

A INCOME TAX OFFICER, CUTTACK AND ORS.
v.
BIJU PATNAIK

DECEMBER 7, 1990

B [KULDIP SINGH AND K. RAMASWAMY, JJ.]

Income Tax Act, 1961: Sections 147 & 148—Condition Precedent for exercise of jurisdiction by I. T. O.

C The respondent-assessee was assessed to income tax for the assessment year 1957-58 ending with financial year March 31, 1957. Subsequently, it came to the notice of the Income Tax Officer that the assessee had not shown in his return a sum of Rs.15 lakhs which he had earned as capital gains by the sale of his mining business. According to the assessee, the transfer of the business had been made on 31.3.1956 and as such the capital gain was not leviable to taxation since capital gain was not subjected to taxation in the assessment year 1956-57. But from the information available with the Income Tax Officer it appeared that the transfer of business took place on 3.11.1956.

D On the basis of this information the Income Tax Officer, with the approval of the Commissioner of Income Tax, issued notice to reopen the assessment in question under sections 147 (a) and 148 of the Income Tax Act, 1961.

E The assessee challenged the notice by way of writ petition under Article 226 of the Constitution which was dismissed by the learned Single Judge. On appeal, the Division Bench, while upholding the exercise of the power under section 147 (a) of the Act, held that the income derived by the respondent was towards sale of goodwill and, therefore, the income was not liable to capital gains tax.

F On behalf of the assessee it was contended before this Court that (i) the sum received by him was consideration for the transfer of the goodwill of the business as an ongoing concern; (ii) the Income Tax Officer had no reason to believe that the income had escaped assessment for that year; and (iii) the satisfaction arrived at by the Income-Tax Officer under section 147(a) did not exist on the facts of the case, and the Income-Tax Officer merely communicated the notice without complying with the provisions of section 147(a) read with section 148 of the Act.

Allowing the appeal, setting aside the judgment of the Division Bench and restoring that of the Single Judge, this Court,

HELD: (1) Section 147 (a) of the Income Tax Act postulates two conditions, namely, that the Income-Tax Officer must, on the basis of material facts on record, prima facie, be satisfied that the income of the assessee is exigible to tax for that relevant assessment year and that he had reason to believe that it had escaped assessment. Further, he must have reason to believe that the escapement of income was on account of the omission or failure of the part of the assessee to fully and truly disclose all the material facts necessary for the assessment. Both the conditions are conditions precedent to the exercise of the jurisdiction under section 147 (a) read with section 148. [492B-C]

Calcutta Discount Co. Ltd. v. I.T.O., [1961] 41 I.T.R. 191 (SC), referred to.

(2) It is true that the notice does not prima facie disclose the satisfaction of the two conditions precedent enjoined under section 147 (a), but in the counter affidavit filed by the Income-Tax Officer in the High Court, he has stated all the material facts. It is settled law that in an administrative action, though the order does not *ex facie* disclose the satisfaction by the Officer of the necessary facts, but if the record discloses the same, the notice or the order does not *per se* become illegal. [492G-493B]

(3) The Division Bench has committed illegality in coming to the conclusion that the sum of Rs.15,00,000 was received towards consideration for sale of goodwill of the on-going business. It is premature on the facts and circumstances in this case to reach such a decision. Whether assets and goodwill together were transferred or the goodwill alone was transferred as on-going concern of the mining business is a matter yet to be gone into by the Income-Tax Officer. [493E-G]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 571 (NT) of 1976.

From the Judgment and Order dated 27/28.11.1974 of the Calcutta High Court in Appeal from Original Order No. 271 of 1973.

Dr. V. Gaurishanker, B.B. Ahuja, Ms. A. Subhashini and S. Rajjappa for the Appellants.

A Dr. Debi Prasad Pal, Ms. A.K. Verma and S. Sukumaran for
JBD & Co. for the Respondent.

