(1995) 01 GUJ CK 0021

In the Gujarat High Court

Case No : Special Civil Application No. 3268 of 1988

Keshrimal Samrathmal APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 02-01-1995

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

Citation : (1995) 128 CTR 202 : (1995) 215 ITR 714 : (1996) 84 TAXMAN 599

Hon'ble Judges : N.N. Mathur, J;M.B. Shah, J

Bench : Division Bench

Judgement

N.N. Mathur, J.—By this petition, the petitioner-company seeks to challenge the notice issued to it u/s 147 of the Income Tax Act, 1961,

dated March 29, 1988, in respect of the assessment year 1984-85, wherein it is alleged that the petitioner-company had escaped assessment

within the meaning of section 147 of the Income Tax Act, 1961 (for short, ""the Act"").

The necessary facts leading to the present petition are given as follows :

The petitioner is a partnership firm dealing in cloth. For the assessment year 1984-85, the return of income showing a loss of Rs. 7,777 was filed.

In the said return, the petitioner had submitted that a syndicate of five dealers including the petitioner-firm had purchased cloth of Marsdan

Monogram Mills jointly and had sold the same and that the profit of that venture was agreed to be shared equally by the five dealers including the

petitioner who constituted this syndicate. According to the petitioner, the total profit came to Rs. 93,695 and the share of the assessee came to Rs.

18,737. The petitioner included the said amount of Rs. 18,737 in the total income. The Income Tax Officer did not accept the submission for the reason that there was no written agreement amongst the five dealers and the bills of purchase and sales were in the name of the petitioner-firm and

that no separate accounts had been maintained by the petitioner-firm and that the accounts of the other co-sellers had not been separately

maintained and that there was no separate capital account of the co-sellers. He, accordingly, added the entire amount to the income of the

petitioner instead of one-fifth of the amount. The petitioner, against the said order of assessment dated March 27, 1987, passed by the Income

Tax Officer, Circle (V), Ward ''B'', Ahmedabad, preferred an appeal to the Deputy Commissioner of Income Tax (Appeals), ARV, Ahmedabad.

It was submitted by the petitioner that a sum of Rs. 40,000 was deposited as tender standard money to the mills by the petitioner on behalf of the

five members of the syndicate and that each syndicate member had contributed Rs. 8,000 and that a separate ledger account had been opened in

the books of the petitioner. It was also submitted that the search and seizure operations had taken place in the premises of the petitioner and that

the books of account were seized. It was further submitted that the absence of a written agreement amongst the five members of the syndicate

could not be of any significance in view of the fact that there were individual loans from the syndicate members indicating their desire to join the

syndicate and enter into the transactions. It was pointed out that the necessary evidence had been filed by the petitioner. The Deputy

Commissioner of Income Tax (Appeals) examined the entire material on record and found that copies of the accounts indicate that the members of

the syndicate had contributed Rs. 8,000 each at the initial stage. He also found that the details of the goods sold and payments made by the

members of the syndicate had been recorded in the books of account. He also found that the profits earned in the accounts had been declared by

each of the syndicate members in his return and the same had been taxed in his hands. In view of the evidence, he came to the conclusion that there

was a syndicate in existence and that the assessee being one of the five members of the syndicate and that its share was one-fifth of the profits

earned by the syndicate could be assessed in the hands of the petitioner. He, therefore, by judgment dated April 14, 1988, directed the Income

Tax Officer to tax only one-fifth of the profits of the syndicate in the hands of the petitioner. Before the said appeal was decided by a decision dated April 14, 1988, the Income Tax Officer, Circle (V), Ward ""B"", Ahmedabad, served a memo dated March 18, 1988, stating that he

proposed to reopen the assessment made for the assessment year 1984-85, u/s 147(a), which reads as under :

Sirs,

It has come to my notice that in the previous year relevant to the assessment year 1984-85, you had entered into the transactions of purchases and

sales of cloth manufactured by the Marsdan Mills and the Monogram Mills, and in the process earned huge profits. The details of such transactions

and the profit therein are as under :

Marsdan Mills Monogram Mills Total

Rs. Rs. Rs.

Sales 56,94,822 84,42,741 1,41,37,563

Purchase 47,46,076 70,71,640 1,18,17,716

Profit 9,48,746 13,71,101 23,19,847

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2. On a reference to the return of income filed by you and the statements accompanying the said return of income, I find that this particular source

of income has not been disclosed and in the result, the income as shown in the preceding paragraph has escaped assessment.

3. I may bring to your attention that the escapement of income as stated above stands duly established in view of the following facts :

(1) The documentary evidence showing the business done in the products of the two mills and the profit earned have been recovered from your

premises in the course of search.

(2) The author of the relevant papers, viz., Shri Sugansingh, has confirmed this business and the profit derived therefrom.

