
(1975) 08 GAU CK 0006
In the Gauhati High Court
Case No : Civil Rule No. 1 of 1972

Ladhuram Laxmi Narayan

APPELLANT

Vs

Income Tax Officer, Additional "A" Ward and Others

RESPONDENT

Date of Decision : 08-08-1975

Acts Referred:

Finance (No. 2) Act, 1965 — Section 24(11)
Income Tax Act, 1961 — Section 147, 148, 149, 151

Citation : (1976) 102 ITR 595

Hon'ble Judges : M.C. Pathak, C.J.; D.M. Sen, J

Bench : Division Bench

Advocate : B.P. Saraf, for the Appellant; G.K. Talukdar and D.K. Talukdar, for the Respondent

Judgement

M.C. Pathak, C.J.—By this application under Article 226 and/or Article 227 of the Constitution of India the petitioner has challenged the notice dated March 10, 1971, issued to him u/s 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), by the Income Tax Officer, respondent No. 1.

2. The petitioner is a partnership-firm registered under the Indian Partnership Act having its head office at Gauhati. For the assessment year 1962-63, the petitioner filed a return showing its total income during the accounting year 1961-62, Ram Navami year 2018. Notice u/s 143(2) of the Act was issued to the petitioner in respect of the assessment year in question and it produced the books of accounts including the books of accounts of all its branches. The Income Tax Officer, thereafter, passed an order of assessment u/s 143(3) read with Section 182(1) of the Act. The income of the firm was determined at Rs. 1,09,430 and the allocation of the shares of the partners of the firm was made on the basis of the income so determined and the taxes were assessed and paid accordingly.

3. Thereafter, the impugned notice dated March 10, 1971, has been issued u/s 148 of the Act.

4. The learned counsel for the petitioner has submitted:

(1) that conditions precedent for issue of a notice u/s 148 of the Act within the meaning of Section 147(a) of the Act are totally absent in the present case and as such the Income Tax Officer issued the impugned notice illegally and without jurisdiction ;

(2) that since the notice is not u/s 147(a) of the Act and even if it is assumed that the notice is u/s 147(b) it is clearly barred by limitation prescribed u/s 149(1)(b); and

(3) that the sanction purported to be given by the Commissioner of Income Tax is wholly mechanical and without any application of mind on the part of the Commissioner and as such the alleged sanction cannot be termed as valid sanction as contemplated u/s 151 of the Act and hence the notice is without jurisdiction.

5. At this stage it would be convenient to quote the relevant provisions of the Act.

" 147. Income escaping assessment.--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 (hereafter in Sections 148 to 153 referred to as the relevant assessment year).

Explanation 1.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:--

(a) where income chargeable to tax has been under-assessed ; or

(b) where such income has been assessed at too low a rate ; or

(c) where such income has been made the subject of excessive relief under this Act or under the Indian Income Tax Act, 1922 ; or

(d) where excessive loss or depreciation allowance has been computed.

Explanation 2.--Production before the Income Tax Officer of account books or

other evidence from which material evidence could with due diligence have been discovered by the Income Tax Officer will not necessarily amount to disclosure within the meaning of this section."

" 148. Issue of notice where income has escaped assessment.--(1) 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 under Subsection (2) of Section 139 ; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that subsection.

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

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

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

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

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

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

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

(3) If the person on whom a notice u/s 148 is to be served is a person treated as the agent of a non-resident u/s 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year."

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

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

6. The assessment year is 1962-63. Return was submitted on January 23, 1963. Assessment u/s 143(3) was made on February 14, 1963, and the notice u/s 148 was issued on March 10, 1971. The notice u/s 148 has been issued after the

expiry of four years from the end of the relevant assessment year. Hence, the notice in the instant case could not be issued without the satisfaction of the Commissioner on the reasons recorded by the Income Tax Officer that it is a fit case for the issue of such notice as required under Sub-section (2) of Section 151.

7. It is found that the sanction in the instant case has been given by the Additional Commissioner and u/s 2(16) of the Act "Commissioner" means a person appointed to be a Commissioner of Income Tax under Subsection (1) of Section 117, and includes a person appointed to be an Additional Commissioner of Income Tax under that Sub-section. Thus, the Additional Commissioner's sanction may be good in law provided it is in conformity with Sub-section (2) of Section 151.

8. In the instant case the notice u/s 148 has been issued for reassessment u/s 147. Before issuing the notice u/s 148, the Income Tax Officer must record his reasons for issuing the notice under the said section.

9. The learned standing counsel for the department produced before us the reasons recorded by the Income Tax Officer for acting u/s 147(a). The reasons may be quoted :

"During the assessment year 1962-63, the assessee-firm from its branch account in Calcutta paid interest to the following parties on the amounts standing to their credits in their accounts :

Rs.