The Judgment of the Court was delivered by

B **K. RAMASWAMY, J.** By proceeding dated January 21, 1959
the respondent was assessed to income tax for the assessment year
1957-58 ending with financial year March 31, 1957. On transfer on
point of jurisdiction, the Income-Tax Officer, Special IV Circle,
Cuttack had drawn his proceeding on July 2, 1965 to reopen the assess-
ment under sections 147(a) and 148 of the Income-Tax Act, 1961 (for
short 'the Act') and obtained the approval of the Commissioners of
C Income-tax, Cuttack, Bihar and Calcutta thus:

D "The assessee sold his mining business during the relevant
accounting year to a Company named M/s. B. Patnaik
Mines (P) Ltd. and earned a profit of Rs. 15 lakhs which
was assessable as capital gains but was not shown by the
assessee in his return. The transfer of the business was
stated by the assessee to have been made on 31.3.1956 and
as such the amount of capital gains was not liable to taxa-
tion, it was claimed by the assessee since capital gains was
not subjected to taxation in the assessment year 1956-57.
E But from information now available it appears that the
transfer of the business took place on 3.11.1956 and thus
the assessee was liable to be taxed on the capital gains
earned in the accounting year ended 31.3.1957. Hence
action under section 147(a) is required to assess the said
sum of Rs. 15 lakhs which escaped assessment".

F The respondent was called upon by notice dated July 31, 1965 to
deliver within 30 days from the date of the service of the notice a
return in the prescribed form of the income assessable for the assess-
ment year 1957-58 and on failure thereof the notice dated September
17, 1965 under section 147(a) was followed to produce or caused to be
produced the relevant records before the officer. Calling in question
G and to quash the notices the respondent filed writ petition under
section 226 of the Constitution. The learned single Judge by judgment
dated February 7, 1973, dismissed the writ petition upholding the
validity of the notice under section 147 of the Act. On appeal, the
Division Bench by judgment dated November 27-28, 1974, while
upholding the exercise of the power under section 147(a) of the Act
H held that the income derived by the respondent was towards sale of

goodwill and that, therefore, the income was not liable to capital gains tax and the impugned notices were quashed. The High Court granted leave under Article 133(1) (a) & (b) of the Constitution. Thus this appeal. A

The contention of Dr. Pal, the learned counsel for the respondent is that the Income-tax Officer merely communicated the notice without complying with the provisions of Section 147(a) read with Section 148 of the Act. The Income-tax Officer must have reason to believe that the income for the relevant assessment year had escaped assessment and that the escapement of the income was on account of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for that assessment year. The sum of Rs. 15,00,000 received by the respondent was consideration for the transfer of the goodwill of the business as an ongoing concern. The Income-tax Officer had no reason to believe that the income had escaped assessment for that year. The findings of the Courts below that the respondent failed to disclose the material facts that the transfer of the goodwill took place on November 3, 1956 and a sum of Rs. 15,00,000 escaped assessment was not correct. Even otherwise, as per findings of the Division Bench, it was not liable to tax. Therefore, the condition precedent, namely, that the Income-tax Officer is satisfied that the escapement was due to omission or failure to disclose the material facts was not made out. Since the receipt of a sum of Rs. 15,00,000 was consideration for the transfer of the goodwill, it was not liable to capital gains tax. The satisfaction arrived at by the Income-tax Officer under section 147(a) did not exist on the facts of the instant case. The impugned notices under Section 147(a) read with Section 148 and Section 142(1) of the Act are without jurisdiction and illegal. Shri Ahuja, the learned counsel appearing for the revenue resisted these contentions and contended that the learned Single Judge has rightly found all the facts against the respondent and that the Division Bench was not justified in law in reversing the well considered judgment of the learned Single Judge. B
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Section 12-B of the Indian Income-tax Act, 1922 making capital gains exigible to tax had come into force with effect from April 1, 1957. Therefore, for the assessment year 1956-57 ending with financial year March 31, 1956 the capital gains was not exigible to tax. It is not also in dispute that the respondent claimed that the income of Rs. 15,00,000 was received before March 31, 1956. Consequently the Income-tax Officer did not assess Rs. 15,00,000 to capital gains tax. By agreement dated November 3, 1956 the assets and goodwill of the G
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A Mining business of the respondent was transferred to M/s. B. Patnaik Mines (P) Ltd. for a consideration of Rs.15,00,000 payable in instalments. The Income-tax Department subsequently came into possession of this information through the Director of Mines, by letter dated June 29, 1965. On the basis of this information the aforestated proceedings to reopen the assessment has been drawn by the Income-tax

B Officer. Section 147(a) of the Act postulates two conditions, namely, that the Income-tax Officer must, on the basis of material facts on record, *prima facie*, be satisfied that the income of the assessee is exigible to tax for that relevant assessment year and that he has reason to believe that it had escaped assessment. He must have reason to believe that the escapement of income was on account of the omission or failure on the part of the assessee to fully and truly disclose all the

C material facts necessary for the assessment. Both the conditions are conditions precedent to the exercise of the jurisdiction under section 147(a) read with Section 148. This is so laid by this Court in *Calcutta Discount Co. Ltd. v. I.T.O.*, [1961] 41 I.T.R. 191 (SC). and host of later decisions.

