

(2012) 21 TAXMAN 512

Orissa High Court

Case No: Writ Petition No. 20748 of 2011

Maa Vaishnavi Sponge
Ltd.

APPELLANT

Vs

Director General of
Income Tax
(Investigation)

RESPONDENT

Date of Decision: Aug. 12, 2011

Acts Referred:

- Constitution of India, 1950 - Article 19(1), 19(1)(f), 19(1)(g)
- Income Tax Act, 1961 - Section 132, 132(1), 132(1)(c), 132(1)(iii), 132(3)

Citation: (2012) 21 TAXMAN 512

Hon'ble Judges: V. Gopala Gowda, C.J; B.N. Mahapatra, J

Bench: Division Bench

Advocate: R.P. Kar, A.N. Ray, B.P. Mohanty, P.K. Mishra and K.K. Sahoo, for the Appellant;
A.K. Mohapatra, for the Respondent

Final Decision: Allowed

Judgement

B.N. Mahapatra, J.

Both the writ petitions have been filed with a prayer to quash the prohibitory order dt. 6th July, 2011 passed under sub-s. (3) of s. 132 of the IT Act, 1961 (for short, "the Act") as per Annex. 1 in respect of the accounts of the petitioner-companies maintained with opposite party Nos. 6 to 10 banks and warrant of authorization dt. 18th June, 2011 on the ground that those are illegal being without jurisdiction.

However, in course of hearing Mr. R.P. Kar, learned counsel appearing on behalf of the petitioners confined his prayer in both the writ petitions only to quashing of the prohibitory order passed under Annex. 1. Since the prayer in both the writ petitions is identical, these are disposed of by this common judgment.

2. The facts and circumstances giving rise to the present writ petitions are that the petitioners are companies incorporated under the provisions of the Companies Act, 1956, having their registered office at Dua Complex, Panposh Road, Rourkela. The petitioners are mainly engaged in manufacturing sponge iron, TMT and structural steel. The petitioners have been regularly filing their IT returns. On the strength of warrant of authorization dt. 18th June, 2011, there were search and seizure operations in the business premises of the petitioner-companies on 6th July, 2011 and 7th July, 2011. In course of search, by letter dt. 6th July, 2011 under Annex. 1 the authorised officer issued prohibitory order under s. 132(3) of the Act to the Branch Manager, IDBI Bank, Rourkela, directing him not to remove, part with or otherwise deal with the articles mentioned in the said order without his permission. Vide letter dt. 6th July, 2011 (Annex. 3) the Asstt. General Manager, Mid Corporate Rourkela intimated the petitioner-Maa Vaishnavi Sponge Ltd. that they have received a notice from the Dy. Director of IT (Inv.) to disclose information regarding transaction in the accounts and to disclose credit facility sanctioned with details of their terms and conditions and securities thereof and also not to remove, part with or otherwise deal with the accounts/safe deposit lockers/safe deposit articles maintained by them without prior permission of the IT authorities or revocation of said notice. On 15th July, 2011, the petitioner made a request to opposite party No. 2 Director of IT (Inv.), Bhubaneswar to allow the petitioners to operate the bank accounts in respect of which prohibitory order under s. 132(3) of the Act has been issued as they are facing difficulties in carrying on their business. Since no action was taken, the petitioners issued another letter dt. 21st July, 2011 with a request to permit them to operate the bank accounts. As repeated requests to permit the assesseees to operate their bank accounts did not yield any result, the present writ petitions have been filed.

3. Mr. R.P. Kar learned counsel appearing for the petitioners submitted that opposite party Nos. 4 and 5 IT authorities have illegally issued prohibitory order under s. 132(3) of the Act on 6th July, 2011 in respect of cash credit and current account etc. maintained with opposite party Nos. 6, 7, 8, 9 and 10 although those accounts are regular accounts of the companies and are disclosed in the return filed by the petitioners for the purpose of assessment. Without forming any opinion that undisclosed income of the assessee-petitioners was deposited in the bank accounts, the opposite parties have illegally restrained the petitioners from operating those accounts. The petitioner-assesseees availed loan of crores of rupees from different banks to carry on their business and for illegal action of the opposite parties their business has come to a halt. The search party including opposite party Nos. 4, 5 and 6 transgressed their power and illegally issued order prohibiting the petitioners from operating the bank accounts. The petitioners are not in possession of any undisclosed income and, therefore, the action taken under s. 132(3) of the Act is illegal. The Commercial Taxes Department and Central Excise Department have also approached the IT authorities to allow the petitioner-companies to operate bank accounts in order to carry on their business. The petitioner-companies have entered into contracts with different buyers, traders and Government organizations and to discharge the contractual obligation, the operation of

the bank accounts is very much necessary. Due to seizure of the bank accounts of the petitioners, their business got closed and more than 500 daily wage workers were rendered unemployed. The staff quarters are in dark due to non-payment of electricity bill. Statutory payments like staff salary, provident fund, ESI service-tax, excise duty, entry tax could not be paid. Due to arbitrary action committed by opposite party Nos. 1 to 5, the petitioners' business has been paralyzed. Placing reliance on the judgment of this Court in the case of [Visa Comtrade Limited Vs. Union of India \(UOI\) and Others](#), Mr. Kar prayed for quashing of the prohibitory order (Annex. 1) issued under s. 132(3) of the Act.

