

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 166 OF 2007

1. Audhut Timblo
Indian Inhabitant,
residing at La Marvel Colony,
Dona Paula, Goa.

2. Anju Timblo
Indian Inhabitant,
residing at La Marvel Colony,
Dona Paula, Goa.

.... Petitioners

Versus

1. Assistant Commissioner of
Income Tax,
Central Circle, Panaji, Goa,
having his office at 2nd floor,
Pundalik Niwas, Rua de Ourem,
Panaji, Goa.

2. Joint Commissioner of Income Tax,
Central Range, Panaji, Goa,
having his office at 2nd floor,
Pundalik Niwas, Rua de Ourem,
Panaji, Goa.

3. Union of India,
New Delhi, India.

... Respondents

Mr. S. S. Kantak, Senior Advocate along with Ms. V. Palienkar,
Advocate for the Petitioners.

Ms. S. Linhares, Standing Counsel for the Respondents.

Coram:- M.S. SONAK &
C. V. BHADANG, JJ.

Date:- 27th November, 2019

ORAL JUDGMENT (Per M. S. Sonak, J.)

Heard Mr. S. S. Kantak, Senior Advocate along with Ms. V. Palienkar, Advocate for the Petitioners and Ms. S. Linhares, Standing Counsel for Income Tax Department, for the Respondents.

2. Challenge in this petition is to the following:-
 - a) Notice dated 18.10.2006 issued under Section 148 of the Income Tax Act, 1961 (I.T. Act) to the petitioners for the assessment year 2002-03.
 - b) Order dated 31.01.2007 made by the Assistant Commissioner of Income Tax rejecting petitioners' objections to the reasons recorded for reopening of assessment in pursuance of the aforesaid notice dated 18.10.2006.
3. Mr. Kantak, learned Senior Advocate for the petitioners submits that in the present case, there is overwhelming material available on record which establishes that no income had escaped assessment for the assessment year 2002-03. He submits that the income of ₹10.33

Crores, which is alleged to have escaped assessment was the subject matter of the order dated 27.09.2002 made under Section 158 BC of the I.T. Act, in which, a block assessment was carried out and this very income was directed to be added to the income of the petitioners as unexplained cash credits. He points out that the order dated 27.09.2002 was however set aside by the Commissioner (Appeals) vide order dated 13.07.2006. He points out that even for the assessment year 2002-03, regular assessment was undertaken and culminated in the issuance of orders dated 21.03.2005 under Section 143(3) of the I.T. Act. In the course of these assessment proceedings as well, information was sought for in respect of this very income and upon furnish of such information, the assessment orders came to be made. Mr. Kantak submits that in these circumstances, there was absolutely no material on record for the assessing officer to have any reason to believe that this particular income had escaped assessment. In the absence of any such material, the issuance of notice dated 18.10.2006 is clearly in excess of jurisdiction and warrants interference.

4. Mr. Kantak relies upon the following decisions in support of the aforesaid contentions:-

(a) Smt. Mira Ananta Naik and others vs. Deputy Commissioner of Income Tax (Investigation) and others – (2009) 183 TAXMAN 0040 (Bom);

(b) GKN Sinter Metals Ltd. vs. Ms. Ramapriya Raghavan, Assistant Commissioner of Income Tax and others – (2015) 232 TAXMAN 0386 (Bom); and

(c) Asian Paints Ltd. vs. Deputy Commissioner of Income Tax – (2009) 308 ITR 195 (Bom).

5. Mr. Kantak, further submitted that after the institution of the present petition, the department's appeal, against order dated 13.07.2006 made by the Commissioner (Appeals), also came to be dismissed by the Income Tax Appellate Tribunal (ITAT) vide order dated 03.12.2009. Mr. Kantak submits that further, the parties to whom the amount of ₹10.33 Crores was owed, instituted arbitration proceedings claiming such amount and secured an award in their favour. He points out that in pursuance of such award, the petitioners, after seeking permission from the Reserve Bank of India, remitted such amount to such parties. Mr. Kantak submits that all these subsequent events clearly established that the amount of ₹10.33 Crores, was not at all the petitioners' income, but it was only a liability, which was disclosed to the respondents from time to time and which liability, the petitioners, have ultimately discharged in accordance with law. Mr. Kantak submits that these are additional reasons to strike down the impugned notice dated 18.10.2006 and the impugned order dated 31.01.2007. For all these reasons Mr. Kantak submits that this petition may be allowed.

