

Income Tax Appeal No. 137 of 2015

Dr. Shiva Kant Mishra

Vs.

Commissioner of Income Tax (Central) Kanpur

Hon'ble Tarun Agarwala, J.

Hon'ble Surya Prakash Kesarwani, J.

(Per: Tarun Agarwala,J.)

The appellant is an individual by status and is a Doctor by profession, running a clinic. The appellant alleges that he was filing his return regularly. For the assessment year 2002-03 the appellant filed his return under Section 139 (1) of the Income Tax Act (hereinafter referred to as the “Act”) disclosing an income of Rs.7,20,377/-. In the return the appellant disclosed an income of Rs.35,85,930/- under the head “long term capital gains” arising from sale of shares. In this return, the appellant claimed exemption under Section 54-F on the income shown under the head “long term capital gains” indicating that the amount was invested in the construction of a house.

Before the return could be processed, a search and seizure operation was carried out under Section 132 of the Act at the appellant’s residence and business premises. Based on this search operation, block assessment proceedings under Section 158BC was initiated for the block period commencing from the assessment year 1997-98 till the date of the search, i.e., 14.12.2002. The block assessment proceedings covered

the assessment year 2002-03 in which extensive query on the sale of shares and purchases of shares was inquired and discussed. The assessing authority passed an assessment order dated 28.9.2004 holding that the whole transaction was a sham transaction with regard to the claim of long term capital gains and that it was merely an entry for claiming false exemption under Section 54-F of the Act. The assessing officer, accordingly, held that the amount of Rs.36,60,072/- was undisclosed income and added the same to the income of the assessee for the assessment year 2002-03. Aggrieved by the block assessment order dated 28.9.2004 the appellant filed an appeal, which was allowed by an order dated 28.4.2006. The appellate authority held that the amount of Rs.36,60,072/- could not be added as an undisclosed income of the assessee as it was not based on the material seized during the course of search and seizure operation under Section 132 of the Act and, therefore, the said amount was liable to be deleted. The revenue, being aggrieved by the appellate order dated 28.4.2006, preferred an appeal which was dismissed by the Tribunal by an order dated 23.5.2008. The Department did not pursue the matter thereafter before the higher forum and, consequently, the order passed by the Tribunal attained finality.

After the completion of the block assessment order dated 28.9.2004 the assessing officer issued a notice dated 30.3.2005 under Section 148 of the Act reopening the assessment proceedings for the assessment year 2002-03 on the sole ground that the assessee received an amount of Rs.1,65,000/-

from M/s Shivani Hospital Private Limited, which was liable to be assessed in the hands of the appellant as deemed dividend under Section 2(22)(e) of the Act. Based on the aforesaid notice issued under Section 148 of the Act reassessment, an order under Section 147 of the Act was passed on 27.3.2006. In this reassessment order, the assessing officer made the additional dividend of Rs.1,65,000/- under the head “deemed dividend” on the account of advance received from M/s Shivani Hospitals Private Limited. The assessing officer further added an amount of Rs.36,60,072/- on account of the sale of shares. While adding the said amount, the assessing officer in its order held that this issue with regard to the long term capital gains was examined in detail in the block assessment order where an addition of Rs.36,60,072/- was made. However, in order to protect the interest of the revenue, this addition of Rs.36,60,072/- was again being made on a “protective basis”.

Being aggrieved by the re-assessment order under Section 147 of the Act, the assessee preferred an appeal, which was allowed by the appellate authority by its order dated 30.4.2012. The appellate authority held that the addition of Rs.36,60,072/- which was treated as income from other sources was beyond the purview of re-assessment proceeding under Section 147 of the Act as all the facts relating to the transaction of shares were already in the knowledge of the assessing officer even before initiation of the proceedings under Section 147 of the Act by issuance of notice under Section 148 of the Act on 30.3.2005.

Aggrieved by the order of the appellate authority, the revenue preferred an appeal before the Income Tax Appellate Tribunal. The Tribunal by its order dated 23.1.2015 allowed the appeal and set aside the order of the appellate authority and directed the appellate authority to re-decide the matter afresh in the light of the observations made therein. The Tribunal held that once assessment is reopened on a particular issue and addition is made thereon, other issues which surface during the course of assessment proceeding can also be examined and addition could be made accordingly. The Tribunal held, that the assessment was reopened on the issue of deemed dividend and during the course of re-assessment proceeding, the assessing officer had examined the issue on long term capital gains and the claim of exemption under Section 54-F, which was within the permissible jurisdiction of the assessing officer to examine and pass orders. The Tribunal held that there was no infirmity in the action of the assessing officer.

The appellant, being aggrieved by the order of the Tribunal, has filed the present appeal under Section 260-A of the Income Tax Act. The question of law formulated is:-

“Whether the Tribunal was justified in holding that the assessing officer was justified in making the addition on transaction of long term capital gains as income from other sources, on the ground that the said information came to the knowledge of the assessing officer after initiation of proceedings under Section 147 of the Act on 30.3.2005 ?”

We have heard Sri Ashish Bansal, the learned counsel for the appellant and Sri Ashok Kumar, the learned counsel for the appellant.

Since no disputed facts are involved and all the materials have been filed along with the memo of appeal, with the consent of the parties, the appeal is being decided at the admission stage itself.

In order to proceed further, it could be relevant to produce Section 147 and Explanation (3) to Section 147 of the Act. For facility, Section 147 is extracted hereunder:-

"**147.** If the [Assessing] Officer [has reason to believe] that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of section 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in section 148 to 153 referred to as the relevant assessment year) :

Provided

Provided

Provided

Explanation 1.....

