
(1993) 04 CAL CK 0048

In the Calcutta High Court

Case No : Income-tax Reference No. 91 of 1991

Commissioner of Income Tax

APPELLANT

Vs

Gupta Cables Pvt. Ltd.

RESPONDENT

Date of Decision : 26-04-1993

Acts Referred:

Income Tax Act, 1961 — Section 147

Citation : (1994) 207 ITR 1055

Hon'ble Judges : Shyamal Kumar Sen, J;Ajit K. Sengupta, J

Bench : Division Bench

Advocate : S.K. Mitra, for the Appellant;

Judgement

Ajit K. Sengupta, J.—In this reference u/s 256(1) of the Income Tax Act, 1961, the following question of law has been referred by the Tribunal :

"Whether, on the facts and in the circumstances of the case, the initiation of proceedings u/s 147(a)/148 of the Income Tax Act, 1961, was proper and whether the Tribunal was justified in holding that the reopening of the assessments was not legal ?"

2. This reference relates to the Income Tax assessment of the assessee-company for the assessment years 1972-73, 1974-75 and 1975-76. The original assessments for each of these three years were completed by the Income Tax Officer u/s 143(3) of the Income Tax Act, 1961, after making proper enquiries and investigations in the regular course. It appears from the original assessment that, in the course of the original assessment proceedings, the assessee-company had filed its audited profit and loss account and balance-sheet and had also filed details of various items appearing in its profit and loss account and balance-sheet for each of the said three years and the Income Tax Officer had completed the assessments after examining the audited account books including the details filed by the assessee-company.

3. Subsequently, reassessment, proceedings in respect of each of these three

years were initiated by issue of notice u/s 148 read with Section 147(a) of the Income Tax Act, 1961, on March 18, 1981, January 28, 1983, and January 28, 1983, respectively.

4. For the assessment year 1972-73, the Income Tax Officer, before initiating proceedings for reopening of assessments u/s 147(a), recorded reasons which are set out hereinbelow :

"The books of account and other documents of the company have been seized by the C. B. I., Bhubaneswar. Investigations conducted in the case helped to get possession of certain other books of account and documents which were prima facie genuine, corroborated by and large the points of allegation.

I have reason to believe that, by reason of failure on the part of the assessee to disclose fully and truly all the material facts necessary for its assessment for the year 1972-73, income chargeable to tax amounting to Rs. 2,50,000 has escaped assessment for that year.

The escaped income is Rs. 2.5 lakhs."

5. For the assessment year 1974-75, the Income Tax Officer, before initiating proceeding"s for reopening of assessments u/s 147(a), has recorded his reasons which are set out hereinbelow :

"In this case, the books of account and other documents were seized from the assessee-company in 1978-79 by the C. B. I., Bhubaneswar, which were handed over to the Income Tax Department. Subsequently, some petitions for evasion of tax were also filed against the assessee before the D. D. I. (Int.), Calcutta, The A. D. I., Calcutta, extensively examined and scrutinised the seized books of account and the evasion petition. On the basis of such examination, it was found that the assessee-company had claimed many bogus expenditure like brokerage and commission to certain parties which were prima facie not genuine expenditure. For example, the assessee had paid brokerage and commission to one Sahualla Trading Company, Cuttack, Enquiries reveal that the assessee was getting raw materials from the Government and was supplying finished products to the Orissa State Electricity Board. Therefore, there was no question of any payment of commission on this account and the expenses claimed under this head are not genuine. The firm, Sahualla Trading Company, consisted of four partners who are the sons and relatives of the directors of the assessee-company. The firm has been presumably constituted to siphon off the profits of the company in the form of commission and brokerage. As this bogus expenditure had been allowed already, this has resulted in escapement of income.

In view of the above facts, I have reason to believe that, due to the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the year income chargeable to tax has escaped assessment.

The amount of such bogus commission paid in the assessment year 1974-75 is

Rs. 1,31,134. And, as such, substantial tax effect is involved in this case. This proposal is sent u/s 147 read with the Explanations 1 and 2 of that section.

Send proposal to the Commissioner of Income Tax for necessary approval."

