

ito Vs. Mansi Enterprises

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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Jan-31-2007

Judge : S Tiwari, S Chowla

Appellant : ito

Respondent : Mansi Enterprises

Judgement :

1. These five appeals by the revenue are against the separate orders of Commissioner (Appeals)-XXV, Mumbai, dated 19-9-2003 for assessment years 1995-96, 1997-98, 1999-2000 and dated 22-9-2003 for assessment years 1996-97 and 1998-99 against the orders under Section 144 read with Section 147 of the Income Tax Act.

2. Common ground of appeals have been raised by the revenue in all the aforesaid appeals which is as under: The assessment proceedings were reopened as one of the persons Smt.

Ramaben Patel is the benami of Shri Vasantlal Patel which has been agreed by Shri Ramaben Patel in her statement recorded on 22-9-1997 and for these reasons, the firm is treated as AOP. The interest and remuneration paid also needs to be disallowed.

3. The revenue has raised another ground of appeal in assessment years 1995-96, 1997-98 and 1999-2000 which is as under: On the facts and in the circumstances

of the case and in law, the Ld. Commissioner (Appeals) has erred in holding that the assessee fulfils all the conditions laid down under Section 44AD, without appreciating the facts brought on record by the assessing officer.

4. Shri Ravindra Kumar, departmental representative appeared for the revenue and Shri Ajay Singh, learned Counsel appeared for the assessee and put forward their rival submissions.

5. The brief facts of the case are that the assessee is a Civil Contractor and the total turnover of the assessee firm for all the years under consideration was below Rs. 40 lakhs. The total turnover of the assessee firm for the years under consideration and the profit declared on such turnover for the years are as under:

6. The assessee admits to having not maintained regular books of account and the assessee being a Contractor, return of income was filed under Section 44AD of the Income Tax Act. The assessments in all the assessment years were completed under Section 143(l)(a) of the Income Tax Act. The assessments thereafter have been re-opened under Section 147 of the Income Tax Act, by recording the following reasons: The assessment proceedings were re-opened as one of the persons Smt.

Ramaben Patel is the benami of Shri Vasantilal Patel which has been agreed by Smt. Ramaben Patel in her statement recorded on 22-9-1997 and for these reasons, the firm is treated as AOP. The interest and remuneration paid also needs to be disallowed.

7. The assessee did not furnish any return of income, in response to the notice issued under Section 148 of the Income Tax Act. The Assessing Officer completed the assessment, in the status of AOP and computed the income after making disallowances out of expenses and also out of cash loans and the differences in the account of debtors.

8. Before the Commissioner (Appeals) the assessee challenged the validity of re-opening of assessment under Section 147 of Income Tax Act. During the course of Appellate proceedings before Commissioner (Appeals), the Ld. AR for the assessee submitted that the ground for re-opening of the assessment was for

treating the firm as AOP on the ground that one of the partners did not know anything about the business of the firm, was not a valid ground. Reliance was placed on the decision of Hon'ble Rajasthan High Court in CIT v. Gulab Das ', the facts of which case were claimed to be similar to the facts of the present case. The Ld. AR further pointed out that if a partner of a firm is not aware of the business activities of the firm then the same would not lead to a conclusion that the firm is not a genuine firm. Reference was made to the provisions of Section 184/185 of the Income Tax Act. It was further submitted by the Ld. AR for the assessee that the allegation that Mrs. Ramaben Patel was benami had been annulled by the verdict of Commissioner (Appeals) vide order dated 23-12-2002. The Ld. AR further stated that as the assessee had declared the income under the provisions of Section 44AD of the Income Tax Act at a percentage which is more than 8 per cent, it is relieved of maintaining the books of account and assessing officer could not insist on production of books of account and make additions on that account.

The learned AR further stated that in case the assessee had declared profits at less than 8 per cent of its turnover, such a case could be scrutinized for regular assessment under Section 143(3) of the Income Tax Act.

9. The Commissioner (Appeals) noted that the case of the assessee was within the purview of Section 44AD of the Income Tax Act as it was engaged in the business of Civil Construction with turnover less than Rs. 40 lakhs. The assessment was re-opened by the assessing officer on the ground that certain information was received from the assessing officer of Shri Vasant A. Patel, that another partner of the firm Mrs.

