

V. Pugalagiri Vs. Assistant Controller of Estate Duty

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SooperKanoon Citation : sooperkanoon.com/810297

Court : Chennai

Decided On : Jul-27-1979

Reported in : [1981]132ITR847(Mad)

Judge : Varadarajan, J.

Acts : [Estate Duty Act, 1953](#) - Sections 59; [Constitution of India](#) - Article 226 and 226(3)

Appeal No. : Writ Petition No. 893 of 1977

Appellant : V. Pugalagiri

Respondent : Assistant Controller of Estate Duty

Advocate for Def. : Nalini Chidambaram, Adv.

Advocate for Pet/Ap. : M.R.M. Abdul Kareem, Adv.

Judgement :

Varadarajan, J.

1. This writ petition has been filed under Article 226 of the [Constitution of India](#) for the issue of a writ of prohibition or any other appropriate writ or order prohibiting the respondent, the Assistant Controller of Estate Duty, Madurai-2, from taking any proceedings in pursuance of his notice No. G.I.R.V. 386/MDU dated February 18,

1977.

2. The petitioner, V. Pugalagiri, is the son of Dr. P. Vadamalayan, who died on March 26, 1972. The total value of the estate of Dr. Vadamalayan was assessed at Rs. 9,01,292 and the estate duty of Rs. 1,92,388 was levied, and the assessment was completed on February 26, 1974. In the present writ petition we are concerned with the value of the nursing home building bearing door No. 9A, Vallabhai Road, Chokkikulam, Madurai, including the surrounding vacant site. In regard to the value of the property what the respondent stated originally in his assessment order was as follows :

' Value of property at 9-A, Vallabhai Road, Chokkikulam, Madurai, including vacant site Rs. 3,00,000 The value taken for the above property in the estate duty account is Rs. 1,50,000. According to the wealth-tax assessment of the deceased, the value of the property was taken at Rs. 5,05,784.

This property was a nursing home which was run by the deceased during his lifetime. On account of the failing health of the deceased this property was leased out to a firm consisting of M/s. Kasirajan and others. The lease was for a period of three years from July 1, 1971, for a monthly rent of Rs. 1,000. The deceased died on March 26, 1972. At the time of the death of the deceased, the unexpired portion of the lease was about twenty-seven months. The accountable person has, therefore, reduced the value of the property to Rs. 1,50,000 taking into account the monthly rental of Rs. 1,000 and the unexpired portion of the lease.

Reliance is placed in support of the valuation on the commentary of D. R. Gupta on the Estate Duty Act. The same property has been valued on October 3, 1973, by an approved valuer at Rs. 3,46,372 including land and building. Having regard to the subsisting lease over the property, I shall fix the value of the land and building at Rs. 3 lakhs. This will be substituted for Rs. 1,50,000 offered in the estate duty account.'

3. In the affidavit filed in support of this petition, the petitioner has stated that he is reliably informed that, subsequent to the order of assessment and the order valuing the property at Rs. 3,00,000 by substituting that figure for Rs. 1,50,000

offered in the estate duty account, the valuation at Rs. 3,00,000 for estate duty purposes had been objected to by the higher authorities in the department on the ground that the wealth-tax valuation of Rs. 5,05,784 should have been adopted by the respondent in the estate duty assessment order. The respondent issued the impugned notice under Section 59(b) of the E.D. Act, 1953. Section 59 of the Act reads thus :

'59. If the Controller-

(a) has reason to believe that by reason of the omission or failure on the part of the person accountable to submit an account of the estate of the deceased under Section 53 or section 56 or to disclose fully and truly all material facts necessary for assessment, any property chargeable to estate duty has escaped assessment by reason of under-valuation of the property included in the account or of omission to include therein any property which ought to have been included or of assessment at too low a rate or otherwise, or

(b) has, in consequence of any information in his possession, reason to believe notwithstanding that there has not been such omission or failure as is referred to in Clause (a) that any property chargeable to estate duty has escaped assessment, whether by reason of under-valuation of the property included in the account or of omission to include therein any property which ought to have been included, or of assessment at too low a rate or otherwise,

he may at any time, subject to the provisions of Section 73A, require the person accountable to submit an account as required under Section 53 and may proceed to assess or reassess such property as if the provisions of Section 58 applied thereto. '

4. In the impugned notice it is stated that the respondent has reason to believe that the property chargeable to estate duty has been underassessed and that the petitioner is, therefore, required to submit an account of all the properties in respect of which estate duty is payable by March 31, 1977.

