(2011) 05 MP CK 0079

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2051 of 2010

Ankit Tracom (P) Ltd. APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 20-05-2011

Acts Referred:
Income Tax Act, 1961 — Section 131(1A), 132, 132(1), 132(3), 132A

Citation : (2011) 05 MP CK 0079

Hon'ble Judges : Mool Chand Garg, J;K.K. Lahoti, J

Bench : Division Bench

Advocate : Kishore Shrivastava with A.P. Shrivastava, for the Appellant; Rohit Arya with Sanjay Lai, for the Respondent

Judgement

Krishn Kumar Lahoti, J.—Petitioner has challenged a warrant issued by the Director of IT (Inv.), Bhopal, respondent No. 2, u/s 132 of the IT Act, 1961 (hereinafter referred to as the Act) dated 11-11-2009 by which the petitioner was restrained from operating fixed deposit receipt in various bank accounts at Katni. The aforesaid challenge is on the ground that all the FDRs were duly entered in the books of account and the interest earned on the FDRs was duly shown in the returns of income tax. The petitioner company was also assessed with the CIT, Kolkata and the respondent No. 2, was having no jurisdiction to search the premises of the petitioner. The facts of the case in short are that the petitioner company was constituted on 31-8-1994 at Kolkata. The company is a non-banking financial company duly registered with the RBI and was complying with all the directions of the RBI issued from time-to-time. The petitioner company was earning income from interest and was filing returns of income since the date of its incorporation. No demand or liability is due on the company or of its directors.

2. The search and seizure operation u/s 132 of the Act took place at the premise of director of the petitioner company namely Lalit Kumar Mittal and his group concerns between dt. 16-9-2009 and 18-9-2009. During the course of search,

fixed deposit receipts pertaining to the petitioner company were found. These fixed deposit receipts were verified, they were found duly recorded in the books of account and were not seized. However, some other documents were seized as finds place in para 5.4 of the petition.

3. That, on 11-11-2009 authorised officer of the respondents visited the petitioner company at Katni and attached various fixed deposits of the petitioner company with four banks amounting to Rs. 29.24 crores.

The Department adjusted Rs, 71 lakhs towards advance tax instalment of December, 2009 and remaining Rs. 28.53 crores are still lying restrained.

4. The contentions of the petitioner are :

(i) That these fixed deposits were duly recorded in the books of account and the interest accrued on these deposits was duly shown in the return of income tax for the assessment year 2009-10. A copy of the return is on record as Annex. P/12. Interest accrued on the TDR was subject to TDS also.

(ii) That on 11-11-2009, neither search warrant was shown to the petitioner nor Panchnama was prepared in respect of inspection but the authorised officer restrained the bank from operation of the FDRs in various banks. Aforesaid action of the respondents was contrary to section 132 of the Act which provides seizure of such articles in three conditions only as specified in section 132(1) of the Act but these conditions were not existing in the case of petitioner.

(iii) That the company on the date of search was assessed with the CIT, Kolkata and the respondent No, 2 was having no jurisdiction to search the premises of the company.

(iv) That u/s 132 of the Act, it was necessary on the part of respondent No. 2 to record its satisfaction which was not recorded, in absence of which entire search and seizure was illegal.

(v) By amendment in the petition, the petitioner has also submitted that after the seizure of FDRs, the petitioner moved an application before the AO who vide order Annex. P/14 dt. 10-5-2010 recorded a finding that the FDRs were entered in the regular books of account of the assessee company but found that the amount involved in the FDRs was unexplained. So probable tax liability including penalty comes to Rs. 14,93,87,688 and after adjustment of the probable tax liability balance amount of Rs. 13,82,65,664 can be released and accordingly directed so. Placing reliance on the order Annex. P/14, it was submitted that in this order the findings are recorded in favor of the petitioner and seizure of FDRs was totally unjustified.

