

IN THE HIGH COURT OF BOMBAY AT GOA**TAX APPEAL NO.8 OF 2007**

M/s. Mavany Brothers,
a duly registered Partnership Firm,
having office at
B-4, Sapna Regency
Dr. Sirgaonkar Road
Panjim-403001, Goa.

....Appellant

V/s

1. Commissioner of Income Tax
having office at
Patto Aayakar Bhavan,
Panjim-403001.

2. Dy. Commissioner of Income Tax,
Circle I, having office at
Patto Aayakar Bhavan,
Panjim-403001.

....Respondents

Mr. D.E. Robinson, Advocate for the Appellant.
Ms. Asha Desai, Advocate for the Respondents.

**CORAM : F.M. REIS &
M.S. SANKLECHA, JJ.**

DATE : 17th APRIL, 2015

JUDGMENT : (Per M.S. SANKLECHA, J.)

This appeal under Section 260A of the Income Tax Act, 1961 (the Act) impugns the order dated 15/01/2007 passed by the Income Tax Appellate Tribunal (Tribunal). This appeal relates to assessment year 1996-97.

2. This appeal was admitted on 26/03/2007 on the following substantial questions of law:

(1) Whether the Tribunal was right in affirming the determination of the capital gains at Rs.72,28,175-00 (or Rs.72,46,825-00) in place of the loss shown in the return of income filed under Section 148?

(2) Whether having regard to the family arrangement entered into in order to put an end to civil litigation commenced against the appellant by late Tajdin and later continued by his legal heirs, no capital gains at all is liable to be assessed?

(3) Whether alternatively the payment of Rs.66 lakhs should be deducted from out of the consideration for the transfer 'received by the appellant' or should go to enhance the cost of acquisition of the land and only to view order, not for print the cinema building and accordingly the capital gains if any should be reduced by the aforesaid sum of Rs.66 lakhs?

(4) Whether on the facts and in the circumstances of the case, the assessment of the appellant for the AY 1996-97 was validly reopened and the notice under Section 147 was valid in law?

3. Briefly the facts leading to this appeal are as under:

(a) On 22/09/1997, the appellant filed its return of income along with its balance sheet and profit and loss account for the assessment year 1996-97. The return of income was processed under

Section 143(1)(a) of the Act and an intimation duly issued to the appellant.

(b) On 13/11/2000 a notice under Section 148 of the Act was issued to the appellant seeking to reopen the assessment for assessment year 1996-97. In response to the notice dated 13/11/2000 the appellant on 17/11/2000 filed a fresh return of income and indicated therein that the other documents namely balance sheet and profit and loss account have already been filed with the original return of income and consequently the same is not being filed. On filing the return of income the appellant also sought that the reasons in support of the notice dated 13/11/2000 be communicated.

(c) On 20/11/2000, the Assessing Officer informed the appellant that there is no profit and loss account and balance sheet attached to return of income filed on 17/11/2000 for the assessment year 1996-97. Thus, the appellant was called upon to furnish the same, otherwise at the peril of the return being declared invalid.

(d) The appellant by letter dated 21/11/2000 supplied copies of the balance sheet and profit and loss account to the Assessing Officer, while reiterating that the original return of income did contain the documents now sought by the Revenue namely balance sheet and profit and loss account. It was also emphasized that there is no

difference between the original return of income filed in 1997 and the present return of income filed on 17/11/2000. Thus, strictly speaking there was no reason for the appellant to file any fresh return of income.