6. For the assessment year 1975-76, the Income Tax Officer, before initiating proceedings for reopening of assessments u/s 147(a), has recorded reasons which are set out herein below :

"In this case, the books of account and other documents were seized from the assessee-company in 1978-79 by the C. B. I., Bhubaneswar, which were handed over to the Income Tax Department subsequently. Some petitions for evasion of tax were also filed against the assessee before the D. D. I. (Int.), Calcutta. The A. D. I., Calcutta, extensively examined and scrutinised the seized books of account and the evasion petition. On the basis of such examination, it was found that the assessee-company had claimed many bogus expenditure like brokerage and commission to certain parties which were prima facie not genuine expenditure. For example, the assessee had paid brokerage and commission to one Sahualla Trading Company, Cuttack. Enquiries reveal that the assessee was getting raw materials from the Government, and was supplying finished products to the Orissa State Electricity Board. Therefore, there was no question of any payment of commission on this account and the expenses claimed under this head are not genuine. The firm, Sahualla Trading Company, consisted of four partners who are the sons and relatives of the directors of the assessee-company. The firm has been presumably constituted to siphon of the profits of the company in the form of commission and brokerage. As this bogus expenditure had been allowed already, this has resulted in escapement of income.

In view of the above facts, I have reason to believe that due to the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the year income chargeable to tax has escaped assessment.

The amount of such bogus commission paid in the assessment year 1975-76 is Rs. 62,275. And, as such, substantial tax effect is involved in this case. This proposal is sent u/s 147 read with the Explanations 1 and 2 of that section.

Send proposal to the Commissioner of Income Tax for necessary approval."

7. The only issue involved in this reference application is whether the initiation of proceedings u/s 147(a) of the Act was proper on the facts and in the circumstances of the case. The Tribunal has held that the reopening of the assessments is based on no evidence. Section 147(a) of the Act says that, if there is any failure or omission on the part of the assessee to disclose truly and fully the true income of the previous year and if the assessee has failed to disclose the true income of the previous year and such a fact has come to the notice of the Income Tax Officer, then he has jurisdiction to reopen the assessment. If there is no failure or omission on the part of the assessee in

disclosing truly and fully all materials necessary for assessment of income of the previous year, then the assessment made by the Income Tax Officer cannot be reopened u/s 147(a) of the Act.

8. It appears from the facts as stated in the statement of case that the assessee filed the return of income showing total income as per original assessments. The Inspecting Assistant Commissioner (Assessment) was in possession of the sets of books of account. In the course of assessment, both the second set of books of account and the first set of books of account were inspected by the assessee's representative. Extracts from the books of account were taken. The assessee claimed the first set of books of account as the genuine set of books of account. It was the assessee's case that the second set of books of account for the calendar year 1971 seized by the Department and in the possession of the Inspecting Assistant Commissioner (Assessment)" were not real and genuine set of accounts. The assessee's case was that its accountant, Shri Bhomraj Rathi and Shri M.L. Pansari, had written the second set of books of account to blackmail the assessee. It was also the case of the assessee that bogus entries were made in those books. The assessee claimed that the second set of books of account did not belong to it.

9. One of the directors of the assessee-company made a few admissions. Therefore, much was made out of those admissions regarding the second set of books of account. The Assessing Officer sought to attribute the second set of books of account to the assessee-company. It was alleged that some of the entries were not made in the first set of books of account and, therefore, there was an omission or failure on the part of the assessee-company to disclose the true and whole income. That was why the additions were made.

10. The submissions made by learned counsel appearing for the assessee stressed that there were no other reasons for reopening than a change of opinion on the same materials. He urged that there can be no reopening on a mere change of opinion. Reference, in this connection, has been made to the following decisions :

(1) Chhugamal Rajpal Vs. S.P. Chaliha and Others, ; (2) Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, ; (3) The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd., ; (4) Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta, ; and (5) Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others,

11. It is also by now well-settled that the reasons for the formation of the belief contemplated by Section 147(a) of the said Act for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of income of the assessee from assessment in the particular year because of his failure to disclose

fully and truly all material facts. It is not any and every material, howsoever vague and indefinite or indistinct, remote and far-fetched which would warrant the formation of the belief relating to escapement of income of the assessee from assessment. Further, simply quoting of the section to the reasons recorded cannot justify reopening of the assessment. The so-called reasons cannot be stated to be belief. Reference, in this connection, has been made to the following cases :

(a) Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, ; (b) Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, ; (c) Commissioner of Income Tax Vs. Dwarka Prosad Bazaz, ; (d) Basanta Ram Kedarnath Vs. Income Tax Officer, ; and (e) S.P. Agarwalla alias Sukhdeo Prasad Agarwalla Vs. Income Tax Officer, E-Ward and Others, .

