IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 27.02.2018
CORAM
THE HON'BLE MS. INDIRA BANERJEE, CHIEF JUSTICE
AND
THE HON'BLE MR.JUSTICE ABDUL QUDDHOSE

Tax Case (Appeal) No.2 of 2018

Principal Commissioner of Income Tax-6,
No.108, Nungambakkam High Road,
Chennai - 600 034. .. Appellant

Vs.

Vatsala Santosh Kamat .. Respondent

PRAYER: Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras "B" Bench, Chennai, dated 26.4.2017 passed in I.T.A.No.174/Mds/2017 as against the order dated 25/10/2016 passed in ITA.No.048/CIT(A)-15/2015-2016 by the Commissioner of Income tax, chennai

as against the re-assessment order dated 16/03/2015 passed by the Deputy Commissioner of Income tax in PAN.NO.AAKPKS0009 in relation to the assessment year 2008-2009.

For Appellant : Mr.T.R.Senthil Kumar
Standing Counsel

JUDGMENT

(Delivered by Ms.Indira Banerjee, Chief Justice)

This appeal is against an order dated 26.4.2017 passed by the Income Tax Appellate Tribunal "B" Bench, Chennai, dismissing the appeal being I.T.A.No.174/Mds/2017 filed by the Revenue against an order dated 25.10.2016 passed by the Commissioner of Income Tax (Appeals) - 15, Chennai, allowing the appeal of the respondent assessee being Appeal No.ITA.No.048/CIT(A)-15/2015-16 against an order of re-assessment passed by the Deputy Commissioner of Income Tax, Non-Corporate Circle-18, Chennai in relation to the assessment year 2008-09 under Section 143(3) read with Section 147 of the Income Tax Act, 1961.

2. The respondent assessee, an individual, filed the income tax return for the assessment year 2008-09 on 26.2.2009 showing the total income of Rs.4,68,860/-. The assessment was completed under Section 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the said Act") on 29.12.2010 accepting the returned income. Proceedings under Section 147 of the said Act were initiated and notice under Section 147 was issued to the respondent assesee on 27.2.2014. The said notice was duly served on the respondent assessee on 10.3.2014.

3. Section 147 of the said Act provides as follows:

> "Income escaping assessment.
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> 147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess 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, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :
>
> Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless 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 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:
>
> Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:
>
> Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of

any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:—

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;

(c) where an assessment has been made, but—

(i) income chargeable to tax has been underassessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act ; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;

(ca) where a return of income has not been furnished by the assessee or a return of income has been furnished by him and on the basis of information or document received from the prescribed income-tax authority, under sub-section (2) of section 133C, it is noticed by the

Assessing Officer that the income of the assessee exceeds the maximum amount not chargeable to tax, or as the case may be, the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;]

(d) where a person is found to have any asset (including financial interest in any entity) located outside India.

Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.

Explanation 4.—For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012."

4. As per the proviso to Section 147 of the said Act, where an assessment under sub-section (3) of Section 143 or under Section 147 has been made for the relevant assessment year, no action shall be taken under Section 147 of the said Act after the expiry of four years from the end of the relevant assessment year, unless 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 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

5. The relevant assessment year being 2008-09, any proceedings for re-assessment under Section 147 of the said Act would necessarily have to be commenced within four years from the end of the relevant assessment year i.e., 31.03.2013, unless it could be shown that the circumstances enumerated in the proviso existed.

6. It is nobody's case that the income chargeable to tax had escaped assessment for the assessment year in question by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice under sub-section (1) of Section 142 or Section 148 of the said Act.

7. The question is whether the respondent assessee failed to disclose fully or truly all material facts for her assessment for the assessment year in question. The Appellate Commissioner and the Appellate Tribunal have in effect, concurred in their factual finding that she did not fail to disclose material facts necessary for assessment.

