2010:BHC-OS:664-DB

HIGH COURT OF JUDICATURE AT BOMBAY
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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

WRIT PETITION NO.2508 OF 2009

M/s.Bhavesh Developers having
its office at Ground Floor, Mansarovar
Building, M.G. Road, Kandivali (Wests),
Mumbai-400 067. ...Petitioner.

Vs.

1. The Assessing Officer, Ward 25(3)-1,
having his office at C-11, Room No.307,
3rd Floor, Building No.C-11, Pratyaksh
Kar Bhavan, Bandra Kurla Complex,
Bandra (East), Mumbai-400 051.

2. The Commissioner of Income Tax,
City XXV, having his office at Building
No.C-11, 6th Floor, Pratyaksh Kar
Bhavan, Bandra Kurla Complex,
Bandra (East), Mumbai-400 051.

3. Union of India,
though the Secretary,
Ministry of Finance,
Government of India, North
Block, New Delhi-110 101. ...Respondents.

....

Mr.Sanjim M.Shah for the Petitioner.
Mr.Suresh Kumar with Ms.Suchitra Kamble for the Respondents.

.....

CORAM : DR.D.Y.CHANDRACHUD AND
J.P.DEVADHAR, JJ.

January 12, 2010.

ORAL JUDGMENT (PER DR.D.Y.CHANDRACHUD, J.) :

Rule. By consent of the Counsel and at their request, made returnable forthwith and taken up for hearing and final disposal.

2. The challenge in these proceedings under Article 226 of the

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Constitution of India, is *inter alia* to a notice issued under Section 148 of the Income Tax Act, 1961, seeking to reopen assessment proceedings. The relevant Assessment Year is 2002-03.

3. The Petitioner engages in the business of developing and constructing buildings. During the Assessment Year 2002-03, the Petitioner filed a return of income on 14th January 2004 and claimed a deduction of Rs.3,85,75,992/- under Section 80-IB(10) of the Act. The return of income was initially processed under Section 143(1) and the declared income was accepted by the Assessing Officer. The case of the Petitioner was thereupon selected for scrutiny. Notices were issued under Sections 143(2) and 142(1) of the Act. In response, the Chartered Accountant of the Petitioner submitted representations on 30th November 2004 and 20th December 2004. On 17th January 2005, an assessment order was passed under Section 143(3). In so far as the deduction under Section 80-IB(10) was concerned, the Assessing Officer, while allowing the deduction, observed as follows:

> "During this year the assessee firm has claimed deduction u/s.80IB(10) of Rs.3,85,75,992/- which is equal to the hundred per cent of the profits derived in the relevant previous year from the business of construction of housing projects. Audit Report in Form No.10CCB under Rule 10BBB has been filed along with the return of income. After verification the claim is found to be in order. Accordingly deduction u/s.80IB(10) is allowed to the extent of the claim of Rs.3,85,75,992/-."

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4. On 30th March 2009, a notice came to be issued to the Petitioner under Section 148 of the Act, proposing to reassess the income for Assessment Year 2002-03 on the ground that its income had escaped assessment within the meaning of Section 147 of the Act. On 6th November 2009, the Petitioner was supplied with a copy of the reasons recorded for reopening the scrutiny assessment for Assessment Year 2002-03. The following reasons have been recorded:

> "On verification of case records, it is seen that the assessee is claiming deduction u/s80IB for an amount of Rs. 3,85,75.992/-. However, as per details filed and P & L A/c. it is further observed that during the year assessee has other income of Rs.50,13,307/- which mainly comprises of society deposit of Rs.47,80,517/-, Stilt Parking Rs.1,25,000/- and Sundry Credit Balances of Rs.1,07,712/-. Since this income does not qualify as the income eligible for deduction u/s. 80IB, I have reason to believe that the income to this extent has escaped assessment and it is a fit case for issuing notice u/s.148 of the I.T.Act, 1961."

