

(1972) 12 MAD CK 0012

In the Madras High Court

Case No : Writ Petition No"s. 983 and 1602 of 1969

M. Varadarajulu

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 08-12-1972

Acts Referred:

Income Tax Act, 1961 — Section 147, 148

Citation : (1974) 97 ITR 474

Hon'ble Judges : V. Ramaswami, J;G. Ramanujam, J

Bench : Division Bench

Advocate : S. Swaminathan and K. Ramagopal, for the Appellant; V. Balasubrahmanyam and J. Jayaraman, for the Respondent

Judgement

Ramaswami, J.—These are two writ petitions for the issue of writs of prohibition prohibiting the respondent. Income Tax Officer, from

continuing the proceedings in pursuance of his notice dated March 7, 1967, issued u/s 148 of the Income Tax Act, 1961 (hereinafter called "the

Act"), in respect of assessment years 1960-61 and 1961-62. The petitioner was carrying on business of purchase and sale of cinder. He was also

a labour sub-contractor to the Madras Electricity System and others. For the assessment year 1960-61 he submitted a return showing a loss of

Rs. 35,763. An assessment order was made on September 30, 1961, after readjusting some debits and ultimately determining the total loss of Rs.

5,696. For the assessment year 1961-62, the total income was determined at Rs. 54,918 under assessment order dated October 30, 1963, made

u/s 143(3) of the Income Tax Act, 1961. In respect of assessment years 1960-61 and 1961-62, the assessee had shown in his accounts a sum of

Rs. 3,15,000 and Rs. 3,45,000, respectively, as representing borrowings on

hundis from Multani bankers and also claimed deductions for interest paid in respect of those borrowings. These borrowings have been shown in the account books of the assessee also. He also gave a list of all the names of the creditors from whom he is said to have borrowed on hundis with their addresses to the Income Tax Officer. He produced the discharged hundis. The account books also disclosed that the interest on these hundis were paid by cheque. It was after a consideration of these materials available with the assessee, the abovesaid assessment orders were made.

2. It appears that the Income Tax department came to know of the extensive prevalence of bogus landings and borrowings in the names of certain persons and these are described as hundi "" hawala "" transactions. On investigation it came to light that these persons who are stated to have advanced monies on hundis to various businessmen were not real money-Senders or bankers, that they are very often persons with no ability to advance and with no credit facilities with banks for discounting the bills, that the transactions in their names were all bogus and that they merely lend their names to the concerned businessmen for bringing the concealed income from undisclosed sources back into the businessmen's account under a masquerade making them appear as borrowings. The department, it is stated, had made a thorough investigation into the activities of all these so-called money-lenders and have also taken statements from these persons. It transpired from those statements that most of them, if not all, were men of no means with no credit facilities with banks for discounting and they were dealing in this type of bogus transactions lending their names. On the basis of these statements, individual assessments of various assessees, who had dealings with these persons, were taken up for reassessment by the Income Tax Officers concerned. One of such cases which was considered by the respondent, Income Tax Officer, is that of the petitioner and that had resulted in the notice issued to him u/s 148.

3. The contention of the learned counsel for the petitioner was that the subsequent material stated to have come into the possession of the Income Tax Officer is not a new material relating to the assessee and relevant to the assessment years 1960-61 and 1961-62. The materials which are now said to have come to the possession of the department do not in any way

suggest that the assessee had not fully and truly disclosed all material facts necessary for his assessment for these assessment years. The Income Tax Officer seems to have proceeded to reopen the assessment on the basis that the hundi loans borrowed from persons listed by the department could not be true loans in view of the investigations made by them and the statements obtained from those persons were without particular reference to the borrowings of the assessee and that, therefore, the Income Tax Officer could not have had or entertained any reasonable belief that the disclosure by the assessee of material facts at the time of assessment was not full and true and that the income had escaped assessment. The Income Tax Officer should have examined those persons whose names were given by the assessee at the time of assessment with reference to the transactions they had with the assessee and those statements should have disclosed that the assessee had not made a full and true disclosure of all material facts. Only then the Income Tax Officer could be said to have bona fide entertained a belief that the assessee had not fully and truly disclosed all the materials and because of that the income or any part thereof has escaped assessment. This, in short, is the contention of the learned counsel for the petitioner.

