

(1999) 11 AHC CK 0006

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 284 of 1998

S.K. Gupta and Co.

APPELLANT

Vs

Income Tax Officer and Another

RESPONDENT

Date of Decision : 22-11-1999

Acts Referred:

Income Tax Act, 1961 — Section 143(1), 147, 148, 154

Citation : (2001) 165 CTR 565 : (2000) 246 ITR 560

Hon'ble Judges : S. Rafat Alam, J; M.C. Agarwal, J

Bench : Division Bench

Advocate : V.B. Upadhyaya and A. Upadhyaya, for the Appellant; Bharat Ji Agarwal, for the Respondent

Judgement

M.C. Agarwal, J.—By this petition under Article 226 of the Constitution of India, the petitioner challenges a notice dated March 26, 1998, issued u/s 148 of the Income Tax Act, 1961, for the assessment year 1987-88; a copy of which is annexure 5 to the writ petition.

2. We have heard Sri V.B. Upadhyaya, senior advocate assisted by Sri A. Upadhyaya, advocate, learned counsel for the petitioner, and Sri Bharat Ji Agarwal, senior advocate, for the respondents.

3. The proceedings relate to the assessment year 1987-88 for which a return of income was filed and an assessment was made u/s 143(1) of the Income Tax Act. Thereafter, on October 5, 1990, the Assessing Officer issued a notice u/s 148 which was received by the assessee on October 10, 1990. In compliance with the said notice a return of income was filed on November 16, 1990. The petitioner claimed the status of a registered firm. On March 27, 1991, the assessment was completed in the status of an association of persons (AOP). On April 22, 1991, the Assessing Officer, i.e., respondent No. 1, passed an order u/s 154 of the Act stating that there had been a mistake in mentioning the status of the assessee in the assessment order and that in place of association of persons (AOP), URF (unregistered firm), be read throughout the assessment order. The

assessee appealed and the Commissioner of Income Tax (Appeals) who allowed the appeal on the ground that an assessment on an association of persons could not be made without issuing a notice to the associations of persons. He, therefore, set aside the assessment directing that the assessment be made again, in accordance with law. Thereafter cross appeals were filed before the Tribunal by the Department as well as by the assessee, against the order passed by the Commissioner of Income Tax (Appeals). The Tribunal dismissed the Revenue's appeal and allowed the appeal by the assessee and quashed the assessment on the ground that in the circumstances of the case, no assessment could be made on the association of persons.

4. During the time taken in the aforesaid proceedings, the assessment proceedings that had commenced on the basis of the notice dated October 5, 1990, u/s 148 of the Act became barred by time. Consequently, the Assessing Officer issued a fresh notice u/s 148 on March 26, 1998, and it is this notice which is under challenge in the present writ petition and the grounds of challenge have been mentioned in paragraph 26 of the writ petition which is as under :

"(A) Because, the original notice u/s 148 having not been quashed and a return in pursuance of that notice having been filed, the Department has no jurisdiction to issue subsequent notice dated March 26, 1998, on the same facts for the same assessment year, i.e., 1987-88, during the pendency of the earlier proceedings.

(B) Because, the notice having been issued with a view to circumvent the period of limitation, is, therefore, illegal, arbitrary and without jurisdiction.

(C) Because, no subsequent notice can be issued on the same facts and on the same ground for the same assessment year, i.e. 1987-88."

5. The respondents have filed a counter affidavit which is sworn by one Shiv Ram Singh Chahal in which it is stated that a search was conducted at the business premises of the assessee as well as the residential premises of the partners and some incriminating material was found and seized. The history of the case, as stated above, is admitted and it is stated that an application u/s 256(1) has been filed against the aforesaid order of the Tribunal. It is stated that the Commissioner of Income Tax directed that the assessment for the year under consideration may be reopened u/s 147 and in compliance of the directions of the Commissioner, the case was reopened with the approval of the Commissioner of Income Tax and the impugned notice u/s 148 was issued and was duly served. It is stated that the impugned notice was served on the partnership firm. It is also stated that the notice u/s 148 was issued to assess the income which was surrendered by the assessee itself during the course of search and seizure operation. In the rejoinder affidavit it is stated that from the counter affidavit itself it is apparent that the assessment was reopened under the dictates of the Commissioner of Income Tax while Section 147 of the Act provides that an assessment can be reopened only if the Assessing Officer has reason to believe

that the income has escaped assessment.

