

(2003) 11 GUJ CK 0022
In the Gujarat High Court

Case No : Special Civil Application No. 8761 of 2003 13 November 2003

Bharat V. Patel

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 13-11-2003

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 143, 143(1), 143(2), 147, 148

Citation : (2004) 186 CTR 639 : (2004) 268 ITR 116 : (2004) 134 TAXMAN 178

Hon'ble Judges : K.A. Puj, J;D.H. Waghela, J

Bench : Division Bench

Advocate : K.R. Dixit, for the Appellant; D.D. Vyas, for the Respondent

Final Decision : Dismissed

Judgement

D.H. Waghela, J.—Invoking Article 226 of the Constitution, the petitioner has, in this petition, prayed for a writ of certiorari or any other appropriate writ or direction to quash the notice dated 15.7.2002 issued u/s 148 of the Income Tax Act, 1961 (in short "the Act") proposing to reassess the income of the petitioner. Initially, while issuing notice in this proceeding, the respondent concerned were directed to disclose to the petitioner the reasons for reassessment and not to proceed further in pursuance of the impugned notice. After grant of such ad-interim relief and statement of the learned senior counsel for the respondents that the Department would not proceed further in pursuance of the impugned notice, a detailed order dated 30.9.2003 was made after hearing the learned counsel so as to direct the petitioner to raise his objections before the Assessing Officer and directing the Assessing Officer to consider and dispose of the objections in accordance with law by a speaking order. That order was expressly made in accordance with the judgment of the Supreme Court in Commissioner of Income Tax Vs. Sunil J. Kinariwala, . The interim relief was confirmed to the extent that reassessment proceedings pursuant to the impugned notice were stayed except for deciding the objections to be raised by the petitioner.

1.1 Accordingly, the petitioner raised his objections by his representation dated 3.10.2003 and the same are decided and disposed by an elaborate order dated 28.10.2003 of the Assistant Commissioner of Income Tax, Circle-2, Vadodara. That order is placed on record by the petitioner, but it is not challenged before us and the learned counsel for the petitioner insisted upon this Court exercising its plenary powers to quash the notice u/s 148 of the Act itself on the grounds which were canvassed before us.

2. The notice as above was sought to be assailed mainly on the grounds that the reasons statutorily required to be recorded before issuance of the notice u/s 148 were not recorded at the relevant time, that those reasons were not intelligible or reasonable, that those reasons were not communicated in time despite an order of this Court and that even taking the reasons at their face value, they disclosed only a change of opinion of the officer even as the return of income filed in regular course was duly accepted by the Department and even the claim of refund was allowed. The learned counsel for the petitioner relied upon the judgments of this Court in *Vxl India Ltd. Vs. Assistant Commissioner of Income Tax, Surat City Gymkhana Vs. Deputy Commissioner of Income Tax, and Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, .

3. It would be necessary to refer to the relevant facts in order to appreciate the contentions of the petitioner. The petitioner filed his regular return of income in "SARAL" Form No.2-D showing total income of Rs.1,84,45,766/- on which the net tax payable was shown to be Rs.60,43,104/-. Out of that, the tax deducted at source was shown to be Rs.50,16,136/- and, Rs.70,94,600/having been paid as advance tax, the balance tax refundable was calculated to be Rs.60,67,632/-. The said amount claimed as refund was, along with interest amounting to Rs.12,13,520/-, stated to have been allowed and the total of Rs.72,81,157/- was stated to have been adjusted against an earlier demand. Intimation dated 21.1.2002 to that effect was issued u/s 143(1) of the Act.

3.1 After issuance of the impugned notice for reassessment and issuance of notice in the present proceeding, reasons for reopening of assessment are supplied to the petitioner vide letter dated 13.8.2003, according to which, the reasons supposed to have been recorded on 15.7.2002 read as under:-

"15.7.2002.

The assessee has filed a return of income for the asstt.year 200-2001 on 24.10.2000, declaring therein total income of Rs.1,84,45,766/-, which was processed u/s. 143(1)(a) on 21.01.02, without making any prima facie adjustment. The assessee has made a note that he has received non-compete fee of Rs.1,85,40,000/- from Proctor and Gamble, which being a capital nature is not taxable and the same is, therefore, is not taxable. The amount of non-compete fees is taxable and the same ought to have been included in the total income.

I have reasons to believe that income of assessee has escaped assessment within the meaning of provisions of 147 of the I.T.Act, 1961 to the tune of Rs.1,85,40,000/-.

Sd/- ACIT, CIR.2, BARODA."

4. It was strenuously argued by learned counsel Mr. Dixit that the intimation u/s 143(1)(a) of the Act was actually an order of assessment accepting the case of the petitioner that the non-compete fee of Rs.1,85,40,000/- was a receipt of capital nature and was accordingly not required to be taxed. It was on that basis submitted that in absence of any new information, reason or justification, the Assessing Officer could not have any reason to believe that any income chargeable to tax had escaped assessment. Relying upon the judgment in VXL INDIA LTD. (supra), he submitted that the scope of section 147 of the Act is not for reviewing its earlier order suo motu irrespective of there being any material to come to a different conclusion apart from just having second thoughts about the inferences drawn earlier and that section 148 of the Act does not confer jurisdiction on change of opinion on the interpretation of a particular provision. It was further pointed out that there was no material to support the belief that income had escaped assessment.

