Act.*

3. *Analysis of information collected/ received :As per the penny stock transaction data available with this office, the assessee has sell 40000 penny stock shares of TUNI TEXTILE Ltd (scrip code 531411) and as per AIMS module in ITS data worth Rs. 3540000/- during F.Y.2011-12 relevant to A.Y.2012-13. The assessee has claimed exempt LTCG of Rs.3438816/- in the return of income. The share price movement in the captioned scrip was seen from public domain and observed that there is share price rise which is prima facie not supported by financial fundamentals of the scrip. Normally, the price manipulation is done by creating a syndicate by the promoters, brokers, managers, controllers etc. and the price of such shares is raised abnormally high to show fictitious LTCG.*

4. *Enquiries made by the AO as sequel to Information collected/*

received : As per AIMS module in ITS/ITBA data available with this office, the assessee has made penny stock transaction in FY 2011-12 and sell TUNI TEXTILE Ltd (scrip code -531411) and the assessee has declared gross total income return of income at Rs. 1226170/- only. Assessee has claimed Exempt income of LTCG at Rs.348816/- but no transaction details have been furnished which shows that the assessee has availed accommodation entry to the tune of sale consideration received on sale of such shares by way of entering into dubious transactions in penny stock scrip. In view of the facts discussed above, I have reason to believe that income of Rs. 3540000/- chargeable to tax has escaped assessment, within the meaning of section 147 of the I.T. Act, 1961 for A.Y.2012-13 by reason of failure on the part of the assessee to disclose fully and truly all material facts relevant to the assessment.

5. Findings of the AO: Assessee has filed the Return of income for A.Y.2012-13 declaring gross total income at Rs. 1226170/- and as per AIMS module the assessee has made transaction of penny stock. Accordingly, the only requirement to Initiate proceeding u/s.147 is reason to believe which has been recorded above paras.

6. Basis of forming reason to believe and details of escapement of income :As the transaction is of penny stock of Rs 3540000/- and the assessee has filed return of income for year under consideration but no assessment as stipulated u/s.2(4) of the Act was made and the return of Income processed only u/s. 143(1) of the I.T. Act. Hence, I have reason to believe that income chargeable to tax of Rs. 3540000/- has escaped assessment within the meaning of section 147 of the I.T. Act. Hence It is fit case for re-opening the assessment under section 147 of the Income Tax Act 1961 for the A. Y. 2013-14. In view of the above, the provisions of clause (b) of Explanation 2 to Section 147 are applicable to facts of this case and the assessment year under consideration, it deemed to be a case where Income chargeable to tax has escaped assessment.

7. Escapement of Income chargeable to tax :The transaction is of penny stock of Rs 3540000/- and the assessee has filed return of income for year under consideration but no assessment as stipulated u/s.2(4) of the Act was made and the return of Income was processed only u/s. 143(1) of the IT. Act. Hence, I have reason to believe that income chargeable to tax of Rs. 3540000/- has escaped assessment within the meaning of section 147 of the I. T. Act. Hence It is fit case for reopening the assessment under section 147 of the Income tax Act, 1961 for the A. Y. 2013-14. In view of the above, the provisions of clause (b) of Explanation 2 to Section 147 are applicable to fact of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.

8. Applicability of the provisions of section 147/151 of the facts of the case:NA

In this case more than four years have lapsed from the end of

assessment year under consideration. Hence necessary sanction to issue notice u/s. 148 has been obtained separately from Principal Commissioner of Income -tax as per the provisions of section 151 of the Act.”

8. The writ applicant raised the objections against the issuance of impugned notice and initiation of the reassessment proceedings, mainly on the following grounds :

- i. Lack/absence of valid sanction under Section 151 of the Act.
- ii. The reasons for reopening factually incorrect;
- iii. No ‘reason to believe’ that income chargeable to tax has escaped assessment;
- iv. No live nexus between the information received and material gathered from the different sources.
- v. Reopening is not permissible for proving and/or fishing inquiry or investigation without their being a specific findings as to escape of income;
- vi. Reopening is based on borrowed satisfaction.
- vii. Reopening is beyond a period of 4 years and there is no failure on the part of the writ applicant as to full and true disclosure
- viii. Reopening based on change of opinion.

