IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 22960 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI

and
HONOURABLE MR.JUSTICE B.N. KARIA

==

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

==

NITIN BABUBHAI ROHIT OR HIS SUCCESSOR IN OFFICE
Versus
ASHOK BHAVANBHAI PATEL

==

Appearance:
MRS MAUNA M BHATT(174) for the PETITIONER(s) No. 1
MR.S.N.SOPARKAR, LD. SENIOR COUNSEL with MR.B.S. SOPARKAR(6851) for the RESPONDENT(s) No. 1
NOTICE SERVED(4) for the RESPONDENT(s) No. 1
Notice sent by e-mail for the RESPONDENT(s) No. 2

==

CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 14/03/2018

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. This petition arises in somewhat peculiar facts which may be noted at the outset.

2. Petitioner is the Income Tax Officer, Ward No.1, Gandhinagar and happens to be the Assessing Officer of the respondent no.1. Respondent no.1 is an individual and assessed to tax as such. For the assessment year 2013-14, he had filed the return of income declaring total income of Rs.4.89 lakhs (rounded off). The return was taken in scrutiny. The Assessing Officer passed order of assessment under section 143(3) of the the Income Tax Act, 1961 ('the Act' for short) on 29.03.2016. In such order, he assessed the assessee's total income at Rs.20.41 crores (rounded off). This included unexplained cash deposit of Rs.2.18 crores (rounded off) in HDFC bank, unsecured loan of Rs.4.42 crores (rounded off) treated as unexplained cash credit and a further sum of Rs.13.66 crores (rounded off) found credited in the suspense account of the assessee which was also treated as his unexplained cash credit.

3. We would refer to statutory provisions later, however, as is well-known, against such order of

assessment, the assessee could either file appeal or a revision petition but could not pursue both. The assessee initially chose the appeal route. With effect from 01.03.2016, rule 45 of the Income Tax Rules, 1962, was amended, making it compulsory to file an appeal before the Appellate Commissioner electronically. The assessee however, manually filed appeal against the order of assessment on 15.04.2016 before the Commissioner of Income Tax (Appeals) taking up various grounds.

4. After filing this appeal, the assessee filed a revision petition before the Commissioner of Income Tax on 10.06.2016 challenging the very same order of assessment. On 07.07.2016, the Commissioner of Income Tax disposed of such revision petition. In such order, he noted that it was confirmed from the office of Commissioner of Income Tax (Appeals), Gandhinagar, that there was no appeal filed by the assessee in that office against the impugned order and therefore, he had the jurisdiction to hear the revision petition. He noted that during the assessment proceedings, the Assessing Officer had issued various notices including for penalty for

failure to respond to such notices. To none of these notices, the assessee has responded till at long last, the Chartered Accountant of the assessee appeared before the Assessing Officer on 01.03.2016. In view of such facts, the Commissioner agreed that the Assessing Officer had given ample opportunity to the assessee, despite which, the Commissioner was of the opinion that whatever be the fault of the assessee, addition of almost Rs.20 crores being a serious matter, it would require a reconsideration. The assessee himself had requested for a special audit under section 142(2A) of the Act. The Commissioner therefore while disposing of the revision petition, remanded the proceedings back to the Assessing Officer and to frame a fresh assessment after carrying out special audit of the accounts of the assessee.

5. On 29.09.2016, the Commissioner (Appeals), wrote to the assessee that rule 45 of the the Income Tax Rules, 1962 has been amended making mandatory to file appeals before the Commissioner of Income Tax (Appeals) electronically. The assessee had filed appeal manually which is not in consonance with

amended rule. The assessee should therefore furnish the appeal in the prescribed format electronically within seven days of the receipt of the letter so that the appeal can be proceeded further for disposal. He further conveyed that in case no such E-appeal is received, it will be presumed that the assessee has not complied with the notification of the Board and the manual appeal will be treated as defective and the same would be treated as non-est. Resultantly, it would be considered that the assessee had filed no appeal.

6. On 06.10.2016, the assessee acknowledged the said letter dated 29.09.2016 received from the Commissioner (Appeals). He conveyed that after filing the manual appeal, he had taken opinion from the professional and preferred to pursue the Revision Petition available under section 264 of the Act. Such Revision Petition has already been disposed of by an order dated 07.07.2016. Because of this he had not filed E-appeal. He requested that the manual appeal be treated as no appeal having been filed.

7. On 21.09.2017, the Commissioner (Appeals)

ignored such pleas of the assessee and proceeded to dispose of the manual appeal of the assessee and dismissed the same.

