
(2011) 05 OHC CK 0044
In the Orissa High Court
Case No : Writ Petition (C) No. 572 of 2011

Visa Comtrade Ltd.

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 18-05-2011

Acts Referred:

Constitution of India, 1950 — Article 19(1)(g)
Income Tax Act, 1922 — Section 22, 37
Income Tax Act, 1961 — Section 131, 132, 132(1), 132(1)(c), 132(3)
Information Technology Act, 2000 — Section 2

Citation : (2011) 201 TAXMAN 413

Hon'ble Judges : V. Gopala Gowda, C.J; B.N. Mahapatra, J

Bench : Division Bench

Advocate : N. Venkataraman, S.M. Venkataraman, S. Mohanty, D.K. Mohanty, R.R. Swain and P.K. Muduli, for the Appellant; S.P. Mishra and B. Mohanty, for the Respondent

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—This writ petition has been filed with a prayer for quashing/ setting aside the prohibitory order dated 11-11-2010 (Annexure-1) passed u/s 132(3) of the income tax Act, 1961 (for short, "the Act") in respect of Current Account No. 0553002100028097 of the petitioner-Company maintained with O.P. No. 7-Punjab National Bank, Station Square Branch, Bhubaneswar and for declaratory relief declaring issuance of fresh warrant of authorization dated 7-1-2011 and Panchanama dated 8-1-2011 and withdrawal of Rs. 12.39 crores from the aforesaid Current Bank Account of the petitioner by opposite party-bank authorities is illegal and without jurisdiction. The further prayer of the petitioner is to direct opp. parties to bring back Rs. 12.39 crores in the above Current Account of the petitioner in question maintained with Opposite Party No. 7- Bank. Bereft of unnecessary details the facts and circumstances giving rise to the present writ petition are that the petitioner is a Company incorporated on 9-8-2006 under the provisions of the Companies Act, 1956 (in short, "Companies

Act") having its registered office at HUL building, 2nd floor, 9 Shakespeare Sarani, Kolkata-700 071. The petitioner-company is an assessee under the Act, under the jurisdiction of Asstt. Commissioner of income tax, Circle-8, Kolkata having Permanent Account No. AACCV3366R and has been assessed to income tax since 2006-07. The petitioner-Company is mainly engaged in trading of coal, coke, minerals and metals. The assessment for the assessment year 2007-08 has already been completed and the petitioner-company has submitted its return of income tax before the Deputy Commissioner/Asstt. Commissioner of income tax for the assessment years 2008-09, 2009-10 and 2010-11.

2. To carry on its business, the petitioner-Company enters into contract with the international supplier for purchase of coal, coke, minerals and metals and the terms of payment to the said supplier provide that the supply of materials is to be made through Letters of Credit issued by a Bank so that the international supplier is protected of its payment. Upon signing of the contract, the petitioner-company through its Bank (O.P. No. 7) opened issuance of Letters of Credit of 180 days on the Bank of the suppliers which are located overseas. The petitioner-company maintains a current Account bearing No. 0553002100028097 (for short, "the Account in question") with O.P. No. 7-Punjab National Bank, Bhubaneswar and the said Account in question has been earmarked for payment of Letters of Credit due.

3. On 11-11-2010 and 12-11-2010, a search and seizure operation was conducted by O.P. No. 3-the Director of income tax (Investigation), Bhubaneswar u/s 132 of the Act in the petitioner's registered office and other group of companies. During the course of search and seizure, the officials seized certain documents and issued Panchanama and also took soft copies of accounts maintained on ERP (SAP) as well as on Tally. On 11-11-2010, O.P. No. 5-the Asstt. Director of income tax (Investigation) also issued prohibitory orders (Annexure-1) u/s 132(3) of the Act on the Bank accounts of all the group of companies of VISA Steel Limited including the petitioner Company, Bank accounts of their promoters and family members including the Account in question of the petitioner Company maintained at the Branch of O.P. No. 7-Bank. vide letter dated 15-11-2010 (Annexure-2), the petitioner-company made a request to O.P. No. 5 for revocation of prohibitory order issued u/s 132(3) of the Act. The said letter was communicated along with copy of audited balance sheet as on 31-3-2010, detailed reconciliation statement of Bank account, copy of IT return acknowledgement, Bank statement/confirmation as on 31-3-2010. Pursuant to letter Annexure-2, O.P. No. 5 has withdrawn the prohibitory orders from some of the Bank accounts but did not withdraw the same issued against the Current Account in question of the petitioner-company maintained with O.P. No. 7 Bank. On 25-11-2010, petitioner-company submitted another letter to O.P. No. 5 requesting for revocation of the said prohibitory order dated 11-11-2010 issued u/s 132(3) of the Act on the Current Account in question as there was sufficient balance in the said Account.

4. Pursuant to summons issued u/s 131 of the Act, the Chairman of the petitioner-Company appeared before O.P. No. 4-the Additional Director of income tax (Investigation) personally and examined himself on oath and answered various questions pertaining to VISA Group of Companies put by O.P. No. 4. Thereafter, O.P. No. 5 asked for various details pertaining to the purchase and sales transactions for the year 2009-10. The authorized officer of the petitioner-company being summoned also appeared before the opp. parties and furnished various details.

5. On 7-1-2011, O.P. No. 7 Bank informed O.P. No. 5 that the Bank has already paid Rs. 89.15 crores to the overseas Banks without appropriating any amount from the Fixed Deposits and Current Account earmarked and requested for withdrawal of the prohibitory order. On the same day, the income tax Department issued a fresh warrant of authorization u/s 132 of the Act in the name of O.P. No. 7 in respect of the Current Account in question. Pursuant to issuance of the said warrant of authorization on 7-1-2011, on 8-1-2011 officials of income tax Department including opp. parties 4 and 5 visited O.P. No. 7 Bank. The O.P. No. 5 directed and demanded the Branch Head of O.P. No. 7 Bank to pay a demand draft/pay order in favour of the income tax Department for the entire amount of Rs. 12.39 crores appearing in the Current Account of the petitioner-company in question. Officials of the income tax Department including O.P. No. 5 converted the amount of Rs. 12.39 crores available in the Current Account in question to Demand Draft in favour of the Commissioner of income tax, Bhubaneswar in order to withdraw the amount from the Account and issued a Panchanama dated 8-1-2011 to that effect. Hence, this writ petition.

