

**(1981) 11 CAL CK 0002**  
**In the Calcutta High Court**  
**Case No : IT Reference No. 157 of 1979**

Commissioner of Income Tax

APPELLANT

Vs

Nathuram Gorulka

RESPONDENT

**Date of Decision :** 24-11-1981

**Acts Referred:**

Income Tax Act, 1922 — Section 34(1)(a)

Income Tax Act, 1961 — Section 147, 147(a), 148, 22, 256(1)

**Citation :** (1982) 10 TAXMAN 197

**Hon'ble Judges :** Suhas Chandra Sen, J; Sabyasachi Mukharji, J

**Bench :** Division Bench

**Advocate :** Ajit Sengupta and Sunil Kumar Mukherjee, for the Appellant; R.N. Bajoria, K.N. Jain and S.K. Ghose, for the Respondent

## Judgement

Sabyasachi Mukharji, J.—In this reference u/s 256(1) of the income tax Act, 1961, the following question has been referred to this court:

Whether, on the facts and in the circumstances of the case, having regard to the disclosure petition filed by the assessee which had not been accepted by the Department, the proceedings u/s 147(a) of the income tax Act, 1961, were validly initiated?

This reference relates to two assessment years, namely, assessment years 1962-63 and 1963-64 for which previous years ended on 31st March, 1962, and 31st March, 1963, respectively. In the original assessment for the first year, the ITO accepted the cash credits in the account of one Radhakishan Almal of Rs. 27,000 as genuine after these cash credits had been investigated by him. On this aspect, the learned advocate of the assessee contended that the cash credit had been accepted after investigation. In the second year with which we are concerned cash credits of Rs. 36,000 in the account of Surajmal Ganeshiram and Rs. 24,000 in the account of Amarchand Sureka were accepted after investigation by issuing summons to those persons concerned. In that year, Rs. 9,000 in the account of the assessee's mother was also sought to have been

accepted. The total amount thus came to Rs. 69,000 for the second year. There was a disclosure petition filed by the assessee on or about 6th of July, 1967, before the Commissioner of income tax u/s 271(4A) of the income tax Act, 1961, which account was rejected on the 25th April, 1974. The ITO, thereafter, started proceedings u/s 147(a) of the income tax Act, 1961, for the assessment year 1962-63 on 15th January, 1971, and for the assessment year 1963-64 on 17th January, 1972, that is, before the rejection of the disclosure petition because the assessee stated that the amount of Rs. 27,000 in the account of Radhakishan Almal could be included in the assessment year 1962-63 and Rs. 69,000 for the assessment year 1963-64. It may be mentioned that though the disclosure petition has not been made a part of the document in the paper book or annexed to the statement of case we were handed over a copy of the said disclosure petition. Both parties agreed that we can look into the petition and we direct that the true copies of the disclosure petition which have been handed over to us be made part of the record. This is consented to by both the parties. In the disclosure petition, in paras. 3 and 4, the assessee had stated as follows:

That your petitioner has in his hand a sum of Rs. 63,000 which is liable to be but yet unassessed except for Rs. 5,000 introduced in your petitioner's books in his mother's name during the previous year 1964-65.

That from the previous year of 1962-63 onwards your petitioner has introduced in different benamis various amounts in his business books and (from 1963-64 onwards) in the books of his partnership above-named.

2. Thereafter, the assessee gave a rotation list, from year to year, which has comprised both himself and his partnership. The assessee prayed that a certain amount might be brought under tax by spreading over five years more or less equally commencing from 1963-64 backwards and the interest credited be included in the total income of the year. The introduction of the partnership book should be left out of the computation of the firm's income and finally the assessee asked for a waiver of the penalties imposed. The assessee had annexed a rotation list with the disclosure petition. For our purpose, it is not necessary to set out in detail the said rotation list. In the original assessment, as we have mentioned and as reiterated in the statement of case, that Prahladrai Almaal, son of the assessee, had appeared and produced the books of account for the period from May 1, 1961, to April 30, 1962, and these were verified. Similarly, for the assessment year 1963-64 one Bunwarilal Sureka, son of Amarchand Sureka appeared and produced the books of accounts.

