

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (M/S) No. 2813 of 2016

M/s Maruti Sah & BrothersPetitioner

Versus

Income Tax OfficerRespondent

Mr. Mohit Maulekhi, Advocate for the petitioner
Mr. H.M. Bhatia, Standing Counsel for the respondent

Date of Judgment: 26.12.2016

Hon'ble V.K. Bist, J.

Petitioner has approached this court seeking following reliefs:

- i) A writ, order or direction in the nature of certiorari quashing the impugned notice u/s 148 of the Income Tax Act, 1961, dated 31.03.2016 issued by the respondent, purposing to reassess the income for the A.Y. 2009-10 and pursuant reassessment proceedings.
- ii) A writ, order or direction in the nature of mandamus directing the respondent restraining them from proceeding any further in pursuance of notice u/s 148 of the Income Tax Act, 1961, dated 31.03.2016.

2. Brief facts of the case, as narrated in the writ petition are, that the petitioner/assessee is Association of Persons (AOP) namely Maruti Sah & Brothers – PAN AABAM0677P and during the relevant year i.e. AY 2009-10 derived income from retail liquor trade and no other source. Maruti Nandan Sah is its Principal Member. The petitioner/assessee received two copies of letter F.No.

ITO-3(1)/NTL/u/s 148/2016-17/ dated 13.05.2016 from the respondent, informing him to file the Income Tax Return (ITR) for A.Y. 2009-10 in response to notice issued u/s 148 of the Income Tax Act, 1961 (*for short, the Act*) dated 31.03.2016, which was enclosed with the letter. The petitioner alleges that the petitioner/assessee was made aware for the first time of the said notice dated 31.03.2016 vide said letter dated 13.05.2016. Thereafter, on 27.05.2016, the petitioner/assessee received yet another letter dated 27.05.2016, whereby the petitioner/assessee was asked to file their ITR for A.Y. 2009-10 in response to notice dated 31.03.2016 issued u/s 148 of the Act. The petitioner/assessee, through his authorized representative, vide reply dated 04.06.2016 to the letter dated 13.05.2016 submitted that “the Original return filed on 30.03.2010 may be treated as the return filed in response to the above-mentioned Notice” and further requested the respondent for copies of the reasons recorded for reopening the assessment, as also the approval accorded by the Prescribed Authority. Thereafter, the respondent vide letter dated 07.06.2016 supplied to the petitioner/assessee the reasons recorded for reopening the assessment u/s 147 of the Act in pursuance of notice u/s 148 dated 31.03.2016 of the Act and also issued notices u/s 142(1) and 143(2) of the Act. According to the petitioner, the reasons recorded for reopening the assessment of the petitioner/assessee AOP are infact solely and purely related to the reasons recorded for reopening the assessment of another assessee Maruti Nandan Sah PAN BBXPS5336N, an individual, u/s 147 and are in no manner related or even connected to the petitioner/assessee AOP. The petitioner/assessee, in response to the aforesaid letter

dated 07.06.2016, to the reasons recorded therein and to notice u/s 142(1) of the Act dated 07.06.2016, preferred objections dated 20.06.2016 and brought on record the erroneous legal and factual position taken by the respondent in recording the reasons for issuing the notice u/s 148, dated 31.03.2016.

According to the petitioner, the notice u/s 148 of the Act was issued consequent to the AIR query raised against Maruti Nanda Sah PAN BBXPS5336N, an individual, and not against the petitioner/assessee, Pan AMBAM0677P, an AOP (association of persons). It is alleged that the AOP has not shown any income from capital gain whereas the petitioner/assessee was never enquired about the aforesaid AIR transaction and in fact the income from capital gain pertains to Sri Maruti Nandan Sah PAN BBXPS5336N, an individual, who has been assessed and taxed on the said income from capital gains. It is also alleged that as per AIR details the assessee made payment of Rs. 2,05,23,993/- for purchase of liquor whereas all the stated AIR transactions relate Maruti Nandan Sah PAN BBXPS5336N, an individual. The respondent has distorted the fact and the AIR enquiry report has been wrongly taken against the petitioner.

