Patna High Court
Kedarnath Goenka vs Income-Tax Officer, "A" Ward And ... on 11 August, 1978
Equivalent citations: 1979 120 ITR 390 Patna
Author: N P Singh
Bench: N P Singh, V Mishra
JUDGMENT Nagendra Prasad Singh, J.

1. The petitioner in this writ application has questioned the authority of the respondent-ITO to issue the notice dated January 8, 1974, under Section 148 of the I.T. Act, 1961 (hereinafter referred to as " the Act") asking the petitioner to file a return of his income in respect of the assessment year 1963-64, because he had reasons to believe that income chargeable to tax has escaped assessment for that year. A copy of that notice is annex. 2 to the writ application. According to the petitioner, the said notice has been issued without jurisdiction and amounts to an arbitrary exercise of statutory power by the respondent-ITO.

2. The case of the petitioner is that he is the karta of a HUF which carries on business at Monghyr under the name and style of M/s. Magniram Baijnath, For the assessment year 1963-64, his total income was assessed on July 19, 1965, at Rs. 11,074. A true copy of that assessment order is annex. 1 to the writ application. It has been asserted that in the course of assessment proceedings for that year the petitioner had disclosed fully and truly all material facts necessary for the assessment. In spite of that the impugned notice dated January 8, 1974, has been issued directing the petitioner to submit a return for that very assessment year 1963-64. Having received the notice, the petitioner requested for a copy of the reasons which had formed the basis for the proceeding. In reply to that, on March 30, 1974, the petitioner received from the respondent-ITO a letter, enclosing therewith a statement containing the reasons for initiating the proceedings in question. A copy of the said letter along with the enclosed statement containing the reasons for the belief about the escaped assessment, has been marked as annex. 4 to the writ application. According to the petitioner, the respondent-ITO, on the materials aforesaid, could not have reasons to believe that income chargeable to tax has escaped assessment in the year in question. According to the petitioner, all the material facts having been fully and truly disclosed before the passing of the assessment order, in the year 1965, the respondent-ITO cannot reopen the assessment in the purported exercise of the powers conferred upon him by Section 147 of the Act.

3. Counter-affidavit has been filed on behalf of the respondents justifying the action of the ITO and stating the circumstances under which the notice in question was issued.

4. The power of the ITO to make reassessment of the income in respect of any year in which the income chargeable to tax has escaped assessment is circumscribed by different sections of the Act, specially Sections 147 to 153. The relevant portion of Section 147, excluding the two Explanations with which we are not concerned in this case, is as follows :

"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."

5. On a plain reading of Section 147, it appears that for Clause (a) of Section 147, two distinct conditions precedent are required to be fulfilled before the ITO can exercise jurisdiction, (i) he must have reasons to believe that income has escaped assessment, and (ii) he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to make a return or to disclose fully and truly all material facts necessary for his assessment for the relevant year. For Clause (b) of Section 47 also, two conditions must exist before the power can be exercised, (i) the ITO should have reasons to believe that income has escaped assessment, and (ii) it should be in consequence of information received after the original assessment. Whether the power is exercised under Clause (a) or under Clause (b), the two conditions mentioned in respect of each clause must be satisfied; otherwise, the ITO's action would be without jurisdiction. In the instant case, we are not concerned with Clause (b) of Section 147, because no notice can be issued in respect of cases falling under Clause (b) after the expiry of four years, from the end of the relevant assessment year. Admittedly, that period is over.

As such, the only question which has to be examined in the present case is as to whether the case falls under Clause (a) of Section 147 or not. Sub-section (I) of Section 149 prescribes that no notice under Section 148 shall be issued in cases falling under Clause (a) of Section 147 for the relevant assessment year, if 8 years have elapsed from the end of that year, but not more than 16 years have elapsed unless the income chargeable to tax which has escaped assessment, amounts to or is likely to amount to Rs. 50,000 or more for that year. Before any such notice is issued, the Board should be satisfied on the reasons recorded by the ITO, that it was a fit case for issue of such notice.

6. Learned counsel appearing for the petitioner has submitted that in the instant case none of the two conditions were fulfilled before the ITO concerned issued the notice. In the case of ITO v. Lakhmani Mewal Das [1976] 103 ITR 437, at page 445, it was observed by the Supreme Court I " The grounds or reasons which lead to the formation of the belief contemplated by Section 147(a) of the Act must have a material bearing on the question of escapement of income of the assessee from assessment because of his failure or omission to disclose fully and truly all material facts. Once there exist reasonable grounds for the Income-tax Officer to form the above belief, that would be sufficient to clothe him with jurisdiction to issue notice. Whether the grounds are adequate or not is not a matter for the court to investigate. The sufficiency of the grounds which induce the Income-tax Officer to act is, therefore, not a justiciable issue. "

7. It was, however, pointed out I " The expression ' reason to believe ' does not mean a purely subjective satisfaction on the part of the ITO. The reason must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings in respect of income escaping assessment is open to challenge in a court of law. "