Ramaben Patel was a benami of Shri Vasant A. Patel, as she did not know about the business of the firm. The Commissioner (Appeals) held that the assessment of the assessee-firm had not been re-opened on valid ground as the provisions of Section 147 of the Income Tax Act deals with escapement of income. The Commissioner (Appeals) noted that the assessment had been re-opened for the verification and investigation of genuineness of the firm which is not permissible under the provisions of the Income Tax Act. Relying on the decision of Rajasthan High Court in Gulab Das 'case (supra) it was observed by Commissioner

(Appeals) that a partnership is valid if the conditions mentioned in the provisions of Section 184/185 of the ITR had been fulfilled and the mere fact that a partner is not aware about the business activities of the firm will not render the firm a non-genuine firm. Accordingly, the initiation of proceedings of re-opening of the assessment were held to be bad and reassessment order was held to be bad. Regarding the issue of applicability of the provisions of Section 44AD of the Income-tax Act, it was observed by the Commissioner (Appeals) that in the case of assessee, it could not be taken up for scrutiny if he had opted for filing the return under Section 44AD of the Income Tax Act. In case where the turnover is less than Rs. 40 lakhs and profit is also less than 8 per cent of the turnover, the appellant is required to adduce evidence and such a return can be scrutinized even if he had opted to file the return of income under Section 44AD of the Income Tax Act. As the assessee had fulfilled all the conditions laid down under Section 44AD of the Income Tax Act, such a return should not have been taken up for scrutiny. On this ground also the reassessment was held to be bad in law and was held to have been re-opened on invalid grounds.

10. The revenue is aggrieved and hence this appeal. The Ld. DR for the revenue stated that the Commissioner (Appeals) had quashed the re-opening of assessment under Section 147 of the Act. He further stated that at the time of re-opening of assessment the assessing officer should have reasons to believe and the sufficiency of the reasons is not relevant. Before issuing the notice under Section 148 of the Income Tax Act what is required is that the assessing officer has reason to believe that income has escaped assessment and the assessing officer has recorded the reasons in writing. In the facts of the case before us when the assessing officer had material by way of information received from the assessing officer dealing with the assessment of Shri Vasant A. Patel, on which he acted bona fide, the reassessment can be made and the correctness of reasons in such a case cannot be called in question. Reliance was placed on various judicial pronouncements of Hon'ble Supreme Court for the proposition that at the time of issuance of notice for re-opening the assessment, the belief of the assessing officer is to be on the basis of information and its correctness is not to be considered.

11. Reference was made to the provision of Sections 184 and 185 (provisions before amendment) of the Income Tax Act for the proposition that in case of non-compliance of provisions of Section 184 of the Income-tax Act firm can be assessed in the status of AOP. It is pointed out by the Ld. DR for the revenue that in the present case the assessee had not complied within the provisions of Section 184(l)(i) of the Income Tax Act. In respect of the merit of provisions of Section 44AD of the Income Tax Act, it was stated by the Ld. DR for the revenue that to the extent of assessability of income in question, the same cannot be questioned, but the assessing officer can question unproved loans raised during the year. It was fairly admitted by the Ld. DR for the revenue that the assessing officer could not ask for the production of books of account while assessing the income under Section 44AD of the Act, but the queries could be raised in respect of loans under Sections 68 and 69 of the Income Tax Act. Reliance was placed on the decision of CIT v. Sun Engg. Works (P.) Ltd. though the reassessment was initiated in respect of certain deduction but on re-opening whole assessment is open for the assessment of escapement of income. In the facts of Sun Engg. Works (P.) Ltd. 's case (supra), the assessment was initially re-opened on the allowability of certain deductions, but the Hundi loans received were also considered in the reassessment proceedings. The Ld. DR concluded by stating that under the mandate of Section 147 of the Income Tax Act, the assessing officer can make any enquiries and if re-opening is held to be valid, the matter should go back to the assessing officer.

12. The learned AR for the assessee submitted that the assessee had filed the return of income under Section 44AD of the Income-tax Act, wherein the assessing officer had no authority to do any assessment.

The learned AR further pointed out that the assessment was re-opened for doing something indirectly, which he could not do directly.

