

(2016) 01 GUJ CK 0121

GUJARAT HIGH COURT

Case No: Special Civil Application No. 20492 of 2015

Prakriya Pharmachem
and Others

APPELLANT

Vs

Income Tax Officer,
Ward 7

RESPONDENT

Date of Decision: Jan. 18, 2016

Acts Referred:

- Income Tax Act, 1961 - Section 143(1), Section 143(2), Section 143(3), Section 147, Section 148, Section 45, Section 47, Section 48

Citation: (2016) 01 GUJ CK 0121

Hon'ble Judges: Akil Abdul Hamid Kureshi and Mohinder Pal, JJ.

Bench: Division Bench

Advocate: S.N. Soparkar, Senior Advocate and B.S. Soparkar, Advocate, for the Appellant;
Sudhir M. Mehta, Advocate, for the Respondent

Final Decision: Disposed Off

Judgement

@JUDGMENTTAG-ORDER

Akil Abdul Hamid Kureshi, J.

1. The petitioner is a company registered under the Companies Act. The petitioner has challenged notice dated 24.02.2015, produced at Annexure "A" to this petition, issued by the respondent-Assessing Officer, to re-open assessment for the Assessment Year 2010-11.

2. Brief facts are as under. For the assessment year 2010-11 the petitioner had filed its return of income on 22.07.2010 declaring loss of Rs. 2.69 lacs (rounded off). Such return was accepted without scrutiny. Thus, no scrutiny assessment under section 143(3) of the Income Tax Act, 1961 ("the Act" for short) came to be framed in that case.

3. The Assessing Officer, in order to re-open such assessment, issued the impugned notice dated 24.02.2015 at the request of the petitioner. He also supplied reasons recorded by him for issuing notice. Such reasons read as under:

".. .. It is seen that the assessee has transferred 5,30,410 shares during year under consideration whose market value on the date of transfer was Rs. 7,63,09,5550/- without consideration to M/s. Nerka Chemicals Pvt. Ltd. by way of transfer deed dated 26.02.2010.

In view of the above facts, I have reason to believe that and I am satisfied that the income chargeable to tax of more than Rs. 1,00,000/- has escaped assessment within the provisions of section 147 of the Income Tax Act."

4. The petitioner raised objections to the notice of re-opening. However, such objections were rejected by the Assessing Officer by order dated 07.10.2015. Hence the petition.

5. Inviting our attention to the reasons recorded by the Assessing Officer counsel for the petitioner submitted that the reasons lack validity. On the basis of such reasons the Assessing Officer could not have formed a belief that the income chargeable to tax had escaped assessment. He submitted that the petitioner-company had transferred total of 4,82,410 shares to its sister concern-company without charging amount by way of gift. In terms of sub-section (iii) of section 47 of the Act, such transfer was not subject to capital gain. In any case, as donor, the petitioner had no tax liability on the gift so made. Taking us through the affidavit in reply filed by the respondent, counsel submitted that reliance on the further proviso to section 48 of the Act placed by the Assessing Officer was wholly baseless.

6. On the other hand learned counsel Shri Sudhir M. Mehta for the Department opposed the petition contending that return of the assessee was accepted under section 143(1) of the Act without scrutiny. There was no opinion formed by the Assessing Officer on the tax liability of the income in question as held by the Supreme Court in case of Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers P. Ltd., reported in , 291 ITR 500 (SC). It is not necessary at this stage for the Assessing Officer to establish conclusively that the income chargeable to tax has escaped assessment. Counsel also relied on decision of this Court in case of Inductotherm (India) P. Ltd. Vs. M. Gopalan, Deputy Commissioner of Income Tax, reported in , 356 ITR 481 (Guj.) in this context. Counsel also relied on the decision of the Supreme Court in case of Deputy Commissioner of Income Tax and another Vs. Zuari Estate Development and Investment Company Ltd., reported in , 373 ITR 661 (SC), in which the Supreme Court referring to decision in the case of Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers P. Ltd. (supra) reversed the judgment of the High Court, by which the High Court had allowed the writ petition, in which the assessee had challenged validity of the notice for re-opening of an assessment which was originally accepted under section 143(1) of the Act.

