
(2002) 06 CAL CK 0010
In the Calcutta High Court
Case No : Writ Petition No. 807 of 2002

G.N. Shaw (Wine) Pvt. Ltd.	Vs	APPELLANT
Income Tax Officer and Another		RESPONDENT

Date of Decision : 12-06-2002

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 139, 142(1), 147, 148, 40A(3)
Income Tax Rules, 1962 — Rule 6DD

Citation : (2003) 183 CTR 528 : (2003) 260 ITR 513 : (2003) 133 TAXMAN 619

Hon'ble Judges : Dilip Kumar Seth, J

Bench : Single Bench

Advocate : Dutta, for the Appellant;Rupen Mitra, for the Respondent

Final Decision : Allowed

Judgement

Dilip Kumar Seth, J.

Submission on behalf of the petitioner

1. The notice dated March 27, 2002, issued u/s 148 of the Income Tax Act, 1961 (the "I. T. Act"), being annexure P2 to this petition, seeking to reopen the assessment in respect of the assessment year 1995-96 is the subject-matter of challenge in this writ petition. Learned counsel for the petitioner challenges the said notice on various grounds. The notice that has been issued is subject to a proviso to Section 147 since issued four years after the end of the relevant assessment year and as such is incompetent and without jurisdiction. Until it is shown that the income sought to be assessed had escaped assessment by reason of failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for assessment, it cannot be reopened. The reopening could be made only if the authority is satisfied that there are reasons to believe that the income has escaped assessment. Though, the reason cannot be judged as to its sufficiency, yet the court can examine as to whether there are any reasons disclosed in the order of reopening. The notice was issued without

the sanction of the Deputy Commissioner as was required u/s 151. On the merits, it was contended that the ground on which income was alleged to have escaped assessment was disclosed by the assessee. This was noted by the Assessing Officer. But the Assessing Officer did not disclose the said question in the assessment order. This according to him, cannot be a ground for reopening, unless it is shown, when the time limit of four years is applicable, that there was failure as contemplated in the proviso to Section 147. But no such reason has been recorded. The two conditions provided in Section 147, namely, the reasons to believe and failure to disclose fully and truly, are mandatory and must be satisfied before a case is reopened. These provisions are conditions precedent for exercising jurisdiction. These data having not been satisfied, the reopening is incompetent and without jurisdiction.

2. He relied on Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others, ; Modi Spinning and Weaving Mills Co. Ltd. Vs. Income Tax Officer, Special Investigation Circle (B), Meerut,) and Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, Relying on Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another,) , he contended that the question whether the Assessing Officer has reason to believe is not a question of limitation, it is a question of jurisdiction. He relied on The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd., and Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, , and contended that mere change of opinion in respect of an erroneous decision would not justify initiation of action for reopening. Relying on Orient Beverages Ltd. Vs. Income Tax Officer and Others, , he contends that recorded reasons must show that the underassessment was due to failure of the assessee to disclose fully and truly all material facts. The question having been available before the authority on being disclosed and the evidence having been adduced, the said question cannot be reopened unless it is shown that some fresh facts are available. He relied on ITO, Calcutta and Others Vs. Kamal Singh Rampuria, . In the name of reopening, the deficiency in the first completed assessment cannot be cured, unless necessary conditions for exercise of jurisdiction are fully present. He relied on Dunlop Rubber Company Ltd. Vs. Income Tax Officer "A"-Ward and Others, . He relied on Chhugamal Rajpal Vs. S.P. Chaliha and Others, , to contend that the safeguards provided in Sections 147 and 151 are not to be lightly treated by the Assessing Officer or the Commissioner. Since such protection is mandatory, it cannot be waived or acquiesced neither it is subjected to estoppel. He relied on P. DOSHI Vs. COMMISSIONER OF Income Tax, GUJARAT,

Submission on behalf of the respondents :

