

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 16898 of 2017****With****SPECIAL CIVIL APPLICATION NO. 16899 of 2017**

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JALIL ABDULBHAI SHAIKH....Petitioner(s)

Versus

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

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Appearance:

MR MANISH J SHAH, ADVOCATE for the Petitioner(s) No. 1

MRS MAUNA M BHATT, ADVOCATE for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 06/02/2018

ORAL ORDER**(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. Since facts are identical on all material aspects, we may record facts from Special Civil Application No.16898 of 2017.

2. Petitioner has challenged a notice dated 31.03.2017 issued by the respondent-Assessing Officer seeking to reopen the petitioner's assessment for the assessment year 2010-11.

3. Brief facts are as under.

4. The petitioner is an individual and is engaged as a professional architect. For the assessment year 2010-11, the petitioner had filed the return of income on 18.09.2010 which was later on revised on 31.10.2010. The return was accepted under section 143(1) of the Act. The petitioner was subjected to survey operation under section 133A of the Act. On 01.12.2011, consequent to the search, the Assessing Officer issued notice under section 148 of the Act on 09.11.2012 to reopen the assessment for the assessment year 2010-11. In response to the notice, the petitioner filed the return declaring total income of Rs.48.85 lakhs (rounded off). In order to issue the notice for reopening, the Assessing Officer had recorded following reasons:

"A survey action u/s. 133A of the IT Act was conducted in the business premises of assessee on 01.12.2011 at B-601, 604, President Plaza, Nr. RTO, Surat. During the course of survey one small mini diary and certain loose papers were found. The mini diary has been impounded as per annexure BI-4 and loose papers as per BI-1. The impounded documents contain unaccounted professional receipts. The statement of assessee recorded on oath and vide answer to question No.32, the assessee has accepted that he has received unaccounted professional income in the tune of Rs.5,96,914/-

In view of the above facts, I have reason to

believe that income to the extent of Rs.5,96,914/- have been escaped assessment for the reason of failure on the part of the assessee to disclose fully and truly the material facts necessary for his assessment for the A.Y. 2010-11 within the meaning of the section 147 of the IT. Act."

5. The Assessing Officer thereupon passed an order of assessment under section 143(3) read with section 147 of the Act on 22.03.2013, in which, he made a disallowance of Rs.1.79 lakhs of the assessee's claim of expenditure of 30% of the receipts. Subject to this modification, the assessee's returned income was accepted.

6. To reopen such assessment, the Assessing Officer issued impugned notice. For which, he had recorded following reasons:

"A Survey action u/s 133 of the I.T. Act was conducted on (01.12.2011) in the case of assessee at his office B-601-604, President Plaza, Near RTO, Surat. The assessee is providing consulting services as Civil Structural Designer to the builders for their residential/commercial projects in Surat, Vapi, Valsad, Navsari and to the private parties for their residential /office premises.

2. During the course of survey, incriminating documents related to unaccounted professional receipts of the assessee in cash was found and impounded. Statement u/s 131 of the assessee was recorded during the course of survey. The

assessee was questioned about loose paper file (Annexure-BI-1) and dairy (Annexure-BI-4) in Q.No.-32 & 33. The assessee has clearly admitted the following in his statement.

(i) Page No-3 to 6 of loose paper file (annexure-BI-1) which is maintained by an employee of the assessee represents each bill raised by him wherein the bifurcation has been given in cheque and cash. The cheque figures have been included in his regular income whereas fees received in cash have not been included in his regular income.

(ii) The diary (Annexure-BI-4), written in his own handwriting represents date wise fees received in cash by him for the different years. After going through the diary the assessee has stated that for A.Y.2010-11, the professional fees received in cash is Rs.5,96,914/-.

(iii) The figures were totaled financial year wise. The amounts were admitted to be cash received not included in regular books of account or regular income by the assessee.

3. On verification of impounded material and statement of the assessee, it is noticed that the assessee was using codes by removing one zero while writing the cash figures in the dairy impounded Annexure-BI-4. Prima facie the figures of amounts, admittedly received in cash out of books were in coded form as the figures are upto first place of decimal; which would otherwise mean that the engineer (assessee) was receiving cash amount upto 30 paise etc. in 2011; which indicated that code was being used. For example 8583.8 on 21.02.2011, 2427.7 and 1912.3 on 05.05.2011 etc. However, not only this, there is conclusive proof of one zero being not used while writing the figures. A document i.e. page no.19 of the loose paper filed found and impounded as per

Annexure-BI-1, which is a letter written by the assessee to Shri Vimalbhai on 03.11.2010, and was confronted to the assessee vide Q. No.25, 26 and 27 of the statement dated 01.12.2011. He accepted receiving unrecorded cash payments and the content of the letter are very clear in Q. No.27 and his reply to it. The same are being reproduced for ready reference.

"Q. No. 27: In answer to Q. No.25, you have stated that you have so far received an amount of Rs.10,41,000/- from Shri Vimal Poddar. Now I am showing you page no. 18 of loose paper file – Annexure -A wherein it has been written as under:

Sr. No.	Name of Project	Amount
01.	Shaurya Palace	175,000.00
02.	Poddar Residency	4,81,000.00
03.	Palm Avenue	<u>3,85,000.00</u>
		10,41,000.00
Was paid		
	4,10,000 + 4,10,000	8,20,000.00
	Cheque Cash	
	Balance	<u>2,21,000.00</u>

(Two Lakh Twenty One Thousand Only)

From the above writing, it is quite evident that you have received an amount of Rs.4,10,000/- in cheque and Rs.4,10,000/- in cash. Please go through the same and confirm whether the nature of these transactions and also confirm whether you have received both the cheque amount and cash amount.

