IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 16872 of 2011

For Approval and Signature:

HONOURABLE MR.JUSTICE V. M. SAHAI
HONOURABLE MR.JUSTICE N.V. ANJARIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? **YES**

2 To be referred to the Reporter or not ? **YES**

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, 1950 or any order made thereunder ? **NO**

5 Whether it is to be circulated to the civil judge ? **NO**

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KALPATARU STHAPATYA PVT.LTD - Petitioner(s)
Versus
INCOME TAX OFFICER WARD 1(3) - Respondent(s)

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Appearance :
MRS SWATI SOPARKAR for Petitioner(s) : 1,
MR PRANAV G DESAI for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE V. M. SAHAI
and
HONOURABLE MR.JUSTICE N.V. ANJARIA

Date : 28/09/2012

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE N.V. ANJARIA)

By way of present petition under Article 226 of the Constitution, the petitioner-assessee questioned the legality of

assumption of jurisdiction by respondent-Income Tax Officer under section 147 read with section 148 of the Income tax Act, 1961, and prayed to quash and set aside notice dated 18.03.2011 issued by the respondent to reopen the assessment for Assessment Year 2005-2006

2. Setting out the relevant facts of the case, the petitioner-assessee was engaged in the business of development and construction of real estate. The petitioner developed a housing project known as 'Sheth Nagar' at Jamnagar road, Rajkot. In the return of income for Assessment Year 2005-2006 filed on 28.10.2005, the petitioner-assessee declared total income of Rs. 19,479/-, and inter alia claimed deduction under section 80-IB(10) of the Income Tax Act, 1961 (hereinafter referred to as' the Act' for sake of brevity) for Rs. 11,50,649/- in connection with the profit earned from that project. The return was initially processed under section 143 of the Act. Thereafter, the case was taken up for scrutiny and notice dated 29.9.2007 under section 143 (2) came to be issued, which was served on the petitioner on 9.10.2006. Another notice alongwith a questionnaire was issued on 7.9.207, and served on the assessee on 12.09.2007. The assessment order under section 143(3) was passed 5.12.2007.

2.1 On 18.03.2011, the respondent issued impugned notice seeking to reopen the assessment which was concluded as above. By communication dated 15.04.2011, the petitioner pointed out that the

assessment was already over in which a full and true discloser of facts was made and fair accounts were produced. The petitioner requested the respondent to supply reasons for the reopening. The respondent furnished the reasons recorded by him on 28.02.2011 alongwith forwarding letter dated 5.8.2011. The petitioner filed his reply on 17.08.2011 raising grounds of objections. They came to be rejected on 10.10.2011 as being without merits, according to the Income Tax Officer.

3. The reasons recorded for reopening of the assessment are usefully extracted herein,

> *"On verification of the records, it is noticed that the assessee had undertaken the project known as 'Sheth Nagar Situated at Jamnagar Road, Rajkot and claim for deduction of an amount equal to 100% of the profit derived in the previous year from such housing project under section 80IB(10) of the I.T. Act.*
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> *On verification of the records, it is noticed that the claim of the assessee for claiming deduction 80IB of the IT Act is not correct and was wrongly claimed as built area of the shops and other commercial establishment of the project is 7.96% which is far more exceeding the statutory limit of 5% of the aggregate built up area of the housing project o2 2000 Sq. fts. Whichever is less as laid down under sub section (d) of section 80IB(10) of the I.T. Act, 1961. Thus the assessee is not eligible for claiming deduction under section 80IB(10) of the It Act, 1961.*
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> *In view of the above fact, the assessment is required to be reopened under section 147 of the Act for bringing the escaped income amounting to Rs. 11,50,649/- under tax net.*

I have, therefore, reasons to believe that the income assessable to tax has escaped assessment within the meaning of section 147 of the Act for A. Y. 2005-2006.

Issue notice under section 148 of the Act."

