

(1968) 07 MAD CK 0021

In the Madras High Court

Case No : Writ Petition No. 2042 of 1964

P.R. Easwaran

APPELLANT

Vs

Sixth Income Tax Officer

RESPONDENT

Date of Decision : 01-07-1968

Acts Referred:

Income Tax Act, 1922 — Section 14(2), 3, 34
Income Tax Act, 1961 — Section 147, 148, 3

Citation : (1969) ILR (Mad) 231 : (1969) 72 ITR 263

Hon'ble Judges : Veeraswami, J; Ramaprasada Rao, J

Bench : Division Bench

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

Judgement

Ramaprasada Rao, J.—The petitioner is seeking a rule under Article 226 of the Constitution against the Sixth Income Tax Officer, Circle II,

Coimbatore, the respondent herein, in the nature of a writ of prohibition or such other appropriate writ restraining him from making any assessment

pursuant to the notice dated September 11, 1964, issued by him u/s 148 of the Income Tax Act, 1961. The relevant facts may be noted. In or

about August 27, 1946, the petitioner's father and three others conjointly purchased lands of an extent of 8 acres 56 cents for a sum and

consideration of Rs. 1,00,000. The purchase money was contributed in unequal proportion ; but the petitioner's father, however, paid one-fifth of

the same. Thereafter, one of the members assigned his undivided interest in the lands to two others, thus enabling five persons, including the

petitioner's father, to be the joint owners of the same. The petitioner's father died on November 11, 1956, and the petitioner became entitled to

the share in the above lands as was held by his father. All the five members, who were apparently interested in a joint venture, earlier leased out and later entered into an arrangement with one Joseph for plotting out and sale of the lands as house sites and the scheme was fully implemented in the year 1959. Indeed, the lay-out for the property was also approved by the Municipality. In the meantime, the petitioner conveyed his one-fifth share in the property to the above-said Joseph for Rs. 30,450. According to the petitioner, the excess gains made by him by the sale amounted to Rs. 10,800. For the year of assessment 1960-61, such gains were brought to tax by the Third Additional Income Tax Officer, Coimbatore. As the deeds evidencing the original purchase and the subsequent sale were not produced, the purchase price was estimated at Rs. 12,000 and the sale price, as spoken to by the petitioner, was accepted and the profits on re-sale by way of plots was reckoned by the revenue at Rs. 18,450 rejecting the contention of the assessee that no tax in the instant bargain was attracted because lands were agricultural lands. The assessment order proceeded to say that the lands were purchased with the intention of re-selling them for a profit after conversion into house sites and that the resultant gains will be treated as profits in an adventure in the nature of trade. It may be noted that, even at that stage, the profits or gains were the result of joint adventure by several persons including the petitioner was indeed conspicuous. In fact, another joint owner was also assessed under similar circumstances by the Second Additional Income Tax Officer, Calicut. Further appeals by the petitioner to the Appellate Assistant Commissioner and later to the Tribunal resulted in the reduction of the quantum of capital gains. Thereafter, the Sixth Income Tax Officer, II Circle, Coimbatore, the respondent herein, issued a notice on September 11, 1964, purporting to be u/s 148 of the Income Tax Act, 1961, calling upon the petitioner, amongst others, as members of an association styled Messrs. P. R. Easwara Iyer and others, Coimbatore, and stating that he has reason to believe that the income in respect of which the petitioner and others were assessable to tax for the assessment year 1960-61 has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961, and, therefore, he proposed to assess the income for the said assessment year and called upon the petitioner, amongst others to deliver to him within 30 days from the date of service of that notice a return