5. It is stated in the affidavit filed in support of the writ petition that the respondent originally adopted the valuation of the property for estate duty purposes as Rs. 3,00,000 on the basis that the property had been let to M/s. Kasirajan and others for a term of three years from July 1, 1971, to June 30, 1974, on a rent of Rs. 1,000 per mensem, that Dr. Vadamala-yan died within nine months of the date of the lease and the property was subject to a leasehold right for a period of about 27 months after the date of death of Dr. Vadamalayan and the respondent adopted 25 times the annual rent and arrived at the value of the property as Rs. 3,00,000 taking into account the fact that the income of Dr. Vadamalayan from this property was dwindling from year to year on account of his ill-health, namely, it was Rs. 75,796 in 1969-70, Rs. 58,529 in 1970-71, Rs. 22,005 in 1971-72, Rs. 22,598 in 1972-73 and Rs. 3,349 in 1973-74 and that, therefore, the popularity of the nursing home had gradually dwindled due to the sickness of Dr. Vadamalayan who is stated to have been suffering from cancer. The grounds urged are that:

(1) The respondent had been compelled to issue the impugned notice on the basis of the audit objection, although the respondent had, prior to the date of the impugned notice, informed the higher authorities that there was no reason to reopen the assessment and the Controller, to whom the audit report was submitted had overruled the respondent's objection and had ordered the reopening of the assessment, and, therefore, the reopening is under compulsion and not valid in law ; and

(2) The audit report would not amount to ' information ' mentioned in Section 59(b) of the E.D. Act, 1953, and, therefore, it was not open to the respondent to issue the notice for reopening the assessment already completed.

6. In the counter-affidavit it is admitted that there was an audit objection by the Accountant-General, Madras, in respect of the property in question and that the impugned notice was issued by the respondent as a consequence of the audit objection under the instructions of the IAC (Audit), Estate Duty, and that the audit report would constitute information on the basis of which the assessment can be reopened under Section 59(b) of the Act. It is further contended in the counter-affidavit that any order passed under Section 59 of the E.D. Act is appealable

under Section 62 of the Act and, therefore, the writ petition is not maintainable having regard to the provisions of art, 226(3) of the [Constitution of India](#) and the contention of the petitioner that no alternative remedy is available is incorrect and misleading-There is no dispute that this property was subject to a lease for a period of three years from July 1, 1971, to June 30, 1974, on a rent of Rs. 1,000 per mensem and that only a period of about 9 months had elapsed by the time of the death of Dr. Vadamalayan on March 26, 1972. This fact had been taken note of in the original order of assessment, which has been extracted above. Having regard to the subsisting lease over the property the value of the property for estate duty purposes had been fixed by the respondent in the original assessment as Rs. 3,00,000 on the basis of the rent of Rs. 1,000 for which the property had been leased. A Division Bench of the Mysore High Court in CWT v. V. C. Ramachandran : [1966]60ITR103(KAR) , has observed (pp. 107, 109, 111):

' Parties are agreed that the proper basis for determining the value of an asset other than cash is to find out its market value. But the real difficulty arises in determining the basis for ascertaining the market value. On behalf of the revenue, it is contended that the only reasonable basis is the prices obtained by the sales of other similar lands near about the land in question. On the other hand, it is contended on behalf of the assessee, that in a case like the one before us, where we are concerned with buildings with compounds in a city, which buildings are in the possession of tenants and the tenants cannot be either evicted or the rent payable by them enhanced except in accordance with the provisions of the Rent Control Act, the only appropriate basis is to capitalise the annual rent by certain number of years'purchase..... In T. Radhakrishna Chettiar v. Province of Madras : (1948)2MLJ159 , a Division Bench of the Madras High Court laid down that the proper method of valuation to be adopted in a case of compulsory acquisition relating to a house and ground situated in a municipality and fetching regular income is to assess the value on the basis of capitalisation of the net annual income. The number of years' purchase to be adopted in capitalisation has to be arrived at by taking into account the interest yielded by the Government securities at the time of the notification under Section 4(1) of the Land Acquisition Act.....

The Appellate Tribunal is competent to decide both questions of law as well as fact. It is the final fact-finding body. If the Tribunal in its discretion has come to the conclusion that, on the facts of this case, the rental basis is the proper basis, we see nothing illegal about it.'

7. The learned judges, held in that case that the Tribunal was justified in ignoring the value of the land surrounding the buildings in valuing the properties Nos. 1 and 2 in that case.

8. According to Section 36(1) of the E.D. Act, the principal value of any property should be estimated to be the price which, in the opinion of the Controller it would fetch if sold in the open market at the time of the deceased's death.

9. In CED v. Radha Devi Jalan [1968] 67 ITR 763, a Division Bench of the Calcutta High Court has observed (pp. 765, 770):

' The contractual rent of Rs. 1,600 per month was payable by the tenant in respect of a building, which at the material time was governed by the West Bengal Premises Tenancy Act, 1956. Under the operation of the various rent restrictions Acts, which have been operating in this State for now well over a quarter of a century, landlords have lost the right of letting out their houses at any rent they choose and of evicting tenants on such grounds as appeal to them.....

