

(1984) 03 MAD CK 0023

In the Madras High Court

Case No : Tax Case No"s. 680 and 686 of 1978 (Reference No"s. 414 and 420 of 1970)

Commissioner of Income Tax

APPELLANT

Vs

P.R.L. Abubacker

RESPONDENT

Date of Decision : 02-03-1984

Acts Referred:

Income Tax Act, 1961 — Section 147(A)

Citation : (1987) 163 ITR 348

Hon'ble Judges : V. Ratnam, J;G. Ramanujam, J

Bench : Division Bench

Advocate : J. Jayaraman, for the Appellant; S.V. Subramaniam, for the Respondent

Judgement

Ramanujam, J.—The following question has been referred to this court for its opinion by the Income Tax Appellate Tribunal :

Whether, on the facts and in the circumstances of the case, the reopening of the assessments made by the Income Tax Officer u/s 147(a) of the

Income Tax Act, 1961, for the assessment years 1964-65 and 1965-66 is valid and justified ?

2. The assessee herein purchased an old property bearing door Nos. 1/28 and 2/28, Maracair Labbai Street, Madras, for Rs. 7,000. The said

building after its purchase was demolished and a new building was constructed during the period May 9, 1963, to January 31, 1965. This period

fell within two assessment years 1964-65 and 1965-66. During the Income Tax assessment for those two assessment years, the assessee showed

the cost of construction at Rs. 20,000 during the assessment year 1964-65 and Rs. 25,000 for the assessment year 1965-66. Thus, the total cost

of construction for the entire building was claimed by the assessee to be Rs. 45,000. The Income Tax Officer at the time of making the original

assessment for these two years added to the cost of construction admitted by the assessee Rs. 5,000 for the assessment year 1964-65 and Rs.

12,000 for the assessment year 1965-66. Thus, the total cost of construction fixed by the Income Tax Officer was Rs. 62,000. Subsequently,

there was a raid in the premises of the assessee's co-brother which revealed that he had paid on money while purchasing the building at Nos. 1/28

and 2/28, Maracair Labbai Street, Madras. Since the assessee was managing the affairs of his co-brother, the Income Tax Officer concluded that

the assessee must have also paid similar on-money for the purpose of the said property. For the purpose of wealth-tax assessment the assessee

filed an estimate of his own valuer showing the market value of the property including the new construction at Rs. 95,000. As a result of the raid in

the assessee's co-brother's house and the filing of the valuation report by the assessee himself in the wealth-tax assessment, the Income Tax

Officer came to the conclusion that the assessee has not disclosed the true particulars regarding the cost of construction and consequently there

had been an escapement of income. In this view, he initiated proceedings u/s 147(a) of the Act and made a further addition of Rs. 15,000 for the

assessment year 1964-65 and Rs. 11,000 for the assessment year 1965-66. The reopening of the assessment as well as the additions of Rs.

26,000 for the two assessment years was challenged by the assessee before the Appellate Assistant Commissioner who confirmed the addition to

the extent of Rs. 20,900 thus, giving relief to the assessee to the extent of Rs. 5,100 for both the assessment years. Then the matter was taken by

the assessee to the Tribunal. Before the Tribunal. two questions arose, namely, -

1. Whether the initiation of proceedings for reopening the assessment u/s 147(a) of the Act was justified ? and

2. Whether the addition made by the Income Tax Officer at the reassessment stage could be justified on merits ?

3. The Tribunal took the view that the proceedings u/s 147(a) of the Act could not legally be sustained as the Income Tax Officer, even at the

original assessment stage, has adopted his own estimate after rejecting the value furnished by the assessee and, therefore, it is not open to the

Income Tax Officer to take up the question of valuation once again. The Tribunal, therefore, cancelled the reassessment made u/s 147(a) of the

Act. In view of the cancellation of the reassessment u/s 147(a) of the Act, it was not necessary to go into the merits of the reassessment. Aggrieved

by the orders of the Tribunal in respect of both the assessment years, the Revenue has come up before us in this reference.

