

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3554 OF 2019

Svitzer Hazira Pvt. Ltd.	]	
302 Delta, Hiranandani Business Park,	]	
Powai, Mumbai – 400 076.	]	... Petitioner

Versus

1. Assistant Commissioner of Income Tax	]	
Circle-5(3)(2), Room No.583, 5 th Floor,	]	
Aayakar Bhavan, M. K. Road,	]	
Mumbai-400 020.	]	
2. Joint / Addl. Commissioner of Income-tax,	]	
Range-5(3), Room No.521, 5 th Floor,	]	
Aayakar Bhavan, M. K. Road,	]	
Mumbai-400 020.	]	
3. The Union of India	]	
Through the Secretary,	]	
Government of India,	]	
Ministry of Finance,	]	
New Delhi – 110 001.	]	... Respondents

Mr. Nishant Thakkar a/w Mr. Hiten Chande i/b PDS Legal for Petitioner.
 Mr. Sham V. Walve a/w Mr. Pritish Chatterjee for Respondent Nos.1 & 2.

CORAM :- K. R. SHRIRAM &
AMIT B. BORKAR, JJ.
DATE :- 21 DECEMBER, 2021

ORAL JUDGMENT : (PER : AMIT B. BORKAR. J.) :-

1. Rule. Rule is made returnable forthwith by consent of parties.

2. By this Petition under Article 226 of Constitution of India, the Petitioner is challenging notice dated 31/03/2019 reopening assessment for AY 2014-15, order dated 28/11/2019 disposing of the objections of Petitioner against the reopening of assessment and notice dated 09/10/2019 issued under Section 143(2) and 142(1) of Income Tax Act, 1961 (hereinafter referred to as 'the Act').

3. Since we are disposing of the present petition only on the ground of lack of prior approval as contemplated under Section 151 of the Act, only those facts essential for adjudication of the said issue are stated hereinafter.

4. The Petitioner is incorporated under the Companies Act, 1956. It provides tailor-made marine services to LNG terminals, ports, and oil & gas terminals around the world.

5. On 31/03/2019, Respondent No.1 uploaded a notice under Section 148 of the Act and reasons for reopening the assessment on the ITBA portal, informing that the assessment for AY 2014-15 has been reopened and requested the Petitioner to file a return of income for that year. The notice was uploaded at 2.40 p.m. on 31/03/2019 on the portal under the digital signature of Respondent No.1. Respondent No.1

furnished a copy of the approval necessary before issuing notice. Petitioner contends that said approval was signed at 2.55 p.m. on 31/03/2019 by the specified authority under Section 151 of the Act.

6. On 26/04/2019, Petitioner filed the original return of income in response to the said notice under Section 148 of the Act. On 14/06/2019, Petitioner filed objections against the reopening of assessment, stating that the notice issued under Section 148 was issued merely based on a change of opinion without any fresh or tangible material on record. It is also stated that the notice under Section 148 had been issued without prior sanction under Section 151 of the Act, and in any case, the sanction had been granted without any application of mind.

7. On 09/10/2019, Respondent No.1 issued a notice under Section 143(2) of the Act and Section 142(1) of the Act requesting Petitioner to attend his office on 16/10/2019 at 11.00 a.m. Petitioner, vide order dated 15/10/2019, informed Respondent No.1 that the objections against the reopening notice have not been disposed of. On 29/11/2019, Respondent No.1 passed the order of disposing of objections holding that notice under Section 147 is based on tangible material.

8. Petitioner has filed the present petition for the reliefs stated above. This Court, on 18/12/2019, granted time to Respondents to file a reply. However, the Respondents, till today, have failed to file their reply. Therefore, the petition is being decided without the reply of Respondents.

9. Mr. Nishant Thakkar, learned Counsel for Petitioner, *inter alia*, submitted that Respondent No.1 has committed an error of jurisdiction by passing the re-assessment order without there being valid sanction as contemplated under Section 151 of the Act. He submitted that prior approval under Section 151 of the Act is mandatory. From the copy received by the Petitioner, it is clear that the notice was issued at 2.40 p.m. and sanction under Section 148 was granted at 2.55 p.m. He submitted that Respondent No.1 was not justified in observing while disposing of the objections that the approval of competent authority was taken physically. After that, approval was granted online. He submitted that the proceedings under Section 148 of the Act are therefore vitiated.

10. Mr. Sham Walve, learned Counsel for Respondent Nos.1 and 2, submitted that Respondent No.1 had initially granted prior approval physically. However, online approval was granted after that, which was uploaded by digital signature at 2.55 p.m. on 31/03/2019. He, therefore, submitted that there is substantial compliance of prior approval as contemplated by Section 151 of the Act.

