

(1975) 01 BOM CK 0012

In the Bombay High Court

Case No : Special Civil Application No. 1310 of 1970

Ambaji Traders P. Ltd.

APPELLANT

Vs

Income Tax Officer, Central Circle (III), Nagpur

RESPONDENT

Date of Decision : 21-01-1975

Acts Referred:

Income Tax Act, 1961 — Section 129, 143, 144, 146, 147

Citation : (1976) 105 ITR 273 : (1975) MhLj 580

Hon'ble Judges : M.N. Chandurkar, J; Dharmadhikari, J

Bench : Division Bench

Advocate : S.C. Ghate, for the Appellant; K.H. Deshpande, for the Respondent

Judgement

Chandurkar, J.—The petitioner in this petition is challenging a notice issued u/s 148 of the Income Tax Act, 1961 (hereinafter referred to as the Act), on January 10, 1967, by the Income Tax Officer, Central Circle (III), Nagpur, for reopening the assessment for the assessment year 1959-60. The petitioner is a partnership firm which commenced its business in April, 1957, and its first year of account ended on June 30, 1957, and the corresponding assessment year was 1958-59. The second accounting year was from July 1, 1957, to June 30, 1958, and the corresponding assessment year was 1959-60. The reference hereafter is to the assessment year. In respect of the previous year relevant to the assessment year 1959-60 the accounts of the petitioner firm disclosed cash credits aggregating to Rs. 3,36,000. This amount came to be added as cash credits to the income of the assessee in the assessment year 1959-60. However, on appeal, the Appellate Assistant Commissioner found that cash credits amounting to Rs. 2,50,000 fell within the financial year relevant to the assessment year 1958-59 and the amount of Rs. 2,50,000 came to be deleted from the income of the assessee for the assessment year 1959-60. On this finding of the Appellate Assistant Commissioner the Income Tax Officer issued a notice u/s 147(a) of the Act for the assessment year 1958-59, and as a result of reassessment an amount of Rs. 2,25,000 for which there was no satisfactory explanation with regard to the

source according to the Income Tax Officer, came to be included in the income of the assessee for the assessment year 1958-59. An appeal was filed against this assessment order by the petitioner. This Appeal No. 27-Spl-B/1965-66 came to be decided on August 22, 1966, by the Appellate Assistant Commissioner. The Appellate Assistant Commissioner took the view that since section 68 of the Act provided that where any sum is founded credited in the books of an assessee maintained for any previous year and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not in the opinion of the Income Tax Officer satisfactory, the sum so credited may be charged to Income Tax as the income of the assessee for that previous year, and as the said amount was credited in the books of the assessee during the previous year ending June 30, 1958, for which regular books of account were maintained by the assessee and the corresponding year for that accounting year was 1959-60, the Income Tax Officer had erred in assessing the amount of Rs. 2,25,000 in the assessment year 1958-59. He, therefore, deleted the amount of Rs. 2,25,000 as income from undisclosed sources for the year 1958-59. After this decision the Income Tax Officer issued the impugned notice u/s 147 of the Act to the assessee stating that he had reason to believe that his income chargeable to tax for the assessment year 1959-60 had escaped assessment and that petitioner was called upon to deliver to the Income Tax Officer a return for the assessment year 1959-60. In the meantime, the order of the Appellate Assistant Commissioner deleting the amount of Rs. 2,25,000 was appealed against by the Income Tax Officer and the Income Tax Appellate Tribunal, by its order dated March 23, 1967, confirmed the decision of the Appellate Assistant Commissioner. The department asked for a reference to be made to the High Court and a reference is now pending with regard to the applicability of section 68 of the Act to the proceedings. As a result of the notice issued in respect of the assessment year 1959-60 the petitioner came to be reassessed and the Income Tax Officer on further inquiry included a sum of Rs. 2,86,000 as unproved loans as income from other sources. A notice as to why action should not be taken for concealment of income was also directed to be issued. The present petition was filed after the Income Tax Officer passed his order of assessment. In the meantime, the petitioner also filed an appeal against the order of assessment which, however, came to be rejected. It then filed an appeal before the Income Tax Appellate Tribunal which came to be decided on June 21, 1974. The Tribunal did not go into the question about the validity of the notice but set aside the orders of the Income Tax Officer and the Appellate Assistant Commissioner on the ground that the petitioner was not given adequate opportunity to represent his case to rebut the proposal of the Income Tax Officer to make an addition as income from undisclosed sources referable to hundi loans. The position as it stands today, therefore, is that the assessment order against the petitioner has been set aside and the Income Tax Officer has been directed to make a fresh assessment after giving the assessee a specific opportunity to rebut the case which was sought to be made out against it. Since the Tribunal did not go into the validity of the notice and it is not now possible for the Income Tax Officer to

go into that question in view of the terms of the remand order, we have heard the learned counsel for the petitioner in this petition. After the assessment order was passed by the Income Tax Officer, he took steps u/s 226(3) of the Act to recover an amount of Rs. 1,76,000 due from the Hindustan Steel Limited to the petitioner. The petitioner in this petition has also prayed that the said recovery is illegal and it was entitled to the refund of that amount.

