
(1992) 11 RAJ CK 0029

In the Rajasthan High Court

Case No : Civil Writ Petition No. 3106 of 1990

HAZARI LAL SONI

APPELLANT

Vs

UNION OF INDIA AND OTHERS

RESPONDENT

Date of Decision : 05-11-1992

Acts Referred:

Income Tax Act, 1961 — Section 132, 132A, 132B, 230A, 271

Citation : (1994) 120 CTR 383 : (1994) 208 ITR 365 : (1994) 70 TAXMAN 383

Hon'ble Judges : M. B. Sharma, J

Bench : Division Bench

Judgement

M. B. SHARMA J. - The seeks a declaration that the search and seizure which was made under the provisions of section 132(1) of the Income Tax Act, 1961 (for short, "the I. T. Act"), on August 22, 1989, at the residence of the petitioner situated in Jhalawar by respondent No. 3, the Assistant Commissioner, Income Tax Department, Circle Kota, be quashed; the order of the Assistant Commissioner made under sub-section (5) of section 132 on December 20, 1989 (annexure-34), as well as the order dated May 3, 1990, (annexure-35), of the Commissioner confirming the order of the Assistant Commissioner be quashed; the gold, silver and cash seized by respondent No. 3 may be ordered to be returned to the petitioner. In the alternative, it has also been prayed that so far as imposition of penalty is concerned, the order of the Assistant Commissioner as confirmed by the Commissioner deserved to be quashed.

In seeking the aforesaid reliefs two contentions have been raised by learned counsel for the petitioner. The first contention is that before conducting the search and seizing the assets (cash, silver and gold ornaments) no satisfaction as required under sub-section (1) of section 132 of the Income Tax Act of the officers mentioned therein for the reasons to believe that the petitioner was in possession of any money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Income Tax Act or the books of

account and other documents which may be useful for, or relevant to, any proceedings under the Income Tax Act and will not be produced if the petitioner is called upon to do so was recorded and, secondly, that so far as the penalty is concerned, it could not have been imposed in the impugned order made u/s 32(5) of the Income Tax Act and could only be made under a separate order.

It is not necessary to give the facts of the case looking to the grounds of challenge which have been stated in the earlier part of this order and suffice it to say that the petitioner carries on business as a goldsmith at Jhalawar since the time of the ancestors and also deals in money-lending and according to the petitioner he is member of a Hindu joint family. On the morning of August 22, 1989, at about 7.00 a.m., a search was conducted of his residential premises and shop and in the said search, the statement of the petitioner was also recorded and the petitioner is said to have admitted in respect of the cash and ornaments that they were his undisclosed income. Under the warrant of authorisation u/s 132 of the Income Tax Act which was issued by the Director of Investigation (Inv.), Ahmedabad, a search at the residential premises of the petitioner and others was conducted. The Assistant Director (Investigation), Jaipur, though the petitioner has said that the search was conducted by the Assistant Commissioner, Income Tax Department, Circle Kota, seized the following valuable and cash :

Rs.

1. Cash

1,25,000

2. Gold weighing 500 gms. valued at

1,50,000

3. Silver weighing 18 kg. valued at

78,000

In addition to the aforesaid there was some other gold and silver, but it was accounted for in the statement of the petitioner and the same were not seized. A notice under rule 112A of the Income Tax Rules, 1962 (for short, "the Rules"), was issued to the assessee requiring him to explain the nature of possession and source of acquisition of assets. A reply was submitted and thereafter an order u/s 132(5) of the Income Tax Act was made on August 22, 1989. In the said order, the undisclosed total income of the petitioner was computed as Rs. 3,76,530 and the Income Tax liability was determined as under :

Rs.