(3) The said accountant has made an attempt to show that some syndicate was constituted to do the business. However, it is seen that the entire

documentary materials relating to the business were available in your premises. It is also clear that you were in complete control of these particular transactions. There is also nothing to suggest that the payments to other parties alleged to be members of the syndicate, were, in fact, made and,

therefore, it can be presumed that the entire funds remained under your control.

(4) From the facts stated above, it is clear that the inter-connection, interlacing, inter-dependence and unity of this business with the other business

reflected in the books of account stands established, on account of common management and administration, common funds and common place of

business. The Supreme Court decision in the case of CIT v. Prithvi Insurance Co. Ltd. [1987] 63 ITR 632 is a case in point. On similar facts, the

decision of Supreme Court in the case of Produce Exchange Corporation Ltd. Vs. Commissioner of Income Tax (Central), Calcutta, and the

Gujarat High Court decision in the case of Commissioner of Income Tax, Gujarat II Vs. Alembic Glass Industries Ltd., are also applicable to the

facts obtaining in your case.

4. In view of the discussion in the foregoing paragraphs, I propose to reopen the assessment made for the assessment year 1984-85 u/s 147(a)

and to bring to tax not only the share shown in your name, but the entire profit of Rs. 23,19,847 which has not been disclosed by you and has

escaped assessment. You are hereby given an opportunity to state your objections, if any, against the proposed action.

5. Your reply in the matter should reach this office latest by March 28, 1988.

Yours faithfully,

(Sd.)

(K. C. Thaker),

Income Tax Officer, Circle (V), Ward ''B'', Ahmedabad.

2. The petitioner replied to the above letter, vide communication dated March 28, 1988, wherein it was pointed out that the goods from which the

syndicate of five members earned the profit of Rs. 93,695 were purchased in the name of the petitioner. The petitioner gave the entire details of the

purchase and sales account of the said goods in the books of the petitioner. It was further pointed out that since the petitioner had purchased the

goods along with many others, the charts seized were found at the place of the petitioner. It was also pointed out that the syndicate led by the

petitioner earned only Rs. 93,695 and the other parties earned the profit shown against their names and that aspect was discussed by the assessing

authority before passing the order u/s 143(3) of the assessment year 1984-85. The petitioner says that the said reply was personally handed over

to the Income Tax Officer on March 29, 1988, and, on the same day, the Income Tax Officer served upon the petitioner the impugned notice

dated March 29, 1988.

3. Mr. J. P. Shah, learned counsel appearing for the petitioner, contends that the impugned notice on the well-known and well-settled law that a

change of opinion on the same facts and on the same evidence cannot be a ground to reopen the assessment, is wholly without jurisdiction. He

submits that this is no more different than that of an attempt by the succeeding officer to look into the same case and the same material over again

because his opinion is different than that of the appellate authority, viz., Deputy Commissioner (Appeals).

4. The respondent has not filed a reply to the petition. However, Mr. B. J. Shelat, learned counsel for the Revenue, has raised an objection that the

writ petition is liable to be dismissed on the ground that the petitioner has approached at a premature stage of notice. The petitioner could take all

available objections or grounds by submitting a reply to the notice. Learned counsel placed reliance on a recent judgment of the Bombay High

Court in Raymond Woollen Mills Ltd. v. ITO [1993] 207 ITR 929, wherein the court took the view that if there are in fact some reasonable

grounds for the Income Tax Officer to believe that there had been any non-disclosure as regards any fact, which could have a material bearing on

the question of underassessment, that would be sufficient to give jurisdiction to the Income Tax Officer to issue notice u/s 147(a) of the Income

Tax Act, 1961. The question whether these grounds are adequate or not, is not a matter for the High Court to investigate in a petition under article

226 of the Constitution.

5. Mr. J. P. Shah, learned counsel, on the other hand, contends that the assessee has placed primary facts in the original proceedings. After the

consideration of the primary facts, the Deputy Commissioner (Appeals), by judgment dated April 14, 1988, directed the Income Tax Officer to

tax only 1/5th of the profits of the syndicate in the hands of the petitioner. The assessment has attained the finality in the original proceedings. It is further pointed out that the Department had taken an appeal against the order of the Deputy Commissioner (Appeals) dated April 14, 1988, to the

Income Tax Appellate Tribunal, Ahmedabad. The Tribunal has also upheld the judgment of the Deputy Commissioner (Appeals) by order dated

May 1, 1991. Thus, the impugned notice for reassessment merely on the change of hands because of change of the Income Tax Officer is wholly

without jurisdiction and it is a settled position of law that the High Court in exercise to the powers under article 226 of the Constitution will have

jurisdiction to interfere with the issuance of notice of such reassessment on changes of opinion being without jurisdiction.

