(2005) 02 DEL CK 0140

In the Delhi High Court

Case No : Writ Petition (C) No''s. 921-924 of 2005

Rajesh Kumar, Prop. Surya Trading APPELLANT

Vs

The Deputy Commissioner, I. Tax RESPONDENT

Date of Decision : 03-02-2005

Acts Referred:

Citation : (2005) 194 CTR 377 : (2005) 117 DLT 559 : (2005) 275 ITR 641

Hon'ble Judges : Swatanter Kumar, J;Madan B. Lokur, J

Bench : Division Bench

Advocate : C.S. Aggarwal, Anil Sharma and Prakash Kumar, for the Appellant; R.D. Jolly, for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, J.—Rajesh Kumar and three other petitioners have invoked the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India praying for issuance of appropriate writ, order; particularly, the writ of certiorari quashing the direction/order dated 7.12.2004 passed by the Deputy Commissioner of Income Tax, Circle 18, Jhandewalan, New Delhi directing special audit u/s 142 (2A) of the Income Tax Act, 1961 (hereinafter referred to as the Act) for the block period 1.4.1996 to 18.12.2002.

2. The petitioners are challenging the validity of this direction on the ground that the same has been issued without application of mind and recording any reason whatsoever in the assessment proceedings or otherwise. It is also the contention of the petitioners that the provisions of Section 142(2A) of the Act cannot relate to any other record except books of accounts of the assesses . Thus, the order being beyond the scope of the relevant provision is even without jurisdiction.

3. In order to examine the merits of these contentions, reference to basic facts giving rise to present petition would be necessary.

4. On 18.12.2002, a team of the Income Tax Department carried out search and seizure upon the petitioners under the provisions of Section 132(1) of the Act.

Various documents and books of account were seized. The assessment was required to be made in accordance with the provisions of Chapter XIVB of the Act. The Department issued notice to the petitioners u/s 158BC of the Act on 19.5.2003 for the block period 1.4.1996 to 18.12.2002. Petitioners filed return of undisclosed income on 2.6.2003. After examination of the return and in exercise of its power, the Assessing Officer issued a notice-cum-questionnaire to the petitioners u/s 142(1) of the Act. To this questionnaire, petitioners had submitted a reply. As apparently, the Department was not satisfied with this reply, they vide order dated 7.12.2004 directed each of the petitioners for special assessment and issued the following directions :-

Please refer to the assessment proceedings pending in your case for the above said block period.

Having regard to the nature and complexity of the accounts and interest of revenue, I am of the opinion that this is a fit case for audit u/s 142(2A) of the Income Tax Act.

M/s.Dhanesh Gupta & Co., CA, 1-1/16, Ansari Road, Shanti Mohan House, Darya Ganj, New Delhi has been nominated by the Commissioner of Income Tax, Central-III, New Delhi for audit u/s 142(2A) of the IT Act. The audit may be completed within 60 days of issue of this letter without fail. In this respect you are required to cooperate with the auditor to facilitate the timely completion of the Audit as required under law.

The expenses of and incidental to the aforesaid audit including the remuneration of the Auditors shall be determined by CIT(C)-III, New Delhi and will be paid by you to the aforesaid auditor.

Necessary approval has already been taken from the CIT(C)-III, New Delhi in the matter."

5. It is this direction of the respondent-Department, which is impugned in the present writ petition on the grounds above noted and also on the fact that petitioners had already submitted audited accounts which could hardly justify the passing of the impugned direction. Furthermore, it is also stated that vide letter dated 13.12.2004, petitioners had asked the respondents to state reasons for passing such a direction and particularly the reasons, basis for treating the accounts of the petitioner as `complexity in accounts'' and justifying issuance of the direction. Having failed to receive any response to their letter, petitioners challenged the correctness of the impugned letter in this petition.

