IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.14455 of 2010

For Approval and Signature:

HONOURABLE MS. JUSTICE HARSHA DEVANI
HONOURABLE MR. JUSTICE H.B.ANTANI

TULSI DEVELOPERS - Petitioner(s)

Versus

DEPUTY COMMISSIONER OF INCOME TAX ANAND CIRCLE - Respondent(s)

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Appearance:
MR JP SHAH with MR MANISH J SHAH for Petitioner(s): 1,
MR KM PARIKH for Respondent(s): 1,

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CORAM : HONOURABLE MS. JUSTICE HARSHA DEVANI
and
HONOURABLE MR. JUSTICE H.B.ANTANI

Date : 15/04/2011

ORAL JUDGMENT (Per: HONOURABLE MS. JUSTICE HARSHA DEVANI)

1. By this petition under Article 226 of the Constitution of India, the petitioner has challenged the notice dated 5th February, 2010 issued by the respondent under section 148 of the Income Tax Act, 1961 (the Act) reopening the petitioner's assessment for assessment year 2005-06.

2. The petitioner, a partnership firm, submitted a return of income for assessment year 2005-06 on 29th October, 2005. The return was accompanied by the computation of income and audit report wherein the petitioner had specifically claimed a deduction of Rs.5,50,000/- by way of remuneration to partners and interest to partners of Rs.2,74,905/-. During the course of scrutiny assessment under section 143, the Assessing Officer sent a questionnaire along with notice under section 142(1) dated 4th September, 2006. The petitioner complied with the requisition by a letter dated 18th September, 2006. The Assessing Officer, thereafter, framed assessment under section 143(3) of the Act on 10th October, 2007 computing the business income at Rs.22,59,221/- and specifically gave deduction of interest of Rs.2,74,905/- and salary to partners of Rs.5,50,000/- and thus computed the total income at Rs.14,34,316/- which came to be rounded off at Rs.14,34,320/-.

3. Thereafter, the petitioner received the impugned notice dated 5th February, 2010 for assessment year 2005-06 stating that income had escaped assessment and asking the petitioner to file the return of income. Reasons for reopening also came to be furnished to the petitioner whereupon, the petitioner filed objections to the proposed reassessment by a letter dated 6th April, 2010. The respondent rejected the said objections by an order dated 12th October, 2010. After passing the objections disposal order, even before the petitioner received the same, the respondent issued notices dated 14th October, 2010 under 133(6) of the Act to various parties who had deposits with the petitioner and also reminded them of the provisions of section 272A(2)(c) in case of non-compliance of section 133(6) notices. Being aggrieved, the petitioner has filed the present petition challenging the notice issued under section 148 of the Act as well as the order rejecting the objections, dated 12th October, 2010.

4. Mr. J.P. Shah, learned advocate for the petitioner submitted that this is out and out a case of change of opinion and, therefore, the notice is bad in view of the decision of the Supreme Court in the case of ***Commissioner of Income-Tax vs. Kelvinator of India Ltd.,*** *320 ITR 561*. It was submitted that the petitioner is a business entity and its only activity is business. The petitioner computed book profit including interest which it had received from the fixed deposits made out of the amounts received as part payment or advance from its customers to whom it had sold flats etc. and on the basis of such book profit, computed the remuneration to partners of Rs.5.50,000/-. Inviting attention to the reasons recorded, it was submitted that it is not the case of the respondent that on the book profit remuneration to partners of Rs.5,50,000/- is wrongly claimed but, according to the respondent, the interest of Rs.2,43,927/- which is earned out of business receipt is not business income. It was submitted that while framing the original assessment, the petitioner claimed this interest of Rs.2,43,927/- to be business income which came to be accepted by the then Assessing Officer. Now, the present Assessing Officer, on a mere change of opinion, seeks to reopen the assessment on the ground that the said interest is taxable under other sources, hence, to that extent, the business income is less and, therefore, to that extent remuneration payable to the partners is to be reduced. Inviting attention to the assessment order made under section 143(3) of the Act, it was pointed out that the Assessing Officer had computed the business income of Rs.22,59,221/- in place of book profit of Rs.11 to 12 lakhs and it is a case of the petitioner having claimed less rather than more, because on Rs.22,59,221/- higher remuneration to partners than claimed will be allowable. Therefore, this is a case of over assessment rather than under assessment and, not a case of income escaping assessment but income having been over assessed.