3.1 From the above, it could be seen that the sole ground for reopening the Assessment was that the deduction under section 80-IB(10) was wrongly claimed by the petitioner. It would be worthwhile to consider the provisions section 80-IB(10) as they stood in the accounting year in question being 2004-2005. It reads as under :

"(10) The amount of profits in case of an undertaking developing and building housing projects approved before the 31st day of March, 2005 by a local authority, shall be hundred per cent of the profits derived in any previous year relevant to any assessment year from such housing project if,-

(a) such undertaking has commenced or commences development and construction of the housing project on or after the 1st day of October, 1998;

(b) the project is on the size of a plot of land which has a minimum area of one acre; and

(c) the residential unit has a maximum built-up area of one thousand square feet where such residential unit is situated within the cities of Delhi or Mumbai or within twenty-five kilometres from the municipal limits of these cities and one thousand and five hundred square feet at any other place."

3.2 Section 80-IB(10) was amended by Finance (No.2) Act, 2005 and inter-alia clause(d) to subsection 10 was inserted, which

reads as under :

> *"(d) the built-up area of the shops and other commercial establishments included in the housing project does not exceed five per cent of the aggregate built-up area of the housing project or two thousand square feet, whichever is higher"*

3.3 The aforementioned provision provides for deduction in respect profits and gains from certain industrial undertaking other than infrastructure development undertaking. By virtue of sub- section (10) thereof, deduction is available to the extent of 100% of the profits derived in the previous year from the housing project, on fulfillment of conditions mentioned therein. The said deduction was available, in so far as the accounting year corresponding to the Assessment Year 2005-2006 was concerned, in respect of the residential portion of a housing project approved before 31.03.2005 by the local authority. The concept of maximum limit of commercial establishment of the project as a condition for deduction was not provided for prior to the amendment.

4. Learned Senior Counsel Mr. S. N. Soparkar assisted by Mrs. Swati Soparkar appearing for the petitioner submitted that the respondent erroneously exercised powers to reopen the assessment after four years as the petitioner-assessee had duly disclosed all the material facts regarding its claim for deduction. It was submitted that there was no failure on part of the petitioner to fully and truly disclose

the facts, and hence, reopening after four years was not permissible in any case. It was submitted that after taking into account the relevant facts, the Assessing Officer allowed deduction under section 80-IB(10), and thus, now on the same facts, the power was being exercised which was impermissible in law being against conditions circumscribed under sec. 147 and in particular, in the First proviso to that section.

4.1 With regard to the ground of reopening that the built up area of shops and commercial establishment was 7.96% as against the prescribed 5% under sub-clause (d) of Section 80 IB (10), learned senior counsel submitted that the said clause was inserted in the statute book by the Finance Act, 2004 w.e.f. 1.4.2005. According to his submission, the same was not applicable to the housing project of the petitioner which was approved before 1.4.2005. It was submitted that deduction was allowed by the Assessing Officer as per the Assessment Order dated 5.12.2007 after considering all the material facts which were before him, and impugned notice was based on a mere change of opinion.

4.2 Learned Senior counsel relied on decision of this Court in **Gujarat Fluorochemicals Ltd. Vs. Deputy Commissioner of Income Tax [(2009) 223 CTR 398 (Guj.)]** to submit that the Assessing Officer in his notice issued under section 148 did not say that he had reason to believe that the assessee had not disclosed

fully and truly all material facts at the time of Assessment. A decision of this Court in **SCA 14250 of 2010 in Ketan Construction Ltd.** was relied on for the proposition that the reasons recorded did not reflect anything on the basis of which it could be inferred that there was failure on the part of the assessee to disclose the material facts. The learned senior counsel relied on decisions in **CIT vs. Kelvinator of India Ltd. [(2010) 320 ATR 561 O(SC)]** to contend that a change of opinion can not be a ground to exercise powers under section 147. In order to buttress the contention that sub clause (d) inserted w.e.f. 1.4.5005 would not apply, learned senior counsel relied on a Bombay High Court decision in **CIT vs. Brahm Associates [(2011) 333 ITR 289 (Bombay High Court)]** to contend that deduction under section 80-IB(10) on the profit derived on the housing projects approved by the local authority as a whole.

