

## M.Z. Khan Vs Commissioner of Income Tax

**Court:** Allahabad High Court

**Date of Decision:** Nov. 30, 1999

**Acts Referred:** Income Tax Act, 1961 " Section 147

**Citation:** (2000) 245 ITR 693

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

**Bench:** Division Bench

**Final Decision:** Allowed

### Judgement

M.C. Agarwal, J.

These are references by the Income Tax Appellate Tribunal, Allahabad, made u/s 256(1) of the Income Tax Act, 1961.

2. In Income Tax Reference No. 100 of 1982, the Tribunal has referred the following questions stated to be of law and to arise out of its order

dated October 31, 1980, passed in ITA No. 1532 (Alld.) of 1975-76 for the assessment year 1964-65 :

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 Income

Tax Officer was justified in initiating reassessment proceedings u/s 147(a) of the Income Tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in restoring the matter to the

Appellate Assistant Commissioner to decide on merits the question of includibility of the remuneration payable to the assessee for the assessment

year 1964-65 as a trustee of the Sherwani Charitable Trust ?

3. In Income Tax Reference No. 285 of 1981, the following questions arising out of the Tribunal's order dated December 12, 1980, in ITA Nos.

1864, 1865 and 1866 of Allahabad of 1979 for the assessment years 1965-66, 1966-67 and 1968-69 have been referred :

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 Income

Tax Officer was justified in initiating reassessment proceedings u/s 147(a) of the Income Tax Act, 1961 ?

2. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in restoring the matter to the

Appellate Assistant Commissioner to decide on merits the question of includibility of the remuneration payable to the assessee for the assessment

years 1965-66, 1966-67 and 1968-69 as a trustee of the Sherwani Charitable Trust ?

4. Thus, the controversy in both the references is similar. The facts of the case are that the assessee was a trustee of a trust named "Sherwani

Charitable Trust". Under a clause of the trust deed, one-third of the income of the trust was to be paid to the trustees as their remuneration. The

trustees had, however, by a resolution given up their right to receive the remuneration and had resolved that that part of the income of the trust be

also spent on the charitable objects of the trust. The resolution was adopted several years prior to the accounting years relevant to the assessment

years in question and the question of the taxability of remuneration had been agitated in some earlier years and it was held that the same was not

taxable. Subsequently, the Assessing Officer of the present assessee received a communication dated March 28, 1973, from the Income Tax

Officer, "A" Ward, Allahabad, that it had been held in the case of another trustee that such remuneration was taxable. On receipt of the said

information, the Assessing Officer proposed to reopen the assessee's assessments u/s 147(a) of the Income Tax Act, 1961, and issued notices u/s

148 of the Act after obtaining sanction from the Commissioner of Income Tax. In pursuance of the notices u/s 148, the assessee returned the

income that had originally been assessed and contended that there was no income by way of remuneration from the aforesaid trust. The Income

Tax Officer did not discuss the details for his reasons to assume that there was an income by way of remuneration. In the assessment order for the

assessment year 1964-65, he followed his order for the assessment year 1972-73 and in the other assessment order, he followed his order for the

assessment year 1964-65. The matter was carried in appeal to the Appellate Assistant Commissioner who held that there was no failure on the

part of the assessee to disclose the material facts which were already known to the Department and, therefore, the assessment could not be

reopened u/s 147(a) and if at all a reassessment was necessary, it could be done only u/s 147(b) for which the limitation had expired. The

Appellate Assistant Commissioner, therefore, held that the assessments were without jurisdiction. The Assessing Officer took the matter in appeal

to the Tribunal which has reversed the appellate order by observing as under in its order dated October 31, 1980, for the assessment year 1964-

65 :

After carefully examining the facts of the case, we do feel that the learned Appellate Assistant Commissioner has erred in holding that the

assessee's case stood covered by the provisions of Clause (b) of Section 147. Admittedly, the assessee is one of the trustees of the Shervani

Charitable Trust and as per the original deed, remuneration was payable to him and as such it was the assessee's duty to place primary facts

necessary for the determination of this question in his return or in the course of his assessment proceedings. By not placing it on record, he clearly

erred and it is of no consequence in this connection that the reopening was done by the Income Tax Officer on receipt of information from another

Income Tax Officer. So long as, it can be shown that the original return filed by the assessee did not contain information with regard to

remuneration derivable by the assessee from Shervani Charitable Trust, the failure would be of the assessee and reopening u/s 147(a) alone would

be possible. We, "therefore, reverse the order of the learned Appellate Assistant Commissioner and restore the case back to him to determine the

includibility or otherwise of the income from the aforesaid source in the assessee's total income on merits.