6. u/s 147 of the Income Tax Act if the Assessing Officer "has reason to believe" that any income chargeable to tax has escaped assessment for any assessment year, he may.... assess or reassess such income . . . Thus, the law requires that the Assessing Officer should have the reason/reasons to believe and Sub-section (2) of Section 148 provides that before issuing a notice for an intended assessment/reassessment u/s 147, the Assessing Officer shall record his reasons for doing so. Thus, the Assessing Officer has to record the reasons for issuing a notice u/s 147 and he has to have his own reasons to believe that any income chargeable to tax has escaped assessment. There is no dispute on this proposition of law and it was so held by the Supreme Court in *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, in which a question had arisen whether proceedings u/s 147 could be initiated on the basis of a report by an internal audit party. At page 1004 of the judgment, the Supreme Court observed that in every case, the Income Tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has now come to his notice he can reasonably believe that income has escaped assessment and that the opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, add to or colour the significance of such law. In short, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income Tax Officer. Some other authorities were also cited on this point but since the legal position is settled and is not disputed, it is not necessary to refer to them here.

7. In raising the aforesaid argument, learned counsel for the petitioner has attempted to make capital out of an unguarded statement made in the counter affidavit that the Commissioner directed that the assessment may be reopened u/s 147. It is to be borne in mind that in the writ petition, the petitioner has not set up a case that before issuing the impugned notice, the Income Tax Officer did not apply his own mind to the facts of the case and did not himself come to have the reason to believe that income chargeable to tax has escaped assessment and it is for this purpose that we have reproduced above the grounds of attack that have been set up by the petitioner in the writ petition. Therefore, we are of the view that the petitioner having not advanced such a contention in the writ petition, he cannot legally, and justifiably raise such a contention. The petitioner's case has to be solely examined on what is stated in the writ petition. The statement made in the counter affidavit is not an admission of any averments made by the petitioner in the writ petition. Therefore, that statement is of no consequence. We may mention that even in the rejoinder affidavit, no assertion to that effect is made on behalf of the petitioner. What was stated is that from the contents of the counter affidavit, it is apparent that the assessment for the year 1987-88 was reopened u/s 147 of the Act under the dictates of the Commissioner.

8. In case the petitioner wanted to contend that the Income Tax Officer had no material on the basis of which he could have the requisite reason to believe or that he did not apply his own mind to the material on record and issued the notice u/s 148 solely under the orders of the Commissioner, it was necessary for him to amend the petition by incorporating therein the requisite averments and preferably annex to the writ petition a copy of the reasons recorded by the Assessing Officer. Had he done so, the respondents would have had an effective opportunity to controvert the allegation and annex to the counter affidavit the alleged direction of the Commissioner, the reasons recorded by the Assessing Officer for having a reason to believe and for proposing to issue notice u/s 148 and the necessary correspondence between the Assessing Officer and the Commissioner for obtaining the latter's approval for the issue of a notice that was statutorily required to be obtained. In our view, therefore, the petitioner is not legally entitled to raise such a condition.

9. Even if the petitioner is allowed to rely on the aforesaid averments in the counter affidavit, no sound basis is laid for the argument that the Assessing Officer did not himself have the reason to believe that income has escaped assessment. "Direct" according to the Webster's New Collegiate Dictionary, Indian edition, means "to show or point out the way for" and "direction" means "guidance or supervision of action or conduct". Direction also means "something" imposed as an authenticate instruction or order". Therefore, a direction does not necessarily mean a command and the language used in the counter affidavit shows that the so-called direction was merely a guidance because, according to the counter affidavit, the direction was that the assessment may be reopened, meaning thereby that the Commissioner merely indicated a direction to the Assessing Officer in which he may proceed and the ultimate decision was left to the Assessing" Officer.

