
(2001) 10 MP CK 0055

In the Madhya Pradesh High Court

Case No : IT Ref. No. 21 of 1999 3 October 2001 A.Y. 1990-91 to 1992-93

Commissioner of Income Tax

APPELLANT

Vs

S.R. CONSTRUCTION

RESPONDENT

Date of Decision : 03-10-2001

Acts Referred:

Citation : (2002) 172 CTR 458 : (2001) ILR (MP) 1274 : (2002) 1 MPJR 118 : (2002) 2 MPLJ 81

Hon'ble Judges : Bhawani Singh, C.J.;Arun Mishra, J

Bench : Full Bench

Advocate : Rohit Arya, for the Revenue and None, for the Assessee, for the Appellant;

Judgement

Arun Mishra, J.

The Commissioner seeks a reference u/s 256(2) of the Income Tax Act. For the assessment years 1990-91, 1991-92 and 1992-93 assessee filed their returns which were accepted assessee is a firm engaged in the business of building flats and sells them. Assessee filed the returns declaring an income of Rs. 56,680, Rs. 48,716 and Rs. 84,168 for the assessment years 1990-91, 1991-92 and 1992-93. The assessee constructed 10 flats and 3 garages on certain piece of land and declared the cost of construction at the rate of Rs. 138.80 per sq. ft.

2. The assessment officer later on issued a notice u/s 148 for reopening the assessment. During the course of reopening of assessment, assessing officer made reference to the valuation officer to determine the costs of construction, who submitted a report on costs of construction on 19-11-1993. The assessing officer on the basis of subsequent report of the assessing officer, (sic) made certain additions, which on appeals being filed by the assessee, were upheld by the Commissioner (Appeals).

3. An appeal was filed aggrieved by the orders passed by the assessing officer and the Commissioner (Appeals), before the Tribunal, by the assessee, which

was allowed. The Tribunal opined that the assessee (sic-assessing officer) was not justified in issuing notice u/s 148 of the Income Tax Act for reopening the assessment. Mainly on the said ground, the appeals were allowed.

4. The revenue prayed for reference to be made by the Tribunal to this court. The Tribunal had declined to make reference. Hence, the present appeal u/s 256(2) of the Income Tax Act, 1961 being filed seeking a direction by this court for reference to be made by the Tribunal. On the above facts and circumstances of the case, the Tribunal was justified in holding that reopening of the assessment by the assessing officer was bad in law and consequently in deleting the additions made.

5. The question urged by learned counsel for the revenue is that the Tribunal was not justified in setting aside the proceedings of reopening of assessment. He submits that sufficient grounds existed for reopening of assessment u/s 148 of the Income Tax Act. He further submits that the cost of construction has been found by the valuation officer to be Rs. 178.56, whereas costs was shown by the assessee to be Rs. 138.60 per sq. ft. which was on lower side. He further submits that the area was also not correctly shown in the return. Hence, the assessing officer was justified in reopening assessment. The assessee's stand was that the valuation mentioned by him was accepted and was correct valuation, his accounts books were accepted and after sale of flats certain fresh construction was raised by the purchaser such as kitchen flooring, furnishing, Kota stones etc. The built up area which was sold was disclosed and subsequent addition and alternation could not have been attributed to the assessee. It was also the case set up in the original return that the assessee disclosed the necessary facts truly and completely, therefore, reassessment proceedings are bad in law. The assessee had maintained regular books of accounts, wherein the cost of construction is duly reflected supported by vouchers and they were produced before the assessing officer on several occasions, but, no defects, were found in the books as maintained by the assessee. Thus, on different view on the same facts reassessment proceedings could not be set in motion. The costs of construction estimated by the valuation officer is far more than the sale consideration received by the assessee from the sale of the buildings at the two sites and subsequent report of valuation officer could not be made a ground to reopen the assessment.

6. The Tribunal has found on fact that for all the three assessment years, returns were filed on the basis of books so maintained. The assessee had filed trading account, profit and loss account, capital account of the partners and the balance sheet. The Tribunal has found that the assessment was reopened on the ground of costs of construction declared by the assessee as per his books of accounts appear to be low, as the flats constructed by the assessee happened to be situated in a posh colony. This could not be a ground adopted by the assessing officer to reopen the assessment as all material facts were disclosed in the return. The Tribunal on facts has also found that there was no material with the

assessing officer to come to a conclusion for reopening the purpose that value was kept low. Thus, there was no reason to believe that the assessee had declared low costs of construction. The Tribunal has opined that there must be material at, the time or prior to the issue of a notice u/s 148 of the Income Tax Act, 1961 for reopening of an assessment to indicate that there has been failure or omission on the part of the assessee to disclose fully and truly all relevant material facts at the time of assessment. Issuance of notice has to be justified on the reason which exists at the time of issue of notice and subsequent enquiry cannot be adopted to justify the issue of notice. The Tribunal further opined that once assessee's accounts were accepted without pointing out any defect in the books, the valuation report could be taken into consideration only when the books of account are not reliable or are not supported by proper vouchers or the Income Tax Officer is of the opinion that no reliance can be placed on such books of account.

