(2014) 07 GUJ CK 0126

In the Gujarat High Court

Case No : Special Civil Application No. 4699 of 2014

Gujarat Sidhee Cement Ltd. APPELLANT

Vs

Assistant Commissioner of Income Tax RESPONDENT

Date of Decision : 22-07-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 220(6)

Citation : (2014) 226 TAXMAN 177

Hon'ble Judges : Mukesh R. Shah, J;Kaushal Jayendra Thaker, J

Bench : Division Bench

Advocate : S.N. Soparkar, Sr. Advocate, Kalpanak Raval and Dharmishta Raval, Advocate for the Appellant; Pranav G. Desai, Advocate for the Respondent

Judgement

Mukesh R. Shah, J.—RULE. Shri Pranav G. Desai, learned advocate waives service of notice of Rule on behalf of the respondents. In the facts and circumstances of the case and with the consent of learned advocates appearing on behalf of respective parties, present petition is taken up for final hearing today. By way of this petition under Article 226 of the Constitution of India, the petitioner assessee has prayed for an appropriate writ, direction, order quashing and setting aside the order dated 27.03.2014 passed by respondent No. 1 at Annexure A to the petition as well as the order dated 03.03.2014 passed by the respondent No. 2.

2. Facts leading to the present special civil application in nut-shell are as under:

2.1 That being aggrieved and dissatisfied with the order of assessment passed by the AO for Assessment Year 2010-11 dated 20.03.2013 with respect to the tax liability of Rs. 12,19,04,650/-, the petitioner assessee had preferred appeal before the Commissioner (Appeals), which is pending final disposal by the learned CIT(A). That as the petitioner assessee was before the Commissioner (Appeals) by way of appeal, the petitioner assessee submitted the application before the AO under Section 220(6) of the Income-tax Act, 1961 (hereinafter referred to as "Act") and requested not to treat the assessee in default with respect to the amount/demand of tax, interest etc. pursuant to the assessment order, during the pendency of appeal before the learned CIT(A). That the AO passed the order dated 26.11.2013 and directed the petitioner assessee to make the payment of Rs. 2.25 crores on or before 31.01.2014 in three installments as under:

It appears that in the aforesaid order dated 26.11.2013, the AO also observed that the assessee shall cooperate in early disposal of the appeal. The AO also passed an order that order under Section 220(6) of the Act i.e. not to treat the assessee in default will be reviewed again in the first week of February 2014 by the concerned Jurisdictional Commissioner. It is not in dispute that the petitioner deposited the entire amount of Rs. 2.25 crores as directed by the AO in its order dated 26.11.2013. It appears that thereafter and in view of the observation made by the AO in its order dated 26.11.2013, the matter came to be reviewed by the Commissioner of Income-tax-III, Rajkot. The concerned Jurisdictional Commissioner on 21.01.2014 directed the assessee to pay further sum of Rs. 2 crores by two equal installments of Rs. l crore each by 28.02.2014 and 20.03.2014 respectively. It is not in dispute that aforesaid amount of Rs. 2 crores has been deposited by the assessee within the stipulated time granted and/or extended by the Jurisdictional Commissioner. However, it appears that in the meantime in the appeal filed by the assessee, CIT(A) directed the AO to submit the comments which were not submitted and therefore, the hearing of the appeal was delayed and therefore, on behalf of the petitioner assessee, a request was made vide communication dated 20.03.2014 requesting to send/submit the comments as directed by the learned CIT(A). That thereafter despite the fact that the petitioner assessee deposited the first installment of Rs. 1 crore as directed by the Commissioner and the second installment of Rs. 1 crore was to be deposited on or before 31.03.2014, by impugned communication dated 27.03.2014, the AO has informed the petitioner assessee that in view of the directions of the learned Commissioner of Income-tax-III, Rajkot, the stay granted earlier has been withdrawn, and the petitioner assessee was called upon to pay the balance demand by 20.03.2014 failing which coercive recovery measures would be taken to recover the said demand.

2.2 Feeling aggrieved and dissatisfied with the impugned communication/order dated 27.03.2014 passed by the respondent No. 1 - AO, the petitioner assessee has preferred the present special civil application.

3. Shri S.N. Soparkar, learned Counsel appearing with Mrs. Kalpana Raval and Ms. Dharmishta Raval, learned advocates appearing on behalf of the petitioner assessee has vehemently submitted that the impugned communication dated 27.03.2014 by the AO is absolutely illegal and most arbitrary. It is submitted that as such the petitioner did deposit the amount which was required to be deposited by the petitioner pursuant to the directions issued by the Commissioner dated 21.02.2014. It is submitted that therefore the AO ought not to have and could