8. The Appellate Commissioner by his order dated 25.10.2016 found that an audit objection had been raised by the Revenue Audit Party. The objection raised, as re-produced in the order of the Appellate Commissioner, is extracted herein below for convenience:

> "The assessee had declared that he had sold one acre of land at Field-III, Green Piece, Sirathavur Kanchi District. He claimed exemption on the ground that this land, being agricultural was situated outside urban limits and was allowed exemption. The exempted capital gain worked out to Rs.28,89,670/- (Rs.35,00,000-Rs.6,16,327). The assessee claimed to have purchased another plot of 5,784 sq.ft. at Krishnan Karanai Village for Rs.34,88,000/- out of consideration of Rs.35 lakhs received.
>
> It is noticed that the cost included cost of development of land for Rs.1,94,545/- spent for forming roads and fencing. Under the circumstance of exemption of Rs.28,83,670/- for capital gain requires to be considered and clarified subject to classification, addition demand of Rs.9.17 lakhs would arise.
>
> Incidentally, the document for sale of Siruthavur land reveals receipt of Rs.25 lakhs from the purchaser for the sale of this land. The balance Rs.10 lakhs attracts provision of section 56(2)(v) of the Act (Deemed gift from non-relative). The assessment of Rs.10 lakhs would result in additional demand of Rs.3,18 lakhs excluding interest and penalty.
>
> In addition though the assessee claimed to have spent Rs.34,88,000/- out of Rs.35 lakhs for purchase of new plot the actual investment is Rs.3,84,470/- (Rs.3,47,040 x 109% +5,199). The details of investment of balance of about Rs.31 lakhs may be looked into and income there from brought to Tax. Tentatively Rs.1.20 lakhs (at the rate of 4%) is assessable and additional demand of Rs.38,190/-p would arise."

9. The Appellate Commissioner also re-produced the views of the Assessing Officer, which is extracted herein below:

> "Assessee's return of income for AY 2008-09 was filed on 26.07.2009 vide acknowledgment No.14077, admitting a total income of Rs.4,68,860/-. Amount other things, the assessee had enclosed a detailed working of capital gain resulting from sale of agricultural land as Sirudhavoor Village, Chingleput Taluk, Kancheepuram District.
>
> The case was picked up for scrutiny by the JCIT, Salary Range-VI, Chennai in November 2010. Details required were filed by the assessee. On 21.12.2010, the assessee had furnished to the Department, a copy of the document relating to the sale of agricultural land which showed that Rs.10,00,000/- was paid to the assessee as development charges. The Addl. Commissioner thereafter deputed an inspector to inspect the property to confirm if the land in question was agricultural land.
>
> The property was inspected on 22.12.2010 (Wednesday). The land is situated 50 kms. from Chennai, 6 kilometers from the Tiruporur Sub Registrar's Office at 24 Kms from the Chingleput municipality. The inspector later visited the VAO's office at Tiruporur to verify the chitta and adangal to gather some information on the nature of crop grown. The land is located approximately 1 kilometer from the main road and falls well outside municipal limits. The adangal issued by the VAO showed that paddy was cultivated on this land during the relevant period (pasali 1416). A copy of the adangal was furnished to the Department on 27.12.2010. The development charges included inter-alia planting of coconut saplings, putting up barbed wire fence, sprinkles, building a road leading into the site from the main road.
>
> It was only after the JCIT was fully satisfied about the genuineness of the assessee's claim that the land in question was agricultural in nature and was the assessment completed accepting the income returned.
> It is pertinent to note here that the JCIT was aware of the facts and the assessment was based on the information provided in the Inspector's report and the same was considered while passing the order."

10. The Appellate Commissioner, on verification of records, found that the assessment of the impugned transaction in land and taxability thereof had extensively been enquired into before finalization of the original assessment proceedings. The Assessing Officer had deputed the Inspector of Income Tax to conduct site verification and local enquiry. The report of the Inspector of Income Tax dated 08.10.2009, which was on record, was also re-produced in the Appellate Commissioner's order and the same is extracted herein below:

> "The Joint Commissioner of Income-tax, Salary Range-VI, has directed to verify the land situated at in Siruthavoor Village in the case of Smt.Vatchala Santhosh Kamat (PAN: AAKPK5000G).
>
> We visited to the above place on 22.12.2010 and identify the land an extent of 1 acre by designated as Field-III, Green Piece comprised on old Survey No.421/10(part), 421/5(part), 421/2(part) & 421/4 (part), New Survey No.421/143 as per patta 352, situated at 124, Siruthavoor Village, Chingleput Taluk, Kancheepuram District.
>
> During our visit on 22.12.2010 the said land is vacant position only and nothing cultivated in this land. The land is not situated within the Thiruporur Town Panchayat or Mahabalipuram Town Panchayat. Further, Thiruporur is not notified by the CBDT as an urban land.
>
> As per Adangal copy issued by VAO of the Village, which is available in the MR, the land were used for Agricultural purpose during the period 01.04.2007 to 31.03.2008.
> Submitted for JCIT's perusal."

