

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10733 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL

and

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

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PREMJIBHAI AND SONS

Versus

JT COMMISSIONER OF INCOME TAX

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Appearance:

MR JP SHAH for Petitioner

MR MIHIR H JOSHI with MR MANISH R BHATT for Respondent No. 1

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CORAM : MR.JUSTICE J.M.PANCHAL

and

MR.JUSTICE M.S.SHAH

Date of decision: 25/01/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this petition under Article 226 of the

Constitution, the petitioner has prayed for a writ of certiorari or any other appropriate writ for quashing the notice dated 29.8.2000 (Annexure "A") under Section 158 BD of the Income-tax Act, 1961 (hereinafter referred to as "the Act") issued by the Joint Commissioner of Income-tax, Special Range-2, Rajkot, the sole respondent herein.

2. The facts leading to filing of this petition, briefly stated and as averred by the petitioner, are as under :-

2.1 The petitioner is engaged in the business of ship breaking at Alang, District Bhavanagar. In the course of its regular business, the petitioner sells materials to various parties from time to time and its purchasers at times pay cash or at times by their own cheques drawn on their own bank accounts or at times the cheques are obtained from other concerned persons with whom they may have transactions. The petitioner is concerned with realization of the sale price whether the payment is made by one mode or the other. The petitioner's accounts are audited under the Income-tax Act as well as under the Companies Act. The search was initiated under Section 132 of the Act in the case of M/s Mahendra H. Shah and Hemant C. Shah and their group concerns. These persons are not in any way connected with the petitioner and the petitioner does not have dealings with them by way of sale of goods or even otherwise. The said persons (hereinafter referred to as "the raidees") are engaged in the business of finance in the name of their various concerns, but the petitioner had not received any cheque issued by them at the instance of the purchasers of materials from the petitioner or even otherwise. It is further averred by the petitioner that the raidees might have made deposits with the petitioner but such deposits are by cheque, repayment is by cheque, interest payment is by cheque. The petitioner had deducted tax from interest. It is also the case of the petitioner that the deposit, interest payment, TDS and repayments are all shown in the books of accounts of the petitioner and that the petitioner has no other dealings with the raidees. On 29.8.2000, the Joint Commissioner of Income-tax, Special Range - 2, Rajkot, the respondent herein, issued notice under section 158BC read with Section 158BD of the Act stating that on perusal of the records of search proceedings in the cases of M/s Mahendra S. Shah and Hemant C. Shah and other group cases, the respondent was satisfied that undisclosed income belongs to the petitioner also and, therefore, the petitioner is required, in pursuance of the provisions of Section

158BC(a)(ii), to furnish the return in the prescribed form setting forth the petitioner's total income including the undisclosed income for the block period between 1.4.1989 and 7.12.99.

2.2 The petitioner has raised the following contentions in the petition :-

- (i) There are no facts which entitle the respondent to issue notice under Section 158BD, the condition precedent for which is satisfaction of undisclosed income belonging to any person other than the raided person.
- (ii) The authorities have not come across any books of accounts, documents or assets belonging to the petitioner which would indicate that the petitioner had any undisclosed income. The condition precedent for applying Section 158BD is not satisfied.
- (iii) All the transactions such as deposits, interest payments, TDS and repayments are duly and correctly recorded in the books of accounts of the petitioner which are audited and these are the only transactions of the petitioner with the raidees.

3. In response to the notice, affidavit in reply is filed by Mr Harsh Prakash, Joint Commissioner of Income-tax, Rajkot, the respondent herein, stating as under :-

"Search and seizure action was carried out in the case of Shri Mahendra Himatlal Shah and Shri Hemant C. Shah, Bhavnagar u/s. 132 of the I.T. Act on 17.12.99. During the course of search proceedings and consequent enquiry, it was noticed that both these persons had opened bank accounts in several names and by using these bank accounts they would deposit cash received from Ship Breakers at Alang and thereafter would pay cheque against this cash to such ship breakers and in the bargain earn commission upto 1.5%. For example, cash received from ship breakers was deposited in the account of "A", "A" would transfer to the credit of account of "B". "B" again would pay to the credit of account "C" and "C" to "D" and so on. Finally the cheque would be issued by the last holder of the bank account to the ship breakers. So the above mentioned

