

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 15748 of 2016

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

Sd/-

and

HONOURABLE MR.JUSTICE B.N. KARIA

Sd/-

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

ORIENT NEWS PRINTS LTD....Petitioner(s)

Versus

DEPUTY COMMISSIONER OF INCOME TAX - CIRCLE - 3 (1)

(1)....Respondent(s)

Appearance:

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

MR NITIN K MEHTA, ADVOCATE for the Respondent(s) No. 1

CORAM: HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 09/01/2017

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE M.R. SHAH)

[1.0] RULE. Shri Nitin Mehta, learned Advocate waives service of notice of Rule on behalf of the respondent. In the facts and circumstances of the case and with the consent of learned Advocates appearing for respective parties, present petition is taken up for final hearing today.

[2.0] By way of this petition under Article 226 of the Constitution of India, the petitioner – assessee has prayed for an appropriate writ, direction and order to quash and set aside the impugned notice dated 28.03.2016 issued under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as “IT Act”) by the respondent – Assessing Officer, by which the learned Assessing Officer has sought to reopen the assessment for AY 2011-12 alleging *inter alia* that the income chargeable to tax has escaped assessment for AY 2011-12.

[3.0] Facts leading to the present Special Civil Application in nut-shell are as follows:

[3.1] That the petitioner filed the return of income for AY 2011-12. The said return was accompanied by the statement of total income, Form Nos.3CB, 3CD, annual audited accounts, audit report obtained under Section 44AB of the IT Act and the audited balance sheet. The case was selected for scrutiny and the notice under Section 142(1) of the IT Act was issued by which the learned Assessing Officer called various details with respect to the increase of share capital, share application money, expenditure incurred by the assessee. That the assessee submitted all the necessary details asked by the learned Assessing Officer more particularly with respect to the increase of share capital; with respect to share application money and even the expenditure incurred by the assessee. At this stage it is required to be noted that in Form No.3CD the assessee specifically stated its business as “trading in fabrics”. The assessee also stated that in the previous year the business of the assessee was “trading in papers”. That thereafter the learned Assessing Officer framed the scrutiny assessment under Section 143(3) of the IT Act. That thereafter the petitioner has been served with the impugned notice under Section 148 of the IT Act by which the learned Assessing Officer has sought to reopen the assessment for the AY 2011-12 alleging *inter*

alia that the income chargeable to tax has escaped assessment. That at the request of the assessee, the learned Assessing Officer has furnished the reasons recorded to reopen the assessment which are as under:

“1. During the year, paid up capital of company was increased by Rs.1,65,00,000 (20,99,00,000 – 19,34,00,000). In addition to this, the assessee also got share application money of Rs.30,15,00,000 during the year. Assessee also got share premium of Rs.16,59,88,800 during the year.

The assessee company vide resolution dated 09.03.2011, allotted 16,50,00 equity shares of Rs.10 each for cash at a premium of Rs.90 per equity share aggregating to Rs.16.50 crore to six persons as detailed below:

Sr. No.	Name of allottee	Address	No. of shares	Amount received
1	Chirayush Agro Marketing Pvt Ltd	Shop No.5, Rizvi Nagar Co-op Housing Society, SV Road, Santacruz (W), Mumbai-54	5,00,000	5,00,00,000
2	Pawantar Agro Agencies Pvt Ltd	Shop No.5, Rizvi Nagar Co-op Housing Society, SV Road, Santacruz (W), Mumbai-54	3,00,000	3,00,00,000
3	Param Commodities Pvt Ltd	Shop No.5, Rizvi Nagar Co-op Housing Society, SV Road, Santacruz (W), Mumbai-54	3,00,000	3,00,00,000
4	Parmarth Agro Marketing Pvt Ltd	Shop No.5, Rizvi Nagar Co-op Housing Society, SV Road, Santacruz (W), Mumbai-54	3,00,000	3,00,00,000
5	Shri Visnukrupa Commodities Pvt Ltd	202, Sonalika, Behind Natraj Studio, Near Manjrekar Wadi, Andheri Kurla Road, Andheri East, Mumbai – 69	1,70,000	1,70,00,000
6	Utkarsh Agro Agencies Pvt Ltd	202, Sonalika, Behind Natraj Studio, Near Manjrekar Wadi, Andheri Kurla Road, Andheri East, Mumbai – 69	80,000	80,00,000
		Total	16,50,000	16,50,00,000

Assessee company furnished confirmation from these persons in this regard. No separate confirmation from above parties u/s 133 was obtained. Bank details from above persons were also not obtained. In view of these facts, in absence of independent confirmation u/s 133 from these parties along with their bank statement corroborating the genuineness of purchase of shares, identity and genuineness of remained unsubstantiated.11. As such Rs.16,50,00,000 was required to be treated as income of assessee u/s 68 of the Act.

