

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 27.01.2020
CORAM:
THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR
W.A.No.1212 of 2017

The Assitant Commissioner of
Income Tax Non-Corporate Circle-1
Room No.309 3rd Floor
Wanaparthi Block
121 Mahatma Gandhi Road Ch-34. Appellant

Vs

S.M.Kutubuddin Respondent

Appeal filed to set aside the order of the judge in
WP.No.12801/2016 dt.02/06/2017

WP.No.12801 of 2016:Writ Petition filed under Article 226 of the
Constitution of India praying for the issuance of Writ of
Certiorari, or any other appropriate Writ or order or direction
in the nature of writ, Calling for the records of the respondent
dated 02.03.2016 relating to the Assessment year 2008-09 in
PAN : AAPPK2572G/2008-09 and quash the same.

For appellant : Ms.Hema Muralikrishnan
For Respondents : Mr.N.Muralikumaran
for M/s.McGan Law Firm

J U D G M E N T
(made by DR.VINEET KOTHARI, J.)

This intra court appeal has been preferred by the Revenue
against the order of the learned Single Judge dated 2 June 2017
by which, the learned Single Judge allowed the Writ Petition in
W.P.No.12801 of 2016 filed by the Assessee Mr.Kutubuddin against
the Assistant Commissioner of Income Tax, and quashed the
reassessment proceedings for the Assessment Year 2008-09 in the
case of the Assessee, despite the objection raised by the
Revenue before the learned Single Judge that against the
impugned reassessment order, dated 2 March 2016, a remedy by way
of appeal was available for the Assessee.

2. The reasons assigned by the learned Single for allowing the writ petition are quoted below for ready reference :-

14.1. A perusal of the communication dated 9 November 2010, would show that the petitioner had in no uncertain terms given the entire details, which included the following : (i) The area of the land, which was stated as 1.59 Acres. (ii) The location. (iii) The date of its purchase and the fact that it was purchased along with his sons, Mr.K.Mohammed Baleegh and Mr.K.Mohammed Anas, for a sum of Rs.15,900/- on 08.04.1985. (iv) The fact that the land was used for cultivating causina/teak. (v) The date of sale, which was indicated as : 03.05.2007. (vi) And finally, the consideration received by the petitioner was disclosed, as well.

14.2. Furthermore, the petitioner also, specifically, stated that since, the Kovalam property was agricultural land, it was not a capital asset within the meaning of the Act, and hence, the profit made upon its sale was not taxable.

14.3. The record shows that, it is only thereafter, the assessment order dated 30.11.2010, was passed under Section 148 of the Act. Therefore, quite clearly, the queries were raised to which, the petitioner had furnished his answers. The respondent, now, oblivious to the queries raised and answers received, chooses to tax the gains made by the petitioner qua his share of the sale consideration on the ground that the Tahsildar, had reported that between 2003 and 2007, that, no agricultural activity was carried out on the Kovalam property.

14.4. According to me, the aforesaid facts, clearly, establish that the respondent is having a second shot at unravelling the tax impact of the subject transaction. Since, the petitioner furnished all the information which was available with him, qua the Kovalam property and the subject transaction, the respondent was, distinctly, acting beyond the ambit of the provisions of Section 147 of the Act,

which vested upon him the power to reassess the income and not "review" the subject transaction. (See Commissioner of Income Tax V. Kelvinator of India Limited, (2002) 256 ITR 1 (Delhi FB), and also Commissioner of Income Tax V. Kelvinator of India Ltd., (2010) 320 ITR 561 (SC)).

14.5. Ms.Muralikrishnan's submission that, since, there was no discussion qua the sale of the Kovalam property, in the assessment order dated 30.11.2010, the respondent, therefore, was not barred from reexamining the subject transaction, even though, the information with regard to the same, was available to him - in my view, is untenable proposition, in the given facts and circumstances. The record shows that query was raised, pursuant to which, information was supplied by the petitioner; a circumstance, which is, suggestive of the fact that an enquiry was made with regard to the subject transaction.

3. The learned Counsel for the Revenue Ms.Hema Muralikrishnan, produced the original assessment record of 143 (3) proceedings before us, as directed by the Court and submitted that the letter dated 9 November 2010 of the Assessee alleged to have been personally handed over to the Assessing Authority disclosing the note of sale of Kovalam property viz., the agricultural land, measuring 1.59 acres at Kovalam Village, was actually never furnished to the Assessing Authority and the order sheet entries would show that the very proceedings had concluded on 1 November 2010 and had been adjourned to 9 November 2010, on which date, there was no separate order sheet drawn or any further communication taken from the Assessee and therefore, in the absence of any discussion on the sale of the agricultural land at Kovalam by the Assessee, one of the reasons for re-assessment proceedings undertaken by the Assessing Authority was to bring to tax the capital gains on such agricultural land by the Assessee. The learned Single Judge, she submitted that, has wrongly relied upon the said letter dated 9 November 2010, as the disclosure on the part of the Assessee, to hold that the re-assessment proceedings were based on a change of opinion on the part of the Assessing Authority, which is not permitted under Section 147/148 of the Act.

4. Accordingly, we had summoned the original records from the Department and the learned Counsel for the Revenue produced the same. The said letter dated 9 November 2010 prima facie appears to have been filed only as annexure 2(a) of the Reply to the notice under Section 147/148 of the Act with the detailed objections filed by the Assessee on the letter head of his Authorized Representative - Chartered Accountant M/s.Nizar & Kumar. Separately, we do not find the said letter dated 9 November 2010 previously filed by the Assessee on the record of the Revenue. The order sheet of the Assessing Authority at the time of the original assessment under Section 143(3) of the Act to the relevant extent commencing from 6 September 2010 to 30 November 2010, are also quoted below for ready reference :-

Shri A.P.Kumar, FCA appeared. Case discussed.

