IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1275 OF 2013
WITH
INCOME TAX APPEAL NO. 1276 OF 2013

Mahesh N. Thakkar	**}**	**Appellant**
versus		
The Assistant Commissioner	**}**	
of Income-tax 1(1)	**}**	**Respondent**

Mr. Nishit Gandhi with Mr. B. G. Yewale i/b.
M/s. Rajesh Shah and Co. for the Appellant.

Mr. P. C. Chhotaray for the Respondent.

CORAM :- S. C. DHARMADHIKARI &
A. K. MENON, JJ.

DATED :- APRIL 27, 2015

P.C. :-

This Appeal of the Assessee challenges the order passed on 9th January, 2013 by the Income Tax Appellate Tribunal, Bench at Mumbai.

2) The Appellant claims that he was owner of 1/3rd share in a immovable property, more particularly described in the statement of facts at para 2(i). This is a property in Mumbai. The Assessee claims that it was acquired several years ago. The co-owners and the Appellant agreed to sell the property and by an agreement dated 15th

June, 2004 for a consideration of Rs.5,23,00,000/- to M/s. Reliance Communication Infrastructure Ltd.

3) For the assessment year 2005-06, a return of income was filed on 31st October, 2005 declaring total income at Rs.62,97,067/-. In computation of income, the Appellant disclosed that the property at Mumbai had been sold for the above consideration to the above entity. The Appellant claimed that the property had been purchased prior to 1st April, 1981 and therefore the valuation of the property on that date was approximately Rs.20,00,000/-. The indexed cost of acquisition was Rs.96,00,000/-. The aggregate long term capital gain was worked out at Rs.4,27,00,000/- and the Appellant computed his 1/3rd share therein at Rs.1,42,33,333/-. After claiming deduction under section 54 of the Income Tax Act, 1961, the chargeable capital gain was computed at Rs.82,57,073/-.

4) A letter was addressed during the course of assessment proceedings on 28th December, 2008, in which, the Appellant appears to have drawn attention to the computation of capital gain and stated that the capital gain had been computed on inadvertent assumption that the said property had been acquired prior to 1st April, 1981, while it had in fact been acquired on 24th August, 1981. The reason for this alleged inadvertence is that there had earlier been prolonged negotiations

before the issuance of the letter of allotment. The Appellant stated that the basic facts were not available and there was haste in filing the return and that is why the assumption was made with regard to the date of acquisition. The date of acquisition was therefore corrected and the cost as well. The revised calculation of the chargeable capital gain was set out. However, the assessment order came to be passed, in which, the revised computation of the capital gain, according to the Appellant, was accepted, but in the original return, an inaccurate assumption was made and that is why penalty proceedings have been initiated. The order passed on 30th June, 2008 under section 271(1)(c) of the Income Tax Act, 1961 holding that the Appellant had filed inaccurate particulars of income with regard to capital gain. He computed the amount of capital gain short offered at Rs.20,57,010/- and levied penalty of 100% of the tax allegedly sought to be evaded thereon.

5) Against this order of the Assessing Officer, Appeal was preferred before the Commissioner of Income Tax (Appeals) and it is stated that this Appeal was allowed on 25th February, 2011.

6) The Revenue filed an Appeal against this order of the Commissioner, which came to be allowed by the impugned order.

7) The grievance of the Appellant's Counsel is that the Tribunal, without calling for the order sheet noting or asking the Assessee reversed the finding of the Commissioner that the Appellant had suo moto intimated to the Respondent the fact that capital gains have wrongly been computed in the original computation of income. Instead, the Tribunal held that there was a pointed query from the Revenue and that is how all these facts were referred by the Appellant. Therefore, the basis in the Commissioner's finding that it was a suo moto act of the Appellant is erroneous. That does not exist once the disclosure came on a query from the Revenue.

8) It is this argument which was canvassed before us and through out. We have noted this argument in our order dated 13th April, 2015. That order reads as under:-

> “1. These Appeals, according to Mr. Gandhi, appearing for the assessee in support, raises a very substantial question of law. According to him, the penalty under Section 271(1)(c) of the Income Tax Act, 1961 has been sustained partially and erroneously by the Income Tax Appellate Tribunal. The penalty on account of concealed long term capital gain of Rs.20,57,010/has been sustained by the Tribunal on the reasoning in para 13 at page 65.
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> 2. Mr. Gandhi submits that this reasoning is fallacious and defective fundamentally. It relies on the fact that the assessee disclosed the particulars of the long term capital gain only when a pertinent query was raised by the Assessing Officer. Mr. Gandhi submits that this is factually incorrect. The assessee on his own and voluntarily disclosed all the facts and particulars in relation to this gain and the record would substantiate this statement.

> 3. Mr. Gandhi, therefore, seeks time to produce an extract of the assessment record, particularly about this disclosure. At the request of Mr. Gandhi, stand over to 27-4-2015. We clarify, that in the event any such record is not produced, then the reasoning of the Tribunal will be accepted and thereafter these Appeals would be dismissed."

