

## HIGH COURT OF JUDICATURE AT ALLAHABAD

Judgment reserved on 23rd January, 2009

Judgment delivered on 27th February, 2009

Court No. 29

Civil Misc. Writ Petition No. 2031 (Tax) of 2008

Dr. Deepak Agrawal

Vs.

Assistant Commissioner of Income Tax, Range-I Allahabad & Anr.,

\*\*\*\*\*

Hon. Janardan Sahai, J.

Hon. Dilip Gupta, J.

Delivered by (Dilip Gupta, J.)

This writ petition seeks to challenge the notice dated 13th March, 2008 issued by the Assistant Commissioner of Income Tax (Range-I) Allahabad under Section 148 of the Income Tax Act, 1961 ( hereinafter referred to as the 'Act') as also the order dated 12th November, 2008 by which the objections filed by the petitioner to challenge the reasons recorded in the aforesaid notice were rejected.

The petitioner, who is a medical practitioner, filed his return under Section 139 of the Act on 27th August, 2001 for the Assessment Year 2001-02 disclosing income of Rs. 2,48,640/-. Along with the return, a cash flow chart was appended which mentioned about the gift of Rs. 3,00,000/- given by Madhu Agrawal.

However, on 23rd November, 2001 search and seizure operation under Section 132 of the Act was carried out on the premises of the petitioner and the Block Assessment order under Section **158-BC of the Act for the block period 1st April, 1995 to 23rd November, 2001 was completed by** the Assessing Officer on **28th November, 2003** on an income of Rs. 43,50,775/- which included undisclosed income of Rs. 3,41,340/- for the assessment year 2001-02. This undisclosed income of Rs. 3,41,340/- comprised of the gift of Rs. 3,00,000/- said to have been given by Madhu Agrawal. This gift was found to be not genuine as she did not have the capacity to gift it.

The petitioner filed an appeal before the Commissioner of Income Tax (Appeals) against the aforesaid Block Assessment order dated 28th November, 2003. **The Commissioner of Income Tax (Appeals) by the order dated 7th May, 2004 granted relief of Rs. 3,00,000/- relating to the gift given by Madhu Agrawal.**

**Feeling aggrieved by the said order dated 7th May, 2004, the Department filed an appeal before the Income Tax Appellate Tribunal. The Tribunal by the order dated 31st August, 2006 observed that the gift of Rs. 3,00,000/- made by Madhu Agrawal is a matter for consideration in the Regular Assessment and not the Block Assessment.**

It needs to be mentioned that in respect of the return filed by the petitioner on 27th August, 2001 for the **Assessment Year 2001-02**, the Assessing Officer passed the assessment order on **23rd February, 2004** under Section 143(3) of the Act on an income of Rs. 10,78,830/- as against the disclosed income of Rs. 2,48,640/-. **While doing so, amongst others, the Assessing Officer added the gift of Rs. 3,00,000/- given by Madhu Agrawal in the income since it was found to be not genuine.**

The petitioner challenged the aforesaid assessment order dated 23rd February, 2004 before the Commissioner of Income Tax (Appeals) in respect of the additions, including the addition of gift of Rs. 3,00,000/- said to have been given by Madhu Agrawal and **by the order dated 20th June, 2005, certain reliefs, including the relief of Rs. 3,00,000/-, was granted to the petitioner in the aforesaid appeal.**

The Department challenged the aforesaid order dated 20th June, 2005 by filing an appeal before the Income Tax Appellate Tribunal in respect of certain deletions but there was no challenge to the relief of Rs. 3,00,000/- given to the petitioner by the Commissioner of Income Tax (Appeals). The petitioner also filed Cross-Objections in the Appeal filed by the Department against the order dated 20th June, 2005 passed by the Commissioner of Income Tax (Appeals).

The Appeal and the Cross-Objections came to be decided on 15th December, 2006. The Appeal

filed by the Department was dismissed while the Cross-Objections were allowed.

