

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 18767 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE N.V.ANJARIA

and

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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

HINDUSTAN MARBLE PVT. LTD.
 Versus
 ASST. COMMISSIONER OF INCOME TAX CIRCLE 2(1)(1) OR HIS
 SUCCESSOR

Appearance:

MR SN DIVATIA(1378) for the Petitioner(s) No. 1

M R BHATT & CO.(5953) for the Respondent(s) No. 1

CORAM:HONOURABLE MR. JUSTICE N.V.ANJARIA

and

HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date :21/10/2022

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE N.V.ANJARIA)

Heard learned advocate Mr.S.N.Divatia for the petitioner and learned senior advocate Mr.M.R.Bhatt assisted by learned advocate Mr.Karan Sanghani for M.R.Bhatt and Co. for the respondent, at length.

2. By filing this petition under Article 226 of the Constitution, the petitioner has prayed to set aside notice dated 23.9.2018 under Section 148 of the Income Tax Act, 1961 in respect of the assessment year 2013-14, seeking to reopen the assessment for the year under consideration. Also prayed is to set aside order dated 28.9.2018 whereby the objections of the petitioners came to be rejected and disposed of by Assistant Commissioner of Income Tax.

2.1 In the aforesaid notice dated 23.9.2018, it was stated by the Assessing Officer that income of the petitioner- assessee chargeable to tax for the assessment year 2013-14 had escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961 (herein after to be referred to as the 'The Act').

3. Noticing the facts, the petitioner happens to be private limited company incorporated under the Companies Act, 1956. It is stated that the petitioner maintains regular books of accounts which are subject to statutory and tax audit. The petitioner filed its return on income for the assessment year 2013-14 on 29.9.2013 declaring total income of Rs.8,56,16,970/-. It is further stated that respondent initially issued notice under Section 142(1) of the Act on 21.7.2015 seeking several details and documents. The regular assessment was completed after

making detailed scrutiny and after making relevant record, stated the petitioner.

3.1 The petitioner has further stated that in the regular assessment the detail regarding about royalty and surface rent expenses were asked for and by reply dated 5.1.2016, such details were furnished. It was stated that the ledger account relating to royalty and rubble expenses for financial year 2012-13 were also furnished. The petitioner further stated that by reply cum communication dated 18.8.2015, the petitioner gave month wise details of opening stock, production- sales and closing stock relating to different accounts of material including the marble rubbles. The regular assessment was accordingly completed and total income of Rs.8,56,91,750/- was assessed.

3.2 Thereafter respondent issued the aforementioned notice under Section 148 of the Act for assessment year 2013-14 proposing reassessment of the total income of the petitioner. It is this notice which is brought under challenge in this petition. By letter dated 6.4.2018 the petitioner requested the respondent to supply the copy of reasons recorded by the Assessing Officer for reopening the assessment. Reasons were supplied to the petitioner on 14.8.2018. The petitioner e-mailed its objections on 1.9.2018 and the petitions were disposed of by order dated 28.9.2018.

4. Learned advocate for the petitioner submitted that the notice under Section 148 of the Act and the order disposing of the objections were without jurisdiction. It was next submitted that for reopening the assessment under Section 147 of the Act,

certain conditions were required to be satisfied. Firstly, the Officer must form a tentative opinion that there was an escapement of the income during the year under consideration and that he must record such *prima facie* opinion in writing. It was submitted that it should be demonstrated on the information available and the reasons recorded that the opinion so formed was not mere suspicion. It was further submitted that the condition to be satisfied is that the information and documents available on record must show nexus to the opinion and the *factum* of escapement of the income. It was submitted that the words 'reason to believe' do not give arbitrary powers to the Assessing Officer to reopen the assessment.

4.1 It was emphasized that mere change of opinion could not be a ground to invoke the powers of reassessment. It was further submitted in that regard that the facts on the basis of which reassessment was sought for was already solicited and examined by Assessing Officer in course of the regular assessment. It was submitted that the details relating to rubble payments in respect of the marble rubble etc. were made available to the Assessing Officer pursuant to such details having been called for in the notice under Section 142(1) of the Act.

4.2 On the other hand learned advocate for the respondent relied on the affidavit-in-reply and raised contentions on that basis. The facts and aspect weighed for proceeding to reopen the case were stated in affidavit, extracting from para 3.