4. Mr. A.K. Mohapatra, learned senior standing counsel for the IT Department submitted that there is no illegality in issuing prohibitory order in respect of the bank accounts in question. The search and seizure action under s. 132(3) is valid as the same has been conducted as per warrant of authorisation dt. 18th June, 2011. The warrant of authorisation has been issued after due satisfaction from the competent authority of the IT Department. The prohibitory order under s. 132 (3) has been issued accordingly on 6th July, 2011 to various banks for the verification of the accounts. As per s. 132(8A), an order under s. 132(3) of the IT Act shall not be imposed for a period exceeding 60 days from the date of that order. Hence, the prohibitory order under s. 132(3) is very much within the purview of law. Basing on the request of the petitioner-assessee, the IT authorities had issued letter to the Branch Manager, State Bank of India, Bonai to allow the petitioners to make payment towards excise duty but they have not been allowed to have free operation of the bank accounts since the very purpose of the search and seizure of the bank account shall be otherwise defeated if the entries of heavy cash deposit and withdrawal would not be examined as to whether same constitute undisclosed income. The allegation of the assessee that the accounts were kept under attachment for a long period is not correct. The money lying with the bank accounts has not been seized or taken away. Only reasonable restriction has been made to verify the accounts. The assessee has not furnished any valid explanation with regard to the discrepancies noticed between cash balance as per cash book maintained in the accounting tally package and the actual cash found during search. Since the investigation is still continuing and each entry is being verified, free operation of the bank accounts may hamper the process of investigation. The prohibitory order under s. 132(3) has been issued after due satisfaction of the competent authority.

5. Mr. Mohapatra further argued that the issue involved in the case of the petitioners is similar one with the issue which had come up in the case of [Lan Eseda Steels Ltd. and Another Vs. Assistant Commissioner of Income Tax and Others](#). In that case, bank operations were frozen by the officers acting under s. 132(3) of the Act. Assessee's case was that its business was being affected by the order and that at any rate the credit balance in the bank account was debts owed by the bank and not capable of attachment under s. 132(3). The High Court dismissed the writ petition following the decision in [Income Tax Officer, Special Investigation Circle-B, Meerut Vs. Seth Brothers and Others etc.](#), stating that if the action taken is a regular one in the course of his functions except

where the action taken is malicious or for a collateral purpose, the Court would not interfere merely by substituting its own office for that of the officials, pointing out that the inconvenience caused is temporary. Decision of Hon"ble Supreme Court in [M.P. Sharma and Others Vs. Satish Chandra, District Magistrate, Delhi and Others,](#) was cited in support of the view that such inconvenience caused by search and seizure is only temporary interference of fundamental right and would constitute a reasonable restriction, It was further held that the High Court was satisfied that there was sufficient prima facie justification for the order in that case and attachment of such bank account had been held to be valid.

6. On the rival contentions, the questions that would arise for consideration are as follows:

(i) Whether before issuing the prohibitory order under s. 132(3) of the Act the AO has formed any prima facie opinion on the basis of the materials on record that the money deposited in various bank accounts represents partly or wholly undisclosed income of the assessee-petitioners?

(ii) Whether in the facts and circumstances of the cases, the prohibitory order issued under s. 132(3) of the Act by the opposite parties IT Department in respect of various bank accounts is valid?

7. Since question Nos. (i) and (ii) are inter-related, those are dealt with together.

Before proceeding further, it is necessary to know what is contemplated in s. 132(3) of the Act. For ready reference the same is reproduced below:

(3) The authorised officer may, where it is not practicable to seize any such books of account, other documents, money, bullion, jewellery or other valuable article or thing, for reasons other than those mentioned in the second proviso to sub-s. (1), 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 officer and such officer may take such steps as may be necessary for ensuring compliance with this sub-section.

Explanation : For the removal of doubts, it is hereby declared that serving of an order as aforesaid under this sub-section shall not be deemed to be seizure of such books of account, other documents, money, bullion, jewellery or other valuable article or thing under cl. (iii) of sub-s. (1)."

