(1990) 06 CAL CK 0001

Calcutta High Court

Case No: Income-tax Reference No. 223 of 1986

Allahabad Bank	APPELLANT
Vs	
Commissioner of Income Tax	RESPONDENT

Date of Decision: June 26, 1990

Acts Referred:

- Income Tax Act, 1961 - Section 147

Citation: (1993) 199 ITR 664

Hon'ble Judges: Suhas Chandra Sen, J; Bhagabati Prasad Banerjee, J

Bench: Division Bench

Advocate: Sukumar Bhattacharjee, for the Appellant;

Judgement

Bhagabati Prasad Banerjee, J.
The Tribunal has referred the following questions of law to this court u/s 256(1) of the Income Tax Act, 1961 :

" 1. Whether, on the facts and in the circumstances of the appellant''s case, the Tribunal was right in law in confirming the order of the Commissioner of Income Tax (Appeals) in upholding the Assessing Officer''s action in reopening the assessment of the appellant for the assessment year 1974-75/1973-74 ?

2. Whether, on the facts and in the circumstances of the appellant''s case, the Tribunal was justified in law in confirming the reassessment proceedings inasmuch as there was no information in consequence of which the Inspecting Assistant Commissioner could have reason to believe that income chargeable to tax has escaped assessment ?

3. Whether, on the facts and in the circumstances of the appellant''s case, the Tribunal was justified in law in holding that the point as to the assessability of the service charges as income from business cannot be raised in the reassessment proceedings ?

4. Whether, on the facts and in the circumstances of the appellant''s case, the Tribunal was justified in holding that depreciation and insurance premium in respect of various installations cannot be allowed in computing the income from service charges u/s 57(2) of the Act ? "

2. The assessment years involved in this case are the assessment years 1973 74 and 1974 75 for which the relevant periods of account are the calendar years ending on December 31, 1972, and December 31, 1973, respectively.

3. The relevant facts of this case are as follows :

" The common point involved was regarding the reopening of the assessment u/s 147(b) for both the years. The Inspecting Assistant Commissioner of Income Tax was the assessing authority who noted in the assessment order that the original assessment was completed earlier on a total income of Rs. 86,86,852 and in consequence of information that came into his possession, he had reasons to believe that income chargeable to tax had escaped assessment. He initiated proceedings u/s 147(b) and issued notice u/s 148 which was complied with by the assessee and the returns were filed on March 1, 1978. Hearing was given by the Assessing Officer who noted that the interest credited to the suspense account was in respect of certain loans and that the assessee charged interest to the party''s account and credited the same to the suspense account instead of the profit and loss account. The amount was Rs. 34,95,010 for the assessment year 1973-74 and Rs. 36,25,203 for the assessment year 1974-75. The assesses objected to the proposed inclusion on the basis that the debts on which the interest was charged were irrecoverable and doubtful and as such the interest on such debts was also doubtful and as such interest should not be included in the total income. The Assessing Officer noted that this issue came up also in the year 1975-76 and that the same reasons were recorded therein, viz., the interest which accrued and charged to the debtor''s account earlier was the income of the assessee during the years and was taxable. He included such amounts in the reassessment."

4. The assesses then took up the matter before the Commissioner of Income tax (Appeals), who disposed of the said appeal by a consolidated order in which the Commissioner of Income Tax (Appeals) noted that the Assessing Officer recorded the reasons for reopening of the assessment on February G, 1978. Such reasons were reproduced by the Commissioner of Income tax (Appeals) in his order. The said reasons as recorded are as follows ;

" The assesses owned a multi-storeyed building in Delhi, 90 per cent. of which is let out to various tenants. The total rent realised for the space let out is Rs. 24,67,093. This income is assessed under the head ''Income from house property''. In order to provide certain facilities to various tenants, the assessee separately installed :

1. Air-conditioning plant,

2. Power generators,

3. Lifts,

4. Electric sub-station,

5. Electric installations,

6. Tube well, etc.

For providing the facilities of lifts, air conditioning, electric power, drinking water, etc., the assessee charges separately and unconnected with the rent for the space let out. Such charges, termed as service charges are assessed under '' other sources ''. The machinery and plant is owned by the assessee and not lot out. The service charges receivable are not chargeable to tax under the head '' Business or profession ''. They are chargeable under the head '' Other sources '', and are charged under that head from year to year ''."