6.1 Counsel drew our attention to the reasons recorded by the Assessing Officer to contend that 5,30,410 shares of the assessee-company which were transferred without any consideration valued at Rs. 7.63 crores (rounded off) and that therefore, further scrutiny was necessary.

7. We are conscious that in the present case return of the income filed by the petitioner was not taken in scrutiny. No scrutiny assessment was therefore, framed. Return was only accepted under section 143(1) of the Act. In that view of the matter the scope for the Assessing Officer to reopen such assessment on a valid reason to believe that the income chargeable to tax had escaped assessment would be much wider compared to the case where scrutiny assessment has been framed. This would be so since there would be no opinion formed by the Assessing Officer while accepting return under section 143(1) of the Act without scrutiny. Consequently, therefore, the question of change of opinion would not arise. This is in sum and substance held by the Supreme Court in the case of Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers P. Ltd. (supra). It is on this ground that the Supreme Court had in the case of Deputy Commissioner of Income Tax and another Vs. Zuari Estate Development and Investment Company Ltd. (supra) reversed the judgment of the High Court. However, even in the case of assessment previously framed without scrutiny which is sought to be reopened by issuance of notice under section 148 of the Act, the principle requirement that the Assessing Officer has reason to believe that the income chargeable to tax had escaped assessment would still survive. Of course, this formation of belief by the Assessing Officer must be prima facie and at the stage when the Court is testing validity of such a notice; it would not be necessary for the Assessing Officer to conclusively establish that the income chargeable to tax had escaped assessment.

8. In the case of Inductotherm (India) P. Ltd. Vs. M. Gopalan, Deputy Commissioner of Income Tax (supra) Division Bench of this Court, in the context of reopening of assessment which was framed without scrutiny held and observed as under:

"13. Despite such difference in the scheme between a return which is accepted under section 143(1) of the Act as compared to a return of which scrutiny assessment under section 143(3) of the Act is framed, the basic requirement of section 147 of the Act that the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment is not done away with. Section 147 of the Act permits the Assessing Officer to assess, re-assess the income or re-compute the loss or depreciation if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. This power to reopen assessment is available in either case, namely, while a return has been either accepted under section 143(1) of the Act or a scrutiny assessment has been framed under section 143(3) of the Act. A common requirement in both of cases is that the Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment.

15. xxx xxx

16. It would, thus, emerge that even in case of reopening of an assessment which was previously accepted under section 143(1) of the Act without scrutiny, the Assessing Officer would have power to reopen the assessment, provided he had some tangible material on the basis of which he could form a reason to believe that income chargeable to tax had escaped assessment. However, as held by the Apex Court in the case of Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd., (supra) and several other decisions, such reason to believe need not necessarily be a firm final decision of the Assessing Officer.

17. If we accept such proposition, the petitioner's apprehension that the Assessing Officer would arbitrarily exercise powers under section 147 of the Act to circumvent the scrutiny proceedings which could not be framed in view of notice under section 143(2) having become time barred, would be taken care of. To reiterate, even for reopening of an assessment which was accepted previously under section 143(1) of the Act without scrutiny, the Assessing Officer should have reason to believe that income chargeable to tax has escaped assessment."

9. With this narrow scrutiny permissible at this stage we would examine the reasons recorded by the Assessing Officer for issuing the impugned notice. We may recall that in the reasons provided it is stated that the assessee has transferred 5,30,410 shares during year under consideration whose market value on the date of transfer was Rs. 7.63 crores (rounded off). This transfer had taken place in favour of M/s. Nerka Chemicals Pvt. Ltd. without consideration under transfer deed dated 26.02.2010. In view of such facts, the Assessing Officer has reason to believe that the income chargeable to tax in excess of Rs. 1,00,000/- had escaped assessment.

