(2012) 08 GUJ CK 0025

In the Gujarat High Court

Case No : Special Civil Application No. 1 of 2005

Gujarat Fluorochemicals Ltd. APPELLANT

Vs

Assistant Commissioner of Income Tax RESPONDENT

Date of Decision : 27-08-2012

Acts Referred:
Income Tax Act, 1961 — Section 143(3), 147, 80HHC

Citation : (2013) 353 ITR 398

Hon'ble Judges : Harsha Devani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : B.S. Soparkar with S.N. Soparkar, for the Appellant; K.M. Parikh, for the Respondent

Judgement

Akil Kureshi, J.—The petitioner has challenged the notice dated August 3, 2004, issued for the purpose of reopening assessment for the assessment year 2000-01. The petition arises in the following factual background: The petitioner is a company registered under the Companies Act and is regularly assessed to tax. For the assessment year 2000-01, the petitioner filed its original return of income on November 29, 2000, declaring a total income of Rs. 23,75,74,840. The return was selected for scrutiny. The Assessing Officer framed assessment u/s 143(3) of the Act computing the total income of the assessee at Rs. 26,01,66,900. The petitioner carried the assessment order in appeal. With respect to such appeal and outcome thereof we are not directly concerned in this proceeding.

2. The Assessing Officer issued the impugned notice on August 3, 2004, seeking to reopen the assessment of the petitioner for the year 2000-01. At the request of the petitioner, reasons for reopening were supplied which read as under:

Reasons for reopening are as under:

(1) The amount of Rs. 3,90,700 on account of penalty for non-fulfilment of export obligation to be disallowed in view of the decision of the Delhi High Court

in the case of The Commissioner of Income Tax, Central-II Vs. Orissa Cement Ltd., .

(2) The "A" has income of insurance claim of Rs. 14,72,186 during the year under consideration but while working the deduction u/s 80HHC, 90 per cent. of the insurance claim has not been reduced from the profit of the business.

(3) The "A" has invested Rs. 10 crores in the units of Prudential ICICI Growth Plan and earned 4.27 crores as dividend income which is exempted. On a perusal of the records it has been seen that the units has been purchased on 16th March and sold on 28th March and incurring a huge loss of Rs. 3.51 crores. This transaction entered by "A" is beyond the ambit of the tax planning and indeed falls under the category of colourable devices. The decision of McDowells ratio is squarely applicable here.

3. The petitioner under communication dated December 24, 2004, raised detailed objections to such reopening of assessment. Primarily the contention of the assessee was that all the three grounds on which the Assessing Officer desired to reopen the assessment were examined in the original scrutiny assessment and that, therefore, reopening on such basis was not permissible. It was also contended that there was no failure on the part of the assessee to make a return or disclose truly and fully all material facts necessary for assessment.

4. Such objections were rejected by the Assessing Officer by an order dated December 28, 2004. At that stage, the petitioner filed the present petition challenging the notice for reopening of assessment itself.

5. The learned senior counsel, Shri Soparkar, submitted that the reasons were not recorded by the Assessing Officer before issuance of notice for reopening. He submitted that recording of reason being the sine qua non for assuming jurisdiction for reopening the assessment, issuance of notice without recording such reasons would be wholly impermissible. Our attention was drawn to an order dated February 7, 2005, passed in the present petition, wherein the court had an occasion to peruse the original files in the context of this controversy.

5. (1) Counsel further submitted that the Assessing Officer held no independent belief that income chargeable to tax had escaped assessment. He submitted that the Assessing Officer was under compulsion by the audit party to issue notice for reopening of assessment though she herself held a firm belief that no income had escaped assessment. In this context, our attention was drawn to the averments made in the petition, particularly, in paras. 2.8 and 3.3 thereof. Counsel also drew our attention to the reply statement of the respondent in which while replying to such paragraphs, according to him such averments were not specifically denied.

5.(2) Counsel relied on the decision of the Division Bench in the case of Adani Exports Vs. Deputy Commissioner of Income Tax, , wherein it was held that the opinion of the audit party in regard to the income escaping assessment cannot be the basis of the Assessing Officer''s firm opinion that income chargeable to tax had escaped assessment. In every case, the Assessing Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note.

