

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 16253 of 2019**

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SILVERDALE INN PVT. LTD.

Versus

INCOME TAX OFFICER

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Appearance:

MR SN DIVATIA(1378) for the Petitioner(s) No. 1

MRS MAUNA M BHATT(174) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**

and

HONOURABLE MR. JUSTICE ILESH J. VORA**Date : 16/02/2021****ORAL ORDER****(PER : HONOURABLE MR. JUSTICE ILESH J. VORA)**

1. By filing this writ application under Article 226, the writ applicant seeks to challenge the notice dated 25.03.2019 issued by the respondent under Section 148 of the Income Tax Act, 1961 ('the act' for short) seeking to reopen the applicant's income assessment for the A.Y 2012-13.
2. The brief facts leading to file the present writ application can be summarized as under:
 - 2.1 The writ applicant – assessee Company filed its return of Income for the A.Y. 2012-13 on 18.12.2013 declaring total income at Rs. NIL and same was processed under Section 143(1) of the Act without scrutiny assessment.
 - 2.2 The Assessing Officer has reopened the assessment under Section 147 by issuing impugned notice dated 25.03.2019

under Section 148 of the Act.

- 2.3 At the request of the writ applicant, reasons recorded have been furnished to the writ applicant, which reads as under :

“2. In this case, the NMS (Non-filer Monitorine System) information regarding cash deposited of Rs. 18,00, 000/- in the Development Credit Bank Lid. during the F.Y.2011-12 relevant to A. Y. 2012-13.

*3. A system generated letter was issued by the NMS Administrator vide Letter No. NMS/AAQCS6335H dated 05-12-2013. Further, notice u/s 1336 of the Act was issued by the undersigned on 12.02.2019 and served by speed post on 22.02.2019. Vide above letter, the assessee was asked to provide the details of cash deposits/cash transactions in Development Credit Bank Ltd. account of Rs.18.00,000/- during the year along with documentary evidences and source from which this transaction made and tax treatment thereof **within three days from receipt of this letter**. In response to the above letter dated 12.02.2019, the assessee has filed reply dated 28.02.2019 (received on 01.03.2019) and stated that cash deposit from opening cash balance. However, on verification of submission filed on 01.03.2019, it is ascertained that the assessee company has not submitted any supporting evidences and source of income. The correct income should have been disclosed as income while filling of return of income. However, the assessee has failed to disclose fully and truly the material facts of its*

correct income in its return of income for the A.Y. 2012-13.

4. In view of the above facts, it is noticed that during the F.Y. 2011-12 relevant to A.Y.2012-13, the assessee entered into transaction regarding cash deposits/cash transactions in Development Credit Bank Ltd. account of Rs.18,00,000/-. The assessee was required to file correct return of income and disclosed the income received during the A.Y.2012-13 for tax. However, the assessee failed to disclose the income for A.Y. 2012-13 and also failed to furnish supporting evidence and source of income to query letter issued to the assessee by this office. In view of the above, I have reason to believe that there is escapement of income to the extent of Rs.18,00,000/- from cash deposits/cash transactions in Development Credit Bank Ltd. Account and failed to disclose fully and truly all necessary material facts.

5. In this case a return of income was filed for the year under consideration but no scrutiny assessment u/s. 143(3) of the Act was made. Accordingly, in this case, the only requirement to initiate proceedings u/s 147 of the Act is reason to believe which has been recorded above (refer Paragraph 3 & 4).

6. It is pertinent to mention here that in this case the assessee has filed return of income for the year under consideration but no assessment as stipulated u/s 2(40)

of the Act was made and the return of income was only processed u/s. 143(1) of the Act. In view of the above, provisions of clause (b) of explanation 2 to Section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.”

