
(1985) 01 AP CK 0003

In the Andhra Pradesh High Court

Case No : Writ Petition No. 11886 of 1984

Ramakrishana Talkies

APPELLANT

Vs

Income Tax Officer, Vijayawada

RESPONDENT

Date of Decision : 19-01-1985

Acts Referred:

Income Tax Act, 1961 — Section 131, 131(1A), 131(3), 132, 132(10)

Citation : (1985) 153 ITR 794

Hon'ble Judges : M. Jagannatha Rao, J;B.P. Jeevan Reddy, J

Bench : Division Bench

Advocate : S. Dasaratharama Reddy, for the Appellant; M.S.N. Murthy, for the Respondent

Judgement

Jagannadha Rao, J.—This write petition mainly raises a question relating to the return of impounded account books and documents under s. 131(3) of the I.T. Act, 1961.

2. The Inspectors of Income Tax conducted a survey under s. 133A of the I.T. Act, 1961, hereinafter referred to as the Act, on April 18, 1984, and they listed various documents found in the cinema business premises of the petitioner. Summons were issued to the petitioner to produce the said listed documents and registers at the office of the responded on April 19, 1984. In response to the summons, the petitioner produced his account books on April 19, 1984, and on that day the respondent impounded the said books under s. 131(3) of the Act stating that there was variance between the daily collection reports given to the petitioner to the sales tax authorities and the collection reports given by the petitioner to the sales tax authorities and the collection reports given to the distributors of the cinema on various dates and that the books were required for facilitating verification and that they are, therefore, impounded until furthers orders. The matter was posted again to April 24, 1984, on which date the respondent issued summons to the Assistant Commercial Tax Officer for production of the daily collection reports, etc., seized from the distributors. As

the petitioner and his representatives were not present on April 24, 1984, the respondent adjourned the case to April 26, 1984, on which date the A.C.T.O. and the assessee were also present. A statement was recorded from the assessee as well as from the A.C.T.O. on that day. It appears that the petitioner did not choose to cross-examine the A.C.T.O.

3. On May 11, 1984, the petitioner filed an application before the respondent requesting (1) for copies of the D.C. Rs. (Daily Collection Reports) seized by the sales-tax authorities; (2) copy of petitioner's sworn deposition; (3) release of the impounded account books and the D.C. Rs., etc.; and (4) depositions taken from the distributors and requesting for stay of the assessment proceedings till such time as the requests of the petitioner in that above application were complied with. A reply was issued by the respondent on June 26, 1984. The respondent thereafter gathered further information from the distributors and the sales tax authorities and posted the case for hearing to July 16, 1984. In the meantime, the petitioner filed another application on July 13, 1984, for return of books and for supply of the copies of the material seized by the sales tax authorities. There was further exchange of letters between the petitioner and the respondent thereafter. The respondent expressed his inability to return the books to the petitioner on the ground that they were impounded and that the purpose for which they were impounded was not completed.

4. Admittedly, the respondent addressed the Commissioner of Income Tax on May 2, 1984, with a request to accord permission to withhold the books till December 31, 1984. The permission granted by the Commissioner of Income Tax was received by the respondent on May 21, 1984.

5. It was at that stage that the petitioner filed the present writ petition on July 27, 1984, praying for the issue of a writ of mandamus declaring the retention of the books impounded by the respondent on April 19, 1984, beyond May 4, 1984 without the approval of the Commissioner of Income Tax or without the same being communicated to the petitioner as illegal and for a direction to the respondent to return the impounded books and also to give certified copies of the daily collection reports seized by the respondent from the distributors by the entertainment tax authorities.

6. It is contended by the learned counsel for the petitioner, Sri S. Dasaradharama Reddy, that under s. 131(3) of the Act, the retention of the impounded books or documents for a period exceeding 15 days (exclusive of holidays) without obtaining the approval of the Commissioner, therefore, is illegal and that the said provision properly construed required the prior approval of the Commissioner for retention beyond 15 days and a communication to the petitioner regarding the approval of the Commissioner for the said purpose. He also contends that the petitioner is entitled for certified copies of the daily collection reports seized from this distributors by the entertainment tax authorities before making an assessment for the assessment years 1981-82 to 1983-84.