3. Mr. Rupen Mitra, learned counsel for the respondents, on the other hand, points out that the sanction as required u/s 151 of the Deputy Commissioner has since been obtained. He then contends that in this case there was failure to disclose fully and truly the materials relevant for assessment, which has since escaped notice. The reasons were sufficient. In any event, those reasons are not

justiciable, as to their sufficiency, by the court. Relying on Section 147, Explanations 1 and 2, particularly, Clause (c)(i) of Explanation 2, he points out that this is a case of underassessment and as such it is a case of escapement of assessment within the meaning of the proviso. That the materials produced before the Assessing Officer cannot be a ground to contend that the materials were disclosed truly and fully, in view of Explanation 1, which stands in the way of the petitioner's contention. According to him, if there is a mistake in terms of Section 292B, the same also can be the subject-matter of reopening.

4. He relied on *Sardar Harvinder Singh Sehgal and Others Vs. Assistant Commissioner of Income Tax and Others*, . According to him, a prima facie satisfaction is to be found out. The sufficiency or correctness of the reasons to believe for reopening cannot be gone into by the court. He relied on *Raymond Woollen Mills Ltd. Vs. Income Tax Officer and Others*, ; *Hindustan Aluminium Corporation Ltd. Vs. Income Tax Officer and Others*, ; *M/s. Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another*,) . He contended further that these objections, which are being now raised, can also be examined by the Assessing Officer and, therefore, this court should not exercise jurisdiction and the matter should be relegated before the Assessing Officer. He referred to *Jagannath Mishra Vs. Commissioner of Income Tax and Others*) and *Jagannath Mishra v. CIT [2002] 254 ITR 276*. He distinguished the decision cited by Mr. Dutta in *M/s. Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another*, ; *Chhugamal Rajpal Vs. S.P. Chaliha and Others*, and *Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das*,) as well as *The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd.*, which are not applicable in the facts and circumstances of the present case.

Obtaining of sanction u/s 151 before reopening :

5. After having heard the respective counsel for the parties, it appears that several questions have since been raised for and against the reopening. The first objection is with regard to the obtaining of sanction u/s 151 of the Income Tax Act. Section 151 provides that no notice u/s 148 for reopening an assessment u/s 147 could be issued unless the Joint Commissioner is satisfied on the reason to be recorded by the Assessing Officer that it is a fit case for issuing of such notice. Producing the relevant records, Mr. Mitra pointed out that such a satisfaction has since been recorded by the Joint Commissioner on the basis of the reasons recorded by the Assessing Officer. Admittedly, in the present case, the assessment was made u/s 143(3) and was sought to be reopened u/s 147, for which notice u/s 148 was issued. The records produced substantiate the fact of concurrence or satisfaction of the Joint Commissioner. Having examined the said record, Mr. Dutta, in his usual fairness, did not raise this point any further. In view of the satisfaction noted in the record, I do not find any substance in the submission of Mr. Dutta with regard to this point.

Escaping of assessment :

6. In order to appreciate the other points raised by Mr. Dutta, we may examine the provisions contained in Section 147. Section 147 empowers the Assessing Officer, if he has reason to believe that any income chargeable to tax has escaped assessment, to assess or reassess such income. In the present case, it is alleged that the income had escaped assessment when assessment was made u/s 143(3) of the Income Tax Act. Therefore, this condition appears to be fulfilled.

Can assessment be reopened after four years ?

7. But the fact remains that the assessment relates to 1995-96 assessment year. But the assessment was sought to be reopened by a notice issued on March 27, 2002. The proviso to Section 147 provides that no assessment can be reopened u/s 147, if the earlier assessment was made u/s 143(3), after the expiry of four years from the end of the relevant assessment year. In the present case, the earlier assessment, admittedly, being one u/s 143(3), the proviso debars reopening of the assessment in respect of this case. The four years period provided therein expired in 2000. Therefore, this assessment is sought to be reopened after the four years embargo provided in the proviso.