**It is on 13th March, 2008 that the Assistant Commissioner of Income Tax (Range-I), Allahabad issued the notice dated 13th March, 2008 under Section 148 of the Act proposing to reopen the assessment for the Assessment Year 2001-02 and the reasons supplied with the notice mention that the notice had been issued in order to give effect to the order dated 31st August, 2006 passed by the Income Tax Appellate Tribunal in respect of the Block Assessment proceedings.**

The petitioner filed objections to the said notice which were rejected by a detailed order dated 12th November, 2008.

We have heard Sri Rakesh Ranjan Agrawal, assisted by Sri Suyash Agrawal learned counsel for the petitioner and Sri Sambhu Chopra learned counsel for the respondents.

Sri Rakesh Ranjan Agrawal learned counsel for the petitioner submitted that the initiation of the proceedings under Section 148 of the Act for the Assessment Year 2001-02 in respect of the gift given by Madhu Agrawal for Rs. 3,00,000/- is illegal and without jurisdiction as the said gift was disclosed by the petitioner in the Cash Flow Chart filed with the return of income on 27th August, 2001 and thereafter the assessment order was also passed. It is his submission that in such circumstances the assessment cannot be reopened under Section 147 of the Act since the petitioner had disclosed fully and truly all material facts necessary for assessment and it cannot be said that the income had escaped assessment. He further submitted that reopening of assessment on the same facts is not permissible under Section 148 of the Act after the assessment order passed under Section 143(3) had merged with the order dated 20th June, 2005 passed by the Commissioner of Income Tax (Appeals) in respect of the amount of Rs. 3,00,000/- given by Madhu Agrawal, which order had become final since the Department did not file appeal. He also submitted that the proceedings could not have been initiated under Section 148 of the Act merely on the basis of the order of the Income Tax Appellate Tribunal dated 31st August, 2006 arising out of the Block Assessment proceedings as they cannot constitute the material for formation of the belief that any income has escaped assessment and no other material had been brought on record. It is also the submission of learned counsel for the petitioner that the reasons mentioned in the notice issued under Section 147 of the Act for reopening of the assessment under Section 147 read with Section 150(1) of the Act are bad in law inasmuch as the provisions of Section 150(1) are not applicable as there is no direction in the order dated 31st August, 2006 to assess the petitioner in respect of the gift given by Madhu Agrawal.

Sri Shambhu Chopra learned counsel appearing for the respondents, however, submitted that the order dated 12th November, 2008 by which objections have been rejected is a valid order and does not suffer from any infirmity; that the petitioner had not filed any appeal in the High Court against the order dated 31st August, 2006 passed by the Income Tax Appellate Tribunal in respect of the Block Assessment proceedings that the gift of Rs. 3,00,000/- given by Madhu Agrawal was a matter for consideration in the Regular Assessment and not in Block Assessment and, therefore, the notice issued under Section 148 of the Act is valid as otherwise the sum of Rs. 3,00,000/- will go unassessed and that Section 150(1) of the Act is clearly attracted to the facts of the case and so the notice was validly issued under Section 148 of the Act to give effect to the order passed by the Income Tax Appellate Tribunal.

We have considered the submissions advanced by learned counsel for the parties.

The records indicate that the Regular Assessment proceedings for the Assessment Year 2001-02 were completed on 23rd February, 2004 on an income of Rs. 10,78,830/- which included the gift of Rs. 3,00,000/- given by Madhu Agrawal. The petitioner filed an appeal against this order before the Commissioner of Income Tax (Appeals) and it was submitted on his behalf that the matter relating to the said gift was to be dealt with during the course of Block Assessment proceedings only and not in the regular assessment proceedings. It was for this reason that in the appeal filed by the petitioner against the order dated 23rd February, 2004, the Commissioner of Income Tax (Appeals) by the order dated 20th June, 2005 directed for deletion of the addition of Rs. 3,00,000/- made by the Assessing Officer. In this connection the relevant portion of the order dated 20th June, 2005 is reproduced below:-

".....During the course of hearing of the appeal I had asked the Id. representative of the appellant to clarify the stand of the appellant with regard to the issue whether the issue pertaining

to gift was a matter to be dealt with in the regular assessment proceedings or whether the matter was to be dealt with in the block assessment proceedings as had been done by the A.O. The Id. representative of the appellant submitted that the matter relating to the gift was to be dealt with during the course of block assessment proceedings only.....