4.3 As against that learned advocate Mr. Pranav G. Desai for the respondent, referring to the averments in respondent's affidavit-in-reply, submitted that in order to get the benefit of deduction under section 80-IB(10) of the Act, each of the conditions prescribed in the provision was required to be satisfied by the assessee. It was submitted that under sub-clause (d) of the section, it is contemplated that the built up area of commercial establishment in the project should not exceed the limit of 5% of the aggregate build up area, whereas in the petitioner’s case, it exceeded the said limit. According to his submission, the deduction was therefore not allowable. He

further submitted that the project was completed after 1.4.2005 and the requirements in clause-(d) was applicable at the time when the deduction was to be considered. It was submitted that in clause (d), a limit was prescribed for commercial establishment whereas prior to the amendment, the position was different. According to his submission, in neither circumstance, the assessee-company had fulfilled the conditions for deduction under section 80-IB(10). He further submitted that in Special Civil Application No. 16871 of 2011 filed by the petitioner for Assessment Year 2004-2005, it was admitted by the petitioner that sub section (d) inserted in section 80IB(10) would be applicable to from the next Assessment Year. He submitted that on this ground alone, the petitioner was not entitled to any relief and no writ should be issued in his favour.

4.4 Learned advocate relied on decision in **Dy. CIT vs. Naginjmara Veneer and Saw Mills Pvt. Ltd. [(2009) 16 SCC 372]** for the proposition that at this stage, the facts stated in the notice must be taken as correct. He next relied on decision in **Raymond Woollen Mills Ltd. vs. Income Tax Officer, Centre Circle XI, Range Bombay and Others [(2008) 14 SCC 218]** to submit that sufficiency or correctness of the reasons recorded for reopening are not subject to judicial review.

5. Having considered the facts on record and the contentions canvassed by both the sides in the context, admittedly,

the reopening of the assessment for Assessment Year 2005-2006 was after a period of four years from the end of the relevant assessment year. The powers of the Assessing Officer to reopen a concluded assessment flow from section 147 of the Act. The section provides for assessment of income which has escaped the assessment. When it comes to the reopening after expiry of four years from end of the relevant assessment year, first the Proviso to section 147 finds operation. Proviso to section 147 reads as under :

> *"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four 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."*

5.1 The exercise of powers beyond four years are fettered by an additional condition that the escapement of income has resulted on account of failure on the part of the assessee inter alia to disclose fully and truly material facts necessary for the assessment for that Assessment Year. The import of the said Proviso is that where the assessee is not in default in disclosing fully and truly all material facts necessary for assessment for the assessment year in question, notwithstanding that there is an escapement of income for

assessment in his opinion, the assessment cannot be reopened. In other words, a failure on part of the assessee to disclose material facts has to be demonstrated. The attribution of failure to disclose to the assessee is sine quo non for reopening the assessment after lapse of four years.

5.2 A close reading of reasons recorded by the respondent would show that the reopening was not on the premise that there was failure on the part of the assessee to disclose any material fact. It was based on the ground that the benefit was wrongly claimed. A wrong claim made would not necessarily mean the material facts not disclosed. If nothing is attributable to the assessee for failure, it could not be said that the Assessing Officer had entertained any belief that the assessee had failed to disclose the facts fully and truly. It was observed by this Court in Surat City Gymkhana v/s Dy. CIT [(2002) 254 ITR 733] that the case of the Revenue must succeed or fail on the basis of reasons recorded.

5.3 In the facts of the present case, it was evident from the assessment order dated 5.12.2007 that the Assessing Officer was aware about the deduction claimed under section 80-IB(10) in respect of the profit earned from the housing project and he considered that aspect in his assessment order as under :

> *"3. In the statement of income, the assessee has shown the profit on swale of shops. The total sale price is taken at Rs. 2,60,000/- for which it has not given any supporting evidence. The sale price of Rs. 2,60,000/- was rejected. The assessee has estimated the gross profit at Rs. 39,000/- @ 15% of Rs. 2,60,000/-*
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> *"4. In the P & L A/c for the relevant year, the assessee has shown the gross receipts of Rs. 65,18,000/- and the expenditure claimed on material, labour and other expenses at Rs. 44,12,139/- thereby leaving the gross profit at Rs. 21,05,861/-....."*

5.4 Thereafter, the Assessing Officer assessed the income of the petitioner in para 6 of the Assessment Order in the following manner.

