

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

And

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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I.T.A.No.372 of 2015

ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

This appeal, under Section 260-A of the Income Tax Act, 1961 (for brevity, 'the Act'), is preferred against the order passed by the ITAT, Hyderabad in I.T.A.No.1420/Hyd/2013 dated 30.06.2014.

The assessee is a company carrying on business in real estate, and also deals in shares. It filed its return for the assessment year 2005-06 on 30.10.2005 disclosing a total income of Rs.4,79,830/-. The return filed by the assessee was processed under Section 143 (1) of the Act on 03.02.2006. The assessee voluntarily filed a revised return of income on 28.08.2006 admitting long-term capital gains of Rs.34,21,819/- on the sale of land. The case was picked up for scrutiny, and assessment under Section 143 (3) of the Act was completed on 14.12.2007 and some expenditure claimed by the assessee was disallowed. The assessment order dated 14.12.2007 disclosed that the assessing officer had considered this issue, of capital gains on the sale of land, in passing the assessment order under Section 143 (3) of the Act on 14.12.2007. Thereafter, on 04.03.2011, the assessing officer issued a notice under Section 148 of the Act seeking to reopen the assessment, and re-assess the assessee to tax treating a sum of Rs.34,21,819/-, which the assessee had claimed to be capital gains, as business income. The assessing officer passed an order under Section 147 of the Act on 29.08.2011.

Aggrieved thereby, the assessee carried the matter in appeal to the Commissioner of Income Tax (Appeals). By his order dated 19.08.2013, the Commissioner of Income Tax (Appeals) held that the period of four years, from the end of the assessment year 2005-06, expired on 31.03.2010; and the notice, under Section 148 of the Act, was issued on 04.03.2011 after expiry of the period of four

years. On the ground that the assessment could not be reopened beyond the period of four years, stipulated under the proviso to Section 147 of the Act, the order of the assessing officer was set aside and the appeal allowed. Aggrieved thereby, the Revenue carried the matter in appeal to the ITAT.

In the order under appeal, the ITAT, relying on the judgments of the Mumbai High Court in **Board of Control For Cricket in India v. Assistant Commissioner of Income Tax** and the Full Bench of the Delhi High Court in **CIT v. Usha International Limited**, held that the concept of change of opinion on the part of the assessing officer, to reopen an assessment, did not stand obliterated after the substitution of Section 147 of the Act by the Direct Taxes (Amendment) Acts, 1987 and 1989; while the assessing officer has now been conferred the power to reopen the assessment if he has reason to believe that income has escaped assessment, this does not imply that the assessing officer can reopen an assessment on mere change of opinion; the concept of change of opinion must be treated as an in-built test to check abuse of power; re-assessment proceedings are invalid in case the assessment order itself records that the issue was raised, and decided in favour of the assessee; re-assessment proceedings, in the present case, is hit by the principle of 'change of opinion'; and, therefore, the appeal of the Revenue must be dismissed.

Sri B.Narasimha Sarma, learned Senior Standing Counsel for the Income Tax Department, would submit that the assessment can be reopened even beyond the period of four years; and, in view of the first proviso to Section 147 of the Act, the orders of the Commissioner of Income Tax (Appeals) and the Tribunal necessitate being set aside.

Section 147 of the Act relates to income escaping assessment and, thereunder, if the assessing officer has reason to believe that any income, chargeable to tax, has escaped assessment he may, subject to the provisions of Section 148 to 153, assess or re-assess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this Section for the assessment year concerned. Under the proviso thereto, where assessment under Sub-Section (3) of Section 143 or Section 147 of the Act has been made for the relevant assessment year, no action shall be taken under Section 147 of the Act after expiry

of four years from the end of the relevant assessment, unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to make a return under Section 139 of the Act or in response to a notice issued under sub-Section (1) of Section 142 or Section 148 of the Act or to disclose fully and truly all material facts necessary for his assessment for that assessment year.

In terms of the proviso to Section 147 of the Act, where the assessment is made under Section 143 (3), no action can be taken under Section 147 of the Act after expiry of four years from the end of the assessment year. As the assessment year, in the present case, is 2005-06 the four year period, prescribed under the proviso to Section 147, expired by 31.03.2010. The proviso to Section 147 of the Act enables exercise of jurisdiction under Section 147 beyond four years only in cases where (a) any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 of the Act or in response to a notice under Section 142 or Section 148 of the Act; or (b) the assessee has not disclosed fully and truly all material facts necessary for that assessment. The second limb of the proviso, of the assessee failing to make a return under Section 139 of the Act, is not attracted as the assessee filed a revised return under Section 139 (5) of the Act on 28.08.2006. The only other ground on which the assessing authority was empowered to exercise jurisdiction, under Section 147 of the Act beyond four years, was if the assessee had failed to disclose fully and truly all material facts necessary for that assessment.

As has been noted, both by the Commissioner of Income Tax (Appeals) and the Tribunal, the order passed by the assessing officer, under Section 143 (3) of the Act, records the claim of the assessee that the sale of land was liable to tax as capital gains. It is not even the case of the assessing officer that the assessee had failed to disclose all material and necessary facts and, as a result, income has escaped assessment. The assessee's claim that the income was liable to be taxed, under the head capital gains, could have been disallowed by the assessing officer while passing an assessment order under Section 143 (3) of the Act, and the said income could have been treated as business income. Having failed to do so, the assessing officer could not have exercised jurisdiction under Section 147 of the Act beyond a period of four years. Even otherwise, as has been rightly held by the Tribunal, jurisdiction under Section 147 of the Act cannot be exercised for a mere

change of opinion. We find no error in the order of the Tribunal, much less a substantial question of law, necessitating interference in this appeal.

The appeal fails and is, accordingly, dismissed. Miscellaneous petitions pending, if any, shall also stand dismissed. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M.SEETHARAMA MURTI, J

18th November, 2015.

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