IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 30TH DAY OF JUNE, 2022

PRESENT

THE HON'BLE MR. JUSTICE P.S. DINESH KUMAR

AND

THE HON'BLE MR. JUSTICE ANANT RAMANATH HEGDE

I.T.A No.12 OF 2015

BETWEEN :

MR. WILFRED D'SOUZA
PROP: KARNATAKA CASHEW CORPN.
AND M/S. GREAT INDIA FINANCE CORPN.
SOUZA BUILDING, KEMMAI, PUTTUR
DAKSHINA KANNADA
PRESENTLY AT # 903, PLAMA ICON
KULSHEKAR
MANGALURU - 575 005
PAN - ABFPD3142C ... APPELLANT

(BY SHRI. A SHANKAR, SENIOR ADVOCATE FOR
SHRI. M LAVA, ADVOCATE)

AND :

THE INCOME TAX OFFICER
WARD-1, RADHIKA PLAZA
COURT ROAD
PUTTUR – 574 201
(DAKSHINA KANNADA DISTRICT) ... RESPONDENT

(BY SHRI. K.V. ARAVIND, ADVOCATE)

THIS ITA IS FILED UNDER SECTION 260-A OF THE INCOME TAX ACT, 1961 ARISING OUT ARISING OUT OF ORDER DATED 22/08/2014 PASSED IN ITA NO.1418/BANG/2012, FOR THE ASSESSMENT YEAR 2008-09.

PRAYING THIS HON'BLE COURT TO FORMULATE THE SUBSTANTIAL QUESTION OF LAW AS STATED ABOVE AND ANSWER THE SAME IN FAVOUR OF THE APPELLANT AND ETC.

THIS ITA, HAVING BEEN HEARD AND RESERVED FOR JUDGMENT ON 31.05.2022 COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, ***P.S.DINESH KUMAR J,*** PRONOUNCED THE FOLLOWING:-

JUDGMENT

This appeal by the assessee has been admitted to consider the following questions of law:

i) *Whether the Tribunal failed to appreciate that the learned Commissioner of Income Tax (Appeals) has erred in not holding that the mandatory conditions for assuming jurisdiction under Section 148 of the Income Tax Act, 1961 ('Act' for short) were not complied and consequently the reassessment proceedings are bad in law on the facts and circumstances of the case?*

ii) *Whether the Tribunal is justified in law in holding that the capital gains is chargeable to tax for the Assessment Year 2008-09 and not Assessment Year 2009-10 and consequently passing a perverse order on the facts and circumstances of the case?*

iii) *Whether the Tribunal is justified in law in holding that there was a transfer under Section 2(47)(ii) of the Act and there was* *no transfer under Section 2(47)(v) of the Act and consequently passing a perverse order on the facts and circumstances of the case?*

iv) *Whether the Tribunal is justified in not adjudicating the issue of levy of interest under Section 234C of the Act on the facts and circumstances of the case?*

2. Heard Shri. A. Shankar, learned Senior Advocate for the assessee and Shri. K.V. Aravind, learned Standing Counsel for the Revenue.

3. Brief facts of the case are, on February 10, 1996, appellant entered into an agreement to purchase property measuring 34 acres 32 guntas spread over in Padavu village and Kudupu village in Mangaluru Taluk for Rs.One Crore. He paid advance consideration of Rs.78.90 Lakhs between 1995-1996 and 1998-1999. As per the agreement, assessee was required to evict the tenants and take possession of the property. Accordingly, he entered into an agreement with the tenants on November

15, 1996 and took possession by paying of Rs.15 Lakhs. Then, he approached the owners with a request to execute the sale deed and they were postponing the same on some pretext and therefore, he filed O.S. No.100/2004 in the Court of Civil Judge (Sr.Dn.), Mangaluru seeking specific performance of the agreement.

4. One Mr. Rohan Monteiro approached the assessee to purchase the property in question and parties entered into an agreement on September 15, 2005. Under the said agreement, assessee received Rs.One Lakh as advance consideration.

5. In June 2006, the owners of the property sold it to one Mr. Guruswamy by executing several sale deeds. Mr. Rohan Monteiro approached Mr. Guruswamy and arranged the sale of the property to M/s. Mangalore Internet City Pvt. Ltd. Mr. Rohan Monteiro offered a sum of Rs.2,32,00,000/- to the

assessee and requested him to withdraw the cases filed by the appellant. They entered into an MOU[1]. On November 13, 2007, appellant filed a Memo to withdraw all cases before the Civil Court, Mangaluru and another Memo[2] in this Court seeking dismissal of the writ petition[3].

