

(1971) 01 AHC CK 0007

In the Allahabad High Court

Case No : Civil Miscellaneous Writ No. 4632 of 1970

Ice and General Mills

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 18-01-1971

Acts Referred:

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

Income Tax Act, 1961 — Section 147, 148, 297(2)

Citation : (1972) 83 ITR 34

Hon'ble Judges : R.S. Pathak, J;H.N. Seth, J

Bench : Division Bench

Advocate : R.K. Gulati, for the Appellant; B.L. Gupta and R.R. Misra, for the Respondent

Judgement

This Judgment has been overruled by : The Ice and General Mills Vs. The Income Tax Officer, Central Circle II, Meerut, (1979) 13 CTR 420 : (1980) 121 ITR 547 : (1980) 1 SCC 346 : (1980) 2 SCR 236 : (1980) 12 UJ 89

Pathak, J.—The petitioner prays for a writ in the nature of certiorari against the notice u/s 148 of the Income Tax Act, 1961, dated July 14, 1967, and a writ in the nature of prohibition restraining the Income Tax Officer from taking proceedings pursuant to that notice.

2. The petitioner carries on the business of the manufacturing of ice and the preservation of potatoes in cold storage. It was assessed to Income Tax for the assessment year 1961-62 by an assessment order dated July 5, 1961. Subsequently, the Income Tax Officer issued a notice dated December 21, 1961, u/s 34(1)(a) of the Indian Income Tax Act, 1922, and upon the proceedings which followed made an assessment order dated December 22, 1965, The petitioner appealed against the assessment order and the appeal was allowed by the Appellate Assistant Commissioner of Income Tax on May 10, 1967. The Appellate Assistant Commissioner proceeded on the view that the notice u/s 34(1)(a) had been issued on the basis that the petitioner had not disclosed fully

and truly all material facts in respect of its property income, and, as that was incorrect, there was no jurisdiction in the Income Tax Officer u/s 34(1)(a) and, therefore, he annulled the reassessment. Thereafter, it appears, the Income Tax Officer served a notice dated. July 14, 1967, issued u/s 148 of the Income Tax Act, 1961, for the same assessment year.

3. The learned counsel for the petitioner has raised a number of contentions before us.

4. The first contention is that if the income now sought to be assessed can be said to have escaped assessment, it has done So, not by reason of any omission or default on the part of the assessee during the original assessment proceeding but because of the failure of the Income Tax Officer to take valid proceedings for reassessment u/s 34 of the Act of 1922. The contention, it seems to us, is without substance. The income of an assessee can be said to escape assessment because of the failure of the Income Tax Officer to include it in the assessment made by him only where a proper and valid assessment proceeding has been taken by the Income Tax Officer. The expression " escaped assessment " is significant. It refers to income which could have been assessed but was not assessed. And income can be assessed only in a proceeding which is within the jurisdiction of the Income Tax Officer. The Appellate Assistant Commissioner found that the proceeding u/s 34(1)(a) was entirely without jurisdiction, inasmuch as the material facts in respect of the petitioner's property income had been disclosed by the petitioner during the original assessment proceeding, and, therefore, there was no jurisdiction in the Income Tax Officer to initiate proceedings u/s 34(1)(a). In substance, the Appellate Assistant Commissioner held that the reassessment proceeding so taken by the Income Tax Officer was void for want of jurisdiction. Nothing that, the Income Tax Officer did during that proceeding could be clothed with legal authority. Consequently, it is not possible to envisage that he could have included in that assessment proceeding the income he now seeks to assess. That being so, there can be no question of the income escaping assessment in the proceeding taken u/s 34(1)(a).

5. Learned counsel for the petitioner has referred us to Commissioner of Income Tax, New Delhi Vs. Rao Thakur Narayan Singh, . That decision does not assist the petitioner at all. The Income Tax Officer there had issued a notice u/s 34 of the Act of 1922 and made an assessment order including in it the interest income as well as the forest income of the assessee. When the case was brought eventually before the Income Tax Appellate Tribunal, the Tribunal overlooked the fact that the only dispute subsisting related to the forest income and that it was admitted that the interest income had been disclosed by the assessee during the original assessment proceeding. The Tribunal made an order holding that the entire proceeding was without jurisdiction. The Income Tax Officer did not apply to the Tribunal for rectification of the order of the Tribunal, nor did he challenge the order before the High Court, and the matter became final. Instead, he initiated proceedings again u/s 34(1) of the Act for the purpose of assessing the interest

income again. The Supreme Court held that the Income Tax Officer was bound by the finding of the Tribunal. It observed that the finding of the Tribunal that the Income Tax Officer had knowledge of the interest income as well as of the forest income at the time when the original assessment was made was binding upon him, and, therefore, it could not be said that the interest income had escaped assessment by reason of any failure or omission on the part of the assessee. In the present case, the facts are entirely distinguishable.