6. It is a settled principle of law that while exercising its jurisdiction under Article 226 of the Constitution of India, this Court does not sit as a court of appeal and a patent illegality or lack of inherent jurisdiction in passing the impugned action/ letter would be a limited ground for invoking the jurisdiction of this Court. Having heard the counsel for petitioner at great length as well as examining the facts and circumstances of the present case, we are of the considered view that the

letter dated 7.12.2004 does not suffer from a patent illegality or inherent lack of jurisdiction on the part of the Assessing Officer.

7. There cannot be any dispute to the preposition that the competent authority under the provisions of the Act is vested with power to direct special audit, provided the conditions and requirements of Section 142(2A) are satisfied. The provisions of this section contemplate that at any stage of the proceedings, the Assessing Officer having regard to the nature and complexity of assessed and interest of the revenue, is of the opinion that it is necessary to do so, he may with the previous approval of the specified authority direct the assessed to get accounts audited by an accountant defined in Explanation below Section 288(2) of the Act. The discretion vested in the Assessing Officer thus is a wider magnitude and of course has to be exercised in consonance with the provisions of the Section, keeping in view the facts and circumstances of the case. In the case of Gurunanak Enterprises and Bhagya Rekha Enterprises Vs. The Commissioner of Income Tax and Another, , the Division Bench of this Court held as under :-

"A bare perusal of the provision would show that the opinion of the Assessing officer has to be formed only by having regard to : (i) the nature and complexity of the accounts of the assessed ; and (ii) the interests of the Revenue. The word "and" signifies conjunction and not disjunction. In other words, the twin conditions of "nature and complexity of the accounts" and "the interests of the Revenue" are the pre-requisites for exercise of power u/s 142(2A). Although the object behind enacting the said provision is to assist the Assessing Officer in framing the assessment when he finds the accounts of the assessed to be complex and is to protect the interest of the Revenue recourse to the said provision cannot be held by the Assessing Officer merely to shift his responsibility of scrutinising the accounts of an assesseds to determine his true and correct income, on to an auditor. True that an order under the said provision cannot be passed on the ipse dixit of the Assessing Officer merely because he finds some difficulty in understanding the accounts. There has to be a genuine and honest attempt on his part to understand the accounts of the assessed , appreciate the entries therein and if in doubt, seek Explanation from the assessed or his representative, rather than pass on the buck to the special auditor. A cursory look at the books of account is not sufficient. It needs little emphasis that the opinion required to be formed by the Assessing officer for exercise of power u/s 142(2A) must be based on objective consideration and not on the basis of subjective satisfaction"

8. Still in another case of Ramesh Chand Industries Ltd. Vs. Union of India, , the Division Bench of this Court held as under :-

"A bare reading of the provision shows that all that is required for initiation of special audit is formation of the opinion that it is necessary so to do depending on the availability of the above said two facts. The provision does not use the words ""reason to believe." Recording of reasons is not an essential requirement of the provision. The Assessing Officer must obtain previous approval of the Chief Commissioner or the Commissioner. The intervention of such a high ranking authority is an in-built protection to the assessed again any arbitrary or unjust exercise of the power by the Assessing Officer. It is not the case of the petitioner that such previous approval of the Chief Commissioner or the Commissioner has not been obtained. There is no allegation of mala fide. This Court would not in exercise of its writ jurisdiction sit in appeal over the formation of the opinion by the Assessing Officer."

9. Reference in this regard can also be made to the case of Super Cassettes Industries Ltd. Vs. Assistant Commissioner of Incomes Tax, , which reads as under :-

"8. In Abhay Kumar and Co''s case (supra) validity of section 44AB and section 271B of the Act was under challenge. The learned Judge also interpreted Section 44AB. The emphasis was on the question whether this section was applicable to commission agents or not. The petitioners therein were commission agents. During the course of this judgment, the learned Judge had observed :

"The assessed is not put to double jeopardy in having to get his accounts audited once u/s 142(2A) and again u/s 44AB. In fact, section 142(2A) was a dormant provision which was to be invoked in a given situation that has been made explicit by incorporating the same in section 44AB. The two provisions are consistent."(p.149)

8.1 In our opinion, even this observation does not advance the petitioner''s case before us. The learned Judge has held the two provisions to be consistent and not hit by the rule of double jeopardy. The specific object behind enacting sub-section (2A) into section 142 is to assist the Assessing Officer in framing an assessment when he find the accounts of the assesseds to be complex, by having the services of a special auditor at hand. Special audit can also be ordered so as to protect the interest of the revenue. Such objects may or may not be achieved by the audit contemplated by section 44AB."