Explanation 2.....

Explanation 3. — For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."

Explanation 3 to Section 147 was inserted by Finance Act No.2 of 2009, w.e.f. 1.4.1989. The Central Board of Direct Taxes (CBDT) issued a circular No.5 of 2010 providing an Explanatory Note to the provisions of Finance Act No.2 of 2009 by which Explanation 3 to Section 147 of the Act was inserted w.e.f. 1.4.1989. Relevant paragraph is extracted hereunder:-

“Clarificatory amendment in respect of reassessment proceeding under section 147

The existing provisions of section 147 provides, inter alia, that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may assess or reassess such income after recording reasons for re-opening the assessment. Further, he may also assess or reassess such other income which has escaped assessment and which comes to his notice subsequently in the course of proceedings under this section.

Some courts have held that the Assessing Officer has to restrict the reassessment proceedings only to issues in respect of which the reasons have been recorded for reopening the assessment. He is not empowered to touch upon any other issue for which no reasons have been recorded. The above interpretation is contrary to the legislative intent.

With a view to further clarifying the legislative intent, it is proposed to insert an Explanation in section 147 to provide that the Assessing Officer may assess or reassess income in respect of any issue which comes to his notice subsequently in the course of proceedings under this section, notwithstanding that the reason for such issue has not been included in the reasons recorded under sub-section (2) of section 148.

This amendment will take effect retrospectively from 1st April, 1989 and will, accordingly, apply in relation to assessment year 1989-1990 and subsequent years.”

This clarificatory note was issued because some of the Courts held that the assessing officer had to restrict the reassessment proceedings only to the reasons recorded for

reopening the reassessment proceedings and was not empowered to decide any other issues for which reason had not been recorded. The explanatory note was, therefore, issued in order to clarify the legislative intent, namely, that the assessing officer may assess or re-assess the income in respect of any issue which comes to his notice, subsequently in the course of proceedings under Section 147 of the Act notwithstanding that the reasons for such issue has not been included in the reasons recorded under sub-section (2) of Section 148 of the Act.

Explanation 3 to Section 147 of the Act and the Explanatory Note issued by the CBDT makes it apparently clear that even though the notice that had been issued under Section 148 containing the reason for reopening the assessment does not contain a reference to a particular issue with reference to such income as escaped assessment, the assessing authority may assess or reassess the income in respect of any issue which has escaped assessment when such issue came to his notice, subsequently in the course of proceedings. The words “such issue comes to his notice subsequently in the course of proceedings under this Section” is of importance. The language is clear and there is no ambiguity, namely, that the issue which is being assessed and which has escaped assessment must come to the notice of the assessing officer subsequently in the course of reassessment proceeding under Section 147 of the Act, which in the instant case was lacking. The issue relating to long term capital gains was already declared by the appellant in his returns filed under

Section 139 of the Act. This issue was discussed in detail in the block assessment proceedings by the assessing officer in the assessment order passed under Section 158-BC. This block assessment order under Section 158-BC was passed prior to the issuance of reassessment notice under Section 148 of the Act. Consequently, information regarding long term capital gains was already existing on the file of the assessee and did not come up as an issue for the first time during reassessment proceedings under Section 147 of the Act nor can it be said that such issue came to the knowledge or notice of the assessing authority subsequently in the case of reassessment proceedings. The assessing officer in the reassessment order under Section 147 of the Act has clearly indicated that the matter was discussed and examined in detail in the block assessment order and an addition of Rs.36,60,072/- was made on a protective basis in order to protect the interest of revenue. It is apparently clear, that this issue relating to long term capital gains had not come to the notice of the assessing officer subsequently in the course of reassessment proceeding.

We are of the opinion, that the assessing officer could not have made this addition in reassessment proceeding under the cover of “protective basis”. We are of the opinion that protective assessment could only be made at the stage when there was any doubt or dispute about the assessability of a particular sum either in relation to the assessment year and/or in relation to the assessee.

We are of the opinion that the reason for adding this amount on “protective basis” by the assessing officer could be

on account of the fact that the assessee's appeal against the block assessment order was pending, on the ground, that no material was found at the time of search with regard to the sale of shares. The assessing officer must have become aware that such addition could not have been added in the block assessment proceedings under Section 158-BC of the Act.

Further, we are of the opinion, that the assessing authority could only assess or reassess such income which has escaped assessment. In order to take an action under Section 147 of the Act there must be a reason to believe that such income had escaped assessment which came to his notice subsequently in the course of re-assessment proceedings. In the instant case, we find that the amount which is alleged to have escaped assessment was duly indicated by the assessee in his return under Section 139 of the Act and was also considered in the block assessment order under Section 158-BC. In the block assessment order the assessing authority had assessed this amount on long term capital gains as undisclosed income. The block assessment order was set aside on the ground that such amount was not an undisclosed income which finding was affirmed by the Tribunal. Once the Tribunal has given a categorical finding that the amount was not an undisclosed income, which order has attained finality, the said amount cannot be treated as an escaped income chargeable to tax under Section 147 of the Act. We are also fortified by the aforesaid view by a decision of this Court in **Vishwanath Prasad Ashok Kumar Sarraf vs. Commissioner of Income Tax and others**, 327 ITR 190.

For the reasons stated aforesaid, the appeal is allowed. The order of the Tribunal is set aside. The question of law, as framed aforesaid, is answered in favour of the assessee.

Dated:9.7.2015.
AKJ.

(Surya Prakash Kesarwani, J.) (Tarun Agarwala, J.)