5. Having regard to the facts and circumstances appearing on record, there are hardly any reason to come to the conclusion that the reasons required to be recorded under the provisions of section 148 of the Act were not recorded in the first place on 15.7.2002, the date on which they are purported to have been recorded. We are also unable to agree with the contention of learned counsel Mr. Dixit that the reasons are not intelligible and are only a straight-forward conclusion of the officer stating that income had escaped assessment. The contention which is not born out by record was also that the recording of reasons and the issuance of impugned notice were by different officers.

5.1 As regards the contention of the Assessing Officer merely having changed his opinion, it has to be noted that the regular assessment had concluded by the intimation u/s 143(1)(a) of the Act without issuance of notice under sub-section (2). Learned senior counsel Mr. Vyas, appearing for the Department, submitted that, in the facts of the present case, not only the income had obviously escaped assessment but there was no formation of any opinion with regard to the non-compete fee being taxable or non-taxable. In this context, the observations of an erudite judgment of this Court even in a case after regular assessment after notice u/s 143(3) are apposite and relied upon by learned senior counsel Mr. Vyas. In that case of Praful Chunilal Patel Vs. M.J. Makwana, Assistant Commissioner of Income Tax, it is observed (per: R.K. Abichandani, J.) as under:

"In cases where the Assessing Officer has not made an assessment of any item of income chargeable to tax while passing the assessment order in the relevant assessment year, it cannot be said that such income was subjected to an assessment. In the assessment proceedings, the Assessing Officer would

ascertain on consideration of all relevant circumstances the amount of tax chargeable to a given taxpayer. The word "assessment" would mean the ascertainment of the amount of taxable income and of the tax payable thereon. In other words, where there is no ascertaining of the amount of taxable income and the tax payable thereon, it can never be said that such income was assessed. Merely because during the assessment proceedings the relevant material was on record or could have been with due diligence discerned by the Assessing Officer for the purpose of assessing a particular item of income chargeable to tax, it cannot be inferred that the Assessing Officer must necessarily have deliberated over it and taken it out while ascertaining the taxable income or that he had formed any opinion in respect thereof. If looking back it appears to the Assessing Officer (albeit within four years of the end of the relevant assessment year) that a particular item even though reflected on the record was not subjected to assessment and was left out while working out the taxable income and the tax payable thereon, i.e. while making the final assessment order, that would enable him to initiate the proceedings irrespective of the question of non-disclosure of material facts by the assessee. In fact, if there is material placed on record which would show existence of income chargeable to tax and which ordinarily ought to have included in the ascertainment of taxable income made in the assessment order but was not so included, that would itself provide a cause or justification for a belief to the Assessing Officer that such income had escaped assessment and the Assessing Officer in such cases would be ex facie justified in initiating the proceedings on such basis. The cases of non-assessment of an item of income chargeable to tax would warrant formation of requisite belief to initiate the proceedings within four years of the end of the relevant assessment year, even where full disclosures were made and yet an income chargeable to tax had escaped from being included in the final assessment order in which taxable income was worked out. In such cases, the Assessing Officer has in fact a duty to exercise his jurisdiction. The Assessing Officer has not to conclusively come to any finding on the facts which prompted his reason to believe at the stage of issuance of notice u/s 148 pursuant to which the assessee is to be heard; and the order if adverse, can be questioned under the provisions of the Act."

It is further observed in the same judgment that:

"As noted above, the provisions of section 147 require that the Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has a cause or justification to think or suppose that income had escaped assessment, he can be said to have a reason to believe that such income had escaped assessment. The words "reason to believe" cannot mean that the Assessing Officer should have finally ascertained the facts by legal evidence. They only mean that he forms a belief from the examination he makes and if he likes from any information that he receives. If he discovers or finds or satisfies himself that the taxable income has

escaped assessment, it would amount to saying that he had reason to believe that such income had escaped assessment. The justification for his belief is not to be judged from the standards of proof required for coming to a final decision. A belief though justified for the purpose of initiation of the proceedings u/s 147, may ultimately stand altered after the hearing and while reaching the final conclusion on the basis of the intervening enquiry. At the stage where he finds a cause or justification to believe that such income has escaped assessment, the Assessing Officer is not required to base his belief on any final adjudication of the matter....."