D The learned Single Judge found that the material on record would show that the Income-tax Officer had before him the material that the respondent had a sum of Rs.15,00,000 as capital gains by transferring his mining business to a limited company during the accounting year ended on March 31, 1957 which had escaped assess-

E ment. The respondent had stated that he received the amount before March 31, 1956 from the material which had come to the possession of the Income-tax Officer, but was not available at the time of original assessment, disclosed that the date of transfer of the business under law fell during the accounting year ended on March 31, 1957. Hence it was necessary to reopen the assessment for the year 1957-58. This

F finding was affirmed by the Division Bench.

It is undoubtedly true that the notice does not *prima facie* disclose the satisfaction of the two conditions precedent enjoined under section 147(a), but in the Counter Affidavit filed by the Income-tax Officer in the High Court he stated all the material facts. The respon-

G dent had inspected the record and the record also bears out the existence of the material facts. The proceedings drawn which was abstracted earlier also shows that the Income-tax Officer had applied his mind to the facts on record and was *prima facie* satisfied that reopening of the assessment for the assessment year 1957-58 was needed due to those stated facts. Thus though *ex facie* the notice does

H not disclose the satisfaction of the requirement of Section 147(a), but

from the record and the averments in the counter affidavit it is clear that the Income-tax Officer had applied his mind to the facts and after *prima faice* satisfying himself of the existence of those two conditions precedent reached the conclusion to reopen the assessment. It is settled law that in an administrative action, though the order does not *ex facie* disclose the satisfaction by the officer of the necessary facts, but if the record discloses the same, the notice or the order does not per se become illegal.

We reject the contention of Dr. Pal that the Income-tax Officer had no reason to believe that the income had escaped assessment for the relevant accounting year for the reasons mentioned by the Income-tax Officer in the proceedings drawn on July 2, 1965. It is also clear therefrom that the escapement of assessment was on account of the omission of failure on the part of the respondent to disclose the material facts truly and fully. It is the contention of the respondent, before making assessment, that the income was received before March 31, 1956 by which date Section 12-B of the Indian Income-tax Act had not come into force. Accepting this sum of Rs.15,00,000 was excluded from the consideration of the assessment. The subsequent information in possession of the Income-tax Officer discloses that the assets were transferred on November 3, 1956 by which date Section 12-B came into force.

It is true that the Division Bench has stated in the judgment that it repeatedly enquired of the counsel for the revenue whether the income was towards the transfer of goodwill of the mining business as on-going concern as the capital receipt and that no satisfactory reply was given by the counsel. We are afraid that it is not correct to reach a conclusion or to record a finding on the basis of indecisiveness of the counsel for revenue to make a positive statement or a wrong concession that the sum of Rs.15,00,000 was received towards consideration for sale of goodwill of the on-going mining business. The Division Bench, therefore, has committed illegality in reaching the above conclusion. Whether assets and goodwill together were transferred or the goodwill alone was transferred as on-going concern of the mining business is a matter yet to be gone into by the Income-tax Officer. It is open to the respondent to place all the necessary material facts and the Income-tax Officer is free to consider the material and to make a decision in that regard. The Division Bench rested its conclusion on the ground that since income derived was for the transfer of the goodwill of the business as on-going concern it is not capital gain and that, therefore, is not exigible to tax. (It is premature, on the facts and

- A circumstances in this case. to reach such a decision.) We are clearly of the opinion that the Division Bench committed grave error of law in holding that the notice under sections 148 and 142 are vitiated on account of the above conclusion. It is open to the respondent to submit his return and all the necessary materials in support of his case and the
- B Income-tax Officer is free to consider on merits and pass the assessment order in accordance with law. It is made clear that any observations made here or by the High Court shall not be construed to mean any opinion expressed by this Court on merits. It is limited only for the purpose of finding the legality of the exercise of the power under sections 147(a) and 142. The Income-tax Officer had validly and legally exercised his jurisdiction and reopened the assessment for the
- C assessment year 1957-58. The judgment of the division Bench is set aside and that of the Single Judge is restored.

The appeal is allowed, but in the circumstances without costs.

R.S.S.

Appeal allowed.