7. Sri M. Suryanarayanamurthy, the learned standing counsel for the Department, contends that the retention of the books is not illegal, that "prior" approval for retention beyond 15 days is not contemplated and such approval can be obtained subsequent to the retention and could validate the previous retention of the books. He also submits that the communication of the approval to the petitioner is not necessary and that the petitioner is not entitled to certified copies of the D.C. Rs. Two questions mainly arise for consideration :

8. The first question that arises for consideration is : Whether in cases where books of account and documents are impounded by the ITO under sub-s. (3) of s. 131 of the Act and he decides to retain them beyond fifteen days (exclusive of holidays), it is incumbent upon him to obtain the approval and "communicate" the approval of the Commissioner to the person from whom they are received and impounded. The second question will be whether the approval of the Commissioner can be obtained or granted ex post facto after the expiry of the said period of fifteen days.

9. It is necessary to refer to the relevant provisions of the statute. The provisions of sub-s. (1) of s. 131 of the Act enable the ITO, the AAC, the IAC, the Commissioner (Appeals) and the Commissioner to compel the production of books of account and other documents. Sub-s. (1A) of s. 131 of the Act confers like powers on the Assistant Director of Inspection in certain circumstances. The power of impounding books and documents is conferred on all these authorities under sub-s. (3) of s. 131 and they can also retain them for such period as they think fit but in cases where the impounding is done by the ITO or the Assistant Director of Inspection, two additional safeguards are provided. At the stage of the initial "impounding", the ITO and the Assistant Director of Inspection are required to record their reasons for so doing and that would enable them to retain the books of account and documents impounded for a period of fifteen days (excluding holidays). But in case these two officers want to "retain" them beyond the said period of fifteen days, an additional safeguard is provided, namely, that they should obtain the approval of the Commissioner therefor.

10. It is argued by Sri S. Dasaradharama Reddy for the petitioner that, in this case, the retention was beyond the said period of fifteen days, and, hence, the approval of the Commissioner should have been obtained for such retention and the orders of such approval should have been communicated to the petitioner. For that purpose, he placed strong reliance on the ruling rendered under s. 132(8) of the Act, i.e., the decision of the Supreme Court in Commissioner of Income Tax, West Bengal III and Others Vs. Oriental Rubber Works, . On the question that ex post facto approval is not valid, he again placed reliance on rulings arising under s. 132(8) of the Act, namely, the ruling of a Division Bench of this court in Hyderabad Vanaspati Limited Vs. Income Tax Officer, Central Circle, Hyderabad and Another, , the ruling of the Delhi High Court in Metal Fittings P. Ltd. and another Vs. Union of India and others, and of the Madhya Pradesh High Court in Sampatlal and Sons Vs. Commissioner of Income Tax and

Others, .

11. We have examined the relevant statutory provisions in s. 131(3) and ss. 132 (8), (10), (12) closely and have come to the conclusion that the reasoning of the Supreme Court in Commissioner of Income Tax, West Bengal III and Others Vs. Oriental Rubber Works, to a large extent, supports the contention of the petitioner. While sub-clause (b) of the proviso to s. 131(3) requires that the two officers, namely, the ITO and the Assistant Directors of Inspection, "shall not retain" the custody of the books and documents impounded beyond fifteen days (exclusive of holidays) without "obtaining the approval" of the Commissioner therefor, the provisions of sub-s. (8) of s. 132 direct that the books of account or documents seized "shall not be retained" beyond a period of one hundred and eighty days unless the reasons for retaining the same are recorded by him in writing and "the approval" of the Commissioner for such retention obtained. Thus while under s. 131(3), the retention of the books of account and documents beyond fifteen days as prescribed is not permissible unless the condition, namely, the approval of the Commissioner is obtained, the retention under s. 132(8) beyond one hundred and eighty days shall not be made unless two conditions, namely, the reasons for retention are recorded and the approval of the Commissioner is obtained. Under sub-ss. (10) and (12) of s. 132, a right is conferred on the concerned person to file objections before the Central Board of Revenue questioning the order of approval of the Commissioner.

12. A reading of the relevant provisions of s. 131(3) and s. 132(10) and (12) would show the Parliament has imposed the various checks abovementioned upon the exercise of the power mentioned in those sections with a view to see that the power is not arbitrarily exercised. The Supreme Court emphasised the above checks while dealing with s. 132 (10) and (12), and, in the present case, we are concerned with s. 131(3).

