

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.327 OF 2004**

M/s. Kala Niketan & Anr. .. Petitioners.

Vs.

Union of India & Ors. .. Respondents.

Mr. B.V. Jhaveri with Mr.Sriram for the Petitioners.

Mr. Suresh Kumar for the Respondents.

**CORAM : M. S. SANKLECHA &
A.K. MENON , JJ.**

DATED : 21ST NOVEMBER, 2016

ORAL JUDGMENT (PER A.K. MENON, J.) :

1. By this writ petition, the petitioner challenges the notice under Section 148 of the Income Tax Act, 1961 (the 'Act') dated 21st July, 2003 seeking to reopen the assessment of the Petitioner's partnership firm for the assessment year 1990-91.

2. The brief facts are as follows : The petitioner is a partnership firm carrying on business at all material times with its principal place of business at 95, Queen's Road, Mumbai and with three other branches at one

each at Juhu(Mumbai), Pune and Ahmedabad. With effect from 31st March, 1990 two partners of the petitioner firm retired. By a deed of retirement dated 25th May, 1990 the two retiring partners were allotted the branch at Ahmedabad with all its assets and liabilities at book value as their share in the business and as more particularly set out in the petition. During the course of assessment proceedings for the assessment year 1991-92, it was found that with effect from 1st April, 1990 the petitioner firm was left with only three shops situated at Queen's Road, Juhu and Pune. The Assessing Officer held that the branch at Ahmedabad which came to be allotted to the aforesaid retiring partners amounted to a transfer inclusive of capital assets by the firm to the retiring partners and therefore the Assessing Officer required the petitioner firm to explain as to why the provisions of Section 45(4) of the Act ought not to be applied on the footing that the allotment of the said branch amounted to distribution of a capital asset by way of transfer thereof.

3. In the instant case the firm having been reconstituted,

continued to carry on business at the two establishments in Mumbai and one at Pune. The firm furnished its written submissions and inter alia contended that the Ahmedabad branch along with its assets and liabilities having been allotted to retiring partners in pursuance of a family arrangement, there was no 'transfer' of any capital asset as contemplated under Section 45(4) of the Act. Even otherwise, the conditions required by Section 45(4) of the Act were not attracted. They relied upon the provisions of the family arrangement dated 25th May, 1990. It was the case of the firm that all the partners had arrived at the family arrangement by which the aforesaid branch came to be allotted to the share of the retiring partners. The Assessing Officer however made an addition by way of capital gain in a sum of Rs.52,27,282/- consisting of Rs.37,27,282/- towards transfer of capital assets and a sum of Rs.15,00,000/- towards transfer of goodwill.

4. Being aggrieved by the order of the Assessing Officer, an appeal was preferred before the Commissioner of Income Tax (Appeals)

[CIT (A)], who vide order dated 26th October, 1995 upheld the Assessing Officer's order. Being aggrieved by the order of the CIT (A), the firm filed an appeal before the Income Tax Appellate Tribunal bearing No.ITA No.9916/Mum/95. The Tribunal by its order dated 7th June, 2001 allowed the appeal inter alia holding that allotment of the said branch to the retiring partners did not amount to a transfer under Section 45(4) of the Act. It also held that Section 45 of the Act not being a Code in itself, it would not be appropriate to include the aforesaid allotment within the meaning of expression "transfer" as defined under Section 2(47) of the Act. In effect, the Tribunal held that upon retirement of partners and allotment of the Ahmedabad branch, there was no transfer within the aforesaid definition of Section 2(47) of the Act and therefore the addition of capital gain of Rs.52,27,282/- was directed to be deleted.

5. In the course of passing the order the tribunal in paragraph 8 of the order observed as follows :

"8.

