
K.S. Suresh Vs Deputy Commissioner of Income Tax

**Writ Petition No"s. 10607, 10608, 10628, 10629, 10630 and 10631 of 2005 and W.P.
M.P. No"s. 11513, 11514 and 11529-32 of 2005**

Court: Madras High Court

Date of Decision: March 31, 2005

Acts Referred:

Income Tax Act, 1961 – Section 132(5), 139, 142(1), 143(3), 147

Citation: (2006) 200 CTR 392

Hon'ble Judges: P.D. Dinakaran, J

Bench: Single Bench

Advocate: Janarthana Raja, for the Appellant; Pushya Sitaraman, for the Respondent

Final Decision: Allowed

Judgement

P.D. Dinakaran, J.

Writ Petitions Nos. 10608, 10629 and 10630 of 2005 are filed challenging the notices even dated November 18,

2004, issued u/s 148 of the Income Tax Act, 1961, (hereinafter referred to as "the Act") proposing to reassess the income of the petitioners for the

assessment year 2000-01 on the ground that the respondent in each of the writ petitions has reason to believe that the petitioners income

chargeable to tax for the assessment year 2000-01 has escaped assessment within the meaning of Section 147 of the Act.

2. Writ Petitions Nos. 10607, 10628 and 10631 of 2005 are filed challenging the proceedings even dated November 25, 2004, served on the

petitioners passing an order of provisional attachment u/s 281B of the Act pending proceedings of the reassessment notices even dated November

18, 2004, initiated u/s 148 of the Act, which are challenged in Writ Petition Nos. 10608, 10629 and 10630 of 2005, referred to the above.

3. While Writ Petitions Nos. 10608 and 10607 of 2005 are filed by one K. S. Suresh, W. P. Nos. 10629 and 10628 of 2005 are filed by one K.

S. Ganesan and W. P. Nos. 10631 and 10630 of 2005 are filed by one K. S. Aghoram.

4. Since the issue involved in Writ Petitions Nos. 10608, 10629 and 10630 of 2005 challenging the notices even dated November 18, 2004, u/s

148 of the Act and the issue raised in Writ Petitions Nos. 10607, 10628 and 10631 of 2005, challenging the consequential proceedings of

provisional attachment even dated November 25, 2004, issued u/s 281B of the Act are the same and identical, arising under similar facts and

circumstances of the case, the writ petitions are heard and disposed of jointly at the admission stage itself, of course after hearing the submissions

of Mr. Janarthana Raja, learned counsel for the petitioners, as well as Mrs. Pushya Sitaraman, who takes notice on behalf of the respondent.

5. Since the petitioners have chosen to challenge the notices even dated November 18, 2004, issued u/s 148 of the Act and the consequential

proceedings of provisional attachment even dated November 25, 2005, issued u/s 281B of the Act, I am of the considered opinion that it may not

be proper for this court to go into the merits of the case at this stage.

6. However, Mr. Janarthana Raja, learned counsel appearing for the petitioners, while challenging the impugned notices even dated November 18,

2004, issued u/s 148 of the Act and the consequential proceedings of provisional attachment even dated November 25, 2004, issued u/s 281B of

the Act restricts his submissions only with regard to the scope and jurisdiction of the respondent even to initiate and issue notices u/s 148 of the

Act proposing to reassess the income of the petitioners on the ground that the respondent has reason to believe that the petitioners income

chargeable to tax for the assessment year 2000-01 has escaped assessment within the meaning of Section 147 of the Act.

7. The core contention of Mr. Janarthana Raja, learned counsel for the petitioners, is that the impugned notices even dated November 18, 2004,

issued u/s 148 of the Act suffer from ""reason to believe"", which is a condition precedent u/s 148 read with Section 147 of the Act, and therefore,

the respondent is ceased with the jurisdiction to proceed further in the matter in issuing consequential proceedings of provisional attachment dated

November 25, 2004, issued u/s 281B of the Act, and hence, the impugned proceedings are liable to be quashed.

8. Learned counsel for the petitioner also invited my attention to Sections 147, 148 and 281B of the Act, which read as follows:

Section 147. Income escaping assessment. -- If the Assessing Officer, has reason to believe that any 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 and also any other

income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this

Section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned

(hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under Sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action

shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax

has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return u/s 139 or in response to a

notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment for

that assessment year.

