IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P. (C) Nos. 10587, 10588, 10589, 10659, 10660, 10661 and 10662 of 2009

Smt. Smrutisudha Nayak .... ***Petitioner***
(in all the petitions)
Mr. Sidhartha Ray, Advocate

-versus-

Union of India and Others .... ***Opposite Parties***
(in all the petitions)
Mr. T.K. Satapathy, Sr. Standing Counsel

CORAM:
THE CHIEF JUSTICE
JUSTICE B. P. ROUTRAY

JUDGMENT
27.10.2021

Dr. S. Muralidhar, CJ.

1. These writ petitions arise from a common set of facts involving same questions of law and are accordingly being disposed of by this common judgment. For the sake of convenience the Court is taking up for discussion the facts of the lead case i.e. W.P.(C) No. 10587 of 2009.

2. The background facts of the case are that the Petitioner is a Director of a Private Limited Company in the name and style of Sambit Resorts Pvt. Ltd. On 15th November, 2007 search was conducted by the Income Tax Department at the Petitioner's residence in Bhubaneswar and a Panchnama was drawn up on that date. Subsequently another search warrant was issued under

Section 132 (1) of the Income Tax Act, 1861 ('the Act') on 6th December, 2007 by one Sri V. Ananda Rajan, Additional Director of Income Tax (Investigation) ('ADIT') authorizing himself and Sri M.L Sardar, Additional Director of Income Tax (Investigation) to conduct search and seizure operation of the locker standing jointly in the name of the Petitioner and her husband at Andhra Bank, Ashok Nagar Branch, Bhubaneswar. Though the said search took place, nothing was found in the locker. The said search was not followed up immediately by a notice under Section 153A of the Act initiating search assessment proceedings.

3. More than 18 months later, the Assessing Officer, i.e., the Assistant Commissioner of Income Tax, Circle-I (2), Bhubaneswar issued a notice on 14th July, 2009 commencing assessment proceedings under Section 153A/ 143(3) of the Act for the Assessment Year (AY) 2002-2003. Identical notices were issued for each of the AYs of 2008-2009. The Petitioner filed her returns for the said AYs. Thereafter the present writ petitions were filed in this Court challenging the initiation of the assessment proceedings under Section 153A of the Act. On 11th September, 2009 this Court directed that the assessment proceedings may continue but no final order shall be passed.

4. During the pendency of the writ petition, Section 132(1) of the Act was amended by Finance (No.2) Act, 2009 authorizing the Additional Director or the Additional Commissioner or the Joint Director or the Joint Commissioner to issue a search warrant. This provision was given retrospective effect from 1st June, 1994. At

the same time, a proviso was inserted in Section 132(1) wherein it is stated that in case of a search warrant issued by the Additional Director or the Additional Commissioner or Joint Director after 1st October, 2009, he has to take the approval of the Central Board of Direct Taxes (CBDT). Section 132(1) of the Act as amended reads as under:

> "**132.** (1) Where the (Director General or Director) or the (Chief Commissioner or Commissioner) (or Additional Director or Additional Commissioner) (or Joint director of Joint Commissioner) in consequence of information in his possession, has reason to believe that—
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> (*a*) any person to whom a summons under sub-section (1) of section 37 of the Indian Income-tax Act, 1922 (11 of 1922), or under sub-section (1) of section 131 of this Act, or a notice under sub-section (4) of section 22 of the Indian Income-tax Act, 1922, or under sub-section (1) of section 142 of this Act was issued to produce, or cause to be produced, any books of account or other documents has omitted or failed to produce, or cause to be produced, such books of account or other documents as required by such summons or notice, or
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> (*b*) any person to whom a summons or notice as aforesaid has been or might be issued will not, or would not, produce or cause to be produced, any books of account or other documents which will be useful for, or relevant to, any proceeding under the Indian Income-tax Act, 1922 (11 of 1922), or under this Act, or
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> (*c*) any person is in possession of any money, bullion, jewellery or other valuable article or thing and such money, bullion, jewellery or other valuable article or thing represents either wholly or partly income or property which has not been, or would not be, disclosed for the purposes of the Indian Income-tax Act, 1922 (11 of 1922), or this Act (hereinafter in this section referred to as the undisclosed income or property),
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> then,—

(*A*) the (Director General or Director) or the (Chief Commissioner or Commissioner), as the case may be, may authorize any (Additional Director or Additional Commissioner or) (Joint director, (Joint Commissioner), (Assistant Director (or Deputy Director), (Assistant Commissioner or Deputy Commissioner) or Income Tax Officer), or

(*B*) such Additional Director or Additional Commissioner or Joint Director, or Joint Commissioner, as the case may be, may authorise any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer,

(the officer so authorized in all cases being hereinafter referred to as the authorized officer) to—