6. It is in this context that the present case has to be determined, prima facie, as to whether the impugned notice issued by the Income Tax Officer

is passed on a mere change of opinion and as such the order passed is without jurisdiction or not. Though in the notice no reasons had been stated,

however, the reasons are given in the memo dated March 18, 1988. Firstly, it is stated that in the year 1984-85, the petitioner-firm had entered

into the transaction of purchase and sale of cloth manufactured by the Marsdan and Monogram Mills and in the process earned huge profit of Rs.

23,19,847, which has not been disclosed and as such escaped assessment. During the original assessment proceedings, an explanation as regards

the goads purchased from Marsdan and Monogram Mills was sub-mitted along with the relevant materials. It was pointed out that there were

certain parties in the market including the petitioner who were interested in purchasing the goods of Marsdan and Monogram Mills both lying in the

custody of the High Court as well as lying with certain other persons and accordingly the interested persons/buyers purchased the goods of the

said mills. As the buyers were together only in respect of purchasing the goods of Marsdan and Monogram Mills, the parties decided as to how to

trade in the particular goods which might render profit to all the parties. In the meetings, charts used to be prepared of estimated profit. All such

charts of estimated profits or estimation were produced in the original assessment proceedings. The other papers seized during the search and

seizure including the statement of Sugansingh were on record during the original assessment proceedings. The Deputy Commissioner (Appeals),

after considering the entire material, arrived at the positive conclusion that there existed a syndicate and the profit was earned by the syndicate and the petitioner-firm was only having a one-fifth share therein, and the balance has been taxed in the hands of the respective members of the

syndicate. Learned counsel for the petitioner has also placed before us the judgment of the Income Tax Appellate Tribunal dated May 1, 1991,

rejecting the appeal filed by the Assistant Commissioner, Income Tax Circle (V), Ahmedabad, against the judgment of the Deputy Commissioner

(Appeals) dated April 14, 1988. It was contended by the Revenue before the Tribunal that since the tender was in the name of the assessee and

since these transactions were in the name of the assessee, it should be presumed that it was the assessee who had dealt with the transaction in

question and as such the entire profit had been rightly assessed in the hands of the assessee. The Tribunal, after considering the submission and the

entire record, arrived at the conclusion that a syndicate was constituted, the tender was fixed in the name of the assessee and as such obviously the

transaction was required to be carried on in one name. Consequently, the fact that the assessee gave his name for this transaction would not mean

that the transaction had been entered into by the assessee on its own. It was further held that the assessee-firm represented all the members of the

syndicate in entering into transactions with the Monogram and Marsdan Mills for purchase of the lots of cloth. The Tribunal, after perusing the

letters of the syndicate, held that each member had a 20 per cent. share in the profit out of the transaction in question. It was also noticed by the

Tribunal that each member of the syndicate has shown his share of profit in the return filed by him and the profit is assessed in his hands. Thus, it is

apparent that the profit shown as Rs. 23,19,847 belongs to others with whom this syndicate was not directly or indirectly concerned. The charts

were produced in the original proceedings. The profit was earned by the other co-purchasers whose names appear in the chart which was

produced along with the communication dated October 1, 1987, annexure ""J"", before the order of assessment in the original proceedings.

7. In paragraph 3 of the communication dated March 18, 1988, certain reasons have been given to substantiate the allegations of escapement of

income. The first reason given is that the recovery of certain documentary evidence from the premises of the petitioner-firm during the course of

search. This document was very much available during the original proceedings. The second reason given is the statement of Sugansingh. This statement was also in existence during the original proceedings. The third reason is with respect to the constitution of the syndicate. It is evident

from the above discussion that this aspect was thoroughly discussed and a positive conclusion was arrived by the Deputy Commissioner

(Appeals). The fourth ground given is the account of common management. All these aspects have been considered in the original proceedings and

now there is nothing but a change of opinion because of the change of the Income Tax Officer. In fact, even the earlier Income Tax Officer had not

agreed with the contention of the petitioner-firm with respect to the constitution of the syndicate, but this view was not upheld and the order of

assessment was set aside by the higher authority, namely, the Deputy Commissioner (Appeals). But now the other Income Tax Officer wants to

stick to the view taken by the earlier Income Tax Officer which has been set aside by the higher authority. It may further be pointed out that as

already stated, the Tribunal has also affirmed the view taken by the Deputy Commissioner (Appeals).

8. In view of the aforesaid discussion, the reopening of the assessment on the face of it is based on a mere change of opinion.

9. In view of the settled position of law that the revision of assessment based on a change of opinion is not permitted u/s 147 of the Act, the

impugned notice is without jurisdiction.

10. In the result, this writ petition succeeds and the impugned notice dated March 29, 1988, issued u/s 147 of the Act with respect to the

assessment year 1984-85 is hereby quashed. Rule made absolute accordingly.