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IN THE HIGH COURT OF ORISSA AT CUTTACK

WRIT PETITION (CIVIL) No.2936 of 2018

(An application under Articles 226 and 227 of the Constitution of India)

Sri Sai Cashews *Petitioner*

-versus-

The Chief Commissioner of Income Tax, Bhubaneswar and Others *Opposite Parties*

Appeared in this case:

For Petitioner : Mr. Sidhartha Ray, Advocate

For Opposite Parties : Mr. R.S. Chimanka
Senior Standing Counsel (IT)

**CORAM:
THE CHIEF JUSTICE
JUSTICE B.P. ROU TRAY**

JUDGMENT

23.08.2021

Dr. S. Muralidhar, CJ

1. The challenge in the present writ petition is to an assessment order dated 29th December, 2017 passed by the Assistant Commissioner of Income Tax, Central Circle-I, Bhubaneswar (Opposite Party No.2) under Section 143(3) read with Section 153 C of the Income Tax Act, 1961 ('Act') for the Assessment Year (AY) 2016-17 and the second notice of demand of the same date issued by the Opposite Party No.2 under Section 156 of the Act calling upon the Petitioner to pay a sum of Rs.7,71,81,350/-.

2. On 18th June, 2018 this Court *inter alia* allowed two applications seeking amendment of the writ petition viz., Misc. Case No.3489 of 2018 Misc. Case No.4517 of 2018 whereby certain averments were permitted to be inserted to the effect that the Petitioner's assessment were reopened under Section 153C of the Act for the AY 2012-13 to 2016-17 and that the Assessing Officer (AO) had not recorded a satisfaction note before initiation of the proceedings under Section 153 C of the Act.

3. I.A. No.9051 of 2018 has thereafter been filed seeking to insert para 18 to the effect that the AO had not stated that incriminating materials belonging to the Petitioner was seized from the searched persons and therefore, the proceedings were liable to be quashed.

4. For the reasons stated therein, I.A. No.9051 of 2018 is allowed.

5. This Court has heard the submission of Mr. Sidhartha Ray, learned counsel for the Petitioner and Mr. R.S. Chimanka, learned Senior Standing Counsel for the Opposite Party (IT Department).

6. The background facts are that the Petitioner firm is engaged in the business of manufacturing/processing of cashew nuts into cashew kernel. It filed its original return of income on 18th October, 2016 for the AY 2016-17 declaring the total income at Rs.8,94,1000/-. The Authorized Officer (ITO) at Keonjhar undertook a survey operation under Section 133A of the Act on 12th February, 2016. Instead of conducting a survey assessment

Opposite Party No.2 invoked the jurisdiction under Section 153C of the Act for making a block assessment for the AYs 2010-11 to 2016-17. This was as a result of searches being conducted in the premises of Sri Jami Ramesh and Sri Jami Sivasai

7. Mr. S. Ray, learned counsel for the Petitioner first submits that there was no recording of satisfaction by the AO of the searched persons, Sri Jami Ramesh and Sri Jami Sivasai, that the materials seized during the said search revealed the undisclosed income of a 3rd person viz., the present Petitioner and no such note of satisfaction was transmitted to the AO having jurisdiction to assess the present Petitioner under Section 153C of the Act. He points out that even the assessment orders passed under Sections 153A in respect of the searched persons do not indicate that any incriminating materials vis-à-vis the present Petitioner was found during the course of search.

8. The above submissions have been considered. It is seen in the present case that the documents relied upon by the AO were found in the course of survey of the Petitioner and not during the search of the aforementioned two persons viz., Sri Jami Ramesh and Sri Jami Sivasai against whom the search authorization was issued under Section 132 of the Act.

9. In terms of the circular dated 31st December, 2015 issued by the Central Board of Direct Taxes (CBDT) it was explained that

before initiation of the proceedings under Section 153C of the Act the following steps are imperative:

- (i) a satisfaction note has to be prepared either at the time of or along with the initiation of the proceedings; or
- (ii) in the course of the assessment proceeding under Section 153C of the Act; or
- (iii) immediately after the assessment proceedings are completed of the search persons.

10. Section 153C of the Act has been held to be similar to Section 158 BD of the Act. Therefore, the law explained in the judgment of the Supreme Court in ***Commissioner of Income Tax (CIT) v. Calcutta Knitweaves (2014) 362 ITR 673 SC*** applies. In the said decision the Supreme Court while interpreting Section 158 BD of the Act explained the legal position as under:

“We would certainly say that before initiating proceedings under Section 158BD of the Act, the assessing officer who has initiated proceedings for completion of the assessments under Section 158BC of the Act should be satisfied that there is an undisclosed income which has been traced out when a person was searched under Section 132 or the books of accounts were requisitioned under Section 132A of the Act. This is in contrast to the provisions of Section 148 of the Act where recording of reasons in writing are a sine qua non. Under Section 158BD the existence of cogent and demonstrative material is germane to the assessing officers’ satisfaction in concluding that the seized documents belong to a person other than the searched person is necessary for initiation of action

under Section 158BD. The bare reading of the provision indicates that the satisfaction note could be prepared by the assessing officer either at the time of initiating proceedings for completion of assessment of a searched person under Section 158BC of the Act or during the stage of the assessment proceedings. It does not mean that after completion of the assessment, the assessing officer cannot prepare the satisfaction note to the effect that there exists income tax belonging to any person other than the searched person in respect of whom a search was made under Section 132 or requisition of books of accounts were made under Section 132A of the Act. The language of the provision is clear and unambiguous. The legislature has not imposed any embargo on the assessing officer in respect of the stage of proceedings during which the satisfaction is to be reached and recorded in respect of the person other than the searched person.

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In the result, we hold that for the purpose of Section 158BD of the Act a satisfaction note is sine qua non and must be prepared by the Assessing Officer before he transmits the records to the other Assessing Officer who has jurisdiction over such other person. The satisfaction note could be prepared at either of the following stages : (a) at the time of or along with the initiation of proceedings against the searched person under Section 158BC of the Act; (b) along with the assessment proceedings under Section 158BC of the Act; and (c) immediately after the assessment proceedings are completed under Section 158BC of the Act of the searched person.”

11. In the present case, the Department has not been able to dispute any of the above factual averments. In particular there is no denial that no incriminating materials concerning the present Petitioner were found in the premises of the two searched persons

i.e. Sri Jami Ramesh and Sri Jami Sivasai. The absence of the satisfaction note of the AO of the searched persons about any such incriminating material vis-à-vis the present Petitioner is also not disputed. The assessment order challenged in the present petition relates to disallowance of expenditure under Section 140A(3) of the Act that is payable to the cultivators, expenses towards Hamali i.e. labour charges, unexplained money under Section 69A of the Act, negative cash and unaccounted stock. This was not on account of the discovery of incriminating materials concerning the Petitioner found in the course of the search. In fact there was no search warrant under Section 132 of the Act against the Petitioner firm.

12. The legal position as regards Section 153 C of the Act has been explained in the decision of Delhi High Court in *Pepsi Foods P. Ltd. v. Assistant Commissioner of Income Tax (2014) 367 ITR 112 (Delhi)* where it was observed as under:

“On a plain reading of Section 153C, it is evident that the Assessing Officer of the searched person must be "satisfied" that inter alia any document seized or requisitioned "belongs to" a person other than the searched person. It is only then that the Assessing Officer of the searched person can handover such document to the Assessing Officer having jurisdiction over such other person (other than the searched person). Furthermore, it is only after such handing over that the Assessing Officer of such other person can issue a notice to that person and assess or re-assess his income in accordance with the provisions of Section 153A. Therefore, before a notice under Section 153C can be issued two steps have to be taken. The first step

is that the Assessing Officer of the person who is searched must arrive at a clear satisfaction that a document seized from him does not belong to him but to some other person. The second step is - after such satisfaction is arrived at - that the document is handed over to the Assessing Officer of the person to whom the said document "belongs". In the present cases it has been urged on behalf of the petitioner that the first step itself has not been fulfilled. For this purpose it would be necessary to examine the provisions of presumptions as indicated above. Section 132 (4A) (i) clearly stipulates that when inter alia any document is found in the possession or control of any person in the course of a search it may be presumed that such document belongs to such person. It is similarly provided in Section 292C(1)(i). In other words, whenever a document is found from a person who is being searched the normal presumption is that the said document belongs to that person. It is for the Assessing Officer to rebut that presumption and come to a conclusion or "satisfaction" that the document in fact belongs to somebody else. There must be some cogent material available with the Assessing Officer before he/she arrives at the satisfaction that the seized document does not belong to the searched person but to somebody else. Surmise and conjecture cannot take the place of "satisfaction".

13. Subsequently, the legal position was reiterated in *Pepsico India Holdings P. Ltd. v. Assistant Commissioner of Income Tax (2015) 370 ITR 295 (Del)*, where after discussing the decision in *Savesh Kumar Agarwal v. Union of India (2013) 353 ITR 26 (All)* the Delhi High Court held as under:

“From the foregoing discussion, it is evident that in order that the Assessing Officer of the searched

person comes to the satisfaction that documents or materials found during the search belong to a person other than the searched person, it is necessary that he arrives at the satisfaction that the said documents or materials do not belong to the searched person.”

14. In view of the clear legal position explained in the above decisions, and in the absence of incriminating materials vis-a-vis the present Petitioner being found in the course of the search of the searched persons viz., Sri Jami Ramesh and Sri Jami Sivasai, the impugned assessment order and the consequential demand order are unsustainable in law and are hereby set aside. The writ petition is allowed in the above terms, but in the circumstances, with no order as to costs.

15. An urgent certified copy of this order be issued as per rules.

(S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge

S.K.Jena/PA