12. It is submitted that a bare reading of the reasons shows that the Income Tax Officer initiating reassessment proceedings for the assessment year 1972-73 did not indicate as to what primary or material fact the assessee failed to disclose in the course of the original assessment proceedings and as to how he had reasons to believe that income to the extent of Rs. 2.5 lakhs has escaped assessment. There is no break up of Rs. 2.5 lakhs available in the reasons recorded. By reading the reasons as recorded for the assessment year 1972-73, it is submitted that no reasonable person could have ever formed a reasonable belief that income of the assessee-company for the said year had escaped assessment to the extent of Rs. 2.5 lakhs by reason of the assessee-company's failure to disclose fully and truly some primary facts in the course of the original assessment proceedings. The Income Tax Officer appears to have quoted only the provisions of Section 147(a). The reasons themselves are stated to be the belief which is self-contradictory. The initiation of reassessment proceedings for this year is directly hit by the decision of the Supreme Court in Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, as well as by the decision of the Supreme Court in Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, , since it is an admitted position that the impugned notice u/s 148/147(a) was issued in this case beyond a period of four years. The decision of the Delhi High Court in ASOKE KUMAR SEN Vs. Income Tax OFFICER, SPECIAL CIRCLE-V, NEW DELHI, AND ANOTHER., as well as the two decisions of this court in Basanta Ram Kedarnath Vs. Income Tax Officer, and Commissioner of Income Tax Vs. Dwarka Prosad Bazaz, also support the case of the assessee-company.

13. As regards the assessment years 1974-75 and 1975-76, the only ground as stated in the reasons recorded by the Income Tax Officer, which have been stated hereinbefore is that, in the course of the original assessment proceedings, the assessee-company had claimed many bogus items of expenditure like brokerage and commission to one Sahualla Trading Co., Cuttack, The Income Tax Officer also mentioned that the assessee was getting raw materials from the Government and was supplying finished products to the Orissa State Electricity

Board. The firm, Sahualla Trading Co., consisted of four partners who are the sons and relatives of the directors of the assessee-company. Therefore, there was no question of any payment of commission. The Income Tax Officer also notes "the firm has been presumably constituted to siphon off the profits of the company in the form of commission and brokerage". The amounts of brokerage and commission mentioned by the Income Tax Officer are Rs. 1,31,134 for the assessment year 1974-75 and another sum of Rs. 62,275 for the assessment year 1975-76.

14. It is an admitted position that both these sums were specifically shown in the audited profit and loss account of the assessee-company for each of the said two years. This fact is clearly apparent from page 368 of the paper book, where the sum of Rs. 1,31,154.31 is shown as an expenditure under the heading "Brokerage and discount" in the profit and loss account of the assessee-company for the year ended December 31, 1973, corresponding to the assessment year 1974-75. Similarly, the other sum of Rs. 62,275.50 was also shown in the profit and loss account of the assessee-company for the year ending December 31, 1974, corresponding to the assessment year 1975-76 at page 383 of the paper book. Both these sums were claimed as business expenditure in the course of the original assessment proceedings and as recorded in the original assessment orders for the said two years appearing at page 79 and page 113 of the paper book, the assessee-company had filed details of accounts and the case was heard from time to time. The Income Tax Officer computed the total income of the assessee for each of the said two years based upon the said audited profit and loss account and allowed the said two sums as business expenditure in the course of the original assessment proceedings. The assessee had, therefore, disclosed all primary facts regarding brokerage and commission for each of the said two years.

