

(1995) 01 DEL CK 0085

In the Delhi High Court

Case No : Civil Writ Petition No. 3753 of 1992

Rakesh Agarwal

APPELLANT

Vs

The Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 09-01-1995

Acts Referred:

Income Tax Act, 1961 — Section 147

Citation : (1996) 1 AD 356 : (1996) 61 DLT 351

Hon'ble Judges : Y.K. Sabharwal, J;D.K. Jain, J

Bench : Division Bench

Advocate : P.V. Kapur, Anurag Chawla, Rajendra and R.K. Chaufla, for the Appellant;

Judgement

D.K. Jain, J.

(1) This writ petition by the legal heir .of Late Shri R.S. Agarwal, (hereinafter referred to as the assessee) validity the validity of a notice dated 2 August 1991, issued by the Assistant Commissioner of Income Tax, Central Circle- 12, New Delhi u/s 148 of the Income Tax Act, 1961 (for short the Act) proposing to re-assess certain income on the ground that it has escaped assessment for the assessment year 1987-88.

(2) For the relevant assessment year, the assessed claims to have filed his return of income on 30 July 1987 in Ward 15(6), New Delhi deciding a total income of Rs. 18,55,100.00. The total income so declared included the net income of Rs. 18,240.00 from a house property at A-5, Gulmohar Park, New Delhi, let out to Hotel Banjara Ltd., at a gross annual rent of Rs. 92,000.00. The total income also included income from "Salary" from Hotel Banjara Ltd. Though the assessed claims that after filing of the said return of income a notice u/s 143(2) of the Act was issued by the Income Tax Officer Ward 15(6), and, in response there to he had filed a letter dated 26 September, 1989, the issue of any such notice is denied by the revenue. It, however, appears that subsequently another return of income for the assessment year in question, marked as "duplicate", was filed on

26 February, 1990 before another officer, namely, the Deputy Commissioner of Income Tax (Special Range 12), New Delhi, who vide his order dated 15 March, 1990 paused the assessment order u/s 143(1) of the Act, accepting the income declared. by the assessee. No further tax was found to be payable by the assessee. Thereafter, vide order dated 11/16 July, 1991, the Commissioner of Income Tax, Delhi IX transferred the case of the assessed from Deputy Commissioner, Special Range-12 to Assistant Commissioner, Central Circle 12, who has now issued the impugned not i. e u/s 148 of the Act, requiring the assessed to file the return as he has reason to believe that certain income chargeable to tax for the said assessment yeas had escaped assessment within the meaning of Section 147(a) of the Act, in as much as : (i) the rent from the properties was kept low and for the difference in rent the assessed was compensated by giving interest free security of Rs. 8.00 lacs and Rs. 6.82 lacs, which fact came to light during the course of assessment proceedings for the assessment year 1988-89 from assessor's own letter dated 20 February, 1991, (ii) as compared to the assessment year 1988-89 excessive claim for the municipal taxes had been made and allowed in the relevant assessment year, and (iii) value of perquisites provided by Hotel Banjara Ltd in the form of free residential accommodation and other assets had not been included in the income from salary from Hotel Banjara Ltd.

(3) The proposed action of the Assistant Commissioner is challenged primarily on the ground that the assessed had made true and full disclosure of all primary facts necessary for the assessment for the relevant assessment year, the condition precedent for exercise of jurisdiction u/s 147(.) of the Act, viz., that the income chargeable to tax should have escaped assessment for that year "by reason of the omission or failure on the part of the assessed to disclose fully and truly all material facts necessary for his assessment for that year" did not exist and Therefore, the impugned notice was illegal and without jurisdiction, in view of the law laid down by the Supreme Court in *I.T.O. v. Lakhmani Mewal Das*, (1976) 1tr 437 (SC), *I.T.O. v. Madnani Engineering Works Ltd.*, (1979) 118 Itr 1 (SC) and *Indian Oil Corporation Vs. Income Tax Officer, Calcutta and Others*, , respectively, holding that the reasons which lead to the formation of the belief contemplated by Section 147(a) must have a material bearing on the question of escapement of income of the assessed from assessment because of its failure or omission to disclose fully and truly all material facts; the validity of initiation of reassessment proceedings has to be judged with reference to the material available with the officer at the time of the issue of notice u/s 148 and not with reference to the material that may have come to light subsequently in the course or re-assessment proceedings and there must be materials to come to the conclusion that there was "omission or failure to disclose fully and truly all material facts necessary for the assessment of the year".