M/s. Surajraal Ganesh Ram 2,662

M/s. Laxminarayan Mohanlal 2,551

M/s. Sri Gopal Onkarmal 1,360

M/s. Sarma & Sons 1,005

M/s. Golaprai Mishrilal 280

7,858

10. In the assessment, these interests were allowed by the Income Tax Officer. Subsequently, the assessee-firm came out with a disclosure under the Finance (No. 2) Act of 1965 admitting that the credits standing in the names of the above parties were fictitious ones and these belonged to the partners of the firm. In the disclosure petition, the principal amount standing to the credit of the aforesaid bogus parties were only disclosed excluding the above interest shown as paid. In the subsequent assessments the interest paid to them on their bogus credits were disallowed by the Income Tax Officer in the hands of the firm's assessment. The action of the Income Tax Officer was also upheld by the Appellate Assistant Commissioner in the appeal against these subsequent assessments. As the assessee had not disclosed fully and truly the nature of the

transaction in the course of original assessment the interest paid to the above parties amounting to Rs. 7,858 was allowed by the Income Tax Officer and thus the above interest escaped assessment in terms of Section 147(a).

11. Further, there is a loan account in the books of the assessee-firm in the name of Shri Ganpatrai Mundra, an employee of the assessee. As per records he is credited with a sum of Rs. 1,15,300 during the assessment year 1962-63 and interest of Rs. 2,626. The above loan was not disclosed to be fictitious one nor had formed part of the disclosure made by the assessee. Before the assessing Income Tax Officer in Calcutta, Shri Mundra admitted that he had to borrow moneys from other parties to advance loan to my assessee-firm and that he borrowed a sum of Rs. 1,00,000 from M/s. Suraj-mal Ganesh Ram for advancing the aforesaid loan to my assessee. M/s. Suraj-mal Ganesh Ram had confessed before his assessing Income Tax Officer that he was a mere name-lender. This was established from the fact that the credit standing in his name in the books of the assessee was admitted by the partners of the assessee-firm to be a fictitious one and formed part of the disclosure made by them. There was every reason to believe that the loan of Rs. 1,00,000 taken by Shri Mundra from M/s. Surajmal Ganesh Ram just to lend it to my assessee represents undisclosed money of the assessee-firm and the assessee was using Shri Mundra as a middleman to introduce its undisclosed money in the shape of loan.

12. As there is sufficient evidence as stated above to show that Shri Mundra had no independent source of these credits, I hold that the balance of Rs. 15,300 also belong to the assessee-firm introduced in the name of Shri Mundra in the books of accounts for the assessment year 1962-63.

13. Having regard to the above facts and circumstances of the case, I do hold that the interest amount of Rs. 7,858 and the aforesaid credit of Rs. 1,15,300 have escaped assessment for which action u/s 147(a) is necessary. As such, the Commissioner of income tax's approval is required to reopen the assessment for 1962-63."

14. In Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, while considering Section 34(1)(a) of the Indian Income Tax Act, 1922, the Supreme Court has observed at page 377 as follows :

"We have, therefore, come to the conclusion that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this.

The position, therefore, is that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of "underassessment" that would be sufficient to give jurisdiction to the Income Tax Officer to issue the notices u/s 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non-disclosure of material facts would not be open for the court's investigation. In other words, all that is necessary to give this

special jurisdiction is that the Income Tax Officer had when he assumed jurisdiction some prima facie grounds for thinking that there had been some non-disclosure of material facts.

Clearly it is the duty of the assessee who wants the court to hold that jurisdiction was lacking, to establish that the Income Tax Officer had no material at all before him for believing that there had been such nondisclosure."

15. The first submission of the learned counsel for the petitioner is that the conditions precedent for the issue of the notice u/s 148 of the Act within the meaning of Section 147(a) of the Act are absent in the present case.

16. From the reasons recorded by the Income Tax Officer for issuing the notice u/s 148, it is found that the Income Tax Officer assumed jurisdiction to issue the notice u/s 148 on two grounds, namely, (1) that the assessee filed disclosure petition under the Finance (No. 2) Act of 1965, admitting that the credits standing in the names of the said five parties mentioned in the grounds were fictitious and those belonged to the partners of the firm; and (2) secondly, that the assessee credited Rs. 1,15,300 during the assessment year 1962-63 in its loan account in the name of Ganpatrai Mundra, an employee of the assessee. The above loan was not disclosed to be fictitious nor formed part of the disclosure made by the assessee. But the said Mundra stated before the assessing Income Tax Officer in Calcutta that he borrowed moneys from other parties to advance loan to the assessee-firm and he further stated that he borrowed Rs. 1,00,000 from M/s. Surajmal Ganeshram for advancing the said loan to the assessee. M/s. Surajmal Ganeshram confessed before the assessing Income Tax Officer in Calcutta that he was a mere name-lender.

