

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 19821 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE BELA M. TRIVEDI

Sd/-

and

HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
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

ZAVERI AND COMPANY PRIVATE LIMITED, KISHOR PRANJIVANDAS
 MANDALIA DIRECTOR

Versus

DEPUTY COMMISSIONER OF INCOME TAX

Appearance:

MR. R.K. PATEL, ADVOCATE WITH DARSHAN R PATEL(8486) for the
 Petitioner(s) No. 1

MR. M.R. BHATT, SENIOR ADVOCATE WITH MRS MAUNA M BHATT(174)
 for the Respondent(s) No. 1

CORAM: HONOURABLE MS. JUSTICE BELA M. TRIVEDI

and

HONOURABLE DR. JUSTICE ASHOKKUMAR C. JOSHI

Date : 05/07/2021

CAV JUDGMENT

(PER : HONOURABLE MS. JUSTICE BELA M. TRIVEDI)

1. The present petition filed by the petitioner - Zaveri and Company Private Limited through its Director - Kishor Pranjivandas Mandalia, under Article 226 / 227 of the Constitution of India, is directed against the impugned notice dated 30.03.2019 (Annexure - F) issued under section 148 of the Income-Tax Act, 1961, (hereinafter referred to as 'the said Act'), and the order dated 10.10.2019 (Annexure K) passed by the respondent rejecting the objections filed by the petitioner against the said notice.
2. The facts in nutshell as emerging from the record of the petition are that the petitioner - company is engaged in the business of manufacturing and trading in jewellery, bullion trading, trading and speculation in commodities, shares and securities, units of mutual funds and derivatives, generation and sales of electric power through windmills and trading in SEZ unit as well as gold and silver refinery business. The petitioner had filed the return for the A.Y. 2012-13 and thereafter had filed a revised return. After the scrutiny assessment having been undertaken on various points and after issuing the show-cause notice, the Assessing Officer had framed the assessment order under section 143(3) of the said Act on 28.03.2014. Thereafter the petitioner received a notice under section 148 on 28.03.2017 seeking re-

opening of the assessment for the A.Y. 2012-13 on the ground of the alleged accommodation entries obtained by the petitioner - company, as revealed during the search proceedings in case of one Bhanwarlal Jain Group. The said proceedings terminated in the assessment order dated 29.12.2017 passed under section 143(3) read with Section 147 of the said Act (Annexure E). According to the petitioner, the petitioner again received the impugned notice dated 30.03.2019 issued by the respondent for reopening of the assessment in the case of the petitioner for the assessment year 2012-13 under section 148 of the said Act (Annexure F). The petitioner filed return of income in response to the said notice as per Annexure G. The petitioner received the reasons dated 18.04.2019 recorded for reopening of the assessment under section 147 of the Act for the year 2012-13 (Annexure H). On the receipt of the said reasons for reopening, the petitioner filed exhaustive objections on 13.06.2019 along with the supporting documents (Annexure I). The respondent vide the order dated 10.10.2019, rejected the said objections (Annexure K). Being aggrieved by the said order, the present petition has been filed.

3. The gist of the reasons recorded for reopening of the assessment under section 147 of the Act for the assessment year 2012-13, as

emerging from Annexure - H is that the office of the respondent had received the information from the office of DDIT (Inv.) Unit-1(3), Ahmedabad on 24.03.2019 *inter alia* that the petitioner - company was identified as one of the beneficiaries of the accommodation entries unearthed during the course of search proceedings conducted on 11.09.2018 in case of Sanjay Shah and Jignesh Shah of Ahmedabad, which had resulted into seizure of unaccounted cash of Rs. 19.37 crores along with the incriminating digital as well as documentary evidences. The clandestine record of unaccounted cash, synchronized trading, proving bogus LTCG in various BSE listed scrips and transport of such cash through angadiyas was found to be maintained in secret Tally Data file. In the said secret file, against the transactions of shares on BSE platform, movement and delivery of cash, the receipt of commission in cash under the head into "LTG Commission" was recorded, which manifested the record of the accommodation entries of LTCG against the receipt of cash. The data analysis coupled with the circumstantial evidences led to the discovery that 15 BSE listed scrips were used for generating bogus LTCG and contrived losses, as admitted by the accommodation entry providers. Further, the respondent office also received an information in the case of assessee from the office of Pr. DIT (Inv.), Unit-2, Mumbai on

