

(2002) 04 RAJ CK 0059

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1026 of 2002 26 April 2002

Suman Steels

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 26-04-2002

Acts Referred:

Income Tax Act, 1961 — Section 143, 147, 148, 151, 44AD

Citation : (2003) 127 TAXMAN 353

Hon'ble Judges : B. Prasad, J

Bench : Division Bench

Advocate : Gajendra Maheshwari, for the Assessee and Sandeep Bhandawat, for the Revenue, for the Appellant;

Judgement

The petitioner is a proprietorship concern and is engaged in the business of manufacturing tubular trusses for auction platform on contract basis. The petitioner filed a return of income for the assessment year 1995-96. The return of the petitioner was processed u/s 143(1)(a) of the Income Tax Act (hereinafter referred to as the Act) and refund was granted to the petitioner. The petitioner has been served with a notice u/s 148 of the Act for the assessment year 1995-96. In the present writ petition, the petitioner is impugning the notice issued u/s 148 of the Act.

The petitioner states that respondent No. 4 while issuing notice has claimed to have reason to believe that income of the petitioner for the assessment year 1995-96 has escaped assessment within the meaning of section 147 of the Act. In the notice, it is stated that respondent proposes to reassess the petitioner. The petitioner was required to file return within 31 days from the date of service of the notice u/s 148 of the Act. The petitioner submitted Annex. P/3 whereby he demanded copies of certain documents. In this reply, it was also stated by the petitioner that the original return already filed by the petitioner may be considered as return in response to notice u/s 148 dated 15-5-2001. The petitioner prayed for supply of copy of reasons recorded in support of issuance of

notice. The request of the petitioner was accepted and authorised representative of the petitioner was permitted to go through the reasons recorded by the respondent No. 4.

The petitioner impugns the notice stating inter alia on the ground that the assessing officer has been vested with the power u/s 147 of the Act to issue a notice, only if he has reason to believe that income has escaped assessment. In fact, there is total absence of reasons. Therefore, no proceedings could be taken up u/s 147 of the Act and consequently no notice u/s 148 of the Act was liable to be issued. The petitioner has submitted that reasons supplied to the petitioner show that there are no reasons to believe but they are only reasons to suspect. No notice can be issued on the basis of reasons to suspect. The expression "reason to believe" postulates an existence of reasons to believe. Mere subjective satisfaction of the assessing officer will not be sufficient to issue notice. The petitioner further claimed that there must be a rational and intelligible nexus between the reasons recorded and beliefs. The stand of the petitioner is that there is no direct material available in support of the reasons supplied to the petitioner which would justify that there existed reasons to believe to issue a notice u/s 148 of the Act. The petitioner has submitted that there was no reason to issue notice. The notice issuing authority has assumed that in the contract business, the net profit ranges from 80 per cent to 12 per cent. The petitioner has detailed a chart wherein he has shown that his net profit rate is below 3 per cent and up to 0.67 per cent has been accepted by the department. The range of profit suggested by the assessing officer shows that the respondent had only reasons to suspect. There was no basis where it can be concluded that the respondent had reason to believe to issue notice u/s 148 of the Act.

The respondents have put in appearance and had contested the writ petition. The stand of the respondents is that petitioner has only come against notice u/s 148 of the Act. The re-assessment has not been done so far. If he has any grievance against the proposed re-assessment, then he can contest the same before the departmental authorities. The respondents have further asserted that assessing officer had reason to believe that income has escaped assessment and it is after recording of reasons, notice has been given.

The reasons recorded are given in Annexure R/1. The respondents have stressed that earlier assessment was completed u/s 143(1)(a) of the Act. In such cases, no reasons are recorded because return filed by the assessee is accepted. As and when, an assessment is processed u/s 143(3) of the Act, reasons are recorded. Since, no reasons were recorded in the first assessment, therefore, it cannot be said that notice has been issued only after change of opinion of the assessing authority.

The reasons assigned and contained in Annexure R/1 are sufficient pointer to exclude arbitrariness. The department is processing returns of such businessmen who are engaged in similar trade. The observation of the departmental authority is that 8 per cent to 12 per cent profit is generally found in such business. This

practical view of the assessing authority is riot without foundation. Section 44AD of the Act supplies a presumption clause and statutory presumption is made available to the respondent authorities. It cannot therefore be said that notice is based on suspicion or gossip. May be such presumption is provided for turn over upto Rs. 40 lakhs. But as and when, there is a turn over exceeding Rs. 40 lakhs, it cannot be expected that profit would show a diminishing trend. The respondents have contested the stand of the petitioner that since his stand was accepted in the past, therefore it should be accepted in the present also. The assessee cannot be permitted to say so when his falsehood comes to the ground that "you accept my lie, now your hands are tied and you can do nothing", and therefore, it has been contended that reassessment notice has rightly been issued.