Lastly, in the case of buildings, which are in the possession of tenants and the tenants cannot either be evicted or the rent payable by them enhanced, except in accordance with the provisions of the Rent Control Act, the only appropriate method of valuation is to capitalise the annual rent by a certain number of years' purchase. The method of valuing the land and the building separately and adding up the values would be improper in such cases, because that would ignore the impact of the Rent Control Act on the value of the land and the building. This is the view which was expressed by the Mysore High Court in Commissioner of Wealth-tax v. V.C. Ramachandran : [1966]60ITR103(KAR) and we respectfully agree with the view.'

10. These two decisions of the Division Benches of the Mysore and Calcutta High Courts following this court's view expressed in *T. Radhakrishna Chettiar v. Province of Madras* : (1948)2MLJ159 have taken the view that in the case of buildings with a surrounding land which together had been let out in places where Rent Control Acts, such as the Tamil Nadu Act 18 of 1960, are in operation, the method of valuation is to capitalise the annual rent by a certain number of years' purchase and that the method of valuing the land and the building separately and adding up the values would be improper in such cases. The learned judges of the Mysore High Court have observed that the Tribunal was competent to decide the question of fact and if in its discretion it has come to the conclusion that on the facts of the case the rental basis is the proper basis, they see nothing illegal about it. In the present case also the respondent was competent to decide the question of the value of the property in question, as a question of fact, and taking into consideration the fact that the property was subject to a lease on a rent of Rs. 1,000 per mensem at the time of death of the deceased, he held that it must be valued at Rs. 3,00,000 on the basis of the 25 years' purchase. In the circumstances, it could not be stated that there is anything illegal about it.

11. The most important question for consideration in this writ petition is whether the audit report, on the basis of which admittedly the notice for reopening the assessment already completed has been issued, would constitute information contemplated in Section 59(b) of the Act. The records show that the IAC (Audit), Madras, had sent the letter D.O. No. 772B(249) Aud/76 dated March 28, 1977, informing the respondent that the Commissioner had directed that the respondent should take action as already suggested in the IAC's D.O. letter dated March 11, 1977. Therefore, it is clear that the impugned notice had been issued under the compulsion of the superior authorities by the respondent.

12. In the case, out of which the decision in *ITO v. Nawab Mir Barkat Ali Khan Bahadur* : [1974]97ITR239(SC) arose, the assessment for the years 1955-56 to 1958-59 had been completed on March 18, 1958, March 19, 1958, July 30, 1958 and March 21, 1961, respectively, under the Indian I.T. Act, 1922. After the return for those years had been filed, the ITO called upon the assessee to state what his relationship with the four ladies mentioned in the returns were by putting three

queries. The respondent before the Supreme Court, namely, the assessee, had executed three trust deeds on May 1, 1950, August 8, 1950, and December 29, 1950, for the benefit of three ladies and the minor children of the last two of those three ladies. In those trust deeds, those three ladies were described as the wives of the assessee and the children of the last two of those three ladies were described as his children. Those trust deeds were before the ITO before he completed the assessment of the aforesaid four years. In the reply dated September 9, 1957, to the three queries put by the ITO it was represented on behalf of the assessee that the late Dulhan Pasha Begum Saheba was the only legally wedded wife of the assessee and that he had not gone through the essential formalities of a valid marriage with the three ladies mentioned in the returns and they were referred to as his wives in the trust deeds in view of the special favours bestowed upon them. This explanation was apparently accepted by the ITO because while assessing the total income of the respondent for the said four years he did not include the income of the three ladies and the minor children of two of them. On March 13, 1964, notices under Section 148 of the I.T. Act, 1961, were issued seeking to reopen the assessments under Section 147 of the Act. It was stated that the material facts relating to two other trust deeds dated March 21, 1957, and December 5, 1957, were not brought to the notice of the department in the course of the original assessment proceedings. The department stated that it was established that the three ladies and the children were the legitimate wives and children of the assessee. Their Lordships of the Supreme Court have observed (p. 244):

'The documents of 1957 conform to those of 1950 in material particulars ; the trust deeds of 1957 only repeat what the deeds of 1950 had disclosed. Non-production of the documents executed in 1957, at the time of the original assessments, cannot, therefore, be regarded as non-disclosure of any material fact necessary for the assessment of the respondent for the relevant assessment years. The High Court was right in holding that the Income-tax Officer had no valid reason to believe that the respondent had omitted or failed to disclose fully and truly all material facts and consequently had no jurisdiction to reopen the assessments for the four years in question. Having second thoughts on the same material does not warrant the initiation of a proceeding under Section 147 of the Income-tax Act,

1961.'

13. In the present case also the respondent has been made to have second thoughts regarding the valuation of the property which, to his knowledge, at the time of assessment had been valued at Rs. 5,05,784 for the purpose of wealth-tax.

