
(1992) 12 CAL CK 0014
In the Calcutta High Court
Case No : P.M.A.T. No. 1675 of 1989

Smt. Uma Devi Jhawar

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 23-12-1992

Acts Referred:

Income Tax Act, 1961 — Section 139, 147, 148

Citation : (1996) 218 ITR 573 : (1995) 78 TAXMAN 532

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : A.K. Dey, for the Appellant; R.C. Prosad, for the Respondent

Judgement

Ajit K. Sengupta, J.—This appeal is directed against the judgment and order dated May 17, 1989, passed by the court of the first instance on a writ petition filed by the appellant. In the said writ petition, Smt. Uma Devi Jhawar, the appellant/writ petitioner challenged the validity of a notice dated March 31, 1976, issued by the Income Tax Officer, "K" Ward, Companies District-I, Calcutta, u/s 148 of the Income Tax Act, 1961 ("the Act"), for the assessment year 1967-68. By the aforesaid judgment and order dated May 17, 1989, the said writ petition was dismissed.

2. Shortly stated, the facts are that in the year 1964, the writ appellant purchased a piece of land at No. 24B, Carcha Road, Calcutta (also numbered as 51E, Gariahat Road, Calcutta), for a consideration of Rs. 86,000. In July, 1966, the appellant started construction of a house thereon which was completed in October, 1968. The said building was constructed at a total cost of Rs. 1,46,363.11 paid by the appellant in four years from 1967 to 1970.

3. In the course of the assessment proceedings for the said assessment year 1967-68, the appellant furnished details of the said cost of construction in each year and also filed a valuation report dated November 21, 1968, of J. Ganguli and Co., surveyor and valuer. In this connection, the appellant also filed a letter

dated March 16, 1972, explaining the cost of construction.

4. By an order of assessment dated March 23, 1972, made u/s 143(3) of the Act the appellant was assessed for the said assessment year 1967-68 on a total income of Rs. 13,670.

5. In the course of the said assessment proceedings, the appellant disclosed the fact of purchase and construction of the said house property. It is relevant to point out here that in the assessment for the assessment year 1969-70, the Income Tax Officer, on the basis of a valuation report dated November 21, 1968, estimated the said cost of construction of the said house property and made an addition of Rs. 48,182. The said addition was deleted by the Appellate Assistant Commissioner by his order dated October 17, 1973. The Department preferred an appeal to the Tribunal. The Tribunal, by its order dated March 26, 1975, dismissed the said appeal of the Department and held, inter alia, that before the Income Tax Officer books of account maintained for the construction and other details supported by vouchers were produced. The Income Tax Officer had not pointed out any defect in the accounts or bills produced. Hence, the said accounts could not be rejected. In the circumstances, the appeal was dismissed.

6. On March 31, 1976, the appellant received from respondent No. 2 (the Income Tax Officer) a notice dated March 31, 1976, issued by him u/s 148 for the assessment year 1967-68 wherein respondent No. 2 alleged that he had reason to believe that the income of the appellant for the said assessment year had escaped assessment within the meaning of Section 147 of the Act which he proposed to reassess and, hence, required the appellant to file the return for the said assessment year. It was alleged that the said notice was issued after obtaining the satisfaction of respondent No. 3 (Commissioner, West Bengal XII, Calcutta).

7. The appellant, by a letter dated April 27, 1976, protested against the said notice dated March 31, 1976, and required the Income Tax Officer to disclose the reasons for the said notice. No reply was given by the Income Tax Officer.

8. On May 25, 1976, the writ petition herein was moved challenging the legality and validity of the said notice dated March 31, 1976, when a rule nisi and interim order was granted by this court.

9. The writ petition came up for hearing in May, 1989, before the court of the first instance when, it appears, no one appeared for the respondents, no affidavit on behalf of the respondents was filed and no records were produced. In the aforesaid circumstances, the hearing was concluded and the matter was posted for judgment on May 17, 1989.

10. On May 17, 1989, the respondents appeared before the court of the first instance and produced some records and prayed for time to file affidavit-in-opposition, which was disallowed. No copy of the recorded reasons produced was given to the appellant nor were the same disclosed to the appellant's counsel.

The learned judge was pleased to go through the records produced by the respondents. The appellant's counsel appearing was not called upon to make any submission with reference to the records produced by the respondents, in spite of the request for the same made by the appellant's counsel.

11. The learned judge, by the judgment and order dated May 17, 1989, dismissed the writ petition.

12. The learned judge was of the view that even the records produced do not contain any material so as to effectively help in the adjudication of the matter in dispute.

13. The records produced showed that reasons have been recorded that inasmuch as on a plot of land at 51/1 Gariahat Road, there was construction of a house during the financial years 1966-67 to 1968-69 and the assessee had disclosed the cost of construction thereof at Rs. 1,46,363, the officer being the valuation officer of the Income Tax Department had determined the cost of such construction at Rs. 2,84,000 and since there is a gap of Rs. 1,37,637 and since there is concealment of income, the Income Tax Officer had reasons to believe that the income of Rs. 22,664 had escaped assessment for the year 1967-68.

