MAHANAGAR TELEPHONE NIGAM LTD. Vs CHAIRMAN, CENTRAL BOARD OF DIRECT TAXES and Another

Court: Delhi High Court

Date of Decision: Aug. 24, 2000

Citation: (2000) 162 CTR 554 : (2000) 112 TAXMAN 337

Hon'ble Judges: Arijit Pasayat, C.J; D.K. Jain, J

Bench: Full Bench

Advocate: Gauri Shankarwith Sai Kumar and L.R. Khatana, for the assessedHarish N. Salv with Sanjeev Khanna and Ajay Jha, for the Revenu, for the Appellant;

Judgement

Arijit Pasayat, C.J.

Notice issued u/s 148 of the Income Tax Act, 1961 (hereinafter referred to as `the Act''), is challenged by the Mahanagar Telephone Nigam

Limited (hereinafter referred to as `the MTNL) on the purported ground that there was no under assessment of income or escapement of income

requiring reassessment and the impugned notice which was issued on the basis of mere change of opinion about allowability or otherwise of an

expenditure is invalid, inoperative and unsustainable.

2. Factual position in a nutshell, as stated by the petitioner, is as follows :

(a) Petitioner was incorporated as a limited company on 28-2-1986, for the purpose of establishment, maintenance and working of telephone

services for metros of Delhi and Mumbai and license for effecting the same was granted by the Government of India, Department of

Telecommunications, under sub-section (2) of section 4 of the Indian Telegraph Act, 1885 (hereinafter referred to as `the Telegraph Act''), initially

for a period of five years and it was subsequently extended from time to time and the last extension is valid for a period of 15 years with effect

from 1-4-1998. Petitioner was paying license fee of Rs. 101 in terms of the license from financial years 1986-87 to 1992-93, the relevant

assessment years being 1987-88 to 1993-94. Such payment was made to the Department of Telecommunications, Government of India.

Subsequently, license fees were enhanced to Rs. 800 as intimated to the petitioner vide letter No. 26-10/94-TA 1, dated 13-5-1994, and the

license fees was further enhanced to Rs 900 per WDEL with effect from the financial year 1995-96. The present dispute relates to the assessment

year 1994-95. Return of income for the said year was filed on 30-11-1994. A sum of Rs. 1,24,85,60,000 was claimed as license fee. There was

no such claim for the preceding year. Intimation in terms of section 143(1) of the Act was given to the petitioner. Subsequently a notice u/s 148 of

the Act was issued on 23-3-1999, requiring it to file a return as the assessing officer had reasons to believe that the petitioner''s income for the

concerned year i.e., 1994-95 has escaped assessment within the meaning of section 147 of the Act. Petitioner filed its reply stating that the reasons

be communicated in order to enable it to file its return.

(b) It was petitioner''s stand that no income chargeable to tax had escaped assessment and notice had been issued to reassess the petitioner by a

mere change of opinion. The assessing authority, Joint. Commissioner, Special Range-20, New Delhi, intimated the petitioner that no return of

income in response to the notice has been filed and the petitioner was directed to file it immediately and in case, it had filed the return, a copy of

acknowledgment was to be submitted. Petitioner thereafter filed this petition questioning validity of the notice issued.

By order, dated 7-3-2000, this court directed the assessing authority to supply the reasons for issuance of the impugned notice. In compliance with

the directions, reasons have been indicated.

3. Mr. Gauri Shankar, learned counsel for the petitioner, submitted that the action as taken is impermissible as the view regarding allowability of the

claim of expenditure was arrived at by mere change of opinion. Factually, it was submitted that there was no escapement or underassessment and,

Therefore, the notice was at the threshold to be nullified. It was further submitted that even though the return has been acted upon in terms of

section 143(1)(a) of the Act and an intimation was given about the payability or otherwise of the tax, in essence, it was an order of assessment as

ultimately the facets of computation of income and tax payable were involved. Though the expression ""assessment"" is not used in section 143(1)

yet an interpretation has to be given which would harmonize the concepts of assessment and computation of tax. In the background of a procedure

for assessment, even an intimation u/s 143(1) can result in liability and, Therefore, conceptually the expression ""intimation"" as used in section

143(1) is same as assessment in the manner understood in common parlance. The fact that an appeal has been provided u/s 246 of the Act against

an intimation u/s 143(1)(a) makes the position clear that assessment is involved and is inbuilt. Therefore, it was a clear case of mere change of

opinion about the acceptability of the claim which is in issue. It is to be noted that section 143(1) has undergone a change by Finance Act, 1999,

with effect from 1-6-1999.

