IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 12873 of 2014

TO

SPECIAL CIVIL APPLICATION NO. 12875 of 2014

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and

HONOURABLE MR.JUSTICE A.G.URAIZEE

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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 ?	

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VARSHABEN SANATBHAI PATEL....Petitioner(s)

Versus

INCOME TAX OFFICER & 1....Respondent(s)

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Appearance:

MR RK PATEL, ADVOCATE with MR DARSHAN PATEL, ADVOCATE for the Petitioner

MR KM PARIKH, ADVOCATE for the Respondents

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CORAM: **HONOURABLE MS.JUSTICE HARSHA DEVANI**
and
HONOURABLE MR.JUSTICE A.G.URAIZEE

Date : 13/10/2015

ORAL JUDGMENT

(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. Since the controversy involved in all these petitions under Articles 226 and 227 of the Constitution of India is common and the parties are also common, the same were taken up for hearing together and are disposed of by this common judgment.

2. The assessment years are 2009-2010, 2010-2011 and 2011-2012 respectively. For assessment year 2009-2010, the petitioner assessee filed return of income on 17.10.2009. In relation to assessment year 2010-2011, the return of income came to be filed on 04.10.2010 and in relation to assessment year 2011-2012, the return of income came to be filed on 29.09.2011. All the returns came to be processed under section 143(1) of the Income Tax Act, 1961 (hereinafter referred to as "the Act"). Subsequently, by the impugned notices dated 26.03.2014, the assessment in relation to each of the above assessment years is sought to be reopened by the Assessing Officer. In response to the notices issued under section 148 of the Act, the petitioner assessee requested the Assessing Officer to furnish the reasons recorded for reopening the assessment. Upon such reasons being furnished, the petitioner submitted objections against reopening of the assessment. By orders dated 02.09.2014, the respondent Assessing Officer rejected the objections filed by the petitioner

against reopening of assessment under section 147 of the Act. Being aggrieved, the petitioner has filed the present petitions challenging the notices issued by the first respondent under section 148 of the Act.

3. Mr. R. K. Patel, learned advocate for the petitioner invited the attention of the court to the reasons recorded by the Assessing Officer for reopening the assessment, to submit that while recording the reasons, the Assessing Officer has not alleged that the assessee has not disclosed purchases in the books or has not disclosed corresponding sale in the books. It was submitted that if the sales made are held to be genuine, then the corresponding purchases cannot be bogus, because without such purchases, corresponding sales is not possible. It was pointed out that in the reasons recorded, the Assessing Officer has recorded that on verification of details available, it is noticed that the assessee had made bogus purchases to the extent stated therein. It was submitted that however, the Assessing Officer has nowhere disclosed as to from which record of the assessee, he has reached to such conclusion in the reasons for reopening of the assessment. Referring to the order rejecting the objections filed by the petitioner, it was pointed out that the Assessing Officer stated that he has acted pursuant to the information received from the Director General of Income Tax (Inv.), Mumbai; however, there is no reference to such fact in the reasons recorded for reopening the assessment. It was submitted that the information received from the DGIT (Inv.) appears to have been made the basis for reopening the assessment; however, there is no independent application of mind by the Assessing Officer if one looks into the reasons recorded. According to the learned counsel, in the

above circumstances, the very reopening of assessment is without any basis and that on the reasons recorded, the Assessing Officer could not have formed the belief that any income chargeable to tax has escaped assessment within the meaning of such expression as envisaged under section 147 of the Act.

4. Opposing the petitions, Mr. K. M. Parikh, learned senior standing counsel for the respondent submitted that in each of the petitions, the notices under section 148 of the Act have been issued within a period of four years. In all these cases, previously only intimation had been issued under section 143(1) of the Act and hence, the question of there being any change of opinion does not arise as there was no formation of any opinion on the part of the Assessing Officer. Referring to the reasons recorded, it was submitted that the Assessing Officer has duly applied his mind and recorded the reasons for reopening the assessments and the sufficiency of the reasons recorded cannot be gone into by the court while testing the validity of the notice under section 148 of the Act. It was argued that non-disclosure of the source of information in the reasons recorded would not vitiate the notice under section 148 of the Act and that the Assessing Officer, therefore, had correctly assumed jurisdiction. It was submitted that considering the reasons recorded for reopening the assessment, it is apparent that the Assessing Officer has found that bogus purchases have been made and that the amount to the extent of bogus purchases would not form part of the expenditure, and income to that extent has escaped assessment. It was pointed out that in the peculiar facts of this case, not reflecting the facts as stated in paragraphs 4 and 5

of the order disposing of the objections in the reasons recorded, would not affect the jurisdiction of the Assessing Officer to reopen the assessment within a period of four years, in a case where no assessment had been framed under section 143(3) of the Act.

