

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO. 1432 OF 2007

The Commissioner of Income

Tax-14, Mumbai

....Appellant

V/s.

Shri. Shankardas B. Pahajani

....Respondent

* * * * *

Mr. P.C. Chhotaray, Advocate for the appellant.

Mr. Ankur Pahade i/by. Ajay Misar & Co., Advocate for the respondent.

CORAM :-

M.S. SANKLECHA, &

SANDEEP K. SHINDE, JJ.

DATE :-

24TH APRIL, 2018.

P.C. :-

1. The High Court website showed this Appeal as having been admitted. However on checking, the Registry found that there was no order in the file indicating admission of this Appeal. In the above view, this Appeal was kept on board for directions to find out from the

parties whether this Appeal has been admitted and whether they have a copy of this order admitting this Appeal. Thus, on 22nd March, 2018 this Appeal was kept on board under the caption 'for directions' to ascertain the exact status of this Appeal. However, on that date the Counsel for the parties informed us that they do not have any copy of the order passed by this Court either admitting or dismissing this Appeal. They also stated that, their clients are infact not aware whether this Appeal is dismissed or admitted.

2. In the above view, we took up the Appeal for considering its admission.

3. This Appeal under Section 260A of the Income Tax Act (Act) challenges the order dated 13th September, 2004 passed by the Income Tax Appellate Tribunal (Tribunal). The impugned order dated 13th September, 2004 relates to Assessment Year 1994-95.

4. The Revenue has urged the following questions of law for our consideration :

“(A) Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal was right in confirming the order of CIT (A) in holding that the re-opening proceedings u/s. 148 of the IT Act made by the Assessing Officer are invalid as it was merely due to change of opinion ?

(B) Whether on the facts and in the circumstances of the case and in law the Hon'ble Tribunal was right in confirming the orders of CIT (A) in directing the Assessing Officer to tax the profit of sale of a flat and 2 car parking in 'Tanhee Heights' as long term capital gains ?”

5. The respondent had filed his return of income for the year 1994-95. The respondent's assessment was taken up for scrutiny assessment. During the course of assessment, detailed letters were filed by the respondent giving complete details of the transactions relating to the purchase and sale of flats in a building known as 'Tanhee Heights' resulting in capital gains. Thus, the same was subject of consideration leading to assessment order

dated 12th September, 1996 under Section 143(3) of the Act.

6. On 15th May, 1998 a notice under Section 148 of the Act was issued by the Assessing Officer seeking to reopen the assessment for Assessment Year 1994-95. The appellant objected to the re-opening of Assessment but the same was not accepted. This resulted in Assessment order dated 22nd February, 2001 passed under Section 143(3) read with Section 147 of the Act.

7. On appeal, the CIT (A), allowed the appellant's appeal, holding that re-opening notice dated 15th May, 1998 is without jurisdiction.

8. On further appeal, the impugned order of the Tribunal holds that the exercise of re-opening the assessment is without jurisdiction. This on the ground that, the entire issue of capital gains on which the re-opening notice was issued was the subject matter of consideration during the regular assessment proceedings under Section 143(3) of the Act. This is evident from the

letters of the appellant disclosing all facts during the regular Assessment proceedings. Therefore, it held it to be a case of change of opinion on the part of the Assessing Officer and therefore absence of any reason to believe that income chargeable to tax has escaped assessment. Moreover, the impugned order of the Tribunal seems to have referred to the reasons recorded in support of the impugned notice and concluded that there was absence of application of mind by the Assessing Officer and the re-opening notice was issued on borrowed satisfaction i.e. on the basis of audit objection. In the aforesaid facts, the impugned order of the Tribunal held the re-opening notice to be without jurisdiction.

9. Mr. Chhotaray, appearing in support of the Appeal invites our attention to the assessment order dated 22nd February, 2001 passed consequent to the re-opening notice dated 15th May, 1998. In the above order, the Assessing Officer has recorded the fact that the re-opening notice dated 15th May, 1998 has been issued on

account of a recent decision of the Bombay High Court in **Commissioner of Income-Tax V/s. Smt. Beena K. Jain, [1996] Vol.217 ITR 363** (rendered on 23rd November, 1993). Thus, it is submitted that the re-opening notice is valid in law and the appeal deserves to be admitted.

10. We find that, both the CIT(A), as well as, the Tribunal have held that the re-opening notice dated 15th May, 1996 is without jurisdiction. We note that during the regular assessment proceedings leading to the assessment order dated 12th September, 1996 under Section 143(3) of the Act, the respondent-assessee had furnished all information in respect of the issue of capital gains by letters during assessment proceedings. Therefore, the Assessing Officer had applied his mind to the facts and the law while passing the order of regular assessment. The decision in the case of *Beena K. Jain* (supra) being relied upon by the appellant in support of the re-opening notice was available at the time when the

regular assessment order dated 12th September, 1996 under Section 143 of the Act was passed. Therefore, it would not be fair to presume that the Assessing Officer was ignorant of the decision rendered by this Court. Moreover, as the impugned order of the Tribunal itself records that the reasons recorded in support of the impugned notice was merely on the basis of borrowed satisfaction of the audit party. This also makes the impugned notice bad.

11. For the aforesaid reasons, Question-(a) as proposed does not give rise to any substantial question of law. So far as Question-(b) is concerned, in the present facts it is academic as the merits of the addition is to be examined only if the re-opening notice was held to be valid.

12. Accordingly, the appeal is dismissed. No order as to costs.

(SANDEEP K. SHINDE, J)

(M.S. SANKLECHA, J)