

(1980) 02 GUJ CK 0017
In the Gujarat High Court

Surat District Co-operative Purchase Andsale Union Ltd. APPELLANT
Vs
Income Tax Officer, Circle-I, Ward-B, Surat RESPONDENT

Date of Decision : 28-02-1980

Acts Referred:

Income Tax Act, 1961 — Section 147, 80P(2)

Citation : (1980) 17 CTR 289 : (1981) 129 ITR 718

Hon'ble Judges : S.B. Majmudar, J;B.J. Diwan, J

Bench : Division Bench

Advocate : J.P. Shah, for the Appellant; N.U. Raval, for the Respondent

Judgement

Majmudar, J.—The petitioner is a co-operative purchase and sale union registered under the Indian Co-operative Societies Act, 1960. It has challenged that a notice issued by the ITO under s. 148 of the I. T. Act, 1961 (hereinafter referred to as "the Act"), seeking to reopen the previously concluded assessment of the petitioner-society for the assessment year 1975-76. The relevant accounting year is 1974-75.

2. The petitioner-society contends that the respondent-ITO had no jurisdiction to reopen the proceedings as the condition precedent to the exercise of the power given under s. 147 of the Act does not exist in the present case.

3. In order to appreciate the aforesaid controversy between the parties, it is necessary to have a glance at the relevant facts. The petitioner society functioning at Surat submitted a return of its income for the assessment year 1975-76 on June 30, 1975, and disclosed its income for the relevant year as under :

Rs. Business income	1,79,468	Adjusted against loss of prior years	1,79,468
_____ Nil _____		Rs. Dividend	10,599
Interest from co-op. society	5,088	Property income	10,271
Godown income	6,044	Capital gains	33,615
_____ Deduction u/s. 80P	65,617	44,331 _____	Taxable income
21,286 _____			

4. During the course of assessment proceedings it became clear that the loss of prior years may not be allowed and the assessee submitted a revised statement of income working out the net total income at Rs. 1,00,845. Along with this revised total income the assessee also filed a statement showing the proportionate business profits income exempt under s. 80P of the Act because of its dealing with non-members as well. It is pertinent to note at this stage that the petitioner-society had sold during the accounting year some depreciable assets and had filed a statement of profit as per s. 41 (2) of the Act. The society had also made a claim in the revised statement of income under s. 80P(2) (iii) and (iv) of the Act. The ITO passed an assessment order after having considered all the pros and cons and after due discussion with the petitioner-society's representative and having arrived at the assessable income and depreciable income, the ITO computed the net income of the society under the provisions of the Act on March 26, 1976. In para. 3 of the assessment order it had been in terms observed by the ITO that the rice mill which was being run by the assessee had been sold, and the short-term capital gains and profits under s. 41(2) had been reflected in the statement filed. On that basis, he allowed deduction also. The aforesaid assessment order became final.

5. Thereafter the petitioner-society received a notice dated January 20, 1979, under s. 148 from the respondent. The said notice stated that the respondent had reason to believe that income chargeable to tax for the assessment year 1975-76 had escaped assessment and that he proposed to reassess the income and required the society to deliver a return within 30 days. The said notice is annex. D to the petition. It is the impugned notice. The contention of the petitioner-society is that the respondent had no jurisdiction to issue such a notice as the requisite condition precedent to the issuance of such a notice was absent. The petitioner-society addressed a letter dated February 14, 1979, to the respondent stating that the assessment for the above said year was completed after considering all the relevant facts and, therefore, there was no ground for the said action and further requested the ITO to intimate the society the ground on which the said notice had been issued so that the return could be filed in time. By a subsequent letter, dated February 17, 1979, the petitioner society requested the respondent to consider the original return filed under s. 139 and further stated that if a separate or duplicate return was required, the society may be informed. The society filed a return in time so that it might not drag itself in penalty and interest for late filing of the return. Thereafter, the petitioner society received a letter from the respondent dated March 2, 1979, informing the society about the reasons which prompted the respondent in issuing the impugned notice. These reasons were :

"(1) Profit u/s. 41(2) had not been properly declared or assessed;

(2) Deduction u/s 80P (2) (iii) and (iv) was wrongly claimed and allowed."