11. It must be noted that Sections 147 and 148 grant power to Revenue to reopen the earlier assessment and therefore Assesseees are protected by safeguard against unnecessary harassment. Prior approval as contemplated by section 151 operates as a shield from the arbitrary exercise of power by the Assessing Officer. The power of prior approval has been conferred on the superior Officer so that the superior Officer shall examine the reasons, material or grounds and adjudicate whether they are sufficient and adequate to the formation of necessary belief on the part of the Assessing Officer. It is, therefore, necessary for the superior Officer to apply his mind and record his reasons howsoever brief so that the Assessing Officer's belief is well reasoned and *bona fide*. The remark on the part of superior authority must indicate application of mind by giving reasons for prior approval.

12. The legislature has advisedly used the expression '*No notice shall be issued*' in section 151. The expression '*No notice shall be issued*' cannot be construed to mean post-facto approval. The expression "*No notice shall be issued*" reflects the intention of the legislature to indicate that prior approval is the *sine qua non* before issuance of notice under Section 148 of the Act. The purpose of insertion of expression '*No notice shall be issued*' before issuing a notice of re-assessment is to avoid harassment to taxpayers and the arbitrary exercise of the power to reopen

the assessment. It is introduced as an in-built safeguard by the legislature. Therefore, we have no doubt in holding that sanction to be granted by the authority under Section 151 has to be prior in point of time of issuance of notice under Section 148 of the Act.

13. In the facts of the present case, it is clear from the digital signature on the notice issued by Respondent No.1 that the notice was issued at 2.40 p.m. on 31/03/2019. The sanction by the authority under Section 151 was digitally signed at 2.55 p.m. on 31/03/2019. The explanation furnished by Respondent No. 1 in the order of disposing of objections that initially physical approval was granted and thereafter online approval was granted has not been supported by any material on record. We fail to understand the need to grant online approval at 2.55 p.m. if physical approval was already granted before 2.40 p.m. In the absence of valid explanation by cogent material, we cannot accept explanation by Respondent No.1 in the order of disposing of objections that physical approval was granted before issuance of notice under Section 148 of the Act.

14. We find that while according sanction, the Joint CIT, Range 5(3), Mumbai has recorded his approval in the following words:

‘Yes, I am satisfied’.

In the context of recording of reasons while according sanction under section 151 of Act, High Court of ***Madhya Pradesh, in the case of Commissioner of Income-tax, Jabalpur Vs. S. Goyanka Line & Chemicals Ltd.***¹, in paragraph 7 held as under :

“7. We have considered the rival contentions and we find that while according sanction, the Joint Commissioner, Income Tax has only recorded so "Yes, I am satisfied". In the case of Arjun Singh (supra), the same question has been considered by a Coordinate Bench of this Court, and the following principles are laid down :

‘The Commissioner acted, of course, mechanically in order to discharge his statutory obligation properly in the matter of recording sanction as he merely wrote on the format “Yes, I am satisfied” which indicates as if he was to sign only on the dotted line. Even otherwise also, the exercise is shown to have been performed in less than 24 hours of time which also goes to indicate that the Commissioner did not apply his mind at all while granting sanction. The satisfaction has to be with objectivity on objective material.”

15. The Apex Court, in the case of ***Chhugamal Rajpal Vs. S. P. Chaliha***², held as under :

“..... We are also of the opinion that the Commissioner has mechanically accorded permission. He did not himself record that he was satisfied that this was a fit case for the issue of a notice under section 148. To question No.8 in the report which reads “Whether the Commissioner is satisfied

¹ [2015] 56 taxmann.com 390 (Madhya Pradesh)

² [1971] 79 ITR 603 (SC)

that it is a fit case for the issue of notice under section 148”, he just noted the word “Yes” and affixed his signature thereunder. We are of the opinion that if only he had read the report carefully, he could never have come to the conclusion on the material before him that this is a fit case to issue notice under section 148. The important safeguards provided in sections 147 and 151 were lightly treated by the Income-tax Officer as well as by the Commissioner. Both of them appear to have taken the duty imposed on them under these provisions as of little importance. They have substituted the form for the substance.”

16. We are, therefore, satisfied that there is complete non application of mind on the part of Joint CIT, Range 5(3), Mumbai, while granting sanction under section 151 of Act. There is no prior sanction granted by Respondent No.2 before issuance of notice under Section 148 of the Act. Therefore, the jurisdictional condition of complying with Section 151 was not satisfied, resulting in Respondent No.1 committing the error of jurisdiction by issuing notice under Section 148 of the Act calling for interference under Article 226 of the Constitution of India.

17. We, therefore, pass the following order :-

“Rule is made absolute in terms of prayer clause (1) which reads thus :

(a) This Hon’ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner’s

case and after examining the legality and validity thereof quash and set aside the Impugned Notice under Section 148 of the Act (Exhibit "L") and the Impugned Order (Exhibit "Q") and the notice dated 9 October 2019 (Exhibit "O") issued by Respondent No.1."

(AMIT B. BORKAR, J.)

(K. R. SHRIRAM, J.)