(2000) 11 CAL CK 0005

Calcutta High Court

Case No: FMA No. 155 of 1997 22 November 2000 A.Y. 1973-74 and 1974-75

Badal Choudhury		APPELLANT
	Vs	
Income Tax Officer and Others		RESPONDENT

Date of Decision: Nov. 22, 2000

Acts Referred:

- Income Tax Act, 1961 - Section 139, 147(a), 148

Citation: (2001) 168 CTR 587 : (2001) 119 TAXMAN 952

Hon'ble Judges: Tarun Chatterjee, J; S.N. Bhattacharjee, J

Bench: Full Bench

Advocate: R.N. Dutta, for the Assessee and R.C. Prasad, for the Revenue, for the Appellant;

Judgement

Tarun Chatterjee, J.

The subject-matter of this appeal is the judgment and/or order passed by a learned Judge of this court on a writ petition which was moved in this court for setting aside the notices dated 16-6-1980, issued u/s 148 of the Income Tax Act, 1961, for the assessment years 1973-74 and 1974-75 by the Income Tax Officer, J. Ward, District-IV(i), and the order being order No. Re-open/1/81/WS-X/227, dated 6-6-1980, passed by the Commissioner, West Bengal-10, and for other incidental reliefs. The reason for issuing the notices u/s 148 has disclosed in para 6 of the affidavit-in-opposition. The reason was that the writ petitioner had claimed deduction on the interest paid on loans from one Shri Asit Kr. Saha for the assessment years in question. During the assessment proceedings in respect of subsequent years, the Income Tax authorities obtained materials suggesting that Sri Asit Kr. Saha was a fictitious person. Therefore, the Income Tax Officer was of the view that the loan shown as having been obtained from Sri Asit Kr. Saha as well as interest claimed by the writ petitioner to have been paid on such loans had escaped assessment for the failure on the part of the assessee to disclose fully and truly all

material facts in the return at the time of the original assessments. The notices issued by the Income Tax Officer being the respondent No. 1 were challenged on the following grounds :

(1) The Income Tax Officer could have no reason to believe that any income had escaped assessment, although the reasons recorded by the Income Tax Officer had shown that "cash credit" in the name of Shri Asit Kr. Saha and interest thereon had escaped assessment.

(2) The previous Income Tax Officer having held that the loans in question were genuine, the plea of the Income Tax Officer issuing the impugned notices u/s 148 was a mere change of opinion with regard to an inference which did not justify initiation of a proceeding u/s 147 of the Act.

(3) The basis of the conclusion of the Income Tax Officer was contrary to the records, namely, that the confirmation of the loan in the assessment years in question had not been subject to proper verification.

According to Mr. Dutta, in fact there had been a proper verification at the time of assessment for the years in question. Mr. Dutta submitted that the primary facts having been disclosed by the assessee, it could not be stated that the assessee had not made a full disclosure of material facts.

2. The submissions of Mr. Dutta, appearing for the assessee/appellant were hotly contested by Mr. R.C. Prasad, learned counsel for the revenue . According to Mr. Prasad, the judgment under appeal has been passed in accordance with the settled proposition of law and, therefore, no interference can be made with the said judgment in this appeal.

3. Having heard the learned advocates for the parties and considering the relevant submissions of the learned counsel for the parties and the materials on record, we are of the view that in the facts and circumstances of the case and in view of the settled law now, the learned Trial Judge erred in refusing to quash the notices issued u/s 147 read with section 148 of the Act. Reasons are as follows :

Before we consider the relevant submissions of the learned counsel for the parties, it is necessary for us to reproduce sections 147 and 148 of the Act which are as follows :

Section 147.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;

(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.

Explanation 1 : For the purposes of this section, the following shall also deemed to be cases where income chargeable to tax has escaped assessment, namely :

(a) where income chargeable to tax has been 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, or

(d) where excessive loss or depreciation allowance has been commuted.

Explanation 2 : Production before the Income Tax Officer of all 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.

Section 148."Before making the assessment, reassessment or recomputation u/s 147, the Income Tax Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 139 and the provisions of this Act shall, so far as may be, accordingly as if the notice were a notice issued under that sub-section (2). The Income Tax Officer shall before issuing any notice under this section, record his reasons for doing so."

