IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 17756 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA

and
HONOURABLE MR. JUSTICE ILESH J. VORA

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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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PRITI PARAS SAVLA
Versus
INCOME TAX OFFICER WARD (3)(2)(4)

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Appearance:
MR RK PATEL WITH MR DARSHAN R PATEL(8486) for the Petitioner
MRS MAUNA M BHATT(174) for the Respondent

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CORAM:**HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE ILESH J. VORA

Date : 11/06/2021

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE ILESH J. VORA)

1. By filing this writ application under Article 226, the writ applicant seeks to challenge the notice dated 31.03.2018 issued by the respondent under Section 148 of the Income Tax Act, 1961 ('the act' for short) seeking to reopen the applicant's income tax assessment for the A.Y 2011-12.

2. The brief facts can be summarized as under:

2.1 The writ applicant being individual had earned long term capital gain of Rs.2,03,33,181/- on sale of shares and claimed it as exempt income under Section 10(38) of the Act, while filing return of income for the year AY 2011-12. The assessee filed her return of income for A.Y. 2011-12 on 31.07.2011 declaring total income at Rs. 7,37,385/- claiming the long term capital gain as exempt income. and same was processed under Section 143(1) of the Act and no scrutiny assessment was being undertaken, however, the reopening of the assessment sought to be reopened by issuing notice dated 14.03.2017 under Section 148 of the Act, on the ground that the assessee had taken entry of bogus long term capital gain to the tune of Rs.1,31,04,599/- through the scrip of M/s KGN Industries during the AY 2011-12. The assessee had submitted objections against the reasons recorded for the impugned notice dated 14.3.2017 which came to be rejected by the revenue and during the course of assessment proceedings, the Assessing Officer had called details of long term capital gain earned by the assessee vide notice dated 142(1) and same was complied and after considering the material, the assessment was completed under Section 143 (3) on 26.12.2017, whereby, the amount of Rs.22,72,895/- claimed as LTCG for the sales of shares of M/s. KGN Enterprise Ltd. was treated as bogus

and same was added to the total income under Section 68 of the Act, determining the total taxable income at Rs.30,10,285/-

2.2 Thereafter, the Assessing Officer reopened the assessment for the year AY 2011-12 by issuing impugned notice dated 31.03.2018 under Section 148 of the Act, observing in the reasons recorded that subsequent to the assessment order dated 26.12.2017, information was received that M/s. Aarya Global Shares and Securities Ltd., a penny stock listed on BSE had been used to facilitate introduction of unaccounted income of members of beneficiaries in the form of exempt of capital gain in their books of accounts and the assessee was one of the beneficiaries who had taken bogus entry of LTCG to the tune of Rs.1,80,51,878/- during the year AY 2011-12 which has escaped assessment within the meaning of Section 147 of the Act.

2.3 The assessee had requested to treat his original income of return as a return of income and asked to provide “reasons recorded” for the reopening of the assessment. The The Assessing Officer vide communication dated 21.05.2018 has provided the reasons recorded for reopening to the assessee. The assessee filed objections vide communication dated 16.07.2018 and same came to be rejected by the respondent vide order dated 20.09.2018. The reasons recorded for the reopening of the assessment reads thus:

> 1. “In this case, assessee filed return of income on 31.7.2011 declaring total income of Rs.7,37,385/-. Thereafter, order U/s. 143(3) r.w.s. 147 of the Act was passed in this case on 26.12.2017 determining taxable income at Rs. 30,10,285/-.
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> 2. In this case, information received from ADIT (Inv), Unit-8(2), Mumbai that

"…. Reliable information is received that M/s, Aarya Global Shares and Securities Limited, a penny stock listed on BSE with Scrip Code (531731) and this company has been used to facilitate introduction of unaccounted income of members of beneficiaries in the form of exempt capital gain or short term capital loss in their books of accounts., it was noticed that share price of M/s. Aarya Global Shares and Securities Limited rose from Rs.39.96 on 17th June 2009 to 967.86 on 22nd Sept. 2010 and dipped to Rs.16.99 to Rs. 16.99 on 12th Jan. 2012.

