IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 28978 of 2007

With

SPECIAL CIVIL APPLICATION No. 28979 of 2007

To

SPECIAL CIVIL APPLICATION No. 28980 of 2007

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 ?

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MANJUSHA ESTATE PVT LTD - Petitioner

Versus

THE INCOME TAX OFFICER - Respondent

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Appearance :
MR MANISH J SHAH for Petitioner
MR KM PARIKH for Respondent
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 24/02/2009

COMMON ORAL JUDGMENT

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

1. Rule. Learned advocate for the respondent in each of the petitions is directed to waive service and the petitions are taken up for final hearing and disposal today considering the scope of the controversy. The three petitions involve Assessment Years 2000-2001, 2001-2002 and 2002-2003 respectively.
2. The petitioner, a Private Limited Company, is engaged in the business of developing land and construction of residential and commercial buildings.
3. For Assessment Year 2000-2001, the return of income under Section 139 of the Income Tax Act, 1961 (the Act) was filed on 30.11.2000. The return of income was accompanied by audited Profit and Loss Account, balance sheet, etc. For the assessment year, the acknowledgment receipt dated 30.11.2000 was the only communication for showing that the assessment had been completed under Section 143(1) of the Act.

4. For Assessment Year 2001-2002, return of income was filed on 31.10.2001. The respondent authority made an inquiry regarding cost of construction in relation to the projects and a detailed reply dated 11.01.2003 was filed on behalf of the petitioner. The details called for were supplied at item No.9 of the said reply. After considering the details and the explanation tendered by the assessee, the Assessing Officer did not accept the books of accounts and worked out net profit at the rate of 10% of receipts of a sum of Rs.1,10,86,447/-. This was carried in appeal and was confirmed by the Commissioner (Appeals) vide order dated 16.6.2003. The order made by Commissioner (Appeals) was further challenged by way of Second Appeal before the Tribunal and the action of Assessing Officer in rejecting the book result was also confirmed by the Tribunal.

5. In so far as Assessment Year 2002-2003 is concerned, the return of income was filed on 21.10.2002. Once again an inquiry was made by the Assessing Officer on 19.08.2004 (Exhibit-B) calling for details of construction work including total plot area, total construction area, total number of units along with area of construction, total cost of project etc.; details of purchases were called for, details of various charges were also called for, and the assessee tendered reply on 9.9.2004. The assessment was thereafter framed on 31.3.2005 on the basis of the book profit as the same was higher than the total income declared.

6. Thereafter, respondent authority issued three notices, for three Assessment Years, under Section 148 of the Act, all dated 21.2.2007. It is the said notices, which are under challenge. It is an admitted position that reasons recorded for issuance of notice under

Section 148 of the Act for all the three Assessment Years are common and hence, the reasons recorded for issuing the notice for Assessment Year 2000-2001 are reproduced hereunder:

 Asst.Year:2000-01

The assessee company is engaged in the business of developing land and construction of residential and commercial building. It was noted that the assessee company has transferred the entire project of Shantam Park on 16.3.2002 to its associated concern M/s. J. Upendra Construction Pvt. Ltd. for a total consideration of Rs.75,60,240/-. Since the assessee has not disclosed fully and truly all the material facts necessary for its assessment especially with respect to cost of construction, the matter was referred to the Departmental Valuation Officer for valuation of the project. The District Valuation Officer, Ahmedabad has submitted his report vide letter No.2(9)/DVO/2004-05/469 dated 23.1.2006. As per the valuation report, the expenditure incurred on construction of the project upto the date of transfer as determined by the DVO and as shown by the assessee in its books are as follows:-

Sr No.	***Period of construction***	***Expenditure as stated by assessee***	***Assessed cost of construction***	***Difference***
1	*1999-2000*	*50,14,080*	*75,37,620*	*25,23,540*
2	*2000-2001*	*86,64,747*	*1,30,10,430*	*43,45,683*
3	*2001-2002*	*1,17,75,535*	*1,74,27,860*	*56,52,325*
4	*Total*	*2,54,54,362*	*3,79,75,910*	*1,25,21,548*

Thus, the assessee company has under stated the cost of construction incurred during the year under consideration to the extent of Rs.25.23 lacs and the source thereof has also not been proved. Therefore, I have reason to believe that the income to the extent of Rs.25.23 lacs has escaped assessment on account of the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment.

Sd/-

(S.G. NAIR)

Income tax Officer,

Ward 4(1), Baroda.

Date: 5.2.2007

Place: Baroda.

