
(1974) 01 OHC CK 0033
In the Orissa High Court
Case No : S.J.C. No. 186 of 1971

Commissioner of Income Tax	Vs	APPELLANT
Prafulla Kumar Mallick		RESPONDENT

Date of Decision : 14-01-1974

Acts Referred:

Income Tax Act, 1961 — Section 139, 147, 148, 153

Citation : (1976) 103 ITR 418

Hon'ble Judges : R.N. Misra, J;B.K. Ray, J

Bench : Division Bench

Advocate : S.C. Roy, for the Respondent

Judgement

R.N. Misra, J.—This is a reference made u/s 256(1) of the Income Tax Act of 1961 (hereinafter referred to as the Act), at the instance of the revenue, of the following question for determination of this court :

" Whether the Tribunal is justified in law in holding-

(i) that only the provisions of Section 147(b), if at all, applied to the facts of this case ?

(ii) that there was no basis for treating the issue of the notice as one u/s 147(b) in this case ? and

(iii) that even if there was any basis for the issue of the notice u/s 147(b), the issue of such notice and reassessment u/s 147(b) were barred by limitation ?"

2. The assessee is an individual and maintains accounts according to the calendar year. For the accounting period ending on December 31, 1957 (assessment year 1958-59), he was assessed to Income Tax on January 29, 1960. The accounts showed a cash credit of Rs. 30,000 on February 2, 1957. The assessee claimed that it was a loan from one Janhabhi Charan Roy. He produced an affidavit of the creditor and later the creditor also appeared before the Income Tax Officer to support the loan transaction. The Income Tax Officer, however, was

not satisfied that the amount of Rs. 30,000 entered in the books of account on February 2, 1957, represented a transaction of loan. The amount was accordingly added as income from a concealed source. The addition was upheld by the Appellate Assistant Commissioner, but the Appellate Tribunal deleted the amount by saying :

" In this case the assessee has discharged the initial onus on him by producing the alleged creditor before the Income Tax Officer for examination who had supported the version of the assessee. Both the Income Tax Officer and the Appellate Assistant Commissioner have held that the amount is really the assessee's concealed income by refusing to believe the evidence of the creditor without, in any way, trying to disprove the truth of the statements made by him. In this case, the creditor, Janhabi Charan Roy, has stated on solemn affirmation before the Income Tax Officer that in 1956 when he came to Puri he brought this amount of Rs. 30,000 with him and that he put it for safe custody in the iron safe of the Math where he was staying. In 1957 he lent this amount to the assessee. It would have been very simple for the Income Tax Officer to have tested the veracity of this statement by making enquiries from the head of this Math as to whether Janhabi Charan Roy, had, in fact, brought Rs. 30,000 with him in 1956 and deposited the same in the iron safe of the Math for safe custody. No such attempt has been made by the Income Tax Officer. He simply refused to believe the evidence of the creditor. The department has obviously failed to discharge the burden shifted on to it as held in the aforesaid decision of the Bombay High Court in *Orient Trading Co. Ltd. Vs. Commissioner of Income Tax (Central), Calcutta*, . There does not seem to be any justification for treating this amount as the assessee's concealed income and this amount must be directed to be deleted from the assessment."

3. While directing the deletion of the addition on a finding that it was not an unexplained cash credit but truly a loan, the Tribunal further said :

"The credit appears on February 2, 1957. For incomes from undisclosed sources the previous year is the financial year. So, in any event, this amount could have been taxed only in the assessment year 1957-58."

4. The appellate order of the Tribunal is dated November 30, 1963.

5. The assessee had his assessment for the assessment year 1957-58 completed on April 30, 1958, which corresponded to the accounting period January 1, 1956, to December 31, 1956. On July 13, 1964, the Income Tax Officer asked for sanction of the Commissioner to reopen the assessment of that year (1957-58) u/s 147(a) of the Act on the ground that a cash credit of Rs. 30,000 in the name of Janhabi Charan Roy dated February 2, 1957, in the books of account of the assessee remained unexplained and this amount was sought to be taxed. On March 30, 1965, the assessee was served with the notice u/s 148 of the Act. " In the reassessment proceeding the Income Tax Officer found that there were certain other cash credits which were also liable to be taxed. Accordingly, he

reassessed the assessee by adding a sum of Rs. 1,30,000 and odd including the aforesaid Rs. 30,000 said to be of Janhabhi Charan Roy. The Appellate Assistant Commissioner deleted the addition of Rs. 30,000 by holding that it was not an unexplained cash credit but a loan, and directed that the peak cash credit of Rs. 51,031 should be taken as an addition. On the assessee's further appeal to the Tribunal, it came to hold that the Income Tax Officer had made the assessment u/s 147(b) of the Act and the same was barred by limitation. The issue of the notice as well as the reassessment were not saved by Explanation 2 of Section 153(3) of the Act.

