

(1981) 07 BOM CK 0006

In the Bombay High Court

Case No : Special Civil Application No. 1715 of 1978

Mundra Salt and Chemical Industries

APPELLANT

Vs

Paramjit Singh

RESPONDENT

Date of Decision : 08-07-1981

Acts Referred:

Income Tax Act, 1922 — Section 34(1)(b)
Income Tax Act, 1961 — Section 147, 154, 45

Citation : (1981) 7 TAXMAN 305

Hon'ble Judges : Pendse, J

Bench : Single Bench

Advocate : S.E. Dastur, S. Mukherjee and H.D. Vora, for the Appellant; P.M. Pradhan and Kum. S.G. Shah, for the Respondent

Judgement

Pendse, J.—The petitioner is a partnership firm and is registered under the provisions of the income tax Act, 1961. The petitioner carries on the business of manufacturing and selling common salt and has its head office situated in Thana town. The petitioner purchased in an auction sale held by the Collector, Thana, land admeasuring about 244 acres situated at Mulund and Thana. The petitioner constructed certain salt works on the said property. The Bombay Municipal Corporation was desirous of acquiring a portion of the aforesaid property, and the portion admeasures about 3 lakhs square yards. By an agreement dated October 25, 1967, between the Corporation and the petitioner, the possession of the land was handed over to the Corporation, and the petitioner received an amount of Rs. 12 lakhs towards the purchase price. It was agreed between the parties that the Corporation would take steps to acquire the land under the provisions of the Land Acquisition Act, 1894, and the petitioner would be entitled to the compensation to be determined under the provisions of the said Act. Accordingly, steps were taken by the Corporation to initiate proceedings under the said Act, and ultimately an award was passed on April 13, 1972, whereby the petitioner received the gross compensation of Rs. 28,66,535. The petitioner had filed his return of income for the assessment year 1968-69. In the said return the

petitioner pointed out the fact that the agreement was arrived at between the petitioner and the Corporation to transfer the land, but the said transfer would be complete only on the passing of the award under the provisions of the Land Acquisition Act. The petitioner claimed that as the transfer was not complete, the amount to be received by the petitioner could not be treated as capital gain accrued during the assessment year 1968-69. The ITO, F-Ward, Thana, did not accept the contention of the petitioner and came to the conclusion that as the assessee-firm has parted with the possession of the land on October 25, 1967, the transfer became complete on that day itself. The ITO further held that the question of quantum of compensation was only postponed and that would not entitle the petitioner to claim that the capital gain had not accrued as per the provisions of section 45 of the income tax Act. On the strength of these findings the ITO completed the assessment for the assessment year 1968-69 on March 27, 1972, and the sale price was calculated at Rs. 28,31,484. Excluding the cost of the land, the total capital gain was calculated at Rs. 9,84,864. A rectification order u/s 154 of the income tax Act was passed by the ITO on August 29, 1975, as it was noticed that the gross compensation awarded by the Land Acquisition Officer was slightly more than what was computed by the ITO while completing the assessment earlier.

2. The petitioner had also filed his return of income for the assessment year 1973-74, and that assessment was completed by the ITO on February 23, 1974. While passing the assessment order for that relevant year the ITO took into consideration the fact that the award was passed on April 13, 1972, and that required the Corporation to pay the interest on the amount awarded to the petitioner right from the date when the Corporation took over the possession of the land. The question which cropped up for consideration before the ITO was as to whether the interest on that amount should be treated as a capital gain for the assessment year 1973-74 or the amount should be spread over between the assessment years 1968-69 onwards. The ITO did not accept the claim of the petitioner that the interest amount should be spread over and capital gain should be distributed over the years, and held that the entire interest should be treated as a capital gain for the assessment year 1973-74. That order was challenged by the petitioner before the income tax Appellate Tribunal, and the contention of the petitioner was upheld.

3. Thereafter on August 18, 1977, the ITO, M-Ward, Thana, served the impugned notice dated August 18, 1977, upon the petitioner communicating that in view of the information in his possession he had reason to believe that there is an "escaped assessment" for the assessment year 1973-74 and the ITO proposes to reopen the assessment. The petitioner was called upon to show cause within a period of 30 days as to why the action contemplated u/s 147 of the income tax Act should not be adopted. The petitioner thereupon called upon the ITO to furnish him the information which had led the officer to serve the notice u/s 147 of the income tax Act. In answer to the query, a letter dated September 20, 1977, was addressed to the petitioner, wherein it was stated that the transfer of

the land would be complete only after the passing of the award under the land Acquisition Act, and as the award was passed on April 13, 1972, the capital gain would become assessable only in the assessment year 1973-74. As the information was totally unsatisfactory, the petitioner insisted upon further data, and a clarification was given by the ITO, by another letter dated February 22, 1978. By this letter whatever was stated in the earlier letter was reiterated, and it was further mentioned that the conclusion which the ITO has come to is supported by a decision of the Tribunal. The petitioner has thereafter preferred the present petition under art. 226 of the Constitution of India to challenge the legality of the action of the ITO.

