

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 18138 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR.JUSTICE A.S. SUPEHIA

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 ?	

GIRIRAJ STEEL....Petitioner(s)

Versus

DY. COMMISSIONER OF INCOME TAX....Respondent(s)

Appearance:

MR. HARDIK V VORA, ADVOCATE for the Petitioner

MRS MAUNA M BHATT, ADVOCATE for the Respondent

CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**

and

HONOURABLE MR.JUSTICE A.S. SUPEHIA

Date : 31/01/2018

ORAL JUDGMENT**(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)**

1. Rule. Mrs. Mauna Bhatt, learned senior standing counsel waives service of notice of rule on behalf of the respondent.

2. Having regard to the controversy involved in the present case and with the consent of the learned counsel for the respective parties, the matter was taken up for final hearing.

3. By this petition under Article 226 of the Constitution of India, the petitioner has challenged the notice dated 3.3.2017 issued by the respondent under section 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") seeking to reopen the assessment of the petitioner for assessment year 2012-13.

4. The petitioner is engaged in the business of trading in iron and steel items. During the year under consideration, the petitioner had converted the partnership firm into a Private Limited Company. In paragraph 5 of Schedule 17 of the audit report, it was specifically stated that profit earned till 30.6.2011 was transferred to the successor company, viz. M/s Giriraj Iron Ltd. The assessee firm filed return of income for assessment year 2012-13 on 22.8.2012, declaring nil income. The case was selected for scrutiny assessment and after making detailed inquiry, the Assessing Officer accepted the return of income.

5. It may be pertinent to note that the profit for the entire

year of the petitioner M/s Giriraj Steel and the successor company, M/s Giriraj Iron Ltd. was offered for tax in the books of M/s Giriraj Iron Ltd. and the same was assessed by the Assessing Officer of M/s Giriraj Iron Ltd. vide order dated 28.2.2015 passed under section 143(3) of the Act.

6. Subsequently, by the impugned notice, the Assessing Officer has assumed jurisdiction to reassess the income of the petitioner for assessment year 2012-13. By a letter dated 20.3.2017, the petitioner requested the respondent to accept the return of income filed by it earlier and also requested for a copy of the reasons recorded, which came to be furnished along with a letter dated 4.9.2017. In response thereto, the petitioner submitted detailed objections, which came to be rejected.

4. Mr. Hardik Vora, learned advocate for the petitioner, invited the attention of the court to the documents annexed along with return of income to point out that all the facts were duly disclosed before the Assessing Officer. It was pointed out that the Assessing Officer during the course of scrutiny assessment, had called for various details in response to which, the petitioner had duly pointed out that the firm was converted into a company with all assets and liabilities and that the profit earned by the firm was disclosed in the profit and loss account of the company. It was submitted that the Assessing Officer, after being satisfied with the explanation given by the petitioner, had accepted the return of income and hence, it is amply clear that the assessment is sought to be reopened on a mere change of opinion. It was further submitted that the income which is alleged to have escaped

assessment, has been duly reflected in the return of income of the successor company and the tax has been paid on the same. It was submitted that the assessee is no longer in existence and ultimately, it is the successor company which would have to pay the amount of tax. It was submitted that, therefore, no income can be said to have escaped assessment, inasmuch as, the tax on the income in question has been duly paid. It was urged that, therefore, the proceedings would ultimately result into an exercise in futility and therefore also, the petition deserves to be allowed by setting aside the impugned notice.

