

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided On : 04.03.2014

+ W.P.(C) 272/2013 & CM APPL. 560/2013

SH. PRADYOT K. MISRA

..... Petitioner

Through : Mr. Ajay Vohra, Ms. Kavita Jha
& Ms. Bhoomika Choudhary, Advs.

Versus

ASSISTANT COMMISSIONER OF INCOME-TAX AND ANR.

..... Respondents

Through : Ms. Suruchi Aggarwal, Sr.
Standing Counsel & Mr. Judy James, Advs.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.V. EASWAR

MR. JUSTICE S. RAVINDRA BHAT (OPEN COURT)

%

1. In this proceeding under Article 226 of the Constitution of the India, the petitioner challenges a notice under Section 147/148 of the Income Tax Act issued by the respondent – (hereafter referred to as “the revenue”) on 26.03.2012.

2. The facts briefly are that the petitioner is a retired Central Government officer and had served the Income Tax Department in various capacities, including as Chief Commissioner of Income Tax (CCIT) and Director General of Income Tax (Vigilance). He was appointed as Income Tax Ombudsman and thereafter took voluntary

retirement from that post on 19.11.2007. He had filed a regular return of income for the Assessment Year 2005-06 on 09.08.2005. That was processed and accepted under Section 143(1). After about 7 years from the end of the assessment year, he received the notice impugned in this case, issued by the revenue, proposing to reassess his income under Section 147/148 on the ground that income had escaped assessment due to his failure to disclose material facts. The impugned notice was based upon a tax evasion Petition given to the Revenue by a serving Commissioner of Income Tax, then posted at Ranchi.

3. The petitioner alleges that this Tax Evasion Petition was issued out of personal vendetta of the complainant who was known to use scandalous language and level false and baseless allegations and that he had also launched frivolous litigation solely with a view to cause harassment. The Revenue, at the request of the petitioner, furnished a copy of the reasons to believe recorded under Section 147 of the Act to support the re-opening of assessment. The material portions of the reasons so recorded are extracted below:

“The details of investment in immovable property which has not been declared in return of income and not included in the taxable income disclosed by the assessee, pertains to several assessment years beginning A.Y. 2004-2005 onwards. One specific investment in immovable property being one single floor flat on a plot of about 300 sq. yards. At D-877, IInd floor, New Friends Colony, New Delhi- 110065 was alleged to have been acquired by assessee during F.Y 2004 -2005 relevant to A.Y. 2005-2006 and the value of the property was alleged to be in the region of 8-10 crores. It was

alleged by the complainant that the assessee has made investment in the said property out of his undisclosed income and has not disclosed the investment and corresponding income of that transaction in his returns of income of the relevant assessment year and to that extent there was concealment of income and evasion of tax by the assessee for A.Y 2005-2006 relevant for F.Y. 2004-2005. Perusal of the returns of income of the assessee for A.Y. 2005-2006 as filed by it show that no disclosure is made by the assessee about its linkage with the said property for the source of the same or the source of the investment in that property or the status of the property in the hands of the assessee as also in what capacity and for what authority, the assessee was using that property as his residence.

It was informed by the complainant that the assessee has filed an affidavit before the Hon'ble High Court CWP No. 6274 of 2008 titled Sh. S.K. Srivastava Vs. CVC & others wherein he has given property No. D-877, IInd Floor, New Friends Colony, New Delhi – 110 065 as his address. A copy of affidavit filed by the assessee before the High Court was provided by the complainant that discloses property NO. D-877, IInd Floor, New Friends Colony as his address and residence and therefore prima facie, the link between the property at D-877, IInd Floor, New Friends Colony, New Delhi- 110 065, which was disclosed as residence of assessee before Hon'ble Delhi High Court on affidavit and the assessee stands corroborated and there being as disclosure about the status of the said property in the returns of income for A.Y 2005 – 2006 relevant for F.Y. 2004-2005 as filed by the assessee or in any assessment year thereafter or prior to that, the source of investment in the said property needs to be enquired into as to what was the

status in the hands of the assessee as this was not disclosed by the assessee and in what capacity the assessee was using this property as his residence.

