
(1978) 02 AHC CK 0011
In the Allahabad High Court
Case No : C.M.W.P. No. 747 of 1975

LAKSHMI KANT GUPTA

APPELLANT

Vs

INCOME TAX OFFICER.

RESPONDENT

Date of Decision : 21-02-1978

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 147, 45, 48, 52, 53

Citation : (1978) 7 CTR 323

Hon'ble Judges : K. C. Agrawal, J

Bench : Division Bench

Judgement

K. C. Agrawal, J. - This is a petition under Article 226 of the Constitution for writ of certiorari quashing the notice u/s. 147 of the Income Tax Act, 1961 (hereinafter referred to as "the Act") dated 28th July 1975 issued by the Income Tax Officer, Award Circle 2 Varanasi and for a writ of mandamus directing the respondents not to enforce the same.

2. Laxmi Kant Gupta was a member of a Hindu Undivided Family. For the assessment year 1973-74 ending on 31st March, 1973, the petitioner filed a return. During the assessment year in question the assessee sold house No. 62 Baratalla Street, Calcutta-7 by two sale-deeds dated 29th September, 1972 for Rs. 40,000/- each to one Shrimati Taradevi Chaurasiya wife of Kamla Prasad Chaurasiya. In return, the petitioner claimed that as the value of the property was assessed under Wealth-Tax Act at Rs. 1,26,000/- and since the same was sold only for a sum of Rs. 80,000/- the petitioner suffered a capital loss of Rs. 40,000/- from the sale of this house. During the assessment proceedings the Income Tax Officer concerned gave a notice on February 17, 1975 calling upon the petitioner to show cause why the figure of Rs. 80,000/- shown as the price of the house No. 62 Baratalla Street, Calcutta be not fixed at Rs. 2,65,260/-. The petitioner submitted a reply dated 4th March, 1975 explaining the circumstances under which the property fetched only Rs. 80,000/-. It was also mentioned in the said reply that the petitioner, had, if fact, entered into an agreement of sale

before selling the same to Shrimati Taradevi Chaurasiya, with one Noor Karan Chaudhri and that the latter had paid a sum of Rs. 5,000/- by way of earnest money as well but subsequently he defaulted and did not purchase the same. It was thereupon that since the petitioner was not getting a purchaser that he was compelled to sell it for Rs. 80,000/- to Shrimati Taradevi Chaurasiya. It was also stated that for the purposes of capital gains or loss the cost of acquisition of this property was to be taken at Rs. 84,500/- which was the value determined on the date of partition under which the petitioner received this property. In this connection the petitioner further pointed out that S. 52 of the Act, under which the Income Tax Officer could determine the fair market value did not apply in as much as there is no relationship direct or indirect with the purchaser. The deal was made through a broker. It appears that after the receipt of the aforesaid explanation, the Income Tax Officer accepted that the sale consideration of the house in Calcutta was Rs. 80,000/- besides Rs. 4,322/- which had been forfeited by the petitioner. Thus the total sale proceed was Rs. 84,322/- and as the cost of the acquisition of the said house shown in the partition of 1-9-1958 was Rs. 84,000/-, the capital gains arising from its sale being below Rs. 5,000/- was not assessable. In this view of the matter, the Income Tax Officer completed the assessment on 17th July, 1975.

3. Subsequent to the aforesaid assessment order, the Income Tax Officer, by means of a notice dated 28th July, 1975 issued under S. 147 of the Act called upon the petitioner to file another return as his income in respect of the assessment year 1973-74 had escaped assessment. Aggrieved, the petitioner filed the present writ petition in this court challenging the validity of the said notice, inter alia, on the grounds that as the Income tax Officer had applied the provisions of S. 52 of the Act and had found the explanation submitted by the petitioner true and correct, he had no jurisdiction to reopen the question of the capital gains earned by the petitioner as a result of the sale of the Calcutta house mentioned above. It was also alleged that the Income Tax Officer had no information in his possession in consequence of which, he had reason to believe that the income chargeable to tax had escaped assessment.

