

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

**SPECIAL CIVIL APPLICATION No. 10657 of 2009**

**For Approval and Signature:**

**HONOURABLE MS.JUSTICE HARSHA DEVANI  
HONOURABLE MR.JUSTICE R.M.CHHAYA**

**HOTEL OASIS (SURAT) PVT LTD - Petitioner(s)**

**Versus**

**DY. COMMISSIONER OF INCOME - TAX, CIRCLE 1 - Respondent(s)**

=====  
**Appearance :**

MR RK PATEL for Petitioner

MRS MAUNA M BHATT for Respondent  
=====

**CORAM : HONOURABLE MS.JUSTICE HARSHA DEVANI  
and  
HONOURABLE MR.JUSTICE R.M.CHHAYA**

**Date : 05/05/2011**

**ORAL JUDGMENT**

**(Per : HONOURABLE MS.JUSTICE HARSHA DEVANI)**

1. Rule. Mrs.Mauna Bhatt, learned Senior Standing Counsel waives notice of service of rule on behalf of the respondent.
2. Considering the controversy involved in the present case which lies in a

narrow compass and with the consent of the learned advocates for the parties, the matter is taken up for hearing today.

3. By this petition under Article 226 of the Constitution of India, the petitioner has challenged the notice dated 24.3.2009 issued by the respondent under section 148 of the Income Tax Act, 1961 (the Act), the preliminary order dated 22.9.2009 and the further notice dated 22.9.2009.
4. The petitioner, a private limited company, is running a liquor shop and lodging hotel. The return of income filed by the petitioner for assessment year 2003-03 was processed by the department by issuance of notice under section 143(2) of the Act. After considering various submissions of the petitioner company and its representative Chartered Accountants, details of business activity, bank accounts, creditors, sales and purchases, closing stock, details of expenses etc. were furnished and the documents were test checked by the Assessing Officer. Ultimately, the Assessing Officer framed assessment under section 143(3) of the Act on 30.11.2004 after making ad-hoc disallowance of Rs.50,000/- on account of expenses claimed by the petitioner.
5. Subsequently, the Commissioner of Income Tax initiated revision proceedings under section 263 of the Act for disallowing expenditure debited to advertisement expenditure in respect of gift articles given to all customers so as to induce them for being guests repeatedly at the petitioner's hotel/liquor shop. The Commissioner passed order under section 263 of the Act on 22.3.2007 directing the Assessing Officer to reframe the assessment *de novo*.
6. The petitioner went in appeal before the Tribunal against the order of the Commissioner under section 263 of the Act, which came to be allowed by an order dated 14.9.2007, whereby the order of the Commissioner came to be set aside.
7. At the relevant time when the petition was filed, the petitioner was not aware as to whether any appeal had been preferred against the said order

of the Tribunal. However, the learned advocate for the petitioner has thereafter placed on record an order dated 26.10.2009 passed by this Court in Tax Appeal No.813 of 2009, whereby the appeal preferred by the revenue against the aforesaid order dated 14.9.2007 passed by the Tribunal, has been dismissed.

8. Thereafter, by the impugned notice dated 24.3.2009, the assessment of the petitioner for the assessment year 2002-03 is sought to be reopened. Upon receipt of the said notice, the petitioner requested the respondent to supply copy of the reasons recorded for initiating reassessment proceedings beyond a period of four years from the end of the relevant assessment year. Upon the reasons being supplied to the petitioner, the petitioner submitted detailed objections dated 28.4.2009 to the respondent with a request to drop the proceedings. However, the Assessing Officer continued with the assessment proceedings by issuing notice under section 143(2) of the Act on 23.6.2009. By a letter dated 21.7.2009, the petitioner requested the Assessing Officer to pass appropriate order on the objections filed by it. By the impugned order dated 22.9.2009, the respondent-Assessing Officer rejected the objections filed by the petitioner. Being aggrieved, the petitioner has filed the present petition challenging the impugned notice as well as the order passed by the Assessing Officer rejecting the objections filed by the petitioner as well as the subsequent notice issued under section 143(2) of the Act.
9. Mr. R. K. Patel, learned advocate appearing on behalf of the petitioner has submitted that in the present case, the assessment for assessment year 2002-03 is sought to be reopened by issuance of a notice dated 24.3.2009 under section 148 of the Act, which is clearly beyond a period of four years from the end of the relevant assessment year. It is submitted that in the circumstances, the proviso to section 147 of the Act would be attracted and as such, unless there is any omission or failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment, the assumption of jurisdiction on the part of the Assessing Officer is invalid.
10. Referring to the reasons recorded, it was submitted that the first reason for reopening the assessment is in respect of the advertisement expenses

incurred by the petitioner which was subject matter of revision under section 263 of the Act by the Commissioner and was set aside by the Tribunal and that the said order of the Tribunal had been confirmed by the High Court. It was further submitted that there is total absence of any genuine reason to believe on the part of the Assessing Officer, since the belief of the Assessing Officer is based on the fact that in the last year, the gift articles expense was Nil, which is factually incorrect. Attention was invited to the notice under section 142(1) of the Act issued in respect of the assessment year 2001-02, to point out that the petitioner at the relevant time had submitted details of advertisement expenses.