4. The reasons recorded in support of the reopening notice dated 13/11/2000 as communicated to the appellant read as under:

“On referring to the correspondence with various parties and Partnership Deed dated 08.08.95 and the Confidential Report dtd. 05.10.99, received from the DDIT(Inv), Panaji, it is seen that a theatre property named Cine El-Dorado existing for a long time in Panaji city was owned by the Mavani Family, viz Late Shri Leelali Mawani and Late Sri Tazadin Mavani. Due to various disputes between them, cases were filed in Civil Courts at various points of time. After the death of the above mentioned person, their successors inherited the disputes. When the decision was made to sell the theatre along with the land appurtenant thereto to M/s. Sapna Real Estate, these successors formed a Partnership, by name and style of “M/s. Mavani Brothers” on 8.8.95. This partnership firm owned the theatre Cine El-dorado along with the land appurtenant thereto. An agreement for 'Restructuring, Reconstruction and/or Remodelling and/or Development of the premises of the theatre was entered into on 8.8.95 between the said firm and M/s. Sapna Real Estate. The said agreement provided for handing over of possession and all rights in the said theatre and land appurtenant thereto to M/s. Sapana Real Estate and in return consideration in money terms (Rs.66 lakhs already paid) as well as in kind (35% of the built-up area of the building) was agreed and fixed. The partnership firm was formed as a result of family settlement dtd. 8.8.95 and the sole asset of this partnership was the Cinema Theatre and land at which it is

situated. The contract for the so called remodelling provided for the assessee to give M/s. Sapna Real Estate uninterrupted access to the theatre building and the land. After taking possession of the theatre along with the land, the builder demolished the theatre and constructed another building, which is being sold as a commercial space. In return for this, the consideration has been fixed and paid to the firm (in the form of payments to the partners). M/s. Sapna Real Estate is allowed to sell 65% of the builtup area along with the undivided rights in the land to the various customers and the assessee will have no say in the matter. The assessee had executed an irrevocable power of attorney dated 11.09.1995 in favour of the Builder which authorises him to negotiate and settle any person in the status of tenant, to representing the assessee before any Court of law, Tribunal, Planning and Development Authority, etc. in relation to the said property. All this shows that transfer as per sec.2(47) of the I.T. Act is complete and the assessee is liable for capital gains tax. In spite of this, it is seen that the firm has not declared the sale of theatre and the land. The so called contract in remodelling etc., is nothing but the sale agreement and therefore capital gains on this transfer should have been declared, which has not been done. The transfer as defined in Section 2(47) has taken place when the contract dtd. 08.08.95 was performed i.e. when possession was given, which was done in August 1995 itself. Therefore the transfer of land and the theatre, building has taken place in AY 96-97. Therefore, I have reason to believe that income chargeable to tax has escaped assessment as per Section 147.

Issue notice u/s.148.”

5. The appellant did not object to the reasons recorded for reopening the assessment. The appellant attended the hearing before the Assessing Officer and contended that there was no transfer of property under Section 2(47) of the Act and therefore no occasion for

capital gains arose. Without prejudice it was also contended that the payment of Rs.66.00 lakhs which was paid to some of its partners was paid in their individual capacity and the same cannot be considered as a consideration received by the appellant - firm. So also, if the 35% amount retained by one of the partners of the appellant - firm in the building to be constructed is excluded while computing the respondents' case considering the indexed value of the property at Rs.44.44 lakhs from which is reduced the actual cost of construction it would lead to a capital loss of Rs.13.78 lakhs. However, the Assessing Officer did not accept the same and held that the amount of Rs.66.00 lakhs was in fact not paid to the partners of appellant - firm but was in fact an consideration received by the appellant - firm. Moreover, the actual cost of construction was taken at Rs.50.75 lakhs and not at Rs.30.68 lakhs as contended by the appellant. Besides, the Assessing Officer had held that transfer had taken place by virtue of the agreement dated 8/08/1995 between M/s. Sapna Real Estate and the appellant for reconstructing the theater premises and the possession of the property was also handed over to M/s. Sapna Real Estate. In view of the above, it was held that the transfer in terms of Section 2(47) has taken place and there has been profit on account of the aforesaid transaction of Rs.72.28 lakhs being the capital gains.