14. Thus, the court was satisfied upon looking into the relevant files that the grievance of the appellant as to the issuance of the notice u/s 148 was not justified. Sufficient opportunity was given to her to show cause pursuant to the said notice and the writ court will not come to her aid and the appellant was not entitled to relief. The writ petition was without merit and dismissed.

15. Dr. Pal, the learned advocate appearing for the appellant, has contended that the judgment under appeal was made in gross violation of the principles of natural justice inasmuch as the court of the first instance looked into and considered the records produced by the respondents, only at the time of the judgment and not before, without allowing, the petitioner a copy thereof or inspection thereof or any opportunity to make its submissions on the said records or alleged recorded reasons.

16. It is his contention that the learned judge should not have considered the said records without allowing the petitioner an opportunity to make her submission. It is the contention of Dr. Pal that inasmuch as the writ petitioner was not allowed to make submissions with reference to the records, the attention of the court could not be drawn to the order of the Tribunal dated March 25, 1975, which was a part of the writ petition. It is contended that the findings contained in the said order of the Tribunal would go to show that all the material and primary facts relating to the construction of the said house were disclosed fully and truly by the assessee in the course of the original assessment proceedings.

17. Dr. Pal has also assailed the judgment under appeal contending that the learned judge failed to appreciate that a notice u/s 148 was a jurisdictional

notice and not a show-cause notice. Dr. Pal further contended that inasmuch as the learned judge did not hold that on the basis of the recorded reasons produced by the respondents, a reasonable belief u/s 147(a) could be formed and conditions for the formation of the requisite belief existed and were satisfied, the court of the first instance should have held that the impugned notice was without jurisdiction and. was illegal.

18. He has also contended that except for producing the recorded reasons the respondents did not satisfy the court that the conditions laid down in Section 151(2) of the Act regarding the approval of the Commissioner had been satisfied. Dr. Pal has relied on several decisions in support of his contentions to which we shall presently refer.

19. On the other hand, the contention of the learned advocate for the Revenue is that the learned judge came to a correct finding on the basis of the material in possession of the Assessing Officer. It has not been seriously disputed that the inspection of the records which were considered by the learned judge was not given to the learned advocate for the appellant.

20. We have considered the rival contentions. Notice u/s 148 is not a show-cause notice. Such a notice can be issued only if the conditions precedent for assumption of jurisdiction u/s 147(a) are satisfied. For invocation of jurisdiction u/s 147(a), two conditions are to be satisfied; firstly, the Income Tax Officer has reason to believe that income, profits or gains chargeable to Income Tax have escaped assessment, and secondly, he must have also reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to make a return of his income u/s 139 or (ii) omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for that year. Both the conditions are conditions precedent to be cumulatively satisfied before the Income Tax Officer could assume jurisdiction to issue notice u/s 148 read with Section 147(a). Thus, if either of these two conditions is not fulfilled, the notice issued by the Assessing Officer would be without jurisdiction. In our view, therefore, the learned judge was not right in equating the notice u/s 148 with a mere show-cause notice.

21. When the validity of a notice issued u/s 148 is in challenge, it is for the Income Tax Officer to satisfy the court that the aforesaid conditions have been satisfied. The expression "reason to believe" means that there is a reason coupled with the belief. It is, therefore, open to the court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing on the formation of belief and are not extraneous or irrelevant to the purpose of Section 147(a). The Supreme Court in *Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others*, has reiterated the principle that if there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on the facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income Tax Officer could not have reason to believe. In such a case, the notice

issued by him would be liable to be struck down as invalid and without jurisdiction. The materials having a natural nexus to the formation of belief have to be disclosed by the Income Tax Officer.

22. He can do so by filing an affidavit. The mere disclosure of the belief in the affidavit filed by the Income Tax Officer without setting out any material on the basis of which the belief was arrived at is not sufficient. Where no affidavit is filed by the Income Tax Officer, in spite of the opportunity given, the court may direct production of the records containing materials to establish that there is a direct nexus or live link between the materials and the formation of his belief. If the court allows the Income Tax Officer to produce such records and the court examines the materials to find whether there are tenable reasons, the court must allow inspection of such records to the assessee. The recorded reasons or materials or the letter of proposal sent by the Income Tax Officer to the Commissioner are not privileged documents. In our view, the learned judge was not right in denying inspection of the records to the assessee. No litigant should have a feeling that the procedure adopted by the court has denied him a reasonable opportunity of hearing. Unless a document is privileged, if the court looks into such document for the purpose of deciding the merits of the respective contentions, inspection of such document cannot be withheld from the adversary.