Even otherwise, it is a settled law that if while interpreting a provision two views are reasonably possible, then the interpretation in favour of the assessee should be adopted. In view of above, we have no hesitation to hold that Sec.45(4) was not applicable to the facts of the case under appeal before us. Even otherwise Mr.C.V. Parekh and Mr.P.C. Parekh retired from the assessee firm with effect from close of the business hours on 31.3.1990. Assessee firm is carrying on the business of retail sale of sarees. The retail shops are normally closed around 8' clock. Thus, the business hours on 31.3.1990 closed at 8 pm on 31.3.1990 i.e. during the financial year 1989-90 relevant to assessment year 1990-91. Therefore, the issue of capital gains, if any, on retirement of partners from the firm would not arise in the year under appeal i.e. assessment year 1991-92. In view of above, we find no justification to sustain the addition of Rs.52,27,282/- made by the A.O. as capital gains in the year under consideration. The same is deleted." (Emphasis supplied)

6. In view of the aforesaid emphasized portion in paragraph 8, the impugned notice came to be issued. The impugned notice dated 21st July, 2003 stated that the Assistant Commissioner of Income Tax had reason to believe that income chargeable to tax for the Assessment Year 1990-91 had escaped assessment within meaning of Section 147 of the Act and he therefore proposed to reassess income for the said Assessment Year. The reasons recorded for issuance of the impugned notice reads as under :

“During the course of appellate proceedings before ITAT, Mumbai in respect of assessee's appeal on the said case, the ITAT has held that the issue of capital gain, if any, on retirement of partner from the firm would not arise in the year under appeal i.e. A.Y. 1991-92 because the retail shops are normally closed around 8 O'clock. Thus, the business hour on 31/3/1990 was closed at 8.00 p.m. i.e. during the F.Y. 1989-90 relevant to A.Y. 1990-91. Therefore, addition of Rs.52,27,282/- is to be made in A.Y. 1990-91 as required by the Tribunal.

In view of the above, I have reason to believe that

income of Rs.52,27,282/- chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for A.Y. 1990-91. Accordingly, necessary approval is solicited to issue notice under section 148 of the I.T. Act. “

7. The Revenue obviously believed that since the Tribunal had observed that business hours of the firm on 31st March, 1990 would have ended at 8 pm viz. the date on which the aforesaid two partners retired, the addition of Rs.52,27,282/- is not to be made in the assessment year 1991-92. Although in the reasons provided to the assessee, it was stated that necessary approval was for issuance of the notice had been solicited, this aspect is not now relevant since in an affidavit in reply the approval is stated to have been accorded on 18th July, 2003 i.e. prior to issuance of notice dated 21st July, 2003.

8. Mr. Jhaveri, learned counsel appearing on behalf of the petitioner contended that the notice was issued after expiry of period of four years and therefore same is clearly barred by limitation. Section 149 provides that the notice under Section 148 cannot be issued beyond period

of seven years from the end of relevant assessment year and in the present case the period of seven years at the relevant time (now six years) expired on 31st March, 1995 and notice under Section 148 has been issued on 21st July, 2003.

9. Mr. Jhaveri further pointed out that under Section 149 of the Act notice under Section 148 could not be issued beyond the period of 7 years (at the relevant time) from the end of the relevant assessment year even if the income escaping assessment exceeds Rs.1 lakh. In the present case the notice was beyond time by 8 years and 4 months from the end of the normal period of four years. He invited our attention to Section 150(1). Mr. Jhaveri submitted that in order to give any effect to a “finding” or “direction” contained in the order passed by the Tribunal under the Act, a notice under Section 148 may be given at any time and the time limit will not apply in cases which are contemplated under the aforesaid Section. Section 150(1) clearly provides that notice under Section 148 may be issued at any time for the purpose of making a reassessment in consequence of *“any finding or direction contained in an order passed by any authority in any proceeding”*

under the Act either by way of appeal, reference or revision. It is the case of the petitioner that in the instant case the order of the Tribunal does not contain any 'finding' or 'direction' as contemplated in Section 150(1).

