

(1970) 01 CAL CK 0015
In the Calcutta High Court
Case No : Matter No. 419 of 1968

Indra Co. Ltd.

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 21-01-1970

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 34
Income Tax Act, 1961 — Section 147, 148

Citation : (1971) 80 ITR 559

Hon'ble Judges : K.L. Roy, J

Bench : Single Bench

Advocate : D. Pal and R.N. Bajoria, for the Appellant; S. Sen, for the Respondent

Judgement

K.L. Roy, J.—This last desperate attempt of the department to rope in an amount which has apparently escaped assessment must also be held to have failed. The petitioner is an Indian company dealing in shares. In its return for the assessment year 1959-60 it claimed a loss of Rs. 2,41,472 in respect of its share dealing business. The shares, on the sale of which the loss was claimed, included 1,393 bonus shares of Hastings Mills Ltd. which the assessee had valued in its books at the face value of Rs. 100 each. The assessment for that year was made by the first respondent herein u/s 23(5) of the repealed Income Tax Act, 1922, disallowing the claim for the said loss of Rs. 2,41,472 on the ground that the said loss did not arise in the normal course of the assessee's business. On the assessee's appeal from the said assessment order, by his order dated the 11th December 1964, the Appellate Assistant Commissioner allowed the entire claim for loss of Rs. 2,41,472 on the ground that the said loss arose in the normal course of the assessee's business. On the 28th July, 1965, the respondent-income tax Officer passed necessary orders u/s 31/154 of the Income Tax Act, 1961, giving effect to the aforesaid appellate order.

2. Thereafter, by a letter dated the 19th April, 1967, the respondent-income tax

Officer purported to give notice to the petitioner u/s 154 of the 1961 Act for rectifying the assessment for 1959-60 as the profit from the sale of the said bonus shares to the extent of the face value thereof, viz., Rs. 1,39,300, had been under-assessed. Against the aforesaid notice the petitioner moved this court under Article 226 and a rule was obtained on the 16th November, 1967, which was finally made absolute by me on the 20th August, 1969. After the service of the aforesaid rule on the respondents including the respondent No. 1 herein, a notice purporting to be a notice u/s 148 of the 1961 Act dated the 18th January, 1968, was served on the petitioner by the said respondent No. 1 proposing to reassess its income for the assessment year 1959-60 as such income had escaped assessment within the meaning of Section 147 of the Act. The petitioner was further notified that the aforesaid notice was being issued after obtaining the necessary satisfaction of the Commissioner of Income Tax, Central Circle, Calcutta. Without prejudice to its contentions the petitioner filed its return for the aforesaid year in pursuance of the said notice and on the 24th April, 1968, a notice u/s 143(3) of the Act was issued on the petitioner calling upon it to produce or cause to be produced the documents, books of account and other evidence on which the petitioner wanted to rely in support of the return filed and the date of hearing under the said notice was fixed on the 10th May, 1968. This application was made and this rule obtained by the petitioner on the 18th June, 1968, requiring the respondents to show cause why the aforesaid notice u/s 148 and/or the proceedings held thereunder should not be quashed.

3. In the affidavit-in-opposition affirmed by the present incumbent to the post of the Income Tax Officer, Central Circle, I, Calcutta, the respondent-No. 1, it has been stated in paragraph 10 that the respondent was not bound to disclose its reasons for issuing the said notice to the petitioner as it would be extremely detrimental to the interests of the Income Tax department and would completely frustrate the object underlying the initiation of proceedings under the said notice if such reasons were made known to the petitioner at this stage. Reference was made to the departmental records which would be produced before the court. This application came up for hearing on the 16th January, 1970, and was part Heard and adjourned to enable the learned counsel appearing for the department to consult the records as the records were not produced in court on that date. Even today when the application was being heard no such records were produced in spite of the rule calling upon the respondents to produce such records.

