

(2008) 07 GUJ CK 0079
In the Gujarat High Court
Case No : Tax Appeal No. 845 of 2007

Commissioner of Income Tax III

APPELLANT

Vs

R.K. Construction Co.

RESPONDENT

Date of Decision : 30-07-2008

Acts Referred:

Income Tax Act, 1961 — Section 131, 142(1), 143(2), 143(3), 145(3)

Citation : (2009) 221 CTR 415 : (2009) 313 ITR 65

Hon'ble Judges : K.A. Puj, J; Bankim N. Mehta, J

Bench : Division Bench

Advocate : K.M. Parikh, for the Appellant; S.N. Soparkar and Swati Soparkar, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The revenue has filed this Tax Appeal u/s 260A of the Income Tax Act, 1961 for A.Y. 2001/ 02 proposing to formulate the following substantial questions of law for the determination and consideration of this Court:

A. Whether the ITAT was right in law and on facts in deleting the addition of Rs. 2,37,61,817/- which was enhanced from Rs. 30,66,860/- by the CIT u/s 263 of the IT Act, 1961 on account of erroneous order passed by the AO ?

B. Whether the ITAT was right in law and on facts in holding that the order passed by the CIT is beyond the jurisdiction u/s 263 of the IT Act, 1961 and further holding that the order is also not correct on merits ?

C. Whether the ITAT was right in law and on facts in holding that the word "record" used in Section 263(1) of the Act would not mean the record as it stands at the time of examination by the Commissioner, but it means the record as it stands at the time the order in question was passed by the Income Tax Officer ?

D. Whether the ITAT was right in not taking note of the decision rendered by the

Apex Court in the case of CIT v. Shree Manjunathesware Packing Products and Camphor Works 231 ITR 53 as also not properly appreciated the decision of the Apex Court rendered in the case of Malabar Industrial Company Limited v. CIT 243 ITR 83 ?

2. The brief facts giving rise to the present Tax appeal are that the Commissioner of Income Tax (for short "CIT") issued show-cause notice to the assessee u/s 263 of the Income Tax Act, 1961 dated 26.06.2005, in respect of the order passed by the Assessing Officer u/s 143(3) for A.Y. 2001/02 dated 30.12.2003 stating therein that in the trading account, the assessee had reduced gross receipts of Rs. 30.08 Crores by Rs. 7.84 Crores claiming the same as sublet payment. As against this amount, the assessee had shown the income by way of sublet commission to the tune of Rs. 14.83 Lacs only which came to merely 1.88% and that while making the assessment, the Assessing Officer did not inquire into the genuineness of the sublet payment and the identity of sub-contractors. It was further stated in the said show-cause notice that for want of conducting the relevant inquiries in respect of sub-contractors, the order passed by the Assessing Officer was erroneous in so far as it was prejudicial to the interest of the revenue. The assessee was asked to furnish all relevant materials, more particularly, a note on the mode and proof of sub-let payments with date wise and party wise break up, identity of each of the sub-contractors and their Bank account extracts of the relevant period indicating subsequent debits as also proof of payment of labour charges with the precise extent of work of widening and extension of roads done in the year under consideration and in the preceding year and similar details of other expenses. The assessee gave detailed reply vide letter dated 01.08.2005 along with all necessary details. The learned CIT went on raising various queries and asked the assessee to produce the books of accounts etc. which were produced by the assessee before the Assessing Officer. The assessee submitted all details vide its letters dated 22.08.2005, 26.10.2005, 20.11.2005, 01.12.2005 and 07.12.2005. Subsequently, the learned CIT issued another show-cause notice dated 18.01.2006 asking the assessee to show-cause as to why sublet payments should not be disallowed and income should not be computed u/s 145(3) of the Act. The assessee again has given detailed reply to the second show-cause notice on 15.02.2006, 21.02.2006 and 22.02.2006. Ultimately, the learned CIT passed an order u/s 263 of the Act holding that order passed by the Assessing Officer was erroneous in so far as it was prejudicial to the interest of the revenue. The learned CIT has held that the payment made by the assessee to the sub-contractors cannot be considered as genuine and legitimate business expenditure and accordingly, after reducing the amount of Rs. 4,84,935/- received by the assessee as commission from 17 sub-contractors, out of the payment made by the assessee amounting to Rs. 2,42,46,752/-, the net amount of Rs. 2,37,61,817/- was disallowed and consequently, the total income determined in the assessment order dated 30.12.2003 was enhanced by an amount of Rs. 2,37,61,817/-.