6. On the other hand, learned counsel, Shri Parikh, for the Department opposed the petition contending that the Assessing Officer had recorded proper reasons before issuing notice. Such notice was issued within a period of four years from the end of the relevant assessment year. He further submitted that the Assessing Officer being satisfied that income chargeable to tax had escaped assessment, had issued such notice. Even if certain aspects were brought to her notice by the audit party, that by itself would not vitiate the notice to reopen the assessment.

7. Having thus heard learned counsel for the parties and having perused the documents on record, we may examine the two principal contentions raised by the counsel for the petitioner.

8. Firstly, we may advert to the question of recording of reasons before issuing notice. The learned counsel for the Revenue has made available the original files pertaining to the reopening of the assessment. Such file starts with a document recording reasons by the then Assessing Officer. She has placed the date of August 3, 2004, on such document. Right next to such document, we find original of the notice for reopening the assessment which is also dated August 3, 2004. In such notice, it is stated that "this notice is being issued after obtaining the necessary satisfaction of the Commissioner of income tax (1), Baroda, the Central Board of Direct Taxes".

9. We are intrigued to notice that such satisfaction whether required or not is stated to have been obtained before issuing the notice. Notice was issued on August 3, 2004, for which the reasons were also allegedly recorded on August 3, 2004. Shri Parikh produced before us a copy of communication dated August 2, 2004, issued by the Commissioner of income tax, Baroda, granting approval for appropriate remedial action in the case of the petitioner in which he had recorded that he had approved the action u/s 147 of the Act as the most appropriate remedial action. This letter does not obviously bear any reference to the reasons recorded by the Assessing Officer. We fail to see how on the basis of the reasons recorded on August 3, 2004, the Assessing Officer had obtained the approval of the Commissioner for issuing notice for reopening on August 2, 2004. We have serious doubts whether as stated before us, such reasons were recorded before issuing notice.

10. Be that as it may, it is the second contention of the petitioner which we find even more damaging to the Revenue. The petitioner has contended in the petition firmly that the Assessing Officer was not inclined to reopen the assessment holding a belief that grounds pointed out by the audit party were not sufficient. In the petition itself, it was stated as under:

2.8 It has come to the knowledge of the petitioner that the respondent has issued the impugned notice on the basis of remarks of the Accountant General (Audit). It has further come to the knowledge of the petitioner that the respondent has, as a matter of fact, not accepted the objections raised by the audit party and immediately, on receipt of the audit objections, raised counter-objections to the said audit remarks and informed the audit party that the view taken by her is correct in law as well as on facts and the said audit remarks are required to be dropped.

3.3 The petitioner submits that it has come to the knowledge of the petitioner that audit party has taken some objections and instructed the Assessing Officer to reopen the completed assessment and, therefore, the impugned notice came to be issued. It has further come to the knowledge of the petitioner that the respondent has, as a matter of fact, not accepted the objections taken by the audit party and asked them to withdraw the same. In other words, when the impugned notice was issued the respondent did not hold any belief that the income of the petitioner has escaped assessment for any reason. Legally it is well settled that in case of reopening ''the reason to believe'' must be that of an Assessing Officer and it cannot be substituted with anyone else''s belief, be it the superior authority of the Assessing Officer.

11. The Assessing Officer in her affidavit dated January 23, 2005, in reply to such averments stated as under:

E With reference to para. 2.8 it is submitted that the allegation in this para. is totally unfounded and baseless. At this juncture the deponent wants to place on record its apprehension about the possible source of the so-called information claimed to be with the assessee Inter Departmental correspondences, if any, are strictly official and does not have any bearing on the proceedings under consideration in the current case as on date. In this regard the deponent is surprised of being aware of the fact that the correspondence between the Department and Accountant General which are not privy to the public are being stated as public knowledge before the court. Further, in the reasons recorded by the deponent there is no such reference and the deponent after application of her mind recorded the reasons and issued the notice as per law.

H. With reference to para. 3.3 it is submitted that this issue has been adequately dealt with in reply to para. 2.7

12. The pointed averments of the petitioner to the effect that the Assessing Officer did not accept the objections raised by the audit party and in fact through further deliberation stuck to her position that she was correct in law as well as on the facts and that therefore, the audit remarks were required to be dropped, were not denied by her in her said affidavit. In the affidavit what was vaguely stated was that the Department was apprehensive about the source of information on the basis of which such averments were made. Inter-departmental correspondence was strictly confidential. She was surprised that the petitioner was aware about any such document. The petitioner''s further

elaboration of this stand taken in para. 3.3 of the petition met with a brief answer in the reply, namely, that such averments were adequately dealt with in the reply to para. 2.7 (perhaps referring to para. 2.8).