From a plain reading of section 147, it is found that clause (a) of section 147 of the Act clearly confers jurisdiction to the Income Tax Officer or the assessing officer only if the Income Tax Officer has reason to believe that by reasons of the omission or failure on the part of an assessee to make a return u/s 139 for any assessment year or to disclose fully or truly all the material facts necessary for his assessment for that year, income chargeable to tax escaped assessment for that year. The expression "material facts necessary for assessment" was interpreted by the Supreme Court to mean "primary facts" as distinguished from inferences, factual or legal, which may properly be drawn from the primary facts. In Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , the Supreme Court held that while the assessee was bound to disclose truly and fully all primary facts, the assessee was under no obligation to point out the factual inference which might be drawn from these facts. The Supreme Court observed at pp. 200 to 201 as follows :

"There can be no doubt that the duty of disclosing all the material facts relevant to the decision of the counsel before the assessing authority lies on the assessee. There is no doubt about the aforesaid principle laid down by the Supreme Court in the aforesaid decision once all the primary facts and before the assessing authority. But he requires any further assistance by way of disclosure. It is for him to decide what inferences had ultimately been drawn. It is not for somebody else for loss the assessee to tell the assessing authority what inferences whether of facts or law should be drawn."

Therefore, from the aforesaid principle as laid down by the Supreme Court in the aforesaid decision, the expression "material facts necessary for assessment" would mean "primary facts" which should be disclosed by the assessee before the assessing authority at the time of assessment. Therefore, it can easily be concluded that while the duty of the assessee is that he should disclose fully and truly all primary relevant facts, but it does not extend beyond this. In the case of Calcutta Discount Company (supra), the Supreme Court also observed as follows :

"From this observation it follows that the "material facts" which the assessee required to disclose at the time of assessment are the primary facts material and necessary for the purpose of his assessment. The assessee is under no obligation of further informing the Income Tax Officer that some of the entries in his account books and the balance sheet are false. It is for the Income Tax Officer to scrutinise the accounts of the assessee and after informing as to their correctness to make the assessment. It is true that as stated in Expln. 2 of section 147 of the Act, mere production before the Income Tax Officer of the 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 that section.

But, in the present case, the Income Tax Officer at the time of the original assessment specifically required the assessee to prove the cash credits standing in the name of the forms including the five forms mentioned in the earlier part. This judgment and petition satisfied the Income Tax Officer about the genuineness of those accounts . . . . ."

It is thus apparent that the Income Tax Officer has changed his opinion on account of subsequent information which has come to his possession. It was the duty of the Income Tax Officer making the assessment year in 1964 to hold the enquiry and find genuineness or otherwise of the case credits. He in fact, hold the enquiry by asking the petitioner firm to prove the genuineness of those cash credits. It is not open to him to commence proceedings for reassessment u/s 148 of the Act on a changed opinion in such circumstances."

4. From the observation of the Supreme Court, it is, therefore, clear that the assessee was not under any obligation to inform the Income Tax Officer that the

