H K BUILDCON LTD - Petitioner(s)

Versus

INCOME TAX OFFICER - Respondent(s)

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Appearance :
MR SN SOPARKAR, SR. ADVOCATE with MRS SWATI SOPARKAR & MS. PAUROMI SHETH for Petitioner
MRS MAUNA M BHATT for Respondent

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 12/04/2010

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1. Considering the scope of the controversy, the petition is taken up for final hearing and disposal today. **Rule**. Learned advocate appearing for the respondent is directed to waive service of rule.
2. This petition has been preferred challenging validity of notice dated 24th September 2009 issued under section 148 of the Income Tax Act, 1961 (the Act) (Annexure A) as well as re-assessment order dated 21st December 2009 framed under section 144 read with section 147 of the Act for assessment year 2005-06.
3. Upon issuance of notice, respondent put in appearance and has tendered affidavit in-reply dated 29th March 2010. On 5th April 2010,

when the matter came up for hearing, following order came to be made by the Court:

> *In light of the ratio of the judgment reported in (2008) 307 ITR 115 (Guj.) in the case of Hynoup Food And Oil Industries Ltd. V/s. Assistant Commissioner of Income-Tax. Learned Counsel Appearing for respondent Authority is directed to produce the original record to establish that the successor assessing officer had made a noting in relation to the reasons recorded prior to issuance of notice under section 148 of the Income Tax Act, 1961. To come up on 12.4.2010.*

4. Today, learned advocate appearing for respondent authority has produced the original file containing original record and proceedings for the perusal of the court. The order sheet reveals that on 24th September 2009, the successor assessing officer has recorded that having gone through the record as well as the reasons recorded by the predecessor assessing officer, he is in agreement with the said reasons and has directed issuance of notice. Hence, the preliminary objection based on the ratio of judgement in the case of ***Hynoup Food And Oil Industries Ltd.*** (supra), would not survive.
5. Insofar as the exercise of jurisdiction under section 147 of the Act is concerned, the submission on behalf of the petitioner was that though the impugned notice has been issued within a period of four years from the end of the relevant year, yet the reasons recorded would indicate, when read in context of the record of original assessment proceedings, that the reassessment proceedings are based merely on a change of opinion without pointing out as to what is the escapement of income.

6. On behalf of respondent authority, reliance has been placed on the affidavit in-reply, and it is submitted that for assessment year 2006-07, an elaborate assessment order has been framed covering all the issues and on the basis of the same, the reasons were recorded on 27th March 2009 for reopening the assessment for the year under consideration, namely, assessment year 2005-06. Learned advocate has referred to the re-assessment order dated 21st December 2009 to emphasize that the concept of mutuality was not applicable as recorded in the communication dated 27.11.2009 as well as the findings recorded in paragraph No.4 of the assessment order dated 21.12.2009 wherein relevant extracts from assessment order of assessment year 2006-07 have been reproduced.
7. It is an accepted position that the assessing officer, while framing original assessment, issued notice under section 142(1) of the Act. On 20.2.2007, various submissions were made by the petitioner in response to notice under section 142(1) of the Act. Subsequently, fresh notice dated 5.7.2007 under section 142(1) of the Act was issued, fixing the hearing on 13.7.2007. On 20.7.2007, the petitioner responded, followed by further submissions on 13.8.2007. Once again, one more notice came to be issued under section 142(1) of the Act on 9.10.2007. On 23.11.2007, submissions were made, followed by submissions on 30.11.2007 as well as 24.12.2007 (two letters of same date). The original assessment under section 143(3) of the Act was framed on 26.12.2007.
8. The reasons recorded for reopening the concluded assessment for assessment year 2005-06 read as under :

<u>REASONS FOR REOPENING OF THE ASSESSMENT U/S. 148 OF THE I.T. ACT:</u>

Reg: H.K.BUILDCON LTD., A'bad PAN-AABCH 2762C

In this case, the assessee has filed its return of income on 20-12-2005 declaring total income of Rs.Nil/-. Thereafter, the order u/s 143(3) of the I.T. Act was passed determining income at Rs.Nil/- on 26.12.2007.