Reliance was placed on the decision of Sun Engg. Works (P.) Ltd. 's case (supra) and also the decision of Punjab & Haryana High Court in the case of Vipan Khanna v. CIT . The learned AR for the assessee further pointed out that while invoking the provisions of Section 147 where any income has escaped from

assessment, any and every aspect cannot be looked into. The notice in the present case was issued for one particular purpose and the reassessment was completed on another stand. The learned AR for the assessee further pointed out that the re-opening in the present case was initiated because of the belief that one of the partners was not aware of the affairs of the business has no relevance as because of the findings of the ITAT in the case of Vasantlal A. Patel v. ITO (IT Appeal No. 5513 (Mum.) of 2002), wherein it has been held that there is no material available on record which could indicate Mrs. Ramaben D. Patel is a benami of Shri Vasantlal A. Patel. In any case, even if one of the partners is found as representing someone else does not make the firm an AOP, where the reassessment proceedings have to be initiated. On merits, it was stated that the firm is a genuine firm, wherein capital and loans have been introduced by the partners. The notice has been initiated merely on the aforesaid basis, the same is not valid and liable to be quashed.

Reliance was placed on the decision of Hon'ble Bombay High Court in Vijaykumar M. Hirakhanwala (HUF) v. ITO (Writ Petition Nos. 1355 to 1358 of 2006).

13. We have heard the rival submissions and perused the records. The assessee is engaged in the business of Civil Construction. The annual source of income of the assessee is income from construction business.

The total turnover of the assessee firm for the years under consideration was less than Rs. 40 lakhs. Under the provisions of Section 44AD of the Income Tax Act, person carrying on the business of Civil Construction or supply of labour for Civil Construction work have an alternate method of estimating the income from their respective business. As per the provisions of Section 44AD of Income Tax Act the persons having gross receipts less than Rs. 40 lakhs may estimate the income at the rate of 8 per cent or more of the gross receipts.

14. The first issue in the present appeal is whether the re-opening of the assessment under Section 147 of the Income Tax Act is valid. The basis for re-opening the assessment in the present case was that one of the partners of the firm Mrs. Ramaben Patel did not know anything about the business of the firm and she was treated as benami of Shri Vasant A. Patel, another partner of the firm.

Under the provisions of Section 147 of the Income-tax Act, the assessing officer having a reason to believe that any income chargeable to tax has escaped assessment for any assessment year may re-open the assessment for assessing or reassessing such income or any other income which had escaped assessment and comes to his notice subsequently, in the course of proceedings under the Section. The primary condition for invoking the provisions of Section 147 of the Income Tax Act is "the reason to believe". It is an established principle of law settled by various judicial pronouncements on the issue that "the reason to believe" pre-supposes existence of some material or information based on which a reasonable belief of escapement of income could be entertained. *Vijaykumar M. Hirakhanwala (HUF) v. ITO Writ Petition Nos. 1355 to 1358 of 2006* had held as under: ...In our opinion, the reasons recorded that there is hardly any activity from the Bombay office is totally vague and would neither constitute any material or information so as to form nexus or reason to believe that the income has escaped assessment. As stated earlier for several decades, the expenditure incurred at the Bombay office of the assessee has been consistently allowed in the regular assessments and there is no material on record to show that in the past the expenditure has been erroneously allowed. Thus, in the present case, there is no material or information based on which the assessing officer could form a reasonable belief that the income chargeable to tax has escaped assessment. Therefore, it is evident that the re-opening of the assessments are based on pure change of opinion and there is no material whatsoever to constitute any basis for re-opening the assessments.

16. We may note that for assessment year 2002-03 the assessing officer has recorded an additional ground for re-opening the assessment namely, excess depreciation has been allowed on account of failure to deduct the capital subsidy from the written down value of fixed assets while claiming depreciation. The assessee in its objection to the re-opening of the assessment has clearly stated that the capital subsidy received has in fact been deducted from the written down value of fixed assets while claiming depreciation. It appears that the explanation given by the assessee is accepted by the revenue because neither in the order rejecting the objections raised by the assessee, nor in the affidavit in reply and not even before this Court, the revenue has pressed the ground for re-opening the

assessment on account of excess depreciation. Thus, the only ground on which the assessments are sought to be re-opened in all the years in question is that the expenditure/loss incurred at the Bombay office cannot be allowed as there is hardly any activity from the Bombay office of the assessee. In our opinion, the re-opening of the assessments based on the above ground which is totally vague and devoid of any substance cannot be the basis for re-opening the assessments.

17. In the result, all the petitions are allowed by quashing and setting aside the notices all dated 30-3-2004 issued under Section 148 of the Income-tax Act, 1961.

