

(2011) 03 GUJ CK 0023
In the Gujarat High Court

Case No : Special Civil Application No. 9677 of 2001

Trivenu Ship Breakers

APPELLANT

Vs

Harsh Prakash

RESPONDENT

Date of Decision : 17-03-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 10(15)(iv)(c), 143(3), 148, 40(a)(i), 40(c)(i)

Citation : (2011) 240 CTR 296 : (2011) 335 ITR 284 : (2012) 20 TAXMAN 386

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

Bench : Division Bench

Advocate : R.K. Patel and B.D. Karia, for the Appellant; B.B. Naik, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.—By this petition under Art. 226 of the Constitution of India, the petitioner has challenged notice dt. 28th May, 2001 issued by the respondent under s. 148 of the IT Act, 1961 ("the Act") reopening the petitioner's assessment for the asst. yr. 1994-95. The petitioner, a registered firm, carries on business of ship breaking. For this purpose it purchases ships that are not sea worthy from sellers usually based abroad. The transaction is carried out through banking channel. The buyer remits a portion of the amount through the bank and takes over possession of the ship. The remaining amount is to be paid within 60 days along with interest now popularly known as "usance interest. The petitioner filed its return of income on 31st Oct., 1994 for asst. yr. 1994-95 along with computation of income accompanied by Audit Report and relevant annexures as required under s. 44AB of the Act. Subsequently, after seeking various information and details, the assessment came to be framed under s. 143(3) of the Act on 26th March, 1997 making certain additions and disallowances.

2. Thereafter, by the impugned notice, the assessment of the petitioner for the

asst. yr. 1994-95 is sought to be reopened on the ground that the petitioner had paid interest to non-residents out of the boundaries of India, therefore, it was required to deduct tax as per the provisions of s. 40(a)(i) r/w Chapter XVII-B of the Act failing which the interest could not be allowed as a deduction in computation of income chargeable under the head "Profits and gains from business or profession. The AO formed the belief that in the present case the petitioner had paid usance interest amounting to Rs. 14,32,469 on purchase of ships but had not complied with the aforesaid provisions and as such the petitioner had been allowed deduction against profits which was contrary to the law in force, resulting in escapement of income chargeable to tax. Being aggrieved, the petitioner has filed the present petition.

3. Mr. B.D. Karia, learned advocate appearing on behalf of the petitioner invited attention to the provisions of s. 10(15)(iv)(c) of the Act which provides that the interest payable by an industrial undertaking in India on any moneys borrowed or debt incurred by it before the 1st June, 2001, in a foreign country in respect of the purchase outside India of raw materials or components or capital plant and machinery, to the extent to which such interest does not exceed the amount of interest calculated at the rate approved by the Central Government in this behalf, having regard to the terms of the loan or debt and its repayments shall not be included in computing the total income of the previous year of any person. It was submitted that the Taxation Laws (Amendment) Act, 2003 Expln. 2 came to be inserted under cl. (c) with retrospective effect from 1st April, 1962, whereby the usance interest payable outside India by an undertaking engaged in the business of ship-breaking in respect of purchase of ship from outside India is deemed to be interest payable on debt incurred in a foreign country in respect of the purchase outside India. It was submitted that in the light of the Expln. 2 to cl. (c) the usance interest payable by the petitioner would not be includible in computing the total income of the petitioner for the year under consideration. It was accordingly submitted that in the light of the aforesaid amendment, the very foundation of the show cause notice issued under s. 148 of the Act does not survive.

4. This Court has also heard Mr. B.B. Naik, learned senior advocate appearing on behalf of the respondent.

5. From the facts noted hereinabove, it is apparent that the assessment of the petitioner for the asst. yr. 1994-95 is sought to be reopened by issuing the impugned notice on the ground that the petitioner had paid the usance interest amounting to Rs. 14,32,469 on purchase of ships and had not complied with the provisions of s. 40(c)(i) of the Act. However, by virtue of Expln. (2) to s. 10 (15) (iv)(c) of the Act, which has been made retrospectively effective from 1st April, 1962, usance interest payable outside India by an undertaking engaged in the business of ship-breaking in respect of purchase of ship from outside India is deemed to be interest payable on debt incurred in a foreign country in respect of the purchase outside India and as such the same cannot be included while

computing the total income of the petitioner. In the circumstances, the very basis for reopening the assessment no longer survives. The impugned notice under s. 148 of the Act, therefore, cannot be sustained. For the foregoing reasons, the petition succeeds and accordingly it is allowed. The impugned notice dt. 28th May, 2001 issued under s. 148 of the Act is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.