**(1984) 11 KAR CK 0026**

**In the Karnataka High Court**

**Case No :** I.T.R.C. 166 of 1979

Mysore Tobacco Co. Ltd. APPELLANT

Vs

C.I.T. (Karnataka). RESPONDENT

**Date of Decision :** 06-11-1984

**Acts Referred:**
Income Tax Act, 1961 — Section 147

**Citation :** (1985) 29 KarLJ 10

**Hon'ble Judges :** S. A. Hakeem, J;K. Jagannatha Shetty, J

## Judgement

Jagannatha shetty, J.-The Income Tax Appellate Tribunal, Bangalore Bench has referred the following questions under S. 256(1) of the I.T. Act, 1961 (the Act):

(i) "Whether, on the facts and in the circumstances of the case, the Tribunal was correct in upholding the reassessment by treating the notice issued by the Income Tax Officer under S. 145 as one issued under S. 14/(b)?"

(ii) "Whether, on the facts and in the circumstances of the case, the Tribunal was correct in upholding the reassessment by application of S. 150 read with S. 153(3) Explanation 2 of the Income Tax Act, 1961 ?"

2. The facts, in brief, leading to the above questions are:

The assessee is a public limited company. For the assessment year 1966-67, the assessment was completed taxing a sum of Rs. 2,00,000 received by the company on April 16, 1966 from Imperial Tobacco Company Ltd. In the second appeal against the said assessment order, the Tribunal had held that the sum of Rs. 2,00,000 could not be taken as the income of the accounting year ending March 31, 1966, since there was no approval of the sum till April 16, 1966. Pursuant to the said order of the Tribunal, the I.T.O resorted to reopening of the assessment for the assessment year 1967-68 under S. 147(a). The assessee resisted the action of the I.T.O contending, inter alia, that there was no failure or omission on its part to disclose the material facts at the time of completion of original assessment and therefore, the I.T.O has no jurisdiction to reopen the assessment. The I.T.O, however, rejected the challenge to reopening of the assessment. He held that the assessee neither in the return of income nor in the statement of income accompanied had made any mention of the credit of Rs. 2,00,000 received from Imperial Tobacco Company Ltd., and that amounted to non-disclosure of material facts necessary for the assessment year 1967-68. The I.T.O also referred to the judgment of the Tribunal relating to assessment year 1966.67 wherein it was clearly held that the sum of Rs. 2,00,000 was a revenue receipt. Hence, the I.T.O concluded that the sum of Rs. 2,00,000 has to be treated as the business income of the assessee for the assessment year 1967-68.

Against the reassessment order, the assessee appealed to the Appellate Assistant Commissioner reiterating its contentions. The A.A.C accepted those contentions. He held that when the I.T.O made the assessment for 1966-67, the fact of waiver of debt of Rs. 2,00,000 on April 16, 1966 was before him and nothing prevented him from Including the said sum of Rs. 2,00,000 in the original assessment itself. Having not done so, it was not open to the I.T.O to resort to the provisions of S. 148 on the ground that the assessee did not disclose fully and truly all the material facts at the time of the original assessment.

The Department appealed to the Tribunal. The Tribunal also agreed with the view taken by the A.A.C so far as the applicability of S. 147(a) is concerned. The Tribunal held that the escapement in the case had happened because of no fault of the assessee and that escapement had occurred because the Department drew a wrong inference from the primary facts disclosed. The Tribunal, however, said though S. 147(a) did not apply, S. 147(b) applied on the facts of the case, since the information regarding the order of the Tribunal relating to the assessment year 1966-67 came into the possession of the I.T.O after the original assessment was made and, therefore, the reopening of the assessment could be sustained under S. 147(b).

The Tribunal in support of its conclusion relied upon the decisions of the Calcutta High Court in Mriganka Mohan Sur v. C.I.T. (95 ITR 503) and I.T.O. v. Eastern Coal Co. Ltd., (101 ITR 477) in preference to the decision of the Allahabad High Court in Raghubar Dayal Ram Kishan v, C.I.T.(63 ITR 572). The Tribunal also observed that S. 150 and Explanation 2 to S. 153(3) could be called into aid by the I.T.O for making the assessment. Thereunder, the I.T.O would be entitled to give effect to any finding or direction contained in the order of the Tribunal relating to the assessment year 1966-67. The Tribunal, accordingly, allowed the appeal sustaining the reassessment under S. 147(b) read with Section 150 and Explanation 2 to S. 155(3) of the Act.

3. We will take up the first question first for consideration:

Mr. Bhat, learned Counsel for the assessee, strongly urged that it is not open to the Tribunal to sustain the assessment under S. 147 (b) of the Act when it has expressly stated that the reassessment made by the I.T.O under S. 147(a) was not valid. He urged that the requirements of S. 147(a) and 147(b) are quite distinct and different and it is not open to the Tribunal in the second appeal to sustain the invalid reassessment order under a different provision of law. In support of the contention, the learned Counsel relied upon two decisions of the Supreme Court: (i) Johri Lal (H.U.F.) v. C.I.T. (88 ITR 439) and (ii) Ram Narain v. The State of U.P. (AIR 1957 SC 18). The learned Counsel also strongly relied upon the decision of the Allahabad High Court in Raghubar Dayal Ramkishan v. C.I.T. (63 ITR 572) which the Tribunal refused to rely upon.