Required to file

- (i) Property details along with documents;
- (ii) Rental agreement if any;
- (iii) Copy of LIP paid receipt;
- (iv) Copies of P & C/Balance sheet of M/s.London Stores of which the assessee is a partner.

To file by 15/9/x.

Sd/-

Sd/-

A.R.

Assessing Officer

A's and AR Shri A.P.Kumar, FCA appeared. Case discussed. Details filed. Adjourned to 9.11.2010 @ 4.00 p.m.

Sd/-

Sd/-

A.R.

Assessing Officer

DNO/s under Section 154 -Rs.87,797/-. Case discussed. A.O. Dictated.

Sd/-

C.No.10/P-4/2010-11

A.R.

AO and OA n/p 156 prepared and put up.

Sd/-

Sd/-

A.R.

Assessing Officer

5. From the aforesaid order sheets of proceedings of Original Assessment under Section 143(3) quoted, we find that even though the case was adjourned after the last appearance of the Authorized Representative on 1 November 2010, and the case was discussed with him, and details were also filed as required in the previous order dated 6 September 2010, the matter was adjourned to 9 November 2010 at 4 p.m. by the Assessing Authority, but no separate proceedings are drawn on 9 November

2010. Had the said letter dated 9 November 2010 been filed by the Assessee on 9 November 2010, the same would have been taken on record by a Member in the said order sheet of 9 November 2010 and the said letter dated 9 November 2010 in original, would have been found in the assessment record produced before us, but it is not there.

6. The copy of the said communication dated 9 November 2010 now produced with the Affidavit by Chartered Accountant Mr.A.P.Kumar dated 19 January 2020 also bears an endorsement by Chartered Accountant, "handed over in person" on 9 November 2010. But such an endorsement is not found in the copy of this letter filed with the original typed set filed by the Respondent/ Revenue Department.

7. Prima facie therefore, without expressing our any opinion on the same, we are not inclined to rely on the said letter dated 9 November 2010, to be available on the record of the Assessing Authority on 9 November 2010 itself. It may be a matter of enquiry and investigation which, we, for obvious reasons, in the extraordinary jurisdiction, cannot undertake here in the writ appeal.

8. Though the learned Counsel for the Assessee has also brought to our notice the computation of income of the son of the Assessee, who is also 1/3rd shareholder in the said land in Kovalam village, in whose Statement of Computation of Income filed with the Return of Income, a Note is shown about the Kovalam property, but unfortunately, the copy of the Computation of Income, filed by the present Assessee Mr.Kutubbudin (father) is not available on the records. The said Note quoted in the Assessee's son's Computation is extracted below for ready reference :-

4. Long Term gain on sale of agricultural land situated at Kovalam Village, Tiruporur Taluk, 1/3rd share of Rs.3445000/- (jointly held with father S.M.Kutubuddin & brother K.Md.Baleegh) not considered as income. As that does not fall under the purview of capital asset.

9. In such circumstances, we, consciously, refuse to express any opinion on the validity of the contentions raised by the learned Counsel for the Assessee based on the said communication dated 9 November 2010 said to have been filed by the Assessee during the contemporary period before the Assessing Authority, during the proceedings under Section 143(3) of the Act, on which the entire case of the Assessee for challenging the impugned

reassessment proceedings on the ground of 'change of opinion' is based.

10. In these circumstances, we feel that the learned Single Judge ought to have upheld the objection of the Revenue and relegated the Assessee to the regular Appellate remedy available to the Assessee against the impugned Reassessment Order under Section 147/148 of the Act for the Assessment year 2008-09.

11. The learned Counsel for the Assessee Mr.N.Muralikumaran also fairly submitted before us that even at this stage, the Assessee may be allowed to avail his remedy by way of appeal before the First Appellate Authority viz., CIT (Appeals), to which the learned Counsel for Revenue Ms.Hema Muralikrishnan also does not have a serious objection.

12. We are inclined to accept the said submission of the learned Counsel for the Assessee and the Revenue, accordingly, we allow the present appeal of the Revenue and set aside the order passed by the learned Single Judge and we direct that, if the Assessee prefers a regular appeal before the learned CIT (Appeals) for the Assessment year 2008-09 against the impugned re-assessment order dated 2 March 2016 for the Assessment year 2008-09, within a period of four weeks from today, then, without raising any objection with regard to the limitation, the learned CIT (Appeals) may entertain the said appeal, and decide the same on merits and in accordance with law, subject to fulfillment of other conditions, as may be imposed by it.

13. We make it clear that the appeals of the Assessee may be decided independently, uninfluenced by any of the observations made by the learned Single Judge in the order impugned before us.

14. With these observations, the writ appeal filed by Revenue is disposed of. No costs.

Sd/-
Asst.Registrar (CJ conf)

/true copy/

Sub Asst. Registrar

tar

To

The Assitant Commissioner of
Income Tax Non-Corporate Circle-1 Room No.
309 3rd Floor Wanaparthi Block 121
Mahatma Gandhi Road Ch-34

+1 cc to Mr.Hema Muralikrishnan Advocate sr5689

+1 cc to Mcgan Law firm sr5655

W.A.No.1212 of 2017

rsv(co)
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