

(1984) 09 MP CK 0020

In the Madhya Pradesh High Court

Case No : Miscellaneous Civil Case No. 41 of 1984

Yeshwant Talkies

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 21-09-1984

Acts Referred:

Income Tax Act, 1961 — Section 147, 263

Citation : (1985) 47 CTR 57 : (1985) ILR (MP) 700 : (1986) 157 ITR 103 :
(1985) 21 TAXMAN 268

Hon'ble Judges : G.L. Oza, Acting C.J.;V.D. Gyani, J

Bench : Division Bench

Advocate : G.M. Chaphekar, for the Appellant; R.C. Mukati, for the Respondent

Judgement

Oza, Actg. C.J.

1. This is a reference made by the Income Tax Appellate Tribunal referring for our answer the following questions of law :

"1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in holding that the reassessment u/s 147(b) of the Income Tax Act, 1961, was valid in law ?

2. Whether, on the facts and in the circumstances of the case, when the original assessment was the subject-matter of an appeal before the Appellate Assistant Commissioner, the action of the Income Tax Officer to initiate action u/s 147(b) subsequently could be legally justified ?"

2. The facts stated in the statement of the case submitted by the Tribunal are that the assessee is a registered firm of two partners deriving income from film exhibition. The relevant assessment year is 1973-74 for which the accounting period ends on October 31, 1972. The assessee had filed return disclosing a total income of Rs. 1,08,870. The Income Tax Officer completed the assessment u/s 143(3) of the Act on a total income of Rs. 1,24,461 by his order dated March 9, 1976. Against this order, the assessee preferred an appeal before the Appellate

Assistant Commissioner who by his order dated April 18, 1978, allowed the appeal.

3. After completion of the original assessment, the Income Tax Officer received certain audit objections that in the original assessment, expenses allowed in respect of gratuity, bonus, performance tax, repairs and maintenance and also in respect of amount written off were not properly allowed. Consequent to the audit objections, the Income Tax Officer made certain enquiries from the assessee and thereafter he discovered reasons for disallowance of some of the items. According to him, items totalling to Rs. 82,843 should have been disallowed. He, therefore, initiated proceedings u/s 147(b) of the Act and issued a notice u/s 148 on February 28, 1978. The Income Tax Officer was satisfied that the allowance on account of bonus, as claimed, was reasonable. He, however, in respect of gratuity, expressed the view that the amount was only a provision and, in view of the provisions of Section 40A(7) of the Act, the claim could not be accepted. He, therefore, disallowed the assessee's claim in respect of gratuity. A part of the expenses on repairs and maintenance of furniture was disallowed on estimate to the extent of Rs. 15,000 considering it to be in the nature of capital. Further, the Income Tax Officer found that in the profit and loss account, a sum of Rs. 25,000 was debited with the narration "Film Rehgir rights written-off". According to him, this amount was not a business loss as the assessee's involvement in the tripartite agreement was not for business requirement but was motivated by non-business considerations. He, therefore, rejected the assessee's claim by making the disallowance. The Income Tax Officer completed the reassessment u/s 147(b) on a total income of Rs. 1,63,357 by his order dated March 15, 1979. The assessee thereafter filed an appeal before the Commissioner of Income Tax (Appeals). One of the contentions advanced before him was that the Income Tax Officer had no jurisdiction to act u/s 147(b) and this could not be sustained in law. It was submitted that the Income Tax Officer, at the time of the original assessment, had considered all the points about the claims of the assessee and all the claims were allowed after necessary enquiries. It was also contended that on the opinion of the audit party, the Income Tax Officer considered the matter afresh, but that did not constitute any information within the meaning of Section 147(b) on the basis of which he could record his satisfaction. Reliance for this submission was placed on *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, . The Commissioner of Income Tax in appeal accepted the contention of the assessee and annulled the reassessment relying upon the aforesaid decision. Against this decision, the Department filed second appeal before the Tribunal. The Tribunal held that the action taken by the Income Tax Officer u/s 147(b) was fully justified. It was found that the Income Tax Officer, after necessary enquiries, felt that he had reason to believe that there was escapement of assessment of the income of the assessee for the year under appeal and on this basis the Tribunal held that the Income Tax Officer had rightly acted u/s 147(b). According to the Tribunal, the Income Tax Officer, after the audit objections, had actually obtained certain details and evidence from the

assessee and came to the conclusion that certain disallowance should have been made in the computation and, therefore, took action u/s 147(b). On merits, the Tribunal held that as it has held that the action u/s 147(b) was proper, it chose to remand the matter to the Commissioner of Income Tax (Appeals) for consideration on merits after affording an opportunity of being heard to both the parties. Thereafter, at the instance of the assessee, the Tribunal made this reference.