However, the financial of the company for the relevant period do not show any substantial change so as to support such as huge share price movement. The company does not have business worthwhile to justify the sharp rise in market price of shares. The sharp rise in the market price of this entity is not supported by financial fundamentals of the company. Both purchase and sale of the shares are concentrated within few persons/entities. The exit providers do not have creditworthiness. They are either non-filers or have filed nominal return of income..."

4. On verification of the details, it is seen that during the year under consideration, assessee has shown Long Term capital gain from Kuvam International Fashion Limited earlier known as Arya Global Shares and Securities) to the tune of Rs. 1,80,52,878/- during the year under consideration.

5. As per the information received, the above named assessee is one of the beneficiary who has taken entry of bogus long term capital gain to the tune of Rs, 1,80,52 878/- through the scrip of M/s Aarya Global Shares and Securities Limited (now known as Kuvam International Fashions Limited) during the F.Y. 2010-11 relevant to A.Y. 2011-12.

6. On the basis of the above tangible material available on record and after analyzing it, I have reason to believe that income chargeable to tax, as indicated by the accommodation entry of LTCG on sale of script of M/s. Arya Global Shares and Securities Limited (now known ax Kuvam International Fashions Limited) amounting to Rs.1,80,52,878/- have escaped assessment for A.Y. 2011-12 within the meaning of section 147 of the I.T. Act, 1961."

3. Being aggrieved by the impugned notice and order of disposal of the objections against the notice for reopening of the assessment, the writ applicant has came up before this Court with the present writ application.

4. We have heard Mr. R.K. Patel, the learned Senior counsel assisted by Mr. Darshan R. Patel, the learned advocate appearing for the writ applicant and Mr. Manish Bhatt, the learned Senior Counsel, assisted by Mrs. Mauna Bhatt, the learned Senior Standing Counsel, the learned Standing Counsel appearing for the revenue.

5. Learned Senior Counsel appearing for the writ applicant Mr. R.K. Patel, raised the following contentions :

(a) Referring to the reasons recorded for reopening, it was submitted that the Assessing Officer is of the view that long term capital gains from the sale of shares of M/s. Aarya Global Shares and Securities Ltd is liable to be assessed as income having escaped assessment on the basis of belief that same is accommodation entry. In this context, it was further submitted that the claim of LTCG of M/s. Aarya Global was thoroughly examined at the time of framing assessment in pursuance of first reopening notice and the assessee had furnished all necessary details with supporting documents i.e. details of LTCG earned on shares of M/s. Aarya Global, amount of investment, source of investment, mode of payment, bank statement, demote account, copy of ledger etc. and the Assessing Officer did not have made any addition while framing the assessment vide order dated 26.12.2017. Under the circumstances, it was submitted that the impugned notice after expiry of 4 years from the end of the

assessment year in the relation to LTCG earned on sale of shares of M/s. Aarya Global is, nothing but a case of reopening due to the change of opinion, which law does not permit.

(b) It was submitted that in the present case, the reopening is beyond 4 years from the end of relevant assessment year and there is no any reference in the reasons recorded regarding failure on the part of the writ applicant to disclose fully and truly all material facts necessary for her assessment.

(c) Placing heavy reliance on the decision of the Apex Court in case of **New Delhi Television Ltd Vs. Dy. Commissioner of IT (Civil Appeal No. 1008 of 2020)**, to submit that the entire exercise of reopening of the assessment is lacking jurisdiction since enquiry was already made on the subject matter of capital gain as there was full and true disclosure of the transaction during the course of filing of the return as well as original assessment framed under Section 143(3) of the Act and therefore, the action on the part of the revenue to reopen the concluded assessment beyond period of 4 years from the end of the assessment year is contrary to law and assumption of jurisdiction by the Assessing Officer is invalid.

6. In the aforesaid contentions, the learned counsel would submits that the impugned notice is bad in law and it has been issued in contravention of Section 147 of the Act, which deserves to be quashed and set aside.

