

(2012) 01 DEL CK 0124

In the Delhi High Court

Case No : Writ Petition (C) 8341 of 2011

Rajat Export Import India Pvt.Ltd.

APPELLANT

Vs

Income Tax Officer

RESPONDENT

Date of Decision : 18-01-2012

Acts Referred:

Citation : (2012) 2 AD 276 : (2012) 252 CTR 307 : (2012) 187 DLT 66

Hon'ble Judges : Sanjiv Khanna, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Kaanan Kapur, for the Appellant; Sanjeev Rajpal, for the Respondent

Final Decision : Dismissed

Judgement

R.V. Easwar, J.—M/s. Rajat Export Import India Pvt. Ltd. has filed the present writ petition under Article 226 of the Constitution of India praying for issue of writ of certiorari to quash the notice issued by the Income Tax Officer, Ward 15(2), New Delhi, the respondent herein, u/s 148 of the Income Tax Act on 28.3.2011 as well as all subsequent proceedings emanating therefrom. It has also been prayed that the order passed by the respondent on 11.11.2011 disposing of the objections filed by the petitioner to the issue of notice u/s 148, may be quashed. A general prayer for issue of any other order as may be appropriate in the facts and circumstances of the case has also been made.

2. The petitioner is a private limited company. In respect of the assessment year 2004-05 it filed a return of income on 27.10.2004 and the same was processed u/s 143(1) of the Act on 31.12.2004. Thereafter, on 28.3.2011 the respondent issued notice u/s 148 of the Act calling upon the petitioner to file a return of income on the ground that income chargeable to tax had escaped assessment. On receipt of the notice the petitioner wrote a letter to the Assessing Officer, who is the respondent herein, on 24.10.2011, after a period of nearly 7 months. In this letter it was requested that the return filed originally by the petitioner company may be treated as return filed in response to the notice u/s 148. The

letter also contained detailed objections styled as "preliminary objections" to the reopening of the assessment. Under the head "objections on merits" raised without prejudice to the preliminary objections, the petitioner pointed out that there was no escapement of income to justify the reopening of the assessment, that the amount of Rs.3 lakhs received from a company by name M/s. Shivam Softech Ltd. was in the nature of share application money, that it was received through banking channels and that the share applicant company had sufficient creditworthiness to advance the monies to the petitioners for purchase of the shares and that in these circumstances there was no question of any income escaping assessment. In support of the objections on merits, the correspondence exchanged between the share applicant and the petitioner as well as the confirmation issued by the share applicant together with the balance sheet and return of income for the period ended 31.3.2002 were submitted to the respondent. The certificate of incorporation and the certificate of commencement of business of the share applicant company were also submitted. It was pleaded that the above documents would clearly show the genuineness of the transaction and establish the identity and creditworthiness of the share applicant company. Reliance was also placed on several authorities to contend that in these circumstances no addition can be made in respect of the amount received as share capital u/s 68 of the Act.

3. The objections of the assessee (petitioner herein) were disposed of by the Assessing Officer (the respondent herein) by an order dated 11.11.2011 in terms of the judgment of the Supreme Court in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, . The respondent stated in the order that the objections of the assessee cannot be upheld since his (respondent's) belief that income chargeable to tax had escaped assessment was based on a report of the investigation wing which has examined meticulously the various bank accounts of the assessee and other parties besides other substantive material like recorded statements of proven entry operators. It was, therefore, stated that the belief of the Assessing Officer is well founded and was not based on vague grounds. A couple of judgments of this Court were also relied upon by the respondent. Accordingly, the respondent rejected the objections of the petitioner.

4. The present writ petition has been filed by the petitioner-assessee against the aforesaid order passed by the Assessing Officer rejecting the objections to the reopening of the assessment. After hearing the learned counsel for the petitioner for some time on 28.11.2011, the learned standing counsel for the revenue was directed to produce the original records and the matter was relisted on 2.12.2011. On that date the file was produced but it did not contain the relevant papers on the basis of which the reasons were recorded u/s 148. Therefore, the matter was directed to be relisted on 16.12.2011 with a direction that the Assessing Officer shall be present along with the relevant papers before the Court on that date. It was also directed that till 16.12.2011 no assessment order shall be passed.