4. It will be clear from the facts stated above that the Income Tax Officer while making the original assessment estimated the value of the

constructions said to have been put up by the assessee at Rs. 62,000. At that stage, the assessee has produced the sanctioned plan No. 1771 of

1964 dated September 17, 1964, which showed that the sanctioned plan was only for the ground and the first floors. It is only on the basis of the

sanctioned plan the Income Tax Officer valued the constructions and that means that the valuation was made by the Income Tax Officer only for

the ground and first floors. At the time of making the assessment, the Income Tax Officer was not aware of any further constructions.

Subsequently, as already stated, for the purpose of wealth-tax assessment, the assessee himself has filed a valuer's estimate showing the market

value at Rs. 95,000. That estimate contained the value of construction for the second floor as well. Subsequently, there was a raid in the premises

of the assessee's co-brother which was taken by the Income Tax Officer to indicate that the assessee also should have paid on-money for the

purchase of the property over which he has put up the construction. Taking these new materials which were not brought to his notice at the stage

of the original assessment, the Income Tax Officer initiated proceedings u/s 147(a) of the Act. In the reassessment proceedings, the Income Tax

Officer has proceeded on the basis that since the estimate made by the assessee's own valuer is higher than the value fixed by him at the stage of

the original assessment, it should be taken that the assessee has not disclosed the true particulars regarding the cost of construction and that is

sufficient to invoke section 147(a) of the Act. When that reassessment was challenged before the Appellate Assistant Commissioner, he went into

the matter in considerable detail and found that from the report of the assessee's own valuer, the second floor had been constructed simultaneously

with the ground and first floors and the method of valuation adopted by the valuer would indicate that the construction of the second floor should

have been made before March 31, 1965. Based on this finding, the Appellate Assistant Commissioner proceeded to hold that since the assessee has concealed the factum of construction of second floor at the stage of the original assessment, the reassessment could be justified u/s 147(a) of the Act. The Appellate Assistant Commissioner has taken the view that the Income Tax Officer in the course of the original assessment was given no more data than the approved sanctioned plan and the fact that the assessee has accounted for the cost of construction at Rs. 45,000 would suggest that there was a non-disclosure of a very material fact by the assessee, that is, construction of second floor and the expenses for constructing the second floor. The Tribunal also found that there was no evidence to the contrary produced by the assessee to suggest that the second floor construction was made as a supplementary construction later than March 31, 1965. The Appellate Assistant Commissioner, therefore, held that the construction right up to the second floor was completed by March 31, 1965, and that the assessee's valuer's report as well as the departmental valuer's report do not suggest that any part of the construction was not taken up simultaneously with the rest or that it was done after some interval of time or at any rate later to March 31, 1965, and, therefore, there was no non-disclosure as regards that construction for the assessment years 1964-65 and 1965-66. But, on the other hand, the assessee seems to have taken the plea that at best what all has happened is that the cost of construction of the second floor had remained undisclosed to the extent it was not covered by the approved plan submitted to the Income Tax Officer at the time of original assessment. But that will not attract the provision u/s 147(a) of the Act. On this aspect of the case, the Tribunal has given a cursory treatment. The Tribunal has thought that the Income Tax Officer himself did not purport to invoke section 147(a) of the Act based on the factum of nondisclosure of the construction of the second floor but has proceeded to reassess merely on the basis that part of the construction has been suppressed. The Tribunal then goes on to say that to justify the reopening of the assessment, a finding is necessary that the second floor was constructed before March 31, 1965, and there is no evidence to show that the second floor was constructed on or before March 31, 1965. There is no basis for the Income Tax Officer to reopen the assessment u/s 147(a) of the Act. We do

not see how the Tribunal can overlook the findings of the Appellate Assistant Commissioner as to when the second floor would have been

constructed. The Tribunal without referring to the various materials considered by the Appellate Assistant Commissioner merely proceeds to say

that there is no evidence to show that the second floor was constructed before March 31, 1965. As already stated, at no stage of the proceedings

perhaps except up to the stage of the appeal to the Tribunal, the assessee ever came forward with a case that the second floor was constructed

after March 31, 1965. As a matter of fact, before the Appellate Assistant Commissioner, the assessee appears to have contended that it is only the

cost of construction of the second floor that remained undisclosed to the extent not covered by the approved plan submitted to the Income Tax