11. The Appellate Commissioner found that it was not the case of the Revenue that the matter had not been examined by the Assessing Officer in the original proceedings. It was also not the case that no view had been taken. Even though there was no explicit mention in the assessment order on the acceptance of the stand of the respondent assessee on the issue that lands in question were agricultural lands and exempt from the charge of capital gains, the Assessing Officer had clearly mentioned in the assessment order that “after scrutinizing the details filed, the assessment is completed accepting the income returned”.

12. The Appellate Commissioner very rightly held that for the valid initiation of the re-assessment proceedings, the Assessing Officer had to justify that the decision to issue notice under Section 148 of the said Act was based on discovery

of new and tangible material that led to the conclusion that there had been escapement of income. The Appellate Commissioner did not find the case to be so.

13. The Appellate Commissioner found that the only new development, post original assessment, was the Revenue Audit objection extracted herein above. As the verification of records clearly indicated that the issue had been examined threadbare by the Assessing Officer during the course of the original assessment proceedings, the re-assessment was only an outcome of the audit objection. The Inspector's report categorically mentioned that the land was used for agricultural purpose during the period from 1.4.2007 to 31.3.2008.

14. Being aggrieved by the aforesaid decision of the Appellate Commissioner, the Revenue appealed to the Appellate Tribunal, which dismissed the appeal as aforesaid by the order impugned before us. The Appellate Tribunal also found that initiation of re-assessment was an outcome of the audit objection and arrived at the finding that the initiation of re-assessment proceedings was based on a change of opinion and not on any fresh or tangible materials or on account of failure of the assessee to disclose fully or truly all material facts necessary for assessment for the assessment year in question.

15. The Appellate Commissioner as also the Appellate Tribunal rightly relied on the decision of the Supreme Court in CIT v. Kelvinator of India Limited, reported in (2010) 320 ITR 561, where the Supreme Court categorically held that mere change of opinion could not per se be the reason to initiate re-assessment proceedings. The Assessing Officer has the power to re-assess, but no power to review. The Appellate Commissioner rightly held that the ratio of Kelvinator, supra, was squarely applicable to the facts of the instant case.

16. In the instant case, re-assessment proceedings had not only been initiated upon the change of opinion for the reasons observed above, but after the expiry of four years from the end of the assessment year in question. This could only have been done in circumstances specified in the proviso to Section 147 of the said Act. None of the aforesaid circumstances exist. There were no new materials before the Assessing Officer at the time of re-assessment which were not available before the Assessing Officer at the time of formation of original opinion and/or making of the original assessment order.

17. Once an order of assessment has been passed, the Assessing Officer has no jurisdiction to open reassessment after expiry of 4 years from the end of the relevant assessment year, unless there has been failure to disclose truly and fully material facts necessary for assessment. The condition precedent

for exercise of jurisdiction to reopen assessment is failure on the part of the assessee to fully and truly disclose the material facts. Reference may the made to the judgments in Amiya Sales & Industries v. ACIT reported in (2005) 274 ITR 25 (Cal.); Sanghvi Swiss Refills v. Smt. Arti Handa, reported in (2008) 300 ITR 276 (Bom.); Sadbhav Engineering Ltd. v. DCITreported in (2011) 239 CTR 258 (Guj.); Dhampur Sugar Mills Ltd. v. ACIT, reported in (2011) 239 CTR 303 (All.) and in CIT v. Pradeshiya Industrial & Investment Corporation of Uttar Pradesh Ltd., reported in (2011) 332 ITR 324 (All.).

18. In Calcutta Discount Company Ltd. v. ITO, reported in (1961) 41 ITR 191(SC), a Constitution Bench of the Supreme Court held that the Assessing Authority had to draw inferences regarding other facts from the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of facts disclosed, or otherwise. The Assessing Authority ultimately has to draw proper, legal inferences from the primary facts and further facts and ascertain the proper tax leviable, on a correct interpretation of the taxing enactment. It is not for anybody else, far less the assessee, to tell the Assessing Authority what inferences, whether of facts or of law should be drawn. The Supreme Court observed that it was the duty of the assessee to disclose all primary relevant facts. The Supreme Court observed that the duty of the assessee did not extend beyond disclosure of primary relevant facts. If from primary facts more inferences could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the Assessing Authority. An assessee could not be charged with failure to communicate an inference. The aforesaid view was reiterated by the Supreme Court in ITO v. Lakhmani Mewal Das, reported in (1976) 103 ITR 437(SC).

