

(1992) 09 RAJ CK 0021
In the Rajasthan High Court
Case No : Special Appeal No. 278 of 1992

Goyal and Company

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 02-09-1992

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 132, 132(5)

Citation : (1992) 3 WLC 441 : (1992) WLN 469

Hon'ble Judges : K.C. Agrawal, C.J; V.K. Singhal, J

Bench : Division Bench

Advocate : S.M. Mehta and P.K. Kasliwal, for the Appellant;

Judgement

V.K. Singhal, J.—This special appeal is directed against the judgment of the learned single judge dated April 13, 1992, wherein the writ petition filed by the petitioner was dismissed on the ground that the petitioner has a remedy against the order passed u/s 132(5) of the Income Tax Act, 1961, and that the said order has only been made in a summary manner and regular assessment proceedings are yet to take place.

2. The submission of learned counsel for the appellant is that the remedy provided u/s 132(11) of the Act is not a bar to maintenance of a writ petition. It is submitted that the said order has been passed without giving reasonable opportunity to the petitioner and that the notice has been issued only in respect of the investment of Rs. 50,000 whereas the amount of income determined is far in excess of that sum and thus the order is without jurisdiction.

3. It has also been submitted that the Income Tax Officer has no jurisdiction to take into consideration the various factors and take the investment in respect of items which were not seized and that the order has been passed beyond 120 days of the seizure. Reliance has been placed on the judgment of the Gujarat High Court in the case of Maneklal Bhagwandas Vs. N.N. Sheth, Income Tax Officer, Surat, wherein it was held that non-compliance with Clause (4) of Rule

112A would render the order passed u/s 132(5) bad. The said clause related to providing reasonable notice to the person concerned to show cause as to why such material which the Income Tax Officer proposes to use should not be used against him.

4. Reliance has also been placed on the case of K.A. Karim and Sons Vs. Income Tax Officer, "A" Ward and Others, , wherein the material collected and the person examined were not confronted to the assessee and it was held that the procedure adopted by the Income Tax Officer is unfair, unjust and unreasonable and violates all canons of fair play and natural justice.

5. Reliance has also been placed on the judgment in Mangilal Jain Vs. Collector of Customs, Madras and Others, , where the order passed without notice to the person from whom money was seized was held to be in violation of the principles of natural justice and the order u/s 132(5) was quashed.

6. Reliance has been placed on the judgment of Vindhya Metal Corporation and Others Vs. Commissioner of Income Tax and Others, , wherein the order which was wholly without jurisdiction and resulted in the infringement of the fundamental right of the petitioner and the conditions precedent for the exercise of power u/s 132A were found lacking, it was held that the alternative remedy is not a bar to entertaining the writ.

7. It has further been submitted that the Supreme Court in Dr. Smt. Kuntesh Gupta v. Management of Hindu Kanya Mahavidyalaya, AIR 1987 SC 2186, has held that the writ petition is maintainable and is not barred because of availability of alternative remedy as the authority had no power to review its order.

8. Lastly, reliance has been placed on the judgment of the Karnataka High Court in Nenmal Shankarlal Parmer Vs. Assistant Commissioner of Income Tax (Investigation), , wherein for the exercise of powers u/s 132(5), it was held that there must be a valid seizure and in the absence of such valid seizure the order passed u/s 132(5) is liable to be quashed.

9. Section 132(11) provides that if any person objects for any reason to an order made under Sub-section (5), he may within 30 days of the date of such order, make an application to the Chief Commissioner or Commissioner stating therein the reasons for such objection and requesting for appropriate relief in the matter.

10. Rule 112A of the Income Tax Rules, 1962, provides the procedure for inquiry u/s 132. In The Director of Inspection of Income Tax (Investigation), New Delhi and Another Vs. Pooran Mal and Sons and Another, , it has been observed that the provisions of Rule 112A of the Income Tax Rules, 1962, are not mandatory. It has also been observed that it is not every provision of a taxing statute that will fall under the rule of strict interpretation. The question whether a certain provision of law is directory does not fall to be decided on different standards because it is found in a taxing statute. There is no rule that every provision in a

taxing statute is mandatory. The strict construction that a citizen does not become liable to tax unless he comes within the specific words of a statute is a different proposition.