2. The main argument advanced for the petitioner is that the notice issued by the Income Tax Officer u/s 147 of the Act is beyond the period prescribed u/s 149 and, therefore, according to the learned counsel, the notice was liable to be quashed. There was some dispute as to the nature of the jurisdiction that was being exercised by the Income Tax Officer while issuing the notice. It appears that originally the stand taken by the department appeared to be that the notice was u/s 147(b) of the Act. We asked the learned counsel for the department for the reasons which weighted with the Income Tax Officer when he decided to issue the impugned notice and it is clear from the report made to the Commissioner of Income Tax when permission was sought for the issue of the notice that the notice resulted from the observation made by the Appellate Assistant Commissioner in his order while disposing of the appeal in respect of the assessment year 1958-59 that the alleged income from undisclosed sources was liable to be included in there assessment for the assessment year 1959-60. Now, what is contended on behalf of the petitioner is that section 149 of the Act prescribed a limitation of four years for the issue of a notice under clause (b) of section 147 from the end of the relevant assessment year. The relevant assessment year 1959-60 ended on March 31, 1960, and therefore, according to the learned counsel, the notice dated January 10, 1967, for reopening the assessment proceedings taken by the Income Tax Officer were entirely without jurisdiction. Now, prima facie, the argument appears to be plausible if one looks merely to the provisions of section 147(b) of the Act. The contention, however, does not stand close scrutiny when we look to the provisions of section 150 and 153 of the Act. Section 150, of which sub-section (1) is analogous to the second proviso to sub-section (3) of section 34 of the 1922 Act, reads as follows :

"150. (1) Notwithstanding anything contained in section 149, the notice u/s 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision.

(2) The provisions of sub-section (1) shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that sub-section relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, reassessment or recomputation may be taken."

3. At this stage we may also refer to the provisions of section 153. Sub-section (1) of section 153 prescribes the period for making an order of assessment u/s 143 or u/s 144 of the Act. Sub-section (2) of section 153, in so far as it deals with the assessment, reassessment or recomputation u/s 147(b), reads as follows :

"No order of assessment, reassessment or recomputation shall be made u/s 147 -.....

(b) where the assessment, reassessment or recomputation is to be made under clause (b) of that section, after -

(i) the expiry of four years from the end of the assessment year in which the income was first assessable, or

(ii) the expiry of one year from the date of service of the notice u/s 148, whichever is later."

4. We may also reproduce the material part of sub-section (3) of section 153 which is relevant for the purpose of the present case :

"The provisions of sub-sections (1) and (2) shall not apply to the following classes of assessments, reassessments and recomputations which may, subject to the provisions of sub-section (2A), be completed at any time -

(i) where a fresh assessment is made u/s 146;

(ii) where the assessment, reassessment or recomputation is made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order u/s 250, 254, 260, 262, 263 or 264 or in an order of any court in a proceeding otherwise than by way of appeal or reference under this Act.....

Explanation 1. - In computing the period of limitation for the purposes of this section, the time taken in reopening the whole or any part of the proceeding or in giving an opportunity to the assessee to be reheard under the proviso to section 129, or any period during which the assessment proceeding is stayed by an order or injunction of any court, shall be excluded.

Explanation 2. - Where, by an order referred to in clause (ii) of sub-section (3), any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order....."

5. Now, what was contended by Mr. Ghate on behalf of the petitioner is that even assuming that by virtue of Explanation 2 to section 153(3) the assessment of the income which was excluded in the assessment year 1958-59 and had, therefore, to be included in the assessment year 1959-60 could be fictionally included u/s