" In the copulation of income, the assessee deducted a sum of Rs. 1,51,0.39 (Us. 1,30,813 for 1974-75), being the depreciation on the assets. Insurance premium--Rs. 5,505 (Rs. 5,493 for 1974-75). This deduction is not permissible under law. While scrutinising the records in connection with the assessment proceedings for the assessment year 1972-73, I found that this deduction was allowed. It is clear that in the original assessment excessive depreciation allowance had been computed. Thus, in consequence of information that has come to my possession, I have reason to believe that income chargeable to tax has escaped assessment for the assessment year 1973-74 (1974-75). The assessment requires to be reopened u/s 147(b).

Issue notice u/s 148."

5. On the basis of the aforesaid recorded reasons, it was found by the Commissioner of Income Tax (Appeals) that, in consequence of information that came to his possession, the Assessing Officer had reason to believe that income chargeable to tax had escaped assessment for both the years.

6. Before the Commissioner of Income Tax (Appeals), it was contended on behalf of the assessee that action u/s 147(b) was wrongly taken on the basis of the audit objection. It was also stated by the assessee that the assessment for the assessment year 1972-73 had been reopened on similar grounds and that at the time of finalisation of the reassessment for the assessment year 1972-73, the reassessment proceedings for the years under consideration, i.e., 1973-74 and 1974-75, were reopened and, therefore, the assessee contended that it was clear that these proceedings were also undertaken as a consequential measure and were related to the action u/s 147(b) taken for the assessment year 1972-73. The contention was that the reopening of the assessments for these two years under consideration was based purely on the audit report which would not constitute information. Reference

was made to the decision of the Hon''ble Supreme Court in the case as reported in Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, .

7. It was also contended before the Commissioner of Income Tax (Appeals) that, at the time of the original assessment, the assessee furnished a statement along with the returns regarding service charges and, in this statement, the assessee had claimed deduction on account of depreciation as well as insurance premium on the plant and machinery. It was urged that since all the facts were disclosed at the time of the original assessment and on the basis of those facts given, the Assessing Officer had taken a particular view of the matter and the reassessment would, therefore, be nothing but a mere change of opinion. It was urged, therefore, that the reopening for the two years should be cancelled.

8. The Commissioner of Income Tax (Appeals) found no force in the contentions. He was of the view that it was not correct to claim that the reassessment for the two years had been made on the basis of the audit objection, as there was no such revenue audit objection in respect of the two years and it would not be proper to link it up with the action u/s 147(b) for the assessment years 1973-74 and 1974-75. Accordingly, the Commissioner of Income Tax (Appeals) held that each year is independent and there is no res judicata in taxation matters. He found that the action taken by the Assessing Officer for those two years was independent of the assessment year 1972-73 and thus rejected the contention of the assessee on the point.

9. The Commissioner of Income Tax (Appeals) also considered the contention of the assessee that, along with the original return, a statement was filed disclosing receipt of service charges, etc. He found on perusal of the record that it was a fact that a statement of this nature was filed by the assessee at the time of the original assessment. But, at the same time, the Commissioner of Income Tax (Appeals) found from the records that even though a statement had been filed regarding the assessee''s claim for depreciation for plant and machinery, etc., the Assessing Officer had never applied his mind to those details and no enquiry was made at any stage of the original assessment. He was, therefore, of the view that it was clear that this aspect of the matter was completely overlooked at the initial stage and the knowledge about this mistake came to the possession of the Assessing Officer after the original assessment was completed. According to him, Section 147(b) was applicable to such type of situation. He thus rejected the contention of the assessee on this point.