.....Addition if any in respect of this alleged gifts was, therefore, required to be made only during the course of block assessment proceedings. No addition could be made during the course of regular assessment proceedings on protective basis. The addition made by the A.O. of Rs.3 lakhs on protective basis is directed to be deleted. At the cost of re-petition I may like to reiterate that I am not giving any findings on the merit of the additions or genuineness of the gifts. The addition is being directed to be deleted only on the basis of the fact that substantive addition had been made during the course of block assessment proceedings and on the facts and circumstances of the case the addition if any was required to be made during the course of block assessment proceedings only. Hence the addition made on protective basis during the course of regular assessment has been directed to be deleted." (emphasis supplied)

Accordingly, the Department contested this matter relating to the gift of Rs. 3,00,000/- given by Madhu Agrawal before the Income Tax Appellate Tribunal in the pending appeal filed by the Department against the order dated 7th May, 2004 passed by the Commissioner of Income Tax (Appeals) in respect of the Block Assessment order and on the materials available on record, the Income Tax Appellate Tribunal gave a categorical finding that the gift cannot be treated to be genuine but after having recorded this finding it was also observed that this will fall for consideration in the Regular Assessment and not Block Assessment. The relevant portion of the order is quoted below:-

"We have considered the rival submissions and perused the material on record. What we notice is that the source of income of Smt. Madhu Agrawal has not been proved. Her annual income in two years put together amounted to Rs.1 lacs only. There is no other source of income. She admittedly borrowed money from her husband and brother to give gift. This is unusual and against all human probabilities. Gift is normally given out of own fund and not by borrowing funds from others. No relationship or any bondage between donor and donee has been shown so as to suggest that donor could give gift to the donee. The A.O. has rightly quoted from Sanjay Baman's case (B1 ITD 01) and also relied on the decision of Hon'ble Supreme Court in Sumati Dayal's case (214 ITR 18). Thus, human probability does not suggest that Madhu Agrawal will be giving gift to the assessee. It is all adjustment to create capital for the assessee which is utilized in construction of the house property. Thus, gift is not treated as genuine. However, one important question remains as to whether this gift could be taxed in block assessment. The bank account of Rohit Agrawal and Dhruva Agrawal are not held as undisclosed. These are the sources from where the money has flown into the account of the assessee. The account, in which money has flown, is also not shown to be undisclosed. This, money is found deposited into a declared bank account of the assessee. This will, therefore, fall for consideration in the regular assessment and not in block assessment. Further only an account signed by Smt. Madhu Agrawal forwarded to the assessee was found during the course of the search. It as such does not reflect that the assessee's undisclosed income has passed to Madhu Agrawal and than routed to him as gift. What is only available at present is that the gift is not treated as genuine but it is not proved that it involves undisclosed money of the assessee. Thus, non-genuine nature of the gift would fall for consideration in the regular assessment and not in block assessment. We, therefore, confirm the order of the Id. CIT (A) but on different ground and reject this ground of the revenue."(emphasis supplied)

Once this categorical finding had been recorded by the Income Tax Appellate Tribunal in the aforesaid order in respect of the Block Assessment proceedings, there was no occasion for the Department to again raise this plea in the pending appeal before the Income Tax Appellate Tribunal in respect of the Regular Assessment.

The notice dated 13th March, 2008 that was issued by the Department under Section 148 of the Act read with Section 150(1) of the Act is merely to give effect to the order dated 31st August, 2006 of the Income Tax Appellate Tribunal.

