

**HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.13605 of 2015 (O&M)

Date of Decision: 22.03.2016

Sumit Passi

... Petitioner

VS.

Assistant Commissioner of Income Tax

... Respondent

CORAM: HON'BLE MR.JUSTICE SURYA KANT

HON'BLE MR.JUSTICE P.B. BAJANTHRI

1. Whether Reporters of local papers may be allowed to see the judgment? yes

2. To be referred to the Reporters or not? yes

3. Whether the judgment should be reported in the Digest? yes

Present: Mr. Akshay Bhan, Senior Advocate with
Mr. Alok Mittal, Advocate for the petitioner

Ms. Urvashi Dhugga, Advocate for the respondent

Surya Kant, J.

(1) This order shall dispose of CWP Nos.13605, 13607, 13609, 13618, 13624, 13641, 13645, 13666, 13667, 13668, 13683 of 2015 as not only an identical question of law is involved but the parties are also the same and the impugned notices/orders too are similarly-worded except for the Assessment Years.

(2) The petitioners (Sumit Passi and Sachit Passi, sons of Vijay Passi, the Assessee) are owners of plot No.125, Industrial Area-I, Chandigarh. They are also partners in the firm – M/s Krishna Automobiles having 50% of the share each.

(3) The petitioners were served with notices under Section 148 of the Income Tax Act, 1961 (in short, 'the Act') as the Assessing Authority had reasons to believe that their income

chargeable to tax for the Assessment Years 2005-06 to 2013-14 escaped assessment within the meaning of Section 147 of the Act. Their objections to the re-opening of assessment have also been turned down. The notices as well as the orders disposing of their objections in respect of each Assessment Year are under challenge in this bunch of writ petitions. The facts are being extracted from CWP No.13605 of 2015. The Revenue has filed its reply in CWP Nos.13609 & 13667 of 2015 which have been adopted in the connected cases as well.

(4) The facts may be briefly noticed. The Assessee entered into a lease agreement (P1) in respect of their industrial plot with the firm M/s Krishna Automobiles (the lessee) w.e.f. 01st April, 2005. The lessee agreed to pay a monthly rent of ₹1.50 lacs. The rent was payable to both the brothers in the ratio of 50:50. The agreed lease period was that of 15 years commencing from 01st April, 2005 with the stipulation of 5% annual increase in the monthly rent.

(5) Some of the other salient terms and conditions agreed to between the lessee and the lessors are as follows:-

“4.2 The Lessee is fully authorized to construct the building to suit their own requirements, subject to the same complying with the prevailing bye laws. The Lessee shall have full ownership/control of the said building throughout the lease period.

5.2 The Lessee will obtain all requisite clearances & permissions and land use charges

for setting up its BUSINESS as described above and pay all the charges/levies/taxes/fees as required by the concerned authorities.

5.4 On completion of the lease period, the Lessee shall hand over to the Lessors the building built on the said premises in good condition without any defects/ damages/ leakages/ or any other areas requiring repairs.

5.5 The Lessee shall hand over quite and vacant possession of the land & building to the Lessors with no charges what so ever at the end of the lease period after paying all outstanding bills/taxes/fee/levies/bills/dues to the authorities and shall hand over a no due certificate on the date of the end of the lease period from the municipal corporation, Chandigarh, Estate office, Electricity Department, Water Department etc.”

(6) The Chandigarh Administration vide notification dated 19th September, 2005 notified the Scheme known as “Chandigarh Conversion of Land Use of Industrial Sites into Commercial Activity/Services in Industrial Area, Phase-I/Phase-II, Chandigarh Scheme-2005”, thereby permitting to carry out commercial activities in the industrial plots after payment of conversion fee in the manner as prescribed under the Scheme.

(7) The Assessee applied on 15th September, 2006 as the owners of above-stated industrial plot for the conversion of land use for commercial activities along with a sum of ₹96,24,996/- payable along with the application. The competent authority

accorded the permission and the industrial plot was permitted to be used for commercial activities subject to payment of balance amount of ₹8,66,24,964/- to the Chandigarh Housing Board which the Assesseees agreed to pay in 9 annual instalments of ₹1,40,11,415/- each with interest @ 8.25% per year. The last instalment was payable on or before 15th September, 2015.