5. For the other years, the Tribunal followed its order for the assessment year 1964-65.

6. As is evident from the questions, reproduced above, the controversy is whether the assessments were rightly reopened u/s 147(a) of the Act

which provides that if the Assessing Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a

return u/s 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary for the assessment for that

year, income chargeable to tax had escaped assessment for that year, he may subject to the provisions of Section 148 to 153, assess or reassess

such income or recompute the loss ... In this case the assessee had admittedly filed his returns of income for the four years and the reopening was

based on the alleged failure of the assessee to disclose fully and truly all material facts necessary for his assessment for the respective years. The

material facts were, (1) that the assessee was a trustee of Shervani Charitable Trust, (2) that under one of the clauses of the trust deed, a part of

the income of the trust was to be distributed to the trustees as remuneration, (3) by a resolution passed several years before, the trustees had given

up their right to remuneration and it was provided that the part of the income of the trust would also be spent for charitable purposes, and (4)

whether any remuneration was actually received by the assessee.

7. The contention of learned counsel for the assessee was that all the facts were on the assessment records of the assessee for the earlier years and

were in the knowledge of the Revenue and it had already been held in several assessment orders that the assessee did not derive any income by

way of remuneration from the said trust and no such income was taxable in the hands of the assessee and, therefore, there was no obligation on the

assessee to disclose these facts over and over again in the various following years. We have reproduced the relevant portion of the Tribunal's

order to show that although the Appellate Assistant Commissioner had mentioned that the material facts were already on record and had been

considered in the assessment for the assessment years 1957-58, 1958-59 and 1959-60, the Tribunal has failed to demonstrate how the omission

of the assessee to make any mention of the relevant facts in the returns of income for the years under consideration amounted to a failure on the

part of the assessee to disclose fully and truly all material facts. The Tribunal has given a go-by to the resolution of the trustees by which the right to

remuneration was given up and to the fact that no remuneration was actually received and in earlier years, it had been held that no assumed

remuneration was taxable in the hands of the assessee.

8. In Jagdish Prasad v. CIT [1976] 104 ITR 214 , a Division Bench of this court held that where the Income Tax Officer had become aware of all

the material facts, failure on his part to take necessary action could not result in escapement that could be attributed to any default on the part of

the assessee and, therefore, initiation of action u/s 34(1)(a) of the 1922 Act was not permissible. Reliance was placed on a judgment of the

Supreme Court in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , in which the Supreme Court

had held that once all the primary facts were before the assessing"" authority, it was for him to decide what inferences of facts could reasonably be

drawn and what legal inferences had ultimately to be drawn. It was not for anybody else--far less the assessee--to tell the assessing authority what

inferences, whether of facts or law, should be drawn.

9. In Gemini Leather Stores Vs. The Income Tax Officer, "B" Ward, Agra and Others, , though the assessee did not disclose certain transactions

evidenced by certain drafts, the officer himself discovered the facts relating thereto but by oversight did not bring the amounts represented by

certain bank drafts to tax as the income of the appellant. Subsequently, the Income Tax Officer initiated action u/s 147(a) of the Income Tax Act,

1961, with a view to assess the amounts as the appellant's income from undisclosed sources. The Supreme Court held that in such circumstances

action u/s 147(a) could not be taken, In our view, therefore, the question of taxability of the assumed amount of remuneration having been thrashed

out in the earlier assessment years and there being no change in the circumstances, it was not necessary for the assessee to disclose any fact in the

assessment proceedings for the years under consideration and it could not be said that the assessee failed to disclose fully and truly any material

fact necessary for the assessment of the disputed income. Therefore, the reopening of the assessment by recourse to Section 147(a) of the Income

Tax Act, 1961, was not permissible and the Appellate Assistant Commissioner had rightly held that the action taken by the Assessing Officer was

without jurisdiction.

10. For the above reasons, we answer the first question in the two references in the negative, i.e., in favour of the assessee and against the

Commissioner, and hold that the Income Tax Appellate Tribunal was not justified in holding that the Income Tax Officer was justified in initiating

reassessment proceedings u/s 147(a) of the Income Tax Act, 1961.

11. Question No. 2 is consequential and as a result of the answer to question No. 1, this question has also to be answered in the negative and we

answer the same accordingly holding that the Income Tax Appellate Tribunal was not justified in restoring the matter to the Appellate Assistant

Commissioner to decide on merits the question of includibility of the remuneration from Shervani Charitable Trust.

12. The references are answered accordingly.

13. An authenticated copy of this judgment be transmitted to the Appellate Tribunal for further action in accordance with law.