



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO.3546 OF 2018

Rajbhushan Omprakash Dixit.] P etitioner

Versus

Deputy Commissioner of Income Tax]
Central Circle - 2(4), Mumbai.] R espondent

Mr. C. S. Agarwal, Senior Advocate a/w Mr. Sankalp Sharma & Mr. Ravikumar Mall i/b Mr. Prem Jha for Petitioner.
Mr. Suresh Kumar a/w Ms. Samiksha Kanani for Respondent.

**CORAM :- AKIL KURESHI &
SARANG V. KOTWAL, JJ.**
DATE :- 05 APRIL, 2019

P. C. :-

1. Heard learned Counsel for parties for final disposal of the petition.

2. The Petitioner, an individual, has challenged a notice dated 02/05/2017 issued by the Respondent - Deputy Commissioner of Income Tax.

3. Brief facts are as under :

The Petitioner, at the relevant time, was working as an independent Director of one M/s. Toporder Properties Pvt. Ltd. which was one of the Sterling Biotech Ltd. group companies. The said group of entities, including the Petitioner, was subjected to search and seizure action under Section 132(1) of the Income Tax Act, 1961 ('the Act', for short) and survey operations under Section 133A of the Act on 28/06/2011. Subsequent to the search, the Assessee filed the return of income for the Assessment Year 2011-2012 declaring total income of Rs.7.20 Lakhs (rounded of). The Assessing Officer completed the assessment under Section 153A read with 143(3) of the Act on 20/03/2014 accepting the Petitioner's returned income.

4. To reopen such assessment, he issued the impugned notice. In order to do so, he had recorded the following reasons :

Return of Income for the year under consideration was filed 23.02.2012 declaring total income of Rs.7,20,916/-. Subsequently, assessment u/s 153A r.w.s. 143(3) was finalized by the then DCIT, CC. 10, Mumbai on 20.03.2014 determining total income of Rs.7.20,980/-.

Search & Seizure action u/s. 132(1) of the I.T. Act was conducted in the Sterling Group of cases on 28.06.2011 by the DDIT (Inv.) Unit VII (4), Mumbai. In the Search and Seizure

action u/s. 132(1) several parties were involved at various places. Party No.17 conducted search at the premises of M/s. Sterling Biotech Ltd. at Sandesara Estate, Vadodara. During the course of search proceedings, the search party seized various documents being Annexure-A7, on perusal of Annexure-A7, it is observed that-

- i. Annexure-A7 consists of 152 pages.
(A) In the page no.8 dated 10.1.2011, the following entry is made inter alia -

Rs. 20,00,000/- cash received from Mr. R. B. Dixit at Delhi, the same is given to cash S.K.G. (through Gagan Dhawan).

The above entry in the seized document clearly reveals that the assessee had minimum cash in hand on 10.01.2011 of Rs.20,00,000-. The cash possessed by the assessee is not forming part of assessee's return of income for the year under consideration. This tantamount escapement of income within the meaning of Section 147 of the Income Tax Act.

Survey u/s. 133A was conducted in the case of M/s. PMT Machines Ltd., 20/B, Khatau Bldg., A. D. Marg, Fort, Mumbai by DDIT, (Inv) Unit-I, on 28.6.2011. The survey was conducted simultaneously when the Search & Seizure action was taken in the case of M/s. Sterling Group of cases on 28.06.2011 by the DDIT (Inv.) Unit VII(4), Mumbai. During the course of survey action 133A the survey team impounded certain documents which includes Annexures A-4 and A-5 inter alia. On perusal of these Annexures it is observed that these impounded documents include vouchers. These vouchers show the payments have been made to Shri R. B. Dixit on various dates as detailed below :-

<i>Annexure</i>	<i>Page No.</i>	<i>Date</i>	<i>Amount (Rs.)</i>
A-4	104	11.10.2010	18,00,000
A-4	65	8.06.2010	3,25,000
A-4	53	27.04.2010	5,35,000
A-4	45	15.11.2010	15,00,000
A-5	157	27.01.2011	16,00,000
A-5	139	8.9.2010	2,85,000
A-5	134	17.9.2010	11,50,000
A-5	49	12.01.2011	20,00,000
A-5	11	19.10.2010	20,00,000
		Total	85,35,000

The aforementioned amounts of Rs.85,35,000/- received by Shri R. B. Dixit for the reasons specified in the vouchers. These amounts received by the assessee is an income in his hands which is not offered for tax in the return of income and thereby not forming part of assessment order.

