

(2024) 03 BOM CK 0093
In the Bombay High Court
Case No : Writ Petition No.231 Of 2016

Chandni J. Ahuja

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 01-03-2024

Acts Referred:

Income Tax Act, 1961 — Section 143(1), 147, 147(a), 148, 149, 150, 151, 152, 153

Citation : (2024) 03 BOM CK 0093

Hon'ble Judges : K. R. Shriram, J;Dr. Neela Gokhale, J

Bench : Division Bench

Advocate : Chandni J. Ahuja, Prakash Chhotaray

Final Decision : Dismissed

Judgement

K.R. Shriram, J

1 Petitioner, a Chartered Accountant by profession, had filed return of income for Assessment Years 2010-2011, 2011-2012 and 2012-2013. The return for all the three years were processed under Section 143(1) of the Income Tax Act, 1961 (the Act). Thereafter, petitioner received identically worded notices all dated 20th March 2015 for Assessment Years 2010-2011, 2011-2012 and 2012-2013 seeking to reopen the assessment of those years. The reasons in support of the impugned notices are also identical, except the years and figures vary. The reasons read as under :

In this case as per the CIB information you have entered into huge share transaction for A.Y. 2010-11. As per the information received the value of the share transaction is Rs.29,43,22,193/-.

In view of the above, I have reason to believe that income chargeable to tax has escaped assessment and, therefore, to verify the above aspect, it is necessary to reopen the case for A.Y. 2010-11.

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In this case as per the CIB information you have entered into huge share transaction for A.Y. 2011-12. As per the information received the value of the share transaction is Rs.18,11,26,743/-.

In view of the above, I have reason to believe that income chargeable to tax has escaped assessment and, therefore, to verify the above aspect, it is necessary to reopen the case for A.Y. 2011-12.

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In this case as per the CIB information you have entered into huge share transaction for A.Y. 2012-13. As per the information received the value of the share transaction is Rs.66,16,51,715/-.

In view of the above, I have reason to believe that income chargeable to tax has escaped assessment and, therefore, to verify the above aspect, it is necessary to reopen the case for A.Y. 2012-13.

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2 Petitioner filed detailed objections dated 27th July 2015 which came to be rejected by an order dated 6th November 2015. In the order rejecting objections, it is recorded "..... the information received from CIB may not be genuine and therefore requires further investigation. These facts in itself are enough to form an independent belief to reopen the assessment". Therefore, we have to note that even in the order rejecting the objections itself there is an admission that information from CIB, based on which the notice under Section 148 of the Act has been issued, may not be genuine.

3 At this stage, petitioner filed the present petition which came to be admitted by an order dated 13th April 2016. The order reads as under :

1. Heard. Rule. Respondent waives service.

2. This petition challenges three Notices dated 20th March, 2015 under Section 148 of the Income Tax Act, 1961 seeking to reopen the assessment for Assessment Years 2010-11, 2011-12 and 2012-13. The reasons in support of the impugned notices are similar. The basis as recorded in the reasons is that C.I.B. information was received that the petitioner was having huge transactions in shares. This information led the Assessing Officer to believe that income chargeable to tax has escaped assessment. Further, the reasons also record that reopening of assessment is necessary to verify the above aspect.

3. The reasons as recorded do not indicate any link between the material obtained from the C.I.B. and the reasons to believe that income chargeable to tax has escaped assessment. In the absence of any indication of how the material obtained has led to the belief the income chargeable to tax has escaped assessment, the reasons prima facie, do not disclose any reason to believe that income chargeable to tax has escaped assessment.

4. In view of the above, all the three Notices dated 20th March, 2015 seeking to reopen the assessment for Assessment Years 2010-11, 2011-12 and 2012-13 are stayed till the final disposal of this petition.

