
(1993) 01 GUJ CK 0020
In the Gujarat High Court
Case No : Special Civil Application No. 31 of 1993

A.B. Parikh

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 27-01-1993

Acts Referred:

Income Tax Act, 1961 — Section 146, 147, 148, 149, 150(1)

Citation : (1993) 111 CTR 16 : (1993) 203 ITR 186

Hon'ble Judges : S. Nainar Sundaram, C.J.; S.D. Dave, J

Bench : Division Bench

Advocate : J.P. Shah, for the Appellant; M.R. Bhatt, for the Respondent

Judgement

S. Nainar Sundaram, C.J.—Earlier notice pending admission was issued in this matter. We find that, on such notice being served, the respondent has entered appearance through standing counsel, and an affidavit-in-reply has also been presented to the court meeting the points raised in this special civil application. Considering the nature and scope of the points involved in this special civil application, we deem it fit and proper to dispose of the special civil application, we deem it fit and proper to dispose of the special civil application today itself, after hearing both the sides. Learned counsel on both the sides made their submissions in full.

2. In this Special Civil Application, the petitioner question the notice u/s 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), for the alleged escaped assessment for the assessment year 1981-82. The impugned notice is dated November 12, 1992. Two points are being urged by Mr. J. P. Shah, learned counsel for the petitioner, coveting interference at our hands. The first points is that the impugned notice is time barred, when we take note of the provisions u/s 149 of the Act under which the maximum time limit could be ten years from the end of the relevant assessment year, namely, March 31, 1982. The second point urged is that the conditions precedent for exercising jurisdiction for any alleged escaped assessment have not at all been fulfilled and hence the impugned notice

is without jurisdiction. We will first take up for consideration the point relating to bar of limitation. In answer to the first point Mr. M. R. Bhatt, learned counsel for the respondent, submits that section 150(1) of the Act specifically contemplates that notice u/s 148 may be issued, notwithstanding anything contained in section 149, at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under the Act by way of appeal, reference, revision or by a court in any proceeding under any other law. Learned counsel for the respondent submits that, in the instant case, there was an appeal by the firm in which the petitioner was a partner before the Income Tax Appellate Tribunal for the assessment year 1981-82 and there the findings have been rendered holding that the transactions in respect of which the present proceedings have been initiated are only those of the petitioner and not of the firm, of which he was a partner and, in view of that finding, the matter could be brought within the ambit of section 150(1) so as to enable the authority to initiate action for escaped assessment by issuance of the notice u/s 148 at any time without any limitation. Section 147 speaks about income escaping assessment. The power to initiate action for escaped assessment is subject to the provisions of sections 148 to 153. Section 148 provides for issuance of notice where income has escaped assessment. Section 149 prescribed the time limit for issuance of notice u/s 148. Then we come to section 150, on which learned counsel for the respondent relied to escape the scathe of limitation, which otherwise applies, as contended by learned counsel for the petitioner. Section 150(1) which alone is relevant reads as under :

"150. (1) Notwithstanding anything contained in section 149, the notice u/s 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a court in any proceeding under any other law."

3. Learned counsel for the respondent would submit that, by virtue of the Income Tax Appellate Tribunal holding the income to be not that of the firm, but that of the partner, the petitioner, the proceedings for escaped assessment shall be deemed to be one made in consequence of or to give effect to a finding or direction of the Income Tax Appellate Tribunal.

4. Learned counsel for the petitioner given an answer to this submission put forth by learned counsel for the respondent by drawing our attention to Explanation 3 to section 153 of the Act and would submit that firstly there is no positive finding as such rendered by the Income Tax Appellate Tribunal holding that the disputed transactions would amount to income of the petitioner and, secondly, the petitioner was not afforded an opportunity of being heard before the order of the Income Tax Appellate Tribunal was passed. Section 153 of the Act speaks about time limit for completion of assessments and reassessments. Sub-section (2)

prescribes a two-year time limit for the making of an order u/s 147 for escaped assessment. Sub-section (3) is more relevant for our purpose and it reads as follows :

"Sub-section (3). - The provisions of sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and, recomputations which may, subject to the provisions of sub-section (2A), be completed at any time -

(i) where a fresh assessment is made u/s 146;

(ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under sections 250, 254, 260, 262, 263, or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act;

(iii) where, in the case of a firm, an assessment is made on a partner of the firm in consequence of an assessment made on the firm u/s 147."

5. Of the three clauses, clause (ii) alone may be relevant for the purpose of our case. The language of clause (ii) of sub-section (3) of section 153 is in pari materia with section 150(1) of the Act. It is only in this context we have to understand the scope and purpose of Explanation 3 to section 153 which portentously speaks on the subject. The said Explanation reads as follows :

"Explanation 3. - Where, by an order referred to in clause (ii) of sub-section (3), any income is excluded from the total income of one person and held to be the income of another person, then, an assessment of such income on such other person shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order, provided such other person was given an opportunity of being heard before the said order was passed."