6. Mr. N. Venkataraman, learned Senior Advocate appearing for the petitioner submitted that the petitioner-company as well as its group of Companies has always correctly disclosed each and every income made by it and has never suppressed any of such income to the Department. The Current Account in question has been regularly disclosed in the books of account for the assessment years 2008-09, 2009-10 and 2010-11. Along with the letter dated 15-11-2010 requesting for revocation of the prohibitory order, the petitioner has submitted audited balance sheet on 31-3-2010 evidencing disclosure of detailed statement of reconciliation of bank account till the date of search, copy of IT return acknowledgement, bank's confirmation as on 31-3-2010 as per Annexure-2. The money in the Current Account in question belongs to O.P. No. 7-Bank and O.P. No. 7 has already incurred liability against the same by discharging Letters of Credit and the petitioner is not in a position to set off/appropriate the said amount lying in Current Account in question because of the prohibitory order issued by the income tax Department.

7. Mr. Venkataraman emphatically submitted that the officials of the income tax Department threatened O.P. No. 7-Bank officials to the effect that the officials of O.P. No. 7 Bank will be arrested and the Bank may be seized and sealed unless they act in accordance with their direction. The petitioner-company was not

informed about the warrant of authorization dated 7-1-2011 for search of the Current Account of the petitioner-company in question. On being orally informed by the Branch Head of O.P. No. 7-Bank to the petitioner Company regarding illegal demand for withdrawal of cash by way of demand draft/pay order from its Current Account in question by O.P. No. 5 and other officials of the income tax Department during search on 8-1-2011, the petitioner-company faxed a letter at about 2.00 PM on the same day to O.P. No. 7-Bank informing that the Current Account in question is a disclosed account and also enclosed a letter dated 15-11-2010 issued to the income tax Department in this regard. The official of the income tax Department continued to pressurize O.P. No. 7-Bank officials till late evening despite the fact that it was Saturday. The petitioner Company also sent another fax to O.P. No. 7-Bank informing that the officials of the income tax Department do not have power to attach any amount from the Current Account in question which is disclosed in the books of account of the petitioner and in case money is remitted to the income tax Department it would be bad in law and O.P. No. 7-Bank would be parting with its own securities for which the Bank will be solely responsible.

8. It was further argued that the audited balance sheet as on 31-3-2010 filed by the petitioner Company along with income tax return for the year 2010-11 clearly disclosed regarding the Current Account in question. Hence, the same could not have been made a part of the prohibitory order u/s 132(3) of the Act on the ground of undisclosed income. Section 132 of the Act does not authorize the income tax Department to direct O.P. No. 7 Bank to convert a deposited amount lying in the Current Account in question into bank draft in favour of the income tax Department. Since the prohibitory order was passed on 11-11-2010 and the period of sixty days was to expire on 10-1-2011, opp. parties with mala fide intention and only to frustrate the provisions of the statute have illegally issued a fresh warrant of authorization dated 7-1-2011 u/s 132 of the Act for the self same Current Account for which prohibitory order was passed earlier vide Annexure-1 which was in vogue. This action of the I.T. Authorities is nothing but a deliberate attempt to harass the petitioner Company and to take away the money lying in its Current Account in question which was already disclosed to the income tax Department. Money lying in the Current Account in question was for discharging the liability in terms of letters of Credit facility extended by O.P. No. 7 Bank towards discharge of letter of credit liabilities to the petitioner-company and the Bank had lien over the said account. Since the action of opp. parties authorities will result in civil consequences, they ought to have issued notice to the petitioner-company before directing O.P. No. 7-Bank for conversion of the said amount of Rs. 12.39 crores into bank draft in favour of the income tax Department. Since no material was available during search and seizure the fresh warrant of authorization dated 7-1-2011 was issued u/s 132 of the Act with the intention to withdraw the amount lying in the Current Account in question which is not permissible in law. As per Search and Seizure Manual the only thing contemplated for deposit in separate PD account of the Commissioner concerned

till final determination of the tax liability by the Assessing Officer relates to "Cash in Hand" and not "Cash in Bank".

9. Placing reliance on the decision of the Apex Court in Gudikanti Narasimhulu and Others Vs. Public Prosecutor, High Court of Andhra Pradesh, Mr. N. Venkatraman, learned Senior Counsel for the petitioner argued that the duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of original assessment. The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty is over. It is for the income tax Officer to draw the correct inference from the primary facts at the time of assessment.

10. Placing reliance on a decision of the Apex Court in K.C.C. Software Ltd. and Others Vs. Director of Income Tax (Inv.) and Others, it was submitted that the Apex Court clarified about the impermissibility to convert assets to cash and thereafter impound the same.

11. Placing reliance on a decision of the Punjab and Haryana High Court in H.L. Sibal Vs. Commissioner of Income Tax and Others, it was argued that before the Commissioner acts u/s 132(1) of the Act, he must be reasonably satisfied that it is necessary to take action contemplated by that section. If the grounds on which the belief is founded are non-existent or are irrelevant, or are such on which no reasonable man can come to that belief, the exercise of the power by the Authorized Officer under the above provisions of the Act would be bad. The authorized officer is required to apply his mind during the seizure of books of account about the relevance and usefulness of these books in any proceedings.

12. Placing reliance on decision of the High Court of Allahabad in Suresh Chand Agarwal Vs. Director General of Income Tax (Investigation) and Others, it was argued that once the assets are disclosed in the return the same cannot be subjected to seizure by the income tax Department. The income tax Department Authorities cannot rely on materials found during the search for taking the plea that this was the basis of the reason to believe, unless such material was brought to the knowledge of the authority who signs the warrant of authorization before or at the time when he signs it.