14. In *Kalyanji Mavji & Co. v. CIT* : [1976]102ITR287(SC) it has been held that the word 'information' in, Section 34(1)(b) of the Indian I.T. Act, 1922, is of the widest amplitude and comprehends a variety of factors, but the power under Section 34(1)(b), however wide it may be, is not plenary because the discretion of the ITO is controlled by the words 'reason to believe'. Information may come from external sources or even from the materials already on record or may be derived from the discovery of new and important matter or fresh facts, but where the ITO gets no subsequent information, but merely proceeds to reopen the original assessment without any fresh facts or materials or without any enquiry into the materials which form part of the original assessment, Section 34(1)(b) would have no application. In the present case also the assessment is not sought to be reopened on the basis of any fresh facts which had come to the knowledge of the respondent subsequent to the date of the assessment. It is sought to be reopened having regard to the fact that for the purpose of wealth-tax the property had been valued at Rs. 5,05,784 a fact which is mentioned in the original order of assessment itself.

15. A Division Bench of the Gujarat High Court has stated in *CIT v. Ratanlal Lallubhai* : [1978]112ITR985(Guj) thus (p. 993):

' It would thus appear that the view which now prevails finally is that the true legal position is as follows :

(1) that 'information' means instructive knowledge concerning a matter bearing on the assessment received after the completion of the original assessment;

(2) that the 'information' may be as to the correct state of facts or of law relating to the taxable income;

(3) that such 'information' must be capable of arousing or suggesting ideas or notions not before existent in the mind of the Income-tax Officer;

(4) That it must be of such a nature as to acquaint, enlighten or instruct the mind of the Income-tax Officer for the first time concerning a matter pertaining to the taxable income so that he could form a reasonable belief that there has been an escapement of assessment of tax which requires to be set right by taking steps for reopening the assessment;

(5) that mere change of opinion on the part of the Income-tax Officer would not be sufficient and it would not constitute ' information ';

(6) that ' information ' as to any fact bearing on the assessment may be received from any external source, that is to say, from any person who knows the fact or it may be obtained even from the record of the original assessment proceedings ; and

(7) that 'information' not amounting to change of opinion as to the correct state of law may be received from research of law made by the Income-tax Officer or it may be received from an external source ; if, however ' information ' as to the correct state of law is received from an external source, it must be derived from the judicial decision of a person, body or authority competent and authorised to pronounce upon the law...

It would thus appear that the 'information' which the Income-tax Officer received subsequent to the original assessment was as to the correct state of the law and that it was received from the report of the audit department. The information as to the true and correct state of the law was not derived from any research made by him or from any judicial decision of a competent authority but it was received entirely from the report of an administrative authority. Having regard to the clear pronouncement of law in *Kasturbhai Lalbhai's case* : [1971]80ITR188(Guj) and in *Kalyanji Mavji 6- Co.'s case* : [1976]102ITR287(SC) , such report would not constitute [information ' within the meaning of Section 147(b) upon which the Income-tax Officer could have initiated proceedings for reassessment. It was, therefore, a case not of receiving ' information ' within the meaning of Section 147(b) as understood and explained in decided cases but of a mere change of opinion and under such circumstances the Income-tax Officer could not have initiated proceedings for reassessment. '

16. In the present case also it is the audit report that is stated to be the ' information ' received by the respondent for reopening the assessment. In that decision of the Gujarat High Court following the decision of the Supreme Court in *Kalyanji Mavji 6 Co.'s case* : [1976]102ITR287(SC) , the audit report has been clearly held to be not information within the meaning of Section 147(b) of the I.T. Act, which is similar to Section 59(b) of the E.D. Act. Even if that could 'be information, it was not received for the first time after the original assessment and could not be stated to have not existed in the mind of the respondent at the time of the original assessment, having regard to the fact that a reference has been made in the original order of assessment to the fact that the property had been valued at Rs. 5,05,784 for wealth-tax purposes.

17. The question for consideration in *R.K. Malhotra, ITO v. Kasturbhai Lalbhai* : 1975 CriLJ1545 by their Lordships of the Supreme Court was whether the intimation which the ITO received from the audit department would constitute ' information ' within the meaning of Section 147(b) of the I.T. Act, and it has been held, having regard to the facts of that case, that the audit department was the proper machinery to scrutinise the assessments of the ITOs and point out the errors, if any, in law, and that the information received by the ITO constituted ' information ' within the meaning of Section 147(b) in consequence of which the ITO could reopen the assessment. Their Lordships have observed (p. 541):

' Two conditions are necessary for invoking the sub-section: (1) the officer should receive information after the original assessment; (2) in consequence of such information he should have reason to believe that income has escaped assessment. The ' information ' may be of facts or of law. The ' information ' of a fact may be from external source. The fact that the Income-tax Officer with diligence could have obtained the information during the previous assessment on a proper investigation of the materials on the record or the facts disclosed thereby, would not make it any the less information if the fact was not in fact obtained and came to his knowledge ' only subsequently. So also the fact that on a research as to the state of law the Income-tax Officer would have ascertained the true legal position would not make any difference if the officer came to know the real position of the law only subsequently. The decision of a court of law subsequent to the

assessment would be 'information' and the Income-tax Officer is entitled to take note of it.'

