

(2009) 01 DEL CK 0097

Delhi High Court

Case No: ITA 881 of 2008

The Commissioner of Income
Tax (Central) - II

APPELLANT

Vs

Pawan Kumar Garg

RESPONDENT

Date of Decision: Jan. 16, 2009

Citation: (2009) 222 CTR 36 : (2011) 334 ITR 240 : (2009) 178 TAXMAN 491

Hon'ble Judges: Rajiv Shakhder, J; Badar Durrez Ahmed, J

Bench: Division Bench

Advocate: R.D. Jolly, for the Appellant; Rakesh Gupta, Poonam Ahuja and Aarti Saini, for the Respondent

Final Decision: Dismissed

Judgement

Badar Durrez Ahmed, J.

Mr. Jolly, who appears on behalf of the appellant, has produced the record pertaining to the issuance of warrants of authorization as well as their execution and the panchnamas which have been drawn in this case.

2. The record indicates that the Director Income Tax (Investigation) issued a warrant of authorization in Form 45 u/s 132 of the Income Tax Act, 1961 (hereinafter referred to as the **said Act**) and Rule 112 (2) (a) of the Income Tax Rules, 1962 (hereinafter referred to as the **said Rules**) to, inter alia, the Additional Director of Income Tax (Investigation) (Mr A. K. Singh) as also to Assistant Directors of Income Tax (Investigation) [Mr L. K. Aggarwal, Mr. Ajay, Mr. Anil Kumar, Mr. S. Bose, Mr. K. C. Badhang, Mr. P. K. Mishra (DCIT) and Mr. Rajiv Kumar]. This warrant of authorization was issued on 25.05.2000 and was in respect of the premises at B-256, Suraj Mal Vihar, Delhi-92. A panchnama was drawn upon on 25.05.2000 itself and a restraint order u/s 132(3) of the said Act in respect of locker No. 11-PNB, Preet Vihar, Delhi under the names of Sh. P. K. Garg and Smt. Shashi Garg was also served on Mr P. K. Garg.

3. Thereafter, a second warrant of authorization in Form 45 u/s 132 of the said Act read with Rule 112 (2)(a) of the said rules was issued on 25.05.2000 by Mr. A. K. Singh, Additional Director of Income Tax (Investigation) authorizing some Deputy Directors of Income Tax, Assistant Directors of Income Tax and Income Tax Officers to conduct a search in respect of the said locker No. 11 standing in the names of Mr. P. K. Garg and Smt. Shashi Garg in Punjab National Bank, Preet Vihar, Delhi. The panchnama drawn on 26.05.2000 indicated that the search in respect of the said locker commenced on 26.05.2000 at 12.05 p.m and the same was closed on 26.05.2000 at 1.15 p.m temporarily, to be commenced subsequently and for which purpose seals were placed on the said locker.

4. Thereafter, further search was conducted on 02.06.2000 as indicated by the panchnama of that date. The said panchnama indicated that the search commenced on 02.06.2000 at 12.35 pm and was closed on that very date at 1.45 pm as finally concluded. The restraint order u/s 132(3) was also lifted.

5. According to the revenue this panchnama is the last of the panchnamas relating to the search and seizure operations conducted at the premises relating to the assessee. Consequently, the period of limitation has to be reckoned from the end of this month, that is, from 30.06.2000. On the other hand, the contention of the assessee, which was accepted by the Tribunal, is that the last panchnama was the one drawn on 25.05.2000 pursuant to the warrant of authorization issued by the Director of Income Tax (Investigation) and, therefore, the limitation has to be reckoned from 31.05.2000. The Tribunal took this view because in its opinion the warrant of authorization issued by the Additional Director of Income Tax (Investigation) on 25.05.2000 in respect of the said locker was invalid as he had no power to do so.

6. Section 132(1) of the said Act indicates the persons who are authorized to issue warrants of authorization for searches. There are two classes of persons mentioned in Section 132(1). The first class includes the Director General, Director, the Chief Commissioner and Commissioner. This group of persons can authorize other persons specified in Clause (A) of Section 132(1) to conduct the search. The second group of persons includes the Joint Director and Joint Commissioner. However, the Joint Director and Joint Commissioner who fall in this category are those who are empowered in this behalf by the Central Board of Direct Taxes (in short the board) to issue warrants of authorization to other persons indicated in Clause (B) of Section 132(1) of the said Act. In the present case what has happened is that the second warrant of authorization in respect of the said locker was issued by the Additional Director Income Tax (Investigation). The Additional Director does not find mention in the provisions of Section 132(1). However, it was contended by the learned Counsel for the revenue that the Additional Director would be covered in the expression Joint Director in view of the provisions of Section 2(28D) of the said Act. Even assuming that the expression Joint Director as used in Section

132(1) includes an Additional Director, such Additional Director or Joint Director would have to have initial empowerment by the Board to issue warrants of authorization in view of the provisions of Section 132(1)(B). This, of course, is de hors the argument that the definition given in Section 2(28D) has to be read in the light of the opening words of Section 2 which clearly stipulates that the definitions given in that provision are subject to the expression - ♦unless the context otherwise requires♦.