13. Placing reliance on the decision of the High Court of Calcutta in Windson Electronics Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, it was argued that the maximum period of sixty days under sub-section (8A) of section 132 in respect of restraint order has been provided in the statute keeping in view that the revenue officials taking advantage of the provisions for extension used to prolong the investigation, search and seizure which resulted in undue harassment of the taxpayer.

14. Placing reliance on the judgment of the High Court of Bombay in Jagdishprasad M. Joshi Vs. Deputy Commissioner of Income Tax and Others, it was argued that the Court did not approve the action of the income tax Department in encashing the assets and appropriating the same without order of

assessment.

15. Concluding his argument, Mr. N. Venkataraman, learned Senior Counsel submitted that the action of the income tax officials directing the Bank to convert the amount of Rs. 12.39 crores available in the Current Account of the petitioner-company in question into demand draft/pay order in favour of the income tax Department, fresh warrant of authorization dated 7-1-2011 as well as Panchanama dated 8-1-2011 is illegal, arbitrary, contrary to law, without jurisdiction and smacks mala fide.

16. Learned Additional Solicitor General of Government of India submitted that the present writ petition is not maintainable in law, since it involves several disputed questions of fact. Whether the money lying in the current account represents the disclosed or undisclosed income is a disputed question of fact. Moreover, the said aspect is the very subject-matter of investigation which is presently going on. There is an alternative efficacious statutory remedy available for the petitioner and the money is liable to be released in its favour, if the petitioner is found eligible under procedure statutorily prescribed. The petitioner is involved in task of evasive practices. Therefore, the present writ petition is not maintainable. There is a strong reason to believe that the petitioner is involved in illegal practice of causing heavy revenue leakage as it has suppressed its taxable profit by (i) hiking the purchase price made from its foreign goods concerned, (ii) claiming bogus expenses; (iii) under invoicing, (iv) wrong determination of taxable profit.

17. During the course of search, various incriminating documents and books of account relating to group of companies were seized. The actions taken by the Authorized Officer u/s 132(1) and 132(3) are legal, justified and bona fide and in accordance with law. The warrant of authorization was issued by opposite party No. 4-Addl. Director of income tax (Investigation), Bhubaneswar, in favour of Authorized Officer only after recording his satisfaction based on incriminating documents found during the search and seizure operation on 11-11-2010 and information/evidence gathered during the post-search investigation. The recorded satisfaction note clearly brought out that the money lying in the current account represented income of the petitioner, which was not disclosed in terms of the Act. The post search investigation conducted by the Directorate clearly shows that the petitioner-company has not disclosed its true income to the Department in its returns. Basing upon the findings of satisfaction note, warrant of authorization dated 7-1-2011 was issued and Rs. 12.39 crores was seized from the current account of the petitioner-company maintained at Punjab National Bank, Station Square Branch, Bhubaneswar. The prohibitory order in respect of current account in question was not revoked as post search investigation was in progress. In course of recording of statement, Sri Saran has avoided most of the questions posed to him. The prohibitory order in respect of the bank account of the petitioner in question was issued on 11-1-2010 and the same was to expire after 10-1-2011. Before expiry of 60 days, a decision was taken whether to

release the money in the bank account or to seize it. A warrant of authorization was issued on 7-1-2011 on the basis of fresh satisfaction note. The allegation of threatening the bank officials is wild and unfounded and the same are denied as baseless. Since there is no provision in the Act to extend the prohibitory order u/s 132(3) beyond 60 days, the money could not be kept under prohibitory order till completion of the assessment. If the money was not converted to draft and was left in the bank account, it would amount to release the same without seizing it. Therefore, in order to give effect to the seizure, the bank was asked to make over the money by way of demand draft in favour of the Revenue. In the balance sheet as on 31-3-2010, the petitioner has disclosed the current account in question. However, the provisions of the Act prescribe that it is not the bank account which is relevant, but it is the money which should be examined to ascertain as to whether it is disclosed or not. Once the condition, that the money in the bank account represented in the income or property which has not been disclosed for the purpose of the income tax, the requirement of section 132(3) of the Act for issuing a warrant of authorization is fulfilled. The petitioner's contention that since the bank account is disclosed, the authorized officer is forbidden to take any further action u/s 132 of the Act is not legally acceptable and accordingly not tenable. Sixty days u/s 132(3) of the Act has been provided to investigate as to whether the money lying in the account represent undisclosed income and upon finding the same to seize the money therein if necessary. After seizure of money from the bank was carried out, the copies of Panchanama dated 8-1-2011 along with annexures was immediately sent to the petitioner by speed post on 10-1-2011. Before arriving at the satisfaction for issuance of warrant the petitioner company was allowed opportunity to explain the findings of the post search investigation by issuing summons on 10-12-2010 and 29-12-2010. The seizure action carried out on 8-1-2011 was bona fide and to safeguard the interest of the revenue.

18. Relying on the decisions of the Kolkata High Court in the case of Windson Electronics (P.) Ltd. (supra), Jharkhand High Court in Santosh Singh Vs. Commissioner of Income Tax and Others, ; Andhra Pradesh High Court in Lan Eseda Steels Ltd. and Another Vs. Assistant Commissioner of Income Tax and Others, it is argued that the income tax Authorities have power u/s 132 of Act to seize money from a bank account of the assessee.

19. It is further argued that section 132(1)(c) of the Act requires that a search and seizure can be initiated if the money in possession of a person represents undisclosed income and does not provide any immunity from the search and seizure action if merely, the account is disclosed in income tax returns. Placing reliance on the judgment of the Karnataka High Court in Rudrachar Vs. Director of Income Tax (Inv.) and Others, , it was argued that where the satisfaction note shows that there was application of mind and recording of finding that there was reason to believe that the circumstances mentioned in section 132 exist there was no irregularity or infirmity in the search warrant issued. Relying upon a decision of the Allahabad High Court in Raghuraj Pratap Singh and Others Vs.

