IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.29122 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS.JUSTICE HARSHA DEVANI

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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, 1950 or any order made thereunder?

5 Whether it is to be circulated to the civil judge?

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DISHMAN PHARMACEUTICALS & CHEMICALS LIMITED - Petitioner(s)
Versus
THE DEPUTY COMMISSIONER OF INCOME TAX (OSD) - Respondent(s)

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Appearance:
MR TUSHAR P HEMANI for Petitioner
MRS MAUNA M BHATT for Respondent

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

Date: 02/07/2012

ORAL JUDGMENT

(Per: HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the notice dated 30th March 2007,

issued under section 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") whereby the respondent seeks to reopen the assessment of the petitioner for the assessment year 2000-01.

2. The petitioner, a public limited company, filed its return of income on 30th November 2000 declaring an income of Rs.69,55,240/-. In the statement of income filed along with the return of income as also in the report in Form 10CCAC, the petitioner stated the amount of deduction claimed under section 80HHC of the Act along with the working thereof. The assessment came to be framed under section 143(3) of the Act on 28th March 2003, wherein, while calculating the deduction under section 80HHC of the Act the Assessing Officer did not grant deduction under section 80HHC of the Act on the income from Duty Entitlement Pass Book licences (hereinafter referred to as "DEPB licences"). The assessee carried the matter in appeal before the Commissioner (Appeals), who vide order dated 24th July, 2003 partly allowed the appeal of the petitioner by allowing the claim for deduction under section 80HHC of the Act on the income from DEPB licences. The respondent went in appeal against the order of the Commissioner (Appeals) before the Income Tax Appellate Tribunal which was pending for adjudication at the relevant time.

3. Subsequently, by the impugned notice dated 30th March 2007, the respondent sought to reopen the assessment of the petitioner for assessment year 2000-01. By a letter dated 26.04.2007 the petitioner requested the respondent to treat the original return of income as filed in compliance of the notice under section 148 of the Act and also requested the respondent to supply a copy of the reasons recorded while issuing the impugned notice. Such reasons came to be furnished on 1.05.2007, pursuant to which the petitioner filed its objections which came to be

rejected vide order dated 8.10.2007, giving rise to the present petition.

4. Mr. Tushar Hemani, learned advocate for the petitioner assailed the impugned notice by submitting that the same has been issued much beyond a period of four years from the end of relevant assessment year and, as such, in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for that assessment year, the assumption of jurisdiction by the Assessing Officer under section 147 of the Act is invalid. Referring to the reasons recorded, it was pointed out that the sole basis for reopening the assessment is a subsequent amendment of section 80HHC of the Act which has been given retrospective effect. According to the Assessing Officer, the petitioner has failed to fulfill the conditions laid down by the amended provisions of section 80HHC and as such, there is failure on his part to disclose fully and truly all material facts. It was submitted that at the relevant time when the return came to be filed, the amended provision was not in existence, under the circumstances, the petitioner could in no manner have predicted that subsequently the legislature would bring about such an amendment and have filed the return accordingly. Under the circumstances, by not stretch of imagination can it be stated that when the petitioner filed its return on income in the year 2000 claiming deduction under section 80HHC of the Act, the petitioner had failed to disclose all material facts. Once there is no failure on the part of the petitioner in disclosing fully and truly all material facts necessary for the assessment, the reopening is bad in law and consequently the impugned notice deserves to be quashed and set aside.

4.1 In support of his submissions, the learned counsel placed reliance upon the decision of this Court in the case of ***Denish Industries Ltd. v. I.T.O.,*** *(2004) 271 ITR 340 (Guj.,* wherein on the question whether

the assessee had failed to disclose fully and truly all material facts necessary for assessment, the court held that it was obvious that when the assessee had filed its return in 1983, it could not assume that such a legislative amendment was going to be made in the year 1986 with retrospective effect from the year 1974. Therefore, by no stretch of imagination could it be said that in the year 1983 when the assessee had filed the return claiming investment allowance on the capitalization of interest paid after the date on which the machinery was installed and put to use, the assessee had failed to disclose all material facts.

5. On the other hand, Mr. M. R. Bhatt, Senior Advocate, learned counsel for the respondent has supported the impugned notice and has placed reliance upon the reasons recorded as well as the affidavit in reply filed by the respondent and the order disposing of the objections. Reference was made to the order disposing of the objections wherein the respondent has stated that the petitioner had failed to disclose fully and truly all material facts as per the amended provisions in section 80HHC of the Act. It was, accordingly, submitted that the assumption of jurisdiction on the part of the Assessing Officer is legal and valid and there is no warrant for interference by this Court.

