
(2002) 05 RAJ CK 0070

In the Rajasthan High Court

Case No : C.W.P. No. 3304 of 2002 31 May 2002

Shiv Kant and Bros.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 31-05-2002

Acts Referred:

Income Tax Act, 1961 — Section 142, 158BC

Citation : (2003) 128 TAXMAN 859

Hon'ble Judges : B. Prasad, J

Bench : Division Bench

Advocate : Paras Kuhad, for the Assessee and J.K. Singhi, for the Revenue, for the Appellant;

Judgement

The petitioners in the present writ petition are partnership firms. These firms were subjected to procedure of search and seizure. After such seizure, while mechanism provided in the Income Tax Act, 1961 (hereinafter referred to as the Act) was in process to determine the tax liability, cases were transferred from Delhi to Kota. The petitioners feel that order of transfer of the cases from Delhi to Kota was without jurisdiction, illegal and void. Still, the petitioner have not chosen to impugn the order of transfer.

2. A notice u/s 158BC of the Act was issued to the petitioners namely Ispat Traders and Shivchand & Brothers on 28-9-2001. The opportunity provided in this notice was less than statutory period. Another notice was issued in respect of aforesaid firms afresh on 28-1-2002 requiring these firms to file the return of block period. These firms filed the return of undisclosed income for the block period in response to the aforesaid notices on 22-3-2002. Notice was issued to the third petitioner on 12-3-2002. The third petitioner also filed return in response to the notice.

3. While all the aforesaid proceedings were continuing, a direction u/s 142(2A) of the Act was issued by the assessing officer directing the petitioners to get a special audit done of accounts on 22-4-2002. The petitioners claimed that such

direction was issued without recording his satisfaction and without framing his opinion in respect of nature and complexity of accounts. The petitioners claim that books of account of all the aforesaid firms were seized on 7-4-2000, the date of search. During this entire period, no whisper of complexity in the account of books was ever raised. Such contingency is not reflected in various notices issued and the questionnaire supplied to the petitioner. The assessing officer was required to complete the assessment on or before 30-4-2002 as that was the statutory time limit.

4. It is claimed by the petitioners that on 10/11-4-2002, the Commissioner of Income Tax came to Kota along with one Chartered Accountant, Mr. Goyal. He held his camp office in Income Tax Office at Kota. The petitioners were called for discussions and in the presence of Mr. Goyal, C.A. discussions took place. After discussion, Mr. Goyal advised the petitioners as to why did they not go to the Settlement Commission. This could have made the Assessment Officer free from this time-barring matter. It is also urged that Commissioner, Jaipur discussed the matter with the assessing officer. It is claimed by the petitioners that it was at that point of time, certain directions were issued by the Commissioner for taking appropriate measures u/s 142(2A) of the Act. The petitioners claim that they came to know that the assessing officer would be issuing directions u/s 142(2A). Consequently, the petitioners claim that they received directions u/s 142(2A). The propriety and legality of these directions is being challenged by the petitioners. The petitioners have been directed to get their accounts audited by M/s. Maya Agrawal, FCA of M/s. Pramod & Associates, Mahavir Nagar, Kota. The petitioners claim that she appears to be as associate of Mr. Goyal who came from Jaipur along with Commissioner of Income Tax.

5. The petitioners claim that they have answered the questionnaire given to them. Sufficient explanation was furnished by them. It is claimed that no adverse assessment order was likely to be passed against the petitioners. The petitioners claim that in view of an arrangement entered into between the Assistant Commissioner of Income Tax (Central Circle), Kota, Commissioner of Income Tax, Jaipur and Mr. Goyal, CA the department has decided to take recourse to section 142(2A) of the Act. While arriving at such an agreement it is alleged that it was in the mind of the authority that assessment order, if passed, will go in favour of the petitioners. It is also alleged that in case assessment order is not passed after 30-4-2002, it would get barred by limitation. It is alleged that it was in these circumstances the Assessing Authority has issued a direction to the petitioners u/s 142(2A) of the Act.

6. In the aforesaid background of facts, the petitioners claim that there was nothing on record that any approval was obtained by the Commissioner by the assessing officer. Further, there was nothing on record to suggest that any exercise as required under the Act was undertaken by the assessing officer. The issuance for directions by the assessing officer u/s 142(2A) at the directions of the Commissioner are vitiated being arbitrary and against the judicial system.

