

(1973) 12 CAL CK 0020
In the Calcutta High Court
Case No : Appeal No. 72 of 1971

Income Tax Officer, "A" Ward and Others	APPELLANT
Vs	
Eastern Coal Co. Ltd. (In Liquidation)	RESPONDENT

Date of Decision : 04-12-1973

Acts Referred:

Income Tax Act, 1922 — Section 10(2), 39
Income Tax Act, 1961 — Section 148, 150, 150(1), 151(1), 153(3)

Citation : (1975) 101 ITR 477

Hon'ble Judges : Sankar Prasad Mitra, C.J.; Sabyasachi Mukharji, J

Bench : Division Bench

Advocate : Suhas Sen and Ajit Sen Gupta, for the Appellant; Pranab Kumar Pal and Manisha Seal, for the Respondent

Judgement

Sabyasachi Mukharji, J.—In this appeal the question involved is the validity of the notice dated the 7th December, 1965, issued u/s 148 of the Income Tax Act, 1961, for the assessment year 1958-59. It appears that Eastern Coal Company sold its colliery to Bhowrah Kankanee Collieries Ltd., by an indenture dated the 28th of September, 1957. This sale was made effective on and from the 1st of January, 1955. The consideration for the sale was Rs. 62 lakhs with an abatement of Rs. 5 lakhs on the ground of retrenchment compensation. On the 26th of June, 1958, Eastern Coal Company went into voluntary liquidation. On the 29th of December, 1960, the assessment of the Eastern Coal Company for the assessment year 1956-57, accounting year being 1st of October, 1954, to 30th of September, 1955, was completed. The assessee offered for taxation the said sum of Rs. 62 lakhs for the said assessment year and was accordingly taxed u/s 10(2)(vii) of the Indian Income Tax Act, 1922, for a sum of Rs. 2,21,057. The difference between the written down value and the actual sale consideration was the figure which was subjected to tax on this account. It is stated that the assessment was made on the basis of the documents and evidence furnished by the assessee. Thereafter, on the 28th of February, 1961, the assessment for the assessment year 1958-59 was completed on the basis of the return filed by the

assessee. The assessee claimed that its business and its collieries had been sold with effect from the 1st January, 1955. The assessee also produced certain evidence in support of the said claim and was taxed only on interest on security and dividend income. The assessee's claim for expenses under the head "Loss on working" was disallowed on the ground that in the relevant year the assessee was not carrying on any business. On the 21st of July, 1965, the assessee was allowed to take a supplementary ground before the Income Tax Appellate Tribunal in its appeal for the assessment year 1956-57, contending that the profit which was the subject-matter of taxation u/s 10(2)(vii) of the Indian Income Tax Act, 1922, for the assessment year 1956-57 was not liable to be taxed in the said assessment year. The Tribunal came to the conclusion following the decision of the Supreme Court in the case of Commissioner of Income Tax Vs. Bhurangya Coal Co., that the sale was concluded on the 28th of September, 1957, when the deed of conveyance was registered. The Tribunal accordingly held that the profits u/s 10(2)(vii) were, therefore, liable to be included in the assessment of the assessee for the assessment year 1958-59 and not in the assessment year 1956-57 under appeal. It appears that thereafter on being moved u/s 35 of the Indian Income Tax Act, 1922, the Tribunal rectified the order by deleting the words "liable to be included in the total income of the appellant in the assessment year 1958-59" in view of the decision of the Supreme Court in the case of Income Tax Officer, A-Ward, Sitapur Vs. Murlidhar Bhagwandas, Lakhimpur Kheri, . On the 7th of December, 1965, the Income Tax Officer issued a notice u/s 148 of the Income Tax Act, 1961, in respect of the assessment year 1958-59 and on the 4th February, 1966, this rule was obtained under Article 226 of the Constitution challenging the validity of the notice. The rule ultimately came up for hearing before K. L. Roy J. and by a judgment delivered and an order passed on the 6th of October, 1969 the rule nisi was made absolute and the notice u/s 148 was quashed. This appeal has been preferred from the said judgment.

