(1999) 03 BOM CK 0097

Bombay High Court (Goa Bench)

Case No: Writ Petition No. 209 of 1991

Smt. Laxmibai A. Wagle since deceased through legal representative and others		APPELLANT
	Vs	
Income Tax Officer and another		RESPONDENT

Date of Decision: March 30, 1999

Acts Referred:

- Income Tax Act, 1961 - Section 139, 147, 148, 153

Citation: (1999) 4 ALLMR 52 : (1999) 3 BomCR 691 : (2000) 162 CTR 479 : (1999) 240 ITR 427 : (2000) 1 MhLj 637

Hon'ble Judges: R.K. Batta, J; N.P. Chapalgaonkar, J

Bench: Division Bench

Advocate: V.K. Bodke, for the Appellant; S.R. Rivonkar, A.C.G., S.C., for the Respondent

Judgement

@JUDGMENTTAG-ORDER

N.P. Chapalgaonkar, J.

This is a petition by Laxmibai A. Wagle (now deceased through her legal representatives), challenging the validity of a notice issued u/s 148 of the Income Tax Act, 1961, praying for quashing the said notice and an order of prohibition preventing the respondent Income Tax authorities from proceeding in furtherance of the said notice. The petitioner assessed as an individual for the purpose of Income Tax and Wealth Tax, is also a partner in a partnership firm M/s A.G. Wagle. She owns various properties including agricultural land at Sanco Alois (Goa), bearing Matriz Nos. 510 and 512. She had shown in her returns for the assessment year 1984-85 that she has received a sum of Rs. 1,98,625/-from M/s. Zuari Agro Chemicals Ltd., in consideration of water drawn by them from the agricultural land of the petitioner. A note explaining the exemption of this amount from tax liability was appended to both statements of wealth and income submitted by her. Note reads:

"7. The assessee during the year received a sum of Rs. 1,98,625/-(Rupees one lakh ninety eight thousand six hundred and twenty five) from M/s. Zuari Agro Chemicals Limited, Zuari Nagar, Goa, in consideration of the water drawn by them, subsisting on the assessee''s agricultural land situated at Sancoales, Goa, bearing Matriz Nos. 510 and 512. The assessee claims that the water subsisting in the assessee''s agricultural land is a capital asset and the amount received by her is in the nature of capital receipt. Hence not taxable under the Income Tax Act, 1961."

In the assessment year 1985-86, the petitioner disclosed in the Income Tax as well as in the Wealth Tax returns that she has received a sum of Rs. 3,22,936/- from M/s. Zuari Agro Chemicals Ltd., in consideration of the water drawn by them from the source located in the agricultural land and it was also stated that the amount is not taxable under the Income Tax Act. Similarly, in the following assessment years 1986-87, 1987-88 and 1988-89, the income received by the petitioner was disclosed in the Income Tax returns, by the petitioner in consideration of the water drawn by M/s. Zuari Agro Chemicals Ltd. Income Tax assessment and the Wealth Tax assessment for the said periods was done and the orders were passed. Thereafter, on 26-3-1991, a notice u/s 148 was received by the petitioner seeking to re-open the case of the petitioner for the assessment years 1984-85 to 1988-89. In reply to the said notice, a letter was sent by the petitioner on 15-4-1991, seeking a clarification from the Income Tax Department whether the said notices have been issued u/s 147(a) or u/s 147(b) of the Income Tax Act. She also asked for the copy of the reasons recorded before issuing notices u/s 148 of the Income Tax Act. On 23-5-1991, the petitioner was asked to appear before the Income Tax Officer, Ward I, Panaji, Goa. The petitioner, therefore, filed this writ petition, challenging the validity of the notice and for quashing the same.

2. Shri V.K. Bodke, learned Counsel for the petitioner submitted that since the fact of receipt of a particular income and the nature of the income was disclosed fully in the Income Tax and Wealth Tax returns and the claim of the petitioner that the said income was not taxable, was accepted by the Income Tax Officer, it is not now within the competence of the Income Tax Officer to re-open the case on the ground that he had taken a mistaken view. It is also contended that unless reasons are recorded and are communicated to the assessee, a notice under sections 147 and 148 is not at all contemplated, and, therefore, the order is without jurisdiction.