18. The decision that the audit report was 'information' in that case was rendered having regard to the facts of that case and would not apply to the facts of the present case where the information, namely, that the property had been valued at Rs. 5,05,784 for wealth-tax purposes did not come to the knowledge of the respondent for the first time only after he received the audit report but it was already within his knowledge and had been specifically referred to in his original order of assessment.

19. The learned counsel for the respondent submitted that pointing out an inadvertence and an error of the assessing authority on the basis of the materials already filed with him would constitute 'information'. In this connection reliance was placed by the learned counsel on the decision of the Supreme Court in *Anandji Haridas and Co. (P.) Ltd. v. 5. P. Kushare, STO* : [1968]1SCR661 in which their Lordships of the Supreme Court were concerned with the Central Provinces and Berar Sales Tax Act, 1947. They have observed (at p. 336):

'It was urged on behalf of the revenue that 'information' contemplated by section 11A should be from some outside source and not something that could be gathered by the assessing authority from his own records. According to the revenue in the instant case there was no information from any outside source, therefore, it cannot be said that the assessing authority was satisfied about the escapement of tax in consequence of 'any information which has come into its possession'. In our view, this contention is untenable. In *Maharaj Kumar Kamal Singh v. Commissioner of Income-tax* : [1959]35ITR1(SC) this court held that the word 'information' in Section 34(1)(b) of the Income-tax Act, 1922, includes information as to the true and correct state of the law and so would cover information as to the relevant judicial decisions. It was laid down therein that the information need not be about any fact, it may be even as to the legal position. In other words, the term 'information' in Section 34(1)(b) of the Income-tax Act, 1922, really means knowledge.....

The meaning of the word 'information' came up again for consideration before a Division Bench of the Kerala High Court in *United Mercantile Co. Ltd. v. Commissioner of Income-tax* : [1967]64ITR218(Ker) . Their Lordships held that to 'inform' means to 'impart knowledge' and a detail available to the Income-tax Officer in the papers filed before him does not by its mere availability become an item of 'information'. It is transmuted into an item of information in his possession only if and when its existence is realised and its implications recognised. Applying that test to the facts of the case before them, the court held that the awareness of the Income-tax Officer for the first time after the assessment order of 19th November, 1957, that the bonus shares were issued not out of premiums received in cash and the consequent result in the light of the Finance Act, 1957, was information within the meaning of that expression as used in Section 34(1) of the Indian Income-tax Act, 1922, and, consequently, the reopening of the assessment under that provision was not illegal.'

20. This decision will not apply to the facts of the present case where the information was not gathered by the respondent for the first time after the original order of assessment was made, from the records or from any external source, but was available to him and has been specifically referred to by him in his original order of assessment, as stated earlier.

21. The next decision relied upon by the learned counsel for the respondent is of a Division Bench of this court in *CIT v. Rathinasabapathy Mudaliar* : [1964]51ITR204(Mad) . It has been held in that decision that information contemplated by Section 34(1)(b) of the Indian I.T. Act, 1922, which gives jurisdiction to the ITO to reopen an assessment, is information that income, profits and gains chargeable to income-tax had escaped assessment in the assessment of the assessee. Even inadvertence or error in the making of assessment would bring a case within Section 34(1) (b) and if an error is discovered after the assessment was made, that is information subsequent to the original assessment. The information relevant to Section 34(1)(b) need not be wholly extraneous to the record but may be derived from the record of the assessment itself, as for instance, an error or inadvertence in assessment by which the income had escaped assessment is discovered after the assessment. This decision also would

not help the respondent, for, the discovery that the property had been valued at Rs. 5,05,784 for wealth-tax purpose had not been made for the first time either from the records or from any extraneous source but it was within his knowledge and was specifically referred to in the original order of assessment.

22. On a consideration of the various decisions referred to above, I hold that the audit report in this case, on the basis of which the reassessment is sought to be made by the impugned notice, does not constitute information within the meaning of Section 59(b) of the E.D. Act, 1953, for, it had not come to the knowledge of the respondent after the date of the original order of assessment either by the respondent himself looking into the records or by his receiving that information from some extraneous source, but the fact was within his knowledge and was specifically referred to in the original order of assessment itself.