9) Today, when the matter was placed and at the request of Mr. Gandhi so as to enable him to produce the relevant record, he submits that neither any affidavit has been filed nor the record has been produced by a legally accepted and known procedure. We had earlier clarified to Mr. Gandhi that this Court cannot interfere with the orders of the present nature by probing the factual position. If the factual position is otherwise or assumed to be such or termed to be against the Assessee without any legal and valid basis, then, possibly the argument of perversity on the part of the Tribunal can be raised. However, even when the order of the Tribunal is termed as perverse, it must be established and in the legal sense that the Tribunal omitted from consideration relevant and germane piece of evidence or that the Tribunal based its conclusion on irrelevant materials and having absolutely no nexus or connection with the issue raised before it. The argument is that the Tribunal's reasoning is fallacious and defective fundamentally. It is the Assessee who volunteered and disclosed the factual position and by a communication referred to above. It was not any query but a suo moto act.

10) Once the Tribunal has found the position to be otherwise and when no material is produced by Mr. Gandhi, then, the order of imposition of penalty passed by the Assessing Officer and confirmed by the Tribunal calls for no interference.

11) We had intimated this position to Mr. Gandhi on the earlier occasion. Despite detailed arguments on the earlier occasion, Mr.Gandhi would rely upon two Judgments, one rendered by the Hon'ble Supreme Court in the case of *Price Waterhouse Coopers Pvt. Ltd. vs. Commissioner of Income-Tax and Another* reported in **(2012) 348 ITR 306**. There, the factual position has been noted by the Hon'ble Supreme Court. In the assessment year 2000-01, the Assessee provided multidisciplinary management consultancy services and having a worldwide reputation. It filed return of income on 30th November, 2000. The tax audit report was also filed. In the form 3CD, the relevant particulars were entered and it was stated that provision for payment of gratuity not allowable under section 40A(7) so paid and the Assessee claimed a deduction thereon in its return of income. This was contrary to the position, namely that the provision towards such gratuity was made and that was not allowable. According to the Assessee, the deduction was inadvertently made in the return of income despite such particulars in the form having been entered. It is much

later that the Assessing Officer issued a notice under section 148 of the Income Tax Act, 1961 on 22nd January, 2004 for reopening assessment and in response to the notice, the return was filed under protest. The reasons for reopening were communicated and the Assessee realised the mistake on reading the reasons. It promptly informed the Assessing Officer by a letter that there was no willful suppression of facts by the Assessee but that a genuine mistake has been committed, and which later also appears to have been overlooked by the Assessing Officer. That is how the penalty proceedings were interfered with by the Hon'ble Supreme Court. This entire finding and in favour of the Assessee before the Hon'ble Supreme Court came in the backdrop of such peculiar and unique facts. We do not see how this Judgment can assist the Assessee in this case and for questioning the conclusion reached by the Tribunal. The Tribunal has reached this conclusion in para 13 of the order under challenge. The Tribunal has found that this is not a case where the Assessee had voluntarily revised the long term capital gain. It is in these circumstances that this Judgment will not assist the Assessee before us.

12) Insofar as the Division Bench Judgment of the Calcutta High Court in the case of *Udayan Mukherjee vs. Commissioner of Income-Tax* reported in **(2007) 291 ITR 318 (Cal)** is concerned, there as well

the factual position was that calculation mistake and on indexation was committed, however, the particulars were disclosed. It was a mistake in calculation. That was also on the basis of a mistaken indexation. This was not a case as was found before us. The Calcutta High Court has clarified that there is a distinction between furnishing of wrong particulars and making wrong calculation of particulars furnished. In the case of former, there is definitely a case for imposition of penalty. In the case of latter, there is no concealment. We find that the Calcutta High Court was dealing with a different factual scenario than the one which is dealt with by us. Even this Judgment is distinguishable on facts.

13) The only thing that can be said about the argument desperately canvassed before us is that the Assessing Officer did not give a personal hearing nor granted an opportunity to the Assessee before imposing penalty is that such argument is now being raised without pointing out such a defect in the Assessing Officer's order before the Tribunal. Apart therefrom, we do not find how, when the Assessing officer's order was challenged before the Commissioner and the Assessee succeeded before the Commissioner, the penalty was set aside, that from an Appeal by the Revenue against the Tribunal's order can such a ground be raised. Even if such a plea can be raised now, we

do not find that there is any prejudice caused, as all the fact finding authorities have gone elaborately through the contentions raised by the Assessee. There is no miscarriage of justice.

14) As a result of the above discussion, both the Appeals do not raise any substantial question of law. The findings of fact are not perverse or vitiated by any error of law apparent on the face of the record. The Appeals are accordingly dismissed.

(A.K.MENON, J.) **(S.C.DHARMADHIKARI, J.)**