

**IN THE HIGH COURT OF UTTARAKHAND
AT NAINITAL**

Special Appeal No. 29 of 2017

Maruti Nandan Sah.Appellant.

Versus

Income Tax Officer, Nainital.Respondent.

And

Special Appeal No. 30 of 2017

M/s Maruti Sah and brothers.Appellants.

Versus

Income Tax Officer, Nainital.Respondent.

Present:

Mr. Mohit Maulekhi, Advocate for the appellant.

Mr. Hari Mohan Bhatia, Advocate for respondent.

Coram:

Hon'ble K.M. Joseph, C.J.

Hon'ble Alok Singh, J.

K. M. Joseph, C.J. (Oral)

These appeals being connected for reasons which will advert to, we are disposing of by the common judgment.

Special Appeal No. 30 of 2017 is filed against WPMS No. 2813 of 2016. Special Appeal No. 29 of 2017 is filed against WPMS No. 2804 of 2016.

WPMS No. 2804 of 2016 was filed by one Sri Maruti Nandan Sah. The prayer sought in the said writ petition reads as follows:

"i. A writ, order or direction, in the nature of Certiorari quashing the impugned notice under Section 148 of the Income Tax Act, 1961 dated 31.03.2016 issued by respondent proposing to re-assess the income for the AY 2009-10 and pursuant re-assessment proceedings (Annexure No. 1).

ii. A writ, order or directing in the nature of Mandamus directing the respondents restraining them from

proceeding any further in pursuance of notice under Section 148 of the Income Tax Act, 1961 dated 31.03.2016 (Annexure No. 1)”

Writ Petition No. 2813 of 2016 was filed by Sri Maruti Nandan Sah and brothers. It appears that Sri Maruti Nandan Sah and brothers is an association of persons (hereinafter referred to as “AOP”) under the Income Tax Act, 1961 (hereinafter referred to as “Act”). Sri Maruti Nandan Sah is the principal member of AOP. The main business of AOP is to carry on the business of retail liquor. The issue relates to assessment year 2009-10. Respondent issued, according to the appellants, a query letter on 31.08.2015. It was alleged that there was cash deposit of Rs. 33 lakh in the account of Sri Maruti Nandan Sah. Further the case of the Department is that Annual Information Return (AIR) revealed that Sri Maruti Nandan Sah incurred liability to pay income tax under the head capital gains by having transferred the property for Rs. 75 Lakh on 08.08.2008. As far as AOP is concerned, we find, from Annexure No. 6 in WPMS No. 2813 of 2016, the reasons, for reopening the assessment purporting to Section 147, recorded as follows:

“As per online Air information the assessee deposited cash of Rs. 33,00,000/- during the year and sold immovable properties of Rs. 75,00,000/- on 08.08.2008 and of Rs. 66,76,000/- on 11.07.2008 respectively. A query letter dated 20.10.2015 and reminder there of dated 16.02.2016 were issued to Shri Maruit Nandan Sah. In response, Shri Maruti Nandan Sah submitted his reply stating that the cumulative receipts of Rs. 1,74,76,000/- were out of the sales made during the year by the AOP M/s Maruti Sah and Brothers, Shri Maruti Nandan Sah being the principal member of AOP deposited it in his own bank account. However, as per computation of income enclosed with the copy of return of income for the relevant year, the assessee AOP has not shown any income from capital gain. As per trading and P&L account of the AOP, the only receipt declared apart from other income of Rs. 4,25,80,310/- from the business of liquor sale. Further as per AIR details the assessee made payment of Rs. 2,05,23,993/- for purchase of liquor and timber and parking lot contract etc. but in the

Trading and P&L a/c total amount debited is for the purchase only and that too only Rs. 1,80,68,601/-. As such there is a difference of Rs. 24,55,392/- under the purchase head. As such amount of Rs. 24,55,392/- is also considered as income escaping assessment. The assessee has not been able to reconcile the deference satisfactorily in its reply.

