IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved On	Orders Pronounced On
08.07.2020	22.07.2020

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case (Appeal) No.440 of 2018

Principal Commissioner of Income Tax 1
No.63, Race Course Road,
Coimbatore. .. Appellant

-vs-

Shri.K.R.Jayaram .. Respondent

Tax Case (Appeal) filed under Section 260A of the Income Tax Act, 1961, against the order dated 17.10.2017 made in ITA No.1698/Mds/2016 on the file of the Income Tax Appellate Tribunal Madras 'C' Bench, Chennai for the assessment year 2009-10.

For Petitioner : Mr.T.R.Senthil Kumar,
: Sernior Standing Counsel &
: assisted by
Ms.K.G.Usha Rani
Junior Standing Counsel

For Respondent : Mr.Naresh Kumar for
Mr.R.N.Amarnath

JUDGMENT

T.S.Sivagnanam, J.

This Tax Case (Appeal) under Section 260(A) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') has been filed by the Revenue challenging the order dated 17.10.2017 made in ITA No.1698/Mds/2016 on the file of the Income Tax Appellate Tribunal Madras 'C' Bench, Chennai (for brevity 'the Tribunal') for the assessment year 2009-10.

2.The Tax Case (Appeal) was admitted on 24.06.2019 on the following substantial questions of law:-

> "(i) Whether the Tribunal was justified in holding that the reopening of assessment was a result of mere change of opinion, even when there is no opinion formed or expressed by the Assessing Officer on this issue in the original assessment?
>
> (ii) Whether the Tribunal was right in not considering the decision of the Hon'ble Supreme Court wherein reopening of assessment on the basis of information possessed by the Assessing Officer either from external sources or from material on record is legally tenable as held in the case of Kalyanji Mavji & Co., vs. CIT [reported in 102 ITR 286] ? and

(iii) Whether the Tribunal was right in stating that reopening of assessment is bas in law when Section 147 of the Income Tax Act clearly says that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment, the Assessing Officer can assess or re-assess the assessment?"

3.Heard Mr.T.R.Senthil Kumar, learned Senior Standing Counsel assisted by Ms.K.G.Usha Rani, learned Junior Standing Counsel appearing for the appellant/Revenue and Mr.Naresh Kumar, for Mr.R.N.Amarnath, learned counsel appearing for the respondent/assessee.

4.The issue, which falls for consideration, is whether the reopening of the assessment under Section 147 of the Income Tax Act ('The Act' for brevity) is proper and valid.

5.The assessee is an individual engaged in Real-Estate business, filed his return of income for the assessment year 2009-10, declaring the total income of Rs.1,31,99,850/- on 01.07.2009. The Assessing

Officer completed the assessment under Section 143(3) of the Act by making an addition of Rs.23,29,000/- being disallowance of improvement cost of land claimed by the assessee and the assessee had shown the sale of the land under the head of "short term capital gain". Subsequently, the assessment was reopened stating that on verification of the document, i.e., sale deed, it is seen that Section 50C value was fixed at Rs.735.00 Lakhs by the District Revenue Officer exercising powers under the Indian Stamp Act and the correct market value of the property that should have been adopted by the assessee is Rs.367.50 lakhs i.e., 50% of Rs.735 lakhs, as two persons including the assessee had done the business and each of them shared the profit on equal ratio. Therefore, the Assessing Officer proposed that the sale consideration for capital gains computation should have been worked out on the said amount of Rs.367.50 lakhs. Notice under Section 148 of the Act was served on the assessee on 26.03.2014. In response thereof, the assessee filed return on 02.06.2014 showing Rs.1,16,55,725/- as business income as against the earlier classification as "capital gains". The Assessing Officer held that the assessee having filed the return, which was a revised return, that too, only after notice

under Section 148 was issued, the same cannot be accepted. Further, the Assessing Officer held that in the original return, the assessee has shown the amount as "capital gains" and in the return filed in response to the Section 148 notice, the said income was shown by the assessee as "business income", which is not acceptable. Accordingly, the assessment was completed under Section 143(3) read with Section 147 of the Act, by order dated 02.07.2014.

