(1992) 08 AP CK 0007

Andhra Pradesh High Court

Case No: Writ Petition No''s. 5870, 5886, 5897, 5944, 5981 and 5994 of 1987

Phoolchand Lalith Kumar and Co.		APPELLANT
	Vs	
Income Tax Officer		RESPONDENT

Date of Decision: Aug. 30, 1992

Acts Referred:

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1922 - Section 22, 34(1)
- Income Tax Act, 1961 - Section 139, 14, 143(1), 147, 147(a)

Citation: (1992) 65 TAXMAN 162

Hon'ble Judges: Syed Shah Mohammed Quadri, J; Lakshmana Rao, J

Bench: Division Bench

Advocate: Y. Ratnakar, for the Appellant; S.R. Ashok, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

Syed Shah Mohammed Quadri, J.
The short question that arises in these writ petitions is whether, notices issued to the petitioner u/s 148 of the income tax Act, 1961 (''the Act'') are valid. The petitioner is a partnership firm. It is carrying on business as commission agent in the market at Guntur. It also purchases and sells other agricultural produce. It is an assessee under the Act. The assessments of the petitioner for the assessment years 1980-81, 1981-82, 1982-83, 1983-84, 1984-85 and 1985-86 were completed. The respondent issued notices u/s 148 to reopen the assessment u/s 147(a) of the Act for the above years on the ground that the income chargeable to tax escaped assessment. In response to the notices the petitioner requested the respondent to furnish reasons for reopening the assessment. The respondent communicated the reasons by his letter dated 27-3-1987. Then the petitioner filed returns under protest and challenged the validity of the said notices by praying for a writ of certiorari to call for

the records relating to the said notices and quash them. The impugned notices u/s 148 for reopening the assessments for the assessment years 1980-81 to 1985-86 are questioned in writ petition Nos. 5981 of 1987, 5944 of 1987, 5994 of 1987, 5870 of 1987, 5887 of 1987 and 5886 of 1987, respectively.

2. The respondent filed a counter-affidavit and an additional counter-affidavit. It is stated that the petitioner''s main source of income is commission from selling of chillis. It also carries on the business of purchasing and selling other agricultural produce. In the course of assessment proceedings for the year 1986-87, it is stated, it came to light that certain income chargeable to tax has escaped assessment, therefore, notices u/s 148 were issued. The petitioner collected amounts under the head ''Sub sadaran'' while effecting sales to the customers, during the previous year relevant to the assessment years in question. Therefore, the income escaped assessment within the meaning of section 147(a) and the respondent had reason to believe that by reason of omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for assessment in respect of assessment years in question, the income chargeable to tax has escaped assessment, therefore, notices u/s 148 were issued. It is further stated that though the respondent was not bound to communicate the reasons, at the request of the petitioner the reasons were also furnished. It is further stated that the collections were made compulsorily, therefore, the amounts cannot be said to have been collected for charity and that the petitioner did not furnish the particulars as to how the amounts, thus, collected were spent. The amounts collected as ''Sub sadaran'', it is stated, are trading receipts of the petitioner and merely because the same are not shown in the account books as trading receipts the assessing authority is not precluded from treating them as trading receipts. It is added that the Act provides a complete machinery to challenge the order of assessment, therefore, the writ petition is not maintainable. The amounts collected as ''Sub sadaran'' were assessed to tax in the year 1986-87 by the respondent and the petitioner carried the matter in appeal before the Commissioner, Vijayawada, who, by his order dated 12-4-1988 upheld the assessment. It is added that the amounts received as ''Sub sadaran'' may not fail under the customary collection. The petitioner, it is stated, filed returns in response to the notice issued u/s 148. The other assessees are including the said collections in the trading receipts and they are accordingly taxed. The respondent was not informed as to how those amounts were being spent. It is denied that a practice of collecting ''Sub sadaran'' existed in the business communities for the last 30 years. The collection of the amounts and the details of the charities on which they were spent were not disclosed in the returns. The petitioner did not furnish the primary and material particulars relating to the said item, so the respondent could not enquire into the truth, tenability or otherwise of the claim of the petitioner. It is further stated that the assessments for the assessment years 1981-82 and 1982-83 were completed u/s 143(1) of the Act, and in respect of the assessment years 1980-81, 1983-84, 1984-85 and 1985-86 the petitioner did not disclose the primary