3. In the reassessment proceedings under clause (a) of section 147 of the income tax Act, the assessee objected to the inclusion of the sums of Rs. 27,000 and Rs. 69,000 in the total income of the assessee for the year under reference by letters dated 4th February, 1975, and 7th February, 1975, respectively. In those letters, the assessee stated that he was filing the returns under protest and as the reassessment proceedings were invalid no adverse inference should be drawn on the basis of the said petition inasmuch as this was done under a

misconception and general circumstances and panic thereto prevailing at the relevant time. There was a general rumour that the creditors had appeared before the Revenue and had deposed that they were mere name-lenders and the Department would act on their statements. The assessee further stated that in order to avoid unnecessary litigation and to purchase peace of mind the assessee had offered for assessment certain deposits by spread over. It was further the case of the assessee that these deposits were duly considered and accepted at the time of original assessment after considering the evidence. Therefore, it was submitted that the proceedings under clause (a) of section 147 of the Act could not be taken for those two years. The ITO rejected this contention and included the amounts in the assessee's income for the two years.

4. Being aggrieved by the said decision the assessee went up in appeal before the AAC. The AAC upheld the action of the ITO and rejected the appeal on this point.

5. The assessee then went up before the Tribunal and contended that the proceedings under clause (a) of section 147 was improper and without jurisdiction. Reliance was placed on several decisions of the Supreme Court and some other decisions and we need not refer to all those decisions cited before the Tribunal. The Tribunal was of the view that as the disclosure petition had not been accepted the statement made in the disclosure petition could not be relied on as relevant materials on which any reasonable belief could be formed that there was non-disclosure of primary facts which were required to be disclosed at the time of the original assessment. The Tribunal discussed the question of the effect of the disclosure petition, the effect of non-acceptance of the statement in the disclosure petition and came to the conclusion that reopening under clause (a) of section 147 of the Act was without jurisdiction. In these circumstances, the assessee's appeal was allowed. On the application of the Revenue the question indicated above has been referred to this court.

6. We are only concerned with the question whether there are materials relevant for the formation of the belief by the ITO for reopening the assessment for the two earlier years and numerous decisions of the High Courts and the Supreme Court have considered this aspect on various grounds. In this case, the facts are that certain amounts were shown in the original return as cash credits in the names of certain persons for the two years; whether these were cash credits or not, were according to the statement or in the statement of case as well as in the assessee's offer, then investigated and examined by the ITO making the original assessment, and accepted. Thereupon, the reopening was sought to be made on the basis of the statements made by the assessee in the disclosure petition which we have mentioned hereinbefore. Of course, the assessee had retracted from the statements made in the disclosure petition by stating that this disclosure petition was made under a misconception and under fear or panic and, furthermore, the disclosure petition had not been accepted by the Revenue.

7. The question, therefore, that arises is, whether the statement in this

background contained in the disclosure petition could be said to be sufficient material upon which a reasonable belief could be formed by the ITO that there was escapement of income in the original assessment and any failure or omission on the part of the assessee to disclose fully and truly all material and relevant facts.

8. The principle upon which emphasis was laid on behalf of the assessee is that the obligation of the assessee was to disclose primary facts and not the inference to be drawn on such primary facts. It was also emphasised that the subsequent materials must have reasonable nexus with the formation of the belief that there was non-disclosure at the time of original assessment. It was submitted that the nature of a cash credit or whether these were loans or accumulated income is the inference to be drawn, as in this case the fact of cash credit had been disclosed and investigated and there was no non-disclosure or omission. Any subsequent view of the income character of these cash credits or the question whether these were really in the nature of the cash credits were an inference to be drawn from the basis of primary facts and the subsequent materials and the nature of the cash credit would be the invariable fact which the assessee had disclosed in the original assessment.

9. This question has been the subject-matter of adjudication by the High Courts in several decisions. We need not refer to all those decisions in great detail. We might refer only to those decisions for the purpose of reiterating the law. The Supreme Court explained in the case of *S. Narayanappa and Others Vs. Commissioner of Income Tax, Bangalore*, the requirements to be fulfilled under clause (a) of section 147 of the income tax Act. We must, however, point out that the Supreme Court in that case was dealing with section 34(1)(a) of the Indian income tax Act, 1922. The Supreme Court has observed that two conditions must require to be satisfied in order to confer jurisdiction on the ITO to issue the notice u/s 34 of the income tax Act, in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year, viz., (i) the ITO must have reason to believe that income, profits or gains chargeable to income tax had been under-assessed or escaped assessment; and (ii) he must have reason to believe that such "underassessment or escapement" had occurred by reason of either, (a) omission or failure on the part of the assessee to file a return of his income u/s 22, or (b) omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for that year. The Supreme Court reiterated that those two conditions were conditions precedent to be satisfied before the ITO acquired jurisdiction to issue a notice under the section. If there was in fact some reasonable grounds for the ITO to believe that there had been any nondisclosure as regard any fact, which could have a material bearing on the question of under-assessment, that would be sufficient to give jurisdiction to the ITO to issue the notice u/s 34. Whether these grounds were adequate or not is not a matter for the court to investigate. In other words, the sufficiency of the grounds which induced the ITO to act was not a justiciable issue. It is, of course, open to the

