(1990) 10 BOM CK 0009

In the Bombay High Court

Case No : IT APPEAL NO. 6725 (BOM) OF 1987

TWELFTH Income Tax OFFICER — APPELLANT

Vs

H. B. DHURU. — RESPONDENT

Date of Decision : 31-10-1990

Acts Referred:
Income Tax Act, 1961 — Section 147(b), 150, 153

Citation : (1991) 39 ITD 135

Hon'ble Judges : Garg, A.M.

Bench : Division Bench

Judgement

Garg, A.M. - This is an appeal by the revenue against the order of the AAC, for the assessment year 1964-65.

2. The assessee was a member with one-fifth share in an Association of Persons, known as R. B. Dhuru and others. The assessee and four others were members of a Hindu undivided family, which was partitioned on 10-1-1962. The partitioned property was allotted to the members and was to be held as tenants-in-common by all the five members, subject to a charge of Rs. 73,760 in favour of assessees mother, Smt. Sumatibai. One-third part of the property was sold on 26-9-1963 for a sum of Rs. 2,35,000. Capital gains was made on the sale of this property at Rs. 1,89,492, which was disclosed by the members in their individual returns, though without the working of the exact capital gain. In the case of the assessee, the return was filed on 25-5-1965. The ITO, however, assessed the entire gain in the hands of the AOP. In the assessment of the assessee, which was originally made, the ITO observed :

"Return of income has been filed on 25-5-1965 showing a total income of Rs. 8187 with a foot-note stating that 1/3rd of Prabhadevi Plot has been sold, details of gain will be supplied later. He, however, included the assessees one-fifth share for rate purposes.

3. The assessment of the AOP came up to the Tribunal stage and the Tribunal,

vide order dated 17-11-1971 in ITA No. 4629/Bom/1969-70, held that the members of the AOP were not joint tenants, but tenants-in-common, and they being the owners of the property, the capital gain on the sale thereof could not be assessed in the hands of the AOP. Consequent thereto, the ITO reopened the assessees case u/s 147 and completed the assessment by rejecting the plea of the assessee with regard to the limitation in view of the provisions contained in section 150 read with Explanation 3 to section 153(3) of the Act. The AAC canceled the reassessment, by observing in para 6 of his order, as under :

"6. I do not agree with the ITO. In the case of the appellant, the appellant has clearly disclosed to the ITO at the time of original assessment that he had earned capital gain and the ITO in the original assessment order has mentioned that the 1/3rd of Prabhadevi Plot has been sold, details of capital gain will be supplied later on. Not only this, the ITO has taxed the capital gain as share from AOP at Rs. 36,889. It is also seen that the Tribunal had merely deleted the capital gain from the assessment of the AOP. The Tribunal has not given any direction in that order dated 17-11-1971 as to whom the capital gain belongs and as to where it is to be taxed. In the absence of any clear directions, application of provisions of section 147(b) by the ITO cannot be upheld. ITO has, therefore, erred in taxing the capital gain u/s 147(b) of the IT Act in the hands of the appellant. The assessment order is, thereof, canceled."

4. The learned Departmental Representative submitted that the only effect of the order of the Tribunal and, as also contended by the assessee before the Tribunal in the appeal of the AOP, was that the property belonged to the five individual members and not the AOP and, therefore, the capital gain was the income of these individuals. He, therefore, submitted that the reopening was to give effect to or in consequence of the order of the Tribunal and, hence, saved by the limitation as provided in section 15 read with Explanation 3 to section 153. The learned counsel for the assessee, on the other hand, submitted that the Tribunal having given no direction to assess the capital gain in the individual assessments, it was not a case of reopening of the assessment consequent to, or to give effect to the order of the Tribunal, within the provisions of section 150 and, therefore, was not saved by the limitation. The assessee had returned the income and the department chose not to assess the individual but the AOP, it was a case of no assessment and not escapement of assessment. He has, in this connection, placed reliance on the judgment of the Supreme Court in case of Rajinder Nath and Others Vs. Commissioner of Income Tax , Delhi, .

5. We have heard the parties and considered their rival submissions. Normally, as provided in section 149 of the Act, an assessment can be reopened u/s 147 within four years from the end of the assessment year, if the escapement was within the purview of cl. (b) of section 147. It is eight years, if the escapement was within the purview of section 147(a). An assessment can also be reopened within sixteen years, where the escapement is more than Rs. 1 lakh, which in this case is not, as the amount involved is only Rs. 37,898. The assessment year

involved is 1964-65. Therefore, four years time limit expired on 31-3-1969 and eight years on 31-3-1973. In this view of the matter, the reopening on 20th March, 1980 was beyond the time limit prescribed u/s 149 of the Act. Section 150(1), however, lifts the bar of limitation and provides that notwithstanding anything contained in section 149, notice u/s 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision. Explanation 3 to section 153, relevant for the purposes of the appeal, reads as under :

"Explanation 3 : Where, by an order referred to in clause (ii) of sub-section (3) any income is excluded from the total income of one person and held to be the income of another person, then, an assessment of such income on such other person shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect of any finding or direction contained in the said order, provided such other person was given an opportunity of being heard before the said order was passed."