3. Being aggrieved by the said order of the learned CIT, the assessee took up the

matter before the Income Tax Appellate Tribunal and the Tribunal, for the reasons stated in its order dated 17.11.2006, allowed the appeal of the assessee on both grounds, namely, on legality as well as on merits.

4. In the above background of the matter, the present appeal is filed before this Court.

5. Mr. K. M. Parikh, learned Standing Counsel appearing for the revenue has submitted that the Tribunal has wrongly arrived at the conclusion that the order passed by the learned CIT was beyond the jurisdiction u/s 263 of the Act. The Tribunal has also wrongly arrived at the conclusion that the order of the learned CIT was not correct on merits. He has further submitted that the Tribunal has given its finding contrary to the judgment of the Hon''ble Supreme Court in the case of CIT v. Shri Manjunathesware Packing Products & Camphor Works 231 ITR 53 The Tribunal has erroneously held that the word 'record' used in Section 263 of the Act would not mean the record as it stands at the time of examination by the Commissioner but it means the record as it stands at the time when the order in question was passed by the Assessing Officer.

6. Mr. Parikh has relied on the decision of Juggi Lal Kamalapat Vs. Commissioner of Income Tax, U.P., wherein it is held that tax authorities are entitled to go behind the legal form of the transaction and to find out the substance. They have not to go by colorable transaction. They are entitled to pierce the veil of corporate entity and look at the reality of the transaction having regard to the economic reality behind the legal facade.

7. He further relied on the decision of the Hon''ble Supreme Court in the case of Commissioner of Income Tax, West Bengal II Vs. Durga Prasad More, wherein it is held that the facts of life cannot be ignored. The tax authorities are entitled to look into the surrounding circumstances to find out the reality. They have not to go by a version that does not accord with human probabilities. They have not to accept make belief statements.

8. Mr. Parikh further relied on the decision of the Hon''ble Supreme Court in the case of Mc Dowell & Company Limited v. CTO 154 ITR 171 wherein it was held by the majority that tax planning may be legitimate provided that it is within the parameters of law. Colorable devices cannot be part of tax planning. This majority decision was approved in the subsequent decision in the case of Union of India v. Azadi Bachao Andolan reported in 263 ITR 706.

9. Based on the above decisions, Mr. Parikh has submitted that substantial questions of law as proposed by the revenue have arisen from the order of the Tribunal and hence, this Court should allow the appeal in favour of the revenue and against the assessee, after formulating the substantial questions of law as framed by the revenue.

10. Mr. S. N. Soparkar, learned Senior advocate appearing for the assessee, on the other hand, has submitted that the Tribunal has considered the entire facts

and circumstances of the case and after proper appreciation of evidence placed before the Tribunal, it has come to the right conclusion and this being finding of facts given by the Tribunal, no question of law, much less any substantial questions of law arises out of the order of the Tribunal. He has further submitted that the order passed by the Commissioner of Income Tax u/s 263 of the Act is absolutely illegal and it was rightly cancelled by the Tribunal. There was no error in the order of the Assessing Officer. He has further submitted that the basis of revising the assessment order by the Commissioner of Income Tax is law gross profit and that the Assessing Officer did not inquire about the genuineness of the sublet payment, labour charges, etc. As a matter of fact, the assessee has supplied all details with regard to gross profit, labour charges, sub-contractor payment as well as the copy of accounts to the Assessing Officer during the course of assessment proceedings. He has further submitted that the assessee has also supplied the relevant details consisting of copy of accounts, copy of Income Tax return, nature of the work done by each of the contractor etc. Each and every query raised by the Assessing Officer was duly satisfied. Despite this fact, the Commissioner has made further inquiry after issuance of notice u/s 263 and he went on asking for details after details. All these details have been placed before the Tribunal. On appreciation of these details and having considered the scope of revisional powers vested with the Commissioner u/s 263 of the Act, the Tribunal came to the conclusion that the information collected by the Commissioner after issuance of notice u/s 263 of the Act cannot be regarded to be the record as defined under Explanation (b) to Section 263 of the Act in as much as this explanation clearly states that the record shall include all records, relating to any proceedings under the same and available at the time of examination by the Commissioner. The examination of the record is an action which is to be carried out by the CIT before initiation of proceedings u/s 263 of the Income Tax Act. Mr. Soparkar has, therefore, submitted that the Tribunal has rightly come to the conclusion that the information conducted by the CIT during the course of inquiry cannot be part of the record which is available at the time of initiation of proceedings u/s 263 of the Act.

