M/s. Indian and Eastern Newspaper Society, New Delhi

Vs

Commissioner of Income Tax, New Delhi

Tax Reference Cases Nos. 1 to 4 of 1973

(P.N. Bhagwati, V.D. Tulzapurkar, R.S. Pathak JJ)

31.08.1979

JUDGMENT

PATHAK, J. -

1. Can the view expressed by an internal audit party of the Income Tax Department on a point of law be regarded as "information" for the purpose of initiating proceedings under Section 147(b) of the Income Tax Act, 1961 ? Opinion on the question has been divided among the High Courts, and accordingly the present cases have been referred by the Income Tax Appellate Tribunal under Section 257 of the Act.

2. The assessee, Messrs. Indian and Eastern Newspaper Society, is a society registered under the Indian Companies Act. It is a professional association of newspapers established with the principal object of promoting the welfare and interest of all newspapers. The assessee owns a building in which a conference hall and rooms are let out on rent to its members as well as to outsiders. Certain other services are also provided to the members. The income from that source was assessed to tax all along as income from business. It was so assessed for the years 1960-61, 1961-62, 1962-63 and 1963-64 also.

3. The Income Tax Department includes an internal audit organisation whose function it is to examine income tax records and check mistakes made therein with a view ultimately to improve the quality of assessments. In the course of auditing the income tax records pertaining to the assessee for the assessment years 1960-61 to 1963-64, the 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 not have been assessed as income from business. It said that an assessment should have been made under the head "Income from property". The Income Tax Officer treated the contents of the report as "information" in his possession for the purpose of Section 147(b) of the Income Tax Act, 1961, and reassessed the income on that basis. The Appellate Assistant Commissioner allowed the appeals filed by the assessee holding, inter alia, that that in law it could not be said that the Income Tax Officer had any "information" in his possession enabling him to take action under Section 147(b). On appeal by the Revenue, the Income Tax Appellate Tribunal, Delhi Bench noticed a conflict of judicial opinion on the question whether the internal audit report could be treated as "information" for the purpose of Section 147(b). The Gujarat High Court in Kasturbhai Lalbhai v. R. K. Malhotra, ITO ((1971) 80 ITR 188 (Guj)) has held that an internal audit report could not be regarded as "information", while the Delhi High Court in CIT v. H. H. Smt. Chand Kanwarji ((1972) 84 ITR 584 (Del)) had expressed a contrary view. Following the view adopted by the Delhi High Court, the Tribunal held that the Income Tax Officer had jurisdiction to proceed under Section 147(b). The assessee applied for a reference, and having regard to the difference between the High Courts on the

point, the Tribunal has considered it expedient to refer the following question of law directly to this Court :

> Whether, on the facts and in the circumstances of the case, the Income Tax Officer was legally justified in reopening the assessments under Section 147(b) for the years 1960-61, 1961-62, 1962-63 and 1963-64 on the basis of the view expressed by the internal audit party and received by him subsequent to the original assessment ?

4. Since then, the judgment of the Gujarat High Court in Kasturbhai Lalbhai case ((1971) 80 ITR 188 (Guj)) has, on appeal, been reversed by this Court in R. K. Malhotra, ITO, Group Circle II(1), Ahmedabad v. Kasturbhai Lalbhai ((1977) 3 SCC 519 : 1977 SCC (Tax) 508 : (1977) 109 ITR 537). It has been strenuously contended that the view taken by this Court calls for further consideration. Having regard to the dimensions of the controversy and the importance of the question, we have been persuaded to take a fresh look at the point.

5. An assessment proceeding is a quasi-judicial proceeding. It acquires finality on the assessment order being made. And the finality of such an order can be disturbed only in proceedings, and within the confines, provided by law. An appeal, revision and rectification are proceedings in which the finality may be questioned. The assessment may also be reopened under Section 147 of the Act. It is a proceeding for assessing income which has "escaped assessment". Section 147 reads :

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 under Section 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) 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 Section 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.