in the prescribed form of his income. In a covering letter to the said notice, the respondent made it clear that the notice sent to the petitioner would enable him to furnish the return in respect of the profit made on sale of certain lands by the association of persons consisting of the petitioner and some others. The petitioner, through his counsel, filed objections to the said notice. Inter alia, he stated that the material on which the respondent came to the conclusion that there has been an escapement of tax was not furnished to him and he, therefore, requested for the same. He also stated that for the assessment year in question he has already been assessed and the capital gains have already been brought to tax in the hands of the individual members of the association, even if there was one, and a regular consideration and proper assessment of such gains having been made once, the revenue has no jurisdiction to assess once over the said income as if the association of persons was being tackled for a second time. He would also state that once the income of the association was charged in the hands of the members individually and the assessments of the members remained as valid assessments, there could be no fresh assessment of the income in the hands of the association. Though at one time the petitioner asked for some time to file the return, he did not do so, but raised the above legal contention in answer to the notice issued by the respondent as above. He would state that the department can only seek to assess, the income either in the hands of the members of the association or the association as such and, having once assessed the individual members of such an association, it is no more open to the department to go behind it and claim to assess the association. In the records filed before us, it is seen that certain particulars were also furnished by the petitioner through his counsel relating to the facts and circumstances under which the original assessments were made against him and others who were involved in the joint and concerted adventure. By a further letter dated November 10, 1964, the respondent called upon the petitioner to furnish certain particulars regarding the purchase and sale of the lands as spoken to and referred to in the original assessment and substantiated by his counsel, when objections against the issuance of the notice u/s 148 were made. The respondent also threatened that if there is no proper response on the date of hearing fixed for the purpose, he would be constrained to make an ex parte assessment and initiate penal proceedings. Feeling apprehensive of the

situation, the petitioner moved this court, under Article 226 of the Constitution of India, for the issue of a writ of prohibition.

2. In the counter-affidavit, the department, in effect, concedes that, even at the time when the original assessment was made by the revenue against

the petitioner in respect of the capital gains in question, certain materials were before it. But, according to the department, such materials were not

sufficient for them to come to a conclusion that there was an association of persons who were interested in a joint venture and information

regarding such a concerted action by the petitioner and others not having been made available by the petitioner at the appropriate time, the re-

opening of assessment for the year 1960-61, u/s 148 of the Income Tax Act, 1961, which is similar to Section 34 of the earlier Act, was justified.

The revenue further contends that the action of the respondent is within his jurisdiction and perfectly legal because the business of the association

came to an end and the association of persons itself became extinct, and at the time when the Income Tax Officer initiated action to back-assess

the association of persons, the association itself had served its purpose and was no more. The respondent contends that the petitioner has filed a

return and moved the Income Tax Officer for an adjournment to furnish the necessary particulars called for by him and, therefore, his present

action in invoking the extraordinary jurisdiction of this court for the issuance of a writ is absolutely ill-founded.

3. Countermending the legal contentions of the petitioner, the case of the respondent is that Section 3 of the Act does not compel the Income Tax

Officer to make a choice between, the assessment of an association on the one hand and association of members on the other. It only envisages

relief from total taxation. The revenue proceeds that Section 14(2)(b), to which Section 3, is subordinate, postulates that, in the matter of

assessments there can be "no co-existence of an assessment on the association along with assessments on the members. In any event, their

specific case is that action u/s 148 is justified in case of escapement of assessment of income of an association and this need not be avoided

because one of its members has already been assessed in respect of his share. On the facts, the department would maintain that the totality of the

material and the figures were not before the officer when the original assessment was made and no return of income having been filed by the

association as an entity, the present action of the respondent is justified.

4. It would thus be seen that whilst the petitioner's case on the one hand is that the Income Tax Officer having elected to assess him having on his

files sufficient material to call upon the so-called association of persons to furnish a return and make them consequentially liable thereon, he cannot,

by invoking Section 148 of the present Act, vest himself with jurisdiction to re-open what, according to the petitioner, is a closed assessment after

due consideration ; the case of the department is that such an election was in fact not made because of paucity of material and, even if it is deemed

to have been made, such an election or option exercised by the taxing officer would not restrain him from re-opening the assessment if no return

has been filed by an association of persons as such or a principal officer thereof, as in this case, and such a reassessment contemplated by the

respondent is valid in law and within his jurisdiction.

5. At this stage it is necessary to observe the relevant statutory provisions and their scope to appreciate the relevant contentions of parties. A

peculiar mode of treatment is accorded if, in a given case, it is established beyond reasonable doubt that there is an association of persons who by

their co-ordinated activity should be deemed to be persons interested in a concerted action to gain profits therefrom. This is envisaged in Section 3

of the Indian Income Tax Act, 1922. This was the provision which was applicable at the time when the original assessment was made. Section 3,

dealing with charge of Income Tax, provides that Income Tax shall be charged for any year at such prescribed rates in respect of the total income

of the previous year of every association of persons or the members of the association individually. Section 14(2)(b), dealing with exemptions of a

general nature, provides that such tax shall not be payable by an assessee if he is a member of an association of persons, in respect of any portion

of the amount which he is entitled to receive from the association on which the tax has already been paid by the association. Section 44 provides

for liability in case of a discontinued association of persons; in such a case every person who was a member at the time of such discontinuance

shall, in respect of the income of the association, be jointly and severally liable to assessment and for the amount of tax payable. Section 63,

providing for service of notice, enables the revenue to serve a notice, in the case

of an association of persons, on the principal officer thereof.