9. Being aggrieved by the order of disposal of the objections, against the notice for reopening of the assessment, the writ applicant has come up before this Court by filing the present writ applicant.

10. We have heard learned Senior Counsel Mr. Tushar Hemani, assisted by Ms. Vaibhavi Parikh, the learned counsel appearing for the writ applicant and Mr. Manish Bhatt, the learned Senior Counsel assisted Mr. Karan Sangani, the learned advocate appearing for the revenue.

11. Mr Tushar Hemani, the learned Senior Counsel appearing for the writ applicant, raised the following contentions:

- a. It was submitted that the impugned notice is bad in law and without jurisdiction because the conditions precedent for reopening under Section 147 of the Act are not satisfied;
- b. It was submitted that, reasonable belief as contemplated under Section 147 /148 of the Act must be that of an honest and reasonable person based upon reasonable ground and it should not be based on some suspicious and vague reason. Whereas, in this case, the reasons are vague and do not reveal any income having escaped assessment and furthermore, reasons recorded made it clear that, this is a case of borrowed satisfaction without any independent application of mind.
- c. It was further submitted that, in case of reopening beyond period of 4 years, it is mandatory to obtain sanction from the competent Authority as provided under Section 151 of the Act. Whereas, in this case, the sanction as required under Section 151 of the Act before issuance of the notice was not obtained by the Assessing Officer. Thus, the impugned notice on this ground required to be quashed and set aside.
- d. It was submitted that, there is no independent application of mind on the part of the Assessing Officer while recording the reasons for reopening and that merely placing reliance on the materials provided by the Investigation Wing for recording the reasons is impermissible. In this case, the Assessing Officer failed to record an independent finding as to how income has escaped assessment on a proper application of mind.

- e. It was submitted that there was no link between the information received and formation of opinion that the income has escaped assessment.
- f. It was further submitted that, the affidavit-in-reply filed by the revenue, the revenue seeks to supplement the reasons recorded by the Assessing Officer which cannot sustainable in law.
- g. It was submitted that the Assessing Officer has merely presumed that the transactions entered into by the writ applicant in the scrip in question is a penny stock transaction, which cannot be a legal ground to reopen the assessment for the year under consideration.
- h. It was contended that at the time of framing the assessment under Section 143(3) of the Act all the necessary particulars had been furnished to Assessing Officer, who while issuing notice under Section 142(1) of the Act, had specifically called upon the writ applicant to furnish the details in respect of alleged transaction. Under the circumstances, the Assessing Officer has framed the original assessment and did not make any addition with regard to long term capital gain. Thus, in view of the aforesaid facts, now it is not open for the Assessing Officer to change that opinion and take a different view based on the very same set of facts and information.
12. In view of the aforesaid contentions, the learned counsel submitted that reopening of the assessment is, therefore, without jurisdiction and hence, the impugned notice deserves to be quashed and set aside.
13. In support of the aforesaid submissions, the learned Senior

Counsel Mr. Tushar Hemani has relied upon the following decisions:

- i. Principal Commissioner of Income Tax Vs. Smt. Krishna Devi (Delhi High Court, ITA 125 of 2020 decided on 15.01.2021)
 - ii. Prashant S. Joshi Vs. Income Tax Officer (2010) 189, taxmann 1(Bom)
 - iii. Gujarat Lease Finance Ltd. Vs. Deputy Commissioner of Income Tax (2013) 36 taxmann.com.359 (Guj)
 - iv. Krishna Metal Industries Vs. HM Algotar (1997) 225 ITR 853, Gujarat
 - v. N.B. Bhatt Inspecting Asst. Commissioner of Income Tax Vs. I.B.M. World Trade Corporation (1995) 216 ITR 811, Bom.
 - vi. Hindustan Lever Limited Vs. R.B. Wadkar (2004) 137 taxman.479 (Bom) Krupesh Ghanshyambhai Thakkar Vs. Dy. Commissioner of Income Tax, (2017) 77 taxmann.com. 293 (Guj.)
14. On the other hand, learned Senior Counsel Mr. Manish Bhatt, vehemently opposed the writ application, contending that the Assessing Officer was in receipt of information from the Investigation wing I&CI wing through AIMS Module of the ITBA, that the writ applicant had sold 40,000 penny stock shares of Tuni Textiles Ltd., worth of Rs.35,72,261/- during A.Y 2012-13 and after in depth investigation into the transaction of the scrip of Tuni Textiles Ltd., it was found that the transaction was penny stock and the assessee had availed accommodation entry to the tune of sale consideration received on sale of such shares by way of entering into dubious transactions in penny stock scrip. In this background of the facts, the writ applicant is the beneficiary of the accommodation entries of long term capital gain on penny stock transactions and therefore, the Assessing Officer has reasons to believe that the income chargeable to tax has escaped assessment. Mr. Bhatt placed reliance upon the decision of this Court in the