27.03.2019, that the petitioner - company was identified as one of the beneficiaries of the accommodation entries unearthed during the course of search proceedings conducted on 19.03.2019 in case of one Naresh Jain and his associates operating from Bombay. It was revealed that the petitioner had entered into the transactions in penny stock namely Dhvanil Chemicals Ltd. / Veronica Production Ltd., which companies were used for bogus LTCG and contrived losses, as admitted by the said Sanjay Shah and Jignesh Shah in their statements recorded during the course of search proceedings. During the course of investigation carried out by the Investigation Wing Mumbai, Shri Naresh Jain had also admitted in his statement recorded under section 132(4) of the said Act at his residence that he had used the scrip VMS Industries for providing accommodation entries. On the basis of said specific pieces of information received from the investigation wings, outlining the systemic evasion of taxes by the petitioner - assessee and others, the respondent had reason to believe that the petitioner - assessee company had sold scrips to Veronica Productions Ltd. / Dhvanil Chemical Ltd. for Rs. 7,15,585/- and had bought 64,200 scrips for Rs. 42,83,705/- during the financial year 2011-12, and thereby had booked bogus losses through penny scrip Veronica Productions Ltd. / Dhvanil Chemical Ltd. The petitioner - assessee had also sold

shares worth Rs. 97,13,809/- of the penny scrip - VMS Industries Ltd, and thereby was involved in bogus transactions through trading in penny scrip - VMS Industries Ltd. to the tune of Rs. 97,13,809/-. Under the circumstances, the respondent had a reason to believe that income of the petitioner - company to the extent of Rs. 1,23,47,788/- had escaped assessment during the assessment year 2012-13.

4. The sheet anchor of the learned advocate Mr. R.K. Patel's arguments was that the reasons for reopening of the assessment for the A.Y. 2012-13 by the respondent was based on incorrect facts as demonstrated in detail in the objections raised before the respondent as well as the summary produced before the Court. According to him, the original allotment in the Initial Public Offering (IPO) could never be equated with penny stock as the same was allotted after the approval of the SEBI norms and procedure. The facts and figures appearing in the reasoning part for reopening were also absolutely incorrect as all the alleged transactions were undertaken by the petitioner at the market rate in the listed securities through the banking channel and the recognized brokers after paying the necessary statutory levies of the concerned stock exchange. Mr. Patel further submitted that there was no nexus of the petitioner - company with Shri Naresh Jain or the other

brokers referred to in the reasons. Relying upon the decision of Bombay High Court in the case of **Gateway Leasing P. Ltd. versus Assistant Commissioner of Income Tax** reported in **(2020) 117 Taxmann.com 442 (Bom.)**, he submitted that the respondent had merely acted on the borrowed belief of the other investigation wings without verification of facts and record, though the case of the petitioner was already processed twice prior to the impugned notice under section 148 of the said Act. Mr. Patel further submitted that on completion of assessment under section 143(3), the tax paid on the income assessed under section 115JB is more than the tax liability that may occur on the income assessed under the normal provisions, and therefore, it could not be said that there was an escapement of income. In this regard, he has relied upon the decision of this Court in case of **PKM Advisory Services Pvt. Ltd. Versus ITO** reported in **(2012) 21 taxmann.com 86 (Gujarat)**. Relying upon the provisions contained in section 151 of the said Act, and the decision of Supreme Court in the case of **Chhugamal Rajpal versus S.P. Chaliha and others** reported in **79 ITR 603**, Mr. Patel submitted that there was absence of a reasoned sanction by the Principal Commissioner as contemplated in the said provision, which is statutory and mandatory requirement for reopening the assessment after the expiry of four years from the end of the relevant

assessment year.

5. Per contra, the learned Senior Advocate Mr. M.R. Bhatt appearing for the respondent challenging the very maintainability of the petition, submitted that after the objections are duly considered by the respondent, the proper course would be to permit the Assessing Officer to frame an assessment in accordance with law, and in the event, the petitioner is aggrieved by the said re-assessment, he could file an appeal to the CIT Appeals, and thereafter to the Tribunal as per the provisions of the Act. Mr. Bhatt further submitted that the case of the petitioner was reopened for the assessment year 2012-13 on the basis of the information received from the Investigation Wing, Ahmedabad and the Investigation Wing Mumbai respectively, as a result of which it was revealed that the petitioner had not made full and true disclosure during the course of filing of its return of income or revised return of income. He also submitted that the Assessing Officer had a reason to believe, meaning thereby, he had a cause or justification to suppose that the income of the petitioner had escaped assessment and that as per the settled legal position, the sufficiency of reasons could not be gone into by the Court. In the instant case, runs the submission of Mr. Bhatt, the Assessing Officer after applying his mind on the

information received from the other investigating wings, had *prima facie* formed an opinion that there was a systematic tax evasion carried out by means of investing in various scrips, and he had also obtained the requisite sanction before issuing the impugned notice for reopening the assessment, as required under section 151 of the said Act. According to Mr. Bhatt, the submission of Mr. Patel with regard to the Section 115JB can not be considered at this juncture, as the respondent has not finally concluded as to how much income chargeable to tax has escaped assessment.