"Assessee filed its return of income for A.Y. 2013-14 on 29.09.2013 declaring income of Rs.8,56,16,970/-. The same was assessed u/s

143(3) and income was determined at Rs.8,56,91,750/- vide order dated 29.02.2016.

Subsequently it was noticed that assessee had incurred royalty expenditure of Rs.1,93,45,708/- on marble rubble mined. In form 3CD report, the assessee had stated 2,96,816 MT of marble rubble during the year.

It was noticed that as per Gujarat Minor Mineral Concession Rules, 2010 royalty at the rate of Rs.60 per MT is leviable on marble rubble. At this rate marble rubble produced comes to 3,22,428 MT (=1,93,45,708/60) whereas the assessee had shown mining of marble rubble to the extent of 2,96,816 MT only. This shows that the assessee had under reported mining production of marble rubble by 25,612 MT. As assessee had sold the rubble marble on an average rate of Rs.743 per MT, the consequent underreporting of profit comes to Rs.1,90,29,716/- (25,613 X 743). Therefore as the income chargeable to tax has escaped assessment notice u/s. 148 was issued.”

5. Now, following reasons came to be recorded by the Assessing Officer.

“Assessee is a company engaged in mining of marble Assessee filed its return of income for A Y 2013-14 on 29.09.2013 declaring income of Rs. 8,56,16,970. Then same was assessed u/s 143(3) and income was determined at Rs. 8,56,91,750 vide order dated 29.02.2016. On scrutiny of profit and loss account, computation of income, balance sheet, 3CD report and submissions of assessee during the course of assessment, it was seen that assessee has incurred royalty expenditure of Rs. 1,93,45,708 on marble rubble mined. In the from 3CD report, the assessee has stated that it has mined 2,96,816 MT of marble rubble during the year. It was noticed that as per Gujarat Minor Mineral Concession Rules,

2010 that royalty at the rate of Rs.60 per MT is leviable on marble rubble. At this rate the marble rubble produced comes to 3,22,428MT (=1,93,45,708 / 60). The assessee has shown mining of marble rubble to the extent of 2,96,816 MT only. This shows that the assessee has under reported mining production of marble rubble by 25,612 MT. As assessee has sold the rubble marble on an average rate of Rs. 743 per MT, the consequent under reporting of profit comes to Rs. 1,90,29,716 (25,612 x.743). I have, accordingly, reason to believe that the income of Rs. 1,90,29,716 / has escaped assessment within the meaning of Section 147 of the Act. The assessment year involved is A.Y. 2013-14 and thus, it is covered under sub section (2) of Section 151 of the Act. I, therefore, have invoked the provisions of Section 147 of the Act for AY. 2013-14 after obtaining necessary approval.”

5.1 The petitioner- assessee filed its objections by letter dated 31.8.2018 wherein it was stated that the reopening of the case was based on the wrong understanding and the aspect that the royalty on marble rubbles is payable on the basis of the production whereas under Rule 21(1) of Gujarat Minor Mineral Concession Rules, 2010, the royalty on marble rubbles is payable on removal of marble rubbles from the leased area.

5.2 The petitioner gave the details in support of his say stating as under, extracting from the letter of objections.

“We enclose herewith a Statement of Monthly and Yearly Quantitative details of Opening Stock, Production, Sales and Closing Stock of Marble Rubbles and Royalty paid thereon during FY 2012-13 alongwith copies of monthly returns in Form H, showing quantities, submitted to Mining Department for payment of royalty. In the said statement, for the sake of convenience,

we have given calculation of production and profit derived by AO for recording reasons for re opening of the case. From the said statement and returns, it can be seen that quantity of sales of 322428 M.Tons and production of 296816 M.Tons of Marble Rubbles shown by us in Audit Reports are correct. Instead of taking production of Marble Rubbles at 296816 M.Tons, you have wrongly derived production at 322428 M.Tons. (which in fact is quantity of sales) and held that we have under reported mining production of Marble Rubbles by 25612 M.Tons. Based on this, you have held that we have under reported profit by Rs, 1,90,29,716/- (25612 ML.Tons x Rs. 743 average sales rate). We submit that your entire exercise is based on wrong understanding of base for payment of royalty. Royalty payment is to be made on the basis of removal of material whereas you have wrongly taken on the basis of production.”