(8) The Assesseees-cum-owners paid all the instalments but factually the payment was made by M/s Krishna Automobiles – the lessee.

(9) M/s Krishna Automobiles treated the payment of conversion charges as revenue in nature in its books and has claimed these as expenses under Section 37 of the Act.

(10) The Assessing Authority served the petitioner(s) with Section 148 notices dated 07.01.2015 with a reason to believe that the income of the petitioner(s) chargeable to tax for the Assessment Year 2005-06 (onwards) escaped assessment within the meaning of Section 147 of the Act and thus it was proposed to assess/re-assess the income for those Assessment Years and the petitioner(s) were asked to deliver return(s) in the prescribed form of their income for the said Assessment Year within a period of 30 days.

(11) The petitioner(s) sought a copy of the reasons recorded for the assessment/re-assessment of his/their income which was duly supplied (P5). These reasons are to the following effect:-

“1.3 At the time of leasing out of the above said property, the nature of land was industrial and as per agreement, the rent was agreed at Rs.1,50,000/- per month with an increase of 5% every year. However, with the grant of change of land use, the property has acquired commercial nature, therefore, the property has increased its value many fold. Consequently, the rent attributable to the property should have been increased. However, the owners of the property who are also the partners in the firm M/s Krishna Automobiles have made payments of change of land use to the Chandigarh Housing Board directly through the firm M/s Krishna Automobiles.

Although, the payment has directly been made by M/s Krishna Automobiles to Chandigarh Housing Board instead of routing through the accounts of Sh. Sumit Passi and Sh. Sachit Passi, it has been made for conversion of land use and is thus, on behalf of the owners of the land.

Therefore, the whole transaction can be understood as a short-cut to the process of M/s Krishna Automobiles making payment to partners who further make the payment to Chandigarh Housing Board. In other words, the amount paid by M/s Krishna Automobiles to Chandigarh Administration is constructive receipt towards rent in the hands of the owners of the land.

1.4 The plot when leased was having industrial character. The change of land use has changed its character to commercial w.e.f. 09.11.2006.

Therefore, the rental value of land has increased many fold. This has been received by the partners as constructive receipt towards rent as a consequence of payments made by the firm to Chandigarh Housing Board. The actual annual rent is, thus, the sum total of the rent as per agreement plus the amount of constructive receipt towards rent paid by the firm M/s Krishna Automobiles by way of payment to Chandigarh Housing Board on behalf of the owners of the land.”

(12) The Assessing Officer thus concluded that as against the rental income of ₹9 lac shown by the Assessee, say in the Assessment Year 2010-11, his actual rent receipt was ₹80,99,663/-.

(13) The petitioner(s) filed objections, questioning the jurisdiction under Section 147 and further relied upon Clauses 3.8 and 4.4 of the Lease Agreement whereunder the lessee had agreed to pay all duties, levies, fee or charges relating to the land and building. The Assessee(s) also relied upon Section 56 of the Act to submit that only the income actually received from leasing of land is taxable as the real income alone could be brought to tax and not any notional/unrealizable or uncertain amount. It was also claimed that there were no reasons to believe that any income chargeable to tax had escaped assessment. An elaborate reference to the case law was also made.

(14) The Assessing Officer has turned down the objections vide order dated 5th June, 2015 (P7) observing that the application

for change in land use could be made only by the owner of the land who gets the ultimate benefit through an increase in the value of the land for all times to come. The application for change in land use was actually made by the petitioner-owners. The conversion charges paid by the lessee (M/s Krishna Automobiles) were therefore on behalf of the owners of the land. It further concluded that:-

*“The issue in the case of the assessee is not regarding a notional/unrealized or uncertain income. The issue is regarding an expense (payment for change in land use) which was to be borne by the assessee (the 50% owner of land and also partner in M/s Krishna Automobiles) but was borne by someone-else (M/s Krishna Automobiles) on his behalf. **The firm, M/s Krishna Automobiles, was paying rent to the assessee for the property in the nature of industrial land. The firm made payment to the Chandigarh Housing Board for the change in land use which resulted in change in the nature of land from industrial to commercial which increased its value manifold. This payment was to be made by the owner of the land, i.e. the assessee, however, it was made by the firm on behalf of the owner. Therefore, the amount paid by M/s Krishna Automobiles to Chandigarh Administration is constructive receipt towards rent in the hands of the assessee.**”*

(15) The respondent-Authority further observed that the conversion charges paid on behalf of the landlord are indeed revenue receipts which are taxable in his/their hands as it is the landlord who is the ultimate beneficiary of the payment of conversion charges paid by the lessee of the leased out land. The order(s) rejecting the objections as also the notices are being assailed in these writ proceedings.