Explanation 1. -- 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 the foregoing proviso.

Explanation 2. -- 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 no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of

which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to Income Tax;

(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;

(c) where an assessment has been made, but --

(i) income chargeable to tax has been underassessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

(emphasis supplied)

Section 148. Issue of notice where income has escaped assessment. -- (1) Before making the assessment, reassessment or recomputation u/s 147,

the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of

his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the

relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be

prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished u/s 139.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so.

(emphasis supplied)

Section 281B. Provisional attachment to protect revenue in certain cases. -- (1) Where, during the pendency of any proceeding for the assessment

of any income or for the assessment or reassessment of any income which has escaped assessment, the Assessing Officer is of the opinion that for

the purpose of protecting the interest of the revenue it is necessary so to do, he may, with the previous approval of the Chief Commissioner,

Commissioner, Director-General or Director, by order in writing, attach provisionally any property belonging to the assessee in the manner

provided in the Second Schedule.

Explanation. -- For the purposes of this sub-section, proceedings under Sub-section (5) of Section 132 shall be deemed to be proceedings for the

assessment of any income or for the assessment or reassessment of any income which has escaped assessment.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under

Sub-section (1):

Provided that the Chief Commissioner, Commissioner, Director-General or Director may, for reasons to be recorded in writing, extend the

aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two

years:

Provided further that where an application for settlement u/s 245C is made, the period commencing from the date on which such application is

made and ending with the date on which an order under Sub-section (1) of Section 245D is made shall be excluded from the period specified in

the preceding proviso.

(emphasis supplied)

9. According to Mr. Janarthana Raja, learned counsel for the petitioner, immediately after the service of the impugned notices even dated

November 18, 2004, the representatives of the respective petitioners, by their letters even dated November 29, 2004, requested the respondent

to furnish respective copies of the recorded reasons for reopening of the assessment under Sections 147 and 148 of the Act, as contemplated by

the decision of the apex court in GKN Driveshafts (India) Ltd. v. ITO, in [2003] 259 ITR 19.

10. On receipt of the said letter dated November 29, 2004, the respondent by letter dated December 7, 2004, furnished the reasons for reopening

the assessment u/s 147 of the Act. In response to the reasons furnished by the respondent for reopening the assessment referred to above, the

petitioners submitted their objections on December 27, 2004, and requested the respondent as follows:

14.1 The learned Assessing Officer could not have had reason to believe that income liable to tax had escaped assessment and so the

reassessment proceedings are not warranted or justified and so it is prayed that the proceeding be dropped under intimation to the asses-see for

which act of justice the assessee shall ever remain grateful.

14.2 If, however, the learned Assessing Officer decides to proceed further in the matter, it is prayed that as laid down by the apex court in GKN

Driveshafts (India) Ltd. [2003] 259 ITR 19 the learned Assessing Officer shall meet all the objections raised against the assumption of jurisdiction

u/s 147 with a speaking order.

11. In continuation of the said representation dated December 27, 2004, the respective petitioners made an additional objection on January 10,

2005, with a request to consider the said additional objection also before proceeding further in the matter as per the ratio laid down by the apex

court in GKN Driveshafts (India) Ltd. v. ITO, in [2003] 259 ITR 19.

12. After the receipt of the said additional objections even dated January 10, 2005, the respondent by his proceedings even dated February 10,

2005, furnished the calculation of demand for provisional attachment issued in the proceedings even dated November 25, 2004, made u/s 281B of

the Act, which is challenged in W. P. Nos. 10607, 10628 and 10631 of 2005.

13. Mr. Janarthana Raja, learned counsel for the petitioner, specifically invited my attention to paras. 2.2 and 3 of the proceedings even dated

February 10, 2005, which read as follows:

2.2 Further, being fit case for levy of penalty u/s 271(1)(c), if minimum amount of penalty is levied, it will work out to Rs. 5.8 crores.

3. You may give your submissions, if any, on or before February 18, 2005, to consider your objection(s) in reopening the case u/s 147 of the

Income Tax Act, 1961.