4. It is true that the department had not questioned the persons who were said to have advanced loans to the petitioner with reference to the particular loan transactions shown by him in his account books. But those statements were recorded from them generally about their business and their lending capacity. It is also true that some of them have claimed to have had genuine transactions also apart from the hawala transactions. It is, therefore, all the more important for the Income Tax Officer to have satisfied himself with reference to the particular transactions of the assessee before issuing the notice u/s 148, There can be no dispute that any fact or circumstance which forms the reason for the Income Tax Officer to believe that there was an omission or failure to disclose fully and truly all material facts necessary for the assessment must relate to the assessee and in particular to the assessment year in question and not a general doubt based on general information not related to the particular case. If the initiation of the proceedings u/s 147(a) is to be permitted on this vague and general doubt, it would be permitting the department to make a fishing

or roving enquiry without a reasonable belief that the assessee had omitted or failed to disclose fully and truly all material facts necessary for the assessment. We, therefore, looked into the statements of those persons from whom the petitioner is stated to have borrowed money during the relevant assessment years 1960-61 and 1961-62 to find out whether there is any particular reference to the transactions they had with the assessee. Though, we did not find any special reference to the dealings with the assessee or the particular transactions noted in the account books of the assessee, at least in one instance a person, whose name finds a place in the list of persons given by the assessee who are said to have advanced loans to the assessee, had given a statement that he never had any genuine transactions with anybody, and that all the transactions in his name were hawala transactions. This statement shows that particular individual could not have lent any money to the petitioner during the assessment years in question and that the entries in his name in the account books of the petitioner are all hawala transactions. This, in our opinion, is "some material" which could form some reasonable ground for thinking that there had been a non-disclosure of some material fact. In this connection we may usefully quote the following passage in the judgment of the Supreme Court in the leading case, *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, :

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 under-assessment that would be sufficient to give jurisdiction to the Income Tax Officer to issue notices u/s 34 of the Indian Income Tax Act, 1922 (now u/s 148). Whether these grounds are adequate or not for arriving at the conclusion that there was a non-disclosure of the 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.

5. The learned counsel for the petitioner then contended that the reports submitted by the Income Tax Officer to the Commissioner of Income Tax and the sanction of the Commissioner are not in strict compliance with Sections

147, 148 and 151 of the Act. Though the learned counsel had no material with him in support of this contention, he advanced this argument on the basis that the counter-affidavit does not disclose that the report and the sanction complied with the provisions of the Act except stating that the Income Tax Officer had formed a reasonable belief on the basis of materials on record that the Multani bankers from whom the petitioner is supposed to have obtained hundi loans during the relevant accounting years, had only indulged in hawala transactions and that the said transactions really represent the assessee's income from undisclosed sources. In this connection, he also invited our attention to the decision of the Supreme Court in *Chhugamal v. S. P. Chaliha*, [1971] 79 ITR 605. That was also a case similar to the case on hand and the assessment was sought to be reopened on the basis of statements recorded from various parties who all had hawala business. After filling up the relevant columns in the form of the report, the report concluded that from the reports of the Commissioner of Income Tax of Bihar and Orissa "it appears that these persons are name-lenders and the transactions are bogus. Hence, proper investigation regarding these loans is necessary". With reference to this report, the Supreme Court observed:

In his report the Income Tax Officer does not set out any reasons for coming to the conclusion that this is a fit case to issue notice u/s 148. The material that he had before him for issuing notice u/s 148 is not mentioned in the report. In his report he vaguely refers to certain communications received by him from the Commissioner of Income Tax, Bihar and Orissa. He does not mention the facts contained in those communications. All that he says is that from those communications "it appears that these persons (alleged creditors) are name-lenders and the transactions are bogus". He has not even come to a *prima facie* conclusion that the transactions to which he referred are not genuine transactions. He appears to have had only a vague feeling that they may be bogus transactions. Such a conclusion does not fulfil the requirements of Section 151(2). What that provision requires is that he must give reasons for issuing a notice u/s 148. In other words, he must have some *prima facie* grounds before him for taking action u/s 148. Further his report mentions: "Hence proper investigation regarding these loans is necessary." In other words his conclusion is that

there is a case for investigating as to the truth of the alleged transactions. That is not the same thing as saying that there are reasons to issue notice

u/s 148. Before issuing a notice u/s 148, the Income Tax Officer must have either reason to believe that by reason of the omission or failure on the

part of the 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 alternatively notwithstanding that

there has been no omission or failure as mentioned above 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. Unless the requirements of Clause

(a) or Clause (b) of Section 147 are satisfied, the Income Tax Officer has no jurisdiction to issue a notice u/s 148.

6. The Supreme Court further noted that to question No. 8 in the report which reads "" whether the Commissioner is satisfied that it is a fit case for

the issue of notice u/s 148"", it is merely noted ""yes"" and signed by the Commissioner of Income Tax. On this the Supreme Court observed:

We are also of the opinion that the Commissioner has mechanically accorded permission. He did not himself record that he was satisfied that this

was a fit case for the issue of a notice u/s 148..... We are of the opinion that if only he had read the report carefully, he could never have come to

the conclusion on the material before him that this is a fit case to issue notice u/s 148.

7. We have seen the report made by the Income Tax Officer to the Commissioner of Income Tax, Madras. The reasons given in column 7 of the

report states that;

The assessee, during the accounting year relevant to the assessment year 1960-61, had taken loans on hundi from Seth Arthmal Motilal,

Khubchand Vashumal and others, Madras, to the extent of Rs. 1,50,000 and paid interest of Rs. 42,938. There is information to show that this

banker/these bankers have been indulging in hawala business. The full details of these loans and their true nature were not disclosed at the time of

original assessment. The loan in the name of the above bankers should, therefore, represent the assessee's income from undisclosed sources.

There appears to be, therefore, an escapement of income to the extent of Rs. 1,92,938 for the assessment year 1960-61 and the assessment needs to be reopened. Tax effect.... Rs. 1,19,780.

8. For 1961-62 also a report in identical terms has been made except that the figures of income escaped and the tax effect are different. On this report, we find from the note file, a note was put up to the Commissioner which reads as follows :

The assessee's claim to have borrowed hundi loans during the relevant period is proved to be not true. Hence, income had escaped assessment as under.

9. Then he sets out the income escaped and the tax effect on the same in respect of 1960-61 and 1961-62 and further states that the proposals are in order and that sanction may be accorded. On that the Commissioner has given his sanction and made an endorsement in column 8 of the report ""Yes, I am satisfied"" and then signed the same.

10. It is seen from the report of the Income Tax Officer that he had disclosed the material he had before him for issuing the notice, the income escaped and the tax effect on the same. He has also stated that these materials showed that the assessee had not made a true disclosure at the time of original assessment. Though he used the expression ""appears"" when he mentioned the amount of escapement, it is clear from a reading of the entire report that the Income Tax Officer, prima facie, believed that there was an escapement of the income due to the non-disclosure of material facts at the time of original assessment. It is also seen that the Commissioner has not mechanically accorded permission. The note prepared and shown in the note file shows that the facts were analysed and a note was put up to the Commissioner and on being satisfied the Commissioner accorded sanction. The provisions of Sections 148 and 151(2) are therefore, satisfied.