2. It was further noticed that share application money of Rs.30,15,00,000 was received from 7 entities located at Kolkata which itself had received money from others as detailed below:

Name of entity from which share application money received	Address	Name of entities from which advances were received by applicant	Amount
Quest Financial Services Pvt Ltd	454, Dum Dum Park (Ground Floor), Kolkata	Drishti Suppliers Pvt Ltd	7,00,00,000
		Gangotri dealers Pvt Ltd	
Burnpur Power Pvt Ltd	21, Hemant Basu Sarni, Center Point, 2 nd Floor, Kolkata	Pranjeewan Distributors Pvt Ltd	7,15,00,000
		Drishti Suppliers Pvt Ltd	
		Gangotri dealers Pvt Ltd	
		Fairdeal Vincom Pvt Ltd	
Faithful Cloth Merchants Pvt Ltd	319,21, Jessore Road, Kolkata	Burnpur Power Pvt Ltd	2,00,00,000
Pears Mercantiles Pvt Ltd	262, Panchanantala road, Howrah	Burnpur Power Pvt Ltd Drishti Suppliers Pvt Ltd Quest Financial Services Pvt Ltd	5,50,00,000
Wonderland Paper Suppliers Pvt Ltd	27, Netaji Subhash Road, Bally, Howrah	Fastner Machinery Pvt Ltd	3,00,00,000
Cyrus Infocomm Pvt Ltd	No.17, Ground Floor, Prabhat Center, Belapur, Navi Mumbai	Cott-Tex Fabrics Pvt Ltd	50,00,000
Anurodh Infrastructure Pvt Ltd	319,21, Jessore Road, Kolkata	Pears Mercantiles Pvt Ltd	5,00,00,000
		Fairdeal Vincom Pvt Ltd	
		Total	30,15,00,000

Further, it was noticed from the website of MCA that Quest Financial Pvt Ltd (CIN U 65910AP1990PTC011212) which has paid Rs.seven crore as share application, has paid up share capital of only Rs.18,000 and has its registered office at Room No.24, Unity House, Abids, Hyderabad. Its last AGM, date of balance sheet and name of directors were not available. Anurodh Infrastructure Pvt Ltd which has paid Rs.five crore as share application, has no details at all. Pranjeewan Distributor Pvt Ltd from which Burnpur Power Pvt Ltd has stated to receive money as advance and Fastner Machinery Pvt Ltd from which Wonderland Paper Suppliers Pvt Ltd has stated to receive money as advance have no details. Dristi Suppliers Pvt Ltd which has advanced money to Quest Financial Services

Pvt Ltd, Burnpur Power Pvt Ltd and Pears Mercantiles Pvt Ltd in AY Financial Services Pvt Ltd, Burnpur Power Pvt Ltd and Pears Mercantiles Pvt Ltd in AY 2011-12 (FY 2010-11), has last filled its balance sheet as on 31.03.2010 and present status is reported as amalgamated. All these facts give a strong indication that these entities are merely working as facilitator to accommodate entries for channelizing unaccounted money.

3. *During the year, the assessee has shown income from sales being sales of shirting fabrics of Rs.1,44,66,761 against which purchase expenditure in the form of paper of Rs.1,43,22,938 was shown. No details of sales / purchases or copies of invoices are available on record. It was not clear that when the purchase was of paper only, how there was sale of shirting fabrics only. Incidentally, there was no opening / closing balance of any stock. As such, Rs.1,43,22,938 was required to be treated as income of assessee."*

[3.2] That the assessee submitted his detail objections against the reasons recorded for reopening vide his communication dated 06.05.2016. It was the specific case on behalf of the assessee that the grounds / reasons on which the assessment is sought to be reopened, were infact gone into by the learned Assessing Officer while framing the scrutiny assessment under Section 143(3) of the IT Act and during the course of the scrutiny assessment queries were raised with respect to increase in share capital; with respect to share application money and also with respect to expenses incurred by the assessee and all the relevant materials were supplied / furnished by the assessee and only thereafter the learned Assessing Officer framed the assessment. Therefore, it was submitted that the reopening can be said to be on a mere change of opinion by the subsequent Assessing Officer which is not permissible. With respect to the ground No.3 it was specifically submitted that during the year under consideration, the business of the assessee was trading in fabrics and it was a typographical error in the P&L Accounts and by mistake it was stated to be "paper purchase". Therefore, it was requested to drop the reassessment proceedings.