4. The petitioner has disclosed three letters after notice to the solicitor for the respondents which are very material for the purpose of determination of the issues raised in the present application. In the first of such letters dated the 25th October, 1962, the respondent-income tax Officer had asked for various information from the petitioner in regard to its assessment for the year 1959-60 and one of such queries was for full details of the bonus shares, the date and source of acquisition, the parties to whom they were sold, the date of sale and the value thereof. This letter was accompanied by a notice u/s 22(4) of the 1922 Act. In its reply dated the 8th November, 1962, the assessee gave full particulars

in answer to the queries raised in the aforesaid letter of the-respondent and so far as bonus shares were concerned it gave the following-information : One item, viz., 1939 bonus shares, out of sale of 2,786 shares, of Hastings Mills Ltd. were sold on January 24, 1959, to Messrs. Kamaia Co. Ltd. at the rate of Rs. 105. These shares were acquired in March, 1951, from the Hastings Mills Ltd., on issue of bonus shares and necessary adjustments in the books have been made in respect of cost of these bonus, shares being taken at their face value.

5. The proceedings purported to have been taken u/s 154 as aforesaid were, inter alia, for the purpose of rectifying an alleged error apparent in the original assessment order by including the profit on the sale of the bonus shares of Hastings Mills Ltd. to the extent of Rs. 1,39,300 being the face value of the said bonus shares debited to purchases and credited to reserve.

6. Dr. Pal for the petitioner submitted that in this case before the original assessment was completed all the necessary information required for the purpose of the petitioner's assessment for 1959-60 were supplied to the respondent-income tax Officer. There was no omission or failure on the part of the petitioner to disclose any primary facts necessary for its assessment for that year. Particularly in respect of the bonus shares the income tax Officer himself put the specific questions as to how many shares were sold during the year, to whom, at what price and how was the profit or loss arising from the sale thereof accounted for in the assessee's books and full particulars were supplied in regard to these bonus shares. Finding; his attempt to include the face value of the bonus shares which were debited in the accounts as the cost of those shares u/s 154 to be untenable, the respondent-income tax Officer issued the impugned notice u/s 148 to include the same amount in the assessee's total income for that year by way of reassessment. At the time the original assessment was completed, the Patna High Court in Dalmia's case ITR 1961(Pat.) 705 decided that the cost of bonus shares should be taken at their face value and this decision, was also followed by this court in Commissioner of Income Tax, Bihar Vs. Dalmia Investment Co. Ltd., . It was only when the decision of the Supreme Court in the appeal from Dalmia's case was given on the 13th March, 1964, that the position became clear that the cost of bonus shares should be determined by spreading over the cost of acquisition of equity shares over both the equity shares and bonus shares. The attempt at reassessment is the result of the aforesaid decision of the Supreme Court and the department would have been perfectly justified in taking proceedings u/s 147(b) within four years of the end of the assessment year, as undoubtedly, the decision of the Supreme Court was information within that clause. As in this case there has been no failure or omission on the part of the petitioner to disclose any material facts for the purpose of its assessment so far as the loss arising from the bonus shares were concerned, there can be no application of Section 147(a) and the notice must be struck down.

7. Mr. S. Sen, learned counsel for the respondents, argued two points in his

attempt to sustain the impugned notice. His first contention was that if the Income Tax Officer had jurisdiction to initiate the assessment proceedings u/s 147 in consequence of the information received from the aforesaid judgment of the Supreme Court, then he had initial jurisdiction to issue the notice. Whether Clause (a) or Clause (b) of Section 147 would apply would be a question of limitation and this court in an application under Article 226 would not go into such a question Mr. Sen referred me to a decision of B. C. Mitra J., in Pliant Investment Corporation Ltd. v. Income Tax, Officer, "A" Ward, Companies District II I.T.R. 1968 (Cal,) 847. In that case a notice u/s 23A of the 1922 Act requiring an assessee to show cause why an order under that section should not be passed against him was challenged under Article 226 of the Constitution on the ground that, as the period of limitation for an assessment as provided in Section 34(3) had already expired, the Income Tax Officer had no jurisdiction to start proceedings u/s 23A. The learned judge, after considering the authorities on the subject, and particularly the decisions of the Supreme Court in Lalji Haridas Vs. R.H. Bhatt and Another, and Lalji Haridas Vs. Income Tax Officer and Another, , observed that the plea of the bar created by Section 34(3) of the Act raised by the petitioner in that petition could as well be raised by it before the revenue authorities, who alone had the power to issue the impugned notice calling upon the petitioner to show cause why the order should not be made u/s 23A of the Act. There was no bar in law to the issue of that notice. The bar is to the making of an order of assessment or reassessment in those cases where the bar of limitation created by Section 34(3) of the Act applies, and such a question could not be agitated in an application for a high prerogative writ. I do not see what application has that decision in the present case. Section 147 of the 1961 Act is as follows:

" 147. If-

(a) the Income Tax Officer has reason to believe that, by reason of the omission or 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 recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned. . . ."