6. Ms. Linhares, learned Standing Counsel for the Department submits that the subsequent events referred to by Mr. Kantak cannot be taken into consideration for determining the validity of the impugned notice dated 18.10.2006 and the impugned order dated 31.01.2007. She submits that the validity of the impugned notice and impugned order has to be judged from the material available on record at the time when the impugned notice was issued or when the impugned order was made. She therefore submits that the so called subsequent developments are clearly irrelevant for deciding the issues raised in the present petition.

7. Ms. Linhares submits that in the present case, the relevant assessment year is 2002-03. She submits that the order dated 27.09.2002 made under Section 158 BC of the I.T. Act admittedly, did not relate to this assessment year. She submits that even if certain amounts may not have qualified as income for the years for which the block assessment was carried out, this amount of ₹10.33 Crores certainly qualifies to be treated as income for the relevant assessment year 2002-03 for the reasons quite cogently set out in the communication addressed to the petitioners furnishing reasons. She therefore submits that the orders dated 27.09.2002 and 13.07.2006 are quite irrelevant and cannot form the basis for questioning the impugned notice or the impugned order.

8. Ms. Linhares submits that the precise character of the amount of ₹10.33 Crores needs to be investigated and full opportunity will be afforded to the petitioners to give their say consequent upon reopening of the assessment proceedings. She therefore submits that the present petition may be dismissed since, the challenge in the petition is only to the notice seeking to reopen assessment, which had clearly escaped assessment, in the facts and circumstances of the present case. For all these reasons Ms. Linhares submits that this petition may be dismissed.

9. The rival contentions now fall for our determination.

10. The petitioners have consistently claimed and even disclosed to the petitioners that they had agreements with certain parties, in terms of which, they had accepted certain advances/booking amounts towards room nights for the period between October, 1994 to October, 1997 in some cases and 01.10.1997 to 31.05.2001 in some other cases. It was also the case of the petitioners that such agreements were renewed from time to time however, for the present, we are not really concerned with the issue of renewals. The total of such amount came to approximately ₹10.33 Crores.

11. Some time in the year 2000, proceedings under Section 132 of the I.T. Act were undertaken and a search was made at the office and

residential premises of the petitioners. In pursuance of the same, a block assessment was carried out which resulted in the making of order dated 27.09.2002 under Section 158 BC of the I.T. Act. By this order, an addition of ₹10.33 Crores was made to the income of the petitioners as unexplained cash credits.

12. The petitioners, appealed against the order dated 27.09.2002 to the Commissioner (Appeals), who, vide order dated 13.07.2006, set aside the order dated 27.09.2002, thereby deleting the addition of ₹10.33 Crores. On 13.09.2006, the respondents, appealed against the order dated 13.07.2006 to the ITAT.

13. Soon thereafter i.e. on 18.10.2006, the respondents issued the impugned notice invoking the provisions of Sections 147/148 of the I.T. Act stating that this very income of ₹10.33 Crores had escaped assessment and therefore reassessment or reopening of assessment was proposed for assessment year 2002-03. On 02.11.2006, the petitioners sought for reasons, which were furnished on 28.11.2006. The objections raised by the petitioners were to the reopening of the assessment for assessment year 2002-03 were rejected by the first respondent vide the impugned order dated 31.01.2007. Hence the present petition questioning the impugned notice dated 18.10.2006 and the impugned order dated 31.01.2007.

14. At this stage it is also necessary to note that in respect of the regular assessment for assessment year 2002-03, the respondents, had issued notice to the petitioners under Section 142 of the I.T. Act, seeking inter alia particulars and clarifications with regard to this very income of ₹10.33 Crores, which notices are dated 07.02.2005 and 18.03.2005. The petitioners have placed on record that necessary particulars as well as clarifications were furnished by the petitioners in writing and petitioners' representative even appeared before the first respondent on 18.03.2005 to explain the status and character of such amounts. Based upon all this, orders were made under Section 143(3) of the I.E. Act by the first respondent assessing the income for assessment year 2002-03, in respect of both the petitioners.

15. From the aforesaid it is quite clear that on the date when the impugned notice dated 18.10.2006 was issued by the respondents seeking to reopen the assessment on the ground that the amount of ₹10.33 Crores had escaped assessment, the following orders had already been made:-

- a) Order dated 27.09.2002 under Section 158 BC of the I.T. Act, by which the amount of ₹10.33 Crores was directed to be added to the income of the petitioners as unexplained cash credits;
- b) Order dated 13.07.2006 by which the Commissioner (Appeals) had set aside the aforesaid order dated 27.09.2002 and deleted the addition

of ₹10.33 Crores for the block assessment;

c) Orders dated 21.03.2005 under Section 143(3) of the I.T. Act making regular assessment in the assessment year 2002-03, in which, the explanation had been furnished by the petitioners, in respect of this amount of ₹10.33 Crores.