6. A copy of the said letter reopening the assessment is at annex. C to the petition.

7. The petitioner-society contends that the impugned notice at annex. D, when read in the light for the reasons for the notice at annex. G, clearly showed that the respondent had no authority or jurisdiction to reopen the assessment proceedings which had become final for the relevant assessment year merely on account of change of opinion on the part of the ITO. The latter had issued the impugned notice and, that, therefore, it was the case of an attempt to revise the assessment without there being any new information and that the ITO was not justified in issuing the said notice. The petitioner has, therefore, approached this court for the issuance of a writ of mandamus or any other appropriate writ, direction or order to quash and set aside the impugned notice at annex. D.

8. The respondent in response to the rule issued by this court has filed his reply and stated that he sought to reopen the assessment under s. 147(b) on account of fresh information available to him from the audit note from the competent audit party and the reasons for reopening the completed assessment have been furnished to the petitioner and that the reopening has been made on the basis of information from the audit in view of the decision of the Supreme Court in the case of R.K. Malhotra, ITO, Group Circle II(1), Ahmedabad Vs. Kasturbhai Lalbhai (Huf), .

9. Mr. J. P. Shah, learned advocate appearing for the petitioner, contended that the reasons supplied by the ITO for reopening the assessment proceedings as per annex. `G", when read in the light of his affidavit-in-reply, para. 2, leave no room for doubt that the ITO was seeking to reopen the assessment proceedings only on account of a change of opinion and that there was no real information in the possession of the ITO within the meaning of s. 147(b) which can justify the impugned notice. Mr. Raval, appearing for the respondent, has placed before us the relevant audit objection for the assessment year 1975-76 which has formed the basis for the impugned action on the part of the revenue. The said audit objections are taken on record in this petition. A look at the said objections for the relevant year shows that the audit has pointed out that for the assessment year 1975-76 the ITO had passed the order under s. 143(3) on March 26, 1976. The respondent has relied upon two audit objections in issuing the impugned notice for the reassessment of the petitioner's income. These are audit-objections Nos. 2 and 3. Consequently, it is necessary to have a look at these two audit objections. The 2nd audit objection states "the ITO has not obtained the sale deed of machineries and godowns sold to the Gujarat State Marketing Society for verification, etc. Necessary action in the matter may be taken". It is very clear from the aforesaid objection that the audit felt that the ITO had considered the question of capital gains without adequate material. That certainly cannot amount to positive information on facts which may have been supplied by the audit to the ITO to enable him to reopen the assessment proceedings. The ITO in his assessment order, Ex. C, page 3, says that he, on that count, was alive to the fact that the rice mill was sold during the relevant year. The ITO had considered the question of capital gains. It is not the case of the ITO now at this stage that any positive information was supplied to him on facts which required

him to reopen the assessment proceedings on that count. It is thus clear that the ITO had on the previous occasion applied his mind to all the pros and cons of the case pertaining to the question of capital gains and profits. If the audit felt in retrospect that the ITO had not made further detailed inquiry about the said matter it cannot ask the ITO to reopen the assessment proceedings only on that ground. It is now well settled by the recent decision of the Supreme Court in the case of *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, that the opinion of an internal audit party of the I. T. Dept. on a point of law cannot be regarded as "information" within the meaning of s. 147(b) of the Act for the purpose of reopening the assessment. It is further stated in the aforesaid decision that although an audit party does not possess the power to pronounce on the law, it nevertheless may draw the attention of the ITO to it. Law is one thing, and its communication another. If the distinction between the source of the law and the communication of the law is carefully maintained, the confusion which often results in applying s. 147(b) may be avoided. While the law may be enacted or laid down only by person or body with authority in that behalf, the knowledge or awareness of the law may be communicated by any one. No authority is required for the purpose. That part alone of the note of the audit party which mentions the law which escaped the notice of the ITO constitutes "information" within the meaning of s. 147(b); the part which embodies the opinion of the audit party in regard to the application or interpretation of the law cannot be taken into account by the ITO. In every case, the ITO 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. The basis of his belief must be the law of which he has now become aware. 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. The true evaluation of the law in its bearing on the assessment must be made directly and solely by the ITO. It was, therefore, held that the opinion of the audit party on a point of law could not be regarded as "information" enabling the ITO to initiate reassessment proceedings under s. 147(b). In the case before the supreme Court the ITO had, when he made the original assessment, considered the provisions of ss. 9 and 10 of the Indian I. T. Act, 1922. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. The supreme Court in the aforesaid decision also had occasion to reconsider its previous decision in the case of (1976) 102 ITR 287 (SC) and had to observe to the effect that the proposition that the case where income had escaped assessment due to "oversight, inadvertence or mistake" of the ITO must fall within s. 34(1)(b) of the Indian I. T. Act, 1922, was stated too widely and travelled further than the statute warranted in so far as it could be said to lay down that if on reapprising the material considered by him during the original assessment, the ITO discovered that he had committed an error in consequence of which income had escaped assessment it was open to him to reopen the assessment. An error