6. Mr. Bhatt also drew the attention of the Court to the order dated 20.01.2021 passed by the Coordinate Bench in Special Civil Application No. 12615 of 2019 and Special Civil Application No. 18899 of 2019 involving identical facts and circumstances and the issues as involved in the present petition, and by which order the Coordinate Bench had dismissed the said petitions.

7. At the outset, it may be noted that as per the settled legal position, two conditions have to be satisfied before the Assessing Officer invokes his jurisdiction to reopen the assessment under section 147 of the said Act after the expiry of four years from the end of the relevant assessment year - firstly, that the

Assessing Officer must have reason to believe that the income chargeable to tax has escaped assessment for the concerned assessment year, and secondly, such escapement of assessment was by reason of failure on the part of the assessee to make the return under section 139, or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all the material facts necessary for his assessment for that assessment year. So far as the case of the present petitioner is concerned, the assessment for the A.Y. 2012-13 is sought to be reopened by the Assessing Officer under section 147/148 of the said Act, on his having arrived at a satisfaction that the income for the said assessment year had escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment.

8. It is pertinent to note that as held by the Supreme Court in catena of decisions, the formation of belief by the Assessing Officer at the stage of initiation of action under section 147 of the Act is within the realm of subjective satisfaction. The Supreme Court in the case of **Assistant Commissioner of Income Tax versus Rajesh Jhaveri Stock Brokers P. Ltd.** reported in **(2007) 291 ITR 500 (SC)**, had an occasion to deal with the scope and effect of section 147 as substituted w.e.f. April 1st, 1989, in which the

Court has observed as under : -

"Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in *Central Provinces Manganese Ore Co. Ltd. v. ITO* [1991] 191 ITR 662, for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ***ITO v. Selected Dalurband Coal P. Ltd.*** [1996] 217 ITR 597 (SC)]; ***Raymond Woollen Mills Ltd. v. ITO*** [1999] 236 ITR 34 (SC).

The scope and effect of section 147 as substituted with effect from April 1,

1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied : firstly the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147."

9. In the case of **Raymond Woollen Mills Ltd. Versus Income-Tax Officer and others** reported in **1999 236 ITR 34(SC)**, the Supreme Court observed that the Court has only to see whether there was *prima facie* some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage.

10. It is very pertinent to note that in the case of **Phool Chand Bajrang Lal versus Income-Tax Officer** reported in **203 ITR 456 (SC)**, it was observed that the acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment, which went to expose the falsity of the statement made by the assessee at the time of original assessment was different from drawing fresh inference from the same facts and material which was available with the Income-Tax Officer at the time of the original assessment proceedings. Where the transaction itself on the basis of the subsequent information was found to be a bogus transaction, the mere disclosure of that transaction at the time of original proceedings could not be said to be disclosure of the true and full facts, and the Officer would have the jurisdiction to reopen the concluded assessment in such a case. The precise observation made by the Supreme Court in the said case may be reproduced as under : -

"In the present case as already noticed, the Income-Tax Officer, Azamgarh, subsequent to the completion of the original assessment proceedings, on making an enquiry from the jurisdictional Income-Tax Officer at Calcutta, learnt that the Calcutta company from whom the assessee claimed to have borrowed the loan of Rs. 50,000/- in cash had not really lent any money but only its name to cover up a bogus transaction and, after recording his satisfaction as required by the provisions of section 147 of the Act, proposed to reopen the

assessment proceedings. The present is thus not a case where the Income-Tax Officer sought to draw any fresh inference which could have been raised at the time of the original assessment on the basis of the material placed before him by the assessee relating to the loan from the Calcutta company and which he failed to draw at that time. Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment, which goes to expose the falsity of the statement made by the assessee at the time of the original assessment is different from drawing fresh inference from the same facts and material which were available with the Income-Tax Officer at the time of the original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself, on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings cannot be said to be a disclosure of the "true" and "full" facts in the case and the Income-Tax Officer would have the jurisdiction to reopen the concluded assessment in such a case."