case of *Purvi Snehalbhai Pachhigar Vs. Asst. Commissioner of Income Tax, (2019) 101 Taxman.com.393,* to submit that, in a similar set of facts, this Court had dismissed the petition challenging the notice issued under Section 148 of the Act.

It was submitted by the learned counsel Mr. M.R. Bhatt that the principle of change of opinion would not be applicable as the information with regard to transactions being received after assessment proceedings and same was not available at the stage of previous proceedings.

15. Mr. Manish Bhatt, learned Senior Counsel for the revenue submits that there being no merits in the writ application, the same deserves to be dismissed.

16. Having heard the learned counsel for the respective parties and having gone through the materials on record, the only question falls for our consideration is that, whether the revenue is justified in reopening the assessment for the year under consideration?

17. It is settled position of law that Section 147 of the Act empowers the Assessing Officer, if he has reasons to believe that, any income chargeable to tax has escaped assessment, to assess or reassess such income or recompute any allowance. This power is subject to the provisions of Section 148 to 153 of the Act.

18. A plain reading of reasons recorded reveals that, the case of the assessee is reopened under Section 147 of the Act, since the information was received as per AIMS module that as per the penny stock transaction data, the assessee had sold 40000 shares

of Tuni Textile Ltd., for the consideration of Rs.35,72,261/-. After receiving the information, the Assessing Officer made enquiries and gathered the information of the assessee and noticed that, the shares sold by the assessee are penny stock. The Assessing Officer has observed that, the transactions with the Tuni Textile Ltd. being a penny stock transactions, he has reason to believe that the income of Rs.35,40,000/- chargeable to tax has escaped assessment. While forming the opinion with regard to income has escaped assessment, the Assessing Officer has noticed that the price rise in the share of Tuni Textiles Ltd., for the relevant year had not been supported by financial fundamental of scrip and there was a manipulation by group of syndicate like promoters, brothers and controllers who played major role in rising the price for fictitious long term capital gain and the assessee has availed accommodation of entry to the tune of sale consideration received on sale of such shares by way of entering into dubious transaction in penny stock scrip.

19. It appears that, in the affidavit in reply filed by the revenue, it has been stated that, Principal Director of Income Tax (Inv) Kolkata, had undertaken the accommodation entry of long term capital gain, and identified large number of beneficiaries who had availed huge amount of bogus entries of LTCG and identified 64811 beneficiaries involving bogus LTCG amounting Rs.38000 crores. In reply affidavit, the revenue has highlighted the modus operandi of the business of penny stocks and further pointed out that the company involved in this case i.e. Tuni Textile Ltd., was having market price of share around Rs.32/- on 26.09.2011 and thereafter, by rigging the price was reached upto Rs.268.75 ps in 13 months and was again fall down at Rs.23/- in mid March,

2013.