4. Learned counsel for the assessee contended that the opinion expressed in the audit objection could not be said to be any information on the basis of which satisfaction could be recorded as contemplated u/s 147(b) of the Act. It was also contended that whatever enquiries were made by the Income Tax Officer on which the Tribunal placed reliance is nothing but reconsideration of the question which was considered earlier and what the Income Tax Officer felt was that the view taken earlier was not right. It was submitted that it was because of this reason that the Income Tax Officer sent a report to the Commissioner inviting him to take action u/s 263, which is apparent from the report submitted by the Income Tax Officer on February 6, 1978. It was then contended that the Income Tax Officer himself felt that as no new information has been collected, action u/s 147(b) could not be taken and that is what he has written in the last paragraph of his report : "Taking into account the facts and circumstances of the case, I am also of the view that action u/s 147/154 cannot be taken." It was also contended that the annexures sent with the report clearly show that no new facts were found, but the Income Tax Officer felt that the view taken earlier was not correct when certain exemptions were granted and, therefore, the order should be revised ; and as there was no new information or fact before the Income Tax Officer, he submitted to the Commissioner that as action could not be taken u/s 147(b), the proper course for the Commissioner would be to act by exercising his powers u/s 263. It was further contended that this change of opinion could not be said to be information on the basis of which action u/s 147(b) could be justified. Learned counsel for the assessee also referred to the order dated February 28, 1978, in the order-sheet made by the Income Tax Officer regarding starting of proceedings u/s 147. In this also, it is apparent that satisfaction is not expressed upon any fact or information collected or brought to the notice of the Income Tax Officer, but reference is made to the report, the last paragraph of which has been quoted above, and further relevant words are : "As directed by the Commissioner of Income Tax, vide his letter dated February 24, 1978, I am satisfied that income has escaped assessment." It is, therefore, clear, according to the learned counsel, that even in this order there is no reference to any information on the basis of which the Income Tax Officer could record his satisfaction. He, therefore, contended that the action of the Income Tax Officer u/s 147(b) could not be justified in law. Reliance was placed on the decision of the Supreme Court in *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, .

5. Learned counsel for the Revenue, on the other hand, contended that the

Income Tax Officer did not act on the audit objections only but thereafter made enquiries from the assessee itself, called its account books, examined them and it is only thereafter that he prepared his report which was sent to the Commissioner. However, learned counsel frankly conceded that in the report, the Income Tax Officer expressed the view that it was not possible to take action u/s 147 and, therefore, he placed the matter before the Commissioner for taking action u/s 263 ; but he contended that ultimately in the order-sheet when the Income Tax Officer passed order starting proceedings u/s 147, he has expressed satisfaction on the facts which form part of his report to the Commissioner and, therefore, it could not be said that there was no information on the basis of which action could have been taken u/s 147(b) of the Act.

6. Having gone through the order passed by the Income Tax Officer starting proceedings u/s 147, which has been quoted above, and the report submitted by him to the Commissioner which, admittedly, is after making all preliminary enquiries, clearly disclose that no new facts were found nor was any new information collected but on a reconsideration of the facts which were before the Income Tax Officer at the time of assessment, he was impressed by the opinion expressed in the audit objection and, therefore, on the basis of those objections, felt that some of the items which have been allowed should not have been allowed. There is nothing in this report which indicates that any new fact was discovered or any new information was collected which was not before the Income Tax Officer when the original assessment was made by him. It was submitted that it was because of this that the Income Tax Officer took the view by saying that action u/s 147 could not be taken and, therefore, the only proper course was for the Commissioner to act u/s 263. What further has been expressed by the Income Tax Officer while starting the proceedings u/s 147 was nothing more than what has been stated in this report, as in the order-sheet itself the Income Tax Officer has observed that "for the reasons discussed in detail in the proposal u/s 263 sent to the Commissioner of Income Tax, vide this office letter dated February 6, 1978". Therefore, the only thing which weighed with him for expressing his satisfaction for taking action u/s 147 was, as has been clearly mentioned by him in the order-sheet dated February 28, 1978, which has been quoted above, was the direction of the Commissioner of Income Tax. It is, therefore, plain that on the material which was collected by the Income Tax Officer which apparently is no information or no new fact found, he could not express his satisfaction to start proceedings u/s 147, but he expressed that satisfaction because of the directions of the Commissioner.

7. Section 147(b) of the Act reads :

" If--.....

(b) notwithstanding that there has been no omission or failure as mentioned in Clause (a) on the part of the assessee, the Income Tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

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 to 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 low a rate ; or
- (c) where such income has been made the subject of excessive relief under this Act or under the Indian Income Tax Act, 1922 (XI 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."