6. On a reading of the appellate order of the Tribunal for the assessment year 1958-59 it is clear that the Tribunal came to hold that the sum of Rs. 30,000 which found place in the books of account of the assessee on February 2, 1957, as a loan from Janhabhi Charan Roy had been sufficiently established to be a loan and the revenue had no justification to treat it as an unexplained cash credit. On this finding deletion of the amount was directed. The subsequent statement contained in para. 4 of the appellate order, in our view, is not a finding. It was intended to show the fallacy in the contention of the Income Tax Officer, namely, if it was really an unexplained cash credit which could be treated as income from undisclosed sources it was not available to be assessed during the assessment year 1958-59, but in the previous year. This is, in our view, neither a finding nor a direction, the tests for which have been clearly laid down by the Supreme Court in *Income Tax Officer, A-Ward, Sitapur Vs. Murlidhar Bhagwandas, Lakhimpur Kheri*, .

7. It is appropriate that we refer to the relevant provisions of the Act here. Sections 147 148 149 150 152 and 153 of the Act have a bearing on the point raised for determination. They are extracted below for convenience :

" 147. Income escaping assessment.--If-

(a) the Income Tax Officer has reason to believe that, by reason of the omission for failure on the part of an assessee to make a return u/s 139 for any assessment year to the Income Tax Officer, or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in Clause (a) 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,

he may, subject to the provisions of Sections 148 to 153, assess or reassess such income or re-compute the loss or the depreciation allowance, as the case may be for the assessment year concerned (hereafter in Sections 148 to 153 referred to as the relevant assessment year).....

148, Issue of notice where income has escaped assessment.--(1) Before making

the assessment, reassessment or re-computation u/s 147, the Income Tax Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

(2) The Income Tax Officer shall, before issuing any notice under this section, record his reasons for doing so.

149. Time limit for notice.--(1) No notice u/s 148 shall be issued,--

(a) in cases falling under Clause (a) of Section 147-

(i) for the relevant assessment year, if eight years have elapsed from the end of that year, unless the case falls under Sub-clause (ii);

(ii) for the relevant assessment year, where eight years, but not more than sixteen years, have elapsed from the end of that year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more, for that year;

(b) in cases falling under Clause (b) of Section 147, at any time after the expiry of four years from the end of the relevant assessment year.

(2) The provisions of Sub-section (1) as to the issue of notice shall be subject to the provisions of Section 151.....

150. Provision for cases where assessment is in pursuance of an order on appeal, etc.--(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.

151. Sanction for issue of notice.--(1) No notice shall be issued u/s 148 after the expiry of eight years from the end of the relevant assessment year, unless the Board is satisfied on the reasons recorded by the Income Tax Officer that it is a fit case for the issue of such notice.

(2) No notice shall be issued u/s 148 after the expiry of four years from the end of the relevant assessment year, unless the Commissioner is satisfied on the reasons recorded by the Income Tax Officer that it is a fit case for the issue of

such notice.

153. Time limit for completion of assessments and reassessments,--(1).....

(2) No order of assessment, reassessment or recomputation shall be made u/s 147-

(a) where the assessment, reassessment or recomputation is to be made under Clause (a) of that section, after the expiry of four years from the end of the assessment year in which the notice u/s 148 was served;

(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.....

(3) 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--.....

(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 2.---Where, by an order referred to in Clause (ii) of subsection (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..... "

8. The learned counsel for the revenue claimed the benefit of Explanation 2 of Section 153 of the Act. We have already indicated that the finding of the Tribunal for the assessment year 1958-59, was categorical that the amount of Rs. 30,000 appearing in the assessee's books of account on February 2, 1957, represented a genuine loan and not an unexplained cash credit. In view of such a clear finding, benefit of Explanation 2 of Section 153 of the Act is not available to the revenue. The Tribunal, in our opinion, came to the right conclusion when it refused to accept such a contention raised by the revenue before it.