(Underlined, italicized in print, for emphasis)

8. The use of word "such" appearing in s. 132 of the Act refers to the assets mentioned in s. 132(1)(c), i.e., assets which are reasonably believed to be undisclosed property of the assessee. Where it is not practicable to seize such assets the provisions of sub-s. (3) of

s. 132 of the Act is resorted to. Law is well-settled that in order to make a seizure of the assets in exercise of power under s. 132(1)(iii) assessee's possession over the assets is not sufficient. The authorised officer must have reason to believe that the assets represent wholly or partly the undisclosed income of the person in whose possession the assets are found. Similarly, where the authorised officer is not satisfied or he has doubt to believe that a particular asset found on search is undisclosed property of the assessee, he cannot have recourse to the provisions of s. 132(3) of the Act. It is only when the authorised officer has reasonably believed that incorporeal assets such as bank deposits or deposits in pass books, documents etc. found on a search represent wholly or partly the undisclosed property of the assessee and the circumstances of the given case [for reasons other than those mentioned in the second proviso to sub-s. (1)] do not permit immediate seizure of the same, the provision of sub-s. (3) of s. 132 may be resorted to. Thus, s. 132(3) can be resorted to only if there is any practical difficulty in seizing the asset which is liable to be seized. Therefore, it is only when in course of search any jewellery, ornament or money etc. is discovered and on scrutiny it is found to be undisclosed property the same can be seized under s. 132(1)(iii) or for the reasons stated in second proviso to sub-s. (1) or for the reason stated in s. 132(3), an order can be served on the owner or person who is in immediate possession or control of the assets that he shall not remove, part with or otherwise deal with it except with previous permission of authorized officer, as the case may be.

9. The intention of legislature is certainly not to give unbridled power to the authorized officer to seize or issue prohibitory order in respect of any asset/bank account etc. found in the course of search without application of his mind for forming of an opinion/a belief on the basis of any material available on record that the asset/deposit in bank account represents wholly or partly the undisclosed income of the assessee.

This Court in *Visa Comtrade Ltd.* (supra), held as under:

38. ...Recording of reasons/satisfaction involves application of intelligent mind to come to a conclusion that the money lying in the current account represents the undisclosed income of the assessee for which the same is liable to be seized. Top most care should be taken before taking seizure action in respect of a bank account already disclosed to the IT Department. Needless to say that in fiscal statutes emphasis is given to transact every transaction through the bank account. Even the Act itself does not recognize cash transaction after a particular limit. Therefore, all bona fide assesseees are required to do their business transactions through the bank account. If a current bank account of a bona fide assessee is seized without properly applying the mind that the money deposited in the bank account represents undisclosed income, then that will cause irreparable loss to the assessee concerned and his business will be jeopardized. The employees will not get their salary, electricity dues cannot be paid, day-to-day expenses of the business cannot be met and the supplier cannot get their dues; various Revenue authorities including the Government authorities will not get their dues/taxes/duties. Ultimately, the business will come to an end and the assessee shall be deprived of his fundamental right guaranteed

under Art. 19(1)(g) of the Constitution to carry on his business/profession. It is certainly not the object of the search and seizure provided under the Act to close anybody's business. No doubt, the Revenue authorities are watchdogs of the Government revenue. They are not expected to take any lenient view in respect of unscrupulous and dishonest businessman. Evasion of tax is not to be tolerated and action must be taken against the erring assessee and/or the tax evaders. At the same time, they must see that the honest and bona fide businessmen are not harassed because they are the source of the Government revenue. Therefore, various fiscal statutes provide that before taking any drastic step including search and seizure operation in case of an assessee, the competent authority has to first record its satisfaction for taking such action.

Therefore, order under s. 132(3) cannot be issued indiscriminately or it is not automatic in a search and seizure proceeding as contended by learned senior standing counsel Mr. A.K. Mohapatra.

10. In the instant cases, it is not the case of the opposite party IT authorities that any deposit/transaction made in the various bank accounts in respect of which prohibitory order under s. 132(3) of the Act has been issued represents wholly or partly the undisclosed income of the assessee-petitioners. On the contrary, the stand of the opposite party IT authorities is that the prohibitory order under s. 132(3) has been issued for the purpose of finding out whether any transaction made in those accounts represents undisclosed income of the assessee. Petitioners' case is that the accounts were disclosed to the IT Department in their return of income for the purpose of assessment and the petitioners have no undisclosed income which is parked in those accounts.

