

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

WP 346 of 2015

RANGLAL BAGARIA HUF

-Versus-

ASSISTANT COMMISSIONER OF INCOME TAX AND OTHERS

And

WP 347 of 2015

SUDERSHAN PRASAD BAGARIA

-Versus-

ASSISTANT COMMISSIONER OF INCOME TAX AND OTHERS

For the Petitioners: Mr R. N. Bajoria, Sr Adv.,
Mr J. P. Khaitan, Sr Adv.,
Mr Akhilesh Gupta, Adv.,
Mr Deepak Jain, Adv.

For the Respondents: Mr S. B. Saraf, Adv.,
Mr Prithu Dudhoria, Adv.

Hearing concluded on: April 28, 2016.

BEFORE

SANJIB BANERJEE, Judge

Date: May 4, 2016.

SANJIB BANERJEE, J. : –

These two petitions pertain to notices issued under Section 148 of the Income Tax Act, 1961 for reassessment under Section 147 thereof in respect of assessment year 2007-08.

2. There is no dispute that the first proviso to Section 147 of the Act applies. In the case of the petitioning assessee in the first matter, the proposed reassessment would be a second reassessment. In respect of the petitioner in the second matter, the proposed reassessment would be in addition to the scrutiny assessment undertaken earlier. The facts pertaining to the first petition are referred to in this judgment since the facts are common in the sense that the matter pertains to the sale of an immovable property jointly owned by these petitioners with some others.
3. In the computation of total income for year ended March 31, 2007, the first petitioner filed the return claiming long term capital gain on the sale of a New Delhi property at 3, Tilak Marg. The sale consideration of such petitioner's one-fourth share in the property was indicated as Rs.21,56,25,000/-. After deducting the legal fees and brokerage involved in the sale, the net consideration was shown as Rs.21,14,14,419/-. The cost of acquisition of the property as at April 1, 1981 was claimed as per the valuer's report appended to the return at Rs.11.91 crore and the petitioner's one-fourth share was said to be Rs.2,97,75,000/-. The indexed cost of the property at the time of the sale was shown to be Rs.15,45,32,250/- and the net gain to such petitioner was indicated as Rs.5,68,82,169/-. The petitioners also claimed the benefit under Section 54EC of the Act by investing in REC bonds of value of Rs.50 lakh. Finally, both petitioners claimed to have invested in residential houses of value in excess of Rs.6 crore, such that the net capital gain from the sale of the immovable property was covered by the investment made in the REC bonds under Section 54EC of the Act and in the investment in another residential house under Section 54 thereof.

4. The common valuation report in respect of the New Delhi property indicated the valuation of the land at the government recommended rate of Rs.2000/- per square metre at Rs.1,69,96,660/- as at April 1, 1981. On the basis of the 1981 value of the land, the approved valuer reckoned that the “fair market value of the property including land and building” was Rs.11.91 crore as at the date of the report on September 16, 2006.
5. In the case of the petitioner in the first matter, a notice dated August 13, 2008 was issued under Section 148 of the Act for reassessment of the income in assessment year 2007-08. Upon such petitioner seeking the recorded reasons for reopening the assessment already made, the department furnished the following reasons under cover of a letter dated October 23, 2009:

“The assessee claimed to have invested in new assets and claimed deductions U/s.54EC and U/s.54F (*sic*, S.54) for Rs.5,68,82,169/-. In the Balance Sheet Rs.17,15,539.94 was found to be invested in Fixed asset and Rs.19,22,51,167.88 was found to be invested in Government & Others securities. It is not clear in what asset the assessee invested the Capital Gain. Further no interest from Govt. Securities is found to be included in the total income.

“In the circumstances, it appears that the return does not reflect the true state of affairs of the assessee's investment and income.

“I have, thus, the reason to believe that income chargeable to tax escapes assessment.”