[2] Thereafter, it is observed that the Assessee is engaged in the construction business; followed project completion method and accordingly did not prepare the profit and loss account. The expenses were to be accounted on work completion basis as per clause-E of Schedule-7 to Balance Sheet. The expense incurred on the project was, shown work in progress (WIP), in the balance sheet. At the end of 31.3.2005, the construction work in progress (WIP) was Rs.4,12,09,737/-. The assessee had collected advance to the tune of Rs.1,20,56,460/- from customers against the price fixed for the units to be sold and thus, the proportionate income accrued could be estimated. Thus, profit percentage of completion of the project is estimated in respect of which the W.I.P.; @ 10% of W.I.P. of Rs.41209737. The under assessment of income was to the tune of Rs.41,20,974/- (10% of Rs.41209737).

[3] In view of the above, I have reason to believe that income of the assessee to the extent of Rs.41,20,974/- has escaped assessment and therefore assessment is required to be reopened.

Date : 27.03.2009 [B.L.MEENA]

Income Tax Officer, Wd-4(3)

Ahmedabad.

9. A plain reading of the reasons recorded would indicate that the assessing officer is of the opinion that the method of accounting employed by the assessee was to be given a go-bye and estimated profit had to be worked out by applying rate of 10% to the value of work in progress. In the entire reasons recorded, there is nothing on record to show as to what income had escaped assessment for which the assessing officer received information subsequently, either from external source, or from any other source.
10. As against that, when one goes through the various submissions made by the petitioner in response to notices under section 142(1) of the Act, before the assessment was originally framed on 26.12.2007, it becomes clear that in relation to the very issue which forms the basis of reasons recorded, a specific query was raised by the assessing officer and the petitioner had replied on 24.12.2007 in the following words :

[1] Accounting System Adopted:

We are following completion method for transferring work in progress to land and building account since we directly purchase materials and hire labours for development construction activity. We book the members on their interest basis irrespective of stage of work. We allot shares to them to part with ownership of land and building. We are not preparing any profit and loss account for our company in the period of construction as all the expenditure are debited to work in progress and transfer at the completion of work to land and

building account on one side and members contribution to reserve and surplus account under building fund. We are enclosing here with details of dwelling and shop units proposed floor wise along with total size of floor and constructed areas for your kind perusal. Annexure-1

11. Thus, it is apparent that, on the same set of facts and material available on record, the successor assessing officer has come to form a different opinion and recorded reasons thereupon without establishing any lapse on part of the petitioner or any fresh information. The settled legal position in this regard has been reiterated by the Apex Court recently in the case of ***Commissioner of Income Tax, Delhi v. Kelvinator of India Limited***, (2010)2 SCC 723, wherein the Court has held in paragraph No.6 of the judgment that there is a conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has only power to reassess. It is further laid down that reassessment has to be based on fulfillment of certain precondition and if the concept of change of opinion is removed, then, in the garb of reopening the assessment, review would take place. It is further laid down that one must treat the concept of change of opinionas an in-built test to check abuse of power by the assessing officer. After referring to circular No.549 dated 31st October 1989, explaining the amendment made by Amending Act, 1989 to reintroduce the expression reason to believe in section 147 of the Act, the Apex Court has come to the conclusion that if the phrase reason to believe is omitted, the same would give arbitrary powers to the assessing officer to reopen the past assessment on mere change of opinion and this is not permissible even as per legislative intent.

12. In light of the facts noted hereinbefore, the ratio enunciated by the Apex Court in the aforesaid decision would apply with all force, as in the present case, the reasons recorded themselves indicate that the successor assessing officer has merely recorded a different opinion in relation to an issue to which the assessing officer, who had framed the original assessment, had already applied his mind and come to a conclusion that the method of accounting employed by the petitioner was correct and was not required to be disturbed.
13. In the circumstances, the impugned notice dated 24th September 2009 issued under section 148 of the Act and the consequential reassessment order dated 21st December 2009 framed under section 144 read with section 147 of the Act are hereby quashed and set aside. The petition is allowed accordingly. Rule is made absolute. There shall be no orders as to costs.

[D.A.MEHTA, J.]

[HARSHA DEVANI, J.]