

## **BOMBAY HIGH COURT**

Rajabally Hirji Meghani

Vs

S.N. Sahane

(Bharucha and Daud, JJ.)

30.06.1987

### **JUDGMENT**

#### **Bharucha, J.**

1. The appellant was assessed to income-tax for the assessment year 1971-72 by an assessment order dated March 27, 1974. On September 30, 1974, the appellant was given notice under section 148 of the Income-tax Act, 1961, of the proposed reopening of his assessment for the said assessment year. On November 29, 1975, the appellant wrote to his Income-tax Officer protesting against the proposed reopening. He asked the Income-tax Officer to furnish him with the grounds for the same. On that day, he also filed a return as required by the notice under section 148, but under protest.

2. Nothing transpired until January 17, 1980, when the Income-tax Officer wrote to the appellant on the subject of the reopening of his assessment under section 147(a) of the Income-tax Act, 1961, for the said assessment year. He stated that after the assessment for that year had been made, the Income-tax Department came to know that loans shown by the appellant were not genuine; that one J. K. Thakkar had merely lent his name to show that a loan had been received from him, though he had not given it. The Department had, therefore, reason to believe that the amount of the loans represented the appellant's own unexplained money and that his income had escaped assessment because he had failed to furnish full, true and correct particulars of his income at the time of the original assessment. Accordingly, the assessment had been reopened under section 147(a) by issue of a notice under section 148 of the Income-tax Act, 1961. Along with the letter, the Income-tax Officer had enclosed notices under sections 143(2) and 142(1) of the said Act and a summons for personal attendance under section 131. On February 15, 1980, the appellant wrote to the Income-tax Officer a long letter in which he again asked to be furnished with the grounds recorded by the Income-tax Officer before the notice under section 148 was issued. On February 23, 1980, the Income-tax Officer informed the appellant of the grounds. They were recorded thus :

"The assessee had for this year shown a loan of Rs. 50,000 taken from one Jethalal K. Thakkar which has been accepted in the original assessment made. As per intimation letter dt. 20-4-1974 on record from the 2nd ITO, BSD (West), this person has given havalas. There is also an intimation from the 3rd ITO, X-Ward, Bombay, that one J. K. Nathwani had arranged bogus havala loans in the name of Jethalal Karsondas Mohanlal & Sons during the years 1971 and 1972 for the assessee.

I have, therefore, reason to believe that on account of the assessee's omission to disclose fully and truly all the material facts necessary for assessment for this year, income chargeable to tax of Rs. 50,000 has escaped assessment. Issue notice u/s. 148.

(Sd.)..... ITO."

3. Along with the letter dated February 23, 1980, the Income-tax Officer enclosed copies of letters dated February 7, 1975, and April 20, 1974, which were referred in the grounds.

4. On March 4, 1980, the appellant filed a writ petition impugning the notice under section 148 of the Income-tax Act, 1961, the notices under sections 143(2) and 142(1) of the said Act and the summons under section 131. The writ petition was heard and disposed of by the learned single judge on December 22, 1983. The learned judge dismissed the writ petition in so far as it concerned the notice under section 148 on the ground of delay. He quashed the notices under sections 143(2) and 142(1) and the summons under section 131. This appeal filed by the original petitioner assails the judgment and order of the learned judge in so far as they rejected his contentions in regard to the notice under section 148.

5. The notice under section 148 of the Income-tax Act, 1961, was issued on September 30, 1975. Soon thereafter, on November 29, 1975, the appellant wrote to the Income-tax Officer calling for the grounds for the proposed reopening. There was no reply to this communication. Nothing was heard of the proposed reopening till the Income-tax Officer wrote to the appellant on January 17, 1980, and even then he did not set out the grounds which he had recorded before he issued the notice under section 148. It was, however, for the first time that the Income-tax Officer then stated that the reopening was proposed under section 147(a). It was only when, once again, the assessee required the Income-tax Officer to furnish him with the grounds that they were given to him on February 23, 1980. The writ petition was thereafter filed on March 4, 1980. In these circumstances, it does not appear to us equitable that the appellant's writ petition should be dismissed in regard to the notice under section 148 only upon the ground of delay.

6. To appreciate what follows, clauses (a) and (b) of section 147 of the Income-tax Act, 1961, must be set out :

"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 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 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 (hereafter in sections 148 to 153 referred to as the relevant assessment year)."

7. It is apparent from the grounds which are quoted above that the reopening could not have been under clause (a) of section 147 of the Income-tax Act, 1961, and this is not seriously disputed. It is equally apparent from the grounds that the reopening was proposed because of the information received by the Income-tax Officer by the letters dated February 7, 1975, and April 20, 1974, from fellow Income-tax Officers. The first of the letters was written by the Income-tax Officer to the aforementioned J. K. Thakkar (also called J. K. Nathwani). The letter stated that J. K. Thakkar had filed an affidavit in which he had listed the names of the parties for whom he had arranged "havalas" on commission basis. The appellant was shown in the list as having received in the assessment year 1971-72 a "havala of Rs. 50,000 ". The second letter was also from the Income-tax Officer of J. K. Thakkar. It referred to an entry in the account of J. K. Thakkar maintained in the appellant's books which showed that the former had advanced Rs. 50,000 in cash to the latter on March 31, 1971. Information gathered, the letter said, showed that J. K. Thakkar acted only as name-lender passing bogus havalas for the alleged loans.