entries in his books of accounts are false. In the case of CIT v. Karam Thappa & Bros (P) Ltd. (sic), the Supreme Court considered the following facts for the purpose of deciding the validity of the notices issued u/s 148 of the Act. For the assessment year 1965-66, there were three cash credit entries dated 22-8-1964, from Meghraj Durichand, Associated Commercial Asscn. (P) Ltd. and Lakshmi Narayan Antaram, the first two being for a sum of Rs. 30,000 each and the last one for a sum of Rs. 40,000. The aforesaid three amounts mentioned in the notice were found in the assessees accounts by the Income Tax Officer who examined the same in course of the assessment proceedings. He called upon the assessee to substantiate the genuineness of the transaction and the assessee had produced material to support the same. The Income Tax Officer accepted the documents produced and treated all the three transactions to be genuine and on that footing he completed the assessment. Therefore, the primary facts were before the Income Tax Officer at the time of the regular assessment and he called upon the assessee to explain to his satisfaction that the entries were genuine and on the basis of materials provided by the assessee satisfaction was reached. It was then open to the Income Tax Officer to make further proof before completing the assessment if he was of the view that the material provided by the assessee was not sufficient for him to be satisfied that the assessees information was correct. Upon the aforesaid facts, the Supreme Court in the aforesaid decision following the decision of the Supreme Court earlier in the case of Calcutta Discount Company Ltd. v. ITO (supra) held that section 147(a) of the Act did not apply to the facts of that case as the alleged escapement of income from assessment had not been resulted from failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. Accordingly, the said notice u/s 148 of the Act was quashed by the Supreme Court in the aforesaid decision. Following the aforesaid decision of the Supreme Court a Division Bench of the Madhya Pradesh High Court in the case of Dinesh Kumar Gordhandas Vs. Commissioner of Income Tax, held that when primary facts were already before the Income Tax Officer and after some routine enquiry the Income Tax Officer assessed the income on the basis of such information, it was not open for him to invoke the provisions of section 147(a) of the Income Tax Act, 1961, and reopen the assessment even though he may have to notice facts mentioned in the return by the other side. In that decision also the Madhya Pradesh High Court held that when the assessee had disclosed all material facts and even if the Income Tax Officer was of the view that such disclosure was not genuine it was for the Income Tax Officer to make necessary enquiries and draw proper inference as to whether the transaction of loan on which payment of interest was disclosed by the assessee was a genuine transaction of loan or not. After doing so, it cannot be said that the assessee had not fully and truly disclosed all material facts necessary to assess the arrear, when all the primary facts were disclosed by the assessee to the Income Tax Officer, and the Income Tax Officer had failed to hold further enquiry in respect of the disclosures made by the assessee merely because in any subsequent assessment proceeding, the assessing officer discredited the testimony of someone

and happened to come to a conclusion that there was in fact no loan advanced by her to the assessee on which interest could have been paid by him, it cannot be held that the Income Tax Officer acquired jurisdiction to initiate action under clause (a) of section 147 of the Act. In the aforesaid situation, the Madhya Pradesh High Court held :

"It was a case of change of opinion and accordingly answered the question in favour of the assessee and against the revenue , Again in the case of Basanta Ram Kedarnath Vs. Income Tax Officer, Division Bench of this court said :

Law appears to be settled that in order to attract the case within the ambit of section 147, it is for the revenue to establish that the assessee had failed to disclose the material correctly or truly which has resulted in assessment of the income of the assessee. As long as the material facts with contemporaneous record and documents are placed before the Income Tax Officer at the time of original assessment, the assessee can be said to have done his duty, thereafter it is for the Income Tax Officer to investigate and then to accept case of the assessee. It is not for the assessee to invite a rejection from the Income Tax Officer by confessing with his return as filed, is not true or correct or that he has conceded material facts or has made untrue statements.

(Emphasis, italicised in print, added)

5. Following the principles laid down in the case of Calcutta Discount Company v. ITO (supra) as noted herein earlier, another learned Judge of this court hold that it was an obligation on the part of the assessee to inform the Income Tax Officer that its sale of share was in course of its business as a dealer in shares and not in the character of an investor in shares. In that case also and in the decision of this court in the case of Calcutta Credit Corporation Ltd. Vs. Income Tax Officer, Central and Others, the learned Judge considered the fact that the assessee was claiming an allowance of Rs. 5,000 as commission paid to M/s Purusottam Chowbey & Co. for services rendered by that company and that payment was corroborated by its books of accounts produced before the Income Tax Officer in the background of this fact. The learned Judge held that it was for the Income Tax Officer to investigate that claim and find out whether the amount actually claimed has been for the purpose of assessees business in order to call for allowance under the provisions of the Act. Considering the various decisions of the Supreme Court and as well as this court and also of different High Courts of India as noted herein above, let us consider the facts of this case. For this purpose, the original assessment order passed for the aforesaid assessment years in question by the assessing officer was perused. In the said assessment year, the assessing officer said the following :
"Loan creditors of the assessee have filed confirmations and the loan transactions have been verified from the loan creditors books of accounts and other evidence produced by the loan creditors. The case is disclosed and the assessees total income

is computed."