- 11.** As stated hereinabove, the Assessing Officer has sought to reopen the assessment for A.Y. 2012-13 of the petitioner on the basis of fresh material having been received as a result of the search made by the Office of DDIT (Inv.) Unit-1(3), Ahmedabad conducted on 11.09.2018 at the premises of Sanjay Shah and Jignesh Shah of Ahmedabad, and as a result of the investigation carried out during the search proceedings conducted by the office of Pr. DIT (Inv.), Unit-2, Mumbai on 19.03.2019 at the premises of

Naresh Jain and his associates at Bombay that the petitioner company was one of the beneficiaries of the accommodation entries as the petitioner had entered into the transactions in penny stock namely Dhvanil Chemicals Ltd. / Veronica Production Ltd., which companies were used for bogus LTCG and contrived losses. The Assessing Officer had also received specific information from the said investigating wings outlining the systemic evasion of taxes by the petitioner and others, and had therefore reason to believe that the petitioner had sold scrips to Veronica Production Limited / Dhvanil Chemicals Ltd., which were penny stock to the extent of Rs. 97,13,809/- during financial year 2011-12. Such satisfaction arrived at by the Assessing Officer being subjective in nature and based on the fresh material for coming to the *prima facie* conclusion that the petitioner had failed to disclose fully and truly all material facts necessary for his assessment for the A.Y. 2012-13, it could not be said that the respondent had initiated the proceedings under section 147 of the Act on the basis of incorrect facts or on the basis of borrowed belief of the Investigation Wings at Ahmedabad and Mumbai, as sought to be submitted by the learned advocate Mr. R.K. Patel for the petitioner. The Court also does not agree with the submission made by the learned advocate Mr. Patel that the respondent could not have reopened the

assessment of the petitioner under section 147/148 of the said Act after the scrutiny assessment having been undertaken by the Assessing Officer under section 143(3) of the said Act for the A.Y. 2012-13. The Assessing Officer having arrived at his subjective satisfaction based on additional fresh material placed before him that the petitioner had not fully and truly disclosed all the material facts necessary for his assessment for the relevant assessment year and *prima facie* his income chargeable to tax had escaped assessment, he was fully justified in initiating the proceedings under section 147/148 of the said Act.

12. There is also no force in the submission of Mr. Patel that the Principal Commissioner had granted sanction under section 151 of the said Act without any application of mind. Since he has relied upon the decision of Supreme Court in case of **Chhugamal Rajpal (supra)** in this regard, it may be noted that in the said case, the report of the Income Tax Officer in connection with the proceedings under section 147 did not set out any reason nor the material that he had before him for issuing the notice under section 148 was mentioned in the report. Under the circumstances, the Supreme Court held that the Commissioner had mechanically accorded the permission under section 151. Such is not the situation in this case. In this case, the

Assessing Officer has recorded the reasons in detail and the objections raised by the petitioner have also been dealt with by him in detail vide the impugned order. It may further be noted that no such contention that the Principal Commissioner had granted sanction without application of mind or without assigning any reason, was taken up by the petitioner before the respondent authority in the objections filed by him, nonetheless the respondent has mentioned in the impugned order that his satisfaction was duly approved by the CIT-4, Ahmedabad vide his letter / approval dated 30.03.2019. Again in response to the said contention raised in the petition, the respondent has contended in his affidavit-in-reply that the case of the petitioner was reopened after obtaining the sanction from the Pr. CIT-4, Ahmedabad as required by section 151 of the said Act and that the Pr. CIT had approved the notice after appreciating the facts and after duly applying his mind. The petitioner has chosen not to controvert the said submission in the affidavit-in-rejoinder filed by him.

- 13.** There is also no merit in the submission of Mr. Patel that the petitioner was assessed under section 115JB and that the assessee was already paying more tax under section 115JB than the income tax liability arising under the normal provisions of the Act. As rightly observed by

the respondent in the impugned order disposing of the objections, whether the income chargeable to tax has escaped assessment or not, could not be considered at this stage and no conclusive opinion could be rendered at this point of time when the assessment / reassessment has not even started.

14. Mr. M.R. Bhatt has rightly drawn the attention of this Court to the decision in case of **Mehrunnisa Mohamed Fazal Maniar versus Income Tax Officer (supra)**, in which the proceedings under section 147/148 initiated by the Assessing Officer against the petitioners on the basis of fresh material brought to his notice in respect of the same search proceedings conducted under section 132 in case of Jignesh Shah on 11.09.2018, were challenged, and the Court vide the order dated 20.01.2021 has dismissed the said petitions, after considering the similar contentions as raised in the present petition.

15. In that view of the matter, the petition being devoid of merits, is dismissed. Notice is discharged. Interim relief, if any, stands vacated forthwith.

Sd/-
(BELA M. TRIVEDI, J)

Sd/-
(A. C. JOSHI, J)

AMAR SINGH