9. Law is settled that the Income Tax Officer for the purpose, of initiating action u/s 147 of the Act must have reason to believe that income chargeable to tax has escaped assessment. If this escapement is by reason of omission or failure on the part of the assessee to make a return u/s 139 of the Act or to disclose fully

and truly all material facts necessary for his assessment, action can be taken under Clause (a) and where in consequence of information in his possession (there being no omission or failure on the part of the assessee as is referred to in Clause (a)) the Income Tax Officer comes to believe that there has been esrapement, action can be taken under Clause (b) of Section 147 of the Act in Chhugamal Rajpal v. S. P. Chaliha [1971] 79 ITR 604, the Supreme Court stated :

"Before issuing a notice u/s 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 u/s 139 for any assessment year to the Income Tax Officer or to disclose fully and truly all material facts necessary for his 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 u/s 148. From the report submitted by the Income Tax Officer to the Commissioner, 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 Income Tax Officer had any material before him which could satisfy the requirements of either Clause (a) or Clause (b) of Section 147. Therefore, he could not have issued a notice u/s 148. Further, the report submitted by him u/s 151(2) does not mention any reason for coming to the conclusion that it is a fit case for the issue of a notice u/s 148. We are also of the opinion that the Commissioner has mechanically accorded permission. He did not himself record that he was satisfied that this was a fit case for the issue of a notice u/s 148. To question No. 8 in the report which reads : " Whether the Commissioner is satisfied that it is a fit case for the issue of notice u/s 148 ", he just noted the word " Yes " and affixed his signature thereunder. We are of the opinion that if only he had read the report carefully he could never have come to the conclusion on the material before him that this is a fit case to issue notice u/s 148. The important safeguards provided in Sections 147 and 151 were lightly treated by the Income Tax Officer as well as by the Commissioner. Both of them appear to have taken the duty imposed on them under these provisions as of little importance. They have substituted the form for the substance."

10. In Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, , the Supreme Court reiterated the aforesaid view and stated :

" In our judgment, the law laid down by this court in the above case (Chhugamal

Rajpal v. S. P. Chaliha), is fully applicable to the facts of the present case. There can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration of sufficiency of the reasons for the belief cannot be investigated by the court."

11. The steps taken by the Income Tax Officer in reopening the matter in this case were actually of the type indicated by the Supreme Court in the case of Chhugamal Rajpal v. S. P. Chaliha. We may extract the said document for convenience :

" Report in connection with the starting of proceedings u/s 147 of the Income Tax Act, 1961.

Name or District, Ward or Circle " C ". Cuttack, G.I.R. No.119-M/C.

1. Name and address of the assessee Sri P. K. Mallick, Jaipur Road, Cuttack.

2. Status Individual (3600/-).

3.

Assessment year for which notice u/s 148 is proposed to be issued.

1957-58.

4.

Whether it is a new case or one in which reassessment (or recomputation) has to be made.

A case of reassessment.

5.

If a case of reassessment (recomputation), the income (or loss or depreciation allowance) originally assessed/ determined.

Rs. 95,101.

6.

Whether the case falls under clause (a) or (b) of section 147.

147(a).

7.

Brief reasons for starting proceedings u/s 147 (indicate the items which are believed to have escaped assessment.)

Cash credit of Rs. 30,000 in the name of Sr Janhabi Charan Roy dated 2-2-57 in the books of account of assessee remains unexplained. This is sought to be taxed.

(Sd.) A. N. Misra

I.T.O., Ward-C, Cuttack,

13-7-64.

8.

Whether the Commissioner is satisfied that it is a fit case for the issue of notice u/s 148.

Yes

.....

Commissioner of Income Tax, Bihar & Orissa, Patna

9.

Whether the Board is satisfied that it is a fit case for the issue of notice u/s 148.

.....

Secretary, Board of Revenue,"

12. It has been indicated in *Johri Lal (H.U.F.), Agra Vs. The Commissioner of Income Tax*, by the Supreme Court :

" The formation of the required opinion by the Income Tax Officer is a condition precedent. Without formation of such an opinion he will not have jurisdiction to initiate proceedings u/s 34(1)(a) (of the 1922 Act corresponding to Section 147(a) of the 1961 Act). The fulfilment of this condition is not a mere formality but it is mandatory. The failure to fulfil that condition would vitiate the entire proceedings. As held by this court in *Sheo Nath Singh v. Appellate Assistant Commissioner of Income Tax*, the Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied, does not exist or is not material or relevant to the belief required by this section. It is true that the courts will not go into the sufficiency of the reasons which persuaded the Income Tax Officer to initiate proceedings u/s 34(1)(a) of the Act but the courts will examine the relevancy of the reasons which persuaded the Income Tax Officer to take proceedings u/s 34(1)(a). The formation of the required belief is not the only requirement. The Income Tax Officer is further required by Section 34 to record his reasons for taking action u/s 34(1)(a) and obtain the sanction of the Central Board of Revenue or the Commissioner, as the case may be."