7. The learned Counsel for the revenue also contended that there was authority granted to the Additional Director of Income Tax by the Board to issue warrants of authorisation of search and seizure operations u/s 132(1) of the said Act. A reference was made, first of all, to a notification dated 06.11.1979 issued by the Board in exercise of powers conferred u/s 132(1) of the said Act. By virtue of the notification, the Board empowered the following Deputy Directors of Inspection and Inspecting Assistant Commissioners to authorize action u/s 132(1) of the said Act:

1. The Deputy Directors of Inspection posted in the Directorate of Inspection (Investigation) and working under the Director of Inspection (Investigation);
2. The Deputy Directors of Inspection posted in the Intelligence Wings; and
3. The Inspecting Assistant Commissioners of Income Tax.

8. It is clear from the above notification that only Deputy Directors of Inspection posted in a particular wing had been authorized by the Board to issue warrants of authorisation in respect of search and seizure operations u/s 132(1) of the said Act. Such an authorisation by the Board was imperative before any Deputy Director of Inspection or any Inspecting Assistant Commissioner could authorise an action u/s 132(1) of the said Act. It is also clear that only those Deputy Directors of Inspection and Inspecting Assistant Commissioners who have been specifically authorised by virtue of the said notification dated 06.11.1979, had the authority to act u/s 132(1) of the said Act.

9. The learned Counsel for the revenue then referred to the notification dated 11.10.1990 issued by the Board empowering the following Deputy Directors and Deputy Commissioners to authorise action u/s 132(1) of the said Act:

1. All Deputy Directors of Income Tax (Investigation) posted under the Directors General of Income Tax (Investigation);
2. All Deputy Directors of Income Tax (Investigation) posted under the Directors of Income Tax (Investigation); and
3. All Deputy Commissioners of Income Tax in-charge of Income Tax Ranges, including Special Ranges.

10. This notification of 11.10.1990 was necessitated because of the amendment brought about in Section 132(1) of the said Act in 1988. At this juncture, it would be

relevant to point out the legislative history of Section 132(1). Initially, u/s 132(1), it was only the Commissioner who was empowered to authorise any action u/s 132 of the said Act. This position continued till 1965 when, by virtue of the amendments brought about in 1965, the Director of Inspection, alongwith the Commissioner, was empowered to take action u/s 132 of the said Act. By the amendment introduced in 1975, an additional class or category of persons was created in Section 132(1). That class or category included Deputy Directors of Inspection and Inspecting Assistant Commissioners. While the persons belonging to the original category, i.e., of Director of Inspection or Commissioner of Income Tax were empowered by the statute itself to authorise any action u/s 132 of the said Act, the persons falling in the second category, i.e., Deputy Directors of Inspection and Inspecting Assistant Commissioners had to be specifically empowered by the Board to issue warrants of authorisation of search and seizure operations u/s 132 of the said Act. After the 1975 amendment, even Deputy Directors of Inspection and Inspecting Assistant Commissioners could initiate action u/s 132 provided they were specifically empowered to do so by the Board. It is pursuant to this amendment in 1975 that the Board issued the notification dated 06.11.1979 empowering specific Deputy Directors of Inspection and Inspecting Assistant Commissioners to take action u/s 132 of the said Act. This position continued till 1988 when, by virtue of an amendment, the first category of persons comprised of (1) the Director General; (2) Director; (3) Chief Commissioner and (4) Commissioner. These persons, without requiring any further authorisation from the Board, could issue warrants of authorisation of search and seizure operations u/s 132. The second category of persons was also amended. It comprised of the Deputy Director of Income Tax and the Deputy Commissioner of Income Tax. These persons, however, required specific empowerment by the Board before they could authorise action u/s 132(1) of the said Act. It is apparent that because of this amendment brought about in 1988, the Board issued the second notification dated 11.10.1990 authorising the specified Deputy Directors of Income Tax and Deputy Commissioners who were empowered to authorise action u/s 132(1) of the said Act. It is apparent that not all the Deputy Directors and not all the Deputy Commissioners were empowered to authorize action u/s 132(1) of the said Act. Only those officers who found specific mention under the notification dated 11.10.1990 were empowered to authorize action u/s 132(1) of the said Act.

