**(2011) 05 GUJ CK 0160**

**In the Gujarat High Court**

**Case No :** Special Civil Application No. 10657 of 2009 (A.Y. 2002-03)

Hotel Oasis (Surat) (P) Ltd. APPELLANT

Vs

Dy. CIT RESPONDENT

**Date of Decision :** 05-05-2011

**Acts Referred:**

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 142(1), 143(2), 143(3), 147, 148

**Citation :** (2011) 05 GUJ CK 0160

**Hon'ble Judges :** R.M. Chhaya, J;Harsha Devani, J

**Bench :** Division Bench

**Advocate :** R.K. Patel, for the Appellant; M.R. Bhatt and Mrs. Munna M. Bhatt, for the Respondent

**Final Decision :** Allowed

# Judgement

Ms. Harsha Devani, J.—Rule. Mrs. Munna M. Bhatt learned senior standing counsel waives notice of service of rule on behalf of the respondent.

2. Considering the controversy involved in the present case which lies in a narrow compass and with the consent of the learned advocates for the parties, the matter is taken up for hearing today.

3. By the petition under Art. 226 of the Constitution of India, the petitioner has challenged the notice dt. 24-3-2009 issued by the respondent u/s 148 of the IT Act, 1961 (the Act), the preliminary order dt. 22-9-2009 and the further notice dt. 22-9-2009.

4. The petitioner, a private limited company, is running a liquor shop and lodging hotel. The return of income filed by the petitioner for the assessment year 2003-04 was processed by the Department by issuance of notice u/s 143(2) of the Act. After considering various submissions of the petitioner company and its representative chartered accountants, details of business activity, bank account, creditors, sales and purchases, closing stock, detail of expenses, etc. were

 

furnished and the documents were test checked by the assessing officer. Ultimately, the assessing officer framed assessment u/s 143(3) of the Act on 30-11-2004 after making ad hoc disallowance of Rs. 50,000 on account of expense claimed by the petitioner.

5. Subsequently, the CIT initiated revision proceedings u/s 263 of the Act for disallowing expenditure debited to advertisement expenditure in respect of gift articles given to all customers so as to induce them for being guests repeatedly at the petitioners hotel/liquor shop. The CIT passed order u/s 263 of the Act on 22-3-2007 directing the assessing officer to reframe the assessment de novo.

6. The petitioner went in appeal before the Tribunal against the order of the CIT u/s 263 of the Act, which came to be allowed by an order dt. 14-9-2007, whereby the order of the CIT came to be set aside.

7. At the relevant time when the petition was filed, the petitioner was not aware as to whether any appeal had been preferred against the said order of the Tribunal. However, the learned advocate for the petitioner has thereafter placed on record an order dt. 26-10-2009 passed by this Court in Tax Appeal No. 813 of 2009, whereby the appeal preferred by the Revenue against the aforesaid order dt. 14-9-2007 passed by the Tribunal, has been dismissed.

8. Thereafter, by the impugned notice dt. 24-3-2009, the assessment of petitioner for the assessment year 2002-03 is sought to be reopened. Upon receipt of the said notice, the petitioner requested the respondent to supply copy of the reasons recorded for initiating reassessment proceedings beyond a period of four years from the end of the relevant assessment year. Upon the reason being supplied to the petitioner, the petitioner submitted detailed objections dt. 28-4-2009 to the respondent with a request to drop the proceedings. However the assessing officer continued with the assessment proceedings by issuing notice u/s 143(2) of the Act on 23-6-2009. By a letter dated 21-7-2009, the petitioner requested the assessing officer to pass appropriate order on objections filed by it. By the impugned order dt. 22-9-2009, the respondent assessing officer rejected the objections filed by the petitioner. Being aggrieved the petitioner has filed the present petition challenging the impugned notice as well as the order passed by the assessing officer rejecting the objections filed by the petitioner as well as the subsequent notice issued u/s 143(2) of the Act.

9. Mr. R.K. Patel, learned advocate appearing on behalf of the petitioner has submitted that in the present case, the assessment for asst. yr. 2002-03 is sought to be reopened by issuance of a notice dt. 24-3-2009 u/s 148 of the Act, which is clearly beyond a period of four years from the end of the relevant assessment year. It is submitted that in the circumstances, the proviso to section 147 of the Act would be attracted and as such, unless there is any omission or failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment, the assumption of jurisdiction on the part of the assessing officer is invalid.