5. On 16.12.2011 the respondent appeared before the Court with the relevant record. The learned standing counsel for the revenue submitted that the information on the basis of which reasons were recorded u/s 148 was received from the investigation wing of the department in the form of a CD (compact disc) and a print out/hard copy of the same was produced before us in Court. It was stated on behalf of the revenue that the reasons were recorded after examining and considering the CD, which included the copy of the bank statement and the statement of Vishal Aggarwal recorded on 5.4.2005. It may be stated that Vishal Aggarwal was the director of M/s. Shivam Softech Ltd. from whom the assessee received the money. A copy of the statement of Vishal Aggarwal and the bank entry were handed over to the learned counsel for the petitioner to enable him to make submissions in support of the writ petition after perusing the material handed over. He however submitted that the Assessing Officer should file an affidavit in support of the statement that the reasons were recorded on the basis of the material contained in the CD. We were not inclined to accept the contention at that stage, but granted time to the learned counsel for the assessee to make his submissions on the basis of what was handed over to him in Court. The matter was accordingly directed to be relisted on 19.12.2011.

6. When the matter came up for hearing on 19.12.2011 the learned counsel for the assessee vehemently contended that the information contained in the material handed over to him was not relevant for the purpose of forming the belief that income chargeable to tax had escaped assessment in the case of the assessee. He pointed out that the name of the assessee (petitioner herein) does not find a place in the statement of Vishal Aggarwal or in any other material given to him and unless the name of the assessee is linked to the alleged entry providers it is not possible to form even a prima facie belief, for the purposes of Section 147, that income chargeable to tax has escaped assessment. He submitted that in the absence of any link between the material before the Assessing Officer and the petitioner herein, it must be held that the reopening of the assessment was based on mere suspicion or surmises. The learned counsel for the assessee also filed a compilation of authorities relied upon by him and on the basis of these authorities he contended that what was being relied upon by the Assessing Officer now has not been mentioned or stated in the reasons recorded on 17.2.2011 on the basis of which notice u/s 148 was issued on 28.3.2011. He submitted that the respondent should not be permitted to improve or add to the reasons recorded at the time of the issue of notice u/s 148. According to him, the statement of Vishal Aggarwal has been used by the respondent to supplement the reasons recorded by the Assessing Officer on 17.2.2011 which is not permissible in law and even otherwise, and without prejudice to the said contention that the statement should not be looked into, it cannot be relied upon since it does not specifically name the assessee. The statement recorded was non-specific, vague and ambiguous.

7. Despite the valiant attempt made by Mr. Kaanan Kapur, the learned counsel for the assessee, to discredit the reasons recorded for reopening the assessment,

we are afraid we cannot agree with his submissions. On 17.2.2011 the Assessing Officer recorded the following reasons for reopening the assessment:-

Reasons for the belief that income has escaped assessment: Return of Income was filed on 27.10.2004. DIT (Inv) during the course of investigation in the case of Mukesh Gupta group along with its close confidants Shri Rajan Jassal and Shri Surinder Pal Singh found that the group have operated multiple accounts in various branches to plough back unaccounted black money for the purpose of business or for personal needs such as purchase of assets etc. in the form of gifts, share application money, loans etc. During the course of investigations by the DIT (Inv) it was discovered that the assessee who have unaccounted money (hereinafter called as entry takers or beneficiaries) and want to introduce the same in the books of accounts without paying tax approach another person (entry operator) and hand over cash (plus commission) and take cheques/DDs/ Pos. The cash is deposited by the entry operator in a bank account either in his own name or in the name of relative/friends or other person hired by him, for the purpose of opening bank account. The entry operator thereafter issues cheque/ DD/PO in the name of beneficiary from the same account (in which the cash is deposited) or another account in which funds are transferred through clearing in two or more stage. The beneficiary in turn deposit; these instruments in his regular books of account in the form of gift, share application money, loan etc. through banking channels and the transaction looks genuine.

It is noticed from the list of entries that the assessee M/s Rajat Export Import (India) Pvt. Ltd. has taken the following accommodation entries from the following person(s) as per details hereunder:-

Amount

Instrument

Date

Name entry provider

Name of Bank

Name of Branch

A/c No.

300000

945931

25-April-03

SHIVAM SOFTECH LTD.

FEDERAL

KAROL BAGH

In view of the report received from the DIT (Inv.) New Delhi, and in view of the facts narrated above it is clear that the assessee has not disclosed fully and truly all material facts necessary for its assessment for that assessment year. I have therefore, reason to believe that the sum of Rs.3.00.000/- chargeable to tax has escaped assessment. Thus, the same is to be brought to tax u/s 147/148 of the I.T. Act 1961. Notice u/s 148 may be issued, if approved.