2. The first ground of challenge to the said notice is that all primary facts had been disclosed. We directed the Income Tax department to produce before us the recorded reasons for the reopening of the said assessment. The said reasons were produced; the reasons were shown to counsel for the assessee. The reasons are as follows :

"In this case the Tribunal have deleted the profits u/s 10(2)(vii) amounting to Rs. 2,21,057 in respect of immovable properties from the assessment year 1956-57, on the ground that under the second proviso to Section 10(2)(vii) such profits are includible in the total income of the previous year in which the sale took place. In the instant case the sale of immovable properties was concluded on 28-9-1957 when the conveyance was executed and registered. Therefore, the profits u/s 10(2)(vii) in respect of the immovable properties are liable to be included in the total income of the assessee in the assessment year 1958-59 and not in the assessment year 1956-57.

At the time of the assessment year 1958-59, the assessee had failed to disclose fully and truly all material facts necessary for his assessment for that year. As each assessment is a separate and distinct entity, disclosure of the fact of sale in connection with the assessment year 1956-57 is not disclosure for the assessment year 1958-59. The assessee did not, in fact, offer the income arising from sale of property in respect of the assessment year 1958-59 nor did he even specifically disclose the fact of sale. In such circumstances, therefore, this income of Rs. 2,21,057 which has escaped assessment requires to be assessed. Hence, the action u/s 148(a) is proposed."

3. As a matter of fact the substance of these reasons has been stated in the affidavit-in-opposition filed in answer to the rule nisi. It appears that the Income Tax Officer has proceeded on the basis of failure and omission on the part of the assessee to disclose fully and truly all primary facts and as a result of which, according to the Income Tax Officer, the income of the assessee for the assessment year 1958-59 has escaped assessment. Therefore, it appears that the Income Tax Officer was proposing action under Clause (a) of Section 147 of the Income Tax Act, 1961. The learned trial judge has come to the conclusion that Clause (a) of Section 147 of the Income Tax Act, 1961, cannot be applied in this case, because, according to the learned judge, all primary facts had been disclosed and were in possession of the department at the time of the original assessment for the assessment year 1958-59. We are in agreement with the learned judge on this aspect of the matter. It appears to us that the primary facts in connection with this transaction are the sale, the consideration, the date of conveyance and the date of registration. All these facts were disclosed to the department and/or were otherwise in the possession or knowledge of the department because of the disclosure or otherwise at the time of the original assessment for the assessment year 1958-59. It has to be borne in mind that assessment for the year 1956-57 had been completed already at the time of the original assessment for the year 1958-59. There is no obligation on the assessee to disclose the correct legal inference in respect of a particular transaction. The principles upon which Clause (a) of Section 147 of the Income Tax Act, 1961, or Section 34(1)(a) of the Income Tax Act, 1922, can be invoked are well-settled by the provisions of these sections as well as by the decisions of the courts. In view of the principles which are well-established we are of the opinion that in this case there was no failure on the part of the assessee to disclose fully or truly all primary facts, and in any event the income which has escaped assessment was not due to failure or omission on the part of the assessee to disclose fully and truly all the material facts because all relevant and material facts were in the possession of the department at the time of the original assessment of 1958-59. So, escapement, if any, has happened not as a result of the failure of the assessee but because both the assessee as well as the department drew wrong inference from the facts disclosed. In such a case Clause (a) of Section 147 of the Income Tax Act, 1961, cannot be invoked. Reliance may be placed on the decisions of the Supreme Court in the case of Calcutta Discount Company

Limited Vs. Income Tax Officer, Companies District, I and Another, and Kantamani Venkata Narayana and Sons Vs. First Additional Income Tax Officer, Rajahmundry, and the decision of this court in the case of Commissioner of Income Tax Vs. Kallu Babu Lalchand, .

