
**COMMISSIONER OF INCOME TAX Vs MISS EATHER P. CARVALHO and
Others**

IT Ref. No. 443 of 1985

Court: Bombay High Court

Date of Decision: Nov. 3, 1998

Acts Referred:

Income Tax Act, 1961 " Section 256(1)

Citation: (1999) 153 CTR 272

Hon'ble Judges: Pratibha Upasani, J; Dr. Pratibha Upasani, J; Dr. B.P. Saraf, J; B.P. Saraf, J

Bench: Full Bench

Advocate: S.M. Chatterjee and None,s, for the appearing parties;

Judgement

DR. B.P. SARAF, J.:

By this reference under s. 256(1) of the IT Act, 1961, the Tribunal has referred the following two questions of law to this Court for opinion at the

instance of the Revenue.

1. Whether, on the facts and in the circumstances of the case, the Tribunal is right in holding that ITO is not entitled to reopen the assessment

under s. 147(a) even though there is failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that

year in his return or during the course of assessment proceedings ?

2. Whether on the facts and in the circumstances of the case, the Tribunal is right in law in holding that the ITO was very well seized on the facts

and there was no necessity for the assessee to disclose the same again and it is omission on the part of the ITO himself and, therefore, he is not

entitled to reopen the assessments under s. 147(a) ?

2. This reference pertains to asst. yr. 1975-76. The material facts giving rise to this reference, briefly stated, are as follows :

The income of the assessee for the asst. yr. 1975-76 was assessed by the ITO under s. 143(3) of the IT Act, 1961 ("Act"). The assessee

owned extensive lands situated in the heart of Panaji town which were valued by them as follows :

S. Name of the assessee Area Amount of Rs.

No.

1. Mr. Joao de Detiz, Carvalho Vasoo 5,481 sq. mtrs. 7,00,000
2. Mrs. Maria Jose Miranda Carvalho 6/7th of the property 7,00,000
3. Miss Eather P. Carvalho, Goa 1/7th of the property 2,40,000
4. Mr. Manual Fde Carvalho 1866 Sq. mtrs. 3,16,000

These lands were introduced by the assessee as their capital in the firm M/s Carvalho Real Estate. of which they were partners at the market

value. According to the Revenue, these primary facts were not disclosed by the assessee in the returns of income filed by them, which resulted in

the escapement of capital gains liable to tax on transfer of these lands to the firm from assessment. The ITO, therefore, issued notice to the

assessee under s. 148 r/w s. 147(a) of the Act on 16th Oct., 1978, and reopened the assessment to bring to tax the capital gain on transfer of the

lands and completed the assessments by including the capital gains arising out of the above transfer of lands. The assessee challenged the order of

the assessment before the CIT(A). The challenge was to the jurisdiction of the ITO to exercise power under s. 147(a) of the Act. The case of the

assessee was that the ITO was aware of the transfer of the lands by them to the partnership firm as the very same lands had been subsequently

sold by the partnership firm to a limited company M/s Mahabrest Hotel (P) Ltd. According to the assessee, the ITO assessing the firm was very

much concerned with the capital gain arising from the transfer of those lands by the firm to the company and hence, he was aware of all the material

facts relevant for the assessment of the assessee also. It was, therefore, contended by the assessee before the CIT(A) that there was no

necessity of disclosing these facts to the ITO. The CIT(A) accepted this contention of the assessee and cancelled the order of reassessment.

Aggrieved by the order of the CIT(A), Revenue appealed to the Income Tax Appellate Tribunal ("Tribunal"). The contention of the Revenue

before the Tribunal was that this was a clear case of failure of the assessee to disclose the material facts. It was contended on behalf of the

Revenue that there was not even a whisper in the returns filed by the assessee about the ownership of the lands and the transfer thereof at market

value to the firm as capital. It was contended that there being a clear non-disclosure of the primary facts by the assessee, the ITO was justified in

exercising power under s. 147(a) of the Act and reopen the assessments and reassess the income of the assessee. The Tribunal did not accept the

above contention of the Revenue, as it was also of the view that while making the assessment of the firm M/s Carvalho Real Estate, of which the

assesseees were partners, the ITO was aware of the fact of transfer of the lands belonging to the assesseees to the firm and hence there was no

necessity for the assesseees to disclose those facts in their individual returns. The Tribunal observed that it was a case of the omission on the part of

the ITO himself. The Tribunal, therefore, upheld the order of the CIT(A) and dismissed the appeal of the Revenue. Hence, this reference at the

instance of the Revenue.