The aforesaid reasons were enclosed to the notice dated 28.3.2011 issued u/s 148. It will be noticed that in the reasons recorded the Assessing Officer has referred to the investigation made by the DIT (Inv.) in the case of Mukesh Gupta Group along with its close confidants Rajan Jassal and Surinder Pal Singh. The group was found to have operated multiple accounts in various branches of banks to introduce unaccounted money in the guise of gifts, loans, share application money etc. It was further found by the investigation wing that those who wanted to introduce their own unaccounted money into their books approach persons belonging to the group, pay them cash plus commission and take cheques or demand drafts or pay orders for an equivalent amount. The cash is deposited in banks by the persons belonging to the group, who are known as entry operators or entry providers, and cheques are issued to assesseees who want to get their own unaccounted money introduced into their business. After referring to the broad and general modus operandi adopted by the entry providers, the Assessing Officer specifically noticed from the list of entries given to him by the investigation wing that the petitioner herein has taken accommodation entry from Shivam Softech Ltd. in the amount of Rs.3 lakhs. This may be seen from the columnar table set out in the reasons recorded and quoted above. It may also be seen that the table gives the instrument number, date, name of the bank and the branch as well as account number. M/s. Shivam Softech Ltd. has been described in the table as an entry provider. The information contained in the table itself constitutes reasons to believe, prima facie, that income chargeable to tax has escaped assessment in the hands of the petitioner. It must be noticed that the information contained in the table was received by the Assessing Officer from DIT (Inv.), who was in charge of the investigation into groups that operate as entry providers or entry operators. The material before the Assessing Officer, in our opinion, is relevant and affords a live link or nexus to the formation of the prima facie belief that income chargeable to tax had escaped assessment in the assessee's hands. We are not at this stage concerned whether the material before the Assessing Officer is sufficient for the formation of the belief. What we are concerned at this stage is whether the material before the Assessing Officer is relevant for forming the prima facie belief that income chargeable to tax has escaped assessment. It is also well settled that at that stage, that is at the stage when reasons are recorded for reopening the assessment, the Assessing Officer is not required to build a fool proof or a fort-like case for making addition to the assessee's income; all that he is required at that stage is to form a prima facie opinion or belief that income has

escaped assessment. The relevancy of the material before the Assessing Officer is to be judged only from that perspective and not from the perspective as to whether the material is sufficient or adequate to sustain the addition ultimately. That will be an aspect which the Assessing Officer will examine and decide in the course of the re-assessment proceedings after hearing the assessee in the manner required by law. These propositions are so well settled that they do not require citing of any authority.

8. However, we deem it appropriate to examine the judgment in Writ Petition (Civil) No. 8067/2010 titled Signature Hotels (P) Ltd. vs. Income Tax Officer - Ward 8(4) & Anr., decided on 21st July, 2011, as one of us (Sanjiv Khanna, J.) was the author of the said judgment. In the said case, it was noticed that the reasons recorded by the Assessing Officer and enclosed with the counter affidavit were different from the reasons recorded by the Assessing Officer for approval u/s 151. Secondly, on examination of the reasons mentioned by the Assessing Officer for approval it was found that they were sketchy, scanty and vague. Reference was made to the Annexure mentioned in the reasons and it was held that the Annexure cannot be regarded as a material or evidence that prima facie shows or establishes nexus or link which discloses escapement of income. It was further observed that the Assessing Officer while recording reasons did not apply his own mind to the information and examine the basis and material. The Commissioner acted on the same basis by mechanically giving his approval.

In paragraph 15 of the judgment, it was recorded as under:-

15. The aforesaid reasons do not satisfy the requirements of Section 147 of the Act. The reasons and the information referred to is extremely scanty and vague. There is no reference to any document or statement, except Annexure, which has been quoted above. Annexure cannot be regarded as a material or evidence that prima facie shows or establishes nexus or link which discloses escapement of income. Annexure is not a pointer and does not indicate escapement of income. Further, it is apparent that the Assessing Officer did not apply his own mind to the information and examine the basis and material of the information. The Assessing Officer accepted the plea on the basis of vague information in a mechanical manner. The Commissioner also acted on the same basis by mechanically giving his approval.