5. Vehemently opposing the petition, Mrs. Mauna Bhatt, learned senior standing counsel for the respondent, invited the attention of the court to the reasons recorded, to submit that despite the fact that the assessee remained in existence till 30.6.2011, and had earned income during that period, it has not disclosed any income in the return of income. The Assessing Officer was, therefore, justified in forming the belief that the income chargeable to tax had escaped assessment for the year under consideration. Referring to the assessment order framed under section 143(3) of the Act, it was submitted that no opinion has been formed therein and hence, there is no question of change of opinion. In support of her submission, the learned counsel placed reliance upon the decision of this court in the case of **Gujarat Power Corporation Ltd. v. Assistant Commissioner of Income Tax**, (2013) 350 ITR 266 (Guj.), wherein the court has held that when in an assessment framed by the Assessing Officer, if a certain claim of the assessee is not examined, no queries are raised or answers elicited, it cannot be stated that merely because the

Assessing Officer did not reject such a claim in the final order of assessment, he should be deemed to have expressed an opinion with respect to such a claim and any reopening of an assessment of this nature even within a period of four years from the end of the relevant assessment year would amount to change of opinion. It was submitted that the above decision would be squarely applicable to the facts of the present case, inasmuch as, there is nothing to show that the Assessing Officer had raised any queries with respect to the ground on which the assessment is sought to be reopened, nor has the Assessing Officer discussed the issue in the assessment order. Reliance was also placed upon the decision of the Supreme Court in the case of **Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.**, (2007) 291 ITR 500 (SC), for the proposition that section 147 authorises 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. 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 income had escaped assessment. The court held that at that stage, final outcome of the proceedings 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. It was submitted that therefore, what would be the outcome of the matter and the facts regarding the income having been taxed in the hands

of the successor are not material at this stage. It was, accordingly, urged that on the reasons recorded, the Assessing Officer was wholly justified in forming the belief that income chargeable to tax had escaped assessment, and hence, the Assessing Officer has rightly assumed jurisdiction under section 147 of the Act. It was, accordingly, urged that the petition being devoid of merits, deserves to be dismissed.

6. This court has considered the submissions advanced by the learned counsel for the respective parties and has perused the record of the case as placed before the court.

7. Before advertng to the merits of the case, it may be germane to refer to the reasons recorded for reopening the assessment which read as under:

"In this case, the assessee had filed his Return of Income for A.Y. 2012-13 on 22.08.2012 declaring total income of Rs.NIL/-. Assessment have been completed and income was determined accepting return income vide order dated 07.07.2014.

Scrutiny of balance sheet, P & L Account, 3CD report and details of conversion of partnership firm into company revealed that the partners Bhadresh Shah and Shailesh Shah were holding shares of company in their individual capacity as on date of incorporation of company i.e. 26.04.2011 and the firm Giriraj Steel remained in being till 30.06.11. The mention of change of name of the firm and introduction of other persons as partners as mention in AoA of the company, is not acceptable in view of contrary evidences. The assessee firm was required to be assessed in respect of the income of the previous year in which succession took place up to the date of succession are prescribed u/s 170(i) of the Act. As assessee has income of Rs.1,08,92,638/- as on 30.06.11.

In view of the above, I am satisfied that there is under

assessment in this case for the relevant assessment year 2012-13. I therefore have reasons to believe that Rs.1,08,92,638/- has escaped assessment within the meaning of section 147 of the I.T. Act, 1961 and is fit case for reopening u/s 147 of I.T. Act, 1961. The case is reopened after approval from the Jt. CIT, Range-1(2), Ahmedabad vide his letter bearing no Joint CIT/R-1/2/Ahm/Revenue Audit Objection/148/2016-17 dated 01.03.2017."

8. On a plain reading of the reasons recorded, it is apparent that the assessment is sought to be reopened on the ground that the partnership firm was converted into a company and that the firm viz., Giriraj Steel remained in being till 30.6.2011. According to the Assessing Officer, the assessee firm was required to be assessed in respect of the income of the previous year in which the succession took place up to the date of succession as prescribed under section 170(i) of the Act, as the assessee had income of Rs.1,08,92,638/- as on 30.6.2011.

