

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION No. 6557 of 2001****With****SPECIAL CIVIL APPLICATION No. 6558 of 2001****With****SPECIAL CIVIL APPLICATION No. 6559 of 2001****With****SPECIAL CIVIL APPLICATION No. 6560 of 2001****For Approval and Signature:****HONOURABLE MR.JUSTICE AKIL KURESHI
HONOURABLE MS.JUSTICE HARSHA DEVANI**

=====

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, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

=====

BIPINKUMAR P KHANDHERIA ADVOCATE - Petitioner(s)

Versus

DY COMMISSIONER OF INCOME TAX - Respondent(s)

=====

Appearance :

MR JP SHAH with MR MANISH J SHAH for Petitioner

MRS MAUNA M BHATT for Respondent

=====

CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 13/08/2012

ORAL COMMON JUDGMENT**(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)**

1. These petitions arise in similar background. The petitioner is common in all the petitions. He has challenged separate notices, all dated 2.5.2001, issued by the Assessing Officer under section 148 of the Income Tax Act, 1961 ("the Act" for short). We may notice the facts as emerging in Special Civil Application No.6557 of 2001. In such petition, the petitioner has challenged the notice under section 148 of the Act seeking to reopen assessment for the assessment year 1997-98. The premises of the assessee were subjected to search operation on 21.4.1995. His statement was recorded on the same day under section 132 of the Act in which he declared undisclosed income of Rs.25 lakhs and stated that he would be including such income in the return to be filed. On 8.5.1995, he wrote a detailed letter to the Assessing Officer retracting his statement dated 21.4.1995.

2. On 26.3.1996, the assessee filed a return of income for the assessment year 1994-95 before the Income Tax Officer, Ward 1(2), Rajkot who was the Assessing Officer under normal circumstances. The assessee having been subjected to search operations, however, such return was transferred to the A.C.I.T. (Investigation), Rajkot. Such return was processed under section 143(3) of the Act. The A.C.I.T. (Investigation), Rajkot framed his scrutiny assessment with respect to assessment year 1994-95 on 27.3.1997.

2.1 The assessee filed his return of income for the

assessment year 1995-96 on 26.3.1997. Such return of income was processed under section 143(3) of the Act and assessment was framed on 27.11.1997 by the Income Tax Officer, Ward 1(2), Rajkot.

2.2 For the assessment year 1997-98, the assessee filed his return of income on 6.1.1998 before the Income Tax Officer, Ward 1(2), Rajkot. Such return was accepted under section 143(1) of the Act without any scrutiny. This assessment the Assessing Officer desired to reopen under section 147 of the Act, for which the impugned notice dated 2.5.2001 came to be issued.

3. The Assessing Officer had recorded his reasons for reopening the assessment which read as under :

"In this case search action u/s. 132 was conducted in the month of April '95 at the residential premises at Gondal. The office and residential premises are together. A. Y. 1994-95 is completed in this circle. Thereafter the assessee did not file any return of income in this circle.

It is learnt that the assessee had filed the return with some other ward with malafide intention. The jurisdiction over the assessee rests with this circle and the assessments were the core assessments for A.Y. 1995-96 and 1996-97 onwards. These returns for A.Y. 1995-96 onwards were filed with I.T.O., Ward 1(2), Rajkot who completed the assessments for A.Y. 1995-96 u/s 143(3) without mentioning the search related facts and without jurisdiction.

I, therefore, have reason to believe that the above assessments have escaped assessments. Thus, by reason of omission or failure on the part of the assessee, for not filing the return of income, income chargeable to tax for the A.Ys. 1997-98 to 2000-2001 have escaped assessment.

I, therefore, issue the notice u/s 148 for above mentioned years for filing the returns."

4. The assessee thereupon approached this Court objecting to the reopening of the assessment on various grounds. Since facts are more or less similar in all other petitions, we do not find it necessary to refer such facts separately. However, we may record that for the assessment year 1995-96, the return of income was processed under section 143(3) of the Act and the Assessing Officer had also issued a notice of reopening of such assessment. The reasons recorded therein being different than in the present group of cases, we propose to deal with the petitioner's challenge to reopening of such assessment for which he has filed Special Civil Application No.6555 of 2001, separately.

5. Insofar as these petitions are concerned, primarily the contention of the petitioner is that the petitioner had filed the returns before the proper officer who had accepted such returns. It would not be open to the Department to contend that the returns were filed before the wrong officer and therefore, such returns were invalid returns.

6. On the other hand, principally the stand of the Department is that the assessee having been subjected to search operations, by virtue of notifications issued by the Department, the A.C.I.T. (Investigation), Rajkot was the proper officer who had the jurisdiction to assess the income of the assessee. The assessee having filed the returns before the wrong officer who had no jurisdiction, such returns were *non est*. Since therefore the assessee had not filed any valid return, his income could be assessed under section 147 of the Act.