- 2.4 The writ applicant had raised the objections vide its communication dated 26.07.2019 and same came to be rejected by the respondent vide order dated 06.09.2019.
3. Being aggrieved by the disposal of the objections against the notice for reopening of the assessment, the writ applicant has come up with the present writ application.
4. The case of the revenue is that the department had received information from NMS (Non Filer Monitoring System) regarding cash deposition of Rs.18,00,000/- in the Development Credit Bank during A.Y. 2012-13. It is case of the revenue that the assessee was required to file correct return of income in its return of income for the year under consideration and assessee failed to furnish supporting evidence and the source of income with regard to cash deposit of Rs.18,00,000/- .
5. In the objection filed against the reopening of the assessment, the assessee had explained the source of cash deposit, stating *inter-alia* that there was a sufficient cash balance with the company as during the year 2010-11 and Rs.18,00,000/- cash was withdrawn from the account of DCB Bank and the same amount was re-deposited during the year under consideration.

6. We have heard Mr. S.N. Divatia, the learned counsel appearing for the writ applicant and Mr. Manish Bhatt, learned Senior Counsel assisted by Mrs, Mauna Bhatt, the learned Standing Counsel appearing for the revenue.

7. Mr. S.N. Divatia, the learned counsel appearing for the writ applicant raised the following contentions:

7.1 It was submitted that the impugned notice as well as the order disposing of the objections are bad in law and without jurisdiction because the conditions precedent for valid reopening of the notice under Section 147 of the Act is not satisfied.

7.2 It was submitted that after receiving the notice under Section 133(6) of the Act, the assessee had explained the source of cash deposition of Rs.18,00,000/- by submitting reply dated 28.02.2019 along with supporting evidences, like copy of cash book for the year 2010-11, 2011-12, copy of bank statement of Vijay Cooperative Bank and DCB Bank. In this regard, it was submitted that the cash transactions of withdrawal and deposit from the bank accounts were duly recorded in bank accounts and also reflected in the audited annual account. In these circumstances, it is evident that the Assessing Officer did not have applied his independent mind while recording the reasons and forming the belief of escapement of assessment. Therefore, the reasons recorded lacked validity and the department has proceeded on erroneous premise.

7.3 Referring to the reasons recorded, the learned counsel for

the writ applicant submitted that the Assessing Officer has solely relied on the information received from NMS system. It is obligatory on the part of the Assessing Officer that the reopening notice has to be issued by the Assessing Officer on his own satisfaction and not on 'borrowed satisfaction'. Therefore, in the present case, the Assessing Officer has not applied his mind independently so as to reach a conclusion that income has escaped assessment.

7.4 It was argued that the Assessing Officer has drawn the inference that the assessee failed to disclose the income for the year under consideration and also failed to furnish supporting evidence and source of income to query letter issued to the assessee. In this regard, it was submitted that the written explanation along with supporting evidence having not been properly considered by the respondent and there was no any reference to this effect in the reasons recorded by the Assessing Officer. Therefore, the reasons to believe are nothing but a conclusions based on the borrowed information.

7.5 The learned counsel submitted that while recording the reason, the Assessing Officer has observed that the assessee company has not submitted any supporting evidences and source of income. In this regard, the learned counsel submitted that there is no assertion made by the Assessing Officer that on what basis he has come to the conclusion that the assessee failed to explain the source of cash deposit. Therefore, without any discussions or explanation with regard to material evidence submitted by the assessee, the crucial link between material and formation of belief with regard to escapement of

assessment is missing.

8. Heavy reliance has been placed on the decision of this Court in case of **Swati Malav Divatia (98 taxmman.com 447) (Guj)**, it was contended that in the cited case, the assessee was asked to explain the source of cash deposits and the assessee had disclosed that she had withdrawn the amount from her account and the Assessing Officer in the reasons recorded did not consider the explanation for the availability of the cash on hand. In this circumstances, the Division of this High Court held that the reasons lacked validity and department proceeded on erroneous premise.
9. In the aforesaid contention raised by the learned counsel for the writ applicant, he prays that there being a merit in the writ application, it may be allowed.
10. Mr. M.R. Bhatt, the learned Senior Counsel assisted by Mrs. Mauna Bhatt, the learned Standing Counsel appearing for the revenue has vehemently opposed the writ application. The learned Senior counsel submitted that the respondent is justified in reopening the assessment. In this regard, it was pointed out that in the present case, no scrutiny assessment took place and only the intimation under Section 143(1) of the Act was issued initially. In this background, he submitted that the information received from NMS was analyzed and further inquiry was conducted by issuance of notice under Section 133(6) of the Act and after considering the assessee's submission, an opinion was formed that there was no explanation by the writ applicant with supporting evidence with regard to source of income for depositing such a substantial cash amount.

