(2014) 03 GUJ CK 0081

In the Gujarat High Court

Case No : Special Civil Application No. 24743 of 2006

N.K. Industries Ltd. APPELLANT

Vs

Income Tax Officer (OSD) RESPONDENT

Date of Decision : 11-03-2014

Acts Referred:

Income Tax Act, 1961 — Section 143(3) 147 147(c) 148 234B

Citation : (2014) 362 ITR 502

Hon'ble Judges : S.G. Gokani, J;Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : J.P Shah for Mr. Manish J. Shah, for the Appellant; M.R. Bhatt and Mrs. Mauna M. Bhatt, for the Respondent

Judgement

Akil Abdul Hamid Kureshi, J.—Petitioner has challenged a notice dated 16th January 2006, as annexed at Annexure-B to the petition, issued by the respondent-Assessing Officer u/s 148 of the income tax Act, 1961 ["the Act" for short]. Vide such notice, she proposed to reopen assessment of the petitioner for the Assessment Year 2001-2002. Such assessment was originally framed after scrutiny. At the request of the petitioner, the Assessing Officer supplied the reasons recorded for issuing such notice. Such reasons read as under:- In this case, return of income for A.Y. 2001-02 was filed on 31.10.2001 declaring therein total loss of Rs. 32,36,408/- which was finalized u/s. 143(3) on 30.03.2004 on a total loss of Rs. 26,12,838/-.

2. On perusal of audit report furnished alongwith the return of income it was noticed at Sr. 12B that "the company had given loan amounting to Rs. 660.62 lakhs and the same is considered doubtful and therefore, interest was not charged". As per the mercantile accounting system accrued interest has to be considered as income. The interest worked out at the rate of 18% on Rs. 660.62 lacs comes to Rs. 1,18,91,160/-. The Company has failed to disclose the said income amounting to Rs. 1,18,91,160/-. This has resulted in under assessment of Rs. 92,67,322/- [Rs. 1,18,91,160 - Rs. 26,23,838 loss determined u/s.

143(3)].

3. It is seen from the P&L account for F.Y. 2000-01 attached with the return that the company had paid interest to others of Rs. 2,10,876/- and to bank and financial institution Rs. 7,14,237/-. After adjustment of interest received of Rs. 5,27,260/- net interest paid on loan borrowed debited to P&L account of Rs. 3,97,853/-. On the other hand, it had granted interest free unsecured loan of Rs. 652.63 lacs to the company under the same management. The loanee company''s net worth was negative and there was no stipulation of repayment. Since, the company had obtained interest bearing loan and given interest free loan to another company under the same management which cannot be said to have been used for business purpose of the assessee. Therefore, interest of Rs. 3,97,853/- debited to the P&L account requires to be disallowed u/s. 36[1](iii).

4. It is also noticed from the statement of income that allowable depreciation u/s. 32 of the I.T. Act was Rs. 2,42,60,145/-. However, annexure-I shows computation of depreciation pertaining to machinery as under:--

The Company has put to use plant and machinery and office equipment worth Rs. 2,02,129/- after 1.10.2000 on which depreciation at the rate of 12.5% works out to be Rs. 25,266/-. The assessee company has wrongly worked out depreciation on W.D.V. of Rs. 4,26,080/- at the rate of 12.5% at Rs. 53,260/- claiming excess depreciation of Rs. 27,994/- which requires to be withdrawn.

5. Considering the above facts, I have reason to believe that there is an escapement of income within the meaning of Section 147(c) of the income tax Act, 1961. Issue notice u/s. 148 of the I.T. Act.

Petitioner raised objection to the notice for reopening under communication dated 27th February 2006. Such objections were, however, rejected by the Assessing Officer by an order dated 14th November 2006. At that stage, the petitioner filed this petition. 2. In the present case, notice for reopening had been issued within a period of four years from the end of the relevant assessment year. Under such circumstances, the additional requirement arising out of the proviso to Section 147 of the Act of the income escaping the assessment due to failure on the part of the assessee to disclose truly and fully all material facts would not arise. It is also not a case of the petitioner that any of the grounds on which the reopening is based was scrutinized in the original assessment, and that therefore, the Assessing Officer could be stated to have formed an opinion on any of these controversial issues. The main contention of the petitioner, however, was that the Assessing Officer had acted at the behest of the audit party and that the reopening of the assessment was not based on independent reason to believe held by the Assessing Officer. In this context, we had perused the original file presented by the learned counsel for the Revenue. It thus emerge that certain aspects of the matter were brought to the notice of the Assessing Officer by the audit party. It also appears that of the two objections raised by the audit party, the Assessing Officer had serious dispute. She, in fact, stated that such objections are not acceptable. She also recorded her reasons for stating so. This would be apparent from the internal communication in the form of a letter dated 9th August 2005 written by the Assessing Officer to the Commissioner of Income. Relevant portion thereof reads as under:--