(4) On merits it is claimed that during the course of assessment proceedings, copies of the lease/rent deeds between the assessed and Hotel Banjara Ltd. and Gulmohar Estates Ltd. were filed by the assessed Along with his letter dated 26

September, 1989, the same were on record when the assessment was completed by the Deputy Commissioner of Income Tax, Special Range 12 on 15 March, 1990 and, Therefore, no material fact regarding interest free securities was suppressed by the assessed and he was under no obligation to tell the Assessing Officer to minutely peruse and scrutinize the lease/rent deed to ascertain the correct annual letting value of the property in question or the inference he should draw there from. The allegations of excessive claim for municipal taxes and non-disclosure of value of perquisites are also denied and it is submitted that there had been no non-disclosure of material facts on the part of the assessee, the Assessing Authority could not be permitted to re-open a concluded assessment.

(5) In the counter-affidavit filed on behalf of the respondent Assessing Officer, it is denied that the assessed had filed his original return in Ward 15(6) or that any notice u/s 143(2) of the Act was issued to him before the assessment order was passed on 15 March, 1990 by the Deputy Commissioner of Income Tax Special Range 12 or that letter dated 26 September, 1989 had been filed by the assessed during the course of assessment proceedings for the assessment year in question. It is claimed that the said assessment order was made u/s 143(1) of the Act. Though it is not disputed that along with the duplicate return, filed before the Dy. Commissioner of Income Tax, the assessed had tied a statement of net assessable income showing income from salary, house property, share in registered firms, income from other sources and capital gains along with balance sheet as on 31 March, 1987 but it is asserted that the balance sheet did not indicate that the credit balances reflected in the balance sheet in favor of Hotel Banjara Ltd and Gulmohar Estates Ltd., were in respect of interest free security deposits from the said tenant companies. The stand of the Assessing Officer is that his belief that there has been under-assessment of income for the assessment year 1987-88 is based on appraisal of assessment records of the assessed for the Assessment year 1988-89, particularly on assessor's Chartered Accountant's letter dated 20 February, 1991, filed during the course of assessment proceedings for the Assessment year 1988-89, wherein the annual rateable value declared was sought to be justified on the basis of the following calculations:

"CALCULATIONS of Rateable Value : 1. As per Municipal Valuation 1,62,400.00-
2. Rent received from : Gulmohar Estate 12,000 Banjara Hotels Ltd. 66,000
78,000.00 354 3. Security Received: -Gulmohar Estate 8,00,000 Banjara Hotels
Ltd 6,82,500 14,82,500 Intt. @ 15% p.a. on 14,82,500 (Opportunity cost of
security received) 2,22,375.00 3,00,375.00 Hence the actual rent received
including interest is more than the municipal valuation, because on the amount
of securities received the assessed has earned something which is taxable in the
hands of assessee. We hope you would find the above in order and will complete
the assessment."

(6) During the course of hearing learned Counsel for the parties raised the question and addressed us at some length as to whether the old Section 147 as

it existed prior to its amendment by Direct Taxes Laws (Amendment) Act, 1987 would, as claimed by the assessee, or the amended Section, which admittedly is much wider in scope as claimed by the respondent apply to the facts of the case. The pre-amendment position was that before proceedings u/s 147(a) could be initiated, the twin conditions, namely : (i) the assessing officer having reason to believe that income chargeable to tax has escaped assessment, and (ii) such escapement was occasioned by reason of omission or failure on the part of the assessed to disclose fully and truly all material facts necessary for assessment for that year, which were held to be cumulative, must be satisfied, whereas the newly substituted Section 147(a) provides that if the assessing officer has reason to believe that any income chargeable to tax has escaped assessment torn any assessment year, he may assess or re-assess such income. The result is that under the old Section the fulfillment of both the conditions (i) and (ii) is the sine qua non for taking action u/s 147(a) and this alone could confer jurisdiction on the assessing officer to make a back assessment, but in the new Section this twin condition has been given a go bye and the existence of only the first condition, of the Assessing Officer having reason to believe (for whatever reason) that income has escaped assessment, confers jurisdiction to re-open the assessment. The reason need not necessarily be failure to truly and fully disclose material facts.