assessee to contend that the ITO did not hold the belief that there had been such non-disclosure. In other words, the existence of the belief could be challenged by the assessee but not the sufficiency of the reasons for the belief.

10. The Supreme Court further observed that the expression "reason to believe" in the relevant section did not mean a purely subjective satisfaction on the part of the ITO. The belief must be held in good faith; it could not be merely a pretence. It was open to the court to examine whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and were not extraneous or irrelevant to the purpose of the section. To this limited extent the Supreme Court reiterated that the action of the ITO in starting proceedings u/s 34 of the Act is open to challenge in a court of law. Facts of this case are different. We do not think it is necessary to discuss the facts. The Supreme Court have enunciated the principles or the limits of judicial review.

11. The Tribunal has relied on certain observations of the Supreme Court in the case of Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, . There the original assessment for the assessment year 1958-59 was made on the assessee after allowing deduction of a sum of Rs. 10,494 towards interest to certain creditors. Thereafter by a notice u/s 148 of the income tax Act, 1961, dated March 8, 1967, served on the assessee on March 14, 1967, the ITO sought to reopen the assessment. In his report made in February, 1967, to the Commissioner, for reopening the assessment of the assessee for the assessment year 1958-59 after four years u/s 147(a) of the income tax Act, 1961, two reasons were mentioned; (i) M. K., who was shown to be one of the creditors of the assessee, had since confessed that he was doing only name-lending, and (ii) that N. M., D.K.N., B.S. and others whose names too were mentioned in the list of the creditors of the assessee were known name-lenders. The assessee thereupon filed a writ petition claiming that there was no material before the ITO on which he could have reason to believe that income chargeable to tax for the year had escaped assessment by reason of the respondent's failure to disclose material facts and stated that he had produced all books of account, bank statements and other necessary documents in connection with his return. The High Court, by a majority judgment, held that the pre-conditions for the exercise of jurisdiction u/s 147 were not fulfilled.

12. The Supreme Court on appeal held that the second ground, which could not have led to the formation of the belief, was that the income of the assessee chargeable to tax had escaped assessment for the assessment year 1958-59 because of failure of the assessee to disclose fully and truly all material facts. Since there was nothing to show that the confession of M. K. related to a loan to the assessee, much less to the loan which was shown to have been advanced by that person to the assessee in the first ground, the live link or close nexus, which should be there between the material before the ITO and the belief, which he was to form, was missing, or in any event too tenuous, to provide legally a sound basis for reopening the assessment.

13. The Supreme Court further analysed the two conditions represented before the ITO forming the belief and upheld the majority view. Our attention was drawn to the observations of the court at p. 443 where the learned advocate for the assessee had canvassed for the correctness of the view taken by the majority regarding the defective nature of the report. The learned advocate also assailed the finding of all the three judges of the High Court in so far as they had held that the assessee was being charged with omission to disclose true facts. The contention of the learned advocate was that the material on the basis of which the ITO initiated these proceedings for reopening the assessment did not have any rational connection with the formation of the belief that the assessee had not made a true disclosure of the facts at the time of the original assessment.

14. The Supreme Court did not deal with that aspect of the matter and upheld the majority decision on the ground that there was no live link established with the formation of the belief. Therefore, it was held that the statement in the original return should be a true statement, but if there is any material to doubt the truth or correctness of the statement then section 147 can be resorted to. This was the view of the three judges, but in the case before the Calcutta High Court the majority held that the live link had not been established, while the view of the minority judges was that the live link had been established. The Supreme Court, though it noted the arguments on behalf of the assessee that the High Court's opinion was erroneous in dealing with the true nature of the transactions which the assessee was obliged to disclose and could not support the decision of the High Court, chose to confirm the decision of the majority judgment on the ground that the live link was not established in the facts of the case.