6. In cases falling under Section 147(b), the expression "information" prescribes one of the conditions upon which a concluded assessment may be reopened under that provision. It is an indispensable ingredient which must exist before the section can be availed of. What does "information" in Section 147(b) connote ? In Maharaj Kumar Kamal Singh v. CIT ((1959) 35 ITR 1 : 1959 Supp 1 SCR 10 : AIR 1959 SC 257) this court, construing the corresponding Section 34(1)(b) of the Indian Income Tax Act, 1922 held the word "information" to mean not only facts or factual material but to include also information as to the true and correct state of the law and, therefore, information as to relevant judicial decisions. Thereafter in CIT v. Raman & Co. ((1968) 67 ITR 11 : (1968) 1 SCR 10 : AIR 1968 SC 49), the Court defined the expression "information" in Section 147(b) of the Income Tax Act, 1961 as "instruction or knowledge derived from an external source concerning facts or particulars, or as to law, relating to a matter bearing on the assessment". That definition has been reaffirmed in subsequent cases, and with it as the point of departure we shall now proceed.

7. Insofar as the word "information" means instruction or knowledge concerning facts or particulars, there is little difficulty. By its inherent nature, a fact has concrete existence. It influences the determination of an issue by the mere circumstance of its relevance. It requires no further authority to make it significant. Its quintessential value lies in its definitive vitality.

8. But when "information" in regarded as meaning instruction or knowledge as to law the portion is more complex. When we speak of "law", we ordinarily speak of norms or guiding principles having legal effect and legal consequences. To possess legal significance for that purpose, it must be enacted or declared by competent authority. The legal sanction vivifying it imparts to it its force and validity and binding and binding nature. Law may be statutory law or, what is popularly described as, judge-made law. In the former case, it proceeds from enactment having its source in competent legislative authority. Judge-made law emanates from a declaration or exposition of the content of a legal principle or the interpretation of a statute, and may in particular cases extend to a definition of the status of a party or the legal relationship between parties, the declaration being rendered by a competent judicial or quasi-judicial authority empowered to decide questions of law between contending parties. The declaration or exposition is ordinarily set forth in the judgment of a court or the order of a tribunal. Such declaration or exposition in itself bears the character of law. In every case, therefore, to be law it must be creation by a formal source, either legislative or judicial authority. A statement by a person or body not competent to create or define the law cannot be regarded as law. The suggested interpretation of enacted legislation and the elaboration of legal principles in textbooks and journals do not enjoy the state of the law. They are merely opinions and, at best, evidence in regard to the state of the law and in themselves possess no binding effect as law. The forensic submissions of professional lawyers and the seminal activities of legal academics enjoy no higher status. Perhaps the only exception is provided by the writings of publicists in international law, for in the law of nations the distinction between formal and material sources is difficult to maintain.

9. In that view, therefore, when Section 147(b) of the Income Tax Act is read as referring to "information" as to law, what is contemplated is information as to the law created by a formal source. It is law, we must remember, which because it issues from a competent legislature or a competent judicial or quasi-judicial authority, influences the course of the assessment and decides any one or more of these matters which determine the assessee's tax liability.

10. In determining the status of an internal audit report, it is necessary to consider the nature and scope of the functions of an internal audit party. The internal audit organisation of the Income Tax Department was set up primarily for imposing a check over the arithmetical accuracy of the computation of income and the determination of tax, and now, because of the audit of income tax receipts being entrusted to the Comptroller and Auditor-General of India from 1960, it is intended as an exercise in removing mistakes and errors in income tax records before they are submitted to the scrutiny of the Comptroller and Auditor-General. Consequently, the nature of its work and the scope of audit have assumed a dimension co-extensive with that of Receipt Audit. (INTERNAL AUDIT MANUAL, Vol. II, p. 1) The nature and scope of Receipt Audit are defined by Section 16 of the Comptroller and Auditor-General (Duties, Powers and Conditions of Service) Act, 1971 "16. Audit of receipts of Union or of states. - It shall be the duty of the Comptroller and Auditor-General to audit all receipts which are payable into the Consolidated Fund of India and each State and of each Union Territory having a Legislative Assembly and to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue and are being duly observed and to make for this purpose such examination of the accounts as he thinks fit and report thereon."