8. However, such reopening can be made in certain exceptional cases. According to Mr. Mitra, this is one such exceptional case. The exception provided in the said proviso prescribes that even after the expiry of four years, assessment can be reopened on two conditions that there was a failure on the part of the assessee to submit a return either u/s 139 or in response to a notice u/s 142(1) or Section 148. The present case, admittedly, does not come under this condition since the assessment was made u/s 143(3), it is not a case of failure to submit return or to respond to a notice u/s 142(1) or u/s 148. The second condition is failure to disclose fully and truly all material facts necessary for his assessment for that assessment year. Mr. Mitra points out that this is a case, which comes within the second condition. He contended that there were lapses or omissions or failure to disclose fully and truly the material facts necessary for assessment. This question was sought to be supported by Mr. Mitra by referring to Explanation 2. Mr. Mitra also points out relying on Explanation 1 that though in this case books of account were produced, it does not amount to disclosure as contemplated in the proviso and that as such there is an underassessment, as is in the present case, it is a case of escapement of assessment and as such liable to reopening.

9. Explanation 1 provides that production of books of account before the Assessing Officer does not amount to disclosure within the meaning of the proviso, even if with due diligence, the Assessing Officer could have discovered the fact. Whereas Explanation 2 provides as to which could amount to escaping of assessment. We are not concerned with Clause (a). Clause (b) requires understatement of income by the assessee or claiming excessive loss, deduction, allowance or relief in the return. Clause (c) provides in Sub-clause (i) that income chargeable to tax has been under assessee. This case can be brought, according to Mr. Mitra, within the purview of these two clauses.

10. The principal Section 147 does not lay down any condition. The Explanation can be applied straightaway without any qualification. If there is understatement of income or excessive loss, deduction, allowance or relief, it can be reopened. If the tax is under assessee then also it can be reopened. There is no difficulty with regard to the contention of Mr. Mitra, if such reopening is made within the four years from the end of the relevant assessment year. But the question assumes a different dimension after the expiry of these four years from the end of the relevant assessment year, in view of the proviso provided to Section 147, in respect of reopening and assessment made u/s 143(3).

11. In the present case, admittedly, the earlier assessment was completed u/s 143(3), therefore, the proviso is attracted and in such a case the four year limitation is a bar. It would not be a bar if the earlier assessment is made under any provision other than Section 143(3). In such a case it can be re-opened even beyond four years provided any of the two conditions are satisfied. The present case does not fall within the first condition of non-submission of return or non-response to notice. It can be reopened if the assessee had failed to fully and truly disclose all material facts necessary for the assessment. Counsel for the petitioner has pointed out that there was no allegation of failure to disclose fully and truly all material facts. Before issuing notice in view of Section 148, the materials must be deemed to be present on record.

12. Now let us examine as to how far the reasons recorded justify the reopening. Mr. Mitra had produced the reasons, which runs as follows :

"In this case, the return for the assessment year 1995-96 was filed on November 30, 1995, showing a total income of Rs. 1,73,960. The income had been assessed u/s 143(3) on March 31, 1998, at Rs. 1,73,960.

In the course of hearing, it was detected that the assessee made payment of Rs. 1,79,52,909 in cash in violation of Section 40A(3) of the Income Tax Act, 1961. But in the assessment order passed u/s 143(3) on March 31, 1998, there is no discussion about the said payment made in contravention of Section 40A(3), nor any addition had been made to that effect. As such, I have reason to believe that the amount of payment of Rs. 1,79,52,909 made in cash in contravention of the provisions of Section 40A(3) of the Income Tax Act escaped assessment. As the said amount need to be taxed, a proposal for reopening of the case is sent to the Commissioner of income tax-III, Kolkata, for according his kind approval in the matter."

