IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 16725 of 2018

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PURVIBEN SNEHALBHAI PANCHHIGAR

Versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 1(3)

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Appearance:

MR SHAKEEL A QURESHI(1077) for the PETITIONER(s) No. 1

for the RESPONDENT(s) No. 1

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

and

HONOURABLE MR.JUSTICE UMESH TRIVEDI

Date : 29/10/2018

ORAL ORDER

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. The petitioner has challenged a notice of re-opening of assessment for the Assessment Year 2013-2014.

2. Brief facts are as under:

2.1 Petitioner is an individual. For the Assessment Year 2013-2014 the petitioner had filed a return of income on 8.10.2013 declaring the total income of Rs.3,10,980/-. Such return was accepted without scrutiny under Section 143(1) of the Income Tax Act, 1961 (for short "the Act"). To re-open such assessment, impugned notice came to be issued by the Assessing Officer on 31.3.2018. In order to do so, the

Assessing Officer had recorded following reasons:

> "The assessee Smt. Purvi Snehal Pachchigar having her address at 10 Meghdoot Society, Athwalines, Surat derived income from house property, business income and income from other sources during the year under consideration. The Assessee is assessed under the PAN – ABRPP2820M. The assessee had filed return of income for A.Y. 2013-14 on 08.10.2013 declaring total income of Rs.3,10,980/-. During the year, the assessee has shown income from house property Rs.2,26,367/- business income Rs.68,330/- and income from other sources Rs.33,145/-. The case of the assessee was not selected for scrutiny earlier, i.e. for the assessment year 2013-14.
>
> This office was in receipt of information through ITD, wherein it was intimated that the assessee had sold the scrip named TURBO TECH which has been ascertained as a penny scrip. It was mentioned that the assessee had sold 31750 shares of TURBO TECH valued at Rs.1,33,43,352/- thereby deriving exempt capital gain which was claimed u/s. 10(38) of the Income Tax Act in A.Y. 2013-14. The Kolkatta investigation wing during the course of investigation had found and concluded that the said company TURBO TECH was not engaged in any substantial activity. The financials of the company were poor, funds raised were not used for any business purposes and the process of preferential allotment of shares was a pre-arranged and managed process to allot preferential shares to beneficiaries of bogus LTCG claimants. The prices of shares were rigged on the stock exchange through manipulation of the stock market and various shares brokers and exit providers have in their statements confirmed the fact that the shares of the said company were used for providing bogus claim of LTCG/STCG."

2.2 The petitioner raised detailed objection to the notice of re-opening under a communication dated 12.7.2018. Such objections were rejected by the Assessing Officer on 20.9.2018, upon which this petition came to be filed.

3. Counsel for the petitioner raised following contentions:

(1) There is no material to come to the conclusion that income in case of the assessee has escaped assessment.

(2) The Assessing Officer has proceeded entirely on the basis of the information supplied to it and the investigation is going on without making any independent inquiry on its own. The Assessing Officer has thus proceeded on the borrowed satisfaction.

(3) The Assessing Officer wishes to make fishing inquiry.

4. For the reasons recorded hereafter, we are not inclined to interfere. Perusal of the reasons recorded by the Assessing Officer would suggest that the petitioner had shown to sold scrip of one TURBO TECH Company for a sale consideration of Rs.1.33 crores rounded off and claimed exemption long term capital gain thereon.

5. The information was received from the departmental channels that the sale pertains to 31750 shares of TURBO TECH, the Kolkatta Investigation Wing had investigated several companies including TURBO TECH. During the course of investigation it was found that the TURBO TECH was not engaged in any substantial activity. The financials of the company were poor, funds raised were not used for any business purposes. It was also found that there was preferential allotment of shares in a pre-arranged manner managed to allot such shares to beneficiaries of bogus long term capital gains claimants. The prices of the shares were

rigged on the stock exchange through manipulation. The shares of the company were basically used for providing bogus claim of long term or short term capital gain. It was found that the assessee had thus sold penny stocks which were valued at Rs.1.33 crores and thereby claimed wrong exempt capital gain.

