

(2011) 01 GUJ CK 0016
In the Gujarat High Court

Case No : Special Civil Application No. 14139 of 2010 (A.Y. 2005-06)

PKM Advisory Services P. Ltd.

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 24-01-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 115JB, 139(1), 143(3), 147, 148

Citation : (2011) 339 ITR 585

Hon'ble Judges : Harsha Devani, J;H.B. Antani, J

Bench : Division Bench

Advocate : Deepak Shah with Tej Shah, for the Appellant; M.R. Bhatt with Mrs. Mauna M. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani

1. Considering the controversy involved in the present case, which lies in a narrow compass, the matter is taken up for hearing and final disposal today. Rule. Mrs. Mauna Bhatt, learned standing counsel, waives service of rule on behalf of the respondent. This petition under article 226 of the Constitution of India challenges the notice dated 25-3-2010, issued by the respondent u/s 148 of the income tax Act, 1961 ("the Act"), reopening the assessment of the petitioner for the assessment year 2005-06.

2. The petitioner, a company is engaged in the business of consultancy and advisory, broking, etc., as well as in the generation of electricity with the help of renewable sources, and more particularly wind. For the assessment year 2005-06, the petitioner filed its return of income u/s 139(1) of the Act accompanied by a statement of total income, annual audited accounts and audit report obtained u/s 44AB of the Act. The income declared by the petitioner as per the regular provisions of the Act was Rs. 1,57,073. However, since the tax payable on the said income was less than 7.5 per cent, of the book profit as

defined in section 115JB of the Act, income came to be determined u/s 115JB at Rs. 63,06,232 and tax thereon, at 7.5 per cent, being a sum of Rs. 4,72,967 was paid. The Assessing Officer selected the case for scrutiny and by an order dated 27-8-2007, framed assessment u/s 143(3) of the Act. Subsequently, by the impugned notice, the assessment has been reopened for the assessment year 2005-06. Pursuant to the said notice, the petitioner requested the respondent to furnish a copy of the reasons recorded. Upon a copy of the reasons recorded being furnished, the petitioner filed its objections thereto. By an order dated 24-9-2010, the respondent rejected the objections. Being aggrieved, the petitioner has moved the present petition, challenging the reopening of the assessment by issuance of notice u/s 148 of the Act.

3. Mr. Deepak Shah, learned advocate appearing on behalf of the petitioner, has invited attention to the reasons recorded for reopening the assessment to point out that the sole ground for reopening the assessment is that income has escaped assessment as the petitioner has claimed excess depreciation of Rs. 8,59,944 in respect of the items enumerated therein which, according to the Assessing Officer, has resulted into under assessment of income to that extent. The learned advocate has submitted that the petitioner has been assessed u/s 115JB of the Act and has paid a sum of Rs. 4,72,967 by way of tax on the income so assessed. Referring to the reasons recorded it is pointed out that even as per the reasons recorded, the tax effect as computed by the Assessing Officer aggregates to Rs. 4,05,930 which is less than the tax to which the petitioner has been assessed u/s 115JB of the Act to submit that, in fact, there is no escapement of income and as such, the formation of belief as regards escapement of income is without any basis. It is, accordingly urged that on this ground alone, the impugned notice is required to be quashed and set aside.

4. Submissions on other aspects of the reopening have also been made by the learned advocate for the petitioner, inter alia, contending that the reopening is based on a mere change of opinion; the material on the basis of which the assessment is sought to be reopened is the audit objection; and that in the absence of any new material on the basis of which the Assessing Officer could have formed a reason to believe that there is escapement of income, the reopening of assessment is not valid in law. However, considering the view that the court is inclined to take in the matter the said contentions are not set out in detail.

5. Mr. M.R. Bhatt, learned senior advocate, appearing on behalf of the respondent, has reiterated the averments made in the affidavit-in-reply. However, on the question of escapement of income from assessment, the learned counsel is not in a position to controvert the submission made by the learned advocate for the petitioner that even as per the calculation made in the reasons recorded, in fact, no income has escaped assessment as the tax actually paid would still be more than the amount computed by the Assessing Officer for the purpose of reopening the assessment. Having regard to the submissions

advanced by the learned advocates for the respective parties and considering the reasons recorded, it is apparent that the assessee has been assessed under the provisions of section 115JB of the Act and has paid tax of Rs. 4,72,967 at the rate of 7.5 per cent, of Rs. 63,06,232 as determined under the said section. According to the Assessing Officer, the income chargeable to tax that has escaped assessment by way of excess depreciation is Rs. 8,59,944. Adding the said amount to the amount computed under the ordinary provisions of the income tax Act, the aggregate amount even as per the Assessing Officer comes to Rs. 4,05,930 which is less than the amount of tax paid by the petitioner on being assessed u/s 115JB of the Act. In the circumstances, when the tax payable as per the reasons recorded is less than the tax paid by the petitioner under the assessment framed u/s 143(3) of the Act, the question of any income having escaped assessment does not arise. The order recording reasons itself indicates that in fact no income has escaped assessment and as such there is no basis for the formation of belief that income has escaped assessment. In the circumstances, the basic pre-condition for reopening the assessment u/s 147 of the Act, namely, that the Assessing Officer should have reason to believe that income has escaped assessment is not satisfied. In the circumstances, the assumption of jurisdiction by the Assessing Officer by issuing notice u/s 148 of the Act is without jurisdiction and as such the impugned notice u/s 148 of the Act as well as all proceedings pursuant thereto cannot be sustained. 8 For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned notice dated 25-3-2010, issued u/s 148 of the Act (annexure A to the petition) as well as all proceedings pursuant thereto, are hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.