IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 20436 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE N.V.ANJARIA

and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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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 or any order made thereunder ?	

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SHAHLON SILK INDUSTRIES PVT LTD
Versus
THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 2(1)(2)

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Appearance:
MR TUSHAR HEMANI, SENIOR ADVOCATE WITH MS VAIBHAVI K PARIKH WITH MR PARIMALSINH PARMAR for the Petitioner(s) No. 1
MR NIKUNT RAVAL for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE N.V.ANJARIA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 06/01/2023

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)

1. Heard learned Senior Advocate Mr. Tushar Hemani with learned advocate Ms. Vaibhavi Parikh and learned advocate Mr. Parimalsinh Parmar for the petitioner and learned advocate Mr. Nikunt Raval for the respondent.

2. By this petition under Article 226 of the Constitution of India, the petitioner has challenged the notice dated 13.12.2017 issued under section 148 of the Income Tax Act, 1961 (For short "the Act") for reopening of the assessment proceedings for the Assessment Year 2012-2013.

3. Brief facts of the case are as under :

3.1) The petitioner is a company incorporated under the Companies Act, 1956 and was engaged in the business of manufacturing and trading of yarn and fabric

during the assessment year under consideration.

3.2) For the Assessment Year 2012-2013, the petitioner filed return of income on 28.09.2012 declaring total income of Rs.1,58,22,100/- after claiming deduction of Rs. 27,62,980/- in respect of key man insurance premium.

3.3) The assessee company Shahlon Industries Pvt. Ltd merged with the petitioner herein i.e. Shahlon Silk Industries Pvt. Ltd vide order dated 27.08.2014 passed by this Court.

3.4) Case of the petitioner was selected for scrutiny assessment under section 143(3) of the Act. Various details were called for by the Assessment Officer. The petitioner furnished such details vide letter dated 7.02.2015.

3.5) The Assessing Officer issued show cause notice dated 9.03.2015 calling upon the petitioner assessee to show cause as to why disallowance under section 14A of the Act should not be made.

3.6) The assessee vide letter dated 12.03.2015 gave justification to the Assessing Officer as to why disallowance under section 14A of the Act is unwarranted in case of the petitioner.

3.7) The Assessing Officer after examining various issues chose not to make any disallowance in respect of Keyman insurance premium while framing assessment under section 143(3) of the Act vide order dated 16.03.2015. However, disallowance was made under section 14A of the Act while framing assessment under section 143(3) of

the Act.

3.8) The assessee (i.e. Shahlon Industries Pvt. Ltd.) vide letter dated 30.09.2015 informed the Deputy Commissioner of Income Tax, Circle-2(1)(2), Surat that it has amalgamated with the petitioner herein i.e. Shahlon Silk Industries Pvt. Ltd.

3.9) The respondent thereafter issued the impugned notice dated 13.12.2017 under section 148 of the Act in the name of assessee i.e. Shahlon Industries Pvt. Ltd. seeking to reopen the case of the assessee for the year under consideration.

3.10) The petitioner vide letter dated 22.12.2017 enclosed the copy of original return of income filed by the assessee for the year under consideration.

3.11) The respondent vide notice dated 26.07.2018 called upon the assessee to file return of the income electronically in response to the notice under section 148 of the Act.

3.12) The petitioner vide letter dated 9.08.2018 submitted reply and stated that the assessee company has already merged with the petitioner and assessee - company is no longer in existence, hence, assessee company cannot file return of income electronically.

3.13) The petitioner thereafter requested the Assessing Officer to supply copy of reasons for reopening the case of the assessee and the respondent supplied such reasons on 6.08.2018. The reasons recorded by the Assessing Officer for reopening the assessment read as under :

"The assessee is a Company engaged in

manufacturing and trading of yarn and fabrics. The assessed filed its return of income for AY 2012-13 on 28.09.2012 declaring income of Rs.1,58,22,102/- under normal provision and income of Rs.1.71,69,275/- u/s 115JB of the Act. The same was assessed u/s 143(3) and income was determined at Rs.1,75,85,100/- under normal provisions while accepting returned income u/s 115JB vide order dated 16.03.2015.