discovered on a reconsideration of the same material (and no more) did not give him that power. It is clear that in the present case the ITO sought to reopen the assessment on the ground that the question regarding capital gain had not been satisfactorily considered by the then ITO. The audit objection also does not give any information as to fresh facts. It was only pointed out by the audit that detailed inquiries were not made by the ITO at the time of the original assessment. That certainly cannot be considered to be any positive information under s. 147(b) so as to clothe the ITO with the requisite jurisdiction. Consequently, the first reason supplied by the ITO cannot be of any avail for the issuance of the impugned notice as the same is obviously untenable and does not constitute the condition precedent to the exercise of the power under s. 147(b) of the Act.

10. Switching over now to the second reason supplied by the ITO at annex. 'G' it is clear that it is mentioned therein that deduction under s. 80P(2)(a)(iii) of Rs. 46,469 and Rs. 30,499 has not been correctly allowed. This also cannot amount to any information within the meaning of s. 147(b) of the Act so as to enable the ITO to reopen the assessment proceedings which have otherwise become final. At page 3 of the audit note it has been stated as under :

"Deduction u/s. 80P(2)(a)(iii) of Rs. 46,469 and Rs. 30,499, respectively, has not been correctly allowed. The section does not permit any fractional deduction on percentage basis. Excess relief thus allowed of Rs. 76,968 may be withdrawn....."

11. This according to the audit is the ground to reopen the assessment proceedings and this has been made the basis by the ITO to reopen the assessment proceedings. As laid down by the Supreme Court in the case of Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, , the opinion of an internal audit party of the I. T. Dept. on a point of law cannot be regarded as "information" within the meaning of s. 147(b) of the Act. In this case the audit objection shows that according to the audit the interpretation of s. 80P(2)(a) (iii) and (iv) by the earlier ITO was not correct. This certainly does not amount to conveying any information about any binding decision of the court or any binding statutory provision which might have been missed by the ITO on the earlier occasions. This is merely the opinion of the audit party on the construction of a section which according to the audit was not properly construed by the ITO on the earlier occasion and retrospect the audit found that the ITO had misconstrued the section. If on the basis of such an opinion the ITO proposes to reopen the assessment proceedings it would clearly amount to a change of opinion by the second ITO on the construction of the section which was based on the same material and which was considered originally by the concerned ITO when he passed the assessment order. Such type of information can obviously not amount to the requisite information within the meaning of s. 147(b) of the Act as finally settled by the supreme Court. In that view of the matter even the second ground cannot give any efficacy to the

impugned notice and it cannot be utilised to sustain the impugned notice. These are the only two grounds for the respondent to reopen the assessment proceedings and as neither of them falls within the purview of "information" as contemplated by s. 147(b), the condition precedent to the exercise of the jurisdiction by the ITO to reopen the proceedings is absent in the present case and where the condition precedent is absent it must be held that the ITO had no jurisdiction to issue the impugned notice.

12. As a result of the aforesaid discussion, it must be held that the impugned notice at annex. D is ultra vires and de hors the provisions of s. 147(b) and is nullity and consequently this petition will succeed. The petitioner will be entitled to a writ of mandamus quashing and seeking aside the impugned notice. The respondent is permanently restrained from proceeding further with the said notice which is declared to be null and void. Rule is accordingly made absolute with costs. Interim relief vacated.