

Court No. - 7**Case :- WRIT TAX No. - 1313 of 2019****Petitioner :- Deepak Gupta****Respondent :- Assistant Commissioner Income Tax And 2 Others****Counsel for Petitioner :- Suyash Agarwal****Counsel for Respondent :- S.S.C.****Hon'ble Biswanath Somadder,J.****Hon'ble Ajay Bhanot,J.**

1. The Revenue drew proceedings against the petitioner-assessee for reassessment of income which had allegedly escaped assessment for the Assessment Year 2012-13. The petitioner has assailed various orders taken out by the Revenue at different stages in pursuance of the reassessment proceedings initiated under the relevant provisions of the Income Tax Act, 1961 (hereafter referred to as (I.T. Act, 1961)

2. The petitioner has assailed the notice issued under Section 142 (1) of the I.T. Act, 1961 dated 22.10.2019 requiring the petitioner to furnish details, documents and accounts which were necessary to process the case under the relevant provisions of law. The petitioner has also impugned the "reasons to believe" recorded on 22.03.2019 by the assessing officer to support the formation of opinion of the Revenue as required under Section 147 of the I.T. Act, 1961. Lastly the petitioner has laid a challenge to the orders dated 28.10.2019 and 26.11.2019 disposing of the objections of the petitioner against the issuance of the notice under Section 148 of the I.T. Act, 1961 for the Assessment Year 2012-13.

3. Sri R.R. Agarwal, learned Senior Counsel assisted by Sri Suyash Agarwal, learned counsel for the petitioner contends that the only submission made on behalf of the petitioner is that the mandatory prior approval required under Section 151 of the I.T. Act, 1961 from the Principal Commissioner, Income Tax, Noida, was not obtained before initiation of the aforesaid reassessment proceedings. In the absence of such approval under Section 151 of the I.T. Act, 1961 from the competent authority the proceedings against the petitioner which are assailed in the instant writ petition, have no legs to stand on and are devoid of jurisdiction. This is the sole submission made by the learned Senior Counsel for the petitioner.

4. Per contra, learned counsel for the Revenue, Sri Subham Agarwal calls attention to various assertions made in the orders impugned dated 28.10.2019 and 26.11.2019 to contend that the requisite approval from the competent authority under Section 151 of the I.T. Act, 1961 was taken prior to the initiation of the proceedings in the manner contemplated by law. He further contends to the material on the basis of which the satisfaction was arrived at by the authorities to come to the conclusion that income of the petitioner had escaped assessment for the Assessment Year 2012-13 was credible and duly considered by the Revenue before initiating reassessment proceedings.

5. Heard learned counsel for the parties.

6. The sole contention of the petitioner-assessee that prior approval required from the competent authority under Section 151 of the I.T.

Act, 1961 was not obtained before issuing notice under Section 148 of the I.T. Act, 1961 will be considered first. The objection in this regard was also taken by the assessee before the authorities below. It was raised in the objections against issuance of notice under Section 148 of the I.T. Act, 1961.

7. The assessing authority dealt with the aforesaid objection regarding grant of prior approval by the competent authority under Section 151 of the I.T. Act, 1961 before issuance of notice under Section 148 of the I.T. Act, 1961. The assessing authority in its order dated 28.10.2019 specifically recorded "Further, the notice u/s 148 was issued after taking prior approval u/s 151 from the Ld. Pr. Commissioner of Income Tax, Noida."

8. Similarly the order dated 19.11.2019 disposing of the self same objection of the petitioner-assessee against the issuance of notice under Section 148 of the I.T. Act, 1961 stated as follows:

"In this regard, please find the copy of approval taken from higher authorities and copy of statement of Shri Ashok Kumar Kayan."

9. The findings returned by the authorities in the orders disposing of the objections of the petitioner under Section 148 of the I.T. Act, 1961 are official acts and hence attract the presumption of correctness in their favour. This legal presumption of correctness is the prop and the pillar of legitimacy of all official acts. The presumption is rebuttable. However, the burden lies upon the petitioner to rebut the presumption. The petitioner on his part has taken the following plea in the writ

petition to rebut the said presumption:

“That the order of the respondent no.1, dated 28.10.2019 in para 3.2 as stated that it is supplying the copy of the approval of the respondent no. 2, granted u/s 151 (1) of the Act, after accepting the objection of the petitioner relating to the decision of Sabh Infrastructure Ltd. (Supra) & Godawari Saraf (Supra) but no such approval was appended along with the objection dated 26.11.2019, as such the petitioner has reason to believe that no such mandatory approval as provided u/s 151 (1) of the Act, has been granted by the respondent no. 2, in pursuance of the guidelines of Sabh Infrastructure Ltd. (supra).”