5. The Department has filed reply opposing the contentions of the petitioner. In nutshell, relevant part of the reply may be referred which reads as under :

After following due procedure established by law a search and seizure operation u/s 132(1) of IT Act, 1961 was carried out on 16-9-2009 in the cases of Pawan

Kumar Mittal & Ors. Annex. P-2 as referred to in para 1 of the writ petition is a copy of Annexure FDR(F) drawn during the course of search proceeding conducted in case of Katni Bauxite (P) Ltd. & Ors. of Katni in the office premises of the group at 26, Commercial Complex, Housing Board Colony, Katni. It enlisted 135 fixed deposits of total value Rs. 72.77 crores in the name of family members, concerns and companies wherein nearly Rs. 28 crores was deposited into the bank accounts within 2 to 3 months from the date the company was taken over by the Mittals. The source of such fund could not be reasonably explained and therefore, all the FDRs were put under prohibition u/s 132(3) of the IT Act, 1961. The director of company was given another opportunity to explain the source by issuing a summons u/s 131(1A) of the IT Act, 1961, but even on that occasion the source from which the fund came into the bank accounts could not be reasonably explained. Subsequently developments and discreet enquiries into the source of FDRs in the name of the petitioner company necessitated action u/s 132(1) of the IT Act, 1961 on 11-11-2009.

5.3 Averments made in this para are denied. A search and seizure operation u/s 132(1) of the IT Act, 1961 took place from 16th to 18-9-2009 in case of the Mittals of Katni. During the course of search, a number of fixed deposit certificates and photocopies of such fund could not be reasonably explained and, therefore, all the FDs were put under prohibition u/s 132(3) of the IT Act, 1961. The director of the company was given another opportunity to explain the source by issuing a summons u/s 131(1A) of the IT Act, 1961, but even on the occasion the source from which the fund came into the bank accounts could not be reasonably explained. Subsequent developments and discreet enquires into the source of FDRs in the name of the petitioner company necessitated action u/s 132(1) of the IT Act, 1961 on 11-11-2009.

5.5 After discreet enquiry and following the due procedure as established by the law, the Authorised Officers conducted search and seizure operation on 11-11-2009 by virtue of warrants of authorisation issued by the Director of IT (Inv.) Madhya Pradesh and Chhatisgarh, Bhopal. The order issued under second proviso to section 132(1) of the IT Act 1961 during the said search proceedings were made because the fixed deposits in the name of company in the said banks represented either wholly or party the income which had not been disclosed for the purpose of IT Act, 1961. Undisclosed income does include such money which is recorded in the books of assessee but the nature and source of acquisition of such money is not reasonably explained.

6. Shri Rohit Arya, learned counsel appearing for the Department submitted that in consequence to information in his possession, the competent authority after recording reasons to be believed, had conducted search and the action was taken u/s 132(l)(c) of the Act. That after assessment, the petitioner shall get back all the FDRs. That the source of income for the FDRs was not satisfactory and in this regard, at the time of the assessment, the petitioner shall get a opportunity to explain it and if the petitioner would be able to satisfy the assessing authority,

the petitioner would get all the FDRs back.

7. In this case, a subsequent event has occurred. The order Annex. P/14 dt. 10-5-2010 has been passed by the Asstt. CIT, Katni. From the perusal of the aforesaid order, it is apparent that the Asstt. CIT, Katni considered the application filed by the petitioner for release of seized FDRs and passed an order which is referred thus :-

8. An effort was made to work out what could be maximum tax liability (including minimum penalty). A statement showing capital availability and approximate tax liability (including penalty) of the company prepared is enclosed as Annex. A the face value of the FDRs claimed to have been belonging to the company is duly reflected in the audit report. Prima facie, it is found that the FDRs are entered in the regular books of the accounts of the assessee company. At the most one can presume that all the FDRs were made through unaccounted money or source of investment in respect of some of the FDRs were not proved by the assessee company. Even the tax liability of the assessee will be less then the amount of FDRs seized. The tax liability (including penalty) calculated is enclosed as Annex. A. However as per statement (Annex. A) it is clear that the amount of FDRs under seizure is more than the tax liability which may arise consequent to assessment assuming that the amount involved in the FDRs are unexplained. The overall probable tax liability including penalty comes to about Rs. 14,93,87,688. The total amount of FDRs under seizure is of Rs. 28,76,53,351. After adjustment of the probable tax liability of Rs. 14,93,87,688, the balance amount of FDRs comes to Rs. 13,82,65,664.