7. The petitioners claim that such directions have been issued without any scrutiny having been made. The account books of the petitioners were left with the assessing officer for almost two years. The assessing officer had not utilised this occasion to scrutinise such account books. As such, he could not have concluded that accounts involved complexity. Before a drastic action like the one impugned was ordered, it was necessary that assessing officer should have exercised his jurisdiction properly and undertaken the scrutiny of papers available with him. The assessing officer has chosen to go for less cumbersome method in ordering audit by issuing directions instead of doing scrutiny himself. Such directions have been issued mechanically without giving a speaking order. The seized documents which might have looked by the assessing officer are outside the scope of scrutiny for issuing direction u/s 142(2A) . The assessing officer is under obligation to do the assessment himself. He cannot empower the Chartered Accountant to examine and investigate on his behalf. The order appears to have been passed only for getting the time extended. u/s 158BC the assessment is required to be made within two years. Thus, the order is bad in the eye of law.

8. Supporting the case, learned counsel for the petitioner submitted that exercise of issuing directions u/s 142(2A) by the assessing officer is in absence of two requisite conditions, namely, (a) complexity of accounts; (b) interest of revenue. The assessing officer has only framed an objective opinion. This should have been done after due application of mind. There is no opinion framed by the assessing officer, therefore, there was no application of mind at his end. Unless there was application of mind at the level of assessing officer, there was no question of approval being accorded by the Commissioner for the purposes of issuing directions u/s 142(2A) of the Act. Thus, the whole exercise is vitiated. It has further been submitted on behalf of the petitioners that the order which has been passed by the assessing officer u/s 142(2A) is not after framing an opinion by the assessing officer.

9. On such assertions being made by the petitioners, counsel for the department was called on 29-5-2002 and requested to keep the records of the instant case ready for perusal of the court. The records have been called and a copy has been placed on record. The same have also been shown to the counsel for the petitioners. After perusal of the record, it is submitted by the counsel for petitioners that the reference letter which has been shown today, clearly brings out the fact that there was no application of mind either on the part of the assessing officer or the Commissioner further no opinion was formed by the assessing officer before referring the matter to the Commissioner for approval as provided u/s 142 of the Act. Therefore, it has been claimed by the petitioners that powers conferred u/s 142(2A) could not have been invoked. The petitioner has placed reliance on following decisions of the courts :

Commissioner of Income Tax Vs. Shri Lal Bahadur Shastri Education Society, Mathew M. Thomas and Ors Vs. Commissioner of Income Tax, , Swadeshi Cotton

Mills Company Ltd. Vs. Commissioner of Income Tax and Another, . 10. This has further been submitted by the petitioners that the documents sought to be audited are all the seized documents, whereas under the provisions of the Act only accounts can be ordered to be audited and not all the other documents. By passing such an order, the assessing officer has abrogated his powers to scrutinise the documents. It has further been claimed by the petitioners that auditors have been appointed on extraneous considerations. The appointed auditor was the person who came along with Commissioner and, therefore, this is colourable exercise of powers. It has also been claimed by the petitioners that before passing order of special audit, no opportunity of hearing was provided as it envisages civil addition liability in terms of payment of audit fees, etc. Such burden of fees is determined by the petitioners and, therefore, exercise of jurisdiction of assessing officer is without jurisdiction.

I have considered the submissions made by the petitioner and have perused the record produced by the petitioners along with writ petition. The proceedings as produced by the respondent department on the directions issued to the counsel for the department were also perused.

11. Learned counsel for the petitioners in arguments stressed that one Mr. Goyal, C.A. accompanied the Commissioner while he visited Kota and submitted that it was with the aid and advice of Mr. Goyal, the present exercise of ordering audit has been undertaken just to benefit one Ms. Maya Agarwal. The Officials of the Income department were present at the time of hearing and it was submitted on their behalf that the department will not insist upon the audit being carried out by Ms. Maya Agarwal. Another auditor will be substituted and in case petitioner has any objection about the auditor to be appointed by the respondent-department due weightage will be given to his objection, if raised. Thus, apprehension of the petitioner that exercise of audit has been taken at the instance of Mr. Goyal for some undisclosed reasons and considerations for Ms. Maya Agarwal will have no bearing in the proceedings because she has been represented to be excluded from the audit and will be substituted, Thus, apprehension of the petitioners regarding extraneous consideration has no bearing in the present controversy.

12. The petitioners have further gone on record to suggest that it was a device to save time barring assessment by bringing the same in the purview of the audit. It has been done to furnish sufficient opportunity to the department. The argument is too presumptive to be accepted, The time limit was to expire on 30-4-2002. The exercise of ordering audit is shown to have been generated on or around 10/11-4-2002. At least three weeks period was available to the department to have undertaken any exercise for assessment. Without any relevance material, such inferences cannot be recognized. A shadow on the exercise of statutory powers can only be permissible if there is sufficient material. Unfounded assumption cannot be permitted to statutory exercise of jurisdiction.