parties were carrying on the business of converting black money into legally accounted funds for a meagre commission. It may be submitted that above mentioned parties are not assessed to tax and have never filed return of income so far. The seized materials in the case of the above mentioned parties indicate that the petitioner was involved in converting its unaccounted funds into legally accounted funds in garb of sales made/loans received by him which were not found to be genuine. The petitioner M/s Premjibhai & Sons during the financial year 1998-99 has deposited a sum of Rs.85,02,994/- in cash and received Cheques/DDs through the bank account of Shri Mahendra H. Shah in the garb of having made sales to M/s Rajiv Sales Corporation, Mumbai. As also a sum of Rs.47,19,653/- during the F.Y. 1997-98 in the garb of having made sales to M/s.Sheetal Marketing, Ahmedabad and Rs.14,40,100/- during the F.Y. 1998-99 in the garb of having made sales to M/s Hiren Enterprise, Mumbai. In these cases the transaction was found not to be genuine. During the post search enquiry and also enquiry made at Mumbai by the investigation wing revealed that M/s. Rajiv Sales Corporation stated to be residing at 1/6, Sahyadrinagar, Charkop, Kandivli (West), Mumbai do not exist in such address. In fact the premises where M/s. Rajiv Sales Corporation stated to be carrying out business was actually three-storey building. The area was residential area consisting of building No. 1, is "Shiv Krupa". Shri Vasant Vithal Abitekar occupies flat No. 6, only this name plate exists. M/s Rajiv Sales Corporation could not be found here also. Similarly, it was found that genuine sales were not made to M/s Sheetal Marketing, Ahmedabad. As regards M/s Hiren Enterprise, Old Bhagwan Bhuvan, M.G. Road, Ghatkopar (East), Mumbai, the address could be located. The Phone No. of the party was 5125961. Proprietor's name is Shri Kantibhai. No name plate/board of the party exists, the party used the name M/s Hiran Enterprise in earlier times. The party appeared to be a very small time trader.

That from the facts stated above, it was noticed that M/s Premjibhai & Sons (the petitioner) has converted unaccounted income to the extent of Rs.1,46,62,747/- into legally

accounted funds by making bogus sales to M/s Rajiv Sales Corporation, M/s Sheetal Marketing and M/s Hiren Enterprise and credit such funds to its books of account conveniently through bank account maintained by Shri Mahendra C. Shah. The above findings are corroborated by statement of Shri Mahendra C. Shah u/s. 132(4) of the I.T. Act wherein he has clearly admitted while answering question No. 2, 10, and 11 that he is in the business of providing cheques against cash.

That the petitioner M/s Premjibhai & Sons, during the F.Y. 1998-99 arranged loan of Rs.2,25,000/- by providing cash and obtaining cheques through bank accounts maintained by Shri Hemant C. Shah in the name of M/s M. Dineshkumar & Co. which is to be brought to tax, u/s. 68 of the I.T. Act as undisclosed income during the block period."

The respondent has further averred that prima facie on the basis of the facts gathered during the search, which is corroborated by the statement of Mr Mahendra H. Shah under Section 132(4) of the Act, the petitioner was in possession of undisclosed income during the block period. It is further stated that the petitioner's claim regarding genuineness of the transaction will be inquired during the proceedings under Section 158BD.

4. The petitioner has filed rejoinder affidavit reiterating the ground that there is no evidence to show that the petitioner has undisclosed income. It is stated that in reality it is the case of cash credit and sales which are recorded in the books of accounts of the petitioner and are, therefore, disclosed income and could only form the subject matter of regular assessment under Section 143(3). It is further submitted in the rejoinder that the Assessing Officer of the raidees has to make the affidavit of his satisfaction and that the respondent is not the Assessing Officer of the raidees. Neither the Assessing Officer of the raidees has made any affidavit nor does the respondent's affidavit state that the Assessing Officer of the raidees was satisfied under Section 158BC. It is also contended that the notice is given for the wrong assessment years 1988-89 to 1998-99 when in law and facts it has to be for assessment years 1990-91 to 2000-2001.