2. On perusal of balance sheet, profit and loss account, 3CD report, computation of income and submission of assessee in respect of key man insurance premium revealed that assessee has claimed payment of total key man insurance premium of Rs.27,62,980/- This amount was not debited to profit and loss account but to balance sheet under the head Long Term Loan and Advances - Keyman Insurance Premium. Assessee however claimed this expenditure as business expenditure in its computation of tax and the same was allowed by assessing officer. It was however noticed from submission of assessee that insurance premium (including service tax) of Rs. 27,62,980/- was paid on insurance Policy named Max Life Maker Unit Linked Investment Plan- Risk Element, HDFC Life Insurance SL Pro Growth Flexi Death benefit and HDFC Sampoom Samirdhi Death Benefit in favour of Nitin Raichand Shah, Mahendra Raichandra Shah, Avani Arvind Shah and Dipan Jayantilal Shah. It was noticed from broachers of Max Life Insurance Company and HDFC Life Insurance Company available on their respective websites

that these policies are not term policies in the nature of pure life insurance policies but also having investment plans. As such, these policies are not Keyman Insurance Policy as per IRDA and as per ratio applied by ITAT Amritsar Bench in case of F.C. Sonani & Company (India) Pvt. Limited v. DCIT [TS-243-ITAT-2014(ASR)]. As such claim of assessee in this respect was required to be disallowed.

2.1. Further, on perusal of Balance Sheet and P & L A/c, it is seen that the assessee has average investment of Rs.194.445 lakh and average total of assets of Rs. 12901.91. The assessee has incurred expenditure by way of interest of Rs.491.17 lakh during AY 2012-13. It was noticed from assessment order that while computing disallowance under rule 80 under section 14A of the Act, value of investment of only Rs.16,000/- (which was value of 52 shares of Siddhinath Texurisers (P) Ltd) was considered. Investment in shares of Shahlon Ind. Infra(P) Ltd, shares of Fairdeal Textiles Pvt Ltd, shares of Fairdeal Eco Infra Pvt Ltd, share of Uday Yarn Twisters(P) Ild and share of Sanket Finance & Leasing Pvt Ltd was not considered. As investment in these shares also yield exempted income, value of these investments was required to be included while computing disallowance u/s 14A of the Act, which is worked out at Rs.4,29,678/-

3. In view of the above, I have reason to believe that the income chargeable to tax has escaped assessment to the tune

of Rs.31,92,658/- (27,62,980+ 4,29,678) on account of relief granted for Key Man policy & disallowance u/s 14A of the IT Act. Therefore, I am satisfied that it is a fit case for reopening the case u/s 147 of the I. T. Act read with explanation 2C."

3.14) The petitioner vide letter dated 24.09.2018 raised objections against the reopening.

3.15) The respondent vide order dated 30.11.2018 disposed of the objections raised by the petitioner.

3.16) Being aggrieved by the action of the respondent, the petitioner has preferred this petition.

4. Learned Senior Advocate Mr. Tushar Hemani assisted by learned advocate Ms. Vaibhavi Parikh and learned advocate Mr.Parimalsinh Parmar for the petitioner submitted that

before passing of the impugned order, the assessee company was amalgamated with M/s. Shahlon Silk Industries Private Ltd vide order of this Court dated 27.08.2014. It was submitted that though the amalgamation was sanctioned on 27.08.2014, the assessment order under section 143(3) dated 16.03.2015 and penalty order dated 24.09.2015 was passed in the old name of the company i.e. M/s. Shahlon Industries Pvt. Ltd which is the amalgamating company.

