

(2012) 10 GUJ CK 0014

In the Gujarat High Court

Case No : Special Civil Application No. 204 of 2012

Vishwanath Engineers

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 08-10-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 143(3), 147, 148, 271(1)(c), 274

Citation : (2013) 354 ITR 211

Hon'ble Judges : Harsha Devani, J; Akil Abdul Hamid Kureshi, J

Bench : Division Bench

Advocate : Manish J. Shah, for the Appellant; Paurami B. Sheth, for the Respondent

Judgement

Akil Kureshi, J.—Rule. Learned counsel, Ms. Paurami B. Sheth, waives service of notice of rule on behalf of the respondent. The petition is taken up for final disposal forthwith.

2. The petitioner is a partnership firm and is regularly assessed to tax. The petitioner has challenged a notice dated April 19, 2010, issued by the respondent-Assessing Officer u/s 148 of the income tax Act, 1961 (hereinafter to be referred to as "the Act"), seeking to reopen the assessment of the petitioner for the assessment year 2006-07.

3. For the assessment year 2006-07, the petitioner filed the return of income on July 26, 2006, declaring total income of Rs. 25,30,915 along with audited accounts. In the profit and loss account, the petitioner had claimed various expenses including a sum of Rs. 7,50,771 as maintenance contribution (society) under the head of administrative expenses.

4. The assessment was taken in scrutiny. The Assessing Officer framed assessment u/s 143(3) of the Act on December 26, 2008. There was no disallowance of such expenditure. He computed the income of the assessee at

Rs. 28,97,560.

5. Subsequently, the Assessing Officer issued the impugned notice dated April 19, 2010, u/s 148 of the Act.

6. After receipt of the notice, the petitioner addressed a letter dated April 22, 2010, to the respondent. In addition to opposing such reopening of the assessment on the ground that any reopening would be based on a mere change of opinion, the petitioner also requested the Assessing officer to supply the reasons recorded for such reopening. Ignoring such request, the Assessing Officer issued notices to the petitioner to remain personally present or through representative to clarify certain aspects, on which he required clarification. The case of the petitioner thus, is that without even supplying the reasons for reopening recorded, the Assessing Officer assumed jurisdiction and proceeded with the reassessment proceedings. Be that as it may, the reasons were supplied to the petitioner by the Assessing Officer, which read as under:

The assessee has filed the return of income for the assessment year 2006-07 on July 27, 2006, showing a total income of Rs. 25,30,915. Assessment u/s 143(3) of the income tax Act was completed on December 26, 2008. As per section 37 of the income tax Act, 1961, any expenditure incurred wholly and exclusively for the purpose of business or profession can be allowed as expenditure while computing the taxable income of the assessee. On verification of the details, it is noticed that the assessee, a consultant in real estate business, had entered into agreement with "Kundan (Satellite) Co-operative Society". As per the terms and conditions of the agreement, the developer should collect "maintenance deposit" from the members and incur expenditure from the deposit towards maintenance of the society. However, the assessee had debited Rs. 7,50,771 as "maintenance contribution (society)" under the head "administrative expenditure" in the profit and loss account during the previous year 2006-07. The same was allowed in the scrutiny assessment as expenditure while computing the taxable income of the assessee. As the expenses, i.e., maintenance contribution was not directly related to the business of the developer, the same requires to be disallowed and added back to the income. In view of this fact, I have reason to believe that the income chargeable to tax has escaped assessment within the meaning of section 147 of the income tax Act.

7. Now, armed with the reasons for reopening, the petitioner made a further detailed representation to the respondent-Assessing Officer on August 10, 2011. In such communication, he pointed out that the entire aspect of the expenditure of Rs. 7,50,771 was examined by the Assessing Officer in the original assessment. Therefore, any reopening even within a period of four years from the end of the relevant assessment year, would not be permissible. He placed reliance on several decisions of the High Courts as well as the Supreme Court.