3. The Revenue Audit party has raised the following audit objections:--

(a) It was noticed from the audit report that the company had given loan amounting to Rs. 660.62 lakhs and the same was considered doubtful, therefore, interest was not charged. As per the mercantile accounting system accrued interest was to be considered as income. The interest worked out at the time of 18% comes to Rs. 1,18,91,160/-. This amount has not been reflected in P&L Account by the assessee company and also this point was not considered at the time of assessment proceedings, which resulted in under assessment of income of Rs. 92,67,322/- with short levy of tax of Rs. 46,62,620/- including interest of Rs. 14,19,058/- u/s 234B.

(b) The assessee company had debited to P&L Account net interest paid on borrowed loan to the extent of Rs. 3,97,853/- on the other hand the assessee company had granted interest free unsecured loan of Rs. 952.63 lakhs to the companies under the same management. The loanee company''s net worth was negative and there was no stipulation of repayment. Since the assessee company had obtained interest bearing loan and given interest free loan to the company under the same management, which obviously not used for business purpose. Therefore, interest of Rs. 3,97,853/- debited to the P&L A/c. requires to be disallowed u/s. 36(1)(iii) which resulted in short levy of tax of Rs. 1,57,350/-.

(c) The assessee company has put plant and machinery and office equipment worth Rs. 2,02,129/- after 01/10/2000 on which depreciation @ 12.5% works out to Rs. 25,266/-. The assessee company has worked out the depreciation on W.D.V. of Rs. 4,26,080/- @ 12.5% Rs. 53,260/-. Claiming excess depreciation at Rs. 27,994/- which resulted in short levy of tax of Rs. 1,107/-.

4. The objection mentioned in para 3(a) and 3(b) are not acceptable in the light of judgment delivered by Hon. Supreme Court in the case of Commissioner of Income Tax, Bombay City I Vs. Shoorji Vallabhdas and Co., in which it was held that income does not arise at all, there cannot be a tax, even though in books an entry is made about "hypothetical income" which is not materialized. Issue arose in the audit is fully covered by the findings of the Apex Court. Also in the case of Godhra Electricity Co. Ltd., Ahmedabad Vs. Commissioner of Income Tax, Gujarat-II, Ahmedabad, Hon. Supreme Court has held hypothetical income cannot be brought to tax unless it is accrued.

5. However, the following remedial actions are available in this case:--

3. With respect to the first of the two reasons recorded by the Asses Officer therefore it clearly emerges that she was acting at the instance of audit party, though she herself held a contrary belief that no income charge to tax has

escaped assessment on these two counts. Had this being the sold reason for issuing notice for reopening, we would have perhaps allowed the petition and quashed the notice. In the present case, however, the Assessing Officer was convinced that on third ground recorded in the reasons, income chargeable to tax had escaped assessment. It is true that such ground was also brought to her notice by the audit party and that by itself would not mean that she was acting at the instance of the audit party. As held by the Supreme Court in case of Commissioner of Income Tax Vs. P.V.S. Beedies Pvt. Ltd., if a particular issue is brought to the notice of the Assessing Officer by the audit party and the Assessing Officer of his/her application of mind finds that the ground is valid, reopening of assessment cannot be quashed merely because such ground was brought to the notice of the Assessing Officer by the audit party. In this context, even the counsel for the petitioner was unable to dispute that the question of depreciation require re-examination since the question whether the asset for which the depreciation was claimed was put to use before 30th September of the year under consideration, and therefore, whether full depreciation at the specified rate during the year under consideration was allowable. On this ground, we are not inclined to quash the notice. The petition is therefore dismissed. Rule is discharged. Interim relief, if any, stands vacated.