

(2011) 04 GUJ CK 0149

In the Gujarat High Court

Case No : Special Civil Application No. 2651 of 2001

Chandrakantbhai Amratlal Thakkar

APPELLANT

Vs

Dy. CIT and Another

RESPONDENT

Date of Decision : 15-04-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 131(1), 132(1)(A), 158(B)(D)

Citation : (2011) 337 ITR 258

Hon'ble Judges : Harsha Devani, J;B.M. Trivedi, J

Bench : Division Bench

Advocate : Manish J. Shah, for the Appellant; Mauna M. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.—By this petition under Art. 226 of the Constitution of India, the petitioner has challenged notice dt. 1-3-2001 issued by the respondent No. 2 u/s 158BD of the IT Act, 1961 (the Act).

2. The facts of the case as appearing in the petition are that the petitioner, an individual, who is being assessed to tax as such for the last several years under the Act, is engaged in the business of transport of goods at Ahmedabad. It is the case of the petitioner that the petitioners nephew, Atulbhai had gone to Deesa on 22-9-1998 for purchase of a second-hand truck. As according to Atulbhai, it was not safe to carry cash with him to Deesa, he decided to go first and finalize the deal and then if need be, on finalization of the deal and the price to be paid, he would be making arrangement for payment. On reaching Deesa and making a deal with the seller of the truck, who was a stranger to Atulbhai, Atulbhai made an arrangement to get cash through Devendra Finance of Deesa. Devendra Finance of Deesa which was contacted by Atulbhai, asked Atulbhai to handover Rs. 2,00,000 to Banshi Finance of Ahmedabad situated at Kalupur and told Atulbhai that their representative would be going to Banshi Finance to collect

these monies and bring the same to Deesa. Atulbhai, therefore, telephoned the petitioner and asked him to give Rs. 2,00,000 to Banshi Finance at Kalupur in Ahmedabad. On receiving this message, the petitioner, along with Nandkishore M. Thakkar, who is also the petitioners nephew, went to Kalupur to pay Rs. 2,00,000 which could be transferred to Deesa for the purpose of purchase of truck. As the premises of Banshi Finance was not on the ground floor, and as the petitioner had severe pain in his knees, instead of climbing up, he asked Nandkishore to go and give Rs. 2,00,000 to Banshi Finance. The petitioner also sent a chit along with Nandkishore which was to be handed over to Banshi Finance. Thereafter, the petitioner left in his car for other work leaving Nandkishore at the office building of Banshi Finance. When Nandkishore reached the premises of Banshi Finance, he was not aware that there was an income tax search at the premises of Banshi Finance. The said monies and chit were seized by the raiding party. A statement of Nandkishore was recorded on 22-9-1998.

3. On coming to know that the monies had been so seized by the IT authorities, Atulbhai returned to Ahmedabad without purchasing the truck. On 29-9-1998, Atulbhai addressed a letter to the Director of Investigation, wherein he mentioned his PAN and inter alia stated that he had submitted his returns of income for and upto asst. yr. 1997-98 with AO, Ward 8(2). That he had generated substantial revenue from his transport business and that the same was being regularly accounted for in the books of accounts maintained by him. It was further stated that because of the nature of the business carried on by him, Atulbhai was normally having a substantial cash balance which was available with him and which was also duly reflected in the books of accounts regularly maintained by him and that on 22-9-1998, that is, the date of the search, he had cash balance of Rs. 3,16,719.60 and that Rs. 2,00,000 which Nandkishore had gone to deliver to Banshi Finance were withdrawn from the said amount.

4. The above-referred facts were also submitted to respondent No. 1 by virtue of an affidavit dt." 7-10-1998 made by Atulbhai, wherein it was stated that Rs. 2,00,000 seized were accounted for in the cash book maintained by Atulbhai and the entry of withdrawal of Rs. 2,00,000 had also been accounted for in the concerned book. Atulbhai was, thereafter, served with summons dt. 18-1-1991 u/s 131(1A) of the Act calling upon him to remain present and to produce cash book, ledger, bank book, assessment details along with copy of the acknowledgment for the last return of income filed for the financial year 1998-99 which came to be complied with.

5. Thereafter, after about a gap of 22 months, the petitioner and Atulbhai were required to attend the office of the Dy. CIT and statements of the petitioner as well as Atulbhai came to be recorded on 15-11-2000. Thereafter, the petitioner received a notice u/s 158BD of the Act dt. 1-3-2001 requiring the petitioner to prepare a true and correct return of total income including the undisclosed income in respect of which the petitioner is assessable for the block period starting from 1-4-1988 to 31-3-1998 and 1-4-1998 to 22-9-1998, that is, till the

date of search. Being aggrieved, the petitioner has filed the present petition challenging the above-referred notice.

6. Mr. J.P. Shah, learned advocate appearing on behalf of the petitioner invited attention to the provisions of section 158BD of the Act to submit that the basic requirement of the said section is that the AO of the searched party is required to be satisfied that undisclosed income belongs to any person other than the person with respect to whom search was made u/s 132 or whose books of account or other documents or any assets were requisitioned u/s 132A of the Act. It was submitted that in the present case, the very fact that in respect of the amount of Rs. 2,00,000 notices u/s 158BD of the Act came to be issued to the petitioner as well as to Atulbhai shows the absence of the requisite satisfaction that the said amount is an undisclosed income of the petitioner. Hence, the notice u/s 158BD of the Act is bad in law as the condition precedent for issuance of such notice is not satisfied.

