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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.722 OF 2011

DSJ Communication Ltd.Petitioner
V/s.
Dy. Commissioner of Income Tax, Circle-2(1) & Anr. ...Respondents

Mr.Salil Kapoor with Mr.Satendra Kumar Pandey i/b Mr.Jitendra Singh for the Petitioner.

Mr.Vimal Gupta for the Respondents.

CORAM : S.J. VAZIFDAR AND
M.S. SANKLECHA, JJ.
DATE : 13TH SEPTEMBER, 2012.

P.C. :-

1. The petitioner has sought inter-alia a writ of certiorari to quash a notice under section 148 of the Income Tax Act, 1961 dated 28.1.2004 issued by respondent No.1 and an order dated 4.3.2011. Respondent No.2 is the Commissioner of Income Tax.

2. On 28.11.1997, the petitioner filed its return of income, which was accepted under section 143(1). The impugned notice dated 28.1.2004 was issued within a period of four years. By a letter dated 16.3.2004, the petitioner requested for the reasons in respect of the impugned notice. On 14.3.2005, the assessment order was passed under section 143(3) read with section 147 by making certain

additions and disallowances. The same was done without respondent No.1 having furnished the reasons.

3. For the purpose of this petition, it is not necessary to consider the merits of the assessment order dated 14.3.2005. Nor is it necessary to consider the submission that the assessment order was passed without establishing that any income had escaped assessment. This is for the reason that the writ petition is liable to be allowed on one ground itself, in view of the judgment of a Division Bench of this Court, which we will refer to shortly.

4. By an order dated 17.11.2009, the Commissioner of Income Tax (Appeals) dismissed the petitioner's appeal. The petitioner had contended that the reasons for issuance of the impugned notice had not been furnished. It was held that the same had been furnished during the re-assessment proceedings.

5. The petitioner had filed an appeal before the Income Tax Appellate Tribunal inter-alia on the ground that the reasons had not been furnished by the Assessing Officer before completing the assessment. It was further contended before the Tribunal that in spite of a specific request by a letter dated 16.3.2004, respondent No.1 had not furnished the reasons recorded for issuing the impugned notice. The Tribunal by an order dated 30.9.2010 set aside the order of the AO in view of the absence of the respondents having

communicated the reasons for the impugned notice. The Tribunal remanded the matter to the AO with a direction to communicate the reasons for re-opening the assessment and thereafter to pass a fresh order after considering the petitioner's objections thereto, if any. The appeal before the Tribunal was accordingly disposed of.

6. Subsequently, under cover of a letter dated 10.2.2011, the reasons were furnished to the petitioner. For the purpose of this petition, it is sufficient to note that the reasons were furnished by respondent No.1 – Deputy Commissioner of Income Tax. Below the signature of respondent No.1, an Additional Commissioner of Income Tax, Range-2 (1), Mumbai has signed the following endorsement :-

“Put up for approval for issue of notice u/s. 148 of the Income-tax Act, 1961”

7. Mr.Kapoor relied upon section 151, which reads as under :-

“151. Sanction for issue of notice.—

(1) In a case where an assessment under sub-section (3) of Section 143 or Section 147 has been made for the relevant assessment year, no notice shall be issued under Section 148 by an Assessing Officer, who is below the rank of Assistant Commissioner or Deputy Commissioner, unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice:

Provided that, after the expiry of four years from the end of the relevant assessment year, no such notice

shall be issued unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer aforesaid, that it is a fit case for the issue of such notice.

(2) In a case other than a case falling under sub-section (1), no notice shall be issued under Section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.

Explanation.— For the removal of doubts, it is hereby declared that the Joint Commissioner, the Commissioner or the Chief Commissioner, as the case may be, being satisfied on the reasons recorded by the Assessing Officer about fitness of a case for the issue of notice under Section 148, need not issue such notice himself.”

Mr.Kapoor submitted firstly that the approval as required by section 151 had not been obtained. Secondly, he submitted that in any event, even according to the respondents, the approval of the CIT-2 was obtained. In other words, admittedly, the approval of the Joint Commissioner was not taken. The impugned order is therefore, according to him, liable to be set aside.

8. The endorsement at the foot of the reasons merely directed that the matter be “Put up for approval” for issue of a notice under section 148. There is nothing on record that indicates that the same was actually put up for approval. Nor is there anything to indicate that the approval was in fact granted.

9. Mr.Gupta, the learned counsel appearing on behalf of the respondents submits that it must be presumed from the said endorsement that the approval had been granted. He was however, unable to produce the approval despite our having granted him an opportunity of doing so. The affidavit in reply does not annexe the approval. Despite a further opportunity in Court, the approval was not produced.

