

(2005) 08 PAT CK 0066
In the Patna High Court
Case No : C.W.J.C. No. 5420 of 2005

Mrs. Farhat Hasan

APPELLANT

Vs

Commissioner of Income Tax and Another

RESPONDENT

Date of Decision : 08-08-2005

Acts Referred:

Citation : (2005) 08 PAT CK 0066

Judgement

J.N. Bhatt, C.J.—In this writ petition, by invocation of the provisions of Article 226 of the Constitution of India, the challenge is against the initiation of the proceedings and further resultant impugned reassessment order, in terms of the provisions of Section 148 read with Section 147 of the Income Tax Act, 1961 ("the Act"), recorded on March 31, 2005, by the Assistant Commissioner of Income Tax, Central Circle-4, Patna, of the Income Tax Department, in relation to the assessment for the year 1997-98 against the petitioner, who carries on the work of running a school known as "International School" in New Patliputra Colony, at Patna, mainly, on the one premise, that the grounds stated in the impugned reassessment order u/s 148 read with Section 147 of the Act are without jurisdiction, and in the result, the following short question comes to surface for our consideration and adjudication in this writ petition;

Whether initiation and subsequent completion of the impugned reassessment order u/s 148 of the Act has been without jurisdiction, as there was no "reason to believe" as provided in section 147 of the Act, as the authority had no supporting material ?

2. With a view to appreciate the merits of the petition let us first have the skeleton projection of the factual matrix and the chronology of the events leading to the rise of this petition under Article 226 of the Constitution of India:

3. A search and seizure operation was conducted by the respondent authority on May 8, 2003, under the Act.

4. Thereafter, the jurisdiction of the case was transferred to the authority who

has passed the assessment order in question on account of the fact that the reassessment proceedings were initiated upon issuance of notice u/s 148 read with Section 147 of the Act on March 10, 2004.

5. Search and seizure operation had been carried on in terms of the provisions of Section 132 of the Act in the residential premises of the assessee. During the course of search, seized documents identified as NK-24 which disclosed to the authority that the assessee had purchased a vehicle Tata Safari for approximately Rs. 8,50,000.

6. One of the documents was the receipt showing the amount of Rs. 8,73,500.

7. The authority believed that in the statement recorded on oath during the course of search process, the assessee was unable to explain in respect of both the investments as well as the receipts. It was also found by the authority that substantial gifts were being received by the assessee and her family members repeatedly over the years and that the acquisition of property including construction both at Patna and elsewhere for apparent consideration was far below the prevailing market rates which indicated accumulation of unaccounted funds, available with the assessee the source of which could be attributable to the only visible source of income, i.e., the operation of M/s. International School at Patna under the proprietorship of the assessee Smt. Farhat Hasan.

8. On these grounds the authority formed the opinion that there was reason to believe that the income relating to the assessment year 1997-98 has escaped assessment, as a result of which the Deputy Director of Investigations (DDI) in his appraisal report recommended reassessment of the income for the assessment year 1997-98 for which approval for reopening of assessment u/s 151(2) of the Act of the Additional Commissioner of Income Tax, Central Range-1, Patna, had been obtained.

9. It followed issuance of notice in terms of Section 148 of the Act, on March 10, 2004, and it was further followed with a notice u/s 142(1) of the Act on September 7, 2004, with an enclosed questionnaire of even date sent to the assessee.

10. In response thereto a written communication dated September 14, 2004, came to be received by the authority, wherein, the assessee offered clarification in respect of the documents seized together with a request that the reassessment proceedings for the year under consideration should be dropped.

11. The authority had suitably replied to the assessee by letter dated November 29, 2004, whereupon the assessee once again was to ensure compliance with the statutory notice served u/s 148 by filing a return of income as well as the questionnaire issued as enclosure to the notice u/s 142(1) of the Act.