6. Section 149 lays down the time limits for issuance of notice u/s 148. Section 150(1) forms an exception to it and provides that a notice u/s 148 could be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to, any finding or direction contained in an order in appeal, reference or revision under the Act. Similarly, section 153(3)(ii) using the same language as could be seen from the extract made above, provides that no time limit applies for completion of assessment which is made in consequence of, or to give effect to, any such finding or direction. Exclusion of time limit will depend on the same contingencies in both the cases. Explanation 2 and 3 to section 153 deem certain assessments to have been made in consequence of, or to give effect to, a finding or direction. We need to advert to Explanation 2, since it concerns the very assessee covered by the order in question. Explanation 3 referring to "another person" is relevant for our case, and the fiction enacted therein applies for the purposes of both section 150 and section 153. This is evident from the use therein of the set of expressions

"for the purposes of section 150 and this section".

7. There is no gainsaying that this specific references gives no room for exclusion of the application of the fiction set forth in Explanation 3 to section 153 even in respect of section 150. The result is for the purpose of section 150, so as to enable the authority to issue the notice u/s 148 at any time without being curtailed by the time limit prescribed u/s 149, there must be satisfaction of the ingredients under Explanation 3 to section 153. The endeavour of Mr. M. R. Bhatt, learned counsel for the respondents, was to bring the matter within the ambit of Explanation 3 to section 153.

8. The first ingredient is there must be a finding that the income excluded from the total income of one person is the income of another person. The second ingredient is that the order must be one which has come to the passed after the other person was given an opportunity of being heard, Mr. M. R. Bhatt, learned counsel for the respondent, on the first ingredient draws our attention to the following passage occurring in the order of the Income Tax Appellate Tribunal and he wants us to say that this would amount to a finding excluding the income from that of the firm and holding it to be that of the petitioner who was a partner of the firm :

"The initial statements made by Shri A. B. Parikh on September 22, 1980, should have been immediately followed up by the Department. It took nearly four years to confront the assessee-firm. What we find from the subsequent statement of Shri A. B. Parikh and the statements of the recipients of the money from Shri A. B. Parikh, copies of the accounts filed by Mukund Trust so also Pandya Gaurishankar Madhavji of Talaja is that the transactions in dispute undoubtedly belonged to the personal transactions of Shri A. B. Parikh and not the business transactions of the assessee-firm and the recipient of the cash from the disputed transactions was Mukund Trust through its representatives. In view of this, the assessee's explanation needs to be accepted. In our view, considering all the facts of the case and statements made by the parties and placed on record the addition is not justified. We have no hesitation in deleting the same."

9. When we took into the passage extracted above from the order of the Income Tax Appellate Tribunal, it is possible to say that the passage does make out a finding to the effect that the income is held to be not that of the firm but that of the petitioner who was a partner of the firm. Be that, so the question that relevantly arises of or consideration is as to whether the second ingredient of Explanation 3 to section 153 stands satisfied in the instant case. Obviously, there was no notice served on the petitioner in respect of the proceedings prosecuted before the Income Tax Appellate Tribunal and he was not called upon to answer any proposition for holding the income to be only that of his and not of the firm. The intendment of the Explanation 3 to section 153 when it says "such other person was given an opportunity of being heard before the said order was passed" is apparent. The person concerned must be put on notice that the consequence of the income being held as his is likely to follow in the proceedings

prosecuted. Furthermore, he must be given an opportunity of being heard on that question. All these features must be borne out by records. In this connection, Mr. J. P. Shah, learned counsel for the petitioner, draws our attention to the decision of the High Court of Allahabad in *Gupta Traders Vs. Commissioner of Income Tax*, . The facts that fell for consideration by the learned judges of the High Court of Allahabad run as follows (headnote) :

"During the assessment year 1965-66, the assessee-firm consisted of two partners, D and his son, D having 10 annas share and his son having 6 annas share. The Income Tax Officer held that the assessee-firm did not carry on business in the status of a firm and the business actually belonged to D and, therefore, assessed the entire income of the firm in the hands of D as an individual. On appeal by D, the Appellate Assistant Commissioner held that the firm was genuine and, therefore, only D's share in the income of the firm was assessable in his hands. Thereafter, the Income Tax Officer assessed the assessee-firm treating it as a firm. The assessee appealed to the Appellate Assistant Commissioner and contended that sine no assessment had been made on the assessee-firm, on the basis of the returns filed by it, within the period of four years from the end of the relevant assessment year and also as no action had been taken u/s 147 of the Act, the assessment, having been made beyond the period of limitation, was not legal and valid. The Appellate Assistant Commissioner accepted the contention of the assessee and annulled the assessment. Thereafter, the Income Tax Officer initiated proceedings u/s 147(b) of the Income Tax Act, 1961, and issued a notice u/s 148 to the firm. In response to the notice, the assessee filed a return and contended before the Income Tax Officer that the proceedings initiated u/s 147 were barred by limitation. The Income Tax Officer rejected the contention of the assessee and completed the assessment. The Appellate Assistant Commissioner dismissed the appeal filed by the assessee on the ground that partner D, who had a 10 annas share in the firm, had full knowledge of the proceedings and hence the proceedings were not barred by limitation. On further appeal, that Tribunal found that although technically no notice was given by the Appellate Assistant Commissioner to the assessee-firm, yet since it was the case of the firm itself that it was genuine and that partner D was a 10 annas partner in the firm and the other partner was only his son, the assessee-firm was given an opportunity of hearing by the Appellate Assistant Commissioner while disposing of the appeal filed by partner D and the assessment was not barred by limitation. "