4.1) Learned Senior Advocate Mr.Hemani submitted that notice under section 148 dated 13.12.2017 was issued in the name of amalgamating company instead of new company i.e. M/s. Shahlon Silk Industries Pvt Ltd. It was submitted that in the reasons recorded, it has been observed by the Assessing Officer that assessee claimed deduction of insurance premium of Rs. 27,62,980/- on account of

Keyman Insurance Policy in the computation of total income which was wrongly allowed by the Assessing Officer as the policies on which the premium were paid were not Keyman Insurance policy and further in the reasons recorded by the Assessing Officer, it was observed that there is a mistake in computation of disallowance made under section 14A which actually worked out at Rs. 4,29,678/-.It was submitted that the claim of the petitioner for payment of Keyman insurance premium of Rs. 27,62,980/- appeared in the computation of income, Keyman insurance premium also appeared in the audited accounts under the head Long Term Loans and Advances and details of Keyman insurance policy along with receipts for payments made during the year under consideration were also furnished vide letter dated 07.02.2015. It was further submitted that insofar as disallowance of Rs.

4,29,678/- under section 14A of the Act is concerned, the petitioner had produced the investments and assets in the balance sheet and a specific show cause notice dated 9.03.2015 was issued with respect to disallowance under section 14A of the Act. The assessee had also filed reply dated 12.03.2015 explaining as to why disallowance under section 14A was not justified and in fact, the Assessing Officer made an addition under section 14A of the Act while framing assessment under section 143(3) of the Act.

4.2) Learned Senior Advocate Mr. Hemani pointed out that after issuance of notice under section 148 of the Act, the assessee immediately intimated the Assessing Officer vide letter dated 22.12.2017 that M/s. Shahlon Industries Pvt. Ltd. is amalgamated with M/s. Shahlon Silk Industries Pvt. Ltd. vide order dated 27.08.2014 and thereafter

the Assessing officer issued notice under section 142(1) of the Act requesting the assessee to file return of income in response to notice under section 148 of the Act. It was submitted that in response to such notice, assessee's Chartered Accountant vide letter dated 9.08.2018 informed the Assessing Officer that the company was no longer in existence and therefore, the return of the income could not be filed. It was submitted that it is well settled that no notice can be issued in the name of non-existent entity and therefore, the impugned notice issued in the name of a non-existent entity is non-est.

4.3) Learned Senior Advocate Mr. Hemani submitted that the assessment for the year under consideration was framed under section 143(3) of the Act and the same is sought to be reopened beyond the period of four years from the end of relevant assessment year. It

was submitted that such attempt on part of the Assessing Officer to reopen the assessment is illegal and bad in law inasmuch as there is no failure on part of the assessee to fully and truly disclose all material facts necessary for assessment.

4.4) Learned Senior Advocate further submitted that the notice under section 148 of the Act can be issued only if an Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment. It was submitted that words "reason to believe" suggest that the belief must be that of the Assessing Officer and it must be that of an honest and reasonable person based upon reasonable ground and not a mere change of opinion and there must be live link or close nexus between the materials before the Assessing Officer and the belief he has formed regarding escapement of income. It was

further submitted that the Assessing Officer had minutely scrutinized all the materials available on record while framing assessment under section 143(3) of the Act and now the respondent Assessing Officer is attempting to reopen the very same issue which is nothing but change of opinion which is not permissible in eye of law.

4.5) Learned Senior Advocate Mr.Hemani further submitted that there is no new information or fresh evidence which has come into the possession of the respondent which was not already there when original assessment was framed and therefore, reopening of the assessment is merely a change of opinion and therefore, impugned notice is required to be quashed and set aside.

4.6) In support of his contentions,

reliance was placed on the following decisions :

1) Judgment of this Court in case of **Dharmnath Shares & Services (P) Ltd. v. Assistant Commissioner of Income-tax, Cen. Cir1(2)** reported in (2018) 94 taxmann.com 458 (Gujarat).

2) Decision of Apex Court in case of **Assistant Commissioner of Income-Tax (Central) Circular1(2) v. Dharmnath Shares & Services (P) Ltd** reported in (2018) 100 taxmann.com 416(SC).

3) Decision of Apex Court in case of **Principal Commissioner of Income Tax v. Maruti Suzuki India Ltd.** reported in (2019) 107 taxmann.com 375(SC).