6. Being aggrieved, the appellant filed an appeal to the Commissioner of Income Tax Appeals [CIT(A)]. It is at that stage that the appellant for the first time raised an objection to the reopening notice dated 13/11/2000 under Section 148 of the Act that it was without jurisdiction. This on the ground that the confidential report of the DDIT had not been furnished to the appellant. Besides, the return of income filed in 1997 was not available with the Revenue. Consequently, there could be no occasion for the Assessing Officer to have any reason to believe that income chargeable to tax has escaped assessment. In support of this the appellant placed reliance upon an inspection of the records of the Revenue with regard to the appellant on 8/09/2004. In the absence of the original return there was no basis for issuing the impugned notice. Besides, the appellant also raised various contentions with regard to the issue of no capital gains being attracted in the facts of the present case.

7. The CIT(A) by its order dated 30/11/2004 dismissed the appeal inter alia holding that the non availability of the original return in the record of the Assessing Officer on 8/09/2004 does not mean that the original return was not available on 13/11/2000 i.e. the date when the

notice under Section 148 of the Act was issued to the appellant. So far as the other issues are concerned, the CIT(A) held that the agreement dated 8/08/1995 between M/s. Mavany Brothers and M/s. Sapna Real Estate along with handing over of the possession of the property did amount to part performance of the agreement and was therefore a transfer in terms of Section 2(47) of the Act. Besides the CIT(A) also held that the amount of Rs.66.00 lakhs which was paid to some of the parties was not in their individual capacity but as partners of the appellant - firm. The same is evidenced by the fact that the books of account of the appellant - firm showed the receipt of Rs.66.00 lakhs in its account. Accordingly, the appeal of the appellant was dismissed.

8. On further appeal, the Tribunal by the impugned order upheld the order of the CIT(A) both on issue of reopening of assessment as well as on the issue of capital gains.

9. Being aggrieved, the appellant is in appeal before this Court.

10. We called upon the learned Counsel of both sides to first address us on the basic issue raised by the appellant viz. the

reopening notice being without jurisdiction. Depending upon the view taken by us on this issue will the other issues arise.

11. Mr. Robinson, learned Counsel for the appellant in support of the appeal submits as under:

(A) So far as substantial question (4) is concerned the reopening of the notice dated 13/11/2000 is completely without jurisdiction as on that day the Assessing Officer did not have on record the original return of income filed by the appellant. It is submitted that only on examination of the same could the Assessing Officer have a reason to believe that income chargeable to tax has escaped assessment. Thus the entire proceedings are without jurisdiction.

(B) The impugned orders failed to notice the appellant's contention that the original return of income filed in 1997 was not available with the respondent - Revenue when the notice dated 13/11/2000 was issued to the appellant was not considered. This is apparent from the fact that the appellant had while filing the return of income on 17/11/2000 consequent to the reopening notice on 13/11/2000 had indicated that profit and loss account and balance sheet were part of the original return and therefore were not being

separately attached. The return as filed on 17/11/2000 was identical to one filed on 22/09/1997. In spite of the same on 20/11/2000 the Assessing Officer called for the profit and loss account and balance sheet on the ground that the same is not attached to the return of the income filed on 17/11/2000. It is submitted that if the return of income was available with the Assessing Officer there would have been no occasion for him to call for the balance sheet and profit and loss account by letter dated 20/09/2000 from the appellant. Thus the conclusion of the CIT(A) as well as the Tribunal that the original return of income may have been available on 13/11/2000 when the notice for reopening was issued without any evidence/basis cannot be sustained.

12. As against the above, Mrs. A. Desai submits that it is not open to the appellant to raise an issue of jurisdiction to issue notice under Section 148 of the Act before the first appellate authority. This is particularly so as the appellant had submitted to the jurisdiction of the Assessing Officer and had made no grievance with regard to lack of jurisdiction of the Assessing Officer. Even otherwise it is submitted the fact that income chargeable to tax has escaped assessment need not necessarily flow out to examination of return of income and the

same could be from any other source. Thus, the requirement of having a return of income available at the time of issuing of the notice is not necessary. So far as the questions nos. 1 to 3 as admitted, it is submitted that the same would depend upon the view taken by the Court on the issue of jurisdiction. Therefore, at this stage no submissions were made with regard to questions nos.1 to 3 with liberty to make the same in case the Court is of the view that the issue of impugned notice dated 13/11/2000 was a notice within jurisdiction of the Assessing Officer.