6. Learned counsel then relied on Commissioner of Income Tax, West Bengal, and Another Vs. Hemchandra Kar and Others, . The assessee in that case was a Hindu undivided family consisting of six members. Following the demonetisation of high denomination notes in January, 1946, the assessee encashed notes of the value of Rs. 19,000 and five members of the family encashed notes of the aggregate value of Rs. 1,10,000. The Income Tax Officer reopened the assessment of the assessee and the individual members and made orders of reassessment including the sum of Rs. 19,000 in the hands of the family and the sum of Rs. 1,10,000 separately in the hands of the five individual members.. Subsequently, he also issued a notice u/s 34(1)(a) of the Act of 1922, for the purpose of including a sum of Rs. 1,10,000 in the hands of the assessee-family. The Supreme Court held, affirming the view of the High Court that the proceedings were invalid, that all the material facts were before the Income Tax Officer when he reopened the assessment originally, and it was open to him then to include the entire amount of Rs. 1,10,000 in the hands of the assessee-family when he reassessed its total income at that stage. We are unable to see how the ratio of that case is attracted here.

7. The next contention of the learned counsel for the petitioner is that a full and complete disclosure was made by the petitioner at the time of the original assessment proceedings, and the material on which the Income Tax Officer has initiated the impugned proceedings can give rise merely to suspicion and nothing else. He has referred us to the following passage in the original assessment order dated July 5, 1961 :

" From potato hire the assessee has shown his gross receipt at Rs. 2,05,352 as against Rs. 1,88,721 recorded in the preceding year. The ledger accounts of the constituents are properly kept in the khata bahi. On test check accounts were found to be in order. The rates of storage this year have remained the same as in the past. On examination the account was found to be in order. Income shown under this head is accepted."

8. A copy of the report of the Income Tax Officer on the basis of which he has initiated the impugned proceeding has been annexed to the counter-affidavit filed on behalf of the Income Tax Officer. In the report he has set out the reason on which he sought the sanction of the Commissioner of Income Tax for taking proceedings u/s 147 against the assessee. Those reasons are set out hereunder :

" Original assessment in this case was made on July 5, 1961, on a total income

of Rs. 53,548. Subsequently the action u/s 34(1) of the Income Tax Act, 1922, was taken for inclusion of certain property income which has escaped assessment. During the course of proceedings u/s 34, it was found that the assessee had concealed a sum of Rs. 1,00,000 as his income which was added as income from undisclosed sources, on account of benami sources of potatoes in various names. This concealment was established fully in the assessment under consideration which was completed u/s 34(1)(a) on December 27, 1965, on a total income of Rs. 1,76,147.

2. The Appellate Assistant Commissioner has annulled this assessment vide his order dated May 10, 1967, mainly on the ground that the assessment was not properly reopened u/s 34(1)(a) of the Income Tax Act, as the assessee has not failed to furnish the full particulars of his income in regard to the property income, and, therefore, there was no scope to reopen the assessment u/s 34(1)(a). Since the assessment was reopened u/s 34(1)(a) on the only ground of failure on the part of the assessee to disclose property income fully, which was not there, the Appellate Assistant Commissioner has annulled the assessment without considering the merits of the additions at all,

3. As it has been established during the proceedings u/s 34(1)(a) that the assessee had concealed a sum of Rs. 1 lakh, there is a clear failure on the part of the assessee to disclose the particulars of his income fully and truly. Therefore, action u/s 147(a) of the Income Tax Act, 1961, is clearly called for.

4. Sanction may kindly be accorded for initiating the proceedings u/s 147(a) for assessing this concealed income in this year."

9. The Income Tax Officer has proceeded on the basis of material showing that the assessee had concealed a sum of Rs. 1,00,000 representing his income from undisclosed sources. He has taken into account the circumstances that the names of several constituents recorded in the petitioner's account books were benami. He has referred to the earlier assessment order made u/s 34(1)(a) on December 27, 1965. During that reassessment proceeding, it appears, the Income Tax Officer had examined a large number of witnesses including those whose names were shown in the relevant entries in the petitioner's accounts. From their testimony he has come to the conclusion that the entries were false. Learned counsel for the petitioner has placed before us the findings of the Appellate Assistant Commissioner in the appeals by the petitioner against the assessment orders for the years 1962-63 and 1963-64 and has attempted to show that the materials on which the Income Tax Officer now proceeds cannot be treated as good materials for the purpose of initiating proceedings u/s 147. We have perused the orders of the Appellate Assistant Commissioner, and we do not find any finding by that authority from which that inference can be drawn. All that the Appellate Assistant Commissioner has found is that " the entire amount of the potatoes taken by the Income Tax Officer to be in benami names does not appear to be benami in its entirety and therefore, only a portion of it is being considered as on assessee's account ". If this finding can be referred to at all, it

shows that the Appellate Assistant Commissioner also came to the conclusion that the petitioner was engaged in showing the potatoes stored in benami names. This only reinforces the validity of the action now taken by the Income Tax Officer. We are unable to hold that the material on the basis of which the Income Tax Officer has proceeded to issue the impugned notice u/s 148 cannot serve as a valid foundation for that notice. The second contention of the petitioner is also rejected.