13. We are of the view that the above decision of the Supreme Court rendered with respect to s. 132 (10) and (12) supports the contention of the petitioner's counsel to this extent, viz., that the ITO and the Assistant Director of Inspection have no jurisdiction to retain the custody of the books and documents impounded beyond 15 days (exclusive of holidays) without obtaining the approval of the Commissioner therefor. Having regard to the fact that the period mentioned in s. 131(3), viz., 15 days is comparatively smaller than the period of 180 days mentioned in s. 132(8), we are of the view that while it is mandatory for the above officers to obtain the sanction of the commissioner within the said period of 15 days for the purpose of further retention of the accounts and documents, it is, however, not obligatory that the said approval should be communicated to the relevant person within the said period. Inasmuch as the concerned person has not been given a right to file objections in s. 131(3) while such a right is given under the provisions of s. 132(10), we are of the view that it is not necessary for the above officers to communicate the reasons given by the Commissioner while granting the approval for further retention of the books

of account and documents.

14. But, from the point of view of the assessee, it is necessary that he should know whether the above two types of officers are retaining the documents or books of account after obtaining the necessary approval of the commissioner or without obtaining such approval. For that purpose, we think that it would be desirable for the above two officer to communicate to the relevant a person that the approval of the Commissioner for further retention of the books of account and documents has been obtained within the period of 15 days mentioned in s. 131(3). We may also make it clear that it is not necessary to mention the reason given by the Commissioner for the approval, inasmuch as no right to file objections has been given to the concerned person and that it is sufficient if the factum and date of the approval be the Commissioner is communicated to the concerned persons. We wish to make it further clear that while the obtaining of the approval within the period of 15 days is a mandatory requirement, the communication of the factum and date of approval is not mandatory and will not vitiate the proceedings. In the event of the above officers not communicating the factum of approval or its date, it is open to the concerned person to approach the concerned officer seeking information as to whether the approval of the Commissioner for further retention has been in fact obtained or not or as to when it was obtained and we are sure that in such cases, the officer concerned will not hesitate to inform the concerned person in writing about the factum of the approval of the commissioner and the date of such approval so that the concerned person may feel satisfied that such approval has been obtained within the mandatory period of 15 days. If the concerned person, however, finds that the approval has not been obtained within the period of 15 days he could immediately seek for return of the books of account and documents on the ground that further retention beyond the period of 15 days is unlawful and without jurisdiction.

15. Thus on a consideration of the decision of the Supreme Court in Commissioner of Income Tax, West Bengal III and Others Vs. Oriental Rubber Works, , we hold on the first point that it was incumbent on the respondent for obtaining the approval of the Commissioner within the period of 15 days and that inasmuch as admittedly the approval of the Commissioner was obtained long after the said period as disclosed from the counter-affidavit, we hold that the retention of the books of account and documents beyond 15 days (exclusive of holidays) is illegal and unauthorised.

16. The further question that we have to consider is whether such approval of the commissioner can be granted ex post facto or after the expiry of the period of fifteen days (exclusive of holidays) ?

17. We are of the view that the answer to this point is also to be found in the judgment of the Supreme Court in Commissioner of Income Tax, West Bengal III and Others Vs. Oriental Rubber Works, . It is, therefore, necessary for us to go back to the provisions of s. 132(8) once again. It will be seen at once that sub-s.

(8) of s. 132 does not also use the words "prior approval" but only uses the words "approval". Even so, their Lordships of the Supreme Court pointed out that on the expiry of the statutory period of 180 days mentioned in s. 132(8), (i) the concerned person becomes entitled to the return of the books of account and documents "forthwith"; (ii) the custody thereof by the officer becomes "unlawful"; and (iii) the concerned person cannot be kept "ignorant" of the fulfilment of the condition for the extended retention. Their Lordships observed that the conditions laid down by the statute :

"must be fulfilled before such extended retention becomes permissible in law".

18. There can, in our opinion, be no doubt that the above observations clearly lead to the conclusion that the approval by the Commissioner must be a "prior approval" and not one given ex post facto.

19. It is argued for the Revenue once against that in cases covered by s. 132(8), there is an independent right to file objections under s. 132(10) before the Board and, hence, in such cases, the approval must naturally be a "prior" approval but that in cases covered by s. 131(3) of the Act, there being so such express provision for filing objections the approval can be ex post facto.