and material facts relating to the claim either in the return of income or in the course of the assessment proceedings, therefore, the assessing authority could not go into the justifiability of the claim, as such, the notices issued u/s 148 are legal. It is added that the notices u/s 148 have been issued on account of gathering of information subsequent to the assessment. For this reason also the notices are valid. For the assessment years 1984-85 and 1985-86, apart from non-disclosure of particulars relating to ''Sub sadaran'', the petitioner claimed deduction of market cess and sales tax without paying the amounts under those, heads, therefore, there has been violation of section 43B of the Act, and, hence, for the said years notices u/s 148 are legal and valid. Furnishing credit balances in ''Sub sadaran'' account on the liabilities side of balance sheet does not amount to discharge of obligation cast on the assessee of furnishing primary and material particulars. It is stated that the impugned notices can be sustained alternatively u/s 147(b).

3. Shri Y. Ratnakar, the learned counsel for the petitioner, contends that the amounts collected under the head "Sub sadaran'' are meant for charity and it is customary in the business community to collect the amounts for that purpose under different nomenclatures and that the same do not fall under the head Trading receipt''. He further contends that the ground for reopening of assessment u/s 147(a) does not exist, therefore, the notices are without jurisdiction and are liable to be quashed.

4. Shri S.R. Ashok, the learned standing counsel for income tax, on the other hand, contends that having regard to the compulsory nature of the collection under the head ''Sub sadaran'' and in the absence of particulars of expenditure of the said amount, the same cannot but be treated as trading receipt in the hands of the petitioner, therefore, it is liable to be taxed. The requirements of section 147(a) have been complied with, and issuing of impugned notices is in accordance with law and cannot be said to be without jurisdiction. In any event, submits the learned counsel, the notices can be sustained under sub-section (b) of section 147. Insofar as the assessment years 1984-85 and 1985-86 are concerned, there are additional reasons, viz., deductions in regard to the market cess and sales tax which are not allowable as the amounts were not actually paid by the petitioner to the concerned authority. For this additional reason also the notices issued for the said year are sustainable.

5. Both the learned counsel for the petitioner as well as the learned standing counsel for the income tax after arguing at length, the question as to whether the amounts received as ''Sub sadaran'' constitute trading receipt, have conceded, in our view rightly, that question does not directly fall for consideration in the instant case. We, therefore, do not propose to express any opinion on that point.

6. At the outset we may observe that in view of the fact that the reasons given by the respondent for reopening the assessments relate to the grounds u/s 147(a), we are not Inclined to entertain the contention of the learned standing counsel that the impugned notices can be sustained u/s 147(b).

7. Now the only question which remains to be considered is, whether the impugned notices are valid u/s 147(a). It would be appropriate to read section 147(a) here:

147. Income escaping assessment. - If--

(a) the income tax 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 income tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) ****

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(11 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 ITO will not necessarily amount to disclosure within the meaning of this Section.

Section 34(1) of the Indian income tax Act, 1922 (''the 1922 Act'') which is analogous to section 147, fell for consideration of their Lordships of the Supreme Court in Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, In that case for the assessment years in question the assessee was not assessed to tax on the profits realised by the company by sale of shares. The ITO initiated reassessment proceedings u/s 14 of the Act, for submitting fresh returns. The assessee submitted the returns, but filed a writ petition under article 226 of the Constitution praying for a direction to the ITO not to proceed to assess on the basis of the notice issued u/s 34. The reason given by the ITO for reopening the assessment was that during the course of the assessment proceedings for the subsequent year the profits earned by sale of shares were included in the total assessable income. It was then discovered that the company was carrying on the business of selling shares, therefore, he asserted that he had reason to believe that