19. Where the assessee discloses all primary facts, but still income escapes assessment because of the failure on the part of the Assessing Officer to draw the correct inference in law, initiation of reassessment proceedings after expiry of 4 years from the end of the relevant assessment year cannot be justified, in view of the clear language appearing in proviso to section 147. This view finds support from the judgment of the Supreme Court in Gemini Leather Stores v. ITO, reported in (1975) 100 ITR 1(SC).

20. In Parashuram Pottery Works Co. Ltd. v. ITO, reported in (1977) 106 ITR 1(SC), the Supreme Court held that failure on the part of the Assessing Officer to allow correct depreciation to the assessee was not a valid ground for initiation of reassessment proceedings. The Supreme Court held that when on the basis of facts on record the Income Tax Officer determines the amount of depreciation allowable to the assessee.

erroneously, the responsibility for that mistake cannot be ascribed to be an omission or failure on the part of the assessee. The Supreme Court quashed the initiation of reassessment after expiry of 4 years from the end of the relevant assessment year.

21. In CIT v. Cholamandalam Investment & Finance Co. Ltd., reported in (2009) 309 ITR 110 (Mad.), the Madras High Court held that after expiry of 4 years from the relevant assessment year, where the assessee had disclosed fully and truly all primary facts in relation to his claim for depreciation, the initiation of reassessment proceedings on the ground of the claim for depreciation had not been explained would be without jurisdiction, illegal, invalid and void ab initio.

22. In Berger Paints (India) Ltd. v. Assistant Commissioner of Income Tax reported in 2010 (1) CLT 334 (Cal.), a Single Bench of the Calcutta High Court held that mere change of opinion was no ground for reassessment. When assessment were sought to be reopened on the basis of the same materials, the notice under section 148 of the I.T. Act was liable to be set aside. In this case too, there are no new materials, which were not there at the time of initial assessment.

23. The proposition, that change of opinion is no ground for reopening of assessment, which is well-established and well-settled, also finds support from the following judgments:

1. Binnani Industries Ltd. v. ACIT, reported in (2007) 6 VST 783 (SC).

2. M.J. Pharmaceuticals v. DCIT, reported in (2008) 297 ITR 119 (Bom.).

3. Niba India Ltd. v. Smt. Arti Honda, reported in (2008) 300 ITR 283 (Bom.).

4. Cartini India Ltd. v. ACIT, reported in (2009) 314 ITR 275 (Bom.).

5. Manjusha Estate Pvt. Ltd. v. ITO, reported in (2009) 314 ITR 263 (Guj.)

6. CIT v. Jagson Intemational Ltd., reported in (2010) 321 ITR 544 (Del.).

24. In all the aforesaid cases, the Courts held that there could be no justification in law in initiation of reassessment proceedings on the basis of facts and materials already disclosed in course of the original proceedings.

25. On behalf of the Revenue, the learned standing counsel strongly argued that the Assessing Officer had not formed any opinion at the time original assessment. When there was no opinion, there could be no question of change of opinion. The original assessment order was not reasoned and had been passed ignoring the contention of the Revenue that the land in question was not agricultural land.

26. First of all, the materials on record relied upon by the Appellate Commissioner and the Appellate Tribunal clearly indicate that the question whether the land was agricultural land or not was considered at the time of initial assessment. The Appellate Commissioner as also the Appellate Tribunal clearly held that there was an opinion found at the time of initial assessment.

27. It is well settled that an appeal under Section 260A of the said Act lies on a question of law and it is not open to this Court to entertain an appeal from the factual finding, except in cases of absolute perversity, which in itself may give rise to the question of law. In our considered opinion, the impugned Appellate order does not call for interference.

28. The appeal is, therefore, dismissed. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To:

1. The Registrar
Income Tax Appellate Tribunal
"B" Bench, Chennai.

2. The Commissioner of Income Tax (Appeals)-15
Chennai.

3. The Deputy Commissioner of Income Tax,
Non-Corporate Circle - 18,
Chennai.

4.The Principal Commissioner of Income tax-VI
No.108 Nungambakkam High Road
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+1 cc to Mr.T.R.Senthil kumar Advocate sr 14891

svi(co)
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