10. Inviting our attention to the order of the Tribunal Mr. Jhaveri referred to paragraph 8 wherein the Tribunal had arrived at a “finding” that there was no transfer, in the instant case, pertaining to the allotment of the branch at Ahmedabad to the retiring partners. The Tribunal further observed that even otherwise, the two retiring partners had retired from the firm with effect from the close of business hours on 31st March, 1990 and in the light of the fact that the assessee firm was carrying business of retail sale of sarees and the fact that retail shops would normally closed around 8' O clock, the business hours on 31st March, 1990 would have come to a close at 8 pm. on the said date. In other words, during the Financial Year 1989-90 which was relevant to the Assessment Year 1990-91, the business of the petitioner firm would have come to a close at 8 pm. on 31st March, 1990 and therefore issue

of any capital gain accruing on retirement of partners would not arise in the year under appeal which was AY 1991-92. The Tribunal was of the view that there was no justification to sustain the addition of Rs.52,27,282/- by the Assessing Officer as capital gain in the year under consideration. The addition therefore came to be deleted.

11. During the course of his submissions Mr. Jhaveri relied upon the decision of this Court in the case of ***Lotus Investments Ltd. v/s. ACIT & Ors. 288 ITR 459*** in which this Court had occasion to consider the decision of the Supreme Court in the matter of ***ITO v/s. Murlidhar Bhagwan Das 52 ITR 335*** which held that the word “finding” can only be that which is necessary for the disposal of an appeal in respect of an assessment for a particular year. The Court further held that the appellate authority may incidentally find that the income belongs to another year but that is not a finding 'necessary' for the disposal of the appeal at hand. Similarly it was further observed that the expression “direction” can only be construed by the appellate authority or revisional authority given under

Section mentioned therein.

12. On the other hand, Mr. Suresh Kumar appearing for the Revenue in support of the notice contended that the aforesaid observation of the Tribunal in paragraph 8 amounted to a “finding” with the meaning contemplated in Section 150(1) and by that reasoning he submitted that based on the aforesaid finding there was no question of the notice being barred by the law of limitation as applicable to notices under Section 148. There being no bar to issuance of the notice, Mr. Suresh Kumar submitted that the assessment could have been reopened since the Tribunal had in effect held that the addition could have been made for the year A.Y. 1990-91.

13. During the course of submissions by counsel, we had enquired of Mr. Suresh Kumar as to whether the sanction which had been sought and as contemplated in the reasons had in fact be obtained. Mr. Suresh Kumar had at that stage filed an additional affidavit dated 23rd August, 2016 of one Neerja Sharma annexing thereto a copy of the sanction dated 18th July, 2003.

Perusal of the sanction reveals that on 18th July, 2003 satisfaction was recorded by the Commissioner of Income Tax in the following words:-

“Yes I am satisfied in view of the provisions of Section 150 read with Explanation 2 below Section 153(3).”

14. The reference made in the said sanction was not only to Section 150 but Section 150 read with explanation (2) to Section 153(3) which provides as follows:-

“Where, by an order referred to in clause (ii) of sub-section (3) any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.”

The aforesaid explanation clarifies that where an order referred to in clause (ii) of sub-section (3) results in exclusion of income from the total income of the assessee for an assessment year, then assessment of such income for another assessment year would be deemed to have been made in consequence of, or to give effect to any finding or direction contained in the

said order.

15. Thus, while granting sanction, the Commissioner was also of the view that such sanction was justified by virtue of the finding given by the Tribunal while passing the order in respect of Assessment Year 1991-92. The finding of the Tribunal in our view, in the instant case is limited to the fact that no transfer as contemplated under the Act had occasioned. The impugned notice however has proceeded on the basis that there was a finding to the effect that capital gain had accrued during the assessment year 1990-91 based on the aforesaid observation of the Tribunal in paragraph 8. This is the basis of the notice being issued. In our view, the observation in paragraph 8 adverted to above is neither finding nor a direction which would have justified in issuance of the impugned notice.

16. In the facts of that case the Commissioner of Income Tax had observed that the Assessing Officer was free to look into and consider the disallowance under Section 148 of the Act for the relevant assessment years in terms of Section 150(1) read with Explanation 2 of Section 153 of the Act and that cannot be construed as a direction to reopen assessment so as to enable the Revenue to issue reopening notice even after expiry of 6 years from the end of the relevant assessment year as contemplated under Section 150. That the observations by the CIT (A) in that case had based on a

suggestion made to the Assessing Officer to consider whether such disallowances can be made by initiating reassessment proceedings. In the present case as well we find that the basis for issuing the notice is the understanding of the Revenue that by virtue of Section 150(1) read with Explanation 2 of Section 153 of the Act it would entitle them to reopen the assessment even though it would appear to be beyond time by about 8 years and 4 months.