13. True, in view of the decision cited by Mr. Mitra, this court cannot judge the sufficiency of the reasons. But this being a case hit by the proviso to Section 147, the court can examine as to whether the reason is noted there or not. A plain reading of the reasons given does not show that there was any failure on the part of the assessee to disclose fully and truly the relevant materials. Mr. Dutta had produced the certified copy of the order sheet. A xerox copy thereof has since been taken on record. From the certified copy, it appears that on

September 5, 1997, it was recorded that the assessee should disclose details of all payments in violation of Section 40A(3). From the order dated November 6, 1997, it appears that the assessee was required to submit details of all payments in violation of Section 40A(3), all copies of bank statements and various other particulars. From the order dated February 26, 1998, it appears that a list of payments in violation of Section 40A(3) has since been furnished together with details of transport charges. It was pointed out that 90 per cent. of such payment was made to a single party, D. P. Shaw and Co. (Wine) Pvt. Ltd., aggregating to Rs. 1,78,15,909 in cash in violation of Section 40A(3). From the order dated March 30, 1998, it appears that the books of account were examined and it was found that the payments so made were genuine. The managing director of D. P. Shaw and Co. (Wine) Pvt. Ltd. was produced as a witness. This witness had confirmed that they had insisted upon cash payment, since they were required to make cash payment towards excise duty, before lifting the stock from the ware house. He also stated that he is also assessed to Income Tax in Company Circle 2(1), Kolkata, and had shown those receipts in the accounts filed with the Income Tax return of his company. The case was, however, adjourned for filing explanation regarding cash payments to the other two parties. Thereafter, the assessment was made u/s 143(3) on March 31, 1998.

14. Section 40A(3) has two provisos. The second proviso provides that no disallowance under the said sub-section shall be made, if any payment is made beyond the prescribed amount otherwise than by a crossed cheque drawn on a bank or a crossed bank draft, having regard to the nature and extent of banking facilities available, consideration of business expediency and other relevant factors. In the present case, there were certain materials, as is apparent from the certified copy of the order sheet produced, to explain the considerations of business expediency and other relevant factors to the extent that such cash payment was demanded by the payee for lifting the goods from the warehouse on payment of excise duty, which is alleged to be payable in cash. These explanations might have satisfied the Income Tax Officer with regard to the question of disallowance being excepted in view of the second proviso to Section 40A(3). Inasmuch as, the terms of this Section 40A(3) are absolute but subject to some relaxation. Considerations of business expediency and other relevant factors are not excluded. Genuine and bona fide transactions are not taken out of the sweep of the section. It is open to the assessee to furnish to the satisfaction of the Assessing Officer the circumstances under which the payment in the manner prescribed in Section 40A(3) was not practicable or would have caused genuine difficulties to the payee. Such relaxation has been specified in Rule 6DD of the Income Tax Rules. Therefore, it is the duty of the assessee to disclose fully and truly such material facts to explain or justify, in order to bring it within the scope and ambit of the second proviso to Section 40A(3). If such facts are so disclosed, and four years have expired after the end of the assessment year, the assessment cannot be reopened.

15. In M/s. Attar Singh Gurmukh Singh, etc. Vs. Income Tax Officer, Ludhiana,

etc., , the apex court had held that Section 40A(3) is not absolute. Some genuine and bona fide transactions are taken out of the sweep of the prohibition, if it is proved that it was not practicable or there were genuine difficulties. Though, the provisions contained in Section 40A(3) are mandatory, but it is subject to the relaxation of the rigour as contemplated in the second proviso to the section read with Rule 6DD, as was held in *Hasanand Pinjomal Vs. Commissioner of Income-tax, Gujarat*, . The object of Rule 6DD is to relax the rigour of Section 40A(3) in genuine and bona fide cases to avoid hardship and harassment. It was so held in *Giridharilal Goenka Vs. Commissioner of Income Tax*,) . The case might have been considered by the Assessing Officer to fall within the scope and ambit of Clause (j) of Rule 6DD so far as the petitioner is concerned and the said D. P. Shaw and Co. (Wine) Pvt. Ltd., which might be required to pay the amount in terms of Clause (b) of Rule 6DD.