The contention of learned counsel for the petitioner is that since the gift of Rs. 3,00,000/- had

been shown in the Cash Flow Chart filed with the return of income and it was considered by the Assessing Officer in the order dated 23rd February, 2004, it cannot be said that the income had escaped the assessment and, therefore, resort to the provisions of Section 147 of the Act cannot be taken to reopen the assessment on the basis of the order dated 13th March, 2008 passed by the Income Tax Appellate Tribunal.

The main emphasis of the learned counsel for the petitioner is on Section 147 of the Act and the same is reproduced below:-

"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 recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter 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 the 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 assessee to make a return under section 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:-

- (a) where no return of income has been furnished by the assessee 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.
- (b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;
- (c) where an assessment has been made, but---
  - (i) income chargeable to tax has been underassessed; 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."

It is true that the gift of Rs. 3,00,000/- had been mentioned in the Cash Flow Chart filed by the petitioner along with the return of income and that the Assessing Officer in his order dated 23rd February, 2004 had examined this gift and found it not to be genuine but it is also a fact that in the appeal filed by the petitioner before the Commissioner of Income Tax (Appeals) against the aforesaid order of the Assessing Officer, the petitioner took a categorical stand that the matter relating to gift of Rs. 3,00,000/- from Madhu Agrawal was required to be looked into in the Block Assessment proceedings and not in the Regular Assessment proceedings and it is for this reason alone that the Commissioner of Income Tax (Appeals) by the order dated 20th June, 2005 deleted the aforesaid amount of Rs. 3,00,000/-. However, while doing so it was made clear that no finding had been recorded as to the genuineness of the gift. Thus, the genuineness of this gift of Rs. 3,00,000/- from Madhu Agrawal was not considered by the Commissioner of Income Tax (Appeals) in the Appeal arising out of the Regular Assessment proceedings.

The contention of learned counsel for the petitioner is that reopening of the assessment is not permissible as in the order dated 20th June, 2005, the Commissioner of Income Tax (Appeals) deleted the amount of Rs. 3,00,000/- said to have been given as gift by Madhu Agrawal and this order had attained finality as no appeal was filed by the Department against this part of the order. This contention cannot be accepted for the simple reason that the order was passed by the

Commissioner of Income Tax (Appeals) only on the statement made by the petitioner that the gift of Rs. 3,00,000/- was not to be assessed in the Regular Assessment but in the Block Assessment as is clear from the relevant portion of the order which has been quoted above. Thus, in view of the aforesaid reasons it is clear that this amount of Rs. 3,00,000/- was not assessed at all in the Regular Assessment proceedings for the Assessment Year 2001-02.

It is also the contention of the learned counsel for the petitioner that the assessment cannot be reopened under Section 147 of the Act since the petitioner had disclosed all material facts necessary for assessment and, therefore, there was no reason to believe that the income relating to gift from Madhu Agrawal had escaped assessment. His further contention is that there was no relevant material in the formation of this belief as no fresh materials have been brought on record to reopen the assessment except the order dated 31st August, 2006 passed by the Income Tax Appellate Tribunal which order cannot be taken into consideration.

This contention of learned counsel for the petitioner cannot be accepted in view of the decision of the Supreme Court in Maharaj Kumar Kamal Singh Vs. Commissioner of Income-Tax, Bihar and Orissa reported in 1958 (IT-2)-GJX-0133-SC. The Supreme Court examined the provisions of Section 34 (1)(b) of the Income Tax Act, 1922 and observed as follows:-

"It is clear that two conditions must be satisfied before the Income-tax Officer can act under section 34(1) (b). He must have information in his possession, which, in the context, means that the relevant information must have come into his possession subsequent to the making of the assessment order in question and this information must lead to his belief that income chargeable to income-tax has escaped assessment for any year, or that it has been under-assessed or assessed at too low a rate or has been made the subject of excessive relief under the Act. Two questions are raised by Mr. Sastri under this sub-section in the present appeal. He contends that the relevant information means information as to facts and cannot include the decision of the Privy Council on a point of law; and he argues that, where income has been duly returned for assessment and an assessment order has been passed by the Income-tax Officer, it cannot be said that any income has escaped assessment within section 34(1)(b). Thus the appellant's case is that both the conditions required by section 34(1)(b) have not been satisfied and so the order of revised assessment passed against the appellant is illegal.