5.3 The regular assessment for the assessment year 2013-14 was completed under Section 143(3) of the Act by the Assessing Officer. The record show that in the said regular assessment completed for the year under consideration, in notice under Section 142(1) dated 21.7.2015, the Assessing Officer had *inter alia* asked the various details which included, at serial No.22 the details relating to different material. The petitioner was asked to furnish month wise details opening stock, purchase, sales and closing stock of different materials and to indicate the quantity and value. The assessee had disclosed such details by forwarding letter dated 5.1.2016. In the ledger account, figuring on record, the amount towards royalty- block was shown to be Rs.11,042,436/-, surface rent was shown Rs.51,487/- and the royalty on marble rubbles was shown to be Rs.19,345,708/-.

5.4 When the respondent had called for details of the regular

assessment and had examined the quantity of the marble rubbles, produced and sold, at that time, satisfying the query, the petitioner had given complete details of quantity of marble rubble in tax audit report in Form 3-CD at serial No.28. The details were also produced in Part-A-QD of prescribed return of income in Form ITR-6. In the course of regular assessment proceedings, as stated above, the respondent had asked relevant details under item No.22 which was furnished by the petitioner in reply dated 18.8.2015 detailing ledger account with complete narration relating to the royalty paid on the relevant quantity of sale of marble rubble was shown. The respondent had fully examined the rubble aspect and the royalty removal.

5.5 Therefore it is clear that factual details on the basis of which the power to reassess was sought to be exercised was already furnished by the petitioner and considered by Assessing Officer in the course of regular assessment. The Assessing Officer was within the know of such facts and details. Reassessment notice was acted upon basing the formation of reasons on very facts. It amounted to change of opinion on part of the Assessing Officer which is not permissible in law.

5.6 In **Commissioner of Income Tax Vs. Kelvinator of India Limited, [(2010) 320 ITR 561 (SC)]**, the Apex Court dealt with the concept of 'change of opinion' on part of the Assessing Officer to reopen the assessment does not stand obliterated after substitution of Section 147 of the Act by Direct Tax Laws (Amendment) Acts, 1989. Emphasizing that there must be a 'tangible material' available with the Assessing Officer for to come to the conclusion that there was escapement of income

from assessment, reason must have a link with the formation of the belief, the Supreme Court stated,

“...prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer.”

5.7 In **Inductotherm (India) Private Limited [356 ITR 481]** Division Bench of this court in the context of reopening of the assessment which was framed without scrutiny held and observed as under in para 13,

“Despite such difference in the scheme between a return which is accepted under section 143(1)

of the Act as compared to a return of which scrutiny assessment under section 143(3) of the Act is framed, the basic requirement of section 147 of the Act that the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment is not done away with. Section 147 of the Act permits the Assessing Officer to assess, re-assess the income or re-compute the loss or depreciation if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. This power to reopen assessment is available in either case, namely, while return has been either accepted under section 143(1) of the Act or a scrutiny assessment has been framed under section 143(3) of the Act. A common requirement in both of cases is that the Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment.”

5.7.1 It was further observed in para 16,

*“It would, thus, emerge that even in case of reopening of an assessment which was previously accepted under section 143(1) of the Act without scrutiny, the Assessing Officer would have power to reopen the assessment, provided he had some tangible material on the basis of which he could form a reason to believe that income chargeable to tax had escaped assessment. However, as held by the Apex Court in the case of **Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd., (supra)** and several other decisions, such reason to believe need not necessarily be a firm final decision of the Assessing Officer.”*

5.7.2 It was next observed in para 17,

“If we accept such proposition, the petitioner's apprehension that the Assessing Officer would arbitrarily exercise powers under section 147 of the Act to circumvent the scrutiny proceedings which could not be framed in view of notice

under section 143(2) having become time barred, would be taken care of. To reiterate, even for reopening of an assessment which was accepted previously under section 143(1) of the Act without scrutiny, the Assessing Officer should have reason to believe that income chargeable to tax has escaped assessment."

6. Also on facts, it was the case of clear change of opinion on part of the Assessing Officer in exercising powers to reopen the assessment but he misguided himself in law in seeking to reassess the income on the ground of mined and produced. It could not have acted on the same material which was examined by him in the regular assessment, in addition that the erring Officer erred in law too.

7. For the forgoing reasons and discussion, the present petition deserves to be allowed. It is accordingly allowed. Notice dated 29.3.2018 issued under Section 148 of the Income Tax Act, 1961 in respect of the assessment year 2013-14 is set aside, also set aside is the order Assessing Officer dated 28.9.2018 rejecting the objections.

(N.V.ANJARIA, J)

(BHARGAV D. KARIA, J)

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