The enquiries conducted by this office reveal that property is owned by one Sh. K.K. Khanna in the records of MCD it has further been alleged by the complainant that the aforesaid flat has been acquired through power of attorney during F.Y. 2004 – 2005 relevant to A.Y. 2005-2006 out of concealed income of the assessee which has not been offered to tax and on which no tax has been either paid or collected by the department although the same is payable. It has further been alleged that one MTNL landline telephone was installed at Flat NO. 877, IInd Floor, New Friends Colony, New Delhi – 110 065 which was surrendered by Sh. P.K. Misra after the complainant found out that Sh. P.K. Misra had invested his unaccounted income concealed from tax in the said flat. Since there is no disclosure about any link between Sh. P.K. Misra and the property and the said property is admitted on affidavit sworn by the assessee and filed before Hon'ble Delhi High Court as his address & residence and the cost of property or the rent of the property as may be the case, exceeds the limit prescribed U/s 147 for assumption of jurisdiction to re-open the assessment, this is considered to be a fit enough case for initiation of proceedings U/s 147 and issue of notice U/s 148 of Income Tax Act, 1961,

The complainant has alleged that during the period beginning 01.04.2004 i.e. F.Y. 2004-2005 relevant to A.Y. 2005 – 2006, the assessee has constructed a bungalow on 175, Green Woods, Government Officers,

Co-operative Housing Society, Sector – Omega, Greater Noida, Uttar Pradesh at a cost of about Rs.1.50 crores. Perusal of the return of income does not disclose any investment in the property at Greater Noida. The alleged investment in the property exceeds the limit prescribed in section 147 for assumption of jurisdiction U/s 147. It is therefore considered to be a fit case for initiation of proceedings U/s 147/148 of the Income Tax Act, 1961 on this ground as well.”

4. The petitioner objected to assumption of jurisdiction under Section 147/148, stating that the reasons so recorded were factually incorrect and could not be construed as legitimate grounds for re-opening the reassessment. It was also urged that the materials could not be said to constitute fresh or tangible admissible evidence within the meaning of that expression. Apparently, prior to the assumption of jurisdiction in respect of one of the items, i.e. the New Friends Colony property, the statement had been recorded of one Mr. K.K. Khanna. The said Mr. Khanna was shown to be the owner of the property. It was urged that the materials on record in the form of Mr. K.K. Khanna's affidavit and deposition clearly demonstrated that the first allegation made against the petitioner, i.e. the alleged ownership of the New Friends Colony property, was entirely false. The petitioner relies upon the statement of Mr. K.K. Khanna in this regard; it was recorded on oath on 24.05.2011.

5. The petitioner also alleges in his objections to the assumption of jurisdiction made on 22.06.2012 that as far as the second item requiring reassessment, i.e. Green Woods property at Greater Noida was concerned, there was no material to suggest that he had not

declared his income. He had urged that the construction of the property was concluded only in 2008 and not during the relevant assessment year which concerned reassessment proceedings. The objections given by the petitioner were rejected by the Revenue on 29.10.2012. It is in these circumstances that the present writ petition under Article 226 has been preferred.

6. It is argued on behalf of the writ petitioner that the principal allegations, i.e. acquisition of the Second floor of D-877, New Friends Colony and consequent non-disclosure to the extent of about ₹ 10 crore is devoid of any material. In this regard, reliance is placed upon the statement of Mr. Khanna, the owner. It is also submitted that the material on record suggested that the petitioner's statement, i.e. that immediately upon his ceasing to be a Central Government employee, since he was not in possession of any residential property in Delhi, he leased-out the New Friends Colony property which belonged to Mr. Khanna, is not only substantiated but completely established. It is argued in this regard that the relevant records, i.e. the municipal tax records, the title deeds etc. clearly established that the owner of the property, i.e. Mr. Khanna and that the petitioner had leased the property for period till 2009. The rent paid was ₹ 33,000/- per month. All these are matters of record. The Revenue's contention in this regard, which led to the reopening of the assessment, was based upon the allegations received in the tax evasion Petition that the real owner of the property was none other than the writ petitioner and that the truth of this was substantiated because a telephone connection in his name was found at the address. Learned counsel emphasized that since

the petitioner lived in the said premises for about two years, it was but inevitable that a telephone connection was in his name for that period; it could not point to ownership of the entire property. There was in fact absolutely no material to substantiate the continuance of the proceedings based upon the tax evasion Petition.