3. Shri S.R. Rivonkar, the learned Counsel for respondent Income Tax authorities defended the notice and submitted that in a case where the Income Tax Officer did not notice that the income disclosed is taxable and accepted the contention of the assessee without proper application of mind, he has jurisdiction to re-open the case u/s 147 read with section 148 of the Income Tax Act.

4. Section 147, as it stood before the amendment, which came into effect from 1-4-1989, was as under:

"If (a) the Assessing Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return u/s 139 for any assessment year to the Assessing Officer 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 years, or

(b) notwithstanding that there has been no omission or failure as mentioned in Clause (a) on the part of the assessee, the Assessing Officer 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 sections 148 and 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 sections 148 and 153, referred to as the relevant assessment year)."

Therefore, section 147 was permitting the re-opening of the assessee''s case and assess or reassess the income escaped, only if (a) the Assessing Officer has reason to believe that there is an omission on the part of the assessee to make a return u/s 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary; (b) even if there is no such failure on the part of the assessee, but if the Assessing Officer has, in consequence of information in his possession, reason to believe that the income chargeable to tax has escaped assessment for any assessment year. Thus, the law, as it stood before the amendment made by the Tax Laws (Amendment) Act, 1987, gave a well defined narrow scope for reopening of the assessment. He could do so if the fact of receipt of a particular income is not disclosed by the assessee or he has received information giving him reason to believe that the income chargeable to tax has escaped assessment.

5. Section 148 deals with the requirement to issue notice before assessment or reassessment is made u/s 148 and sub-section (2) makes it mandatory that the Assessing Officer shall, before issuing any notice under that section, record the reasons for doing so. The petitioner contends that since the assessee has disclosed the information, re-opening is permissible only if there is some information to the Assessing Officer, which necessarily means a material which was not there in existence when the assessment was made.

6. The facts relating to this case are not in dispute. The income which the assessee received from M/s. Zuari Agro Chemicals Ltd., for the sale of water from a source which was situated in the agricultural land, was disclosed. It is contended that they are capital receipts, not taxable. The position was accepted by the Assessing Officer. No fresh information is received by the Assessing Officer and the Assessing Officer, on 26th March, 1991, recorded an opinion noting that :

"The assessee has claimed that receipts are of capital nature. I am of the opinion that these receipts are of revenue nature. I therefore have reasons to believe that the income is chargeable to tax is under assessed. Notice u/s 148 is to be issued to reopen the assessment."

and, thereafter, issued notice u/s 148.

7. The first contention raised by the petitioner''s Counsel that the reasons should have been communicated to the assessee has no foundation in the statutory requirement. Requirement of recording reasons may be for different purposes. Requirement of recording reasons in a speaking and reasoned order is different from the requirement of recording reasons before an authority reopens a case. They are to be recorded to ensure that he has applied mind and has considered the material which permits him to reopen the case. In judicial scrutiny, the Court would be entitled to examine those reasons, but the notice u/s 148 is not required to contain reasons recorded by the Assessing Officer. We, therefore, reject the contention that the re-opening is bad inasmuch-as the reasons are not communicated to the assessee. We also find that reasons have been recorded and those reasons can be read from the original file which has been made available by the Counsel for the respondents.

8. Shri Rivonkar invited our attention to two Supreme Court judgments in Maharaj Kumar Kamal Singh v. Commissioner of Income- Tax, Bihar and Orissa, Income Tax Reports Volume XXXV-1959 and in A.L.A. Firm v. Commissioner of Income Tax, Income Tax Reports Vol. 189 page 285. Interpreting the word "information" as occurring in section 34(1)(b), the Supreme Court held that the word "information" make also be as to the true and correct state of law and so would cover information as to relevant judicial decisions. If a judicial decision, like judgment of the High Court is not considered by the Assessing Officer and if it subsequently, comes to his knowledge, he would be justified in re-opening assessment u/s 34(1)(b) of the then Act. It was observed by the Supreme Court in Maharaj Kumar Kamal Singh v. Commissioner of Income Tax, Bihar and Orissa (supra), that the word "escape" in section 34(1)(b) was not confined to cases where no return had been submitted by the assessee or where income had not been assessed owing to inadvertence or oversight or other lacuna attributable to the assessing authorities. Even in a case where a return had been submitted, if the Income Tax Officer had erroneously failed to tax a part of the assessable income, it was a case where that part of the income had escaped assessment within the meaning of that provision.