4.1 In support of his submissions, the learned counsel placed reliance upon the decision of the Supreme Court in the case of ***Phool Chand Bajrang Lal and another v. Income-Tax Officer and another***, *(1993) 203 ITR 456*, for the proposition that since the belief is that of the Income Tax Officer, sufficiency of the reasons for forming the belief is not for the court to judge, but it is open to an assessee to establish that there in fact existed no belief or that the belief was not a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the court may look into the conclusion arrived at by the Income Tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income Tax Officer and further whether that material had any rational connection with or a live link for the formation of the requisite belief. Reliance was also placed upon the decision of the Supreme Court in the case of ***Raymond Woollen Mills Ltd. v. Income Tax Officer and others***, *(1999) 236 ITR 34*, for the proposition that the court has only to see whether there was *prima facie* some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. Reliance was also placed upon the decision of the Supreme Court in the case of ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.***,

(2007) 291 ITR 500 (SC), for the proposition that so long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued. Reliance was also placed upon the decision of this court in the case of ***Dishman Pharmaceuticals and Chemicals Limited v. Deputy Commissioner of Income Tax (OSD) (No.1)***, *(2012) 346 ITR 228 (Guj.)*, for the proposition that at the time of ascertaining whether the notice was validly issued, what could be the probable conclusion of a fresh assessment if reopening is permitted, is not the inquiry of the court. In other words, the merits of the proposed action, through reopening of the assessment, cannot be gone into by the court beyond the *prima facie* stage. The decision of the Delhi High Court in the case of ***Acorus Unitech Wireless P. Ltd. v. Assistant Commissioner of Income Tax***, *(2014) 362 ITR 417 (Delhi)* was cited, for the proposition that in its writ jurisdiction, the scope of proceedings before the court while considering a notice under section 147/148 of the Income Tax Act, 1961, is limited. The court cannot enter into the merits of the subjective satisfaction of the Assessing Officer or judge the sufficiency of the reasons recorded, but rather, determine whether such opinion is based on tangible, concrete and new information that is capable of supporting such a conclusion. The law only requires that the information or material on which the Assessing Officer records his or her satisfaction is communicated to the assessee, without mandating the disclosure of any specific document. This is not to say that the Assessing Officer may in all cases refuse to disclose

documents relied upon by him on account of confidentiality, but rather, that fact must be judged on the basis of whether other tangible and specific information is available so as to justify the conclusion irrespective of the contents of the document sought to be kept confidential. It was, accordingly, urged that the action of the Assessing Officer in issuing the impugned notices under section 148 of the Act being in consonance with the relevant statutory provisions and the settled principles enunciated in that regard, there is no warrant for interference by this court.

5. This court has considered the submissions advanced by the learned counsel for the respective parties and perused the record of the case. For the purpose of better appreciating the controversy in issue, it would be necessary to refer to the reasons recorded by the Assessing Officer for reopening the assessments for the assessment years in question under section 147 of the Act, which read thus :

Special Civil Application No.12873 of 2014

> *"[1] On verification of details available on records, it is noticed that assessee has made Bogus Purchase of Rs.30,65,639/-, during the financial year 2008-09 i.e. A.Y. 2009-10. By claiming bogus purchases in the trading and P & L A/c as an expenses, the assessee has shown less profit to the extent of the amount of Bogus Purchases.*
>
> *[2] In view of the above facts of the case, I have reason to believe that the income chargeable to tax*

has escaped assessment within the meaning of section 147 of the I. T. Act, 1961, to the extent of Rs.30,65,639/- for the A.Y. 2009-10."

Special Civil Application No.12874 of 2014

"[1] On verification of details available on records, it is noticed that assessee has made Bogus Purchase of Rs.37,11,752/-, during the financial year 2009-10 i.e. A.Y. 2010-11. By claiming bogus purchases in the trading and P & L A/c as an expenses, the assessee has shown less profit to the extent of the amount of Bogus Purchases.

[2] In view of the above facts of the case, I have reason to believe that the income chargeable to tax has escaped assessment within the meaning of section 147 of the I. T. Act, 1961, to the extent of Rs.37,11,752- for the A.Y. 2010-11."

