

Civil Misc. Writ Petition (Tax) No.458 of 2015

Rich Udyog Network Ltd. Petitioner

Vs.

Chief Commissioner Of Income Tax
And Others Respondents

Hon'ble Tarun Agarwala, J.

Hon'ble Surya Prakash Kesarwani, J.

(Per: Tarun Agarwala, J.)

The petitioner is a company incorporated under the Indian Companies Act and contends that it has been filing its income tax return regularly. For the financial year 2013-14, the petitioner declared a turnover of Rs.62,08,20,868/-. The present writ petition has been filed praying for the quashing of the search made by the income tax authorities on 28th April, 2015 under Section 132 of the Income Tax Act at premises no.7/125, C-2, Swarup Nagar, Kanpur and HDFC Bank, Civil Lines, Kanpur with a further prayer to return the records so seized under the search.

The petitioner contends that the respondents arrived at their registered office at around 12.00 noon on 28th April, 2015 for the purpose of conducting a survey under Section 133A of the Income Tax Act and during

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the course of survey seized cash amounting to Rs.64,56,970/- and also impounded the books of account in the absence of any Panchas. The petitioner's contended that the respondents deposited the cash in the petitioner's bank account on 28th April, 2015 at 5.00 pm and thereafter, got a demand draft made in their names. It is alleged that initially a survey was conducted under Section 133A of the Act but the same was converted into a search under Section 132 of the Act without there being any warrant or authorisation to search the premises under Section 132 of the Act. It was further alleged that the search started on 28th April, 2015 and concluded on 29th April, 2015 at 7.00 am and that the Panchanama was issued on 29th April, 2015.

In the light of the aforesaid factual position, we have heard Sri Shubham Agarwal, the learned counsel for the petitioner and Sri Ashok Kumar, the learned counsel for the income tax department at length. By an earlier order of the Court, the income tax department was directed to produce the original records relating to the recording of the satisfaction for the purpose of conducting a search under Section 132. The said record was produced, which the Court has perused.

The contention of the petitioner is, that the action of the respondents in converting the survey under Section 133A of the Act into a search under Section 132 of the Act was wholly illegal and without jurisdiction. According to the petitioner, the condition precedent for initiating action under Section 132 of the Act was lacking. The

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petitioner contended that there was no information in the possession of the authority, which could lead to have a reason to believe that the petitioner was in possession of any money, bullion or jewellery or other articles, which represented undisclosed income. The learned counsel contended that the conditions mentioned in Section 132 of the Act must exist and is a mandatory requirement for a valid search. The learned counsel further submitted that merely because some cash was found would not entitle the authorities to convert the survey into a search operation. The learned counsel submitted that the cash so found, at best, could be utilized in the assessment proceedings but could not become a ground to convert the survey into a search operation. In support of his submission, the learned counsel for the petitioner has placed reliance upon the following decisions, namely, ***Harbhajan Singh Chadha and others Vs. Director of Income Tax and others in Writ Tax No.451 of 2012*** decided on 27th March, 2015, ***Vindhya Metal Corporation and others Vs. Commissioner of Income Tax and others, 156 ITR 233, Ganga Prasad Maheshwari and others Vs. Commissioner of Income Tax, 139 ITR 1043, Dr. Nand Lal Tahiliani Vs. Commissioner of Income Tax and others, 170 ITR 592*** and ***Director General of Income Tax (Investigation), Pune and others Vs. Spacewood Furnishers Pvt. Ltd. and others, 2015 ISI B-716 (SC)***.

Sri Ashok Kumar, the learned counsel for the department submitted and admitted that initially a survey

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was conducted under Section 133A of the Act, which was subsequently converted into a search under Section 132 after recording the satisfaction of the competent authority and after obtaining administrative approval from the Director General of Income Tax (Investigation) and that the search conducted was based not only on definite information but also upon relevant material, which led the authority to form an opinion that he has reasons to believe that the action under Section 132 of the Act was not only imminent but was also justifiable. The learned counsel submitted that in the facts and circumstances it became necessary that the survey was required to be converted into a search in order to secure the evidence, which was not likely to be made available by issue of summons and, therefore, the tax authorities had to resort to search and seizure in order to secure the evidence of undisclosed income, which would not have been disclosed in ordinary course. The learned counsel consequently, justified the action of the department in conducting the survey at the premises in question.

In the light of the aforesaid, the Court directed the department to produce the original records in order to find out as to whether there was information available on the file and satisfaction was recorded for taking action under Section 132 of the Act. For this purpose, we have perused the original file produced by the department.

Upon perusal of the file, we find that the Director of Income Tax (Investigation), Kanpur had given

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information regarding huge amount of cash being deposited in the petitioner's bank account no.6636 and approval was sought for getting a survey operation conducted under Section 133A of the Act at the business premises. The survey action under Section 133A was approved by the Competent Authority. Accordingly, the survey team consisting of Income Tax Officers and other authorised officers reached the premises and commenced the survey action under Section 133A of the Act at around 12.00 noon on 28th April, 2015 after showing the authorisation under Section 133A of the Act, which was duly acknowledged by the petitioner's Director.

