

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 21470 of 2016

FOR APPROVAL AND SIGNATURE :
HONOURABLE Mr. JUSTICE M.R. SHAH
and
HONOURABLE Mr. JUSTICE B.N. KARIA

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 ?	

DR. RAJIVRAJ RANBIRSINGH CHOUDHARY....Petitioner(s)
Versus
ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 1
(2)....Respondent(s)

Appearance:

Mr B S SOPARKAR, ADVOCATE for the Petitioner(s) No. 1
Mr SUDHIR M MEHTA, ADVOCATE for the Respondent(s) No. 1

CORAM: HONOURABLE Mr. JUSTICE M.R. SHAH
and
HONOURABLE Mr. JUSTICE B.N. KARIA
6th February 2017

ORAL JUDGMENT (PER : HONOURABLE Mr. JUSTICE M.R. SHAH)

1. Rule. Learned advocate Shri Sudhir M. Mehta waives service of notice of rule for and on behalf of the respondent.

2. In the facts and circumstance of the case, with the consent of learned advocates appearing on behalf of the respective parties, the present Special Civil Application is taken up for final hearing *today*.

3. By way of this petition under *Article* 226 of the Constitution of India, the petitioner-assessee has prayed for issuance of appropriate *writ* or order to *quash* and set-aside the *impugned* Notice dated 29th March 2016 issued under Section 148 of the Income-tax Act, 1961 [**“the Act”** for short] by which, the Assessing Officer has sought to reopen the assessment for Assessment Year 2009-2010 alleging *inter alia* that the income chargeable to tax for A.Y 2009-2010 has escaped assessment within the meaning of Section 147 of the I.T Act.

4. The facts leading to the present Special Civil Application in nutshell are as under :

4.1 That the assessee filed return of income for A.Y 2009-2010 on 30th September 2009 declaring total income at Rs. NIL. While submitting the return of income, the assessee disclosed that he had taken loans from the following family members :

[a] Shree Rajivram R Chouhry-HUF	Rs.
1,43,96,000/=	
[b] Shree Karan R. Choudhry	Rs.
10,00,000/=	
[c] Shree Urmila R Choudhry	Rs.
19,00,000/=	
	=====
	Rs. 1,72,96,000/=
	=====

4.2 The original assessment was taken in scrutiny. That thereafter, the Assessing Officer framed scrutiny assessment under Section 143 (3) of the Act on 29th December 2011 accepting the return of income; including the case on behalf of the petitioner that he had taken loans from the aforesaid family members. That thereafter, beyond the period of four years, the assessment for A.Y 2009-2010 is sought to be reopened

by the Assessing Officer by the *impugned* notice. At the request of the assessee, the Assessing Officer had supplied the reasons recorded for issuing the Notice under Section 148 of the I.T Act, which read as under :-

“Reasons for issuing Notice u/s. 148 of the I.T Act, 1961

Brief facts of the case are that the assessee has filed return of income for the A.Y 2009-2010 showing income at Rs. Nil on 30.09.2009 and the A.O has completed the scrutiny assessment u/s. 143 (3) on 29.12.2011 accepting the return of income.

On perusal of records, it is noticed that the assessee has taken loans from the following family members during the year under consideration :

[a]	Shree Rajivram R Chouhry-HUF	Rs.
	1,43,96,000/=	
[b]	Shree Karan R. Choudhry	Rs.
	10,00,000/=	
[c]	Shree Urmila R Choudhry	Rs. 19,00,000/=
	=====	
	Rs. 1,72,96,000/=	
	=====	

A survey u/s. 133A of the Income-tax Act

was carried out at the Hospital premises of the assessee on 19.12.2012 and statement of the assessee Dr. Rajiv R. Choudhry was recorded on oath on 20.12.2012 during the proceedings. In the answer to Question No. 31 of 35 of the said statement, the assessee stated that he has taken above loans from his HUF and his family members during the year which were given by them out of sale proceeds of the ancestral property situated at Panipat [Haryana]. Thereafter, the DDIT [Inv.] Unit-3, Surat has issued a commission u/s. 131 [1](d) to the DDIT [Inv.], Panipat for making necessary inquiries in respect of the sale of the ancestral property of the assessee and his family members at Panipat. The DDIT [Inv.], Panipat *vide* his letter dated 31.08.2015 has responded that no part of amount as claimed have been obtained during the F.Y 2008-09 by Dr. Shri Rajiv R. Choudhry and others from the sale of ancestral property including HUF is not proved. From the report of the DDIT [Inv.], Panipat, it is proved that the sources of the above loan providers of the assessee are not proved as claimed by the assessee. Therefore, the source of Rs. 1,72,96,000/= is remained unexplained. Hence, the assessee has concealed income to the extent of Rs. 1,72,96,000/= during the year.

These facts are came to the knowledge of the Revenue after completing the scrutiny assessment of A.Y 2009-2010 as a result of survey.