17. Regarding the first ground, the learned standing counsel for the department admitted that the disclosure spoken of was made by some of the partners of the assessee-firm, but the assessee-firm did not make the disclosure in question.

18. The learned counsel for the petitioner also submits that the said disclosure was not made by the assessee-firm as stated by the Income Tax Officer in his report to the Commissioner containing the grounds for assuming jurisdiction u/s 148 of the Act. Thus, it is found that the ground stated by the Income Tax Officer for thinking that there had been non-disclosure by the assessee regarding some primary fact is a mistaken ground on the face of it or in other words this is a non-existent ground. Such a mistaken ground cannot be held to be reasonable ground for believing that there has been some non-disclosure on the part of the assessee regarding primary facts for his assessment for the relevant year. A mistaken ground or a non-existent ground cannot be made the basis of thinking that there had been non-disclosure as contemplated under Clause (a) of Section 147 giving jurisdiction to the Income Tax Officer to issue notice u/s 148 of the Act. If the declarant was the assessee-firm there would have been another hurdle for the department u/s 24(11) of the Finance (No. 2) Act of 1965, which reads as follows :

"24. (11) Notwithstanding anything contained hereinabove or in any other law for the time being in force, nothing contained in any declaration made under this section shall be admissible as evidence against the declarant for the purpose of any assessment proceeding or any proceeding relating to imposition of penalty or for the purpose of prosecution under any of the Acts mentioned in Sub-section (9) of the Wealth-tax Act, 1957, in respect of any amount specified in an order made by the Commissioner under Sub-section (4) or, if such amount is altered by an order of the Board under Sub-section (6) then, such altered amount."

20. Regarding the second ground we find that Ganpatrai Mundra, who has been shown in the books of accounts of the assessee-firm as the lender of the sum of Rs. 1,15,300, during the assessment year 1962-63, has not admitted anywhere that he did not lend the money. Before the Income Tax Officer in Calcutta, Mundra is stated to have admitted that he borrowed moneys from M/s. Surajmal Ganesh Ram for advancing the money to the assessee. But M/s. Surajmal Ganesh Ram confessed before his assessing Income Tax Officer that he was a mere name-lender. These facts, taken at the most, may be information gathered by the Income Tax Officer from which he may reasonably believe that income chargeable to tax had escaped assessment for the relevant assessment year. But in that case also this ground will come under Clause (b) of Section 147 and the notice will be apparently barred u/s 149, inasmuch as the notice has been issued after the expiry of the four years from the end of the assessment year. It is thus found that the first ground given by the Income Tax Officer for assuming jurisdiction to issue notice u/s 148 is a wrong ground or non-existent ground and the second ground given by the Income Tax Officer for assuming jurisdiction to issue notice u/s 148 is found to come under Clause (b) of Section 147 and the notice would be barred u/s 149 of the Act. That being the position we are of the opinion that the conditions precedent for issuing the notice u/s 148 of the Act within the meaning of Section 147(a) of the Act are found to be absent in the instant case and, therefore, we hold that the impugned notice is illegal and without jurisdiction.

21. The third submission of the learned counsel for the petitioner is that there was no sanction by the Commissioner of Income Tax as contemplated u/s 151 of the Act.

22. Sub-section (2) of Section 151 requires that before issuing a notice u/s 148, the Commissioner must be satisfied on the reasons recorded by the Income Tax Officer that it is a fit case for the issue of such notice. The submission of the learned counsel is that in the instant case there was no real satisfaction of the Commissioner or in other words there could not be satisfaction of the Commissioner as contemplated under Subsection (2) in the facts and circumstances of the case. In the column of the report whether the Commissioner was satisfied, the Additional Commissioner said " Yes ".

23. We have already found that the first ground given by the Income Tax Officer in his report praying for sanction for acting u/s 148 is admittedly a mistaken

ground and, therefore, non-existent. That being so, the satisfaction of the Additional Commissioner in the instant case, so far as the first ground is concerned, is wholly mechanical without applying his mind.

24. Regarding the second ground, we find that the satisfaction could in law be only with respect to Clause (b) of Section 147 and that being so the notice issued on March 10, 1971, would be clearly barred u/s 149 of the Act.

25. In the result, in any view of the matter, we find that the impugned notice u/s 148 in the instant case is bad in law and without jurisdiction. Accordingly, we quash the impugned notice dated March 10, 1971, u/s 148 of the Act.

26. The petition is allowed and the rule is made absolute. We, however, make no order as to costs.

D.M. Sen, J.

27. I agree.