6. The petitioner in the first matter responded to the reasons by a letter dated November 9, 2009 wherein such petitioner indicated that the Tilak Marg property was sold by a deed executed on December 21, 2006 for Rs.86,25,00,000/- out of which such petitioner's share came to be Rs.21,56,25,000/- as indicated in the return. A copy of the relevant sale deed was forwarded to the department. The petitioner in the first matter also informed the department that the property had been acquired on July

23, 1948 at a cost of Rs.2 lakh and the transfer expenses thereon. The purchase deed of July 23, 1948 was also forwarded to the department. Such petitioner asserted that the indexed cost of the property as at April 1, 1981 was Rs.11.91 crore. Such petitioner informed the department that the New Delhi property was sold to Oswal Chemicals and Fertilizers Limited and furnished the particulars of such purchaser, including its permanent account number. The petitioner in the first matter also forwarded a copy of the REC bond of value of Rs.50 lakh in respect whereof deduction had been claimed under Section 54EC of the Act. In connection with the deduction claimed under Section 54F of the Act, the said petitioner forwarded a photocopy of the capital gain deposit account opened by him at Indian Bank, Strand Road Branch and a photocopy of the purchase deed in respect of the new residential property acquired at 18G Alipore Road, Kolkata.

7. In connection with the first reassessment exercise pertaining to assessment year 2007-08, further information was sought by the department from the first petitioner under Section 131 of the Act. Such petitioner filed a detailed reply on December 16, 2009 wherein it was stated that such petitioner, along with the other co-owners of the New Delhi property, entered into an agreement on August 14, 2006 with Oswal Chemicals “for sale of their perpetual leasehold right in the property” at a consideration of Rs.86.25 crore; that at the time of such agreement 90 per cent of the agreed consideration was received by each of the co-owners in proportion to their shares in the property; that the agreement permitted the buyer to take steps for conversion of the leasehold rights to freehold rights in the names of the vendors; and, the conversion was effected on November 13, 2006 upon a public notice being issued by the government. The said petitioner also explained that since the share in the property came to the petitioner upon a family partition, it was not shown in any balance sheet, though it was disclosed in the wealth tax returns.

8. Despite the previous reassessment exercise qua the petitioner in the first matter being completed in the year 2009, the petitioner received the impugned notice under Section 148 of the Act dated March 28, 2014 for reassessment of the petitioner's income in assessment year 2007-08 as the concerned Assessment Commissioner believed that the income for the relevant period had escaped assessment within the meaning of Section 147 of the Act. At such petitioner's request, the reasons recorded under Section 148 of the Act were forwarded to the assessee under cover of a letter of May 21, 2014.
9. Clause (a) of the reasons noticed that the assessee had claimed to have sold the land and building, but the assessee had actually sold only the leasehold rights in respect of the relevant property. The entirety of the deed of conveyance of December 21, 2006 was set out under clause (a) of the reasons. In clause (b), it was observed that no cost was indicated by the assessee for the original acquisition of the property in 1948. Clause (c) contended that since the co-sharers only owned leasehold rights to the property, the claim to sell the ownership rights amounted to the failure to disclose material facts necessary for the assessment. Clause (d) referred to the valuation of the property as at April 1, 1981 being taken at seven times the valuation of the land as per the prevailing government rates. A further limb of clause (d) claimed that the possession of the property was with the Delhi Government and the fair market value of the property had been overstated since it was "a case of sale of rights in leasehold property." The same clause concluded that "an income of Rs.15,45,32,250/- claimed by the assessee and allowed by the assessing officer as indexed cost of acquisition of property has escaped assessment on account of failure of the assessee to disclose truly and fully all the material facts necessary for the computation."

10. Clause (e) of the recorded reasons asserted that the relevant assessee and the other co-owners had received a total amount of Rs.23.79 crore as damages for fair rent, which had been claimed as being exempt to tax as it was not in the nature of a revenue receipt. The officer reasoned that such amount should have been deducted from the cost of acquisition of the property. In clause (f) of the recorded reasons, the officer claimed that the assessee “never disclosed that the possession of the property was with him till the date of sale.” The officer alleged that since the assessee was not in possession of the property, such assessee could not take any advantage under Section 23 of the Act for the annual valuation of such property to be taken as nil. The officer then proceeded to indicate the annual valuation of the Tilak Marg property and alleged that an income in excess of Rs.1 crore had escaped assessment on such count. In final clause (g) of the recorded reasons, the officer opined that the deduction under Section 54 of the Act had been wrongfully claimed and obtained by the assessee since “it is a case of sale of leasehold rights and not sale of house property”.
11. The concerned officer summed up the reasons by recording that an income of Rs.23,19,95,033/- had “escaped assessment on account of failure of the assessee to disclose truly and fully all the material facts necessary for the computation of income” in the relevant assessment year.
12. The petitioners and the department have referred to various provisions of the Act, particularly pertaining to capital gains. The parties have also referred to several judgments, some dealing with Section 147 of the Act as applicable in the present matters and others dealing with the essence of the provision in its previous form. The principal contention of the petitioners is that under the first proviso to Section 147 of the Act there is a pre-condition to any action being taken for reassessment. The petitioners assert that it is a jurisdictional requirement to comply with the pre-condition before making any reassessment. The expression “failure on the

