

(1997) 12 GUJ CK 0012
In the Gujarat High Court

Case No : Special Civil Application No's. 3827 and 3829 of 1997

Saradbhai M. Lakhani

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 05-12-1997

Acts Referred:

Income Tax Act, 1961 — Section 141(1), 143(1), 143(3), 147, 148

Citation : (1998) 145 CTR 110 : (1998) 231 ITR 779

Hon'ble Judges : Kumaran Sreedharan, C.J;M.S. Shah, J

Bench : Division Bench

Judgement

K. Sreedharan, C.J.—Rule. With the consent of the parties, the petitions are taken up for final disposal.

The petitioners are assesseees under the IT Act for the last several years. They were partners of firm, under the name and style of "M/s Bharat Vijay Construction Co.". They were assessed during the asst. yr. 1988-89 under s. 143(1) of the Act. They were served with notice dt. 13th March, 1997, issued under s. 148 of the Act, stating that income for the asst. yr. 1988-89 has escaped assessment" within the meaning of s. 147 of the IT Act. Validity of these notices are questioned in these petitions. Issues raised for quashing the notices are the same. So, we consider it advantageous to dispose of these petitions by a common judgment.

2. Facts alleged by the petitioners in these petitions are identical. They are as follows :

Petitioners filed return for the asst. yr. 1988-89, enclosing therewith income and expenditure account, wherein it showed an amount of Rs. 47,82,922.50 by way of receipt from Daman Ganga Dam arbitration. How this amount was arrived at was also shown in an Annexure to the return. An amount of Rs. 1,91,31,690 received on account of the Daman Ganga Dam work was shown distributed to four partners in equal shares, each getting about Rs. 47,82,922.50. Along with

the return, petitioners submitted Exhibit "E" Note :

"... In pursuance of arbitration award in connection with claim of Bharat Vijay Construction Co. (the business of which has been taken over and continued by a private limited company) the assessee as the erstwhile partner of a firm received sums during the year. Since this amount represents collection by the assessee of a right allotted to him and held by him on capital account, it is not liable to tax and hence, not included in the returns of taxable income. Further, also as the assessee is not carrying any business, the question of considering this amount as business income does not arise and hence, not included in the return of taxable income ..."

The AO passed assessment order dt. 9th March, 1990. Order under s. 155 of the IT Act was passed on 24th July, 1992. Copy of that order is marked as Exhibit "G". For the asst. yr. 1988-89, Bharat Vijay Construction Co. was assessed taking into consideration entire amount of Rs. 1,91,31,690 received on account of Daman Ganga Dam construction. Thereafter, petitioners have been issued with notice under s. 148, requiring them to file return for the asst. yr. 1988-89.

3. The AO filed reply affidavit dt. 30th July, 1997. Contention taken therein are to the following effect :

Bharat Vijay Construction Co. was dissolved on 24th October, 1984, when Bharat Vijay Construction Pvt. Ltd. was incorporated specifically with the object of purchasing the business of the firm. Before the firm was dissolved, they have undertaken work of Daman Ganga Project and completed the same on 22nd March, 1983. On 5th November, 1984, the business of the firm was transferred to the private limited company except the right to receive pending claims in connection with Daman Ganga Project. Arbitrator, who went into the claim, passed an award for Rs. 1,91,31,690 on 6th November, 1986 in favour of the firm. Partners applied to the Court for getting the amount directly. Payment was made on 21st April, 1987, to the four partners of the erstwhile firm, each getting Rs. 47,82,922. The partners showed the receipt of the amount in their returns of income and claimed exemption as capital receipt. Dy. CIT (Asst.), Special Range, where the firm was assessed, passed order, making addition of Rs. 1,91,31,690 and intimated the share of income to the respective AOs, where partners were assessed, to be assessed in the hands of the partners. Consequently, order under s. 155 was passed on 24th July, 1992, when the shares of award were assessed to tax after deduction of firm's tax. The firm preferred appeal before the CIT(A), who confirmed the addition. Aggrieved by the order, the firm went in appeal to the Tribunal and the case is still pending. Meanwhile, this Court, in *Banyan and Berry Vs. Commissioner of Income Tax*, took the view that persons, who would be assessed in situation similar to the present case, are the partners, who actually received the amount. Notice under s. 148 was issued after obtaining necessary approval from the CIT, Surat.

4. Along with the reply affidavit, order passed by the ITO on 20th February,

1997, giving the reason for the belief that income has escaped assessment, has been annexed. For a proper understanding of the reasons, we read the same :

".. In pursuance of arbitration award in connection with the pending claim of M/s. Bharat Vijay Construction Co., the assessee as an erstwhile partner of a firm has received amount of award of Rs. 47,82,922 (1/4th share of total award of Rs. 1,91,31,690) during the financial year relevant to asst. yr. 1988-89. This amount of award should be assessed in the hands of the assessee as the same was actually received by him as an erstwhile partner of the firm. But, the amount of award received has not been included in the total taxable income by the assessee.