6.The assessee preferred appeal before the Commissioner of Income Tax (Appeals)-2, Coimbatore in ITA No.437/14-15. The appeal was dismissed by order dated 30.03.2016. Aggrieved by the same, the assessee preferred appeal to the Tribunal, which was allowed by order dated 17.10.2017, impugned in this Appeal.

7. Though three substantial questions of law have been framed for consideration, if we take a decision as to whether the reopening was justified, that would be sufficient to answer all the three questions, because all the three substantial questions of law are interlinked and the only issue is whether the reopening of assessment is valid.

8.The learned counsel appearing for the Revenue strenuously contended that the notice under Section 148 was served on the assessee on 26.03.2014, well before the expiry of four years and the observations of the Tribunal that the revision of assessment was based on change of opinion, is an incorrect finding and the question of obtaining fresh tangible material is not necessary when the assessment is reopened within four years. In this regard, the learned counsel referred to Section 147 of the Act and also the three provisos and four explanations contained therein. In support of his contentions, the learned counsel referred to the judgment of the High Court of Gujarat in ***Chunibhai Ranchhodbhai Dalwadi vs. Assistant Commissioner of Income-tax, [2017] 81 Taxmann.com 136 (Gujarat)*** .

9.The learned counsel appearing for the respondent/assessee submitted that the Tribunal has elaborately considered the issue, referred to various decisions and has rightly held that the reopening was bad in law, as it is a clear case of change of opinion. In support of his contention, the learned counsel referred to the decision of this Court in

the case of ***CIT vs. Ashley Services Ltd., (2014) 369 ITR 209 (Madras)***. Further, it is submitted that Section 50C, which is a special provision for full value of consideration in certain cases, was inserted by the Finance Act, 2002 w.e.f., 01.04.2003. In sub-Section (1) of Section 50, the words "or assessable" were inserted by Finance (No.2) Act 2009, w.e.f., 01.10.2009 and the said provision cannot be applied to the case of the assessee, as admittedly, the sale transaction took place on 02.05.2008. Further, a circular has been issued by the CBDT stating that the words "or assessable" which were inserted w.e.f., 01.10.2009, are prospective and this aspect was considered by a Division Bench of this Court in ***CIT vs. R.Sugantha Ravindran, (2013) 352 ITR 488 (Madras)***.

10.We need not labour much to take a decision in the instant case, in the light of the decision of the Delhi High Court in the case of ***CIT vs. Kelvinator India Ltd.,*** reported in ***(2002) 256 ITR 1***, which was affirmed by the Hon'ble Supreme Court in the case of ***CIT vs. Kelvinator India Ltd.,*** reported in ***(2010) 320 ITR 561.*** It was pointed out that a schematic interpretation is to be given to the words

"reason to believe" failing which, Section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of mere change of opinion, which cannot be *per se* reason to reopen.

11.It was pointed out that the Assessing Officer has no power to review; he has power to reassess. The power of reassessment has to be based on fulfilment of certain pre-conditions and if the concept of "change of opinion" is removed, then, in the garb of reopening the assessment, review would take place and the concept of "change of opinion" should be treated as an in-built test to check abuse of power by the Assessing Officer. Thus, it is clear that the words "reason to believe" occurring in Section 147 of the Act as interpreted by the Hon'ble Supreme Court in ***Kelvinator India Ltd.,*** (supra), does not make a distinction in respect of reopening done within four years or beyond four years.

12.The provisos contained in Section 147 of the Act impose conditions when reopening is done beyond four years and matters connected thereof. Thus, the common issue in all cases of reopening is

whether the Assessing Officer had "reason to believe" that income chargeable to tax has escaped assessment. The reason to believe cannot be on a "change of opinion". The assessee is expected to file his return of income along with his books and documents. It is for the Assessing Officer to consider the same in accordance with law and complete the assessment. The assessee is not there to advice the Assessing Officer as to how he should go about in assessing the income of the assessee, as it is the statutory duty of the Assessing Officer. Admittedly, the Sale Deed dated 02.05.2008, is only the document, which is the subject matter of the assessment. This document was very much available with the Assessing Officer when he completed the assessment under Section 143(3), dated 05.12.2011. At that juncture, all that the Assessing Officer was concerned about is the claim made by the assessee as expenses for the improvement of the land by levelling, sand filling, road laying etc.

