

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 5692 of 2006

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

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TORRENT POWER S.E.C. LIMITED....Petitioner(s)

Versus

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

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Appearance:

MR. S.N. SOPARKAR LD. SR. ADV WITH MRS SWATI SOPARKAR, ADVOCATE
for the Petitioner(s) No. 1

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

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CORAM: HONOURABLE MR.JUSTICE M.R. SHAH

and

HONOURABLE MR.JUSTICE B.N. KARIA

Date : 02/12/2016

ORAL JUDGMENT

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

1.0. By way of this petition under Article 226 of the Constitution of India, the petitioner has prayed for an appropriate writ, direction and order to quash and set aside the impugned notice issued under Section 148 of the Income Tax Act dated 03.09.2004, by which, the Assessing Officer has sought to reopen the assessment for AY 2000-01 under

Section 147 of the Income Tax Act.

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

2.1. That the petitioner company incorporated under the Companies Act (hereinafter referred to as the “assessee”) filed its return of income declaring total income of Rs.8,41,95,356/-. The said return was processed and accepted under Section 143(1) of the Act on 28.02.2001. It appears that thereafter the audit party raised audit objection with respect to the gross receipt shown in P & L account with respect to subsidy amount received from the Government. That having received the remarks from the audit party, the Assessing Officer vide communication dated 2.05.2002 called for various details from the Assessee regarding subsidy showing nature, amount payable by government, amount payable to the government, amount sanctioned and received and the treatment given to the transaction in the books of accounts of the assessee, liability on account of the government duty and the tax on sale of electricity, details of gross earning and adjustments of subsidy etc. in response to certain queries raised by the auditors from the office of the Accountant General. That the assessee furnished all the details called for by the Assessing Officer. That the Additional Commissioner of Income Tax, Range-4, Surat -immediate superior of the Assessing Officer vide his communication / letter dated 2.12.2002 addressed to the Commissioner of Income Tax,II, Surat clarifying that on examination of books of accounts of the assessee it was found that (1) the gross sales of electricity, including the amount of subsidy had been credited in the books of accounts of the assessee and therefore, the sales includes subsidy and there is no need to add it further to the sales and in P & L account of the assessee;(2) No such subsidy was borne by the

Government in FY 1999-00 and hence the objections of the audit for FY 1999-00 (AY 2000-01) stands infructuous. That the subsidy on the account of equalization of tariff was discontinued w.e.f. 1.4.1999. The amount of Rs. 30.66 crores was only a release of outstanding subsidy during AY 2000-01 pertaining to earlier years; (3) Therefore, the objections raised by the Audit Party cannot survive more so when there was no discrepancy in the accounting system of the assessee with regard to the accounting of subsidy. It was stated that therefore, the observation of the audit report may be treated as complied with and no remedial action was called for on the merits of the case.

2.2. That after a period of approximately 18 months, Assessing Officer issued the impugned notice dated 03.09.2004 under Section 148 of the Act, reopening the assessment for AY 2000-01. That in reply to the aforesaid notice, the assessee vide letter dated 28.09.2004, asked the Assessing Officer to treat the original return filed as return filed in response to the notice under Section 148 of the Act. At the request of the assessee, Assessing Officer supplied the reasons recorded to reopen the assessment for AY 2000-01 vide communication dated 23.02.2005. The reasons recorded to reopen the assessment is as under:

“The reasons to believe that income chargeable to tax has escaped assessment:

The power tariff of the assessee company was higher than the power tariff of the Gujarat Electricity Board (GEB). As a result of the agitation of the consumers of the assessee company, the Government of Gujarat asked the assessee company to charge the consumers at par with the rate of GEB and the Government of Gujarat agreed to reimburse the difference to the assessee company by way of subsidy.

From the records, it is seen that the assessee had received the subsidy from the Government of Gujarat during the previous year amounting to Rs.3066 lakhs.

The subsidy amounts have not been distinctly shown in the profit and loss account of the assessee company. The records neither reveal that the amount of subsidy had really passed

on to the assessee nor reveal that the consumers were charged at lower rate and the gross receipt was inclusive of subsidy amount. Thus, the subsidy amount has not been offered as income of the assessee. In the given position of facts, I have reason to believe that income to the extent of Rs.3066 lakhs has escaped assessment.

Issue notice u/s 148 of the Act.”

2.3. That thereafter, the assessee through its authorized representative raised various objections both on jurisdiction and on merits against the reopening of the assessment, vide communication / letter dated 09.03.2005. It was the specific case on behalf of the assessee that assessment is reopened solely on the objection raised by the audit party and that there is no independent satisfaction of the Assessing Officer that income has escaped assessment. The detailed objections were also made on merits. Therefore, it was requested to drop the reassessment proceedings. That vide letter dated 08.09.2005, the Assessing Officer disposed of the objection raised by the assessee and inter alia held that reopening is valid and within the jurisdiction. That thereafter, vide letter dated 30.09.2005, the assessee once again pointed out reopening is bad in both on law as well as on facts relying upon the chronology of events for various earlier assessment years and inter alia pointed that Assessing Officer has made some factually erroneous statement and observations contrary to the evidences placed on record. It was also submitted that subsidy received from the government has been properly accounted in the books of account. Therefore, it was requested that reopening proceedings be dropped. However, reassessment proceedings have not been dropped. Hence, the petitioner has preferred present Special Civil Application challenging the impugned notice under Section 148 of the Act.

