(2004) 06 PAT CK 0001

In the Patna High Court

Case No : Appeal from Appellate Order No. 204 of 2001 23 June 2004

Dr. Oswald Anthony APPELLANT

Vs

Commissioner of Income Tax and Another RESPONDENT

Date of Decision : 23-06-2004

Acts Referred:

Citation : (2004) 06 PAT CK 0001

Hon'ble Judges : S. N. Hussain, J;Nagendra Rai, J

Bench : Division Bench

Judgement

Nagendra Rai, J.

The assessee-appellant has filed this appeal u/s 260A of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), against the decision dated 21-12-2000, passed in I.T.A. No. (SS) 25 (Patna) of 1998 by the Income Tax Appellate Tribunal, Patna Bench, Patna, by which the Tribunal has upheld with modification, the order dated 28-1-1998, passed by the assessing officer (Assistant Commissioner of Income Tax), Patna, u/s 158BC of the Act making assessment for the block period 1987-88 to 1997-98 (up to 27-11-1996).

The factual matrix for disposal of the appeal is that the appellant is a dental surgeon and employed under the Government of Bihar. One Dr. O.P. Diwakar was an employee of the Animal Husbandry Department and was a tenant in the house of the appellant situate at Road No. 20, Gardaribagh, Patna. He was involved in the animal husbandry scam involving defalcation and misappropriation of an amount of rupees one thousand crores. A search u/s 132 of the Act was conducted against the said Dr. O.P. Diwakar, the appellant and others. In the case of the appellant the search commenced on 27-11-1996, and was concluded on 9-1-1997. The warrant of authorization was issued for the search of the lockers at State Bank of India, Dujra Branch, Patna, on 11-12-1996, and the Central Bank of India, Bettiah, on 9-1-1997. The panchanama issued for both the dates were in the name of the appellant and his mother-in-law, Mrs. Lily Tobias, etc. In the case of search in respect of locker No.

14 at Central Bank of India, Bettiah, the warrant of authorisation was issued on 11-12-1996, which was executed on 9-1-1997, as per panchanama. After the search, on 17-3-1997, the appellant was directed by the assessing officer to file a return for the block period u/s 158BC of the Act. A notice u/s 142 of the Act was also issued requiring the appellant to file a statement of all his assets and liabilities, whether included in the accounts or not, and whether standing in his name or in the name of someone else with regard to the dates mentioned in the aforesaid notice. The assessee filed a reply to the notice u/s 142 of the Act wherein he promised that he is going to file his return, computation of income, capital account and balance-sheet, etc., in terms of the notice, but he did not file the return. However, during the assessment proceedings, he filed certain data regarding his income during the block period. As the appellant did not comply with the requirements as mentioned in the notice u/s 142(1) of the Act, the assessing authority adopted best judgment assessment procedure u/s 144 of the Act on the basis of the information available on record and the information furnished by the assessee in his examination u/s 132 of the Act. During the course of search the assessing authority found that the appellant has salary income from the government. This apart he has professional income from his private dental clinic running at Kurjee and Danapur, income from house property and income from other sources and accordingly made the assessment u/s 158BC of the Act for the block period by order dated 28-1-1998.

The appellant filed an appeal before the Tribunal and the Tribunal made certain modifications with regard to income and others and partly allowed the appeal and thus upheld the assessment with regard to the block period with modifications.

Learned counsel appearing for the appellant has raised two points. Firstly, that the assessment for block period is barred u/s 158BE of the Act. In this connection, he submitted that the last of the authorisations regarding search against the appellant was executed on 11-12-1996, and the subsequent execution of authorisation on 9-1-1997, in respect of the bank locker belonging to the appellants mother-in-law could not extend the limitation on the ground that the appellants name is also mentioned in the authorisation. In other words, he submitted that the authorisation in the case of the appellant was executed on 11-12-1996, and the order of assessment was passed on 28-1-1998, and as such it was beyond one year from the end of the month in which the last of the authorisations for search u/s 132 was executed in the case of the appellant. The subsequent authorisation issued on 11-12-1996 and executed on 9-1-1997, could not be taken into consideration for counting the period of limitation as that was issued in respect of the bank locker belonging to the appellants mother-in-law. Secondly, he submitted that the pre-conditions for issuance of authorisation of search and seizure as provided u/s 132 of the Act were not satisfied and, accordingly, the entire search and seizure is invalid in the eye of law.

Learned counsel appearing for the department, on the other hand, submitted that section 158BE of the Act provides time limitation for completion of block assessment and according to sub-section (1)(a) of section 158BE of the Act which is applicable in the present case, the order for assessment of block period shall be passed within one year from the end of the month in which the last authorisation for search u/s 132 of the Act was executed. In this case, the last authorisation against the appellant and others was issued on 11-12-1996, for the search of the bank locker at Central Bank of India, Bettiah, which was executed on 9-1-1997, and the order of assessment has been passed on 28-1-1998, and as such it was within one year from the end of the month in which the last authorisation for search was executed. He further submitted that the concerned authority, namely, the Deputy Director of Income Tax, on the basis of the materials available and after being satisfied that there were sufficient reasons ordered for authorisation for search and seizure. The appellant did not raise this point before the assessing authority and for the first time raised this point before the Tribunal and the Tribunal has found that there was enough material in the possession of the concerned authority for reason to believe that the appellant and others were in possession of income which has not been disclosed. The sufficiency of the material cannot be gone into specially when there is nothing on record to show that the power of exercise u/s 132 of the Act was mala fide.