3. We have heard Mr. R.V. Desai, learned counsel for the Revenue, who submits that this is a clear case of non-disclosure of material facts

necessary for the assessment by the assesseees. He, therefore, submits that the ITO was justified in exercising power under s. 147(a) of the Act to

reopen the assessment of the assesseees by issue of notices under s. 148 of the Act and the Tribunal was not justified in setting aside the orders of

reassessment. Reliance is placed in support of his contentions on the decision of the Supreme Court in *M/s. Phool Chand Bajrang Lal* and another

Vs. Income Tax Officer and another, Sri Krishna Private Ltd. Etc. Vs. I.T.O., Calcutta and Others, , and the decision of this Court in *Zohar Siraj*

Lokhandwala Vs. M.G. Kamat and others, .

4. We have carefully considered the above submissions. The facts of this case are glaring. The undisputed position is that in the returns submitted

by the assesseees, the assesseees did not disclose the transfer of the lands to the partnership firm. Nor did they disclose these facts at the time of

assessment.

There does not appear to be any controversy about the fact that the assesseees were liable to capital gains in respect of the transfer of lands by

them to the firm. The only ground which the assesseees seek to challenge the orders of reassessment is that their case would not fall under s. 147(a)

of the Act, as there was no failure on their part to disclose fully or truly the material facts relevant for the assessment for the years under

consideration. The case of the Revenue although out has been that there is a total non-disclosure of the material facts by the assesseees. None of the

authorities, including the Tribunal, dispute this fact. The only ground on which the Tribunal has set aside the order of reassessment is that while

making the assessment of the partnership firm *M/s Carvalho Real Estate*, the ITO was aware of the fact of transfer and sale of the lands belonging

to the assesseees, and, therefore, there was no necessity for the assesseees to disclose the facts in their individual returns. We have given our careful

consideration to the reasoning of the Tribunal. We, however, find it extremely difficult to accept the same. In our opinion, the Tribunal

misconstrued and misinterpreted the provisions of s. 147(a) of the Act and the settled law on the subject. At the material time, s. 147 of the Act at

the material time, read as follows :

14 7. In come escaping assessment. -If (a) the ITO has reason to believe that by reason of the omission or failure on the part of an assessee to

make a return under s. 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for his assessment for that

year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in cl. (a) on the part of the assessee, the ITO has in consequence of

information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

he may, subject to the provisions of ss. 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the

case may be, for the assessment year concerned (hereafter in ss. 148 to 153 referred to as the relevant assessment year).

Explanation L-For the purposes of this section the following shall also be deemed to be cases where income chargeable to tax has escaped

assessment, namely :

(a) where income chargeable to tax has been under assessed; or

(b) where such income has been made at too low a rate; or

(c) where such income has been made the subject of excessive relief under this Act or under the Indian IT Act, 1922 (M of 1922); or

(d) where excessive loss or depreciation allowance has been computed.

Explanation 2.-Production before the, ITO of account books or other evidence from which material evidence could with due diligence have been

discovered by the ITO will not necessarily amount to disclosure within the meaning of this section. "" Sec. 148 provides for issue of a notice on the

assessee before making the assessment or reassessment under s. 147 as a condition precedent to assessment or reassessment.

Sec. 149 prescribes the time-limit for issue of notice under s. 148. This section, so far as relevant, reads :

149. Time limit for notice. -(1) No notice under s. 148 shall be issued,

(a) in cases falling under cl. (a) of s. 147 -

(i) for the relevant assessment year, if eight years have elapsed from the end of that year, unless the case falls under sub-cl. (ii);

(ii) for the relevant assessment year where eight years, but not more than sixteen years, have elapsed from the end of that year, unless the income

chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year :

(b) in cases falling under cl. (b) of s. 147 at any time after the expiry of four years from the end of the relevant assessment year.

In the instant case, proceedings have been initiated under s. 147(a).

The two conditions precedent which are required to be satisfied before assuming jurisdiction under cl. (a) of s. 147 of the Act are :

(i) that the ITO must have reason to believe that income, profits or gains chargeable to tax had either been made, assessed or had escaped

assessment; and

(ii) that the ITO must have reason to believe that such escapement was occasioned by reason of omission or failure on the part of the assessee to

make a return or to disclose fully and truly all material facts necessary for the assessment year.

[see Phool Chand Balrangelal vs. ITO (supra)]