11. In the course of hearing, learned senior standing counsel Mr. Mohapatra also submitted that the authorised officer after recording his satisfaction that money lying deposited in the bank accounts represents wholly or partly the undisclosed income of the assessee-petitioners, prohibitory order under s. 132(3) has been issued in respect of the bank accounts in question. To substantiate his stand he wanted to produce the relevant record and accordingly he produced the relevant record. On perusal of the same, we are not satisfied that the Revenue has recorded any reason to come to a conclusion before issuance of prohibitory order dt. 6th July, 2011 (Annex. 1) that any deposit/transaction in the bank accounts in question has not been passed through regular books of account and/or undisclosed income of the petitioners (wholly or partly) has been parked in the said accounts. Mr. Mohapatra, learned senior standing counsel fairly conceded the same. On the other hand, as stated above in its counter, the Department stated that investigation is going on to ascertain as to whether the money lying in the bank accounts in question represents disclosed or undisclosed income. However, he vehemently argued that issuance of a prohibitory order under s. 132(3) of the Act pursuant to search and seizure under s. 132(1) is automatic and 60 days' time under s. 132(8A) of the Act has been given to the IT Department to examine and find out as to whether the various deposits made in such bank accounts are disclosed or undisclosed income.

12. For the reasons stated above, we are unable to accept the above contention of the learned senior standing counsel justifying the action of the authorised officer in issuing prohibitory order under s. 132(3) of the Act. Moreover, even though in the meantime more than one month passed from the date of issuance of prohibitory order under s. 132(3) of the Act, no material has been produced before us to show that any of the deposits/entries made in various bank accounts in question represent wholly or partly the undisclosed income of the assesseees. This Court in *Visa Comtrade Ltd. (supra)*, referring to the judgment of Punjab & Haryana High Court in [Om Parkash Jindal and Another Vs. Union of India \(UOI\) and Others](#), and the decision of Allahabad High Court in the case of [Sriram Jaiswal Vs. Union of India \(UOI\) and Others](#), held that prohibitory order under s. 132(3) of the Act issued in respect of bank accounts without forming any belief or without any material on record to conclude that the amount deposited in such bank accounts is either wholly or partly undisclosed income of the petitioner is not sustainable in law.

13. The decision of the apex Court in *M.P. Sharma (supra)* has no application to the present cases as in that case the apex Court while examining as to whether issue of search warrant under s. 96(1) of Criminal Procedure Code, 1898 infringes the fundamental right under Art. 19(1)(f), 19(1)(g) and (5) of the Constitution, held that a search by itself is not a restriction on the right to hold and enjoy property. No doubt a seizure and carrying away is a restriction on the possession and enjoyment of the property seized. This, however, is only temporary and for the limited purpose of investigation. A search and seizure is, therefore, only a temporary interference with the right to hold the premises searched and the articles seized. Statutory regulation in this behalf is necessary and reasonable restriction cannot per se be considered to be unconstitutional. The damage, if any, caused by such temporary interference if found to be in excess of legal authority is a matter for redress in other proceedings. Hence, no question of violation of Art. 19(1)(f) is involved where search warrants which purport to be under the first alternative of s. 96(1) of the Criminal Procedure Code are issued. The apex Court in the case of *Seth Brothers (supra)*, while considering the scope of s. 132 of the Act, 1961, held that since by the exercise of power under s. 132 of the IT Act, 1961, a serious invasion is made upon the rights, privacy and freedom of the taxpayer, the power must be exercised strictly in accordance with the law and only for the purposes for which the law authorizes it to be exercised. If the action of the officer issuing the authorization or of the designated officer is challenged, the officer concerned must satisfy the Court about the regularity of his action. If the action is maliciously taken or power under the section is exercised for a collateral purpose, it is liable to be struck down by the Court. If the conditions for the exercise of the power are not satisfied the proceeding is liable to be quashed. Thus, this case on the other hand supports the case of the petitioners. The case of the Andhra Pradesh High Court in *Lan Eseda Steels Ltd. (supra)* has no application to the present cases as the facts and issues involved in that case are different from the present cases.

14. For the reasons stated above, we are of the considered view that. issuance of prohibitory order dt. 6th July, 2011 under s. 132(3) of the Act in respect of current bank accounts, savings bank accounts, cash credit accounts, loan accounts, overdraft accounts, recurring deposit accounts, personal accounts, any other type of accounts of the petitioners is not valid. Therefore, the order under s. 132(3) of the IT Act in respect of the above accounts is quashed. So far as lockers and safe deposit articles mentioned in prohibitory order (Annex. 1) are concerned, the authorised officer is directed to take a final decision in accordance with law after giving opportunity of hearing to the petitioners.

15. We make it clear that our observations/findings given above are confined to the order issued under s. 132(3) of the IT Act in respect of bank accounts maintained with different banks as indicated supra. We have not expressed any opinion with regard to validity of search and seizure operation conducted by the IT Department in exercising power under s. 132(1). We further clarify that our order/direction would not preclude the IT authorities to examine the deposits/entries made in the bank accounts in question and utilize the same in making assessment of the income of the petitioners if permissible under law. In the result, the writ petitions are allowed to the extent indicated above. No order as to costs.