Special Civil Application No.12875 of 2014

"[1] On verification of details available on records, it is noticed that assessee has made Bogus Purchase of Rs.48,92,390/-, during the financial year 2010-11 i.e. A.Y. 2011-12. By claiming bogus purchases in the trading and P & L A/c as an expenses, the assessee has shown less profit to the extent of the amount of Bogus Purchases.

[2] In view of the above facts of the case, I have

reason to believe that the income chargeable to tax has escaped assessment within the meaning of section 147 of the I. T. Act, 1961, to the extent of Rs.48,92,390/- for the A.Y. 2011-12."

6. A plain reading of the reasons recorded in relation to each of the assessment years in question makes it abundantly clear that they are identically worded except for the figures. A perusal of the reasons recorded reveals that the Assessing Officer on verification of the details available on record has noticed that there were bogus purchases. However, from the reasons there is nothing whatsoever to show as to which is the record which shows that there were bogus purchases to the extent stated therein. No details have been mentioned by the Assessing Officer as to what is the basis on which he says that the purchases are bogus.

7. Pursuant to the objections raised by the assessee against the reopening of assessment, the Assessing Officer has passed separate orders dated 02.09.2014 in relation to each assessment year rejecting the objections raised by the assessee, wherein, he has stated that he had received information from the Director General of Income Tax (Inv.), Mumbai that M/s Yash Trading Company, Proprietor Smt. Varshaben Sanatbhai Patel has made bogus purchases from the parties referred to thereunder in relation to the financial years relevant to the assessment years in question. It is further stated that the reason to believe has been recorded on the basis of the knowledge that the assessee is engaged in bogus purchases with the parties mentioned therein. It is also stated therein that the contention of the assessee that the reasons

supplied to her are without supporting material are baseless and frivolous. Based on the aforesaid reasoning, the Assessing Officer has turned down the objections whereby it was alleged that the reopening was without any supporting material.

8. At this juncture, reference may be made to certain averments made in the affidavit-in-reply filed by the respondent, wherein a stand has been taken that the Director General of Income Tax (Inv.), Mumbai has carried out independent inquiries on hawala transactions and has supplied the information of bogus purchases by the assessee for the years under consideration and that this information, as received from the DGIT (Inv.), Mumbai, is made part and parcel of the assessment record of the assessee. It is further stated therein that the case of the assessee has been reopened to verify the purchases made by the assessee. The notice under section 148 of the Act was issued after recording of reasons and satisfaction of the Assessing Officer on the basis of the details, that is, of DGIT (Inv.), Mumbai, available on record. It is further the case of the respondent that there was no assessment in this case and no opinion was formed, and therefore, there was no question of change of opinion and that the case has been reopened on the basis of subsequent information provided by the authority defined under the Act. Reference has been made to the decision of the Supreme Court in the case of *Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.* (supra), to contend that so long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate

reassessment proceedings even when intimation under section 143(1) had been issued.

9. Thus, the undisputed facts are that in relation to all the three assessment years, the income tax returns filed by the petitioner have only been processed under section 143(1) of the Act and no assessment has been framed under section 143(3) of the Act. Under the circumstances, as held by the Supreme Court *Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.* (supra), the conditions with regard to change of opinion would not be attracted, and so long as the ingredients of section 147 of the Act are fulfilled, the Assessing Officer is free to initiate the proceedings under section 147 of the Act. The question that therefore, arises for consideration is as to whether the ingredients of section 147 of the Act are satisfied in the facts of the present case.

10. Before adverting to the merits of the case, reference may be made to the decision of the Supreme Court in the case of ***Income Tax Officer, I Ward, Distt. VI, Calcutta and others v. Lakhmani Mewal Das***, *(1976) 103 ITR 437*, wherein it has been held that the grounds or reasons which lead to the formation of belief contemplated by section 147(a) of the Act must have a material bearing on the question of escapement of income of the assessee from assessment. Once there exist reasonable grounds for the Income Tax Officer to form the above belief, that would be sufficient to clothe him with jurisdiction to issue notice.