13. We have considered the rival contentions. The jurisdiction under Section 147/148 of the Act is an extra ordinary jurisdiction and can only be exercised when condition precedent as provided in Sections 147/148 of the Act are satisfied. It is the appellant's case that the aforesaid conditions are not satisfied inasmuch as in the absence of the Assessing Officer having the original return of income available it would not be possible for him to have a reasonable belief that income chargeable to tax has escaped assessment. This issue of jurisdiction according to the respondent - Revenue could only have been raised before the Assessing Officer and not having been raised before him, the appellant had waived its rights to raise the same. The

appellant having submitted to the jurisdiction of the Assessing Officer cannot now challenge the same. This is not entirely correct. It is well settled that mere acquiescence will not give jurisdiction to an authority who has no jurisdiction. In fact this Court in ***CIT V/s. ITSC*** reported in ***365 ITR 87*** has held that mere participation by a party in proceedings without jurisdiction will not vest/confer jurisdiction on the authority. Reason to believe that income chargeable to tax has escaped assessment is a jurisdictional fact and only on its satisfaction does the Assessing Officer acquire jurisdiction to issue notice. Thus this lack of satisfaction of jurisdictional fact can never confer jurisdiction and an objection to it can be raised at any time even in appeal proceedings. The mere fact that no objection is taken before the Assessing Officer would not by itself bestow jurisdiction as the Assessing Officer. Such an objection can be taken in appeal also. Moreover, the Apex Court in its recent decision in ***Kanwar Singh Saini V/s. High Court Of Delhi*** reported in ***2012(4) SCC 307*** has held that it is settled position that conferment of jurisdiction is a legislative function and cannot be conferred by consent of petitioner. An issue of jurisdiction can be raised at any time even in appeal or execution. Reliance in this regard could usefully be made to ***Indian Bank v/s Manilal Govindji Khona*** reported in ***2015 (3) SCC 712***.

Paras 22 of the said judgment read as under :

“22. In *Sushil Kumar Mehta case* [*Sushil Kumar Mehta v. Gobind Ram Bohra*, (1990) 1 SCC 193] this Court has elaborately considered the relevant factual and legal aspect of the case and has laid down the law at para 10, after referring to its earlier decision of a four-Judge Bench of this Court speaking through Venkatarama Ayyar, J. in *Kiran Singh v. Chaman Paswan* [AIR 1954 SC 340 : (1955) 1 SCR 117] , which would be worthwhile to be extracted as under: (*Sushil Kumar Mehta case* [*Sushil Kumar Mehta v. Gobind Ram Bohra*, (1990) 1 SCC 193] , SCC p. 199)

6. “10. ... ‘6. ... *It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties.* If the question now under consideration fell to be determined only on the application of general principles governing the matter, there can be no doubt that the District Court of Monghyr was coram non judice, and that its judgment and decree would be nullities.’ (*Kiran Singh case* [AIR 1954 SC 340 : (1955) 1 SCR 117] , AIR p. 342, para 6)”

Thus, it is open to the petitioner to raise the issue of jurisdiction before the appellate authorities.

14. So far as the Revenue’s contention is concerned that the reason

to believe that income has escaped assessment need not necessarily flow from the return of income originally filed by an Assessee but this reason to believe could also arise on information received from any other source. This however, has not been the contention of the respondent - Revenue before the authorities under the Act. They have proceeded on the basis that the return of income filed in 1997 was available with the Assessing Officer at the time when the notice dated 13/11/2000 was issued under Section 148 of the Act to the appellant. Nothing in support of the submission now being made was placed by the Revenue before the authorities under the Act. In fact the authorities have proceeded on the basis that the original return filed in 1997 was not available at the time when the record was inspected on 8/09/2004 but proceed on the premise that the same may have been available at the time when the notice on 13/09/2000 was issued under Section 148 of the Act. This conclusion has been drawn by the authorities ignoring the appellant's contention as is evident from the revised return of income filed on 17/11/2000 wherein the appellant had specifically mentioned that the profit and loss account and the balance sheet was enclosed to the original return of income filed on 22/09/1997. The Assessing Officer had on 20/11/2000 called upon the appellant to produce the balance sheet and profit and loss account

