
(2001) 12 OHC CK 0001
In the Orissa High Court
Case No : O.J.C. No. 1532 of 2000

Vishnu Borewell

APPELLANT

Vs

Income Tax Officer and Another

RESPONDENT

Date of Decision : 18-12-2001

Acts Referred:

Income Tax Act, 1961 — Section 133A, 147, 148

Citation : (2002) 178 CTR 409 : (2002) 257 ITR 512

Hon'ble Judges : R.K. Patra, J;Ch. P.K. Misra, J

Bench : Division Bench

Advocate : B. Mohanti, K.C. Kar, S.K. Jena, G.C. Sahoo and S.S. Patra, for the Appellant; A. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

R.K. Patra, J.—In this application under Articles 226 and 227 of the Constitution of India the petitioner seeks quashing of the notice dated August 31, 1999, issued u/s 148 of the Income Tax Act, 1961, at annexures 1 and 1/A requiring it to file return in the prescribed form for the assessment years 1997-98 and 1998-99 for the purpose of reassessment of the income as the income chargeable to tax for the aforesaid assessment years has escaped assessment within the meaning of Section 147 of the said Act.

2. Briefly stated the case of the petitioner is that it is a partnership firm constituted by a deed dated March 31, 1995, comprising of N. Venugopal, his two sons V. Kanan and V. Prasanna and his niece E. Puspa--to carry on the business for execution of the contract works. V. Venugopal, one of the partners, was alone assessed to Income Tax up to the assessment year 1994-95 in the status of an individual. The other partners had not been assessed as their income fell below the taxable limit. On August 23, 1999, the petitioner's resi-dence-cum-business premises were invaded and the Income Tax Officer seized some books of account. On the next day, he recorded the statement on oath from N. Venugopal. While the matter stood thus, the petitioner was suddenly served with the

impugned notices purported to be one u/s 148 of the Act. According to the petitioner, one of the pre-conditions of reopening of an assessment is the recording of reasons and there being no such recording, the impugned notices are invalid and without jurisdiction.

3. The Income Tax Officer opposite party No. 1 has filed a counter affidavit. He has pleaded that on August 23, 1999, a survey u/s 133A(1) of the Act was conducted in the business premises of the petitioner. The low and highly fluctuating rates of profit/book profit (8 per cent, to 3.2 per cent to 2.8 per cent.) due to the debiting of various expenses, particularly the payments to the rig owners, and the non-filing of the detailed lists of the creditors along with the audit reports (sundry creditors were shown at Rs. 14,68,635 for the assessment year 1997-98 and Rs. 10,39,588 for the assessment year 1998-99 and needed verification), were the reasons which prompted the conducting of the survey in this case. Besides this, no regular books of account such as cash book and ledgers were found in the business premises except some hand written copy books with lots of details of payments to all and sundry. On being confronted, the assessee gave an evasive reply in his statement recorded u/s 131 of the Act on August 24, 1999. The assessee stated that he maintains the cash books, ledgers, petty cash books, labour payment registers, work order files, etc., but all those books of account were with his accountant, S. Balaji--who had gone to his native place in Chennai and in his absence it is not possible to produce them. He, however, promised to produce them within 10 to 15 days. The books of account and other documents found during the survey were rough and were unsystematic records of sundry payments. The rough books of account found were xeroxed and copies have been retained for cross-verification with regular books of account as and when they would be produced by the assessee. On January 12, 2000, the authorised representative of the assessee sought for the recorded reasons for issuance of the impugned notices. The same was not furnished because there is no statutory provision for furnishing the recorded reasons to the assessee. Moreover, if the recorded reasons are furnished before filing of the return, the assessee could tamper with the records and books of account which can destroy/nullify the evidence. The petitioner has filed rejoinder to the counter of the Income Tax Officer. Shri Mohanti, learned senior counsel for the petitioner raised the following two contentions in support of the writ application :

- (i) As the Assessing Officer has not recorded reasons before issuance of the impugned notices u/s 148 of the Act the same are bad in law ; and
- (ii) Assuming that there are recorded reasons, they must be furnished to the petitioner to enable it to file its cause.

