(1984) 07 MAD CK 0001

In the Madras High Court

Case No : Tax Case No''s. 680 and 686 of 1978

Commissioner of Income Tax APPELLANT

Vs

P.R.L.S. Abubacker RESPONDENT

Date of Decision : 02-07-1984

Acts Referred:

Income Tax Act, 1961 — Section 147(a)

Citation : (1986) 26 TAXMAN 518

Hon'ble Judges : Ratnam, J;Ramanujam, J

Bench : Division Bench

Advocate : J. Jayaraman and N.V. Balasubramanian, for the Appellant; S.V. Subramanian, for the Respondent

Judgement

Ramanujam, J.—The following question has been referred to this Court for its opinion by the 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?

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 9-5-1963 to 31-1-1965. This period fell within

the two assessment years 1964-65 and 1965-66. During the income tax assessments 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 ITO 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 ITO 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 No. 1/28, and 2/28, Maracair Labbai Street,

Madras. Since, the assessee was managing the affairs of his co-brother, the ITO concluded that the assessee must have also paid similar on-money

for the purchase of the said property. For the purpose of wealth-tax assessment, the assessee has 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 wealth-tax valuation report by the assessee himself in the wealth-tax assessment, the ITO 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 income tax Act, 1961 (''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 assesses before the AAO who confirmed the addition to the extent of Rs. 20,900. Thus, giving a 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 reopening the assessment u/s 147(a) of the income tax Act, 1961, was justified? and

2. Whether the addition made by the income tax Officer at the reassessment stage could be justified on merits?''''

2. The Tribunal took the view that the proceedings u/s 147(a) could not legally be sustained, as the ITO 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 ITO to take up the question of

valuation once again. The Tribunal, there fore, cancelled the reassessment made u/s 147(a). In view of the cancellation of the reassessment u/s

147(a), 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.

3. It will be clear from the facts stated above that the ITO 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. 1771/64 dated 17-9-1964

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 ITO valued the

constructions, and that means that the valuation was made by the ITO only for the ground and first floors. At the time of making the assessment,

the ITO was not aware of any further construction. 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 also a raid in the premises of the assessee''s co-brother which was taken by the ITO to indicate that the assessee should

have paid on-money for the purchase of the property over which he has put up construction. Taking these new materials which were not brought

to his notice, at the stage of the original assessment, the ITO initiated proceedings u/s 147(a). In the reassessment proceedings, the ITO has

proceeded that since the estimate made by the assessee''s own valuers 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). When that reassessment was challenged before the AAC 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 31-3-1965. Based on this finding,

the AAC proceeded to hold that since the assessee has concealed the factum of a construction of a second floor at the stage of the original

assessment, the reassessment could be justified u/s 147(a). The AAC has taken the view that the ITO 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 of Its. 45,000 that

would suggest that there was a non-disclosure of a very material fact by the assessee that is, construction of a 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 31-3-1965. The AAC, therefore, held that the construction right

up to the second floor was completed by 31-3-1965 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 31-3-1965 and, therefore, there was no nondisclosure 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 ITO at the time of original assessment. But that

will not attract the provision u/s 147(a). On this aspect of the case, the Tribunal has given a cursory treatment. The Tribunal has proceeded that the

ITO himself did not purport to invoke section 147(a) based on the factum of non-disclosure 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 31-3-1965 and that there is no evidence to show

that the second floor was constructed on or before 31-3-1965. There is no basis for the ITO to reopen the assessment u/s 147(a). We do not see

how the Tribunal can overlook the findings of the AAC as to when the second floor would have been constructed. The Tribunal without referring

to the various materials considered by the AAC merely proceeds to say that there is no evidence to show that the second floor was constructed on

or before 31-3-1965. 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 31-3-1965. As a matter of fact before the AAC, 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 ITO 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 ground and first floors before 31-3-1965 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 a 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 AAC,

indicates that the entire construction including the second floor was constructed simultaneously with the ground and first floors before 31-3-1965.

It cannot be disputed that as to when the second floor was constructed it 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 31-3-1965, there was

no concealment of construction during 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 31-3-1965, the Tribunal has chosen to make out a case for the assessee and say that the construction

might have been put up after 31-3-1965. So long as it has not been shown that the second floor was constructed factually before 31-3-1965, the

assessee has to be held to be 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 31-3-1965, 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 31-3-1965. It is not in

dispute that at the original assessment stage the ITO had to determine the cost of construction on the basis of the plan furnished by the assessee.

Since the ITO 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 ITO is entitled to reopen the

assessment by invoking his powers u/s 147(a). Though the ITO is justified in reopening the assessment u/s 147(a), 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. The fact that

the assessee''s co-brother had made certain on-money payments, it is not possible to infer that the co-brother should have adopted the same

modus operandi. As a matter of fact, the AAC has not relied also while disposing of the reassessment u/s 147(a) on this additional factor.

However, since the reopening of the assessment u/s 147(a) could be sustained on the factum of non-disclosure of the construction of the second

floor before 31-3-1965, it is unnecessary to go into that aspect of the case in detail. 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, as it cancelled

the reassessment made u/s 147(a), 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 his costs. Counsel fee Rs. 500 one set.