4. Counsel for the revenue, then, contended that in view of the provisions of Section 279(2)(d)(ii) read with Section 150(2) and Section 153, Explanation 2 of the Income Tax Act, 1961, the action taken in this case could be justified on the ground of Clause (b) of Section 147 of the Income Tax Act, 1961. To this the first submission of the assessee is that Clause (b) of Section 147 cannot be invoked in this case because the Income Tax Officer had purported to take action under Clause (a) of Section 147 of the Income Tax Act, 1961. As it is not necessary, the notice does not mention under which clause the action was taken but counsel for the assessee can justifiably claim that the grounds indicated in the reasons recorded as well as in the affidavit-in-opposition establish that the Income Tax Officer was proceeding on the basis of Clause (a) of Section 147 of the Income Tax Act, 1961. The first question in this case is whether where the Income Tax Officer has proceeded under Clause (a) of Section 147 if it transpires later that such a course was not justified but action could have been taken under Clause (b) of Section 147 of the Act, can such action be upheld by court ? It has been held by the Supreme Court in the case of Johri Lal (H.U.F.), Agra Vs. The Commissioner of Income Tax, that where action has been taken u/s 34(1)(b) of the Income Tax Act, 1922, it was not possible for the court to transform such an action and treat the notice issued as one u/s 34(1)(a) of the Income Tax Act, 1922. It is true that a notice issued on the ground of Clause (b) of Section 147 of the Income Tax Act, 1961, cannot be later on treated as one issued under Clause (a) of Section 147 of the said Act. But that is because certain specific and special conditions are required to be complied with in cases under Clause (a) of Section 147 which normally and in ordinary course are not required to be complied with in respect of cases under Clause (b) of Section 147 of the Act. But a notice u/s 147 which has been proposed under Clause (a) can be treated as one, if the material conditions are fulfilled, under Clause (b) of Section 147 of the Income Tax Act, 1961. It was so held by this court in the Income Tax Reference No. 89 of 1968, Mriganka Mohan Sur v. Commissioner of Income Tax [1974] 45 ITR 503 . In this case it is apparent that the information that the Income Tax for the assessment year 1958-59 has escaped assessment came as a result of the appellate order of the Tribunal which was passed subsequent to the original assessment for the assessment year 1958-59. Therefore, there was information coming into the possession of the department that income of the assessee has escaped assessment which came as a result of the decision of the Tribunal. The Income Tax Officer, however, thought that the assessee had failed to disclose fully and truly all material facts but that position was not correct. The assessee had not failed to disclose fully and truly all material facts and in any event the income did not escape as a result of such alleged failure on the part of the assessee, but there was escapement and that information came subsequent to

the original assessment and there was information to that effect. If these are the conditions fulfilled and if reasons have been recorded, then in such a case, there is no impediment in treating a notice issued under Clause (a) of Section 147 of the Income Tax Act, 1961, as one under Clause (b) of the Income Tax Act, 1961.

5. The next question is whether this action can be held to be valid in view of the provisions of Section 297(2)(d)(ii) of the Income Tax Act, 1961, read with Section 150(2) and Section 153, Explanation 2, of the said Act, Counsel for the assessee contended that Section 297(2)(d)(ii) of the Income-tax Act, 1961, did not apply because, firstly, it was submitted that it was in conflict with the provisions of Section 297(2)(a) of the Income tax Act, 1961, and it was submitted that assessment under that Act included reassessment. Therefore, it was urged that inasmuch as a return for the original assessment had been filed before the coming into operation of the income tax Act, 1961, Clause (a) of Sub-section (2) of Section 297 applied to this case because reassessment was a part and continuation of the process of assessment and not Clause (d), Sub-clause (ii) of Section 297(2) of the Act. It is true that by definition "assessment" could include reassessment, but Clause (a) of Sub-section (2) of Section 297 deals with the general situation, namely, where a return has been filed but no assessment has been made as yet before the commencement of the 1961 Act. And Clause (d) of Section 297 deals with two specific situations, namely, under Clause (i) where on the belief of escapement of income a notice u/s 34 of the 1922 Act though given, yet action pursuant thereto remains incomplete, and under Clause (ii) where income chargeable to tax has escaped assessment but no notice u/s 34 of the 1922 Act had yet been served when the 1961 Act came into operation. The last situation contemplated by Sub-clause (ii) of Clause (d) of Sub-section (2) of Section 297 of the Act is the present position in the instant case. In such a situation the harmonious way of construction is to consider that a special provision should be applicable to a special case and the special case mentioned in the later part of the same Act is an exception to the earlier general provision of the same Act. Therefore, in view of the fact that in this case no notice had been issued u/s 34 of the Indian Income Tax Act, 1922, prior to the coming into operation of the 1961 Act, Sub-clause (ii) of Clause (d) of Sub-section (2) of Section 297 would apply in our opinion.