10. The third contention of the learned counsel for the petitioner is that the petitioner has disclosed all the primary facts to the Income Tax Officer during the original assessment proceedings and, therefore, there was no jurisdiction in the Income Tax Officer to take the impugned proceeding on the ground of any failure or omission on the part of the petitioner. We have been referred to paragraph 34 of the petition. What were the material primary facts placed by the petitioner before the Income Tax Officer during the original assessment proceeding have not been set out in that paragraph. Learned counsel says that the names and addresses of the constituents who stored potatoes with the petitioner were placed before the Income Tax Officer and that amounted to a sufficient disclosure of the material primary facts. In our opinion, the disclosure of the primary facts must be a full and true disclosure;. There is no doubt, as the Supreme Court has observed in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, Calcutta* that once the assessee has disclosed the material primary facts it is for the Income Tax Officer to arrive at the necessary inferences flowing from those facts and that it is not for the assessee to advise him what inferences to draw. We do not find anything in the observations made in that case to justify the contention now raised before us that even though the facts disclosed by the assessee may not be consistent with the true factual position in the case, the assessee can be said to have discharged his obligation under the law. Section 147(a) is intended to invest the Income Tax Officer With jurisdiction to assess escaped income where the assessee has failed to disclose " fully and truly all material facts necessary for his assessment for that year ". A representation as to the facts not true at all cannot be pressed into service by an assessee who seeks to escape the jurisdiction conferred u/s 147(a). The third contention of the petitioner has no force and is also rejected.

11. Learned counsel has placed reliance on *Seth Kirorimal Adwani and Others Vs. Income Tax Officer, "E" Ward and Others*, . That case is distinguishable. The Assam High Court specifically proceeded on the basis that all the facts had been truly and fully disclosed by the assessee before the Income Tax Officer at the time of the original assessment.

12. Learned counsel for the petitioner then, says that the Income Tax Officer had made a test check at the time of the original assessment and must be presumed to have taken into account all the materials showing whether the names of the constituents entered in the petitioner's account books were genuine or not. As will appear from a perusal of the assessment order, all that the Income Tax

Officer did was to examine the account books of the petitioner with a view to ensuring that the figures disclosed in the return were supported by the data contained in the account books. There is nothing on the record before us to show that when he examined the account books there was anything to lead to the suspicion that all was not right with them. We have been referred by learned counsel to the case of *Modern Theatres Ltd. Vs. Commissioner of Income Tax, Madras*, . In that case, reliance was placed by the department upon the Explanation to Section 34(1)(a) of the Act of 1922 in support of the submission that the mere production of certain documents by the assessee before the Income Tax Officer during the original assessment proceeding could not relieve the assessee from placing all the material facts specifically before the Income Tax Officer. The Madras High Court found that the Income Tax Officer had in fact called for a number of documents apart from those expressly placed before him and must, therefore, be taken to have applied his mind to the transactions in question and that, therefore, the Explanation mentioned above could not be availed of. The decision in that case, we think, has no application to the facts of the present case.

13. It is also pointed out that the notice u/s 34(1)(a) of the Act of 1922 was issued on December 21, 1961, and the reassessment was contemplated by the order dated December 22, 1965, and that, therefore, inasmuch as the said proceeding u/s 34 was pending on April 1, 1962, when the Income Tax Act of 1961 was brought into force, no proceeding could be taken u/s 147 of that Act. We have been referred to Section 297(2)(d)(ii). The provision reads as follows:

" 297. Repeals and savings,--(1) The Indian Income Tax Act, 1922 (11 of 1922), is hereby repealed.

(2) Notwithstanding the repeal of the Indian Income Tax Act, 1922 (11 of 1922), hereinafter referred to as the repealed Act).

(d) where in respect of any assessment year after the year ending on the 31st day of March, 1940,

(ii) any income chargeable to tax had escaped assessment within the meaning of that expression in Section 147 and no proceedings u/s 34 of the repealed Act in respect of any such income are pending at the commencement of this Act, a notice u/s 148 may, subject to the provisions contained in Section 149 or Section 150, be issued with respect to that assessment year, and all the provisions of this Act shall apply accordingly."

14. It seems to us that this provision contemplates a proceeding u/s 34 of the Act of 1922 which can in contemplation of law be considered as such proceeding. It does not refer to a proceeding which is without jurisdiction. This contention on behalf of the petitioner is also rejected.

15. Lastly, it was contended by learned counsel for the petitioner that, inasmuch as it has been held by the Appellate Assistant Commissioner that the petitioner's

property income was already in the mind of the Income Tax Officer at the time of the original assessment, the notice u/s 148 is invalid to the extent that it attempts to comprehend within its scope such property income. The reasons disclosed by the Income Tax Officer in his report to the Commissioner of Income Tax for the purpose of obtaining the latter's sanction do not indicate that the assessment of the property income is the ground for initiating proceedings u/s 147. The notice cannot be successfully assailed on that contention. Whether or not the property income should be included in the reassessment now proposed by the Income Tax Officer is a matter to be decided by the Income Tax Officer at the time of making the assessment.

16. In our opinion, none of the contentions raised on behalf of the petitioner have any substance. The petition fails and is dismissed with costs.

Petition dismissed.