11. In Smt. Punam Tandon Vs. Director of Inspection and Others, and in SHAMBHU NATH CHAKRAVARTI Vs. DEPUTY DIRECTOR OF INVESTIGATION, Income Tax, AND OTHERS., , the Allahabad High Court has held that it is open to the petitioner to urge all points available to him in law in appeal provided against the order passed u/s 132(5) of the Income Tax Act and the writ petitions were dismissed on this ground alone.

12. In R. Ramachandra Naidu Vs. Commissioner of Income Tax and Another, the Madras High Court has held that unless the order of the Income Tax Officer is found to be not honest or a capricious and mala fide exercise of power, the court will not normally interfere with the summary orders.

13. In Narayan R. Bandekar Vs. Second Income Tax Officer and others, it was held that the order passed u/s 132(5) was an order of summary nature which does not conclude the rights of the petitioner because while passing the assessment order, it is always open to the petitioner to point out that the assets recovered in search do not represent undisclosed income and, secondly, the order passed u/s 132(5) of the Act is appealable and if there is any violation in the exercise of the power, then the proper remedy is to lodge an appeal before the appellate authority. The effect of passing of the order u/s 132(5) was that the assets recovered in the search were held in custody by the officer till the assessment proceedings were completed. In view of these reasons, the order u/s 132(5) was not quashed on the ground that the Income Tax Officer has relied upon certain statements without giving an opportunity to the assessee to cross-examine the witnesses.

14. In Chiranjilal and another Vs. Commissioner of Income Tax, Delhi-I and another, the Delhi High Court has held that against the order u/s 132(5), there is an adequate remedy of appeal and for this reason, the writ petition was not entertained.

15. In Ram Mohan Rastogi Vs. Union of India (UOI) and Others, the Allahabad High Court has held that against an order u/s 132(5), there is an alternative remedy u/s 132(11) and on that ground it was held that the power under Article 226 of the Constitution should not be exercised.

16. From a perusal of the provisions of the Act, the Rules and the various authorities cited above, it is clear that the assessee has an alternative efficacious remedy against the order passed u/s 132(5) and the said order could be challenged for any reason. Even the Commissioner has the power not only to examine the validity of the proceedings from the initial stage but even to provide an opportunity to the assessee for examination of any witness. The validity and the legality of the order passed u/s 132(5) is completely open before the Commissioner and in respect of any objection raised by the assessee the said

authority is bound to consider those objections looking to the facts and the law applicable thereon. In the present case, it is evident that a notice was issued under Rule 112A on December 12, 1991, wherein the assessee was given an opportunity to explain the nature of possession and source of acquisition of the assets seized, namely, share applications amounting to Rs. 50,000. Besides this, another notice was issued on January 8, 1992, wherein detailed information was required not only with regard to the assets but in respect of different matters mentioned in the said notice. The assessee has not produced the books of account and has contended that the amount invested by him was in his capacity as a broker only and the said amount was deposited by Bhagwandas Agrawal and Ashok Kumar. The explanation of the assessee was not found satisfactory by the Income Tax Officer and on account of non-production of books of account, documents, information required and the copy of the bank account, the order u/s 132(5) of the Act was passed. It would not be proper at this stage to say about the correctness of the order passed, suffice to say that all objections raised by the petitioner could be considered by the Commissioner u/s 132(11) of the Act. Any finding given by the Income Tax Officer is not binding when regular assessment is made. The order u/s 132(5) is passed for retention of the assets seized if there is a possibility of the tax liability exceeding the amount of the value of the assets. Though the order passed u/s 132(5) is summary in nature, the assessee has a right to challenge the said order u/s 132(11) of the Act and the powers under this Section are not curtailed in any manner. We find that there are certain factual disputes also, besides various legal submissions and, therefore, the remedy under Article 226 of the Constitution is not justified in the facts and circumstances of the case. The appellant may file objections within 15 days from today and if it is done, the respondent shall treat them to have been filed within limitation.

17. With these observations, the special appeal is dismissed.