Ans. 27: Yes sir, these are the consultancy charges received by me from Shri Vimal Poddar for the three projects. I also confirm that I have received both the cheque amount and cash amount subsequently. The balance amount of Rs.2,21,000/- has also been received by me in cash."

Clearly, Rs.4,10,000/- have been received

(from Shri Vimal Poddar for projects Shaurya Palace, Poddar Residency and Palm Avenue) through cash till the date of writing of the letter i.e. 03.11.2010 and the assessee has accepted that the remaining balance of Rs.2,21,000/- was received in cash thereafter before the statement was recorded.

Now, when the contents of this letter are compared with the contents of the diary as per Annexure BI-4, it becomes very clear and is a clinching proof that one decimal place has been removed while writing the figures in the diary. The payment of Rs.2,21,000/- which was pending on 03.11.2010 and the appellant has accepted had already been received on the date of search has been noted received in the diary in 23.10.2011 in the diary at page no.117 as 22100. The narration is Vimal Poddar with respect to 3 projects. Clearly, one zero has been removed, while writing the figures.

4. The payment of Rs.4,10,000/- as mentioned in the letter, which was received in cash as mentioned in letter, has also been noted in the diary by removing one digit (decimal place) on different dates. Details of payment of Rs.4,10,000/- received from Vimal Poddar date as noted in diary seized as per Annexure-BI-4 is as under:

Date	Amount in code noted in diary	Noted at page no.
06.11.2007	2500	57
11.06.2007	1500	57
18.02.2008	4000	61
06.02.2008	4000	64
26.09.2008	4000	67
23.10.2008	5000	71
24.10.2008	7500	72
22.04.2009	3500	75

05.02.2009	2000	76
05.04.2009	2000	76
15.10.2009	2500	83
15.10.2009	2500	83
Total	41000	

From the above it is evident that the assessee has willfully under reported the unaccounted receipts by 10 times.

5. On perusal of case records of the assessee it is seen that case of the assessee was reopened u/s 147 for A.Y. 2010-11 and notice u/s 148 of the I.T. Act was issued on 09.11.2012. In compliance of notice u/s 148 the assessee has filed his return of income in which he has disclosed unaccounted receipt without adding zero i.e. Rs.5,96,914/- and claimed 30% deduction as expenses on unaccounted receipts. Therefore, the assessee has not disclosed his true particulars of his unaccounted income i.e. Rs.59,69,140/- even in the return of income filed in compliance to notice u/s.148 of the Act.

6. Hence, I have reason to believe that the income of the assessee has escaped assessment to the extent of Rs.53,72,226/- (59,69,140 – 5,96,914) during the A.Y. 2010-11 because of the failure on the part of the assessee to disclose his income fully and truly. Therefore, I am satisfied that this is a fit case for invoking the provisions of section 147 of the Act. Accordingly, approval for issue of notice u/s. 148 of the Act may kindly be accorded."

7. The gist of the reasons elaborately recorded by the Assessing Officer is that according to him, there is material on record to suggest that the figures mentioned in the personal diary maintained by the

assessee represented the cash transactions reduced by one zero. In other words, reference to the outstanding payment of Rs.4,10,000/- in the diary was made by noting a figure of Rs.41,000/-. This picture, the Assessing Officer desired to project against the assessee's unaccounted receipt of Rs.5,96,914/- made in the diary.

8. We may recall, during the survey operations, the assessee was confronted with such entry in the diary and the assessee admitted that the said figure of Rs.5,96,914/- represented his unaccounted cash and professional receipts, which he had not offered to tax. While therefore filing a return in response to the notice under section 148 of the Act, the assessee included such income in the declared income. The Assessing Officer accepted such return and, as noted earlier, barring minor adjustment of claim of expenditure, confirmed the assessee's declaration of income. To reopen such assessment, the impugned notice came to be issued which clearly is beyond the period of four years from the end of relevant assessment year. The reasons proceed concededly only on the material available on record. Such relevant

material included the notings in the assessee's diary which recorded a figure of Rs.5,96,914/- as outstanding fees to be collected and other entries referring to certain outstanding payments. The Assessing Officer now contends that insofar as other entries are concerned, there is material to believe that the figures in the diary were recorded after dropping one zero. The Assessing Officer therefore now contends that even the said figures of Rs.5,96,914/- should be considered as the assessee's undisclosed income by adding one zero.

9. We are not called upon to decide the validity of Assessing Officer's such contention. The fact remains that whatever legal conclusions on the basis of the factual analysis the Assessing Officer desirous to arrive at, is based on the material already on record all throughout during previously reopened assessment proceedings. In absence of any new information or material which do not form part of the original assessment proceedings, it would not be open for the Assessing Officer to frame fresh assessment, that too, in a case where the notice of reopening has been issued beyond a period of four years. Even otherwise,

permitting the Assessing Officer to reexamine the entire issue once again, looking at materials on record from a different angle would destroy the very concept of finality of an assessment order which can be permitted only on legally recognized grounds.

10. In the result, petitions are allowed. Respective impugned notices are set aside.

(AKIL KURESHI, J.)

(B.N. KARIA, J.)

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