7. Principally around this controversy, learned counsel for both the sides have made detailed submissions. Learned counsel Shri J. P. Shah for the petitioner drew our attention to various documents and record to contend that the assessee had been filing returns before his normal Assessing Officer. The assessee had no idea that by virtue of search operations, the returns should be filed before the A.C.I.T. (Investigation), Rajkot. The Assessing Officer, Ward 1(2), Rajkot before whom such returns were filed, ought to have transferred the returns as was done with respect to assessment year 1994-95. Counsel drew our attention to the relevant statutory provisions to contend that the burden cannot be cast on the assessee to search out the correct Assessing Officer. If at all the return was filed before a wrong officer, the Department could either have refused to accept such a return or the Assessing Officer before whom such a return was filed ought to have transferred it before the proper authority. Having accepted such returns, having sent intimation under section 143(1) or having framed assessment under section 143(3), the department cannot now turn back and take a stand that the returns were not filed at all.

8. Counsel further submitted that even the notification under which such procedure was set out for transfer of jurisdiction, was not made available to the petitioner. Before this Court also, the Department filed a wrong notification, before ultimately producing the relevant notification covering the case of the petitioner. In short, his case was that under such circumstances, burden cannot be cast on the petitioner to unearth the departmental notifications and find out before which officer the transferred jurisdiction stood.

9. On the other hand, learned counsel Mrs. Mauna Bhatt for the Department opposed the petition contending that the term "Assessing Officer" has been defined under section 2(7A) of the Act. Upon the petitioner being subjected to search, in light of the provisions contained in section 120 of the Act read with section 124 of the Act and in view of the departmental notifications, his all subsequent assessments would lie before the A.C.I.T. (Investigation), Rajkot. The petitioner having filed returns before a wrong officer who had no jurisdiction, such returns were *non est*. In view of the provisions contained under section 147 of the Act, therefore, the income which had escaped assessment could be assessed by the Department for which purpose, after recording reasons, notice under section 148 of the Act was issued.

10. In support of her contentions, counsel relied on the following decisions :

[a] In case of ***Industrial Trust Ltd. v. Commissioner of Income Tax)Central and Rajasthan)***, reported in (1973) 91

ITR 550, wherein the Income Tax Officer had issued a notice on the assessee. Thereafter, fresh notices were also issued by the Income Tax Officer, Central Circle-4, New Delhi. The stand of the Department was that the Income Tax Officer, Ajmer had no jurisdiction over the case of the assessee and therefore, his notice was without jurisdiction and therefore, fresh notices issued by the Income Tax Officer, Central Circle-4, New Delhi were valid. The Apex Court confirmed the view of the Rajasthan High Court. The Apex Court noted that in the case on hand, the return was submitted to an Income Tax Officer who had no jurisdiction, territorial or otherwise, over the assessee.

[b] In case of **Sanwarmal Agarwal v. Assistant Commissioner of Income Tax and another**, reported in (1998) 229 ITR 783, wherein the Gauhati High Court dismissed the assessee's writ petition challenging a notification issued under section 120 of the Act, observing that the income tax authorities under the scheme of the Act are authorized to exercise their power and to give full effect to the provisions of the Act and to make the Act fully operative. It was held that the Commissioner as the superior authority may transfer a case to any of the Income Tax Officer or Officers having concurrent jurisdiction, who are subordinate to him. While doing so, he is required to take into account the criteria specified in section 127 of the Act.

[c] In case of **B. R. Industries Ltd. v. Commissioner of Income Tax and others**, reported in (2002) 255 ITR 593 wherein the Delhi High Court rejected the petitioner's challenge to the order passed by the Commissioner of Income Tax under section 120(2) of the Act, holding that the Income Tax Officer,

Ward 2(4) had jurisdiction to deal with the case of the assessee. In context of such challenge, the Bench observed that the assessee cannot demand that his assessment should be done by a particular officer.

11. Having thus heard the learned counsel for the parties, we notice that insofar as this group of petitions is concerned, the sole ground on which the assessments are sought to be reopened is that the assessee had filed the returns with some other ward with *mala fide* intention. It was noted that the jurisdiction over the assessee rested with Circle I, Rajkot. However, the returns were filed with the Income Tax Officer, Ward 1(2), Rajkot who completed the assessments without mentioning search related facts.