Assistant Commissioner of Income Tax, it was argued that the bank account can be searched and seized.

20. In the rejoinder, the petitioner submitted that the proceeding under sections 132(3) and 132(1) of the Act is null and void and completely without jurisdiction. Proceeding u/s 132 of the Act can be initiated only when there is a non-disclosure of income, assets, bank accounts etc. The petitioner has placed on record its balance sheet evidencing details of the bank accounts including available balance on its account as on the relevant date along with TDS effected through Punjab National Bank, Bhubaneswar.

21. The allegations made in the counter affidavit are either non-issue or of no consequence at this stage of investigation which is yet to be completed by the IT Department. The allegation as made is not corroborated by any factual evidence. The summons dated 29-12-2010 issued u/s 131 of the Act was duly replied in full along with details vide petitioner's letter dated 3-1-2011 (Annexure-8). The petitioner was not asked to provide any other document thereafter. The allegation of under invoicing of sale transactions is not supported even by single evidence. All purchases from VISA Comtrade AG have been made on arm's length basis. Whenever VISA Comtrade AG has sold part cargo to the petitioner and has sold the balance quantity from the same ship to an independent third party in India, purchase price of VISA Comtrade Limited is invariably equal or sometimes even lower than the purchase price of the independent third party which is evident from the comprehensive statement enclosed to the rejoinder as Annexure 13. On the basis of this statement, it is reconfirmed that the petitioner has never paid anything more than that is rightfully due, following the arm's length policy on its purchase. Further all imports are through notified Ports of customs and the bills of entry are assessed by customs authorities and customs duty is determined on the transaction value which has to be identical on all imports. The question of suppressing any price or value does not arise. Opposite parties have not shown any evidence or document in support of their allegation. The petitioner denies that there is any unaccounted income in the company and as such question of parking such unaccounted income is only a figment of imagination.

22. The assertion made by opposite party that total income tax paid by the petitioner-company since its inception is Rs. 1.7 crore is incorrect and erroneous. The actual tax liability was Rs. 3.26 crores and actual amount of tax paid by the company including TDS is Rs. 8.49 crores. The allegation that the most of the L/Cs opened by the petitioner in favour of its overseas suppliers were extended beyond 180 days is wrong and incorrect. Only 30 L/Cs out of 95 L/Cs opened were extended beyond 180 days. As directed by opposite party No. 5, the petitioner vide e-mail dated 22-12-2010 had supplied details of all deposits in the current account in question right from the date of opening of the current account till 30-11-2010 (Annexure-16). Not a single transaction of cash would be found in the current account in question right from the date of opening of the

current account. The action u/s 132 can be taken only in the event of non-disclosure of income, assets, bank accounts etc. which blissfully not the case here. When an enquiry is pending and when no show-cause notice has been issued, no opportunity of hearing is granted and no assessment orders have been passed, encashment of such huge sum of Rs. 12.39 crores is only laying foundation for premeditated and prejudged adjudication.

23. Learned counsel appearing for opposite party No. 7 submitted that they received summons to witness u/s 131 of the Act vide letter dated 23-11-2010 from O.P. No. 5 and accordingly, the officer of O.P. No. 7-Bank appeared before the IT Authority on 30-11-2010. As desired by the said IT Authority, O.P. No. 7-Bank handed over the desired information in the form of a CD to the ITO on 3-12-2010 and wrote a letter dated 8-12-2010 to O.P. No. 5 stating the details of the FLC position on account of the writ petitioner.

24. It is further submitted that a team of officers of the IT Department led by O.P. No. 5 came to the premises of O.P. No. 7-Bank at about 11.10 AM on 8-1-2011 and showed a warrant of authorization u/s 132 of the Act read with rule 112(1) of the income tax Rules, 1962 (in short, "the Rules") for seizure of the entire balance lying in the Current Account in question standing in the name of the writ petitioner, but refused to provide a copy of the said warrant of authorization to opp. party-officials and served a letter dated 8-1-2011 for seizure of money lying in the aforesaid bank account of the writ petitioner u/s 132 of the Act, and demanded to issue a demand draft in favour of the PD account of the Commissioner of income tax, Bhubaneswar, for the entire amount lying in the aforesaid account of the writ petitioner. The Asstt. General Manager of O.P. No. 7-Bank explained the position of accounts of the writ petitioner to the team of IT officials stating that the entire amount lying in the aforesaid current account of the writ petitioner is towards margin money for the high value LCs already opened and the same is under lien of the Bank. The AGM further informed the IT officials that Bank has already taken liability on behalf of the writ petitioner during the subsistence of the prohibitory order and made payment to the tune of Rs. 88.26 crores and requested the IT officials that the day being a Saturday which is a half working day of the Bank and the server of the computer system was down, it will not be possible on his part to reconcile the accounts of the bank vis-a-vis the writ petitioner had requested vide his letter dated 8-1-2011 to give one working day time to arrive at the actual position of bill outstanding and the free amount available in the aforesaid current account. But the IT officials refused to accept the letter and request thereon. The IT officials did not pay any heed to the request made by O.P. No. 7-Bank officials and continued to pressurize them to issue the demand draft pursuant to the notice made vide letter dated 8-1-2011. O.P. Nos. 3 and 5 thereafter dictated a letter to be signed by the officials of O.P. No. 7 and to prepare the demand draft as per their instruction failing which they threatened to arrest the officials of O.P. No. 7 and to seize and seal the Bank premises. For the continuous, consistent pressure and coercive attitude and threat of arrest made by the officials of O.P. Nos. 3 and

5, O.P. No. 7 signed the letter dated 8-1-2011 and issued pay orders bearing No. 071361 and 071362 amounting to Rs. 12.39 crores. IT officials prepared a Panchanama duly signed by all the attending parties.

25. On the rival contentions, the questions that fall for consideration by this Court are as follows:

(i) Whether the present writ petition challenging validity of search and seizure operation is maintainable?