3.0. Shri S.N. Soparkar, learned counsel for the petitioner has

vehemently submitted that the impugned notice under Section 148 of the Act to reopen the assessment for AY 2000-01 is bad in law both on jurisdiction as well as on merits. It is vehemently submitted by Shri Soparkar, learned counsel for the petitioner that as such impugned notice under Section 148 of the Act is not sustainable under law as the same is on the audit objection raised by the audit party only and that there is no independent opinion by the Assessing Officer income has escaped assessment. It is submitted that on the contrary after considering the material on record it was submitted by the assessee to the Additional Commissioner of Income Tax, Range 4- Surat, communicated to the Commissioner of Income Tax, II, Surat that the objections raised by the Audit Party do not survive more so when there is no discrepancy in the accounting system of the assessee with regard to the accounting of subsidy. It is submitted that no remedial action was called for on the merits of the case. It is submitted that despite in the objections, it was specifically pointed out that solely relying upon the audit objection raised by the audit party and without any independent opinion formed by the AO that the income has escaped assessment, by disposing of the objection, the Assessing Officer has not deliberately not dealt with the same.

3.1. It is further submitted by Shri Soparkar, learned counsel for the petitioner that notice can be issued under Section 148 of the Act if the Assessing Officer has reason to believe that the income chargeable to tax has escaped assessment. It is submitted that belief must be that of honest and reasonable based on reasonable ground but not a mere change of opinion or suspicion. It is submitted that belief must lead to a conclusion that income has escaped assessment. It is submitted that in the present case there cannot be any reason to believe that some income has escaped assessment for the simple reason that there is nothing on

record to suggest that the assessee has not reflected the subsidy from the Government of Gujarat in its books of accounts and / or hidden the particulars of subsidy so as not to reflect the same in its gross sales. On the contrary, as per the audited accounts the subsidy outstanding for recovery from Government of Gujarat was shown separately under the schedule of "Sudry Debtors". It is submitted that as such the subsidy from the income was shown in the total income, in the books of account, however the same was adjusted against the dues of the State Government such as electricity dues etc. It is submitted that therefore, there cannot be any reason to believe that the same income has escaped assessment.

Making above submissions and relying upon the decisions of this Court in the case of Raajratna Metal Industries Ltd vs. Assistant Commissioner of Income Tax reported in (2014) 49 Taxmann.com 15(Gujarat) as well as in the case of National Construction Co vs. Joint Commissioner of Income Tax, Gandhidham Range reported in (2015) 60 Taxmann. Com 29(Gujarat), it is requested to allow the present Special Civil Application by quashing and setting aside the impugned notice.

4.0. Shri Nitin Mehta, learned counsel has appeared on behalf of the Revenue. At the outset, it is required to be noted that though the present Special Civil Application is of the year 2006 till date no reply has been filed either opposing the present petition and / or disputing the averments made in petition. Shri Mehta, learned counsel for the revenue has vehemently submitted that the original assessment order was under Section 143(1) of the Act and therefore, the Assessing Officer had no occasion to consider and / or go through in detailed the books of account / P & L account. It is submitted that therefore, the case on behalf of the assessee that amount of subsidy / repaid to the extent of Rs. 30.66 crores has been duly accounted for any gross receipt was

required to be verified. It is submitted that on verification of the details filed along with submissions / objection it has been found that subsidy / repaid receivable is nowhere reflected in the balance sheet. It is submitted that therefore, reopening of the assessment for 2000-01 is just and proper.

Making above submissions, it is requested to dismiss the present Special Civil Application.

5.0. Heard the learned advocates for the respective parties at length. At the outset, it is required to be noted that assessment for AY 2000-01 is reopened by impugned notice. From the reasons recorded, it appears that the assessment is reopened with respect to assessee received subsidy from the income during the previous year amounting to Rs.30.66 crores on the ground that the said subsidy amount has not been distinctly shown in the profit and loss account of assessee company. However, it is required to be noted that according to the assessee reopening is solely on the audit objection raised by the audit party and there is no independent formation of opinion by the Assessing Officer that the income had escaped the assessment. The said objection was raised against the reasons recorded in the notice and averments in the present petition, however the aforesaid has not been denied or disputed. From the material on record, it appears that after audit objections were received, the Additional Commissioner of Income Tax, Range-4, Surat asked the necessary particulars / documentary evidence on the objection raised by the audit party. The assessee furnished necessary documentary evidence including books of accounts etc. and after having satisfied with respect to the accounting system of the assessee with regard to the accounting of the subsidy, Additional Commissioner of Income Tax, Range 4- Surat, communicated to the Commissioner of Income Tax, II, Surat that the objections raised by the Audit Party do not survive and /

or observation made by the audit party may be treated as complied with and no remedial action was called for on the merits of the case. It is required to be noted that the assessment is reopened on the very ground on which the objections raised by the audit party. Under the circumstances and more particularly the allegations that the assessment is reopened solely on the objection raised by the audit party and there is no independent formation of opinion by the Assessing Officer that the income has escaped assessment, have not been denied or disputed, the impugned notice under Section 148 of the Act cannot be sustained. The decisions of this Court in the case of Raajratna Metal Industries Ltd (supra) and National Insurance Co (supra) shall be squarely applicable to the facts of the case on hand. Under the circumstances on the aforesaid ground alone, the impugned notice deserves to be quashed and set aside.

6.0. In view of the above and for the reasons stated above, present petition succeeds. The impugned notice issued under Section 148 of the Income Tax Act dated 03.09.2004 to reopen the assessment proceedings deserves to be quashed and set aside and 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.)

Kaushik