

## ITAT direct to examine whether AO was in possession of original return when reassessment notice was issued

**Summary – The High Court of Bombay in a recent case of Mavany Brothers., (the Assessee) held that where assessee raised plea that date on which notice for reassessment was issued to assessee under section 148, Assessing Officer was not in possession of original return since said issue went to root of matter, issue was to be remanded back for re-adjudication**

### Facts

- The assessee filed its return of income along with its balance sheet and profit and loss account for the assessment year 1996-97, which was processed accordingly. On 13-11-2000, a notice under section 148 was issued to assessee. On 17-11-2000 the assessee filed a fresh return of income and indicated therein that the other documents were taken as filed along with original return of income.
- The Assessing Officer noticed that assessee had earned certain capital gain on sale of its theatre building, which were not disclosed in its return for year 1996-97 and, thus, he concluded that income had escaped assessment to tax and concluded assessment levying capital gains tax.
- The assessee raised a plea that date on which notice was issued *i.e.* 13-11-2000, the Assessing Officer was not in possession of original return and, therefore, he could not have issued notice seeking to re-open assessment.
- The Commissioner (Appeals) as well as the Tribunal without considering aforesaid plea of assessee, upheld the reassessment order passed by Assessing Officer, levying capital gain tax.
- On appeal:

### Held

- The jurisdiction under section 147/148 is an extraordinary jurisdiction and can only be exercised when conditions precedent as provided in section 147/148 are satisfied. It is the assessee's case that the aforesaid conditions are not satisfied inasmuch as in the absence of the Assessing Officer having the original return of income available, it would not be possible for him to have a reasonable belief that income chargeable to tax has escaped assessment. This issue of jurisdiction according to the revenue could only have been raised before the Assessing Officer and not having been raised before him, assessee had waived its rights to raise the same. The assessee having submitted to the jurisdiction of the Assessing Officer cannot now challenge the same. This is not entirely correct. It is well settled that mere acquiescence will not give jurisdiction to an authority who has no jurisdiction.
- Reason to believe that income chargeable to tax has escaped assessment is a jurisdictional fact and only on its satisfaction does the Assessing Officer acquire jurisdiction to issue notice. Thus, this lack of satisfaction of jurisdictional fact can never confer jurisdiction and an objection to it can be raised at any time even in appeal proceedings. The mere fact that no objection is taken before the

Assessing Officer would not by itself bestow jurisdiction as the Assessing Officer. Such an objection can be taken in appeal also.

- In fact the authorities have proceeded on the basis that the original return filed in 1997 was not available at the time when the record was inspected on 8-9-2004 but proceed on the premise that the same may have been available at the time when the notice on 13-9-2000 was issued under section 148. This conclusion has been drawn by the authorities ignoring the assessee's contention as is evident from the revised return of income filed on 17-11-2000 wherein the assessee had specifically mentioned that the profit and loss account and the balance sheet was enclosed to the original return of income filed on 22-9-1997. The Assessing Officer had on 20-11-2000 called upon the assessee to produce the balance sheet and profit and loss account for the assessment year 1996-97 as the same were not attached to the return of income filed on 17-11-2000. In case the revenue had in its possession the 1997 return of income then it would have had relied upon the annexures filed with the original return of income and no occasion to call for it from the assessee could arise. The absence of record is *prima facie* evident from the letter, dated 20-11-2000 addressed by the Assessing Officer to the assessee merely 7 days after the issuing of the impugned notice. This aspect has not at all been considered by the authorities under the Act, including the Tribunal. The impugned order of the Tribunal while rejecting the assessee's plea of the notice being without jurisdiction, has not dealt with the assessee above contention but merely upheld the order of the Commissioner (Appeals). In view of the above, the impugned order of the Tribunal holding that the notice dated 13-11-2000 issued under section 148 was within jurisdiction has to be set aside. However, the same is being restored to the Tribunal to consider afresh the contentions of the assessee as well as the revenue with regard to the existence of the original return of income filed on 22-9-1997 in the record of the Assessing Officer at the time when the notice, dated 13-11-2000 was issued.
- The impugned order of the Tribunal was set aside on the issue of reopening notice and matter was remanded to Tribunal for fresh consideration.