(ii) Whether issuance of prohibitory order dated 11-11-2010 passed u/s 132(3) of the Act and issuance of fresh warrant of authorization dated 7-1-2011 and Panchanama dated 8-1-2011 under the income tax Act in respect of the current Account No. 0553002100028097 are valid?

(iii) Whether opposite party-income tax Department Authorities are justified in converting Rs. 12.39 crores lying in the current account in question into demand draft/pay order in favour of the Commissioner of income tax and withdrawing the same from the said account?

(iv) What order?

26. The question No. (i) relates to maintainability of the writ petition. Although a preliminary stand was taken that the disputed questions of fact are involved in this petition, in fact, the questions that are raised are questions of law involving interpretation of the various provisions containing in section 132 of the Act and the true effect of the expression "disclosed income" and "undisclosed income". Similarly, the plea urged by the Additional Solicitor General relating to alternative remedy available for the petitioner is untenable. In course of hearing reference has been made to section 132B of the Act. That provision has no application because that is a stage of post search and seizure operation. When the validity of the seizure is questioned on the ground that seizure is illegal, section 132B of the Act does not come to the picture at all. Therefore, the writ petition is maintainable.

27. In order to decide question No. (ii), it is necessary to examine the scope and ambit of section 132 of the Act. The relevant provisions of section 132 are quoted below:--

132. Search and seizure. -(1) Where the Director General or Director or the Chief Commissioner or Commissioner or any such Joint Director or Joint Commissioner as may be empowered in this behalf by the Board, in consequence of information in his possession, has reason to believe that:

(a) any person to whom a summons under sub-section (1) of section 37 of the Indian income tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian income tax Act, 1922 (11 of 1922), or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or

other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or

(b) any person to whom a summons or notice as aforesaid has been or might be issued will not, or wouldn't, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian income tax Act, 1922 (11 of 1922), or under this Act, or

(c) any person is in possession of any money, bullion, jewellery or other valuable article or things and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be disclosed for the purposes of the Indian income tax Act, 1922 (11 of 1922) or this Act (hereinafter in this section referred to as the undisclosed income or property),

then,-

(A) the Director General or Director or the Chief Commissioner or Commissioner, as the case may be, may authorize any Joint Director, Joint Commissioner, Assistant Director or Deputy Director Assistant Commissioner or Deputy Commissioner or income tax Officer, or

(B) such Joint Director or Joint Commissioner, as the case may be, may authorize any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or income tax Officer,

(the officer so authorized in all cases being hereinafter referred to as the authorized officer) to-

(i) enter and search any building, place, vessel, vehicle, or aircraft where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

(ii) break open the lock of any door, box, locker, safe almirah or other receptacle for exercising the powers conferred by clause (i) where the keys thereof are not available;

(iia) search any person who has got out of, or is about to get into, or is in the building, place, vessel, vehicle or aircraft, if the authorized officer has reason to suspect that such person has secreted about his person any such books of account, other documents, money, bullion, jewellery or other valuable article or thing;

(iib) require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in clause (t) or sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000), to afford the authorized officer the necessary facility to inspect such books of account or other documents;

(iii) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search:

Provided that bullion, jewellery or other valuable article or thing, being stock-in-trade of the business, found as a result of such search shall not be seized but the authorized officer shall make a note or inventory of such stock-in-trade of the business;

(iv) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies there from;

(v) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing:

(3) The authorized officer may, where it is not practicable to seize any such books of account, other documents, money bullion, jewellery or other valuable article or thing, for reasons other than those mentioned in the second proviso to sub-section (1) serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it except with the previous permission of such officer and such officer may take such steps as may be necessary for ensuring compliance with this sub-section .

Explanation. -For the removal of doubts, it is hereby declared that serving of an order as aforesaid under this sub-section shall not be deemed to be seizure of such books of account, other documents, money, bullion, jewellery or other valuable article or thing under clause (iii) of sub-section (1).

(13) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), relating to searches and seizure shall apply, so far as may be, to searches and seizure under sub-section (1) or sub-section (1A)."

(Emphasis supplied)

28. Section 132 prescribes that the competent authorities are empowered to permit the authorized officers to enter, search, break open, seize, place marks of identification and take other steps as contemplated under sub-clauses (i) to (v). However, such powers can be exercised against a person upon fulfilment of certain conditions. Firstly, the competent authority must have the information in its possession and, secondly, on the basis of such information it must have the reason to believe that the condition as stipulated in clause (a) or (b) or (c) of section 132(1) of the Act exists. Search and seizure cannot be sustained unless it is clearly shown that it was done by the authority duly authorized and any of the conditions precedent in relation thereto existed.

29. The opinion or the belief so recorded must clearly show whether the belief falls under clause (a) or (b) or (c) of section 132(1) of the Act. The satisfaction note should itself show the application of mind and the formation of opinion by the officer ordering the search. If the reasons which are recorded do not fall

within the clause (a), (b) or (c) then the authorization u/s 132 (1) would not be valid. In order to justify the action the authority must have relevant materials on the basis of which he can form an opinion that he has reason to believe that action to be initiated against a person u/s 132 of the Act is needed. The belief should not be based on some suspicion or doubt. Section 132 speaks of reason to believe and not reason to suspect or reason to doubt.

30. The reason to suspect that the petitioner is having undisclosed asset and there is likelihood that the same would not be disclosed is not equal to "reason to believe" that petitioner is in possession of undisclosed assets and intends to evade tax. Therefore, search and seizure carried out on the basis of reason to suspect is not valid because reason to believe is mandatory requirement of law for search and seizure- See Mahesh Kumar Agarwal Vs. Deputy Director of Income Tax and Others, .

31. The words "reason to believe" postulate application of mind and assigning of reasons. There is a rationale nexus between "reason" and "believe"- See Ganga Saran and Sons (Huf) Vs. Income Tax Officer, Company Circle-IV, New Delhi and another, .

