

(1982) 09 AHC CK 0048

Allahabad High Court

Case No: Civil Miscellaneous Writ No. 353 of 1982

Smt. Nain Kumari Suri

APPELLANT

Vs

Commissioner of
Income Tax and
Another

RESPONDENT

Date of Decision: Sept. 9, 1982

Acts Referred:

- Income Tax Act, 1961 - Section 132, 132(11), 132(5), 263
- Income Tax Act, 1961 - Section 132, 132(11), 132(5), 263
- Income Tax Act, 1961 - Section 132, 132(11), 132(5), 263

Citation: (1983) 34 CTR 333 : (1983) 144 ITR 634 : (1983) 13 TAXMAN 464

Hon'ble Judges: R.B. Lal, J; K.N. Seth, J

Bench: Division Bench

Advocate: R.K. Gulati, for the Appellant; None, for the Respondent

Final Decision: Dismissed

Judgement

K.N. Seth, J.

The petitioner has approached this court praying for a writ, order or direction in the nature of certiorari quashing the notice dated January 21, 1982, issued by the Commissioner of Income Tax u/s 263 of the I.T. Act, and the order of the ITO dated November 20, 1981, passed u/s 132(5) of the Act.

2. A search was carried out, of the lockers belonging to the petitioner, in the Hindustan Commercial Bank, Birhana Road, Kanpur, and the Allahabad Bank. In the search, some jewellery and cash were seized. The ITO by his order dated November 20, 1981, passed u/s 132(5) of the Act directed that a sum of Rs. 43,650 be retained and the remaining cash and jewellery be released in favour of the petitioner. The amount retained was considered sufficient to cover the tax liability of the petitioner and the penalties leviable under Sections 271(1)(c) and 273. The petitioner has preferred detailed objection before

the Commissioner u/s 132(11) of the Act which is still pending.

3. The Commissioner purporting to act u/s 263 of the Act issued a notice to the petitioner calling upon her to show cause as to why the aforesaid order u/s 132(5) be not modified as in his opinion the order was prejudicial to the interests of the Revenue. The petitioner filed an objection asserting that the proceedings u/s 263 were incompetent and should be dropped. The Commissioner, however, did not accede to the request of the petitioner and issued notice calling upon the petitioner to appear before him.

4. Learned counsel for the petitioner contended that the proceedings initiated by the Commissioner are wholly void and without jurisdiction principally on the ground that the order passed by the ITO u/s 132(5) could not be subjected to the revisional power of the Commissioner u/s 263. We find no merit in the contention, Section 263 provides that the Commissioner may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the ITO is erroneous in so far as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment. The language of the section is wide enough to cover an order passed u/s 132(5) The revisional power of the Commissioner is not confined to orders passed in assessment proceedings only. The language "including an order enhancing or modifying the assessment" clearly indicates that the power of revision u/s 263 embraces within its ambit also the order passed in assessment proceedings. It is not correct to say that the revisional power u/s 263 is confined to an order passed in assessment proceedings only. Orders accepting the registration of a firm and recording the partition of a Hindu undivided family are independent orders and do not form a part of the assessment orders. Such orders would be open to revision u/s 263 if they are prejudicial to the interests of the Revenue.

5. Sub-section (5) of Section 132 empowers the ITO to, (1) estimate the undisclosed income, including the income from the undisclosed property, in a summary manner to the best of his judgment on the basis of such materials as are available with him ; (2) calculate the amount of tax on the income as estimated in accordance with the provisions of the Act ; (3) determine the amount of interest payable and the amount of penalty imposable in accordance with the provisions of the Act, as if the order had been the order of regular assessment ; and (4) specify the amount that will be required to satisfy any existing liability under the Act and any one or more of the Acts specified in Clause (a) of Sub-section (1) of Section 230A ; and retain in his custody such assets or part thereof as are in his opinion sufficient to satisfy the aggregate of the amounts referred to above and release the remaining portion of the assets to the person from whose custody they were seized. The assessment of income and the tax liability or the liability for interest and penalty that may be imposed is done only provisionally and it is to safeguard the interests of the Revenue that the assets considered sufficient to satisfy these liabilities may be

seized. The order passed u/s 132(5) is not a final order of assessment. That is to be done in regular assessment proceedings. If the Commissioner on an examination of the record of the proceedings u/s 132 finds that the order of the ITO is erroneous in so far as it is prejudicial to the interests of the Revenue, he may exercise his revisional power u/s 263 of the Act. We find no substance in the contention that unless the tax and other liabilities of the assessee are determined in regular assessment proceedings no occasion arises to protect the interests of the Revenue. The order passed u/s 132(5), though provisional in nature, may itself be prejudicial to the interests of the Revenue. If the ITO on an erroneous view releases all or most of the assets seized during a search, that order may be prejudicial to the interests of the Revenue and in such a situation the Commissioner would be competent to exercise his power u/s 263 of the Act. Section 132 is intended to achieve two limited objectives : (1) to get hold of evidence bearing on the tax liability of a person which the said person is seeking to withhold from the assessing authority, and (2) to get hold of assets representing income believed to be undisclosed income and applying so much of them as may be necessary in discharge of the existing and anticipated tax liability of the person concerned. It would not be correct to say that an order passed by the ITO cannot be prejudicial to the interests of the Revenue unless first the tax liability of the person concerned is determined. It may be prejudicial to the interests of the Revenue even in the case of the anticipated tax liability.

6. It was next contended that since the Commissioner is the authority under Sub-section (11) of Section 132 to adjudicate upon the objection against the order passed under Sub-section (5), he would not be competent to deal with the objection if he is invested with the power to revise the order passed u/s 132(5) on the ground that it was prejudicial to the interest of the Revenue. This argument is also not tenable. When proceedings are initiated u/s 263 it is not an expression of any final opinion in the matter. It is open to the assessee to satisfy the Commissioner that the order of the ITO was not prejudicial to the interests of the Revenue and further that the order of the ITO deserved to be modified in favour of the assessee in exercise of the power under Sub-section (11) of Section 132. We are not prepared to accept that since the Commissioner issued the notice u/s 263, he would be prejudiced or biased against the petitioner and, therefore, is not competent to hear the objection u/s 132(11) of the Act.

7. It was next contended that if Section 263 is interpreted to vest the Commissioner with the power of revision against an order passed u/s 132(5) of the Act, that would lead to multiplicity of proceedings--one proceeding arising out of the order passed u/s 263 and the other arising out of the regular assessment proceeding--both proceedings leading up to appeal before the Tribunal and reference applications. That can. hardly be a relevant factor in interpreting the scope of Section 263.

8. In our opinion, the action taken by the Commissioner of Income Tax by issuing notice u/s 263 of the Act is not without jurisdiction and no case has been made out for interference by this court. The petition is accordingly dismissed with costs.