11. It was further submitted that the other ground on which the assessment is sought to be reopened is on the ground that certain additions were made in assessment year 2006-07 disallowing the repair and maintenance expenses of Rs.10,87,465/- and disallowing Rs.21,40,512/- under section 40A(3) of the Act. It was submitted that the fact that 50% of the amount claimed was disallowed in assessment year 2006-07 has no connection with the present year and that in any case, as is evident from the reasons recorded, the Assessing officer is not sure that any income has escaped assessment and that, he is only of the opinion that the same is required to be considered in assessment year 2002-03 after due investigation. It is submitted that the reasons reflect that the Assessing Officer wants to carry out roving and fishing inquiry without an iota of evidence indicating valid reasons recorded for assuming jurisdiction under section 147 of the Act. It was, accordingly, submitted that both the grounds for reopening the assessment are invalid grounds inasmuch as, in respect of the first ground, the matter had been carried up till this Court and the same has been decided against the revenue and that, by reopening the assessment, the Assessing Officer cannot sit in appeal over the findings recorded by the Tribunal, as confirmed by the High Court. Insofar as the second ground for reopening is concerned, it was submitted that there is nothing to indicate that any income has escaped assessment and that the Assessing Officer is only of the opinion that the same requires investigation. It is submitted that there is no material whatsoever to show that there is any failure on part of the petitioner to disclose fully and truly all material facts necessary for its assessment and as such, the Assessing Officer is not justified in reopening the assessment after the expiry of a period of four years from the end of the relevant assessment year.

12. The petition is opposed by Mr. M. R. Bhatt, learned Senior Advocate appearing on behalf of the respondent who has supported the impugned notice by reiterating the grounds stated in the order rejecting the objections of the petitioner.
13. In the present case, the assessment is sought to be reopened in respect of the assessment year 2002-03 by issuing notice dated 24.3.2009 which is clearly after the expiry of a period of four years from the end of the relevant assessment year. In the circumstances, for the purpose of assuming valid jurisdiction under section 147 of the Act, the Assessing Officer is required to establish, firstly that income chargeable to tax has escaped assessment, and secondly, that such escapement is by reason of failure on part of the petitioner to furnish return of income under section 139 or in response to notice issued under sub-section (1) of section 142 or section 148 of the Act or that there is failure on the part of the petitioner to disclose fully and truly all material facts. In the present case, it is not the case of the respondent that the petitioner has not filed the return as envisaged under the proviso to section 147 of the Act. In the circumstances, for the purpose of assuming valid jurisdiction under section 147 of the Act, the respondent is required to establish that there is failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment.
14. The reasons recorded by the Assessing Officer for reopening the assessment runs into several pages. However, the relevant part thereof reads as under :

*“[1] The assessee company is running hotel and liquor shop at Surat. The return of income for the A.Y. 2002-03 was filed on 28.12.2002 showing total income at Rs.1,49,980 as against total turnover of Rs.3.95 Crs.*

*[2] The main business of the assessee was selling of liquor. The room rent is meager amount of Rs.67,545. During the year, the assessee incurred expenses of Rs.26,10,975 (P.Y. Nil).*

*[3] The sales turnover remained almost same as carried year it is increased to Rs.3.95 Crores as against Rs.3.91 Crores of previous year. So, expenditure on gift was not at all justified. Further, it was noticed that the entire amount was shown as outstanding.*

*[4] It can be therefore concerned that the expenditure claimed on Gift is not a genuine expenses and not justified. This wrong claim has resulted in under assessment of income of Rs.26,10,975.*

*[5] Further, it may be mentioned here that additions were made in A.Y. 2006-2007, of disallowance out of Repair & Maintenance expenses of Rs.10,87,465 and disallowance u/s 40A(3) of Rs.21,40,512, which may be considered in the AY 2002-2003 also after due investigation.”*

The rest of the reasons relate to legal aspects of reopening the assessment as well as judicial decisions.