(*i*) enter and search any building, place, vessel, vehicle or aircraft where he has reason to suspect that such books of account, other documents, money, bullion, jewellery or other valuable article or thing are kept;

(*ii*) break open the lock of any door, box, locker, safe, almirah or other receptacle for exercising the powers conferred by clause (*i*) where the keys thereof are not available;

(*iia*) search any person who has got out of, or is about to get into, or is in, the building, place, vessel, vehicle or aircraft, if the authorised officer has reason to suspect that such person has secreted about his person any such books of account, other documents, money, bullion, jewellery or other valuable article or thing;

(*iib*) require any person who is found to be in possession or control of any books of account or other documents maintained in the form of electronic record as defined in clause (*t*) of sub-section (1) of section 2 of the Information Technology Act, 2000 (21 of 2000), to afford the authorized officer the necessary facility to inspect such books of account or other documents;

(*iii*) seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing found as a result of such search:

Provided that bullion, jewellery or other valuable article or thing, being stock-in-trade of the business,

found as a result of such search shall not be seized but the authorised officer shall make a note or inventory of such stock-in-trade of the business;

(*iv*) place marks of identification on any books of account or other documents or make or cause to be made extracts or copies there from;

(*v*) make a note or an inventory of any such money, bullion, jewellery or other valuable article or thing :

Provided that where any building, place, vessel, vehicle or aircraft referred to in clause (*i*) is within the area of jurisdiction of any (Chief Commissioner or Commissioner) but such (Chief Commissioner or Commissioner) has no jurisdiction over the person referred to in clause (*a*) or clause (*b*) or clause (*c*), then, notwithstanding anything contained in section 120, it shall be competent for him to exercise the powers under this sub-section in all cases where he has reason to believe that any delay in getting the authorisation from the (Chief Commissioner or Commissioner) having jurisdiction over such person may be prejudicial to the interests of the revenue :

Provided further that where it is not possible or practicable to take physical possession of any valuable article or thing and remove it to a safe place due to its volume, weight or other physical characteristics or due to its being of a dangerous nature, the authorised officer may serve an order on the owner or the person who is in immediate possession or control thereof that he shall not remove, part with or otherwise deal with it, except with the previous permission of such authorised officer and such action of the authorised officer shall be deemed to be seizure of such valuable article or thing under clause (*iii*):

Provided also that nothing contained in the second proviso shall apply in case of any valuable article or thing, being stock-in-trade of the business:

Provided also that no authorisation shall be issued by the Additional Director or Additional Commissioner or Joint Director or Joint Commissioner on or after the 1st

day of October, 2009 unless he has been empowered by the Board to do so."

5. According to the Petitioner the above amendment discriminates between two sets of Assessees: one to whom a search warrant has been issued prior to 1st October, 2009 for which due approval of the CBDT is not necessary and the other for whom a search warrant is issued after that date where the approval of the CBDT is mandatory. In the present case the search warrant was issued prior to 1st October, 2009. According to the Petitioner the Parliament has failed to provide a safeguard when the search warrant is issued by the Additional Director or the Additional Commissioner and therefore it is stated that the amendment violates Article 14 of the Constitution. It is further submitted that since the search and seizure operation is an invasion of the rights and liberty of the citizen, Section 132(1) of the Act could not have been amended with retrospective effect since it affects the substantive rights of the Petitioner.

6. The second ground is against the initiation of the proceedings under Section 153A of the Act, which is contended to be *ab-initio* void.

7. It may be mentioned that on 11th September, 2009 permission was given to the Petitioner to amend this writ petition to raise the above contentions. It is submitted by Mr. Sidharth Ray, learned counsel for the Petitioner that no material has been placed on record by the Opposite Parties to show the authorization in favour of Sri Rajan, ADIT authorizing himself or Sri Sardar, ADIT

(Investigation) being authorized with the power to issue a warrant. In this regard, reliance is placed on the decision of the High Court of Delhi in ***CIT v. Jainson, (2009) 222 CTR (Delhi) 34*** holding that the ADIT (Investigation) does not have the power to issue any authorization or warrant in terms of the proviso to Section 132 (1) of the Act. Reliance is also placed on the decisions of Delhi High Court in ***CIT v. Pawan Kumar Garg 334 ITR 240 (Del);*** *and* ***Dr. Nalini Mahajan v. Director IT (Investigation), (2002) 257 ITR 123***. The decision in ***Raghuraj Pratap Singh v. Assistant Commissioner of Income Tax 207 ITR 450 (All)*** is also referred to.