23. The next point for consideration is whether the impugned notice, which is only in the stage of notice, could be challenged in proceedings under Article 226 of the [Constitution of India](#). In this connection reliance has been placed by the learned counsel for the respondent on a decision of Ramanujam and Mohan JJ. in W.P. No. 1951 of 1974, rendered on January 4, 1978 (see p. 866 *infra*). The learned judges have observed (p. 867):

'The petitioner's contention that Kumaraswami Mudaliar before his death and later the receiver had disclosed all necessary and material particulars for deciding the question of status and that the assessing authority has no power to go back on his earlier assessment on the question of status, involves investigation of facts as to what were the materials that were produced before the Income-tax Officer at the first instance when the assessment was made in the status of an individual. Further, the petitioner has come to this court even at the stage of the issue of a notice and before the actual proceedings are taken. It is always open to the petitioner to put forward his objections and convince the second respondent who issued the notice under Section 147 of the Income-tax Act that there is no room for making a revised assessment as proposed by him and that he, having decided earlier the status, cannot change his opinion and make a revised assessment on the estate of Kumaraswami Mudaliar in the status of a Hindu undivided family.

We have to, therefore, hold that this writ petition is premature. Further, the matter involves investigation of facts. The proper thing for the petitioner is to go before the second respondent and put forward his objections and if ultimately any adverse orders are passed against him by the second respondent, he can challenge that order in appropriate proceedings. '

24. On the other hand, a number of decisions have been relied upon by the learned counsel for the petitioner in support of the contention that the petition under Article 226 of the Constitution would lie for quashing the impugned notice. The first of those decisions is of the Supreme Court in *Madhya Pradesh Industries Ltd. v. ITO* : [1965]57ITR637(SC) . In that case, on December 26, 1960, the ITO issued a notice to the petitioner-company in exercise of the powers under Section 34 of the Indian I.T. Act reciting that having ' reason to believe that ' the income of the company assessable to income-tax for the assessment year 1953-54, had '(a) escaped assessment, (b) been under-assessed ', he proposed to reassess the said income that had '(a) escaped assessment, (b) been under-assessed' and directed the company to submit a return of the total income of the company assessable for the said assessment year 1953-54. The writ petition was filed for the issue of a writ in the nature of prohibition or mandamus. Their Lordships of the Supreme Court had observed (p. 642):

' An attempt to short-circuit the procedure provided by the Indian Income-tax Act for investigation of facts which the Income-tax Officer alone is competent to investigate in the first instance may also justify the High Court in rejecting a petition for the issue of a writ under Article 226. But where, as in the present case, the claim made is that the Income-tax Officer has no power to issue the notice under Section 34, and that the power is exercised not for any legitimate purpose for which it may be used, but for the purpose of making a fishing enquiry and to review a previous order passed in favour of the company, a rule upon the Income-tax Officer to show cause why the order should not be set aside and an opportunity to the authority whose action was challenged either to accept or deny the facts alleged and to set out such other material facts as have a bearing on the question, was at least called for. '

25. I am of the view that the latter part of these observations apply to the facts of the present case where the notice had been issued to review a previous order of assessment passed by the respondent on the basis of a material, the audit report, which has been held, under the circumstances of the case, to be not 'information' within the meaning of the word 'information' mentioned in Section 59(b) of the E.D. Act.

26. The next decision relied upon by the learned counsel for the petitioner in this connection is of M. N. Roy J. in *Surja Mohan Chakraborty v. State of West Bengal* [1977] 39 SIC 462 (Cal). In that case the writ petition was filed against a notice dated August 22, 1972, issued by the Assistant Commissioner, Commercial Taxes, Calcutta, calling upon the dealer to show cause why the security of a lakh of rupees under Section 7(4AXi) of the Bengal Finance (Sales Tax) Act, 1941, should not be demanded from them. The Assistant Commissioner had been invested with the powers of the Commissioner under that Act. It was submitted that the impugned notice was not an 'order', not being the formal expression of any decision, and that nothing final was decided by the same. The learned judge has observed (p. 474):

' The impugned notice, not being either an assessment or order, finally determining the rights of the said petitioner, is not revisable..... and, as such, Mr. Chakravartty is right in his submission that the present provisions of Article 226(3) would not be a bar in maintaining the petition, the more so when the impugned notice or order in annexure B would not come within the category of the orders as mentioned in the several clauses of sub-section (3) and of sub-section (4) of Section 20 of the said Act. Thus, the preliminary point as raised by Mr. Dutta fails. '

27. The learned judge issued a writ directing the respondents in that case, to quash and not to give effect to the impugned notice or order in annex. B or to act on the basis thereof.