10. The assessee took up the matter before the Tribunal and reiterated similar contentions and arguments as made before the Commissioner of Income tax (Appeals). The Tribunal rejected the appeal filed by the assessee and affirmed the decision taken by the Commissioner of Income Tax (Appeals), and observed as follows :

" 18. We have heard both the sides at length and have perused the orders of the authorities below for our consideration and we have taken into account the decisions as relied on by both the sides. The Commissioner of Income Tax (Appeals) has given a finding, as discussed earlier, that the reopening of the assessments u/s 147(b) for both the years was not on the basis of audit objection which might be the reason for reopening the assessment for the assessment year 1972-73. The Commissioner of Income Tax (Appeals) has reproduced the reasons recorded in the impugned order. In our opinion, sufficiency of the reasons cannot be questioned. In our view, the Commissioner of Income Tax (Appeals) was justified in his analysis of the facts and the conclusions arrived at by him. In this connection, it may be useful to refer to the decision of the Hon''ble Supreme Court of India in the case of Commissioner of Income Tax, Madras Vs. T.S.Pl.P. Chidambaram Chettiar (Dead) through Legal Representatives, in which, on the facts of the case, it was held that even if there was some vague information before the officer at the time of the original assessment and the fact that the officer could have made further enquiry into the matter did not take the case out of Section 34(1)(a) of the old Income tax Act. It was also noted that the remarks made in the order sheet did not amount to a decision taken by him on the basis of the facts found, but had to be treated as a casual observation.

19. As pointed out by the learned Departmental representative the Income Tax Officer has taken the net amount of the service charges into consideration without discussing any details on fact. In our opinion, in such a situation, it cannot be said that the Assessing Officer had considered all the relevant facts. For this proposition, we may refer to another decision of the Hon''ble Supreme Court of India in the case of Malegaon Electricity Co. P. Ltd. Vs. Commissioner of Income Tax, Bombay, . Even otherwise, it cannot be said that the Assessing Officer has formed a certain opinion at the time of making the original assessment on the basis of the facts available before us. In such a situation, it cannot be said that there was a change of opinion, when no earlier opinion was formed at the time of the original assessment, as held by the Hon''ble Delhi Court in the case of DELHI GLASS WORKS P. LTD Vs. COMMISSIONER OF Income Tax, NEW DELHI., . Similar is the view of the Hon''ble Delhi High Court in the case of Nawabganj Sugar Mills Co. Ltd. and others Vs. Commissioner of Income Tax, Delhi, .

20. It is submitted before us that along with the return, the assessee has filed a certain statement containing various claims, etc., on which the Assessing Officer, as claimed by the Revenue, had not applied his mind. In this connection, we may refer to the decision of the Hon''ble Calcutta High Court in the case of Income Tax Officer, H-Ward and Another Vs. Sudhir Kumar Bhose, , in which, on the facts of that case, it was held that the Assessing Officer would have jurisdiction to issue notice u/s 147 immediately after the omission to file the return or failure to disclose all the material facts therein and no subsequent act on the part of the assessee can take away this jurisdiction and the assessee cannot resist the notice u/s 147 contending that he

had furnished the particulars by other means. It has been contended on behalf of the Revenue that even if, as wrongly contended on behalf of the assessee, the assessment was reopened in pursuance of the audit objection, the reassessment proceedings cannot automatically be quashed. Learned counsel for the Revenue refers to page 1003 of 119 ITR referred to earlier in which it was held on the facts of that case that although an audit party did not possess the power to pronounce on the law, it nevertheless may draw the attention of the Income Tax Officer to it as law is one thing and its communication another. As mentioned by us earlier, the Commissioner of Income Tax (Appeals) has noted the ground on which the Assessing Officer had reopened the assessment on the grounds that there was excessive depreciation allowance, etc., and that the information came to his possession after the original assessments were completed for both the years under consideration. We have taken into account Explanation 1 to Section 147 dealing with a case where income chargeable to tax has been under assessed or excessive relief was allowed, etc. The provisions of Section 147 would cover such contingencies also. In the circumstances, we are of the opinion that the Commissioner of Income Tax (Appeals) was justified in sustaining the order of the Assessing Officer in respect of both the years relating to the reopening of the assessments completed earlier.