- 10.2 Mr. Bhatt, the learned Senior Counsel would submit that as per the requirement of Section 147 of the Act, the Assessing Officer is expected to form an opinion or belief regarding the applicability of the provisions in question at the time of recoding of reasons for reopening the assessment and it is not necessary for Assessing Officer to conclusively establish that his belief or opinion is correct even on the merits.
11. In view of the above contentions, the learned counsel for the revenue urged that the writ application may not be entertained.
12. We have heard the learned counsel appearing for the respective parties and have carefully examined the materials on record.
13. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the question that falls for our consideration is whether the revenue is justified in reopening the assessment beyond the period of 4 years under Section 147 of the Act?
14. We take notice of the fact that the assessee had filed its return of income on 18.02.2013 declaring total income at Rs.NIL for the A.Y. 2012-13 and same was processed under Section 143(1) of the Act. When no scrutiny assessment under Section 143 of the Act was made, the only requirement to initiate proceedings under Section 147 of the Act is 'reason to believe' that income for any assessment has escaped assessment. It is not required to prove by the revenue that the assessee failed to disclose truly and fully all material facts relating to assessment for the year under consideration.

15. A plain reading of the reasons recorded reveals that the Assessing Officer has considered the submission filed by the assessee and drew the inference that the assessee failed to submit supporting evidences and source of income with regard to cash deposits. In this regard, the Assessing Officer has noted that the assessee also failed to disclose the fully and truly the material facts of its correct income in the return of income for the year 2012-13 and formed the opinion that the income has escaped assessment to the extent of Rs.18,00,000/-.
16. The contention is that the Assessing Officer has not discarded the documentary evidence submitted during the inquiry and there is no reference to this effect in the reasons recorded by the Assessing Officer.
17. After careful reading of the reasons recorded, as referred to above, we are of the view that after receiving the information from the NMS the Assessing Officer has verified the documents and explanation offered by the assessee and was not agree with the explanation and based on the outcome of the verification, drew the inference that the transactions of cash deposit was not shown in the return of income for the year under consideration and noted that the true facts of transactions having not been disclosed by the assessee and income has escaped assessment. We have examined the copy of bank statements at page Nos. 58 and 59 of this writ application. The assessee has not produced the copy of cash books for the years 2010-11 and 2011-12. We found some discrepancies in the bank statements with regard to opening balance and withdrawals of the cash amount. The explanation of the assessee before the Assessing Officer indicates

that the assessee had not explain the transactions of cash withdrawal and deposits in a precise manner. In other words, he should have disclose and point out the entry wise explanation before the revenue authority, enable them to draw necessary inference with regard to genuineness of the transactions.

18. In view of the aforesaid, we are of the view that the information received by the system was specific and clear and after verification of the material evidence produced by the assessee the Assessing Officer disclosed his mind that the assessee failed to explain the source of cash deposit and has reason to believe that the income has escaped assessment. Therefore, it cannot be said that the Assessing officer has not applied his mind and there was no satisfaction by his own with regard to escapement of income.
19. It would be profitable to refer and rely on the decision rendered by Constitutional Bench (five judges), in case of **Calcutta Discount Co. Ltd Vs ITO (1961) 41 ITR 191 (SC)**, a three Judge Bench of the Apex Court in **S. Narayanappa Vs. CIT (1967) 63 ITR 219** held that if there are in fact some reasonable grounds for the Income Tax Officer to believe that there had been any non-disclosure as regards any fact, which would have a material bearing on the question of under-assessment that would be sufficient to give jurisdiction to the Income Tax Officer to issue the notice under S.34 Whether these grounds are adequate or not is not a matter for the Court to investigate.
20. It is a settled law that the word 'reasons to believe' would mean cause or justification. If the Assessing Officer has caused or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that income

had escaped assessment. In the case of hand, the Assessing Officer after verification of the information as well as material produced by the assessee not satisfied with the explanation and formed the opinion that the assessee failed to disclose true facts of the transactions in the return of income and income has escaped assessment. In this context, we may refer to and rely the case of **Asst. Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Broker Ltd (2007) 291 ITR 500 SC**, wherein, the Apex Court in para-16 observed thus :

“16. [Section 147](#) authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. 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, it can be said to have reason to believe that an 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. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers.