4 An affidavit in reply has been filed in which it is stated "..... But the actual extent of escapement of income can be established only after detailed investigation after providing opportunity of hearing to the petitioner". Therefore, admittedly this is a clear case of a fishing enquiry and even at the stage of filing an affidavit in reply, a reason to believe has not been formed. Mr. Chhotaray, relying upon Commissioner of Income Tax V/s. Podar Cement Pvt. Ltd. and Ors. (1997) ITR 625 (SC) , submitted that the law cannot presume every situation. Relying upon Income Tax Officer V/s. Biju Patnaik 188 ITR 247, Mr. Chhotaray submitted that even if the notice or the reason to believe does not disclose the satisfaction of the requirement of Section 147 of the Act, if from the averments in the counter affidavit it is clear that the Income Tax Officer had applied his mind to the facts and after prima facie satisfying himself of the existence of two conditions reached the conclusions for reopening the assessment, it being an administrative action, the notice or order does not per se become illegal. It is open to the assessee to place all necessary material facts and the Income Tax Officer is free to consider the material and make a decision in that regard.

5 In our view, Biju Patnaik (Supra) will not help Mr. Chhotaray. This Court has, in Sun Tan Trading Co. Ltd. V/s. The Deputy Commissioner of Income Tax, Circle 1(3)(1), Mumbai and Ors. 2024 SCC Online Bom. 469 in paragraphs 20 and 22, dealt with Biju Patnaik (Supra). It read as under :

20. In Biju Patnaik (Supra), that Mr. Chhotaray had relied upon in the case before the Apex Court, the reasons were recorded by the Assessing Officer in the order-sheet on 2nd July 1965 to state that although the assessee had claimed that the transfer of business was made on 31st March 1956, however, from the information available with the Assessing Officer, it appears that the transfer of business took place on 3rd November 1956. Thus, the assessee was liable to be taxed on the capital gain earned by the assessee in the accounting year ending on 31st March 1957. The Assessing Officer had, thereafter, issued a notice dated 31st July 1965 requiring the assessee to deliver within 30 days the return of income in the prescribed form. The Hon'ble Apex Court held that :

It is undoubtedly true that the notice does not prima facie disclose the satisfaction of the two conditions precedent enjoined under section 147(a), but in the counter – affidavit filed by the Income-tax Officer in the High Court, he stated all the material facts. The Respondent had inspected the record and the record also bears out the existence of the material fact. The proceedings drawn upon which are abstracted earlier also show that Income-tax Officer has applied his mind to the facts on record and was prima facie satisfied that the reopening of the assessment for the assessment year 1957 – 58 was needed due to those stated facts.

The Hon'ble Apex Court further held that :

We reject the contention of Dr. Pal that the Income-tax Officer has no reason to believe that income has escaped assessment for the relevant accounting year for the reasons mentioned by the Income-tax Officer in the proceedings drawn on July 2, 1965. It is clear therefrom that the escapement of assessment was on account of omission or failure on the part of the Respondent to disclose the material fact truly and fully.

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22. Further, the Hon'ble Apex Court in the case of GKN Driveshafts (India) Ltd. V/ s. Income Tax 259 ITR 19 (SC) has held that the process to be followed in reopening cases is that once a notice under Section 148 of the Act is issued, the assessee must file the return of income and, thereafter, the reasons recorded by the Assessing Officer would be provided to the assessee. The assessee can file its objection and the Assessing Officer is thereafter bound to dispose of the objections by passing a speaking order. The process prescribed by the Hon'ble Apex Court also proceeds on the footing that the objections are required to be filed on the basis of the "reasons recorded" by Assessing Officer and the Assessing Officer is required to pass order justifying the reopening on the basis of the said reasons. Therefore, if the Assessing Officer is allowed to justify the reopening beyond the reasons, the whole process prescribed by the Hon'ble Apex Court will also be rendered nugatory and infructuous.

6 In the facts of this case, it is not possible to interpret the decision of the Hon'ble Apex Court in Biju Patnaik (Supra) as sought to be done by Mr. Chhotaray, i.e., to say that the validity of the reopening is to be decided on the basis of not only the reasons recorded but other material as well. If the interpretation as sought by Mr. Chhotaray is given then, it would lead to the recording of reasons being an empty formality as the Assessing Officer would always be able to justify the reopening by not only referring to the reasons but also surrounding material and circumstances. The same can never be the intention of the provisions of Section 147 of the Act, which specifically provides that the Assessing Officer must have reason to believe that income has escaped assessment. We should also note that the approval is required under Section 151 of the Act from the superior authority on the reasons recorded by the Assessing Officer.