12. It be noted that the return of income was eventually filed on December

13. Again the authority issued a notice u/s 142(1) dated December 24, 2004,

with a written communication to the assessee informing that a considerable length of time has already passed in seeking reasons recorded u/s 148(2) before making any compliance which was not justified. More so on account of the fact that the assessment was delayed.

14. The assessee replied and relied on the decision of the Supreme Court in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others,

15. Upon consideration of the facts and circumstances and hearing, the assessing authority passed the reassessment order in question holding that the total income of the assessee for the year in question was determined at Rs. 19,84,930 only with interest as per the provisions of law under Sections 234A, 234B and 234C. The authority further directed in the reassessment order that penalty proceedings u/s 271(1)(c) of the Act be initiated for concealment and for filing inaccurate particulars of income and directed to issue notice of demand in which an amount of Rs. 19,09,200 has been demanded. Hence this petition with the aid of Article 226 of the Constitution of India.

16. Learned Counsel for the assessee has offered submissions in the course of his marathan submissions. Learned standing counsel for the Income Tax Department has also countered the submissions advanced by the other side and has, forcefully, supported the impugned orders. Two decisions are relied on by learned Counsel in the course of the submissions which shall be referred to hereinafter.

17. First of all let it be highlighted that there is a specific provision provided under the Act u/s 246 in Chapter XX relating to appeals and revisions. We have examined carefully the said provision as learned standing counsel for the Income Tax Department has also contended before us that the impugned order of reassessment upon completion is also appealable in terms of the provisions of Section 246(1) whereas, learned Counsel for the assessee has submitted before us that though the impugned order ordinarily could be said to be an order appealable u/s 246(1) of the Act but in the present case since the impugned order is without jurisdiction the assessee is not obliged first to exhaust the apparent statutory remedy under the Act.

18. In order to substantiate the version that the impugned order is without jurisdiction. It has been contended before us by learned Counsel for the petitioner-assessee that in the light of the provisions of Section 147 the statutory expression "reason to believe" held by the Assessing Officer is unsupportable, in the absence of requisite material to support it and in such a factual reality it would tantamount to be without jurisdiction. It is, therefore, forcefully submitted that the assessee is not bound to first avail of the statutory remedy of appeal against the impugned order of reassessment. He has further submitted that the petitioner has a right to invoke the provisions of Article 226 of the Constitution of India as the formation of the opinion with regard to the aforesaid expression "reason to believe" is without supporting material and hence without jurisdiction.

19. Upon consideration of the submissions on this point and keeping in mind the factual profile emerging from the record of the present case, as well as the relevant provisions of Section 147 "reason to believe" we have no slightest hesitation in finding that the impugned order of reassessment could not be branded or labelled as one without jurisdiction. At the best it could be said to be wrong exercise of the jurisdiction vested in the assessing authority under Sections 147 and 148 and the impugned order could be said to be without jurisdiction, when the authority has no express or implied jurisdiction or when the jurisdiction is assumed on the premise of some material which is extraneous to the issue in question or exercise of such jurisdiction is contrary to the express statutory provisions as held by the judicial pronouncements.

20. Failure or wrong exercise or error in exercising jurisdiction or insufficiency of the material could not be said to be divesting of power of authority authorised under the statutory provision as enshrined under Sections 147 and 148 of the Act. We are therefore of the clear opinion that the alleged ground that mere insufficiency or inadequacy of the reasons or materials in support of forming the opinion leading to "reason to believe" is an exercise of powers under the statute which is appealable u/s 246(1) of the Act. It cannot be said even for a moment that the impugned order is manifesting lack of jurisdiction even when the undisputed facts are examined and appreciated by the assessing authority under the powers of the Income Tax Act. It is possible as it happens in many cases that a decision making process may be faulty, may be defective or may be wrong but that would not suitably "ipso facto" take us to the conclusion that the same is without jurisdiction or total lack of jurisdiction,

