(2011) 01 GUJ CK 0055

In the Gujarat High Court

Case No : Special Civil Application No. 15148 of 2010

Sayaji Hotels Ltd. APPELLANT

Vs

Income Tax Officer RESPONDENT

Date of Decision : 11-01-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 115JB, 139, 142(1), 143(1), 143(3)

Citation : (2011) 239 CTR 488

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

Bench : Division Bench

Advocate : Manish J. Shah, for the Appellant; K.M. Parikh, for the Respondent

Final Decision : Allowed

Judgement

Harsha Devani, J.—Rule. Mr. K.M. Parikh, learned standing Counsel waives service of rule on behalf of the Respondent. Considering the

controversy involved in the present case which lies in a narrow compass, the petition is taken up for hearing and final disposal today.

2. In this petition under Article 226 of the Constitution of India, the Petitioner has challenged the notice dt. 24th March, 2010 issued u/s 148 of the

IT Act, 1961 (''the Act'') reopening the Petitioner''s assessment for asst. yr. 2003-04.

3. The facts of the case stated briefly are that the Petitioner, a limited company, filed return of income on 27th Nov., 2003 declaring a loss of Rs.

1,46,546 which was accompanied by computation of total income in which tax was calculated according to Section 115JB of the Act and no tax

was payable under the said provision, hence, refund of TDS was claimed. Along with the computation, the status of carried forward unabsorbed business loss and depreciation and bifurcation of accumulated depreciation and accumulated loss as per books for the asst. yr. 2003-04 were also

attached. An intimation u/s 143(1) of the Act was passed accepting the return filed by the Petitioner. Thereafter, a notice u/s 154 of the Act came

to be served on the Petitioner requiring the Petitioner to withdraw excess depreciation claimed and allowed to the Petitioner on hotel building @

20 per cent as against 10 per cent admissible w.e.f. 1st April, 2003 for asst. yr. 2003-04. The mistake apparent on record was corrected by an

order dt. 18th Feb., 2005 made u/s 154 of the Act. The depreciation was effectively reduced to Rs. 2,18,51,428 from Rs. 2,99,86,870 and the

net reduction was set off against the business loss of Rs. 81,35,442. Thereafter, notice was issued u/s 142(1) of the Act. During the course of

scrutiny assessment proceedings the AO asked the Petitioner to clarify the method of claiming depreciation pertaining to fixed assets for the

projects of Gandhidham and Indore vis-a-vis the method of claiming depreciation for the Baroda project, pursuant to which the Petitioner

submitted fresh computation of income pertaining to revised depreciation chart. After due scrutiny, the AO framed assessment u/s 143(3) of the

Act by an order dt. 29th March, 2006. Subsequently, by the impugned notice dt. 24th March, 2010, the assessment for the year 2003-04 was

sought to be reopened. In response to the notice the Petitioner by a letter dt. 16th April, 2010 requested the Respondent to treat its previous

return as the return filed in response to the reassessment notice and asked for a copy of the reasons recorded. Upon receipt of a copy of reasons,

the Petitioner filed its objections thereto by a letter dt. 18th Oct., 2010. By an order dt. 12th Nov., 2010, the objection raised by the Petitioner

against reopening of the assessment came to be rejected. It is in the background of the aforesaid facts, that the Petitioner has filed the present

petition challenging the notice dt. 24th March, 2010 issued u/s 148 of the Act.

4. In response to the notice, the Respondent has filed an affidavit-in-reply dt. 24th Dec, 2010 denying the averments made in the petition.

5. Mr. M.J. Shah learned advocate appearing on behalf of the Petitioner has submitted that the assessment year under consideration is 2003-04,

whereas the notice u/s 148 of the Act has been issued on 24th March, 2010 which is clearly beyond a period of four years after the expiry of the relevant assessment year and as such, in the absence of any failure on the part of the Petitioner to disclose fully and truly all material facts necessary

for its assessment for that assessment year, the assumption of jurisdiction u/s 147 of the Act is invalid. Inviting attention to the reasons recorded for

reopening the assessment, it is pointed out that the according to the AO, the Assessee has wrongly calculated the book profit u/s 115JB of the Act

and that there is not even a whisper as regards any failure on the part of the Assessee to disclose fully and truly all material facts necessary for its

assessment. Inviting attention to the order rejecting the objections filed by the Petitioner and more particularly para 5 thereof, it is pointed out that

according to the AO some facts of the case slipped from the mind of the AO while framing assessment order which is the reason why Section 147

has been inserted in the IT Act to protect the interest of the Revenue and to tax the escaped income. It is submitted that it appears that according

to the Respondent some of the facts slipping from the mind of the AO are sufficient ground for reopening assessment. It is pointed out that apart

from the fact that the reasons recorded do not indicate any failure on the part of the Petitioner to disclose fully and truly all material facts, there is

also nothing in the entire order rejecting the objections to indicate that there is any failure on the part of the Petitioner to disclose fully and truly all

material facts necessary for its assessment and as such, the impugned notice having been issued beyond a period of four years from the end of the

relevant assessment year, is barred by limitation and is required to be quashed and set aside. The learned advocate has also advanced submissions

on the merits of the case, however, considering the view that the Court is inclined to take in the matter, it is not necessary to set out the same in

detail.