16. But, this is a question of inference by the Assessing Officer. If at a later point of time, some other officer may not agree with the inference drawn by the predecessor, the same would not be a ground for reopening, after the expiry of four years from the end of the assessment year, in view of the proviso to Section 147. In the present case, there are some materials to show that this question was gone into and some explanations were on record. However, those were not specifically dealt with in the assessment order. Omission to deal with the question in the assessment order cannot be construed to bring it within the exception provided in the proviso to Section 147 for reopening the assessment. If there are sufficient materials to draw a particular inference, omission to deal with the same cannot be constituted to draw an inference adverse to the assessee, at a subsequent stage hit by the proviso to Section 147. Since such benefit are to be held in favour of the assessee, the omission to deal with the same is to be construed to mean that the Assessing Officer was satisfied with the question and as such he had not dealt with the same. But then it is not the question of dealing with a particular point by the Assessing Officer. It is the question whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. If facts are disclosed fully and truly necessary for assessment, the liability of the assessee ends. Whether it is dealt with or not is wholly immaterial. The only point, on which jurisdiction can be assumed, is the failure to disclose fully and truly material facts necessary for assessment. Admittedly, so far as Rs. 1,78,15,909 is concerned, the assessee appears to have fully and truly disclosed material facts necessary for assessment, though, however, such facts were not disclosed in respect of the sum of Rs. 1,37,000.

17. In such circumstances, it appears that these facts in relation to Rs. 1,78,15,909 were disclosed by the assessee and were within the knowledge of the Assessing Officer. Therefore, it cannot be said that there was any failure to disclose fully and truly all material facts necessary for the assessment in respect of the said amount. It may be that the Assessing Officer was satisfied with regard to the said Rs. 1,78,15,909 and might have omitted to deal with the same

any further in view of the satisfaction with regard to the same. It may be an erroneous decision; it may be an underassessment; it may be open to reassessment u/s 147 provided it is reopened within the four years from the end of the relevant assessment year. But as soon it is beyond four years, then reopening cannot be made, unless it was due to failure of the assessee to disclose fully and truly all material facts necessary for assessment. Thus, on facts, it does not appear to fall within the said exception for the purpose of enabling the Assessing Officer to reopen the case, in respect of Rs. 1,78,15,909. However, it appears that in respect of Rs. 1,37,000, there was failure to disclose fully and truly all material facts necessary for assessment. Therefore, this part attracts the exception provided in the proviso to Section 147 and, therefore, can be reopened.

Interpretation of fiscal statute :

18. The statute is a fiscal statute. It is to be interpreted strictly. When a particular action has to be taken in a particular manner, the same has to be taken in that manner and not otherwise. When the proviso provides that it can be reopened only if there is a failure to disclose truly and fully all materials, then it is only on such failure, it can be reopened. But, there is nothing recorded in the order showing the satisfaction of the Joint Commissioner or the Assessing Officer that there was a failure on the part of the assessee as above. Simple escapement of notice will not confer jurisdiction to reopen the assessment, four years after the end of the assessment year.

19. This is a question of jurisdiction to be assumed by the concerned officer. These are jurisdictional facts, which this court can go into, even for the purpose of finding out as to whether such reason is present or not. The court could not have judged the sufficiency of the reason, but it can see whether such reason is present. Here no such reason has been disclosed that there was a failure on the part of the assessee. On the other hand, from the tenor of the order, it appears that the payment was made in contravention of the provision of Section 40A(3), but there was no indication that this was because of failure to disclose. Thus, this case cannot be brought within the purview of the proviso to Section 147 to reopen the assessment. Therefore, the notice issued appears to be without jurisdiction and no proceeding can be taken out of such notice.