(16) We have heard learned senior counsel for the Assessee(s) and the counsel for Revenue and have gone through the record.

(17) Reiterating their objections to the re-opening of the cases, it was urged on behalf of the Assessee(s) that –

- (i) The conversion charges paid by the lessee firm to the Chandigarh Housing Board cannot constitute the income of its partners;
- (ii) In the absence of any actual receipt of income by the Assessee(s) nothing can notionally/hypothetically be brought to tax in their hands;
- (iii) Even according to the Revenue, the value of the property has increased due to change in the nature of land use from industrial to commercial and, at best, it amounts to an accretion in the value of capital asset of the Assessee(s) which shall get taxed at the time of transfer of the property by the Assessee(s) and thus the Revenue shall also get the due tax thereon;

- (iv) The land prices increase or decrease due to market forces and it can have no bearing on the taxable rental income;
- (v) The conversion charges paid by the lessee (firm) were neither available, directly or indirectly, to the Assessee(s) in any form nor paid on their behalf. The lessee paid the conversion charges in its own business interest as per Clauses 3.8 and 4.4 of the Lease Agreement;
- (vi) There is no provision in the Act for taxing an amount on notional basis as the so-called 'constructive receipt' is alien to the scheme of the Act;
- (vii) The regular assessment of the Firm under Section 143(3) of the Act for the relevant years has been completed and the claim of the firm to treat the payment 'conversion charges' as 'business expenditure' has been allowed for various assessment years. The respondent-authorities were thus aware of such expenses being borne by the Firm.
- (viii) There is no fresh material with the Assessing Officer and all the aspects were duly considered at the time of 'scrutiny assessment' of M/s Krishna Automobiles under Section 143(3) of the Act. The case could not be re-opened on the mere change of opinion of the Assessing Officer;

- (ix) The Assessing Officer must have reasons to believe that the income has escaped assessment and thus both the essential ingredients, namely, 'reason to believe' and 'escapement of income' must co-exist to invoke the powers under Section 147/148 of the Act;
- (x) There is no tangible material to conclude that there was escapement of income from assessment hence 'reasons to believe' cannot be based upon mere suspicion, gossip or rumour;
- (xi) The Revenue could not have allowed an expenditure made on behalf of someone else as a revenue expenditure;
- (18) Learned counsel for the Revenue contrarily urged that:-
- (i) this Court in exercise of writ jurisdiction need not travel into the realm of factual issues which are required to be gone into by the Assessing or other superior authorities;
- (ii) the petitioners have ample opportunity(ies) to prove their plea before the authorities under the Act and cannot seek a pre-emptory order to restrain the authorities from performing their duties under the Statute;
- (iii) the tentative opinion formed by the Assessing Authority is based upon correct appreciation of the law

and facts as there was no binding contract between the lessor(s) and lessee for the latter to pay the conversion of land use charges on behalf of the formers and since such charges have been admittedly paid by the lessee, surely on behalf of the lessors, the said payment is liable to be accounted for towards the enhanced rental value of the leased property;

(19) It goes without saying that after its amendment w.e.f. 01.04.1989, Section 147 of the Act empowers the Assessing Officer to assess or re-assess any income which he has reason to believe that it was chargeable to tax and has escaped assessment. The mandatory twin-test earlier embedded in Section 147 for re-opening of assessment has been dispensed with under the amended provision so as to enable the Assessing Officer to make a back assessment subject to fulfillment of the solitary condition that he has reason(s) to believe that income has escaped assessment.

(20) The Supreme Court in *Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers Private Limited (2008) 14 SCC 208* has very aptly clarified that to confer jurisdiction under Section 147(a) two conditions were required to be satisfied firstly the Assessing Officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i)

omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under Section 148 read with Section 147(a) But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to Section 147. The case at hand is covered by the main provision and not the proviso.