16. From the aforesaid, it is quite clear that this was not at all a case where it could be said that the amount of ₹10.33 Crores had in fact escaped assessment for assessment year 2002-03. In order to issue notices under Section 147/148 of the I.T. Act proposing to reopen the assessment, the respondents, must have reason to believe that the income has escaped assessment. With the aforesaid facts, it can never be said that the amount of ₹10.33 Crores had indeed escaped assessment. Record indicates that this amount had in fact been assessed at two stages i.e. at the stage of block assessment in terms of Section 158 BC of the I.T. Act and regular assessment for the assessment year 2002-03, in terms of the orders dated 21.03.2005 made under Section 143(3) of the I.T. Act. The most important jurisdictional parameter for issuance of impugned notice dated 18.10.2006, being absent, the impugned notice cannot be sustained and is liable to be interfered with.

17. In *Smt. Mira Ananta Naik and others (supra)*, in somewhat

similar circumstances, the division bench of this court held that the issuance of notices under Section 147/148 of the I.T. Act, was an exercise in excess of jurisdiction. In that case on 16.01.1997, the assessment officer passed a block assessment order dated 31.12.1997 under Section 158 BC of the I.T. Act. The assessee however challenged the said order and the said order was quashed by the ITAT vide order dated 07.06.1999. On 20.12.1999, the petitioners were served with notice under Section 148 of the I.T. Act. Reasons were furnished to the petitioners but the objections were ultimately rejected.

18. In the aforesaid circumstances, the Division Bench of this Court, held that there was no basis for issuance of notice under Section 148 of the I.T. Act merely because the orders for block assessment had been reversed by the Tribunal. The relevant discussion on the aforesaid issue is to be found in paragraphs 22 and 23, which read as under:-

“22. For the present petition, it is not necessary to consider and determine or decide any larger issues or controversy. The factual situation in the present case is undisputed. The search and seizure proceedings culminated in block assessment, which block assessment was subject-matter of challenge at the instance of the petitioners. A perusal of the order of the Tribunal would reveal that the Tribunal was called upon to decide the contentions, which have been raised in para 2 of one of its orders. One of the

contentions raised was that the assessment extends to income disclosed in regular proceedings before the assessment officer. The Tribunal has permitted authorities to make detailed submissions and thereafter in para 12 of the order has gone into the details of the search proceedings. Thereafter, it considered the law on the point and subsequently held that the assessment cannot be sustained and the appeal challenging the search and seizure deserves to be allowed. Reasons are contained in paras 12 to 18 of the order passed by the Tribunal. The search and seizure proceedings were commented upon and it is worthwhile noting that the orders were delivered on 7th June, 1999 and subsequently, the Department challenged them under s. 260A of the IT Act but even that challenge in this Court has failed.

23. It is also disputed before us that the block assessment was carried out and the block assessment was the subject-matter of the proceedings. Therefore, the notices which merely state that there is reason to believe that the income chargeable to tax for the relevant assessment year has escaped assessment without anything more, cannot be said to be something which would enable the authorities to invoke s. 147 of the IT Act in the peculiar facts of this case. The notices are identical and neither any details of the income chargeable to tax are disclosed in the

notice nor it has been set out as to how that can be termed as having escaped assessment within the meaning of s. 147. The reasons supplied are recorded in an order sheet for the years in question. The reasons in the order-sheets and the same being supplied only after reminders to the Department. There is much substance in the contentions of Shri Nadkarni that the search having resulted in block assessment and the Department having resorted to s. 158BA to s. 158BC of the IT Act, it cannot be said that the income escaped assessment. In these proceedings the income was assessed and taxed after it was brought to the notice of the AO. Merely because the block assessment was not upheld by the authorities under the IT Act, it cannot be reason enough in this case to invoke s. 147 of the same. The income has not escaped assessment in the admitted factual position. We are of the view that even the order sheet does not meet the requirement in law. The same merely sets out that the seized material and inquiries with the assessee at the time of search, reveal that the income as per particulars is unaccounted in the books of the seizure. Therefore, there is reason to believe that the income has escaped assessment. The reasons clearly show that there is no reference to any block assessment or the proceedings pursuant thereto.”

19. According to us, the ruling in *Smt. Mira Ananta Naik and others (supra)*, completely supports the contentions raised by and on behalf of the petitioners and on the basis of reasoning reflected therein, in this case as well, the impugned notice dated 18.10.2006 and the impugned order dated 31.01.2007 deserve to be quashed. In this case as well, block assessment orders have been made treating this amount as income vide order dated 27.09.2002. This order was however reversed by the Commissioner (Appeals) on 13.07.2006 and soon thereafter the respondents, proceeded to issue impugned notice dated 18.10.2006, even though, there was really no material to suggest that any income had escaped assessment.