10. As stated above, before issuing a notice u/s 148 of the Act, the Assessing Officer has to record his reasons. He has to seek the approval of the Commissioner. Therefore, it cannot be presumed that the Assessing Officer did not apply his mind and did not make up his own belief. Whenever such a contention is raised, the burden is on the assessee to show that the Assessing Officer did not act according to law. For that purpose, he may take the assistance of the court and require the production of the relevant records and he may also obtain certified copies of the requisite documents. Such a plea cannot be raised at random as in the case before us. We, therefore, hold that it is not permissible to the assessee to raise the aforesaid contention and in any case we further hold that it is not established that the Assessing Officer did not himself examine the matter and arrive at his own belief and that he acted solely on any command from the Commissioner.

11. The second contention raised on behalf of the petitioner is that when the Tribunal quashed the assessment, the earlier notice issued by the Assessing Officer u/s 148 and the return filed by the assessee revived and, therefore, the

Assessing Officer could have proceeded on those documents if it was permissible under the law. Reliance is placed on a judgment in *S.P. Kochhar Vs. Income Tax Officer*, in which it was held that where an assessment is pending, a notice u/s 148 cannot be issued. Reliance is also placed on *Commissioner of Income Tax Vs. P. Krishnankutty Menon*. In that case reassessment proceedings had been initiated u/s 147(b) and during the pendency of the reassessment, further notices u/s 147(a) were issued. It was held that when the assessment was open no valid notice u/s 147(a) could be issued. This proposition of law was also not challenged on behalf of the Revenue. However, what is evident is that due to the time taken in the earlier round of proceedings, the limitation for making an assessment on the basis of the return of income, filed in pursuance of the notice dated October 5, 1990, had expired and, therefore, it cannot be said that either the said notice or the return of income had revived and could be treated to be pending. Such a situation has been taken care of by Clause (b) of Explanation 2 to Section 147. Explanation 2 states that for the purposes of Section 147, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :--

"(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;"

12. Thus, in view of this Explanation and the fact that because of the events, narrated above, no assessment was made on the assessee-partnership firm, it becomes a case where income chargeable to tax has escaped assessment. As stated in paragraph 7 of the counter affidavit, the income was not stated by the assessee in the return that was filed in pursuance of the earlier notice u/s 148 on November 16, 1990. The income declared in the said return was only Rs. 99,620 while as stated in paragraph 16 of the counter affidavit during the course of search and seizure operations, the assessee had offered an additional income of Rs. 1 lakh. Therefore, all the conditions mentioned in Clause (b), reproduced above were satisfied in this case and the Assessing Officer could reassess the income after issuing a notice u/s 148. It is not a case of circumventing the period of limitation but is a case where because of certain circumstances, the statute itself allows the Assessing Officer an opportunity to bring to tax escaped income although the period originally prescribed had expired. It was also contended that the impugned notice, a copy of which is at page 38 of the paper book as annexure 5, did not specify whether it was issued to the association of persons or to the partnership firm. No such ground has been set up in the writ petition. The notice has been issued to S. K. Gupta and Co. which, as admitted in the petition itself, is a partnership firm and was being assessed to tax from before at general index register No. S 302/W1. This number is mentioned in the notice itself making it quite clear that it has been issued to the partnership firm. The conduct of the Assessing Officer in making the order u/s 154 also indicated that he wanted only to assess a partnership firm and not an association of persons.

Therefore, in any case there is no infirmity in the notice on this account as well.

13. No other point was raised in this writ petition and for the reasons discussed above, the same is hereby dismissed with costs to the respondents. The interim order, if any, is discharged.