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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 12158 of 2009

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA

HONOURABLE MS.JUSTICE H.N.DEVANI

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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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EAGLE FASHION PVT LTD - Petitioner(s)

Versus

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

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Appearance :
MR BD KARIA for Petitioner
MR BB NAIK for Respondent
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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 05/04/2010

ORAL JUDGMENT

(Per : HONOURABLE MS.JUSTICE H.N.DEVANI)

1. Since the controversy involved in the present case lies in a very narrow compass, with the consent of the learned advocates for the parties, the matter is taken up for final hearing today. Hence, Rule. Learned advocate for the respondent is directed to waive service.
2. This petition under Articles 226 and 227 of the Constitution of India challenges the notice dated 27th March, 2007 (Annexure Dto the petition) issued by respondent under section 148 of the Income Tax Act, 1961 (the Act) and further notice dated 25th September 2009 along with preliminary order dated 22nd September 2009 (Annexure Hto the petition), whereby the objections raised by the petitioner assessee are rejected.
3. The petitioner is a Private Limited Company, engaged in the business of manufacture of yarn and cloth. The petitioner has two units. Unit II of the petitioner is situated in the backward area of Silvasa (Union Territory of Dadra & Nagar Haveli) and is eligible for deduction under section 80-IB (4) of the Act. For the assessment year 2003-04, the petitioner filed return of income on 29.10.2003 declaring income of Rs.5,66,114/- after claiming deduction under section 80-IB(4) of the Act in respect of the income of Unit II at Silvasa. For claiming deduction under section 80-IB(4) of the Act, audit report under section

80-IB read with section 80-IA(7) in Form No.10-CCB is required to be filed. However, the petitioner had not filed the report with the return of income, but had filed the same during scrutiny assessment proceedings. Assessment order under section 143(3) of the Act was passed in the case of the petitioner wherein deduction under section 80-IB(4) of the Act was granted. Subsequently, vide the impugned notice, the respondent, on being satisfied that substantial income had escaped assessment for the year under consideration, seeks to reopen the assessment under section 147 of the Act. The petitioner filed objections dated 6.5.2009 against the said notice, which came to be rejected vide the impugned order dated 22nd September 2009. It is this notice under section 148 of the Act as well as order rejecting the objections raised against the said notice which are subject matter of challenge in the present petition.

4. On 23rd March 2001, this Court had passed an order in the following terms:

Heard learned advocates for the parties. In relation to the deduction under section 80-IB(4) of the Income Tax Act, 1961, prima facie, there is no material on record to indicate how the figure of Rs.45,25,308/- has been arrived at by the petitioner assessee. It is necessary that the original record is available for perusal. Learned counsel for the respondent is directed to keep the original record available. It will be open to the petitioner to explain the aforesaid position in relation to the documents furnished before the assessment was framed originally under section 143(3) of the Act. Matter to come up on 29th March, 2010. Ad-interim relief granted earlier to continue till then.

5. Pursuant to the aforesaid directions, the learned advocate for the

respondent has produced the original record and we have perused the same.

6. Mr. B. D. Karia, learned advocate for the petitioner has submitted that the Assessing Officer has vide the impugned notice assumed jurisdiction under section 147 read with section 148 of the Act after a period of more than four years from the end of the assessment year for which the exercise for reopening is sought to be undertaken, hence in the light of the proviso to section 147 of the Act, the same is bad in law. It is submitted that the entire exercise undertaken by the respondent for reopening the assessment is a mere change of opinion on the same set of evidence on record which was scrutinized during scrutiny assessment proceedings under section 14(3) of the Act. Inviting attention to the impugned notice, it is submitted that none of the reasons recorded for reopening the completed scrutiny assessment are valid. It is submitted that the only ground on which the assessment is sought to be reopened is that the report in Form No.10-CCB had not been filed along with the return. That though the said report had not been filed along with the return, the same has been filed during the scrutiny assessment proceedings and that the Assessing Officer had taken the said report into consideration at the relevant time and deduction had been granted while framing the assessment order under section 143(3) of the Act. It is submitted that the very same items in respect of which the proceedings are sought to be reopened, were already disclosed in the earlier proceedings. That there is no further information with the respondent justifying any escapement of the income and that the respondent is merely expressing a second thought on the same material on record without there being any additional information which would justify reopening of the assessment.