9. In this case, it may be pertinent to note that for the assessment year under consideration, viz., 2012-13, the petitioner filed its return of income, a copy whereof is annexed at Annexure "A" to the petition. A perusal of the return of income indicates that all the columns are blank and the only detail contained in the column of income is regarding TDS of Rs.7,58,653/-. It is an admitted position that for the year under consideration, a scrutiny assessment came to be carried out, which culminated into an assessment order dated 6.2.2014. A perusal of the assessment order reveals that at the relevant time when the scrutiny assessment came to be carried out, notice under section 142(1) of the Act along with detailed questionnaire was issued on 11.11.2013 and subsequently,

due to change of incumbent, notice under section 142(1) read with section 129 of the Act was issued on 3.9.2014. The record further reveals that in response to the notice, the assessee submitted details and explanation vide a communication dated 18.12.2014 stating that the applicant firm M/s Giriraj Steel was converted into a Joint Stock Company with effect from 1.4.2011 on "Going Concern" basis under Part IX of Companies Act, 1956. Along with the letter, various documents have been submitted including the statement of profit and loss account of Giriraj Iron Ltd. for financial year 2011-12, highlighting the profit of Giriraj Steel upto 30.6.2011. In the submissions, it is further stated that from the documents submitted, it is clear that the firm is converted into a company with all assets and liabilities; profit earned by the firm is disclosed in the profit and loss account of the company.

10. In the backdrop of the aforesaid facts, if one looks at the return of income as described hereinabove, no income is declared therein and the only fact reflected therein is in relation to TDS of Rs.7,58,653/-. During the course of scrutiny assessment, there was no other item for the Assessing Officer to look into except the fact that no income had been disclosed by the assessee in the return of income. The assessment order clearly reveals that a detailed questionnaire had been issued to the assessee along with the notice under section 142(1) of the Act. The submissions of details and explanation furnished by the petitioner clearly show that it has explained that the firm was converted into a company with all assets and liabilities and that the profit earned by the firm was disclosed in the profit and loss account of the company. The Assessing Officer, upon being convinced by the explanation given by the

petitioner, has accepted the return of income as filed by the petitioner during the course of scrutiny assessment. Thus, it is evident that the Assessing Officer has applied his mind to the issue in question and has accepted the same. While, in the assessment order there is no discussion about the issue in respect of which the assessment is sought to be reopened, however, having regard to the facts noted hereinabove, the only issue that could have been before the Assessing Officer would be in relation to the non-disclosure of any income in the return of income filed by the petitioner. The Assessing Officer in the assessment order, has recorded that after verification and discussion and from the data made available, the total income of the assessee is computed as nil. Evidently therefore, the Assessing Officer has applied his mind to the fact that the assessee had filed nil return of income and had accepted the same. Under the circumstances, the court is of the view that the reasons recorded for reopening the assessment reflect a mere change of opinion, inasmuch as, the Assessing Officer has already applied his mind to this aspect.

11. As regards the decision of this court in the case of **Gujarat Power Corporation Ltd. v. Assistant Commissioner of Income Tax** (supra), on which reliance has been placed by the learned counsel for the respondent, it would not assist the case of the respondent, inasmuch as, it is well settled as laid down by this court in a catena of decisions that even if the Assessing Officer does not discuss the item in the assessment order, but if he has called for an explanation or details in respect of such item and the assessee has furnished the explanation thereto, he is deemed to have applied his mind to the said issue.

12. Insofar as the decision of the Supreme Court in the case of ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.*** (supra) is concerned, the same would not be applicable to the facts of the present case, inasmuch as, this court after considering the reasons recorded, has come to the conclusion that the same are based upon a mere change of opinion. The question as to whether or not at this stage there was sufficient ground for the Assessing Officer to form the requisite opinion is not in issue. Under the circumstances, the said decision also would not be applicable to the facts of the present case.

13. In the light of the above discussion, the court is of the view that the reopening of assessment being based upon a mere change of opinion, the assumption of jurisdiction on the part of the Assessing Officer lacks validity. The impugned notice issued under section 148 of the Act, therefore, cannot be sustained.

14. In the result, the petition succeeds and is, accordingly, allowed. The impugned notice dated 3.3.2017 issued under section 148 of the Income Tax Act, 1961 in relation to assessment year 2012-13 is hereby quashed and set aside. Rule is made absolute accordingly, with no order as to costs.

(HARSHA DEVANI, J.)

(A. S. SUPEHIA, J.)

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