6. The petition is opposed by Mr. K.M. Parikh, learned standing Counsel appearing on behalf of the Respondent. Referring to the reasons

assigned for reopening the assessment, it is submitted that the Assessee is found to have wrongly calculated the book profit u/s 115JB of the Act.

According to the learned Counsel, wrong calculation amounts to failure to disclose fully and truly all material facts. It is accordingly submitted that

the AO was justified in reopening the assessment beyond a period of four years from the end of the relevant assessment year. Inviting attention to the provisions of Section 149(1)(b) of the Act, it is submitted that in case where the income chargeable to tax which has escaped assessment

amounts to or is likely to amount to rupees one lakh or more, it is permissible for the AO to reopen the assessment after a period of four years but

not more than six years. In the facts of the present case, the reopening is within a period of six years and as such, the same is legal and valid.

7. In rejoinder. Mr. M.J. Shah, learned advocate for the Petitioner has invited attention to the decision of this High Court in case of Gujarat

Carbon and Industrial Ltd. Vs. Joint Commissioner of Income Tax, In the said case the successor AO issued notice after recording reasons u/s

148 of the Act for reopening the assessment on the ground that the value of excess stock of carbon black found during the search operation had

escaped assessment. The Court upon consideration of the facts and circumstances of the case found that there was no failure on the part of the

Assessee to disclose fully and truly all material facts relevant for its assessment. At the most, it could be termed to be a case wherein the AO had

formed an incorrect opinion in the opinion of the successor AO. In the circumstances, the AO could not treat the Assessee to be in default for non-

disclosure of material facts relevant for the assessment year. It is submitted that the said decision would be squarely applicable to the facts of the

present case where according to the successor AO, the AO who had framed the original assessment had committed a mistake in computing the

amount of depreciation. Reliance is also placed upon a decision of this High Court in case of Austin Engineering Co. Ltd. Vs. Joint Commissioner

of Income Tax, where the Court has interpreted the provisions of Expln. 2 to Section 147 of the Act, and held that:

The language employed by the proviso itself indicates that the legislature has consciously laid down a time frame within which reassessment

proceedings in relation to escaped income can be initiated, and beyond the prescribed period of limitation, even if income has escaped assessment,

if the required conditions enumerated in the proviso are not shown to exist, no action can be initiated u/s 147 of the Act regardless of the fact that

income may have escaped assessment.

It is, accordingly, submitted that even if resort is made to the provisions of Expln. 2 to Section 147, the requirement of the proviso to Section 147 of the Act, namely that there should be failure on the part of the Assessee to disclose fully and truly all material facts necessary for its assessment,

still has to be satisfied.

8. The undisputed facts of the case are that the assessment year is 2003-04 whereas the notice u/s 148 has been issued on 24th March, 2010,

which is clearly after the expiry of a period of four years from the end of the relevant assessment year. In the circumstances, in the light of the first

proviso to Section 147 of the Act, the assessment can be reopened only in a case where income chargeable to tax has escaped assessment for

such assessment year and such escapement is by reason of the failure on the part of the Assessee, (i) to make a return u/s 139 or in response to a

notice issued under Sub-section (1) of Section 142 or Section 148; or (ii) to disclose fully and truly all material facts necessary for his assessment,

for that assessment year. Insofar as escapement of income from assessment is concerned all that has been recorded in the reasons is that the

Assessee is found to have wrongly calculated the book profit u/s 115JB of the Act. The AO has also reproduced a table on the basis of which he

has computed the book profit at a different figure than that computed by the AO in the original assessment order. The said table is more or less

bodily lifted from the table submitted by the Petitioner along with its communication dt. 24th March, 2006 (Ext. H collectively). Thus, the reasons

for reopening are based upon material furnished by the Assessee, viz., the statement as given by the Assessee during the course of assessment

proceedings. A perusal of original assessment order u/s 143(3) of the Act clearly shows that the AO, at the relevant time has applied his mind to

the issue in respect of which the assessment is sought to be reopened and thereafter worked out the book profit. In the circumstances, this is only a

case of a successor AO holding a different opinion as regards computation of book profit than that of the AO who framed the original assessment.

The reopening is, therefore, being based on a mere change of opinion and as such cannot be sustained.