10. The above enunciated principle clearly show that there has to be objective consideration and application of mind by the Assessing Officer, based upon the material and proper examination of the books of accounts produced by the assesseds, before a direction, as contemplated u/s 142(2A), can be issued to the assesseds. In the present case, there was search and seizure on the premises of the petitioners on 18.12.2002. Large records Along with books of accounts were seized. During pendency of the assessment proceedings, commenced upon issuance of notice u/s 158BC of the Act for the block period 1.4.1996 to 18.12.2002, the return filed by the assesseds was, found to be unsatisfactory. After examination of the books of accounts and the documents which were seized, the Assessing Officer was of the opinion that it would be in the interest of Revenue to direct special audit under the provisions of the Act. The contention raised before us is that there is no application of mind and no reasons have been

provided in the impugned direction by the Assessing Officer. We find no merit in this contention. Before passing the impugned direction, the Assessing Officer had issued a detailed questionnaire u/s 142(1) of the Act to each of the petitioners requiring them to furnish the details. As many as 120 questions were served upon the assesseds under the questionnaire dated 1.11.2004. It is not necessary for us to note these questions in greater detail. Suffice it to note that certain amounts which were not found in the books of accounts but for which documents were seized, the assesseds was called upon to answer about the income in relation to various years out of the block period. For example, cash amounting to Rs.3,60,000/- was found from the residence of one of the assesseds and the assesseds was called upon to explain the same in relation to the books of accounts for the financial year 2002-2003. A sum of Rs.10,81,000/- was stated to be seized from the assesseds by the Director of Investigation u/s 132 of the Act on 31.10.2002, which was not shown in the books of accounts and the assesseds was required to show why the same be not treated as unexplained income for the financial year 2001-2002. Large number of amounts were referred to,s in the same manner in this questionnaire. Thereafter answer to the questionnaire was not found to be satisfactory by the Assessing Officer and thereupon he issued the impugned direction for special audit. In these circumstances, we cannot held that there was no application of mind by the concerned officer before issuing the impugned direction.

11. We also find no merit in the contention raised on behalf of the petitioner that the expression `accounts of the assesseds'' can only refer to the books of accounts of the assesseds and not the other records available before the Assessing Officer for examination or otherwise. The complexity of accounts of the assesseds is to be determined not only by the books of accounts, but even by other documents which are available, the course of an assessment and at any stage subsequent there of may become available to the Assessing Officer. To give a narrow meaning to the expression ''accounts'' so as to confine it to the books of accounts, submitted by the assesseds simplicitor, would amount to giving an interpretation which would completely defeat the very object of the Section. The mere fact that the petitioners have submitted audited account and Therefore there is no occasion for directing special audit, is also of no help to the petitioners. Submission of audited accounts per se would not oust the jurisdiction or authority of the Assessing Officer to pass such a direction. Of course, he is expected to issue the directions after due application of mind and in accordance with the principles afore-narrated. The Assessing Officer while applying his mind, to the facts and circumstances of the case, need not confine himself only to the books of accounts submitted by the assesseds, but can take into consideration such other documents related thereto and which would be part of the assessment proceedings. In the case at hand, the books of accounts as well as other records seized during the search and seizure on 18.12.2002 have rightly been considered by the Assessing Officer before issuing the impugned direction.

12. We see no merit in this writ petition and the same is dismissed accordingly.