15. It is not understood as to what primary or material fact the assessee-company failed to disclose in regard to the claim of this commission and brokerage in the course of the original assessment proceedings. It is well-settled that reassessment proceedings u/s 147 cannot be initiated after the expiry of four years from the relevant assessment year unless income escapes assessment on account of failure on the part of the assessee to disclose fully and truly all material facts. Mere change of opinion cannot be a ground for reopening of assessment. No other ground has been given by the Income Tax Officer in the reasons recorded. The payment of commission and brokerage cannot become bogus merely because supplies are made to the State Electricity Board and the firm to which payment is made consists of sons and relatives of the directors of the payer company. This very aspect has been considered by the Supreme Court in *Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others*, where their Lordships quashed the reassessment proceedings initiated on the ground that payment of salary and bonus to one Mr. Dev Dutt, which was allowed in the original assessment proceedings appeared to be bogus while initiating reassessment proceedings on the ground that the amounts were utilised for

making substantial loans to the managing director and gifts to his near relatives. Furthermore, the following cases also support the assessee's case in this respect :

(a) The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd., ; (b) Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta, ; (c) Thanthi Trust Vs. Income Tax Officer, ; (d) Narang Brothers Vs. Commissioner of Income Tax and Another, ; (e) COMMISSIONER OF Income Tax, M.P. Vs. THAKURLAL., ; and (f) H. Noronha Vs. Income Tax Officer, Circle-II, Bangalore,

16. The Revenue's counsel, Sri S.K. Mitra, referred to the following two decisions of this court :

(a) Md. Serajuddin and Bros. Vs. Income Tax Officer, A-Ward and Others,

(b) H.A. Nanji and Co. Vs. Income Tax Officer, "A" Ward and Others, .

17. It appears to us that both these decisions are clearly distinguishable on facts and cannot justify the stand of the Revenue.

18. In the case of Md. Serajuddin and Bros. Vs. Income Tax Officer, A-Ward and Others, , the reasons recorded by the Income Tax Officer at the time of reopening of the assessment are quoted at pages 469 to 471 of the Reports. A perusal of these three pages would clearly show that the Income Tax Officer has recorded in detail as to how the assessee was guilty of not disclosing truly and fully all primary and material facts in the course of the original assessment proceedings and as to how receipt of "on money" was not offered for taxation in the course of assessment proceedings. There was reference to detailed investigation report which was set out in the reasons recorded and it was clearly shown as to how the income escaping assessment for the relevant years was worked out. In the face of the detailed reasons recorded by the Income Tax Officer before initiating reassessment proceedings, this court held and observed at page 472 of the Reports that there was a clear case of failure on the part of the assessee to disclose fully and truly all material facts in the course of the original assessment proceedings. There was under-invoicing in many cases and these were not disclosed even at the time when the original assessment was completed pursuant to a settlement of the Revenue authorities. The facts are, therefore, clearly distinguishable inasmuch as the detailed reasons given by the Income Tax Officer were found to be sufficient to indicate as to how the assessee-company was guilty of not having disclosed primary facts in the course of the original assessment proceedings. This is not the case here.

19. In the other case H.A. Nanji and Co. Vs. Income Tax Officer, "A" Ward and Others, , the reasons recorded appear at pages 600 to 602 of the Reports. Detailed reasons were recorded therein by the Income Tax Officer. It was shown in the reasons recorded that certain loans were accepted in the course of original assessment proceedings merely on the basis of confirmation letters. It was subsequently found that the loan-creditors were bogus. It was also noted at page

611 of the Reports that reassessment proceedings were initiated not on the same set of primary facts as were available at the time of original assessment, but altogether additional materials which were not before the Income Tax Officer originally. In fact, this decision was subsequently considered by this court in the case of S.P. Agarwalla alias Sukhdeo Prasad Agarwalla Vs. Income Tax Officer, E-Ward and Others, This court distinguished H.A. Nanji and Co. Vs. Income Tax Officer, "A" Ward and Others, and held that, unless there was evidence to show that the/creditors concerned have made confessions to the effect that loans granted to the assessee concerned were bogus, no reassessment proceedings would be initiated. At page 1020 of the Reports, this court noted that in H.A. Nanji and Co. Vs. Income Tax Officer, "A" Ward and Others, , there were confessional statements by the hundi-creditors and some of the hundi-creditors of the assessee had specifically confessed that they had been mere name-lenders for the purported loans which appeared in the books of account of the assessee concerned for the relevant assessment years.