7. On the other hand, Mr. Manish Bhatt, the learned Senior Counsel appearing for the revenue, reiterate the stand adopted by the revenue

in the affidavit in reply as well as in the order disposing of the objections, would submit that the action by the Assessing Officer is just, legal and proper and do not warrant any interference. It was submitted by the learned Senior Counsel that in the case on hand, the assessment order under Section 143 was passed on 26.12.2017 and thereafter, the information was received from ADIT (Inv) Unit-8(2), Mumbai dated 26.03.2018 that the M/s. Aarya Global Shares and Security Ltd., being a penny stock company was used to facilitate introduction of unaccounted income of members of beneficiaries in the form of exempt capital gain and the assessee was one of the beneficiaries of such LTCG to the tune of Rs.18052878/- which income chargeable to tax, has escaped assessment due to failure on the part of the assessee to fully and truly disclose the material facts of the assessment. It was further submitted by the learned counsel that the share price of M/s. Aarya Global rose from Rs.39.96 to Rs.967.86 during the period 17.6.2009 to 22.9.2010 and dipped to Rs.16.99 on 12.1.2012. In this context, it was submitted that such sharp rise in the market price of the company was not supported by financial fundamentals of the company. It was further submitted that the Assessing Officer has analyzed the information and made enquiries independently and had formed an opinion that the assessee being a beneficiaries of the bogus LTCG, the income has escaped assessment. Relying on the SEBI order dated 30.11.2017, it was submitted that the SEBI had conducted investigation in the scrip of M/s. Aarya Global for the period May 21, 2010 to December 31, 2011 for the alleged irregularity in the scrip and imposed monetary penalty. In this background facts and contentions raised hereinabove, the learned Senior Counsel would submit that since the revenue discover fresh

tangible material subsequent to the assessment order dated 26.12.2017, it cannot be said that the Assessing Officer did not have reason to believe that income has escaped assessment.

8. In support of aforesaid contentions, heavy reliance is placed on the case of **M/s. Phoolchand Bajranglal and another Vs. Income Tax officer (1993) 4 SCC 77**, to contend that during the previous proceedings of the assessment, the assessee failed to disclose a transaction of shares of penny stock company i.e. Aarya Global and subsequently based on the information, the said transaction found to be a bogus transaction, therefore, the disclosure in the previous proceedings cannot be said to be a disclosure of the "true" and "full" facts in the case. Under the circumstances, the Assessing Officer is justified to reopen the concluded assessment.

9. We have considered the submissions advanced by the learned counsel for the respective parties and perused the case records.

10. Before adverting to the issues, we may briefly refer to the relevant legal provisions.

11. Section 147 of the Act deals with "income escaping assessment". Section 147 says that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to provisions of Section 148 to 153, assess or reassess such income and also any other income chargeable to tax, which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under Section 147 of the Act.

The first proviso to Section 147 is important. As per this proviso, where an assessment under sub-section (3) of Section 143 or Section 147 has been made for relevant assessment year, no action shall be taken under Section 147 after the expiry of 4 years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

12. In the facts of the present case, the assessment year is 2011-12. The impugned notice under Section 148 of the Act was issued on 31.03.2018. Therefore, it is a case of reopening of assessment after expiry of 4 years. Under such circumstances, the first condition for invoking Section 147 is that the Assessing Officer must have reason to believe income chargeable to tax has escaped assessment for relevant assessment year. The second condition is that the Assessing Officer must arrived at the satisfaction that income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.

13. Law with regard to what is meant by “true” and “full” disclosure, has been succinctly laid down by a Constitution Bench of the Apex Court in ***Calcutta Discount Co. Ltd, Vs. Income Tax Officer, Companies District 1, Calcutta and 1 another, (AIR 1961 SC 372)***,

wherein, the Apex Court held as follows : 8, 9, 10 and 11.