During the assessment proceedings of the A.Y 2009-2010, the A.O has referred the matter of the hospital building to the Valuation Officer to assess the actual cost of construction. At that time, time barring date for completing scrutiny assessment was 31.12.2011 and the A.O has completed the scrutiny assessment of the A.Y 2009-2010 on 29.12.2011. The Valuation Report of the DVO was received after completion of the scrutiny assessment on 30.11.2012. Hence, no cognizance of the said valuation report was given by the A.O at that point of time. However, as per valuation report of the Departmental Valuer, the assessee has suppressed the investment in the construction of the Hospital Building to the extent of Rs. 9,21,148 [Rs. 2,84,15,071 – Rs. 2,74,93,923/=] during the year under reference. Hence, the assessee has also concealed the investment to the extent of Rs. 9,21,148/= during the year.

From the above discussion, it is clear that the assessee has not disclosed fully and truly, all material facts necessary for his assessment for the year under consideration and the assessee

has concealed the income to the extent of Rs. 1,82,17,148/= [1,72,96,000 + 9,21,148].

In view of the above, I have reason to believe that the assessee has escaped income to the extent of Rs. 1,82,17,148/= from tax which is an escaped assessment within the meaning of Section 147 of the I.T Act, 1961. Hence, it is a fit case for issuing notice u/s. 148.

Issue notice u/s. 148 to the assessee.”

4.3 That thereafter, the assessee raised objections against the reasons recorded to reopen the assessment *vide* communication dated 23rd November 2016. It was a specific case on behalf of the assessee that the issue of his taking loans of Rs. 1,72,96,000/= from the concerned three parties was duly examined by the then Assessing Officer, and that on the basis of the confirmation and the assessment details submitted by the concerned creditors, the concerned Assessing Officer found the *impugned* loans to be genuine, and therefore, did not make any addition and has declared the total income on account of unexplained cash credit. Thus, it was submitted that there was no failure on the

part of the assessee in disclosing the true and correct facts necessary for the assessment. Therefore, it was submitted that the assumption of *jurisdiction* to reopen the assessment beyond the period of four years is bad in law. It was submitted that therefore, the condition precedent for assuming *jurisdiction* to reopen the assessment beyond the period of four years is not satisfied. It was also submitted that even the reasons are factually incorrect. It was submitted that the documents produced alongwith a copy of the computation of total income, together with acknowledgment of return of income filed by Dr. Rajivram R Choudhry [HUF] for A.Y 2005-2006 was to show that the said assessee *ie.*, Dr. Rajivram R Choudhry [HUF] has shown to have received a sum of Rs. 1,21,25,000/= by way of sale consideration of land at Panipat and that the said assessee has also computed chargeable capital gains for the said Assessment Year. It was also submitted that the said assessee has also paid income tax on the chargeable

capital gain. It was submitted that the reliance placed upon DDIT [Investigation] Inquiry Report with regard to the sale of land by Dr. Rajivraj R Choudhry [HUF] for Financial Year 2008-2009 was absolutely misplaced. It was submitted that from the very beginning, it was the case of the assessee that the aforesaid assessee-Dr. Rajivram R Choudhry [HUF] sold ancestral property in the financial year 2005-2006 and from the amount available with HUF, loan was given to the assessee. It was submitted that if the DDIT [Invs.], Panipat made inquiry with respect to F.Y 2008-2009 observing that there was no sale transaction by the said HUF in the F.Y 2008-2009, and therefore, the claim of the assessee that he received loan from Dr. Rajivram R. Choudhry [HUF] from the balance amount from the property sold by the said HUF is not believable.

4.4 Now so far as the second reason given by the Assessing Officer to reopen the assessment *ie.*, difference in the amount of investment in the construction of hospital building, it was submitted that

there is difference of only three *percent*. It was submitted that according to the assessee, investment in the construction of hospital building was to the extent of Rs. 2,74,93,923/=, however, as per the investigation report, it was Rs. 2,84,15,071/=. It is submitted that therefore, as per the *catena* of decisions, DVO's report, at the most, can be said to be an opinion on the basis of which alone, re-assessment proceedings is not permissible.

4.5 That thereafter, the Assessing Officer has disposed of the objections and has not agreed with the objections raised by the assessee. Hence, the assessee has preferred the present petition under *Article* 226 of the Constitution of India, requesting to *quash* and set-aside the *impugned* notice issued under Section 148 of the Income-tax Act, 1961.

5. Heard learned advocates appearing on behalf of respective parties.

6. The present petition is vehemently opposed by Shri Sudhir Mehta, learned counsel appearing on behalf

of the Revenue. It is submitted that after a detailed inquiry and information received from DDIT [Inv.], Unit-III, Surat who issued commission under Section 131 [1] (d) to the DDIT [Inv.], Panipat and thereafter, when it was found that the claim of the assessee that he had not received any loans from the aforesaid HUF and others, and the claim of the assessee that he received loans from the aforesaid three persons is not genuine, the Assessing Officer is justified in reopening the assessment.

