(2009) 02 GUJ CK 0105

Gujarat High Court

Case No: None

Shankarlal Nagji and Co. and Others		APPELLANT
	Vs	
ITO and Another		RESPONDENT

Date of Decision: Feb. 9, 2009

Acts Referred:

- Income Tax Act, 1961 - Section 131, 147, 148

Hon'ble Judges: S.R. Brahmbhatt, J; D.A. Mehta, J

Bench: Division Bench

Judgement

D.A. Mehta, J.

This petition has been preferred challenging notices issued u/s 148 of the Income Tax Act, 1961 (hereinafter referred to as the Act) for assessment years 1995-96, 1996-97 and 1997-98.

2. The petitioner is a partnership firm, who is assessed to tax under the Act. The petitioner has business of selling fresh vegetables on commission basis in the market outside Jamalpur Gate. The market is run and managed by Agricultural Produce Market Committee (APMC). The petitioner purchases vegetables from farmers and sells the same. According to the petitioner, the petitioner is supposed to get 5 per cent commission on sales as decided by APMC and the petitioner is required to pay market fee at the @ 0.50 paise on every Rs. 100 of sale, which the petitioner collects from the purchasers of the goods sold by the petitioner.

3. Sometime in November, 1997, it is the say of the petitioner, that the petitioner received summons u/s 131 of the Act from the Assistant Director of Income Tax (Investigation), Unit No. 1(1) (the Asstt. Director of IT (Inv.)hereinafter referred to as) on the basis of some search and seizure proceedings in case of some other dealers in the market. It is the case of the petitioner that the petitioner has no relation, either in business or in any other manner with the said dealers. The petitioner has

narrated in para No. 2 of the petition the modus operandi for accounting its commission receipts as explained to the Asstt. Director of IT (Inv.) when the petitioner attended before the said authority with books of accounts. It appears that, according to the petitioner, the Asstt. Director of IT (Inv.) advised the petitioner to avail of the Voluntary Disclosure of Income Scheme, 1997 (the VDIS) which was in operation at the relevant point of time. For this purpose, the petitioner has referred to communication dated 30-12-1997 addressed by the petitioner to the Asstt. Director of IT (Inv.). Ultimately, it appears that the petitioner declared an amount of Rs. 6,00,000 under VDIS for each of the three years under consideration.

4. Subsequently, the impugned notices, for the three assessment years dated 23-3-1999 have been received by the petitioner and the same are under challenge in the present petition.

5. Learned advocate for the petitioner has assailed the action of the respondent authority, firstly on the ground that the respondent department has gone back on its word in reopening the assessments which were concluded under the VDIS and the said income, which was declared under the said scheme, is sought to be taxed again. For this purpose reliance has been placed on various questions and answers issued in the form of Circular No. 755, dated 25-7-1997 ((1997) 141 CTR 1 to contend that an income which has been declared under VDIS cannot be subjected to any further proceedings. Secondly, it was submitted that the reasons recorded do not disclose any income which has escaped. assessment so as to clothe the respondent authority with jurisdiction.

6. On behalf of the respondent authority Shri M.R. Bhatt, learned senior standing counsel, submitted that it was an accepted position that the petitioner was required to pay market fee @ 0.50 paise per Rs. 100 of sale and the petitioner had paid market fee of Rs. 1,97,679 in assessment year 1995-96, Rs. 1,73,435 in assessment year 1996-97 and Rs. 1,91,572 in assessment year 1997-98. Therefore, the assessee was bound to have received total commission of Rs. 19,76,790 Rs. 17,34,350 and Rs. 19,15,720 for each of the three assessment years respectively. As against that commission receipts to the tune of Rs. 7,18,358, Rs. 8,71,534 and Rs. 9,44,173 were shown to have been received by the petitioner assessee as recorded in books of account leading to substantial difference in each of the three years under consideration. Therefore, it was for the assessee to lead evidence to establish whether the said figure was required to be reduced by any expenditure made by the petitioner, otherwise the respondent authority was entitled to raise a presumption that the gross receipts were liable to tax. It was further submitted that the matter was at the stage of notice and in light of the apex court decision in the case of Raymond Woollen Mills Ltd. Vs. Income Tax Officer and Others, if there was prima facie some material on the basis of which department could reopen the case, it was not necessary to enter into any further analysis of facts. It was therefore urged that the petition was required to be rejected.

