

**(1978) 03 CAL CK 0048****Calcutta High Court****Case No:** Matter No. 323 of 1273

Baijnath Saboo and Others

APPELLANT

Vs

Income Tax Officer, "J" Ward and  
Others

RESPONDENT

**Date of Decision:** March 17, 1978**Acts Referred:**

- Income Tax Act, 1961 - Section 147, 148

**Citation:** (1978) 113 ITR 303**Hon'ble Judges:** Sabyasachi Mukharji, J**Bench:** Single Bench**Advocate:** D. Pal, R.N. Bajoria, Dilip Dhar and A.K. De, for the Appellant; Balai Pal and  
Suhas Sen, for the Respondent**Judgement**

Sauyasachi Mukharji, J.

In this application under Article 226 of the Constitution the subject-matter of challenge is a notice issued u/s 148 of the Income Tax Act, 1961, dated the 29th March, 1973, for the assessment year 1968-69. The petitioners are the trustees of a trust known as Birla Janakalyan Trust. The assessment for the assessment year 1968-69 in respect of the said trust was completed on or about 27th February, 1969. As the trust in respect of which the petitioners are the trustees is a public charitable trust, the income of the said trust was entirely exempt. The said trust had claimed that it had received as gift certain shares from a private trust and, therefore, the taxes that were deducted at source in respect of the dividends on the shares which had been gifted to the public charitable trust, were refunded to the trust of which the petitioners are the trustees. It transpired or came to the knowledge of the Income Tax Officer, according to him, that the gift by the private trust in favour of the public trust was void as the private trust had no power to make the gift. Therefore, the refund of the taxes deducted at source given to the public charitable trust, according to the Income Tax Officer, were wrongly given and had to be

rectified. It was for this purpose that the assessment for the assessment year 1968-69 was sought to be reopened. The grounds for such reopening can best be stated in the words of the Income Tax Officer as stated in the affidavit-in-opposition in paragraph 14. The statements are as follows:

"I say that after completion of the assessment for the assessment year 1968-69 on 27th February, 1969, in the case of the petitioners, on the basis of the information received afterwards, I had reason to believe that the refund claimed by the petitioners-assessces on account of dividend income was wrongly allowed. The petitioners had received income from dividend amounting to Rs. 4,83,110.35 for the year ending 31st March, 1968, corresponding to the assessment year 1968-69. The Income Tax deducted at source on the said dividend income amounted to Rs. 74,645. In the course of the assessment proceedings of the petitioners the petitioners claimed exemption from Income Tax u/s 11 of the Income Tax Act, 1961. The petitioners" claim for exemption u/s 11 was allowed in the course of the assessment proceedings and the petitioners were given a refund of Rs. 77,121 (tax deducted at source on dividend Rs. 74,645 and on interest on securities of Rs. 2,476). The aforesaid refund was granted to the petitioners on the basis of the petitioners" claim that the aforesaid shares were the property of the petitioners, the shares having been received in pursuance of a valid gift from Raja Baldeodas Birla Santatikosh Trust. Information was subsequently received by respondent No. 3 under I.A.C., Survey Range, Memo. No. 385/Survey/8E/88/64-65 dated March 23, 1973, enclosing a D.O. letter No. D.I. (Inv)/SVB/31/Tech. (1)/72-73/13 dated March 14, 1973, of Director of Inspection (Inv.) addressed to the Commissioner of Income Tax, West Bengal, Calcutta, stating that enquiries made by the directorate had revealed that the trustees of the Santatikosh Trust had no powers to make the gift of shares to the Birla Janakalyan Trust. The shares were received by the Santatikosh Trust by a deed of settlement executed by Shri Jugal Kishore Birla dated May 20, 1943, but the settlement deed did not confer any power on the said trust to gift or alienate any portion of the movable assets included in the corpus of the trust. The subsequent deeds of settlement executed by Raja Baldeodas Birla and/or Shri Jugal Kishore Birla by which certain assets were transferred to Santatikosh Trust also did not confer any such powers upon the trustees of the said Trust to gift or alienate any portion of movable assets belonging to the said trust. The petitioners, trustees of Birla Janakalyan Trust; allegedly received the aforesaid shares by virtue of a letter dated 30th March, 1964, from the Santatikosh Trust was invalid and void ab initio, the petitioners did not acquire any right, title and interest in the said shares. The dividend income disclosed by the petitioners" in their accounts was not the petitioners" income and the refund of tax deducted at source was wrongly allowed to the petitioners. I say that the proceedings u/s 147(b) were lawfully and validly commenced in respect of the assessment year 1968-69 on the basis of the aforesaid information."

2. The question, therefore, is whether there has been any escapement of income of the trust of which the petitioners are the trustees entitling the revenue authorities to reopen, the said assessment. Section 147 of the Income Tax Act entitles the Income Tax Officer to reopen the assessment if he has reason to believe that income chargeable to tax has either, (i) escaped assessment for the relevant year ; or (ii) has been under-assessed ; or (iii) has been assessed at too low a rate ; or (iv) has been made the subject of excessive relief; or (v) excessive loss or depreciation allowance has been computed. As the trust of which the petitioners are the trustees is a public charitable trust, its income was not assessable to tax. Therefore, there is no question of any income escaping assessment because the income was not assessable, nor was there any question of any under-assessment or assessment at too low a rate. In this case, there is also no question of excessive loss or depreciation allowance being computed. If that was the position, then the only ground on which the assessment could have been reopened was that the income chargeable to tax had been made the subject of excessive relief. The income being not chargeable to tax, being the income of a public charitable trust, there was no question of that income being given excessive relief. Therefore, the fact that the petitioners got away with refund which the petitioners were not entitled in law, does not authorise the Income Tax authorities to say that the petitioners had been given excessive relief on income chargeable to tax. This position seems to be fortified by the decision of the Supreme Court in the case of P. S. SUBRAMANYAN, Income Tax OFFICER, COMPANIES CIRCLE 1(1), BOMBAY, AND ANOTHER Vs. SIMPLEX MILLS LTD. . It appears that a similar view was also taken by the Kerala High Court in the decision of the case of Moidu v. Income Tax Officer [1965] 2 ITJ 336.

3. In that view of the matter, the notice u/s 148 cannot be sustained and must be held to be without jurisdiction. This order, however, will not prevent the revenue authorities, if they are entitled in law, to proceed against the private trust or against the trustees of the said private trust or to rectify the order of refund in favour of the petitioners in accordance with law, if they are otherwise entitled to. Subject to the observations as aforesaid, the rule is made absolute and the notice is quashed. There will, however, be no order as to costs. Stay asked for is granted for a period of four weeks.