Principal officer "" has been defined in Section 2(12) as any person connected with such association upon whom the Income Tax Officer serves a

notice of his intention of treating him as the principal officer thereof.

6. An examination of the relevant provisions as above indicates that at the time when the revenue intends to charge Income Tax on an association

of persons, it has obviously the option to proceed in one of two ways. The assessing authority can either assess the association as such or the

members of the association individually. If the Income Tax Officer, at the time when he makes up his mind to charge the income of the association

for Income Tax, has information that the assessee before him is a member of an association of persons, then u/s 2(12) of the Act, he has the right

to treat such member who is being assessed by him individually as the principal officer of the association. In fact, he has also the right to give such a

notice to the individual before him as the principal officer of an association which has been discontinued by reason of the fact that the concerted

action in which the members of the association were involved was completed by then. No doubt, a specific exemption is granted to a member who

has been assessed on the income derived by him from the joint adventure in case the association is again or presumably simultaneously tackled for

purposes of assessment and charge. This cannot, however, be considered as an enabling provision which would entitle the Income Tax Officer to

simultaneously keep alive the two alternative processes of assessment over an association of persons as contemplated in Section 3 of the Act. The

sine qua non to exercise such an option, as is contemplated in Section 3 of the Act, appears to us to be that if the Income Tax Officer is apprised

of the relevant particulars regarding the concerted action in which the association of members are involved, then it is up to him to call upon the

association to file a return, assess it and charge it to tax, or, in the alternative, deal with the individual member qua an individual and complete the

assessment in respect of the income derived by him from the joint adventure of the association of persons in which such individual was a member.

No doubt, whilst electing to do so or exercising such an option, the Income Tax Officer has to bear in mind the relevant gains or losses which the

revenue as such might incur. It is his bounden duty as a prospector of revenue to

go into such subterranean details, so that at the time when he exercises an option, it should appear that he has made up his mind one way or the other. There is no power for vacillation if materials furnished to him are sufficient for a reasonable and a prudent man to act firmly and if the Income Tax Officer takes the risk of adopting a defined course by voluntarily electing to do so, then it would appear that at a later time he cannot, by buttressing such state of affairs, attempt to wriggle out of the earlier defined procedure adopted by him by recourse to the provisions such as Section 34 of the old Act or Section 148 of the present Act.

7. Whilst expatiating, therefore, the above norms as contained in the relevant provisions as are necessarily to be considered in this petition, the counsel very rightly conceded even in the beginning that he was not seriously pressing his contention that there was no association of persons at all.

He strenuously based his arguments on his alternative contention that even if there was an association of persons, such facts and material were

before the Income Tax Officer when he made the original assessment in 1961 and, therefore, he had no jurisdiction to re-open such a closed

assessment under the garb of escapement. The relevant facts as has been shown above are a pointer to the fact that, even at the time when the

original assessment was made, the Income Tax Officer had knowledge that the petitioner had one-fifth share in the lands sold by the association of

persons. No doubt the purchase deed and the sale deeds which followed were not placed before the Income Tax Officer. The fact, however,

remains that the officer was aware that there was a concerted action by more than one person and such joint adventure related to the sale of lands

which were sub-divided into housing sites and such an adventure in the nature of trade was with an intention to gain profits. In the instant case one

other factual detail, which touches on the enquiry, is that while making the original assessment the Income Tax Officer made no reservation

whatsoever that the assessment was being provisionally made on the assessee so as to give him an exemption u/s 14 of the Indian Income Tax Act.