6. From the facts noted hereinabove, it is apparent that the impugned notice under section 148 of the Act has been issued after the expiry of a period of four years from the end of the relevant assessment year in a case where earlier an assessment had been framed under section 143(3) of the Act. Under the circumstances, the proviso to section 147 of the Act would be attracted. Therefore, for the purpose of assuming jurisdiction under section 147 of the Act, it is necessary that the Assessing Officer should form a belief that income chargeable to tax has escaped assessment, and that such escapement is by reason of failure

on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the assessment year under consideration. Such satisfaction should be reflected in the reasons recorded for reopening the assessment. It may, therefore, be germane to refer to the reasons recorded by the Assessing Officer which read thus:

> *"The assessee company filed its return of income declaring total income at Rs.269,55,240/- on 30/11/2000 under normal provision of the IT Act. The assessee has shown book profit u/s 115JA of the Act of Rs.100,11,622/-. In the return assessee had claimed deduction u/s chapter VI-A as under:*
>
> *80G Rs.62,500/-*
> *80HHC Rs.711,09,051*
>
> *Further it is also noticed that in the computation of the deduction u/s 80 HHC of the IT Act, assessee claimed deduction u/s 80HHC which include deduction claimed @ 90% on Export incentives totaling to Rs.49,24,297/-. Further, total export turnover for the period is Rs.63,70,68,125/- i.e. more than Rs.10 Crores.*
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> *Sec. 80HHC of the I.T. Act is amended by the Taxation Laws (Amendment) Act, 2005. As per the new law, export incentives received by the assessee is not to be included as part of deduction, if the assessee fails to prove that the rate of DEPB/DFRC was less than that of Duty Draw back available to the assessee. Since there is nothing on record which shows that the assessee has fulfilled the conditions laid down by amended provisions of section 80HHC, the case requires to be reopened u/s 147 of the Act for necessary verification.*
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> *It is pertinent to mention that during the assessment proceeding for A.Y.2003-04 assessee failed to fulfil the provision of amended section 80HHC and addition were made regarding his claim of DEPB.*
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> *In view of the above facts I have reason to believe that the deduction claimed on export incentive of Rs.49,24,297/- has escaped assessment. Hence, Notice u/s. 148 is to be issued."*

7. On a plain reading of the reasons recorded it is evident that

there is not even a whisper to suggest that there is any failure on the part of the petitioner to disclose fully and truly all material facts. All that is stated therein is that in terms of the amendment of section 80HHC by the Taxation Laws (Amendment) Act, 2005, export incentives received by the assessee could not be included as part of deduction, if the assessee fails to prove that the rate of DEPB/DFRC was less than that of Duty Drawback available to the assessee. In fact, according to the Assessing Officer since there is nothing on record which shows that the assessee has fulfilled the conditions laid down by the amended provisions of section 80HHC, the case is required to be reopened under section 147 of the Act for necessary verification. Thus, in essence and substance, it appears that the Assessing Officer seeks to reopen the assessment for the purpose of verification as to whether or not the petitioner has fulfilled the conditions laid down by the amended provisions of section 80HHC. However, in the entire reasons recorded, there is no assertion that there is any failure on the part of the petitioner to disclose fully and truly all material facts. Such assertion is only found in the order disposing of the objection, which too is only to the effect that the assessee has failed to disclose fully and truly all material facts as per the amended provisions of section 80HHC of the Act. Now, when the petitioner filed its return of income, the amended provisions of section 80HHC of the Act had not been brought on the statute book. The law requires the assessee to file returns in accordance with the existing laws, and does not and cannot expect the assessee to be a soothsayer anticipating future amendments made in the enactment and file its return accordingly. Under the circumstances, the very basis for reopening, viz. that the assessee had not filed its return according to the amended provisions of section 80HHC is fallacious.

8. The present case would be directly covered by the decision

of this Court in the case of ***Denish Industries Ltd v. I.T.O. (supra)***. As rightly contended by the learned counsel for the petitioner, at the relevant time when the petitioner filed its return of income for the assessment year 2000-01, it could not have assumed that section 80HHC was going to be amended in the year 2005 and file its return accordingly. Under the circumstances, the contention put forth on behalf of the respondent that the petitioner by not filing its return in terms of the amended provisions of section 80HHC of the Act had failed to disclose fully and truly all material facts deserves to be stated only to be rejected. When the amended provisions of section 80HHC of the Act were not in existence at the relevant time when the return came to be filed, no such failure can be attributed to the assessee.

9. In the aforesaid premises, it is apparent that the basic requirement for reopening the assessment after the expiry of the period of four years from the end of the assessment year, namely, that there is escapement of income chargeable to tax by reason of failure on the part of the petitioner to disclose fully and truly all material facts is not satisfied, thereby rendering the impugned notice under section 148 of the Act, unsustainable.

10. For the foregoing reasons, petition succeeds and is, accordingly, allowed. The impugned notice dated 30th March 2007, issued under section 148 of the Act, is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.

(Akil Kureshi J.)

(Harsha Devani, J.)

(vjn)