 

10. Referring to the reasons recorded, it was submitted that the first reason for reopening the assessment is in respect of the advertisement expenses incurred by the petitioner which was subject-matter of revision u/s 263 of the Act by the CIT and was set aside by the Tribunal and that the said order of the Tribunal had been confirmed by the High Court. It was further submitted that there is total absence of any genuine reason to believe on the part of the assessing officer, since the belief of the assessing officer is based on the fact that in the last year, the gift articles expense was nil, which is factually incorrect. Attention was invited to the notice u/s 142(1) of the Act issued in respect of the assessment year 2001-02, to point out that the petitioner at the relevant time had submitted details of the advertisement expenses.

11. It was further submitted that the other ground on which the assessment is sought to be reopened is on the ground that certain additions were made in assessment year 2006-07 disallowing the repair and maintenance expenses of Rs. 10,87,465 and disallowing Rs. 21,40,512 u/s 40A(3) of the Act. It was submitted that the fact that 50 per cent of the amount claimed was disallowed in assessment year 2006-07 has no connection with the present year and that in any case, as is evident from the reasons recorded, the assessing officer is not sure that any income has escaped assessment and that, he is only of the opinion that the same is required to be considered in assessment year 2002-03 after due investigation. It is submitted that the reasons reflect that the assessing officer wants to carry out roving and fishing inquiry without an iota of evidence indicating valid reasons recorded for assuming jurisdiction u/s 147 of the Act. It was, accordingly, submitted that both the grounds for reopening the assessment are invalid grounds in as much as, in respect of the first ground, the matter had been carried up till this Court and the same has been decided against the Revenue and that, by reopening the assessment, the assessing officer cannot sit in appeal over the findings recorded by the Tribunal, as confirmed by the High Court. Insofar as the second ground for reopening is concerned, it was submitted that there is nothing to indicate that any income has escaped assessment and that the assessing officer is only of the opinion that the same requires investigation. It is submitted that there is no material whatsoever to show that there is any failure on the part of the petitioner to disclose fully and truly all material facts necessary for Its assessment and as such, the assessing officer is not justified in reopening the assessment after the expiry of a period of four years from the end of the relevant assessment year.

12. The petition is opposed by Mr. M.R. Bhatt, learned senior advocate appearing on behalf of the respondent who has supported the impugned notice by reiterating the grounds stated in the order rejecting the objections of the petitioner.

13. In the present case, the assessment is sought to be reopened in respect of the assessment year 2002-03 by issuing notice dt. 24-3-2009 which is clearly after the expiry of a period of four years from the end of the relevant assessment

 

year. In the circumstances, for the purpose of assuming valid jurisdiction u/s 147 of the Act, the assessing officer is required to establish, firstly that income chargeable to tax has escaped assessment and secondly, that such escapement is by reason of failure on part of the petitioner to furnish return of income u/s 139 or in response to notice issued under sub-section (1) of section 142 or section 148 of the Act or that there is failure on the part of the petitioner to disclose fully and truly all material facts. In the present case, it is not the case of the respondent that the petitioner has not filed the return as envisaged under the proviso to section 147 of the Act. In the circumstance, for the purpose of assuming valid jurisdiction u/s 147 of the Act, the respondent is required to establish that there is failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment.

14. The reasons recorded by the assessing officer for reopening the assessment runs into several pages. However, the relevant part thereof reads as under :

(1) The assessee company is running a hotel and liquor shop at Surat. The return of income for the assessment year 2002-03 was filed on 28-12-2002 showing total income at Rs. 1,49,980 as against total turnover of Rs. 3.95 crores.

(2) The main business of the assessee was selling of liquor. The room rent is meagre amount of Rs. 67,545. During the year the assessee incurred expenses of Rs. 26,10,945 (previous year nil).

(3) The sales turnover remained almost same as carried (sic) year it is increased to Rs. 3.95 crores as against Rs. 3.91 crores of previous year. So, expenditure on gift was not at all justified. Further, it was noticed that the entire amount was shown as outstanding.

(4) It can be therefore concerned (sic) that the expenditure claimed on gift is not a genuine expense and justified. This wrong claim has resulted in underassessment of income of Rs. 26,10,975.

(5) Further, it may be mentioned here that additions were made in asst. yr. 2006-07 of disallowance out of repair and maintenance expenses of Rs. 10,87,465 and disallowance u/s 40A(3) of Rs. 21,40,512, which may be considered in the assessment year 2002-03 also after due investigation.

The rest of the reasons relate to legal aspects of reopening the assessment as well as judicial decisions.