21. It is pertinent to note here also that other incomes have also been taken into consideration in reassessment proceedings. In our opinion, once the reopening has been validly made, the Income Tax Officer is not restricted to the portion of the income that escaped assessment as, in fact, the Income Tax Officer had not only jurisdiction but it was his duty to levy tax on the entire income that had escaped assessment during that year, as held by the Hon''ble Supreme Court of India in the case of V. Jaganmohan Rao and Others Vs. Commissioner of Income Tax and Excess Profits Tax, Andhra Pradesh, which was followed earlier by the Hon''ble Calcutta High Court in the case of Ramsevak Paul [1971] 110 ITR 527.

22. After considering the entirety of the facts and the background of the case and after taking into account the ratio of the decisions relied on by the parties before us, we are of the opinion that, on the facts available for these years under appeal, the Assessing Officer was justified in reopening the assessment for the years under consideration u/s 147(b). This part of the order of the Commissioner of Income Tax (Appeals) is sustained. "

11. Mr. Sukumar Bhattacharjee, learned counsel appearing on behalf of the assessee-applicant, submitted that the condition precedent for invoking the provisions of Section 147(b) of the Income Tax Act, 1961, was wholly absent, inasmuch as there was no fresh material before the Income Tax Officer conferring jurisdiction upon the Income Tax Officer. It was further submitted that the reasons, as recorded by the Income Tax Officer, did not indicate that any material had come into his possession on the basis of which he could have reason to believe that the income chargeable to tax had escaped assessment for both the years in question. It

was further submitted that there was a mere change of opinion by the Income Tax Officer inasmuch as, at the time of the original assessment, the assessee had furnished a statement along with the returns regarding service charges and in that statement, the assessee had claimed deduction on account of depreciation as well as insurance premium on the plant and machinery and since all the facts were disclosed at the time of original assessment and, on the basis of those facts, the Assessing Officer had taken a particular view of the matter, the reassessment on the basis of the self-same materials would, therefore, be nothing but a mere change of opinion. In this connection, reliance was placed on the decision of the Supreme Court in the case of Indian and Eastern Newspaper Society v. CIT [19791 119 ITR 996. In that case, the Supreme Court held (headnote) :

" The assessee society registered under the Companies Act, a professional association of newspapers established with the principal object of promoting the welfare and interest of all newspapers, owned a building in which a conference hall and rooms were let out on rent to its members as well as to outsiders and also provided certain services to its members. All along the. assessee''s income from that source was assessed to tax as income from business and it was so assessed for the assessment years 1960-61 to 1963-64 also. In the course of audit, an internal audit party expressed the view that the money realised by the assessee on account of the occupation of its conference hall and rooms should have been assessed under the head '' Income from property '' and not as business income. Treating the contents of the audit report as ''information'', the Income Tax Officer initiated reassessment proceedings for those four years u/s 147(b). "

12. The Supreme Court held that the opinion of the audit party on a point of law would not be regarded as " information " enabling the Income Tax Officer to initiate reassessment proceedings u/s 147(b). The Income Tax Officer had, when he made the original assessment, considered the provisions of Sections 9 and 10 of the Indian Income Tax Act, 1922. Any different view taken by him afterwards on the application of those provisions would amount to change of opinion on materials already considered by him.