4. Mr. Srinivasan, learned Counsel for the Revenue, contended to the contrary. He urged that the Tribunal was justified in sustaining the reassessment order under S. 147(b) of the Act. The learned Counsel in support of his contention has relied upon trilogy of decisions Of the Supreme Court in: (i) Hazari Mal Kuthiala v I.T.O., Special Circle, Ambala (41 ITR 12); (ii) Hukumchand v. The State of Madhya Pradesh (52 ITR 583); and (iii) Isha Beevi v. Tax Recovery Officer & Otrs. (101 ITR 449).

5. We will now turn to the cases cited at the Bar. In Johri Lal (H.U.F) v. C.I.T.(88 ITR 439), the Supreme Court was concerned with the assessment reopened under S. 34(1)(b) which was sought to be justified by the Tribunal under S. 34(1)(a). It was held by the Supreme Court in that case that it was not possible for the Tribunal to transform an action taken under S. 34(1)(b) as one under S. 34(1)(a) of the I.T. Act, 1922. That is because the I.T.O was further required by S. 34(1)(a) to record his reasons for taking action and obtain the sanction of the Central Board of Revenue or the Commissioner, as the case may be. The Supreme Court observed:

"....The Tribunal could not have initiated proceedings under S. 34(1)(a). If the Tribunal converts the proceedings into one under S. 34(1)(a) then the conditions prescribed in S. 34(1)(a) cannot be satisfied."

But the position is quite different in the present case. If a notice had been issued under S. 147(b) of the Act, it could not have been later treated as one issued under S. 147(a) since certain special conditions are required to be complied with in cases falling under S. 147(a) which are ordinarily not required to be complied with in respect of cases falling under S. 147(b). But a notice under S. 147(a) can without difficulty be treated as one under S. 147(b) if the required conditions are fulfilled. In the instant case, such conditions are also satisfied. The I.T.O. received the information from the judgment of the Tribunal that a sum of Rs. 2, 00,000 had escaped assessment in the year 1967-68. Upon that information, the I.T.O. thought that the assessee had failed to disclose fully and truly all material facts although that position was, in fact, not correct. The assessee had not failed to disclose fully and truly all material facts and the income did not escape as a result of the failure on the part of the assessee. Yet there was escapement and the information of that escapement came subsequent to the original assessment. It was apparently from the order of the Tribunal relating to the assessment year 1966-67. It was in consequence of that information, he had the reason to believe that the income chargeable to tax had escaped assessment. There could, therefore, be no impediment to treat the notice issued under S. 147(a) as one under S. 147(b) of the Act.

Mr. Bhat, however, urged that the formation of the opinion that there was an escapement either under S. 147(a) or under S. 147(b), should be that of the I.T.O. and not that of the appellate authority or that of the court and, therefore, it would be impermissible for any other authority to sustain the reopening of the assessment under S. 147(b) on which the I.T.O. had not relied. It is true that S. 147(a) or (b) refers to the I.T.O. It confers power on the I.T.O. to reopen assessment. But it has been well settled that a wrong reference to the power under which action was taken by an authority would not per se vitiate that action if It could be justified under some other provision under which the authority could lawfully do that Act. There is a strong line of decisions of the Supreme Court on this aspect of the matter. See: (i) Hazari Mal Kuthiala v. I.T.O. Special Circle, Ambala (41 ITR 12); (ii) Hukumchand v. The State of Madhya Pradesh (52-ITR 583); and (iii) Isha Beevi v. Tax Recovery Officer & Otrs. (101 ITR 449). It will be clear from these decisions that if on the material on record, the power to proceed is actually there under another provision, the action taken by the authority could be supported under that provision even though that provision has not been expressly invoked by the authority.

Secondly S. 147(a) and S. 147(b) are not mutually exclusive. They are not charging sections, but only machinery provisions. See: (1) Mriganka Mohan Sur. v. C.I.T (95 ITR 503 at 506 & 507); (ii) I.T.O v. Eastern Coal Co., Ltd, (101 ITR 477); (iii) Chupatrai Hirachand v. C.I.T. Calcutta (109 ITR 97); (iv) Avtar Singh Sandhu v. Wealth Tax Officer and Anr. (129 ITR 531 (Delhi); (v) Ganga Saran & Sons v. I.T.O., New Delhi (130 ITR 212 (Delhi); (vi) C.I.T. v. Associated Stone Industries (Kotah) Ltd., (130 ITR 868 (Rajasthan); (vii) Commissioner of Wealth Tax, Gujarat v. Chhatrshal Sinhji D.Zala (135 ITR 826 (Gujarat); and (viii) C.I.T. v. Ess Ess Kay Engineering Co. (P.) Ltd., (137 ITR 446).