8. The same view had been expressed by the Supreme Court in the case of Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 in connection with the corresponding provision of the Indian I.T. Act, 1922, where it was observed that the question whether the ITO has reason to believe that under-assessment had occurred by any reason of non-disclosure of material fact was not a mere question of limitation, but was a question of jurisdiction. So far as the second condition is concerned that such escapement was by reason of omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for the relevant year has also to be fulfilled before an action is taken for reassessment. It was pointed out that once the assessee is able to show that he had fully and truly disclosed all material facts on the earlier occasion, then even if some income has escaped assessment due to wrong view being taken by the then ITO, the notice for reassessment shall be without jurisdiction. In that case, while construing the words " omission or failure to disclose fully and truly all material facts necessary for his assessment for that year ", it was observed (p. 200) :

" It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assessing authority has to draw inferences as regards certain other facts ; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable."

9. It was further observed that while it was the duty of the assessee to disclose all primary facts relevant to the decision, but once all the primary facts are before the assessing authority, (p. 201) " he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else--far less the assessee--to tell the assessing authority what inferences, whether of facts or law, should be drawn". It was further pointed out that if there were, in fact, some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of " under-assessment ", that would be sufficient to give jurisdiction to the Income-tax Officer to issue the notice. Whether the grounds were sufficient or not for arriving at that conclusion were not open for a writ court to investigate. It was observed in that connection (pp. 201, 202) :

" .....all that is necessary to give this special jurisdiction is that the Income-tax Officer had when he assumed jurisdiction some prima facie grounds for thinking that there had been some non-disclosure of material facts."

10. Same view has been expressed by the Supreme Court in Gemini Leather Stores v. ITO [1975] 100 ITR 1, Chhugamal Rajpal v. S, P. Chaliha [1971] 79 ITR 603 and CIT v. Burlop Dealers Ltd. [1971] 79 ITR 609 and in the decisions of different High Courts in the cases of Sujir Ganesh Nayak & Co. v. ITO [1976] 104 ITR 524 (Ker), Govind Ram v. ITO [1966] 61 ITR 120 (All), Poonjabhai Vanmalidas and Sons v. CIT [1974] 95 ITR 251 (Guj) [FB] and CIT v. Sri Bihariji Mills Ltd. [1976] 103 ITR 599 (Pat).

11. Whether the material facts had been disclosed or not by the assessee on the earlier occasion, will be a question which has to be decided in each case. Whenever any controversy arises as to whether there had been nondisclosure of material facts, all that is necessary to give jurisdiction to the ITO, is that there must be some prima facie grounds for thinking that there had been some non-disclosure of material facts. If the assessee wants the writ court to hold that in fact the officer had no jurisdiction to exercise that power, then he has to establish that the ITO had no material at all before him for believing that there had been any such non-disclosure.

12. Now it has to be examined as to whether the petitioner has been able to establish that the ITO had no material at all before him for believing that there had been such non-disclosure. On behalf of the petitioner in support of this assertion reference was made to the reasons recorded by the ITO, a copy whereof was forwarded to the petitioner (annex. 4). It appears from the reasons stated that during the relevant year, i.e., 1963-64, the aforesaid firm " Magniram Baijnath " had shown purchase of 4,44,800 shares of British India Corporation Ltd. It had been stated then that the shares had been purchased from the borrowed funds. At the time of assessment, the petitioner had produced confirmation letters from the alleged creditors. Now, according to the ITO, it has transpired, (i) that the petitioner had disclosed dividend in respect of 3,44,800 shares only and no dividend was disclosed in respect of remaining one lakh shares. As such an amount of Rs. 35,000, which was received as dividend by the petitioner was not disclosed and it has escaped assessment, and (ii) that it has also transpired that the aforesaid purchase of 4,44,800 shares on the [basis of the borrowed funds from the creditors was not correct because those creditors did not have any reliable source of funds in their books. The ITO has, thereafter, discussed the status and source of income of the three creditors who were said to have advanced the loan to the petitioner for the purchase of the aforesaid shares. On that, the ITO was satisfied that the case of taking loans from the creditors aforesaid was not correct and the purchase was made by secret funds. While recording the reasons, towards the end the ITO has stated that on account of the petitioner's failure to disclose fully and truly all material facts necessary for his assessment, the amount of Rs. 5,70,000 (dividend Rs. 35,000 and unexplained cash credit Rs. 5,35,000) had escaped the assessment.