5. In the instant case, there is no dispute about the fulfilment of the first condition. Admittedly, profits and gains chargeable to tax had escaped

assessment. The only dispute is regarding second condition, whether the escapement was occasioned by reason of omission or failure on the part

of the assessee to disclose fully and truly all material facts necessary for assessment. Obviously, there was a failure on the part of the assessee to

disclose material facts relevant for the assessment of capital gains on transfer of lands by them to the partnership firm. The lands were transferred

by the assessee to firm which resulted in capital gain chargeable to tax. In the return of income furnished by the assessee, there was no mention

of the transfer of the lands by the assessee to the firm. The ITO discovered this omission, may be from the assessment of the firm to which the

lands in question were transferred by the assessee. Having found that the assessee had not disclosed the fact of transfer of lands by them to the

partnership firm which resulted in escapement of capital gains arising therefrom to tax, the ITO initiated proceedings under s. 147(a) of the Act and

assessed the capital gain to tax. We do not find any

infirmary in the above action of the ITO. In our opinion, the ITO rightly initiated reassessment proceedings under s. 147(a) of the Act on the basis

of information which was specific, relevant and reliable under s. 147(a) of the Act, as the escapement was on account of the failure of the

assessee to disclose fully and truly all material facts at the time of assessment. It is well-settled that it is the duty of the assessee to disclose all

primary facts necessary for his assessment before the assessing authority, If the assessee fails to do so, he cannot be permitted later to contend that

it was the duty of the ITO to find out those facts and if he could not find out the same, it was the failure on his part and not on the part of the

assessee. The fact that the AO could have found out the fact of transfer of lands by the assessee to the firm from the assessment of the firm does

not and cannot exonerate the assessee from their duty to make a full and true disclosure of the material facts. The onus is on the assessee to do

their part of the duty and to disclose all the material facts necessary for the assessment before the ITO, and if they fail to do so and as a result

thereof some income escapes assessment, their case would fall under s. 147(a) of the Act. As observed by the Supreme Court in Phool Chand

Bajrang Lal vs. ITO (supra), it is immaterial whether the ITO at the time of making the original assessment could or could not have found out the

facts himself. If on the basis of the subsequent information, the ITO arrives at a conclusion after satisfying the twin conditions prescribed under s.

147(a) of the Act that the assessee had not made the full and true disclosure of the material facts at the time of the original assessment and

therefore, income chargeable to tax had escaped assessment. it would be open to him to initiate proceedings for reassessment under s. 147(a) of

the Act. Reference may also be made in this connection to the decision of this Court in Zohar Siraj Lokhandwala vs. MG Kamat (supra) wherein it

was held that so far as the primary facts are concerned, it is the assessee's duty to disclose all of them. The fact that the AO could have found out

the correct position by further probing the matter does not exonerate the assessee from his duty to make a full and true disclosure of the material

facts. Explanation 2 to s. 147 of the IT Act, 1961, makes the position abundantly clear.

6. In *Zohar Siraj Lokhandwala vs. MG Kamat (supra)*, during the accounting year relevant to the asst. yr. 1987-88, the assessee had received a

sum of Rs. 45 lakh for the assignment of his beneficial interest in M/s Lokhandwala Developers. The assessee showed this amount in his return of

income as a receipt and claimed the same to be exempt from levy of capital gain tax on the basis of the decision of the Supreme Court in

Commissioner of Income Tax, Bangalore Vs. B.C. Srinivasa Setty, wherein it was held that there will be no capital gains from the transfer of a

capital asset if its cost of acquisition was nil. This claim of the assessee was allowed by the AO. After the completion of the assessment, the AO

discovered that the cost of the beneficial interest of the assessee in the property transferred for a sum of Rs. 45 lakhs was Rs. 300. This was found

on a perusal of the trust deed as well as the deed of assignment which showed that the assessee, who was a beneficiary of the trust, was entitled

not only to 30 per cent of the net income of the trust but also to a 30 per cent share of the corpus of the trust. It was found that the share in the

corpus of the trust was the cost of the beneficial interest of the assessee in the asset which was transferred. The ITO issued a notice of

reassessment. The assessee challenged the notice by a writ petition. It was submitted on behalf of the assessee that as the trust deed and the

assignment deed were already on record before the ITO, the ITO could not have initiated proceedings under s. 147(a) of the Act. Repelling this

contention, this Court held that the production of the trust deed or assignment deed by itself did not amount to a true and full disclosure of the

material facts necessary for the purpose of the assessment. The fact that there was a cost of acquisition of the beneficial interest was a material fact

necessary for determining whether the sum of Rs. 45 lakhs received by the assessee on the assignment of his beneficial interest in the assets in

question was assessable to capital gains tax and hence it was for the assessee to tell the AO whether there was any cost of acquisition or not and

disclose the material facts in that regard, Later, the ITO having discovered that there was a cost of acquisition of the beneficial interest initiated

proceedings under s. 147(a). The reassessment proceedings were, therefore, held to be valid.

7. Applying the ratio of the above decisions to the facts of the present case, we are of the clear opinion that the ITO was justified in exercising

power under s. 147(a) of the Act. There was a patent non-disclosure of material facts by the assessee which resulted in the escapement of capital

gain from tax and the ITO had cogent reasons to form an opinion to that effect.

8. In view of the above, we answer both the questions referred to us in the negative i.e. in favour of the Revenue and against the assessee.

Reference is disposed of accordingly with no order as to costs.