8. A counter affidavit was filed by the Opposite Parties belatedly on 5th August, 2021 in the writ petition contending that a search warrant can be issued by the ADIT (Investigation) in terms of the amendment with retrospective from 1st June, 1994. It is sought to be contended that the Additional Director or the Additional Commissioner always had the power to issue a warrant of authorization and that the amendment was merely declaratory and clarificatory in nature. Mr. T.K. Satapathy, Sr. Standing Counsel for the Department refers to the explanatory note issued by the CBDT by circular dated 3rd June, 2010 in this context. He relied on the decision in ***Government of Andhra Pradesh v. Laxmi Devi (2008) 4 SCC 720*** to contend that the greater latitude is normally given by the Courts to fiscal statutes or tax measures. Reliance is also placed on the decision of ***State of Madhya Pradesh v. Rakesh Kohali (2012) 6 SCC 312***. However on the merits of the

search assessment, there is no reply in the counter affidavit to the averments in the writ petition.

9. In addition to the above issues Mr. Sidhartha Ray, learned counsel for the Petitioner also raised the issue of invocation of Section 153-A of the Act, where no incriminating materials have been found or seized. He placed reliance on the decisions of the Delhi High Court in ***CIT v. Kabul Chawla, (2016) 380 ITR 573 (Delhi)*** and ***Filatex India Ltd. v. CIT,*** **380 ITR 586**. Reliance is also placed on the decision of the Rajasthan High Court in ***Jai Steel (India) v. Assistant CIT, (2013) 1 ITR-OL 371 (Raj); and CIT v. Continental Warehousing Corporation (Nhava Sheva) Ltd., (2015) 374 ITR (Bom)***. Reference is also made to the decisions of the Delhi High Court in ***Principal CIT v. Meeta Gutgutia (2017) 395 ITR 526 (Del); and Principal CIT v. Kurele Paper Mills Pvt. Ltd. (2016) 380 ITR 571 (Del)***.

10. Apart from making submissions on the lines of the counter affidavit filed, Mr. T.K. Satapathy, Senior Standing Counsel for the Department has also filed a written note of submissions. It is sought to be contended therein that the ADIT or the Additional Commissioner of Income Tax (ACIT) is treated as an authorized officer in terms of the amendment to Section 132(1) of the Act with retrospective effect. It is further sought to be contended that the assessment in the case of the Petitioner was not originally completed under Section 143 (3) of the Act prior to the date of the search. Hence the assessment had not attended finality and therefore the ratio in ***Kabul Chawla*** (*supra*) is not applicable. Further it is submitted that on a collective reading of Sections

153A(1)(a) and 153A(1)(b) the requirement of there having to be incriminating documents/materials is not found. It is submitted that there was an obligation on the jurisdictional Assessing Officer to issue notice once a search has taken place.

11. The above submissions have been considered. As regards the validity of the amendment to Section 132(1) of the Act authorizing the ADIT with retrospective effect from 1st June, 1994, the Court is inclined to accept the explanation offered by the Department, in terms of the clarification issued by the CBDT that the said amendment is only clarificatory. The said explanatory note reads thus :

> "**43. Clarificatory amendment in section 132:**
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> 43.1 Under clause (B) of the subsection (1) of section 132 such Joint Director or Joint Commissioner may authorize any Assistant Director or Deputy Director, Assistant Commissioner or Deputy Commissioner or Income-tax Officer to conduct search and seizure operation.
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> 43.2 As per clauses (28C) and (28D) of section 2 the Joint Director or Joint Commissioner are understood to include Additional Director and Additional Commissioner. Based on this understanding in the Department, Additional Directors and Additional Commissioners have issued warrant of authorization. However, the courts have held that the Joint Directors and Joint Commissioners referred to in section 132 of the Income Tax Act do not include "Additional Director or Additional Commissioner".
>
> 43.3 Therefore, to provide explicitly that Additional Director or Additional Commissioner always had the power to issue warrant of authorization, a clarificatory amendment has been made in clause (B) of subsection (1) of section 132, by inserting the words Additional Director or Additional Commissioner. The amendment

clarifies that the Additional Commissioner or Additional Director always had the power to issue authorization.

43.4 Applicability - This amendment has been made applicable with retrospective effect from 1st June, 1994.

43.5 Sub-section (1) of section 132 provides that the Director General or Director or the Chief Commissioner or Commissioner, Additional Director or Additional Commissioner had the power to issue authorization.

43.6 A clarificatory amendment has been made in the subsection (1) of the section 132 to provide that Joint Director or Joint Commissioner always had the power to issue authorization."

12. Consequently this Court negatives the challenge raised by the Petitioner to the amendment to Section 132(1) of the Act. However, as regards the substantive challenge to the assessment proceedings under Section 153A, a perusal of the Panchnama shows that there is absolutely no incriminating material recovered. The Panchnama in fact reveals that the material recovered is 'NIL'. In other words there were no materials on the basis of which the assessment proceedings under Section 153A could have been initiated. Section 153A reads as under :

"153A. **Assessment in case of search or requisition**.