150 and was deemed to be an assessment by giving effect to a finding or direction contained in an order, even that could not be done beyond the period of four years in view of the provisions of section 150(2). The learned counsel for the petitioner does not dispute that the limitation of time referred to in sub-section (2) of section 150 for the purposes of the present case would be the one found in clause (b) of section 153(2), and according to the learned counsel it is that limitation which will govern the proceedings for assessment, and since the notice was issued beyond four years from the end of the assessment year 1959-60 and the notice was also not issued within the similar period as prescribed by section 149(1)(b), the notice was liable to be quashed. Now, it is no doubt true that sub-section (2) of section 153 prescribes the limitation for making an order of assessment, reassessment or recomputation, and where such an order is to be made under clause (b) of section 147, it cannot be made after the expiry of four years from the end of the assessment year in which the income was first assessable, which is the assessment year 1959-60 in the instant case. The legislature has, however, made positive provisions excluding certain proceedings from the bar of limitation contained in section 153(1) and (2). One such provision is contained in clause (ii) of sub-section (3) of section 153, which says that the provisions of sub-section (1) and (2) shall not apply where the assessment, reassessment or recomputation is made in consequence of or to give effect to any finding or direction contained in an order u/s 250, i.e., in an appeal u/s 254, i.e., in an order of the Appellate Tribunal u/s 260, i.e., in a decision of the High Court or Supreme Court on the case stated u/s 262, i.e., in an appeal to the Supreme Court against a decision of the High Court on a reference u/s 256, u/s 263 which deals with the revisional jurisdiction of the Commissioner of Income Tax in respect of orders prejudicial to revenue, or u/s 264 which deals with the revisional power of the Commissioner in respect of an order other than an order to which section 263 applies. A further category of orders consequent upon which an assessment, reassessment or recomputation is to be made without any bar of limitation is referred to in clause (ii) of sub-section (3) as an order of any court in a proceeding otherwise than by way of appeal or reference under the Act. Thus, the substantive provisions of sub-section (3) of section 153 have removed the bar limitation prescribed in sub-section (2) in the cases contemplated by the section. Now, under Explanation 2 it is provided that where, by an order referred to in clause (ii) of sub-section (3), any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purposes of section 150 and section 153 be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order. This is a new provision and is a departure from the 1922 Act under which, for the purposes of the second proviso to sub-section (3) of section 34, the finding to which effect could be given without a bar of limitation had to be in respect of the same assessment year as held by the Supreme Court in *Income Tax Officer v. Murlidhar Bhagwan Das* and *N. KT. Sivalingam Chettiar v. Commissioner of Income Tax*. The effect of the second Explanation is that where

the income of an assessee has been excluded from one assessment year and it has to be included in another assessment year, this has been fictionally treated for the purposes of section 150 as a proceeding in consequence of or to give effect to any finding or direction contained in an order. Where such income excluded from one year has to be included in another year and such proceeding is fictionally treated as one u/s 150, then the bar of limitation will not apply in view of the express provisions in section 153(3). In a case like the instant one the provisions of section 153(2) will not be attracted. Sub-section (2) no doubt provides that sub-section (1) of section 150 shall not apply in a case where the assessment, reassessment or recomputation relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the subject-matter of the appeal, reference or revision, as the case may be taken. Now, if as argued by the learned counsel, the limitation referred to in sub-section (2) of section 150 is the one referred to in sub-section (2) of section 153, then by the express provisions of sub-section (3) of section 153 the bar of limitation has been removed. The provisions of sub-section (2) of section 150 cannot, therefore, be availed of by the petitioner.

6. The view which we have taken is supported by a Division Bench decision of the Andhra Pradesh High Court in *Abdul Rahman Saheb v. Income Tax Officer*. Dealing with section 153(3), Explanation 2, the Division Bench observed at page 546 :

"Explanation 2 to sub-section (3) of section 153 partially supersedes the Supreme Court decision in *Murlidhar Bhagwandas*'s case and *Sivalingam Chettiar*'s case by providing that in any case where income is excluded in appeal, reference or revision, or any other legal proceedings, from the assessment for any year, an assessment of such income for another assessment year shall be deemed to be one made in consequence of, or to give effect to, any finding or direction by the authority hearing the case. This fiction of law removes the bar of limitation irrespective of the question whether the authority has in fact given or can, in law, give a finding or direction that the income should be taxed in a specified assessment year other than the year for which the authority hears the case. The effect of section 150 and this sub-section read with Explanation 2 is that, if any income is deleted from assessment in a higher proceeding on the ground that it is not the income of that year, steps may be taken u/s 147 to assess it as the income of another year, without any limitation applying to the issue of the notice u/s 148 or to the completion of the assessment or reassessment."

7. Therefore, having regard to the order of the Appellate Assistant Commissioner in respect of the assessment year 1958-59, in which the income which is now sought to be brought to tax was excluded for the assessment year 1958-59, it could be brought to tax in the assessment year 1959-60, and for initiating a proceeding by the issue of a notice u/s 147(b) there was no bar of limitation.

