

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CIVIL APPLICATION No. 13060 of 2009**

**with**

**SPECIAL CIVIL APPLICATION No. 13061 of 2009**

**with**

**SPECIAL CIVIL APPLICATION No. 13062 of 2009**

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**ASHIMA ISPAT PRIVATE LIMITED - Petitioner(s)**

**Versus**

**DEPUTY COMMISSIONER OF INCOME TAX - Respondent(s)**

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**Appearance :**

MR TUSHAR P HEMANI for Petitioner(s) : 1,

None for Respondent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE K.A.PUJ**

**and**

**HONOURABLE MR.JUSTICE RAJESH H.SHUKLA**

**Date : 14/12/2009**

**COMMON ORAL ORDER**

(Per : HONOURABLE MR.JUSTICE K.A.PUJ)

1. The Petitioner has filed these three petitions under Article 226 of the Constitution of India, challenging the notice of reopening issued by the Income Tax Officer, Ward-1 (4), Ahmedabad for assessment years 2004-05, 2005-06 and 2006-07.
2. Before issuing the notice of reopening, the Assessing Officer has recorded the reasons for all the three assessment years. Copy of the reasons recorded for each of the three assessment years was supplied to the petitioner and the petitioner has raised its objections to the reopening of assessment. The objections raised by the petitioner are dealt with by the Deputy Commissioner of Income Tax, Circle-I, Ahmedabad and the said objections were overruled by him, and being aggrieved by the said order, the present petitions are filed by the petitioner.
3. Heard Mr. Tushar P. Hemani, the learned advocate appearing for the petitioner. He has raised mainly two objections against the notice of reopening. The first objection raised by him is that the reasons have been recorded by the Income Tax Officer, Ward 1(4), Ahmedabad, Shri S.K.Suthar, whereas the impugned notices have been issued by Shri S.K.Katiyar, Income Tax Officer, Ward 1(4), Ahmedabad, which is not permissible in law as held by this Court in the decision of **Hynoup Food And Oil Industries Limited v. Assistant Commissioner of Income Tax, [2008] 307 ITR 115 (Guj.)**. He has also submitted that even the present respondent, who is now in the process of framing reassessment, is a different officer having designation Deputy Commissioner of Income Tax, Circle-I, Ahmedabad. He has therefore submitted that if the reasons are recorded by different officer, notice is issued by different officer and re-assessment is being framed by an altogether different officer, the reassessment is bad in law and hence, the petition deserves consideration by this Court.
4. Mr. Hemani has further submitted that the main ground of re-opening, as stated in the reasons recorded,

appears to be non-application of provisions of Section 40A(3) of the Act on the cash purchases made by the petitioner from two concerns viz. M/s Bhoomi Corporation and M/s Shyam Steel. It is the case of the respondent that 20% of this amount is required to be disallowed, and therefore, to that extent the income has escaped assessment and therefore the notice of reopening is issued in all the three years. Mr. Hemani has further submitted that so far as the first two years are concerned, the disputed purchases are alleged to have been made from two parties. So far as the third year is concerned, the petitioner has made disputed purchases only from M/s Shyam Steel and not from M/s Bhoomi Corporation, and still, the reasons recorded indicate that the petitioner has made such disputed purchases from the above referred two parties. It is therefore submitted that there is a total non-application of mind while recording the reasons. So far as the first two years are concerned, the petitioner has not made any purchases from the said two parties and did not claim any expenditure towards purchases being made from the said two parties. He further submitted that the petitioner has not claimed any purchase made from the two parties, and if this is the situation, there is no question of disallowing under the provisions of Section 40A(3) of the Act and resultantly no question of escapement of any income as alleged or for the reasons as alleged in the reasons recorded. He has therefore submitted that the reasons are recorded without any application of mind, and therefore, the notice of reopening is required to be quashed and set aside.

5. Mr. Hemani has further submitted that the petitioner has specifically raised these two issues pursuant to the notice and still while dealing with these objections, the respondent has not given any finding on these issues and straightway rejected those objections. He has therefore submitted that the impugned order rejecting the petitioner's objections, passed by the respondent is contrary to the law laid down by the Apex Court in case of **GKN Driveshafts (India) Ltd. v. ITO & Others, 259 ITR 19 (SC)**.
6. We have heard learned counsel appearing for the petitioner and gone through the notice of reopening, reasons recorded, petitioner's objections filed before the respondent and the impugned order passed by the respondent

while rejecting the petitioner's objections. We have also considered the judgment of this Court in the case of **Hynoup Food and Oil Industries Limited** (supra).