13. The Supreme Court was dealing with an appeal arising out of a reference under the Act. In two earlier decisions the Supreme Court had also taken the similar view. In *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, , the Supreme Court said :

" To confer jurisdiction under this section to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year two conditions have therefore to be satisfied. The first is that the Income Tax Officer must have reason to believe that income, profits or gains chargeable to Income Tax have been under-assessed. The second is that he must have also reason to believe that such " under-assessment " has occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income u/s 22, or (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income Tax Officer could have jurisdiction to issue a notice for the assessment or reassessment beyond the period of four years, but within the period of eight years, from the end of the year in question."

14. In *S. Narayanappa and Others Vs. Commissioner of Income Tax, Bangalore*, the Supreme Court with reference to the same provisions again reiterated :

" It is true that two conditions must be satisfied in order to confer jurisdiction on the Income Tax Officer to issue the notice u/s 34 (now Section 148) in respect of assessments beyond the period of four years but within a period of eight years, from the end of the relevant year. The first condition is that the Income Tax Officer must have reason to believe that the income, profits or gains chargeable to Income Tax had been underassessed. The second condition is that he must have reason to believe that such "under-assessment" had occurred by reason of either, (i) omission or failure on the part of an assessee to make a return of his income u/s 22, or (ii) 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. Both these conditions are conditions precedent to be satisfied before the Income Tax Officer acquires jurisdiction to issue a, notice under the section."

15. To the appeal before the Tribunal for the assessment year 1958-59, the Income Tax Officer was a party. The Tribunal's order, as already stated, recorded a categorical finding that Rs. 30,000 appearing in the assessee's books of account on February 2, 1957, was a loan. The impugned notice was issued more than a year after the Tribunal's decision though the Income Tax Officer had taken action to reopen the matter some time in July, 1964. Though the learned standing counsel seriously contended that the appellate decision of the Tribunal was not the basis upon which action u/s 147 of the Act was taken, we find the following statement in the order of the Tribunal in the appeal out of which this reference arises :

"In the assessment before us for the assessment year 1957-58, an identical amount of Rs. 30,000 is sought to be included and it is common ground that the order of the Appellate Tribunal indicating that the amount could in any event be taxed in the assessment year 1957-58 furnished the basis for reopening the assessment."

16. No objection appears to have been taken to this statement in the appellate order in the application u/s 256(1) of the Act. We must, therefore, proceed on the basis that the Income Tax Officer was actuated to take action u/s 147 of the Act on the basis of the appellate order of the Tribunal for the assessment year 1958-59. There was no room for the income tax Officer to hold that Rs. 30,000 appearing in the assessee's books of account on February 2, 1957, could be brought into the net of taxation in the assessment year 1957-58. Law is settled that for concealed source of income (and an unexplained cash credit would be assessed as such) the relevant assessment year would be the previous year corresponding to the ordinary financial year *Baladin Ram Vs. Commissioner of Income Tax, Uttar Pradesh*, . Law is equally settled that where it is a loan it has to be taken into consideration in the appropriate assessment year depending upon the assessee's previous year. The transaction of Rs. 30,000 appearing on February 2, 1957, if a loan, was thus to be accounted for the assessment year 1958-59. The Appellate Tribunal in dealing with the appeal for that assessment year rightly examined the addibility of the amount and directed its deletion upon a finding that it is a loan. As we have already said, the subsequent observation by the Tribunal was only for unfolding the hollowness of the revenue's stand that even if it were an income from a concealed source it had been trapped in a wrong assessment year. We have already said that it was neither a finding nor a direction. As a result of the Tribunal's appellate order for the assessment year 1958-59, the amount of Rs. 30,000 of Janhabi Charan Roy was conclusively taken as a loan. There was absolutely no material before the Income Tax Officer when he reported to the Commissioner, of Income Tax in July, 1964, that that cash credit of Rs. 30,000 had remained unexplained. Once such a conclusion is reached, it is indeed immaterial as to whether the assessment in question is under Clause (a) or Clause (b) of Section 147 of the Act. There was no omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment because the very amount received the attention of the Income Tax Officer in the assessment year 1958-59. Detailed enquiries had been held to find out whether it was a loan and not a cash credit amounting to an income from a concealed source. The Income Tax Officer had come to a determination against the assessee. The Tribunal has rightly held :