10. On a reference, it was held (headnote) :

"That though under the general law a firm is not a legal person or juridical entity, yet for purposes of the Income Tax Act, a firm is treated as an entity distinct from the persons who constituted the firm. Therefore, in the case of partner D, before making an order that a part of the income which had been assessed in his case was the income of the assessee-firm it was necessary to give an opportunity being heard to the assessee-firm. No notice was given to the assessee-firm,

when the appeal filed by partner D came up for hearing before the Appellate Assistant Commissioner and, therefore, the Revenue could not take advantage of the provisions contained in section 150(1) read with section 153(3)(ii), Explanation 3, and the initiation of proceedings u/s 147(b) was barred by limitation. Further, in the order passed by the Appellate Assistant Commissioner in the appeal of partner D, as a consequence of which the assessment of the assessee-firm was sought to be reopened, there was no direction as to how the income excluded from the assessment of partner D was to be dealt with. The assessment was set aside by the Appellate Assistant Commissioner with a direction to make it afresh but there was no direction given by the Appellate Assistant Commissioner in that appeal for the inclusion of any income in the firm's case."

11. Though it was a converse case of the income being held to be that of the firm, the principle deducible from the provisions has been taken note of and the initiation of proceedings was held to be barred by limitation.

12. However, Mr. M. R. Bhatt, learned counsel for the respondent, relied on the pronouncement of the High Court of Patna in *Commissioner of Income Tax Vs. Dhanpatram Chhotelal*, and would submit that the petitioner being a partner of the assessee-firm, must be held to have had notice, since in the assessment proceedings he was representing the cause of the assessee-firm. First of all, we must point out that we cannot act on presumptive level. There is no record placed before us to show that the petitioner was representing the cause of the assessee-firm before the Income Tax Appellate Tribunal in consequence of whose finding alone the present proceedings for escaped assessment are stated to have been initiated. Even if he had so represented, that position could not be straightway equated to participation in the proceedings pursuant to an opportunity being afforded on the question before the order is passed, within the meaning of Explanation 3 to section 153. In the case before the High Court of Patna, the facts ran as follows (headnote) :

"DC was a Hindu undivided family of which D was the karta and C was his son. There was a partial partition and a firm, DC, was formed. On September 26, 1966, two returns were filed by DC, one in the status of a Hindu undivided family and another in the status of a firm. The claim of partition was not accepted by the Income Tax Officer and the assessment was made on the Hindu undivided family, but the Appellate Assistant Commissioner accepted the claim of partition. The Appellate Assistant Commissioner also directed that the assessment should be made afresh in the correct status. This appellate order was passed on December 31, 1971, and the Income Tax Officer made the assessment on February 14, 1972, in the status of a registered firm. The Tribunal held that the assessment of the firm was barred by limitation."

13. On a reference, the High Court of Patna held (headnote) :

"That, in the instant case, the karta of the Hindu undivided family and his son

were vitally interested in the firm in which they were partners. When the Appellate Assistant Commissioner held that the status of the assessee should be taken as that of a firm and not a Hindu undivided family and the Income Tax Officer proceeded to assess the firm, in view of Explanation 3 to section 153, although the two assessee were different persons, the assessment of the firm was not barred by limitation."

14. We must point out that there is no discussion in the pronouncement of the implications of Explanation 3 to section 153. Even otherwise, we are unable to spell out any parity between the facts of the case dealt with by the High Court of Patna and the facts of the present case. There the parties were very much in the picture from the inception putting forth the stand with reference of status and, in that view, it was held that they were vitally interested in the firm in which they were partners and in that context Explanation 3 to section 153 would come to the rescue of the Revenue and against the assessee. Our analysis of the implications of the provisions of the Act relevant for the purpose of our case, as done above, has left us with no other alternative but to allow this special civil application. Since we have sustained the first point relating to bar of limitation and that has served the cause of the petitioner, we have not gone to the second point. Accordingly, we allow this special civil application and the impugned show-cause notice as per annexure A is quashed. We make no order as to costs.