17. We are not persuaded by the submissions of the Revenue inasmuch as the facts of the case in *Murlidhar Bhagwan Das* (supra) are very akin in the facts of the present case as well. Moreover, in paragraph 11 of *Lotus Investments* (supra) the Court had occasion to deal with the effect of Section 150(1) read with Explanation 2 of Section 153 and has observed that Assessing Officer was free to look into and consider the disallowances under Section 148 of the Act for the relevant assessment years in terms of provisions of Section 150(1) read with Explanation 2 of Section 153 of the Act.

18. Mr. Jhaveri also pointed out that in respect of assessment year 1991-92 the revenue had filed Income Tax Appeal bearing (L) No.552 of 2003 pursuant to the order passed by the Tribunal on 7.6.2001. However, said appeal stood rejected on account of this Court having declined to condone delay of 302 days in filing that appeal. Mr. Jhaveri relied upon a

copy of the said Income Tax Appeal (L) No.552 of 2003 and the order dated 26th February, 2007 passed by this Court in Notice of Motion No.1635 of 2003 in Income Tax Appeal (L) No.552 of 2003 declining to condone the delay. Even otherwise it is seen that the revenue's appeal seeking to challenge the order of the Tribunal dated 7th June, 2001 in respect of assessment year 1991-92 had proposed the following question of law :

“(i) Whether on the facts and in the circumstances of the present case and in law, the Tribunal is correct in deleting the addition of capital gain income of Rs.52,57,282/- of the assessee arising out of the transfer capital assets and further holding that Section 45(4) of the Income Tax Act, is not applicable”.

19. Although the appeal is disposed of not on merit, we find no substance in reliance placed by the respondent's revenue upon so called finding of the revenue. The finding of the Tribunal is that there was no transfer. This finding is one which was required for the disposal of the Appeal the Tribunal was seized of. The observation that income may have accrued during another year was not a finding required for disposal of the appeal and hence it falls beyond the scope of Section 150 read with the Explanation (2) to Section 153 (3).

20. Mr. Jhaveri in support of these contentions relied upon the

decision of this Court in ***Eskay K'n' IT (India) Ltd. v/s. Deputy Commissioner of Income Tax (2015) 54 taxman.com 22 (Bombay)*** in Writ Petition No.3314 of 2004 on 11th August, 2014 to which one of us (M.S.Sanklecha,J.) was a member and drew our attention to the facts in that case which was very similar and almost identical to the facts at hand. While dealing with the expression “finding” this Court had also relied upon the decision of the Supreme Court in Murlidhar Bhagwan Das (supra) as well as Lotus Investments (supra). However, what is most pertinent to mention is that the word “finding” was dealt with in a factual background wherein the Revenue issued a reopening notice seeking to reopen the assessment for the A.Y.1949-50, as a result of which assessment order also came to be passed in appeal before the Appellate Assistant Commissioner . It was held that the addition made for Assessment Year 1949-50 was incorrect and if at all it had to be included in the Assessment Year 1948-49. As a consequence the notice for reopening was issued on 5th December, 1957. The assessee in that case approached the Court under Article 226 of the Constitution of India challenging the attempt to reopen assessment and the Revenue had contended that for Assessment Year 1949-50 the appellate authority had given a finding that income was chargeable to tax for Assessment Year 1948-49. The Supreme Court did not accept this version and on the basis that it was not necessary for disposal of the appeal in respect of Assessment Year 1949-50.

21. The facts being almost identical in the present case, we are of the view that there is no justification in issuing the impugned notice and the power of issuance of such notice would not arise by virtue of Section 150(1) read with Explanation 2 of Section 153 of the Act. In the circumstances, we find that the petitioner is entitled to the relief claimed in the petition. We therefore pass the following order:-

- (i) Rule is made absolute in terms of prayer clause (a).
- (ii) No order as to costs.

(A. K. MENON, J.)

(M.S. SANKLECHA, J.)