
(2008) 09 GUJ CK 0069
In the Gujarat High Court
Case No : Tax Appeal No. 772 of 1999

Patel Chemicals Works

APPELLANT

Vs

Assessing Officer

RESPONDENT

Date of Decision : 08-09-2008

Acts Referred:

Evidence Act, 1872 — Section 6
Income Tax Act, 1961 — Section 271(1)

Citation : (2009) 309 ITR 450 : (2009) 180 TAXMAN 99

Hon'ble Judges : D.A. Mehta, J; Bankim N. Mehta, J

Bench : Division Bench

Advocate : K.R. Dixit, for the Appellant; Manish R. Bhatt, for Opponent 1, for the Respondent

Judgement

D.A. Mehta, J.—On 3-4-2000, this appeal came to be admitted by this Court and in the said order of admission the following eight questions were formulated by this Court for determination:

- (1) Whether the Tribunal erred in upholding the imposition of penalty on the basis of the decision in McDowell and Co. Ltd. Vs. Commercial Tax Officer,
- (2) Whether the Tribunal erred in holding that the contracts with the sister concerns were sham transactions?
- (3) Whether the Tribunal erred in holding that the appellant had diverted its income to sister concerns?
- (4) Whether the Tribunal erred in applying Section 6 of the Indian Evidence Act when the assessee had filed its return in a statutory form as required?
- (5) Whether the Tribunal erred in confirming the Commissioner's order for one charge when the penalty order was for another charge and the show cause notice was for still another charge?
- (6) Whether the Tribunal erred in holding that explanation 1 to Section 271(1)(c)

was applicable in this case?

(6A) Whether the Tribunal erred in holding that the appellant's transactions with sister concerns were sham transactions although the income from those transactions were taxed in the hands of the sister concerns on substantive basis?

(7) Whether the Tribunal erred in confirming the Commissioner's order on a basis different from the basis of his order, thus making a new order to the detriment of the assessee in the assessee's appeal?

2. Heard the learned advocate for the appellant - assessee and the learned Senior Standing Counsel appearing for the respondent. Though the submissions have been made by both sides on various issues raised by the aforesaid questions in light of the view that the Court is inclined to adopt it is not necessary to set out the facts and the contentions in elaborate detail.

3. Assessment Year in question is 1982-83.

4. The assessee firm returned total income of Rs. 95,965/- as per the Return of Income filed on 15-07-1982. Vide assessment order dated 30-03-1985 the assessment was framed at total income of Rs. 2,59,383/- which, inter-alia, included addition of Rs. 1,61,018/- stated to be on account of diversion of profits by the sham transaction with sister concerns of the assessee firm. According to the Assessing Officer, out of total sales of Rs. 18,98,928/- the assessee firm had effected sales to the tune of Rs. 11,00,547/- to three sister concerns at the prices which were lower than the prices charged by the assessee to the persons other than three sister concerns.

5. The assessee carried the matter in successive appeals before the Commissioner (Appeals) and the Tribunal but did not succeed. The Tribunal's order in quantum proceedings was brought before this Court by way of Income Tax Reference No. 220 of 1989 wherein the following question of law was raised.

Whether, on the facts and in the circumstances of the case, the Tribunal was right in law in finding that tax was avoided without ascertaining whether there is any revenue loss on account of non-inclusion of the income in question in the assessee's assessment and its inclusion in the assessment of the sister concerns?

6. The High Court vide its judgment rendered on 14-07-2003 answered the question in the affirmative i.e. in favour of the revenue and against the assessee.

7. The quantum proceedings have rested at this stage.

8. The present appeal pertains to penalty levied by the Assessing Officer at a sum of Rs. 2,12,332/- u/s 271(1)(c) of the Income Tax Act, 1961 ("the Act"). The penalty order was challenged by the assessee before Commissioner (Appeals) and the Tribunal but both the appellate authorities rejected the contentions raised by the assessee and confirmed the penalty levied by the Assessing Officer.

9. One of the principal contentions raised in the penalty proceedings relates to the very same income arising out of the sale transactions, being taxed in the hands of three sister concerns and thus, the assessee not being liable to penalty, income in question having been declared by three sister concerns. The said contention has been reproduced by the Tribunal in paragraph No. 6.1 of impugned order dated 08-09-1999. The contention has been dealt with by the Tribunal in its impugned order in the following terms:

The last contention of the Id. Counsel which remains to be considered is based on so called principle of double taxation as argued by the assessee. The Id. Counsel urged that since the profits diverted by the assessee to the sister concerns have already been assessed in the hands of the sister concerns, these can not be assessed again in the hands of the assessee firm and on this ground penalty, according to the Id. Counsel, cannot be sustained u/s 271(1)(c). In our considered opinion the plea based on the concept of double taxation, suffers from an inherent infirmity inasmuch as it proceeds on the erroneous presumption that the Revenue is debarred from assessing the income belonging to the assessee in the hands of the assessee on the ground that the said income has been declared by another person and the same has been assessed by the AO. It is well established by various judicial pronouncements of the Hon'ble Supreme Court as well as the other High Courts that when an assessee shows certain income in his return, the Revenue does not act inconsistently if it accepts the return of that assessee on its face value and at the same time tax that income in the hands in which it ought really to be taxed. Reference in this context may be made to the decisions of the Supreme Court in *Jamnadas Kanhaiyalal Vs. Commissioner of Income Tax, M.P., Bhopal*, *Income Tax Officer, New Delhi and Others Vs. Rattan Lal and Others*, and the *Income Tax Officer, A-ward, Lucknow Vs. Bachulal Kapoor*,

The Apex Court observed in the case of *Income Tax Officer Vs. Atchiaiah*, as under:

We are of the opinion that under the present Act, the Income Tax Officer has no option like the one he had under the 1922 Act. He can, and he must, tax the right person and the right person alone. By "right person", we mean the person who is liable to be taxed, according to law, with respect to a particular income. The expression "wrong person" is obviously used as the opposite of the expression "right person". Merely because a wrong person is taxed with respect to a particular income, the Assessing Officer is not precluded from taxing the right person with respect to that income. This is so irrespective of the fact which course is more beneficial to the Revenue.

In view of the aforesaid settled legal position, the contention of the Id. Counsel is entirely misconceived and is therefore dismissed.

10. It is in the aforesaid context that Question No. (6A) as appearing hereinbefore assumes importance. The contention raised on behalf the assessee

has been misconstrued by the Tribunal and dealt with as if the Tribunal was deciding the quantum appeal by referring to the various decisions to hold that income is liable to be taxed in the hands of the right person regardless of whether the same income has been declared and taxed in the hands of a different person. In so far as assessment proceedings are concerned, there can be no dispute with the aforesaid proposition.

11. However, when the issue is raised in penalty proceedings the factum of the very same income having been offered for tax by different entity and having been taxed substantially in the hands of other entity becomes a relevant factor for determining whether the assessee has concealed the said income or furnished inaccurate particulars regarding the said income which has already been taxed after being shown in the hands of different entity, namely other than the assessee. The Court does not intend to convey that in each and every case, in such circumstances, no penalty is leviable at all but such fact has to be treated as a relevant factor for arriving at a decision and in the present case the Tribunal has misdirected itself in not recording correct conclusion on this count. May be, the Tribunal may come to the same conclusion once again, or it may take a different view of the matter. But, the Tribunal shall have to consider this factor in right perspective, in accordance with law and then determine as to whether charge of concealment or furnishing inaccurate particulars of income can be fastened in so far as the assessee is concerned. As noted hereinbefore, extracted portion of the Tribunal's order itself reveals that the Tribunal has committed an error of law by treating the contention as if the Tribunal was determining whether the same income is to be taxed twice or not instead of treating the same as a factor for recording a finding as to whether the assessee was liable to penalty u/s 271(1)(c) of the Act.

12. Instead of recording any final decision one way or the other in the present proceedings, it would be just and fair to both the sides if the tribunal is called upon to record a specific finding in this regard, namely, if the income from the transactions with the three sister concerns had already been taxed on a substantive basis in hands of the three sister concerns whether it was open to the Revenue to levy penalty u/s 271(1)(c) of the Act.

13. On other questions various submissions were made by both the sides. But the Court finds that for recording a correct and complete finding, the appeal is required to be restored to the file of the Tribunal instead of sending only one issue to be decided by the Tribunal. Therefore, all respective contentions available to both the sides on facts and in law are left open without recording any opinion in this regard so as to enable the parties to raise all the contentions of facts and law before the Tribunal when the appeal is heard by the Tribunal. This is necessary as the issues are interlinked and any segregation, or partial decision may result in prejudice to one or the other side.

14. In the circumstances, in light of the view that the Court has adopted, all other questions are left unanswered leaving it open to the Tribunal to decide the

entire penalty appeal afresh. Accordingly, I.T.A. No. 2553/AHD/1993 for the assessment year 1982-83 stands restored to the file of Income Tax Appellate Tribunal, Ahmedabad Bench upon the order dated 6-8-1999 being quashed and set aside. The Tribunal shall decide the entire appeal afresh and in accordance with law, after permitting both the sides to raise all contentions of facts and law.

15. The appeal stands disposed of accordingly, with no order as to costs.