It is also the case of the petitioner/assessee that the petitioner/assessee had also brought to the notice of the respondent that apart from completely erroneous appreciation of the factual position, the department had initiated proceedings u/s 148 of the Act on the basis of the AIR query initiated w.r.t. Maruti Nandan Sah PAN BBXPS5336N, an individual, whereas, no such proceedings were adopted in the case of the petitioner/assessee PAN AMBAM0677P, an AOP. This

was sufficient to drop the proceedings. The petitioner further submits that the Central Board of Direct Taxes (CBDT) has issued instruction no. 1/2009, dated 12.02.2009, which makes it mandatory for the respondent department to issue query letter before proceedings with issuance of notice u/s 148 of the Act. In spite of being seized of the aforesaid objections dated 20.06.2016, the respondent afresh wrote to the petitioner/assessee vide letter dated 22.06.2016 stating that processing u/s 148 of the Act are initiated against the petitioner/assessee on the AIR information available with the respondent office in the case of Sri Maruti Nandan Sah, Member of assessee AOP who is assessed as an individual. According to the petitioner, the observation and the reasoning of the respondent department with regard to escapement of Rs.1,99,31,392/- is absolutely hypothetical inasmuch as Rs.33,00,000/- was deposited in the individual account of Maruti Nandan Sah. Rs. 75,00,000/- worth of property was sold by Maruti Nandan Sah and Rs. 66,76,000/- worth of property allegedly sold by Maruti Nandan Sah and alleged difference in purchase of liquor to the tune of Rs. 24,55,392/- is all related to AIR information pertaining to Maruti Nandan Sah, PAN BBXPS5336N, an individual. The petitioner alleges that these facts were very well disclosed by the petitioner/assessee before the Assessing Officer in the Income Tax Return for A.Y. 2009-10, submitted online within stipulated time on 17.03.2011. The petitioner/assessee AOP had in fact submitted its ITR for the relevant Assessment Year, i.e. A.Y. 2009-10, within stipulated time frame after getting its accounts audited u/s 44A of the Act and this fact finds place in the records of the respondent department.

It is further alleged that the respondent has not recorded cogent reasons and pre-se the reasons recorded suggests that the Assessing Officer, on the basis of AIR information relating to Maruti Nandan Sah, PAN BBXPS5336N, an individual, has assumed jurisdiction to initiate re-assessment proceedings against the petitioner/assessee AOP on its mere *ipse dixit*. Therefore it is ex-facie clear that the reasons recorded are wrong, out of context and in no manner related to the petitioner/assessee AOP.

3. Counter affidavit has been filed by the respondent. Few paragraphs, which are relevant, are as follows:

“3. That the Assessee AOP, M/s Maruti Sah & Bros filed its ITR for A.Y. on 30.03.2010 declaring total taxable income at Rs. 3,96,380/-, the return was processed u/s 143(1) accepting the returned income.

4. That this office received PAN based AIR information regarding following transactions in respect of the AOP for F.Y. 2008-09 relevant to A.Y. 2009-10.

(i) Purchase of liquor for human consumption, timber obtained not by forest lease, parking lot & interest other than securities amounting to Rs. 2,05,23,993/-

5. That a query letter regarding above transactions was issued to the assessee by this Office on 20.10.2015 giving him compliance date for 04.11.2015. This letter was duly received by the assessee on 21.10.2015. In

response, assessee submitted his written reply which was received in this office on 11.03.2016.

6. That as per assessee's written submission, Shri Maruti Nandan Sah, the Principal Member of AOP has submitted that the transactions are reflected in its book of accounts of the AOP duly audited u/s 44AB of the IT Act 961.

7. That on perusal of Trading & Profit & Loss account of the assessee AOP for the F.Y. 2008-09, it is revealed that the purchase has been shown at Rs. 1,80,68,601/-. But as per 26AS details of the assessee for the same F.Y., the assessee AOP has paid TCS on purchase amount of Rs. 2,05,23,993/-. Thus there arising difference of $\text{Rs. } 2,05,23,993 - 1,80,68,601 = 24,55,392/-$.

8. That the assessee statement/written view in respect of the above facts found unsatisfactory. It is also evident from the above facts that the assessee has knowingly concealed the true picture of his final accounts.

9. That on the basis of above, it becomes a reason to believe that the income amounting to Rs. 24,55,392/- has escaped assessment for A.Y. 2009-10.

10. That accordingly a proposal for initiating proceedings u/s 148 of the I.T. Act 961 was put up before the Ld. Pr. CIT/haldwani, quoting the reason as per point No. 6 & 7 above.