5. In assailing the notice under Section 148, Counsel appearing on behalf of the Petitioner submitted that (i) Admittedly, a notice in the present case was issued after the expiry of a period of four years from the relevant Assessment Year, 2002-03; (ii) The power to issue a notice reassessing the income after the expiry of four years is conditioned by the requirement that there is a failure on the part of the assessee to fully and truly disclose all material facts necessary for his assessment for that Assessment Year; (iii) The pre-condition for the exercise of the jurisdiction spelt out in the proviso to Section 147 is absent in the

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present case; and (iv) No finding has been recorded that there was a failure on the part of the assessee to disclose the material facts and hence, the exceptional power which is conferred upon the Revenue to reopen an assessment after the expiry of four years, has not been lawfully exercised.

6. When the Petition came up for admission, we had indicated to Counsel that having regard to the nature of controversy involved, this Court is inclined to dispose of the Petition finally at the stage of admission. Accordingly, an affidavit in reply has been filed on behalf of the Revenue in which the reasons which have been specified as grounds for reopening the assessment, have been reiterated.

7. The admitted position before the Court, on the basis of the material on the record, is that by the notice under Section 148 issued on 30th November 2009, the assessment pertaining to the year 2002-03 was sought to be reopened after the lapse of four years. Section 147 postulates *inter alia* that if the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment for any Assessment Year, he may subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment. The proviso to Section 147 stipulates that where an assessment has been made under sub-section (3) of Section 143 or Section 147 for the relevant Assessment Year, no action shall be taken

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after the expiry of four years from the end of the relevant Assessment Year unless certain preconditions are fulfilled. These conditions are that the income chargeable to tax must have escaped assessment for such Assessment Year (i) by reason of the failure on the part of the assessee to make a return in response to a notice issued under Section 147; or (ii) by the failure of the assessee to make a return in response to a notice issued under Section 142(1) or Section 148; or (iii) to disclose fully and truly all material facts necessary for his assessment for that Assessment Year. In the present case, what falls for consideration is whether there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for Assessment Year 2002-03. There is no dispute about the fact that there is no failure on the part of the assessee to make a return under Section 139 of the Act.

8. In support of the claim for deduction under Section 80IB(10), the assessee had placed certain material before the Assessing Officer. The material that was filed with the return of income included a duly filled up Form 10 CCD. The form contained details as specified, including in Item 19, the total sales of the undertaking; in Item 21, the profits and gains derived by the undertaking from the eligible business; and, in Item 22, disclosed that the deduction has been claimed under sub-section (10) of Section 80IB. The form was certified by a Chartered Accountant. The statement of total income and the balance sheet as on 31st March 2002

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were appended to the return. The profit and loss account for the year ending 31st March 2002 contained a disclosure of other income in the amount of Rs.50,13,307.16. Schedule G to the balance sheet contains a break up of the other income of Rs.50.13 lakhs. The constituent elements of the other income are: (i) Society deposit; (ii) Stilt parking; (iii) Sundry credit balance appropriated; and (iv) discount received. In addition to this disclosure, during the course of the assessment proceedings, a letter was addressed on behalf of the assessee, by its Chartered Accountant to the Assessing Officer. The letter inter alia contains an explanation of the other income as reflected in the profit and loss account. The assessee also furnished to the Assessing Officer a statement of sales and other income for each wing and for the flats comprised in the construction as of 31st March 2002.

9. In this background, it would be necessary to scrutinize the basis on which a notice was issued under Section 148 for reopening the assessment. The basis of the notice is to be found in the reasons disclosed to the assessee on 6th November 2009. The reasons postulate that on a verification of the case records, it emerges that the assessee was claiming a deduction under Section 80IB in the amount of Rs.3.85 crores. However, "as per details filed and P& L A/c." it was observed that the assessee had during the year, other income of Rs.50.13 lakhs which mainly comprised of society deposit, stilt parking and sundry credit