Thus, two questions arise for consideration in this appeal. The first question is as to whether the assessment for the block period was barred u/s 158BE of the Act. The second question is as to whether the search and seizure was made in violation of section 132 of the Act.

The last authorisation to search and seizure u/s 132 of the Act in the case of the appellant and others was issued on 11-12-1996, in respect of locker No. 14 at Central Bank of India and a copy of which has been annexed as annexure B to the counter affidavit filed on behalf of the department. The said authorisation slip contains the name of the appellant and others. In pursuance of which the search was conducted on 9-1-1997, and the panchanama shows that the warrant of authorisation was in the name of the appellant and others and that was executed on 9-1-1997.

There is no legal bar in issuance of a common authorisation. The fact that the locker was in the name of other family members of the appellant with regard to which authorisation for the search was also issued will not make any difference when the authorisation u/s 132 of the Act also contains the name of the appellant. In pursuance of the said authorisation, the search was made on 9-1-1997. According to the relevant provision of section 158BE of the Act, the order for assessment for block period has to be passed within one year from the end of the month in which the last of the authorisation for search u/s 132 of the Act was executed. As the execution of authorisation in the case of the appellant was made on 9-1-1997, the period of one year is to be counted from the end of the month of January, 1997 and within one year admittedly the assessment has been made on 28-1-1998, which is within one year from the date of execution of the last authorisation in the case of the appellant and, accordingly, the first submission raised on behalf of the appellant is without any substance.

Section 132 of the Act empowers the Director-General or Director or the Chief Commissioner or Commissioner or Joint Director or Joint Commissioner as empowered in this behalf by the Board, to issue authorisation for search and seizure after recording reasons if he has reason to believe that one or more of the conditions as provided u/s 132 of the Act exist. The order issued is in the form of authorisation to the subordinate officers empowering them to enter and search any buildings and premises as mentioned in the order and exercise the duties and functions as proved u/s 132 of the Act. The order for search and seizure is an invasion upon the rights, privacy and freedom of the power of the taxpayer and as such the power should be exercised in accordance with law for the purpose of which provision has been made u/s 132 of the Act. Search and seizure cannot be ordered in a casual manner. The authority has to be satisfied on the basis of the material in its possession and record reasons for coming to the conclusion that it has reason to believe that search and seizure is necessary for any of the purposes mentioned u/s 132 of the Act. If there are materials to support the formation of opinion by the concerned authority u/s 132 of the Act, the court cannot substitute its own opinion for deciding the question as to whether the authorisation should have been issued or not. If the power is exercised without any material or for a collateral purpose or is mala fide then the proceeding initiated on the basis of search and seizure is liable to be quashed. However, if the power is exercised bona fide, then the proceeding cannot be quashed on any error of judgment on the part of the officers. In this connection, reference may be made to the judgment of the Apex Court in the case of Income Tax Officer, Special Investigation Circle-B, Meerut Vs. Seth Brothers and Others etc., wherein the Apex Court at page 843, while dealing with the scope of section 132 of the Act has held as follows :

"The section does not confer any arbitrary authority upon the revenue officers. The Commissioner or the Director of Inspection must have, in consequence of information, reason to believe that the statutory conditions for the exercise of the power to order search exist. He must record reasons for the belief and he must issue an authorization in favour of a designated officer to search the premises and exercise the powers set out therein. The condition for entry into and making search of any building or place is the reason to believe that any books of account or other documents which will be useful for, or relevant to, any proceeding under the Act may be found. If the officer has reason to believe that any books of account or other documents would be useful for, or relevant to, any proceedings under the Act, he is authorised by law to seize those books of account or other documents, and to place marks of identification therein, to make extracts or copies therefrom and also to make a note or an inventory of any articles or other things found in the course of the search. Since by the exercise of the power a serious invasion is made upon the rights, privacy and freedom of the taxpayer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorizes it to be exercised. If the action of the officer issuing the authorization or of the designated officer is challenged, the officer concerned must satisfy the court about the regularity of his action. 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. If the conditions for exercise of the power are not satisfied the proceeding is liable to be quashed. But where power is exercised bona fide, and in furtherance of the statutory duties of the tax officers any error of judgment on the part of the officers will not vitiate the exercise of the power. Where the Commissioner entertains the requisite belief and for reasons recorded by him authorises a designated officer to enter and search premises for books of account and documents relevant to or useful for any proceeding under the Act, the court in a petition by an aggrieved person cannot be asked to substitute its own opinion whether an order authorising search should have been issued. 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."

The appellant, as stated above, did not raise this point before the assessing officer and for the first time raised this point before the Tribunal. The Tribunal found that the concerned authority had material before it before exercising power u/s 132 of the Act. The Tribunal in paragraph 3.2 observed as follows :

"That the department had noticed in the case of Dr. O.P. Diwakar, a colleague of the assessee in the Animal Husbandry Department, Government of Bihar, and an accused in the fodder scam, that certain investment had been shown in the name of the assessees wife."

Thus, there was material before the authority before taking steps u/s 132 of the Act and the satisfaction arrived at by the concerned authority cannot be assailed on the ground of there being no material or actuated by mala fides or collateral purposes. This point also is not worth acceptance.

In the result, there is no merit in this appeal and the same is dismissed.

S. N. Hussain, J.

I agree.

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