
(1994) 03 BOM CK 0034

In the Bombay High Court

Case No : Writ Petition No. 1436 of 1994

Zohar Siraj Lokhandwala

APPELLANT

Vs

M.G. Kamat and others

RESPONDENT

Date of Decision : 04-03-1994

Acts Referred:

Income Tax Act, 1961 — Section 147, 148

Citation : (1994) 121 CTR 283 : (1994) 210 ITR 956

Hon'ble Judges : M.L. Dudhat, J;B.P. Saraf, J

Bench : Division Bench

Advocate : S.E. Dastur, for the Appellant; G.S. Jetley, for the Respondent

Judgement

Dr. B.P. Saraf, J.—The petitioner seeks to challenge a notice dated October 6, 1993, issued by respondent No. 1, the Assistant Commissioner of Income Tax, Central Circle 11, Bombay (Assessing Officer), u/s 148 of the Income Tax Act, 1961, for the assessment year 1987-88. The notice has been issued after obtaining necessary sanction of the Commissioner of Income Tax, (Central-1), Bombay. The contention of the petitioner is that the said notice, having been issued after the expiry of four years from the end of the relevant assessment year, must fulfil the conditions laid down in section 147(a) of the Income Tax Act, 1961 ("the Act"). According to the petitioner, one of the conditions for exercise of jurisdiction u/s 147(a) of the Act that the income chargeable to tax should have escaped assessment for that year "by reason of the omission or failure on the part of the assessee to for disclose fully and truly all material facts necessary for his assessment for that year" is absent in the instant case as he had made true and full disclosure of all material facts necessary for his assessment for that year. That being so, the impugned notice u/s 148 is illegal and without jurisdiction. In support of the above contention, Shri Dastur, learned counsel for the petitioner, referred to the decisions of the Supreme Court in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, and Commissioner of Income Tax, Gujarat Vs. Bhanji Lavji, Porbandar, , and the

decision of the Calcutta High Court in Calcutta Credit Corporation Ltd. Vs. Income Tax Officer, Central and Others, .

2. On behalf of the respondents an affidavit has been filed by the Assistant Commissioner of Income Tax, Central Circle 11, wherein it is stated that during the accounting year relevant to the assessment year 1987-88, the petitioner, Zohar Siraj Lokhandwala, had received a sum of Rs. 45,00,000 for the assignment of his beneficial interest in Messrs. Lokhandwala Developers. The assessee showed this amount in his return of income as a receipt and claimed the same to be exempt from levy of capital gains tax on the basis of the decision of the Supreme Court in Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, , where it has been held that there will be no capital gain from the transfer of capital asset if its cost of acquisition in the hands of the transferor is nil. According to the respondents, the above submission was accepted by the assessing authority as the assessee did not disclose that there was any cost of acquisition of the said asset. After the completion of the assessment, the Assessing Officer discovered that the cost of the beneficial interest of the petitioner-assessee in the property transferred for a sum of Rs. 45,00,000 was Rs. 300. This was found on a perusal of the trust deed as well as the deed of assignment which showed that the petitioner, who was a beneficiary of the trust, was entitled not only to 30 per cent. of the net income of the trust but also to 30 per cent. share of the corpus of the trust (paragraph (b) of the deed of assignment). It was found that the share in the corpus of the trust was the cost of the beneficial interest of the petitioner in the asset which was transferred for a sum of Rs. 45,00,000. This information, according to the respondents, is material for the purpose of determination of capital gain because, if it was so, the ratio of the decision of the Supreme Court would not apply. It was this material fact which, according to the respondents, was not disclosed by the assessee in his return or at the time of the assessment, as a result of which income of Rs. 45,00,000 chargeable to capital gains tax escaped assessment. On the basis of the above information, the Assessing Officer was satisfied that income had escaped assessment by reason of the failure of the assessee to disclose truly and fully and the material facts necessary for his assessment within the meaning of section 147(a) of the Act read with Explanation 2 thereto.