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balances. Since this income did not qualify as income eligible for deduction under Section 80IB, it was stated that there was reason to believe that the income had, to that extent, escaped assessment. Now, ex-facie, the reasons which have been disclosed to the assessee would show that the inference that the income has escaped assessment is based on the disclosure made by the assessee itself. The reasons show that the finding is based on the details filed by the assessee and from the profits and loss account. Quite clearly, therefore, it was impossible for the Assessing Officer to even draw the inference that there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for Assessment Year 2002-03. Significantly, the reasons that have been disclosed to the assessee do not contain a finding to the effect that there was a failure to fully and truly disclose all necessary facts, necessary for the purpose of assessment. In these circumstances, the condition precedent to a valid exercise of the power to reopen the assessment, after a lapse of four years from the relevant Assessment Year, is absent in the present case. There is merit in the submission which has been urged on behalf of the assessee that an exceptional power has been conferred upon the Revenue to reopen an assessment after a lapse of four years. The conditions which are prescribed by the statute for the exercise of such a power must be strictly fulfilled and in their absence, the exercise of power would not be sustainable in law. Though an attempt was made on behalf of the

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Revenue to urge that the assessee should be relegated to the ordinary remedy of an appeal against the order of the assessment, we are of the view that a petition under Article 226 of the Constitution would be maintainable for questioning reopening of the assessment in a case such as this where the pre-conditions for the exercise of the power have not been fulfilled.

10. The view which we have taken is in consonance with the law laid down by the Supreme Court and by this Court. In **Income Tax Officer vs. Lakhmani Mewal Das**, (1976) 103 ITR 437 (SC), the Supreme Court had occasion to interpret the erstwhile provisions of Section 147 and observed thus :

> "We may add that the duty which is cast upon the assessee is to make true and full disclosure of the primary facts at the time of original assessment. Production before the ITO of the 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 contemplated by law. The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty ends. It is for the ITO to draw the correct inference from the primary facts. It is no responsibility of the assessee to advise the ITO with regard to the inference which he should draw from the primary facts. If an ITO draws an inference which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify "initiation of action for reopening assessment."

A similar view was taken in a subsequent judgment in **Ganga Saran & Sons (P) Ltd. vs. Income Tax Officer**, (1981) 130 ITR 1 where the

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Supreme Court held thus:

> "It is well settled as a result of several decisions of this Court that two distinct conditions must be satisfied before the ITO can assume jurisdiction to issue notice under s.147(a). First, he must have reason to believe that the income of the assessee has escaped assessment and, secondly, he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice issued by the ITO would be without jurisdiction. The important words under s. 147(a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief entertained by the ITO must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the ITO in coming to the belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under s.147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the ITO could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid."

The same view has been reiterated in a judgment of a Division Bench of this Court in **IPCA Laboratories Ltd. vs. Gajanand Meena,** (2001) 251 ITR 416 where Hon'ble Mr.Justice S.H.Kapadia (as the Learned Judge then was), speaking for a Division Bench held thus:

> "The position of law after 1st April, 1989, is not in dispute. By virtue of a proviso to s.147, no action can be taken for reopening after four years unless the AO has reason to believe that income has escaped assessment by reason of the failure

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> on the part of the assessee to disclose fully and truly all material facts necessary for assessment. In the present case, the affidavit and the reasons disclosed indicate that the Department has purported to reopen the assessment only on the basis of change of opinion. This position is, in fact, conceded vide para 3 of the affidavit-in-reply dt. 13th march, 2001. The reasons also do not spell out failure on the part of the assessee to disclose fully and truly all material facts. ... We are satisfied on the facts of the present case that reopening is sought on the basis of change of opinion. Further, even in the reasons, there is nothing to indicate that reopening is sought on the ground of the failure on the part of the Petitioner to disclose fully and truly all material facts."

11. For the reasons aforesaid, we are of the view that recourse to the power under Section 147 cannot be sustained on a mere change of opinion, there being no failure of the assessee to disclose fully and truly, all material facts necessary for assessment. The basic condition prescribed by the statute for the exercise of the power has not been fulfilled. The Petition has to be allowed.

12. The rule is accordingly made absolute by quashing the impugned notice dated 30th March 2009 (Exhibit 'J'). There shall be no order as to costs.

(Dr.D.Y.Chandrachud, J.)

(J.P.Devadhar, J.)

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