7. The learned advocate has invited attention to the computation of total income filed along with the return to point out that all material particulars had been disclosed before the Assessing Officer at the time of assessment. Referring to the computation of total income, it is pointed out that the Net Profit as per the Profit & Loss Account of Unit II have been worked out at Rs.64,78,664/- and the detailed computation is provided at page 58 in the Statement of Accounts. Insofar as the depreciation as per Companies Act is concerned, which is worked out at Rs.27,82,842/-, the details thereof are at page 60. The details of the depreciation as per the Income Tax Act, which is worked out at Rs.46,21,871/-, are provided at page 56. Profit on sale of assets of Rs.11,43,727/- is shown in the computation of total income as well as at page 62 under the head other income. It is pointed out that depreciation under the Income Tax Act as well as profit on sale on fixed assets have been excluded from the profit for the purpose of working out entitlement to the benefit of section 80-IB of the Act. It is submitted that in the circumstances, all material particulars had been disclosed at the time of scrutiny assessment and after considering the same, the Assessing Officer had passed the assessment order dated 28th February, 2006 under section 143(3) of the Act. It is submitted that in the circumstances, there was no failure on part of the assessee in disclosing fully and truly all material facts necessary for the assessment year under consideration and that, there was no reason for the Assessing Officer to believe that any income chargeable to tax had escaped assessment. In the circumstances, the impugned notice which has been issued beyond the period of four years cannot be sustained and deserves to be quashed. It is submitted that in its objections, the petitioner had pointed out that the audit report in Form No.10-CCB had been furnished during the

assessment proceedings which was in sufficient compliance with the provisions of the Act. That while claiming deduction under section 80-IB (4) of the Act, profit on sale of assets of Rs.1,14,327/- had been excluded while calculating profit of industrial undertaking. That interest received of Rs.46,888/- was the interest received on late payment from customers which was clearly eligible for deduction under section 80-IB of the Act. That FDR was required to be made as security against guarantee given by bank to Electricity Department. Thus, the FDR was necessarily made for the purpose of industrial undertaking and as such, was eligible for deduction under section 80-IB of the Act. It is submitted that the Assessing Officer has not properly considered the objections raised by the petitioner assessee and has wrongly rejected the objections.

8. On the other hand, Mr. B .B. Naik, learned Senior Advocate for the respondent has supported the impugned notice as well as the impugned order rejecting the objections raised by the petitioner against the notice issued under section 147 of the Act. It is submitted that the assessee having failed to disclose all material facts at the time of assessment proceedings, income chargeable to tax had escaped assessment, hence, the Assessing Officer was justified in reopening the assessment.

9. A perusal of the reasons recorded indicates that the reasons for reopening the assessment are that the petitioner company has not fulfilled all the conditions precedent to the allowance of deduction under section 80-IB (4) of the Act and has deliberately included other income in calculating all the deductions, resulting in income escaping assessment in view of non-disclosure of material facts by the assessee relevant for the purpose of making assessment. According to the Assessing Officer, the income that has escaped assessment is to the tune

of Rs.47,05,687/-.

10. In response to the said notice, the assessee filed its objections pointing out that at the time of scrutiny assessment proceedings, they had furnished the audit report in Form No.10-CCB. The assessee once again furnished a copy of the said audit report in Form No.10-CCB for reference by the Assessing Officer. It was contended that it is well established law that filing of audit report in Form No.10-CCCB along with return of income is directory and not mandatory and even if the audit report is furnished at a later stage, that is sufficient compliance. It is further pointed out that profit on sale of assets of Rs.1,14,327/- had been excluded while calculating the profit of industrial income, whereas insofar as the interest received of Rs.46,888/-, it was the interest received on late payment from customers which was eligible for deduction under section 80-IB as per the decision of this Court in ***Nirma Ltd.,*** (2006) 283 ITR 402 (Guj). As regards FDR, it was submitted that this was also an income derived from the industrial undertaking as FDR was required to be given as security against guarantee provided by the Bank to the Electricity Department and as such, was eligible for deduction under section 80-IB of the Act. It was further contended that the reopening was merely a change of opinion and that the reasons were not based on any new information, finding or material. It was also contended that the notice was time barred in view of the first proviso to section 147 of the Act, as all the material facts necessary for their assessment was fully and truly disclosed along with the return of income.
11. In response to the objections submitted by the petitioner, the Assessing Officer vide order dated 22nd September, 2009, rejected the objections holding that since the assessee had itself stated that audit report in Form

No.10-CCB had been furnished during the course of assessment proceedings, meaning thereby that the assessee had not furnished the said report along with the return of income, it had been established beyond doubt that the assessee had not fulfilled one of the main conditions for claiming deduction under section 80-IB of the Act. Hence, the Assessing Officer had every reason to believe that substantial amount of income had escaped assessment. It is further recorded in the said order that other income (interest, FDR interest and profit on sale of assets) cannot be said to have been received from the business of industrial undertaking. It is recorded that the assessee has itself shown interest income and profit on sale of assets under the head other sources, hence, it can clearly be concluded that interest income and profit on sale of assets shown by the assessee under the head other income are not forming part of profits and gains derived from industrial undertaking and as such, the Assessing Officer had every reason to believe that substantial amount of income has escaped assessment. As regards the contention that the notice issued under section 148 of the Act is time barred, the Assessing Officer has held that the assessment can be reopened under section 147 of the Act upto six years from the end of the relevant assessment year where assessment has been made under section 143(3) if the income chargeable to tax has escaped assessment by reason of failure on part of the assessee to: (a) make a return under section 139 or in response to notice issued under sub-section (1) of section 142 or 148; or (ii) disclose fully and truly all material facts necessary for assessment for that assessment year. The Assessing Officer held that as discussed in the reasons recorded, the assessee had failed to disclose fully and truly all material facts necessary for assessment year 2003-04 and as such, the six years period

would end on 31st March 2010 and as such, the notice was well within the period of limitation.