11. Under that section, the audit by the Comptroller and Auditor-General is principally intended for the purposes of satisfying him with regard to the sufficiency of the rules and procedures prescribed for the purpose of securing an effective check on the assessment, collection and proper allocation of revenue. He is entitled to examine the accounts in order to ascertain whether the rules and procedures are being duly observed, and he is required, upon such examination, to submit a report. His powers in respect of the audit of income tax receipts and refunds are outlined in the Board's Circular No. 14/19/56-II dated July 28, 1960 (INTERNAL AUDIT MANUAL, Vol. II. p.39). Paragraph 2 of the Circular repeats the provisions of Section 16 of the Comptroller and Auditor-General (Duties, Powers and Conditions of Service) Act, 1971. And paragraph 3 warns that "the Audit Department should not in any way substitute itself for the revenue authorities in the performance of their statutory duties". Paragraph 4 declares :

> 4. Audit does not consider it any part of its duty to pass in review the judgment exercised or the decision taken in individual cases by officers entrusted with those duties, but it must be recognised that an examination of such cases may be an important factor in judging the effectiveness of assessment procedure .... It is however, to forming a general judgment rather than to the detection of individual errors of assessment, etc. that the audit enquiries should be directed. The detection of individual errors is an incident rather than the object of audit.

Other provisions stress that the primary function of audit in relation to assessments and refunds is the consideration whether the internal procedures are adequate and sufficient. It is not intended that the purpose of audit should go any further. Our attention has been invited to certain provisions of the Internal Audit Manual more specifically defining the functions of internal audit in the Income Tax Department. While they speak of the need to check all assessments and refunds in the light of relevant tax laws, the orders of the Commissioners of Income Tax and the instructions of the Central Board of Direct Taxes, nothing contained therein can be construed as conferring on the contents of an internal audit report the status of a declaration of law binding on the Income Tax Officer. Whether it is the internal audit party of the Income Tax Officer Department or an audit party of the Comptroller and Auditor-General, they perform essentially administrative or executive functions and cannot be attributed the powers of judicial supervision over the quasi-judicial acts income tax authorities. The Income Tax Act does not contemplate such power in any internal audit organisation of the Income Tax Department; it recognises it in those authorities only which are specifically authorised to exercise adjudicatory functions. Nor does Section 16 of the Comptroller and Auditor-General (Duties, Powers and Conditions of Service) Act, 1971 envisage such a power for the attainment of the objectives incorporated therein. Neither statue supports the conclusion that an audit party can pronounce on the law, and that such pronouncement amounts to "information" within the meaning of Section 147(b) of the Income Tax Act, 1961.

12. But although an audit party does not possess the power to so pronounce on the law, it nevertheless may draw the attention of the Income Tax Officer to it. Law is one thing, and its communication another. If the distinction between the source of the law and the communicator of the law is carefully maintained, the confusion which often results in applying Section 147(b) may be avoided. While the law may be enacted or laid down only by a person or body with authority in that behalf, the knowledge or awareness of the law may be communicated by anyone. No authority is required for the purpose.

13. In the present case, an internal audit party of the Income Tax Department expressed the view that the receipts from the occupation of the conference hall and rooms did not attract Section 10 of

the Act and that the assessment should have been made under Section 9. While Section 9 and 10 can be described as law, the opinion of the audit party in regard to their application is not law. It is not a declaration by a body authorised to declare the law That part alone of the note of an audit party which mentions the law which escaped the notice of the Income Tax Officer constitutes "information" within the meaning of Section 147(b); the part which embodies the opinion of the audit party in regard to the application or interpretation of the law cannot be taken into account by the Income Tax Officer. In every case, the Income Tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has now come to his notice he can reasonable believe that income has escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, add to or colour the significance of such law. In short, the true evaluation of the law in its bearing on the assessment must be made directly and solely by the Income Tax Officer.