13. Learned counsel for the petitioners has further submitted that directions issued by the assessing officer appears on the basis of the directions issued by the Commissioner. Such an assertion as contained in paragraph 11 of the writ petition is more in the form of a derivative conclusion from the manner of proceedings as alleged to have taken place on 10/11-4-2002. Allegations in paragraph 11 of the writ petition falls short of establishing the fact that directions have been issued under the instructions of Commissioner. There is no foundations available on record to suggest that orders have been passed under the directions of the Commissioner by the assessing officer, so much so, statement contained in paragraph 11 of the writ petition also do not make out any cause for personal information of the petitioners. It only states that :

"The petitioners came to know from the assessing officer himself that he would be issuing directions u/s 142(2A) of the Income Tax Act by getting the special audit of accounts".

14. This statement does not show that assessing officer himself has told that he has done so on instructions of Commissioner. May be the petitioner added certain things by imagination and thus concluded that order was passed under the instructions of Commissioner. The petitioners have further claimed that if this order was riot passed u/s 142(2A), assessment would become time-barred. This against is a conclusion which is only presumption of the petitioners. If it was a conclusion like one as suggested by the petitioners, then of course, it could not have been under the directions of the Commissioner.

15. This is suggested that this was in the mind of the assessing officer that he is going to loose the case for the statutory period. Therefore, he has thought of approaching the matter under the Scheme of the Act as provided u/s 142(2A) of the Act. These are permutation and combination available for doing a mental gymnastics. There was no material on record to conclude that such allegations had in fact any foundation. Merely on the basis of apprehension, quasi-judicial orders are to required to be touched and, therefore, flight of imagination of the petitioner is not considered sufficient enough to cause any shadow of the doubt in the mind of the court. There is no convincing material on record to deduce that the exercise of ordering an audit u/s 142(2A) was not an independent exercise of jurisdiction. It cannot, therefore, be said that it was under the directions of the Commissioner.

16. I have seen the order of assessing officer as produced before me. The same has been placed on record. It records that :

"It was observed that sales outside books of account have been made, which was also accepted by the partners, during the course of search and seizure operation itself, it was also observed that stock of all the three firms are lying in a common place and stock of any firm cannot be bifurcated.

During the course of assessment proceedings, it was noticed that stock register is not maintained properly by all the three firms. The following defects were

detected in the stock register :

- (a) Day-to-day balancing has not been done
- (b) Different items such as GI Sheets angles, etc. have been clubbed in a single account.
- (c) Quantity/measurement of the stock has not been mentioned in the stock register." (Emphasis, here italicised in print, supplied)

These observations of the assessing officer in the recommendation to the Commissioner record an admission of the petitioners that sales have been taken outside the books of account. If sale has taken place outside the books of account, then necessary corollary of this submission is that there is an attempt of the tax evasion. The petitioner has relied on the judgment of Allahabad High Court in the case of Swadeshi Cotton Mills Co. Ltd. (supra) wherein it has been observed thus :

"The exercise of power to direct special audit depends upon the satisfaction of the Income Tax Officer with the added approval of the Commissioner. But he must be satisfied that the accounts of the assessee are of a complex nature, and, in the interests of the revenue, the accounts should be audited by a special auditor. The special auditor is also an auditor like the companys auditor, but he has to be nominated by the Commissioner and not by the company. The accounts are again to be audited at the cost of the company.

*** **

` 2. As regards companies, only those cases are to be referred for special audit where :

- (i) there are reports of misfeasance, gross neglect or breach of duty on the part of the principal officer or director in relation to the affairs of the company, or
- (ii) the companys affairs have been the subject of a search or seizure under the Income Tax Act or been the subject of a probe under the Foreign Exchange Regulations Act, or
- (iii) the company has foreign collaboration arrangements, or
- (ii)) where the companys principal is a foreign company and deduction of head office expenses, etc., have been claimed, or
- (v) where the company has import/export business with a yearly turnover of more than a crore of rupees, or
- (vi) where there are allegations of substantial tax evasion, or
- (vii) where the Income Tax Officer has any other information necessitating special audit.