13. On behalf of the petitioner, it was urged that even if the assertions made above are accepted on their face value, the petitioner having disclosed the fact about the purchase of 4,44,800 shares, should not be held guilty of non-disclosure of material facts it was for the ITO to calculate as to what amount the petitioner had derived as dividend and as to whether the case of credit for purchase of

shares was true or false. It was also urged that the petitioner had mentioned the names of the different creditors and had produced confirmation letters from them, the correctness or otherwise of which could have been examined then by the ITO, but having failed to do so, it will not amount to a non-disclosure of material facts fully and truly by the petitioner, vesting power in the respondent-ITO to issue notice under Section 148 of the Act. Learned standing counsel appearing for the respondents, however, submitted that admittedly the petitioner had not included Rs. 35,000 which he had earned by way of dividend, over the remaining one lakh shares, in his earlier return and certainly this will amount to non-disclosure within the meaning of Section 147 of the Act. He also urged that if the stand of the ITO is found to be correct that the case of purchase of the shares on the basis of the loans advanced by the creditors named therein was false, then it cannot be held that the petitioner had disclosed the material facts truly. In other words, according to learned standing counsel, it is not one of those cases where it can be held that the ITO had no material at all before him for believing that there had been such non-disclosure. On the other hand, in the facts and circumstances of the present case the ITO had, when he assumed jurisdiction, some prima facie grounds for thinking that there had been some non-disclosure of material facts.

14. Learned standing counsel made reference to the two Bench decisions of the Calcutta High Court in the cases of ITO v. Mahadeo Lal Tulsian [1977] 110 ITR 786 and ITO v. Mahadeo Lal Tulsyan [1978] 111 ITR 25 and a Bench decision of the Patna High Court in the case of Bihar State Road Transport Corporation v. CIT [1976] 103 ITR 736, in support of his contention that merely because on an earlier occasion the case of credit had been accepted, it will not be a bar in every case for exercise of power under Section 148 and notice under Section 148 should not be quashed in the exercise of writ jurisdiction by this court. Reference was also made to Sub-clause (3) of Article 226 of the Constitution of India (42nd Amendment) Act, 1976, on the basis of which a Full Bench of the Punjab and Haryana High Court in the case of Jai Hanuman Trading Co. Pvt. Ltd. v. CIT [1977] 110 ITR 36 took the view that an assessee should not be allowed to agitate the validity of a notice under Section 148 and he should first avail of the remedy provided under the Act. Learned standing counsel also placed reliance on an observation of the Supreme Court in the case of Lalji Haridas v. R. H. Bhatt [1965] 55 ITR 415 about the scope of an application under Article 226 even as it stood then, against issuance of a notice under Section 148. In my opinion, whether a writ application against an issuance of notice under Section 148 of the Act should be entertained or not will depend on the facts of each case. If the notice is issued without there being any material before the ITO for believing that there had been such non-disclosure, such notice being without jurisdiction, can be quashed in the writ jurisdiction of this court. In such a situation, the assessee cannot be asked to submit before an authority who is acting without jurisdiction. However, on the other hand, as was pointed out in the case of Calcutta Discount Co. Ltd. [1961] 41 ITR 191 (SC) at page 201, if the ITO, when he had assumed jurisdiction, had some prima facie grounds for thinking that there had been non-disclosure of material facts, the notice issued should not be quashed in exercise of writ jurisdiction. This was the position even before the 42nd Amendment Act of the Constitution.

15. In the instant case, an amount of Rs. 35,000, which was received as dividend, is said to have been not disclosed by the petitioner. If that assertion be correct, whether the petitioner can be exonerated of the charge of non-disclosure merely because he had disclosed the fact of purchase of 4,44,800 shares of the British India Corporation Ltd., is a matter which has to be examined in

detail. A finding has to be recorded that tax on the income of Rs. 35,000 escaped because of the mistake of the ITO and not due to the non-disclosure by the petitioner. Similarly, if the assertion, that the persons who were said to have advanced loans for purchase of shares by the petitioner have been found to be men of no means be true, then it has to be examined as to at what stage the confirmation letters had been produced from the alleged creditors and whether it amounted to a full and true disclosure of the material facts regarding the advancement of the loans from those creditors. If it is found that there has been a dereliction of duty on the part of the ITO, then the charge of the non-disclosure of material facts may not be levelled against the petitioner. On the other hand, if the petitioner had suppressed certain facts which were relevant to be disclosed or had disclosed certain facts which were untrue, then certainly the matter can be re-examined in exercise of the power under Section 147. In my view, it is not one of those cases where the petitioner has been able to establish that the ITO had no material at all before him for believing that there had been such non-disclosure. As such, in the facts and circumstances of the case, it cannot be held that the notice has been issued without jurisdiction, so that it can be quashed by this court in exercise of its writ jurisdiction. Of course, I hasten to add that my observation while rejecting the prayer to quash the notice should not be interpreted to mean that the two conditions requisite for exercise of the power under Section 147 of the Act have been fulfilled. My finding aforesaid is only for the purpose as to whether the notice should be quashed in exercise of the writ jurisdiction of this court or not. The respondent-ITO has to consider now on the materials which are on the record of the case or which may be produced on behalf of the petitioner as to whether the two conditions precedent for exercise of jurisdiction under Section 147 of the Act have been fulfilled or not.

16. In the result, the writ application fails and it is dismissed. In the circumstances of the case, however, there will be no order as to costs.

Vishwanath Misra , J.

18. I agree.