11. Mr. Soparkar has further submitted that the Tribunal has not merely rested its decision only on this legal aspect. The Tribunal has also gone into the merits of the matter and found that all the 17 sub-contractors were duly assessed to Income Tax. They have filed their Income Tax returns on the basis of the income computed u/s 44AD. The details of the work carried out by each of the sub-contractors were duly filed by the assessee. The statements of the contractors were duly recorded by the Assessing Officer. The payments to the sub-contractors were made through A/c. payee cheques. The assessee has filed the affidavits of the sub-contractors but no contrary evidence was brought on record which may prove that these contractors have not carried out the work that was assigned to them. Even the returns of these contractors were duly accepted by the department. No action either u/s 147 or u/s 263 was carried out against each of the sub-contractors. It has also not been alleged by the CIT that the tax has

not been deducted in respect of the payment made to sub-contractors. The Tribunal has also found that the allegations levied were general in nature stating that there was difference in the signatures in the returns as well as the statements recorded u/s 131 of the Act but ignoring the fact that how these are relevant for the assessee. The assessee has neither signed the return nor has given the statement. The other allegations are to this effect that the sub-contractors got the cheque received discounted from the Shroffs. The assessee was not concerned about the financial evidence of these parties. So far as the computation of income in accordance with the provisions of Section 44AD is concerned, the Tribunal did not find any illegality because the return has been filed by these sub-contractors in accordance with the provisions of law which was in existence during the year. For the work carried out by these contractors, the affidavits were duly filed. There was also no evidence on record that these contractors were related to the assessee or were associates or sister-concern of the assessee. The Tribunal has, therefore, come to the factual finding that the revenue has not brought any evidence on record showing that 17 sub-contractors were not genuine. He has, therefore, submitted that the order of the Tribunal cannot be said to be perverse or unreasonable on any count.

12. In support of his submissions, Mr. Soparkar has relied on the decision of this Court in the case of Commissioner of Income Tax Vs. Arvind Jewellers, wherein it is held that the finding of fact given by the Tribunal was that the assessee had produced relevant material and offered explanations in pursuance of the notices issued u/s 142(1) as well as Section 143(2) of the Act and after considering the material and explanations, the Income Tax Officer had come to a definite conclusion. Since the material was there on record and the said material was considered by the Income Tax Officer and a particular view was taken, the mere fact that different view can be taken should not be the basis for an action u/s 263. This Court, therefore, took the view that the order of revision was not justified.

13. Mr. Soparkar further relied on the decision of the Hon"ble Supreme Court in the case of M. Janardhana Rao Vs. Joint Commissioner of Income Tax, wherein it is held that in exercise of the powers u/s 260A, the findings of fact of the Appellate Tribunal cannot be disturbed. There is no scope for interference by the High Court with a finding recorded, when such finding can be treated to be a finding of fact.

14. Mr. Soparkar has further submitted that the Tribunal has rightly considered the decision of the Hon"ble Supreme Court in the case of Malabar Industrial Company Limited v. CIT 243 ITR 83 wherein it is held that every loss of revenue as a consequence of an order of the Assessing Officer, cannot be treated as prejudicial to the interests of revenue, for example, when an Income Tax Officer adopted one of the courses permissible in law and it has resulted in loss of revenue, or where two views are possible and the Income Tax Officer has taken one view with which the Commissioner does not agree, it cannot be treated as an

erroneous order prejudicial to the interest of revenue unless view taken by the Income Tax Officer is inconsistent in law. Based on this decision, he has submitted that by no stretch of imagination, it can be said that the view taken by the Assessing Officer can be said to be a view not sustainable at law. He has, therefore, submitted that the order passed by the Tribunal does not call for any interference by this Court and no substantial question of law arises out of its order.