6. It was then contended that Section 297(2)(d) was ultra vires because it discriminated between the persons who had been served with notices u/s 34 of the Income Tax Act, 1961, and those who had not been served with such notices. It was further urged that provisions of the 1961 Act were more onerous than the provisions of the 1922 Act. It has been held by this court that those whose income had escaped assessment and in respect of whom notices had been issued prior to the coming into operation of this Act and those whose income had escaped assessment and no notices had been issued in respect thereof are two different and distinct classes to be dealt with by two different methods of the procedure, and the difference in the procedure has a rational connection with the differentiation made, and as such does not amount to discrimination. Reference

may be placed on the decision of this court in the case of M.M. Ispahani Ltd. Vs. Commissioner of Income Tax (Central) and Another, . It has been held in the aforesaid decision that it could not be said that the provisions of the one Act were more onerous than the other because these two Acts made different provisions for two contingencies. In the premises, this contention of the assessee cannot be accepted.

7. The next question that requires consideration is whether u/s 150 of the Income Tax Act, 1961, this notice can be treated as valid. Counsel for the revenue contended that in view of Sub-section (1) of Section 150 the period of limitation prescribed u/s 149 would not be a bar for taking action in this case. It was submitted that it was to give effect to the finding or direction contained in the order of the Appellate Tribunal that the present action was taken; the first question that requires consideration is whether it was to give effect to any finding or direction. As mentioned hereinbefore the Tribunal following the decision of the Supreme Court given under the provisions of the 1922 Act in the case of Income Tax Officer, "A" Ward, Sitapur v. Murlidhar Bhagwan Das subsequently deleted the direction contained in the appellate order as indeed specific direction could not be given by the Tribunal in respect of another year when hearing an appeal in respect of one year, but there was a finding in the year 1956-57 that the income in question though liable to be taxable was not taxable in the year 1956-57. The question is what is the effect of that finding. As a result of that finding it became apparent that this income escaped assessment. Explanation 2 to Sub-section (3) of Section 153 provides that where by an order referred to in Clause (ii) of Sub-section (3) any income is excluded from the total income of the assessee for an assessment year, then assessment of such income for another assessment year shall, for the purposes of Section 150 and this section, namely, section 153, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order. It appears that in order to avoid the mischief spoken of by the Supreme Court in the aforesaid decision of Income Tax Officer, "A" Ward, Sitapur v. Murlidhar Bhagwan Das, this Act specifically made a direction in one year or a finding made in one year to be valid for taking action in respect of a subsequent year or another year. The first contention of counsel for the assessee, however, is that Sub-section (1) of Section 152 speaks of a finding or a direction contained in an order passed by an authority in a proceeding under "this Act" by way of appeal, reference or revision, namely, the Income Tax Act, 1961. It was contended that the decision of the Income Tax Appellate Tribunal for the assessment year 1956-57 was not given under "this Act", namely, 1961 Act, but was given under the provisions of the Indian Income Tax Act, 1922. We have referred to the provisions of section 297(2)(d)(ii) and we have held that under the said provisions the present Act would apply to the present proceedings. But the question is to what extent this 1961 Act is to be applied. It appears to us that when the section speaks "that all the provisions of this Act shall apply accordingly" in Sub-clause (ii) of Clause (d) of Sub-section (2) of Section 297 of the Income Tax Act, 1961, the provisions