20. The learned counsel appearing for the writ applicant raised the contention that, the facts mentioned in the affidavit in reply clearly proves that, the respondent seeks to supplement the reasons recorded by the Assessing Officer, which is not permissible in law. On the other hand, the learned counsel for the revenue would submit that, the attempt on the part of the revenue is to make further clarification of the information received by the Assessing Officer and it is permissible in law. We have examined the reasons recorded as indicated above for reopening of the assessment. It appears that, the Assessing Officer has made reference of the information received from the concerned investigation wing with regard to bogus accommodation entries of long term capital gain provided by the certain entities. Though, full details of the information and enquiry conducted by Kolkata wing having not been reflected in the reasons recoded, but a specific reference made in the reasons recorded by the Assessing Officer that, the transactions made by the assessee is penny stock. In this context, we may place reliance on the decision of this Court in the case of *Aayojan Developers Vs. ITO*, [335 ITR 234], wherein, this Court after referring the decision of the Calcutta High Court in the case of *East Cost Commercial Com. Ltd.*, [128 ITR 324], held that, the income tax officer in his affidavit filed in the Court could explain or elaborate or clarify the reasons recorded by him, but he could not thereby introduce new grounds or new reasons or new materials which were not to be found in the recorded reasons, either expressly or by implication.

21. Applying the aforesaid principles of law, in the case of Aayojan Developers (supra) to the facts of the present case, we are of the view that, the facts mentioned in the affidavit by the revenue could not be termed as “new ground” or “new reasons” to supplement the reasons recorded by the Assessing Officer. Therefore, the contention raised by the learned counsel for the writ applicant that, by way of affidavit in reply, the revenue has improved the reasons recorded, has no any merit and cannot be accepted to hold that, the exercise to reopen the assessment is without jurisdiction.

22. The principal argument of Mr. Hemani, the learned Senior Counsel for the writ applicant is that the reopening of the assessment cannot be permissible on the basis of the change of opinion by the Assessing Officer. A bare perusal of the reasons recorded, it appears that the Assessing Officer was in receipt of information that the scrip TUNI Textiles was penny stock, used by the beneficiaries (seller of shares) to launder money in the garb of LTCG. We are of the view that the aforesaid information and subsequent outcome of the enquiry made by the Assessing Officer, were not previously disclosed during the assessment proceeding. Thus, when the information came into knowledge of the Assessing officer, which was not on record and available at the time of assessment order, the principle of change of opinion would not apply. Therefore, the contention raised by the learned Senior counsel with regard to principle of applicability of change of opinion in the present case is not acceptable.

23. The next contention is that, the Assessing Officer failed to record an independent finding as to how the income has escaped

assessment. Under such facts and circumstances, it is vehemently contended that, the Assessing Officer while recording the reasons for reopening the assessment did not have any valid reasons to believe that, the income earned by the assessee by way of long term capital gain has escaped assessment.

24. A bare perusal of the reasons recorded and further clarification of the information made by the revenue by way of affidavit in reply would make it clear that, the company Tuni Textile Ltd., was used in providing bogus accommodation entries of long term capital gain by certain entities like broker etc. Undisputedly, the assessee had purchased 40000 shares on 04.08.2010 at a total cost of Rs. 88,445/- and sold it on 22.03.2012, for total consideration of Rs. 35,72,261/-. It further appears that, on the basis of information received from the concerned wing, the Assessing Officer made independent enquiries and applied his mind to the information and upon due satisfaction and the materials gathered during the enquiries, finally formed a belief that, the income has escaped assessment. At the stage of issuing the notice, the court cannot investigate into adequacy or sufficiency of the reasons. When no scrutiny assessment made under section 143(1) of the Act, the requirement for reopening is only reason to believe. Considering the facts of the present case, the Assessing Officer has caused of justification that, the alleged transaction of penny stock, claiming amount of long term capital gain has escaped assessment. We may place reliance on the case of *Central Prominces Mangnese Ore Company ltd. (191 ITR 662 SC)*, wherein the Apex Court interpreted the word “reason to believe”. It was held that, the word “reason” in the phrase “reason to believe” in Section 147,

would mean cause or justification. If the assessing officer has cause or jurisdiction to know or suppose that income has escaped assessment he can be said to have reason to believe that income has escaped assessment. The expression cannot be read to mean that the assessing officer should have finally ascertained the fact by legal evidence or conclusion.