21. Even from the jurisprudential point of view if any person or authority exercises the statutory power appreciating the facts or evidence on record and reaches a definite conclusion based on reasons which may not appear to be palatable or acceptable to the person against whom such order is passed that cannot be said to be an order or conclusion without jurisdiction. This proposition of law is exclusively examined and intensely propounded by various judicial pronouncements of various High Courts, as well as the Supreme Court. We need not dilate any more and detain us further in view of the clear settled legal proposition on the point, while viewed in the backdrop of the facts. Moreover, our conscience is satisfied with the material considered and examined by the Assessing Officer to reach a conclusion for a "reason to believe" in exercise of power u/s 147 of the Act and it could not be said to be without jurisdiction as observed hereinbefore.

22. The quantum and quality of the material on record may not be free from any defect or doubt but that "ipso facto" would not lead to an inference of an order without jurisdiction. Otherwise if the proposition which is advanced before us on behalf of the petitioner-assessee by learned Counsel Mr. Jain is accepted on its face value in the light of the specific provisions in the Act and clear factual profile, we are afraid, that may lead to a paralytic impact on the exercise of

powers and jurisdiction in terms of the prescribed statutory provisions under the Act.

23. We are, therefore, of the opinion that the impugned reassessment order is not without jurisdiction and therefore in the result ordinarily though it is not a ban or bar in exercise of this constitutional writ jurisdictional power under Article 226 of the Constitution of India in the light of the settled proposition of law and the prudence as well. The assessee is first obliged to take recourse to statutory appellate provision under the Act. He cannot be permitted to short circuit the provisions prescribed for challenging the impugned order in the higher forum. The inbuilt statutory mechanism having jurisdiction to hear the appeal u/s 246(1) of the Act is distinguishably provided under the Act whereas constitutional powers of this Court enshrined under Article 226 of the Constitution of India are as such decidedly, plenary, extraordinary, equitable and discretionary. Ordinarily, the writ court would be inclined to interfere where under the statutory provisions in question the impugned orders are not appealable. So is not the position in the case on hand. We are, therefore, of the clear opinion that no person can be allowed to short circuit or circumvent the statutory provisions of the Act. For an appeal provision for deposit of amount is a tempting factor for Article 226.

24. Reliance is placed on the decision of the hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, wherein it has been propounded that upon notice to the assessee u/s 148 of the Act the proper course of action for the noticee-assessee in this case is to file the return and, if he so desires, to seek reasons for issuing the notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the assessee or the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order.

25. It is further propounded that on receiving such notice u/s 148 the return had been filed and notice was received thereafter by the assessee u/s 143(2) calling for further information on certain points in connection with the returns. Thereupon the appellant filed writ petitions challenging the notices. The High Court dismissed the writ petitions holding that the petitions were premature and the appellant could raise its objections to the notices by filing reply to the notices before the Assessing Officer. The appellant as such had preferred appeals which came to be dismissed by the Supreme Court observing that since the reasons for reopening of assessments u/s 148 had been disclosed in respect of five assessment years, the Assessing Officer had to dispose of the objections, if filed, by recording a speaking order.

26. It would be quite manifest from the observation and conclusion in the aforesaid case that the assessee has to follow the aforesaid procedure. There is no reason why the appeal is not resorted to. It is not the case that the impugned order is without giving an opportunity of hearing or is in violation of the statutory provisions. Upon evaluation of the facts and certain admitted facts the guidelines

in the observations made in the aforesaid decision of the Supreme Court are to be followed in the case in hand. We fail to understand as to how this decision could be pressed into service on behalf of the assessee. On the contrary, it helps the Department.