10. We are afraid the aforesaid pleading is deficient and does not at all discharge the burden of proof which lay squarely upon the petitioner to reverse the presumption of correctness of the findings in the orders passed by the revisional authorities in discharge of their official duties. There is no reason or basis to decline the presumption of correctness in favour of the said findings so recorded in the orders passed by the revisional authorities regarding approval under Section 151 of I.T. Act, 1961 before initiation of proceedings under Section 148 of the I.T. Act, 1961. This Court has not been shown any reason or material to doubt the correctness of the finding recorded in the orders dated 28.10.2019 and 26.11.2019 that the notice under Section 148 of the I.T. Act, 1961 was issued after taking prior approval under Section 151 of the I.T. Act, 1961 from the Ld. Pr. Commissioner of Income Tax, Noida. This finding has not been shown to be perverse in any manner and is not liable to be interfered with by this Court. The argument on behalf of the petitioner is accordingly rejected.

11. There is more to the controversy.

12. The “reasons to believe” of the Assessing Officer that income had escaped assessment have been recorded in meticulous detail on 22.03.2019 by the assessing authority. The material on which such “reasons to believe” were founded are also disclosed in the order. The order dated 22.03.2019 passed by the Deputy Commissioner of Income Tax, Circle-1, Noida, regarding sufficiency of “reasons to believe” on which foot the proceedings under Section 147 of the I.T. Act, 1961 are liable to be initiated, contains a recital regarding information from credible sources regarding tax fraud in the case of M/s DLS Exports Pvt. Ltd. and related beneficiaries.

13. The enquiry made in pursuance of the aforesaid information revealed that one Devesh Upadhyay a well known Kolkata based entry operator admitted that he used the bank accounts of the companies which were under his sole control and management for layering the funds and providing accommodation entries in the form of bogus Share Capital/Premium, bogus LTCG/STCG. Statements of Ashok Kayan, Bikash Surekha and Sunil Kayan were also recorded on oath under Section 131 of the I.T. Act, 1961. The said persons in their statements admitted that their bank accounts were used for layering funds and providing accommodation entries in the form of bogus Share Capital/Premium, bogus LTCG/STCG to several beneficiaries. The name of the petitioner appeared in the list of the beneficiaries.

14. In the face of such statements and evidences it was recommended that during assessment proceedings the Assessing Officer is required to

record the statements again for corroborating the evidences so collected.

15. In the wake of such material emanating from the said enquiry the Deputy Commissioner of Income Tax, Circle-1, Noida recorded his satisfaction and set forth his “reasons to believe” regarding the escapement of tax in the following manner:

“ I have perused the above information and it is seen that the name of assessee Shri Deepak Gupta is appearing at Sr. No. 125 and it is seen that the assessee is one of the beneficiaries and received Rs. 49,10,240/- from the sale proceeds of the shares of M/s DLS Exports Pvt. Ltd. From the enquiries conducted, it has been established that M/s DLS Exports Pvt. Ltd, was involved in layering of funds and providing accommodation entries in the form of bogus LTCG/STCL to several beneficiaries and assessee is one of them. I have analysed the details from the return filed by the assessee for A.Y. 2012-13 and it is seen that the assessee has not declared any Capital Gain in his return of income. It is clear from the details available on record that the assessee has concealed the capital gain of Rs. 40,10,240/- has escaped assessment for AY 2012-13 with the meaning of provisions of Section 147 of the I.T. Act, 1961.”

16. Accordingly proceedings under Section 147 of the I.T. Act, 1961 were initiated to assess the escaped income for Assessment Year 2012-13.

17. At this stage it would be apposite to reflect on some relevant aspects of the statements given by Ashok Kumar Kayan under Section 131 of the I.T. Act, 1961 under oath before the income tax authority at Kolkata which was part of the investigations which led to unearthing of the surreptitious transactions which facilitated the escapement of assessment. In the telling of the said Ashok Kumar Kayan under oath the modus of operandi of the parties to the bogus transactions to

facilitate escapement of income was thus described:

“Q.7 Please state the modus of operandi in respect to providing bogus LTCCG/STCL through Penny Stock.