4.1 Next, it was submitted that the Assessing Officer had himself allowed Rs.5,50,000/- in computation, which is indicative of both application of mind and opinion, and exactly for the same reason, that now according to the Assessing Officer less is allowable because interest

though shown and taxed as business income is wrongly taxed as such, is nothing but a change of opinion. Placing reliance upon the decision of the Bombay High Court in the case of ***Commissioner of Income Tax vs. Paramount Premises (P) Ltd.,*** *(1991) 190 ITR 259 (Bom.),* it was submitted that interest from deposit of business receipt is a business income, more particularly, when the money is deposited in FDRs and waiting to be very soon used in the business and, therefore, the contrary opinion of the present Assessing Officer that it is not a business income is factually and in law incorrect. Reliance was also placed upon the decision of the Punjab & Haryana High Court in the case of ***Commissioner of Income Tax vs. Supreme Builders,*** *(2008) 303 ITR 1*.

4.2 In conclusion, it was urged by the learned advocate for the petitioner that in any case, the view taken by the Assessing Officer is a plausible view in the light of the above referred decisions, assuming that it is capable of two views. It was submitted that whether interest income is a business income is a debatable issue which is capable of two opinions and as such, the reopening of assessment is merely a change of opinion and therefore, the assumption of jurisdiction on the part of the Assessing Officer under section 147 of the Act is bad in law.

5. The petition was vehemently opposed by Mr. K.M. Parikh, learned standing counsel appearing on behalf of the respondent. It was submitted that the Assessing Officer has recorded detailed reasons and has given a reasoned order while disposing of the objections raised by the petitioner. Inviting attention to the original assessment order framed under section 143(3) of the Act, it was submitted that there is no discussion as regards FDR bank interest in the assessment order and that the same has not been computed separately by the petitioner-assessee while computing its income. It was submitted that there is no mention of Rs.2,43,927/- either in the return or in the computation by the Assessing Officer and neither the petitioner nor the Assessing Officer has dealt with the same separately. It was argued that interest income cannot

be considered as business income. That the assessee had computed the book profit by adding FDR interest income though the same was not computable under the head of 'Income from business or profession'. That the assessee had clubbed income of two different sources together and the Assessing Officer while framing assessment under section 143(3) of the Act had not applied his mind to this aspect. It was, accordingly submitted that the reasons for reopening being germane, there is no warrant for any intervention by this Court.

6. In rejoinder, Mr. J.P. Shah, learned advocate for the petitioner drew the attention of the Court to the computation of income to point out that the same clearly indicates that the partners' salary has been worked out on the basis of net profit as per profit and loss account. Referring to the profit and loss account for the year ended on 31st March, 2005, it was pointed out that the same clearly indicates bank interest income of Rs.2,43,927/-. It was submitted that in the circumstances, the submission of the learned counsel for the respondent that the FDR interest is not mentioned by the petitioner, is contrary to the record of the case. Referring to the communication dated 18th September, 2006 of the petitioner filed in response to the letter dated 4th September, 2006 of the Assessing Officer, it was pointed out that it is clearly stated therein that the interest accrued on Rs.57 lakhs is provided as interest accrued on bank deposit of Rs.2,43,927/- during the year. It was submitted that in the circumstances, the petitioner had disclosed all material facts before the Assessing Officer and the Assessing Officer after approving the same and applying his mind to the issue involved, had framed the assessment under section 143(3) of the Act. The reopening of assessment is, therefore, based upon a mere change of opinion and as such, is not valid in law.

7. In the light of the rival contentions raised by the learned advocates for the respective parties, it may be germane to refer to the reasons recorded for reopening of the assessment under section 147 of the Act, which read thus:

REASONS FOR REOPENING OF THE ASSESSMENT U/S 147 OF THE INCOME TAX ACT, 1961

The assessee had filed return of income for the assessment year 2005-06 on 29/10/2005 declaring income of ***Rs.7,26,980/-****. The assessee is engaged in construction business. The assessment proceedings were completed u/s.143(3) of the Income Tax Act, 1961 on 10/10/2007 determining total income at Rs.14,34,320/-.*

2. As per section 40(b)(v)(2) for the purpose of book profit, only income ***chargeable*** *under the head business or profession is to be computed. Therefore, if there is income chargeable to tax under the head other than business or profession i.e. income from other sources, capital gains and income from house property credited to P & L account, will be deducted from the net profit for computation of book profit.*

3. It is observed that Rs.2.43,927/- being FDR bank interest received by the firm and credited to Profit & Loss account requires to be excluded to compute book profit u/s.40(b) of the Act. The A.O. has allowed deduction of Rs.5,50,000/- as against Rs.4,54,430/- resulting excess allowance on this count by Rs.97,570/-. This has resulted in short levy of tax plus interest of Rs.46,773/-.