7. Heard learned counsel for the petitioner. It is submitted that in so far as the first Assessment Year is concerned, provisions of Section 142A of the Act could not have been invoked by the respondent authority to disturb an assessment completed prior to 30.9.2004. That as already held by this Court, provisions of Section 142A of the Act cannot be invoked in absence of any proceedings pending assessment. That the assessment for Assessment Year 2000-2001 was not pending on the date reference was made to the Departmental Valuation Officer, namely 2.12.2004, and therefore, on this count also the assessment could not be reopened.

7.1 In relation to the second and third years' under consideration namely Assessment Years 2001-2002 and 2002-2003, the Assessing Officer had made detailed inquiry and arrived at a conscious decision in relation to the cost of construction incurred by the assessee. Therefore there is no case for holding that there was any failure or omission on part of the petitioner assessee to disclose fully or truly all material facts relevant for the Assessment Year 2001-2002 considering the fact that the impugned notice under Section 148 of the Act dated 21.2.2007 was issued beyond a period of 4 years from last day of the Assessment Year in question, namely 31.3.2002. Thus in so far as Assessment Year 2001-2002 is concerned, it was submitted that the action of respondent authority was required to be struck down on both the counts, namely non-availability of the provisions of Section 142A of the Act, as well as absence of any failure on the part of the assessee to disclose truly or fully all the material facts necessary for the purposes of assessment for the relevant assessment year.

7.2 In relation to Assessment Year 2002-2003, it was submitted by learned counsel that even for this assessment year, the Assessing Officer had made detailed inquiries and formed an opinion. That in absence of any fresh material, the Assessing Officer could not have resorted to reopening of the completed assessment on the basis of change of opinion.

8. The learned Standing Counsel appearing on behalf of respondent authority submitted that in so far as the first year is concerned, namely Assessment Year 2000-2001, the Supreme Court decision in case of ***ASSISTANT COMMISSIONER OF INCOME-TAX v.***

RAJESH JHAVERI STOCK BROKERS P. LTD., reported in (2007) 291 ITR 500 (SC) would cover the issue because the assessment was framed under Section 143(1) of the Act. That intimation under Section 143(1)(a) of the Act cannot be treated to be an order of assessment. Therefore, there being no assessment under Section 143(1)(a) of the Act, the question of change of opinion did not arise. He therefore urged that in the circumstances the provisions of Section 142A of the Act cannot be applied.

8.1 In relation to the remaining two years, learned counsel referred to the reasons recorded and submitted that once the respondent authority had recorded that the assessee has not disclosed fully and truly all the material facts necessary for assessment, especially with respect to cost of construction, the Court should not interfere at this stage and permit the reopening undertaken by the respondent department. It was submitted that in so far as applicability of Section 142A of the Act is concerned, in so far as Assessment Year 2001-2002 is concerned, the same has traveled upto Tribunal and hence it could not be stated that the assessment had become final and conclusive on or before 30.9.2004. That in relation to third year, namely Assessment Year 2002-2003, the reopening was within the period of four years and the reference was made to Departmental Valuation Officer in relation to an assessment framed on 31.3.2005. Therefore, for this year, there was no hurdle, even as regards factum of disclosure being there or not.

9. In so far as the first Assessment Year is concerned, namely 2000-2001, admittedly the return of income which was filed on 30.11.2000 was acknowledged on the same day

and was not followed by any assessment order. Therefore applying the ratio of the Apex Court decision in case of Assistant Commissioner of Income-Tax Vs. Rajesh Jhaveri Stock Brokers P. Ltd. (Supra), it cannot be stated that there was any assessment. However, for invoking provisions of Section 142A of the Act, the first requirement of the provision is that where an estimate of the value of any investment referred to in section 69, or section 69A, or Section 69B of the Act is required to be made, the Assessing Officer may in his discretion, require the Valuation Officer to make an estimate of such value, but the opening portion of subsection (1) of Section 142A of the Act stipulates that the Assessing Officer can undertake such an exercise only for the purposes for making an assessment or reassessment under the Act. It is further subject to the Proviso which says that nothing contained in this section shall apply in respect of an assessment made on or before the 30th day of September, 2004, and where such assessment has become final and conclusive on or before 30th day of September, 2004. For the present it is not necessary to consider the exception laid down in the Proviso.

10. In the facts of the case, it is apparent that as per scheme of the Act, the income returned by the assessee had been assessed as such without any variation on 30.11.2000, namely before 30.9.2004. Therefore, provisions of Section 142A of the Act could not have been invoked by the respondent authority.