28. The third decision relied upon by the learned counsel for the petitioner is of the Supreme Court in *CIT v. A. Raman and Co.* : [1968]67ITR11(SC) . It has been held in that case that the expression 'information' in the context in which it occurs in Section 147(b) of the I.T. Act must mean instruction or knowledge derived from

an external source concerning facts or particulars, or as to law relating to a matter bearing on the assessment, and that to commence the proceedings for reassessment it is not necessary that on the materials which came to the notice of the ITO, the previous order of assessment was vitiated by some error of facts or law, and that the jurisdiction of the ITO to reassess income arises if he has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment and that the information must have come to his possession after the previous assessment, but even if the information be such that it could have been obtained during the previous assessment from an investigation of the materials on record, or the facts disclosed thereby, or from other enquiry or research into facts or law, but was not in fact obtained, the jurisdiction of the ITO is not affected. It was also held by their Lordships of the Supreme Court that the High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued under Section 147(b) of the I.T. Act, 1961, if the condition precedent to the exercise of the jurisdiction to issue the notice does not exist. As stated earlier, in the present case also the condition precedent to the issue of the impugned notice does not exist, namely, that the audit report in this case does not constitute information within the meaning of the expression used in Section 59(b) of the E.D. Act, for, it has not come to the knowledge of the respondent for the first time after the original assessment order was passed, but was specifically within his knowledge and has been mentioned by him in the original order itself.

29. In *Ahmedabad Cotton Mfg. Co. Ltd. v. Union of India*, AIR 1977 Guj 113 the assessee-company filed a writ petition challenging a trade notice issued by the Deputy Collector of Central Excise on June 9, 1966, as illegal and without jurisdiction on the ground that it ran counter to Tariff No. 18-E and to the fundamental principles of levy of excise duty on the manufacture of excisable goods and was without authority of law, and, therefore, violative of Article 31(1). On the question whether the trade notice could be challenged, the learned judges have observed in their decision thus (p. 130):

' In *Orient Paper Mills v. Union of India*, : 1973ECR1(SC) , their Lordships in terms held : ' If the power exercised by the Collector was a quasi-judicial power--as we

hold it to be--that power cannot be controlled by the directions issued by the Board. No authority, however high placed, can control the decision of a judicial or quasi-judicial authority. That is the essence of our judicial system. There is no provision in the Act empowering the Board to issue directions to the assessing authorities or the appellate authorities in the matter of deciding disputes between the persons who are called upon to pay duty and the department. It is true that the assessing authorities as well as the appellate authorities are judges in their own cause ; yet when they are called upon to decide disputes arising under the Act they must act independently and impartially. They cannot be said to act independently if their judgment is controlled by the directions given by others. Then it is a misnomer to call their orders as their judgments; they would essentially be the judgments of the authority that gave the directions and which authority had given those judgments without hearing the aggrieved party. The only provision under which the Board can issue directions is Rule 233 of the Rules framed under the Act. That rule says that the Board and the Collectors may issue written instructions providing for any supplemental matters arising out of these Rules. Under this rule the only instruction that the Board can issue is that relating to administrative matters; otherwise that rule will have to be considered as ultra vires section 35 of the Act'..... The Superintendent, who is the assessing authority, even in the letter at annexure ' B' dated August 28, 1976, has invited the attention of the mills to this trade notice and as per the direction in paragraph 2 of the said trade notice has directed accounting of the yarn in R.G. 1 Register adding that for E.B. 4 Register or assessment of duty, the weight on the yarn at the stage of cones, bobbins and beams, etc., should be taken into account and has requested the mills to maintain the E.B. 4 Register immediately. Even in annexure ' F' the Superintendent mentions that he had already directed that for assessment of this yarn the weight of the yarn should be taken at cones, beams, bobbins stage, etc. and he objected to the duty being paid on the yarn at spindle stage and directed to adopt this changed basis. Therefore, the petitioners' property is sought to be reached by these directions. The executive officers even though in the exercise of such quasi-judicial functions are bound to ignore such directions of their superiors, the fact remains that in the* present case immediate implementation has started, of this notice, giving the right, to move this court, to the petitioners because of the

actual threat to their property rights before even they are heard. '

30. In the present case also the property right of the petitioner would be affected if further proceedings are taken in pursuance of the impugned notice which is not valid in law. Therefore, the notice could be challenged in proceedings under Article 226 of the Constitution.

31. The preponderance of authority is in favour of the view that notices of this kind could be challenged at the stage of notice itself for taking proceedings under Article 226 of the [Constitution of India](#), I hold accordingly.

