

(2009) 04 BOM CK 0037
In the Bombay High Court
Case No : Writ Petition No. 660 of 2001

Yuvraj

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 30-04-2009

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 143, 143(1), 143(3), 147, 147A

Citation : (2009) 225 CTR 283 : (2009) 315 ITR 84

Hon'ble Judges : Naresh H. Patil, J;N.D. Deshpande, J

Bench : Division Bench

Advocate : P.M. Shah, instructed by A.S. Sawant, for the Appellant; Alok Sharma, for the Respondent

Final Decision : Dismissed

Judgement

Naresh H. Patel, J.—The petitioner-assessee challenges the proposed action u/s 147 of the Income Tax Act, 1961, vide order dated May 17, 2000, of the Deputy Commissioner of Income Tax, Circle 2(1), Dhule.

2. The petitioner contends that the late Shri Kisanrao Sonuji Karankal had acquired "right to purchase property", an open plot at Kothrud, Pune. Those rights were sold as per the agreement dated January 2, 1995, to one Shri Lalit Amrutlal Shah and Simil Shridhar Deshpande. The petitioner contends that the late Shri Kisan Karankal entered into an agreement of assignment and transfer. An amount of Rs. 5,50,000 was received from time to time by way of part completion and assignment as compensation from M/s. Bilwa Promoters, Pune and other intervening parties. The prospective purchasers committed breach of agreement and failed to perform their part of contract. Ultimately, on October 11, 1995, the petitioner made a total assignment in favour of Lalit Amrutlal Shah and Sunil Shridhar Deshpande for a total consideration of Rs. 12,00,000.

3. It is submitted that the petitioner filed a return on November 6, 1996, in respect of the assessment year 1996-97 disclosing income derived from the said

memorandum of agreement dated January 2, 1995. According to the petitioner, the competent authority, the Assistant Commissioner of Income Tax, Circle-2(1) Dhule assessed the income and passed a speaking order u/s 143(3) of the Act on January 9, 1998. The Deputy Commissioner of Income Tax, Circle-2(1) Dhule issued a notice, dated December 29, 1999, purporting to be u/s 154 of the Income Tax Act. The notice was replied by the petitioner on January 5, 2000. According to the petitioner, the notice indicates that the long-term capital gain on sale of right to purchase of a open plot at Kothrud, Pune, was sought to be treated as casual income and bringing it to tax liability at 40 per cent.

4. The petitioner further contends that respondent No. 2 passed order on May 17, 2000, stating that he had reason to believe that the income of the petitioner had escaped the assessment within the meaning of Section 147 and, therefore, respondent No. 2 proposed to reassess the income for the assessment year 1996-97.

5. According to the petitioner, on June 14/27, 2000, the petitioner made a representation to the Additional Commissioner of Income Tax, Jalgaon Range, Jalgaon, seeking directions u/s 147A of the Act and requesting to consider the correctness of the proposed action. However, the Additional Commissioner declined to interfere in the correctness of the proceedings, vide his order dated July 28, 2000, and thereafter the petitioner preferred the present writ petition.

6. Respondents Nos. 1 and 2 filed affidavit-in-reply. It is contended by the respondents that considering the record the Assessing Officer had reasons to believe that the income of the assessee had escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961, and, therefore, after recording reasons the assessment was reopened. There was reasonable belief on the part of the Revenue that the income of the assessee had escaped assessment. The deponent referred to the details of the transaction entered into between the parties, the proceedings initiated u/s 147 of the Act and the issue of "casual receipt" and "capital gain".

7. The learned senior counsel Shri P.M. Shah submits that there is conceptual difference between the proceedings initiated u/s 143(1) and 143(3) of the Act. Once the order was passed u/s 143(1) the Revenue should have good and strong reasons for reopening the assessment under the provisions of Section 147 of the Act. Mere change of opinion is not a ground for the Revenue to have reasons to believe to reopen an assessment. This position in law, according to the learned Counsel, is not altered even by the 1989 amendments to the provisions of Section 148 of the Act. The Revenue, therefore, will have to demonstrate that there was application of mind before initiating proceedings under Sections 147 and 148 of the Act. In support of this submission, the learned senior counsel has placed reliance on the following judgments:

(1) Smt. Laxmibai A. Wagle v. ITO : [1999] 240 ITR 427 : [2000] 162 CTR 479 (Bom). In the facts of the case, it is observed that, in judicial scrutiny, the court

would be entitled to examine those reasons, but the notice u/s 148 is not required to contain the reasons recorded by the Assessing Officer.

(2) Commissioner of Income Tax Vs. Kalvinator of India Ltd., . In this case it is observed that the expression "reason to believe" finds place in the provisions of Clauses (a) and (b) of Section 147 and Sub-section (2) of Section 148 mandates that before jurisdiction u/s 147 is invoked by the Assessing Officer he is to record his reasons for doing so or before issuing any notice u/s 147. Therefore, formation of reason to believe and recording of reasons were imperative before the Assessing Officer could reopen a completed assessment.

(3) Commissioner of Income Tax Vs. Vijay Flexible Containers, . This case relates to purchase of immovable property.

(4) Asiatic Oxygen Limited Vs. Commissioner of Income Tax, . This judgment was cited on the issue of casual and nonrecurring receipts.