32. In absence of any relevant material, authority would be acting in excess of his power and in violation of the mandatory power of section 132 of the Act and the action of the authority cannot be sustained. Before taking action u/s 132 the competent authority must assure and reassure about the truthfulness and correctness of the information. A search which is conducted u/s 132 is a serious invasion into the privacy of the citizen. Therefore, section 132(1) has to be strictly construed and the information of the person or reason to believe by the authorizing officer must be apparent from the note recorded by him.

33. The case of the Revenue is that in course of search and seizure operation they have issued prohibitory order u/s 132(3) of the Act in respect of the current account in question. Subsequently, the Authorized Officer recorded his satisfaction as provided u/s 132(1)(c) of the Act to the effect that the money in the said current account represented undisclosed income of the petitioner and thereafter fresh warrant of authorization dated 7-1-2011 was issued in respect of the said current account. On 8-1-2011 Rs. 12.39 crores lying in the said current account was converted into bank draft/pay order and Panchanama was issued. Subsequently, the said amount was withdrawn from the bank.

34. The petitioner's case is that the current bank account in question was opened on 2-9-2007 in the Punjab National Bank. The said current account has been regularly disclosed in the Books of Account for the assessment years 2008-09, 2009-10 and 2010-11. The current bank account in question has been disclosed to opposite party-income tax Department. All the transactions in the said bank account are made through Cheques and no cash transaction was there. Therefore, opposite party-income tax authorities are unjustified in issuing prohibitory order u/s 132(3) and warrant of authorization dated 7-1-2011 and

forcibly taking Rs. 12.39 crores from the said current account by way of draft in favour of the Commissioner of income tax.

35. A bare reading of section 132 reveals that the said section deals with concealed income of any person. The specific case of the income tax Department is that they have seized current bank account in question by exercising power u/s 132(1)(c) of the Act. Said section provides that if any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been or would not be disclosed for the purpose of the Act, then the authorized person is empowered to seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search. Therefore, in order to initiate action for seizure of the money lying in the bank account, the condition envisaged in clause (c) of sub-section (1) of section 132 should be satisfied. Clause (c) of section 132(1) concerns money, bullion, jewellery or other valuable article or thing. In order to proceed under clause (c) there must be information with the authorizing authority relating to two matters, firstly, that any person is in possession of money bullion, jewellery or other valuable article or thing; and secondly such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been or would not be disclosed for the purpose of the Act.

36. Thus, in order to bring a case within the sweep of section 132(1)(c) or section 132A(1)(c) the belief of the authorizing authority as to mere possession of the assets mentioned in that section by a person is not sufficient. The information in possession of the authorizing authority must be such that he may have reason to believe that the assets represent undisclosed income of the person in whose possession these are. Thus, where the authorizing authority issues warrant of authorization without there being any reason to believe that the asset which was in possession of a person represented wholly or partly his undisclosed income, his action is to be held to be without jurisdiction.

37. Formation of opinion on the basis of reason to believe that a particular property/asset has not been disclosed or would not be disclosed so that the action u/s 132 would be taken is not an empty formality. It takes away the valuable right of citizens of the country. Revenue must satisfy the Court that there must be sufficient reason to invoke the drastic provisions contained in section 132 of the IT Act. Recording of reasons/satisfaction involves application of intelligent mind to come to a conclusion that the money lying in the current account represents the undisclosed income of the assessee for which the same is liable to be seized. Top most care should be taken before taking seizure action in respect of a bank account already disclosed to the income tax Department. Needless to say that in fiscal statutes emphasis is given to transact every transaction through the bank account. Even the Act itself does not recognize cash transaction after a particular limit. Therefore, all bona fide assesseees are

required to do their business transactions through the bank account. If a current bank account of a bona fide assessee is seized without properly applying the mind that the money deposited in the Bank Account represents undisclosed income, then that will cause irreparable loss to the assessee concerned and his business will be jeopardized. The employees will not get their salary, electricity dues cannot be paid, day-to-day expenses of the business cannot be met and the supplier cannot get their dues; various Revenue authorities including the Government authorities will not get their dues/taxes/duties. Ultimately, the business will come to an end and the assessee shall be deprived of his fundamental right guaranteed under article 19(1)(g) of the Constitution to carry on his business/profession. It is certainly not the object of the search and seizure provided under the Act to close anybody's business. No doubt, the Revenue authorities are watchdogs of the Government Revenue. They are not expected to take any lenient view in respect of unscrupulous and dishonest businessman. Evasion of tax is not to be tolerated and action must be taken against the erring assessee and/or the tax evade Rs. At the same time, they must see that the honest and bona fide businessmen are not harassed because they are the source of the Government Revenue. Therefore, various fiscal statutes provide that before taking any drastic step including search and seizure operation in case of an assessee, the competent authority has to first record its satisfaction for taking such action.

38. Now we have to examine whether the Authorized Officer has any information or material in his possession for his satisfaction that the money lying in the current account in question represents wholly or partly the income of the petitioner-company and the same had not been disclosed or would not be disclosed to the income tax Department.

39. The undisputed fact is that the current account in question was opened on 2-9-2007 and has been disclosed to the Department much before action u/s 132 is taken. In paragraph 25 of the writ petition the petitioner averred that audited balance-sheet as on 31-3-2010 filed by the petitioner-company along with the income tax return for the assessment year 2010-11 clearly discloses regarding the current account in question maintained with opposite party No. 7-Bank. In reply to the said averment, the income tax Department in paragraph 23 of their counter submitted that it is true that the petitioner has disclosed the current account in question in the balance-sheet as on 31-3-2010. The said current bank account has been regularly disclosed in the Books of Account and reflected in the audited account for the assessment years 2008-09, 2009-10 and 2010-11. It is not the case of the department that any assessment has been made for any preceding assessment years in which addition has been made to the return of income in respect of deposit made in the current account in question treating the same as undisclosed income of the petitioner-assessee.