In view of the above facts, I am of the opinion that income amounting to Rs. 1,99,31,392/- has escaped assessment within the meaning of Section 147 of the IT Act, 1961."

There is no dispute that the reasons, which were required to be recorded, have been communicated to the appellants. Further purporting to act under Section 147 of the Act, notices were issued. The amount of the tax involved being above Rs. 1,00,000/- under Section 149 of the Act, the notice can be treated within time, if it was served on or before 31.03.2016.

The contention, however, raised by the appellants is that notices were not served within time either on the Assessee or on his authorized representative. It was served on somebody else. It is his further case that as far as AOP is concerned, there was no query letter issued, though under the instructions, there was obligation to issue query letter. Query letter was issued only to Mr. Maruti Nandan Sah in his individual capacity and no query letter was issued to Sri Maruti Nandan Sah as representing the AOP, it is contended.

Learned Single Judge found that reasons have been recorded in the query letter, therefore, there is no ground for interference under Article 226 of the Constitution. However, it was left open to the appellants to file objection to the notice.

By the time, appeal was filed and came up, it appears that on the basis of the reopening done under Section 147 of the Act assessment has been completed and assessment order has been passed against both the appellants. Neither assessment orders are before us nor they are specifically challenged before us.

Learned counsel for the appellants drew our attention to the judgment passed by the Division Bench of Delhi High Court reported in **2016 (382) ITR 613 (Commissioner of Income Tax Vs. Chetan Gupta)**. This judgment shows that it is rendered in an appeal under Section 260A of the Act. Therein the Court undoubtedly proceeded to hold inter alia that burden of showing that service of notice has been effected, within the meaning of Section 148 of the Act, is on the Revenue.

Having regard to the facts of present case, as assessment order has already been passed on the basis of impugned notices, we should dispose of the appeal by leaving it open to the appellants to pursue remedy under the Act where all the contentions can be raised including the contention that there was no valid notice served within the time on the assessee or his authorized representative, as contemplated under law. With regard to absence of separate query with regard to AOP, we are not clearly able to cull out whether any separate query / notice was sent to the appellant in Special Appeal No. 30 of 2016. In this regard, we may notice that from the reasons supplied, which we have extracted, wherein Rs. 1,99,31,392/- was noted as escaped assessment, there is reference to the query dated 20.10.2015 and the reminder dated 16.02.2016. We find that in neither writ petition, this query letter dated 20.10.2015 is seen produced. No doubt, learned counsel for the appellant would submit that even reasons supplied would show the query letter was addressed to Sri Maruti Nandan Sah and not to AOP but we would think prima facie that Sri Maruti Nandan Sah is also admittedly the principal member of AOP. We cannot, on the material available, find conclusively - whether it is issued to Sri Maruti Nandan in his individual capacity or as member of the AOP. We would still leave it open to the appellants to raise contentions before statutory authority.

We, therefore, cannot proceed on the basis that there is no query letter issued but even then, we leave it open to the appellants to pursue the said contention also that there is no query letter issued with regard to the AOP.

Therefore, we think that we should not interfere under Article 226 in the facts of these cases. Instead, we leave it open to the appellants to raise all contentions available to them under the law before the statutory authority.

Learned counsel for the appellant points out that relegating the appellants to avail appropriate remedy would involve the appellants in great financial difficulty as very large sums are involved.

Mr. Hari Mohan Bhatia, Advocate for the respondent, after instructions submits that under the circular issued by CBDT appellants would have to deposit only 15% for the purpose of moving stay application.

We would think in such circumstances, we cannot grant any further relief in the form of waiver of the amount to be paid, as requested by learned counsel for the appellants. Consequently, both the appeals are disposed of leaving it open to the appellants to pursue statutory remedy raising all the contentions before statutory authority.

Let copy of this judgment be placed in the connected appeal.

(Alok Singh, J.)
15.03.2017

(K.M. Joseph, C.J.)
15.03.2017