(1) Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, in the case of a person where a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A after the 31st day of May, 2003, the Assessing Officer shall—

(a) issue notice to such person requiring him to furnish within such period, as may be specified in the notice, the return of income in respect of each assessment year

> falling within six assessment years referred to in clause (b), in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139;
>
> (b) assess or reassess the total income of six assessment years immediately preceding the assessment year relevant to the previous year in which such search is conducted or requisition is made."

13. It is clear that the exercise under Section 153A is not to be undertaken mechanically. In other words, it is not possible to accept the contention of the Department that there was an obligation to initiate the assessment proceedings under Section 153-A of the Act only because a search has been conducted, even though no incriminating materials whatsoever have been found during search. It does not matter that the original assessment was not completed under Section 143(3) of the Act for that purpose. In ***CIT v. Chetan Das Lachman Das (2012) 254 CTR (Del) 392***, it was held by the High Court of Delhi as under:

> "……Section 153A (1) (b) provides for the assessment or reassessment of the total income of the six assessment years immediately preceding the assessment year relevant to the previous year in which the search took place. To repeat, there is no condition in this Section that additions should be strictly made on the basis of evidence found in the course of the search or other post-search material or information available with the Assessing Officer which can be related to the evidence found. This, however, does not mean that the assessment

HIGH COURT ORISSA

under Section 153A can be arbitrary or made without any relevance or nexus with the seized material…..”

14. In ***Jai Steel (India) v. Assistant CIT*** (*supra*), the Rajasthan High Court on analyzing the provision held as under:

> “In the firm opinion of this Court from a plain reading of the provision along with the purpose and purport of the said provision, which is intricately linked with search and requisition under Sections 132 and 132A of the Act, it is apparent that:
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> (a) the assessments or reassessments, which stand abated in terms of II proviso to Section 153A of the Act, the AO acts under his original jurisdiction, for which, assessments have to be made;
>
> (b) regarding other cases, the addition to the income that has already been assessed, the assessment will be made on the basis of incriminating material and
>
> (c) in absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made.”

15. The legal position was thereafter summarized by the Delhi High Court in ***Kabul Chawla*** (*supra)*, as under:

> “37. On a conspectus of Section 153A(1) of the Act, read with the provisos thereto, and in the light of the law explained in the aforementioned of decisions, the legal position that emerges is as under:–
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> i. Once a search takes place under Section 132 of the Act, notice under Section 153 A (1) will have to be mandatorily issued to the person searched requiring him to file returns for six AYs immediately preceding the previous year relevant to the assessment year in which the search takes place.

ii. Assessments and reassessments pending on the date of the search shall abate. The total income for such assessment years will have to be computed by the assessing officers as a fresh exercise.

iii. The assessing officer will exercise normal assessment powers in respect of the six years previous to the relevant assessment year in which the search takes place. The assessing officer has the power to assess and reassess the 'total income' of the aforementioned six years in separate assessment orders for each of the six years. In other words, there will be only one assessment order in respect of each of the six assessment years "in which both the disclosed and the undisclosed income would be brought to tax".

iv. Although Section 153 A does not say that additions should be strictly made on the basis of evidence found in the course of the search, or other post-search material or information available with the assessing officer which can be related to the evidence found, it does not mean that the assessment "can be arbitrary or made without any relevance or nexus with the seized material. Obviously an assessment have to be made under this Section only on the basis of seized material."

v. In absence of any incriminating material, the completed assessment can be reiterated and the abated assessment or reassessment can be made. The word 'assess' in Section 153 A is relatable to abated proceedings (i.e. those pending on the date of search) and the word 'reassess' to completed assessment proceedings.

vi. Insofar as pending assessments are concerned, the jurisdiction to make the original assessment and the assessment under Section 153A merges into one. Only one assessment shall be made separately for each assessment year on the basis of the findings of the search and any other material existing or brought on the record of the assessing officer.

vii. Completed assessments can be interfered with by the assessing officer while making the assessment under section 153 A only on the basis of some incriminating material unearthed during the course of search or requisition of documents or undisclosed income or property discovered in

the course of search which were not produced or not already disclosed or made known in the course of original assessment."

16. The same principles have been reiterated in ***Principal CIT v. Meeta Gutgutia*** (*supra*) and the ***Principal CIT v. Kurele Paper Mills Pvt. Ltd.*** (*supra*).

17. In the present cases, with there being absolutely no incriminating materials found or seized at the time of search, there was no justification for the initiation of assessment proceedings under Section 153A. On this ground therefore the writ petitions ought to succeed.

18. Accordingly, the impugned notices issued to the Petitioners for the AYs 2002-03 and 2008-09 under Section 153A(1) read with Sections 143(3) of the Act are hereby quashed. The writ petitions are allowed but, in the circumstances, with no order as to costs.

HIGH COURT
सत्यमेव जयते
ORISSA

(S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge

A. Dash/
AR-cum-Sr.Secy.