40. In paragraph 23 of the rejoinder affidavit the petitioner stated that as directed by opposite party No. 5 the petitioner vide its e-mail dated 22-12-2010

had filed details of all deposits in the current account in question right from the date of opening of the current account till 30-11-2010. A copy of the same has been enclosed to the rejoinder as Annexure 16. There is no denial to this averment by the IT Department. The opposite party-income tax department has not come with a case that the deposit in the current account explained by the assessee is false and the same has not been passed through the regular books of account of the assessee. Though the stand of opposite party-department that the money lying in the current account in question represents the undisclosed income of the assessee, they do not say which particular deposit represents undisclosed income of the assessee. Therefore, such an allegation is vague and general in nature. On the contrary, it is accepted that it has been disclosed in the Books of Account. Further case of the petitioner that there is no cash deposit in the said current account has also not been denied by opposite party-income tax department. When this Court specifically asked the learned Senior Counsel for the income tax Department whether the Department has cross verified the entries in the current account in question with the regular books of account maintained by the assessee-petitioner and any discrepancy was found out, the revenue replied that no such exercise has been made by the Department. On the other hand, in paragraph 2(a) of the counter affidavit dated 25-1-2011, the income tax Department stated that investigation on the very subject-matter as to whether the money lying with the current account represents disclosed income or undisclosed income was going on. In such situation, we are unable to accept the contention of opposite party-Department that on subjective satisfaction of the income tax Authorities, the current account in question has been seized. Needless to say that subjective satisfaction must have some objective foundation. It cannot be ipse dixit of the Authorized Officer. The scheme of section 132 of the Act provides adequate safeguard to protect the bona fide assesseees from any misuse of power vested u/s 132 by the IT Authorities. The Act has not given unbridled and arbitrary power to the IT Authorities to invoke power u/s 132 of the Act.

41. To justify their action in seizing the Current Account in question the income tax Department in paragraph 7 of their written notes made the following submissions:

... At the same time, the argument that because an account is disclosed, the income therein cannot represent undisclosed income, is wholly unfounded. To illustrate, say a person X had a total income of Rs. 10,000 in a given period, however he disclosed only Rs. 5,000. On a given date, Rs. 5,000 was found in his account, which account was duly disclosed in his books. Now, could it be said in law, that since such an account was disclosed, therefore the Rs. 5,000 lying in it, cannot and must not represent his undisclosed income? This illustration shows as to how the argument of the assessee, if accepted, would render the whole provision futile and unworkable. Also, this may be taken in the context of the present case, where the amounts and disproportions are huge. Therefore also, the argument of the assessee/petitioner is liable to be rejected.

42. The conclusion drawn by the income tax Department from the above illustration that out of the total income of Rs. 10,000, Rs. 5,000 deposited by the assessee in the Bank Account and duly disclosed in his books of Account can and must represent the undisclosed income of the assessee is totally fallacious and contrary to the very concept of "undisclosed income". This view of the Department is unfortunate. If that is the understanding of the income tax Department regarding "undisclosed income" and on that understanding, the warrant of authorization has been issued and Rs. 12.39 crores lying in the Current Account in question of the petitioner has been seized then the said action of the Department must be held to be illegal, irrational, without legal basis and not in conformity with section 132 of the Act, which we accordingly hold.

43. In the above illustration, Rs. 5,000 deposited in the bank account out of income of Rs. 10,000 and disclosed in the books of account represents "disclosed income" of the assessee and that cannot be seized exercising power/jurisdiction u/s 132 of the Act. On the other hand, in the above illustration, if there is deposit of more than Rs. 10,000 during the given period and the assessee fails to explain the source of the amount deposited exceeding Rs. 10,000 that excess amount deposited will be treated as "undisclosed income" of the assessee and the same can be seized u/s 132 of the Act.

44. In the counter affidavit a stand was taken that the petitioner company is suppressing taxable profit by way of:

- (a) under-invoicing of sale transactions by receiving a part of sales in cash,
- (b) Transferring its profit to its foreign group concern namely Visa Comtrade AG (VCAG) by inflating purchase price;
- (c) Transferring its profit to its foreign group concern namely Visa Bulk Shipping Pvt. Ltd., Singapore (VBSPL) by inflating freight payable;
- (d) Claiming bogus expenditure such as commission to parties who have been found to be entry operators of Kolkata;
- (e) Wrongly setting off speculative losses against normal business profit;
- (f) Not showing sales for the entire quantity purchased for some shipments, and;
- (g) Parking of unaccounted income through entry operators for Kolkata in the group concerns.

45. All these above allegations have been denied by the petitioner in its rejoinder affidavit giving several explanations. All the above allegations raised by the I.T. Department to say that the petitioner has suppressed taxable profit can be the subject-matter of the assessment, which is subsequent to search and seizure operation. Without confronting those to the petitioner-assessee and considering its explanation, no adverse view can be drawn against the petitioner. On those untested allegations and in absence of any findings that source of any deposit in the current bank account has not been explained or not disclosed in the regular

books of account, no seizure is sustainable. As noted above, the correctness of allegation has to be assessed in assessment.

46. Another glaring illegality committed by opp. party-income tax Department that we have noticed that prohibitory order u/s 132(3) has been issued without forming any reasonable belief that the money lying in the Current Account in question is wholly or partly representing undisclosed income of the petitioner.

47. In the written submission filed by the income tax Department, it is stated that when the authorized officer requires time to investigate further to determine if the asset in question represents undisclosed income or not, he passes prohibitory order u/s 132(3) of the Act on the day of the search and avails the time period of 60 days for investigation u/s 132(8A) of the Act. In case, within that time-limit evidence is found that the asset in question represents undisclosed income, the same is seized as per law. Therefore, the intent of power of keeping any asset including a bank account under prohibition is clearly to investigate and ascertain whether it represents undisclosed income or not. If, after satisfying that it represents undisclosed income, the Authorized Officer has no power to seize it and the whole exercise of placing the bank account u/s 132(3) is futile as the said bank account cannot be kept under prohibition beyond sixty days.