part of the assessee ... to disclose fully and truly all material facts necessary for his assessment, for that assessment year” implies, according to the petitioners, that it is incumbent on the department to comply with such jurisdictional pre-condition in either of the following manners: to demonstrate that a fact which would have had a material bearing on the assessment had not been disclosed by the assessee prior to the previous assessment; or, that any false or misleading information had been furnished by the assessee in course of the assessment to materially affect the same.

13. The petitioners first refer to the celebrated case of *Calcutta Discount Company Limited v. Income-tax Officer* reported at (1961) 41 ITR 191 where the majority opinion rendered on the comparable Section 34 of the Act of 1922 was that the court could investigate into the existence of the twin pre-conditions that are required to be met by such provision. Though the judgment is instructive as to what would amount to material non-disclosure, the language of the present provision is substantially different from that in the predecessor statute.
14. In the next judgment cited by the petitioners, reported at (1975) 100 ITR 1 (*Gemini Leather Stores v. I.T.O., B-Ward, Agra*), the Supreme Court found that the dictum in *Calcutta Discount Company Limited* was applicable to the corresponding provision in the present Act and the essence of the majority view therein would govern the tests under the provision as it stood at the time of the judgment. Though Section 147 of the Act has since been amended, the tests may still be as recognised in the report:

"In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assessing authority has to draw inferences as regards certain other facts; and ultimately from

the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences ... Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessee - to tell the assessing authority what inferences, whether of facts or law, should be drawn."

15. A more recent judgment, reported at (2010) 320 ITR 561 (*Commissioner of Income-tax v. Kelvinator of India Limited*), has also been carried by the petitioners for the purport of the expression "reason to believe" which cannot be construed as mere change of opinion or a power of review. The judgment emphasises that there must be "tangible material" to come to the conclusion that there is an escapement of income from assessment and the reasons must have a link with the formation of the belief.
16. The petitioners have also referred to the judgments reported at (2015) 370 ITR 154 (*Business India v. Joint Commissioner of Income-Tax*), (2004) 268 ITR 332 (*Hindustan Lever Limited v. R. B. Wadkar*) and (2015) 372 ITR 421 (*Asiatic Oxygen Limited v. Deputy Commissioner of Income-Tax*) for the proposition that the reasons recorded under Section 148 of the Act cannot be improved upon in a subsequent affidavit or oral submission. Such proposition is not questioned by the department.
17. Finally, the petitioners have placed a Supreme Court judgment reported at (2003) 259 ITR 19 (*GKN Driveshafts (India) Limited v. Income Tax Officer*) where it was held that where a notice under Section 148 of the Act is received in connection with any proposed reassessment, the noticee may seek the reasons for issuing such notice, whereupon the assessing officer is bound to furnish the reasons within a reasonable time. It was also held that on the receipt of the reasons, "the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order."