6. On July 16, 2010, respondent issued a notice under Section 148 of the Income Tax Act, 1961 requiring the assessee to file return of income and the assessee filed the returns for A.Y.2008-09 declaring total income as 'NIL'. The Assessing Officer concluded the assessment by determining assessee's total income as Rs.77,24,173/-. Assessee challenged the said order before the CIT (Appeals) and the same was dismissed. Assessee's

[1] Memorandum of Understanding dated 01.10.2007
[2] Dated 20.11.2007 and 11.02.2008
[3] W.P. No.2476/2006

further appeal before the ITAT[4] was also dismissed. Hence, this appeal.

7. Shri. Shankar, for the assessee submitted that:

- the assessee had made a request to the Assessing Officer to provide a copy of the reasons recorded before issuing the notice under Section 148 of the Act. Assessing Officer replied[5], that assessee had received a sum of Rs.30,00,000/- from Mr.Rohan Monteiro, but he had not filed the return of income. Except that, the Assessing Officer has not recorded his satisfaction as regards the nature of income and the taxability thereof. Thus, the Assessing Officer did not have any 'reason to believe', but had only 'reason to suspect';

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[4] Income Tax Appellate Tribunal
[5] Vide communication dated October 30, 2012

- Section 147 of the Act requires that the Assessing Officer should have 'reason to believe' and such belief should not be a product of imagination and speculation;
- The Assessing Officer, the First Appellate Authority and the ITAT have erred in holding that the Assessing Officer had 'reasons to believe' that the income had escaped assessment;
- The ITAT has failed to appreciate that the actual date of withdrawal of the suits was not forthcoming in the MOU and therefore, the notice is based on suspicion, assumption and surmise;
- That reopening of assessment based on suspicion and in the absence of 'reasons to believe', is unsustainable in law;
- That receipt of any amount is a transaction and not income. The transaction was

completed upon receipt of the balance sum of Rs.One Crore, on April 30, 2008;

- Assessee has filed his returns for the A.Y.2008-09 and made a true disclosure of the entire transaction.

8. In substance, Shri. Shankar submitted that, to reopen an assessment, the notice must contain 'reasons to believe' and the notice issued in this case is bereft of any reasons and therefore, the entire proceedings are vitiated.

9. Shri. K.V. Aravind, for the Revenue, submitted that:

- the MOU dated October 1, 2007 clearly shows that assessee had received Rs.30 Lakhs. Therefore, assessee had an income of Rs.30 Lakhs in the A.Y.2007-08. Assessee had not filed returns for the said year. Therefore, the Assessing Officer did rightly issue the notice and also communicated the reasons sought by the assessee;

- 'Transfer' defined in Section 1(38) of IT Act includes extinguishment of right. With the receipt of Rs.30 Lakhs, assessee's right had stood extinguished;
- Having received a huge sum of Rs.30 Lakhs, assessee was duty bound to file his return, which he had failed to do so.

10. In substance, Shri. Aravind's argument is, assessee had an income of Rs.30 Lakhs for the assessment year 2008-09. The Assessing Officer has recorded proper 'reasons to believe' in his communication dated October 30, 2012. Therefore, the orders passed by the Assessing Officer, Appellate Authority and the ITAT do not call for any interference.

11. We have carefully considered rival contentions and perused the records.

12. Undisputed facts of the case are, assessee has not filed his returns for the Assessment Year 2008-09. The main argument advanced by Shri. Shankar is, unless there are 'reasons to believe', a notice under Section 148 of the Act cannot be issued. Further, those reasons must be recorded. Thus, according to him, 'reasons to believe' is the *sine qua non* for issuance of notice. In support of this contention, he has placed reliance on following authorities:

(1) *Ganga Saran & Sons (P) Ltd., Vs. Income-tax Officer*[6] *to contend that the Assessing Officer must have reasons to believe escapement*;

[6] (1981) 130 ITR 1 (SC) para 6

(2) *Chhugamal Rajpal Vs. S.P. Chaliha*[7] to contend that unless requirement of Clause (a) or Clause (b) of Section 147 are satisfied, the Income Tax Officer has no jurisdiction to issue notice under Section 148.

(3) *Indian Oil Corporation Vs. Income-tax Officer*[8], to contend that the 'reason to believe' is not the same as 'reason to suspect'.

(4) *Hindustan Lever Ltd., Vs. R.B. Wadkar*[9] to contend that the Assessing Officer has to speak through his reasons and the reasons recorded cannot be supplemented by filing Affidavit or oral submission.