11. This court in ***Aayojan Developers v. Income Tax Officer***, *(2011) 335 ITR 234*, after referring to various

decisions of the Supreme Court as well as other High Courts in this regard, has held that for the purpose of assuming jurisdiction to issue notice under section 148 of the Income Tax Act, 1961, the Assessing Officer is required to record his reasons for doing so as laid down under sub-section (2) of section 148 of the Act. For the purpose of filing objections to the issuance of notice, the assessee is required to be provided with a copy of the reasons for issuing notice. The reasons should set out the reasons for formation of the belief of the Assessing Officer that the income has escaped assessment and in case where the reopening of assessment is after the expiry of a period of four years from the end of the relevant assessment year, the belief should be that, by reason of omission or failure on the part of the assessee to disclose fully and truly the material facts, the income has escaped assessment in a particular year. Unless the substratum is laid in the reasons, clearly demonstrating the twin belief, that is, the belief that income has escaped assessment and the belief that such escapement is by reason of failure on the part of the assessee, filing an affidavit and stating the same before the court for the first time would amount to bringing on record material which did not form the basis of formation of such belief. The belief that income has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts has to be recorded in the reasons, though the same may be elaborated by filing an affidavit. But, in the absence of formation of any such belief being recorded in the reasons, it is not open for the Assessing Officer to express formation of such belief for the first time by way of affidavit-in-reply filed in the court.

12. The reasons recorded by the Assessing Officer for reopening of the assessment for the years under consideration have to be viewed in the light of the above settled principles. Having regard to the fact that in this case there was no scrutiny assessment under section 143(3) of the Act, the scope of inquiry by this court is limited to the extent laid down by the Supreme Court in *Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.* (supra), viz. whether there was relevant material on which a reasonable person could have formed the requisite belief.

13. On a plain reading of the reasons recorded, what emerges is that the Assessing Officer, on verification of the details available on record, has noticed that there were bogus purchases. However, there is no assertion as regards on the basis of which material on record he has come to such conclusion. A perusal of the order rejecting the objections raised by the petitioner, shows that the reopening is based, not upon the material on record, but on the basis of material received from an external source viz., the DGIT (Inv.), Mumbai, pursuant to inquiries made by him (the DGIT). Therefore, the material on the basis of which the Assessing Officer seeks to assume jurisdiction under section 147 of the Act, is the information received from an external source viz., from the DGIT and not the material on record as reflected in the reasons recorded. Under the circumstances, on the basis of the material on record, the Assessing Officer could not have formed the belief that income chargeable to tax has escaped assessment, inasmuch as, the formation of belief of the Assessing Officer is not based upon the details available on record, but on the material made available by the DGIT (Inv.),

Mumbai which is an external source. Under the circumstances, it cannot be said that the requirements of section 147 of the Act are satisfied, inasmuch as, the belief of the Assessing Officer is not based upon the material on record, but on some other material from an external source which does not find reference in the reasons. As is clear on a plain reading of the reasons recorded, except for the assertion that there were bogus purchases, the Assessing Officer has not referred to any material on the basis of which he proceeded to invoke the provisions of section 147 of the Act. The assertion made by the Assessing Officer is a bare one, without any reference to the material on the basis of which he made such assertion.

14. At this juncture, reference may be made to the decision of the Supreme Court in the case of ***Ram Bai v. Commissioner of Income Tax****, (1999) 3 SCC 30,* wherein, the Income Tax Officer has made an order of assessment under section 147(a) of the Act holding that a sum of Rs.2,43,934/- was payable as tax and initiated penalty proceedings. On appeal by the assessee, the Commissioner of Income Tax (Appeals) held that the ITO could not have had any reason to believe that there was escapement of income as there was no material whatever at that time to indicate that the lands were non-agricultural. The Commissioner (Appeals) allowed the appeal and cancelled the order of assessment under section 147(a). The Department approached the Income Tax Appellate Tribunal with an appeal, but in vain, as the Tribunal agreed with the Commissioner and confirmed his order. The revenue applied for reference to the High Court which answered the reference in favour of the revenue and against the assessee. The assessee filed special leave petition

before the Supreme Court. Before the Supreme Court, the revenue placed reliance upon the judgment of the Supreme Court in ***Central Provinces Manganese Ore Co. Ltd. v. Income Tax Officer***, *(1991) 191 ITR 662*, wherein it was held on the facts in that case that the reasons recorded in the notice issued under section 147(a) and the material on record, justified the issue of such notice. The court observed that the said ruling would not help the revenue in that case as there was no material whatever on record to justify the issue of notice by the Income Tax Officer under section 147 of the Act. The court observed thus:

> ***"6.*** *We have already mentioned that the ITO sought sanction of the Commissioner to reopen the matter. That was by a communication dated 17-3-1973 in which the relevant part read as follows:*
> *"In this case, the assessee owned 16 acres 33 cents in Nacharam Village near Hyderabad. This was acquired by the Government with effect from 27-10-1964. The assessee was awarded a final compensation of Rs 2,10,361 on 7-7-1967. The land in question is not agricultural land and has not been subjected to agricultural operations. The capital gains are chargeable to income tax. The value as on 1-1-1954 is estimated at Rs 1000 per acre and the total value of the entire land as on 1-1-1954 would be about Rs 16,500. Thus the assessee made a net capital gain of Rs 1,93,860. Besides the amount of interest that accrued year to year will have to be included as a protective basis. The assessee has filed a return disclosing an income of Rs 3599 being interest on belated compensation on 17-2-1972. As this has been filed beyond the period prescribed under Section 139(4), the return has been treated as invalid and filed. I have, therefore, reason to believe that the income chargeable to tax has escaped for Assessment Year 1965-66 and that such escapement was by reason of omission or failure on the part of the assessee to make a valid return under Section 139 for Assessment Year 1965-66. I request the Commissioner to*

accord sanction for reopening the assessment under Section 147(a).”

7. *Apart from the said communication, there is nothing on record to disclose the material on which the ITO decided to reopen the assessment. He has made an assertion in the said communication that the land in question was not subjected to agricultural operation and that he had reason to believe, the income chargeable to tax had escaped for Assessment Year 1965-66 by reason of omission or failure on the part of the assessee to make a valid return. But for such assertion, no reference has been made to any material on the basis of which he proceeded to invoke the provisions of Section 147(a) of the Act. Even the assertion as such was a bare one without any reference to the materials on the basis of which he made the said assertion.”*

“9. *Learned counsel for the Revenue has placed reliance on the judgment of this Court in Central Provinces Manganese Ore Co. Ltd. v. ITO. It was held on the facts in that case that the reasons recorded in the notice issued under Section 147(a) and the material on record justified the issue of such notice. That ruling will not help the Revenue in this case as there is no material whatever on record to justify the issue of notice by the ITO under Section 147 of the Act*.”

15. Adverting to the facts of the present case, the returns filed by the assessee have been processed under section 147(1) of the Act. The Assessing Officer in the reasons recorded for the purpose of reopening the assessment has placed reliance upon the record of the case. As noted hereinabove, there is no assertion as regards on what basis the Assessing Officer has stated that the assessee had made claim in respect of bogus purchases in the trading and the Profit and Loss Account as expenditure. The Assessing Officer has stated that on verification of the details available on

record, it has been noticed that the assessee has made bogus purchases; however, no specific averments are made as regards which details available on record reflected such bogus purchases. It is evident that the Assessing Officer for the purpose of reopening the assessment has placed reliance upon the material from an external source which does not form part of the record. However, the said aspect is not reflected in the reasons recorded. On behalf of the Assessing Officer, the learned counsel is not in a position to point out any material on the record on the basis of which the Assessing Officer could have formed such belief. What is now sought to be stated by way of the order rejecting the objections as well as the affidavit-in-reply filed in response to the averments made in the petitions is that the formation of belief is based upon the information which is received from the DGIT (Inv.), Mumbai. It is settled legal position as held by a catena of decisions that the substratum for formation of belief that income liable to tax has escaped assessment has to form part of the reasons recorded. In the present case, the substratum for formation of belief, as indicated in the order rejecting the objections as well as the affidavit-in-reply, is the information given by the DGIT (Inv.), Mumbai, which got no relation with the reasons recorded, which are stated to be based upon the material available on record. Under the circumstances, the Assessing Officer, on the basis of the material on record, could not have formed belief that there was any escapement of income chargeable to tax so as to validly assume jurisdiction under section 147 of the Act. As held by the Supreme Court in a catena of decisions, the reasons recorded cannot be supplemented in the affidavit or by the order rejecting the objections. The material, on the basis of which, the belief that

income chargeable to tax has escaped assessment has been formed, has to find place in the reasons itself.

16. In the aforesaid premises, the formation of belief that income has escaped assessment not being based upon record, it is evident that the substratum for reopening the assessment is not laid in the reasons recorded, but on material extraneous thereto. Under the circumstances, the basic requirement for assumption of jurisdiction under section 147 of the Act for reopening the assessment is not satisfied in the present case. The impugned notice under section 148 of the Act, therefore, cannot be sustained.

17. For the foregoing reasons, the petitions succeed and are, accordingly, allowed. The impugned notices all dated 26th March, 2014 issued under section 148 of the Act are hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs in each of the petitions.

(HARSHA DEVANI, J.)

(A.G.URAIZEE,J)

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