On the Other hand, whilst knowing the joint adventure of persons including the petitioner, the Income Tax Officer provisionally accepted the

figures furnished by the petitioner as regards the purchase and sale of the lands and assessed him accordingly. It cannot be denied, as is rightly

contended by the learned counsel for the petitioner, that the Income Tax Officer knew of the joint venture, and the right to tax the income of the firm in the hands of the firm was not reserved by the department. In such circumstances, the Bombay High Court in *Commissioner of Income Tax, Bombay South Vs. Murlidhar Jhawar and Purna Ginning and Pressing Factory*, observed that if the department makes a note that "" joint venture income...taken provisionally subject to a rectification after the assessment of the joint venture "", such a note does not mean that the right to tax the income of the firm in the hands of the firm was reserved by the department. The learned judges were of the view that the effect of the above note in the assessment order was that the department had only reserved to themselves the right to ascertain the extent and true income of the firm and make the necessary rectification in the assessment order of the partners. The instant case is an a fortiori one. No such reservation or no such note has been made.

8. Further, as has been observed, it cannot be said that there was no material before the original authority in 1961 when he opted to assess the petitioner as an individual and not as a member of an association of persons. No attempt has been made to treat him as a member of the association of persons or as the principal officer of the association of persons. On the other hand, the revenue consciously and deliberately chose to assess the petitioner in his individual capacity notwithstanding the fact that sufficient material and particulars were indeed placed and in fact available before the taxing officer. It cannot be said that, in such circumstances, the taxing officers have an unrestricted power to re-open assessment while resting their case u/s 34 of the Indian Income Tax Act. It is only in circumstances where they have reason to believe that there has been an escapement and where decisions earlier made have not become final and if it is discovered that there was an overt act on the part of the assessee which hoodwinked the revenue from probing into the reliefs then the revenue can exercise jurisdiction u/s 34 of the Indian Income Tax Act (presently Section 148 of the Income Tax Act, 1961). As was pointed out by the Supreme Court in *Commissioner of Income Tax, New Delhi Vs. Rao Thakur Narayan Singh*, :

It was not the intention of the Legislature by amending Section 34(1) in 1948 to

enable the Income Tax Officer to re-open final decisions made against the revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position it would result in placing an unrestricted power of review in the hands of the Income Tax Officer to go behind the findings given by the hierarchy of Tribunals and even those of the High Court and the Supreme Court with his changing moods.

9. Mr. Balasubrahmanyam, for the revenue, however, contends that strictly there is default since the association of persons has not filed a return.

This would be, however, begging the question. When all particulars were before the Income Tax Officer, and the Income Tax Officer himself did

not choose to call upon the assessee as a member or principal officer of the association of persons to file a return, but was satisfied in exercising his

jurisdiction to assess the petitioner as an individual instead of as a member of association of persons, then such an option or election exercised by

him cannot be lightly given up only for the purpose of reopening a closed assessment. This would be, to adopt once again the language of the

learned judges of the Supreme Court quoted above, to suit the changing moods of the officer. The revenue, however, invited our attention to the

decision of the Supreme Court in *M.M. Ipoh and Others Vs. Commissioner of Income Tax, Madras*, . This was a case in which certain general

observations were made by the Supreme Court indicating that the duty of the Income Tax Officer is to administer the provisions of the Act in the

interests of public revenue and to prevent evasion or escapement of tax legitimately due to the State. The policy and principles for the guidance of

the Income Tax Officer, which were dealt with by the learned judges in that decision, do not lend support to the view that, once an option has been

exercised by the Income Tax Officer, he could, with impunity, ignore the same and seek to reassess the very same assessee as a member of the

association only because he chose not to do so in the first instance. It would be apposite to refer to the decision of the Supreme Court in (1966)

60 ITR 95 (SC) , wherein Shah J., speaking for the Bench, observed :

That the partners of an unregistered firm might be assessed individually or they might be assessed collectively in the status of an unregistered firm ;

the Income Tax Officer could not, however, seek to assess the one income twice--once in the hands of the partners and again in the hands of the

unregistered firm. When once the option is exercised for assessing the individual partner and including his share of profits in the firm in his

assessment, it is not open to the department to assess the same income as income of the unregistered firm.