9. In the light of the above discussion and in order to serve the purpose of the applicant as well as to safeguard the interests of the Revenue and keeping in view the fact that FDRs seized is excess with reference to the income already disclosed by the assessee, I am of the view that the balance amount of FDRs which works out to Rs. 13,82,65,664 under seizure can be considered for release. As the issue of seizure of FDR is sub judice before the Hon''ble Madhya Pradesh High Court, the CIT may consider release of appropriate amount with clear stand in writing that this release would not be prejudicial to the Departmental case pending before the Hon''ble High Court, as such release is intended to ensure smooth carrying of business by the assessee group.

8. From the perusal of the aforesaid, it is apparent that the AO recorded a finding that there is probable tax liability on the petitioner for an amount of Rs. 14,93,87,688 and after retaining the FDRs for the said amount it has been directed that the balance amount of FDRs for Rs. 13,82,65,664 be returned to the petitioner. Assessment is going on. As order Annex. P/14 is appealable before the appellate authority. In this petition, this order has not been assailed by the petitioner so it will not be proper for this Court to consider the contention in respect of search as raised by the petitioner. We have also perused the satisfaction note recorded by respondent No. 2 dt. 11-9-2009 and find that there was sufficient information and material in his possession to record his reasons to

be believed as required u/s 132 of the IT Act. As it is a confidential document, though we have perused the aforesaid document, but we find it appropriate not to refer the reasons of his belief and satisfaction in this judgment. The apex Court considering this aspect in Manish Maheshwari Vs. Asstt. Commissioner of Income Tax and Another, , held thus :

11. Condition precedent for invoking a block assessment is that a search has been requisitioned u/s 132A. The said provision would apply in the case of any person in respect of whom search has been carried out u/s 132 or documents or assets have been requisitioned u/s 132A. section 158BD, however provides for taking recourse to a block assessment in terms of section 158BC in respect of any other person, the conditions precedents wherefor are : (i) satisfaction must be recorded by the AO that any undisclosed income belongs to any person, other than the person with respect to whom search was made u/s 132 of the Act, (ii) the books of account or other documents or assets seized or requisitioned had been handed over to the AO having jurisdiction over such other person, and (iii) the AO has proceeded u/s 158BC against such other person.

9. The apex Court issued guidelines and limitations on the exercise of power u/s 132 of the Act in Income Tax Officer, Special Investigation Circle-B, Meerut Vs. Seth Brothers and Others etc., Held thus : Sec. 132 does not confer any arbitrary authority upon the Revenue Officers. If the officer has reason to believe that any books of account or other documents would be useful for, or relevant to any proceeding under the Act, he is authorised by law to seize those books of account or other documents. If the action is maliciously taken or power under the section is exercised for a collateral purpose, it is liable to be struck down by the Court where the power is exercised bona fide any error of judgment on the part of the officers will not vitiate the exercise of power. Again any irregularity in the course of entry, search and seizure committed by the officer acting in pursuance of the authorisation will not be sufficient to vitiate the action taken provided the officer has in executing the authorisation acted bona fide.

In the present case, we find that on the basis of information a satisfaction was duly recorded in respect of undisclosed income. The AO has now proceeded ahead in the matter and has passed order Annex. P/14 which has not been challenged by the petitioner. The AO after recording findings in favor of the petitioner found that the FDRs for Rs. 14,93,87,688 deserve to be retained and balance amount of FDRs was directed to be returned. In view of the subsequent event, we do not find it appropriate to pass any order for the return of the FDRs to the petitioner. However, petitioner either may participate in the assessment proceedings or may assail the order Annex. P/14 before an appropriate forum. With the aforesaid liberty, this petition is finally disposed of with no order as to costs.