4. On going through the profit & loss account file along with the return of income, it is seen that said account is credited by

Gross profit Rs.22,88,315/-

Interest income Rs.2,43,927/-

Income tax refund Rs.1,02,470/-

Net profit worked out at Rs.5,64,001/-. As per provisions of section 40(b) of the Act, the book profit is to be computed in respect of income chargeable under the head "Profit and Gains from business or profession". In view of this provision, the income received from interest is to be excluded for working out the book profit u/s.40(b) of the Act.

5. In view of the above provisions, income chargeable to tax amounting to Rs.97,570/- has escaped assessment. Therefore, I have reason to believe that the income chargeable to tax to the extent of Rs.97,570/- has escaped the assessment within the meaning of Sec. 147 of the Income-tax Act, 1961 for the assessment year 2005-06 and it is a fit case for issuance of notice u/s. 148 of the Act. Notice u/s. 148 is accordingly issued.

A perusal of the reasons recorded shows that the main ground for reopening the assessment is that FDR bank interest of Rs.2,43,927/- received by the firm and credited to the profit and loss account was required to be excluded while computing book profit under section 40(b) of the Act. If the said amount were excluded, the allowance towards partners' salary would come to Rs.4,54,430/- as against Rs.5,50,000/- allowed by the Assessing Officer, resulting in short levy of tax plus interest of Rs.46,773/-. The other ground is that the income of Rs.2,43,927/- received from interest is to be excluded while working out the book profit under section 40(b) of the Act and that if the income of the petitioner is computed after excluding the interest income from the book profit under section 40(b) of the Act, the total income chargeable to tax which has escaped assessment would come to Rs.97,570/-.

8. A perusal of the assessment order as originally framed under section 143 of the Act indicates that while computing the profit as per the profit and loss account, the Assessing Officer has added interest to partners and remuneration to partners and thereafter, allowed deduction thereof, which clearly exhibits due application of mind on the part of the Assessing Officer. The Assessing Officer has also disallowed Rs.7,01,119/- under section 40(a)(ia) of the Act

which resulted in considerable increase in the total income. The Assessing Officer while recording the reasons has lost sight of this fact, namely that the total income has increased from Rs.7,26,980/- as declared in the return to Rs.14,34,320/- in view of the aforesaid disallowance and therefore, the remuneration to partners of Rs.5,50,000/- as claimed by the petitioner would still be allowable even if the FDR bank interest is not taken into consideration while computing book profit. Hence, income chargeable to tax to the tune of Rs.46,773/- cannot be said to have escaped assessment. The first ground of reopening is therefore, misconceived.

9. Insofar as the exclusion of interest income while computing book profit is concerned, it is apparent that during the course of assessment proceedings, the entire facts regarding FDR bank interest were furnished to the then Assessing Officer who appears to have been of the opinion that the entire investment and income pertains to business only and accordingly net income was worked out and salary paid to partners under section 40(b) of the Act came to be computed. Considering the material placed before the Assessing Officer, it would appear that the Assessing Officer must have applied his mind in taking into consideration the interest income while computing book profit under section 40(b) of the Act. Moreover, in the light of the decision of the Bombay High Court in the case of ***Commissioner of Income Tax vs. Paramount Premises (P) Ltd.*** (supra), the view taken by the Assessing Officer is a plausible view. Once the view taken by the Assessing Officer is a plausible view, reopening of assessment on the ground that another view which is more beneficial to the revenue is possible, is nothing but a mere change of opinion. In the circumstances in the light of the decision of the Supreme Court in the case of ***Commissioner of Income-Tax vs. Kelvinator of India Ltd.*** (supra) wherein it has been held that one needs to give a schematic interpretation to the words “reason to believe” failing which, 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; the reopening of assessment is bad in law.

12. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned notice dated 5th February, 2010 issued by the respondent under section 148 of the Act (Exh. 'E' to the petition) is hereby quashed and set aside. Rule is made absolute accordingly with no order as to costs.

(Harsha Devani, J.)

(H.B. Antani, J.)