6. From the assessment order therefore, it is clear that at the time of the relevant assessment the assessing officer considered the confirmation made by the loan creditors and such loan transactions were verified from the loan creditors books of accounts and other evidence produced by the loan creditors and after being satisfied and examining the said books of accounts and the confirmation of the loan creditors, the assessing officer completed the assessment for the years in question. At that stage, if the Income Tax Officer was of the view that further investigation would be necessary on the question of genuineness of the books of accounts of the loan creditors or the identify of the loan creditors, it was open to him to investigate further on the identity of the loan creditor and also of their books of accounts. It is not in dispute that the assessment order was passed after being satisfied on the question of genuineness of the books of accounts and the confirmation of the loan. Therefore, in spite of such satisfaction, it is difficult to accept that it was still open to the Income Tax Officer to serve a notice u/s 148 of the Act for the purpose of reopening the assessment for the assessment years in question u/s 147 of the Act. The learned trial Judge while dismissing writ application relied on a decision of the Punjab & Haryana High Court in the case of Hazi Amir Mohd. Mir Ahmed v. CIT (1978) 110 ITR 630. In our view, the aforesaid decision on which the learned trial Judge based his decision was on a complete different fact situation. In that decision of the Punjab & Haryana, it appears that in the balance sheet of the assessee, there appeared cash credits in the accounts of certain persons and five others. The assessee produced evidence before the Income Tax Officer about the genuineness of the cash credits. The Income Tax Officer pointed out the genuineness of the credit and accepted them as true. It was only thereafter that he completed the assessment. Later a huge Hundi racket on all India basis was unnerved and broken. The Income Tax Officers only thereafter all over the country started taking further proof of the transaction of various assessees. Some of the creditors shown in the balance sheet of the assessee made confessional statements to the effect that they were lending names and not money. Only then the Income Tax Officer issued notices to the assessee u/s 148 of the Act to reopen the assessment and added a sum of Rs. 1,00,060 to the income of the assessee. In the background of this fact, the Division Bench said :

"Of course, the breaking of a humid racket of an all India basis cannot have any rational calculation with the loans to the assessee but the confessional statements of the creditors move. That depends on whether the confessional statements are related in any manner to the loans to the assessee. That information is not available in the order out of which reference arises or in the case submitted to us by the Tribunal. Therefore, the only answer which we can give to the question referred to us is to say that the Tribunal was justified in upholding the reopening at the assessment u/s 147(a). If the confessional statements referred to in para. 5 of its order were in anyway related to the loans of the assessee, otherwise not." From the

above facts of the said decision there was a confessional statement meant by the creditors that no money was lent, only the means were lent whereas in the present case the notice u/s 148 of the Act was issued on the satisfaction that Shri Asit Kr. Saha from whom the loan was taken was subsequently not in existence in the world of living as notice could not be served on him on the ground that he was not a resident of the address given by the assessee. "

7. In view of the facts as discussed above involved in the aforesaid decision, we are of the view that the learned trial Judge was in error in applying the principles laid down by the aforesaid Punjab & Haryana decision as the same was rendered in a different fact situation.

8. In view of our discussions made hereinabove, it is, therefore, clear that the notice issued u/s 148 was not a valid notice as the Income Tax Officer had no jurisdiction to issue such notice u/s 147 of the Act. That being the position, the impugned order of the learned trial Judge is set aside.

The appeal is thus allowed and the writ petition stands also allowed. The notices issued which are under challenge in the writ application are hereby quashed.

There will be no order as to costs.

S.N. Bhattacharjee, J.

I agree.

By the Court

Mr. Dutta, learned counsel appearing on behalf of the appellant draws our attention to an order passed by the Division Bench of this court at the time when the application for interim relief was disposed of on 24-7-1991, from which it appears that the Income Tax Officer was allowed to proceed with the matter and pass final order in accordance with law, but the same, however, should not be communicated to the writ petitioner/appellant without obtaining prior leave of this Court. In view of the fact that the notice has been quashed, the question of proceeding with the matter on the basis of the said notice shall not arise at all.