13.The stand taken by the assessee was disbelieved, as no material evidence was produced by the assessee to substantiate such expenses. Based on the very same document, the assessment was

reopened by serving notice on 26.03.2014, stating that the assessee should have adopted the value of the land as computed by the District Revenue Officer under the Indian Stamp Act for the purposes of computation of the stamp duty payable on such instrument.

14.As rightly pointed out by the learned counsel for the assessee the words "or assessable" stood inserted by Finance (No.2) Act, 2009 w.e.f., 01.10.2009 and this provision has been held to be prospective and this issue was considered by the Hon'ble Division Bench of this Court in the case of ***R.Sugantha Ravindran*** (supra). Therefore, the revenue cannot refer to Section 50C of the Act to non-suit the assessee.

15.In ***Ashley Services Ltd.,*** (supra), the Court on going through the reasons given for reopening of the assessment, held it to be a review of the assessment order under Section 143(3) and even though the assessment was reopened within four years, when there was no fresh material to disturb the reasoning arrived at, reopening of assessment was unsustainable. Therefore, the Tribunal rightly held that there was no material available with the Assessing Officer other than

what was available with him at the first instance, when he completed the assessment under Section 143(3) of the Act, vide order dated 05.12.2011 to come to a conclusion that there were reasons to reopen the assessment.

16.In ***Chunibhai Ranchhodbhai Dalwadi*** (supra), the assessee sold immovable property, vide sale deed dated 19.04.2006 and the sale value as per agreement is Rs.87,71,765/- and registered with the Sub-Registrar on the same date and the stamp duty paid was Rs.11,92,500/-. As per the calculation adopted by the Registration Department, the sale value was determined at Rs.2,12,84,400/- whereas, the agreement shows the consideration as Rs.87,71,765/- only. Therefore, the Assessing Officer in the said case stated that as per provisions of Section 50C, the deemed long-term capital gain is Rs.1,25,14,635/-, which has not been offered for tax by the assessee in the return of income filed for the assessment year 2007-08. Hence, he has reason to believe that the said income has escaped assessment. The Court held that the Assessing Officer never examined the said issue during the original assessment proceedings. Further, noted that

necessary relevant information was not placed by the assessee during the original assessment and therefore, held that the reopening within four years was permissible. This decision relied on by the revenue is clearly distinguishable on facts, as there is no allegation against the assessee before us that he failed to fully and truly disclose all information.

17.That apart, the effect of the CBDT circular was taken note of and considered by this Court in ***R.Sugantha Ravindran*** (supra). At this juncture, it will be beneficial to refer to the operative operation of the said judgment:-

> *"10.Even otherwise, we are of the firm view that the insertion of words "or assessable" by amending Section 50C with effect from 01.10.2009 is neither a clarification nor an explanation to the already existing provision and it is only an inclusion of new class of transactions namely the transfers of properties without or before registration. Before introducing the said amendment, only the transfers of properties where the value adopted or assessed by the stamp valuation authority were subjected to Section 50C application. However after introduction of the words "or assessable" after the words "adopted or assessed", such transfers where the value assessable by the stamp valuation authority are*

also brought into the ambit of Section 50C. Thus such introduction of new set of class of transfer would certainly have the prospective application only and not otherwise. Hence the assessee's transfer admittedly made earlier to such amendment cannot be brought under Section 50C."

18. In the written submissions placed by the learned Senior Standing counsel appearing for the Revenue after reiterating the factual position, the learned counsel relied upon the decision of the High Court of Bombay in the case of ***Export Credit Guarantee Corporation of India Ltd., vs. Additional Commissioner of Income-tax*** reported in ***[2013] 30 taxmann.com 211 (Bombay)*** wherein the Court held that where there is a complete failure on the part of the Assessing Officer to apply his mind during original assessment to points on which assessment is sought to be reopened, it can be said that there is tangible material and reason to believe that income has escaped assessment.