8. The department through the Assessing Officer has therefore filed this petition challenging the revisional order dated 07.07.2016 passed by the Commissioner of Income Tax principally on two grounds. Firstly, that when the appeal filed by the assessee was pending before the Commissioner of Income Tax (Appeals), the revisional jurisdiction could not have been exercised. The second ground concerns the merits of the revisional order.

9. In this petition, the petitioner had initially joined only the assessee as the sole respondent. However subsequently, the Commissioner of Income Tax was joined as a respondent no.2. Notice was issued to him which was duly served. He has through the department, sent his response in form of a communication dated 13.03.2018, in which, his stand is that by virtue of the CBDT notification no.11 of 2016 dated 01.03.2016, all appeals before the Commissioner (Appeals) were to be compulsorily filed

electronically. This date was extended upto 15.06.2016. Only thereupon, he had exercised his revisional jurisdiction.

10. Counsel for the petitioner submitted that when the appeal filed by the assessee was pending before the Appellate Commissioner, revision petition was not maintainable. The Commissioner of Income Tax therefore committed a serious error in exercising the revisional jurisdiction. The assessee himself should have brought these facts to his notice which the assessee failed to do. On the merits of the order passed by the Commissioner, counsel contended that the Commissioner has exceeded the jurisdiction vested in him. The assessee had not cooperated all throughout the assessment proceedings. The Commissioner having agreed that the Assessing Officer had given full opportunities to the assessee to meet with the adverse material on record before passing the order of assessment, should not have interfered in exercise of revisional powers, that too on the spacious ground that the assessee had at long last himself agreed for a special audit.

11. Shri S.N.Soparkar for the respondent no.1 opposed the petition raising following contentions:

I. The petition is filed by the Assessing Officer who is subordinate to the Commissioner of Income Tax, who is the revisional authority. On his own, he could not have decided to challenge the revisional order. There is nothing on record to suggest that the decision to file the petition was taken by the competent authority of the department.

II. The assessee had filed the manual appeal whereas the amended rule which was already brought into effect by then, required the appeal to be compulsorily filed electronically. The assessee had taken a conscious decision not to pursue the appeal and therefore, not presented appeal electronically. Even the Commissioner (Appeals) had conveyed to the assessee under the communication dated 29.09.2016 that if no electronically filed appeal is received within seven days, appeal filed by the assessee manually will be treated as non-est. On

06.10.2016, the assessee had also conveyed to the Commissioner (Appeals) that he is not interested in pursuing the appeal.

III. Counsel submitted that the Commissioner of Income Tax exercising discretionary powers, has merely remanded the proceedings for fresh assessment after carrying out special audit of the accounts of the assessee. This order is challenged by the department after much delay. In the meantime, special audit was also carried out. Order of the Commissioner requires no interference.

12. We may first examine the assessee's contentions of maintainability of the petition. With respect to maintainability of the petition, the department has made following averments:

> *"3.8 It is submitted that in the present case, AO being an affected party is required to give effect to two contradictory orders passed u/s 264 and u/s 251. The order under Section 264 being contrary to the provision of law, the present petition is filed after taking administrative approval of the Principal Chief Commissioner-2 before filing of this petition."*

Counsel for the Revenue had also tendered a copy of a letter dated 19.12.2017 issued by the Chief Commissioner of Income Tax written by the Principal Commissioner of Income Tax, Gandhinagar, stating that the said authority had approved filing of the writ petition in the High Court. Thus, the Assessing Officer was only carrying out such decision of the department and this petition is not his own volition and therefore cannot be seen as his action of challenging the order of the superior authority.

13. We would now examine the Revenue's contention regarding the authority of the Commissioner of Income Tax to entertain and dispose of the revision petition. Against an order of assessment, the aggrieved assessee could prefer appeal under section 246A of the Act. Section 264 of the Act prescribes the revisional jurisdiction of the Commissioner of Income Tax. Sub-section (1) thereof provides that in case of any order other than an order to which section 263 applies passed by the authority subordinate to him, the Principal Commissioner or the Commissioner either on his own motion or an application made by the assessee for revision, may call for the record of any proceedings under this Act

in which such order has been passed and may make such inquiry or cause such inquiry to be made and may pass such order not being an order prejudicial to the assessee as he thinks fit. Sub-section (4) of section 264 however limits the jurisdiction of the Commissioner to revise an order in certain situations. Sub-section (4) reads as under:

> (4) The [Principal Commissioner or] Commissioner shall not revise any order under this section in the following cases—
>
> (*a*) where an appeal against the order lies to the [Deputy Commissioner (Appeals)] [or to the Commissioner (Appeals)] or to the Appellate Tribunal but has not been made and the time within which such appeal may be made has not expired, or, in the case of an appeal [to the Commissioner (Appeals) or] to the Appellate Tribunal, the assessee has not waived his right of appeal; or
>
> (*b*) where the order is pending on an appeal before the [Deputy Commissioner (Appeals)]; or
>
> (c) where the order has been made the subject of an appeal [to the Commissioner (Appeals) or] to the Appellate Tribunal.

Under clause-(a) of sub-section (4) of section 264 where appeal lies to the Appellate Authority and the time for filing such appeal has not expired or the assessee has not waived his right of appeal, the Commissioner would not exercise his revisional powers. Under clause-(b) of sub-section (4) where the order is pending in appeal before the Appellate Commissioner, the Commissioner would not exercise his revisional powers. Under clause-(c) if the order is already challenged before the Appellate Authority, once again the Commissioner would not exercise his revisional powers. Sub-section (4) of section 264 thus would ensure that the assessee does not pursue the remedies of appeal and revision simultaneously. If therefore, the appeal of the assessee was pending on the date when the Commissioner passed the revisional order on 07.07.2016, he was clearly in error but not otherwise.

14. We may therefore revisit the facts in this context. The facts on record would show that by the time the assessee filed the appeal before the Appellate Commissioner on 15.04.2016, the relevant rule was already amended with effect from 01.03.2016 requiring such appeals to be compulsorily filed electronically. In view of certain difficulties faced by the assessees in filing such E-appeals, this time was extended upto 15.06.2016. Assessees who had filed manual appeals, had to file E-appeals by such date. There was no further extension thereafter. On

07.07.2016, therefore, Commissioner after recording his verification that no such electronically filed appeal was received by the Commissioner of Income Tax, Gandhinagar, was perfectly justified in proceeding further with the revision petition. As the events unfolded, later on, even the department treated the manually presented appeal of the assessee as defective. On 29.09.2016, the Appellate Commissioner conveyed to the assessee that unless this defect is cured within seven days by furnishing E-appeal in prescribed format, the manually filed appeal will be treated as non-est. The assessee conveyed to the Commissioner (Appeals) that he had consciously decided not to file said E-appeal, because after filing the appeal manually under legal advise, he was pursuing the revision petition. Strangely, the Commissioner (Appeals) ignored such stand of the assessee and in fact, ignored his own warning to the assessee that if the defect is not cured, the appeal would be treated as non-est and proceeded to decide the manually filed appeal of the assessee and rejected the same by an order dated 21.09.2017.

15. We do not think that the Commissioner of Income Tax committed any error in entertaining the assessee's revision petition. In fact, it was the Commissioner (Appeals) who was clearly in error in dealing with the assessee's appeal having once taken a stand that if no electronic appeal is presented, the manually filed appeal would be treated as non-est and as if no appeal was ever filed. The assessee had also pointed out to him that he had filed the Revision Petition which was already disposed of. Once the Revision Petition was filed and decided, it was not open to the Commissioner (Appeals) to decide the appeal on the same ground. In fact once the Revision Petition was allowed and assessment order set aside, no order survived for him to confirm in the appeal. His approach gave rise to two conflicting situations, one setting aside the order of assessment and another confirming the same.

16. This brings us to the merits of the order passed by the Commissioner of Income Tax. In such order, he recorded the following opportunities granted by the Assessing Officer to the assessee during the course of assessment which were not availed.

Section under which Notice Issued	Date of issue of Notice	Due date for compliance	Nature of compliance
Notice u/s. 143(2)	28/08/2015		Not complied
Notice u/s. 142(1) questionnaire	30/09/2015	12/10/2015	Not complied
Notice u/s. 142(1) questionnaire	03/11/2015	10/11/2015	Not complied
Show cause notice for penalty u/s. 271(1)(b)	17/11/2015		
Order for penalty u/s.271(1)(b)	26/11/2015		
Notice u/s. 142(1) questionnaire	07/12/2015	15/12/2015	Not complied
Notice u/s.142(1) along with questionnaire & show cause notice for penalty u/s. 271(1)(b)	11/01/2016	19/01/2016	Not complied

17. He noted that;

"At long last the assessee wakes from its hibernation and one Shri R.C. Dave, C.A., attended on 01.03.2016 to furnish cash book, bank book and statements. This opens up further skeletons from the assessee's cupboards as follows:

(i) The assessee is unable to satisfactorily explain the opening cash balance of Rs.1,81,49,026/-.
(ii) There is also an opening balance of Rs.1,35,03,737/- in the capital a/c.
(iii) Further there are unsecured loans totalling Rs.4,42,10,000/-. On this, too, the assessee has not satisfactorily discharged the onus of establishing the identity, capacity of the creditors as well as the genuineness of the transaction.
(iv) Lastly, there is no satisfactory clarification regarding Rs.13,66,95,703/- in the suspense a/c.

