

(1993) 05 CAL CK 0014
In the Calcutta High Court
Case No : F.M.A.T. No. 3748 of 1992

Income Tax Officer and Others

APPELLANT

Vs

Santosh Kumar Dalmia

RESPONDENT

Date of Decision : 28-05-1993

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 147, 148, 52(2)

Citation : (1994) 121 CTR 17 : (1994) 208 ITR 337 : (1994) 77 TAXMAN 575

Hon'ble Judges : Nure Alam Choudhury, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : A.K. Roy Chowdhury, for the Appellant; A.C. Moitra, for the Respondent

Judgement

Ajit Kumar Sengupta, J.—This appeal by the Revenue is directed against the judgment and order dated March 11, 1993, passed by the court of first instance quashing the notice u/s 148 of the Income Tax Act, 1961, and consequent reassessment, if any, for the assessment year 1973-74. The learned judge, after considering the recorded reasons, came to the conclusion that there was no prima facie evidence at all to show that the assessee has received a higher price than disclosed.

2. The reasons which have been recorded by the Income Tax Officer are as follows :

"During the assessment year 1973-74, the assessee has sold its land with building at 65, G. T. Road, Howrah, for a consideration of Rs. 2,00,000 as per conveyance deed and disclosed income under the head "Capital gains" at Rs. 13,000 and the assessment was completed accordingly. But subsequently, it was found on investigation that the market price of the said property was much more than the price shown in the sale deed. Hence, the case was referred to the Departmental valuer for ascertaining the correct and proper valuation of the property. The valuer, in his report dated April 29, 1977, estimated the market

value of the property at Rs. 5,92,000 on the date of sale.

I have, therefore, reasons to believe that for failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment, the income of Rs. 3,79,000 under the head "Capital gains" has escaped assessment. Hence proceedings u/s 147(a) are initiated.

Issue notice u/s 148 and make a note in the Register."

Mr. Moitra, the learned advocate appearing for the Revenue, has submitted that after the reopening was made by the notice dated May 9, 1987, u/s 148 of the said Act, the order of reassessment was also passed by the Assessing Officer on March 20, 1982, and, accordingly, the assessee could avail himself of the remedy provided under the said Act. He has drawn our attention to the assessment order where the Income Tax Officer rejected the assessee's contentions regarding the reopening of the assessment u/s 147 of the said Act. According to Mr. Moitra, since the question of jurisdiction has been rightly or wrongly decided by the Income Tax Officer, the remedy lies before the appellate authority under the Act.

3. We are unable to accept this contention. It is immaterial whether the Income Tax Officer has rejected the contentions of the assessee on the existence of the jurisdictional facts. He cannot assume jurisdiction by deciding jurisdictional facts wrongly. If the Income Tax Officer did not have any jurisdiction to issue the impugned notice, the writ court can always interfere irrespective of the fact whether the assessment pursuant to such notice has been made or not. If the notice issued u/s 148 of the said Act, which is the condition precedent for making reassessment is quashed, then the reassessment cannot stand and that is why the learned judge after quashing the notice u/s 148 of the said Act also directed that if any assessment order has been passed pursuant to the said notice, the same would also be set aside and quashed. That apart, the assessee also challenged the said order of reassessment in the writ petition. If the notice goes, so also does the order of reassessment.

4. The only question is whether the reasons recorded by the Assessing Officer furnish a rational nexus for the belief that any part of the income chargeable to tax for the assessment year in question escaped assessment by reason of the omission or failure on the part of the assessee to disclose fully and truly all relevant facts necessary for the said assessment. As indicated earlier, the basis on which the Income Tax Officer proceeded is the valuation report of the valuer who estimated the market value on the date of the sale. The estimate of the valuer cannot be taken as a fact for holding the belief that the assessee in fact obtained higher consideration than declared in the instrument of transfer.

5. Section 52(2) of the Income Tax Act can be invoked only where the consideration for the transfer of the capital asset has been understated by the assessee or the full value of the consideration in respect of the transfer is shown at a lesser figure than that actually received by the assessee and the burden of proving understatement or concealment is on the Revenue.

6. In *K.P. Varghese Vs. Income Tax Officer, Ernakulam and Another*, the Supreme Court has observed that unless it can be shown by the Department that in fact the assessee has received higher consideration than recorded in the instrument of transfer, Section 52(2) cannot be applied.

7. In any event, the question of valuation is a matter of opinion and valuation differs from valuer to valuer, property to property, depending on the facts and circumstances of each case. The valuer's report is after all a statistical hypothesis that leaves wide room for error on either side. It is no useful material for rational belief as to suppression of real consideration that passed in a transaction. In this case, apart from the valuation report which was relied upon by the Income Tax Officer, there was no material before him to come to the prima facie conclusion that the assessee has received a higher consideration than what has been stated in the deed. The valuer's report could be at best a reason to believe that the consideration shown falls short of the market value. The question is not what the market value is, the question is whether the assessee has concealed any part of the consideration and whether the assessee has received a higher price than recorded in the instrument of transfer. Unless that fact is established and there is some material for a tentative conclusion that there was such suppression and the assessee did not disclose the full consideration, the assessment cannot be reopened. In our view, the learned judge, on the facts of this case, came to a correct conclusion. In that view of the matter, this appeal fails and is dismissed. The notice u/s 148 of the Act and the assessment order made pursuant to the said notice shall stand set aside and quashed.

8. There will be no order as to costs.

Nure Alam Choudhury, J.

9. I agree.