> “8. …..The words used are " omission or failure to disclose fully and truly all material facts necessary for his assessment for that year ". It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material, and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his Possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise-the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary facts have been proved, what other facts can be inferred from them, and taking all these together, to decide what the legal inference should be.
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> 9. There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above., In view of the Explanation, it will not be open to the assessee to say, for example-" I have produced the

account books and the documents: You, the assessing officer examine them, and find out the facts necessary for your purpose: My duty is done with disclosing these account-books and the documents". His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, amount to " omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them-including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.

10. Does the duty however extend beyond the full and truthful disclosure of all primary facts ? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else-far less the assessee--to tell the assessing authority what inferences-whether of facts or law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences-whether of facts or law-he would draw from the primary facts.

> 11. If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn?"

14. In the present case, it is the case of the assessee that all the primary material facts were disclosed during the previous assessment proceedings and transaction with M/s. Aarya Global has been disclosed, despite of this disclosure of primary material facts, the Assessing Officer consciously did not doubt the genuineness of the transaction. Thus, in such circumstances, the impugned notice after expiry of 4 years from the end of the assessment year is nothing but a case of reopening due to change of opinion. On the other hand, it is the contention of the revenue that the information was received with respect to penny stock company and bogus claim of LTCG on 26.03.2018 i.e. after framing of assessment order dated 26.12.2017 and therefore, in the previous proceedings, no such information was available with the office and thus, based on the tangible material, the Assessing Officer was justified to reopen the assessment.

15. After scrutiny of the reasons recorded for reopening of the assessment and case records, it appears that for the AY 2011-12, the notice dated 14.07.2017 under Section 148 of the Act was issued and reassessment proceedings had been initiated by the revenue. Notices under Section 142(1) were issued and accordingly, the assessee had complied the same by furnishing necessary details as called for by the revenue. It is pertinent to note that the Assessing Officer was not satisfied with the material furnished by the assessee and had issued

another notice dated 05.12.2017 under Section 142(1) of the Act and claimed the further details with regard to transaction of sales and purchase of the shares and particulars of claim with respect to LTCG during the year under consideration. The para -10 of the notice is extracted as under :-

> "Para-10: In the return of income filed for AY 2011-12, you have claimed exempt income under Section 10(36)/10(38) at Rs.2,03,33,181/- however, you have filed details as stated hereinabove in respect of KGN Industries only i.e. in respect of capital gain of Rs.22,72,895/-. You have not furnished complete details of exempt income as shown in the return. You are therefore once again requested to furnish complete details of exempt income along with complete details of purchase of sales."

Pursuant to the above details called for by the revenue, the assessee vide letter dated 13.12.2017 furnished the details with calculation of LTCG, whereby, the details with regard to Aarya Global Shares and Security Ltd had been furnished. The schedule of the calculation at page-76 of this writ application shows that the assessee had mentioned the cost of purchase and sales, number of shares sold during the year and benefit of long term capital gain. Over and above, the assessee had furnished the ledger account of M/s. Aarya Global Shares, bank statements to show a transaction, share allotment certificate, the statement of stock broker JM Financial Service Ltd.

Thereafter, the Assessing Officer had framed the assessment under Section 143(3) of the Act vide his order dated 26.12.2017,

wherein, he made a reference to the notice under Section 142(1) of the Act, as referred above and finally framed the assessment with the addition of Rs.22,72,895/-, the amount which had been claimed by the assessee towards LTCG from shares of KGN Industries Ltd., treated as bogus transaction. However, the Assessing Officer was silent with respect to the sale transaction of M/s. Aarya Global and the claim of LTCG.

16. In the aforesaid background facts, we are of the considered view that all the relevant facts with regard to M/s. Aarya Global Shares and Security Ltd was within the knowledge of the Assessing Officer as the material facts of the transaction was fully and truly disclosed by the assessee. Under such circumstances, it cannot be said that the assessee had withheld primary material from the revenue. In our opinion, in the previous assessment proceedings, Assessing Officer consciously did not have consider the transaction of M/s. Aarya Global.

