

(1990) 03 BOM CK 0090

Bombay High Court

Case No: Writ Petition No. 851 of 1984

New Excelsior Theatre Pvt. Ltd.

APPELLANT

Vs

M. B. Naik, Income Tax Officer
and others

RESPONDENT

Date of Decision: March 15, 1990

Acts Referred:

- Income Tax Act, 1961 - Section 143(3), 144(B), 147, 147(A), 148

Citation: (1990) 83 CTR 62 : (1990) 185 ITR 158

Hon'ble Judges: T.D. Sugla, J

Bench: Single Bench

Advocate: K.B. Bhujle, for the Appellant; Dr. V. Balasubramanian, for the Respondent

Judgement

T.D. Sugla, J.

The petitioner is a limited company. The proceedings relate to its assessment for the assessment year 1975-76. Return for the year was originally filed on March 25, 1976, and the assessment was completed u/s 143(3) read with section 144B of the Income Tax Act, 1961, on September 18, 1978. During the previous year relevant to the assessment year, the petitioner, it may be stated, had purchased a property known as New Excelsior Theatre Building for a sum of Rs. 61,00,000 on December 6, 1974, from S. P. Builders, a partnership firm, which is stated to have held 40% shares in the petitioner-company.

2. After the assessment as stated above was completed in the case of the petitioner, the said property came to be valued by the departmental valuer in the case of S. P. Builders. According to the Valuation Officer, the fair market value of the property on the date of the sale was Rs. 1,04,80,000. The assessment of that firm for that year was made taking the market value of the property at Rs. 1,04,80,000 and the said firm was charged to capital gains accordingly. In the petitioner's case, assessment was sought to be revised u/s 263 and after allowing the petitioner an opportunity of

being heard, an order was passed on September 11, 1980, whereby the difference between the market value of the property and the consideration shown in the sale document was treated as the petitioner's income from undisclosed sources. This order was, however, set aside by the Tribunal in appeal on the ground that the assessment had, in the meantime, merged with the order of the appellate authority and could not, therefore, have been revised by the Commissioner u/s 263 of the Act.

3. The order of the Tribunal is dated January 30, 1984. Soon thereafter, the Income Tax Officer issued a notice u/s 148 read with section 147(a) of the Act requiring the petitioner to file a return in a response thereto. This notice is dated March 14, 1984. In the meantime, gift-tax proceedings were also taken against S P Builders, the vendors, from whom the petitioner had purchased the property in dispute. As, in the meantime, another valuer had valued this property at Rs. 93,75,000, the difference between that amount and the amount of Rs. 61,00,000, i.e., Rs. 32,75,000 was treated as in the hands of S. P. Builders. It is, however, not known as to what happened in subsequent proceedings in the case of S P Builders both as regards the Income Tax and gift-tax assessments.

4. This petition was filed in this court some time in April, 1984. On April 25, 1984, rule was issued but no interim relief was granted on the assurance of Shri Joshi for the Revenue that the notice of demand and assessment order will not be served on the petitioner, even if the assessment is completed, till the disposal of the petition. No affidavit-in-reply has yet been filed by the Department. It, however, appears to be a common case that the impugned notice was issued on the basis of the information that the market value of the suit property was Rs. 1,04,00,000 and not Rs. 61,00,000 as was stated in the sale deed. It is stated by Shri Bhujle, learned counsel for the petitioner, that apart from the fact that whether the market value of a particular property is X amount or Y amount is a matter of opinion and not a fact, as such, merely on the basis of this information, the Income Tax Officer could not have formed a reason to believe that the assessee's income chargeable to tax had escaped assessment. At best, it could be a case of reason to suspect and not reason to believe. In particular, he laid emphasis on the fact that in this case there were two valuation reports. As per one valuer, the market value of the property was Rs. 1,04,00,000 whereas the valuer estimated it at Rs. 93,75,000. The third valuer may as well value the property at some other value. The next contention is that assuming this information could provide the basis for formation of belief that income chargeable to tax had escaped assessment, it could certainly be not by reason of failure on the part of the petitioner to disclose full and material facts necessary for assessment. For this purpose, he relied on the Supreme Court decision in the case of [Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta](#), the Calcutta High Court decision in the case of [Smt. Tarawati Debi Agarwal Vs. Income Tax Officer](#), and the Karnataka High Court decision in the case of [Commissioner of Income Tax Vs. Kalappa](#). For the proposition that unless there was some payment by the Petitioner under the table, the income in the hands of the petitioner could not

be said to have escaped assessments, Shri Bhujle made an attempt to derive support from the Supreme Court decision in the case of K P Varghese v. ITO [1981] 31 ITR 597.