10. For multiple reasons we are convinced that these reasons lack validity. The first and foremost, reasons themselves record merely the transaction and nothing more. Quite apart from there not being live link between the first portion of the reasons recorded, namely, by merely duplicating the recording of transaction of transfer of sizable number of shares having considerable market value without consideration and second portion of the reasons where he concluded that the income chargeable to tax had escaped assessment.

11. Quite apart from this, even on greater scrutiny of the statutory provisions, we find that the transaction in question did not invite any tax liability on the petitioner. Section 45 of the Act, as is well known, pertains to capital gains. Sub-section (1) thereof in particular provides for charging of tax on any profit or gain from transfer of capital assets as deemed income of the assessee for the previous year in which transfer took place. Section 47 of the Act pertains to transaction not regarded as transfer. Sub-clause (iii), which is relevant for our purpose reads as under:

"47. Nothing contained in section 45 shall apply to the following transfers:-

(i) xxx xxx

(ii) xxx xxx

(iii) any transfer of a capital asset under a gift or will or an irrevocable trust:

Provided that this clause shall not apply to transfer under a gift or an irrevocable trust of a capital asset being shares, debentures or warrants allotted by a company directly or indirectly to its employees under any Employees' Stock Option Plan or Scheme of the company offered to such employees in accordance with the guidelines issued by the Central Government in this behalf."

Under sub-clause (iii) of section 47 of the Act, therefore, nothing would apply to any transfer of capital assets under a gift or will or irrevocable trust. It is not the case of the Assessing Officer that the present case is not one of transfer of asset under a gift. In terms of sub-clause (iii) of section 47 of the Act, thus such transfer would not be governed by section 45 of the Act. For apparent reasons, the proviso to sub-section (iii) of section 47 of the Act would not apply to the present case, since it applies to any transfer under gift or irrevocable trust under capital asset in the nature of shares, debentures or warrants allotted by a company to its employees under Employees' Stock Option Plan or Scheme. Admittedly, this is not such a case. This proviso is in the nature of exclusion to main provisions of sub-clause (iii) of section 47 of the Act. Under the circumstances, the case on hand would be governed by the main body of sub-clause (iii) of section 47 of the Act and consequently, the provision of section 45 of the Act pertaining to capital gain would not apply.

12. An attempt was made by the Assessing Officer to apply further to proviso to section 48 of the Act. Section 48 of the Act pertains to mode of computation. It essentially provides that the income chargeable under the head "Capital gains" shall be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amounts, namely, expenditure incurred wholly and exclusively in connection with such transfer, and the cost of acquisition of the asset and the cost of any improvement.

Further proviso to section 48 of the Act which the respondents want to press into service reads as under:

"Provided also that where shares, debentures or warrants referred to in the proviso to clause (iii) of section 47 are transferred under a gift or an irrevocable trust, the market value on the date of such transfer shall be deemed to be the full value of consideration received or accruing as a result of transfer for the purposes of this section."

13. For the simple reason this proviso would not apply in the case on hand. Firstly section 48 of the Act itself provides for mode of computation of income chargeable as capital gain. Sub-clause (iii) of section 47 of the Act excludes application of section 45 of the Act in case of certain transfers. By no application of section 48 of the Act, such exclusion can be ignored. Section 48 of the Act only aims to provide for formula for computation of income chargeable as capital gain. Further, this proviso provides for computation of income which is referred to in proviso to sub-clause (iii) of section 47 of the Act, and thus, would cover cases which are to be excluded from the purview of sub-clause (iii) of section 47 of the Act. As noted, the case on hand does not fall within the proviso to sub-clause (iii) of section 47 of the Act, and therefore, mode of computation provided under section 48 of the Act would simply not apply.

14. Under the circumstances, we hold that the reasons recorded by the Assessing Officer to form belief that the income chargeable to tax had escaped assessment lack validity. The Impugned notice is, therefore, set aside. The petition is allowed and is disposed of.