17. In the present case, we find that the assessee had made “true” and “full” disclosure with respect to alleged transaction of purchase and sales of M/s. Aarya Global Shares and Security Ltd. and amount of LTCG earned during the year under consideration, at the time of assessment framed under Section 143(3) of the Act, in the case of KGN Industries Ltd, and the Assessing Officer had applied his mind to the relevant facts. Under the circumstances, it cannot be said that the Assessing Officer had not examined the issue raised in the reasons recorded for reassessment. In our view, the issue with regard to M/s. Aarya Global was being raised and answered by the assessee. Despite the query being answered by the assessee, the Assessing

Officer did not find any ground or reason to make addition. In the context, reference can be made to the case of ***Commissioner of Income Tax Vs. Usha International Ltd, Full Bench of Delhi High Court*** in ITA No. 2026 of 2010, wherein, it is held as under:

> "13. It is, therefore, clear from the aforesaid position that:
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> (1) Reassessment proceedings can be validly initiated in case return of income is processed under Section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion;
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> (2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by principle of change of opinion‖.
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> (3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons."

18. In view of the facts and circumstances of the present case and dictum of law as referred to above, the impugned notice issued after end of 4 years in the present case on a mere a change of opinion is bad in law.

19. In the present case, undisputably the assessment is sought to be reopened after the expiry of period of 4 years from the end of the relevant assessment year and the condition precedent for exercise of powers under Section 147 of the Act as provided under proviso thereto are required to be satisfied before the Assessing Officer

assumed jurisdiction to proceed further. A plain reading of the reasons recorded for the reassessment reveals that in the entire reasons recorded there is no satisfaction arrived at by the Assessing Officer that income chargeable to tax has escaped assessment by reason of failure on the part of the assessee for disclose fully and truly all necessary facts for his assessment for the year under consideration. Therefore, the conditions precedent for exercise of power under Section 147 after expiry of period of 4 yeas from the end of relevant assessment are not satisfied. Thus, the impugned notice dated 31.03.2018 under Section 148 of the Act, assuming jurisdiction under Section 147 after expiry of period of 4 years from the end of the relevant assessment year was invalid and without jurisdiction.

20. It is the submission of the revenue that during the previous proceedings of assessment, the assessee failed to disclose the transaction of shares of penny stock company and subsequently, based on the information, the transaction found to be a bogus transaction and therefore the disclosure whatever made in the previous proceeding cannot be said to be a disclosure of material facts and therefore, the reopening of the assessment on the basis of tangible material is permissible. In this context, the learned counsel Mr. R.K. Patel, appearing for the assessee has relied on the case of New Delhi Televisions Ltd (Supra), to submit that the identical issue raised before the Apex Court, wherein, it was held that the impugned notice to the assessee shows sufficient reason to believe on the part of the Assessing Officer to reopen the assessment but since the revenue has failed to show the non-disclosure of facts, the notice having been issued after period of 4 years is required to be

quashed. Considering the facts and circumstances of the case, we are of the view that the assessee had disclosed all material facts at the time of previous assessment proceedings and all the relevant facts with regard to transaction alleged in the reasons recorded were duly within the knowledge of the Assessing Officer. After disclosure of primary facts with regard to purchase and sales of scrip of M/s. Aarya Global, the Assessing Officer, could have made further inquriy with regard to truthfulness of the transaction and reliability of the company. The Assessing Officer being an expert in the subject, could have inferred from the price of purchase and sales of the scrip that the transaction is bogus. It is pertinent to note that the Assessing Officer was investigating the transaction of penny stock Company i.e. KGN Industries. The record indicates that the report of SEBI imposing penalty was pronounced on 30.11.2017. Therefore, it cannot be said that the revenue was unaware with regard to alleged bogus trading undertaken by M/s. Aarya Global and connected persons and their beneficiaries. Under such circumstances, contention raised by the revenue is not acceptable.

21. In view of the foregoing reasons, the writ application succeeds and is accordingly allowed. The impugned notice dated 31.03.2018 issued by the respondent under Section 148 of the Act in relation to the Assessment Year 2011-12 is hereby quashed and set aside.

(J. B. PARDIWALA, J)

(ILESH J. VORA,J)

P.S. JOSHI