Learned counsel for the petitioner supporting his case argued that assessing officer had no reasons to believe to initiate proceedings against him. There was no reason to believe to arrive at a conclusion that there had been an escapement of income. Learned counsel has placed reliance on the judgment of Supreme Court in the case of Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, wherein it has been held as under :

"In our judgment, the law laid down by this court in the above case is fully applicable to the facts of the present case. There can be no manner of doubt that the words reason to believe suggest that the belief must be that of an honest and reasonable persons based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting without jurisdiction, if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court." (p. 153)

Learned counsel has further supported his case by relying upon the decision of the Honble Supreme Court in the case of ITO v. Lakhmani Mewal Das (1976) 103 ITR 137 and has stressed that expression "reason to believe" does not mean a reason based on purely subjective satisfaction or, the part of Income Tax Officer. This expression also does not mean) a reason to suspect. The reasons should be real and convincing. He has also placed reliance on the judgment of Honble Supreme Court in the case of Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others, and has emphasized that requirement of section 147 of the Act has not been satisfied. It may however be mentioned that this case relates to unamended section 147 of the Act.

The learned counsel has further placed reliance on the decision of this court in the case of Tara Chand Mundhra Vs. Union of India (UOI) and Others, and has stressed that material available on record relied upon by the department was held to be not a sufficient material.

The learned counsel has also placed reliance on the Judgment of Gujarat High Court in the case of Vxl India Ltd. Vs. Assistant Commissioner of Income Tax, and has stressed that assessing officer was required to disclose process of reasoning for issuing a notice. The grounds supplied lack reasoning and that being the position, the notice is bad in the eye of law.

Per contra, learned counsel for the revenue has relied on the judgment of Honble Supreme Court in the cases of M/s. Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another, wherein it has been held as under :

" Since the belief is that of the Income Tax Officer, sufficiency of the reasons for forming the belief is not for the court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the court may look into the conclusion arrived at by the Income Tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income Tax Officer and further whether that material had any rational connection with or a live link for the formation of the requisite belief. It would be immaterial whether the Income Tax Officer, at the time of making the original assessment could or could not have found by further enquiry or investigation, whether the transaction was genuine or not, if, on the basis of subsequent information, the Income Tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in section 147(a) that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore, income chargeable to tax had escaped assessment " (p. 477)

Learned counsel further placed reliance on the judgment of Allahabad High Court in the case of K.M. Bansal (Deceased by Lrs.) Vs. Commissioner of Income Tax and Another, wherein it has been held as under :

"(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.

The High Court in a writ petition challenging reassessment does not sit in judgment over the adequacy or sufficiency of reasons recorded. This is a matter to be gone into in reassessment proceedings. The High Court will interfere only in cases where no reasons are recorded or where the reasons recorded are ex facie irrelevant." (p. 248)

Learned counsel has further placed reliance on the Division Bench decision of this court in the case of Rajan Products Vs. Union of India and Another, wherein it has been held as under

"It is not the case of the appellant herein that no sanction has been obtained as contemplated u/s 151 of the Act. The Income Tax Officer has reason to believe that there is escaped assessment and we have reason to believe that he could exercise his jurisdiction u/s 147 of the Act. We are unable to accept the arguments advanced by learned counsel for the appellant on sections 147 and 148 of the Act. If such contention is accepted, then reopening of the assessment will be impossible and the income which has escaped assessment cannot be taxed in any eventuality. In regard to the request made by the assessee asking for reasons for issuance of notice u/s 147, we are of the opinion that the appellant has no legal right to ask for reasons and the same in our opinion need not to be communicated. The notice was issued u/s 148 of the Act, and, therefore, the appellant ought to have filed the reply immediately. In our opinion, the appellant has wrongly invoked the jurisdiction of this court. As already noticed, the writ petition is directed against the notice u/s 147 of the Income Tax Act. This apart, the appellant has an alternate remedy of filing appropriate appeal before the appropriate authority provided under the Income Tax Act, 1961. In our view, there is no cause of action which has arisen for the appellant petitioner for filing a writ petition and further appeal.