I am in full agreement with the A.O. She has given ample opportunity to the assessee, but for some reason or the other, assessee's *hospitalisation or the accountant running away, the assessee has played a cat and mouse game with the A.O."*

18. Having thus noted the callous approach on the part of the assessee and the fact that even after the Chartered Accountant who represented the assessee appeared before the Assessing Officer, various issues remained totally unexplained, he remanded the proceedings before the Assessing Officer for fresh assessment after carrying out special audit under section 142(2A) of the Act. This was on two grounds. Firstly, according to him, whatever the assessee's defaults, addition of nearly Rs.20 crores is a serious matter. He noted that the assessee's accounts were not even audited. The second ground was that the assessee himself had 'thankfully requested' that the accounts should be audited under section 142(2A) of the Act.

19. In our opinion, the Commissioner has committed a serious error in coming to such conclusions. Firstly, the Commissioner noted that the assessee failed to respond to series of notices issued by the Assessing Officer during the assessment proceedings. Even when

at long last, the Chartered Accountant of the assessee appeared before the Assessing Officer, in the opinion of the Commissioner himself several issues remained totally unexplained. These issues pertained to opening cash balance of Rs.1.81 crores (rounded off). Unsecured loans of Rs.2.42 crores (rounded off) with respect to which, the assessee had not satisfactorily discharged the onus of establishing identity, capacity of the creditors or the genuineness of the transactions, as also clarification regarding Rs.13.66 crores found in the suspense account. If this was the opinion of the Commissioner, he could not have simply ignored such materials on record on the ground that addition of a sum of Rs.20 crores being a serious matter, the same should be examined again. It is not the quantum of additions but the justification thereof which would be germane for deciding to exercise revisional powers. Equally, second ground pressed by the Commissioner in service was unsustainable. Section 142(2A) of the Act empowers the Assessing Officer to call for special audit if at any stage of the assessment proceedings, having regard to the nature and complexity of the accounts, volume of the accounts, doubts about correctness of the accounts, multiplicity of the transactions in the accounts or specialised nature of business activity of the assessee and in the interest of the revenue, is of the opinion that it is necessary to do so. This could be done only with the previous approval of the concerned authority. The powers to be exercised by the Assessing Officer under the said provision thus are meant for specific purposes. Such special audit can be called for only with the prior approval of the concerned authority. It is certainly not an option or a choice which an assessee can exercise or insist upon. The Commissioner of Income Tax therefore gave undue importance to the assessee requesting for such special audit. In fact, he referred to such offer of the assessee as having 'thankfully requested'. We wonder what would the Commissioner have done had the assessee not made such request.

20. Be that as it may, both the grounds for interfering with the order of assessment and to remand the proceedings for fresh assessment before the assessing authority after obtaining special audit

report are unsustainable.

21. In view of serious illegality committed by the Commissioner of Income Tax in passing the revisional order, mere fact that some time had passed before the department took a formal decision to challenge the same, and to file the petition and the fact that in the meantime partially the directions were carried out, would not detain us from interfering with such order.

22. Under the circumstances, the impugned order dated 07.07.2016 is set aside. Before closure however, certain consequential directions would be necessary. We do not propose to leave the assessee without any remedy. We place back the revision petition of the petitioner before the Commissioner of Income Tax for its fresh disposal in accordance with law since in the impugned order, the Commissioner had not examined the merits of the petition at all and with respect to which, we have expressed no opinion. Though not challenged by any one in this petition, we must declare that the order dated 21.09.2017 passed by the Appellate Commissioner is unsustainable and

inoperative. As noted, he had no power to dismiss an appeal which was as per his own stand defective and which in any case, the assessee conveyed that he does not wish to pursue.

23. Petition is disposed of accordingly.

(AKIL KURESHI, J)

(B.N. KARIA, J)

ANKIT SHAH