8. The learned counsel for the petitioner has referred us to a decision of the Allahabad High Court in *Smt. Hemlata Agarwal v. Commissioner of Income Tax* in support of his contention that while the department itself was contending that the income in question could be taxed in the assessment year 1958-59 itself and it is prosecuting a reference in this court, it was not open to the Income Tax Officer to again issue a notice contending that the income was taxable in the assessment year 1959-60. Now, it is difficult for us to accept the argument that the fact that a reference has been made for determination of the question whether the order of the Appellate Tribunal confirming the order of the Appellate Assistant Commissioner that the amount in question was not liable to be included in the income for the assessment year 1958-59 having regard to the provisions of section 68, the Income Tax Officer was prevented from exercising his jurisdiction u/s 147(b) of the Act. As the matter stands today, there is an operative order of competent authorities holding that the amount in question was not liable to be included in the assessment year 1958-59. Indeed, the order of the Appellate Assistant Commissioner who deleted this amount for the assessment year 1958-59 has clearly stated that the period during which this amount was credited in the account books fell for assessment in the assessment year 1959-60. This finding was sufficient for the Income Tax Officer to take steps to bring to tax the disputed amount. The decision in *Smt. Hemlata Agarwal's* case is clearly distinguishable on facts. In that case, a sum of Rs. 24,500 which was stated to be the sale proceeds of the assessee's jewellery and invested in the purchase of a house, was assessed in the hands of the family, but the assessment was set aside in appeal on the ground that the family had disrupted and no assessment on the disrupted family could be made. A notice u/s 34(1)(a) of the 1922 Act, therefore, came to be issued to the assessee's husband and the amount was assessed in his hands stating that it could not be the income of the wife since she had no business and hence no source of income. On the next day of this assessment a notice was issued u/s 34 to the assessee, and though the appeal by the husband was pending before the appellate authority, the said amount was assessed in the hands of the assessee in order to guard against the expiry of limitation for assessment on the wife. The Income Tax Officer completed the assessment on the wife. The Income Tax Officer completed the assessment and the validity of the assessment u/s 34(1)(a) was upheld by the Appellate Assistant Commissioner and the assessee's appeal was also dismissed by the Appellate Tribunal. The Appellate Tribunal had held in that case that the reason why the notice was issued by the Income Tax Officer appeared to be that he was probably in doubt and the notice was, therefore, issued to guard against any risk "after the bitter experience in the quashing of assessment against the Hindu undivided family". The Tribunal did uphold the assessment on the ground of "a mere cautious approach of the Income Tax Officer by way of a protective assessment to avoid the recurrence of technical quashing as in the case of the Hindu undivided family". The matter came up to the High Court by way of reference u/s 66(2) of the 1922 Act, and the question raised by the assessee was whether the Income Tax Officer had reason to believe that the profits or gains

amounting to Rs. 24,500 chargeable to Income Tax had escaped assessment within the meaning of section 34(1)(a) of the Income Tax Act. On these facts the High Court took the view that when the Tribunal itself was not able to make up its mind, and the Income Tax Officer was also not able to make up his mind, it was impossible to say that the Income Tax Officer entertained a reasonable belief that some income of the assessee had escaped assessment and the Income Tax Officer could not blow hot and cold in the same breath. Now, in our view, this decision is of no assistance to the petitioner. The decision really turned section whether on the facts it could be said that the Income Tax Officer had reason to believe that any profits or gains had escaped assessment. The proceedings which the Income Tax Officer had initiated in this case followed the order of the Appellate Assistant Commissioner in the assessment proceedings for the assessment year 1958-59, and the action was clearly supported by the observations made therein as contemplated by section 147(b) of the Act. There was already a final order which continues to be operative which holds that the disputed amount could not be subjected to tax in the assessment year 1958-59. The Income Tax Officer was, therefore, entitled to take recourse to the provisions of section 147(b) and the issue the requisite notice for which unfortunately for the petitioner there does not seem to be any bar of limitation in view of the provisions of section 153(3)(ii) read with Explanation 2.

9. It is not, therefore, possible to hold that the notice issued by the Income Tax Officer was invalid on the ground of limitation.

10. As the matter stands today, the petitioner's argument that the department is not entitled to retain the amount recovered in pursuance of the notice u/s 226(3) of the Act must be accepted. The original assessment order consequent on the notice u/s 147(b) has been set aside by the Appellate Tribunal and consequently no demand can subsist in respect of the tax liability on the basis of the assessment order dated September 3, 1970. By his order dated September 3, 1970, the Income Tax Officer had determined the tax liability of the petitioner at Rs. 1,71,672.62. The notice u/s 226(3) was issued for the recovery of Rs. 1,95,517.62. It is, however, not in dispute that the only actual tax liability so far as the present dispute is concerned was Rs. 1,71,672.62. The said amount now stands in fixed deposit with the State Bank of India in the name of the special officer in pursuance of earlier orders of this Court. The deposit has been renewed from time to time. By another order dated October 30, 1974, the petitioner was permitted to withdraw the entire amount except Rs. 70,000 because at that time it was stated that appeals in penalty proceedings arising out of the impugned assessment were still pending. It, however, appears to us that since the very basis of the recovery is not now subsisting the petitioner will be entitled to the refund of the entire amount recovered from it including Rs. 70,000 deposited in the name of the special officer.

11. The result, therefore, is that the petition is partly allowed. In the circumstances of the case, there will be no order as to costs.