
(1991) 08 AP CK 0007

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 5870, 5886, 5887, 5944, 5981 and 5994 of 1987

Phoolchand Lalith Kumar and Co.

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 13-08-1991

Acts Referred:

Income Tax Act, 1961 — Section 139, 143(1), 147, 148, 148(1)

Citation : (1992) 196 ITR 302

Hon'ble Judges : S.S. Mohammed Quadri, J;A. Lakshman Rao, J

Bench : Division Bench

Advocate : Deokinandan, for Addl. Commissioner, for the Appellant; K.M.L. Majele, for the Respondent

Judgement

Syed Shah Mohammed Quadri, J.—The short question that arises in these writ petitions is whether the notices issued to the petitioner u/s 148 of the Income Tax Act, 1961, are valid.

2. The petitioner is a partnership firm. It is carrying on business as commission agent in the market at Guntur. It also purchases and sells other agricultural produce. It is an assessee under the Income Tax Act. The assessments of the petitioner for the assessment years 1980-81, 1981-82, 1982-83, 1983-84, 1984-85 and 1985-86 were completed. The respondent issued notices u/s 148 of the Income Tax Act to reopen the assessment u/s 147(a) for the above said years on the ground that the income chargeable to tax had escaped assessment. In response to the notices, the petitioner requested the respondent to furnish reasons for reopening the assessment. The respondent communicated the reasons by his letter dated March 27, 1987. Then the petitioner filed returns under protest and challenged the validity of the said notices by praying for a writ of certiorari to call for the records relating to the said notices and quash the same. The impugned notices u/s 148 of the Income Tax Act for reopening the assessments for the assessment years 1980-81, 1981-82, 1982-83, 1983-84, 1984-85 and 1985-86 are questioned in Writ Petition Nos. 5981 of 1987, 5944 of

1987, 5994 of 1987, 5870 of 1987, 5887 of 1987 and 5886 of 1987, respectively.

3. The respondent filed a counter-affidavit and an additional counter affidavit. It is stated that the petitioner's main source of income is commission from selling of chillies. It also carries on the business of purchasing and selling other agricultural produce. In the course of assessment proceedings for the year 1986-87, it is stated, it came to light that certain income chargeable to tax has escaped assessment, and therefore, notices u/s 148 of the Income Tax Act were issued. The petitioner collected amounts under the head "sub sadaran" while effecting sales to the customers, during the previous year relevant to the assessment year in question. Therefore, the income escaped assessment within the meaning of section 147(a) of the Income Tax Act and the respondent had reason to disclose fully and truly all the material fact necessary for assessment in respect of the assessment year in question, income chargeable to tax has assessment and, therefore, notices u/s 148 of the Act were issued. It is further stated that though the respondent was not bound to communicate the reasons, at the request of the petitioner the reasons were also furnished. It is further stated that collecting were made compulsory, and therefore, the amount cannot be said to have been collected for chart and that the petitioner did not furnish the particulars as to how the amounts thus collected were spent. The amounts collected as "sub sadaran" it is stated, are trading receipts of the petitioner and merely because the same are not shown in the account books as trading receipts, the assessing authority is not precluded from treating them as trading receipts. It is added that the Income Tax Act (for short "the Act") provides a complete machinery to challenge the order of assessment and, therefore, the writ petition is not maintainable. The amounts collected as "sub sadaran" were assessed to tax in the years 1986-87 by the respondent and the petitioner carried the matter in appeal before the Commissioner of Income Tax, Vijayawada, who, by his order dated April 12, 1988, upheld the assessment. It is added that the amount received as "sub sadaran" may not fall under the customary collection. The petitioner, it is stated, filed returns in response to the notices issued u/s 148. The other assesseees are including the said collection in the trading receipts and they are, accordingly, taxed. The respondent was not informed as to how those amounts were being spent. It is denied that the practice of collecting "sub sadaran" existed in the business community for the last 30 years. The collection of the amounts and the detail of the charities on which they were spent were not disclose in the returns. The petitioner did not furnish the primary and material particulars relating to the said item, so the respondent could not enquire into the truth. Tenability or otherwise of the claim of the petitioner. It is further stated that the assessment for the assessment years 1981-82 and 1982-83 were completed undue section 143(1) of the Income Tax Act, and in, respect of the assessment years 1980-81, 1983-84, 1984-85 and 1985-86, the petitioner did not disclose the primary and material facts relating to the claim either in the return of income or in the course of the assessment proceedings and therefore the assessing authority could not go to

justifiability of the claim and as such the notices issued u/s 148 are legal. It is added that the notices u/s 148 have been issued on account of gathering of information subsequent to the assessment. For this reason also, the notices are valid. For the assessment year 1984-85 and 1985-86, apart from non-disclosure of particulars relating to "sub sadaran" the petitioner claimed deduction of market cess and sales-tax without payment the amount under those heads and, therefore, there has been violation of section 43B of the Act and, hence, for the said years notices issued u/s 148 are legal and valid furnishing credit balance in "sub sadaran account on the liabilities side of the balance-sheet does not amount to discharge of obligation cast on the assessee of furnishing primary and material particulars. It is stated that the impugned notices can be sustained alternatively u/s 147(a) of the Act.