8. The aforesaid section clearly indicates that if the Income Tax Officer in consequence of information in his possession has reason to believe that income chargeable to tax has escaped assessment, then only action u/s 147(b) can be taken. Direction of the Commissioner of Income Tax or the satisfaction of the Commissioner of Income Tax cannot be substituted in place of the satisfaction on the basis of the information of the Income Tax Officer. This question has been considered by their Lordships of the Supreme Court in the decision in *Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi*, and it has been observed (p. 1000) :

"In cases falling u/s 147(b), the expression "information" prescribes one of the conditions upon which a concluded assessment may be reopened under that provision. It is an indispensable ingredient which must exist before the section can be availed of. What does "information" in Section 147(b) connote ? In *Maharaj Kumar Kamal Singh Vs. The Commissioner of Income Tax, Bihar and Orissa*, , this court, construing the corresponding Section 34(l)(b) of the Indian I.T. Act, 1922, held the word "information" to mean not only facts or factual material but to include also information as to the true and correct state of the law and, therefore, information as to relevant judicial decisions. Thereafter, in *Commissioner of Income Tax, Gujarat Vs. A. Raman and Company*, , the court defined the expression "information" in Section 147(b) of the I.T. Act, 1961, as "instruction or knowledge derived from an external source concerning facts or particulars, or as to law, relating to a matter bearing on the assessment". That definition has been reaffirmed in subsequent cases, and with it as the point of departure we shall now proceed.

In so far as the word "information" means instruction or knowledge concerning facts or particulars, there is little difficulty. By its inherent nature, a fact has concrete existence. It influences the determination of an issue by the mere circumstance of its" relevance. It requires no further authority to make it significant. Its quintessential value lies in its definitive vitality.

But when "information" is regarded as meaning instruction or knowledge as to law, the position is more complex. When we speak of "law", we ordinarily speak of norms or guiding principles having legal effect and legal consequences. To possess legal significance for that purpose, it must be enacted or declared by competent authority. The legal sanction vivifying it imparts to it its force and validity and binding nature. Law may be statutory law or, what is popularly described as, judge-made law. In the former case, it proceeds from an enactment having its source in competent legislative authority. Judge-made law emanates from a declaration or exposition of the content of a legal principle or the interpretation of a statute, and may in particular cases extend to a definition of the status of a party or the legal relationship between parties, the declaration being rendered by a competent judicial or quasi-judicial authority empowered to decide questions of law between contending parties. The declaration or exposition is ordinarily set forth in the judgment of a court or the order of a tribunal. Such declaration or exposition in itself bears the character of law. In every case, therefore, to be law, it must be a creation by a formal source, either legislative or judicial authority. A statement by a person or body not competent to create or define the law cannot be regarded as law. The suggested interpretation of enacted legislation and the elaboration of legal principles in text books and journals do not enjoy the status of law. They are merely opinions and, at best, evidence in regard to the state of the law and in themselves possess no binding effect as law. The forensic submissions of professional lawyers and the seminal activities of legal academics enjoy no higher status. Perhaps the only exception is provided by the writings of publicists in international law, for, in the law of nations, the distinction between formal and material sources is difficult to maintain.

In that view, therefore, when Section 147(b) of the Income Tax Act is read as referring to "information" as to law, what is contemplated is information as to the law created by a formal source. It is law, we must remember, which, because it issues from a competent legislature or a competent judicial or quasi-judicial authority, influences the course of the assessment and decides any one or more of those matters which determine the assessee's tax liability."

9. The question of audit objection was also considered in the same decision and exactly similar situation has been considered by their Lordships and it was observed (p. 1004 of 119 ITR) :

"Now, in the case before us, the Income Tax Officer had, when he made the original assessment, considered the provisions of Sections 9 and 10. 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 revenue contends that it is open to him to do so, and on that basis to reopen the assessment u/s 147(b). Reliance is placed on (1976) 102 ITR 287 (SC) , where a Bench of two learned judges of this court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the Income Tax Officer must fall within Section 34(1)(b) of the Indian Income Tax Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the Income Tax Officer discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this court in Maharaj Kumar Kamal Singh Vs. The Commissioner of Income Tax, Bihar and Orissa, , Commissioner of Income Tax, Gujarat Vs. A. Raman and Company, and Bankipur Club Ltd., Patna Vs. The Commissioner of Income Tax , Bihar and Orissa, Patna, and we do not believe that the law has since taken a different course. Any observations in (1976) 102 ITR 287 (SC) suggesting the contrary do not, we say with respect, lay down the correct law."

10. In this view of the matter, therefore, it is clear that the view taken by the Tribunal could not be said to be the correct view of law.

11. For the reasons stated above, our answer to question No. 1 is in the negative that on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was not justified in holding that the reassessment u/s 147(b) of the Income Tax Act, 1961, was valid in law. In view of our answer to question No. 1, it is not necessary to answer question No. 2. The reference is answered accordingly. Parties are directed to bear their own costs.