6. The return filed by the assessee were accepted without scrutiny. Since there was no scrutiny assessment, the Assessing Officer had no occasion to firm any opinion on any of the issue arising out of the return filed by assessee. The concept of change of opinion would therefore no application. It is equally well settled that at the stage of re-opening of the assessment, the court would not minutely examine the possible additions which Assessing Officer wishes to make. The scrutiny at that stage would be limited to examine whether the Assessing Officer had formed a valid belief on the basis of the material available with him that income chargeable to tax had escaped assessment. Both these aspects have been examined by the Supreme Court in A**ssistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.** ***[{2007) 291 ITR 500 (SC)]*** of which following observations may be noted:

> "13. One thing further to be noticed is that intimation under section 143(1)(a) is given without prejudice to the provisions of section 143(2). Though technically the intimation issued was deemed to be a demand notice issued under section 156, that did not per se preclude the right of the Assessing Officer to proceed under section 143(2). That right is preserved and is not taken away. Between the period from April 1, 1989 to March 31, 1998, the second proviso to section 143(1)(a), required that where

adjustments were made under the first proviso to section 143(1)(a), an intimation had to be sent to the assessee notwithstanding that no tax or refund was due from him after making such adjustments. With effect from April 1, 1998, the second proviso to section 143(1)(a) was substituted by the Finance Act, 1997, which was operative till June 1, 1999. The requirement was that an intimation was to be sent to the assessee whether or not any adjustment had been made under the first proviso to section 143(1) and notwithstanding that no tax or interest was found due from the assessee concerned. Between April 1, 1998 and May 31, 1999, sending of an intimation under section 143(1)(a) was mandatory. Thus, the legislative intent is very clear from the use of the word intimation as substituted for assessment that two different concepts emerged. While making an assessment, the Assessing Officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first proviso to section 143(1)(a), no addition which is impermissible by the information given in the return could be made by the Assessing Officer. The reason is that under section 143(1)(a) no opportunity is granted to the assessee and the Assessing Officer proceeds on his opinion on the basis of the return filed by the assessee. The very fact that no opportunity of being heard is given under section 143(1)(a) indicates that the Assessing Officer has to proceed accepting the return and making the permissible adjustments only. As a result of insertion of the Explanation to section 143 by the Finance (No. 2) Act of 1991 with effect from October 1, 1991, and subsequently with effect from June 1, 1994, by the Finance Act, 1994, and ultimately omitted with effect from June 1, 1999, by the Explanation as introduced by the Finance (No. 2) Act of 1991 an intimation sent to the assessee under section 143(1)(a) was deemed to be an order for the purposes of section 246 between June 1, 1994, to May 31, 1999, and under section 264 between October 1, 1991, and May 31, 1999. It is to be noted that the expressions intimation and assessment order have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used

as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the tax payer. In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under section 143(1)(a) as it stood prior to April 1, 1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D. K. Jain J) in Apogee International Limited v. Union of India [(1996) 220 ITR 248]. It may be noted above that under the first proviso to the newly substituted section 143(1), with effect from June 1, 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any assessment is done by them? The reply is an emphatic no. The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise.

“16. Section 147 authorises and permits the Assessing Officer to assess or reassess income

> chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991 (191) ITR 662], for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is reason to believe, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ITO v. Selected Dalurband Coal Pvt. Ltd. [1996 (217) ITR 597 (SC)] ; Raymond Woollen Mills Ltd. v. ITO [1999 (236) ITR 34 (SC)].“

7. This aspect have also been reiterated by the Supreme Court in the later judgment in the case of **Deputy Commissioner of Income Tax and another v. Zuari Estate Development and Investment Company Limited** *[(2015) 373 ITR 661 (SC)].*

8. In the present case the Assessing Officer has heard the

material on record which would prima facie suggest that the assessee had sold number of shares of a company which was found to be indulging in providing bogus claim of long term and short term capital gain. The company was prima facie found to be a shell company. The assessee had claimed exempt of long term capital gain of Rs.1.33 crores by way of sale of share of such company. The judgment in the case of **Principal Commissioner of Income Tax, Rajkot-3 v. Gokul Ceramics** *[Taxman Vol. 241 {2016) 241],* the Division Bench had examined the contention of the Assessing Officer proceeded on the basis of the information supplied by the department, and after referring to the several judgments, made following observations in para 9 which read thus:

> "It can thus be seen that the entire material collected by the DGCEI during the search, which included incriminating documents and other such relevant materials, was along with report and show-cause notice placed at the disposal of the Assessing Officer. These materials prima facie suggested suppression of sale consideration of the tiles manufactured by the assessee to evade excise duty. On the basis of such material, the Assessing Officer also formed a belief that income chargeable to tax had also escaped assessment. When thus the Assessing Officer had such material available with him which he perused, considered, applied his mind and recorded the finding of belief that income chargeable to tax had escaped assessment, the re-opening could not and should not have been declared as invalid, on the ground that he proceeded on the show-cause notice issued by the Excise Department which had yet not culminated into final order. At this stage the Assessing Officer was not required to hold conclusively that additions invariably be made. He truly had to form a bona fide belief that income had escaped assessment. In this context, we may refer to various decisions cited by the counsel for the Revenue."

9. In the result, the petition is dismissed.

(AKIL KURESHI, J)

(UMESH TRIVEDI, J)

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