by reason of omission or failure of the company to disclose fully and truly all the material facts necessary for the assessment, the income chargeable to income tax had been under-assessed. The learned single Judge of the Calcutta High Court held that the requirements of section 34(1) were not satisfied, and quashed the notices as being without jurisdiction. On appeal, Division Bench of the Calcutta High Court allowed the appeal and dismissed the application of the assessee. The company preferred an appeal to the Supreme Court on the basis of the certificate granted by the High Court. It was held by majority that to confer jurisdiction u/s 34 to issue notice in respect of assessment already made, two conditions had to be satisfied the first was that the ITO must have reason to believe that income, profits or gains chargeable to income tax had been under-assessed; and the second was that he must have reason to believe that such underassessment had occurred by reason of either (a) omission or failure on the part of an assessee to make a return of his income u/s 22 of the 1922 Act (section 139 of the Act), or (b) omission or failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for that year. It was observed that both these conditions were conditions precedent to be satisfied before the ITO could have jurisdiction to issue a notice for the reassessment. While explaining the meaning of the words ''omission or failure to disclose fully and truly all material facts necessary for his assessment for that year used in section 34, it was observed that the section postulated a duty on every assessee to disclose fully and truly all material facts necessary for assessment of the ITO. What facts were material and necessary for assessment differed from case to case. So far as the primary facts were concerned, it was the duty of the assessee to disclose all of them and that duty did not extend beyond the full and truthful disclosure of all primary facts and it was for the assessing authority to decide what inferences of facts could be reasonably drawn and what legal inferences, had ultimately to be drawn, and it was not for anybody else-far less the assessee-to tell the assessing authority what inference, whether of facts or law, should be drawn, If there were some reasonable grounds for the ITO to believe that there had been any non-disclosure as regards any primary facts which could have a material bearing on the question of under-assessment that would be sufficient to give jurisdiction to the ITO to issue notice u/s 34 and it was the duty of the assessee to establish that the ITO had no material at all before him for believing that there had been such non-disclosures.

8. In Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das,) the assessment for the assessment year 1958 -59 was made after allowing some deduction towards interest to creditors. On the ground that one of the creditors confessed that he has only lent his name and the other creditors mentioned in the list of creditors of the assessee were known as name-lender, the assessment was reopened by issuing a notice u/s 148. The assessee filed returns in response to the notice, but challenged the notice in the High Court under article 226 of the Constitution. The High Court held that preconditions for the exercise of the

jurisdiction u/s 147 were not fulfilled. On appeal to the Supreme Court the judgment of the High Court was confirmed. It was held that two conditions have to be satisfied before an ITO acquires jurisdiction to issue notice u/s 148(1) the ITO must have reason to believe that the income chargeable to tax has escaped assessment; and (2) he must have reason to believe that such income has escaped assessment by reason of the omission or failure on the part of the assessee(s) to make return u/s 139 for the assessment year to the ITO, or (b) to disclose fully and truly material facts necessary for his assessment for that year, and that both these conditions must co-exist to confer jurisdiction on the ITO. It was observed that the duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment and that production before the ITO of the account books or other evidence from which material facts could with due diligence have been discovered by the ITO will not necessarily amount to disclosure contemplated by law. It was further observed that the duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts and if an ITO draws in inference which appears subsequently erroneous, mere change of opinion with regard to that inference would not justify initiation of action for reopening assessment.

9. In Income Tax Officer and Others Vs. Calcutta Chromotype Pvt. Ltd., a Division Bench of the Calcutta High Court held that the balance sheet filed along with the return form part of the return itself in view of the provisions under the income tax-Rules. It further held that mere change of opinion regarding the same facts does not confer jurisdiction to issue notice u/s 148.

10. In Sirpur Paper Mills Ltd. Vs. Income Tax Officer, "A" Ward and Another,) a learned single Judge of our High Court held that the income tax Department cannot be permitted to reopen the concluded assessment because of the new views an officer had come to entertain on the facts and if that was permitted litigation would have no end, ''except when legal ingenuity is exhausted''.

11. In a recent case in Indo-Aden Salt Mfg. and Trading Co. Pvt. Ltd. Vs. Commissioner of Income Tax, Bombay, the Supreme Court observed that the obligation of the assessee was to disclose only primary facts and not inferential facts and that it is immaterial whether the failure to disclose or omission to disclose was deliberate or inadvertent and that subject to other conditions being satisfied, if there was omission to disclose material facts, the jurisdiction of the ITO to reopen is attracted. In that case, the assessee did not disclose in the original assessment proceedings either by valuation report or by statement filed before the ITO as to what portion of the assets were of earth work and what portion of masonry work. The ITO had allowed depreciation at 6 percent on the entirety of the assets which was available in respect to masonry work. On the question whether excessive depreciation had been allowed and, thus income had escaped assessment for the years in question owing to failure on the part of the appellant to disclose fully and

truly all material facts, it was held that the ITO could reasonably be said to have material to form the belief that there was under-assessment owing to failure or omission on the part of the appellant to disclose fully and truly all material facts.

12. From the above discussion it follows that to involve section 147(a), two conditions have to be satisfied:--

(i) the ITO should have reason to believe that income chargeable to tax has escaped assessment for the relevant year, and

(ii) the reason for the income escaping the assessment should be by reason of the omission or failure on the part of an assessee,--

(a) to make a return u/s 139 for any assessment year; or

(b) to disclose fully and truly all material primary facts necessary for his assessment for that assessment year; that production of account books or other evidence from which material facts could with due diligence have been discovered, would not amount to full and true disclosure.