11. That after receiving approval of Ld. Pr. CIT/Haldwani, a notice u/s 148 issued to the assessee on 31.03.2016 which was duly received by the assessee on 31.03.2016.

12. That further to proceeding u/s 148, a letter regarding requiring assessee to file return of income for A.Y. 2009-10, fixing date of compliance on 9.05.2016 was issued. In response the A.R. representative of assessee Shri Pawan Kumar Nath FCA attended and furnished that return filed on 30.03.2010 may be treated a return filed in response to above notice. Assessee also requested to provide with him the reasons for re-opening the case which has been duly provided to the assessee.

14. That in reply to the facts mentioned in para no. 5 of the affidavit it is submitted that the assessee was issued notice u/s 148 of the I.T. Act, 1961 dated 31.03.2016 which was duly received by the assessee representative Shri Nirmal Kumar on 31.03.2016 itself. The notice was served at his home. It is relevant to mention that the notice u/s 148 of the IT Act 1961 is a kind of information to the assessee that the proceeding u/s 147 are being initiated against him.

17. That in reply to the facts mentioned in para no. 8 of the affidavit it is submitted that the assessee AOP is engaged in the business of retails trading of liquor for human consumption. The liquor is purchased in the name of the AOP. Accordingly TCS is deducted by the seller. As per the material facts

available on record, the AOP has purchased liquor for human consumption amounting to Rs. 2,05,23,993/- during the F.Y. 2008-09 relevant to AY 2009-10. The assessee claim that the matter is purely related to Shri Maruti Nandan Sah as individual is false as per documentary evidence.”

4. Learned counsel for the petitioner submits that the petitioner/assessee has filed his return for the relevant Assessment Year 2009-10 online within stipulated time on 31.03.2010. The respondent Department on the basis of AIR information available with the Department issued a query letter dated 31.08.2015 to Maruti Nandan Sah in his capacity as an individual assessee, inasmuch as the Assessee is identified by his PAN BBXPS5336N in the said query letter and sought explanation to the amount of Rs.1,74,76,000/- and Rs.2,05,23,993/- for the Financial Year 2008-09. He further submits that the respondent Department also issued notice u/s 148 dated 31.03.2016 which was served upon the Principal Member of the Assessee AOP for the first time vide letter dated 13.05.2016 on the basis of query letter issued to Maruti Nandan Sah in his capacity as an individual assessee, inasmuch as the Assessee is identified by his PAN No.BBXPS5336N and not as the Principal Member of the Assessee AOP having PAN No.AABAM0677P.

5. Learned counsel further submits that the Respondent Department claims the query letter dated 31.08.2015 issued to Maruti Nandan Sah, PAN No.BBXPS5336N, in his capacity of an individual

assessee as basis for initiating proceedings u/s 147/148 of the Act is not tenable because the respondent department was duty bound to adhere to instruction no.1/2009 dated 12.02.2009 which lays down the instructions for utilization of information mentioned in AIR as such is binding upon the respondent department.

6. Learned counsel contends that the respondent department on the basis of AIR information relating to and query letter issued to Maruti Nandan Sah, PAN No.BBXPS5336N, has *ipse dixit* assumed jurisdiction to issue notice u/s 148 to Maruti Sah & Brother, Assessee AOP having PAN No.AABAM0677P, which is against instruction no.1/2009 dated 12.02.2009, and is, therefore, illegal.

7. Learned counsel further contends that the Department claims to have served the notice u/s 148 dated 31.03.2016 on 31.03.2016 itself upon one Nirmal Kumar, who is neither the Assessee nor his Authorized Representative, whereas the Department is required by law to serve the notice upon the petitioner/assessee or upon his duly authorized representative.

8. Learned counsel further contends that the query letter dated 31.08.2015 was issued only to Maruti Nandan Sah, PAN No.BBXPS5336N, in his capacity of an individual assessee and specifically mentioned two distinct sets of amount; the reasons recorded for initiating proceedings u/s 148 dated 07.06.2016 against the petitioner/Assessee AOP, PAN No.AABAM0677P, are based on the query letter issued to Maruti Nandan Sah,

PAN No.BBXPS5336N, and are therefore unsustainable as per the provisions of Section 147/148 of the Act.