11. To continue the historical development of Section 132 of the said Act, we note that the position as obtaining after the 1988 amendment continued upto 1998 when, w.e.f. 01.10.1998, the second category of persons was amended. The first category of persons remained the same. It comprised of Director General, Director, Chief Commissioner and Commissioner. As pointed out above, these persons were empowered by the statute itself to authorize action u/s 132(1) of the said Act. The second category of persons, however, was altered to comprise of Joint Director and Joint Commissioner in place of the erstwhile category which comprised of Deputy

Director and Deputy Commissioner. However, unlike the past, the Board did not issue any notification after the amendment of 1998 specifically empowering any Joint Director or Joint Commissioner to authorize action u/s 132(1) of the said Act.

12. The learned Counsel for the revenue sought to get over this hurdle by drawing our attention to a notification dated 23.10.1998 issued by the Central Government u/s 117(1) of the said Act. The said notification merely re-designated certain officers of the Indian Revenue Service w.e.f. 01.10.1998. The re-designation, inter alia, entailed that Deputy Directors of Income Tax and Deputy Commissioners of Income Tax in the pay scale of Rs 12,000-375-16,500/- would be re-designated as Joint Director or Income Tax and Joint Commissioner of Income Tax in the pay scale of Rs 12,000-375-16,500/-. The learned Counsel for the revenue contended that the empowerment as per notification dated 11.10.1990, would automatically apply, in view of the above re-designation, to Joint Directors of Income Tax as also Joint Commissioners of Income Tax. This argument does not advance the case of the revenue. First of all, the officer who issued the warrant of authorisation on 25.05.2000 was not a Joint Director of Income Tax, but was the Additional Director of Income Tax (Investigation). Secondly, the notification that was necessary in the present case, was a notification by the Board in exercise of powers u/s 132(1) of the said Act. There is no such notification authorizing any Joint Director or Joint Commissioner. The notification dated 23.10.1998 on which the revenue seeks to place reliance is one which has been issued not by the Board, but by the Central Government and that too in exercise of powers u/s 117(1) of the Act. There is no specific empowerment in favour of any Joint Director or Joint Commissioner u/s 132(1) of the said Act. Mere re-designation of a class of officers does not translate to the specific empowerment which is required u/s 132(1) of the said Act.

13. At this juncture, we may take note of the decision of this Court in the case of [Dr. Nalini Mahajan, Ram Lal Mahajan Charitable Trust, Shri Rakesh Mahajan, Pan Foods Ltd. and Others and Mahajan Industries Pvt. Ltd. and Others Vs. Director of Income Tax \(Inv.\) and Others](#), which had been heavily relied upon by the respondent / assessee and also by the tribunal in passing the impugned order. At the outset, we would also like to mention that the revenue had preferred an appeal before the Supreme Court against the order passed by this Court in Dr Nalini Mahajan (supra). By virtue of a judgment dated 30.09.2008, the Supreme Court in Civil Appeal No. 6410-6411/2003 (Director of Income Tax v. Dr Nalini Mahajan) observed that the principal question which arose for consideration in the appeals before it was whether the Additional Director (Investigation) had the requisite jurisdiction to authorize any officer to effect search and seizure in purported exercise of his power conferred upon him u/s 132(1) of the said Act as it stood at the relevant time. The Supreme Court observed that the said question had become academic inasmuch as the Commissioner of Income Tax had issued orders u/s 132B for release of cash, for release of jewellery and for release of books of accounts that were seized during the search and seizure conducted u/s 132(1) of the said Act. The Supreme Court

observed that as the said question had become academic, it was not required to examine the issue raised in the appeals before it. The Supreme Court, however, made it clear that the questions of law raised in the said appeals were expressly kept open. No opinion was expressed by the Supreme Court in that regard. Subject to this, the said civil appeals were dismissed as infructuous. The position in law, therefore, is that the question of law decided by a Division Bench of this Court in the case of Dr Nalini Mahajan (supra), insofar as this Court is concerned, stands concluded. The issue before the Supreme Court, however, is open. The Supreme Court has not expressed any opinion either way in its said judgment dated 30.09.2008.

