

(2011) 01 GUJ CK 0069

In the Gujarat High Court

Case No : Special Civil Application No. 8036 of 1997

Surat People Co-Operative Bank Ltd.

APPELLANT

Vs

ITO

RESPONDENT

Date of Decision : 11-01-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 139, 142(1), 143(3), 147, 148

Citation : (2011) 336 ITR 218 : (2012) 20 TAXMAN 844

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

Bench : Division Bench

Advocate : S.N. Soparkar, for the Appellant; Manish R. Bhatt, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.—This petition under Art. 226 of the Constitution of India challenges notice dt. 21st March, 1997 issued by the respondent herein u/s 148 of the IT Act, 1961 (the Act) for reopening the petitioners assessment for the assessment year 1991-92.

2. The petitioner is a co-operative bank. For the assessment year 1991-92, the petitioner filed its return of income declaring gross income of Rs. 4,47,58,268. However, it claimed deduction u/s 80P(2) of the Act in respect of Rs. 4,47,57,348. Accordingly, the total income of the petitioner was Rs. 920. Subsequently, the return was taken up for scrutiny and by a detailed order dt. 20th Dec, 1993, assessment came to be framed determining the total income at Rs. 3 lakhs. Subsequently, vide the impugned notice dt. 21st March, 1997, the respondent has sought to reopen the assessment for the assessment year 1991-92, which has given rise to the present petition.

3. It is the case of the petitioner as averred in the petition that the impugned action is without jurisdiction, in as much as the notice u/s 148 has been issued beyond a period of four years from the end of the relevant assessment year.

According to the petitioner, u/s 147 of the Act, the AO has been given the power to reassess income which has escaped assessment. However, the proviso to the said section restricts the said power by providing that where an assessment under sub-section (3) of section 143 of the Act has been made earlier no such action shall be taken u/s 147 after the expiry of four years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment for any such assessment year : (i) by reason of failure on the part of the assessee to make a return u/s 139 or (ii) there is failure on the part of the assessee to make a return in response to a notice issued under sub-section (1) of section 142 or section 148, or (iii) to disclose fully and truly all material facts necessary for his assessment for the assessment year. That in the present case admittedly clause (i) and (ii) do not apply. Even clause (iii) cannot apply because there is no failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment. It is also averred in the petition that the return of income was filed giving all relevant particulars. During the course of assessment proceedings, the claim u/s 80P of the Act had been examined in greater detail, after which the respondent came to the conclusion that the petitioner is entitled to a lower claim.

4. In response to the petition, the respondent has filed affidavit-in-reply annexing therewith a copy of the reasons for reopening the assessment. However, no averments have been made dealing with the contention raised by the petitioner that as the notice u/s 148 of the Act has been issued beyond a period of four years from the end of the relevant assessment year, the reopening of assessment is without jurisdiction as there is no failure on the part of the petitioner to disclose fully and truly all material facts.

5. Mr. S.N. Soparkar, learned senior advocate appearing on behalf of the petitioner submitted that in the light of the fact that the assessment is sought to be reopened beyond a period of four years from the end of the relevant assessment year, in the absence of any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment, there is total lack of jurisdiction on the part of the respondent to initiate proceedings u/s 147 of the Act. Referring to the reasons recorded for reopening of assessment, it was pointed out that the reason for reopening of assessment is a subsequent decision of the Supreme Court in the case of M.P. Cooperative Bank Ltd., Jabalpur Vs. Addl. Commissioner of Income Tax, M.P. Bhopal, . Attention was invited to a decision of this High Court in the case of Commissioner of Income Tax Vs. Bipin Vadilal, , wherein it has been held that where the belief as to escapement of income chargeable to tax from assessment was not entertained by the AO on the ground that there has been failure on the part of the assessee to disclose truly and fully all material facts necessary for the assessment, but on the basis of information contained in the judgment, no proceedings can be initiated u/s 148 of the Act after the expiry of four years from the end of the relevant assessment year. It was, accordingly, submitted that the reopening of assessment after the expiry of a period of four years from the end of the relevant assessment year is

without jurisdiction. It was submitted that in any case, the decision of the Supreme Court in the case of Madhya Pradesh Co-operative Bank Ltd. v. CIT (supra) which forms the basis for reopening of assessment by the AO, has subsequently been overruled by a decision of the Supreme Court in the case of Commissioner of Income Tax Vs. KARNATAKA STATE CO-OPERATIVE APEX BANK, , wherein the Court has held that the view taken by the Supreme Court in the case of Madhya Pradesh Co-operative Bank Ltd. v. CIT (supra), does not set down the correct law. It was accordingly urged that even on merits, the reopening of assessment is not sustainable.

6. On the other hand, Mr. M.R. Bhatt, learned senior advocate, appearing on behalf of the respondent has placed reliance upon the affidavit-in-reply filed on behalf of the respondent to submit that no case has been made out so as to call for intervention by this Court.

7. The facts are not in dispute. The assessment year under consideration is 1991-92, whereas the impugned notice u/s 148 of the Act has been issued on 21st March, 1997, which is clearly beyond a period of four years from the end of the relevant assessment year. In the circumstances, for the purpose of reopening assessment, the income chargeable to tax should have escaped assessment (i) by reason of failure on the part of the assessee to make return u/s 139 of the Act; or (ii) there should be failure on the part of the assessee to make a return in response to the notice issued under sub-section (1) of section 142 or section 148; or (iii) to disclose fully and truly all material facts necessary for its assessment for the relevant assessment year. In the facts of the present case, it is an admitted position that there is no failure on the part of the assessee to make return u/s 139 or, to make a return in response to the notice issued under sub-section (1) or section 142 or section 148. Insofar as the third condition is concerned, namely, failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the assessment year in question, a perusal of the reasons for reopening of assessment indicates that the only reason for reopening the assessment is a decision of the Supreme Court in the case of Madhya Pradesh Cooperative Bank Ltd. v. CIT (supra). It is the aforesaid decision, which forms the basis for the belief that income has escaped assessment. In the affidavit-in-reply filed by the respondent also there is no averment to the effect that there is, any failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment. Thus, it is apparent that the basic requirement for assuming jurisdiction u/s 147 of the Act beyond a period of four years from the relevant assessment year is not satisfied as belief as to escapement of income chargeable to tax from assessment has not been entertained by the AO on the ground that there has been failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. In the circumstances, no proceedings could have been initiated by issuance of notice u/s 148 of the Act after the expiry of a period of four years from the end of the relevant assessment year. The initiation of reassessment proceedings in the case of the petitioner for the assessment year under

consideration is, therefore, clearly barred by limitation and as such, the impugned notice u/s 148 of the Act cannot be sustained.

8. Besides, the only ground for reopening the assessment is the decision of a two Judge Bench of the Supreme Court in the case of Madhya Pradesh Co-operative Bank Ltd. v. CIT (supra) which stands overruled by a subsequent decision rendered by a three Judge Bench of the Supreme Court in the case of Karnataka State Co-operative Apex Bank, (supra). In the circumstances, the very basis for reopening the assessment no longer survives. Hence, even on merits the reopening of assessment is not sustainable.

9. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned notice dt. 21st March, 1997 issued u/s 148 of the Act (Annex. A to the petition) is hereby quashed and set aside. Rule is made absolute accordingly, with no order as to costs.