5. On the other hand learned advocate Mr. Nikunt

Raval for the respondent submitted that the Assessing Officer had the reason to believe that the petitioner has suppressed income to the tune of Rs. 31,92,658/- for the relevant assessment year. It was submitted that the Assessing Officer found that the assessee had claimed payment of total Keyman insurance premium of Rs. 27,62,980/-, however this amount was not debited to Profit and Loss account but to the balance sheet under the head Long Term Loan and Advances. It was noticed that the insurance premium of Rs. 27,62,980/- was paid on insurance policy, however, these policies were not term policies in nature of pure life policies but were also having investment plans. Accordingly, the Assessing Officer had reason to believe that income had escaped assessment.

5.1) Learned advocate Mr. Raval relying

upon the judgment in case of **M/s. Peass Industries Engineers Pct. Ltd. v. DCIT** reported in (2016) 72 Taxmann 302 (Gujarat) submitted that at the initial stage for reopening an assessment, what is required is reason to believe and not established fact of escapement of income and therefore, at this stage only question to be considered is whether there was relevant material to form a reasonable belief that income has escaped assessment or not.

5.2) Learned advocate Mr. Raval further submitted that just because the assessee has submitted some information and not clearly pointed out relevant issue under consideration, the same cannot be considered full and true disclosure of material facts.

5.3) Learned advocate Mr. Raval submitted that the assessee company i.e. Shahlon

Industries Pvt. Ltd filed its return of income declaring total income at Rs.1,58,22,100/- on 28.09.2012 and thereafter assessment was carried out under section 143(3) of the Act and since the Assessing Officer has reason to believe that there is escapement of income, notice under section 148 of the Act came to be issued.

5.4) Learned advocate Mr. Raval further submitted that any case may be reopened under section 147 of the Act by issuing notice under section 148 of the Act up to 6 years after following the procedure as laid down under the Act and therefore, the objection of the assessee against reopening of the assessment is not tenable in eye of law.

5.5) It was further submitted that if the Assessing Officer had reason to believe that if any issue has been left out to verify, the

assessment can be reopened under section 147 of the Act by issuing notice under section 148 of the Act.

5.6) Learned advocate Mr. Raval submitted that the Assessing Officer made an addition under section 14A of the Act while framing assessment under section 143(3) of the Act and while computing the disallowance has not taken into account the shares of Shahlon Ind. Infra(P) Ltd., Fairdeal Textiles Pvt. Ltd., Fairdeal Eco Infra Pvt. Ltd., Uday Yarn Twisters (P) Ltd. and Sanket Fiance & Leasing Pvt. Ltd. which resulted into less disallowance to the tune of Rs.9,73,772/-.

5.7) Relying upon the judgment of Calcutta High Court in case of **Somdutt Builders (P) Ltd. v. DCIT** reported in 98 ITD 78, it was submitted that reopening of assessment by the Assessing Officer was

valid. Similarly, relying upon judgment of Delhi High Court in case of **Consolidated Photo & Finvest Ltd. v. ACIT** reported in 281 ITR 294, it was submitted that in cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that authority has not applied its mind to the issue before it nor framed any opinion. It was further submitted that the principle that a mere change of opinion cannot be a basis for reopening completed assessments would be applicable only to situations where the Assessing Officer has applied his mind and taken a conscious decision on a particular matter in issue. It was therefore, submitted that in the present case the order passed by the Assessing Officer in the original assessment proceedings is silent with respect to various aspects which have now led to reasons to believe that income of the

assessee has escaped assessment. It cannot therefore, be construed that there is any change of opinion while forming the belief that there is escapement of income in case of the petitioner assessee.

5.8) In support of his submissions, reliance was placed on decision of this Delhi High Court in case of **Sky Light Hospitality LLP v. Assistant Commissioner of Income Tax, Circle 28(1), New Delhi** reported in (2018) 90 taxmann.com 413 (Delhi).

6. Considering the submissions made by the learned advocates on both the sides, it appears that the impugned notice under section 148 of the Act, 1961 is issued only on the ground that income chargeable to tax has escaped assessment to the tune of Rs.31,92,658/- on account of claim of deduction granted for Keyman policy and

disallowance under section 14A of the Act.