14. Now, in the case before us, the Income Tax Officer had, when he made the original assessment, considered the provisions of Section 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under Section 147(b). Reliance is placed on Kalyanji Mavji & Co. v. CIT ((1976) 1 SCC 985 : 1976 SCC (,Tax) 111 : (1976) 102 ITR 287) where a Bench of two learned Judges of this Court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the Income Tax Officer must fall within Section 34(1)(b) of the Indian Income Tax Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels father than the statute warrants insofar 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. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this Court in Maharaja Kumar Singh v. CIT ((1959) 35 ITR 1 : 1959 Supp 1 SCR 10 : AIR 1959 SC 257), CIT v. Raman & Co. ((1968) 67 ITR 11 : (1968) 1 SCR 10 : AIR 1968 SC 49) and Bankipur Club Ltd. v. CIT ((1972) 4 SCC 386 : 1974 SCC (Tax) 76 : (1971) 82 ITR 831), and we do not believe that the law has since taken a different course. Any observations in Kalyanji Mavji & Co. v. CIT ((1976) 1 SCC 985 : 1976 SCC (Tax) 111 : (1976) 102 ITR 287) suggesting the contrary do not, we say with respect, lay down the correct law.

15. A further submission raised by the Revenue on Section 147(b) of the Act may be considered at this stage. It is urged that the expression "information" in Section 147(b) refers to the realisation by the Income Tax Officer that he has committed an error when making the original assessment. It is said that, when upon receipt of the audit note the Income Tax Officer discovers or realizes that a mistake has been committed in the original assessment, the discovers or realizes that a mistake has been committed in the original assessment, the discovery of the mistake would be "information" within the meaning of Section 147(b). 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 "reasons 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.

16. The recent decision of this Court in R. K. Malhotra v. Kasturbhai Lalbhai ((1977) 3 SCC 519 : 1977 SCC (Tax) 508 : (1977) 109 ITR 537) may be examined now. While making an assessment on a Hindu undivided family, the Income Tax Officer allowed a deduction of municipal taxes in determining the annual value of two house properties occupied by the assessee. Subsequently, the Income Tax Officer reopened the assessment on receipt of a report from the office of the Comptroller and Auditor-General of India that on a true interpretation of Section 23(2) of the Income Tax Act 1961, the deduction of municipal taxes was not admissible in the computation of the annual value of self-occupied house properties. The assessee contended that the report did not constitute "information" within the meaning of Section 147(b) of the Act, and the Gujarat High Court accepted the plea in the view that information as to law would consist of a statement by a person, body or authority competent and authorised to pronounce upon the law and invested with the authority to do so, and that the Audit Department was not such competent or authorised authority. On appeal by the Revenue, a Bench of two learned Judges of this Court, although endorsing the principle enunciated by the High Court, said that the Audit Department was the proper enunciated by the High Court, said that the Audit Department was the proper machinery to scrutinise assessments made by the Income Tax Officer and to point out errors of law contained therein, and the High Court has erred in taking the strict view which it did. The Court rested its decision on Assistant Controller of Estate Duty v. Nawab Sir Mir Osman Ali Khan Bahadur ((1969) 72 ITR 376 (SC)), CIT v. H. H. Smt. Chand Kanwarji ((1972) 84 ITR 584 (Del)), CIT v. Kelukutty ((1972) 85 ITR 102 (Ker)) and Vashist Bhargava v. ITO ((1975) 99 ITR 148 (Del)).