(5) *Income-tax Officer Vs. Lakhmani Mewal Das*[10] to contend that there must be

[7] (1971)79 ITR 603(SC)
[8] (1986)159 ITR 956 (SC) (para 11)
[9] (2004)268 ITR 332 (Bombay) (para 19)
[10] (1976)103 ITR 437 (SC)

legally sound basis for reopening the assessment;

(6) *Commissioner of Income-tax Vs. Dr. N. Thippa Setty*[11] to contend that the reasons recorded should disclose *prima facie* case with regard to escaped assessment.

(7) *Commissioner of Income-tax Vs. Orient Craft Ltd*[12]*.,* on the aspect of 'reasons to believe'.

(8) *Mohanlal Champalal Jain Vs. Income-tax Officer, Ward 1(2) Thane*[13] to contend that the Assessing Officer ought to have verified that income in the hands of assessee was *prima facie* chargeable to tax.

13. Shri. Aravind has relied upon *Assistant Commissioner of Income-tax Vs. Rajesh Jhaveri*

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[11] (2010)322 ITR 525 (KAR)

[12] (2013) 29 Taxmann.com 392

[13] [2019] 102 taxmann.com 293 (Bombay)

Stock Brokers (P)Ltd[14] and contended that at the stage of issuance of notice, the final outcome of the proceeding is not relevant. It is sufficient, if the Assessing Officer had relevant material on which any reasonable person could have formed a requisite belief. Adverting to the facts of this case, he has argued that combined reading of paragraphs 1, 2 and 5 of the MOU, gives a clear indication that assessee had received Rs.30 Lakhs in that year. Therefore, in view of the law laid down in *Rajesh Jhaveri*, the notice issued against assessee is just and appropriate.

14. Shri. Aravind further contended that in all the authorities cited by Shri. Shankar, the assessment was complete whereas, in this case, the assessee had not filed his return. Therefore, they are distinguishable on facts. However, he did not dispute the proposition that the Assessing Officer

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[14] (2007) 291 ITR 500 (para 16)

must have material to reopen the case, but, placing strong reliance on *Rajesh Jhaveri*, he sought to make a fine distinction that at the stage of issuance of notice, the final outcome was not relevant.

15. Thus, the parties are not at variance so far as the principle that the Assessing Officer must have material to reopen the case.

16. In *Mohanlal Champalal Jain,* the assessee had not filed his return for the A.Y. 2011-12 wherein he had made a transaction of Rs.18,82,26,100/- in National/Multi Commodity Exchange. The Officer had recorded the following reasons:

"RESONS FOR REOPENING OF ASSESSMENT U/S 147 OF THE IT.ACT, 1961

1. Details of assessee

The assessee is an individual. It is seen from ITD system that the assessee has not filed the return of income for AY 2011-12.

2. Details of information received

In this case, information as per NMS data and ITS details has indicated that the assessee has made transactions of Rs.18,82,26,100/- in National/Multi Commodity Exchange. Ongoing through the details, it is seen that the assessee has not filed his return of income for the AY.2011-12.

3. Analysis of information received

From the analysis of information as per NMS date and ITS details, it is seen that during the F.Y 2010-11, the assessee has entered into contract of Rs.18,82,26,100/- in the commodities exchange, however, no return of income has been filed for A.Y. 2011-12. As such, profit/gain on commodity exchange remains unexplained and also the source of investment in these transactions remains unexplained.

4. Enquiries made as sequel to information received,

A letter for verification of above information was issued to assessee requesting to comply. However, there is no response received from the assessee. As per information received from the system, it is seen that the assessee has not filed his return of income. As such, from the above information, Profit/Loss earned from Commodity transactions of Rs.18,82,26,100/- remains unexplained. As *such, the income exceeding Rs.1 Lakh or more has escaped assessment.*

5. *Findings*

Analysis of information received and the enquiries made revealed that:-

(I). *The assessee has transacted in Commodities Market at Rs.18,82,26,100/- during the A.Y under consideration.*

(II). *No return of income has been filed by the assessee for AY 2011-12.*

(III). *The Profit/Loss earned from commodity transactions remains unexplained and this income exceeding Rs.1 Lakh or more has escaped assessment since it has not been disclosed by the assessee as no return is filed by him.*

6. *Basis of forming reason to believe and details of escapement of income*
In view of the above, I have reason to believe that the income chargeable to tax of more than Rs.1 Lakh for AY 2011-12 has escaped assessment within the meaning of provisions of Sections 147 of the Income Tax Act, 1961 as no return of income has been filed by the assessee for AY 2011-12.

7. *In this case, more than for years have escaped form the end of the assessment year under consideration. Hence, proposal for grant of necessary sanction to issue*

> *notice u/S. 148 of the Income Tax Act, 1961 in the above case for AY 2011-12 is submitted to the Pr. Commissioner of Income Tax, Range -1, Thane for kind approval."*

17. The Bombay High Court held that the petitioner therein having not filed the return of income, the Assessing Officer had much wider latitude to reopen the assessment. However, even in such a case, the primary requirement is, the Assessing Officer must have 'reason to believe' that the income was chargeable to tax.