7. The next contention raised by the learned advocate for the petitioner was that copies of the original cash book, balance sheet and withdrawal of Rs. 2,00,000 had been duly produced by Atulbhai in support of his say that the amounts in question belonged to him. The search came to be carried out in September, 1998 and as such, the block assessment in the case of Bansi Finance should have been completed by 30-9-2000. Hence, the notice which has been issued u/s 158BD of the Act on 1-3-2001 is also bad on account of being patently late. It was further submitted that on the facts of the present case, there was no material for the AO to have recorded any satisfaction that the amount in question was the undisclosed income of the petitioner and as such, no satisfaction as required u/s 158BD of the Act could have been recorded by him. It was further submitted that notice u/s 158BD has also been issued to Atulbhai hence, it is apparent that the requisite satisfaction has not been recorded by the AO of the search party in as much as the said amount cannot be the undisclosed income of both the petitioner as well as Atulbhai. In conclusion, it was submitted that the impugned notice having been issued without satisfying the requirements of section 158BD of the Act is without jurisdiction and deserves to be quashed and set aside.

8. On the other hand, Mr. M.R. Bhatt, senior advocate, learned counsel for the respondents has supported the impugned notice. The attention of the court was drawn to the affidavit made by the respondent No. 2 wherein it is stated that an appraisal report was prepared by the concerned Dy. Director of IT and sent to Dy. CIT, Central Circle-2(1), Ahmedabad, who is the AO having jurisdiction over the case of the search party, that is, M/s Bansi Finance. He, on being satisfied about necessity of action u/s 158BD in the case of the petitioner, made a reference to ITO, Ward 3(4), Ahmedabad, vide his letter dt. 1-1-2001 and also sent relevant extracts of the appraisal report to him, as at the relevant time ITO, Ward 3(4), Ahmedabad was having jurisdiction over the case of the petitioner. It is further stated in the affidavit that the respondent No. 1 was satisfied as regards the requirement of section 158BD of the Act, and has made reference to

issue notice under the said section in the case of the petitioner. It is also stated that there is no time-limit in the IT Act to initiate action u/s 158BD of the Act and as such, the notice u/s 158BD of the Act dt. 1-3-2001 cannot be said to have been issued beyond the time-limit for completion of block assessment. The learned counsel, accordingly, submitted that the impugned notice having been issued in accordance with law, there is no warrant for any intervention by this court..

9. Since, the satisfaction note had not been produced along with the affidavit in reply, this court had called upon the learned counsel for the respondents to produce the same for the perusal of the court. Pursuant thereto, Mr. M.R. Bhatt has placed on record a communication dt. 1-1-2001 issued by the respondent No. 1 to the ITO, Ward3(4),Ahmedabad, whereby he has forwarded the papers stated therein to him for necessary action.

10. Considering the fact that the principal contention raised in the present petition is that the necessary satisfaction as envisaged under s.158BD of the Act has not been recorded by the AO of Banshi Finance, it may be germane to reproduce the relevant part of the aforesaid communication which reads thus :

2. An action u/s 132(1) has been carried out in the group of Banshi Finance on 22-9-1998. An action u/s 132(1) has also been conducted at the office of Jalaram canvassing, Banshi Finance located at 148/3 Kabbutarkhana, Kalupur, Ahmedabad.

3. During the course of search cash of Rs. 2 lacs has been seized from the custody of Shri Nandkishore M. Thakkar who is an employee of Chandubhai A. Thakkar. An abstract of relevant part of appraisal report is enclosed herewith.

4. Subsequently, statement of Shri Chandubhai A. Thakkar and Shri Atulbhai A. Thakkar has been recorded by the undersigned on 15-11-2000. Shri Chandubhai A. Thakkar has stated in the statement in reply to Q. 11 that he has received a phone from his nephew Atulkumar A. to send Rs. 2 lacs through Banshi Finance and so he send his employee to Banshi Finance with a cash of Rs. 2 lacs. The said cash is to be handed over to a person of Devendra Finance of Deesa. In reply to Q. 12 of the statement of Shri Atulbhai A. Thakkar it is stated that he has asked his uncle on phone to send Rs. 2 lacs through Banshi Finance.

5. Shri Chandrakant A. Thakkar is assessed by you. His PAN is SBJPT6715F. The following papers are submitted herewith for necessary action.

The communication thereafter refers to the documents submitted along with the same.

11. A perusal of the aforesaid communication shows that the AO of the person in respect of whom the search was made has recorded that during the course of search, Rs. 2 lakhs had been seized from the custody of Shri Nandkishore M. Thakkar who is an employee of the petitioner. Thereafter, the AO has referred to the statements of Shri Chandubhai A. Thakkar and Shri Atulbhai A. Thakkar

recorded on 15-11-2000 as well as replies given by the said persons in relation to certain queries. Thereafter, the AO has merely stated that petitioner is assessed by the ITO and has forwarded the papers referred thereto to him. In the entire communication, there is nothing to indicate any satisfaction having been recorded by the AO of the person with respect to whom the search was made to the effect that Rs. 2 lakhs seized during the course of the search proceedings was an undisclosed income of the petitioner.

12. Section 158BD of the Act mandates that the AO of the person with respect to whom search was made should be satisfied that any undisclosed income belongs to any person, other than the person with respect to whom the search was made u/s 132 of the Act and it is after recording such satisfaction that the books of account, other documents or assets seized or requisitioned are required to be handed over to the AO. In the present case, evidently no such satisfaction has been recorded by the AO of the person with respect to whom the search was made, prior to handing over the documents referred to in the aforesaid communication. In the circumstances, the basic condition precedent for invoking section 158BD of the Act qua the petitioner has not been satisfied. In the aforesaid premises, in the absence of the basic requirement for invoking section 158BD of the Act being satisfied, the respondent No. 2 lacked the jurisdiction to issue such notice and as such the impugned notice u/s 158BD of the Act cannot be sustained.

13. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned notice dt. 1-3-2001 issued u/s 158BD of the Act (Ext. H to the petition) is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.