20. We are not inclined to agree. A reading of the reasoning of the Supreme Court in Commissioner of Income Tax, West Bengal III and Others Vs. Oriental Rubber Works, shows that the conclusions at which their Lordships arrived were based on a construction of sub-s. (8) of s. 132 independently without resort to sub-s. (10) of s. 132. Their Lordship referred to sub-s. (10) of s. 132 as a second approach to the same conclusion as is clear from the words "Moreover" used at page 483 of the report. Admittedly, even sub-s. (8) of s. 132, like sub-s. (3) of s. 131, spells only of "approval" and not "prior approval".

21. The reasoning of the Division Bench ruling of this court in Hyderabad Vanaspati Limited Vs. Income Tax Officer, Central Circle, Hyderabad and Another, , which dealt with the invalidity of an ex post facto approval under s. 132(8) also supports our view in regard to s. 131(3). Once of us (Jeevan Reddi J.), sitting with Anjaneyulu J., in that case, pointed out that the words in s. 132(8) are negative and the language is "emphatic and mandatory" and observed (p. 5) :

"The reasons for the concern shown by Parliaments are not far to seek. The power of search and seizure conferred by sub-s. (1) is extraordinary. In the interests of proper administration of the Act and public revenue, such a special power is vested, in the specified authorities of the State. The right of privacy and the principle of inviolability of a citizen's hearth and home are subordinated to overriding public interest. At the same time, Parliament has taken care to hedge the said power by providing more than one check thereon."

and the held that apart from the check of obtaining the approval under s. 132(8), etc., there was an additional check under s. 132(10), and observed (p. 6) :

"In this view of the matter, it has to be held that the twin requirements in sub-section (8) are mandatory and also that they should be complied with before the expiry of 180 days.... It should also be seen that the Act does not empower the Commissioner to accord the approval with retrospective effect. The power to give retrospective effect to its acts is the prerogative of the Legislature alone. Of course, Legislature can empower its delegate to exercise the said power; but, such delegation must be clearly indicated....."

22. The same view was taken by the Delhi High Court in *Metal Fittings P. Ltd. and another Vs. Union of India and others*, and by the Madhya Pradesh High Court in *Sampatlal and Sons Vs. Commissioner of Income Tax and Others*, already referred to.

23. Thus, on a consideration of the rulings of the Supreme Court and of this court and so of other High Courts, we are of the view that the approval to be granted by the Commissioner under the proviso to s. 131(3) is to be a prior approval as under s. 132(8) and cannot be an approval ex post facto.

24. Learned counsel for the petitioner brought to our notice a ruling of the Allahabad High Court in *Kanodia Brothers Vs. S.S. Seth, Income Tax Officer*, rendered by Bhargava and Upadhyaya JJ., with reference to s. 37(2) of the Indian I.T. Act, 1922 (corresponding to s. 131(3) of the 1961 Act) to the effect that the ITO has to record his reasons in writing as a pre-condition for "impounding" books of account and documents. The provisions of s. 37(2) were held to be mandatory and not directory. But that case did not have to deal with any questions relating to the approval of the Commissioner for the extended retention beyond fifteen days inasmuch as it was conceded that the approval of the Commissioner was obtained within time. Likewise, the learned counsel for the Revenue, Sri M. Suryanarayana Murthy, referred to a decision of the Punjab and Haryana High Court in *Ramji Dass Om Parkash Vs. Income Tax Officer and Another*, to the effect that the reasons recorded by the ITO for impounding need not be communicated to the concerned person. That ruling also does not deal with the various questions relating to the approval of the Commissioner with which we are concerned in the case before us and is, in our view, not relevant.

25. The petitioner is, therefore, forthwith entitled to the return of the books of accounts and documents impounded on April 19, 1984. Of course, it is open to the respondent to impound them again in accordance with the proviso to s. 131(3) or to retain them in accordance with the procedure indicated by us.

26. The other question that remains to be considered is the request of the petitioner for the copy of the deposition of the A.C.T.O. and the certified copies of the Daily Collection Reports (DCRs) seized from the distributors by the entertainment tax authorities. We are of the view that on the facts of this case revealed from the counter-affidavit of the respondent, the interest of justice and fair play would be amply satisfied if we direct the respondent furnish the certified copy of the deposition of the A.C.T.O. recorded by the respondent and also

furnish the substance of the D.C. Rs. seized from the distributors by the entertainment tax authorities.

27. The writ petitions is, accordingly, allowed to the extent indicated above. In the circumstances of the case, we make no order as to costs.