(emphasis supplied)

The factual matrix has been noticed in paragraph 16. In paragraph 17, it is recorded as under:-

The reasons recorded by the Assessing Officer do not make reference to any statement of Mahesh Garg or Shubhash Gupta. This may not also be necessary, if the statements were on record and it is claimed and prima facie established that they were examined by the Assessing Officer before or at the time of recording reasons. On the other hand, in the present case, information as enclosed as Annexure, has been referred. This is the only material relied upon by

the Assessing Officer. The said Annexure has been quoted above. In this connection, we may notice that M/s Swetu Stone Pvt. Ltd. is an incorporated company and the petitioner has pleaded and stated that the said company has a paid-up capital of Rs.90 lacs. The company was incorporated on 4th January, 1989 and was also allotted a permanent account number in September, 2001. To this extent, there is no dispute.

(emphasis supplied)

The stand taken in the counter affidavit was that Swetu Stone Pvt. Ltd. was unidentifiable. This was obviously incorrect and it was observed that the said company was not a fictitious entity/person.

9. We did not hear Mr. Kannan Kapur, the learned counsel for the assessee, saying that even the information received from the DIT (Inv.) by the respondent did not contain any material linking M/s. Shivam Softech Ltd., stated to be an entry provider, with the petitioner-assessee. This information is part of the information gathered by the investigation wing in respect of groups of persons operating as entry providers or entry operators helping assessees to introduce their unaccounted monies into their books of accounts by dubious means. As a matter of fact, from the compilation of the material contained in the CD filed before us by the learned standing counsel for the revenue, we find two more entries showing receipt by the petitioner herein of Rs.4 lakhs each from a company called Hopewin Admark Consultants P. Ltd., described as entry provider. This information also is in the form of a table and contains the same details which the table set out by the Assessing Officer in the present case in the reasons recorded by him on 17.2.2011. It is not necessary for the purpose of testing the validity of the notice issued u/s 148 in the present case to refer to these additional entries made in the name of Hopewin Admark Consultants P. Ltd. As the learned counsel for the assessee was not in a position to deny that the material relied upon by the Assessing Officer at the time of recording reasons for reopening the assessment did contain an entry linking M/s. Shivam Softech Ltd. with the petitioner herein, the issue of notice u/s 148 on the prima facie belief that income chargeable to tax had escaped assessment must be upheld as valid.

10. The reasons to believe recorded in writing by the Assessing Officer in the present case have been quoted earlier. They are detailed and show application of mind. The reasons record inferences and conclusions. We wanted to examine the material or evidence on the basis of which conclusions/inferences were drawn. When the record of the Assessing Officer was produced, it was noticed that the documents/ material furnished by the Investigating Wing was not on record and, therefore the order dated 2.12.2011 was passed. Subsequently, on 16.12.2011, the Assessing Officer appeared and had stated that the information given/ furnished by the Investigating Wing was in a CD. The print out thereof was furnished. Copy of the material/ evidence relating to the petitioner was furnished to the counsel for the petitioner. In these circumstances, we did not feel that

there was any necessity for the respondent to file counter affidavit.

11. In the view we have taken as above, it is not considered necessary to examine the statement of Vishal Aggarwal to find out whether the assessee has been implicated therein in any manner as being a recipient of accommodation entries. Nor do we dispute the contention taken before us by the learned counsel for the assessee that the validity of the reopening of the assessment should be judged only with reference to the reasons recorded by the Assessing Officer u/s 148(2) at the time of issue of notice of reopening and any other material sought to be relied upon later, with a view to strengthening or improving the reasons, cannot be looked into by the Court. That contention is sound and is supported by ample authority but it does not apply to the present case. In the present case it cannot be disputed at all that the material present before the Assessing Officer at the time of recording reasons for reopening the assessment did show a link between M/s. Shivam Softech Ltd., described as an entry provider, with the petitioner herein. Not only was there a link between the two names, but the material also disclosed the date on which the entry was taken, the cheque or DD number, the name of the bank and branch and the account number. With such precise material before the Assessing Officer, the existence of which is beyond challenge, it can hardly be said that the Assessing Officer could not have had even a prima facie belief that income chargeable to tax had escaped assessment in the hands of the assessee for the assessment year 2004-05.

12. For the above reasons we dismiss the writ petition filed by the assessee. All interim orders are vacated. There shall be no order as to costs. Needless to add that the observations made by us are only for the purpose of disposing of the present writ petition and shall not be construed as expression of any opinion on merits.