[3.3] That by communication dated 25.07.2016, the learned Assessing

Officer has disposed of the said objections and has not agreed with the objections raised by the assessee. Hence, the petitioner – assessee has preferred the present Special Civil Application challenging the impugned reassessment proceedings.

[4.0] Shri Tej Shah, learned Advocate appearing on behalf of the petitioner – assessee has vehemently submitted that the impugned reassessment proceedings is bad in law.

[4.1] It is submitted that the impugned reassessment proceedings are merely on change of opinion by the subsequent Assessing Officer. It is submitted that from the reasons recorded it can be said that the learned Assessing Officer has sought to reopen the assessment for AY 2011-12 on three grounds / reasons i.e. (1) increase in share capital; (2) share application money and (3) with respect to the expenditure incurred / income from sales being sales of shirting fabrics of Rs.1,44,66,761.

[4.2] It is submitted that all the aforesaid grounds / reasons on which the assessment is sought to be reopened, were infact gone into in detail by the learned Assessing Officer during the course of the scrutiny assessment and the queries were raised by the learned Assessing Officer with respect to the increase in share capital; with respect to share application money etc. and that the assessee furnished all the necessary details which were called for and asked by the learned Assessing Officer and only thereafter the learned Assessing Officer framed scrutiny assessment under Section 143(3) of the IT Act. It is submitted that therefore, the impugned reopening is on a mere change of opinion of the subsequent Assessing Officer, which is not permissible. It is submitted that it is not the case on behalf of the learned Assessing Officer that on the basis of any new material collected subsequently, he has formed an opinion that income chargeable to tax has escaped assessment.

Making above submissions and relying upon the decision of the Hon'ble Supreme Court in the case of **CIT Vs. Kelvinator India Ltd.** reported in **(2010) 320 ITR 561 (SC)** as well as the decision of the Division Bench of this Court in the case of **Gujarat Power Corporation Ltd. vs. Assistant Commissioner of Income-tax** reported in **[2013] 350 ITR 266 (Guj)**, it is requested to allow the present petition and quash and set aside the impugned reopening.

[5.0] Shri Nitin Mehta, learned Counsel appearing on behalf of the Revenue has tried to oppose the present petition by submitting that in the assessment order the learned Assessing Officer has not discussed anything in detail with respect to the increase in the share capital and also with respect to the share application money. It is submitted that even no notices were sent to the respective share applicants as required under Section 133 of the IT Act, to satisfy himself with respect to the genuineness of the share applicants / share application money. It is submitted that therefore the learned Assessing Officer is justified in reopening the assessment after having satisfied that income chargeable to tax has escaped assessment and to consider the genuineness of the increase in the share capital as well as the genuineness of the share application money / share applicants. It is submitted that the impugned reopening is within the period of four years and therefore, when the learned Assessing Officer has formed a reasonable belief considering the material on record that the income chargeable to tax has escaped assessment, the learned Assessing Officer is justified in reopening the assessment in AY 2011-12.

Making above submissions and relying upon the decision of the Division Bench of this Court in the case of **Praful Chunilal Patel vs M.J. Makwana, Assistant CIT** reported in **(1999)236 ITR 832**, it is requested to dismiss the present petition.

[6.0] Heard learned Advocates appearing on behalf of the respective parties at length.