Officer at the time of the original assessment. The Tribunal also has not considered the valuation report filed by the assessee himself which

indicated that the second floor construction should have been done simultaneously with the ground and first floors before March 31, 1965, and not

thereafter. This inference is possible for the reason that the report takes the entire construction as having been put up at the same time, that is, four

years before the report was given and gives depreciation for four years since the date of construction up to October, 1968, when the report was

submitted. The fact that the valuer has given depreciation for four years prior to October, 1968, would indicate that the construction was put up

during the assessment year 1964-65. The Tribunal has not considered the said report of the assessee's valuer, which, according to the Appellate

Assistant Commissioner, indicates that the entire construction including the second floor was constructed simultaneously with the ground and first

floors before March 31, 1965. It cannot be disputed that as to when the second floor was constructed is exclusively within the knowledge of the

assessee and it is for him to come forward with a case and prove the same if possible that the construction of the second floor having been put up

after March 31, 1965, there was no concealment of construction during the assessment years 1964-65 and 1965-66. Even though the assessee

did not come forward with a case that the second floor was constructed long after March 31, 1965, the Tribunal has chosen to make out a case

for the assessee and say that the construction might have been put up after March 31, 1965. So long as it has not been shown that the second floor

was constructed factually after March 31, 1965, the assessee has to be held guilty of non-disclosure of the construction of the second floor during the assessment years 1964-65 and 1965-66. As a matter of fact, the Tribunal has not given any specific finding as to when the second floor was constructed by the assessee and when the substantial question before the Tribunal was as to whether there was non-disclosure of the construction of the second floor by the assessee at the original assessment stage for the assessment years 1964-65 and 1965-66, the Tribunal must give a positive finding as to when the second floor was constructed. In such a case, the Tribunal without giving a specific finding on that question cannot go by surmises and hold that since the second floor construction has not been proved to be before March 31, 1965, the assessee is not guilty of non-disclosure of the construction of the second floor. On the facts, we feel that the Tribunal has thrown the onus wrongly on the Revenue. When the date of the construction of the second floor being exclusively within the knowledge of the assessee, it is for him to positively prove as to when the construction of the second floor was undertaken and completed and on such a fact, which is exclusively within the knowledge of the assessee, the Revenue cannot be called upon to prove, especially when the other materials on record indicate that the second floor should have been constructed on or before March 31, 1965. It is not in dispute that the Income Tax Officer at the original assessment stage had to determine the cost of construction on the basis of the plan furnished by the assessee. Since the Income Tax Officer was not aware of the construction of the second floor at the original assessment stage and that fact was known to him only when the assessee filed a report of his own valuer which included the value of the construction of the second floor as well, there was a clear non-disclosure of the material fact which is essential for the assessment and that fact having come to his knowledge later, the Income Tax Officer is entitled to reopen the assessment by invoking his powers u/s 147(a) of the Act. Though the Income Tax Officer is justified in reopening the assessment u/s 147(a) of the Act on the basis of the new fact which came to his knowledge as to the construction of the second floor and the incurring of the cost therefore, he has also relied on the on-money payments made by the assessee's co-brother as a material from which an

inference can be drawn that the assessee would have also paid on-money for the purchase of the said property. No reopening of the assessment could be sustained on the basis of such an inference. From the fact that the assessee's co-brother had made certain on-money payments, it is not possible to infer that the assessee should have adopted the same modus operandi. As a matter of fact, the Appellate Assistant Commissioner has not relied also while disposing of the reassessment u/s 147(a) on the fact of this additional factor. However, since the reopening of the assessment u/s 147(a) of the Act could be sustained on the factum of non-disclosure of the construction of the second floor before March 31, 1965, it is unnecessary to go into that aspect of the case in detail.

5. The question referred to us has to be answered in the affirmative and against the assessee and accordingly answered. Since the Tribunal did not go into the merits of the reassessment and as it cancelled the reassessment made u/s 147(a) of the Act, the Tribunal is directed to consider the order of reassessment on merits and as modified by the appellate authority and the appeal will be restored to its file. The Revenue will have its costs. Counsel's fee Rs. 500 one set.