5. At the hearing of the petition, Mr JP Shah, learned counsel for the petitioner has raised the following contentions :-

- (i) A notice under Section 158BD can be issued only if the respondent had already seized the books of accounts or other documents belonging to the petitioner and indicating that the undisclosed income belongs to the petitioner. Since no such books of accounts or documents belonging to the petitioner are seized, notice could not have been issued against the petitioner under Section 158BD.
- (ii) The Assessing Officer of the raidees has not filed any affidavit to state that he was satisfied that any undisclosed income belonged to the petitioner. In absence of any such affidavit, the Court must proceed on the footing that the respondent herein i.e. the Assessing Officer of the petitioner issued notice under Section 158 BD without complying with the condition precedent of satisfaction of the Assessing Officer of the raidees. In view of the absence of the jurisdictional fact, the notice must fail.
- (iii) The impugned notice is also bad as it covers the assessment years which are not covered by the definition of the block period as defined by section 158B(a) of the Act.
- (iv) All the amounts which are involved in the entries relied upon by the respondent cannot be construed as undisclosed income as the provisions of Sections 68 and 69 cannot be applied at the time of issuance of notice under Section 158BD, but they can be applied at the time of computing of undisclosed income for the block period. Reliance is placed on the provisions of Section 158BB(2) of the Act.
- (v) The proceedings under Section 158BD can be taken up only after the proceedings under Section 158BC against the raidees are completed which has not been done in the instant case.
- (vi) The department has refrained from producing evidence on the basis of which it has come to an adverse conclusion against the petitioner inspite of the averments made in the petition and in the

rejoinder affidavit contending that all the transactions of the petitioner with the raidees were recorded in the books of accounts of the petitioner.

6. Identical contentions were raised on behalf of Priya Blue Industries Pvt. Ltd., the petitioner in Special Civil Application No. 10731 of 2000. Yesterday, we have already dismissed the said petition rejecting the aforesaid contentions. Contention Nos. 1 to 5 are identical and, therefore, for the reasons recorded in the said judgment dated 24.1.2001, we reject the aforesaid contentions. However, since contention No. 6 is based on the facts of the individual case, we propose to deal with the said contention only.

7. Mr JP Shah, learned counsel for the petitioner has vehemently urged that the respondent has not produced any evidence on record on the basis of which they have purported to come to an adverse conclusion against the petitioner. It is submitted that Special Civil Application No. 10396 of 2000 filed by Rushil Industries Ltd. was dismissed by this Court after considering the facts in that case. Hence, dismissal of the said petition cannot seal the fate of the present petitioner in this case.

In this connection, we would refer to the averments made in the reply affidavit, which are already quoted hereinabove. It has been pointed out that in the garb of having made sales to M/s Rajiv Sales Corporation, Mumbai, M/s Sheetal Marketing, Ahmedabad and M/s Hiren Enterprise, Mumbai, petitioner M/s Premjibhai & Sons has converted unaccounted money into accounted money to the tune of Rs.85,02,994/-, Rs.47,19,653/- and Rs.14,40,100/during the financial years 1997-98 and 1998-99. It has been specifically stated on oath that during the post search enquiry made at Mumbai, it was found that M/s Rajiv Sales Corporation-alleged purchaser could not be found at the address given by the petitioner and that although the address of M/s Hiren Enterprise could be located, the party used to use the name earlier but no name plate/board of the party exists and that person called Kantibhai residing at the address in question appeared to be a very small trader. The finding of bogus sales to the aforesaid three parties are also corroborated by the statement of Mahendra H. Shah under Section 132(4) of the Act wherein he has admitted that he is in the business of providing cheques against cash. Similarly, the petitioner is found to have arranged loan of Rs.2,55,000/- by providing cash and obtaining cheques

through the bank accounts maintained by Hemant C. Shah in the name of M/s M. Dineshkumar & Co.

The affidavit in rejoinder filed on behalf of the petitioner merely contains vague and bald assertions of the petitioner's own case without denying the case of the respondent that the premises in question of M/s Rajiv Sales Corporation did not exist at Mumbai or that Kantibhai who used the name M/s Hiren Enterprise in earlier time was a very small time trader and that no name place/board of M/s Hiren Enterprise exists at the given address.

In view of the aforesaid material on record, it cannot be said that the issuance of notice by the respondent against the petitioner under Section 158BD of the Act suffers from the vice of non-application of mind or for want of any material on record. Sufficient material has been disclosed in the reply affidavit to enable the petitioner to meet with the case against him.

8. In view of the above discussion, we find no merit in any of the contentions raised on behalf of the petitioner. The petition accordingly fails and is summarily dismissed with costs.

Notice is discharged. Ad-interim relief granted earlier stands vacated.

(J.M. Panchal, J.)

(M.S. Shah, J.)

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