Ans. I would like to state that there was a syndicate working in Penny Stock. At first level, client with unaccounted cash approach to the entry operators for getting LTCCG. The entry operator in turn approach a set of broker who are in their network. The brokers work in co-ordination with each other so that trades are time synchronised and the scrips remains with cartel of broker and entry operator only. The share prices are rigged so that a penny stock gets a high value over a period of one year. Once, the scrips are retain beyond a period of one year in the clients accounts they are sold to some jammakharchi company which are operated by the same set of entry operator so the client get LTCCG. Further, since the jammakharchi client has purchased the scrips at the higher rate, the rates are lowered over a period of time so that they get capital losses which they can claim in their return of income. Hence, while the individual clients incur long term capital gain, the jamma kharchi company clients earns short term capital loss and there is tax evasion at both the levels.”

18. A perusal of the “reasons to believe” required under Section 147 of the I.T. Act, 1961 and stated in the order dated 22.03.2019 establishes the fact that the escapement of the income of the petitioner from assessment for the relevant assessment years was part of a larger network which facilitated defrauding of the Revenue on an organised and systematic basis. The authority had credible material before it to come to this conclusion. Further the authority while recording its reasons under Section 147 of the I.T. Act, 1961 on 22.03.2019 duly applied its mind to all the relevant materials in the record.

19. The scope of the expression “reason to believe” and the nature of the belief formed by the assessing officer that the income for any assessment year has escaped assessment arose for consideration before

the Hon'ble Supreme Court in **Assistant Commissioner of Income Tax Vs Rajesh Jhaveri Stock Brokers (P) Ltd.** reported at (2007) 291 ITR 500. The Hon'ble Supreme Court in **Asstt. CIT Vs Rajesh Jhaveri Stock Brokers (P) Ltd (supra)** held thus:

“Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word 'reason' in the phrase 'reason to believe' would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion.....At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is 'reason to believe', but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction.”

20. Dealing with the scheme of Section 147 to 163 in a composite fashion was considered by the Hon'ble Bombay High Court in **Prashant S. Joshi Vs Income Tax Officer, Ward 19 (2)(4)**, reported at (2010) 324 ITR 154. The Hon'ble Bombay High Court elucidated the scope of the provisions as under:

“9. Section 147 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 148-163, 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 the section. The first proviso to Section 147 has no application in the facts of this case. The basic postulate which underlines

Section 147 is the formation of the belief by the Assessing Officer that any income chargeable to tax has escaped assessment for any assessment year. The Assessing Officer must have reason to believe that such is the case before he proceeds to issue a notice under Section 147. The reasons which are recorded by the Assessing Officer for reopening an assessment are the only reasons which can be considered when the formation of the belief is impugned. The recording of reasons distinguishes an objective from a subjective exercise of power. The requirement of recording reasons is a check against arbitrary exercise of power. For it is on the basis of the reasons recorded and on those reasons alone that the validity of the order reopening the assessment is to be decided. The reasons recorded while reopening the assessment cannot be allowed to grow with age and ingenuity, by devising new grounds in replies and affidavits not envisaged when the reasons for reopening an assessment were recorded. The principle of law, therefore, is well settled that the question as to whether there was reason to believe, within the meaning of Section 147 that income has escaped assessment, must be determined with reference to the reasons recorded by the Assessing Officer. The reasons which are recorded cannot be supplemented by affidavits. The imposition of that requirement ensures against an arbitrary exercise of powers under Section 148.”

21. Similarly the Division Bench of the Hon'ble Bombay High Court in **N.D. Bhatt, IAC Vs I.B.M. World Trading Corporation** reported at **(1995) 216 ITR 811**, construed the ambit of Section 148 and observed as under:

“ It is also well settled that the reasons for reopening are required to be recorded by the assessing authority before issuing any notice under section 148 by virtue of the provisions of section 148 (2) at the relevant time. Only the reason so recorded can be looked at for sustaining or setting aside a notice issued under section 148. In the case of Equitable Investment Co. (P.) Ltd. vs. ITO [1988] 174 ITR 714 a Division Bench of the Calcutta High Court has held that where a notice issued under section 148 of the IT Act, 1961, after obtaining the sanction of the CIT, is challenged, the only document to be looked into for determining the validity of the notice is the report on the basis of which the sanction of the CIT has been obtained. The IT Department cannot rely on any other material apart from the report.”

22. The same principal was reiterated in another Division Bench judgment of the Hon'ble Bombay High Court in **Hindustan Lever Ltd. Vs R.B. Wadkar** reported at **(2004) 268 ITR 332**.