must be read *mutatis mutandis* in applying the provisions, otherwise these will lead to incongruous results. It has been so held by the Supreme Court in the case *Third Income Tax Officer, Mangalore Vs. M. Damodar Bhat, Jain Bros. and Others Vs. The Union of India (UOI) and Others, Commissioner of Income Tax, Delhi (Central) Vs. Singh Engineering Works P. Ltd., and Kalawati Devi Harlalka Vs. Commissioner of Income Tax, West Bengal and Others*, . Our attention, however, was drawn to the decision of the Supreme Court in the case of *R.B. Seth Gujar Mal Modi and Others Vs. The Commissioner of Income Tax , Punjab and Another*, . There a notice u/s 34(1)(b) of the Indian Income Tax Act, 1922, was issued on November 7, 1958, to reopen the assessment of the deceased assessee for assessment year 1957-58. It was served only on the appellant No. 2. On June 15, 1963, the Appellate Assistant Commissioner set aside the assessment made pursuant to that notice on the ground that it was necessary to issue notice to all the legal representatives of the deceased assessee. In the meantime, the Income Tax Act, 1961, came into force on April 1, 1962. Thereafter, on January 7, 1964, the Income Tax Officer issued a notice u/s 148 of the Act of 1961 to the appellants. It was held by the Supreme Court that since the proceedings u/s 34(1)(b) of the 1922 Act were pending since April 1, 1962, it was not open to the Income Tax Officer to issue notice u/s 148 of the Income Tax Act, 1961, and since the Appellate Assistant Commissioner's order was not passed under the 1961 Act, the department could not take the support from Section 150(1) of the 1961 Act. It appears as is evident from the facts stated before that notice was issued u/s 148 of the Income Tax Act, 1961, on January 7, 1964, when a notice u/s 34(1)(b) of the Indian Income Tax Act, 1922, was pending. Therefore, the action taken by the notice u/s 148 was really a continuation of the action taken u/s 34(1)(b) of the Indian Income Tax Act, 1922. In construing the validity of such action the provision of Section 297(2)(d) (ii) cannot be applied and, therefore, as it was really a continuation of the proceedings under the old Income Tax Act no question can arise of invoking the provision of Section 150(1) of the Income Tax Act, 1961. In those circumstances, the Supreme Court observed that since the Appellate Assistant Commissioner's order was not passed under the 1961 Act, the department could not take any support from Section 150(1) of the 1961 Act. Therefore, we are of the opinion that the provision of Section 150(1) of the Income Tax Act, 1961, would apply in respect of a notice issued under the 1961 Act even though the direction or the finding out of which this notice was issued was passed under the provisions of the Act of 1922.

8. The next question that was urged in this case was that even if Section 150(1) of the 1971 Act applied the notice had become barred. It was contended that a notice would become barred even u/s 150(1) if on the date of the appellate order the time for taking action for assessment for that year had become barred by the other provisions of the Act. The correct date in this connection would be the date when the order, which is the subject-matter of the appeal, was passed. If on that date the reassessment proceedings could have been validly taken then because

of subsequent lapse of time the said reassessment proceedings do not become barred by time. In this case on the 29th of December 1960, the original order for assessment was passed and, therefore, on that date action could have been taken for reassessment for the assessment year 1958-59. That was the date when the order which was the subject-matter of appeal was passed. In that view of the matter, in our opinion, the provisions of Section 150(1) of the Income Tax Act, 1961, would apply on the facts of this case. It was lastly contended that Explanation 2 to Sub-section (3) of Section 153 could not be invoked in this case, firstly, because it dealt with a different section and, secondly, according to counsel for the assessee. Explanation 2 of that section did not come into play. Explanation 2 created a fiction by deeming an assessment to be made in consequence of an order or to give effect to a finding or direction which was not there. But there was no provision that the proceedings under the 1922 Act should be deemed to be proceedings under the new Act. But for this no fiction or deeming provision, in our opinion, is necessary because Section 297(2)(d)(ii) read properly with the provisions of the new Act would apply mutatis mutandis to the present case. Therefore, even though in respect of an order passed under the 1922 Act, action could be taken under the 1961 Act, the said provision would be applicable. Counsel for the assessee contended that this would result in double deeming which was not permitted. Reliance was placed on a decision of the Supreme Court in the case of Commissioner of Income Tax v. Elphinstone Spinning and Weaving Mills Co. Ltd. [1960] 40 ITR 153 and The Commissioner of Income Tax, Bombay City I, Bombay Vs. Amarchand N. Shroff, by his heirs and Legal Representatives, . On the other hand it has been clearly laid down by the Supreme Court that when a statute creates a fiction the situation in which the fiction can work should be postulated. Reliance may be placed on the decisions of the Supreme Court in the case of Commissioner of Income Tax, Gujarat Vs. Girdhardas and Company Private Ltd., In the aforesaid view of the matter we are of opinion that the action in this case was valid and the notice cannot be challenged in this case.

9. Our attention was drawn to several decisions, viz., Niranjan and Co. (P.) Ltd. Vs. Commissioner of Income Tax and Others, Gopichand Sarjuprasad v. Union of India, S. B. Jain, Income Tax Officer v. Mahendra and Commissioner of Income Tax v. Rajinder Nath. But in the view we have taken it is not necessary for us to discuss the aforesaid decisions in detail.

10. In the aforesaid view of the matter this appeal is allowed and the judgment and order of the learned trial judge are set aside and the rule nisi is discharged.

11. There will be no order as to costs.

Sankar Prasad Mitra, C.J.

I agree.