13. Not willing to decide such an issue by default and in order to give sufficient opportunity to the Revenue to contradict the petitioner''s factual averments on the basis of the documents, we had previously requested learned counsel for the Revenue to make available the original files for the perusal of the court. After couple of opportunities since such files were not produced we had on July 16, 2012, passed the following order:

1. We had previously requested the learned counsel for the Revenue orally to make available the original files of the reassessment proceedings for our perusal. This was so on account of two allegations of the petitioner which remained substantially uncontroverted. The petitioner has been contending that the reasons for reopening of the assessment were not recorded by the Assessing Officer before issuance of notice. More importantly, the Assessing Officer issued notice only on the insistence of the audit party.

2. Previously, we had granted adjournments for this purpose. As a last chance, S.O. to July 30, 2012. If on such date, files are not produced, we may proceed to hear the matter on the basis of the documents on, record.

14. Even thereafter, this petition was adjourned on a couple of occasions. Today the learned counsel Shri Parikh, for the Revenue made a candid statement that such file containing exchanges between the Assessing Officer and the audit party was not traceable. We were, therefore, left with no alternative but to proceed on the basis of the averments made by the two sides on oath.

15. On the basis of such pleadings we have not the slightest hesitation in coming to the conclusion that the petitioner''s firm assertion that the Assessing Officer did not agree with the audit objection and stuck to her position that she was right in law as well as in the facts while framing the original assessment and that, therefore, the audit objection should be dropped, has not been denied by the Assessing Officer though she herself filed an affidavit before this court in response to such averments made in the petition. All that she had to state was that she was surprised that the petitioner could claim access to inter-departmental correspondence which was strictly confidential in nature. This is hardly what the court would accept when specific factual averment has been made by the petitioner, the answer to which would go to the very root of the authority of the Assessing Officer to exercise jurisdiction to reopen the assessment. It is by now well settled that the Assessing Officer can form an independent opinion on an issue which may have been brought to his/her notice by the audit party and seek to reopen the assessment, provided it is the Assessing Officer''s independent belief that income chargeable to tax has escaped assessment. Reference in this respect may be made to the decision of the Supreme Court in the case of Commissioner of Income Tax Vs. P.V.S. Beedies

Pvt. Ltd., . However, it is equally well settled by several decisions particularly by a Division Bench of this court in the case of Adani Exports Vs. Deputy Commissioner of Income Tax, that though the audit objection may serve as information, the basis of which the income tax Officer can act, the ultimate action must depend directly and solely on the formation of belief by the income tax Officer on his own where such information passed on to him by the audit that income has escaped assessment. In the said decision, the court had referred to and relied upon the decision of the Supreme Court in the case of Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, . The court observed (page 230 of 240 ITR):

In the present case, by scrupulously analysing the audit objection in great detail, the Assessing Officer has demonstrably shown to have held the belief prior to the issuance of notice as well as after the issuance of notice that the original assessment was not erroneous and so far as he was concerned, he did not believe at any time that income has escaped assessment on account of erroneous computation of benefit u/s 80HHC. He has been consistent in his submission of his report to the superior officers. The mere fact that as a subordinate officer he added the suggestion that if his view is not accepted, remedial actions may be taken cannot be said to be belief held by him. He has no authority to surrender or abdicate his function to his superiors, nor the superiors can arrogate to themselves such authority.

16. It was in this context extremely important for us to know whether recording of the reasons and consequent issuance of notice (even if it was in that sequence in the present case) was on the basis of an independent opinion of the Assessing Officer on the question of law and facts which may have been brought to her notice by the audit party or whether she eventually held a belief that such grounds were not valid and that she was under compulsion to reopen the assessment solely under insistence of the audit party. The Revenue not having either denied such clear averments of the petitioner made in the petition on oath nor having produced the original files to demonstrate the independent formation of opinion by the Assessing Officer, though sufficient time was made available, issue stands firmly concluded. Under the circumstances notice for reopening cannot be sustained. The same is quashed. The petition is disposed of. Rule made absolute. No order as to costs.