not have issued the communication dated 27.03.2014 threatening the petitioner assessee to take coercive recovery measures with respect to the balance demand and as such ought not to have directed the petitioner assessee to pay the balance demand by 20.03.2014 (next day of the said communication). It is further submitted that as such there was no non-cooperation on the part of the assessee in not proceeding further with the appeal before the learned CIT(A). It is submitted that as such it was the AO who did not submit the comments to the learned CIT(A) and therefore, the hearing of the appeal by the learned CIT(A) was delayed. It is further submitted that in the communication dated 27.03.2014 the AO has issued the said direction on the basis of the instructions from the learned Commissioner of Income-tax-III, Rajkot that though the representative of the assessee was telephonically requested to attend the office for review but he has not attended the office and therefore, the earlier stay granted is withdrawn and the coercive action is to be taken immediately. It is submitted that as such first of all there was no reason for the Commissioner to review its own earlier order by which the petitioner assessee was directed to deposit a further sum of Rs. 2 crores in two equal instalments to be deposited on or before 31.03.2014. It is submitted that even otherwise if at all for a valid reason the Commissioner was of the opinion/view that his earlier order granting two installments of Rs. 1 crore each and on such deposit the assessee not to be treated in default and/or to grant the stay during the pendency of the appeal was to be reviewed, in that case, he was required to issue notice calling upon the assessee to show cause why its earlier order may not be reviewed. It is submitted that however there cannot be review by telephonic instructions and/or notice.

3.1 It is further submitted by Shri Soparkar, learned Counsel appearing on behalf of the petitioner that as such because of the non-compliance of the directions issued by the learned CIT(A) of not submitting the comments by the concerned AO at the relevant time and thereafter by not submitting the rejoinder to the reply given by the petitioner to the comments furnished by the AO, the hearing of the appeal has been delayed. It is submitted that as such the delay in not disposing of the appeal by the learned CIT(A) cannot be attributable to the petitioner assessee at all. Therefore, it is requested to quash and set aside the impugned communication dated 27.03.2014.

3.2 It is further submitted that as such the petitioner is required to challenge the communication dated 03.03.2014 because of the ambiguity in language used by the Commissioner, on one hand the petitioner assessee was directed to pay Rs. 2 crores before the end of the financial year as per the discussion on 21.02.2014 and on the other hand the petitioner assessee is threatened that coercive measures shall be taken.

3.3 Shri Soparkar, learned Counsel appearing on behalf of the petitioner has stated at the Bar that subject to cooperation by the AO, the petitioner assessee is ready and willing and was ready and willing to cooperate learned CIT(A) in early disposal of the appeal preferred by them.

Making above submissions, it is requested to allow the present special civil application and quash and set aside the impugned communications more particularly the communication at Annexure-A dated 27.03.2014.

4. In response to the notice issued by this Court, Shri Pranav G. Desai, learned advocate has appeared on behalf of the respondent. An affidavit in reply is filed on behalf of respondent Nos. 1 and 2. It is submitted that so far as the impugned order/communication dated 27.03.2014 is concerned, it was on the basis of the instructions given by the concerned Jurisdictional Commissioner - Commissioner of Income-tax-III, Rajkot. An affidavit is filed by the learned Commissioner of Income-tax-III, Rajkot. The sum and substance of the affidavit filed by the learned Commissioner of Income-tax-III, Rajkot in support of his instructions to the AO on the basis of which the impugned communication has been issued by the AO dated 27.03.2014 is that there was a pressure from the higher authorities to recover the maximum amount of tax prior to the relevant financial year i.e. 31.03.2014. It is submitted that in the present case as the amount of demand involved was more than Rs. 12 crores and the petitioner assessee deposited only a sum of Rs. 5.25 crores and therefore, in the larger interest of the Revenue, the direction was issued to the AO, on the basis of which the AO send the communication dated 27.03.2014.

4.1 Now, so far as the case on behalf of the petitioner assessee that the AO had not send the comments to the learned CIT(A) and/or rejoinder to the reply submitted by the petitioner assessee to the comment submitted by the AO, he has stated at the Bar that if at all there is any non-compliance of the direction issued by the learned CIT(A) to submit the comments and/or the reply of the comments submitted by the assessee, the same shall be supplied within a period of 15 days from today.

Making above submissions it is requested to pass appropriate order and as such pardon the concerned officers by submitting that as such there was no any other malafide intention on the part of the concerned respondents.