8. The Assessing Officer did not dispose of such objections. He proceeded to frame the final assessment under his order dated November 30, 2011. In the

course of finalising the assessment, he dealt with the objections of the petitioner, but found himself unable to accept the same. He made an addition of Rs. 7,50,771 by disallowing the expenditure claimed by the assessee, making the following observations:

The assessee's aforesaid reply has carefully been considered but the ground not convincing. The assessee-firm has given sufficient opportunity to file its objections. The assessee-firm has stated in its reply that notice u/s 148 was issued without obtaining approval of higher authority. In this regard, the contention of the assessee is not acceptable. The case was reopened u/s 148 in proper and as per law. In this case, the approval for issuing notice u/s 148 was obtained from higher authority after recording reasons. On verification of the details furnished by the assessee-firm and as per case records, it is noticed that the assessee-firm, a consultant in real estate business, had entered into agreement with "Kundan (Satellite) Co-operative Society". As per the terms and conditions of the agreement, the developer should collect "maintenance deposit" from the members and incur the expenditure from the deposit towards maintenance of the society. However, the assessee-firm had debited Rs. 7,50,771 as "maintenance contribution (society)" under the head "administrative expenditure" in the profit and loss account during the previous year 2005-06. As the expenses, i.e., the maintenance contribution was not directly related to the business of the developer. Therefore, the maintenance contribution (society) is disallowed and added to the total income of the assessee-firm. The penalty proceedings u/s 271(1)(c) of the Act are separately initiated for furnishing inaccurate particulars of income.

Subject to the above remarks the total income of the assessee is computed as under:

Reassessed as above u/s 143(3) read with section 147. Give credit for prepaid taxes after verification. Charge interest as applicable. Issue demand notice and challan accordingly. Issue penalty notice u/s 271(1)(c) read with section 274 of the Act for furnishing inaccurate particulars of income.

9. Learned counsel Mr. Manish J. Shah for the petitioner contended that the Assessing Officer had no jurisdiction to reopen the assessment. The notice itself was not valid since the reasons recorded did not establish that any income chargeable to tax had escaped assessment.

10. Counsel further submitted that the entire aspect of the expenditure of Rs. 7,50,771 was examined by the Assessing Officer during the scrutiny. After a detailed examination, the expenditure was allowed. No additions were made. Such assessment could not be reopened on a mere change of opinion. The notice which was issued even within four years from the end of the relevant assessment year, thus lacked validity.

11. Learned counsel, Ms. Paurami B. Sheth, for the Revenue raised a preliminary contention that the assessment order having already been passed, the assessee

be relegated to appellate remedy. She submitted that all contentions including with respect to the validity of the notice for reopening can be examined by the appellate authority.

12. Counsel for the Revenue further submitted that the Assessing Officer, after recording the reasons, had issued notice for reopening within a period of four years from the end of relevant assessment year. In the original assessment, the question of expenditure of Rs. 70,50,771 was not examined. The petition should, therefore, be dismissed.

13. By virtue of the decision of the apex court in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, , the assessee had the right to receive reasons recorded by the Assessing Officer for reopening and to raise his objections to such reopening of the assessment previously framed for scrutiny. Such objections were required to be dealt with and disposed of by the Assessing Officer before finalising the assessment. The Assessing Officer blatantly disregarded such decision of the apex court. Instead of disposing of the objections separately, he proceeded to frame the assessment ignoring the objections of the petitioner. It was only in the final order of the assessment that he touched on the various objections raised by the petitioner. It was perhaps possible for the petitioner to argue that only on this ground, the assessment should be set aside. We may not go to such length, keeping such a contention open to be examined in a proper case in future. However, by no stretch of imagination can we accept the Revenue's contention that the Assessing Officer having framed the assessment ignoring the Supreme Court's directives, now the assessee must appear before the appellate authority. Firstly, mere finalisation of the assessment does not take away the High Court's jurisdiction under article 226 of the Constitution to examine the very validity of the reopening. Secondly, the Assessing Officer, having ignored the Supreme Court's directives of disposing of the objections before finalising the assessment at least cannot hope to capitalize on his own wrong that the assessee now must go in appeal because rightly or wrongly, he having framed the assessment, the only remedy available to the assessee would be to file an appeal. This would amount to allowing the Assessing Officer to take advantage of his own wrong.