14. With these prefatory remarks in respect of the Division Bench decision of this Court in Dr Nalini Mahajan (supra), it would be appropriate to now examine what was actually held in that decision. One of the issues raised was whether the Additional Director (Investigation) had the requisite jurisdiction to authorize any officer to effect search and seizure in purported exercise of the power conferred upon him u/s 132 of the said Act. The Division Bench concluded that the Additional Commissioner (Investigation) did not have the power to issue any authorisation or warrant to the Joint Director, New Delhi. While doing so, the Division Bench considered, inter alia, the provisions of Section 2(21) which defined Director General and Director; Section 2(28D) which defined Joint Director and Section 132(1) of the said Act. The definition of Director General or Director given in Section 2(21) after the amendment of 01.10.1998 indicated that the Director General or Director meant a person appointed to be a Director General of Income Tax or, as the case may be, a Director of Income Tax, under Sub-section (1) of Section 117, and included a person appointed under that Sub-section to be an Additional Director of Income Tax or a Joint Director of Income Tax or an Assistant Director or Deputy Director of Income Tax. An argument was advanced on behalf of the revenue that since the definition of Director includes an Additional Director of Income Tax, the warrant of authorization issued by the Additional Director of Income Tax would be valid. This argument was repelled by the Division Bench after noting that the interpretation clause as contained in Section 2 begins with the words "unless the context otherwise requires" and that the definitions of Director General or Director are exhaustive ones. The court observed that it was a well-settled principle of law that although a definition would govern the statute whenever the defined word is used in the body thereof, where the context makes the definition given in an interpretation clause inapplicable, a defined word may have to be given a meaning different from that contained in the interpretation clause. The court also observed that had "Additional Director" been covered within the purview of the definition of Director General or Director, there would have been no necessity of defining "Joint Director" again as has been done in Section 2(28D) of the said Act, in terms whereof also a Joint Director would be an Additional Director. The Division Bench also observed that an interpretation clause is not a positive enactment and that it

was well-settled that an interpretation clause, having regard to its limited operation, must be given a limited effect. While giving effect thereto, the court must not forget that the scope and object of such a provision is subject to its applicability and it is used having relation to the context only. The Division Bench further observed that a statutory power has been conferred u/s 132 upon the board in favour of a particular statutory authority. In this regard, it was specifically held:

The scope and purport of the said definition, thus, cannot be extended to other authorities in whose favour the power has not been delegated.

15. The Division Bench also reiterated the well-settled proposition, after noticing the important cases on this aspect, namely, AIR 1936 253 (Privy Council) ; *Viteralli v. Saton* 3 Law Ed. 1012 and [Ramana Dayaram Shetty Vs. International Airport Authority of India and Others](#), that when a power is given to do a certain thing in a certain manner, the same must be done in that manner or not at all and that all other proceedings are necessarily forbidden. In this context, the Division Bench found that the Additional Director (Investigation) had no jurisdiction to issue a warrant of authorisation and consequently, the same was liable to be quashed.

16. We may also note that in *CIT v. Jainson* ITA 366/2007 decided on 17.07.2008, we had endorsed and respectfully followed the view taken by this Court in *Dr Nalini Mahajan* (supra). The main question sought to be raised in *CIT v. Jainson* (supra) was with regard to the power of the Additional Director of Income Tax (Investigation) to issue a warrant u/s 132(1) of the said Act. The tribunal in that case had found that the warrant of authorisation by the Additional Director of Income Tax (Investigation) was without authority and, therefore, the entire search as well as the assessment proceedings subsequent upon such warrant were invalid and bad in law. The tribunal had, like in the present case, followed the decision of this Court in *Dr Nalini Mahajan* (supra). We had noted that in *Dr Nalini Mahajan* (supra) this Court had arrived at a conclusion that the Additional Director of Income Tax (Investigation) did not have any power to issue any authorisation or warrant u/s 132(1) of the said Act. We found that the issue sought to be raised by the revenue was entirely covered by the decision of this Court in the case of *Dr Nalini Mahajan* (supra) and consequently we dismissed the appeal as the issue did not call for any further consideration.