18. The petitioners submit that the post-objection speaking order cannot improve on the recorded reasons and the object of the Supreme Court dictum in affording the noticee the right to object to the reasons is to bring to the notice of the assessing officer that there may be no reason to believe that any income had escaped assessment; or in a case where the first proviso to Section 147 of the Act applies, to question the belief of the assessing officer if the recorded reasons do not reveal that the assessee had failed to disclose fully and truly all material facts necessary for his assessment for the relevant assessment year.
19. The department contends that once the recorded reasons allege that some material facts relevant for the assessment may not have been disclosed or that an erroneous impression on facts may have been given, the court will not interfere with the process in this extraordinary jurisdiction and leave the reassessment to be completed. The department submits that since the order of reassessment is amenable to an appeal or revision, the perceived wrong can be redressed at such stage. The department refers to the recorded reasons and says that sufficient indication has been given therein that material facts may not have been disclosed or a false impression as to the state of facts may have been given.
20. The department emphasises on two aspects of the matter: that the valuation of the property was erroneous and that material facts pertaining to the property had not been disclosed in the relevant return or in course of the previous reassessment or scrutiny. The department reads the reasons to question the basis of the valuation report relied upon by the petitioners and contends that the recorded reasons indicate both the indexed cost of acquisition and the sale price to be flawed. In addition, the department says that the recorded reasons make out that the petitioners may not have

been in possession of the New Delhi property to be entitled to claim such property to be their residential house.

21. The department refers to a judgment reported at (1993) 203 ITR 456 (*Phool Chand Bajrang Lal v. Income-Tax Officer*) to rely on the reading of the scope of Section 147 of the Act by the Supreme Court therein. The appellant before the Supreme Court claimed that it had borrowed a sum of Rs.50,000/- from a Calcutta company in assessment year 1963-64. The loan was said to have been received in cash and it was repaid subsequently in 1968. In course of the assessment, the appellant firm was called upon to produce a copy of the accounts of the Calcutta company to support the loan transaction. The firm produced a confirmatory letter from the relevant company. The assessments for the assessment years 1963-64 to 1968-69 were completed by accepting the genuineness of the loan and allowing the deduction on account of interest. Subsequently, the jurisdictional ITO assessing the Calcutta company informed the ITO exercising jurisdiction over the appellant firm that the managing director of the Calcutta company had made a confession to the effect that the Calcutta company was only a name-lender and that it had never advanced any loans to any person; and that such statement was accepted in completing the assessment of the Calcutta company for the assessment years 1962-63 to 1964-65. It was this subsequent discovery of the stand taken by the Calcutta company that prompted a notice for reassessment to be issued to the appellant firm.
22. It was in such context that the Supreme Court observed at as follows at page 478 of the report:

“... One of the purposes of section 147 appears to us to be to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing". It would be a travesty of justice to allow the assessee that latitude.”

23. In the next judgment brought by the department, reported at (1996) 9 SCC 534 (*Srikrishna Private Limited v. I.T.O., Calcutta*), investigations conducted by the department revealed that the assessee had relied on bogus hundi loans and the like. It was recorded as such in the reasons penned under Section 148 of the Act. It was in such factual background that the Supreme Court observed that it was the obligation of the assessee to disclose the material facts - or what are called primary facts - and such disclosure must necessarily be true and complete.
24. The department has also placed a judgment reported at (2014) 366 ITR 453 (*Joint Commissioner v. Kalanithi Maran*) where a Division Bench of the Madras High Court set aside an order quashing a notice for reassessment. However, it is evident from paragraph 21 of the report that the assessee in that case had “only questioned the correctness or otherwise of the notices issued under section 148 of the Act, the reassessment orders passed and the consequential demand notices issued thereon.” It is evident that what weighed with the appellate court was that the notice under Section 148 of the Act was challenged after the reassessment was completed.
25. The authorities carried by the parties instruct that where the first proviso to Section 147 of the Act applies, the reason to believe that any income had escaped assessment in the relevant assessment year must be founded on the failure on the part of the assessee to disclose all primary facts relevant for the assessment at the time thereof upon the discovery of some additional facts that may have materially affected the assessment or upon the discovery of any false statement or impression having been given at the time of the assessment which had a material bearing thereon.
26. When a notice under Section 148 of the Act pertaining to a proposed reassessment is challenged in this jurisdiction, the court may assess the propriety thereof by looking at the reasons recorded therefor. If the reasons

do not indicate that any material fact relevant for the assessment had been suppressed or that any false assertion on the part of the assessee in respect of the facts relevant for the assessment had been discovered, a reassessment on the relevant ground cannot be undertaken.