11. It was then contended by the learned counsel for the petitioner that the assessee had disclosed all material facts by producing all his account books wherein these loan transactions have been entered into disclosing the names and addresses of all those persons from whom he had borrowed on hundis, the discharged hundis and the payment of interest by cheque. There was no further obligation on him to instruct the Income

Tax Officer about the inference to be drawn on these facts. If the Income Tax Officer felt any doubt he could have examined the creditors and

satisfied himself. He having not done so, cannot be permitted to reconsider the same on a change of opinion, so to say. He also submitted that the

material stated to have come to the possession of the Income Tax Officer is a subsequent "information come to the possession" of the Income Tax

Officer within the meaning of Section 147(b) and that, therefore, the case would fall under Section 147(b) and not 147(a) of the Act. If it is a case

falling u/s 147(b), the assessment years being 1960-61 and 1961-62, the notices issued on March 7, 1969, are beyond the period of four years

prescribed u/s 149 and, therefore, the Income Tax Officer lacks jurisdiction to initiate the proceedings. He relied on the decision of the Supreme

Court in *The Commissioner of Income Tax, Calcutta Vs. Burlop Dealers Ltd.*, in support of this contention. In that case, for the assessment year

1949-50, the assessee submitted a return which showed a sum of Rs. 1,75,875 as profits received in a joint venture from H. Manory Ltd. Out of

this sum he claimed a sum of Rs. 87,937 as having been paid to one Ratiram Tansukhrui under a financing agreement entered into with him on

October 7, 1948. The Income Tax Officer after satisfying himself about the existence of the agreement allowed that sum. But, for the assessment

year 1950-51, a similar claim for deduction of an amount paid under that financing agreement was disallowed on the ground that the agreement

between the assessee and Ratiram Tansukhrui had merely been "got up as a device to reduce the profits received from H. Manory Ltd.

Thereafter the Income Tax Officer issued a notice u/s 34 of the Indian Income Tax Act, 1922, to reopen the assessment for 1949-50 and to

assess the sum of Rs. 87,937 alleged in the assessment as paid to Ratiram Tansukhrui. Thereafter, the Income Tax Officer also reassessed the

income u/s 34(1)(a) and added that amount in the assessment for 1949-50. The Appellate Assistant Commissioner confirmed this order observing

that the assessee had misled the Income Tax Officer into believing that there was a genuine agreement with Ratiram Tansukhrui. The Appellate

Tribunal held that the assessee had produced all the relevant accounts and documents necessary for completing the assessment and the assessee

was under no obligation to inform the Income Tax Officer about the true nature of the transactions and allowed the appeal. The Tribunal refused to

state a case and a petition filed u/s 66(2) was also dismissed by the High Court. Thereupon, the Commissioner of Income Tax filed an appeal to

the Supreme Court. The Supreme Court held :

The Income Tax Officer had, in consequence of information in his possession that the agreement with Katiram Tansukhrai was a sham transaction,

reason to believe that income chargeable to tax had escaped assessment. Such a case would appropriately fall under Section 34(1)(b).

12. The Supreme Court further observed :

We are of the view that u/s 34(1)(a) if the assessee had disclosed primary facts relevant to the assessment, he is under no obligation to instruct

the Income Tax Officer about the inference which the Income Tax Officer may raise from these facts. The terms of the Explanation to Section

34(1) also do not impose a more onerous obligation but where on the evidence and the materials produced the Income Tax Officer could have

reached a conclusion other than the one which he has reached, a proceeding u/s 34(1)(a) will not lie merely on the ground that the Income Tax

Officer has raised an inference which he may later regard as erroneous.

13. In the decision above-cited, the assessee had placed all the materials relating to the agreement. No fresh materials came to the possession of

the Income Tax Officer which showed that the agreement was got up as a device to reduce the profits except that on the same materials the

Income Tax Officer has raised a different inference in the subsequent year than the one in the previous year. It is, in these circumstances, the