17. The learned Counsel for the revenue had referred to the decision of another Division Bench of this Court rendered on 30.01.2008 in *Sunil Dua v. CIT* ITA 1429/2006. That decision was referred to in the context of the argument that the expression ♦Deputy Director♦ included an Additional Director and, therefore, since the notification dated 06.11.1979 had empowered the Deputy Directors to issue warrants of authorisation, an Additional Director would, consequently, also have such authority. It may be noted that in *Sunil Dua* (supra), the search had concluded on 16.01.1998, i.e., prior to the amendment of 01.10.1998. The definition of Deputy Director given in Section 2(19C) prior to 01.10.1998 included not only a Deputy Director, but also an Additional Director of Income Tax. Section 2(19C) had been

introduced in 1994 w.e.f. 01.06.1994. The said provision suffered an amendment in 1998 w.e.f. 01.10.1998, whereby the reference to Additional Director of Income Tax was deleted. Perhaps, the definition of Deputy Director as it stood prior to 01.10.1998, was what persuaded the court to observe that the expression ♦Deputy Director♦ includes an Additional Director. The position has altered after the 1998 amendment. Therefore, the decision in Sunil Dua (supra) would have no application to the present case. In any event, the said decision did not notice the earlier decision of this Court in the case of Dr Nalini Mahajan (supra). Apart from that, in Sunil Dua (supra), it was contended that the warrant of authorisation drawn up ♦in favour of♦ the Additional Director of Income Tax was not valid. Here the question is entirely different. It is not a question of in whose favour the warrant of authorisation is drawn up, but who has issued the warrant of authorisation. On this ground also, the decision in Sunil Dua (supra) is clearly distinguishable.

18. It had been argued by the learned Counsel for the revenue that as per Section 2(28D), the Joint Director meant a person appointed to be a Joint Director of Income Tax or an Additional Director of Income Tax u/s 117(1) of the said Act. It was, therefore, contended that since the warrant of authorisation in the present case had been issued by an Additional Director of Income Tax, it meant that it was issued by a Joint Director of Income Tax and, therefore, the warrant of authorisation was valid. This argument cannot be accepted. As held in Dr Nalini Mahajan (supra), the definition of Joint Director has to be read contextually. The provisions of Section 132(1) refers to Director General or Director as well as Joint Director or Joint Commissioner. While the first two authorities fall within the first category, which were empowered by the statute itself to authorize action u/s 132(1), the latter two authorities, namely, the Joint Director or Joint Commissioner, can only authorize action if they are specifically empowered by the Board in that behalf. Now, the definition of Director General or Director as given in Section 2(21), includes Additional Director of Income Tax as well as a Joint Director of Income Tax. If the argument of the learned Counsel for the revenue were to be accepted that the expression ♦Joint Director♦ as used in Section 132(1) would include an Additional Director of Income Tax, then there would have been no occasion for the legislature to have separately specified Joint Director u/s 132(1) when it had already mentioned the Director General or Director. It is obvious that the legislature was mindful of the definitions given u/s 2(21) when it gave separate treatment to Director General / Director and Joint Director / Joint Commissioner. The Director General or Director did not require any further empowerment from the board, whereas the Joint Director or the Joint Commissioner required such specific empowerment. It is clear that the context requires that the words ♦Director General♦ or ♦Director♦ be construed in the limited sense and not in the inclusive sense as defined in Section 2(21) of the said Act. By similar logic, when the legislature has specified the authorities who may be empowered as being the Joint Director or Joint Commissioner, we cannot extend the same by employing the definition given in

Section 2(28D) to extend it to Additional Directors of Investigation. We may also point out that ♦Additional Director♦ has also been defined u/s 2(1D) which was introduced with retrospective effect from 01.06.1994 by virtue of the Finance Act, 2007. Under that provision, Additional Director means a person appointed to be an Additional Director of Income Tax u/s 117(1) of the said Act. It is pertinent to note that while the definition of Additional Director has been inserted with retrospective effect from 01.06.1994 by virtue of the Finance Act, 2007, the definition of Joint Director was introduced as Section 2(28D) for the first time in the said Act by virtue of the Finance No. (2) Act of 1998 w.e.f. 01.10.1998. Thus, there was no concept of a Joint Director prior to 01.10.1998. Since the definition of Additional Director has been inserted with retrospective effect from 01.06.1994, the legislature clearly made the distinction between a Joint Director and an Additional Director. The manner in which the expression ♦Joint Director♦ has been used in Section 132(1) requires the same to be interpreted in its limited sense as meaning only the Joint Director and not an Additional Director of Income Tax. This is so because had the legislature intended to include an Additional Director of Income Tax, it would have done so specifically in Section 132(1) itself.

19. For all these reasons, we feel that the tribunal has correctly applied the law in following the decision of this Court in Dr Nalini Mahajan (supra). The impugned decision of the tribunal does not call for any interference and the issue is entirely covered by the decision of this Court in the case of Dr Nalini Mahajan (supra).

20. The appeal is dismissed. There shall be no order as to costs.