15. This question was again considered by the Supreme Court in the decision in the case of ITO v. Madnani Engineering Works Ltd. [1979] 118 ITR (SC) upon which great reliance was placed. In that case in the original assessment of the assessee for the assessment year 1959-60, completed on August 23, 1960, certain interest paid by it to creditors from whom it claimed to have borrowed moneys on hundis was allowed as deductible expenditure. Subsequently on January 25, 1968, i.e., after a lapse of four years from the end of the assessment year a notice was issued by the ITO to reopen the assessment of the assessee on the ground that the transactions of loan represented by the hundis were bogus and no interest was paid by the assessee to any of the creditors and interest was wrongly allowed. The assessee challenged the validity of the notice by filing a writ petition in the High Court. On December 5, 1968, the ITO in his counter-affidavit declined to disclose the facts on the ground that if such facts were disclosed it would cause great prejudice to the interests of the Revenue and would frustrate the object of reopening the assessment. Thereafter he filed a further affidavit on January 27, 1970, stating that in the course of the assessment of the assessee for the assessment year 1963-64, it was discovered that various items shown as loans against the security of hundis in the assessee's books of account for the assessment year 1959-60 were in fact

fictitious and credits against the names of certain persons, viz., A.G., R.M. and D, were found not to be genuine and in the premises it appeared to the ITO that the assessee had failed to disclose fully and truly all material facts necessary for its assessment and by reason of such failure a portion of its income had escaped assessment. A single judge of the High Court dismissed the writ petition but, on appeal, a Division Bench of the High Court allowed the petition and quashed the notice.

16. On appeal, the Supreme Court affirmed the decision of the Division Bench of the High Court on the ground that the stand taken by the ITO in his first affidavit dated December 5, 1968, was obviously untenable because the existence of reason to believe on the part of the ITO was a justiciable issue and it was for the court to be satisfied whether in fact the ITO had reason to believe that income had escaped assessment by reason of failure of the assessee to make a full and true disclosure. It was further held that the assessee had produced in the original assessment proceedings all the hundis on the strength of which it had obtained loans from creditors as also entries in the books of account showing payment of interest and it was for the ITO to investigate and determine whether these documents were genuine or not the assessee could not be said to have failed to make a true and full disclosure of the material facts by not confessing before the ITO that the hundis and the entries in the books of account produced by it were bogus. It was further held in that case as the ITO had in the second affidavit merely stated his belief but did not set out any material on the basis of which he had arrived at such belief, there was nothing on the basis of which the court could be satisfied on the affidavit that he had reason to believe that a part of the income of the assessee had escaped assessment by reason of its failure to make a true and full disclosure of the material facts. Reliance was placed on the observations of the Supreme Court appearing at pp. 4 and 5 of the report.

17. The Supreme Court, therefore, relied on the observations in the case of The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd., . The Supreme Court was of the view that there was no obligation on the part of the assessee to disclose the inference to be drawn from the primary facts. The impression of the ITO arrived at must be such that the conditions which were relevant for the formation of the belief were that there was failure or omission on the part of the assessee to disclose the primary facts. It was submitted that even if the statement in disclosure petition is such as in the materials then such statement amounted only to the true nature of the transactions which have not been disclosed at the time of the original assessment (sic). It was submitted that the transactions were disclosed from which an inference could be drawn but these transactions need not be disclosed. This was not the obligation of the assessee and not disclosing is an inference to be drawn from those transactions. The assessee could not be said to be guilty of failure or omission to disclose all facts which could come under clause (a) of section 147 of the income tax Act.

18. This view was also corroborated by the observations of the Kerala High Court

in the case of Sujir Ganesh Nayak and Co. Vs. Income Tax Officer, A Ward, Quilon, . The Kerala High Court, accepting the view unanimously of the Calcutta High Court, held that the assessee was under an obligation to disclose the facts which were true.

19. Our attention was also drawn to the observations of the Division Bench of this court in the case of H.A. Nanji and Co. Vs. Income Tax Officer, "A" Ward and Others, . There the ITO stated his belief but did not set out any reason in his affidavit-in-opposition which was relevant for this purpose. We are not concerned with this aspect of the matter. The conditions required either for failure or omission on the part of the assessee were there in initiating the proceedings in the facts of that case. The court came to the conclusion that the conditions were there. In that view of the matter the Division Bench upheld the reopening of the assessment. Reliance was placed by the Division Bench on the observations of the Supreme Court in the case of S. Narayanappa and Others Vs. Commissioner of Income Tax, Bangalore, and the decision in the case of Chhugamal Rajpal Vs. S.P. Chaliha and Others, , which we have mentioned before.

