

(2011) 03 GUJ CK 0024

In the Gujarat High Court

Case No : Special Civil Application No. 4139 of 2001

Vinayak Builders

APPELLANT

Vs

BD Garsar (OR) Successor

RESPONDENT

Date of Decision : 18-03-2011

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 133A, 143(1), 143(1)(a), 147, 148

Citation : (2012) 346 ITR 39

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

Bench : Division Bench

Advocate : S.N. Soparkar with Ms. Bhumi Thakore, for the Appellant; Mauna M. Bhatt, for the Respondent

Final Decision : Dismissed

Judgement

H.B. Antani, J.—By way of filing the present petition under article 226 of the Constitution of India, the petitioner has challenged the notice dated April 11, 2001, issued by the respondent seeking to reopen the petitioner's assessment for the assessment year 2000-01 as illegal and contrary to the provisions of the law and without jurisdiction. The petitioner, a registered firm, filed its return of income for the assessment year 2000-01, on August 1, 2000, declaring total income of Rs. 11,143 which was accepted by the respondent on February 19, 2001, vide intimation issued u/s 143(1) of the income tax Act, 1961 (hereinafter referred to as "the Act"). The petitioner received the impugned notice dated April 11, 2001 and, therefore, the petitioner addressed a letter dated April 23, 2001, asking for the reasons for issuance of the impugned notice and reopening the assessment for the assessment year 2000-01. The respondent addressed a letter dated May 8, 2001, wherein without supplying the reasons for reassessment, stated therein that the request for the supply of reasons for reopening will be considered on the receipt of return of the income as envisaged in the notice dated April 11, 2001.

2. Mr. S.N. Soparkar with Ms. Bhumi Thakore, learned advocate for the petitioner, submitted that the notice issued u/s 148 of the Act is illegal and contrary to the provisions contained u/s 148 of the Act. The learned advocate for the petitioner submitted that notice u/s 148 of the Act can be issued if the Assessing Officer has reason to believe that the income chargeable to tax has escaped assessment. It is settled principle that the words "reason to believe" suggest that the belief must be that an honest and reasonable person based upon the reasonable ground and not a mere change of opinion, suspicion, gossip or rumour and the belief must lead to the conclusion that income has escaped assessment. It is submitted that the income tax Officer, Ward No. 2, Junagadh, recorded the reasons as under :

The assessee being firm filed return of its income for the assessment year 1998-99 being the first return with the Assistant Commissioner of income tax, Junagadh. The Assistant Commissioner of income tax referred the case to the Departmental Valuation Officer for determining the correct cost of constructions. The Departmental Valuation Officer, Ahmedabad, vide his letter No. 2(2)/DVO/99-00/ 1043, dated February 1, 2000, determined the cost of construction for the assessment year 1998-99 at Rs. 49,05,785 and for the assessment year 1999-2000 at Rs. 34,89,830 against the cost of construction declared by the assessee-firm for Rs. 21,42,131 and Rs. 17,23,380 respectively. Thus, the difference in valuation requires to be added back to the total income treating the same as unexplained expenses/ investment. The return of income so filed has been processed u/s 143(1) (a) which requires to be reopened as per the provisions of section 147 of the income tax Act. Moreover, survey operation u/s 133A of the income tax Act was carried out on January 12, 1999, by the Assistant Commissioner of income tax, Junagadh. Intimation to that effect received on March 20, 2001.

3. Learned advocate for the petitioner submitted that the reopening of the assessment is based on the survey operation u/s 133A of the Act and it was carried out by the Assistant Commissioner of income tax, Junagadh. Learned advocate submitted that the decision rendered by the apex court in the case of Asst. CIT v. Dhariya Construction Co. reported in (2010) 328 ITR 515 (SC), squarely applies to the facts of the present case and the opinion given by the District Valuation Officer is not per se information for the purpose of reopening an assessment u/s 147 of the income tax Act, 1961. The learned advocate submitted that in view of the aforesaid ratio laid down by the apex court, the present petition deserves to be allowed and the order issuing the notice at annexure A to the petition, which is under challenge, be quashed and set aside.

4. We have also heard Mrs. Mauna M. Bhatt, learned standing counsel for the respondent at length and in great detail. We have also perused the averments made in the petition as well as the impugned notice which is at annexure A to the petition which is under challenge in the present petition.

5. The petitioner filed the returns of income on August 1, 2000, and declared the

total income at Rs. 11,143. The petitioner-assessee during the previous year was engaged in the construction business and constructed business complex during three financial years, i.e., 1997-98 to 1999-2000 and had filed the returns for its income for the assessment year 1998-99, being the first return with the Assistant Commissioner of income tax, Junagadh. The Assistant Commissioner of income tax, Junagadh, referred the case to the Departmental Valuation Officer, for determining the correct cost of construction. The Valuation Officer, Ahmedabad, vide his report, determined the cost of construction for the assessment year 1998-99 at Rs. 49,05,785 and for the assessment year 1999-2000 at Rs. 34,89,830 against the cost of construction declared by the assessee-firm for Rs. 21,42,131 and Rs. 17,23,380 respectively. According to the Assessing Officer, the difference in valuation requires to be added back to the total income treating the same as unexplained expenses/ investment and, therefore, the assessment is required to be reopened as per the provisions of section 147 of the income tax Act.

6. From the reasons recorded, it is apparent that the sole ground for reopening the assessment is that the Valuation Officer had determined the cost of construction at a higher rate than that shown by the assessee in its books of account. The reasons recorded do not reflect that the Assessing Officer has applied his mind to the facts of the case to ascertain as to whether in fact the assessee has expended more amount towards construction as stated in the valuation report. In the circumstances, we are, therefore, of the opinion that the case of the petitioner is squarely governed by the ratio laid down by the apex court in the case of Asst. CIT v. Dhariya Construction Co. (2010) 328 ITR 515 (SC). The apex court in the aforesaid decision held as under (page 515) :

Having examined the record, we find that in this case, the Department sought reopening of the assessment based on the opinion given by the District Valuation Officer (DVO). The opinion of the DVO per se is not an information for the purposes of reopening assessment u/s 147 of the income tax Act, 1961. The Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon. In the circumstances, there is no merit in the civil appeal. The Department was not entitled to reopen the assessment.

Civil appeal is, accordingly, dismissed. No order as to costs.

In view of the aforesaid proposition of law, the impugned notice u/s 148 of the income tax Act is unsustainable and, therefore, the petition is allowed. The impugned notice dated April 11, 2001, issued by the income tax Officer, Ward No. 2, Junagadh (annexure A to the petition) for reopening the assessment for the assessment year 2000-01 u/s 148 of the income tax Act is quashed and set aside. Rule is made absolute accordingly with no order as to costs.