4. Mr. Salve, learned Solicitor General, on the other hand, submitted that at the stage of intimation u/s 143(1), there is no scope for any

assessment. On the contrary, adjustment of items of expenses/receipts as spelt out in the provision itself is the permissible limit of exercise of

powers under the provision. There is no question of the assessing officer considering or applying its mind to anything beyond that aspect. The

intimation is the result of ministerial work and cannot be termed to be an assessment for the purposes of the Act. The requirements u/s 148 are that

there must be reasons to believe about escapement or underassessment. The requisite ingredients are present in the case in hand and, Therefore,

the action as taken is clearly permissible. The question of change of opinion is not relevant in the light of provisions contained under sections 147

and 148 of the Act as they presently stand. Further, the committee set up to resolve inter-departmental disputes have advised petitioner to

participate in the proceeding. Therefore, this writ petition should not have been filed.

5. In Oil and Natural Gas Commission Vs. Collector of Central Excise, , Apex Court directed to set up a committee to monitor disputes between

Ministry and Ministry of Government of India. Ministry and Public Sector Undertaking of Government of India and Public Sector Undertakings in

between themselves to ensure that no litigation comes to court or to a Tribunal without the matter being examined first by the committee and its

clearance for litigation. If the high power committee is unable to resolve the matter for reasons to be recorded by it clearance shall be granted for

litigation. According to petitioner, committee should have permitted filing of a writ petition to ventilate actual grievances instead of denying

permission. It appears committee has taken the following view in its meeting, dated 9-12-1999:

The committee having regard to the fact that Mahanagar Telephone Nigam Ltd. was contemplating writ petition against show-cause notice

advised Mahanagar Telephone Nigam Ltd. to await appealable order. The committee accordingly, did not permit to file writ petition in the High

Court at this stage.

Present writ petition was filed on 14-1- 2000, and notice was issued on 17-1-2000. Therefore, we have taken up the matter for disposal, keeping

in view committee''s decision.

6. In order to consider the rival submissions, it is necessary to take note of sections 143(1) (as it stood before and after amendment with effect

from 1-6-1999), 147 and 148. The provisions read as follows :

AFTER AMENDMENT

Section 143. Assessment : (1) Where a return has been made u/s 139, or in response to a notice under sub-section (1) of section 142 :

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid, any tax paid

on self-assessment and any amount paid otherwise, by way of tax or interest, then, without prejudice to the provisions of sub-section (2) an

intimation shall be sent to the assessed specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued u/s 156

and all the provisions of Act shall apply accordingly; and

(ii) If any refund is due on the basis of such return, it shall be granted to the assessed and an intimation to this effect shall be sent to the assessed :

Provided that except as otherwise provided in this sub-section, the acknowledgment of the return shall be deemed to be an intimation under this

sub-section where either no sum is payable by the assessed or no refund is due to him ;

Provided further that no intimation under this sub-section shall be sent after the expiry of two years from the end of the assessment year in which

the income was first assessable.

(2) .....

(3) .....

(4) .....

BEFORE AMENDMENT

Section 143(1) as it stood at the point of time when the intimation was given under the said provision, so far as relevant, read as follows :

Section 143(1)(a)-Where a return has been made u/s 139, or in response to a notice under sub-section (1) of section 142 :

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any

amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2) an intimation shall be sent to the

assessed specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued u/s 156 and all the provisions of Act

shall apply accordingly; and

(b) if any refund is due on the basis of such return, it shall be granted to the assessee;

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or

loss declared in the return, namely :

(i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified;

(ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents,

if prima facie admissible but which is not claimed in the return, shall be allowed :

(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return,

accounts or documents, is prima facie inadmissible, shall be disallowed :

Provided further that an intimation shall be sent to the assessed whether or not any adjustment has been made under the first proviso and

notwithstanding that no tax or interest is due from him :

Provided also that an intimation under this clause shall not be sent after the expiry of two years from the end of the assessment year in which the

income was first assessable.