9. Learned counsel further submits that the petitioner/assessee, in response to reasons recorded for initiating proceedings u/s 148 dated 07.06.2016, preferred objections dated 20.06.2016 stating therein that on the basis of AIR information which were specific to Maruti Nandan Sah, the reopening of the assessment of the Assessee (AOP) is illegal and against the facts and law, therefore the reopening proceeding is liable to be cancelled. Moreover, the Assessee was not given an opportunity to present its position before issuing the notice, which is against the principle of natural justice and fair play. It was further stated that the AOP did not sell any land therefore the reason recorded for reopening the assessment is incorrect and is liable to be cancelled. Further, the AIR information narrated "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." is specific to Maruti Nandan Sah (Mr) an individual, therefore the comparison of the aforesaid information with the Final accounts of the Assessee (AOP) is illusionary, deceptive and incorrect and therefore the reopening proceedings is also illegal.

10. Per contra, learned counsel for the respondent reiterates his case what is said in the counter affidavit and submits that the notice dated 31.03.2016 was served in the premises of the assessee and the authorized representative, available on the premises of the assessee, received the said notice and as per the Judgment of Hon'ble Apex Court in the case of GKN Drive Shafts

(India) Ltd. vs. Income Tax Officer 2003(1) SCC 72, the Income Tax Department is duty bound to give the opportunity of the hearing to the petitioner. In the present case, in compliance to notice the assessee himself represented his case through his authorized representative, filing the objection against the said notice before the Assessing Officer and he never raised this plea at any point of time. Therefore, question of denial of opportunity of hearing does not arise. He further submits that in the present case no Assessment Order u/s 143(3) have been passed by the Authority.

11. Learned counsel for the respondent further submits that as per section 149(1)(b) of the Act if more than four years have been elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year, then in that condition time limit to give notice is six years. He submits that in the present case the notice u/s 148 was issued to the petitioner after expiry of four years but within six years and for that the Income Tax Officer before issuing notice to the petitioner got the prior approval from the Principal Commissioner of Income Tax, Haldwani and as such notice issued to the petitioner is perfect and as per law.

12. Learned counsel for the respondent further submits that it is a settled principle of law that the Assessing Officer is the first fact finding authority on the issue and as per the law, the Court cannot look into jurisdictional error in issuing the notice u/s 147 of the Act. In support of his case, learned counsel has also

placed reliance upon paragraph 18 of the judgment rendered by Hon'ble Apex Court in the case of ACIT vs. Rajesh Jhavari Stock Brokers Pvt. Ltd. AIR 2007 SC 2163, and submitted that issuance of notice to the petitioner is in accordance with law. Paragraph 18 of the judgment is reproduced below:

“18. So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued.”

13. I have considered the submissions of learned counsel for the parties. The petitioner has raised many points for the consideration of the Court to entertain the writ petition and to quash the notice issued under Section 148 of the Act. Section 148 of the Act provides for issuance of notice in respect of those cases where income has escaped assessment. Section 147 of the Act provides that 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. Power of assessment/reassessment is subject to certain conditions.

14. Points raised by the petitioner are based on facts which can be appreciated by the Assessing Officer. Machinery has been provided by the Act for

assessment/reassessment. Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer should serve on the assessee a notice requiring him to furnish a return of income within such period as may be specified in the notice. But, before issuing a notice, the Assessing Officer is required to record reasons for doing so. In the present case, I find that required notice has been sent and reasons for issuance of notice/initiation of proceeding have also been disclosed to the petitioner. The argument of the petitioner regarding receipt of query letter by Maruti Nandan Sah can also be looked into by the Assessing Officer. Required sanction was also obtained from competent authority. In such situation, the Court is not inclined to entertain the writ petition for quashing the notice issued under Section 148 of the Act. Rather, it will be appropriate for the petitioner to approach the Assessing Officer and reply the notice. It is always open for the petitioner to take all the pleas before the Assessing Officer which he has taken before the Court. It is not the case of the petitioner that the Authority has not proceeded as per relevant provisions of the Act or is proceeding in the matter in defiance of the fundamental principles of judicial procedure, or has not/is not providing proper opportunity of hearing to the petitioner.

15. In view of the above, the Court is not inclined to grant any relief to the petitioner. The writ petition is, accordingly, dismissed.

16. No order as to cost.

17. It is made clear that this court has not given its view about the merit of the case or on any ground which has been taken by the petitioner. The Assessing Officer will consider the reply of the petitioner, independently in accordance with law.

(V.K. Bist, J.)
26.12.2016

Rajni