15. From the reasons recorded, it is apparent that the assessing officer seeks to reopen the assessment mainly on two grounds. Firstly, on the ground that the petitioner had incurred expenses of the Rs. 26,10,975 towards advertisement expenses which claim according to the assessing officer was not justified. The second ground for reopening is that certain additions were made in assessment year 2006-07 disallowing expenses towards repair and maintenance u/s 40A(3) of the Act. According to the assessing officer, the same could also be considered in assessment year 2003-04 after due investigation.

 

16. Insofar as the first ground for reopening the assessment is concerned, as pointed out by the learned advocate for the petitioner in respect of the said issue, the CIT had taken the assessment order in revision u/s 263 of the Act and had held that the assessment order was prejudicial to the interest of the Revenue and had set aside the assessment and directed the assessing officer to frame the assessment de novo after making proper inquiry. A perusal of the order u/s 263 of the Act shows that the assessment order was taken in revision mainly on the ground of expenditure incurred towards advertisement expenses. The aforesaid order passed by the CIT was taken in appeal by the petitioner before the Tribunal, who by an order dt. 14-9-2009 allowed the appeal and set aside the order passed by the CIT. The Revenue failed in its appeal against the said order of the Tribunal filed before the High Court. Thus insofar as the expenditure incurred towards advertisement expenses of Rs. 26,10,975 is concerned, the same was already subject-matter of revision as well as further appeal before the Tribunal. In the circumstances, once the petitioner has succeeded up till the stage of the High Court in respect of the said item, it is riot open to the assessing officer to reopen the assessment on the said ground.

17. Insofar as the second ground is concerned the assessing officer has merely placed reliance upon an order passed in relation to assessment year 2006-07 without indicating any connection between the assessments of the present year and the said year. Moreover, the frame of the reasons indicates that according to the assessing officer, the same is required to be considered for assessment year 2002-03 after due investigation.

18. This Court in the case of Shankarlal Nagji & Co. & Ors. v. ITO (2010) 322 ITR 90 (Guj) has held that a completed assessment cannot be reopened merely to make inquires. That is the domain of regular assessment.

19. In the case of Chhugamal Rajpal Vs. S.P. Chaliha and Others, where the assessing officer had while recording reasons mentioned "hence proper investigation regarding these loans is necessary", the Supreme Court has held that his conclusion was there is a case for investigating as to the truth of the alleged transactions. The Court held that it was not the same thing as saying that there are reasons to issue notice u/s 148. Before issuing a notice u/s 148, the ITO must have either reason to believe that by reason of the omission or failure on the part of the assessee to make a return u/s 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax his escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of assessee, the ITO has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of clause (a) or clause (b) of section 147 are satisfied, the ITO has no jurisdiction to issue a notice u/s 148 of the Act.

20. In Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, the

Supreme Court held that the powers of the ITO to reopen the assessment, though wide are not plenary. The words used by the statute are "reason to believe" and not" reason to suspect."

21. On a plain reading of the reasons recorded, it is apparent that insofar as the second ground is concerned, the assessing officer has reopened the assessment merely to make inquires. Nothing is stated in the reasons recorded to indicate that any income chargeable to tax has actually escaped assessment in relation to the said ground.

22. In the aforesaid premises, it is apparent that neither of the grounds for reopening the assessment are valid grounds and as such, the basic requirement for invoking the provisions of section 147 of the Act, viz., that income chargeable to tax should have escaped assessment, is itself not satisfied. In the circumstances, the impugned notice issued u/s 148 of the Act seeking to reopen the assessment u/s 147 of the Act, is without jurisdiction and such, cannot be sustained.

23. Another aspect to be noted is that the petitioner has submitted objections against the detailed reasons recorded by the assessing officer, raising all contentions raised in the present petition before the assessing officer. The assessing officer, while disposing, of the objections, has simply brushed aside the objections raised by the petitioner without dealing with the same by making reference to various judicial decisions. The requirement of dealing with objections is not an empty formality and the assessing officer while deciding the same is required to meet with the contentions raised by the assessee if he is of the opinion that the objections are not justified.

24. For the foregoing reasons the petition succeeds and is, accordingly allowed. The impugned notice dt. 24-3-2009 issued by the respondent under s. 148 of the Act for the assessment year 2002-03 (Annex. "G" to the petition), the order dt. 22-9-2009 rejecting the objections filed by the petitioner (Annex. "M" to the petition) as well as the further notice dt. 22-9-2009 issued by the respondent (Annex. "N" to the petition), are hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.

 