(2013) 03 GUJ CK 0087

In the Gujarat High Court

Case No : Special Civil Application No. 3569 of 2013

Rhythm Chemicals (P.) Ltd. APPELLANT

Vs

Asstt. CIT RESPONDENT

Date of Decision : 26-03-2013

Acts Referred:

Citation : (2013) 03 GUJ CK 0087

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

Bench : Division Bench

Advocate : Hardik V. Vora, for the Appellant;

Judgement

1. Draft amendment is allowed.

2. Petitioner has challenged notice dated 30-3-2012 issued by Deputy Commissioner proposing to assess income of the petitioner assessee for the assessment year 2005-06 stating that he had reason to believe that income chargeable to tax for the said year had escaped assessment. The petitioner applied on 17-4-2012 to the Deputy Commissioner seeking a copy of the reasons recorded by him for the purpose of issuing the impugned notices. Under communication dated 26-11-2012 such reasons were supplied to the petitioner, which read as under:-

2. The reasons recorded for reopening the assessment is as under:-

On verification of the audit report for financial year 2004-05, it is noticed that the assessee company has shown purchases of Rs. 78,225 out of direct expenses of Rs. 2,25,357. Asset of Rs. 26,47,198 were added during the financial year 2004-05. Previous year liability was shown at Rs. 8,45,507 which reduced during the financial year 2004-05 to Rs. 3,50,883 hence the company has paid Rs. 4,97,624 (Rs. 8,48,507 Rs. 3,50,883) under this head during financial year This shows that the company has borne total expenses of Rs. 33,70,179 during financial year against which there are provisions of Rs. 33,401. Hence, during financial year 2004-05 total expenses of the company was Rs. 33,55,778 (Rs.

33,70,179 Rs. 34,401).

On perusal of the bank statement, it was observed that there is total debit during the year of Rs. 23,83,738 which includes Rs. 2,95,000 in the form of cheques return i.e. the cheque which was not honoured and other charges of Rs. 528. Hence, total expenses made through Bank of Baroda is Rs. 20,88,210 (Rs. 23,83,738 Rs. 2,95,000 Rs. 528).

Further, during the financial year 2004-05, the assessee company had only one bank account i.e. with Bank of Baroda A/c. No. 02810200000213. The total expenses made by the company as per audit report including liability is Rs. 33,35,778 against total expenses of Rs. 20,88,210 as per bank statement. Sundry creditors as per balance sheet are Rs. 3,50,833 for which no details have been provided. Hence, there is a difference of Rs. 12,47,568 (Rs. 33,35,778 Rs. 20,88,210) in expenditure which appears to be unexplained expenditure made during the financial year 2004-05 by the company. During the said year no manufacturing has been done, rather trading has been done and sales of Rs. 53,570 have been made. This means that no cash sales have been made which can explain the difference in expenses.

During the financial year 2004-05 the assessee has deposited cash in the bank account which is as under:

Date

Particulars

Amount (Rs.)

28-6-2004

By cash

45,000

9-7-2004

By cash

5,000

6-12-2004

By cash

60,000

30-12-2004

By cash

10,000

Total

1,20,000

During the year the total sales of Rs. 53,750 and the cash deposit of Rs. 1,20,000 remains unexplained.

3. The petitioner raised objections under communication dated Rs. 22-1-2013 objecting to the reopening of the assessment. Such objections were, however, rejected by an order dated 1-3-2013. Hence this petition.

4. At the outset, we may record that the assessment for the assessment year 2005-06 was not done after scrutiny as provided u/s 143(3) of the Income Tax Act, 1961 and that the return filed by the petitioner came to be accepted u/s 143(1) of the Act. In the background of such admitted facts, we need to examine the challenge of the petitioner to the impugned notice.

5. Learned counsel for the petitioner mainly contended that the reasons recorded by the assessing officer lacked validity and that therefore no reopening can be based on such reasons even in case of non-scrutiny assessment. He further submitted that the assessing officer cannot be stated to have reason to believe that income chargeable to tax has escaped assessment. He submitted that the assessing officer has, without proper verification of the balance sheet of the assessee, come to certain conclusions which are totally erroneous.

6. We may once again remind ourselves that notices for reassessment have been issued in case of a non-scrutiny assessment. In this context, we may refer to the decision of the Apex Court in the case of Asstt. Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., in which it was held and observed as under:-

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In the scheme of things, as noted above, the intimation u/s 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. u/s 143(1)(a) as it stood prior to 1-4-1989, the assessing officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D.K. Jain J) in Apogee International Ltd. Vs. Union of India and Another, . It may be noted above that under the first proviso to the newly substituted section 143(1), with effect from 1-6-1999, except as provided in the provision itself, the acknowledgement of the return shall be deemed to be an intimation u/s 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgement is not done by any assessing officer, but mostly by ministerial staff. Can it be said that any ''assessment'' is done by them? The reply is an emphatic ''no''. The intimation u/s 143(1)(a) was deemed to be a notice of demand u/s 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment u/s 143(1)(a), the question of change of opinion, as contended, does not arise.

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16. Section 147 authorises and permits the assessing officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word ''reason'' in the phrase ''reason to believe'' would mean cause or justification. If the assessing officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the assessing officer should have finally ascertained the fact by legal evidence or conclusion. The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in Central Provinces Manganese Ore Co. Ltd. Vs. I.-T.O., Nagpur, , for initiation of action u/s 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is ''reason to believe'', but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the assessing officer is within the realm of subjective satisfaction (see INCOME TAX OFFICER Vs. SELECTED DALURBAND COAL CO. (P) LTD., Raymond Woollen Mills Ltd. Vs. Income Tax Officer and Others,

17. The scope and effect of section 147 as substituted with effect from 1-4-1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction u/s 147(a) two conditions were required to be satisfied firstly the assessing officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the assessing officer could have jurisdiction to issue notice u/s 148 read with section 147(a).

But under the substituted section 147 existence of only the first condition suffices. In other words if the assessing officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso.

18. So long as the ingredients of section 147 are fulfilled, the assessing officer is free to initiate proceeding u/s 147 and failure to take steps u/s 143(3) will not render the assessing officer powerless to initiate reassessment proceedings even when intimation u/s 143(1) had been issued.

7. Bearing in mind above ratio of the decision, if we revert back to the facts of the case, in an assessment which was previously not taken in scrutiny, the assessing officer found that there were no cash sales in the financial year 2004-05 and that therefore total sales of Rs. 53,750 was unexplained. The assessing officer also pointed out that the total sum of Rs. 1,20,000 through different entries was deposited in cash in the bank account of the assessee during the said period which is also unexplained. We do not find that such reasons can be stated to be lacking validity permitting the assessing officer to assess the income.

8. Under the circumstances, we are not inclined to interfere. It is, however, clarified that nothing stated in this order should be seen as our opinion on the taxability of the amount in question. In other words, we only find that there was sufficient material with the assessing officer to form a belief that income chargeable to tax had escaped assessment. Whether, in fact, such additions can be made or not, must be judged on the basis of material, which may come on record during such reassessment proceedings.

9. With above observations, petition is dismissed.