" The cash credit in question, according to the books of the assessee, was in the calendar year 1957 which formed the previous year- for the purpose of the business for the assessment year 1958-59. The assessee, in our opinion, could have brought to the notice of the Income Tax Officer this cash credit only in the course of the assessment proceedings for the assessment year 1958-59 and in fact the cash credit was noticed by the Income Tax Officer who treated it as income of that year. It could not, therefore, in our opinion, be said that the assessee deliberately or wilfully failed to furnish the details of the cash credit in connection with the assessment for the assessment year 1957-58."

17. Clause (a) of Section 147 of the Act had, therefore, no application. It is in that view of the matter that the Tribunal proceeded to examine whether the

reopening could be under Clause (b) of Section 147 of the Act. The notice for reopening has been given in this case beyond four years. Therefore, the question as to whether action has been taken under Clause (a) or Clause (b) becomes material. u/s 149(1) the limitation for action under Clause (b) is four years while for action under Clause (a) it is eight years. The Tribunal has taken the view that action in the instant case has been taken under Clause (b) though the Income Tax Officer had stated in the report to the Commissioner of Income Tax that he wanted to take action under Clause (a). In view of the fact that it was conceded before the Tribunal that initiation of action u/s 147 of the Act had been on the appellate decision of the Tribunal for the assessment year 1958-59, the Tribunal's conclusion that the action taken could be deemed to be u/s 147(b) of the Act would ordinarily be a reasonable one. We, however, do not find any justification for the view of the Tribunal that there was a main finding and the observation contained in paragraph 4 was a supporting material. As we have already said, the subsequent observation was to demonstrate how ill-founded the order of assessment had been in adding Rs. 30,000 during that year on the basis that it was an income from a concealed source. On the finding of the Tribunal that Rs. 30,000 was a loan there was absolutely no material before the Income Tax Officer from which the Income Tax Officer could have reason to believe that Rs. 30,000 had escaped assessment. The Tribunal's decision did not constitute information. On the other hand, there was a conclusive finding which had become final against the revenue that the said amount was not available to be taxed.

18. We think it appropriate to refer to some weighty observations of a Division Bench of the Gujarat High Court in *Kanji Ranchhod Vs. Commissioner of Income Tax, Gujarat*, . Shelat C.J. (as the learned judge then was), with whom Bhagwati J. (as the learned judge then was) agreed, stated ;

" An Income Tax Officer cannot say that he had reason to believe that a certain fact which was relevant for assessment and therefore a primary fact existed and that it was not disclosed by an assessee if such a fact did not factually exist. Can an Income Tax Officer, for instance, say that he had reason to believe that the assessee had failed or omitted to submit his return u/s 22 and can he issue on that ground a valid notice u/s 34(1)(a) when the assessee shows that he had in fact filed the return ? Similarly, can an Income Tax Officer say that he had reason to believe that the assessee had failed or omitted to disclose a material fact when the assessee shows either that such a material fact did not exist or that he had in fact disclosed such a fact ? In either of these two cases, it would seem that the court can investigate and come to the conclusion that the Income Tax Officer had no reason to believe and could not have any reason to believe that the assessee had failed to file his return or had failed to disclose a material fact necessary for his assessment. In such a case, the fact whether the return was filed or not or the fact of the existence or not of a thing not disclosed or objective facts and cannot depend on the reasonable belief of the taxing officer. If it was otherwise, an Income Tax Officer can initiate proceedings by merely saying that