14. It is pointed out that even though the respondent in paragraph 3 of the proceedings even dated February 10, 2005, has given opportunity to

the petitioners to submit their objections on or before February 18, 2005, against the proposed reopening of the assessment u/s 147 of the Act,

the respondent has come to the conclusion that it is a fit case to levy penalty u/s 271(1)(c) of the Act in paragraph 2.2 of the said proceedings even

dated February 10, 2005, which apparently proves that the respondent has predetermined the issue and proposed to levy penalty under Sections

271(1)(c) of the Act.

15. Learned counsel for the petitioner drew my attention to the proceedings even dated February 10, 2005, and the objections filed by the

respective petitioners even dated February 18, 2005, in which the petitioners relied on the following decisions, with regard to the power sought to

be exercised under Sections 147, 148, 271(1)(c) and 281B of the Act:

(a) Tin Box Company Vs. Commissioner of Income Tax, ;

(b) Union Carbide Corporation, etc., etc. Vs. Union of India, etc. etc., ;

(c) S.L. Kapoor Vs. Jagmohan and Others, ;

(d) A.K. Kraipak and Others Vs. Union of India (UOI) and Others, ;

(e) R.B. Shreeram Durga Prasad and Fatechand Nursing Das Vs. Settlement Commission (It and Wt) and Another, ;

- (f) Government of India and another Vs. Maxim A. Lobo and another, ;
- (g) Gargi Din Jwala Prasad Vs. Commissioner of Income Tax, ;
- (h) Triambak Pati Tripathi v. Board of High School and Intermediate Education, [1973] AIR 1973 All 1;
- (i) M. Chockalingam and Another Vs. Commissioner of Income Tax, Madras and Another, ;
- (j) Hira Lal Ram Dayal Vs. Commissioner of Income Tax, ;
- (k) C. Kamala Vs. Commissioner of Income Tax, Bangalore, ;
- (l) Commissioner of Income Tax Vs. Vithalbhai P. Patel, ;
- (m) Turner Morrison and Co. Ltd. Vs. Shalimar Tar Products (1935) Ltd. and Others, ;
- (n) B.K. Holdings (P.) Ltd. Vs. Prem Chand Jute Mills and Others, ; and
- (o) GKN Driveshafts (India) Ltd. v. ITO [2003] 259 ITR 19.

16. Even after the receipt of the objection filed by the respective petitioners on February 18, 2005, in response to the notices even dated February

10, 2005, the respondent by his proceedings even dated March 21, 2005, concluded that the assessment proceedings for the assessment year

2000-01 have been validly reopened u/s 147 of the Act and decided to proceed further, which necessitated the petitioners to prefer the above writ

petitions.

17. Mr. Janarthana Raja, learned counsel for the petitioners, specifically contends that in the final order dated March 21, 2005, the respondent has

not considered the objections filed by the petitioners on January 10, 2005, February 18, 2005, and the non-consideration of the objections made

by the petitioners vitiates the proceedings u/s 147 of the Act as arbitrary and unreasonable, as the proceedings dated March 21, 2005, are not in

strict compliance with the well settled principles laid down by the apex court and several decisions of the Division Benches of other High Courts,

referred to above and consequently, the entire proceedings initiated pursuant to the notices even dated November 18, 2004, issued u/s 148 of the

Act and consequential proceedings of provisional attachment even dated November 25, 2004 issued u/s 281B of the Act are vitiated.

18. Mrs. Pushya Sitaraman, learned counsel taking notice on behalf of the respondent, fairly concedes that the objections of the petitioners made

on December 27, 2004, February 10, 2005 and February 15, 2005, were not considered by the respondent, while concluding that the assessment

proceedings for the assessment year 2000-01 have been validly reopened u/s 147 of the Act by proceedings dated March 21, 2005.

19. Learned counsel for the respondent also concedes that the respondent has committed an error apparent on the face of the record by

predetermining the issue, while holding that it is a fit case for levy of penalty u/s 271(1)(c) of the Act, even while giving opportunity to the

petitioners in his proceedings even dated February 10, 2005, to submit their objections on or before February 18, 2005, with regard to reopening

of the assessment for the assessment year 2000-01 and before deciding the matter on the merits.