During the course of the survey, a sum of Rs.64,56,970/- was found from the premises along with incriminating documents showing huge cash transactions. The statement of the Director of the petitioner Gaya Prasad Gupta was recorded under Section 131(IA) of the Act, who was asked to explain the source of cash. The statement indicates that he failed to explain the source of cash. The statement of Sri Gupta further indicates that he was asked to furnish the books of accounts of all the companies allegedly doing business from the premises in question, which he failed to produce. Sri Gupta was also asked to explain various entries in the documents where the assessee was taking cash from various parties and returning the money by cheque to the same parties. There were also entries, which showed that assessee was taking payment in

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cheque and returning the money after taking his commission in cash. These facts were confronted to Sri Gupta and he failed to provide any explanation and only stated that Sri Shaswat Agarwal, Managing Director of the Company would be in a position to explain as he is the main person.

The cash that was found and the documents that were inspected prima facie, proved that huge cash transaction was taking place and indicated that the petitioner was engaged in the activity of providing bogus entries to various parties, whereby the petitioner was accepting undisclosed cash and issued cheques or vice-versa. The dubious entries in the documents found at the premises and the unexplained cash was taking cognizance of and, accordingly, a satisfaction note was prepared to convert the survey into a search. This satisfaction note was put up before the Director of Income Tax (Investigation), who after obtaining administrative approval from the Director General of Income Tax (Investigation), Lucknow issued a warrant of authorisation under Section 132(1) of the Act to seize the unaccounted cash and documents from the premises of the petitioner and other companies.

We find from the record that the administrative approval was obtained from the Director General of Income Tax (Investigation), Lucknow by fax at 4.17 pm on 28th April, 2015 and, thereafter, the warrant of search under Section 132 of the Act was prepared and was shown to Gaya Prasad Gupta, who acknowledged it by

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putting his signatures on the warrant at 5.00 pm on 28th April, 2015. Therefore, the cash was deposited in the Bank at 5.15 pm and a bank draft was obtained. According to the Panchanama, a copy of which has been annexed to the writ petition, before commencing the search, two independent witnesses were called to become witnesses.

Having heard the learned counsel for the parties, we find that a search is required under the Act in order to secure evidence, which is not likely to be made available by issuance of a summon. The tax authorities have to resort to search and seizure when there is evidence of undisclosed documents or assets, which have not been and would not be disclosed in ordinary course. Section 132 of the Act read with Rule 112 of the Income Tax Rules is intended to achieve this purpose, namely, to get hold of evidence and to get hold of assets representing income believed to be undisclosed income.

Section 132(1) of the Act has to be strictly construed and the formation of the opinion or reason to believe by the Authorising Officer must be apparent from the note recorded by him. The opinion so recorded must clearly show whether the belief falls under clause (a), (b) or (c) of Section 132(1) of the Act. No search can be ordered except for any of the reasons contained in clause (a), (b) or (c). The satisfaction note should itself show the application of mind and the formation of the opinion by the officer ordering the search. If the reasons, which are recorded, do not fall under clause (a), (b) or

(c), in that event, the authorisation issued under Section 132(1) will become illegal and will have to be quashed as held in ***L.R. Gupta and others Vs. Union of India and others, 194 ITR 32.***

In order to attract clause (c) of Section 132(1) of the Act, there must be “information” with the authorising authority relating to two matters, namely, that any person is in possession of money, etc. and secondly, that such money, etc. represents either wholly or partly income or property, which has not been or would not be disclosed for the purposes of the Act. The search would be valid if the authorising authority had reasonable ground for believing that a search was necessary and that he further believes that the required object cannot otherwise be obtained without undue delay. In our opinion, clause (a), (b) and (c) of Section 132(1) of the Act spells out the circumstances under which authorising authority may issue a warrant of authorisation. Such authorisation is possible only if the authorising authority in consequence of information in his possession has reason to believe the existence of the circumstances enumerated in clause (a), (b) and (c) of Section 132(1) of the Act.

In order to justify the action under Section 132, it is incumbent upon the authority to collect relevant material on the basis of which, the authority can form an opinion that he has reasons to believe that an action under Section 132 of the Act would be justifiable. The expression “information” must be something more than a

mere rumour, gossip or hunch. There must be some material, which can be regarded as “information”, which must exist on the file, on the basis of which the authorising officer can have “reason to believe” that an action under Section 132 of the Act is called for any of the reasons mentioned in clause (a), (b) and (c).