he had reason to believe that the assessee had omitted or failed to file his return or had omitted or failed to disclose a material fact though in one case the assessee had in fact filed his return and in the other case he had in fact disclosed all material facts or the fact which the Income Tax Officer says was not disclosed, did not in fact exist. The existence of a primary fact is therefore an objective fact which the court can investigate, but once that fact is found to exist, if the Income Tax Officer reasonably believes that there was non-disclosure and that such non-disclosure resulted in non-assessment, under-assessment, etc., the court cannot investigate into the adequacy or otherwise of his reasons to come to that belief and the initiation in such cases would be valid. On the other hand, if there was in fact no omission or failure to file a return or no omission or failure to disclose a primary fact necessary for a proper assessment, there would be no ground or material for the taxing officer to have reason to believe that the assessee had failed or omitted to file a return or had failed or omitted to disclose any material fact and the officer in such a case would not satisfy the conditions laid down in the Calcutta Discount Co.'s case, and the initiation of proceedings by him would be bad. This conclusion is supported by the fact that it is consistent with the object of Section 34(1)(a). The object clearly is to rope in income which has escaped tax or which has been under-assessed, etc., in consequence of a default on the part of an assessee amongst other things to disclose all the necessary facts. Ordinarily, once an assessment is made, it is final and the assessee has a right to know that his liability is crystallized. Such an assessment can be reopened under Sub-section (1) for a period of 8 years on the two grounds set out in it, namely, omission or failure to file a return, or omission or failure to disclose truly and fully all the relevant facts resulting in non-assessment, under-assessment, etc. There is, therefore, an element of deliberate or wilful default on the part of an assessee and, therefore, a larger period than the one in Clause (b) has been provided enabling the taxing authorities to reopen his assessment. If either of these two grounds exists, Clause (a) of Sub-section (1) empowers the taxing authority to reopen the assessment and rope in the income which has escaped tax or in respect of which there is under-assessment, etc. But, that does not mean that a taxing officer can say that he has reason to believe that either of these two grounds exists when in fact it does not."

19. The learned judges further quoted with approval from a Madras decision in *E. M. Muthappa Chettiar Vs. Commissioner of Income Tax, Madras*, :

" Cases sought to be brought within Section 34(1)(a) should strictly fall within that provision and it is for the department to show that the necessary conditions for the exercise of jurisdiction are fully present. The department is not at liberty to take hold of any and every circumstance, call it non-disclosure of material facts and set the machinery of reassessment in motion. If this were to be permitted there is every danger of this provision of law being used as an instrument of oppression against the assessee. The true position is that if the Income Tax Officer was left in the dark in respect of basic and crucial facts relevant to the assessment, he has jurisdiction to reopen the assessment and

pass orders of reassessment."

20. Dealing with Clause (b) the Gujarat High Court preceded to say :

" Under Clause (b) the requirement is a reasonable belief on the part of the taxing officer that there was non-assessment, under-assessment, etc., in consequence of some information that comes in his possession. In a case falling under, Clause (b), though the question whether the officer had reason to believe may not be a question into which the court can go in exercise of its jurisdiction u/s 66 of the Act, yet it would be open to an assessee to challenge the jurisdiction of the officer on the ground that he had no information upon which he could come into a reasonable belief that income had escaped. Therefore, even under Clause (b) the question whether he has information is a question as to an objective fact and if there is complete absence of information, such absence would knock the bottom out of the jurisdiction of the officer."

21. When the aforesaid tests are applied to the facts of the present case we have no doubt that there was absolutely no material before the Income Tax Officer to invoke Clause (a) of Section 147(1) of the Act because, as stated earlier, the fact had been disclosed and the Income Tax Officer had actually brought the very amount into the net of taxation. We agree with the Tribunal that there would have been no occasion for the assessee to show the entry dated February 2, 1957, to the Income Tax Officer while assessment for the earlier year was being taken up. The deliberate omission of the assessee could have been only in the assessment year 1958-59. But as we have already stated whether Clause (a) or Clause (b) applies is immaterial in this case because the primary fact itself that a sum of Rs. 30,000 as cash credit has escaped assessment is non-existent. With the decision of the appellate Tribunal for the assessment year 1958-59, that amount has been treated as a genuine loan. With this conclusive finding made final in the absence of any further proceeding taken against the said appellate order, there was no foundation for the belief of the Income Tax Officer that such an amount had escaped assessment, be it for the assessee's default or not. Action under either Clause (a) or Clause (b) was not available to be taken.

22. Our conclusion to the questions referred to us shall, therefore, be :

(1) Section 147(a) of the Act was not at all applicable; Clause (b) also was not applicable. If at all it could be a case under Clause (b) and not under Clause (a) of Section 147;

(2) There was no basis for treating the issue of the notice u/s 147(b) of the Act; and

(3) Even if there was any basis for the issue of the notice under Clause (b) of Section 147, the notice is barred by limitation.

23. The assessee shall have his costs of this reference. Hearing fee is assessed at, Rs. 300 (three hundred).

B.K. Ray, J.

24. I agree.