The decisions cited on behalf of the petitioner :

20. In *Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das*, the apex court while dealing with this question had held that if on the basis of the facts disclosed, the Income Tax Officer draws an inference, which subsequently appears to be erroneous, mere change of opinion with regard to such inference would not justify initiation of action for reopening the assessment. It had further held that the conditions must be satisfied before the Income Tax Officer acquires jurisdiction to issue notice u/s 148 in respect of an assessment beyond the period of four years. The condition to make a return or response to notice and to

disclose fully and truly the material facts are the two conditions, both of which must co-exist in order to confer jurisdiction on the Income Tax Officer and that if the notice is issued after expiry of four years, the Commissioner must satisfy itself from the reasons recorded by the Income Tax Officer that it was a case fit for issue of such notice. Such reason must be held, to be held in good faith and cannot be a mere pretence. It had also pointed out that the court must bear in mind that the materials may be indifferent, vague, distant, remote or far fetched for formation of the reasons to believe, but the same cannot be examined by the court if the formation of the belief is held in good faith and not a pretence. Reopening of an assessment after a lapse of four years is a serious matter, therefore, the essence of the law must be satisfied before it is reopened and that there must be some relevance or close nexus between the material present in the case and the belief to be formed regarding escapement of income because of failure of the assessee or omission to disclose fully or truly all material facts. Having regard to the ratio laid down above, in this case we find that there is nothing to indicate about the formation of any opinion or satisfaction with regard to the belief that there was failure on the part of the assessee to disclose fully and truly the relevant materials. The same view was taken in *Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others*, . It was also the view taken by the Supreme Court in *Modi Spinning and Weaving Mills Co. Ltd. Vs. Income Tax Officer, Special Investigation Circle (B), Meerut*, . In the said decision, it was held that these conditions are cumulative and precedent to the exercise of jurisdiction to issue a notice of reassessment. It had followed the decision in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, . In *Chhugamal Rajpal Vs. S.P. Chaliha and Others*, , the apex court had held that the important safeguards provided in Sections 147 and 151 cannot be lightly treated by the Income Tax Officer, as well as by the Commissioner. The other decisions cited by Mr. Dutta are repetition of the same proposition. The view I have taken is also supported by the decision in *Orient Beverages Ltd. Vs. Income Tax Officer and Others*,

21. In *ITO, Calcutta and Others Vs. Kamal Singh Rampuria*, , it was held that the assessee during the original assessment having produced relevant materials, it cannot be said that there was a failure on the part of the assessee to disclose primary materials. In *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, , the Supreme Court had held that underassessment must occur by reason of failure on the part of the assessee to make a return or to disclose fully and truly the material facts. Both these are conditions precedent to be satisfied before the Income Tax Officer may assume jurisdiction to issue such notice for assessment or reassessment. The only question to be considered is whether the Income Tax Officer had reason to believe that there had been some omission or failure to disclose fully and truly all material facts necessary for assessment. It was further held, once the primary facts are before the assessing authority, he requires no such assistance by way of disclosure. It is the duty of the assessee to disclose fully and truly all primary

relevant facts. The duty of the assessee does not extend beyond this. Before assuming such jurisdiction, the Income Tax Officer must be prima facie thinking that there were some non-disclosures of material facts. It was further held in the said decision that the conditions precedent to exercise jurisdiction to reopen must exist, otherwise the jurisdiction cannot be assumed. It is not a question of limitation but a question of jurisdiction. In the said case, it was further held that in such a case the High Court is not precluded from granting appropriate relief.

22. The decision in *Dunlop Rubber Company Ltd. Vs. Income Tax Officer "A"-Ward and Others*, , has taken the same view. In *The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd.*, , the apex court had held that once the evidence and the materials are produced, the income tax Officer could reach a conclusion other than that which he had reached. But that will not enable reopening on the ground that the inference drawn by the Income Tax Officer, at a later point of time is regarded as erroneous.