6.1 It is submitted that even on the basis of DVO's report, which was not considered by the Assessing Officer while framing the scrutiny assessment under Section 143 [3] of the Act, when it was found that there was a difference in the investment in construction of hospital building claimed by the assessee and as per the DVO's report and it was found that the assessee by concealing the investment to the extent of Rs. 9,21,148/= during the year under consideration, the Assessing Officer is justified in reopening the

assessment beyond the period of four year. Making the above submissions, it is requested to dismiss the present petition.

7. Having 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 A.Y 2009-2010 is sought to be reopened beyond the period of four years, and therefore, unless and until the condition precedent to reopen the assessment beyond the period of four years, as mentioned in proviso to Section 147 of the I.T Act is satisfied *ie.*, if it is found that there was any failure on the part of the assessee in disclosing the true and correct facts necessary for the assessment, the Assessing Officer is not justified to reopen the assessment beyond the period of four years.

8. It is submitted that in the present case, at the time of scrutiny assessment under Section 147 [3] of the Act and at the time of filing the return of income, the assessee specifically claimed that he had taken loans

from the aforesaid family members during the year under consideration. Alongwith the return of income/computation of income, it appears that the assessee also placed reliance upon materials such as return filed by Dr. Rajivram R Choudhry [HUF] stating that the said HUF sold ancestral property at Panipat in the FY 2005-2006. That thereafter, the Assessing Officer framed scrutiny assessment under Section 143 [3] of the Act and accepted the case of the assessee that he had taken loans from the aforesaid three persons and did not make any amount towards undisclosed cash investment. Under the circumstances, the entire issue as such was gone into by the Assessing Officer while framing the scrutiny assessment under Section 143 [3] of the I.T Act. Under the circumstances, as such it cannot be said that there was any failure on the part of the assessee in not disclosing the true and correct facts necessary for the assessment. Hence, it can be said that the Assessing Officer has materially erred in assuming jurisdiction to reopen the assessment

beyond the period of four years. The conditions precedent to invoke jurisdiction to reopen the assessment beyond the period of four years, as provided in proviso to Section 147 of the I.T Act are not satisfied.

8.1 Even otherwise, considering the material available on record, it appears that the reasons recorded to reopen the assessment beyond the period of four years are not germane. From the reasons recorded, it appears that on the basis of information received from DDIT [Inv.], Panipat that no property was sold by Dr. Rajivram R Choudhry [HUF] in FY 2005-2006, the Assessing Officer has doubted the genuineness of the loans received by the assessee from the aforesaid three persons. However, it is required to be noted that the case of the assessee from the very beginning was that the aforesaid HUF sold the ancestral property in F.Y 2005-2006. It was never the case of the assessee that the said HUF sold the property in F.Y2008-2009. Necessary documents of Shri Rajivram R Choudhry

[HUF] to show that the ancestral properties were sold in F.Y 2005-2006 were already produced on record at the time of scrutiny assessment under Section 143 [3] of the Act. Even a certificate issued by DDIT [Inv.], Panipat was issued with respect to altogether another property for which the sale proceeds were not received in FY 2008-2009. That, the property which was sold in FY 2005-2006 by HUF and others were altogether different properties for which the sale deeds were produced on the record. Under the circumstances, formation of opinion by the Assessing Officer doubting genuineness of the claim of the assessee with respect to the loans taken from the aforesaid three persons is on the wrong premise and the facts.

9. Now so far as the second reason to reopen the assessment for A.Y 2009-2010 is concerned, which is based on the Valuation Report of D.V.O, it is required to be noted that on DVO's report, the Assessing Officer has formed a belief that the assessee had concealed the investment to the extent of Rs. 9,21,148/= during

the year under consideration. However, it is required to be noted that at the time when scrutiny assessment was framed under Section 143 [3] of the Act on 29th December 2011, there was no DVO's report. Even in the reasons recorded, it is specifically mentioned that the valuation report of DVO was received after completion of scrutiny assessment on 30th November 2012. The claim of the assessee with respect to the investment in construction of Hospital building of Rs. 2,74,,93,923/= came to be accepted by the Assessing Officer while framing the scrutiny assessment under Section 143 [3] of the I.T Act. Even otherwise, it is required to be noted that there is hardly a difference of Rs. 9,21,148/= *ie.*, approximately of 3% of the total investment in construction of hospital building. As per the *catena* of decisions, DVO's valuation report can be said to be its opinion and there might be some variation in the calculation. In any case, it cannot be said that there was any failure on the part of the assessee in not disclosing true and correct facts necessary for

assessment which warrants reopening beyond the period of four years.

10. In view of the above and for the reasons recorded hereinabove, the petition succeeds. The *impugned* Notice of reopening of the assessment for A.Y 2009-2010n dated 29th March 2016, which is issued beyond the period of four years is hereby *quashed* and set-aside. Rule is made absolute accordingly. No order as to costs.

[M.R Shah, J.]

[B.N Karia, J.]

Prakash

THE HIGH COURT
OF GUJARAT

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