8. The question now is whether, in these circumstances, we should strike down the notice under section 148 of the Income-tax Act, 1961, because section 147(a) of the said Act, which the Income-tax Officer invoked, is not applicable. There is, in our mind, no doubt that the letters dated February 7, 1975, and April 20, 1974, furnished definite information to the Income-tax Officer. This was not a case of "wholly vague, indefinite, far-fetched and remote" information. The information could not but have led to the reasonable belief that income chargeable to tax in the appellant's hands had escaped assessment.

9. Our attention was drawn by Mr. Rahimtoola, learned counsel for the appellant, to the judgment

of the Allahabad High Court in *Raghubar Dayal Ram Kishan v. CIT*<sup>1</sup> The judgment was delivered on a reference. The question that was answered read thus

"Where an Income-tax Officer assesses the income under section 34(1)(a) and the Appellate Tribunal, on appeal, comes to the conclusion that it should have been assessed under section 34(1)(b), has the Tribunal jurisdiction to convert or alter the assessment made by the Income-tax Officer under section 34 to an assessment under section 34(1)(b) and maintain it as such ?"

10. Desai C.J. and Manchanda J. having differed, the question was referred to Pathak J. Pathak J., agreed with Desai C.J. in answering the question in the negative. He referred to the powers conferred upon the Income-tax Appellate Tribunal and held that the Tribunal did not have the jurisdiction to convert an assessment made under one clause of section 147 of the Income-tax Act, 1961, to an assessment under the other clauses.

11. The Allahabad case, as we have noticed, was concerned with the powers of the Tribunal and was delivered on a reference. The matter before us is an appeal filed from a judgment and order on a writ petition under article 226 of the Constitution. If a court exercising power under article 226 is of the view that the interests of justice will be defeated if some order or notice is quashed for technical reasons, it may decline to issue the necessary writ. It is our view that the information conveyed as aforesaid to the Income-tax Officer assessing the appellant required a reopening of the appellant's assessment and further inquiry. The interests of justice will not be served if such inquiry does not take place by reason of the striking down of the notice under section 148 of the Income-tax Act, 1961. We, therefore, decline to issue that writ.

12. Mr. Jetly, learned counsel for the Revenue, now draws our attention to the judgment of a Division Bench of the Delhi High Court in *Ganga Saran and Sons (HUF) v. ITO*<sup>2</sup> A notice under section 148 of the Income-tax Act, 1961, was issued to an assessee after his assessment was sought to be reopened by invoking the provisions of clause(a) of section 147 of the said Act. The assessee challenged the notice by filing a writ petition. The court came to the conclusion that the provisions of clause (a) of section 147 were not attracted. It then considered the question as to whether a notice issued under clause (a) of section 147 could be validated by reference to clause (b) thereof. The facts before the court were such that the provisions of clause (b) of section 147 were applicable. The principal objection raised by the assessee was, however, that the Income-tax Officer had initiated the action not under clause (b) but under clause (a) of section 147 and that, therefore, the Revenue could not be permitted to seek the aid of clause (b) of section 147 for sustaining proceedings initiated under clause (a) thereof. The court held that it was open to the Revenue to do so notwithstanding the fact that clause (b) of section 147 had not been specifically pleaded and had for the first time been referred to in the course of arguments. The court referred

to its own earlier judgment in *Avtar Singh Sandhu v. WTO*<sup>3</sup> and to the judgments of the Calcutta High Court the latest in *Smt. Nirmala Birla v. WTO*<sup>4</sup> and concurred with the view therein expressed that it was possible for the Income-tax Officer to entertain on the same set of facts alternate beliefs under clause (a) or clause (b) of section 147 and there was nothing to prevent the Income-tax Officer from seeking to support the validity of a notice by reference to the appropriate provision in the statute. The court said that the Revenue had, no doubt, purported to reopen the assessment under clause (a) of section 147, but, if the facts could sustain the reopening of the assessment under clause (b) thereof, it did not see why the validity of the notice under section 148 of the Income-tax Act, 1961, could not be supported.

13. We are in respectful agreement with the views taken by the Delhi High Court in the context of the writ petition to strike down notices issued under section 148 of the Income-tax Act 1961, in exercise of powers under clause (a) of section 147 of the said Act. Where the facts may sustain the proposed reopening under clause (b) of section 147 of the said Act but not under clause (a) thereof, the court may not strike down the notice under section 148 of the said Act.

14. In the result, we dismiss the appeal, but with no order as to costs.

#### Cases Referred.

1[1967] 63 ITR 572

2[1981] 130 ITR 212

3[1981] 129 ITR 531 (Del)

4[1976] 105 ITR 483 [FB]