15. From the reasons recorded, it is apparent that the Assessing Officer seeks to reopen the assessment mainly on two grounds. Firstly, on the ground that the petitioner had incurred expenses of Rs.26,10,975/- towards advertisement expenses which claim according to the Assessing Officer, was not justified. The second ground for reopening is that certain additions were made in assessment year 2006-07 disallowing expenses towards repair and maintenance under section 40A(3) of the Act. According to the Assessing Officer, the same could also be considered in assessment year

2003-04 after due investigation.

16. Insofar as the first ground for reopening the assessment is concerned, as pointed out by the learned advocate for the petitioner in respect of the said issue, the Commissioner of Income Tax had taken the assessment order in revision under section 263 of the Act and had held that the assessment order was prejudicial to the interest of the revenue and had set aside the assessment and directed the Assessing Officer to frame the assessment *de novo* after making proper inquiry. A perusal of the order under section 263 of the Act shows that the assessment order was taken in revision mainly on the ground of expenditure incurred towards advertisement expense. The aforesaid order passed by the Commissioner was taken in appeal by the petitioner before the Income Tax Appellate Tribunal, who by an order dated 14.9.2007, allowed the appeal and set aside the order passed by the Commissioner. The revenue failed in its appeal against the said order of the Tribunal filed before the High Court. Thus, insofar as the expenditure incurred towards advertisement expenses of Rs.26,10,975/- is concerned, the same was already subject matter of revision as well as further appeal before the Tribunal. In the circumstances, once the petitioner has succeeded up till the stage of High Court in respect of the said item, it is not open to the Assessing Officer to reopen the assessment on the said ground.
17. Insofar as the second ground is concerned, the Assessing Officer has merely placed reliance upon an order passed in relation to assessment year 2006-07 without indicating any connection between the assessments of the present year and the said year. Moreover, the frame of the reasons indicates that according to the Assessing Officer, the same is required to be considered for assessment year 2002-03 after due investigation.
18. This Court in the case of ***Shankarlal Nagji & Co. and others v. Income Tax Officer and another***, (2010) 322 ITR 90, has held that a completed assessment cannot be reopened merely to make inquiries. That is the domain of regular assessment.
19. In the case of ***Chhugamal Rajpal v. S. P. Chaliha***, (1971) 79 ITR 603 (SC), where the Assessing Officer had while recording reasons mentioned "Hence, proper investigation regarding these loans is necessary", the Supreme Court has held that his conclusion was there is a case for investigating as to the truth of the alleged transactions. The Court held that it was not the same thing as saying that there are reasons to issue notice under section 148. Before issuing a notice under section 148, the Income Tax Officer must have either reason to believe that by reason of the

omission or failure on the part of the assessee to make a return under section 139 for any assessment year to the Income Tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the Income Tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of clause (a) or clause (b) of section 147 are satisfied, the Income Tax Officer has no jurisdiction to issue a notice under section 148 of the Act.

20. In ***Income Tax Officer, UI Wards, Distt. VI, Calcutta, and others v. Lakhmani Mewal Das***, (1976) 103 ITR 457, the Supreme Court held that the powers of the Income Tax Officer to reopen the assessment, though wide, are not plenary. The words used by the statute are “reason to believe” and not “reason to suspect”.
21. On a plain reading of the reasons recorded, it is apparent that insofar as the second ground is concerned, the Assessing Officer has reopened the assessment merely to make inquiries. Nothing is stated in the reasons recorded to indicate that any income chargeable to tax has actually escaped assessment in relation to the said ground.
22. In the aforesaid premises, it is apparent that neither of the grounds for reopening the assessment are valid grounds and as such, the basic requirement for invoking the provisions of section 147 of the Act, viz., that income chargeable to tax should have escaped assessment, is itself not satisfied. In the circumstances, the impugned notice issued under section 148 of the Act seeking to reopen the assessment under section 147 of the Act, is without jurisdiction and as such, cannot be sustained.
23. Another aspect to be noted is that the petitioner has submitted objections against the detailed reasons recorded by the Assessing Officer, raising all contentions raised in the present petition before the Assessing Officer. The Assessing Officer, while disposing of the objections, has simply brushed aside the objections raised by the petitioner without dealing with the same by making reference to various judicial decisions. The requirement of dealing with objections is not an empty formality and the



Assessing Officer while deciding the same is required to meet with the contentions raised by the assessee if he is of the opinion that the objections are not justified.

24. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dated 24.3.2009 issued by the respondent under section 148 of the Act for the assessment year 2002-03 (Annexure "G" to the petition), the order dated 22.9.2009 rejecting the objections filed by the petitioner (Annexure "M" to the petition) as well as the further notice dated 22.9.2009 issued by the respondent (Annexure "N" to the petition), are hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.

[HARSHA DEVANI, J.]

[R.M.CHHAYA, J.]