(2015) 03 BOM CK 0198

In the Bombay High Court

Case No : Writ Petition Nos. 2308 and 2311 of 2015

Hemant Traders APPELLANT

Vs

Income Tax Officer and Others RESPONDENT

Date of Decision : 31-03-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Income Tax Act, 1961 — Section 133A, 143(1), 147, 148, 148(2)

Citation : (2015) 375 ITR 167

Hon'ble Judges : S.C. Dharmadhikari, J;A.K. Menon, J

Bench : Division Bench

Advocate : Ritika Agarwal i/b. K.D. Jadhwani, for the Appellant; S.V. Bharucha, Advocates for the Respondent

Judgement

1. Having heard both sides and finding that a very short point is involved, we dispose of this Writ Petition finally by this order.

2. Rule. The Respondents waive service.

3. By this Writ Petition under Article 226 of the constitution of India, the Petitioner seeks the following relief :

"(a) to issue writ, order or direction to Respondent No. 1 and Respondent No. 2 quashing the reopening proceedings initiated under section 147 of the Act for Assessment Year 2010-2011.

(b) to declare the notice issued under section 148(2) as invalid and illegal and not in conformity with law."

4. The facts and circumstances in which these reliefs are sought are that the Petitioner is a partnership firm registered under the Indian Partnership Act, 1932. It is registered as a commission agent of the Onion Potato Market under the Agricultural Produce Market Committee, Vashi, Navi Mumbai. The Petitioner firm is regularly assessed to income tax. The Petitioner filed a return of income for

assessment year 2010-11 on 14th October, 2010. Along with this return, they have filed an audit report, audited balance sheet and profit and loss account for the year ended 31st March, 2010. The said return was processed and intimation dated 20th February, 2012 under section 143(1) of the Income Tax Act was issued wherein the clarification was sought but the assessment order was not passed. It is the claim of the Petitioner-Assessee that the profit claimed in the return of income amounting to Rs.13,81,880/- was accepted.

5. In the meanwhile, the survey action under section 133A of the Income Tax Act, 1961 was carried out on 7th January, 2011 at the business premises of the Petitioner at Navi Mumbai. This was pertaining to the assessment year 2011-12. The survey party did not find any discrepancy in the books of accounts. The survey report (Annexure C) dated 2nd April, 2002 was forwarded by the Deputy Director of Income Tax (Investigations) Unit-IV, Mumbai to the first Respondent to this Writ Petition. However, the Petitioner states that this report did not contain any reference of any transactions for assessment year 2010-11.

6. On 6th March, 2014 the first Respondent issued a notice purporting to be under section 148 of the Income Tax Act for the assessment year 2010-11. A copy of this notice is to be found at page 81 of the paper book wherein it is stated that the Assessing Officer is satisfied that the income chargeable to tax has escaped assessment for the assessment year 2010- 11. In response to this notice, the Assessee sought the reasons for reopening of the assessment by an application dated 23rd May, 2014. A copy of which is marked at page 82 of the paper book.

7. However, on 30th June, 2014 the Income Tax Officer sought certain information and production of documents from the Assessee. The Assessee replied to the same and pointed out that a copy of the ''reasons recorded'' have not been supplied and reiterated the said demand.

8. Thereupon the copy of ''reasons recorded'' were supplied by a communication dated 15th July, 2014.

9. It is claimed that these reasons are recorded at the time of issuance of notice under section 148. The same read as under:

"A survey action under section 133A of the Income Tax, Act, 1961 was carried out by the DDIT (Inv.), Unit-VII(2), Mumbai on 7th January, 2011 at the business premises of the Assessee at E97/ C-76, APMC Market Yard, Vashi, Turbhe, Navi Mumbai and on the basis of survey Report forwarded to this office, the case is reopened under section 147 of the Income Tax, 1961 for Assessment Year 2009-10, 2010-11 and 2011-12. Notice under section 148 of the Income Tax Act, 1961 is hereby issued to the Assessee."

10. The Petitioners counsel would submit that there are no reasons much less leading to a belief that income chargeable to tax has escaped assessment. The survey report is made the basis for reopening the assessment and for

assessment years 2009-10, 2010-11 and 2011-12. The survey is stated to be of 7th January, 2011. In the circumstances, there is no satisfaction recorded that any income chargeable to tax has escaped assessment and as pointed out in the survey report or from such other relevant material. It is, therefore, submitted that the notice is ex facie bad in law and the proceedings in pursuance thereof are totally without jurisdiction.

11. Mrs. Bharucha, the learned counsel, appearing on behalf of the Respondents submits that in the affidavit in reply, it is pointed out as to how this notice was justified. The reason for issuing it may be the survey and the report thereof but there is an independent satisfaction that income chargeable to tax has escaped assessment. In such circumstances, she submits that the Petitioner-Assessee should appear before the Income Tax Officer and he has all opportunity in law to raise contentions challenging the reassessment and on merits. At this stage, this Court should not interfere in writ jurisdiction and merely because another view is possible. She submits that the Writ Petition be dismissed.

12. With the assistance of the learned counsel appearing for both sides, we have perused the Petition paper book and the relevant annexures. The pre-condition for issuing the notice under section 148 is the satisfaction and in terms of section 147 that an income chargeable to tax has escaped assessment and in the relevant assessment year. The survey report dated 2nd April, 2012 indicates that on the basis of authorisation dated 7/1/2011 which records that there is a group of Assesses which is engaged in wholesale trading of Potato on commission basis. The survey was conducted based on the allegations that these parties are resorting to hoarding of potatoes and making huge profits by fluctuating the day to day price of potatoes in the market. During the course of survey, the Assessee''s manual books of accounts, cash balance, stock etc. were physically verified and inventory was prepared. The back-up of the books of accounts maintained on computer has been taken and impounded for further verification. The details of the group''s bank accounts have been obtained and kept on record. The further contents of this report would reveal that there were some discrepancies and which are very minor in nature. Therefore, the cash physically found was short of Rs.5020/- for which it is explained that the same pertains to day to day and misc. expenses incurred on the day of survey. Secondly, the physical stock of 672 bags of potato was found. The explanation for the same is recorded.

13. Thus, neither the survey report nor any other material indicates that any income chargeable to tax for the relevant assessment year has escaped assessment. The Assessing Officer, therefore, had nothing before him which would enable him to record his belief that any such escapement has taken place. In the circumstances, the reasons recorded and which pertain to all the assessment years prior and subsequent to the survey can hardly satisfy requirement in law. This is not how the power under section 147 should be exercised. That is to be exercised and in exceptional cases. It should not be

exercised as a manner of routine and merely because some survey of this nature had taken place. At any point of time and when there was shortage of potato in the market, that such powers of survey were invoked. If nothing has been found therein which would indicate escapement of income and chargeable to tax, then, the basis for reopening ought not be such survey actions and the report. Something more was required in law for the Assessing Officer to exercise his powers.

14. As a result of the above discussion, we find that it is not possible to agree with Mrs. Bharucha that writ jurisdiction of this Court should not be exercised to interfere with a notice and at the threshold. Once we find that the foundation or basis for initiation of reassessment proceedings is such a communication and which does not contain the requisite satisfaction or reasons for the belief, then, we are required to step in and at the threshold itself. We cannot allow the Assessing Officer to continue the proceedings and which may cause undue harassment and embarrassment to Assessee like the Petitioner. When there is absolutely no material to institute the proceedings or issue the notice proposing reassessment of income, then, it is the duty of the Court to interfere and quash the proceedings at the threshold. In these circumstances, this Writ Petition is allowed. Rule is made absolute in terms of prayer clause (a) and (b). There would be no orders as to costs.