In view of the above, I have reason to believe that for the year ending 22nd October, 1987 (asst. yr. 1988-89), the income for the assessee chargeable to tax has escaped assessment and, therefore, notice under s. 148 of the Act, is being issued ..."

Learned counsel representing the petitioners advanced an argument that the reason for the ITO's belief that income has escaped assessment is only a change of opinion and that cannot be the basis for issuing a notice under s. 148 of the Act. This argument has been sought to be replied by the learned counsel representing the Revenue by stating that an authoritative judicial pronouncement can be the information warranting the issue of the notice. According to the Revenue, this Court in Commissioner of Income Tax Vs. Ratanlal Lallubhai, took the view that a judicial decision by a competent authority can be the information supporting the issue of notice. Decision in *Banyan & Berry*'s case (supra) clearly provided that the entire amount covered by the arbitration award should have been assessed in the hands of the partners who received the same. In view of that information, it is contended that impugned notice is unassailable.

5. The entire reasons recorded by the ITO, to support his belief that income has escaped assessment, quoted earlier in this judgment, did not make any reference to the decision of this Court in *Banyan & Berry* (supra). In the absence of mention of that case in the order, it is not open to the officer to justify the order by reference to the said decision. Validity or otherwise of the reason should be gone into on the basis of the facts mentioned therein. It is not open to the authorities to justify the action on the basis of further reasons to be supplied in the form of affidavits.

6. In the instant case, Bharat Vijay Construction Co., the partnership firm, was assessed for the asst. yr. 1988-89. Rs. 1,43,25,205 was found divisible in the said assessment order passed under s. 143(3) of the IT Act. Consequently, each sharer was found entitled to Rs. 35,81,301. Aggrieved by that assessment order, the firm preferred appeal before the AAC. When the firm failed before that authority, they took up the matter before the Tribunal and the case is pending.

We would like to add that when confronted with the argument of Mr. Joshi for the Revenue that if, in the pending appeal filed by the firm, the assessment order

passed against the firm is quashed on the basis of the decision in the case of *Banyan & Berry (supra)*, the assessment made against the petitioner in respect of the income treated as received from the firm may also fail, Mr. Shah for the assessee fairly stated that, in that event, the ITO may be in a position to invoke the powers under ss. 147 and 148, but not before any such eventuality arises. We are, therefore, proceeding on the basis of this concession.

7. Petitioners, in their return for the asst. yr. 1988-89, showed the receipt of Rs. 47,82,922.50 as one-third of the amount received from Daman Ganga Project. In the order passed under s. 155 of the IT Act for the asst. yr. 1988-89, the officer observed :

"... In view of the above, the assessee has not declared the share of profit from M/s. Bharat Vijay Construction Co. as the award was pending. The assessment of M/s. Bharat Vijay Construction Co. as well as Bharat Vijay Construction Pvt. Ltd. are done by the Dy. CIT, Special Range-1, Surat. The assessment of the firm of M/s. Bharat Vijay Construction Co. has been decided by the Dy. CIT, Special Range-1, Surat on 27th March, 1991. The Dy. CIT, Special Range-1, Surat has been intimated the share income of the assessee from the firm of M/s. Bharat Vijay Construction Co. for asst. yr. 1988-89. Since the share income not assessed previously and submission made by the assessee is part of the return, was accepted under s. 143(1)(a). Share income communicated by now requires to be taxed in the hands of the assessee. Since the return was accepted under s. 141(1)(a) of the Act, the assessment requires to be rectified under the provisions of s. 155 of the Act. .."

The documents and assessment orders referred to earlier make it clear that assessee placed the entire facts before the assessing authority. That authority took note of all the income accrued during the year 1988-89 and passed the orders of assessments. Thereafter, impugned notices have been issued. The short question is whether the issue of these notices is sustainable or not. Where the action of an executive authority is without jurisdiction and is likely to subject one to lengthy proceedings and unnecessary harassments, it is well settled, the High Courts are to issue appropriate orders to prevent such consequences (*vide Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, .* Before issuing notice under s. 148 of the IT Act, the officer should have reason to believe. The said reason to believe cannot be reason to suspect. It is settled law that reason to believe can never be the outcome of a change of opinion. It is essential that before any action is taken by the officer, the officer should substantiate his satisfaction. Reasons recorded in the instant case, which were quoted earlier, do not bring out any ground, making out an objective satisfaction arrived at by the officer. No reason other than those recorded by the officer therein can possibly be urged to sustain his action either. Since the entire facts relating to the income were made known to the assessing authority and no objective reason has been given for issuing a notice under s. 148, we are constrained to quash the impugned notices issued to the applicants in these

Special Civil Applications.

In view of what has been stated above, the petitions are allowed and notices dt. 13th March, 1997 issued to the applicants herein are quashed. Rule is made absolute accordingly. We make no order as to costs.