20. Some aspect of the views expressed by the Division Bench in the background of those facts were not accepted by the Division Bench of this court and there is another decision, viz., East Coast Commercial Company Ltd. Vs. Income Tax Officer and Others, . Here, on the facts of that case it was first held that the ITO had no jurisdiction to explain the reasons (sic). Secondly, it was held that the conditions for re-opening had not been fulfilled. As we have mentioned hereinbefore, the section requires formation of a tentative belief that there was failure or omission on the part of the assessee to disclose all material facts at the time of the original assessment.

21. That belief must be formed on the material facts which have come to the knowledge of the Revenue or to the knowledge of the ITO subsequently if there is an original assessment. The materials must have reasonable nexus or connection with the formation of the belief and the materials must be such on which a reasonable man could form a tentative belief that at the time of original assessment the assessee had not disclosed the real facts or the materials. From the judgment it appears that the assessee had made two statements in the original assessment and books and records were produced to the effect that certain amounts represented the cash credit in the year in question. If the statements made in the disclosure petition are correct, which we have set out hereinbefore, the statement in the original assessment and records produced could not be correct. In the subsequent disclosure the assessee had stated that a sum of Rs. 63,000 was liable to be taxed but a sum of Rs. 5,000 represented the assessee's income spread over for certain years it could not be cash credit. The assessee did not stick to this belief as this was made on the circumstances which will lead to the conclusion that the statements made in the disclosure petition may not be correct. There is another fact that the disclosure petition has not been accepted by the Revenue. Now, there was contradiction between the

statement made in the original returns and the statements made in the disclosure petition because the two statements simultaneously cannot succeed together, either of them must be true. It is true whether one of them is true or not will be an inference to be drawn on certain facts. This contradiction by itself is a contradiction coming directly from the assessee and not from extraneous sources. The genuineness of the two statements could be considered to be sufficient materials on which a reasonable man could form a tentative belief that at the time of the original assessment, true materials or facts had not been disclosed, because it has to fulfil the requirement of disclosure of true facts, of course, there were arguments in the assessment of the original income. That point is not disputed. In our opinion on the basis of the facts as found in this case and on the basis of the principles enunciated by the Supreme Court it cannot be said that there were no materials or reasonable nexus to the formation of the belief that at the original assessment the assessee had not truly and fully disclosed or a reasonable man could not form a tentative belief. If that is the position, whether those materials were sufficient or whether those materials were true or not, we are not concerned at this stage. The decisions referred to here are to be considered whether the reopening of the assessment was sufficient or not (sic). We are not concerned with the question whether the assessment on the materials could be sustained or not. It may be or it may not be. In that view of the matter we are of the opinion that the Tribunal was not correct in coming to the conclusion that the conditions precedent to the reopening were not fulfilled in the facts and circumstances of the case.

22. Our attention was also drawn on behalf of the Revenue to certain observations of an unreported decision in the case of Smt. Ichhabai Panchal v. CWT in income tax Reference No. 220 of 1977, judgment delivered on April 22, 1981-since reported in Smt. Ichhabai Panchal Vs. Commissioner of Wealth Tax, . We are not concerned with the question whether the statement in the disclosure petition u/s 271(4A) could be considered to be sufficient material calling for the imposition of the penalty. Similarly, our attention was drawn to certain observations in the case of Commissioner of Income Tax Vs. Rajaram Pannalal and Brothers, .

23. Here also the same question was concerned, namely, the effect of the disclosure petition u/s 271(4A) imposing penalty. Learned advocate for the assessee also drew our attention to certain observations of the Madhya Pradesh High Court upon which the Tribunal had relied in the case of Additional Commissioner of Income Tax Vs. Kanhaiyalal Jessaram, and our attention was drawn to the observation of the court at pp. 170-171 on the effect of acceptance or non-acceptance of the disclosure petition u/s 271(4A) of the Act. We may mention that looked at from one point of view the question of acceptance or non-acceptance of the disclosure petition might not be relevant in deciding whether there were materials before the ITO for the formation of the belief. But we are not concerned whether this would constitute sufficient ground for sustaining assessment if it was ultimately made or even for taking any further proceedings.

In that view of the matter it is not necessary for us to express our views on this aspect of the matter. We will, therefore, answer the question in the affirmative and in favour of the Revenue. In the facts and circumstances of the case, the parties will pay and bear their own costs.

Suhas Chandra Sen, J.

I agree.