18. In *Chhugamal Rajpal,* the Apex Court has held as follows:

> **"......** *Unless the requirements of clause (a) or (b) of Section 147 are satisfied, the Income Tax Officer has no jurisdiction to issue a notice under Section 148. From the report submitted by the Income Tax Officer to the Commissioner, it is clear that he could not have had reasons to believe that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his assessment for the*

accounting year in question, income chargeable to tax has escaped assessment for that year; nor could it be said that he as a consequence of information in his possession, had reasons to believe that the income chargeable to tax has escaped assessment for that year. We are not satisfied that the Income Tax Officer had any material before him which could satisfy the requirements of either clause (a) or (b) of Section 147. Therefore he could not have issued a notice under Section 148."

19. In the case on hand, relevant paras of the MOU read as follows:

"1) In pursuance of the aforesaid understanding the Second Party has paid to the First Party a sum of Rs.2,00,00/- (Rupees two lakhs only) by cheque No.009754 dated 01-07-2006 drawn on Karnataka Bank, Dongerkery branch, Mangalore, towards the advance consideration with regard to his claim on the Schedule properties, receipt of which sum the First Party acknowledges herewith.

2) It is agreed between the parties that the balance consideration of Rs.2,30,00,000/- (Rupees two crore thirty lakhs only) shall be paid by the Second Party to the First party within one year form this date, subject to withdrawal of the suit in O.S.

No.100/2004 by the First Party and the Second Party shall obtain proper receipt from the First Party as and when the payment is made.

3) That in pursuance of the aforesaid understanding the First Party has agreed to withdraw the Suit in O.S.No.100/2004 which is pending before the II Addl. Civil Judge (Sr.division), Mangalore.

4) That the First Party hereby assures and declares that he will not make any claim of whatsoever nature in the schedule property or against the aforesaid previous owners with whom he had entered into Agreement for Sale and also against the present owners namely M/S MANGALORE INTERNET CITY (P) LTD.

5) That the First Party hereby assures and confirms with the Second party that, except the above mentioned balance consideration of Rs.2,00,00,000/- (rupees two cores only), the First Party shall not make any additional claim with the Second Party or its aforesaid owners hereafter for any reason."

20. Shri. Aravind has contended that para 5 of the MOU gives an impression that Rs.30 Lakhs was received in the relevant year. The

communication dated 30.10.2012 by the Income tax Officer reads thus:

"Shri Wilfred D'Souza
Prop:Karnataka Cashew Corporation
Chikkamudnur, Kemmai
Puttur
574201

Sub: Reasons for re-opening the assessment procedure – A.Y. 2008-09 – in your own case – reg

Ref: 1) Your letter dated 25/10/2012 filed on 26/10/2012

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Please refer to the above.

Reason recorded for re-opening the assessment procedure u/s 147 by issuing 148 of the I.T. Act is as under.

"The assessee Sri. Wilfred D'Souza has received payment of Rs.30,00,000/- in the F.Y. 2007-08 from Sri. Rohan Monteiro as per Memorandum of understanding dated 1/10/2007. On verification of the records, the assessee has not filed return of income for the 2008-09 till date.

Therefore, I have reason to believe that the income chargeable to tax has escaped assessment within the meaning of section 147 of the I.T. Act."

Yours faithfully

(PARIMELAZHAGAN P.J.)
Income-tax Officer.
Ward-1, Puttur."

21. Except stating that assessee had received Rs.30 Lakhs in the financial year 2007-08 from Rohan Monteiro, the ITO has not recorded any reasons much less, 'reasons to believe' while issuing notice under Section 148 of the Act.

22. Shri. Shankar is right in his submission that payment received in every transaction cannot be construed as Income, but the ITO in this case, has issued notice only on the premise that assessee had received Rs.30 Lakhs in financial year 2007-08. Such notice is not sustainable in law. It is also relevant to note that on completion of transaction, the assessee has filed his return for the financial year 2008-09 and the same is not disputed.

23. In view of the above, this appeal merits consideration. Hence, the following:

<u>Order</u>

(a) Appeal is ***allowed***.

(b) The substantial questions of law raised are answered in favour of the assessee.

(c) The order dated 22.08.2014 in ITA No.1418(Bang)2012 passed by the ITAT, Bengaluru 'C' Bench relating to A.Y. 2008-09 is set-aside.

Sd/-
JUDGE

Sd/-
JUDGE

SPS