THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 08.08.2008

+ ITA 109/2008

COMMISSIONER OF INCOME TAX, DELHI-XI ... Appellant

- versus –

BATRA BHATTA COMPANY ... Respondent

Advocates who appeared in this case:
For the Appellant : Mr R.D. Jolly with Mr Paras Chaudhary
For the Respondent : Mr S.R. Wadhwa

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

1. Whether Reporters of local papers may be allowed to see the judgment ? Yes
2. To be referred to the Reporter or not ? Yes
3. Whether the judgment should be reported in Digest ? Yes

BADAR DURREZ AHMED, J (ORAL)

1. This appeal has been filed by the revenue in respect of the assessment year 1996-97 against the decision of the tribunal in ITA 1186/Del/2003 dated 23.02.2007.

2. The facts are few. The assessee had sold agricultural land at Rs 57,37,500/- in March, 1996 and in its return had claimed exemption under the provisions of Section 2 (14) of the Income-tax Act, 1961 (hereinafter referred to as 'the said Act'). The assessee's claim was

that the agricultural land sold by it was not a capital asset. Consequently, no capital gains accrued at the hands of the assessee and he was not required to pay any tax thereon.

3. Although, it appears that an intimation under Section 143(1)(a) had been sent, the appellant's case throughout has been that it did not receive any such intimation. In any event, nothing turns upon this. The main issue involved in this appeal is with regard to invocation of the provisions of Section 147 of the said Act. The Assessing Officer had issued a notice under Section 148 of the said Act for re-assessment on 30.03.2000. The reasons recorded for issuing such a notice and for invoking the provisions of Section 147 of the said Act were disclosed as under :-

> "The assessee firm has sold an "agricultural land" for Rs.57,37,500/- in March 1996 and claimed exemption under provisions of section 2(14). The claim of assessee that the land is agricultural and hence not a capital asset requires much deeper scrutiny. The cost of acquisition is shown at Rs.4,41,279/-.
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> I have reasons to believe that the income from capital gain to tune of Rs.52.00 lacs has escaped assessment for F.Y. 95-96. Issue notice u/s 148".

Thereafter, the Assessing Officer completed the assessment holding that the land sold by the assessee was located at a distance of less than 8 Kms. from the municipal limits of Gurgaon and consequently it was a

Assessing Officer determined that long term capital gain of Rs 50,56,185/- had accrued to the assessee and was subjected to tax.

4. The assessee, being aggrieved by the said assessment order, preferred an appeal before the Commissioner of Income-tax (Appeals). The Commissioner of Income-tax (Appeals) observed that the "reasons to believe" should not be arbitrary or irrational, but must be based upon relevant and material facts. The Commissioner of Income-tax (Appeals) also observed that by saying that the issue "requires much deeper scrutiny", no belief could be said to have been formed entitling the issuance of a notice under Section 148 in order to initiate re-assessment proceedings. He also observed that in the present case the purpose behind the issuance of the notice under Section 148 appeared to be to reopen the assessment when, in the original return filed by the assessee, all the material facts had already been mentioned and no new facts or any other material had been brought to the file from the date on which the earlier return had been processed to the date the reasons were recorded. Consequently, he held that the jurisdiction assumed by the Assessing Officer under Section 147 and the issuance of notice under Section 148 were illegal. Therefore, the Commissioner of Income-tax (Appeals) annulled the assessment.

5. Being aggrieved, the revenue preferred an appeal before the Income-tax Appellate Tribunal. The tribunal considered the various facts and circumstances as well as the case law cited on behalf of the parties. The tribunal observed that once the assessment has been completed, the Assessing Officer can frame a fresh assessment only after complying with the conditions laid down in sections 147 and 148 of the said Act. Jurisdiction under Sections 147 and 148 of the said Act can be assumed only after recording reasons. The tribunal observed that considering the reasons recorded in the present case, it seems that at the time of recording of the reasons on 30.03.2000, the Assessing Officer had no information in his possession and did not have any material to form a belief that the land sold by the assessee was not agricultural land. The tribunal observed that the Assessing Officer merely wanted to verify the claim of the assessee and that is why it is noted in the reasons recorded that "the claim of assessee that the land is agricultural and hence not a capital asset requires much deeper scrutiny". The tribunal concluded that a mere desire for making a further enquiry does not confer jurisdiction upon the Assessing Officer for re-assessment. Consequently, the tribunal, after considering various decisions, including the decision of the Supreme Court in the case of ***Chhugamal Rajpal v. S.P. Chaliha & Others*****: 79 ITR 603 (SC)**, dismissed the appeal of the revenue and affirmed the order passed by

the proceedings under Section 147 and issuance of notice under Section 148 were without jurisdiction and were illegal. The assessment framed by the Assessing Officer on 31.03.2002 was also annulled.

