

8-ITXA-102-2016

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX APPEAL NO.102 OF 2016

The Pr. Commissioner of Income Tax-1 .. Appellant.
v/s.
M/s. Inarco Limited .. Respondent.

Mr. Suresh Kumar, for the Appellant.
Mr. R. Murlidhar with Mr. Atul Jasani for the Appellant.

**CORAM: M.S.SANKLECHA &
SANDEEP K. SHINDE, JJ.**
DATE : 23rd July, 2018.

P.C:-

This Appeal under Section 260-A of the Income Tax Act, 1961 (the Act), challenges the order dated 28.1.2015 passed by the Income Tax Appellate Tribunal (the Tribunal). The impugned order dated 28.1.2015 is in respect of Assessment Year 2005-06.

2 Revenue urges the following questions of law, for our consideration:

“ Whether on the facts and in the circumstance of the case and in law, the Tribunal was justified in law in dismissing the revenue's appeal by holding that re-opening notice under Section 148 of the Act is bad in law without appreciating the fact that the applicability or otherwise of provisions of section 50C was not examined at all by the Assessing Officer in the assessment order passed u/s 143(3) on 26.12.2007 ?”

3 For the subject Assessment Year, the Assessing Officer had completed regular assessment on 26.12.2007 under Section 143(3) of the Act. Thereafter on 11.3.2010 a notice under Section 148 of the Act was issued seeking to re-open assessment for the subject Assessment Year 2005-06. Reasons in support of the notice dated 11.3.2010 read as under:

“ The assessee disclosed long term capital gain of Rs.60,35,865/- on sale of land at Thane. Sales consideration of the land was Rs.2,24,00,000/-. The assessee disclosed the long term capital gain on the basis of the sales consideration as per sale deed of the land. However, the assessee failed to furnish the copy of the sale deed of the land. Subsequently, it came to notice that the land was valued on the day of the sale by Stamp Duty Authority at Rs.2,83,71,988/-. In view of the provisions of Section 50C of the IT Act, the capital gain is to be computed by adopting the value of the land as determined by Stamp Duty Authority as sales consideration. The omission on the part of the assessee, resulted in escapement of income of capital gain by Rs.59,71,938/-.”

4 The Respondent objected to the issue the re-opening notice dated 11.3.2010 as being without jurisdiction as it is based on change of opinion. This as the issue was subject of consideration in proceedings leading to the Assessment Order dated 26.12.2007 in the regular assessment proceedings. However, the Assessing Officer did not accept the objection and by his order dated 22.12.2010 passed re-assessment order under Section 143(3) read with Section 147 of the Act for the Assessment Year 2006-06. Thus, re-assessing the Respondent on sale of its land on application of Section 50C of the Act i.e. taking stamp-duty valuation as the adopted sales value for the sale of the land to compute capital gains.

5 Being aggrieved with the Assessment Order dated 22.12.2010, the Respondent filed an appeal to the Commissioner of Income Tax (Appeals) [CIT(A)]. In appeal, CIT(A) found on facts that

8-ITXA-102-2016

copy of sale deed was filed during the regular assessment proceedings and the Respondent had during the regular assessment proceedings disclosed long term capital gain on the sale of land at Thane. It is on the disclosure on the aforesaid facts that a view had been taken by the Assessing Officer in the regular assessment proceedings. Thus, the CIT(A) by order dated 18.12.2012 held the notice dated 11.3.2010 was bad in law. Consequently, re-assessment order dated 22.12.2010 passed under Section 143(3) read with 147 of the Act was annulled.

6 Being aggrieved with the order dated 18.12.2012 of the CIT(A), the Revenue carried the issue in Appeal to the Tribunal. By the impugned order dated 28.1.2015, the Tribunal records the fact that copy of the sale deed was very much part of the record before the Assessing Officer and the issue of computation of capital gain was subject matter of enquiry during regular assessment proceedings. In these circumstances, the impugned order held that the re-opening notice dated 11.3.2010 being based on change of opinion is bad in law. Therefore, the view of the CIT(A) as recorded in his order dated 18.12.2012 was upheld.

7 The grievance of the Revenue before us is that the Assessing Officer omitted to consider Section 50C of the Act while passing the order dated 26.12.2007 under Section 143(3) of the Act. Thus, it is submitted that the re-opening notice dated 11.3.2010 is valid in law. In support reliance is placed on the decision of the Supreme Court **A.L.A. Firm v. CIT [1991]55 Taxmann 497**. Thus, the appeal be entertained.

8 We find that both the CIT(A) as well as the Tribunal have

on facts found that during the regular assessment proceedings the copy of the sale deed was produced by the Respondent and it was subjected to consideration as queries were made by the Assessing Officer on the issue of capital gains on sale of land. It was on consideration of all the facts and the law applicable that the Assessment order dated 26.12.2007 under Section 143(3) of the Act was passed. We further find that the reasons recorded do not state that the Assessing Officer had failed to consider the provisions of Section 50C of the Act during the regular Assessment Proceedings but it proceeds on the basis that the Respondent had failed to furnish copy of sale deed of land. This is found to be factually incorrect both by the CIT (A) as well as the Tribunal. Thus the submission on the part of the Revenue seems to be at variance with the reason recorded in support of the impugned notice. This is not permissible as held by this Court in **Hindustan Lever Ltd. v. R.B.Wadkar 268 ITR 332.**

9 The reliance upon the decision of the Supreme Court in **A.L.A. Firm (Supra)** in the present facts is not appropriate. In the above case the Assessing Officer completed regular assessment proceedings being ignorant that the issue stood covered by a decision of the Madras High Court in **G.R.Ramachari & Co. v. CIT 41 ITR 142**, although the decision was rendered sometime before the assessment order was passed. The basis of re-opening the assessment in **A.L.A. Firm (Supra)** was the decision in the case of **G.R.Ramachari & Co. (Supra)** coming to the knowledge of the Assessing Officer subsequent to the completion of assessment proceedings. In this case it is not the case of the Revenue that the Assessing Officer was not aware of Section 50C of the Act at the time of passing the Assessment Order dated 26.12.2007 under Section 143 of the Act. In this case the trigger to re-open assessment proceedings as

8-ITXA-102-2016

recorded in the reasons is non-furnishing of copy of the sale deed by the Respondent. This has been found factually to be incorrect. Therefore, once the sale deed was before Assessing Officer and enquiries were made during the assessment proceedings regarding the quantum of capital gains, it must follow that the Assessing Officer had while passing the order dated 26.12.2007 under Section 143(3) of the Act had taken view on facts and in law as in force at the relevant time. Thus, this is a case of change of opinion.

10 One must not lose the sight that the re-assessment proceedings are not proceedings to review of the order already been passed but only a power to re-assess. As observed by the Supreme Court in **CIT v. Kelvinator 320 ITR 561**, '*We must also keep in mind the conceptual difference between power to review and power to reassess*'.

11 In the above facts and circumstances, the question of law as proposed on behalf of the Revenue does not give rise to any substantial question of law. Thus, not entertained.

12 Accordingly, Appeal dismissed. No order as to costs.

(SANDEEP K. SHINDE,J.)

(M.S.SANKLECHA,J.)