7 Since the admitted position is that the Assessing Officer does not have reason to believe but only reason to suspect, as held by this Court in Darpan P. Chandaliya V/s. Income Tax Officer (2023) 155 taxmann.com 447 (Bombay), reopening of assessment is not satisfactory. In Darpan P. Chandaliya (Supra) a similar situation arose where also the Assessing Officer noted that he is seeking some information to examine the case of assessee. The Court held that, that cannot be stated to be founded on the belief that any income which is chargeable to tax has escaped assessment. Just because some information has been

received does not entitle the Assessing Officer to reopen assessment. The reasons must be founded on the satisfaction of the Assessing Officer that income chargeable to tax has escaped assessment. Once that is not to be found, then, the impugned notice cannot be sustained. What we find is that there are no reasons to believe but, only reasons to suspect. Darpan P. Chandaliya (Supra) was relied upon in Paranjape Schemes (Construction) Ltd. V/s. Deputy Commissioner of Income Tax Circle 2(3)(1) & Ors. Writ Petition No.1415 of 2022 dated 10th November 2023 where paragraph 4 reads as under :

4. In Darpan Chandliya v. Income Tax Officer, a similar situation arose where also the AO had noted that he is seeking some information to examine the case of assessee. The Court held that, that cannot be stated to be founded on the belief that any income which is chargeable to tax has escaped assessment. Just because some information has been received does not entitle Respondent to reopen assessment. The reasons must be founded on the satisfaction of the AO that income chargeable to tax has escaped assessment. Once that is not to be found, then the impugned notice cannot be sustained. The Court said, "what is found is that there are no reasons to believe but, only reasons to suspect. Hence, reopening of assessment is not satisfactory." Paragraph 8 of the said judgment reads as under:

"8. Moreover, the AO has noted in the reason to believe that he is seeking some information to examine the case of assessee, to enquire about these Rs. 7,00,000/-. In the judgment of this Court in the case of Nivi Trading Limited v. Union of India and Another, it is held that

"If more details are sought or some verification is proposed, that cannot be a substitute for the reasons which led AO to believe that an income chargeable to tax has escaped assessment. The principal condition for issuance of notice is to be found in Section 147 of the Act and that is on the reason to believe that, any income chargeable to tax has escaped assessment for any assessment year, then, the AO 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."

In the case at hand, the AO does not say that any income chargeable to tax has escaped assessment. All that the AO desires is 'examination of certain details pertaining to the amount paid by Petitioner to Crown'. That cannot be stated to be founded on the belief that any income which is chargeable to tax has escaped assessment and hence such verification is necessary. Just because some information has been received from the Investigation Wing, does not entitle Respondent to re-open assessment. The reasons must be founded on the satisfaction of AO that income chargeable to tax has escaped assessment. Once that is not to be found, then, the impugned notice cannot be sustained. What we find is that there are no reasons to believe but, only reasons to suspect. Hence, re-opening of assessment is not satisfactory."

8 This Court in Nivi Trading Limited V/s. Union of India and Anr. 2015 (64) taxmann.com 92 (Bom.)/2015 SCC Online Bom. 4871 held if more details are sought or some verification is proposed that cannot be a substitute for the reasons and which led the Assessing Officer to believe that an income chargeable to tax has escaped assessment.

9 In the case at hand, the Assessing Officer does not say that any income has escaped assessment. All that the Assessing Officer desires is examination of certain details pertaining to the actual extent of escapement of income which can be established only after detailed investigation. Even in the reasons recorded, it says " In this case as per the CIB information you have entered into huge share transaction the value of the share transaction is it is necessary to verify the above aspect, it is necessary to reopen the case".

That cannot be stated to be founded on the belief that any income which is chargeable to tax has escaped assessment and hence, such verification is necessary. Just because some information has been received from CIB does not entitle the Assessing Officer to reopen assessment. The reasons must be founded on the satisfaction of the Assessing Officer that income chargeable to tax has escaped assessment. Once that is not to be found, then, the impugned notice cannot be sustained. As noted earlier, what we find is that there are no reasons to believe but only reasons to suspect. Hence, reopening of assessment is not satisfactory.

10 In the circumstances, the rule issued on 13th April 2016 is made absolute. The impugned notice dated 20th March 2015 and the order on objections dated 6th November 2015 are hereby quashed and set aside.