

(1992) 08 BOM CK 0009

In the Bombay High Court

Case No : Writ Petition No. 2119 of 1991

India Finance and Construction Co. (P.) Ltd.

APPELLANT

Vs

B.N. Panda, Deputy Commissioner

RESPONDENT

Date of Decision : 27-08-1992

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 147, 147(b), 148, 2(47)
Transfer of Property Act, 1882 — Section 53A

Citation : (1993) 67 TAXMAN 326

Hon'ble Judges : Sujata Manohar, J; Srikrishna, J

Bench : Division Bench

Advocate : Dilip Dwarkadas, P.J. Pardiwala, for the Appellant; V. Balasubramanian, Mrs. Manjula Singh and P.S. Jetly, for the Respondent

Judgement

Mrs. Sujata Manohar, J.—The petitioners are a company registered under the Companies Act, 1956 and carry on, inter alia, business as property owners, financiers and hoteliers. The petitioners have challenged a notice dated 17-12-1990 u/s 148 of the income tax Act, 1961 issued by the respondents under which the respondents propose to reassess the petitioners' income for the assessment year 1988-89. Dr. Balasubramanian, the learned advocate for the respondents, has produced before us the reasons recorded by the Assessing Officer for issuing the notice of 17-12-1990. As per the reasons so recorded, it seems that the assessee-company was the owner of a plot of land together with structures thereon known as "Mor Bunglow" situated at Tejpal Road, Vile Parle (East), Bombay-400 057. The assessee-company entered into an agreement with its parent company C.R. Developers (P.) Ltd. in respect of this property. The lease agreement is dated 3-4-1967. The lease which the assessee-company has granted is for a period of 98 years with an option of renewal. Pursuant to this agreement possession of the property has been handed over to C.R. Developers (P.) Ltd. There is also a further agreement dated 1-4-1982 entered into between the assessee-company and C.R. Developers (P.) Ltd. under which the assessee-

company has agreed to sell its reversionary right in the said property and/or release its reversionary rights in the said property for a sum of Rs. 50 lakhs with a stipulation for subsequent revision, if any additional F.S.I, is received. Subsequently the assessee-company received additional F.S.I, of 16.000 sq. fts. which has been sold to C.R. Developers (P.) Ltd. at the rate of Rs. 200 per sq. ft.

2. None of these transactions took place in the relevant year relating to the assessment year 1988-89. u/s 147 of the Act if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may proceed to assess or reassess such income. In the present case the transactions relating to this property took place much prior to the period covered by the assessment year in question. On the face of it, there is no material on the basis of which the Assessing Officer can have reason to believe that in the assessment year 1988-89 any income has escaped assessment.

3. In the case of Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, , the Supreme Court has said that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the ITO may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The ITO will be acting without jurisdiction if the reason for his belief does not exist or is not material or relevant to the belief required by the section. The Court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the Court.

4. In the present case looking to the dates when the above transactions took place, apart from mere suspicion, there is no material at all before the Assessing Officer which would give him reason to believe that for the assessment year 1988-89 any income has escaped the assessment.

5. The only reason why the notice u/s 148 has been issued in respect of this transaction is that with effect from 1-4-1988, section 2(47) of the Act, has been amended by adding sub-clause (v) to section 2(47). Section 2(47) defines "transfer" in relation to a capital asset as from 1-4-1988. It now includes, "any transaction involving the allowing of the possession of any immovable property to be taken or retained in part performance of the contract of the nature referred to in section 53A of the Transfer of Property Act, 1982". There is no material at all to show that any such transaction took place or gave rise to any capital gains during the assessment year 1988-89 which can be brought to tax in the assessment year in question. The second transaction on the basis of which notice u/s 148 is issued relates to a transaction entered into in May 1982 under which the assessee-company advanced to C.R. Developers (P.) Ltd. a sum of Rs. 15 lakhs purporting to be an advance for the purpose of construction of a hotel. The advance is in the nature of a loan and no interest is being charged on this account. The respondents contend that the assessee-company should have received an interest income worth approximately Rs. 3 lakhs if interest had been

charged on this advance. Hence, this interest income of approximately Rs. 3 lakhs has escaped assessment. Once again the reason which is recorded is beyond the scope of section 147. It is an accepted position that the assessee-company has in fact not received any interest in respect of this advance from C.R. Developers (P.) Ltd. in the assessment year 1988-89. When no income is received there is no question of paying any tax on income which the respondents think, should have been received but was in fact not received. In the case of Commissioner of Income Tax, Gujarat Vs. A. Raman and Company, , the Supreme Court said that the law does not oblige a trader to make the maximum profit that he can out of his trading transactions. Income which accrues to a trader is taxable in his hands. Income which he could have but has not earned is not made taxable as income accrued to him. The Court also said that the High Court exercising Jurisdiction under article 226 of the Constitution has power to set aside a notice u/s 147(b) if the condition precedent for the exercise of jurisdiction does not exist. It is open to the Court to ascertain whether the ITO had in his possession any information and whether from the information the ITO have reason to believe that the income chargeable to tax has escaped assessment. In the present case the reasons which are recorded clearly show that there is no material at all on the basis of which the Assessing Officer could have reason to believe that any interest income had escaped assessment. No such income had accrued during the assessment year in question.

In the premises, in our view, the notice issued u/s 148 is without jurisdiction and hence the same is set aside.

Rule is made absolute accordingly, with no order as to costs.