	Rs.	Rs.
Total income as per statement of income		11,70,128/-
Add: Addition on account of profit on sale of shops as discussed in para 3 & 4 above	26000/-	
Add: Disallowed out of Administrative expenses as discussed at para 5 above	15000/-	41,000/-
		12,11,128/-
Less : Profit on sale of shops as discussed at para 3 & 4		45,479/-
		11,65,649/-
Less : Deductioin under section 80IB @ 100% of profit on sale of Tenaments		11,65,449/-
Total income		NIL
Add : Profit on sale of shops as discussed at para 3 & 4 above		45479/-

Total Income Assessed		45,479/-
Computation of Book Profits as per provisions of Section 115JB of the IT Act	11,70,128/-	
7.5% of Book Profit of Rs. 11,70,128/-		87,760/-
Add : Surcharge @ 2.5% on Rs. 87,760/- Add: Education Cess @ 2% on Rs. 89,954/-		2,194/- 1,799/-
Tax on Book Profit as computed above (B)		91,753

5.5 From the above, it is clear that the assessing officer allowed deduction under 80-IB(10) at 100% of profit on sale of tenaments after considering the facts and material before him. In respect of sale of the shops, no deduction was allowed for the reason that the assessee had shown the profit on sale of shops by giving total sale price without giving any supporting evidence. The profit on sale of shops was therefore added in the income. There is, therefore, no gainsaying that the Assessing Officer considered and applied his mind to the facts relating to the housing project developed by the petitioner, the shops and the profit earned therefrom. He thereupon qualified the deduction in the assessment order.

6. The apex court in **Calcutta Discount Co. Ltd. v/s Income Tax Officer (1961) 41 ITR 191** has laid down as under :

"The assessee has responsibility of disclosing all primary facts, but once he has disclosed all the primary facts, his duty ends and it is for the assessing officer to draw the proper conclusions from it. If the wrong conclusion is drawn, then it is no ground for reopening the

assessment because the assessing authority previously held another opinion as to the legal effect of certain primary facts and the assessing officer later on took a different view."

6.1 The phrase 'material facts' contemplated in the proviso to section 147 connotes 'primary facts' necessary for assessment in relation to the year of assessment. The expression "material facts" was considered by the Supreme Court in the context of Section 34(1)(a) of the Income Tax Act, 1922 in **Associated Stone Industries (Kotah) Ltd. vs. CIT [(1997) 224 ITR 560 (SC)],** wherein the assessee was granted a lease for quarrying stones by the then Maharao of Kotah State under an agreement of lease. The royalty was inclusive of income tax. When the State of Kotah later merged with United State of Rajasthan, a tri-partie dispute amongst the assesee, State of Rajasthan and Union of India arose pursuant to an application of the assessee-company to the Commissioner of income tax for a declaration that it was exempt from payment of income tax in accordance with the terms of the lease agreement. In that context, the Supreme Court observed that the primary fact in the case was the lease agreement entered into by the appellant- assessee with Maharao of Kotah State, which was placed before the Income tax Officer at the time to original assessment, and it was not the duty of the assessee to draw attention of the Income tax officer to any particular clause or portion of the document and invite him to draw any particular inference therefrom. The Supreme Court held that the expression "material facts" refers to only primary facts. It was

observed that “there is not duty cast on the assessee to indicate or draw attention of the Income Tax Officer to what factual, legal or other inference can be drawn from the primary facts disclosed.”

7. The nature of duty on the part of the assessee to disclose the necessary facts, and the Assessing Officer's enjoinment towards the facts disclosed are thus well settled in law. Applying the primary facts disclosed, the assessing officer may draw inferences. He may deduce certain other facts from the facts disclosed. He may even call for certain additional facts as may may be required by him for the purpose of his assessment for the assessee. The task of the assessing officer is to apply those facts in accordance with legal provisions of assessment. The petitioner was not expected to disclose the facts in a manner so as to indicate how those facts will fit in for his claim. It really explain the process of assessment to be undertaken by the Assessing Officer on the basis of facts before him.

7.1 In the present case, the assessee disclosed the factum of housing project, the construction of shops and the profit derived therefrom. These were the primary facts sufficient for the Assessing Officer to proceed in its assessment process. He had undertaken such process and applied the facts to the provisions of law by applying his mind. Whether the built-up commercial area / the area of shops conformed the requirement of section 80-IB(10), if that section was applicable, was an aspect to be examined by the Assessing Officer. It

was a subsidiary fact to be searched out in the assessment process for which the primary facts were available with the Assessing Officer. An error, a slip, an omission or a mistake on part of the assessing officer in that regard would not furnish a ground to reopen. For, the reopening proceedings are not rectification proceedings. Nor the concluded assessment can be reviewed under the garb.

