
(2014) 03 GUJ CK 0070
In the Gujarat High Court

Case No : Special Civil Application Nos. 24738, 24744 and 24745 of 2006

N.K. Roadways P. Ltd.

APPELLANT

Vs

Income Tax Officer (OSD)

RESPONDENT

Date of Decision : 10-03-2014

Acts Referred:

Income Tax Act, 1961 — Section 143(3), 147(c), 148, 234B, 263

Citation : (2014) 362 ITR 522

Hon'ble Judges : Sonia Gokani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

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

Judgement

Sonia Gokani, J.—Since all these petitions raise identical questions of facts and law, by this common judgment, these petitions are being decided. The facts are drawn from Special Civil Application No. 24738 of 2006, which are as follows:

The petitioner, N.K. Roadways Pvt. Ltd., for the assessment year 2001-02, filed its return of income which came to be finalised on scrutiny assessment.

The respondent-Revenue issued notice for reopening u/s 148 of the income tax Act, 1961 ("the Act" for short) on January 16, 2006, on the ground that income of the petitioner had escaped assessment for the year under consideration. The petitioner filed its return on February 27, 2006, and requested for the reasons recorded for reopening of the assessment. They were provided to the petitioner wherein reference was made to the audit party raising the issue of the company not having provided for interest on the advances and the loans given to the company under the same management and to the relatives of the directors, respectively. The audit report also suggested that the company had not disclosed the accrued interest and, hence, that resulted into underassessment.

2. The objections against such reasons had been raised, vide communication dated March 2, 2006, by stating that on interest-free advances, there is no

provision for charging interest. From the inception of the loans, advances were given interest-free and on the borrowings from where advances were given, no interest was charged by the company. In the mercantile system of accounting, as further contended, there was no question of charging interest. It was also contended that this very issue was already discussed in the original assessment and, therefore, the reasons recorded were nothing but a change of opinion on the part of the Assessing Officer.

3. The objections were, however, rejected by a detailed order. Therefore, the reopening of assessments have been challenged by way of present petitions on the ground of jurisdiction itself.

4. Affidavit-in-reply is filed justifying the issuance of such notice, the contentions of which shall be discussed hereinafter.

5. We have heard learned senior counsel, Shri J.P. Shah, for the petitioners and learned counsel, Mrs. Mauna Bhatt, for the Revenue and with their assistance, examined the entire material on record.

6. Learned counsel for the petitioners urged that the initiation of proceedings being at the behest of audit party, assumption of jurisdiction must fail. Moreover, the very question raised in the reasons recorded is scrutinised by the Assessing Officer in the original assessment and, hence, it is nothing but a change of opinion. Learned counsel for the Revenue, of course, has stuck to its version and defended the reopening.

7. At the outset, the issue that requires consideration by us is that the notice for reopening has been issued by the Assessing Officer at the behest of the objection raised by the audit party and since there is no belief on the part of the Assessing Officer in recording the reasons, by way of settled position of law, the assumption of jurisdiction itself is not sustainable.

8. Reliance is placed on a decision of this court rendered in the case of Gujarat Fluorochemicals Ltd. Vs. Assistant Commissioner of Income Tax, . The court in the said decision held and observed thus (page 403):

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 facts while framing the original assessment and that, therefore, 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 80HHG. 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.

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.

9. This court in the case of Adani Exports Vs. Deputy Commissioner of Income Tax, held that the satisfaction of the Assessing Officer for the purpose of reopening an assessment is subjective in character and judicial review is limited. However, reassessment at the instance of audit party's objections was not held sustainable in the following manner (page 230):

It is true that satisfaction of the Assessing Officer for the purpose of reopening is

subjective in character and the scope of judicial review is limited. When the reasons recorded show a nexus between the formation of belief and the escapement of income, a further enquiry about the adequacy or sufficiency of the material to reach such belief is not open to be scrutinised. However, it is always open to question existence of such belief on the ground that what has been stated is not the correct state of affairs existing on record. Undoubtedly, in the face of record, the burden lies, and heavily lies, on the petitioner who challenges it. If the petitioner is able to demonstrate that in fact the Assessing Officer did not have any reason to believe or did not hold such belief in good faith or the belief which is projected in papers is not belief held by him in fact, the exercise of authority conferred on such person would be ultra vires the provisions of law and would be an abuse of such authority. As the aforesaid decision of the Supreme Court indicates that though audit objection may serve as information on the basis of which the income tax Officer can act, 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.

10. Considering the averments raised before us, at our request, the learned counsel for the Revenue for our perusal produced the original file to consider whether in fact the Assessing Officer has any reason for belief while issuing the notice. We could notice that the Assessing Officer, vide its noting dated July 25, 2005, recorded the reasons in response to the objections raised by the Revenue audit in the following manner:

Kindly refer to the above.

2. In this case, an assessment u/s 143(3) was made on January 19, 2004, on a total income of nil as declared in the return of income filed on October 31, 2001. During the course of audit the revenue audit party has raised the following objections.