32. The last point for consideration in this writ petition is as to the maintainability of the writ petition having regard to the provisions of Article 226(3) of the Constitution. The learned counsel for the respondent relied upon the decision of a Bench of this court in *R. Chinnaswami Naidu and Sons v. First ITO* : [1966]61ITR400(Mad) , There the learned judges have observed (pp. 402, 403, 406):

' Article 226 of the Constitution is undoubtedly widely worded and does not place any restraint or restriction on the High Court in the exercise of its jurisdiction under the article. Even the territorial limitation which originally existed has since been removed..... The powers are, however, discretionary in character, so that in particular cases, no question of legality Or lawfulness of the exercise of the jurisdiction can properly arise but the question would be whether, in the particular circumstances, the court should exercise its discretion and invoke its powers. In the nature of things, that consideration will have to be applied in the context of the circumstances in each case. If the court feels that the circumstances and exigencies of the case taken as a whole require that the court should exercise its power, it will do so... Existence of an alternative remedy, which is adequate or otherwise, may not, however, always stand in the way of this court exercising its jurisdiction if other considerations outweigh. But, normally speaking, existence of an alternative remedy is a strong dissuading factor when powers under Article 226 are invoked. Where a right of appeal is given by a statute from an order, of which a party may feel aggrieved, the question for consideration will be whether the statutory mode of redress should be bypassed, and if so, on what grounds On that

matter, decisions of courts have not been uniform and that, with respect, is what is to be expected because the court in each case is concerned with the facts before them and the compelling or justifiable circumstances with reference to which the powers under the article are exercised..... It is clear, having regard to these three decisions as well as the other cases, that while the power under Article 226 is discretionary a certain restraint upon its exercise will be called for. The very wide amplitude of the power itself justifies such a restraint and the power could be exercised only in proper cases. Where a statute creates a liability and indicates the forum which will determine such liability and sets up a hierarchy of appellate jurisdictions, it is but proper that the scheme of such a statute is not normally or, as a matter of course, bypassed, and interference is made under Article 226 either at the original or at any subsequent stages envisaged in the statutory scheme. It is true the power is wide enough to clothe the High Court with the jurisdiction to interfere even in such cases, but in the exercise of their discretion under the article, the court should, in our opinion, take into consideration the statutory scheme of remedies and decline to interfere unless the alternative remedies are inadequate and to compel a party to resort to them will amount to denial of speedy justice in the circumstances and would mean grave hardship and harassment and waste of time and money.'

33. The observations made in this judgment are not sufficient to hold that the remedy sought for under Article 226 of the Constitution is not the appropriate remedy and that the petitioner should be made to face the reassessment proceedings in pursuance of the impugned notice which has been held to be invalid in law.

34. On the other hand, the learned counsel for the petitioner relies upon three decisions in support of the contention that there is no alternative remedy in the case and that the petition filed under Article 226 of the Constitution is maintainable. The first of those decisions is of the Supreme Court in *Calcutta Discount Co. Ltd. v. ITO* : [1961]41ITR191(SC) . Their Lordships have observed (p. 207):

' Mr. Sastri next pointed out that at the stage when the Income-tax Officer issued the notices he was not acting judicially or quasi-judicially and so a writ of certiorari or prohibition cannot issue. It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.

Mr. Sastri mentioned more than once the fact that the company would have sufficient opportunity to raise this question, viz., whether the Income-tax Officer had reason to believe that underassessment had resulted from non-disclosure of material facts, before the Income-tax Officer himself in the assessment proceedings and, if unsuccessful there, before the appellate officer or the Appellate Tribunal* or in the High Court under Section 66(2) of the Indian Income-tax Act. The existence of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action, '

35. In the present case, it has been found that the respondent had no authority to issue the impugned notice as it is not based on information received after the date of the original order of assessment, and it would be unreasonable to hold that the petitioner should face the reassessment proceedings and if he is aggrieved in the event of the respondent not upholding the objection, to agitate the matter before the appellate and revisional authorities.

36. The next decision relied upon by the learned counsel for the petitioner in this connection is of M. N. Roy J. of the Calcutta High Court in *Surja Mohan Chakraborty v. State of West Bengal* [1977] 30 STC 462 referred to above and the last decision relied upon by the learned counsel for the petitioner is of the Full Bench of the Gujarat High Court in *Ahmedabad Cotton Mfg. Co. v. Union of India*, AIR, 1977 Guj 113 referred to above. The learned judges have observed in para. 27 of their judgment thus:

' If the Act remedy is so wide as to cover even purported orders so that no part of the activity of the authority is a collateral activity, the Act having provided for direct remedies to such a wide extent, that remedy would have to be first exhausted. On the other hand, where the Act remedies are not of such wide amplitude but only for orders under the Act, in cases of such purported orders, the appeal remedy could not come in the way of the petitioner as it could not be said to have been provided for such purported orders which are null and void and which it would not be obligatory for the petitioner to exhaust for the simple reason that such an appeal remedy would not be able to cure the defect even if the appeal confirms the original order bearing this indelible mark of nullity. '

37. Having regard to these three decisions, I hold that there is no provision in the Act for challenging the notice issued under Section 59(b) thereof and that this is a fit case where the notice will have to be quashed in proceedings under Article 226 of the [Constitution of India](#).

38. For the reasons mentioned above, I hold that the petitioner is entitled to the issue of a writ of prohibition as prayed for. The writ petition is accordingly allowed with costs.

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