4. Sri Y. Ratnakar, learned counsel for the petitioner contends that the amount collected under the head "sub sadaran" are meant for charity and it is customary in the business community to collect the amount for the purpose under different nomenclatures and that the same do not fall under the head trading receipt. He further contends that the ground for reopening of assessment u/s 147(a) of the Act does not exist, and, therefore, the notices are without jurisdiction and are liable to be quashed.

5. Sri S. R. Ashok learned standing counsel for Income Tax, on the other hand, contends that, having regard to the compulsory nature of the collection under the head "sub sadaran" and in the absence of particular of expenditure of the said amount, the same cannot but be treated as trading receipt in the hands of the petitioner and, therefore, it is liable to be taxed. The requirements of section 147(a) have been complied with and issuing of impugned notices is in accordance with as and cannot be said to be without jurisdiction. In any event, submits learned counsel the notices can be sustained under clause (b) of section 147(a) of the Act. In so far as the assessment years 1984-85 and 1985-86 are concerned there are additional reasons, viz., deductions in regard to the market cess and sales-tax, which are not allowable as the amounts were not actually paid by the petitioner to the concerned authority. For this additional reason also the notices issued for the said years the sustainable.

6. Both learned, counsel of the petitioner as well as learned standing counsel for the Income Tax Department after arguing at length the question whether the amounts received as "sub sadaran" constitute trading receipts have conceded in our view rightly, that the question does not directly fall of consideration in the instant case. We, therefore, do not propose to express any opinion on that point.

7. At the outset we may observe that in view of the fact that the reasons given by the respondent for reopening the assessment relate to the grounds u/s 147(a) of the Act, we are not inclined to entertain the contention of learned standing counsel that the impugned notices can be sustained u/s 147(a) of the Act.

8. Now the only question which remains to be considered is whether the

impugned notices are valid u/s 147(a) of the Act. It would be appropriate to read section 147(a) here :

"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 as escaped assessment for that year, or...

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 - 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 a rate; or

(c) where such income has been made the subject of excessive relief under this Act or under the India Income Tax Act, 1922 (11 of 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."

9. Section 34(1) of the Indian Income Tax Act, 1922 (for short "the old Act"), which is analogous to section 147(a) of the Act, fell for consideration of their Lordship of the Supreme Court in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, . In that case, for the assessment years in question, the assessee was not assessed to tax on the profits realised by the company by sale of shares. The Income Tax Officer initiated reassessment proceedings u/s 34 of the old Act for submitting fresh returns. The assessee submitted the returns, but filed a writ petition under article 226 of the constitution praying for a direction to the Income Tax Officer not to proceed to assess on the basis of the notices issued u/s 34.

10. The reason given by the Income Tax Officer for reopening the assessment was that, during the course of the assessment proceedings for the subsequent year, the profits earned by sale of shares were not included in the total assessable income. It was then discovered that the company was carrying on the business of selling shares, therefore, he asserted that he had reason to believe