The words “has reasons to believe” as provided in Section 132(1) of the Act postulates a belief and existence of reasons for that belief. The belief must be held in good faith: it cannot be a mere pretence. Such belief should not be based on mere suspicion but must be based on information which is in the possession of the authorising authority. The formation of the belief within the meaning of Section 132(1) is a condition precedent to the authorisation of search and seizure. It is basically a subjective step essentially to make up one's mind as to whether on the basis of information available he had or had not formed the reasons to believe. This belief, cannot be a mere pretence nor can it be a mere doubt or suspicion but has to be something more than that.

From perusal of the record, we find that the warrant of authorisation was issued after according approval from the competent authority. The contention of the petitioner that the search was conducted without recording satisfaction since it was only a survey conducted under Section 133A of the Act appeared to be attractive in the first blush but upon perusal of the record, we find that the department had definite

information about the clandestine activity of the petitioner and upon recording a satisfactory note permission was accorded from the competent authority for a survey under Section 133A of the Act. Based on this permission, a survey was made and incriminating evidence was found. The statement of one of the Directors' were recorded in which the said Director failed to provide any explanation with regard to the cash found at the premises in question and also failed to explain various entries in the documents, which indicated that the petitioner was taking cash from various parties and returning the money via cheque to the same parties. This unexplained cash and dubious entries in the documents fortified the belief and gave reasons to believe that there was undisclosed income, which would not have been disclosed in ordinary course and accordingly, a satisfactory note was prepared upon an application of mind and requesting a search to be conducted. We also find that the competent authority, after considering the matter, recorded its satisfaction and issued authorization for conducting a search under Section 132 of the Act.

The contention of the petitioner that merely because the Director failed to explain the possession of the cash was not fatal and could not invite authorization for conducting a search under Section 132 of the Act is totally misplaced. Reliance upon the decision in ***Vindhya Metal Corporation (supra)*** is distinguishable and not applicable, inasmuch as in the instant case, a

survey action under Section 133A of the Act undertaken on previous information that the petitioner was indulging in huge cash transaction, which were being transferred to subsidiary companies and, therefore, the petitioner and its companies were doing money laundering in the form of unaccounted cash, which fact was proved to be true when the search was conducted.

Further, reliance by the learned counsel for the petitioner in the case of ***Ganga Prasad Maheshwari (supra)*** that possession of cash does not form an opinion that it represented an undisclosed income is erroneous. We find that the condition precedent for exercise of the action under Section 132 of the Act, namely, that there was sufficient information in possession of the authority in consequence of which the authority had reasons to believe that the petitioner was in possession of money, bullion, jewellery, etc., which represented undisclosed income was existing and was also proved during the course of search.

Similarly, reliance upon the decision in ***Dr. Nand Lal Tahiliani (supra)*** that the satisfaction was not arrived at on the basis of material is patently erroneous. We have perused the record and we find that the information was based on certain valid information and that the satisfaction recorded was based upon consideration of the material placed before it. We also find from the original record that administrative approval was taken from the Director General of Income Tax (Investigation), Lucknow and, therefore, the contention

that no such approval was taken is patently erroneous.

The contention that the mere fact that cash was found could have been utilized in assessment proceedings and that the same cannot be a ground to convert the survey into a search operation under Section 132 of the Act cannot be accepted. We find that the petitioner's had not brought on record the statement of the Director, who was examined during the course of search but upon perusal of the original record, we find that the Director was repeatedly asked to explain the source of the cash and entries. Since no plausible reply came forward and the Director was unable to explain the entries, which showed that the petitioner was taking cash from various parties and returning the money via cheque to the same parties and vice-versa, the authorities had reasons to believe that the petitioner's would not produce or cause it to produce the books of accounts or documents evidencing true state of affairs, even if summons under Section 131 or notice under Section 142 of the Act was issued.

In this regard, we find that the Central Board of Direct Taxes has issued Instructions dated 30th September, 2014 indicating that where cash amounting to more than Rs.10 lacs is found at the premises during the survey under Section 133A of the Act, the Director of Income Tax (Investigation) having territorial jurisdiction over the survey should be intimated to examine the facts for taking recourse to Section 132(1) of the Act.

In the light of this instruction, we have no hesitation

in holding that pursuant to the survey and the undisclosed cash and unexplained entries found, steps to convert the survey into a search was rightly taken.

We are consequently, of the opinion that in the facts and circumstances of the case, the authorities had information based upon material which led to a valid survey being conducted under Section 133A of the Act. Based on further incriminating evidence that came forward during the course of survey, a satisfactory note was placed before the competent authority, who after considering the material recorded his satisfaction. Such satisfaction recorded was in accordance with the provision of Section 132 of the Act.

For the reasons stated aforesaid, we do not find any manifest error in the search conducted by the respondents.

The writ petition is dismissed.

Date:7.7.2015

Bhaskar

(Surya Prakash Kesarwani, J.) (Tarun Agarwala, J.)