16. Under the provisions of Sections 184 and 185 of the Act, for the purpose of assessing a firm as a firm, the requirements are: (ii) the individual shares of the partners are specified in the said instrument.

Sub-Section (2) to Section 184 of the Act provides that a certified copy of the partnership deed is to be enclosed with the return of income in respect of which the assessment as a firm is sought for the first time. Thus, the certified copy of the partnership deed is to be filed along with the return of income for the previous year, in which the partnership firm was formed. Sub-Section (3) to Section 184 of the Act further provides that once a firm is assessed as a firm for any assessment year, it shall be assessed in the same capacity for the every subsequent year, if there is no change in the constitution of the firm or the shares of the partners remain same. Sub-Section (4) to Section 184 provides that in case of any change taking place in any previous year, the certified copy of the revised partnership deed shall be furnished along with the return of income for that assessment year.

Sub-Section (5) to Section 184 of the Act provides that in case there is a failure on the part of the firm as mentioned in Section 144 of the Act, no deduction by way of any interest, salary, bonus or remuneration paid by the firm to any partner of such firm shall be allowed in computing the income chargeable under the head 'Profits and gains of business or profession'. It further provides that such interest, salary, bonus or remuneration paid to the partners was also chargeable to tax under Clause (v) of Section 28 of the Act i.e., not includable in the hands of the partners as profits and gains of business.

17. The provisions of Section 185 of the Act at the relevant time provides that where a firm does not comply with the provisions of Section 184 of the Act for any assessment year.

18. Under the amended provisions by the Finance Act, 1992, which were introduced with effect from 1-4-1993, the method of assessment as a firm has undergone changes and for being assessed as a firm the requirements are only that the partnership should be evidenced by an instrument, wherein the individual shares of the partners are specified and such instrument of partnership should be furnished along with the return of income relevant to the previous year in which such instrument is executed.

19. In the present set of facts and circumstances of the case before us, the reason for re-opening was that one of the partners of the firm Mrs. Ramaben D. Patel did not know anything about the business of the firm is not a valid ground for re-opening of the assessment and treating the firm as AOP.²⁰ The fact whether one of the partners is aware about the nature of business or not is not a consideration for assessing a firm under the provisions of Section 184 of the Income Tax Act, even if we do not take cognizance of concept of 'sleeping partners'.

21. Before invoking the provisions of Section 147 of the Act, the Assessing Officer should have a reason to believe that the income has escaped assessment. The requirement of the Section is that at the time of issuance of notice under Section 147 of the Act, there is a reasonable belief, the sufficiency of those reasons though cannot be called in question but the belief of the assessing officer should be reasonable. Merely because a partner is not aware about the business activities of the firm, under no circumstances will render the firm as a non-genuine firm under the provisions of Section 184 of the Income Tax Act, where requirements are that the partnership should be evidenced by an instrument in writing specifying individual shares of partners and the certified copy of such instrument should accompany the return of income. The mere fact that the assessee had furnished only a Xerox copy of the partnership deed, which was not certified in writing was a curable defect. The basis for re-opening the assessment

was that one of partners had no knowledge of the business is not a valid reason as the partner in the present case has not admitted to being nota partner in the partnership firm. We have taken into consideration various judicial pronouncements relied upon by the learned DR, which clearly provide that 'the belief must be held in good faith; it cannot be merely a pretence'. Their Lordships of Hon'ble Bombay High court in Vijaykumar M. Hirakhanwaia (HUF) 's case (supra) have categorically held that where there is no material or information, based on which the assessing officer could form a reasonable belief that the income chargeable to tax has escaped assessment, such re-opening of the assessment is based on pure change of opinion and cannot constitute any basis for re-opening the assessment.

22. In view of our discussion hereinabove, we are of the view that the assessing officer had no reason to believe that the income had escaped assessment specially in cases where the firm was to be assessed as AOP as one of the partners was not aware of the business of firm. In case there is no escapement of income, there is no question of re-opening of assessment and accordingly we confirm the finding of Commissioner (Appeals) that there are no valid grounds with the assessing officer so as to enable him to form a reasonable belief that the income has escaped assessment and accordingly the initiation of proceedings of re-opening of assessment are bad and the assessment made thereafter be cancelled.

23. In the result, the appeals of the revenue in ITA Nos.

7815/Mum./2003to 7819/Mum./2003 are dismissed.

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