that, by reason of omission or failure of the company to disclose fully and truly all the material facts necessary for the assessment, the income chargeable to Income Tax had been under assessed. The learned single judge of the Calcutta High Court held that the requirements of section 34(1) were not satisfied, and quashed the notice satisfied, and quashed the notices as being without jurisdiction. On appeal, the Division Bench of the Calcutta High Court allowed the appeal and dismissed the application of the assessee. The company preferred an appeal to the Supreme Court on the basis to the certificate granted by the High Court. It was held by a majority that, to confer jurisdiction u/s 34 (of the old Act) to issue notice in respect of assessment already made, two conditions had to be satisfied, the first was that the Income Tax Officer must have reason to believe that income, profits or gains chargeable to income, profits or gains chargeable to Income Tax had been under assessed, and the second was that he must have reason to believe that such under assessment had occurred by reason of either (a) omission or failure on the part of an assessee to make a return of his income u/s 22 of the old Act (section 139 of the Act), or (b) omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for that year. It was observed that both these conditions were conditions precedent to be satisfied before the Income Tax Officer could have jurisdiction to issue a notice for the reassessment. While explaining the meaning of the words "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year" used in section 34, it was observed that the section postulated a duty on every assessee to disclose fully and truly all material facts necessary for assessment by the Income Tax Officer. What facts were material and necessary for assessment differed from case to case. So far as the primary facts were concerned, it was the duty of the assessee to disclose all of them and that duty did not extend beyond the full and truthful disclosure of all primary facts and it was for the assessing authority to decide what inferences of facts could be reasonably drawn and what legal inferences had ultimately to be drawn, and it was not for anybody else - far less the assessee - to tell the assessing authority what inferences, whether of facts or law, should be drawn. If there were some reasonable grounds for the Income Tax Officer to believe that there had been any non-disclosure as regards any primary facts 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 notice u/s 34 and it was the duty of the assessee to establish that the Income Tax Officer had no material at all before him for believing that there had been such non-disclosures.

11. In *Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das*, , the assessment for the assessment year 1958-59 was made after allowing some deduction towards interest to creditors. On the ground that one of the creditors confessed that he has only lent his name and the other creditors mentioned in the list of creditors of the assessee were known as name-lenders, the assessment was reopened by issuing a notice u/s 148 of the Act. The assessee filed returns in response to the notice, but challenged the notice in the High

Court under article 226 of the Constitution. The High Court held that the pre-conditions for the exercise of the jurisdiction u/s 147(a) were not fulfilled. On appeal to the Supreme Court, the judgment of the High Court was confirmed. It was held that two conditions have to be satisfied before the Income Tax Officer acquires jurisdiction to issue notice u/s 148 : the Income Tax officer must have reason to believe that income chargeable to tax has escaped assessment; and (2) he must have reason to believe that such income has escaped assessment by reason of the omission or failure on the part of the assessee (a) to make a return u/s 139 for the assessment year to the Income Tax Officer, or (b) to disclose fully and truly material facts necessary for his assessment for that year, and that both these conditions must co-exist to confer jurisdiction on the Income Tax Officer. It was observed that the duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment and that production before the Income Tax Officer of the account books or other evidence from which material facts could, with due diligence, have been discovered by the Income Tax Officer, will not necessarily amount to disclosure contemplated by law. It was further observed that the duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts and if an Income Tax Officer draws an inference which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify initiation of action for reopening the assessment.

12. In *Income Tax Officer and Others Vs. Calcutta Chromotype Pvt. Ltd.*, , a Division Bench of the Calcutta High Court held that the balance-sheet filed along with the return forms part of the return itself in view of the provisions under the Income Tax Rules. It further held that mere change of opinion regarding the same facts does not confer jurisdiction to issue notice u/s 148 of the Act.

13. In *Sirpur Paper Mills Ltd. Vs. Income Tax Officer, "A" Ward and Another*, , a learned single judge of our High Court held that the Income Tax Department cannot be permitted to reopen the concluded assessment because of the new views an officer had come to entertain on the facts and, if that was permitted, litigation would have no end, "except when legal ingenuity is exhausted".

14. In a recent case in *Indo-Aden Salt Mfg. and Trading Co. Pvt. Ltd. Vs. Commissioner of Income Tax, Bombay*, , the Supreme Court observed that the obligation of the assessee was to disclose only primary facts and not inferential facts and that it is immaterial whether the failure to disclose or omission to disclose was deliberate or inadvertent and that, subject to other conditions being satisfied, if there was omission to disclose material facts, the jurisdiction of the Income Tax Officer to reopen is attracted. In that case, the assessee did not disclose in the original assessment proceedings either by valuation report or by statement filed before the Income Tax Officer as to what portion of the assets were of earth work and what portion of masonry work. The Income Tax Officer had allowed depreciation at 6 per cent. on the entirety of the assets which was available in respect of masonry work. On the question whether excessive

depreciation had been allowed and thus income had escaped assessment for the years in question owing to failure on the part of the appellant to disclose fully and truly all material facts, it was held that the Income Tax Officer could reasonably be said to have material to form the belief that there was under assessment owing to failure or omission on the part of the appellant to disclose fully and truly all material facts.

15. From the above discussion it follows that to involve section 147(a), two conditions have to be satisfied, -

(i) the Income Tax Officer should have reason to believe that income chargeable to tax has escaped assessment for the relevant year; and

(ii) the reason for the income escaping assessment should be by reason of the omission or failure on the part of an assessee, -

(a) to make a return u/s 139 for any assessment year; or

(b) to disclose fully and truly all material primary facts necessary for his assessment for that assessment year, that production of account books or other evidence from which material facts could with due diligence have been discovered, would not amount to full and true disclosure.