5. Dr. Balasubramanian, for the Revenue, on the other hand, stated that it would be impossible to expect the Department to have any information more than the information as regards the market value at the stage of reopening the assessment. The fact that the market value of a property is substantially higher than the value shown in the deed of conveyance is, according to Dr. Balasubramanian, a sound and valid reason for the formation of the belief that the income had escaped assessment. As regards the other contention that the petitioner cannot be blamed for not disclosing full and relevant facts necessary for assessment, Dr. Balasubramanian stated that when the assessment was taken up originally, there was very little time on hand. The valuation report could not be available. The assessment was completed in the absence thereof so much so that when the valuation report was available, it should be held that the petitioner had not disclosed full particulars of its income.

6. Before proceeding to consider the rival contentions, it is desirable to restate that the return in this case was filed on March 25, 1976, and the assessment was completed u/s 143(3) read with section 144B on September 18, 1978. It is, therefore, not possible to accept Dr. Balasubramanian's submission that the Income Tax Officer did not have sufficient time in hand to make a proper investigation if he wished to while completing the assessment originally. I am in agreement with Shri Bhujle that the valuation of a property by a valuer on hypothetical basis is a question of opinion. In fact, so far as this case is concerned, it is proved from the fact that the second valuer at the instance of the Department itself valued the property at Rs. 93,75,000 as against Rs. 1,04,00,000 in the first instance. In any event, the fact cannot be overlooked that the petitioner in this case is as purchaser of the property. Even if the market value of the property is more, there are some provisions under which the seller of the property can be held liable. However, so far as the purchaser is concerned, unless there is some further material to indicate not only that the market value of the property is higher but also that the petitioner has paid something more than what is stated in the deed of conveyance, it may not be possible to hold that the mere fact of the higher market value will provide a sound basis for the reason to believe that income has escaped assessment.

7. Assuming, for the sake of argument, the contention of Dr. Balasubramanian that such a material will never be available to the Income Tax Officer at the stage of initiating the proceedings u/s 148 is accepted, the fact cannot be disputed that for reopening the assessment u/s 147(a), one more condition is required to be fulfilled. That condition is that formation of belief that income has escaped assessment must be by reason of either the assessee's omission to file a return of income or non-disclosure of full and material facts necessary for assessment. There is no

suggestion in this case that the return was not filed. Therefore, the only question that requires consideration is whether the petitioner has disclosed full and relevant material necessary for assessment at the time of the original assessment. In this context, it may be mentioned that the petitioner had produced the sale deed dated December 6, 1974, during the assessment proceedings. The sale deed did disclose the name of the seller and the purchaser as also the particulars of the property and the sale consideration. There is no dispute that the seller is a genuine person. The only new material is that the market value, according to a valuer, of this property is higher than Rs. 61,00,000 as stated in the sale deed. Investigation could certainly have been made by the Income Tax Officer when he was completing the original assessment. This was not done even though the assessment was made u/s 143(3) read with section 144B meaning thereby that the assessment passed through the scrutiny of the Inspecting Assistant Commissioner also. On these facts, in my view, the ratio of the Supreme Court decision in [Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta](#), and the Calcutta High Court decision in [Smt. Tarawati Debi Agarwal Vs. Income Tax Officer](#), is clearly applicable. The petitioner cannot be held guilty for non-disclosure of full and relevant information necessary for assessment.

8. In the result, the condition precedent for assumption of jurisdiction u/s 148/147(a) is not satisfied. Hence, the petition succeeds. The impugned notice is quashed. Rule is made absolute in terms of prayer (a). No order as to costs.