(7) We, however, feel that having regard to the facts in hand it is unnecessary to go into this controversy as in our view even if we accept the stand of the assessed that it is the old Section which should be applied to the case of the petitioner, we are satisfied that the twin conditions requisite for assumption of jurisdiction under the old unamended Section 147(a) of the Act do exist in the instant case, which meet the requirement of law laid down in the aforesaid three judgments of the Supreme Court.

(8) The main ground on which the proposed action u/s 147 is challenged is that since the assessed had placed on record copies of lease/rent deed as also the balance sheet showing credit balances in the names of companies to whom the property had been let, there was no failure on his part to disclose fully and truly all material facts necessary for his assessment insofar as the rental income is concerned. It could not be said that the assessed had failed to disclose fully and truly the material facts necessary for his assessment and as such the notice seeking to re-open the assessment was bad in law. The question for consideration, Therefore, is: (i) whether the assessed did submit the documents, noted above, which he claims to have and if so, (ii) whether mere filing of these was sufficient to disable the Assessing Officer to issue the impugned notice u/ Section 148 of the Act.

(9) It is true that in Calcutta Discount Company Ltd.v I.T.O., 41 (1961) Itr 191, the locus classicus on the subject, the Supreme Court did hold that obligation of the assessed is to disclose only primary facts and not inferential facts. Primary facts are those which are material in that if taken into account, they have an

adverse effect on the assessed for assessment on greater income than what has been actually assessed. What facts are material and necessary for assessment differ from case to case. Would mere filing of these documents amount to disclosure of primary facts is the question? Indeed the answer is given in the dissenting portion of the judgment by Hidayatullah, J (as his Lordship then was) in Calcutta Discount Company's case (supra) saying that if some material for the assessment lay embedded in the evidence which the revenue could have uncovered but did not, then, it is the duty of the assessed to bring it to the notice of the Assessing Authority because the assessed knows all the material and relevant facts - the A Assessing Authority might not. These observations have been applied and reiterated in subsequent decisions of the Supreme Court and still hold the field.

(10) To meet the contention of the assessed that once the aforementioned documents had been produced before the Assessing Officer, there was no further obligation cast on him to disclose further facts, which on due diligence, the Assessing Officer might have discovered, Mr. Rajendra, learned Counsel for the revenue has invited our attention to Explanation -2 (as it stood at the relevant time) to Section 147, which runs as follows:

"EXPLANATION2-Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of this Section."

(11) The language of Explanation 2 is self-explanatory and gives a quietus to the contention that where books of accounts or other evidence is produced before the Assessing Officer, there is no duty on the assessed to disclose further facts, which with due diligence could be discovered by the Assessing Officer. The Explanation in itself makes it clear that mere production of evidence before the Assessing Authority would not per se be enough and there may be an omission or failure to make a full and true disclosure if some material for the assessment lay embedded in the evidence which the Revenue could have uncovered but did not (to repeat the words of Hidayatullah, J in Calcutta Discount Co.'s case). In Indo-Aden Salt Mfg. and Trading Co. Pvt. Ltd. Vs. Commissioner of Income Tax, Bombay, , the Supreme Court has further clarified, holding that the fact that the Assessing Officer could have found out the correct position by further probing the matter does not exonerate the assessed from the duty to make a full and true disclosure of the material facts. The Court observed that Explanation 2 to Section 147 makes the position abundantly clear.

(12) At this stage we may notice the significance of the words "not necessarily" as appearing in Explanation 2. In our view these words only indicate that whether there is a disclosure or not within the meaning of Section 147(a) of the Act would depend on the facts and circumstances of each case. To put it differently it would be the nature of documents and the circumstances in which these are produced before the Assessing Officer that will determine the question.

For instance, if material evidence is not writ large on the document but is embedded in some voluminous records/ books of accounts requiring a careful scrutiny and diving deep into it to notice the necessary material, it is quite possible that having regard to the nature of the documents, material evidence cannot be discovered from such records despite due diligence and the case would attract application of Explanation 2 to hold that mere production of the books of accounts or the documents etc., without pointing out the relevant entries therein, does not amount to disclosure within the meaning of Section 147(a) of the Act.