27. It is, thus, left to ascertain whether the reasons recorded by the relevant officer, as forwarded under cover of the letter dated May 21, 2014, make out that any material fact relevant for the assessment had been suppressed or that any false assertion had been made or false impression given that had any material bearing on the previous assessment.
28. Clause (a) of the recorded reasons do not make out any actionable ground. It is evident that the petitioners had asserted that they had sold their ownership rights in the New Delhi property, which was accepted by the relevant assessing officer and certain benefits were permitted to the petitioners on such basis. The deed of sale was available with the department and it was evident therefrom that the ownership rights were transferred by the petitioners and not merely their leasehold rights, since the leasehold rights in the property had been converted to ownership rights between the agreement for sale and the deed of conveyance. Clause (c) of the recorded reasons covers the same ground and, thus, cannot be seen to be making out any allegation of non-disclosure of any material fact or false disclosure of any relevant fact.
29. Clauses (b) and (d) of the recorded reasons refer to the valuation of the property. For the purpose of the valuation of the property, including its cost of acquisition, the petitioners had relied on the report of a licensed valuer. A valuation report is, loosely speaking, an opinion based on the facts narrated in support of such opinion. The entirety of the valuation report was before the department in course of the previous reassessment or scrutiny assessment and the relevant assessing officer accepted the same. The present attempt to question the valuation report amounts to a change

of opinion or a review of the assessment, which is impermissible. The assessee had disclosed all facts and the basis for the valuation. That was accepted by the department. That is not a matter which can be reopened by claiming that there was a mistake in the valuation report.

30. In clause (e) of the recorded reasons, the officer claimed that the amount received on account of rent or occupation charges ought to have been taken into account for assessing the cost or sale price of the New Delhi property. It is evident that the government was in possession of the property for a considerable period without paying any occupation charges therefor. In the arbitration proceedings instituted by the petitioners and other co-sharers (they were then all co-lessees in respect of the property but co-lessors qua the occupant) an award was made for payment of damages on account of rent or occupation charges. It is nobody's case that such amount was received in the relevant assessment year; at least that is not asserted in the recorded reasons. Further, in the context of what should be the consideration for the sale of a property or the assessment of any capital gain thereon, the occupation charges received is not a relevant factor and the omission to mention the same cannot be seen to be any failure to disclose any material fact pertaining to the relevant assessment. Indeed, it is such amount as was collectively awarded to the petitioners and the co-sharers by the arbitral award that may be the root cause for the issuance of the notice under Section 148 of the Act. Since the receipt of such sum may have been in an assessment year other than the assessment year for which it was due, the petitioners claimed the share of the money received on such account as a capital receipt and not a revenue receipt. The department has rejected such contention and a revision is pending on such score. However, such aspect of the matter has no nexus either with the valuation of the property or with the relevant assessment.

31. Clause (f) for the recorded reasons is, again, on the basis of the petitioners allegedly not disclosing that the possession of the property was with the petitioners at the date of the sale. Such assertion is demonstrably wrong since the information furnished pursuant to queries made in course of the previous reassessment covered such matter. Finally in clause (g) of the recorded reasons, the officer perceived that the deduction claimed under Section 54 of the Act was wrongful on the ground that it was a sale of the leasehold rights in a property and not a sale of a house property. As noticed above, the leasehold rights had been converted to ownership rights prior to the sale deed being executed and such fact was known to the department in course of the previous reassessment and scrutiny assessment. In any event, when the deduction was allowed, the assessing officer is deemed to have taken such matter into consideration and any reassessment on such score would amount to a change of opinion or review which is impermissible.
32. For the reasons as above, the recorded reasons for seeking to reassess the petitioners' income for the relevant assessment year cannot be said to disclose any material that would amount to the failure of either petitioner to truly or fully disclose the primary facts pertaining to the transaction relating to the New Delhi property. The decision to issue the impugned notices under Section 148 of the Act appears to be a counter-blast to the petitioners' contention that the damages received in assessment year 2009-10 could not be regarded as a revenue receipt. The relevant notices under Section 148 of the Act seeking to reassess the petitioners' incomes for assessment year 2007-08 stand set aside as there is no basis disclosed in the recorded reasons for the relevant official to have any reason to believe that any income had escaped assessment.
33. There will be no order as to costs.

34. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Sanjib Banerjee, J.)