Decisions cited on behalf of the respondents :

23. So far as the decisions cited by Mr. Mitra in *Sri Krishna Private Ltd. Etc. Vs. I.T.O., Calcutta and Others*, and *M/s. Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another*, , relating to disclosure are concerned, they have no manner of application in the present case, in view of the fact that in this case, there is nothing to indicate that there was failure on the part of the assessee to disclose fully and truly the material facts necessary for assessment. So far as the decision in *Raymond Woollen Mills Ltd. Vs. Income Tax Officer and Others*, ; *Hindustan Aluminium Corporation Ltd. Vs. Income Tax Officer and Others*, ; *M/s. Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another*, are concerned, there is no dispute about the proposition laid down therein. The sufficiency or correctness of the reasons cannot be judged by the court. But there must be some reasons. In the present case, no such reason has been mentioned about the non-disclosure. Therefore, this is a case of complete absence of the reason on the basis of which the assessment can be reopened ; therefore, the principle laid down in the said decision cannot be attracted. It is an examination of jurisdictional facts non-existence whereof renders the exercise without jurisdiction. The decision in *Sardar Harvinder Singh Sehgal and Others Vs. Assistant Commissioner of Income Tax and Others*, , it appears to be misplaced in view of the fact that we are not going by any mistake appearing in the notice. It is not a case of mistake. It is a case of non-existence of the jurisdictional fact in order to enable the authority to assume jurisdiction.

Can Section 292B be attracted :

24. The reference to Section 292B of the Income Tax Act by Mr. Mitra is out of place inasmuch as, Section 292B deals with invalidation of return of income, assessment, notice, summons or other proceedings furnished or made or issued or taken or purported to have been furnished or made or issued or taken under the Income Tax Act by reason of any mistake, defect or omission in such return

of income, assessment, notice, summons or other proceedings if the return of income, assessment, notice, summons or other proceedings is in substance and effect not in conformity with or according to the intent and purpose of this Act. Even we apply this provision, then, as observed earlier, the reopening of the assessment does not seem to be in conformity with or according to the intent and purpose of the Act, namely, the reasons to believe that there was failure to disclosure on the part of the assessee.

25. Can this court entertain the objections : Jurisdictional facts : Mr. Mitra had contended that all these objections can be raised and decided by the Assessing Officer. But when it is a question of jurisdiction, it cannot be questioned before the Assessing Officer since he is not supposed to go into his own jurisdiction since sanctioned by the Commissioner. Inasmuch as, it would be a case of questioning the validity of the sanction given by the Commissioner, by reason whereof he derived his jurisdiction. That apart, when it is apparent on the face of the materials that the assumption of jurisdiction is invalid then the court cannot be shy of exercising its jurisdiction nor it can abrogate itself of its power to invoke the writ jurisdiction. Therefore, the decisions cited by Jagannath Mishra Vs. Commissioner of Income Tax and Others and Jagannath Mishra v. CIT [2002] 254 ITR 276, have no manner of application in view of the distinguishing facts of the present case. The attempt of Mr. Mitra to distinguish the decisions cited by Mr. Dutta, does not cut any ice. The propositions laid down therein are well settled. Applying the tests laid down in those decisions, as discussed above, this is a fit case where this court should rise to the occasion and invoke its jurisdiction to interfere with the proceedings, when absence of jurisdiction is patent and is ex-facie staring on the face,

Conclusion :

26. In the result this writ petition succeeds and the proceeding cannot be proceeded with in respect of Rs. 1,78,15,909, the materials in respect of which were disclosed. But so far as the balance of Rs. 1,37,000 is concerned, the same can be proceeded with since there was failure to disclose materials on the part of the petitioner as is apparent from the records to assess the income in respect thereof.

Order :

27. The writ petition, therefore, succeeds in part; it will be open to the Income Tax Officer to proceed against the petitioner in respect of Rs. 1,37,000 ; but he cannot proceed in respect of Rs. 1,78,15,909, as discussed above. The proceeding so far it relates to Rs. 1,78,15,909 is concerned is hereby quashed with liberty to the Income Tax Officer to proceed with the same in respect of Rs. 1,37,000. Let a writ of certiorari do issue, accordingly.

28. The writ petition is, thus, disposed of.

29. No costs.

30. All parties concerned are to act on a xerox signed copy of the operative part of this order on the usual undertaking.

31. Let xerox certified copy of this judgment and order be made available to the respective parties within seven days from the date, if applied for.