
(1988) 12 BOM CK 0066

In the Bombay High Court

Case No : Income-tax Reference No. 368 of 1976

Jayraj Madeppa Kadadi

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 20-12-1988

Acts Referred:

Income Tax Act, 1961 — Section 10, 147, 45, 9

Citation : (1990) 186 ITR 161

Hon'ble Judges : T.D. Sugla, J;S.P. Bharucha, J

Bench : Division Bench

Judgement

S.P. Bharucha J.

1. This is the assessee's reference. It raises the following two questions :

"1. Whether, on the facts and circumstances of the case, the reopening of the assessments u/s 147(b) of the Income Tax Act, 1961, for the assessment year 1967-68, 1968-69 and 1969-70 was justified ?

2. Whether, on the facts and circumstances of the case, the Tribunal was justified in holding that the lands were not agricultural lands and the sale proceeds therefrom were rightly chargeable to capital gains tax u/s 45 of the Income Tax Act, 1961 ?"

2. The assessee filed Income Tax returns for the assessment years 1967-68, 1968-69 and 1969-70. In part IV of the returns, he stated the following in respect of the sale of land of his ownership :

"Out of the total agricultural land of 15 acres 10 gunthas bearing Survey No. 276/1, six acres of land were allowed to be converted for non-agricultural purposes on May 3, 1966. The same was divided into 29 subplots. Eight plots out of the same were sold for Rs. 47,471 net as detailed separately.

The Land Revenue authorities have sanctioned permission to change the character of the land for non-agricultural purposes; however, the chargeability of

non-agricultural cess commences only from the date of use of such land for non-agricultural purposes. The plots will return as agricultural land till the change over of such land for non-agricultural use.

The sale would, therefore, be of agricultural land and hence does not attract capital gains tax."

3. The Income Tax Officer did not impose any capital gains tax on the sale of the land for the assessment years 1967-68, 1968-69 and 1969-70. His successor reopened the assessments for these assessment years u/s 147 of the Income Tax Act, 1961, on the ground that income which ought to have been brought to capital gains tax had escaped assessment. The assessee's objection to such reopening was rejected by the Income Tax Officer and, in appeal, by the Appellate Assistant Commissioner.

4. For the assessment year 1970-71, the Income Tax Officer levied capital gains tax in respect of the sale of the said land and, in appeal, this was confirmed by the Appellate Assistant Commissioner.

5. The assessee preferred appeals to the Income Tax Appellate Tribunal in respect of the reopening and in respect of the assessment for the assessment year 1970-71. The appeals were consolidated and heard together. The Tribunal noted that the Income Tax Officer had purported to reopen the assessments u/s 147(a) but it found that there had been no failure on the part of the assessee to disclose fully and truly all material facts consequent to which income could have been said to have escaped assessment. Accordingly, it found that the assessments could not have been reopened u/s 147(a). The departmental representative, during the course of the hearing before the Tribunal, invited its attention to a note of the Income Tax Department's internal audit party which, presumably, was found on the record. The note stated :

"Since, after obtaining permission to convert the agricultural land into non-agricultural land, the assessee has divided the same into plots and sold the same, and for the reasons mentioned in para 2 above, the claim of the assessee for exemption from capital gains tax will not stand and the excess of the sale proceeds over the cost will be taxable as capital gains."

6. The Tribunal found that this note constituted information u/s 147(b). It held that the reopening proceedings would not be bad merely because section 147(a) and not section 147(b) had been mentioned.

7. Before us, Mr. Munim, learned counsel for the assessee, submitted that the audit note did not constitute information within the meaning of section 147(b) and that the reassessment proceedings amounted merely to a change of opinion. He submitted also that the Tribunal was not justified in deeming the reassessment proceedings to have been initiated u/s 147(b) when it had been clearly stated that action was taken u/s 147(a). The only argument of Dr. Balasubramaniam, learned counsel for the Revenue, in response, was that the

audit note was information in regard to the assessee's statement in Part IV of his returns which the Income Tax Officer had overlooked.