Section 147. Income escaping assessment.-If the assessing officer has reason to believe that any 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 and also any other

income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this

section, or recomputed the loss or the depreciation allowance or any other allowance, as the case may be for the assessment year concerned

(hereinafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action

shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax

has escaped assessment for such assessment year by reason of the failure on the part of the assessed to make a return u/s 139 or in response to a

notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for

that assessment year.

Explanation 1 : Production before the assessing officer of account books or other evidence from which material evidence could with due diligence

have been discovered by the assessing officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2 : For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped

assessment, namely :

(c) Where no return of income has been furnished by the assessed although his total income or the total income of any other person in respect of

which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to Income Tax ;

(d) Where a return of income has been furnished by the assessed but no assessment has been made and it is noticed by the assessing officer that

the assessed has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(e) Where an assessment has been made, but ;

(i) income chargeable to tax has been under assessed ; or

(ii) such income has been assessed at too low a rate ; or

(iii) such income has been made the subject of excessive relief under this Act ; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

148. Issue of notice where income has escaped assessment.-(1) Before making the assessment, re-assessment or recomputation u/s 147, the

assessing officer shall serve on the assessed 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, apply accordingly as if the notice were a notice issued under the sub-

section.

(2) The assessing officer shall, before issuing any notice under this section, record his reasons for doing so.

7. It is to be noted that substantial changes have been made to section 143(1) with effect from 1-6-1999. Up to 31-3-1989, after a return of

income was filed the assessing officer could make an assessment u/s 143(1) without requiring presence of the assessed or production by him of

any evidence in support of the return. Where the assessed objected to such an assessment or where the officer was of the opinion that the

assessment was incorrect or incomplete or the officer did not complete the assessment u/s 143(1), but wanted to make an inquiry, a notice u/s

143(2) was required to be issued to the assessed requiring him to produce evidence in support of his return. After considering the material and

evidence produced and after making necessary inquiries, officer had power to make assessment u/s 143(3). With effect from1-4-1989, the

provisions underwent substantial and material changes. A new scheme was introduced and the new substituted section 143(1) prior to subsequent

substitution with effect from 1-6-1999, in clause (a), a provision was made that where a return was filed u/s 139 or in response to a notice u/s

142(1), and any tax or refund was found due on the basis of such return after adjustment of tax deducted at source, any advance tax or any

amount paid otherwise by way of tax or interest, an intimation was to be sent without prejudice to the provisions of section 143(2) to the assessed

specifying the sum so payable and such intimation was deemed to be a notice of demand issued u/s 156. The first proviso to section 143(1)(a)

allowed the department to make certain adjustments in the income or loss declared in the return. They were as follows :

(a) an arithmetical error in the return, accounts and documents accompanying it were to be rectified;

(b) any loss carried forward, deductions allowance or relief which on the basis of the information available in such return, accounts or documents,

was prima facie admissible, but which was not claim in the return was to be allowed.

(c) any loss carried forward, relief claimed in the return which on the basis of the information as available in such return, accounts or documents

were prima facie inadmissible was to be disallowed.

8. What were permissible under the first proviso to section 143(1)(a) to be adjusted were (i) only apparent arithmetical errors in the return,

accounts or documents accompanying the return, (ii) loss carried forward, deduction, allowance or relief, which was prima facie admissible on the

basis of information available in the return but not claimed in the return, and similarly, (iii) those claims which were on the basis of the information

available in the return, prima facie inadmissible, were to be rectified/allowed/disallowed. What was permissible was correction of errors apparent

on the basis of the documents accompanying the return. The assessing officer had no authority to make adjustments or adjudicate upon any

debatable issue. In other words the assessing officer had no power to go behind the return, accounts or documents, either in allowing or in

disallowing deductions, allowance or relief.