3. Shri Dastur, Learned counsel for the petitioner, on the other hand, submits that the trust deed and the assignment deed were already on record before the Assessing Officer. The assessee was at liberty to claim that the receipt of Rs. 45,00,000 from assignment of the beneficial interest of the petitioner in the property in question was not subject to capital gains tax in view of the decision of the Supreme Court in Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, . According to the petitioner, the question whether there was a cost of acquisition in the hands of the petitioner or not in such circumstances was a question of law or an inference of law to be drawn by the Assessing Officer on perusal of the documents and that it was no part of the petitioner's duty to tell him as to what inference he should draw or that he should peruse the

assignment deed and the trust deed to find out whether there was cost of acquisition or not. In such circumstances, according to Shri Dastur, there was no non-disclosure of primary facts by the assessee.

4. We have carefully considered the rival submissions. We have also perused the reasons recorded by respondent No. 1. Assistant Commissioner of Income Tax, for initiating proceedings u/s 147(a) of the Act and for obtaining approval of the Commissioner of Income Tax. On a consideration of the same, we find it difficult to accept the contention of the assessee that production of the trust deed or assignment deed by itself amounted to a true and full disclosure of the material facts necessary for the purpose of the assessment. We also do not agree with learned counsel for the petitioner that whether there was any cost of acquisition of the property or the beneficial interest of the assessee is not a material information but a question of law or a question of inference. In our opinion, it is a material fact necessary for determining whether the sum of Rs. 45 lakhs received by the petitioner on assignment of his beneficial interest in the assets in question was assessable to capital gains tax and hence it was for the assessee to tell the Assessing Officer whether there was any cost of acquisition or not and disclose the material facts in that regard. Production of the trust deed or the assignment deed by itself will not amount to full disclosure of material facts within the meaning of section 147(a) of the Act on the ground that the Assessing Officer could have discovered the same if he had probed into the matter and acted more diligently.

5. There is no doubt, as observed by the Supreme Court in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, , that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet the contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the assessing authority might have discovered, the Legislature has enacted Explanation 2, which says that production before the Income Tax Officer of accounts or other evidence from which material evidence could with due diligence have been discovered by the Income Tax Officer will not necessarily amount to disclosure within the meaning of section 147. In view of this Explanation, it will not be open to the assessee to say, for example - "I have produced the account books and the documents : You, the Assessing Officer, examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account books and the documents." His omission to bring to the assessing authority's attention those particular items in the account books, or the particular portions or the documents, which are relevant, will amount to "omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The explanation to the

section gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them-including particular entries in the account books, particular portions of documents, and documents and other evidence which could have been discovered by the assessing authority, from the documents and other evidence disclosed. In other words, the mere production of evidence before the Assessing Officer is not enough and there may be an omission or failure to make a full and true disclosure, if some material for the assessment lies imbedded in that evidence which the assessee can uncover but did not. Or to put it differently, the fact that the Assessing Officer could have found out the correct position by further probing the matter does not exonerate the assessee from the duty to make a full and true disclosure of the material facts. Explanation 2 makes the position abundantly clear, *Indo-Aden Salt Mfg. and Trading Co. Pvt. Ltd. Vs. Commissioner of Income Tax, Bombay*, .

6. We may now deal with the rival contentions of the parties in the light of the legal position set out above. The Assessing Officer's contention is that the fact that there was cost of acquisition of the property was not disclosed by the assessee, as a result of which he did not levy capital gains tax on the amount received on the transfer of the beneficial interest of the assessee in the asset in question following the decision of the Supreme Court in *Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty*, . Later, having discovered that there was a cost of acquisition for the asset, he has initiated proceedings u/s 147(a). In this factual situation, we find it difficult to hold that the Assessing Officer had no material in his position to satisfy him that the income of the assessee had escaped assessment by reason of the omission or failure of the assessee to disclose fully and truly all material facts necessary for the assessment. We are, therefore, satisfied that this is not a fit case where we should interfere with the notice u/s 148 of the Act in exercise of our writ jurisdiction.

7. We, however, like to make it clear that our rejection of this writ petition will not preclude the petitioner from raising all questions of fact and law before the appropriate Income Tax authorities.

8. In view of the above, this writ petition is dismissed. No costs.

Certified copy expedited.