9. In Calcutta Discount Co. Ltd. v. Income Tax Officer, Companies District I, Calcutta & another, Income Tax Reports Vol. XLI pg. 191, five Judges of the Constitution Bench of the Supreme Court per majority, held that it was the duty of the assessee company to disclose all the facts which had a bearing on the question, but the intention of the assessee behind a particular transaction was a matter of inference. The law did not require the assessee to state the conclusion that could reasonably

be drawn from the primary facts. If the Income Tax Officer who issued notice u/s 34 of the then Act did not have any material before him for believing that there had been any material non-disclosure because of which an under-assessment had taken place, he had no jurisdiction to issue notice after the expiry of four years from the Assessment Year. Even in the minority judgment, Hidyatullah, J., observed :

"if it be merely a question of interpretation of evidence by an Income Tax Officer from whom nothing has been hidden and to whom every thing has been fully disclosed, then the assessee cannot be subjected to section 34 merely because the Income Tax Officer miscarried in his interpretation of evidence."

10. When the assessment was sought to be re-opened on the ground of opinion of an internal audit party of the Income Tax Department, it was held by the Supreme Court in case of Indian and Eastern Newspaper Society v. Commissioner of Income Tax, New Delhi, Income Tax Reports 1979(119), that a point of law cannot be regarded as "information" within the meaning of section 147(b) of the Income Tax Act, 1961 for the purpose of re-opening an assessment. Similarly, the letters issued by Government of India placing reliance on it cannot be treated as "information" to the Income Tax Officer to initiate re-assessment proceedings.

11. In the case of Commissioner of Income- Tax v. Rasiklal C. Nagri, Income Tax Reports 1992 Vol. 193 page 665, a Division Bench of Gujarat High Court considered a case where the assessee had appended a note clarifying that the income from the interest is not shown, but share in the income from the firm has been shown. The assessee in his returns had appended a note to the effect that the interest earned by his wife from the firm was not shown in view of the decision of the tribunal for an earlier year. The Income Tax Officer, while framing the assessments, included the share income which the wife had received from the firm in the total income of the assessee. The income tax-Officer did not, however, include the interest received by the wife from the firm in the total income of the assessee. The assessment was completed and thereafter, it was sought to be re-opened u/s 148, read with section 147 of the Income Tax Act, 1961. It was held by the Gujarat High Court that the Income Tax Officer knew that the assessee had included the wife''s share income in his total income. Therefore, all primary facts necessary for assessment were disclosed by the assessee in the original assessment proceedings and no new information was received by the Income Tax Officer justifying the reassessment proceedings. Therefore, the reassessment proceedings were vitiated.

12. In the case before us, it is not the case of respondent Income Tax Department that the Assessing Officer did not notice Judicial Pronouncements or that his opinion was based on a disclosure made that these are capital receipts and now he wants to reopen the case since he has changed his opinion and now he or his successor feels that the income is revenue receipts. This can, hardly, be a ground for reopening assessment u/s 147 read with section 148 of the Income Tax Act, 1961 as it then was.

13. Income Tax Act is a taxing statute. The provisions of this Act will have to be construed strictly. Therefore, unless there is a clear case, which would give the Assessing Officer to exercise the jurisdiction to reopen the assessment u/s 148 read with section 147 of the Income Tax Act, 1961, it would not be valid and proper. Shri Bodke wanted to submit that the inquiry whether the action contemplated is u/s 147(a) or u/s 147(b), was not replied and, therefore, the action is bad. We do not accept this submission. The Supreme Court judgment in Coca-Cola Export Corporation v. Income Tax Officer and another A.I.R 1998 . S.C.W. 1665 has answered the submission and the Supreme Court has held that a notice u/s 148 read with section 147 need not specify whether the action is contemplated under Clauses (a) or (b) of section 147.

14. For the reasons stated above, we allow the writ petition, quash notice dated 17-5-1991 issued by the Income Tax Officer Ward I, purporting to be u/s 148, read with section 147 and hold that in pursuance of this notice re-opening of the assessment is not justified. With these observations, rule made absolute for the above reasons. No order as to costs.

15. Petition allowed.