4. Shri Mukherjee, the learned counsel appearing in support of the petition, submitted that the action of the ITO in exercising jurisdiction u/s 147 of the income tax Act is totally erroneous and the information disclosed by the ITO by his two letters would establish that the action is taken merely because there was a change of opinion and not because of the information which led to believe that there was an escaped assessment. We find considerable merit in the submission of the learned counsel. In the first instance we must point out that the impugned notice does not disclose whether the ITO proposed to take action under clause (a) or clause (b) of section 147. It was necessary for the ITO to clearly indicate in the impugned notice as to what prompted him to take action under the provisions of the said section. Clause (a) and clause (b) contemplate two different situations and the assessee must be furnished with the information as to under what provision the ITO desires to reopen the completed assessment. Clause (a) refers to the cases where the assessments escape certain income chargeable to tax because of failure or omission on the part of the assessee to make a complete return or to disclose fully and truly all material facts necessary for the assessment for a particular year, while clause (b) provides for another set of cases. Clause (b) reads as under :

"Notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the income tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year."

5. Two things are required to be established before the ITO decides to take action under this clause. The officer must have certain information in his possession and which should lead him to believe that the income chargeable to tax has escaped assessment. It is now well settled that a mere change of opinion would not authorise the officer to exercise the powers under this clause. It would suffice to make a reference to the latest decision of the Supreme Court in the case of *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, . The Supreme Court in this judgment disapproved their earlier decision in (1976) 102 ITR 287 (SC) , to the effect that a case where income had escaped assessment due to oversight, inadvertence or mistake of the ITO would attract section 34(1)(b) of the Indian income tax Act, 1922. The Supreme Court

observed that the principles stated in the earlier case were too wide and travel farther than the statute warranted. The Supreme Court laid down that the error discovered in a reconsideration of the same material and no more does not confer power to reopen the assessment. In view of this settled position of law, the question which requires determination is whether the ITO has correctly exercised the jurisdiction under clause (b) of section 147 of the income tax Act, or has adopted the proceedings merely because there is a change of opinion.

6. On the facts and circumstances of the present case, we have no hesitation in holding that the action instituted by the ITO was totally misconceived. From the letters addressed by the ITO to the petitioner in consequence of the service of the impugned notice, it leaves no manner of doubt that the ITO had no additional information in his possession which led him to believe that there was an escaped assessment for the assessment year 1973-74. A reading of the assessment order for the assessment year 1968-69 makes it clear that the ITO had taken a view that the transfer became complete as soon as the petitioner parted with the land and the capital gain accrued in that particular year itself. The view taken by the ITO was reiterated by him when the order of rectification was passed subsequently for the assessment year 1968-69, and also when the assessment for the year 1973-74 was concluded. The ITO took the view that the passing of the award under the provisions of the Land Acquisition Act is not necessary to hold that the transfer of the land has become complete, and this view was taken in spite of the objection of the petitioner that the transfer was not complete and the capital gains, as contemplated u/s 45 of the income tax Act, had not become due till the award was passed. Shri Pradhan, appearing on behalf of the Revenue, submits that the opinion of the ITO was clearly erroneous and contrary to the settled position of law. It may be so, but the officer had taken a view and given his opinion while completing the assessment for the year 1968-69. The mere fact that the officer realised on a later occasion that his earlier opinion was not correct would not entitle him to initiate action under clause (b) of section 147 of the income tax Act. In the present case all the facts relating to the acquisition of the land were available to the ITO when he concluded the assessments for the year 1968-69 and for the year 1973-74. In fact, the assessment for the year 1973-74 was completed only on February 23, 1974, that is, long after the award was passed. In our judgment, this is a clear case where the ITO has initiated the action because of the change of opinion. From the contents of the two letters, which we have mentioned hereinabove, we have no hesitation in concluding that there was no information worth the name which could have led the ITO to believe that certain income has escaped assessment for the assessment year 1973-74. In our judgment, the impugned notice was totally misconceived and requires to be struck down. Shri Mukherjee informs us that in pursuance of the action taken by the ITO, an order has been passed directing the Valuation Officer to submit his report about the value of the land acquired by the Corporation. As we are quashing the impugned notice, Ex. G to the petition, the subsequent action taken by the ITO must fail. Accordingly, the petition succeeds and the rule is made

absolute in terms of prayers (a) and (b). In the circumstances of the case, there will be no order as to costs.