17. In Assistant Controller of Estate Duty v. Nawab Sir Mir Osman Ali Khan Bahadur ((1969) 72 ITR 376 (SC)), this Court held the opinion of the Central Board of Revenue as regards the correct valuation of securities for the purpose of estate duty to be "information" within the meaning of Section 59 of the Estate Duty Act, 1953, on the basis of which the Controller of Estate Duty was entitled to entertain a reasonable belief that property assessed to estate duty had been under-valued. The circumstance that the opinion of the Board was rendered in an appeal filed before it under the Estate Duty Act against the assessment made by the Assistant Controller of Estate Duty was apparently not brought to the notice of this Court when it heard R. K. Malhotra v. Kasturbhai Lalbhai ((1977) 3 SCC 519 : 1977 SCC (Tax) 508 : (1977) 109 ITR 537). The opinion of the Board represented its view as a quasi-judicial authority possessing jurisdiction to lay down the law. Although the Board did not enhance the valuation of the securities in the appellate proceeding because of the argument advanced by the appellant, nonetheless its observations amounted to information as to the law. It was not a case where the Board was functioning as an extra-judicial authority, performing administrative or executive function, and not competent or authorised to pronounce upon the law. The Delhi High Court in CIT v. H. H. Smt. Chand Kanwarji ((1972) 84 ITR 584 (Del)) held that the scrutiny note of Revenue Audit constituted "information" within the meaning of Section 147(b) of the Income Tax Act because the Comptroller and Auditor-General of India was empowered by statute to scrutinise the proceedings of the Income Tax Department and to point out defects and mistakes which adversely affected the Revenue. The High Court considered that the view that information as to law could be gathered only from the decisions of judicial or quasi-judicial authorities was unduly restrictive. In CIT v. Kelukutty ((1972) 85 ITR 102 (Ker)), the Kerala High Court also regarded the note put in by Audit as "information" within the meaning of Section 147(b) of the Act, but it appears to have assumed, without anything more, that an audit note would fall within that expression. As regards Vashist Bhargava v. ITO ((1975) 99 ITR 148 (Del)) the "information" consisted in a note of the Revenue Audit and the Ministry of Law that the payment of interest by the assessee was in fact made to his own account in the Provident Fund and, therefore, in law the money paid did not vest in the Government and, consequently, the original

assessment was erroneous insofar as it allowed the deduction of the interest as expenditure made by the assessee. The Delhi High Court upheld the reassessment on the finding that the note of the Revenue Audit and the Ministry of Law had to be taken into account by the Income Tax Officer, because in his executive capacity he had to be guided by the advice rendered by the Ministry of Law and he had to pay due regard to the note of the Revenue Audit because the officers of the Audit Department were experts empowered to examine and check upon the work of the Income Tax Officers. It seems to us that the considerations on which the Delhi High Court rested its judgment are not correct,. But the decision of the case can be supported on the ground that the basic information warranting the reopening of the assessment was the fact that the payment of interest was made to the Provident Fund account of the assessee himself. That the money so paid did not vest in the Government was a conclusion which followed automatically upon that fact, and no controversy in law could possibly arise on that point.

18. On the consideration prevailing with us, we are of opinion that the view taken by the Delhi High Court and the Kerala High Court in the aforementioned cases is wrong and we must, with great respect, hold that this Court was in error in the conclusion reached by it in R. K. Malhotra v. Kasturbhai Lalbhai ((1977) 3 SCC 519 : 1977 SCC (Tax) 508 : (1977) 109 ITR 537).

19. Our attention has been drawn to the further decision of the Kerala High Court in Muthukrishna Reddiar v. CIT ((1973) 90 ITR 503 (Ker)) and the decisions of the Allahabad High Court in Raj Kumar Shrawan Kumar v. Central Board of Direct Taxes ((1977) 107 ITR 570 (All)) and Elgin Mills Co. Ltd. v. ITO ((1978) 111 ITR 287 (All)). The Kerala High Court merely followed its earlier judgment in CIT v. Kelukutty ((1972) 85 ITR 102 (Ker)) and the Allahabad High Court was impressed by the same reasons substantially which persuaded the Delhi High Court and the Kerala High Court in the case referred to above.

20. Therefore, whether considered on the basis that the nature and scope of the functions of the internal audit organisation of the Income Tax Department are co-extensive with that of Receipt Audit or on the basis of the provisions specifically detailing its functions in the Internal Audit Manual (INTERNAL AUDIT MANUAL, Vol. 2) we hold that the Opinion of an internal audit party of the Income Tax Department on a point of law cannot be regarded as "information" within the meaning of Section 147(b) of the Income Tax Act, 1961.

21. The question referred by the Income Tax Appellate Tribunal is answered in the negative, in favour of the assessee and against the Revenue. The assessee is entitled to one set of costs in these appeals.

</html