6. Having considered the arguments advanced by the counsel for the parties and after examining the matter in detail, we are of the view that the tribunal as well as the Commissioner of Income-tax (Appeals) came to the correct conclusion. A reading of the reasons recorded does not disclose that the Assessing Officer, in fact, had reasons to believe that any income had escaped assessment. It is not just the belief of the Assessing Officer that is material, but such a belief must be based on certain reasons. The first sentence of the reasons recorded is merely a statement of fact that the assessee firm sold agricultural land for Rs 57,37,500/- in March 1996 and claimed exemption under the provisions of Section 2 (14). The second sentence is merely exploratory in nature in the sense that it says that the claim of the assessee that the land is agricultural and hence not a capital asset "requires much deeper scrutiny". There is no indication as to on what information or on what material the Assessing Officer harboured the belief that the claim of the assessee required deeper scrutiny. In fact, as recorded in the order of the Commissioner of Income-tax (Appeals), no new material is on record after the filing of the return and till the issuance of the notice

invoked at the mere whim and fancy of an Assessing Officer and it has to be seen in every case as to whether the invocation is arbitrary or reasonable. The decision of the Supreme Court in ***Chhugamal Rajpal*** *(supra)* is clearly applicable to the facts of the present case. In the case before the Supreme Court, the purported reasons recorded for reopening the assessment were *inter alia*:-

> "It appears that these persons are name-lenders and the transactions are bogus. Hence, proper investigation regarding these loans is necessary."

The Supreme Court did not find that these were sufficient reasons for reopening the assessment. With regard to the sentence "hence, proper investigation regarding these loans is necessary", the Supreme Court observed that this conclusion that there is a case for investigation as to the truth of the alleged transactions is not the same thing as saying that there are reasons to issue a notice under Section 148. The Supreme Court further observed as under:-

> "… he must give reasons for issuing a notice under Section 148. In other words, he must have some *prima facie* grounds before him for taking action under Section 148. Further, his report mentions: "Hence, proper investigation regarding these loans is necessary." In other words, his conclusion is that there is a case for investigating as to the truth of the alleged transaction. That is not the same thing as saying that there are reasons to issue notice under Section 148. Before issuing a notice under Section 148, the Income-tax Officer must have either reasons to believe that by reason of the omission or failure on the part of the assessee to make a return under Section 139 for any

> assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of clause (a) or clause (b) of Section 147 are satisfied, the Income-tax Officer has no jurisdiction to issue a notice under Section 148. From the report submitted by the ITO to the CIT, it is clear that he could not have had reasons to believe that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his assessment for the accounting year in question, income chargeable to tax has escaped assessment for that year; nor could it be said that he, as a consequence of information in his possession, had reasons to believe that the income chargeable to tax has escaped assessment for that year. We are not satisfied that the ITO had any material before him which could satisfy the requirements of either cl.(a) or cl. (b) of s. 147. Therefore, he could not have issued a notice under s. 148."

7. We feel that the observations of the Supreme Court in the aforesaid decision clearly apply to the case at hand. Merely because the Assessing Officer felt that the issue required 'much deeper scrutiny', is not ground enough for invoking Section 147. It is not belief *per se* that is a pre-condition for invoking Section 147 of the said Act but a belief founded on reasons. The expression used in Section 147 is – "If the Assessing Officer has reason to believe" and not – "If the Assessing Officer believes". There must be some basis upon which the belief can be built. It does not matter whether the belief is ultimately proved right or wrong, but there must be some material

Commissioner Income-tax (Appeals) as well as the Tribunal have found as a fact that there was no material upon which the Assessing Officer could have based his belief that income had escaped assessment. The decisions cited by Mr Jolly, who appeared on behalf of the revenue, namely, ***Income-tax Officer v. Selected Dalurband Coal Co. Pvt. Ltd*****: 217 ITR 597**, ***Raymond Woolen Mills Limited v. Income-tax Officer and Others*****: 236 ITR 34** and ***Assistant Commissioner of Income-tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd*****: 291 ITR 500** do not say anything different. In ***Dalurband Coal Co.*** *(supra),* the Supreme Court observed that at the stage of issuance of notice under Section 148 of the said Act, "the only question is whether there was relevant material, as stated above, on which a reasonable person could have formed the requisite belief". Again, in ***Raymond Woolen Mills Ltd*** *(supra),* the Supreme Court, while refusing to interfere with the re-assessment proceedings, observed that– "[w]e have only to see whether there was *prima facie* some material on the basis of which the Department could reopen the case". Lastly, in ***Rajesh Jhaveri*** *(supra),* the issue raised before the Supreme Court was whether failure to take steps under Section 143 (3) of the said Act would render the Assessing Officer powerless to initiate re-assessment proceedings in cases where intimations under Section 143 (1) had been issued. The Supreme Court held that so long as the ingredients of

rights to initiate 're-assessment' proceedings irrespective of whether steps for a regular assessment under Section 143 (3) had been taken or not. While so deciding, the Supreme Court considered the expression "reason to believe" as appearing in Section 147 in the following manner:-

> "Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word 'reason' in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment."
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> "At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is 'reason to believe', but not the established fact of escapement of income. <u>At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief.</u>"
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> (*Underlining added*)

8. We have already noticed that in the present case, the Commissioner Income-tax (Appeals) as well as the Tribunal have returned the concurrent finding of fact that there was no material before the Assessing Officer on the basis of which the Assessing Officer could have maintained a belief that the agricultural land sold by the assessee was a capital asset within the meaning of Section 2 (14) of the said Act.

the expression 'requires much deeper scrutiny' indicates, the Assessing Officer was embarking on mere exploration without any belief, much less a belief based on reason and materials.

9. Consequently, we find that there is no error in the decision of the Tribunal which is impugned before us. No substantial question of law arises for our consideration. The appeal is dismissed.

BADAR DURREZ AHMED, J

August 08, 2008 **RAJIV SHAKDHER, J**
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