1. income tax

1,67,165

2. Surcharge

13,373

Total

1,80,539

Penalty u/s 271(1)(c) three times of tax sought to be evaded (Rs. 1,80,538)

5,41,614

7,22,152

Rounded off

7,22,150

Since in the opinion of the Assistant Commissioner of Income Tax Circle Kota, the liability of the assessee as worked out above exceeds the value of the assets seized, the entire assets seized were retained. The assessee filed an application u/s 132(1) of the Income Tax Act before the Commissioner of Income Tax, Jaipur, who under his order dated May 3, 1990 (annexure-35), partly allowed the application in so far as the plea of the assessee was that some ornaments were pledged with him and directed the Assistant Commissioner of Income Tax to examine the same in reference to the evidence on record.

So far as the first ground of challenge that no satisfaction as required u/s 132(1) of the Income Tax Act was recorded by the Director (Investigation), Ahmedabad, is concerned, it will be seen from a bare reading of section 132(1) of the Income Tax Act that a search and seizure can only take place once the officer mentioned u/s 132(1) of the Income Tax Act records his satisfaction that he has reason to believe that any person is in possession of any money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been or would not be disclosed for the purposes of the Income Tax Act or when called upon to produce the account books and other documents which will be useful for or relevant to any proceedings under the Income Tax Act, such person would not produce the same. I had called upon learned counsel for the Income Tax Department to produce the file for perusal and the said file is produced and the same is perused. It will not be proper to refer in detail to the notes of the satisfaction of the Director (Investigation), Ahmedabad, in so far as he has recorded that he has reason to believe as required u/s 132(1) of the Income Tax Act and suffice it to say that the matter appears to have been examined in detail and there was an informer who had approached the Income Tax authorities initially in July, 1982, and had given information in respect of possession by the petitioner and other members of the family of assets which were not allegedly disclosed and had also given the details of gold, silver and cash which were likely to be found in the possession of the petitioner and others in case a search was conducted. Not only this it also gave information as to wherefrom those assets were likely to be found in case a search was conducted. Further the same informer again met the officers of the Income Tax Department

on August 16, 1988. There were further inquiries, the officers went to Jhalawar and it was only on July 20, 1989, that a detailed note was prepared in respect of the information which had been received and inquiries were conducted and also in respect of returns which were filed by various firms of the family of the petitioner, and taking into consideration the status of the petitioner and other members of the family and the fact that they have allegedly come up during the last ten years, a satisfaction was recorded that there was reason to believe as required u/s 132(1) of the Income Tax Act and, therefore, in the facts and circumstances, I am unable to agree with learned counsel that it was a case where without recording that the Director (Investigation) has reason to believe, as said earlier, the search was conducted and seizure was made. I have purposefully avoided dealing with all the note-sheets because it will not be in the public interest, but I am satisfied that it is not a case where it can be said that the Director (Investigation) had not recorded that he has reason to believe as was required by him u/s 132(1) of the Income Tax Act.

Coming to the next contention of learned counsel that the penalty proceedings are independent proceedings from the assessment proceedings and, therefore, in the same order, penalty could not be imposed/levied. Shri Bafna, learned counsel for the Income Tax Department, contended that while making an order u/s 132(5) of the Income Tax Act, no penalty is actually levied and what is required to be done is that it is to be determined as to what amount of interest and penalty is imposable under the provisions of the Income Tax Act and thereafter to retain such of the assets which satisfy the aggregate amount of tax, interest and penalty, if any, and release the rest of the assets seized in favour of the assessee. He contended that under the circumstances it was not necessary that before determining the amount of interest or penalty imposable, a notice should have been given to show cause as to why the amount of penalty be not determined. It will be proper to read section 132(5) of the Income Tax Act, which reads as under :

Where any money, bullion, jewellery or other valuable article or thing (hereafter in this section and in sections 132A and 132B referred to as the assets) is seized under sub-section (1) or sub-section (1A), the Income Tax Officer, after affording a reasonable opportunity to the person concerned of being heard and making such enquiry as may be prescribed, shall, within one hundred and twenty days of the seizure, make an order, with the previous approval of the Deputy Commissioner, -