7. Provision as contained u/s 148 of the Income Tax Act, 1961, is not unruly horse but is guided on certain conditions. Sub-section (2) of section 148 mandates the assessing officer to record his reasons before issuing any notice to make a reassessment. Two conditions must exist; (1) that the Income Tax Officer has reason to believe that income, chargeable to Income Tax had been under assessed; and (2) that he has also reason to believe that such underassessment" had occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. These conditions are cumulative and precedent to the exercise of jurisdiction to issue a notice of reassessment as held by the Supreme Court in *Modi Spinning and Weaving Mills Co. Ltd. Vs. Income Tax Officer, Special Investigation Circle (B), Meerut*, and in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, .

8. Valuation, which was put by the assessee was considered and was found acceptable on the basis of the account books and the other relevant documents produced by the assessee to the assessing officer. Thus, it was a case of change of opinion by the assessing officer which would (sic-not) justify the action of reopening of the assessment. In *DR. H. K. MAHATAB Vs. INCOME TAX OFFICER, WARD "B", BHUBANESWAR, AND OTHERS.*, notice of reassessment issued on the basis of change of opinion was set aside as the material on the basis of which notice was issued was already before the Income Tax Officer at the time of original assessment and the assessment was completed on that material.

9. In the instant case, since the material was placed and was accepted and no defect was found, no further material was available, hence, it cannot be said that there was any reason to believe available to the assessing officer to reopen the assessment.

10. Sections 147 and 148 of the Income Tax Act, do not vest uncontrolled and arbitrary power in Income Tax Officer. Sub-section (2) of section 148 contains

built-in safeguard to disclose reason for reassessment to assessee. The recording of reasons u/s 148(2) is not an idle formality but is a mandatory requirement of the statute which cast a duty and obligation on the Income Tax Officer to record his reason for issuing a notice for reopening an assessment. Issue of notice has to be justified on the basis of reason recorded for reopening the assessment as held by this court in COMMISSIONER OF Income Tax, M.P. Vs. THAKURLAL, . Same is the view taken by the various other High Courts.

11. True it is that the existence of reason for belief that income escaped assessment, certainly justiciable but not sufficiency of reasons. In the instant case there was no reason to reopen the assessment. No valid reason was recorded for reopening the assessment as none existed.

12. The reasons recorded must be valid and relevant, providing the foundation for assumption of jurisdiction by Income Tax Officer is the view taken in CIT v. Agarwalla Bros. 1990 Tax LR 1154, Equitable Investment Co. (P) Ltd. v. ITO & Ors. (1988) Tax LR 1374, Gwalior Rayon Silk Mfg. (Wvg) Co. Ltd. v. V. Raghavan & Ors. 1984 Tax LR 788 , wherein it has been held that where reasons recorded for reassessment proceedings are improper and vague, reopening of the case is not permissible.

13. Reasons for reopening of assessment must be recorded by Income Tax Officer before issuing notice. Only such recorded reasons can be looked into by court for sustaining or setting aside notice, is the view taken in N.D. Bhatt & Anr. v. IBM World Trade Corporation (1994) Tax LR 473 .

14. Thus, the attempt of the counsel for the revenue in the instant case to justify reassessment on the basis of subsequent material collected by the valuation officer cannot justify the reopening of the assessment. The value which was accepted at Rs. 138.80 per sq. ft, as costs of construction by the Income Tax Officer was reasonable one, based on documents. Learned counsel made an efforts that certain construction was suppressed, but, it was explained that this construction was raised by the purchaser after sale by the assessee. He was not responsible for additional construction. No categorical finding was recorded by the assessing officer in this regard that how much construction was suppressed. Even in the order of reassessment, no such finding has been recorded. Thus, all the attempts to justify subsequent assessment are unfounded and baseless in the absence of finding that how much construction was made by the assessee and how much was made by the purchaser. Additions made on reopening of assessment by Income Tax Officer were not justified.

15. Thus, we are of the opinion that no question of law arises in the instant case requiring the Tribunal to refer it to this court in the case.

16. The application seeking reference is dismissed.