In these decisions, it has been laid down that S. 147 is just a machinery provision whereby an income which had escaped assessment or has been under assessed in the relevent assessment year could be brought into the net of taxation. It is also apparent from these decisions that clauses (a) and (b) of S. 147 are not mutually exclusive, and the reassessment made under one provision could be sustained under the other, provided the conditions precedent have been satisfied. The lone exception to these principles is the decision of the Allahabad High Court in Raghubara Dayal Ramkishan v. C.I.T.(63 ITR 572). No other contrary opinion has been brought to our notice. Most of the High Courts in the decisions to which we have above referred, have dissented from the decision of the Allahabad High Court We do not find any turn of the tide. It seems to us, therefore, that it is better and safer to fall in line with the tide while respectfully differing with the view taken by the Allahabad High Court in Raghubar Dayal Ramkishan''s case.

Mr. Bhat next urged that the legality of the tax imposed on the assessee must be considered with reference to the provision under which the reassessment was actually made and not under a different provision under which, it could have been made. In support of his contention, the learned Counsel has relied upon the observation of the Supreme Court in Ram Narain v. The State of U.P. (AIR 1957 SC 18 at p. 20).

"We think that learned Counsel has rightly submitted that, so for as the present appellant is concerned, the list prepared under S. 15 must have shown him as assessed to a certain amount of tax under cl. (f) of sub s. (1) of S. 14 and the assessment must have been confirmed on that basis by the District Magistrate. Therefore, the legality of the tax imposed on the appellant must be considered with reference to the clause under which the assessment was actually made, and a different clause under which the assessment might have fallen cannot be called in aid of the assessment."

It seems to us that these observations cannot be applied to the present case since S. 14 of the U.P. Town Areas Act referred to in the above decision was a charging section and we have already held that S. 147 of the Act is only a machinery provision.

The question next to be considered is the applicability of S. 150 and Explanation 2 to Section 153(3) reads:

"Where, by an order referred to in clause (ii) of sub-sec. (3) any income is excluded from the total income of the assessee for an assessment year, then, an assessment of such income for another assessment year shall, for the purpose of S. 150 and this section, be deemed to be one made in consequence of or to give effect to any finding or direction contained in the said order.

It was urged that to give effect to any finding or a direction contained in the order of the Tribunal, there must be a valid direction issued by the Tribunal capable of being enforced in accordance with the provisions of the Act. The Tribunal''s direction must be within the limitation prescribed for reopening the assessment by the I.T.O and the Tribunal has no jurisdiction to issue direction beyond the period of limitation prescribed for re-opening the assessment.

We do not think that these submissions are relevant in the context in which Explanation 2 to S. 153(3) has been incorporated. Explanation 2 is a deeming provision which was necessitated in view of the limited powers of the Tribunal or any authority under the Act. The authorities under the Act have no jurisdiction to issue direction relating to the subsequent year of assessment other than the assessment under appeal or revision. While dealing with the scope of the appellate powers under the Act, the Supreme Court in IncomeTax Officer, A-ward, Sitapur v. Murlidhar Bhagwan Das (52 ITR 335 at p. 345) observed;

"....A "finding" therefore, can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. The Appellate Assistant Commissioner may hold, on the evidence, that the income shown by the assessee is not the income for the relevant year and there by exclude that income from the assessment of the year under appeal. The finding in that context is that that income does not belong to the relevant year. He may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the year of assessment in question. The expression ''direction'' cannot be construed in vacuum, but must be collated to the directions which the Appellate Asst. Commissioner can give under S. 31. Under that section he can give directions. inter alia, under S. 31(3)(b)(c) or (e) or S. 31(4). The expression ''direction'' in the proviso could only refer to the directions which the Appellate Assistant Commissioner or other tribunals can issue under the powers conferred on him or them under the respective sections. Therefore, the expression ''finding'' as well as the expression ''direction'' can be given full meaning namely, that the finding is a finding necessary for giving relief in respect of the assessment of the year in question and the direction is a direction which the appellate or revisional authority, as the case may be, is empowered to give under the sections mentioned therein. The words ''in consequence of or to give effect to'' do not create any difficulty, for they have to be collated with, and cannot enlarge the scope of the finding or direction under the proviso. If the scope is limited as aforesaid the said words also must be related to the scope of the findings and directions."

It was, perhaps, to obviate this difficulty in giving effect to the finding or direction of any authority relating to an excluded income from any assessment, Explanation 2 to S. 153(3) was enacted. This provision would certainly come to the aid of the Department in the instant case since the Tribunal has found that Rs. 20,00,000 added in the assessment year 1966-67 was a revenue receipt. The deletion of that income by the Tribunal for that assessment year shall be deemed to be a direction, and to give effect to the direction, reassessment could be made under S. 147(b) read with Ss. 150 and 153(3). The Tribunal, in our opinion, has correctly construed these provisions.

In the result, we answer both the questions in the affirmative and against the assessee.

 