4. The writ petition has been contested by the respondent. Shri M. M. Lal, the Income Tax Officer, A ward Circle II, Varanasi, who had issued the notice under S. 147, has filed a counter-affidavit stating that the notice was neither invalid nor illegal. Explaining the circumstances in which the assessment order was passed by him, stated that the price of the house at which it was alleged to have been sold by the petitioner was inadequate in as much as the letting value of the said house itself was Rs. 16,000/- per year and that the difference between the apparent consideration for the sale and the fair market value of the property could be brought to tax as capital gain under sub-S. (2) of S. 52 of the Act. Shri M. M. Lal stated in his affidavit that the sale value of the house had been arrived by him at Rs. 2,65,260/- on the basis of the annual letting value of the property. But at the time when he made the assessment order on 17th July, 1975, he did not know that the difference between the apparent consideration for the sale and

the fair market value of the property could be brought to tax as capital gains under sub-s. (2) of S. 52 of the Act. In this connection he further stated the, "deponent had read S. 52 but stopped short at what is now sub-S. (1) thereof and did not read sub-s. (2) which was added by Act No. V of 1964 with effect from 1-4-1964 and believed that S. 52 was applicable only to a case where the person who acquires a capital asset from an assessee is directly or indirectly connected with him. The deponent was advised of the correct legal position with regard to the applicability of S. 52 in the course of a casual discussion with Sri S. Prasad who happens to be the Appellate Assistant Commissioner of Income Tax at Varanasi on the 28th July 1975". It was there upon that the Income tax Officer realized his mistake in believing that S. 52 did not apply to the facts of the present case. Then he put the following reasons on the record :-

"The A had sold one property No. 62 Bartala Street Calcutta for Rs. 80,000/- the A.L.V. of the property is Rs. 12,695/-; after adjusting taxes and repairs taking the multiple value of the property at 20 times the fair market value comes to Rs. 2,53,900/- against Rs. 80,000/- sold. The case attracts provisions of S. 52(2) under which with the prior approval of the I.A.C. market value be estimated. The capital gains arising out of sale thus escaped assessment. Issue notice under S. 147 of the Income Tax Act as the income has been under assessed and the capital gains escaped assessment."

on these allegations the respondent has alleged that the notice issued was valid and that the same could not be quashed under the law. The question that now arises for our consideration relates to the jurisdiction of the Income Tax Officer to reopen the assessment order. As already pointed out above, the first point raised was that since the Income Tax Officer had already assessed the petitioner to the capital gains after applying the provisions of S. 52 of the Act, he had no jurisdiction to re-open the same.

5. Sec. 45 of the Act lays down that any profit or gain arising for the transfer of a capital asset effected in the previous year is chargeable to income tax except those provided in Ss. 53, 55A and 54B under the head "capital gains" and shall be deemed to be the income of the previous year in which the transfer took place. S. 48 provides the mode of computation of capital gains by deducting from the full value and the consideration received or accruing as a result of the transfer of the capital assets (1) the expenditure in connection with such transfer and (2) the cost of acquisition and improvement there of S. 52, however, lays down two exceptions to the aforesaid general rule. These are contained in sub-Ss. (1) and (2) of S. 52. Sub-s. (1) of S. 52 applies to a case (a) where the person who acquires a capital asset from an assessee is directly and indirectly connected with the assessee (b) and the Income Tax Officer has reason to believe that the transfer effected was with the object of avoidance or reduction of the liability of the assessee in respect of the capital gains arising from the transfer. Sub-S. (2), however, applies to a case where in the opinion of the Income Tax Officer the fair market value of the asset on the date of its transfer

by the assessee exceeds the consideration as stipulated by the parties by an amount not less than 15 percent of the value so stipulated. On the aforesaid conditions being fulfilled the Income Tax Officer is empowered to reject the stipulated consideration and to ascertain the full value of the consideration on the basis of the fair market value as on the date of the transfer.