Since the writ petition has been filed against the notice of reassessment, we have no other option except to dismiss the appeal as not maintainable. However, the dismissal of the writ appeal will not stand in the way of the appellants raising of legal contention by way of reply to the notice u/s 147 of the Act along with the return if the return has not already been filed. On receipt of reply to the show cause notice issued u/s 147, the Income Tax Officer shall decide the objections filed legally and factually and then pass final orders in accordance with law after affording an opportunity of hearing either to the appellant or to their authorised representative within three months from the date of filing objections regarding reassessment proceedings." (p. 102)

I have considered the rival submissions and have given my thoughtful considerations.

The courts have been slow to interfere at the stage of notice. It is only, where the notice is found to be based on no relevant material, the courts have exercised jurisdiction, at the notice stage. The Supreme Court while dealing with such issue in *Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another*, has observed that as and when notice is issued "all that is necessary to give this special jurisdiction is that the Income Tax Officer had when he assumed jurisdiction some prima facie grounds for thinking that there had been some non-disclosure of material facts." The Honble Supreme Court further observed that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of "Under assessment" that would be sufficient to give jurisdiction to the Income Tax Officer to issue the notice but if there was no non-disclosure of material fact and

there was no material before the assessing authority, then there was no material before the Income Tax Officer to assume that there was no material to deduce that there was a non-disclosure. Thus, Honble Supreme Court has interfered at the stage of notice.

The basic argument of learned counsel for the petitioner proceeds on the premises that mere change of opinion is not sufficient to infer that a case for re-opening is made out. Learned counsel for the petitioner has emphasized that material should be available and relevant. The reasons should be legitimate to generate belief and they should not be merely reasons to suspect. He has supported his assertion on the basis of aforesaid court decisions.

In the instant case, what comes out on the face is that earlier assessment was done u/s 143(1)(a), wherein no reasoning was given. Therefore, there was no occasion for the respondent department to express any opinion. It cannot be said thus, that while issuing impugned notice there was a change of opinion involved. The argument of learned counsel for the petitioner that mere change of opinion is not sufficient to issue notice has no relevancy in the present matter. Had the first assessment been u/s 143(3), requirement of going into the niceties of the reasons would have been there but since assessment was not done u/s 143(3) and was only u/s 143(1)(a), therefore, it would not be necessary to go for the exercise of assessing reasons, because there are none to look at.

Learned counsel for the petitioner has stressed that notice should not be based on rumour or gossip. The net profit specified in the notice to range between 8 per cent to 12 per cent in the contract business can only be said to be a gossip and rumour. While laying stress on the question of rumour being involved in the case, learned counsel for the petitioner has lost sight of the provisions of section 44AD of the Act wherein a presumption has been provided to be drawn, may be for a case involving a turn over of Rs. 40 lakhs. In the instant case, the turn over is above Rs. 40 lacs. But then it cannot be said that as and when turn over increases, the net profit decreases. If presumption net profit is statutorily provided, then it cannot be said that opinion of the assessing officer is not rational. It is at least in the line of a statutory provision. If the assessing officer has stated in the reasons that profit ranges from 8 per cent to 12 per cent, then it is not a gossip but is in the line of statutory provisions. The practical experience of assessing officer while conducting assessment of similarly situated business men also gives his reasons to believe. Thus, it cannot be said that it is a case of recording of reason on the basis of rumour and gossip. When legislature has thought of providing such presumption, it cannot be said that this part of the reasons can be said to be based on the reasons to suspect. In this light, this argument of learned counsel for the petitioner has no relevance.

The Division Bench of this court in the case of Rajan Products has clearly laid down that in such matters, the petitioner should pursue remedies at the level of the department. Rushing to this court by way of a writ petition has not been appreciated. In view of the law laid down by the Division Bench of this court, the

argument of learned counsel for the petitioner is without foundation. The other citations relied upon by learned counsel for the petitioner also cannot help the petitioner because reasons expressed appear to be legitimate which also cannot be said to be irrelevant. As such, it cannot be said that notice issued to the petitioner is entirely without foundation and falls within the parameters described by the Honble Supreme Court in Calcutta Discount Co. Ltd.s case (supra).

That being the position, no interference is called for. The writ petition having no force is dismissed.