4. Counsel for the Revenue, on the other hand, submitted that the impugned notices indicate that the Assessing Officer "had reasons to believe" that the petitioner's income chargeable to tax for the disputed assessment years has escaped assessment. Regarding the contention involving supply of the recorded reasons, he submitted that they can only be furnished to the petitioner after it

appears pursuant to the impugned notices.

5. In view of the rival contentions, it would be appropriate to look at the relevant statutory provisions and the decisions cited at the Bar,

6. Contention No. (i) : The impugned notices are for the assessment years 1997-98 and 1998-99. Both of them are identically worded. Therefore, we may extract hereunder one of them, i.e., annexure 1 :

"Notice u/s 148 of the Income Tax Act, 1961.

Dated, Khurda, the 31st August, 1999.

To,

M/s. Vishnu Borewell, At P. O. Nayagarh, Dist. Nayagarh.

Whereas I have reasons to believe that your income chargeable to tax for the assessment year 1997-98 has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961, I, therefore, propose to reassess the income/recompute loss/depreciation allowance for the said assessment year, and I hereby require you to deliver to me within 30 days from the date of service of his notice, a return in the prescribed form of your income for the said assessment year."

7. We may refer here to Sections 147 and 148 of the Act which read as follows :

"147. Income escaping assessment.--If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under Sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return u/s 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Explanation 1.-- Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely : --

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to Income Tax ;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(c) where an assessment has been made, but--(i) income chargeable to tax has been under assessed ; or (ii) such income has been assessed at too low a rate ; or (iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

148. Issue of notice where income has escaped assessment.--(1) Before making the assessment, reassessment or recomputation u/s 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, not being less than thirty days, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed ; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished u/s 139.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

8. From the aforecited provisions it is clear that before the Assessing Officer assumes jurisdiction to issue notice, he must have reason to believe that the income of the assessee has escaped assessment as mentioned in Explanation 2 to Section 147. The expression in Section 147 "has reason to believe" is stronger than the words "is satisfied". The belief entertained by the Assessing Officer should not be arbitrary or irrational. It must be reasonable. In other words, it must be based on reasons which are relevant and material. The court, no doubt, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Assessing Officer in coming to the belief, but the court can certainly examine whether the reasons are relevant and have a bearing on the matters with regard to which he is required to entertain the belief before he can issue notice. If there is no rational and intelligible nexus between the reasons

and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the inevitable conclusion is that the Assessing Officer could not have reason to believe that any part of the income of the assessee had escaped assessment (see *Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others*, .

9. As the very existence of the recorded reasons is doubted by Shri Mohanti, we called for the relevant records and learned standing counsel has produced the same. On perusal of the records, we find that the Assessing Officer has in fact recorded reasons on August 31, 1999, for issuing notice u/s 148(1). We may say that the reasons mentioned by him do not suffer from any infirmity. The belief entertained by the Assessing Officer is clearly based on reasons which have bearing on the matter.

10. In view of what has been stated above, we do not find any merit in the first contention.

11. Contention No. (ii) : Sub-section (2) of Section 148 clearly provides that the Assessing Officer shall, before issuing any notice thereunder record his reasons for doing so. We have already held above that the Assessing Officer has recorded necessary reasons in support of the belief. The question is whether an assessee can demand a copy of the Assessing Officer's reasons along with the notice. The proceedings in the back assessment begin only with the issue of notice u/s 148. It is only after the service of notice, the assessee becomes a party to the proceedings. Consequently, the assessee is not entitled to get copy of the same at the stage of issuance of notice.

12. For the reasons aforesaid, we do not find any merit in the second contention also.

13. In the result, the writ application deserves dismissal. We order accordingly.

Ch. P.K. Misra, J.

13. I agree.