As observed by the Delhi High Court in [Central Provinces Manganese Ore Co. Ltd. v. ITO](#) [1991 (191) ITR 662], for initiation of action under [section 147\(a\)](#) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. 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 materials 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.”

21. We take the notice of the fact that while disposing the objection against the notice, the reasoned order having been passed by the respondent authority. Therefore, no interference is required to the impugned disposing off the objection.
22. Mr. Divatia in support of his principal argument has placed significant reliance of one order passed by a Co-ordinate Bench of this Court rendered in the case of ***Swati Malove Divetia Vs. Income-tax Officer, Ward-7, Special Civil Application No.7628 of 2018; decided on 10th September 2018.*** In the said case, notice to reopen the writ-applicant's assessment for Assessment Year 2015-16 was a subject matter of challenge. Mr. Divatia seeks to rely on the observations made by this Court in Paragraph-10 of the order. Paragraph-10 reads thus:-

“10. Reason recorded by the Assessing Officer must be seen in light of such facts. We are not for a moment judging sufficiency of the reasons enabling the Assessing Officer to form a belief that income chargeable to tax had escaped assessment. We are testing the reasons on the basis of material which was available with him. In pre-notice queries, the Assessing Officer had asked the assessee to explain the source of the cash deposits post demonetization. The assessee disclosed such source being her own bank accounts and their withdrawals matching quite closely to the deposits which withdrawals were made within the close proximity of the deposits. If the Assessing Officer had any reason to discard such disclosures and still form a belief that the deposits were from the sources not indicated by the assessee, nothing of the sort has come in the form of reasons recorded. In fact, the reasons recorded completely ignored the Assessing Officer's query and the response made by the assessee to such queries. In other words, the Assessing Officer in the reasons recorded has simply kept aside the assessee's explanation for the availability of cash on hand for deposit post

demonetization. The reasons thus clearly lacked validity and proceeded on erroneous premise.”

23. The contention of Mr. Divatia is that in the case on hand, in response to the notice issued to his client under Section-133(6) of the Act, all the necessary documentary evidence was furnished for the perusal of the Assessing Officer with necessary comments on the specific queries raised in the notice issued under Section-133(6) of the Act. According to Mr. Divatia, if the Assessing Officer has any reason to discard such disclosures and still form a belief that the cash deposit of Rs.18,00,000/- remains unexplained, then the Assessing Officer should have stated so specifically in the reasons assigned for the reopening. In other words, the reasons recorded has completely ignored the response made by the assessee to such queries.
24. We are afraid, we are not in a position to accept such submission canvassed on behalf of the writ-applicant. In the reasons, it has been specifically stated that although it is the case of the assessee that the cash deposit was from the opening cash balance, yet upon verification of the submission filed by the assessee, the Assessing Officer noticed that there was no supporting evidence as regards the source of income. In the reasons, it has been specifically stated that the correct income should have been disclosed while filing of the return of the income. Thus, in our opinion, this is not a case, in which, the Assessing Officer could be said to have not been considered the explanation offered by the assessee in response to the notice issued under Section-133(6) of the Act while recording the reasons for reopening. The order of this Court in *Swati Malove Divetia [Supra]* is in the facts of that particular case.

25. In view of the discussions made hereinabove, we hold that the Assessing Officer is justified in reopening of the assessment of the assessee and it cannot be said that the impugned notice dated 23.06.2018 is without jurisdiction and bad in law.
26. For the aforesaid reasons, no case is made out and accordingly, the writ application deserves to be dismissed and is hereby dismissed. Notice discharged.

P.S. JOSHI.

(J. B. PARDIWALA, J)**(ILESH J. VORA, J)**