8. It was also right on part of learned Senior Counsel to rely on the decision of Apex Court in **Kelvinator of India (supra)** and on the decision of this Court **Garden Silk Mills Ltd. v/s CIT (No.2) (1996) 222 ITR 68 (Guj.),** to contend and submit that in the facts of the case the exercise of powers to reopen the assessment was based on the same facts and that a change of opinion does not give a ground to reopen the concluded assessment.

8.1 Eventhough it was contended by learned advocate for the respondent that the petitioner had admitted in the proceedings of previous year in relation to the very issue, that the deduction in question would not apply from 2005-2006, learned advocate could not substantiate his submission. No material was shown regarding the alleged admission. A copy of oral order in SCA 16871 of 2011 was produced, however, from that also nothing could be pointed out which could tantamount to an admission on part of the petitioner, as contended. In the said decision, a Division Bench of this Court quashed the reopening notice for the assessment year 2004-2005,

which was on the same ground of deduction in question having been wrongly claimed. Even on demurer, and in any view, as observed by the Supreme Court in **ARM Group Enterprise Ltd. v/s Waldorf Restaurant and Others [(2003) 6 SCC 423],** that "there can be no admission on a question of law to be held as binding on the appellant." Decision in Naginjamara (supra) relied on by learned advocate was in different set of facts where the assessment was sought to be reopened on the basis of the statement made by the Chief Executive of the assessee company in course of hearing of assessee's case in the subsequent assessment year, on the basis of which the Assessing Officer had a reason to believe that the assessee had "suppressed stock" in the previous assessment year. Raymond Woolen Mills (supra) next relied on behalf of the respondent was on the principle that sufficiency of correctness of the reasons for reopening could to be subject to judicial review which is not the case here.

9. In support of the contention that the requirement under Section 80-IB(10) would not apply to the project of the petitioner, which was approved before 31.3.2005, learned senior counsel invited attention of the Court inter alia to the decision of Bombay High Court in CIT vs. M/s Brahma Associates [(2011) 333 ITR 289], in which the following observations were noticed.

" *Lastly, the argument of the revenue that Section 80-IB(10) as*

amended by inserting clause (d) with effect from 1.4.2005 should be applied retrospectively is also without any merit, because, firstly, clause (d) is specifically inserted with effect from 1.4.2005 and, therefore, that clause cannot be applied for the period prior 1.4.2005. Secondly, clause (d) seeks to deny Section 80-IB(10) deduction to projects having commercial user beyond the limit prescribed under clause (d), even though such commercial user is approved by the local authority. Therefore, the restriction imposed under the Act for the first time with effect from 1.4.2005 cannot be applied retrospectively. Thirdly, it is not open to the revenue to contend on the one hand that Section 80-IB(10) as it stood prior to 1.4.2005 did not permit commercial user in housing projects and on the other hand contend that the restriction on commercial user introduced with effect from 1.4.2005 should be applied retrospectively. The argument of the revenue is mutually contradictory and hence liable to be rejected. Thus, in our opinion, the Tribunal was justified in holding that clause (d) inserted to Section 80-IB(10) with effect from 1.4.2005 is prospective and not retrospective and hence cannot be applied to the period prior to 1.4.2005."

Since it is held in the present case that assumption of the jurisdiction by the Assessing Officer is illegal on the ground of erroneous exercise of powers by him in terms of section 147 of the Act, it was not considered necessary to go into further into the said aspect. Accordingly, the said question has not been gone into and no final opinion is expressed with regard thereto.

10. The conditions of section 147 of the Act and in particular the First proviso thereto, which is applicable in the present case, having not been complied with on facts, the reopening of the assessment

was not permissible. The assumption of jurisdiction by the respondent-Income Tax Officer seeking to reopen the assessment for the Assessment Year 2005-2006 was, therefore, beyond his powers and, was illegal. As a result, the impugned notice dated 18.03.2011 under section 148 of the Act issued by the respondent is hereby set aside. The petition succeeds. There shall be no order as to costs.

[V.M.SAHAI, J.]

[N.V.ANJARIA, J.]

cmjoshi