20. This shows that H.A. Nanji and Co. Vs. Income Tax Officer, "A" Ward and Others, is clearly distinguishable.

21. In the case of the assessee-company, it is not the case of the Income Tax Officer that Sahualla Trading Company, the concern to which brokerage and commission were paid, did not exist and/or that no payment was actually made to that concern. The case of the Income Tax Officer is that Sahualla Trading Company consisted of the relatives and sons of the directors of the assessee-company and that no payment of commission was necessary having regard to the fact that the assessee-company's business was to supply goods to the State Electricity Board. It is submitted that these facts were known to the Income Tax Officer in the course of the original assessment proceedings. No new fact or material has been referred to by the Income Tax Officer in his reasons recorded. It is, therefore, nothing but a clear case of change of opinion. Furthermore, the decision of the Supreme Court in Chhugamal Rajpal Vs. S.P. Chaliha and Others, and Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta, , clearly support the case of the assessee-company.

22. It appears to us that, as far as the assessment year 1972-73 is concerned, the reasons recorded are too vague to afford any rational nexus between the materials available and the belief formed as to escapement of assessment. It merely mentions that certain investigations had been conducted and the same books of account had been seized by the C. B. I. From this, the Income Tax Officer leaps to the conclusion that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. A perusal of the said reasons would show that beyond a vague reference to some investigations having been conducted and books of account seized, there is no other material to lead any reasonable man to a belief that there was either incomplete or untrue disclosure. Neither the results of the investigations nor the contents of the books of account find a place which alone could be the basis for a

belief. Even for the other years, the only allegation in the reason is that the payment of brokerage and commission to the payee, Sahualla Trading Company, was a payment to a concern consisting of the relatives and sons of the directors of the assessee-company. Now, the question is whether, once the identity of the payee in the original assessment was disclosed, the assessee could be said to have furnished the primary fact. In the light of the decision of the Supreme Court in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , it requires that one should be clear in one's mind as to what could be the test whether the fact disclosed in the first assessment, constituted a primary fact or there should have been more to it to make it a primary fact. The Supreme Court, in the said decision, held that the assessee's obligation or duty is limited to disclosing the primary fact and nothing more than the primary fact. This necessarily brings us to the question what the test of primary fact could be--how to know a primary fact from an inferential fact. As we see it, the primary fact is that withholding of which precludes the Assessing Officer from embarking on enquiries to seek for further facts behind it and from making proper inferences. Inferential facts are discoverable by the Assessing Officer either from the revelation resulting from the primary facts or making such enquiries as the primary facts would provoke. It is precisely the reason why the Supreme Court in Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta, held that the assessee is under no obligation to make a confession. Where from the facts furnished by the assessee, a proper inference could have been arrived at as to what the assessee is supposed to confess, no allegation of non-disclosure can be fastened on the assessee.

23. In this case, the names and addresses, amounts, dates of payment and modes of payments are primary facts which are all disclosed by the assessee. Further, it was also asserted that the payments were by way of brokerage and commission and as debits to profit and loss account, they were claimed to be revenue expenditure incurred for the real necessity of the business. In the conspectus of all these disclosures, it must be held that it was for the Income Tax Officer to do all that is within his jurisdiction for drawing proper inferences. If he does not attempt to have the correct inferential fact, no blame can be laid at the doors of the assessee. The initiation of proceedings u/s 147(a) on the allegation of failure to disclose primary facts must fail.

24. We, therefore, hold that the initiation of reassessment proceedings in this case was not proper. The Tribunal was right in striking it down.

25. It may also be clarified that the so-called second set of books of account referred to by learned counsel for the Revenue, Mr. S.K. Mitra, related only to the first year and not to the second and third years, as clearly recorded by the Tribunal in paragraph 2 at page 2 of the paper book. In the first year, i.e., assessment year 1972-73, the Income Tax Officer has not shown as to how there was concealment of income with reference to the second set of books of account. No material has been referred to in the reasons recorded and no basis for Rs.

2,50,000 has been given.

26. We are, therefore, of the opinion that the reference to the second set of books of account which the Tribunal ultimately found as not belonging to the assessee and which finding has not been challenged by the Revenue is wholly irrelevant.

27. For the reasons aforesaid, we answer the question in the affirmative and against the Revenue.

28. There will be no order as to costs.

Shyamal Kumar Sen, J.

29. I agree.