7. Before we consider the submissions made by Mr. Hemani, it is important to note that in all the three assessment years, the original assessment orders were passed under Section 143(1) of the Income Tax Act and the notices for reopening are issued within the period of four years from the end of the relevant assessment years. At the time of issuance of the notice of reopening and recording the reasons, it is specifically stated that survey under Section 133A of the Act was carried out on 10.8.2007. The ADIT (Inv.), Unit-1(1), Ahmedabad vide letter dated 28.3.2008 has intimated that the assessee company has obtained bogus purchase bills from M/s Bhoomi Corporation and M/s Shyam Steel. The ADIT has further stated that the assessee company has accepted that they have resorted to purchase of raw material in cash from outside parties based in Mumbai. In view of the admission of the assessee company regarding purchase made in cash exceeding Rs.20,000/-, provisions of Section 40A(3) of the Act are applicable and disallowance to the extent of 20% of such expenditure as claimed by the assessee company in its books of accounts are required to be made. So far as the issue raised by the petitioner that in the first two years, the petitioner has not made any purchase from these parties, the respondent has dealt with that issue and has observed in the order that in the statement dated 10.8.2007, the petitioner has identified the parties and the quantum of purchases and categorically stated that the payment to parties were non genuine and money has been received back by the petitioner. He has further recorded that during the course of statement under Section 131 of the Income Tax Act dated 12.12.2007, Mr. Mehul N. Shah, the Director of the petitioner company, has reiterated that the company has received bills from various entities and actual material received from other parties. He has also recorded that the petitioner issued cheques to parties based in Ahmedabad to give bogus bill and that the company had resorted to this mode of purchase in order to save 3% Central Sales Tax on purchases. Considering these aspects of the matter, the respondent has taken the view that the objections filed by the petitioner are factually incorrect and are therefore

rejected in totality.

8. The moot question, which is to be decided by the Court is as to whether at the time of framing the assessment, whether the assessing officer has applied his mind to this aspect. Admittedly, the assessment is framed under Section 143(1) of the Act. There is nothing to indicate that he has taken into consideration as to whether any cash purchases were made by the petitioner. In the reasons recorded, it is specifically observed that the purchases were made from the various parties. Even if no purchases have been made from these two parties, it is to be inquired and investigated as to whether purchases are made from other parties and whether those purchases are made in cash or by cheque. Even, so far as these two parties are concerned, it is only when survey was carried out and bogus purchases were detected, the explanation have come forward that they have not made any purchase from these parties and only bogus bills were raised. However, subsequently, the amount was received back. This shows the conduct of the petitioner, and when such conduct is found on the face of the record, the Court is reluctant to exercise its extraordinary equitable writ jurisdiction under Article 226 of the Constitution of India. Even otherwise, the entire issue is open at large and the petitioner be given adequate opportunity to offer its explanation before the assessing officer and even if the assessment is framed, further remedies are available to the petitioner. In this view of the matter, so far as this issue is concerned, the Court does not find any substance.
9. The second legal issue which is raised by the petitioner is that the person who records the reasons, the person who issues the notice of reopening and the person who has to pass the assessment order are different and hence the same is not permissible under the law. This Court in case of **Hynoup Food and Oil Industries Limited** (supra) took a view that Successor Assessing Officer cannot issue notice under Section 147 of the Act on the basis of the reasons recorded by Predecessor Assessing Officer. Because the reason to believe has to be of the officer concerned, viz. the officer issuing the notice under Section 148 of the Act. Nothing has come on record to indicate that the officer, who has issued the notice under Section 148 of the Act, has recorded his satisfaction

as to escapement of income. The Court on facts in that case therefore took the view for the assessment years 1990-91 and 1991-92 that the officers who has issued notice are different than the officer who has recorded the reasons and hences the notice for the said years were held to be invalid.

10. So far as the present case is concerned, the notices were issued by Mr. S.K.Katiyar whereas the reasons were recorded by Mr. S.K.Suthar. Both are the Income Tax Officer, Ward 1(4), Ahmedabad. Mr. Katiyar, while issuing notice has specifically stated in the opening of the said notices that he had reason to believe that income for the assessment year 2004-2005 has escaped assessment. He has also stated that the notice is issued after obtaining necessary satisfaction of the Commissioner of Income Tax, Ahmedabad-1, Ahmedabad.

The Court is therefore of the view that there is no dispute about the fact that Mr. Katiyar while issuing the notice has indicated his satisfaction and since he was in agreement with the satisfaction recorded by Shri S.K.Suthar, and after obtaining the permission from the Commissioner of Income Tax, he has issued the notice. Hence, there is no infirmity in the issuance of the reopening notice by Mr. Katiyar. Even otherwise, there is no evidence before us which even remotely suggests that Mr. Katiyar, before issuing notice, has not recorded his satisfaction. These petitions are merely based on apprehensions. Notice of reopening of assessment cannot be challenged merely on apprehension.

11. So far as the second objection on this very issue that the respondent, who has to now frame the assessment is different and hence on this ground notice is invalid, is concerned, there is no substance in this objection as the respondent has himself observed in his order that the reasons were recorded by the Income Tax Officer, Ward-1(4), Ahmedabad and the reassessment is intended to be completed by him. He has further stated that the case has been transferred to him as he had jurisdiction over all company cases having returned income / loss in excess of Rs.10 lacs and therefore no issue regarding jurisdiction of the respondent over the case arises. He has further recorded that change of incumbent and transfer of cases on account of jurisdiction is liable to occur in

an organizational set up. He has therefore held that there was no bearing on the validity of the reasons recorded for reopening.

12. Looking to the facts of the present case, we are of the opinion that the decision of this Court in the case of **Hynoup Food and Oil Industries Limited** (supra) has no application, and on this ground, the notice of reopening cannot be held to be invalid.

13. The Respondent has passed a speaking order while rejecting the objections raised by the petitioner and hence he has complied with the direction of the Apex Court in the case of GKN Driveshafts (India) Ltd. (supra).

14. Since there is no substance in challenge to the notice of reopening of assessments, all the three petitions are dismissed.

(K.A.Puj,J)

(Rajesh H. Shukla,J)