8. Mr. Munim drew our attention to the judgment of the Supreme Court in *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, . The assessee was an association of newspapers established with the principal object of promoting the welfare and interest of all newspapers. It owned a building in which a conference hall and rooms were let out on rent of its members as well as to outsiders. Certain other services were also provided to the members. Income from this source was assessed to tax all along as income from business. It was so assessed for the assessment years 1960-61 to 1963-64. In the course of auditing the Income Tax records pertaining to the association, the internal audit the Income Tax Department expressed the view that the money realised by the assessee on account of the occupation of its conference hall and rooms should not have been assessed as "income from business" but under the head "income from property". The Income Tax Officer treated the contents of the audit report as information in his possession for the purposes of section 147(b) and reassessed the income on that basis. The assessee challenged this action and the matter ultimately reached the Supreme Court. The Supreme Court held that when section 147(b) was read as referring to "information" as to law what was contemplated was information as to the law created by a formal source. It was law which, because it issued from a competent legislature or a competent judicial or quasi-judicial authority, influenced the course of the assessment and decided any one or more of those matters which determined the assessee's tax liability. The audit party did not possess the power to pronounce of law but it could draw the attention of the Income Tax Officer to it. Law was one thing and its communication another. While the law may be enacted or laid down only by a person or body with authority in that behalf, the knowledge or awareness of the law may be communicated by anyone. In the case before the Supreme Court, the internal audit party had expressed the view that the receipts from the occupation of the conference hall and rooms did not attract section 10 and that the assessment should have been made u/s 9. While the Supreme Court said that sections 9 and 10 could be described as law, information by the audit party in regard to their application was not law. That part of the note which mentioned the law which escaped the notice of the Income Tax Officer constituted "information" within the meaning of section 147(b); that part which embodied the opinion of the audit party in regard to the application or interpretation of the law could not be taken into account by the Income Tax Officer. In every case, the Income Tax Officer was required to determine for himself what was the effect and consequence of the law mentioned in the audit note and whether, in consequence of the law which had come to his notice, he could reasonably believe that income had escaped assessment. The Income Tax Officer had considered the provisions of section 9 and 10. Any different view taken by him thereafter on the application of these provisions would amount to a change of opinion on material already considered by him. An

"error" discovered on a reconsideration of the same material, in the Supreme Court's view, did not give the Income Tax Officer the power to reopen the assessment u/s 147(b). Any observation by a Bench of two learned judges of the Supreme Court in the case of (1976) 102 ITR 287 (SC) , suggesting the contrary did not lay down the correct law. The Supreme Court also rejected the submission made on behalf of the Revenue that the expression "information" in section 147(b) referred to the realisation by the Income Tax Officer that he had committed an error when making the original assessment. The realisation that income had escaped assessment was covered by the words "reasons to believe", and it followed from the "information" received by the Income Tax Officer. The information was not realisation. The information gave birth to the realisation.

9. In the context of the judgment of the Supreme Court, we must examine the audit note. It refers to what was stated in Part IV of the assessee's return and to the reasoning in a part of it which is not before us. It says that, based thereon, "...the claim of the assessee for exemption from capital gains tax will not stand and the excess of the sale proceeds over the cost will be taxable as capital gains". The audit note, therefore, expresses the opinion of the internal audit party as to the correct position in law upon the facts stated by the assessee in Part IV of the returns. The note does not contain any information as to law, inasmuch as it refers to the assessee's statement in his return, it does not inform the Income Tax Officer of anything new as to fact. It is, therefore not information within the meaning of section 147(b). Further, the Income Tax Officer must be deemed to have applied his mind to the facts stated by the assessee in Part IV of the returns when he made the original assessment. He came to the conclusion that no capital gains tax was leviable upon the sale of the said land. It was not open to the Income Tax Officer to then hold in the reassessment proceeding upon the same facts that he had reason to believe that capital gains tax was leviable thereon, for it would be tantamount to an impermissible change of opinion, in our view, therefore, the audit note was, in the instant case, not information within the meaning of section 147(b) and it did not afford the Income Tax Officer good ground upon which he could reopen the assessee's assessment for the assessment years 1967-68 to 1969-70.

10. It becomes, therefore, unnecessary to consider Mr. Munim's alternate submission that the Tribunal was not justified in deeming the reopening to have been made under the provisions of section 147(b).

11. What now survives is consideration of the second question, but only for the assessment year 1970-71. Mr. Munim fairly drew our attention to the judgment of this court in Commissioner of Income Tax Vs. V.A. Trivedi, . The facts of the present case are substantially similar to those in the case of V. A. Trivedi and, following the judgment in that case, we must answer the second question against the assessee.

12. The first question is answered in the negative and in favour of the assessee. The second question, which is considered only in relation to the assessment year

1970-71, is answered in the affirmative and in favour of the Revenue. No order as to costs.