7. Having heard the learned Counsel appearing for the respective parties it is apparent that insofar as the factum of declaration under the VDIS is concerned, though strenuous contentions were raised, it would not be germane to the issue in the facts of the present case because the court is only to examine as to whether the reopening of completed assessments initapsted by issuance of three notices impugned is valid in law or not on the basis of settled parameters. For this purpose it is necessary to consider the reasons recorded by the respondent authority before issuance of impugned notices. Except for the difference in the figures for the three years under consideration, as the language employed is identical, one may usefully reproduce the reasons recorded in assessment year 1995-96 which read as under:

Name of the assessee : Shankarlal Nagaji & Co.

Address of the assessee : Sardar Patel Market O/s. Jamalpur Darwaja, Ahmedabad.

Assessment Year : 1995-96

Status : R.F.

Reason to reopen the assessment u/s 147 of the Income Tax Act

The assessee is doing the business of commission agent of vegetables. According to norms of the APMC the commission agents are suppose to be charged commission at the rate of 5 per cent on total sale proceeds of vegetable growers. On this sale proceeds the commission agent has to pay market fee at the rate of 0.5 per cent from his commission.

During the year under consideration, the assessee had paid a market fee of Rs. 1,97,679. Therefore, the assessee must have received the total commission of Rs. 19,76,790 out of this Rs. 7,18,358 shown as commission received during the year. Therefore, there is a difference of Rs. 12,58,432 in commission received and commission accounted for.

I have therefore, reason to believe that the income chargeable to tax has escaped amount. Issue notice u/s 148 of the Income Tax Act.

Sd
(D.G. Pansari)
ITO, Ward 2(7), Ahmedabad.

8. Section 147 of the Act permits an assessing officer to reassess an income which is chargeable to tax and has escaped assessment for any assessment year if the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. Therefore, the basic requirement is that an income which is chargeable to tax has escaped assessment.

9. Keeping the aforesaid position of law in mind if one reads the reasons recorded in para No. 1 of the reasons, facts are narrated; in para No. 2 the assessing officer

undertakes arithmetical calculation applying the formula of three by taking the figure of market fee paid as the starting point and working out the total commission which the assessee must have received on total sale proceeds by adopting the rate of 5 per cent of sales. Thereafter, difference between commission shown and commission received has been worked out. The last para thereafter states that the respondent has reason to believe that the income chargeable to tax has escaped assessment. There is no link between the last sentence of para No. 2 and para No. 3. After working out the gross commission receipts the assessing officer, while recording reasons, has not even stated that the gross commission receipts are the income chargeable to tax. In fact there is no material discernible from the reasons recorded to establish as to which income has escaped assessment. It is not even the case of the assessing officer that at the point of time when the assessment was originally framed gross commission receipts had been brought to tax. Therefore, it is not possible to accept the contention on behalf of the respondent authority that it is for the petitioner to lead evidence to show that gross receipts are not equivalent to income chargeable to tax. First of all the respondent authority has to show from the reasons recorded that there is material to treat gross receipts as income. The law is well settled. All receipts are not income, and that too chargeable to tax.

10. In fact this position becomes clear when one reads the affidavit-in-reply dated 20-1-2000 wherein the respondent assessing officer has very fairly stated that the VDIS cannot be so read that merely because of a disclosure of some income under the VDIS the department would be estopped in making enquiries with regard to the income which has escaped assessment. This indicates that there is no material available with the respondent authority for holding any belief that any income chargeable to tax has escaped assessment, which in fact reasons recorded also does not disclose. A completed assessment cannot be reopened merely to make inquiries. That is the domain of regular assessment.

11. In the facts of the case the decision cited by the learned Counsel on behalf of the respondent authority is not applicable because this is not a case where there is some material to come to the conclusion that there is any nexus with any income chargeable to tax which has escaped assessment. On facts, in fact, there is no material which can lead the assessing officer to believe that any income has escaped assessment.

12. The three impugned notices of dated 23-3-1999 are hereby quashed and set aside. The petition is allowed accordingly in the aforesaid terms. Rule made absolute with no order as to costs.