(5) Jindal Photo Films Ltd. Vs. The Deputy Commissioner of Income Tax, . It is observed that (headnote) : "The power to reopen an assessment was conferred by the Legislature not with the intention to enable the Income Tax Officer to reopen the final decision made against the Revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods. (See CIT v. Rao Thakur Narayan Singh [1964] 56 ITR 234 (SC).)

8. The learned Assistant Solicitor General Shri Alok Sharma appearing for the respondents submitted that the present writ petition is not maintainable against issuance of mere notice u/s 148 of the Act. If the petitioner had asked for reasons the same would have been furnished to him. The petitioner could have filed a reply and taken steps in accordance with law after issuance of notice. On the merits it was submitted that once reasoned order is passed by the Assessing Officer for reopening the assessment, the said action could not be challenged on the ground that the assessment order was passed u/s 143(3) of the Act. It was sought to be submitted that on the merits the Assessing Officer was justified in issuing notice because it was found that the income derived by the assessee was treated to be casual income and liable to tax at 40 per cent. The assessee still has a right to resort to the procedure and method provided under the Income Tax Act and the Rules. Therefore, the counsel submits that, at the threshold the petitioner, in the facts of the case, is not entitled to challenge the notice. In support of his submissions, the counsel has placed reliance on the following judgments:

(1) Shriyans Prasad Jain Vs. Income Tax Officer and others, . This judgment was cited on the issue of scope of the provisions of Sections 147 and 148 of the Act.

(2) Union of India (UOI) and Others Vs. Priyanka Sharan and Another, . In paragraph 19, it is observed that it is well settled principle in law that, the court

cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the Legislature. The language employed in a statute is the determinative factor of legislative intent.

(3) Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., . In this case, it is observed (page 511 of 291 ITR):

16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in Central Provinces Manganese Ore Co. Ltd. Vs. I.T.O., Nagpur, , for initiation of action u/s 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see INCOME TAX OFFICER Vs. SELECTED DALURBAND COAL CO. (P) LTD., ; Raymond Woollen Mills Ltd. Vs. Income Tax Officer and Others, .

17. The scope and effect of Section 147 as substituted with effect from April 1, 1989, as also Sections 148 - 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of Section 147, separate Clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction u/s 147(a) two conditions were required to be satisfied : firstly, the Assessing Officer must have reason to believe that income, profits or gains chargeable to Income Tax have escaped assessment, and, secondly, he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice u/s 148 read with Section 147(a). But under the substituted Section 147 existence of only the first condition suffices. In other words, if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction

to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to Section 147. The case at hand is covered by the main provision and not the proviso.

18. So long as the ingredients of Section 147 are fulfilled, the Assessing Officer is free to initiate proceeding u/s 147 and failure to take steps u/s 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation u/s 143(1) had been issued.

9. We have perused the judgments cited above, and considered the relevant provisions of the Income Tax Act and the Rules and the material, placed on record.

10. We have perused the assessment order passed u/s 143(3) of the Income Tax Act, 1961, on January 9, 1998. The Assistant Commissioner of Income Tax, Circle 2(1), Dhule, while passing the assessment order observed in paragraph 3 that the assessee had sold his right to purchase open plot (NA) at Kothrud, Pune, and copy of the agreement of acquisition of right to purchase and deed in respect of right to purchase executed by the builders were filed on record. After saying so the Assistant Commissioner observed that subject to the above remarks the total income was computed as per the chart mentioned in the order. From the perusal of the order we do not find any application of mind on the part of the Assistant Commissioner of Income Tax to the facts of the case, the issue to be dealt with and the reasons for passing the order. The value of the land was not determined by the Revenue. The issue relating to capital gain or casual income was also not addressed by the Revenue. In the light of the same, in the facts of the case, we find that the Assessing Officer was justified in issuing the notice u/s 148 of the Act on May 17, 2000.

11. Original record was produced before us by Shri Alok Sharma. The Assessing Officer had applied his mind and then passed a reasoned order for issuing notice u/s 148. There is no dispute on the point that mere issuance of notice would not conclude the issue finally. At that stage, it would be sufficient if the Revenue demonstrates that there were good reasons which were recorded by the Assessing Officer by applying his mind. We find that this Court shall not interfere at the stage of mere issuance of notice. The petitioner is not remediless and all the opportunities which are available to the petitioner in law could be utilized by the assessee.

12. The learned senior counsel submits that as the writ petition was admitted and interim relief was granted the petitioner need not be relegated to the remedies available in law. In a suitable case this argument could have been considered but after a perusal of the assessment order passed u/s 143(3) of the Act, we are of the view that the Assistant Commissioner did not apply his mind and failed to record good and proper reasons for passing the order. In the facts of the case, we do not find mere change of opinion in recording reasons for issuing notice u/s 148 by the Assessing Officer.

13. In that view of the matter we do not find it necessary to address other issues relating to the scope of the proceedings initiated under Sections 147, 148 and the effect of the order passed u/s 143 of the Act.

14. We are not inclined to grant the prayers as made by the petitioner in exercise of the extraordinary writ jurisdiction under Article 226 of the Constitution of India. The petitioner is entitled to raise all the appropriate issues which are available in accordance with law. We expect that the Revenue would deal with the issues raised by the petitioner on the merits and in accordance with the provisions of law.

15. The petition fails and it is accordingly dismissed. Rule is discharged. No order as to costs.