6. In the present case it would be seen that in the reply submitted in March, 1975 the petitioner pointed out that the purchaser of the Calcutta house was not directly or indirectly connected with him . These assertions were obviously made with reference to sub-S. (1) of S. 52. It appears that believing that this was the only provision under which stipulated consideration could be ignored, that Income Tax Officer the respondent No. 1, proceeded to assess the capital gains on the basis of the cost of acquisition which was Rs. 84,500/- on the date of the partition. He did not consider the question of the applicability of sub-S. (2) of S. 52 to the facts of the present case due to the reason that he was absolutely ignorant of the same. Shri V. B. Upadhyaya, Learned counsel for the petitioner took us through the entire reply and pointed out that he had given the circumstances in which the house was sold only for Rs. 80,000/- and that on the facts and in the circumstances it must be accepted that the Income Tax Officer read the reply and after being satisfied of the same made the assessment of the capital gains on the basis of the fair market price. This does not appear to be correct inasmuch as immediately after passing the assessment order on 17th July, 1975, the Income Tax Officer wrote a letter to the Inspecting Assistant Commissioner of Income tax (Acquisition) Ashok Mar, Lucknow on the 17th July, 1975 itself stating that the sale of the Calcutta house for Rs. 80,000/- appeared to him to be doubtful in view of its annual letting value and that the said information had been passed on by him to the Inspecting Assistant Commissioner for the purposes of taking such action in the matter as was open under the Law in that regard. This letter dated 17th July 1975 clearly shows that the Income Tax officer did not accept the case of the petitioner that the price shown from the sale of the house was a correct one. In fact, there is nothing even in the assessment order which could show that Rs. 80,000/- was considered by him to be fair market value. He did not say any thing on this controversy. It, therefore, appears that the affidavit of the Income Tax Officer to the effect that he did not know about sub-S. (2) of S. 52 of the Act must be accepted as correct. He was led away by the explanation offered by the petitioner to the effect that S. 52 applied only to a case where the purchaser was directly or indirectly connected with the seller. In these circumstances, it is not correct to say that the Income Tax Officer applied sub-S. (2) of S. 52 to the facts of the present case, though wrongly and subsequently, thereafter, he changed his opinion. We have no reason to disbelieve the affidavit of the Income Tax Officer where he asserted that he did not know any thing of sub-S. (2) of S. 52 of the Act.

7. In this connection the learned counsel further contended that the Income Tax officer could have ascertained the true legal position had he been diligent and as he did not do so the omission on his part could not give or confer jurisdiction on

him to re-open the assessment proceeding. The submission made has no tenability inasmuch as in Commissioner of Income Tax vs. A. Raman and Company the Supreme Court held that :-

"Jurisdiction of the Income tax Officer to re-assess income arises if he has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment. That information must, it is true, have come into possession of the Income Tax Officer after the previous assessment but even if the information be such that it could have been obtained during the previous assessment, investigation of the materials on the record or the facts disclosed thereby or from other inquiry or research into facts or law but was not, in fact, obtained, the jurisdiction of the Income Tax Officer is not affected."

The same is the view taken by the Supreme Court in R.K. Malhotra, ITO, Group Circle II(1), Ahmedabad Vs. Kasturbhai Lalbhai (Huf), . The law laid down in this case was that the fact that on a research as to the state of Law, the Income Tax Officer would have ascertained true legal position would not make any difference, if the Income Tax Officer came to know the real legal position of the law only subsequently. In this view of the matter, the submission made by the learned counsel for the petitioner that the Income Tax officer ought to have been vigilant; since he was not, the notice issued was invalid cannot be accepted.

8. In this connection the argument advanced further was that the advice received by the Income Tax officer from the Appellate Assistant Commissioner of Income Tax did not amount to "information" within the meaning of that term used in S. 147(b) of the Act. Hence the notice issued was without jurisdiction. The word "information" used in this section covers cases of information as to the state of law as well. It is not to be confined to a matter as to a facts alone. The Income Tax Officer is entitled to press into service S. 147 of the Act for the reassessment on the basis of the legal position of which he may become aware subsequently. The same could be due to his own research or on the basis of the opinion expressed by higher authorities. Thus if this knowledge or information about the correct legal position was acquired by him from a senior Officer such as Appellate Assistant Commissioner, the same would definitely be information within the meaning of that phrase used in S. 147 of the Act. In Shrimati Sarla Devi vs. Controller of Estate Duty, a Division Bench of this Court (of which one of us was a member), held that correct position of law acquired by the Assistant Controller as a result of the research into law subsequent to the original assessment was information in his possession for re-assessment purposes. In this view of the matter, we are of the view that on the facts of the present case the advice received by the Income Tax Officer from the Appellate Assistant Commissioner of income Tax was information within the meaning of that phrase used in Sec. 147 of the Act and that it was not a case of mere change of opinion and the Income Tax Officer had ample authority to issue the impugned notice.

9. In the result, the writ petition fails and is dismissed, with costs.