9. One thing further to be noticed is that intimation u/s 143(1)(a) is given without prejudice to the provisions of section 143(2). Though technically

the intimation issued was deemed to be a demand notice issued u/s 156, that did not per se preclude the right of the assessing officer to proceed

u/s 143(2). That right is preserved and is not taken away. Between the period from 1-4-1989 to 31-3-1998, the second proviso to section 143(1)

(a), required that where adjustments were made under first proviso to section 143(1)(a), an intimation had to be sent to the assessed

notwithstanding that no tax or refund was due from him after making such adjustments. With effect from 1-4-1998, second proviso to section

143(1)(a) was substituted by the Finance Act, 1997, which was operative till 1-6-1999. The requirement was that an intimation was to be sent to

the assessed whether or not any adjustment had been made under the first proviso to section 143(1) and notwithstanding that no tax or interest

was found due from the assessed concerned. Between 1-4-1998 to 31-5-1999, sending of an intimation u/s 143(1)(a) was mandatory. Thus, the

legislative intent is very clear from the use of word ""intimation"" as substituted for ""assessment"" that two different concepts emerged. While making

an assessment, assessing officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first

proviso to section 143(1)(a), no addition which is impermissible by the information given in the return could be made by the assessing officer.

Reason is that u/s 143(1)(a) no opportunity is granted to the assessed and the assessing officer proceeds on his opinion on the basis of the return

filed by the assessee. The very fact that no opportunity of being heard is given u/s 143(1)(a) indicates that the assessing officer has to proceed

accepting the return and making the permissible adjustments only. As a result of insertion of Explanation to section 143 by the Finance Act, No. 2

of 1991 with effect from 1-10-1991, and subsequently with effect from 1-6-1994, by Finance Act, 1994, and ultimately omitted with effect from

1-6-1999, by Explanation as introduced by Finance Act, No. 2 of 1999 an intimation sent to the assessed u/s 143(1)(a) was deemed to be an

order for purposes of section 246 between 1-6-1994 to 31-3-1995, and u/s 264 between 1-10-1991 and 31-5-1999. It is to be noted that the

expressions ""intimation"" and ""assessment order"" have been used at different places. Contextual difference between the two expressions has to be

understood in the context the expressions are used. Assessment is used as meaning sometimes "the computation of income", sometimes "the

determination of the amount of tax payable" and sometimes "the whole procedure laid down in the Act for imposing liability upon the taxpayer". In

the scheme of things, as noted above, the intimation u/s 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well

brought out by the statutory provisions as they stood at different points of time. u/s 143(1)(a) as it stood prior to 1-4-1989, the assessing officer

had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment

order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the CBDT spell out the intents of

legislature, i.e, to minimise the departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These

aspects were highlighted by one of us (D.K Jain, J.) in the case of Apogee International Ltd. Vs. Union of India and Another, by this court. It may

be noted above that under the first proviso to the newly substituted section 143(1), with effect from 1-6-1999, except as provided in the provision

itself, the acknowledgment of the return shall be deemed to be intimation u/s 143(1) where (a) either no sum is payable by the assessed or (b) no

refund is due to him. It is significant that the acknowledgment is not done by any assessing officer, but mostly by ministerial staff. Can it be said that

any ""assessment"" is done by them? The reply is an emphatic ""no"". The intimation u/s 143(1)(a) was deemed to be a notice of demand u/s 156, for

the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be

payable in the intimation became permissible and nothing more can be inferred from the deeming provision. Therefore, there being no assessment

u/s 143(1)(a), the question of change of opinion, as contended, does not arise.

10. Additionally, section 148 as presently stands is differently couched in language from what was earlier the position. Prior to the substitution by

the Direct Tax Laws (Amendment) Act, 1987, the provision read as follows:

148. Issue of notice where income has escaped assessment.-(1) Before making the assessment, reassessment or recomputation u/s 147, the

assessing officer shall serve on the assessed 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, apply accordingly as if the notice were a notice issued under that sub-

section.

(2) The assessing officer shall, before issuing any notice under this section, record his reasons for doing so.

11. Section 147 prior to its substitution by the Direct Tax Laws (Amendment) Act, 1987, stood as follows :

Section 147. Income escaping assessment-If :

(a) the assessing officer has reason to believe that, by reason of the omission or failure on the part of an assessed 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 his assessment for that year, income chargeable

to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the assessing 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 concerned (hereinafter 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 assessing officer of account books or other evidence from which material evidence could with due diligence

have been discovered by the assessing officer will not necessarily amount to disclosure within the meaning of this section.