Mr.Gupta relied upon paragraph 4 of the petitioner's objections contained in the petitioner's letter dated 3.3.2011, which reads as under :-

“4. The sanction given by the Addl.CIT is also not proper as the reasons recorded merely contains the signature of the Addl.CIT but not his comments. If the Addl.CIT has given any separate comments, kindly furnish us a copy of the same for our rebuttal. In absence of any separate comments, the sanction or approval is not proper and therefore, the reopening against lacks jurisdiction”.

The word used in paragraph 4 is “comments” and not “approval”. It is difficult to read the paragraph as an admission on the petitioner's part that the Additional Commissioner had in fact granted his approval. In any event, if he had in fact granted approval, it was for the respondents to produce the same. The respondents cannot merely rely upon their interpretation of a submission by the petitioner in this regard. At the cost of repetition, the respondents have failed to produce the approval of the Additional Commissioner or the Joint

Commissioner either in the affidavit in reply or even otherwise, although they were granted an opportunity of doing so. Whether the approval was granted or not is an objective fact which can be established only by producing the approval. It is not the respondents' case that the approval was in fact granted, but is misplaced.

10. Indeed the respondents' case is to the contrary. In paragraphs 4(iii) and 8 of the affidavit in reply, it is expressly stated that the impugned notice was issued "with the approval of CIT-2, Mumbai." There is not a whisper about the Additional Commissioner or the Joint Commissioner having granted the approval. The alleged approval therefore, in any event, is contrary to the provisions of section 151, as held in the judgment of a Division Bench of this Court, to which one of us (M.S. Sanklecha, J.) was a party, dated 12.3.2012 in *Shri Ghanshyam K. Khabrani vs. Assistant Commissioner of Income Tax Circle-1, Thane & Others*. The Division Bench held as under :-

"6 The second ground upon which the reopening is sought to be challenged is that the mandatory requirement of Section 151(2) has not been fulfilled. Section 151 requires a sanction to be taken for the issuance of a notice under Section 148 in certain cases. In the present case, an assessment had not been made under Section 143(3) or Section 147 for A.Y. 200405. Hence, under sub section 2 of Section 151, no notice can be issued under Section 148 by an Assessing officer who is below the rank of Joint Commissioner after the expiry of 4 years from the end of the relevant Assessment Year unless the

Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice. The expression "Joint Commissioner" is defined in Section 2(28C) to mean a person appointed to be a Joint Commissioner of Income Tax or an Additional Commissioner of Income Tax under Section 117(1). In the present case, the record before the Court indicate that the Assessing Officer submitted a proposal on 28 March 2011 to the CIT(1) Thane through the Additional Commissioner of Income Tax Range (I) Thane. On 28 March 2011, the Additional CIT forwarded the proposal to the CIT and after recording a gist of the communication of the Assessing Officer stated that :

"As requested by the A.O. Necessary approval for issue of notice u/s. 148 may kindly be granted in the case, if approved."

On this a communication was issued on 29 March 2011 from the office of the CIT (1) conveying approval to the proposal submitted by the Assessing officer. There is merit in the contention raised on behalf of the Assessee that the requirement of Section 151(2) could have only been fulfilled by the satisfaction of the Joint Commissioner that this is a fit case for the issuance of a notice under Section 148. Section 151(2) mandates that the satisfaction has to be of the Joint Commissioner. That expression has a distinct meaning by virtue of the definition in Section 2(28C). The Commissioner of Income Tax is not a Joint Commissioner within the meaning of Section 2(28C). In the present case, the Additional Commissioner of Income Tax forwarded the proposal submitted by the Assessing Officer to the Commissioner of Income Tax. The approval which has been granted is not by the Additional Commissioner of Income Tax but by the Commissioner of Income Tax. There is no statutory provision here under which a power to be exercised by an officer can be exercised by a superior officer. When the statute mandates the satisfaction of a particular functionary for the exercise of a power, the satisfaction must be of that authority. Where a statute

requires something to be done in a particular manner, it has to be done in that manner. In a similar situation the Delhi High Court in Commissioner of Income Tax Vs. SPL'S Siddhartha Ltd. (ITA No.836 of 2011 decided on 14 September 2011) held that powers which are conferred upon a particular authority have to be exercised by that authority and the satisfaction which the statute mandates of a distinct authority cannot be substituted by the satisfaction of another. We are in respectful agreement with the judgment of the Delhi High Court.

7 In view of the findings which we have recorded on submissions (i), (ii) and (iv), it is not necessary for the Court to consider submission (iii) which has been urged on behalf of the Assessee. Once the Court has come to the conclusion that there was no compliance of the mandatory requirements of Section 147 and 151(2), the notice reopening the assessment cannot be sustained in law.”

11. In view of the above conclusion, we did not permit Mr.Kapoor to advance any other arguments. It is therefore, also not necessary to consider the other prayers.

12. In the circumstances, Rule is made absolute in terms or prayer (a).

There shall be no order as to cost.

(M.S. SANKLECHA, J.)

(S.J. VAZIFDAR, J.)