
(1999) 04 GUJ CK 0010

In the Gujarat High Court

Case No : Special Civil Application No. 9855 of 1993

Avani Corporation

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 08-04-1999

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 139, 142(1), 143(3), 147, 148

Citation : (1999) 155 CTR 548 : (1999) 238 ITR 407

Hon'ble Judges : Rajesh Balia, J; Anil R. Dave, J

Bench : Division Bench

Advocate : S.N. Soparkar, for the Appellant; R.P. Bhatt, for the Respondent

Judgement

1. The petitioner-assessee challenges the notice under s. 148 of the IT Act, 1961, dt. 27th June, 1993, for reopening of the assessment for the asst. yr. 1987-88. Reasons that were recorded before assuming jurisdiction for issuing notice under s. 148 were furnished to the assessee and were produced as Annexure K. The reasons recorded by the AO reads as under :

"From the records it is seen that you have sold land for a sum of Rs. 8,69,755. The said land was purchased by you for a sum of Rs. 1,75,000. As against this, you have paid a sum of Rs. 7,00,000 to the seller of the land. Furthermore, you have paid a sum of Rs. 75,000 to a third party which was not required to be paid. Under these circumstances, there is escapement of income chargeable to tax."

2. The assessee urges that assumption of jurisdiction under s. 148 r/w s. 147 was without authority of law. It was pointed out that there has been no failure to disclose truly and fully all material facts necessary for the assessment of asst. yr. 1987-88 on the part of the assessee. Any satisfaction to that effect has not even been recorded by the AO in his reasons. Therefore, any action under s. 147 beyond four years from the end of relevant assessment year was clearly barred and the AO had no jurisdiction to initiate the proceedings. It was pointed out that

even otherwise, all the material facts referred in the reasons find place in the order of assessment put before the AO receiving active application of mind to these facts. Therefore, ex facie it is not a case where even by a strained reasoning it could be a case where any failure on the part of the assessee to disclose truly and fully all material facts necessary for the assessment can be attributed to the assessee-petitioner.

3. In reply to the affidavit, it has been reiterated that the assessee has agreed to purchase the land in question at Rs. 1.75 lacs from BD Rajyaguru and Upendra Rajyaguru, the owners of the land. However, he claims to have paid Rs. 7 lacs to the seller and Rs. 75,000 to the third party, thus, inflating the cost price of the land in question which form part of stock-in-trade of the assessee which in turn resulted in reducing the profit. Thus, there were grounds for the AO to have held a bona fide belief that income of the assessee has escaped the assessment.

4. In the reply affidavit reference has also been made to the chain of events which led to the payment of extra price, alleging that there was collusion between the petitioner and the sellers in inflating the price.

5. It was also urged that since the filing of this petition, as per the order of interim order, assessment has taken place and the copy of which has been served on the petitioner along with civil application seeking permission to serve the same on the assessee, therefore, now the assessee should be left to avail alternative remedy of challenging the order in appeal on merit as well as on the ground as to the jurisdiction of the AO to initiate proceedings.

6. Having carefully considered we are not inclined to accept the plea that the petition should be dismissed on the ground of availability of alternative remedy against the final order of assessment which has come to be passed during pendency of this petition. It would be apposite to produce the order of interim relief made on 8th October, 1993 :

"Rule.

Heard the learned counsel appearing for the parties as regards interim relief. In our opinion, it would not be proper to stay the further proceedings pursuant to the impugned notice. Interests of both the sides would be protected if it is directed that the proceedings pursuant to the impugned notice may proceed further in accordance with law upto the stage of passing of final assessment order. However, the assessment order that may be passed shall not be served upon the petitioner and/or upon the partners of the petitioner firm unless a copy of the same is placed on record of this petition. It is further directed that without the permission of this Court, the final order that may be passed shall not be implemented and no fresh demand shall be made upon the petitioner without the permission of this Court. In the facts of the case, it is further directed that the respondent may file further affidavit in reply, if they so choose, latest by 31st December, 1993. Thereafter it will be open to either of the parties to request the Court for fixed date of hearing."