11. We respectfully add that the above principle is equally applicable to an association of persons. Mr. Balasubrahmanyam, however, referred to

the decision of the Supreme Court in *Income Tax Officer, A-ward, Lucknow Vs. Bachulal Kapoor*, . This was a case where the fact of the

existence of a joint family was kept back from the knowledge of the Income Tax Officer and in those circumstances, the learned judges held that it

would be a clear case of the family's income escaping assessment. In fact, while considering the relevant provisions, *Subba Rao J.* (as he then

was), pointedly made a reference to the option or election available to the Income Tax Officer while dealing with a member of an association of

persons to assess either the association of persons or the members of the association individually. The view expressed by us gains support also

from the ratio in the case of *Joti Prasad Agarwal and Others Vs. Income Tax Officer (B) Ward Mathura*, , where again the principle was that,

once the income of the association was charged to Income Tax in the hands of the members individually and the assessments of the members

remained as valid assessments, there could be no fresh assessment of the income in the hands of the association.

12. The impact of the above judicial precedents on the facts of the case may then be considered. The rule asked for by the petitioner is in the

nature of a writ of prohibition. It postulates a patent want of jurisdiction on the part of the respondent. The jurisdictional fact, which is essential to

vest jurisdiction in the respondent to re-open a final assessment, appears to us to be that, at the original stage, no primary facts or material

information was available to the respondent to consider the adventure of the petitioner as one by an association of persons. We are unable to be

persuaded to accept the contention of the revenue that there was such a paucity of material at the first stage relying on which if he so intended he

could not have assessed the persons concerned as an association of individuals. In our opinion, there is no foundation for the view that there was

no adequate information before the assessing officer in the first instance, nor could it be said that he was labouring under ignorance of relevant

facts. Thus, therefore, the jurisdictional fact which can prompt the respondent to act u/s 148 is absent. Again, by an overt voluntary act of

commission on his part, the Income Tax Officer cannot, by changing his mind or mood, vest himself with jurisdiction to re-open assessments which

have become final in the eye of law. Even so, it is difficult to comprehend the hesitant argument of the revenue that a reservation to assess the

association of persons once again was made by the officer in the first instance. Thus, therefore, the respondent has no jurisdiction to re-open the

assessment in the manner proposed.

13. Viewed in a slightly different perspective, the petitioner's request for the rule appears to be justified. It cannot be disputed that Section 3

confers on the Income Tax Officer an option to assess either the association of persons or its members separately and individually. This is because

the association of persons is an entity different and distinct from its members. No doubt, in exercising the option, the Income Tax Officer has to

necessarily act judiciously and judicially bearing in mind the fundamental norm of tax law that public revenue should be safeguarded and evasion of

legitimate taxes avoided. But he takes the risk, once he acts one way or the other. We have unhesitatingly held that the Income Tax Officer had the

essential facts before him to tax either the association or its members. He consciously adopted the method of bringing to tax the individual member.

In so doing, he did not act arbitrarily, but based his judgment on the well-laid policy and rules of guidance as adumbrated in Section 3 of the Act.

Having thus elected, he cannot retrace back and give the go-by to his original definite stand and invoke Section 148, to re-open a conscientious

assessment of his which has become final. This would be colourable exercise of power and would not amount to a judicial re-scrutiny of a state of

affairs in the light of the avowed policy of the legislature.

14. One other argument of Mr. Balasubrahmanyam is that, inasmuch as the petitioner has filed a return pursuant to the notice, the present request of

his to interdict the proceedings through Article 226 of the Constitution of India is premature and not legitimate. This argument, however, overlooks

the main and only contention of the petitioner that the proposed action of the respondent is without jurisdiction and, therefore, illegal. The question

raised goes into the root of the matter and, in our view, it would not make any

difference if the petitioner seemingly participated in the proceedings

up to a certain point and thereafter rightly raised the question whether the respondent had the power and the right to initiate such proceedings u/s

148 of the Indian Income Tax Act. In matters like the one under consideration, if the question to be decided is whether the impugned order or

notice is passed by the officer concerned in exercise of his lawful jurisdiction under any statute, then such incidental matters as has been referred to

by the revenue cannot prevent the court from issuing a rule if the facts and circumstances justify it.

15. It is thus seen that the impugned notice was sought to be issued by the respondent without jurisdiction and, in the ultimate analysis, he could not

forward such a notice to the petitioner in the light of the election made in the earlier proceedings by the revenue. On these two grounds it is clear

that there is a patent lack of jurisdiction which is apparent on the face of the record and the petitioner is, therefore, entitled to a writ of prohibition

restraining the respondent from making any assessment as proposed by him in the impugned notice as against the petitioner. The rule nisi is,

therefore, made absolute and this writ petition is allowed with costs. Advocate's fee Rs. 250.