for the assessment year 1996-97 as the same were not attached to the return of income filed on 17/11/2000. In case the Revenue had in its possession the 1997 Return of Income then it would have had relied upon the annexures filed with the original return of income and no occasion to call for it from the appellant could arise. The absence of record is prima facie evident from the letter dated 20/11/2000 addressed by the Assessing Officer to the appellant merely 7 days after the issuing of the impugned notice. This aspect has not at all been considered by the authorities under the Act, including the Tribunal. The impugned order of the Tribunal while rejecting the appellant's plea of the notice being without jurisdiction has not dealt with the appellant's above contention but merely upheld the order of the CIT(A). In view of the above the impugned order of the Tribunal holding that the notice dated 13/11/2000 was issued under Section 148 of the Act was within jurisdiction has to be set aside. However, the same is being restored to the Tribunal to consider afresh the contentions of the appellant as well as the Revenue with regard to the existence of the original return of income filed on 22/09/1997 in the record of the Assessing Officer at the time when the notice dated 13/11/2000 was issued. It is admitted position that there is no difference in the amount of income returned in the return of income

filed on 17/11/2000 and the one filed originally on 22/09/1997. The appellant in fact need not have filed a return of income and as such could have relied only upon its earlier return of income.

15. In view of the above, we set aside the impugned order of the Tribunal on the issue of reopening notice dated 13/11/2000 and restore the issue to Tribunal for fresh consideration. The appellant and the Revenue are granted liberty to lead such other evidence before the Tribunal as may be necessary to establish the existence/non-existence of the return of income filed originally on 22/09/1997. The Tribunal is also directed to examine all other contentions raised by the respondent - Revenue or appellant – Assessee on the issue of reopening notice. The Tribunal would also examine the issue whether the reason to believe that income has escaped assessment need not necessarily flow from examining the return of income but could also come from any other source. In case there is some other source for the Assessing Officer to come to the conclusion that income has escaped assessment then the same must be urged by the Revenue before the authorities. Further if such other source is relied upon then the principles of natural justice would

require that before the passing of assessment orders, the same must be brought to the notice of the parties so as to enable the noticee to explain that the reliance upon the same is not justified.

16. So far as question no.4 is concerned it raises an issue going to the root of the matter namely jurisdiction. In case the Tribunal after examining all the facts comes to the conclusion that the notice was without jurisdiction then the other issues as formulated herein will not arise for consideration. This is so as the foundation of proceedings on the other issues is the validity of the reopening notices. A decision on the reopening notice will determine whether the other issues are to be considered. The legal maxim *sublato fundamento cadit opus* i.e. when foundation is removed the superstructure falls would apply in this case. Therefore, for the present we are not answering questions no.1 to 3 as formulated by the Revenue. However, we are setting aside the impugned order in its entirety in view of the discussion herein above. The issues raised with regard to capital gains tax would be reconsidered by the Tribunal in case it comes to the conclusion that the notice dated 13/11/2000 is a notice within jurisdiction of the Assessing Officer.

16. Therefore in view of the above, the appeal is partly allowed. The impugned order dated 15/01/2007 passed by the Income Tax Tribunal, Panaji in ITA No.24/PNJ/2005 is quashed and set aside. The appeal is restored to the file of the Tribunal. The Tribunal is directed to decide the appeal afresh on all issues after hearing the parties. As the appeal pertains to assessment year 1996-97, the Tribunal is directed to dispose of this appeal as expeditiously as possible.

M.S. SANKLECHA, J.

F.M. REIS, J.

NH/-