It is not disputed that, according to its strict literal meaning, the word "information" may include knowledge even above a state of the law or a decision on a point of law. The argument, however, is that the context requires that the word "information" should receive a narrow construction limiting it to facts or factual material as distinguished from information as to the true state of the law.....

We would accordingly hold that the word "information" in section 34(1)(b) includes information as to the true and correct state of the law and so would cover information as to relevant judicial decisions. If that be the true position, the argument that the Income-tax Officer was not justified in treating the Privy Council decision in question as information within section 34(1)(b) cannot be accepted.

The next question that remains to be considered is in regard to the other conditions prescribed by section 34(1)(b). When can income be said to have escaped assessment?

.....We see no justification for holding that case of income escaping assessment must always be cases where income has not been assessed owing to inadvertence or oversight or owing to the fact that no return has been submitted. In our opinion, even in a case when a return has been submitted, if the Income-tax Officer erroneously fails to tax a part of assessable income, it is a case where the said part of the income has escaped assessment. The appellant's attempt to put a very narrow and artificial limitation on the meaning of the word "escape" in section 34(1)(b) cannot therefore succeed."(emphasis supplied)

Thus, the order dated 31st August, 2006 of the Income Tax Appellate Tribunal arising out of the Block Assessment proceedings can be taken into consideration and form the basis for issuance of the notice under Section 148 of the Act read with Section 150 of the Act.

Learned counsel for the petitioner also contended that the provisions of Section 150(1) of the Act are not applicable as there is no direction in the order of the Income Tax Appellate Tribunal dated 31st August, 2006 to assess the petitioner for the gift of Rs. 3,00,000/- given by Madhu Agrawal. In order to appreciate this contention, the provisions of Section 150(1) are quoted below:-

"150(1). Notwithstanding anything contained in Section 149, the notice under Section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision."

(2).....

As seen from the relevant portion of the order dated 13th March, 2008 passed by the Income Tax Appellate Tribunal in respect of the Block Assessment proceedings, the matter had been examined on merits and it was found as a fact that the gift was not genuine. However, only on account of the fact that this was a matter to be assessed in the Regular Assessment and not in the Block Assessment, it was ordered by the Income Tax Appellate Tribunal that the genuine nature of the gift will fall within the ambit of Regular Assessment proceedings and not in the Block Assessment proceedings. It cannot, therefore, be said that there was no direction by the Income Tax Appellate Tribunal. The provisions of Section 150(1) are, therefore, clearly attracted and the notice cannot be impugned on this ground. Thus, this contention of learned counsel for the petitioner cannot also be accepted.

Learned counsel for the petitioner lastly contended that none of the exception carved out under Section 147 of the Act are applicable. This contention cannot also be accepted as it is clearly a case falling under Explanation 2(b) of Section 147 of the Act. The contention of the petitioner that it is a case where income had been assessed under Section 143(3) of the Act on 23rd February, 2004 cannot be accepted for the simple reason that in the appeal filed by the petitioner before the Commissioner of Income Tax (Appeals) a categorical statement was made on his behalf that the said gift of Rs. 3,00,000/- cannot be examined in the Regular Assessment proceedings and can be examined only in the Block Assessment proceedings and it is for this reason alone that the addition of Rs. 3,00,000/- was deleted in the order as is clear from the relevant portion of the order reproduced above.

It also needs to be mentioned that the petitioner has not challenged the order dated 31st August, 2006 passed by the Income Tax Appellate Tribunal.

Thus, for all the reason stated above, there is no merit in this petition. It is, accordingly, dismissed.

Date: 27.2.2009

NSC