(21) The expression “reason to believe” is an inbuilt safeguard against exercise of arbitrary powers by the Assessing Officer, for the ‘change of opinion’ cannot be the ‘reason to believe’ that any income chargeable to tax has escaped assessment.

(22) The word ‘reason’ in the phrase ‘reason to believe’ would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. [*Ref. Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers Private Limited (2008) 14 SCC 208*]

(23) The first *proviso* to Section 147 is yet another safeguard against the arbitrary exercise of power by the Assessing Officer, according to which when an assessment under sub-Section (3) of Section 143 has been made for the relevant Assessment Year, no action shall be taken under Section 147 after the expiry of four years from the end of the relevant Assessment Year unless an income chargeable to tax escaped assessment by reason of the 'failure on the part of the assessee' to make a return under Section 139 etc. or to 'disclose fully and truly all material facts' necessary for his assessment, for that Assessment Year.

(24) *M/s Phool Chand Bajrang Lal and another v. ITO and another, (1993) 4 SCC 77* has well explained that the purpose and intent of the provisions have to be looked to. One of the purposes of Section 147, appears to ensure that a party cannot get away by willfully 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 travesty of justice to allow the assessee that latitude.

(25) *In Srikrishna Private Ltd. and others vs. ITO Calcutta and others (1996) 9 SCC 534* it was observed that what needs to be emphasised is that the obligation on the assessee to disclose the material facts - or what are called, primary facts - is not a mere disclosure but a disclosure which is full and true. A false disclosure is not a true disclosure. The disclosure must not

only be true but must be full - "fully and truly". A false assertion, or statement, or material fact, thereof, attracts the jurisdiction of the Income Tax Officer under Section 34/147.

(26) There is however a meaningful caveat as lodged in **The Income Tax Officer, I Ward, District VI, Calcutta and others vs. Lakhmani Mewal Das (1976) 3 SCC 757**, namely, that the reason for the formation of the belief must be held in good faith and should not be a mere pretence.

(27) It is an undeniable fact in the case in hand that the returns filed by the petitioner-assesseees during the relevant Assessment Years were processed under Section 143(1) only and unlike in the case of their firm M/s Krishna Automobiles, their returns have not been subjected to scrutiny assessment under Section 143(3) of the Act.

(28) The returns filed by the partnership firm – M/s Krishna Automobiles were admittedly put to scrutiny assessment and it was during the proceedings under Section 143(3) for the Assessment Year 2012-13 in which the ‘conversion charges’ were allowed as ‘Revenue expenditure’ in the hands of the firm that the relevant documents including the lease agreement were statedly perused, which led the Assessing Officer to have reasons to believe that taxable income in the hands of individual partners has escaped assessment.

(29) The petitioners’ forceful contention that even if the conversion of land-use from ‘industrial’ to ‘commercial’ has

increased its value manifold, such increase, at the best, amounts to accretion in the value of their capital asset and it shall get taxed at the time of transfer of their immovable property OR the equally appealing plea of the Revenue that the 'conversion charges' were paid by the lessee to the Chandigarh Administration, without such an obligation for and on behalf of the assessee and such payment is thus constructive receipt towards rent in their hands, are surely debatable and triable issues which deserve to be determined in accordance with the procedure contemplated under Section 143(3) of the Act. The reasons assigned by the Assessing Officer to tentatively believe that taxable income has escaped assessment cannot be brushed aside at the threshold without a fact-finding procedure, more-so when the petitioners are not remediless and have got equally efficacious recourses under the Act.

(30) A somewhat similar dictum is discernible from ***CIT vs. Chhabil Dass Agarwal (2014) 1 SCC 603*** as it holds that the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals).

(31) Having held so, it is not expedient for this Court to express its opinion on the rival submissions as it may unwittingly cause prejudice to either party. Suffice it to say that no case to quash the notice(s) issued under Section 148 read with Section 147 of the Act or the order(s) rejecting the objections, is made out at this premature stage.

(32) For the reasons afore-stated, we decline to interfere in the impugned notices/orders and dismiss the writ petitions but to no order as to costs.

22.03.2015
vishal shonkar



(Surya Kant)
Judge

(P.B. Bajanthri)
Judge

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