It is also observed in the same judgment that:

"The function of the Assessing Officer is to administer the Act with solicitude for public treasury and with fairness to the taxpayers. He is necessarily armed with great powers. Up to four years an assessment is open to his unreserved consideration on his formation of the requisite belief. If he has such reason, he has the power, and we may add that it is his duty, to reopen the door and demand the amount legally owing. His formation of belief is not a judicial decision, but an administrative decision. It does not determine anything at this initial stage, but the Assessing Officer has a duty to proceed so as to obtain what the taxpayer was always bound to pay if the increase is justified at all. The decision to initiate the proceedings is not to be preceded by any judicial or quasi-judicial enquiry. His reasoning may be the result of official information or his own investigation or may come from any source that he considers reliable. His reason is not to be judged by a court by the standard of what the ideal man would think. He is the actual man trusted by the Legislature and charged with the duty of forming of a belief, for the mere purposes of determining whether he should proceed to collect what is strictly due by law, and no other authority can substitute its standard of sufficient reason in the circumstances, or his opinion or belief for his. Unless the ground or material on which his belief is based, is found to be so irrational as not to be worthy of being called a reason by any honest man, his conclusion that it constitutes a sufficient reason, cannot be overridden. What is, therefore, to be ascertained is, whether the alleged reason really existed, and if it did, whether it was so irrational as to be outside the limits of his administrative discretion with which the Assessing Officer is invested so as to be really in disregard of the statutory condition. If the Assessing Officer honestly comes to a conclusion that a mistake has been made, it matters nothing so far as his jurisdiction to initiate the proceedings u/s 147 is concerned, that he may have come to an erroneous conclusion whether on law or on facts. His jurisdiction to initiate proceedings u/s 147 for assessment and reassessment is, even in such case correctly and rightly exercised, though he may have taken an erroneous view of the law with regard to the mistake committed at the first assessment proceedings that he has found out. Therefore, unless it is shown that the Assessing Officer never enquired into the matter at all or that he never honestly believed that a mistake has been made, the result of his investigation and initiation of the proceedings u/s 147 of the Act cannot be challenged on the

ground of want of jurisdiction. The Assessing Officer has to determine the facts and the law in order to give him jurisdiction to proceed and if in the determination of this he goes wrong, the proper remedy for the assessee would be to go up in appeal and to have the case referred to the High Court under the provisions of the Act. A writ of prohibition under Article 226 cannot be issued against the Assessing Officer in such cases."

6.1 Besides the above legal position which comprehensively answers most of the contentions of the petitioner, in the facts of this case, the first assessment and formation of the opinion are premised only upon the issuance of acknowledgment u/s 143(1) of the Act. The new scheme of assessment, as stated in the order of the Assistant Commissioner of Income Tax rejecting the objections of the petitioner, as per Circular No.549 of the Department, is as under:-

"With the number of income tax assesseees continuously increasing, there was an urgent need to reduce the Department's work load by greater reliance on voluntary compliance by the assesseees. The amending Act, 1987, has, therefore, substituted a new section 143 in the Income Tax Act to introduce an entirely new scheme of assessment after a return of income has been filed. The main features of the new scheme are:

(1) The requirement of passing an assessment order in all cases, where returns of income are filed, has been dispensed with and the issue of an acknowledgment slip to the assessee will be the end of the matter, if he has correctly paid tax and interest, if any, due on the basis of the return.

(ii) If on the basis of the return any amount is found due from the assessee, it can be recovered; if any refund is found due to the assessee, it can be granted without passing an assessment order.

(iii) Assessment orders will be passed only in a very limited number of cases selected for scrutiny."

It is further observed in the said order that:-

"In other words in this case, the Assessing Officer could not have made any adjustment in the income of the assessee as per the law. The assessing officer was to compute tax on the returned income and to determine tax payable or amount refundable. Since, in this case refund was payable, refund order was issued consequent upon processing the return. There is no case of change of opinion on the part of the Assessing Officer firstly as no regular assessment was made, secondly the Assessing Officer had no power to make adjustment to the returned income. Therefore, the objections of the assessee are devoid of merit. In fact the reasons for issue of notice existed at the time of issue of notice and the reasons are genuine."

Thus, in the liberalised and simplified tax-collection regime, mere acceptance and acknowledgment of return and issuance of refund cannot be elevated to the status of regular assessment and formation of opinion about the incidence of tax

on a particular claim or item mentioned in the return of income. And in absence of any formation of opinion about the taxability of the non-compete fees, in the facts of the present case, there can be no question of change of opinion.

6.2 On the other hand, the deeming fiction provided by Explanation 2 to Section 147 of the Act imparts an added obligation in the matter of believing escapement of income. According to the aforesaid Explanation [clause (c)] even where an assessment is made, but income chargeable to tax has been under-assessed, it has to be deemed that such income has escaped assessment. And after noticing that income chargeable to tax was under-assessed and applying the deeming fiction and the ratio of the aforesaid judgment in PRAFUL C. PATEL (supra), the assessing officer can hardly have reason not to believe that any income chargeable to tax has escaped assessment. It is, however, clarified that the legality of the impugned notice u/s 148 of the Act and the very assumption of jurisdiction u/s 147 only being under challenge in this case, it is neither within the scope nor an issue in this judgment to pronounce upon the questions whether the non-compete fees received by the petitioner was a capital receipt or revenue receipt and whether, in fact, there was escapement of income chargeable to tax. These issues are, therefore, left open for decision in accordance with law.

7. In the result, the petition is dismissed, interim relief is vacated and notice is discharged with no order as to costs.