19. The decision in the case of ***Consolidated Photo & Finvest Ltd., vs. ACIT*** reported in ***(2006) 281 ITR 394 (Delhi)***, of the High Court Delhi, was referred to in support of the contention that where the

order of assessment does not address itself to an aspect which is the basis for reopening of the assessment, it is not a case of change of opinion.

20. Reliance was placed on the decision of this Court in ***Smt.A.Sridevi vs. ITO*** reported in ***(2018) 100 Taxmann.com 434, (Mad)***, where reassessment was held to be justified when the assessee had not filed balance sheet or statement of affairs.

21. Relying upon the decision of the High Court of Gujarat in the case of ***Chunibhai Ranchhodbhai Dalwadi vs. ACIT*** reported in ***(2017) 81 Taxmann.com 136 (Gujarat),*** the reopening of the assessment was held to be justified when the sale value of property as determined by the Stamp Duty Authorities was much higher than the declared value by the assessee.

22. Further reliance was placed on the decision of this Court in the case of ***Sword Global India(P) Ltd., vs. ACIT*** reported in ***(2015) 234 Taxman 187 (Madras)***, which is a case where the assessee

wilfully made false or untrue statements at the time of original assessment. In our considered view, the aforementioned decisions are all distinguishable on facts.

23. In the case of ***Export Credit Guarantee Corporation of India Ltd.,*** (supra), the Court came to the conclusion that there was complete failure on the part of the Assessing Officer to apply his mind and therefore, held reopening to be valid. We do not find any such non-application of mind by the Assessing Officer, as the Assessing Officer has considered the affect of the sale deed and there are no other complicated issues in the assessment.

24. The decision in the case of ***Consolidated Photo & Finvest Ltd.,*** (supra) was a case where the assessment order did not address the aspect on which reopening was made. This would arise when there are several issues to be determined by the Assessing Officer, not as in the case of the assessee on hand, where there is a single issue regarding valuation of the property.

25. The decision in the case of ***Smt.A.Sridevi*** (supra) will not apply to the facts of the case on hand, because the assessee in the said case did not produce the relevant documents. In the case of ***Chunibhai Ranchhodbhai Dalwadi*** (supra), the assessee did not declare the long term capital gain in the original return of income nor the Assessing Officer considered the same, whereas in the instant case, the only issue was the claim of cost of improvement against capital gains and there was no other issue. Therefore, the said decision will not assist the case of the Revenue. Equally, the decision in ***Sword Global India(P) Ltd.,*** (supra), would not apply to the facts of the instant case, as there was no allegation against the assessee that he made a false statement.

26. It would be worthwhile to remind ourselves about the decision of the Hon'ble Supreme Court in the case of ***Calcutta Discount Co., Ltd., vs. ITO [1961] 41 ITR 191 (SC)***, wherein the Hon'ble Supreme Court held that the duty of the assessee is to make full and true disclosure of all primary facts and once it is done, it is for the Assessing Authority to decide what inference of fact or law could be drawn there from. The law does not require the assessee to state the conclusion

that could reasonably be drawn from the primary facts and if there were, in fact, some reasonable grounds for thinking that there had been any non-disclosure as regards any primary facts, which could have a material bearing on the question of "under assessment", that would be sufficient to give jurisdiction to the ITO to issue notices under Section 34 (1922 Act) and whether these grounds are adequate or not for arriving at a conclusion that there was a non-disclosure of material facts could not be opened for the Court's investigation.

27. For the above reasons, we find that the Tribunal was right in allowing the assessee's appeal.

28. Accordingly, the appeal filed by the Revenue is dismissed and substantial questions of law are answered against the Revenue and in favour of the Assessee. No costs.

(T.S.S., J.) (V.B.S., J.)
22 .07.2020

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Internet:Yes/No
Index :Yes/No

T.S.Sivagnanam, J.
and
V.Bhavani Subbaroyan, J.

(pbn)

To
Income Tax Appellate Tribunal Madras 'C' Bench, Chennai.

Pre-delivery Judgment made in
Tax Case (Appeal) No.440 of 2018

22.07.2020