7. It appears that before passing of the assessment order, the assessee company was amalgamated with M/s. Shahlon Silk Industries Private Ltd. vide order of this Court dated 27.08.2014 and though the amalgamation was sanctioned on 27.08.2014, the assessment order under section 143(3) of the Act was passed on 16.03.2015 in the name of old company i.e. M/s. Shahlon Industries Pvt. Ltd. The notice under section 148 of the Act dated 13.12.2017 was issued in the name of amalgamating company instead of new company. The petitioner assessee immediately upon issuance of notice under section 148 of the Act intimated the Assessing Officer vide letter dated 22.12.2017 that M/.s Shahlon Industries Pvt. Ltd is amalgamated with M/s. Shahlon Silk Industries Pvt ltd. i.e. the petitioner herein vide order of this Court.

8. It is further evident from the computation of income that the returned income was derived after claiming deduction of Rs. 27,62,980/- in respect of Keyman Insurance premium which was debited to the Profit and Loss account and reflected in the balance sheet under the head Long Term Loans and Advances. Balance of Keyman Insurance premium appearing under the head Long Term loans and advances as on 31.03.2012 was Rs. 68.89 lakh as against Rs. 41.26 lakhs as on 31.03.2011 and therefore, there was increase of Rs. 27.63 lakh during the year under consideration as is evident from the audited annual accounts. Further, it appears from the record that claim of Keyman insurance premium of Rs.27,62,980/- appeared in computation of income and also in audited annual accounts under the head Long term loans and advances and details of Keyman insurance policy along with receipts for

payments made during the year under consideration were also furnished before the Assessing Officer.

9. Insofar as disallowance of Rs. 4,29,678/- under section 14A of the Act, the case of the respondent is that there was an error in computation of the average value of investments, as adopted at the original assessment stage, whereby certain investments yielding exempt income were not considered. From the record, it appears that investments and assets were shown in the balance sheet and specific notice dated 9.3.2015 was issued with respect to disallowance under section 14A of the Act. The assessee vide letter dated 12.03.2015 gave complete details and explanation as to why disallowance under section 14A is unwarranted and in fact, the Assessing Officer made addition under section 14A of the Act while framing the assessment

under section143(3) of the Act.

10. Thus, the Assessing Officer after threadbare examining the various issues including issues as to Keyman insurance premium and disallowance under section 14A of the Act, took a view not to make any disallowance in respect of Keyman insurance premium while framing assessment under section 143(3) of the Act and made disallowance under section 14A of the Act.

11. It is therefore, apparent that there is change of opinion by the Assessing Officer to reopen the assessment for the Assessment Year 2013-2014, more particularly, when the issues raised in the reopening assessment were already considered during the assessment proceedings under section 143(3) of the Act, 1961. The Assessing Officer cannot have any jurisdiction to issue the notice under

section 148 of the Act, 1961 for reopening the assessment for the year under consideration more particularly, when the assessment is sought to be reopened beyond a period of four years as held by the Supreme Court in case of **Commissioner of Income tax v. Kelvinator of India Ltd.** reported in 2010(2) SCC 723 as under:

> "2. A short question which arises for determination in this batch of civil appeals is, whether the concept of "change of opinion" stands obliterated with effect from 1st April, 1989, i.e., after substitution of Section 147 of the Income Tax Act, 1961 by Direct Tax Laws (Amendment) Act, 1987?
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> 6. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-

1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the

Assessing Officer. We quote herein below the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

> "7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression `reason to believe' in Section 147.--A number of representations were received against the omission of the words `reason to believe' from Section 147 and their substitution by the `opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, `reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression `has reason to believe' in place of the words `for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

12. In view of foregoing reasons and considering the facts of the case impugned notice under section 148 of the Act, 1961 is not tenable in law and is accordingly quashed

and set aside and consequential order disposing of the objections raised by the petitioner is also quashed and set aside.

13. Rule is made absolute to the aforesaid extent. No order as to costs.

(N.V.ANJARIA, J)

(BHARGAV D. KARIA, J)

RAGHUNATH R NAIR