8. Section 148 enjoins that before making the assessment, reassessment or recomputation 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 u/s 139(2) of the Act 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. In Section 149 a time limit is provided and in cases falling u/s 147(a) no such notice could be issued if eight years have elapsed from the end of that year, and in cases falling u/s 147(b) at any time after the expiry of four years from the end of the relevant assessment year. It is further provided in Section 151(2) that no such notice shall be issued 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. As the impugned notice in the present application states that it was being issued after obtaining the necessary satisfaction of the Commissioner of Income Tax, Central, Calcutta, it must be accepted that the notice was issued u/s 147(a) of the Act. It is now well-settled by several decisions of the Supreme Court that the foundation of the Income Tax Officer's jurisdiction to make a reassessment either u/s 34 of the repealed Act or u/s 147 of the 1961 Act is the issue and service on the assessee of a valid notice under the aforesaid sections. If the notice is not in conformity with the provisions of either of these sections the Income Tax Officer would have no jurisdiction to start proceedings for reassessment. The extent of the obligation of an assessee to disclose books and documents and to supply information are also now well-settled by the decisions of the Supreme Court, the leading case being that of Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , where it was laid down that two conditions must be satisfied before jurisdiction could be said to be conferred on the Income Tax Officer u/s 34 to issue notice in respect of an assessment beyond the period of four years, viz.:

(1) that he had reason to believe that income, profits or gains. chargeable to Income Tax had been under-assessed or escaped assessment, and

(2) that he must have also reason to believe that such escapement had occurred by reason of either (i) omission or failure on the part of an assessee to make a return, 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.

9. Both these conditions were 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. The words "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year" used in Section 34 postulated a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts were material and necessary for assessment differed from case to case. So far as the primary facts were concerned, it, was the assessee's duty to disclose all of them--including particular entries in account books, particular portions of documents and documents and other evidence which could have been discovered by the assessing authority from the documents and other evidence disclosed.

The duty, however, did not extend beyond the full and truthful disclosure of all primary facts. Once all the the primary facts were disclosed before the assessing authority, it was for him to decide what inferences of facts could be reasonably drawn and what legal inferences had ultimately to be drawn. It is, therefore, necessary to consider whether in this case all the primary facts necessary for the correct evaluation of the assessee's position in regard to the sale of the bonus, shares during the relevant assessment year had been disclosed to the Income Tax Officer before the original assessment was made. I have not. the least hesitation in holding that the assessee's letter dated the 8th November, 1962, in answer to the queries in the respondent-income tax Officer's letter dated the 25th October, 1962, mentioned above gave all the primary facts necessary for the above purpose. It must therefore be held that the Income Tax Officer had no jurisdiction to issue the impugned notice.

10. In regard to the averment made in the affidavit-in-opposition that the respondent-income tax Officer was not required to disclose to the petitioner the reasons for issuing the impugned notice until the petitioner had complied with the notice u/s 143 and disclosed its books of accounts and other documents required to be produced under that notice. Mr. Sen drew my attention to a decision of a Division Bench of this court in *Rungta Engineering & Construction Co. Ltd. v. Income Tax Officer, Central Circle XIII*, [1962] 44 ITR 315 (Cal.). This and several other decisions both of this court and of the Supreme Court have been considered by me in a recent judgment I have delivered in *Umapati Ganguli's* case (unreported), where I have held that while it is not incumbent on the Income Tax Officer to disclose the reasons for issuing the notice at the time of issuing the notice, once the assessee challenges the existence or validity of such reasons in a proceeding under Article 226, the reasons should be disclosed at least in the affidavit-in-opposition. However, I need not deal with this question any further as my decision on the first ground is enough to dispose of the application.

11. In the view I have taken of the assessee's contention as to the validity of the impugned notice it is not necessary for me to consider the other contention raised in the petition, viz., the vires of Section 297(2) Clauses (a) and (b) of the Income Tax Act, 1961, and I express no opinion thereon. In the result this rule must be made absolute. The impugned notice and all proceedings taken thereunder are quashed. There will be no order as to costs.