13. In the instant case we shall examine whether the conditions precedent for reopening the assessment u/s 147(a) are satisfied. Regarding the first-condition it must be shown that the assessing authority has reason to believe that income has escaped assessment. There must be some material before him providing basis for the belief income has escaped assessment. Here the reason given is that in the year 1986-87, the amounts received by the assessee as ''Sub sadaran'' were treated as trading receipts and taxed, which was upheld by the AAC. This is not disputed by Shri Ratnakar. But he submits that in the subsequent years and even in the year 1989-90, collection of amount under head "Sub sadaran was not taxed. True, as submitted by the learned standing counsel, the assessments have not become final, but what does it show? In our view, it shows that regarding nature of receipt as ''Sub sadaran'' there has been change of view from time to time and this cannot furnish reason for belief that income has escaped assessment. [See Lakhmani Mewal Das and Sirpur Paper Mills Ltd. (supra)]. Regarding the second condition the learned standing counsel, however, contends that mere mention of ''Sub sadaran'' in the balance sheet does not amount to full and true disclosure and that the same should have been shown as a trading receipt. We are unable to agree. In our view, what is relevant is the nature of duty of the assessee to make full and true disclosure of primary facts but not the nature of receipt to be disclosed. Admittedly, nature of receipt is in dispute. For the assessment year in question along with the returns the profit and loss and statements of account were filed. In the balance sheet the petitioner mentioned ''Sub sadaran'' and the amount outstanding in that account. Therefore, having regard to the fact that collection by the business community under the head "Sub sadaran'' or ''Incidental'' was in vogue which is an accepted fact and is also stated in the reasons recorded for reopening the assessments, it cannot be said that there was no full and true disclosure of primary fact. For these

reasons, we are of the view that the conditions precedent for reopening the assessments u/s 147(a) are not satisfied. Consequently, the notices issued u/s 148 in regard to ''Sub sadaran'' for the assessment years 1980-81 to 1983-84 are held to be without jurisdiction and are, accordingly, quashed. However, notices for reopening the assessments for the assessment years 1984-85 and 1985-86, apart from the said reason, other reasons are also given, so we shall examine whether for the additional reasons, the impugned notices for these years are sustainable.

14. Insofar as the notice relating to the year 1984-85 is concerned, there are two more reasons for reopening the assessment. They are deductions relating to (i) market cess, and (ii) sales tax. The second ground is also common to the notice issued for reopening the assessment for the assessment year 1985-86.

15. Section 43B which was inserted with effect from 1-4-1984, as it stood in the relevant years, provided that a deduction otherwise allowable under the Act in respect of any sum payable by the assessee by way of tax or duty under any law for the time being in force, should be allowed only in computing the income referred to in section 28 of the previous year in which such sum was actually paid by the assessee irrespective of the previous year in which the liability to pay such sum was incurred by the assessee according to the method of accounting regularly employed by him. Insofar as the deduction of market cess is concerned, as the same was not paid in the previous year relevant to the assessment years 1984-85 and 1985-86, and the same was not covered by section 43B at the relevant time, it cannot be said that the income escaped assessment due to deduction of the said market cess while computing the income. ''Cess'' was included in section 43B by the Finance Act, 1988 with effect from 1-4-1989. Therefore, this reason also is untenable for reopening the assessment for the assessment year 1984-85 and 1985-86. However, insofar as deduction of sales tax is concerned, that is covered by section 43B in the assessment year 1984 -85. Therefore, unless the amount of sales tax was paid by the assessee in the previous year relevant to the assessment year 1984-85, he was not entitled to deduction. The petitioner also does not dispute that the amount of sales tax of Rs. 58,181 was not paid in the previous year relevant to assessment year 1984-85. This reason justified notice issued u/s 148 for reopening the assessment for the assessment year 1984-85. Shri Ratnakar also submits that the petitioner has already written to the department to add back that amount and complete the assessment. The impugned notice issued u/s 148 reopening the assessment for the assessment year 1984-85 cannot, therefore, be said to be bad in law. For the above reasons writ petition Nos. 5981 of 1987, 5944 of 1987, 5994 of 1987, 5870 of 1987 and 5886 of 1987 are allowed and WP No. 5887 of 1987 is dismissed. Having regard to the circumstances of the case, we make no order as to costs.