12. Section 147 of the Act provides that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or re-assess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the case of proceedings under the section. The first proviso to section 147 lays down that where an assessment under sub-section (3) of section 143 or section 147 has been made for the relevant assessment year, no action shall be taken under section 147 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 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) to section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

13. In the facts of the present case, previously an assessment had been made under sub-section (3) of section 143 for the relevant assessment year. There was no failure on the part of the assessee to make a return under section 139. In the circumstances, unless any income chargeable to tax has escaped assessment for the assessment year in question by reason of the failure on part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year, no action can be taken under section 147 of the Act after the expiry of four years from the end of the relevant assessment year. In the present case, the assessment year is 2003-04, whereas the notice under section 148 of

the Act has been issued on 27th March, 2009 which is clearly beyond the period of four years from the end of the assessment year in question. In the circumstances, the respondent is required to establish that the assessee had failed to disclose fully and truly all material facts for the assessment year in question.

14. The reasons recorded indicate that according to the Assessing Officer, the petitioner had failed to file audit report in Form No.10-CCB along with return and that while allowing deduction of Rs.45,25,308/- (Unit II Silvasa) other income of Rs.1,80,379/- (interest Rs.46,888, FDR interest Rs.19,164/- plus profit on sale of assets Rs.1,14,327/-) was not excluded. In the circumstances, what is required to be examined is as to whether the petitioner at the time of filing of the original return and assessment proceedings, had failed to disclose fully and truly all material facts necessary for the assessment.

15. Insofar as the audit report in Form No.10-CCB is concerned, it is an admitted position that the same had been furnished during the assessment proceedings though it was not filed along with the return of income. However, apart from a technical breach of the audit report not accompanying the return of income, it has not been shown how such lapse amounts to failure to truly and fully disclose all relevant facts resulting in escapement of taxable income. The settled legal position is that the audit report is required by the Assessing Officer as and when assessment is undertaken to verify the claim made in the return of income. In the facts of the case, the said position obtains and the test stands satisfied. Insofar as the other income of Rs.1,80,379/- is concerned, as pointed out by the learned advocate for the petitioner, no deduction had been claimed qua profit on sale of fixed assets which is clearly reflected in the computation of total income. In the

circumstances, the notice as well as the order rejecting the objections are clearly contrary to the factual position inasmuch as the computation of total income furnished by the petitioner along with return clearly shows that profit on sale of assets of Rs.1,14,327/- had been excluded while calculating the profit of industrial undertaking. Insofar as the other income namely, interest received and FDR interest is concerned, the same have been clearly reflected in Schedule IX under the head of other income in the Statement of Account furnished with the return of income. It is after considering the documentary evidence placed on record, that the Assessing Officer had framed assessment under section 143(3) of the Act at the relevant time. In the circumstances, the record of the case indicates that there was no failure on the part of the assessee in disclosing fully and truly all material facts necessary for assessment qua any of the issues raised by the Assessing Officer for the purpose of reopening the assessment.

16. It is well settled that before assuming jurisdiction under section 147 after the expiry of four years from the end of the relevant assessment year, the Assessing Officer must have reason to believe that the income of the assessee has escaped assessment and that such escapement is by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled the notice is without jurisdiction. The impugned notice fails to satisfy either of the conditions. The respondent has failed to show from the reasons recorded that there is any material to treat any income as escaped income, whereas the record of the case indicates that there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. The impugned notice, therefore, fails to satisfy the ingredients necessary for reopening

the assessment under section 147 of the Act after expiry of four years from the end of the relevant assessment year. In the circumstances, the entire proceedings initiated vide the notice dated 28th April 2009 under section 148 of the Act and consequential action taken pursuant thereto stand vitiated and as such, cannot be sustained.

17. Insofar as the order dated 22nd September 2009 rejecting the objections raised by the assessee is concerned, it is apparent on the face of record that the same suffers from non-application of mind inasmuch as despite it being the categorical case of the assessee in its reply to the notice that the profit on sale of assets of Rs.1,14,327/- had been excluded while calculating the profit of industrial undertaking, the respondent, in the impugned order, has noted that it is the submission of the assessee that profit on sale of assets is part of profits and gains derived from the business of industrial undertaking. Thus, it is apparent that the respondent has not properly applied his mind to the objections raised by the assessee and has mechanically rejected the objections raised by the assessee.

18. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dated 27th March 2009 under section 148 of the Act and further notice dated 25th September 2009 as well as the order dated 22nd September 2009, are hereby quashed and set aside. Rule is made absolute with no order as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]

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570

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