“...the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the AO to disclose an open his mind through reasons recorded by him. He has to speak through his reasons.... The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the AO. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The AO, in the event of challenge to the reasons must be able to justify the same based on material available on record.... That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the AO cannot be supplemented by filing affidavit of making oral submission, otherwise, the reasons which are lacking in material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.”

23. In the light of the facts found in the earlier part of the judgment and the position of law distilled in the immediately preceding paragraphs, this Court finds that the satisfaction arrived at by the authority satisfies all the requirements of law as contemplated under Section 147 of the I.T. Act, 1961 and explained by judicial pronouncements in that regard.

24. The petitioner was granted full opportunity to state his case before the authorities in his objections against the issuance of notice under Section 148 of the I.T. Act, 1961 for the Assessment Year 2012-13. The petitioner duly availed the aforesaid remedy. The authorities

while deciding the objections of the petitioner passed detailed speaking orders which again reflect due application of mind on the facts and material in the record.

25. The Deputy Commissioner of Income Tax, Circle-5(1) (1), Gautam Buddh Nagar while disposing of the aforesaid objection of the petitioner against issuance of the notice under Section 148 in its order dated 26.11.2019 considered the objections of the petitioner. The objections of the petitioner were dealt with on a point to point basis. While passing the order dated 26.11.2019 the competent Revenue Authority found that necessary pre-requisite of Section 147 that “**there should be an escapement of income**” stood fulfilled. The reasons recorded in that regard were found to be valid. The authority also noticed the admission of the assessee that he had “incurred Long Term Capital Gain of Rs. 47,43,264/- during Financial Year 2011-12, however, the same has not been disclosed in his ITR.”

26. The validity of the refusal of the request of the petitioner to cross examine Ashok Kumar Kayan, Sunil Kumar Kayan, Devesh Kumar Kayan whose statements were part of the material, was also affirmed in the following terms;

“ In this regard, it is clarified that the undersigned cannot compel any other person for such cross examination as all these persons are not residing within 200 km. From the office of the undersigned. Therefore they cannot be summoned/called upon for such cross examination. The Income Tax Act, 1961 does not have any provision which may empower the undersigned to enforce the cross examination of a third party by the assessee. However, the statements of Shri Ashok Kumar Kayan are being provided to the assessee for

ready reference.”

27. No provision was pointed out during the course of the argument which could compel us to take a differing view from that of the authority passing the order dated 26.11.2019.

28. Before parting, we would like to deal with another issue in the interest of justice. We have already found as a matter of fact that the recital in the order dated 28.10.2019 as well as order dated 26.11.2019 that the due approval under Section 151 of the I.T. Act, 1961 was taken from the competent authority is not liable to be interfered with in light of the insufficient pleadings. However, the nature of right of the assessee to be provided a copy of the order of prior approval under Section 151 of the I.T. Act, 1961 as understood by the authority passing the order dated 28.10.2019 has to be adverted to. The authority denied a copy of the approval granted by the competent authority under Section 151 of the I.T. Act, 1961 to the petitioner for the following reasons:

“ However, the AR of the assessee has contested that the copy of approval was not provided with the reasons recorded. In this regard, it is informed that the approvals taken from higher authorities are internal matter of the department for communication hence, the same cannot be provided. Further, the assessee has cited case law of Hon'ble Delhi High Court in support of his claim. It is hereby clarified that the case law of Hon'ble Delhi High Court is not binding on the undersigned. However, if the assessee has case laws of jurisdictional High Court or Hon'ble Supreme Court, the same may be communicated accordingly. Therefore, the above ground of the assessee is not acceptable hence rejected.”

29. The aforesaid finding of the Revenue authority is unsustainable in law. Approval under Section 151 of the I.T. Act, 1961, prior to initiation

of proceedings under Section 148 of the I.T. Act, 1961 is a jurisdictional pre-requisite. In the absence of such approval the proceedings would fall to the ground for want of jurisdiction. As such, the assessee is fully entitled to a copy of the order passed under section 151 of the I.T. Act, 1961 and correspondingly, the Assessing Officer is obliged to hand-over a copy of the same, as and when the assessee seeks for it.

30. There is no infirmity in the reassessment proceedings and the same are not liable to be interfered with.

31. The writ petition is accordingly disposed of finally.

32. Let a copy of this judgment and order be transmitted by the Registry to the Principal Commissioner of Income Tax, Uttar Pradesh, for circulation.

Order Date :- 17.01.2020
Pravin

(Biswanath Somadder,J.)

(Ajay Bhanot,J.)