6. On a careful reading of the aforesaid provision, two things are necessary -

(i) There must be a finding or direction in the order in appeal, reference, or revision with regard to a person other than the assessee and such other person must be intimately connected with the assessee and would be liable to be assessed to the whole or part of the income which was the subject matter of assessment under appeal, revision or reference; and

(ii) The finding or direction was necessary for the disposal of appeal, revision or reference.

7. The assessee, being a member of the AOP, was intimately connected with the assessment. He was tenant-in-common and the owner of the one-fifth share of the property sold which was the subject-matter of assessment of the AOP. In fact, the plea of non-taxability of the capital gain was raised in the assessment of the AOP on the ground that the members were the owners individually and the capital gain was taxable in their hands. The grounds raised before the Tribunal in the case of the AOP were :

(i) the learned AAC erred in confirming the assessment in the status of AOP;

(ii) he ought to have held that every individual member was taxable in respect of his own share alone.

These two grounds were allowed to be substituted by the Tribunal, by adding "in regard to the income by way of capital gains". The contention of the learned counsel for the assessee, as recorded in para 8 of the aforesaid order of the Tribunal, was to the following effect :

"..... The counsel accordingly contended that the capital gains in question could not be included in the assessment of the assessee-AOP, and that every individual member was taxable in respect of his own share in the capital gains."

8. There was no dispute that the capital gain was chargeable to tax. The only dispute was that in whose hands it was to be assessed. On the facts of the case, it was either the AOP or the individuals and none else. In the case of the AOP, the Tribunal in their order dated 17-11-1971 in ITA No. 4629/Bom/1969-70 held as under :

"There was a total and complete partition of all the properties of the HUF including the property at Gothanwadi as on 10-1-1962. All that happened was that since the property taken by the mother was of a much lower value falling short of the members share on partition by a sum of Rs. 73,760 and since the deed of partition provided that the mother shall have a charge on the aforesaid property in respect of the said sum of Rs. 73,760 until payment and since the partition deed further provided that with a view to equalize the partition, the mother should get a sum of Rs. 73,760 from the aforesaid property, the property in question was held by the parties as tenants-in-common. The fact that the property in question was held by the parties as tenants-in-common for the purpose of effectuating the partition does not at all tantamount to saying that the property was owned by the 5 parties as joint tenants. As soon as the partition of the said property was effectuated on 10-1-1962, as duly recognised by the Revenue vide ITOs order dated 14-2-1968, each of the 5 parties became entitled to the equal undivided 1/5th share in the said property in respect of the amount of Rs. 73,760. We are also in agreement with the submission put forth on behalf of the assessee that whatever gain was realised on the sale of the property was merely incidental and it cannot be said that the parties had joined together in a common purpose or action with the object of producing income profits or gains. Having regard to these circumstances, we are of the view that the inclusion of the amount of Rs. 1,84,492 by way of capital gains in the assessment of the assessee-AOP is erroneous. We accordingly delete the aforesaid sum of Rs. 1,84,492 from the total income of the assessee as computed by the authorities below."

9. If it was held not taxable in the status of AOP, the only conclusion would be that it was taxable in the hands of the members individually. The finding that it did not belong to the AOP determines the issue that it belonged to the members individually. We may, in this connection, usefully refer to the judgment of the Supreme Court in the case of Bhagwan Das Sita Ram, H.U.F. represented by its Karta Sita Ram Vs. Commissioner of Income Tax , Lucknow (U.P.), wherein the issue was whether the income on alleged partition belonged to the bigger HUF or to the smaller HUF. It was held in the assessment of the bigger HUF that it did not belong to them and, thereafter, the smaller HUFs assessment was reopened. In that connection, the Supreme Court held that the income either belonged to the bigger HUF or smaller HUF and none else. Consequently, therefore, the finding that it did not belong to the bigger HUF determined the question that it

belonged to the smaller HUF. The facts of the case before the Supreme Court are exactly similar to the facts of the present case.

10. The second condition is also fulfilled in the instant case. The finding that the property belonged to the individuals was necessary to hold that it did not belong to the AOP. The capital gain which was indisputably chargeable to tax could be deleted from the assessment of the AOP only on the finding that it belonged to the members individually and not to the AOP. Any finding to this effect could not be said to be beyond the jurisdiction of the appellate authority; rather, it would be valid and effective for the purposes of this section. In the case of Rajinder Nath (supra), relied upon by the learned counsel for the assessee, there was no such finding to the effect that the income belonged to the other person. In our opinion, therefore, reopening of the assessment was not barred by the limitation and was saved by the provisions contained in section 150, read with Explanation 3, to section 153 of the Act.

11. The order of the AAC to the effect that the Tribunal had not given any direction in the order dated 17-11-1971 as to whom the capital gain belonged and as to where it was to be assessed is not correct. The fact that the assessee had disclosed to the ITO, at the time of the original assessment, that he has earned capital gain, would not make any difference in reopening the case u/s 147(b) as the order of the Tribunal in the case of the AOP formed a piece of "information" came subsequently to the knowledge of the ITO and the same was sufficient enough to entitle him to reopen the case.

12. For the above reasons, we vacate the order of the AAC and restore that of the ITO. The appeal stands allowed.