Supreme Court has held that though the subsequent view of the Income Tax Officer in the assessment for the subsequent year may be an

information which came to the possession of the Income Tax Officer within the meaning of Section 34(1)(b), it could not show that the assessee

had not disclosed the primary facts. But, in the present case, by entering the borrowings in the account books and claiming deduction for payment

of interest on them the assessee has represented that the borrowings were genuine transactions. At that time the Income Tax Officer had no reason

to disbelieve this representation and had accepted the same and allowed the deductions. Later on, the statements of the creditors disclosed that the

prior representation of the assessee could not be true. If the statements of the creditors is to be accepted it would follow that the assessee had not

made a true statement during the assessment proceedings. There could be no dispute, about the materiality of these facts which came into the possession of the Income Tax Officer subsequent to the assessment. In these circumstances, it is manifest that the case falls u/s 147(a) and not u/s 147(b) of the -Act. We are, therefore, unable to accept the contention of the learned counsel for the petitioner that the Income Tax Officer lacked jurisdiction for initiation of the proceedings u/s 147(a) of the Act.

14. While appreciating the legal position that if there is some material which enabled the Income Tax Officer to form a reasonable belief that there had been a non-disclosure as regards primary facts, it is not for the court to go into the question of adequacy of those grounds, the learned counsel pointed out some of the difficulties which the assessee might have to encounter in proving the genuineness of the transactions at this stage. He submitted that some of the persons who had lent the loans might have changed their own place of residence or business and the assessee might not know their present addresses. Some others might have closed the business and left for distant places in North India and yet others in order to save their own liability to Income Tax might have stated that they did not lend and many other factors might have also influenced their minds and so on. These are all matters which really go into the question of appreciation of whatever evidence that might be produced ultimately in the reassessment proceedings. They have no relevance to the question of jurisdiction of the Income Tax Officer ""to initiate proceedings u/s 147(a), But we have no doubt that while appreciating the evidence available, the assessing and appellate authorities will take these circumstances into consideration and pass the reassessment orders on merits.

15. It is next contended by the learned counsel for the petitioner that the Income Tax Officer could not invoke his powers u/s 147(a) to reopen the assessment for the years 1960-61 and 1961-62, which were made under the Indian Income Tax Act, 1922, and if Section 297(2)(d)(ii) were to be interpreted as enabling the Income Tax Officer to reopen the assessment u/s 147(a) that provision violates Article 14 of the Constitution. A similar contention was raised but was repelled by the Supreme Court in Jain Bros. and Others Vs. The Union of India (UOI) and Others, . In that case, the assessee in respect of the assessment year 1960-61, did not file the

return within the time prescribed in the notice u/s 22(2) of the Indian Income Tax Act, 1922, but filed the return actually on November 18, 1961, The assessment was completed on November 23, 1964. On the same date the Income Tax Officer issued a notice u/s 271 read with Section 274 of the Income Tax Act, 1961, calling upon the firm to show cause why an order imposing a penalty should not be passed, on account of the firm's failure to furnish the return within time. After considering the explanation of the firm, the Income Tax Officer made an order on November 19, 1966, u/s 271(1)(a) imposing a penalty for non-compliance with the notice u/s 22(2) of the 1922 Act. The assessee-firm filed thereafter a writ petition in the High Court challenging the constitutional validity of Sections 297(2)(g) and 271(2) of the 1961 Act. The High Court dismissed the writ petition and, thereafter, the assessee filed an appeal to the Supreme Court. The Supreme Court held that, in view of the provisions in sections 271(1) and 297(2)(g), for assessments completed after April 1, 1962, the proceedings for penalty have to be initiated and imposed in accordance with the provisions of the Income Tax Act, 1961, only. The Supreme Court also held that Section 297(2)(g) does not infringe article 14 of the Constitution. Section 297(2)(d) applies for reopening of proceedings u/s 147 while Section 297(2)(g) applies for initiation of proceedings for imposition of penalty. This ratio in the judgment of the Supreme Court is, therefore, a complete answer to the contention of the petitioner. In fact, the learned counsel could not seriously advance his case in view of this decision.

16. For the foregoing reasons, the writ petitions are liable to be dismissed and they are accordingly dismissed and the rules nisi are discharged.

There will be no order as to costs.