16. In the instant case, we shall examine whether the conditions precedent for reopening the assessments u/s 147(a) are satisfied. Regarding the first condition it must be shown that the assessing authority has reason to believe that income has escaped assessment. There must be some material before him providing basis for the belief that income has escaped assessment. Here the reason given is that in the year 1986-87, the amounts received by the assessee as "sub sadaran" were treated as trading receipts and taxed, which was upheld by the Appellate Assistant Commissioner. This is not disputed by Sri Ratnakar. But he submits that, in the subsequent years and even in the year 1989-90, collection of amount under the head "sub sadaran" was not taxed. True, as submitted by learned standing counsel, the assessments have not become final but what does it show ? In our view, it shows that regarding the nature of receipt as "sub sadaran", there has been change of view from time to time and this cannot furnish reason for the belief that income has escaped assessment. (See Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, and Sirpur Paper Mills Ltd. Vs. Income Tax Officer, "A" Ward and Another, . Regarding the second condition learned standing counsel, however, contends that mere mention of "sub sadaran" in the balance-sheet does not amount to full and true disclosure and that the same should have been shown as a trading receipt. We are unable to agree. In our view, what is relevant is the nature of the duty of the assessee to make full and true disclosure of primary facts but not the nature of receipt to be disclosed. Admittedly, the nature of receipt is in dispute. For the assessment years in question along with the returns, the profit and loss account and statements of account were filed. In the balance-sheet, the petitioner mentioned "sub sadaran" and the amount outstanding in that account. Therefore, having

regard to the fact that collection by the business community under the head "sub sadaran" or "incidental" was in vogue which is an accepted fact and is also stated in the reasons recorded for reopening the assessments, it cannot be said that there was no full and true disclosure of primary facts. For these reasons, we are of the view that the conditions precedent for reopening the assessments u/s 147(a) are not satisfied. Consequently, the notices issued u/s 148 of the Act in regard to "sub sadaran" for the assessment years 1980-81, 1981-82, 1982-83 and 1983-84 are held to be without jurisdiction and are, accordingly, quashed. However, notices for reopening the assessments for the assessment years 1984-85 and 1985-86, apart from the said reason, other reasons are also given, so we shall examine whether, for the additional reasons, the impugned notices for these years are sustainable.

17. In so far as the notice relating to the year 1984-85 is concerned, there are two more reasons for reopening the assessment. They are deductions relating to (i) market cess, and (ii) sales-tax. The second ground is also common to the notice issued for reopening the assessment for the assessment year 1985-86.

18. Section 43B which was inserted with effect from April 1, 1984, as it stood in the relevant years, provided that a deduction otherwise allowable under the Act in respect of any sum payable by the assessee by way of tax or duty under any law for the time being in force, should be allowed only in computing the income referred to in section 28 of the previous year in which such sum was actually paid by the assessee irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him. In so far as the deduction of market cess is concerned, as the same was not paid in the previous years relevant to the assessment years 1984-85 and 1985-86, and the same was not covered by section 43B at the relevant time, it cannot be said that the income escaped assessment due to deduction of the said market cess while computing the income. "Cess" was included in section 43B by the Finance Act, 1988, with effect from April 1, 1989. Therefore, this reason also is untenable for reopening the assessment for the assessment years 1984-85 and 1985-86. However, in so far as deduction of sales-tax is concerned, that is covered by section 43B of the Act in the assessment year 1984-85. Therefore, unless the amount of sales-tax was paid by the assessee in the previous year relevant to the assessment year 1984-85, he was not entitled to deduction. The petitioner also does not dispute that the amount of sales-tax of Rs. 58,181 was not paid in the previous year relevant to the assessment year 1984-85. This reason justifies notice issued u/s 148 of the Act for reopening the assessment for the assessment year 1984-85. Sri Ratnakar also submits that the petitioner has already written to the Department to add back that amount and complete the assessment. The impugned notice issued u/s 148 of the Act reopening the assessment for the assessment year 1984-85 cannot, therefore, be said to be bad in law.

19. For the above reasons, Writ Petitions Nos. 5981 of 1987, 5944 of 1987, 5994

of 1987, 5870 of 1987 and 5886 of 1987 are allowed and Writ Petition No. 5887 of 1987 is dismissed. Having regard to the circumstances of the case, we make no orders as to costs.