9. Moreover, for the purpose of assuming jurisdiction u/s 147 of the Act after the expiry of a period of four years from the end of the relevant

assessment year, the requirements of the proviso thereto as referred to hereinabove are required to be satisfied. In the facts of the present case, it is an admitted position that the first situation does not exist. Insofar as the second situation is concerned, namely, that there should be failure on the

part of the Assessee to disclose fully and truly all material facts which are necessary for his assessment, a bare perusal of the reasons recorded

indicates that there is no mention whatsoever in the said order that there is any failure on the part of the Assessee to disclose fully and truly all

material facts necessary for its assessment. Nor do the reasons recorded disclose any such failure.

10. Moreover, in the petition, categorical averments have been made to the effect that the assessment has been reopened beyond a period of four

years in a case of scrutiny assessment u/s 143(3) of the Act and there is no failure on the part of the Petitioner to disclose fully and truly all material

facts necessary for its assessment; however, despite the fact that a detailed affidavit-in-reply has been filed by the Respondent, there is no

averment in the entire affidavit-in-reply to indicate that there is any failure on the part of the Petitioner to disclose fully and truly all material facts

necessary for its assessment. Thus, the said contention raised by the Petitioner remains uncontroverted.

11. A contention has been taken in the affidavit-in-reply as well as by the learned Counsel for the Respondent that in the light of the provisions of

Section 149(1)(b) of the Act, reassessment beyond a period of four years upto the period of six years is valid as the income chargeable to tax

which has escaped assessment is more than one lakh rupees. In this regard it would be germane to refer to the provisions of Sub-section (1) of

Section 149 which reads thus:

149. Time limit for notice.- (1) No notice u/s 148 shall be issued for the relevant assessment year,-

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under Clause (b);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which

has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year:

Explanation: In determining income chargeable to tax which has escaped assessment for the purposes of this Sub-section, the provisions of Expln.

2 of Section 147 shall apply as they apply for the purposes of that section.

12. The heading of the section clearly indicates that the same prescribes the limitation for issuance of notice. On a plain reading of the aforesaid

provision, it is apparent that the same provides for the time-limit within which a notice u/s 148 of the Act can be issued and lays down that in a

case falling under Clause (b) viz., where the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh

rupees or more then no notice can be issued after a period of six years from the end of the relevant assessment year and in cases other than those

falling under Clause (b) no notice u/s 148 can be issued after a period of four years. In other words, in a case where the amount of income

escaping assessment is less than or is likely to amount to less than one lakh rupees, in no case notice can be issued beyond a period of four years

from the end of the relevant assessment year. Thus, Section 149 of the Act merely prescribes the maximum time-limit for issuance of notice u/s 148

of the Act, based upon the amount involved. The said provision does not in any manner override the proviso to Section 147 of the Act which lays

down that no action shall be taken u/s 147, after the expiry of four years from the end of the relevant assessment year unless the conditions

stipulated thereunder are satisfied. The proviso to Section 147 of the Act and Sub-section (1) of Section 149 operate in different fields and are

independent from one another. Thus, in a case where the requirements of the proviso to Section 147 of the Act are not satisfied, no notice u/s 148

can be issued beyond a period of four years even if the amount of tax escaping assessment is more than or likely to be more than one lakh rupees,

whereas, in a case where the amount of tax escaping assessment is not more than or not likely to be more than one lakh rupees, even if the

requirements of the proviso to Section 147 of the Act are satisfied, no notice can be issued beyond a period of four years. Thus, even in those

cases falling under Clause (b) of Sub-section (1) of Section 149 of the Act, if the notice u/s 148 is issued beyond a period of four years but within

a period of six years from the end of the relevant assessment year, for the purpose of invoking Section 147 of the Act, the requirements of the

proviso, namely that there should be failure on the part of the Assessee to disclose fully and truly all material facts necessary for his assessment are still required to be satisfied. The time-limit of six years provided by the said section is the maximum time-limit for issuance of notice u/s 148 of the

Act, beyond which even if the requirements of the proviso to Section 147 of the Act are fulfilled, no notice u/s 148 can be issued. In the

circumstances the contention that the amount escaping assessment being more than one lakh rupees, reopening of assessment beyond a period of

four years but within six years is valid even without satisfying the requirements of the proviso to Section 147 of the Act being contrary to the

provisions of the Act, is required to be rejected.

13. In the facts of the present case, the notice for reassessment has been issued after the expiry of a period of four years from the end of the

relevant assessment year and as noted earlier, there is no failure on the part of the Assessee to disclose fully and truly all material facts necessary

for its assessment for the assessment year under consideration. In the circumstances, the assumption of jurisdiction u/s 147 of the Act by issuance

of notice u/s 148 of the Act is invalid and as such, cannot be sustained.

14. For the foregoing reasons the petition succeeds and is accordingly allowed. The impugned notice dt. 24th March, 2010 issued u/s 148 of the

Act (Ext. L to the petition) is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.