15. We have heard learned Standing Counsel appearing for the revenue as well as learned Senior counsel appearing for the assessee. We have perused the orders passed by the Assessing Officer, u/s 143(3) of the Act and also the order passed by the Commissioner of Income Tax u/s 263 of the Act. We have also gone through the order passed by the Tribunal. We have also perused the records produced before the Commissioner as well as the Tribunal and detailed chart giving particulars of sub-contractors examined by the Assessing Officer as per the directions of CIT in revision proceedings and also summary of details relating to various sub-contractors. From the details of sub-contractors examined by the Assessing Officer as per the directions of CIT in revision proceedings, *inter alia*, include the name of these sub-contractors, their permanent account numbers, their permanent addresses, amount given to them, name of work entrusted to them, nature of such work and statements recorded by the Assessing Officer etc. These details reveal that during the course of examination u/s 131, no question was put to many of these sub-contractors as to the variation in their signatures. Similarly, no question was put to them for the reasons of discounting with the Shroff. It is the stand of the assessee right from the beginning that all these sub-contractors were mainly working for the assessee and they did not have any office set up and since they were working for the assessee, they have used assessee's address for correspondence, especially with the Government for timely communication. These persons are eligible u/s 44AD to file their return under presumptive scheme of taxation. All these persons were produced before the Assessing Officer in revision proceedings and no question was put to them though their statement on oath was recorded. All these persons have confirmed in revision proceedings that the money was not returned by them to any person and have used for their personal benefit. The payments were made to these persons by banking challans and tax was deducted at source in accordance with law. The assessee has also given complete details with respect to labour expenses called for in assessment proceedings. These details were duly verified by the Assessing Officer with the books and records. No adverse observation was made by the Assessing Officer and hence, no addition was made in the regular assessment. The Assessing Officer has also randomly selected two labourers and examined them and their statements were recorded u/s 131 of the Act. Since all necessary details were furnished by the Assessing Officer, there was no reason for the Commissioner of Income Tax to invoke the revisional jurisdiction u/s 263 of the Act. The Commissioner has not stopped merely by issuance of notice u/s 263. Once compliance is made, he went on

issuing notice after notice and certain adverse inferences were drawn by him from the details collected by him during the revisional proceedings. Those details were thoroughly checked and examined by the Tribunal and arrived at a factual finding that there was no illegality committed by the assessee in entrusting the work to sub-contractors nor there was any illegality in making all due payments to them. The Tribunal has also given specific finding to the effect that there was no evidence on record that these contractors were related to the assessee or were associates or sister concern of the assessee. The Tribunal has also given finding that the revenue has not discharged the onus that the payment to sub-contractors were not genuine. Thus the Tribunal has come to the conclusion that no disallowances can be made merely on the basis of suspicion, howsoever strong may it be, and the suspicion cannot take the place of actuality.

16. As far as law is concerned, the Assessing Officer has taken a particular view on the basis of evidence produced before him. On the basis of the said material and materials which were collected by the CIT in revisional proceedings, the Commissioner has taken a different view. However, in the revisional proceedings u/s 263, it is not open for the Commissioner to take such a different view in view of the decisions of the Hon"ble Supreme Court in the case of Malabar Industrial Company Limited v. CIT (Supra). There is nothing on record to suggest that the view taken by the Assessing Officer is unsustainable at law. This Court has also taken the same view in case of CIT v. Arvind Jewellers whereby the order passed by the Commissioner u/s 263 of the Act was quashed and set aside.

17. Before parting, we make it clear that dismissal of this appeal at the very threshold on the ground that no substantial questions of law arise from the order of the Tribunal, does not mean that we have approved the Tribunal's interpretation of the word "record" as appeared in Section 263(1) of the Act. We deem it just and proper not to express any opinion as the Tribunal even otherwise, held on merits that the Commissioner's order u/s 263 of the Act is liable to be quashed and set aside.

18. Having considered the entire facts and circumstances of the case and having given our thoughtful consideration to the settled legal position, we are of the view that no substantial questions of law arise out of the order of the Tribunal and hence, the appeal filed by the revenue deserves to be dismissed. It is accordingly dismissed.