(13) In the light of the aforementioned legal position w. may now deal with the contentions of learned Counsel for the parties. As noted above, the main stand of the Assessing Officer is that the facts regarding furnishing of interest free securities to the tune of Rs. 14.82 lakhs by the said two companies to the assessed to compensate him for the difference in the market rent of the property and the actual rent paid to him, came into light only during the course of assessment proceedings for the subsequent assessment year, viz., 1988-89, when the assessed had sought to justify the actual receipt of rent at much lesser rate viz., Rs. 78,000.00 (declared for the A.Y. 1988-89) as against the annual rateable value of Rs. 1,62,400.00 determined by Municipal Corporation for the purpose of property tax. On the other hand, though the assessee, interestingly, has not denied that income from house property declared and assessed, on the basis of actual rent received was admittedly less than the sum for which the property might reasonably be expected to let for the year, the re-opening of the assessment is being challenged on the ground that by filing the aforementioned documents along with the duplicate return of income, the assessed had disclosed all primary facts regarding rental income and it was for the Assessing Officer to discover if the rental income had been correctly declared or not. The submission is that from the lease/rent deed, stated to have been placed on the assessment record by the assessed during the course of assessment proceedings before the Income Tax Officer, Ward 15(6), the Assessing Officer could have discovered the reason why actual rent received and declared was less than the market rent and if any excess income was to be included in the hands of the assessed on account of interest free securities, it could have been done at the stage of original assessment and the Assessing Officer's omission to do so cannot now clothe him with jurisdiction u/s 147(a) of the Act.

(14) Having perused the documents filed along with the duplicate return of income, namely, statement of net assessable income and balance sheet as on 31 March, 1987, in our opinion it cannot be said that the assessed had discharged the obligation u/s 147(a) of making disclosure of the "true and full" facts, which were necessary for his assessment for the relevant year. The statement of assessable income only indicates that the property at A-5, Gulmohar Park, New Delhi has been let out at Rs. 92,000.00 and the balance sheet merely indicates that there are two credit balances in the sums of Rs. 6,82,000.00 and Rs. 8.00 lakhs in favor of M/s Hotel Banjara Ltd and Gulmohar Estates Ltd respectively and no further. We have no hesitation in coming to the conclusion that by mere

filing of these documents the assessed is not deemed to have disclosed "other evidence" which might have been discovered by the Assessing Officer if he had pursued investigation on the basis of what has been disclosed in the statement of assessable income and the balance sheet.

(15) Although we are not convinced that letter dated 26 September, 1989 was infact filed by the assessed before the Assessing Officer but assuming it to be so, in our view even this letter would not amount to disclosure within the meaning of Explanation 2 to Section 147 of the Act.

(16) We are, Therefore, of the opinion, that in the facts of the instant case, reassessment proceedings have been rightly initiated by the Assistant Commissioner of Income Tax, Central Circle-12, New Delhi by invoking the provisions of Section 147(a) and by issuing notice u/s 148 of the Act, after recording the reasons for the formation of his belief that in the original assessment proceedings, the assessed had not disclosed the material facts truly and fully necessary for his assessment under the head "income from house property

(17) Since we have upheld the validity of notice u/s 148 in respect of the rental income, it is not necessary to go into the question of excessive claim of municipal tax or non-disclosure of value of perquisite and as observed by the Supreme Court in Income Tax Officer, Azamgarh and Another Vs. Mewalal Dwarka Prasad, it will be for the Assessing Officer to take into account these two items in the fresh assessment proceedings.

(18) In view of the foregoing discussion we find it difficult to hold that it was a case where the Assessing Officer had no material in his possession to record his satisfaction that the income of the assessed had escaped assessment for the reason of omission or failure on the part of assessed to disclose fully and truly all material facts necessary for the assessment. Having found so it is not torn this Court to go into the sufficiency of the reasons for forming the belief.

(19) There is no merit in the writ petition and the same is accordingly dismissed with costs, which we quantify at Rs. 2,500.00. 20. Before parting we may clarify that any observations on the merits of the additions sought to be made to the income already assessed are only for a limited purpose to determine whether or not the Assessing Officer was justified in initiating re-assessment proceedings under Sections 147(a) and 148 of the Act and the dismissal of this writ petition will not preclude the assessed from urging any question of fact or law before the appropriate forum.