11. However, even if one examines the matter from a slightly different angle, namely, if one proceeds on the footing that there was no assessment under Section 143(1)(a) of the Act, and it was permissible to the Assessing Officer to obtain an estimate of the value of

investments for the purposes of making an assessment, yet the reasons recorded by the Assessing Officer will have to be examined.

12. The reasons recorded hereinbefore categorically show that there is nothing to indicate therein to establish what part of cost of construction has not been disclosed fully or truly, which constitutes a material fact, necessary for the assessment. In other words, except for reproducing the language of the provision, the reasons recorded do not even prima facie indicate as to what was not disclosed by the assessee, whether particular item which went into the construction was not disclosed, or the correct quantity of material consumed was not disclosed, or the quality of material consumed was not correctly disclosed, or the area of construction was not disclosed, etc., nothing is available in the reasons recorded. In fact when one reads the entire sentence regarding so called failure, it becomes clear that after stating that there is non-disclosure, the matter was referred to Departmental Valuation Officer for valuation of the project. Thereafter the reasons recorded refer to the report of the District Valuation Officer dated 23.1.2006, and reproduce the difference between expenditure recorded in the books of account and cost of construction estimated by the Departmental Valuation Officer; and then the reasons go on to state that because of such difference the assessee Company has under stated the cost of construction. In other words, it indicates that in fact the Assessing Officer had merely made reference to the Valuation Cell only on the basis of a generalized vague statement, which is then sought to be reinforced by the difference worked out by the Departmental Valuation Officer, without the facts in

fact indicating, in the reasons recorded, as to what was the failure on the part of the assessee.

13. Therefore for the second year in question, namely Assessment Year 2001-2002, the proposed reassessment cannot be sustained. There is no failure on the part of the assessee which would permit the Assessing Officer to assume jurisdiction beyond a period of four years from the last day of the assessment year, namely 31.3.2006, the relevant Assessment Year being Assessment Year 2001-2002.

14. As noted, the reasons recorded for all the three years are common and no independent reasons are recorded for the third assessment year. Even the reference made to the Valuation Cell is common, having been made on 2.12.2004 and the report of the Valuation Cell also is common. But in fact, the reasons recorded show that the reference to Valuation Cell was made for estimating the cost of project, which was spread over a period of three years. Therefore, in so far as the third year is concerned, there is no failure on the part of the assessee and in absence of any fresh material on record, the proposed reopening would amount to change of opinion considering the reasons recorded. The proposed reassessment for Assessment Year 2002-2003 also cannot be sustained.

15. Thus, for all the three years in question the reasons recorded do not indicate that the respondent authority was in possession of any material which would permit the respondent to hold a belief so as to form an opinion, or have □reason to believe□ that any income has escaped assessment. The relevant tests for this examination in the

words of Supreme Court as stated in the case of Assistant Commissioner of Income-tax v. Rajesh Jhaveri Stock Brokers P. Ltd. (Supra) are :

"..... The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion."

"..... In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the material would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ITO v. Selected Dalurband Coal Co. P. Ltd.[1996] 217 ITR 597 (SC); Raymond Woolen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC)."

The present reasons recorded do not satisfy even these tests.

16. The Court has taken note of the order dated 12.7.2006, rendered by this Court in Tax Appeal No. 1496 of 2005 with Tax Appeal No.1497 of 2005 to Tax Appeal No.1498 of 2005 in case of ***COMMISSIONER OF INCOME TAX, VALSAD vs. UMIYA CO-OP. HOUSING SOCIETY LTD***, wherein, it has been held by this Court as under :-

Whether any income can be taxed by deeming the value of investment not disclosed, or not fully disclosed, are issues where such types of questions arise while some proceedings are pending for assessment. In absence of such proceedings the Assessing Officer cannot refer any property for valuation to Valuation Officer.

In opening part of section 142A the words used are for the purposes of making an assessment or reassessment under the Act. The intent of the legislation is that the matter can be referred to the Valuation Officer only when the proceedings of assessment or reassessment are pending before the Assessing Officer. When no such proceedings are pending, the Assessing Officer has no jurisdiction to refer any property for assessment.

17. In the circumstances, the impugned notices issued under Section 148 of the Act dated 21.2.2007 for all the three years in question are quashed and set aside. The petitions are allowed accordingly. In each matter rule is made absolute to the aforesaid extent with no order as to costs.

[D.A. MEHTA, J.]

[S.R.BRAHMBHATT, J.]