In the backdrop of above, the undersigned has reason to believe that the income has escaped within the meaning of section 147 of the I.T. Act, Accordingly notice u/s. 148 is being issued after obtaining necessary sanction required by provisions of Section 151 of the Pr. CIT, Central-1, Mumbai.

5. Upon being supplied the reasons, the Assessee raised objections to the notice of reopening of assessment under a letter dated 14th July, 2017. In such objections, he had, *inter alia*, contended as under :

The reference of the documents which is given in the reason for reopening of the case, were already available with the assessing officer at the time of assessment and after considering these documents/materials assessment concluded u/s. 143(3) w.r.t. 153A and hence it is stated that there is only difference of opinion and change of view. In the absence of the additional evidence other than seized material we hereby state that provisions of reassessment under section 147/148 is not warranted and is bad in law as it amounts to change in view.

6. The Assessing Officer rejected such objections by an order dated 19.09.2018. In such order, in relation to the Petitioner's contention of the documents relied upon in the reasons already available with the Assessing Officer during the original assessment, he stated as under :

*5. During the course of the assessment proceedings for the A.Y. 2-11-12, the assessee was not countered by the Assessing Officer with the entires found in Annexure A-7 seized during the search action at the premises of Sterling Biotech Ltd. at Sandesara Estate, Vadodra. The assessee was also not countered with the vouchers included in Annexure A-4 and A-5 which were impounded during the course of survey action u/s 133A on M/s. PMT Machines Limited on 28.06.2011. The Assessing Officer failed to form an opinion on the contents of these entries which show cash possessed by the assessee to the tune of Rs.20,00,000/- and the content of voucher which shows payment made to the assessee amount to Rs.85,35,000. **As the Assessing Officer did not form an opinion on this issue, there is no question of any difference or change of view/opinion.***

7. The Petitioner thereafter filed this petition to challenge the notice of reopening of assessment. Learned Counsel for the Petitioner submitted that there was no failure on the part of the assessee to disclose truly and fully all material facts. The documents relied upon by the Assessing Officer in the reasons for reopening the assessment, were available with the Assessing Officer during the original scrutiny assessment.

8. On the other hand, Mr. Suresh Kumar, learned Counsel for the Department, opposed the petition contending that the Assessing Officer has recorded proper reasons. There was lack true and full disclosure on the part of the Assessee, particularly in view of the Explanation 1 to Section 147 of the Act.

9. Having thus heard the learned Counsel for parties, we may refer to the reasons recorded by the Assessing Officer. In such reasons, he has referred to two facts. Firstly, as per the seized documents (Annexure-A7) during the search, an amount of Rs.20,00,000/- was stated to have been paid in cash by the Assessee to one S.K.G. According to the Assessing Officer, the Assessee had

cash on hand of Rs.20,00,000/- which was undisclosed. The second fact which the Assessing Officer relied upon was the seizure of vouchers during the search showing a total payment of Rs.85,35,000/- to the Assessee. Here again, the Assessing Officer believed that the Assessee had thus received cash amount of Rs.85,35,000/-.

10. Undisputed fact is that all these documents were before the Assessing Officer when the original scrutiny under assessment under Section 153A read with 143(3) was made. It was in this background that the Assessee had, in his objections, asserted that the documents relied upon in the reasons were very much available with the Assessing Officer earlier. It was in the context of these objections that the Assessing Officer, while disposing of the objections, as noted above, had remarked that he had not formed any opinion on such documents in the assessment order.

12. The stand taken by the Assessing Officer may save him from the allegation of change of opinion, however, in the present case when we are examining the validity of the notice of reopening issued beyond the period of four years from the end of relevant assessment

year, the question of lack of true and full disclosure by the Assessee would become relevant. In this context, once the Department i.e. the Assessing Officer had certain information, material, or document before him during the assessment proceeding, irrespective of the source of such information, material, or document, the Assessee cannot be blamed for non-disclosure thereof.

13. Mr. Suresh Kumar, however, sought to rely on the Explanation 1 to Section 147 to contend that this would be a case of lack of true and full disclosure on the part of the Assessee. This Explanation reads as under :

Explanation 1.-- Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

As per this Explanation thus, production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the first proviso to Section 147. Here is not a case where the

Assessee is seeking to rely on a disclosure which the Revenue can seek to bring within the fold of the said Explanation. Here is a case where the Department already had collected certain documents and materials which were before the Assessing Officer at the time of framing assessment. If the Assessing Officer did not, for some reason, advert to such material or did not utilize the same, he surely cannot allege that the Assessee failed to disclose truly and fully all material facts.

14. In view of the above discussion, the impugned notice is set aside. The petition is allowed and disposed of.

(SARANG V. KOTWAL, J.)

(AKIL KURESHI, J.)