3. As regards non-company assesseees, the following cases should be referred for

a special audit

4. While the above guidelines give a broad spectrum of the area of selection, the actual selection should be confined to a few carefully selected cases needing special probe. Further, when a case is referred for special audit for any particular assessment year, it would be desirable if the other intervening years as well as the latest assessment years are also covered. While submitting such cases for approval to the Commissioner of Income Tax, the reasons for selecting the case/cases should be stated....(p.637)

17. If law laid down in *Swadeshi Cotton Mills Co. Ltd.*s case (supra) is applied, then it stands out that as and when there are allegations of substantial tax evasion, then Board has laid down guidelines to select cases for audit u/s 142(2A) of the Act. The assessing officer is under the obligation to follow them and if in the background of such directions, the assessing officer has found that petitioners have admitted that there were sales outside the account books, then obviously, the assessing officer was conscious of the fact that such sales would result in tax evasion and in this background while submitting the case for approval to the Commissioner of Income Tax, this reason is stated in the letter. It cannot therefore be said that the assessing officer had not applied its mind and had acted mechanically at the instance of Commissioner of Income Tax.

18. The other reasons assigned in the recommendatory letter dated 17-4-2002 placed on record by the respondent department under the directions of this court issued on 28-5-2002, parts of which have been quoted hereinabove, rule out any possibility of application of the case relied upon by the learned counsel for the petitioners in the matter of *H.P. State Forest Corpn. Ltd.* (supra). The Division Bench of Himachal Pradesh High Court has proceeded in that case on the basis of facts obtaining in that case wherein it has been observed thus :

"We have considered the rival contentions of the parties and, in our view, the petition deserves to be allowed. It is true that the power has been exercised under sub-section (2A) of section 142 of the Act. But, it is equally true that so far as the order passed vide Annex. P/1, impugned in the present petitioner is concerned, it does not state that the assessing officer had considered the relevant factors which were required to be borne in mind under sub-section (2A) of section 142 of the Act. It is, no doubt, true in the affidavit and further affidavit, several factors have been pointed out before this court as to why the action was required to be taken. In our opinion, however, when those factors have not been reflected in the impugned order, Annex. P/1, the same cannot be pressed in aid at the time of hearing of the petition." (p. 836)

19. The law laid down by Himachal Pradesh High Court in aforesaid case was in the background that there was no reason assigned and the reasons were attempted to be supplied by the Affidavit. The Honble Division Bench of Himachal Pradesh in view of the law laid down in *Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others*, was persuaded to allow the

petitioner but in the instant case, such application is not warranted. the assessing officer had categorically stated after critical examination. He has given reasons including the one that there was an admission of partners that sale has taken place outside the books of account, then, necessarily tending to indicate that there was a tax evasion.

20. The relevant consideration for ordering audit and the order was thus in conformity with law as laid down in *Swadeshi Cotton Mills Co. Ltd.s* case (supra) wherein it has been observed that special audit depends upon the satisfaction of the Commissioner of Income Tax with the added approval of the Commissioner. In view of the aforesaid, the case relied upon by the learned counsel for the petitioners in the matter of *U.P. State Handloom Corpn. Ltd.* (supra) also does not come to the rescue of the petitioners, on the contrary, it supports the revenue wherein the court has observed that assessee had filed provisional balance-sheet showing that assessee was not sure of the correctness of the account books. In the instant case, the assessee has admitted that sales have taken place outside the account books. Once this fact stands out, then conclusion has to be in favour of revenue that accounts books are untrue. Therefore, when accounts are accepted to be not truthful, then it cannot be said that exercise of jurisdiction by assessing officer was not in conformity with the powers conferred on him.

21. The case relied upon by the learned counsel for the petitioners in the matter of *Peerless General Finance & Investment Co. Ltd.* (supra) is of no assistance to the petitioners as that was the case on the basis of proposal which was made without placing material before the Chief Commissioner of Income Tax. In the instant case, there was a definite proposal made before the Commissioner of Income Tax with detailed material and thus this case has not application in the facts and circumstances of the present case.

22. The discussions made hereinabove show that assessing officer has objectively considered the material available with him and has reached to a bona fide conclusion about the nature of accounts placed before him that there had been admitted sale out of account books. The day-to-day balancing has not been done. The stocks of three firms were lying in common place and their bifurcation was not possible in such contingencies to identify separate dominance of the petitioners firms on the stocks available. The exercise undertaken u/s 142(2A) will be of substantial assistance and thus case of the petitioners as stated and made out before this court falls short of making out a case wherein it cannot be said that an exercise has been taken by the respondent department which is not in conformity with the provisions of section 142(2A), Therefore, this court feels that no interference is called for.

23. The writ petition having no force is dismissed.