5. Heard learned advocate appearing on behalf of respective parties at length.

At the outset it is required to be noted that against the assessment order passed by the AO the petitioner assessee is before the learned CIT(A) and the appeal is pending before the learned CIT(A) for its final disposal. It is also not in dispute that during the pendency of the appeal, the petitioner assessee submitted the application under section 220(6) of the Act requesting not to treat the petitioner assessee in default with respect to the demand raised by the AO pursuant to the assessment order. That the AO passed an order dated 26.11.2013 directing the petitioner assessee to make the payment of Rs. 3.25 crores by 31.01.2014 in three instalments dated 30.11.2013, 31.12.2013 and 31.01.2014 and passed an order that on such deposit the petitioner assessee shall not be treated in default. It appears that while passing an order dated 26.11.2013 the AO did observe that the said order will be reviewed again in the first week of February 2014 by the learned Commissioner of Income-tax-Hi, Rajkot. We do not appreciate such direction and/or observation by the AO while passing the order under Section 220(6) of the Act to the extent that the said order will be reviewed by the learned Commissioner of Income-tax-III, Rajkot. Be that as it may, thereafter the learned Commissioner of Income-tax-III, Rajkot reviewed the matter and instructed/directed the petitioner assessee to deposit a further sum of Rs. 2 crores by the end of financial year i.e. on or before 31.03.2014 to be paid in two instalments. It is not in dispute that as such the petitioner had deposited the further sum of Rs. 2 crores as directed by the learned Commissioner of Income-tax-III, Rajkot within the stipulated time/extended period granted by the learned Commissioner of Income-tax-III, Rajkot. It appears that thereafter due to some pressure from the higher authorities (so stated in the affidavit in reply filed by the concerned Commissioner of Income-tax-III, Rajkot), the learned Commissioner decided to review its earlier order of directing the petitioner to deposit a further sum of Rs. 2 crores and on that the petitioner to continue the stay and/or to treat the petitioner assessee not in default and called upon the assessee''s representative telephonically and requested the learned AR to attend the office for review. It appears that the learned AR did not attend the office of the Commissioner. Therefore, despite the fact that the petitioner assessee did deposit the entire amount of Rs. 2 crores as directed by the Commissioner, the Commissioner issued the direction to the AO by observing as under:

"It is seen from the petition dated 20.03.2014 that the assessee intends to pay Rs. one crore before the end of the financial year. How, the Janmesh, A.R. Was telephonically requested to attend the office for review, but he has not attended the office. Therefore, the earlier stay granted is withdrawn and coercive action is to be taken immediately and report the action taken and progress made on day to day basis."

On the basis of the aforesaid communication/instructions of the Commissioner, the AO has issued the impugned communications/order dated 27.03.2014. It is stated in the reply submitted by the Commissioner in support of his above instructions to the AO that in view of the pressure from the higher authorities to make the maximum recovery of tax on or before 31.03.2014 and therefore, he issued directions. We do not appreciate and approve such a stand and the procedure adopted by the Commissioner. The moment it is found that an assessee has complied with directions issued either by the AO and/or the concerned Jurisdictional Commissioner imposed while granting the stay and/or passing the order under Section 220(6) of the Act while not treating the assessee in default, there cannot be any further steps and/or coercive action to recover the amount of demand on the ground of pressure from the higher authorities to recover maximum amount of tax on or before 31.03.2014. Under the guise of recovery of maximum amount of tax on or before 31.03.2014, there may not be any coercive action to recover the amount of tax which otherwise is not permissible under the law. Under the circumstances, the reason given by the

Commissioner of Income-tax-III, Rajkot to issue the instructions to the AO to withdraw the stay and initiate the recovery proceedings for recovery of the balance amount of demand on the basis of which the impugned communication dated 27.03.2014 is issued by the AO, cannot be sustained.

5.1 Now, so far as the challenge to the communication dated 03.03.2014 is concerned, it appears that there is some misconception on the part of the petitioner. From the impugned communication dated 03.03.2014, it cannot be said that the Commissioner of Income-tax-III, Rajkot has observed that despite the payment of Rs. 2 crores before the end of the financial year as discussed with the AR on 21.02.2014, coercive step shall be taken to recover the balance demand. What is meant seems to be that on non-payment of the amount of Rs. 2 crores before the end of the financial year as discussed with the AR on 21.02.2014 immediately, the same may result in coercive measures. Under the circumstances, as such the challenge to the communication dated 03.03.2014 is not warranted and/or justified.

In view of the above and for the reasons stated above, present petition succeeds. The impugned communication/order dated 27.03.2014 of the AO is hereby quashed and set aside. It is reported that the appeal before the learned CIT(A) is not being proceeded further as the AO has not responded to and/or has not send the comments to the reply submitted by the assessee to the comments submitted by the AO. Under the circumstances, the AO to submit the comments to the reply submitted by the petitioner assessee to the comments submitted by the AO as demanded by the learned CIT(A) within a period of 15 days from today and thereafter the learned CIT(A) to finally decide and dispose of the appeal preferred by the assessee thereafter within a period of six weeks and in any case on or before 15.09.2014.

5.2 In view of the above and for the reasons stated above, the impugned communication/order dated 27.03.2014 of the AO is hereby quashed and set aside and the learned AO is directed to act as stated hereinabove and thereafter the learned CIT(A) to decide and dispose of the appeal preferred by the assessee against the assessment order for AY 2010-11 preferably on or before 15.09.2014 as stated hereinabove. All concerned are directed to cooperate the learned CIT(A) in early disposal of the appeal within stipulated time stated hereinabove. Rule is made absolute to the aforesaid extent. In the facts and circumstances of the case, there shall be no order as to costs.