3. In the audit report filed along with the return of income, at paragraph 2E(iii) it has mentioned that interest of Rs. 17.21 lakhs on advances of Rs. 114.75 lakhs has not been charged. On the basis of the above observation the revenue audit has pointed out that non-charging of interest of Rs. 17.21 lakhs resulted in short levy of tax of Rs. 6,80,655 plus interest u/s 234B of Rs. 2,66,673 aggregating to Rs. 9,05,411.

4. Advances of Rs. 114.75 lakhs consist of Rs. 62.70 lakhs interest-free loan given to the company under the same management and Rs. 52.05 interest-free loan given to the relatives of directors. The objection raised is not acceptable in the light of the decision of the Supreme court in the case of Commissioner of Income Tax, Bombay City I Vs. Shoorji Vallabhdas and Co., in which it was held that if income does not arise at all there cannot be tax even though in books an entry is made about "hypothetical income" which is not materialised. Also in the case of Godhra Electricity Co. Ltd., Ahmedabad Vs. Commissioner of Income Tax,

Gujarat-II, Ahmedabad, the Hon"ble Supreme Court has held that hypothetical income cannot be brought to tax unless it is accrued.

In this case, no interest is accrued nor any provisions are made in the profit and loss account. The issue which arose in the audit objection is fully covered by the aforesaid decisions. However, the most appropriate remedial action available is revision of assessment order by the Commissioner u/s 263 for which limitation expires on March 31, 2006. Alternatively, the assessment can be reopened u/s 147(c) of the income tax Act for which limitation expires on March 31, 2008.

5. Necessary directions/guidance in the matter are solicited.

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11. It is apparent from the noting made by the Assessing Officer that the Assessing Officer did not hold any belief that income had escaped assessment. In no uncertain terms, the Assessing Officer has stated that the objections raised by the audit are not acceptable by citing the decisions of the apex court in the case of Commissioner of Income Tax, Bombay City I Vs. Shoorji Vallabhdas and Co., wherein it has been held that if the income in fact does not arise at all there cannot be tax, even though in books an entry was made about "hypothetical income". She also referred to the case of Godhra Electricity Co. Ltd., Ahmedabad Vs. Commissioner of Income Tax, Gujarat-II, Ahmedabad, reiterating the decision on the issue that "hypothetical income" cannot be brought to tax unless it is accrued. She opined that no interest was accrued in the instant case and the issue as raised by the audit had not arisen at all, adding also further that the objections raised were fully covered by the above referred decisions. She has of course mentioned that if at all any remedial action is required to be taken, it is revision of the assessment u/s 263 of the Act where the limitation would expire on March 31, 2006, and noting another alternative, she stated that assessment could be reopened, limitation for which would expire on March 31, 2008, for which she solicited the advise of the higher authority.

12. Examination of such notings clearly and unequivocally reveals that the Assessing Officer had not only not accepted the objections raised by the audit party but after deliberating over the issue raised, preferred to adhere to her earlier version that the income which never materialised cannot be taxed and such a situation was duly answered in the decisions of the apex court. Remedial actions indicated by her could not be said to be satisfying the requirement of her having held the belief. This clearly depicts that, while issuing notice for reopening, the Assessing Officer had not formed any independent belief that the income had escaped assessment for the year under consideration. Considering the details as culled out from the notings on the file and also keeping in mind the issue specified in the reasons recorded, we can safely conclude that the Assessing Officer has issued notice not on forming her own belief, but on compulsion asserted and, therefore, on this very issue it deserve to be held that the assumption of jurisdiction on the part of the Assessing Officer itself is not

sustainable. The Assessing Officer, as well laid down in a catena of judgments, neither can surrender or abdicate his/her functions of forming belief to his superiors. Any action of reopening solely at the behest of objection raised by audit party without any independent belief while recording the reasons would surely make the very assumption of jurisdiction vulnerable. Trigger may have come from the audit party but, the logical decision of initiating the proceedings of reassessment in the form of reason to believe has to be directly and invariably of that of the Assessing Officer.

13. In the affidavit-in-reply filed by the Revenue, a lame attempt is made to contend that the ratio laid down by the Supreme Court in case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, has been strictly followed and, therefore, the petition deserves no entertainment. It is also contended that there is no question of change of opinion on the part of the Assessing Officer, since the reopening is mainly in connection with accrued interest which was not added to the income of the assessee-company.

14. We notice that in the memo of petition as well as in the affidavit-in-rejoinder, it has been specifically averred that no interest has been claimed on the borrowing from which advances have been given. The Assessing Officer, in the original assessment, and, thereafter also, was also of the opinion that such question in the case of the petitioner has not arisen as the question is of taxing "hypothetical income". And even otherwise the issue is already concluded by the decisions of the apex court referred to hereinabove.

15. Resultantly, on both the counts, on initiating the proceedings solely at the behest of audit party as also on the reasons recorded, these petitions deserve to be allowed on the ground of assumption of jurisdiction for issuance of notice of reassessment being contrary to law and unsustainable. These petitions are, therefore, allowed. The impugned notices and all consequential proceedings are hereby quashed. Rule is made absolute accordingly with no order as to costs.