20. Though, it is true that the developments which have taken place during the pendency of the present petition should not ordinarily be taken into consideration for determining the validity or otherwise of the impugned orders, in the present case, it is necessary to note that even the appeal of the respondents against the order dated 13.07.2006 made by the Commissioner (Appeals), was dismissed by the ITAT vide Judgment and Order dated 03.12.2009. The petitioners have also placed on record material in the form of awards of Arbitral Tribunal and permission from Reserve Bank of India to repatriate the amount of ₹10.33 Crores in foreign currency to the parties to whom the same was found to be due and payable in terms of the awards. Though, we have

really not taken into consideration all this material, we are only referring to this material to indicate that even otherwise, this amount was never treated as income by the petitioners.

21. Ms. Linhares, in the course of her arguments, had placed reliance upon decision of the Hon'ble Supreme Court in the case of *Commissioner of Income Tax, Madurai vs. M/s. T.V. Sundaram Iyengar & Sons Ltd. - (1996) 6 SCC 294* to submit that the impugned notice was issued by applying the principles laid down in this decision. In this case, the Hon'ble Supreme Court has held that if an amount is received in course of trading transaction, even though it is not taxable in the year of receipt as being of revenue character, the amount changes its character when the amount becomes the assessee's own money because of limitation or by any other statutory or contractual right, so the amount should be treated as income of the assessee.

22. According to us, the principle in the case of *M/s. T.V. Sundaram Iyengar & Sons Ltd. (supra)*, was not attracted in the facts and circumstances of the present case. This is because the reasons furnished to the petitioners stated that the contracts with the parties expired on 31.05.2001 and the amount of ₹10.33 Crores was sought to be assessed as income for the assessment year 2002-03 i.e. well

within the period of limitation during which the opposite parties could have as well recovered the amount. Besides, this is a case where the petitioners, had consistently, indicated the said amount as a liability and further, made full disclosure to the respondents. The respondents had also assessed these amounts ,both in the course of block assessment as also in the course of regular assessment, for the assessment year 2002-03 itself. In such circumstances, it really cannot be held that this amount, had escaped assessment.

23. In *GKN Sinter Metals Ltd. (supra)*, this Court has held that the law on re-opening of an assessment under the Act, is fairly settled. An assessment once made, is final. The Assessing Officer can re-open an assessment only in accordance with the express provisions provided in Section 147/148 of the Act. This is for the reason that there is a finality/sanctity attached to an assessment order. It is only on the Assessing Officer strictly satisfying the provisions of Section 147 of the Act, that it acquires jurisdiction to re-open an assessment. Section 147 of the Act, clothes the Assessing Officer with jurisdiction to re-open an assessment on satisfaction of the following:

- (a) The Assessing Officer must have reason to believe that
- (b) Income chargeable to tax has escaped the assessment and
- (c) In cases where the assessment sought to be re-opened is beyond the period of four years from the end of the relevant

assessment year, then an additional condition is to be satisfied viz: there must be failure on the part of the Assessee to fully and truly disclose all material facts necessary for assessment.

24. Since, in the present case there was full disclosure and in fact, the amount had even become the subject matter of the assessment both under Section 158 BC and Section 143(3) of the I.T. Act, there could have been no reason to believe that the income chargeable to tax had indeed escaped assessment.

25. In *Asian Paints Ltd. (supra)* this Court had held that in a situation where according to the assessing officer he failed to apply his mind to relevant material in making assessment order, he cannot take advantage of his own wrong and reopen assessment by taking recourse to provisions of section 147/148 of the I.T. Act.

26. In the present case, the assessing officer in the course of regular assessment had in fact asked for information in relation to this very amount of Rs.10.33 Crores. This information was duly furnished by the petitioners. Only thereafter, the assessing officer made orders dated 21.03.2005 under Section 143(3) of the I.T. Act. In these circumstances, it was no longer open for the respondents to issue the impugned notice under Section 147/148 of the I.T. Act.

27. For all the aforesaid reasons, we quash and set aside the impugned notice dated 18.10.2006 and the impugned order dated 31.01.2007 and make the Rule in this petition, absolute in terms of prayer clauses (a) and (b) of this petition.

28. In the facts and circumstances of the present case, there shall be no order as to costs.

C. V. BHADANG, J.

M. S. SONAK, J.