14. Coming to the question of validity of the notice, we may examine the facts little more closely. The original assessment was framed after scrutiny and thorough inquiry. During the course of assessment, the Assessing Officer issued notices, one such notice being dated September 17, 2008, in which, he raised as many as twenty eight queries. One of them being the following:

23. Complete details of various items credited/debited to profit and loss account, like construction income/fees, major purchases, site/labour expenses, AUDA expenses, electricity expenses, interest expenses, etc.

15. In response to such notice, the petitioner supplied various details under a communication dated October 16, 2008. With respect to business expenses, the

assessee stated as under:

Copy of selected business expense accounts and its justification:

1. Interest on borrowed funds
2. Consultation fees
3. Maintenance contribution
4. Office rent expense
5. Legal expense
6. Architect fees
7. Brokerage expense.

16. He further elaborated the nature of expenditure of Rs. 7,50,771 by pointing out that the assessee had received various maintenance deposits from three different societies and agreed to retain such amount without interest and in turn to bear part of the maintenance expenses incurred by the societies. His explanation read as under:

4.4 Maintenance contribution:

We have collected the maintenance deposit from the unit booking holders as per development agreement. The details of maintenance deposit expenses of the three society handed over during the years is as under:

As per the understanding of the agreement we are required to contribute maintenance to the society by drawing cheques in their favour as and when the expense is incurred by the society. Our contribution is restricted to an amount as given by us. Actual expense incurred by society is more than the amount contributed by us. This contribution is given against the use of maintenance deposit in our business which is interest free. Thus the expense being less than 12 per cent, of fund utilized, the claim is justified.

17. The final order of the assessment, which the Assessing Officer passed, did not make any disallowance of this expenditure. Against the returned income of Rs. 25,30,951, he computed the income of the assessee at Rs. 28,97,560. In other words, certain additions and disallowances were made. The expenditure of Rs. 7,50,771 was, however, not one of them.

18. It is this scrutiny assessment which the Assessing Officer now desired to reopen on the ground that such expenditure of Rs. 7,50,771 was not a business expenditure and, therefore, could not have been allowed.

19. We are not required to go into the question of allowability or otherwise of the expenditure of Rs. 7,50,771. The Assessing Officer may perhaps be justified in believing that such expenditure was not for the purpose of business. We would not like to comment on such aspect since we are of the opinion that having

previously examined the nature of expenditure and having accepted the same during the original assessment, it was not open for the Assessing Officer to re-examine such question. Any such attempt on the part of the Assessing Officer would be based only on a change of opinion. Reopening even within four years would not be permissible. The apex court in the case of Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited, held and observed as under (page 564):

On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from April 1, 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between the power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after April 1, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets supports from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reasons to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression, and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer.

20. In the present case, we may recall that the assessee made full disclosure about expenditure in question. The Assessing Officer called upon the assessee to explain all expenses. The sum of Rs. 7,50,771 was a sizable expenditure, which the assessee claimed by way of business expenditure. He gave detailed reply to the queries raised by the Assessing Officer in this respect. He pointed out that the assessee had received various deposits from the co-operative societies. Such deposits were retained without paying any interest. Against that the assessee had the responsibility to meet with part of the maintenance expenditure of the

society. The expenses which were the petitioner borne in six months of the year, were less than 4 per cent, of the deposit amount.

21. After examining such details, the Assessing Officer had framed his original assessment. Of course, in such assessment, he had not made any specific mention of accepting such expenditure. Without there being anything additional on record, any attempt on the part of the Assessing Officer to disallow such expenditure by reopening the assessment would be based on mere change of opinion and, therefore, not permissible in law. In the result, the impugned notice dated April 19, 2010, is quashed. Resultantly, the assessment which came to be framed by the Assessing Officer also would stand invalidated. Rule is made absolute accordingly with no order as to costs.