12. Section 147 authorises and permits the assessing officer to assess or reassess income chargeable to tax if he has reason to believe that income

for any assessment year has escaped assessment. The word ""reason"" in the phrase ""reason to believe"" would mean cause or justification if the

assessing officer has cause or justification to know or suppose that income had escaped assessment, it can be said to believe to reason that an

income had escaped assessment. The expression cannot be read to mean that the assessing officer should have finally ascertained the fact by legal

evidence or conclusion. The function of the assessing officer is to administer the statute with solicitude for public exchequer with inbuilt idea of

fairness to taxpayers. As observed by the Apex Court in Central Provinces Manganese Ore Co. Ltd. Vs. I.-T.O., Nagpur, for initiation of action

u/s 147(1) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, final

outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is ""reason to believe"", but not the established

faction of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable

person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This

is so became the formation of belief by assessing officer is within the realm of subjective satisfaction. INCOME TAX OFFICER Vs. SELECTED

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13. The scope and effect of section 147 as substituted with effect from 1-4-1989 as also sections 148 to 152 are substantially different from the

provisions as stood prior to such substitution. Under old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under

which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction u/s 147(a) two

conditions were required to be satisfied, firstly, the assessing officer must have reason to believe that income, profits or gains chargeable to Income

Tax have escaped assessment, and secondly, he must also have reason to believe that such escapement has occurred by reason of either (i)

omission or failure on part of assessed to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions are

condition precedent to be satisfied before the assessing officer could have jurisdiction to issue notice u/s 148 read with section 147(a). But under

substituted section 147, existence of only the first condition suffices. In other words if the assessing officer for whatever reason has reason to

believe that income has escaped assessment, it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions

must be fulfilled, if the case falls within the ambit of proviso to section 147. Case at hand is covered by the main provision and not the proviso.

14. Another plea taken by the petitioner was that within that prescribed time limit action for assessment u/s 143(3) was not taken. We find no

substance in this plea.

15. So long as the ingredients of section 147 are fulfilled, the assessing officer is free to initiate to proceed u/s 147 and failure to take steps u/s

143(3) will not render the assessing officer powerless to initiate reassessment proceedings even when intimation u/s 143(1) had been issued.

Similar view has been taken in A. Pusa Lal Vs. Commissioner of Income Tax, and Jorawar Singh Baid Vs. Asst. Commissioner of Income Tax

and Others, and Pradeep Kumar Har Saran Lal Vs. Assessing Officer, In the instance case, though statutorily reasons were not required to be

communicated to the assessed prior to the submissions of return in response to notice u/s 148, pursuant to the directions of this court, reasons for

proceeding u/s 147 have been indicated. They are as follows .

M/s Mahanagar Telephone Ltd. with its office at Jeevan Bharati Tower 1, 12th Floor, Connaught Circus, New Delhi, filed its return of income for

the assessment year 1994-95 on a total income of Rs. 7,78,01,90,342. The return so filed on 30-11-1994, was processed u/s 143(1)(a) on 28-

3-1995. Examination of the return of income reveals that a sum of Rs. 1,24,85,60,000 has been claimed as license fee as against nil in the

immediately preceding year. While finalizing the assessment for the assessment year 1996-97 u/s 143(3) on 23-3-1999, for reasons discussed

therein it is found that the claim made by the assessed is erroneous and should have been disallowed. It is so on account of the fact that the

expenditure is application of income and does not tantamount to diversion of income by overriding title.

2. On the facts of the case I have reasons to believe that income chargeable to tax of Rs. 1,24,85,60,000 has escaped assessment for the

assessment year 1994-95. Accordingly, notice u/s 148 read with section 147, is issued to bring to tax the aforesaid amount. Notice signed may

issue.

16. This cannot be said to be a case where initiation of proceedings in terms of notice u/s 148 can be said to be without jurisdiction or foundation.

The reasons indicated cannot be said to be non-relevant, While deciding the validity of a notice u/s 148, the permissible limit of consideration is the

existence of reasons and, as indicated above not sufficiency thereof.

17. Looked at from any angle, the notice issued u/s 148 of the Income Tax Act cannot be said to be invalid. We do not find any merit in this writ

petition, which is accordingly dismissed. However, in view of the peculiar circumstances of the case, there will be no orders as to costs.