48. Thus, the admitted case of opposite party-Department is that before issuing the prohibitory order u/s 132(3) of the Act, no satisfaction has been recorded by the authorized officer that any concealed income is deposited in the Current Account in question. Such satisfaction according to the Department was recorded after issuance of the prohibitory order.

49. A conjoint reading of sub-sections (1) and (3) of section 132 of the Act makes it clear that it is only when the nature or the location of the particular books of account, other documents, money bullion, jewellery, or other valuable articles or thing found on a search, which are reasonably believed to be undisclosed property, does not allow or the circumstances of a given case do not permit immediate seizure of the same, the provisions of sub-section (3) may be resorted to.

50. The Punjab and Haryana High Court in *Om Parkash Jindal and Another Vs. Union of India (UOI) and Others*, held that when the authorized officer is not satisfied or he has doubts to believe that the particular asset found on search is undisclosed property, he cannot have recourse to the provisions contained in sub-section (3) of section 132 of the Act.

51. The Allahabad High Court in the case of *Sriram Jaiswal Vs. Union of India (UOI) and Others*, held that no order u/s 132(3) of the Act can be passed when the authorized officer is in doubt whether the asset is disclosed or undisclosed.

52. In view of the above, prohibitory order issued under sub-section (3) of section 132 of the Act in respect of Current Account in question without forming

any belief and/or without any material to conclude that the amount deposited in the said Current Account is either wholly or partly undisclosed income of the petitioner is unsustainable in law.

53. The revenue has also produced records relating to search and seizure. On perusal of the same, we are not prima facie satisfied that the revenue has recorded any valid reason to come to a conclusion before issuance of prohibitory order dated 11-11-2010 and fresh authorization dated 7-1-2011 that any transaction in the bank account has not been passed through regular books of account and undisclosed income of the petitioner (wholly or partly) has been parked in the said current account. On the other hand, as stated above in its counter, the Department stated that investigation is going on to ascertain as to whether the money lying in the current bank account in question represents disclosed or undisclosed income.

54. For the reasons stated above, we are of the considered view that issuance of the prohibitory order u/s 132(3) of the Act and the authorization dated 7-1-2011 and Panchanama dated 8-1-2011 are not valid.

55. Now the question No. (ii) is as to whether the income tax Department is justified in converting the money lying in the current account into Demand Draft/ pay order in favour of the Commissioner and subsequently withdrawing the same from the said current account.

56. Explaining the scheme of seizure of any asset u/s 132 of the Act, it is submitted by the revenue that only way to seize money from the bank account is by way of withdrawing the amount. There is no other means to seize the money from the bank account. Therefore, if the authorized officer with a valid warrant u/s 132 of the Act is not allowed to convert money from a bank account to cash or Demand Draft, he is effectively forbidden to seize the amount kept in that Bank. Thus, a blank ban for converting the amount in a bank account to Demand Draft is neither desirable nor in conformity with law. Relying on several judicial pronouncements, it was contended that "seizure" means taking possession of a property by an officer under legal process; taking possession contrary to the wishes of the owner of the property.

57. Placing reliance on the judgment of the Apex Court in the case of K.C.C. Software Ltd. (supra), it was submitted by the revenue that in any event the Court may direct the Department to keep the amount withdrawn from the current account in any interest bearing account which shall be adjusted against the tax that would be assessed in future or in case the assessee succeeds, it would be entitled to return with interest.

58. The factual scenario in that case is entirely different. The Apex Court in the above case has not examined the legality of seizure of the amount lying in the bank account. Moreover, the petitioner is not challenging the power of IT Department in seizing any bank account, wherein the undisclosed amount in case of the assessee is deposited.

59. In the present case, we have examined the legality of seizure and come to the conclusion that the seizure of the amount from current account in question is not in accordance with law. Therefore, the decision of the Apex Court in K.C.C. Software Ltd.'s case (supra) has no application to the case of the petitioner.

60. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (vide : Upen Chandra Gogoi Vs. State of Assam and Others, Mangal Prasad Tamoli (Dead) by Lrs. Vs. Narvedshwar Mishra (Dead) by Lrs. and Others, ; and Ritesh Tewari and Another Vs. State of U.P. and Others, .

61. Since we have held that issuance of the prohibitory order u/s 132(3) and warrant of authorization dated 7-1-2011 and Panchanama dated 8-1-2011 are not valid in law, the consequential action in converting the money lying in the current account into Demand Draft/pay order in favour of the Commissioner of income tax and withdrawing the same from the current account is also not valid in law.

62. In view of our above findings, we hereby quash the warrant of authorization issued in respect of current account in question and Panchanama dated 8-1-2011. Consequently, the action of opposite party- IT Department in seizing the bank account and converting the money lying in the bank account into demand draft/pay order in favour of the Commissioner of income tax Department and withdrawing the same is held to be illegal. Since by efflux of sixty days, the validity of the prohibitory order issued u/s 132(3) of the Act has lost, there is no need to quash it by this order.

63. We hereby make it clear that our above observations/findings are confined exclusively to the Current Bank Account in question, i.e., C.A. No. 0553002100028097 maintained with Punjab National Bank, Station Square, Bhubaneswar. We have not expressed any opinion with regard to search and seizure operation conducted by the income tax Department in respect of any premises, other property or assets.

64. The allegation about improper and apparently unauthorized actions of the IT Officials, dealing with opposite party No. 7-Bank is a serious matter involving transparency and legality of action of the departmental authority. This allegation has come from responsible officer of Nationalized Bank and cannot be lightly brushed aside. It would be appropriate for the concerned authority to make detailed inquiry on the matter and take necessary action, if the allegations are

found to be established.

65. In view of the findings in the preceding paragraphs, we direct the income tax Department to bring back Rs. 12.39 crores along with interest accrued thereon into the current account No. 0553002100028097 of the petitioner-Company maintained with Punjab National Bank, Station Square, Bhubaneswar forthwith. In the result, the writ petition is allowed. Rule issued.