- (i) estimating the undisclosed income (including the income from the undisclosed property) in a summary manner to the best of his judgment on the basis of such materials as are available with him;
- (ii) calculating the amount of tax on the income so estimated in accordance with the provisions of the Indian Income Tax Act, 1922 (11 of 1922), or this Act;
- (iia) determining the amount of interest payable and the amount of penalty

imposable in accordance with the provisions of the Indian Income Tax Act, 1922 (11 of 1922), or this Act, as if the order had been the order of regular assessment;

(iii) specifying the amount that will be required to satisfy any existing liability under this Act and any one or more of the Acts specified in clause (a) of sub-section (1) of section 230A in respect of which such person is in default or is deemed to be in default,

and retain in his custody such assets or part thereof as are in his opinion sufficient to satisfy the aggregate of the amounts referred to in clauses (ii), (iia) and (iii) and forthwith release the remaining portion, if any, of the assets to the person from whose custody they were seized :

Provided that if, after taking into account the material available with him, the Income Tax Officer is of the view that it is not possible to ascertain to which particular previous year or years such income or any part thereof relates, he may calculate the tax on such income or part, as the case may be, as if such income or part were the total income chargeable to tax at the rates in force in the financial year, in which the assets were seized and may also determine the interest or penalty, if any, payable or imposable accordingly :

Provided further that where a person has paid or made satisfactory arrangements for payment of all the amounts referred to in clauses (ii), (iia) and (iii) or any part thereof, the Income Tax Officer may, with the previous approval of the Chief Commissioner or Commissioner, release the assets or such part thereof as he may deem fit in the circumstances of the case.

A bare reading of the above extracted section 132(5) of the Income Tax Act will show that the order in that section can only be made after affording reasonable opportunity to all the person concerned of being heard and making such inquiry as has been prescribed under rule 112A of the Rules. An enquiry has to be conducted and an order has to be made within 120 days of the seizure and that to with the previous approval of the Commissioner and in this case the order has been made with the prior approval of the Commissioner. The order has to be made u/s 132(5) of the Income Tax Act (i) estimating the undisclosed income in a summary manner to the best of the judgment; (ii) the amount of tax on the income so estimated as aforesaid has to be also estimated in accordance with the provisions of the Income Tax Act; (iii) the amount of interest payable and the amount of penalty imposable in accordance with the provisions of the Income Tax Act has to be determined as if the order were an order of regular assessment; and (iv) specifying the amount that will be required to satisfy any existing liability under the Act. In terms of such order to be made only such of the assets or party thereof as are sufficient to satisfy the aggregate of the aforesaid amount are to be retained and the rest have to be released. Therefore, in my opinion, neither is any tax imposed or levied and similarly neither is any interest or penalty amount imposed or levied and what is done is that only the tax amount

is estimated and it is determined as to what amount of penalty is imposable and thereafter only such of the assets which will satisfy the aggregate amount of tax, interest and penalty, if any, are to be retained and the rest of the amounts are to be released to the assessee. There is no dispute that ultimately there has to be a final assessment and while making the order of assessment firstly the amount of tax has to be determined and thereafter in accordance with law, where the authorities decide to levy penalty, a notice has to be given as to whether penalty be not imposed. The purpose of determination of the amount of penalty imposable u/s 132(5) of the Income Tax Act as well as calculating the amount of tax is that the assets seized may be retained to that extent alone to safeguard the interest of the Department. I am, therefore, of the opinion that it was not necessary that a notice should have been given either to make the assessment order or to determine the amount of penalty or interest and what is required under sub-section (5) of section 132 of the Income Tax Act is that an order under it can only be made after affording a reasonable opportunity to the persons concerned of being heard and after making the enquiry prescribed and order be passed.

Consequently, there is no force in this writ petition and the same is dismissed with no orders as to costs.