7. A perusal of the aforesaid order clearly goes to show that the Court did not incline to make the special civil application infructuous by permitting the AO to make an order, when it expressly prohibited service of order on the assessee and restraining the recovery in pursuance of order even if allowed to be served unless permitted by the Court to leave the party to prosecute his remedies against the final assessment order which has thus been allowed to come into existence during pendency of the proceedings. Obviously, assessments that were to come into existence during the pendency of the proceedings, there being no stay against it to be within the period of limitation, would not affect the hearing of the petitioner on merit and the final order would be subject to the decision in this special civil application.

8. Moreover, the petitioner in this case raises the question of inherent lack of jurisdiction which would entitle it to writ of prohibition as a matter of course. If on account of the order passed in interim relief, the writ of prohibition becomes inappropriate to be issued in the changed circumstances in case of inherent lack of jurisdiction is made out, the petitioner would be entitled to writ of mandamus, or certiorari or other appropriate direction as the case may be.

9. The preliminary objection as to the further continuance of this petition on the ground of making of assessment order is overruled.

10. Coming to the merit of the petition, we are of the opinion that the case is clearly within the precincts of proviso to s. 147 which while authorises the AO if he has to reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of ss. 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, subject to the provisions of ss. 148 to 153 but has restricted exercise of that jurisdiction under proviso in the following manner :

"Provided that where an assessment under sub-s. (3) of s. 143 or this section has been made for the relevant assessment year, no action shall be taken under this section 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 the failure on the part of the assessee to make a return under s. 139 or in response to a notice issued under sub-s. (1) of s. 142 or s. 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."

11. It is not the case of the Revenue either that there is any failure on the part of the assessee to make a return under s. 139 or in pursuance of notice under s. 142(1) or s. 148. Reasons recorded by the AO which is a sine qua non before assuming jurisdiction to issue notice does not record any satisfaction of the AO that the alleged escapement of income from tax is by reason of failure on the

part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. Apart from this lapse of recording the satisfaction on the part of the AO the order made under s. 143(3) for the asst. yr. 1987-88 clearly records the material facts referred to by the AO for the reasons recorded by him. It would be apposite to reproduce the relevant part of the assessment order for asst. yr. 1987-88 :

"The business of the firm is that of dealing in land. During the year of account, the firm has sold 21 plots of the land at Survey No. 123-B. The firm had entered into an agreement to purchase the said land in July, 1981 for Rs. 1,75,000. As submitted by the assessee in its letter dt. 28th July, 1987, filed with the return of income, the seller, subsequent to the above agreement for sale of land to the assessee, by another agreement, agreed to sell the same land to another party. Accordingly, civil suit had been filed by the assessee and finally there was a settlement in the Court by which the assessee agreed to pay the price of the land at Rs. 7 lacs to the original seller and Rs. 75,000 to M/s M. B. Enterprises, with whom the seller had made an agreement for the sale of the same land."

12. The perusal of the aforesaid part of the assessment order goes to show that the fact that there was an agreement to purchase the land in July, 1980-81 for Rs. 1,75,000. The fact that as ultimately as a result of civil suit the petitioner paid Rs. 7,00,000 to the original seller and Rs. 75,000 to the third party with whom original seller has entered an agreement to sell subsequent to that with the petitioner. Thus, the facts which formed the basis for formation of belief as to the satisfaction of the AO about escapement of assessment were all disclosed during the course of assessment proceedings for the asst. yr. 1987-88, therefore, it cannot be by any stretch of imagination a case where the escapement of income from assessment is on account of failure on the part of assessee to disclose fully and truly all the material facts necessary for the asst. yr. 1987-88. As reasons recorded by the AO and the order under s. 143(3) read together clearly negatives the reason of the escapement being attributed to failure on the part of the assessee to disclose fully and truly all the material facts necessary, the further consequence is not in dispute. The initiation of proceeding under s. 147 could not have been beyond four years from the end of relevant assessment year that is to say within four years from 31st March, 1988, which will expire on 31st March, 1992. The impugned notice initiated action on 27th June, 1993, beyond four years from the end of relevant assessment year and would be inhibited under proviso to s. 147. We are, therefore, of the opinion that the impugned notice having been issued after 31st March, 1992, the AO had no jurisdiction to initiate action under s. 147 and to proceed further in furtherance of that notice.

13. Accordingly this petition succeeds. The impugned notice and the subsequent proceedings taken in furtherance thereof are all quashed.

14. Rule made absolute. There shall be no order as to costs.