13. The Supreme Court further observed as follows (headnote) :

" The proposition in the decision of the Supreme Court in the case of (1976) 102 ITR 287 (SC) , to the effect that a case where income had escaped assessment due to '' oversight, inadvertence or mistake '' of the Income Tax Officer must fall within Section 34(1)(b) of the Indian Income Tax Act, 1922, 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. An error discovered on a reconsideration of the same material (and no more) does not give him that power. "

14. The Supreme Court in that case reiterated the contention of the Revenue that " information " in Section 147(b) refers to realisation by the Income tax Officer that he has committed an error while making the original assessment. The Supreme Court thus observed at page 1005 of the said decision as follows :

" The submission appears to us inconsistent with the terms of Section 147(b). Plainly, the statutory provision envisages that the Income Tax Officer must first have information in his possession, and then in consequence of such information he must have reason to believe that income has escaped assessment. The realisation that income has escaped assessment is covered by the words '' reason to believe '', and it follows from the '' information'' received by the Income Tax Officer. The information is not the realisation, the information gives birth to the realisation. "

15. On behalf of the Revenue, reliance was placed on a single Bench decision of this court in the case of Export Enterprises Pvt. Ltd. Vs. Income Tax Officer, ''B'' Ward and Others, wherein it was observed that the reassessment initiated at a point of time when the Supreme Court had not pronounced the judgment in the case of Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, and when the decision of the Supreme Court in the case of (1976) 102 ITR 287 (SC) was holding the field, as such, the principles laid down on the basis of (1976) 102 ITR 287 (SC) , should prevail even after the pronouncement of the judgment of the Supreme Court in the case of Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, In our opinion, that view of the learned single judge had not correctly laid down the principles of law in this case, inasmuch as the law laid down by the Supreme Court in the case of Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, , which had considered the earlier case of the Supreme Court in the case of (1976) 102 ITR 287 (SC) still holds good. In (1976) 102 ITR 287 (SC) , the Supreme Court has laid down a category of cases where the provisions of Section 34(1)(b) of the Indian Income Tax Act, 1922, would apply and at the same time, the Supreme Court has also observed that where, however, the Income Tax Officer got no subsequent information but merely proceeded to reopen the original assessment without any fresh facts or materials or without any enquiry into the materials which would form a part of the original assessment, Section 34(1)(b) would have no application. The position of law is clear that, in order to invoke the provisions of Section 147(b) of the Income Tax Act, 1961, the Income Tax Officer must have information in his possession and then in consequence of such information, he must have reason to believe that income had escaped assessment. The reasons recorded by the Income Tax Officer on February 6, 1978, stated above, did not indicate clearly in this case what were the mistakes or omissions. From the recorded reasons, it is also clear that, on the basis of the recorded reasons, no reasonable man of ordinary prudence would come to the conclusion that income had escaped assessment. Law is well-settled that the court cannot go into the sufficiency of the materials on the basis of which the opinion has been formed. But, if it is found from the materials

which had been disclosed that no reasonable man with ordinary prudence could form the opinion, as is required under the law, then certainly the court can look into it and can interfere in the matter and can hold that there were no materials on the basis of which such an opinion could be formed. In this particular case, in our view, the materials disclosed did not indicate any omission or error or mistake which had escaped assessment at the time of the original assessment made by the Income Tax Officer and consequently on the basis of the materials on record, the provisions of Section 147(b) of the Income Tax Act, 1961, could not be invoked. Further, in view of the law laid down by the Supreme Court, as referred to above, the Income Tax Officer cannot reopen the assessment on a mere change of opinion in respect of the materials already on the record and in respect of the materials which were considered by the Income Tax Officer at the time of the original assessment. On the basis of more change of opinion, an assessment could not bo reopened u/s 147(b) of the Income tax Act, 1961. Accordingly, in our view, the Tribunal was wrong in holding that the proceedings were initialed validly on the basis of valid materials. We are of the view that the condition precedent for reopening the assessment u/s 147(b) of the Act was wholly absent in the instant case and accordingly the reassessment proceedings could not be said to have been validly initiated.

16. Accordingly, question No. 1 is answered in the negative and in favour of the assessee.

17. In view of our answer to question No. 1, questions Nos. 2, 3 and 4 need not be answered.

18. There will be no order as to costs.

Suhas Chandra Sen , J.

19. I agree.