At the outset it is required to be noted that in the present case the assessment for AY 2011-12 is sought to be reopened for the reasons reproduced hereinabove. It is true that the assessment is sought to be reopened within a period of four years. However, it is a specific case on behalf of the assessee that while framing the scrutiny assessment under Section 143(3) of the IT Act, the grounds / reasons on which the assessment is sought to be reopened were already gone into in detail by the learned Assessing Officer, specific queries were raised by the learned Assessing Officer with respect to increase in the share capital; with respect to share application money as well as the income of the assessee from trading in fabrics. It is the case on behalf of the assessee that only thereafter the learned Assessing Officer framed the scrutiny assessment under Section 143(3) of the IT Act. From the material on record it is found that during the scrutiny assessment, the learned Assessing Officer raised the specific queries with respect to the increase in the share capital; with respect to the share application money and also with respect to income of the assessee from trading in fabrics. The assessee furnished all the necessary information with respect to the new share capital introduced during the year under consideration. He also furnished all the necessary particulars with respect to the share application money including the names and address and the PAN number of the share applicants. He also furnished the details of the sales made by the assessee, to the respective parties. Vide communication dated 06.09.2013 the assessee answered the specific queries with respect to the increase in the share capital as well as the share application money. With respect to the increase in the share capital, the assessee produced the confirmation letter from the party confirming the said investments; share application form; bank statement for the relevant period; acknowledgement for filing their ITR for AY 2011-12; audited

accounts for the financial year 2010-2011 and copy of the PAN card etc. Similar information of material / details were supplied by the assessee with respect to the share application money. It appears that thereafter the learned Assessing Officer having satisfied with the genuineness with respect to the increase in the share capital as well as share application money and also with respect to the income of the assessee from trading in the fabrics framed scrutiny assessment under Section 143(3) of the IT Act. Therefore, subsequent reopening on the aforesaid grounds can certainly be said to be on a mere change of opinion by the subsequent Assessing Officer. As held by the Hon'ble Supreme Court in the case of Kelvinator India Ltd. (Supra) and the Division Bench of this Court in the case of Gujarat Power Corporation Ltd. (Supra), on mere change of opinion by a subsequent Officer, the reopening of the concluded scrutiny assessment under Section 143(3) of the IT Act is not permissible.

[6.1] Now, so far as the reliance placed upon the decision of the Division Bench of this Court in the case of Praful Chunilal Patel (Supra) is concerned, it is required to be noted that as such the said decision has been considered by this Court in subsequent decisions and it is observed and held that the said decision cannot be said to be a decision on an absolute proposition of law that in all the cases where the reopening is within the period of four years, the same is permissible. Even otherwise on facts the said decision shall not be applicable to the facts of the case on hand. In the case before the Division Bench of this Court, it was found that the Assessing Officer subsequently found a glaring mistake for which the assessment was sought to be reopened. The Division Bench observed that though all the necessary materials were furnished by the assessee, when the Assessing Officer has subsequently found a mistake, the reopening is permissible within a period of four years. In the present case, as observed hereinabove, it is not the case on behalf of the assessee that merely because all the material was produced, the reopening is not

permissible. The question is with respect to the change of opinion by the subsequent officer which has been elaborately dealt with and considered by the Division Bench in the case of Gujarat Power Corporation Ltd. (Supra).

[6.2] Now, so far as submission on behalf of the Revenue that during the assessment proceedings the learned Assessing Officer did not hold any inquiry and called for the information from the concerned share applicants and/or did not issue any notice to the concerned share applicants under Section 133 of the IT Act is concerned, it is required to be noted that the assessee did furnish all the necessary details with respect to share applicants including the names, address and even the PAN card number. Thereafter, if the Assessing Officer is doubting the same, it is for the Assessing Officer to issue the notices under Section 133 of the IT Act. If the learned Assessing Officer is satisfied that the reply given by the assessee and/or the details furnished by the assessee, the learned Assessing Officer may not even thereafter issue the notice under Section 133 of the IT Act. However, on the aforesaid ground the reopening is not permissible.

[6.3] In view of the above and for the reasons stated above, when it has been found that the reasons / grounds on which the assessment is sought to be reopened were already gone into in detail by the learned Assessing Officer while framing the scrutiny assessment and after raising the specific queries with respect to increase in the share capital, with respect to share application money and the income of the assessee from the trading in fabrics, only thereafter when the learned Assessing Officer framed the assessment, the impugned reassessment proceeding is not permissible.

[7.0] In view of the above and for the reasons stated above, the present

Special Civil Application succeeds. Impugned notice dated 28.03.2016 issued under Section 143(3) of the Income Tax Act, 1961 by the respondent – Assessing Officer is hereby quashed and set aside. Rule is made absolute to the aforesaid extent. No costs.

Sd/-
(M.R. SHAH, J.)

Sd/-
(B.N. KARIA, J.)

Ajay

