

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 14611 of 2008

For Approval and Signature:

**HONOURABLE MR.JUSTICE D.A.MEHTA
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**

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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 ?
- =====

INDUCTO ISPAT ALLOYS LIMITED - Petitioner

Versus

ASSISTANT COMMISSIONER OF INCOME TAX (OSD), CIRCLE - I - Respondent

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Appearance :

MR. TUSHAR P HEMANI with MS. PAURAMI SHETH for Petitioner
MR. M R BHATT WITH MRS. MAUNA M BHATT for Respondent

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**CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT**

Date : 17/03/2009

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. Having heard learned counsel appearing for the respective parties, the petition is taken up for final hearing and disposal today. Rule. Learned counsel for respondent authority is directed to waive service.
2. The Assessment Year in question is 2002-2003. On 31.10.2002, the petitioner filed return of income showing total income at Rs.NIL. After scrutiny, assessment came to be framed under Section 143(3) of the Income Tax Act, 1961 (the Act) determining the total income at Rs.2,80,96,870/- on 31.3.2005.
3. Vide notice dated 27.3.2008 issued under Section 148 of the Act, the respondent authority has initiated reassessment proceedings. The reasons recorded as supplied by the respondent authority vide communication dated 5.5.2008 read as under:

2. The reasons for re-opening of assessment is as hereunder:

Perusal of assessment records revealed that assessee had paid lease rent of Rs.11,68,740/- on Gas Cylinders in the relevant year. Whereas at the same time assessee had also sold its own Cylinders and worked out Short Term Capital gain of Rs.3,13,530/-. As such assessee had wrongly claimed lease rent of Rs.11,68,740/- as a result of which income chargeable to tax has escaped assessment.

4. The case of the petitioner is that the impugned notice under Section 148 of the Act has been issued beyond the statutory period of four years as provided in Section 147 of the

Act and hence under the Proviso thereto the burden is on the revenue to show that the petitioner has either failed to furnish return of income, or comply with the statutory notice referred in the provisions, or failed to disclose fully and truly all material facts relevant for the assessment of the Assessment Year in question. That in the present case as can be seen from the assessment order dated 31.3.2005 (Annexure B), relevant details had been called for vide show cause notice issued on 23.2.2005 and the petitioner had submitted the necessary explanation under cover of letter dated 22.3.2005. That therefore, there was no failure or omission on the part of the petitioner, the other two conditions not being applicable in the facts of the case.

5. On behalf of the respondent authority attention was invited to the affidavit-in-reply dated 3.3.2009 to emphasize the fact that the petitioner had approached at the notice stage and alternative statutory remedy was available in case the assessment framed was adverse to the petitioner. The petition, therefore, should not be entertained. That the impugned notice has been issued after obtaining approval from the higher authority as required by the provisions of the Act and thus, is within the period of limitation. Learned counsel therefore submitted that the petition be rejected directing the petitioner to avail of the statutory alternative remedy.
6. The position in law is well settled. Under Section 147 of the Act, the Assessing Officer is empowered to reopen a completed assessment if the Assessing Officer has reason to believe that any income for a particular Assessment Year which is chargeable to tax for the said year has escaped assessment. The said section further provides that such power can be exercised within a period of four years from the end of the relevant Assessment

Year. In the present case, the Assessment Year being 2002-2003, the period of four years expired on 31.3.2007 and the impugned notice has been issued on 27.3.2008 i.e. beyond a period of four years. The case is therefore governed by the provisions of the Proviso to Section 147 of the Act. Under the Proviso, a completed assessment can be disturbed for the purposes of reassessment if the assessee has committed any of the defaults mentioned therein. Admittedly, the first two conditions of the three conditions cannot be available to the respondent authority leaving only the third condition as being available. **The respondent has therefore to show that there was omission or failure on the part of the petitioner to furnish full and true particulars of income.**

7. In the present case as the reasons recorded indicate the Assessing Officer is of the opinion that the lease rent of Rs.11,68,740/- paid by the petitioner for Gas Cylinders during the relevant accounting period has wrongly been claimed because according to the Assessing Officer during the same accounting period Gas Cylinders owned by the petitioner were sold off working out Short Term Capital Gain of Rs.3,13,630/-. **Whether the lease rent was wrongly claimed or not is an issue on which the Assessing Officer had applied his mind at the time of framing original assessment on 31.3.2005 by calling for necessary information vide communication dated 23.2.2005 and after considering the explanation dated 22.3.2005, accepted the stand of the assessee that the lease rent was allowable as business expenditure.**
8. In the aforesaid facts and circumstances of the case, it is apparent that not only there is no failure or omission on part of the petitioner, the Assessing Officer having considered the said issue before framing the original assessment, the action of the respondent

authority in issuing the impugned notice under Section 148 of the Act is nothing else but change of opinion on the same set of facts.

9. In the circumstances, the action of the respondent authority cannot be sustained. The impugned notice dated 27.3.2008 (Annexure A) issued under Section 148 of the Act is quashed and set aside for the reasons stated hereinbefore. The petition is allowed accordingly in the aforesaid terms. Rule made absolute with no order as to costs.

[D.A.MEHTA, J.]

[S.R.BRAHMBHATT, J.]