27. Learned Counsel for the assessee-petitioner has also placed reliance on the following judicial pronouncements in order to convince us that the notice u/s 147 read with Section 148 of the Act was without jurisdiction and for correct interpretation of the statutory provision "reason to believe":

(i) Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another,

(ii) Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Special Investigation Circle "B", Nagpur,

(iii) Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, and

(iv) Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das,

28. The aforesaid case law cannot be disputed. However, whether the decisions in the aforesaid case law are attracted or not will depend upon the factual profile of each case. Decisions are rendered in the light of the facts which are variable in each case. We have considered the aforesaid decisions in case law relied on and we find that they are not helpful to the petitioner in the factual profile of the present case.

29. Learned standing counsel for the Income Tax Department has placed reliance on a decision rendered by the Allahabad High Court in the case of K.M. Bansal (Deceased by Lrs.) Vs. Commissioner of Income Tax and Another, . In this decision various judicial pronouncements on the point in issue in this petition have been considered and the following conclusions are highlighted (page 264) :

The above discussion yields the following propositions:

(i) While the recording of reasons as contemplated by Sub-section (2) of Section 148 is obligatory, the reasons so recorded need not be communicated to the assessee along with the notice under Sub-section (1) of Section 148. It is also not open to the assessee to straightaway call upon the Assessing Officer to disclose or communicate reasons to him, as soon as he receives the notice u/s 148(1). He must first file his return or a revised return, as the case may be, and if he raises a contention either that no reasons were recorded or that the reasons recorded are not relevant and germane, then the Assessing Officer has to communicate the reasons to him.

(ii) While communicating the reasons, it is open to the Assessing Officer to withhold the names of informants and/or identities of sources, if he thinks it necessary to protect his sources and informants. If and when, however, the matter comes before the court, the Assessing Officer is bound to disclose the

entire reasons to the court and it is for the court to decide whether to recognise the Assessing Officer's claim to withhold the names/identities of informants/sources or not.

(iii) So far as the material/information on the basis of which the assessment is reopened is concerned, there is no obligation upon the Assessing Officer to disclose all the material and information that may have been gathered by him. His obligation is to disclose such material/information as he wishes to use against the assessee. This is a principle of natural justice--and there is no other principle governing the issue.

(iv) All the issues arising in the reassessment proceedings including the issue relating to the validity of reopening of assessment proceedings have to be gone into at the same time. Normally speaking, there ought not to be any piecemeal decision of issues. If, however, it turns out in a case that no reasons whatsoever were recorded u/s 148(2), it may be a case where proceedings can be terminated on that question itself without going into the merits of the case. We must also clarify that this Court, in a writ petition, does not sit in judgment over the adequacy or sufficiency of reasons recorded. This is a matter to be gone into in reassessment proceedings. This court will interfere only in cases where no reasons are recorded or where the reasons recorded are ex facie irrelevant.

30. As observed hereinbefore in the present case before filing the return the reasons were asked for by the assessee from the authority upon issuance of notice without filing the return which is decidedly not proper. Reasons obviously would follow upon or after assessment proposition or conclusion has been reached.

31. In the course of hearing, it is stated at the Bar that in the demand notice after reassessment dated March 31, 2005, a demand is made of Rs. 19,09,200 which has remained unpaid yet.

32. After having taken into account the overall picture emerging from the record of the present case, factual catalogue of the circumstances, events and procedure followed by the assessing authority before passing the impugned reassessment order, as well as, rival submissions and the above settled proposition of law, we are of the clear opinion that there is no occasion for our interference under the constitutional writ jurisdiction under Article 226 of the Constitution of India in the present case.

33. It will be for the petitioner-assessee to avail of the appropriate statutory remedy as we have not gone into all the grounds on the merits. The observations made by us hereinbefore are purely tentative for the purpose of consideration of our power as to whether to entertain the writ petition without the petitioner filing an appeal or not. However, since the petitioner has made abortive and futile attempt to short circuit the statutory provisions we deem it expedient to direct the writ petitioner to pay a sum of Rs. 5,000 by way of cost, which will be deposited in the Patna High Court Legal Services Committee within a period of

eight weeks.

34. In the result, this writ application is dismissed with cost on the foregoing grounds.