23. Let us now examine the merits of the contentions raised as to whether the Income Tax Officer had jurisdiction to initiate the proceedings u/s 147(a). As indicated earlier, no affidavit-in-opposition was filed by the Income Tax Officer and, accordingly, no materials were disclosed. However, an affidavit-in-opposition to the stay application has been filed by the Income Tax Officer, Ward 4(1), in the appeal court. In the said affidavit-in-opposition in paragraph 5, the reasons recorded by the Income Tax Officer have been disclosed which are as follows :

"On a plot of land at 51/E, Gariahat Road, the assessee constructed a house during the financial years 1966-67 to 1968-69. The assessee had disclosed the cost of construction at Rs. 1,46,363, The Valuation Officer, Income Tax Department, has determined the cost of construction at Rs. 2,84,000. Thus, there is a gap of Rs. 1,37,637. This sum of Rs. 1,37,637 represented concealed income of the assessee. The cost of construction disclosed by the assessee for the previous year relevant to the assessment year 1967-68 is Rs. 24,100. Thus, the undisclosed income relating to the assessment year 1967-68 is

Rs. 24,100 X 1,37,657

or Rs. 22,664

1,46,363

I have reasons to believe that the income of Rs. 22,664 has escaped assessment for the assessment year 1967-68 owing to the failure of the assessee to disclose fully and truly all the material facts necessary for her assessment. This income is sought to be assessed by taking action u/s 147(a)."

24. The only question is, therefore, whether on the basis of the materials so disclosed it can be said that the Income Tax Officer could have any reason to believe that by reason of any omission or failure on the part of the assessee to disclose any basic and primary fact relating to her assessment, any income chargeable to tax had escaped assessment. It appears from the records that the Tribunal for the assessment year 1969-70 of the appellant/writ petitioner, considered the question of cost of construction of the house property in question. There, the Department preferred an appeal before the Tribunal against the order of the Appellate Assistant Commissioner deleting the addition of Rs. 48,162 made by the Income Tax Officer as unexplained investment in the construction of house property. It appears from the order of the Tribunal that the assessee started construction of the two-storeyed building, in July, 1968, and it was completed in October, 1968. The cost of construction was shown by the assessee at Rs. 1,46,363. Before the Income Tax Officer, the books of account maintained for the construction and the other details supported by vouchers, were produced. A valuer's certificate was also filed who valued the property including the out-houses which were already existing at Rs. 1,94,545. The Tribunal held as follows :

"The assessee has maintained books of account for the construction of the house property supported by bills and vouchers. The Income Tax Officer has not pointed out any defects in the maintenance of accounts, or in the bills produced. In the assessee's valuer's report the valuation of the out-houses amounting to Rs. 11,544 has been included which cannot be taken into consideration for the purpose of cost of construction of the new building. Apart from that the valuer has valued the property in the month of November, 1968. This would not indicate the correct valuation as the construction started in 1966. Hence, the valuer's report does not reflect the correct valuation. Since the assessee maintained books of account with full details supported by voucher the Income Tax Officer cannot reject the same without pointing out any defects. In the circumstances, the Appellate Assistant Commissioner was perfectly justified in accepting the valuation shown by the assessee. We do not find any error in the order of the Appellate Assistant Commissioner. Accordingly, we uphold the order of the Appellate Assistant Commissioner."

25. The departmental reference application against the said appellate order of the Tribunal was rejected by the Tribunal. The said findings of the Tribunal have become final and are binding on the respondents. The said decision of the Tribunal was arrived at prior to the issue of the impugned notice u/s 148-on March 31, 1976. In the face of the aforesaid findings and the order of the Tribunal, the Income Tax Officer cannot have any basis to assume that the cost of construction was anything more than Rs. 1,46,363 and he could not have any reason to believe that there was any omission or failure on the part of the petitioner to disclose fully or truly any material facts necessary for the assessment. The valuation made by the departmental valuer could not be any lawful or relevant material on the basis whereof the respondent Income Tax Officer could have any reason to believe or could bona fide and lawfully believe

that any income as regards the construction of the said house property had escaped assessment as alleged. The respondent Income Tax Officer could not form the requisite belief u/s 147(a) and had no jurisdiction whatsoever to issue the impugned notice and the purported proceeding u/s 148 is wholly without jurisdiction and authority of law.

26. In Smt. Tarawati Debi Agarwal Vs. Income Tax Officer, , this court held, inter alia, that where the year-wise construction cost was reflected in the balance-sheet, which was not disputed by the respondents, absence of details of expenses could not be a ground for reopening the assessment u/s 147(a) charging the assessee with omission or failure to disclose fully and truly all the material facts. There cannot be a ground for reopening the assessment holding that the assessee did not disclose the cost of construction or that the difference between the cost of construction shown by the assessee and subsequently estimated by the departmental valuer represents undisclosed investment. This is not a case where a proceeding can be initiated u/s 147(a). The Income Tax Officer in assuming jurisdiction did not have any prima facie ground for thinking that there had been any non-disclosure of the material facts. In any event valuation is always a question of opinion and unless there is a clear finding on the basis of the materials that the assessee invested in the construction of the house property more than what had been shown by her in the course of the assessment proceedings, the Income Tax Officer cannot proceed merely on the basis of the valuation report of the departmental valuer.

27. Similar view has been taken by this court in Rasiklal Jivanlal Shah and Others Vs. Income Tax Officer and Others,

28. For the reasons aforesaid, this appeal is allowed. The judgment and order under appeal are set aside. Rule is made absolute. Let appropriate writs be issued. The impugned notice and all proceedings are quashed.

29. There will no order as to costs.

Shyamal Kumar Sen , J.

30.I agree.