20. However, learned counsel for the respondent seeks liberty to issue fresh notices to the petitioners and to proceed in accordance with law, if it

is so proposed by the respondent.

21. A Division Bench of this court in Commissioner of Income Tax Vs. Smt. Sulochana Legal rep. of Late P. Sadasiva Mudaliar, , to which I am a

party, following the ratio laid down by the apex court in (i) Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, ; (ii) M/s. Phool

Chand Bajrang Lal and another Vs. Income Tax Officer and another, ; and (iii) Raymond Woollen Mills Ltd. Vs. Income Tax Officer and Others,

, while interpreting the powers conferred under Sections 147 and 148 of the Act to the Income Tax authorities for reopening the assessment held

that the reasons to believe are the live link or close nexus between material coming to the notice of the Income Tax Officer and formation of

opinion, and such material should not be vague but definite, specific, relevant and reliable, and decided as under (page 531):

It is true, in Raymond Woollen Mills Ltd. Vs. Income Tax Officer and Others, , the apex court, while dealing with the power of the Revenue u/s

147 of the Income Tax Act for reassessing the case held that sufficiency of the material relied on by the Revenue is not relevant, inasmuch as, the

same cannot be a criterion for the purpose of reopening the assessment u/s 147 of the Income Tax Act. But, the apex court in the very same case

also held that for the purpose of reopening the assessment, what is required to be seen is whether there were prima facie materials on the basis of

which the Department could reopen the case even though the sufficiency of the material is not a thing to be considered at that stage.

It is trite law that the subsequent information based on which the reassessment was proposed should be definite, specific, relevant and reliable and

then only such material would constitute to satisfy the test of reason to believe, because such reason to believe should not be construed as a reason

to suspect. In other words, what is relevant is whether the material has got any rational connection or live link for the purpose of reason to believe.

To put otherwise, if the information which forms the basis for the reason to believe for the Department to reopen the assessment are materials

which lacks specific, relevant and reliable criteria such materials are liable to be rejected only on the ground that they may be reason to suspect,

but not reason to believe, vide M/s. Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another, .

The above proposition is also supported by another decision of the apex court reported in Income tax Officer, Calcutta and Others Vs. Lakhmani

Mewal Das, , wherein it was held as follows (pages 445, 448):

"The existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. The expression ""reason to

believe"" does not mean a purely subjective satisfaction on the part of the Income Tax Officer. The reason must be held in good faith. It cannot be

merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief have a rational connection with or a

relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section.

As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief.

Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer

and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his

failure to disclose fully and truly all material facts....

The powers of the Income Tax Officer to reopen assessment, though wide, are not plenary. The words of the statute are ""reason to believe"" and

not ""reason to suspect"". The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the

reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is

that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the Income Tax

authorities after the assessment has been completed."

It is, therefore, essential that before such action of reopening the assessment is taken, requirement of law such as the live link or close nexus

between the material coming to the notice of the Income Tax Officer and the formation of his belief that there has been escapement of the income

of the assessee should be satisfied. Otherwise, the power conferred u/s 147 of the Income Tax Act would amount to arbitrary and unreasonable

exercise. Hence, while making it clear that the authorities do have the power to reopen the assessment u/s 147, the materials relied on for such

purpose should not be vague but should be definite, specific, relevant and reliable.

22. Under the facts and circumstances of the case and following the well settled proposition of law laid down in the decisions referred supra, I

have no option except to quash the notices even dated November 18, 2004, issued u/s 148 of the Act as well as consequential proceedings of

provisional attachment dated November 25, 2004, issued u/s 281B of the Act, of course, without prejudice to the right of the respondent to issue

fresh notices for reopening the assessment, if it is so advised, and giving liberty to the petitioners to submit their objections to the same, which shall

be considered by the respondent strictly in accordance with law and as per the ratio laid by the apex court and the Division Benches of this court

and other High Courts, referred to above.

23. The writ petitions are allowed. No costs. Consequently, W. P. M. P. Nos. 11513, 11514, 11529, 11530, 11531 and 11532 of 2005 are

closed.