25. In *Praful Chunilal Patel Vs. M.J.Makwana Vs. CIT*, [236 ITR 832], this court while interpreting the term 'reason to believe', held that, the word "reason to believe" cannot mean that the Assessing Officer should have finally ascertained the facts by legal evidence. They only mean that he forms a belief from the examination he makes and, if he likes, from any information that he receives. If he discovers or finds or satisfies himself that the taxable income has escaped assessment, it would amount to saying that he had reason to believe that such income had escaped assessment. The justification for his belief is not to be judged from the standards of proof required for coming to a final decision. A belief though justified for the purpose of initiation of the proceedings under Section 147 may ultimately stand altered after the hearing and while reaching the final conclusion on the basis of the intervening enquiry. At the stage where he finds a cause or justification to believe that such income has escaped assessment, the Assessing Officer is not required to base his belief on any final adjudication of the matter". And, ".....His formation of belief is not a judicial decision but an administrative decision. It does not determine anything at the initial stage, but the Assessing Officer has a duty to proceed so as to obtain, what the taxpayer was always bound to pay if the increase is justified at all. The decision to initiate the proceedings is not to be preceded by any judicial or quasi-judicial enquiry. His reasoning

may be the result of official information or his own investigation or may come from any source that he considers reliable. His reason is not to be judged by a Court by the standard of what the ideal man would think. He is the actual man trusted by the legislature and charged with the duty of forming of a belief for the mere purposes of determining whether he should proceed to collect what is strictly due by law, and no other authority can substitute, its standard of sufficient reason in the circumstances, or his opinion or belief for his. Unless the ground or material on which his belief is based, is found to be so irrational as not to be worthy of being called a reason by any honest man, his conclusion that it constitutes a sufficient reason, cannot be overridden. What is, therefore, to be ascertained is, whether the alleged reason really existed, and if it did, whether it was so irrational as to be outside the limits of his administrative discretion with which the Assessing Officer is invested so as to be really in disregard of the statutory condition....." Evidently, the Assessing Officer purporting to exercise powers under Section 147 of the Act, is not a party who has to not only state but establish before anyone the so-called jurisdictional facts.

26. In view of the settled principles of law as propounded by the Apex Court as well as by this court and considering the contention of the reasons recorded for reopening and further clarification of the information made by the revenue, we are of the view that, the Assessing Officer himself was satisfied with regard to the information and other materials on record, he formed an opinion that, the income has escaped assessment. Therefore, when the information was specific with regard to transactions of penny stock entered into by the assessee with the TUNI Textiles Ltd., and the Assessing Officer had applied his independent mind to the

information and upon due satisfaction, led to form an opinion that, the amount of claim of LTCG claimed by the assessee is chargeable to tax has escaped assessment, which facts suggests that, there is live link between the material which suggested escapement of income and information of belief. Under the circumstances, we are satisfied that, there was enough material before the Assessing Officer to initiate proceedings under Section 147 of the Act.

27. In the discussions made hereinabove, we do not agree with the contention that, merely on the information, the Assessing Officer has recorded the reasons and on the basis of borrowed satisfaction, he formed an opinion with respect to the income chargeable to tax has escaped assessment.

28. We have examined the issue of valid sanction as raised by the learned counsel for the writ applicant. We take the notice of the fact that, the copy of the approval has been provided to the assessee at the stage of passing the order of disposing the objections raised by the assessee. Therefore, it is evident that, in the instant case, the authorities concerned have given approval after due application of mind and expressed their satisfaction with regard to the reasons recoded for reopening of the assessment.

29. In view of the foregoing reasons and considering the facts and circumstances of the present case, we have no hesitation to hold that it could not be said to have that there was no material or grounds before the Assessing Officer and the assumption of jurisdiction on the part of the Assessing Officer under Section 147 of the Act to reopen the assessment by issuing impugned notice under Section 147 of the Act is without authority of law, which

render into the notice unsustainable. Therefore, the assessee failed to make out a case.

30. In the result, the writ application deserves to be dismissed and is hereby dismissed. No order as to costs.

(J. B. PARDIWALA, J)

(ILESH J. VORA, J)

P.S. JOSHI