12 In the present case, undisputed facts are that the petitioner was ordinarily assessed by Income Tax Officer, Ward 1(2), Rajkot. It was before this officer that the assessee filed his returns for the assessment year 1996-97 and later years. Such returns were accepted under section 143(1) of the Act. It is also not in dispute that previously on 21.4.1995, the assessee's premises were subjected to search operations. Before us, the Department has produced a notification dated 30.4.1991 issued under section 120 of the Act by C.B.D.T. by virtue of which, the jurisdiction in case of all persons (other than those in respect of which the DC (IT), Special Range, Rajkot has jurisdiction) where search under section 132 of the Act has been carried out on or after 1.4.1985 and residing in or having principal place of business in municipal wards specified therein and the Rajkot district, the jurisdiction would lie with the Assistant Commissioner of Income Tax (Investigation),

Circle-1, Rajkot. We may, however, note that earlier when the petitioner demanded from the Department on what basis the jurisdiction is transferred, the Department wrote on 4.7.2001. The Department relied upon an order dated 1.7.1998 issued by the Commissioner of Income Tax under which it was provided that in case of all persons where search actions have been carried out under section 132/132A of the Act on or after 1.4.1993 and who are residing in or having their principal place of business/profession or registered office in municipal wards of Rajkot Municipal Corporation or within the limits of Rajkot district, the jurisdiction would lie with the Assistant Commissioner of Income Tax (Investigation), Circle-1, Rajkot. Perhaps being pointed out that such order dated 1.7.1998 was passed after the returns were filed, in the affidavit filed before us, the Department produced the above noted notification. We note this only with a view to highlight that even the departmental authorities were not clear on what basis the jurisdiction in case of the petitioner stood transferred. Can we then expect the petitioner to be aware of such notifications and to file returns before an officer other than his normal Assessing Officer?

13. Even if we proceed on the basis that the petitioner filed the returns before his original Assessing Officer who was a wrong officer, can the Department now take a stand that such returns were *non est* and therefore, the assessments subjected to reopening on the premise that no returns were filed?

14. In the facts of the present case, we are unable to accept such a stand of the Department. On the basis of the returns filed by the petitioner, and the intimation sent by the

Department under section 143(1) of the Act, the assessee discharged his tax liabilities. The Department without ever questioning filing of such returns before a wrong officer, having accepted the tax paid under such returns, now cannot be allowed to contend that such returns were filed before wrong officers who had no jurisdiction to accept the same.

15. It is not reflected from the record that the petitioner was ever made aware about the change of jurisdiction of the Assessing Officer. It may be that for the assessment year 1994-95, the return was processed under section 143(3) of the Act by the A.C.I.T. (Investigation), Rajkot. However, the fact that being subjected to search, all subsequent returns had to go before specified officer and not the ordinary Assessing Officer having jurisdiction over the petitioner's assessment, was nowhere conveyed to him. Section 120(1) of the Act does envisage that the income-tax authorities shall exercise powers and functions as assigned to them by the Board under the Act. The fact that the Board had jurisdiction to issue notification transferring jurisdiction in specified class of cases is not in dispute. However, when the assessee filed his returns before his ordinary Assessing Officer, primarily the Assessing Officer concerned could have either refused to accept such returns or could have transferred them before the competent authority. He not having done so, after a long period of time, it would not be open for the Department to ignore such returns contending that the same were filed before the officer who had no jurisdiction and therefore, such returns were *non est*. Any such attempt on the part of the Department would lead to abnormal and incongruent situation. The returns accepted by the Assessing Officer, with or without scrutiny and the assessment

framed thereon would stand in eye of law. The petitioner – assessee who paid taxes as per his own declaration or may be in a given case, on a further demand by the Assessing Officer on intimation or scrutiny, would now be subjected to a fresh assessment as if the original assessment was *non est*, while at the same time, the taxes paid by him would be retained by the Department.

16. Had there been any other ground for re-opening than the mere ground that the return was filed before a wrong officer who had no jurisdiction, we would have been prompted to examine such reasons further particularly since these cases were accepted under section 143(1). However, in the present group of petitions, the sole ground on which the assessment is sought to be reopened under section 147 of the Act is that the assessee filed returns before a wrong officer.

17. In the affidavit in-reply dated 31.8.2001 filed by one Ms. Garima Jain, ACIT, Circle I, Rajkot, on behalf of the Department in Special Civil Application No.6555 of 2001 (pertaining to reopening of the assessment for the assessment year 1995-96), the stand taken by the Department is that, “.... *it is to be stated that it is not the case of the Department that the order passed by Income Tax Officer, Ward 1(2) is bad in law. The only point is that the income tax has escaped assessment.*”. Thus, before the Court, the stand in the affidavit in-reply filed on behalf of the Department was that such returns were not *non est*. Nothing has been pointed out to us to show that the petitioner, with *mala fide* intentions, filed returns before his original assessing authority.

18. Culmination of our discussion is that the reasons recorded for reopening assessment are not valid. The sole ground on which the assessment is sought to be reopened under section 147 of the Act, is not sustainable. Such notices are, therefore, quashed. All petitions, therefore, allowed and disposed of accordingly.

[AKIL KURESHI, J.]

[HARSHA DEVANI, J.]

parmar*