7. Learned counsel argued that so far as the second allegations with respect to construction of the Green Woods, Greater Noida property goes, the plot was allotted to the petitioner in 1997. Possession of the plot was taken on 21.04.2000. It was further argued that a membership agreement was entered into between the petitioner and the Green Woods Government Officers Welfare Society (GWGOWS, i.e “the society”); copies of these were placed on record and also made available to the Revenue. Learned counsel emphasized that investment in the property was made by the petitioner partly out of the final withdrawal from the General Provident Fund (GPF) Account on 09.05.1997 and partly out of the loan arranged by the society from the Housing Development Finance Corporation (HDFC) through a loan agreement of 27.01.1998. The loan amount was directly disbursed by the HDFC to the society on demands being issued by the latter. In these circumstances, stated counsel, during the concerned year, i.e. the previous year corresponding to A.Y. 2005-06, the writ petitioner did not incur any expenditure and made no investment in regard to the construction of the Greater Noida property. Reliance is placed on the loan agreement dated 27.01.1998 between the HDFC and the petitioner. Learned counsel also relies upon a letter of 09.12.2005 from the Society, asking the members/allottees to begin

construction of their properties on the plots allotted to them. Having received this in December, urges counsel, it would be preposterous to assume that the property had been constructed and completed during the year. In fact, it was urged that the construction commenced in April 2006 and was completed around December 2008. Therefore, the allegation that the petitioner constructed the bungalow in the A.Y. 2005-06 was entirely baseless.

8. Learned counsel relied upon several judgments, including the one delivered by this Court in *Shipra Srivastava v. ACIT* 319 ITR 221; *ITO v. Selected Dalur Band Coal Company* 217 ITR 597; *Ayojan Developers v. ITO* 335 ITR 234 and *CIT v. Atul v. Vinita Jain* 299 ITR 383, for the proposition that the material should be one on the basis of which the reasonable plea and not a completely absurd or unreasonable one can be entertained with respect to evasion of income. It was argued that these decisions also establish that mere suspicion is not sufficient unless it is based upon reasonable facts. Underlining that the entire materials on record did not justify reopening of the assessment as no tax evasion was in fact shown but that the allegations made by the complainant were driven by vendetta, learned counsel submitted that they required to be quashed on account of *malafides*.

9. The respondent Revenue, in its counter affidavit and also through the submissions of the learned counsel urges that the sufficiency and adequacy of the material and the reasons based upon it cannot be the subject matter of proper enquiry under Article 226. Being invested with statutory power, the Assessing Officer (AO) has

to form the opinion where the allegations *prima facie* make out a case for reopening of a completed assessment. Highlighting that in the present case, the original assessment was completed under Section 143(1), it was argued that the Revenue has considerable latitude even upon being informed about some material with respect to tax evasion, to form the opinion that reassessment is warranted. It was submitted that even though the Supreme Court in *G.K.N. Drive Shafts India Limited v. ITO* 2003 (179) CTR (SC) 11 mandated that the AO should give opportunity to the assessee to represent against the reopening of assessment, yet the final word or the final opinion whether to proceed with reassessment notice or drop it is that of the AO himself and none other. In the present case, concededly, the opportunity mandated by the Supreme Court judgment was given to the petitioner. He represented against the notice; the AO made a speaking order rejecting the objections and decided to proceed ahead with the reassessment. It was submitted that even though the statement of Mr. Khanna apparently was in favor of the petitioner, yet the existence of telephone connection was not disputed. Furthermore, submitted learned counsel, the Tax Evasion Petition had alleged that the petitioner was the real owner of the New Friends Colony property. All this required investigation; especially, the complainant needed an opportunity to rebut the writ petitioner's submissions. Likewise, argued learned counsel for the Revenue, the non-declaration of income or its concealment on account of construction of the Greater Noida property was a matter which required investigation in reassessment

proceedings. For these reasons, it was submitted that this Court should desist from granting the relief in this proceeding.

10. The considerable latitude given to the revenue to reopen a settled assessment is premised on the entertainment of the Assessing Officer's opinion ("reasons to believe"), based on *objective materials*, which he is subsequently made aware of, which can possibly lead to conclusion that income had escaped assessment, due to non-disclosure of material facts by the assessee. The seemingly wide power to reopen a settled assessment is therefore hedged with conditions, i.e opinion formation based on some materials (necessarily fresh or "tangible" a.k.a. *Commissioner of Income Tax v Kelvinator India Ltd* 2010 (320) ITR 561 (SC)) pointing to possible income escaping taxation, because of the assessee's omission to disclose a material fact. The judgments relied on, particularly *Shipra Srivastava* are authorities for the proposition that the power to re-open an assessment ought to be exercised on the basis of an appreciation of materials through application of mind, reasonably. This Court had, in that decision, quashed the reassessment notice, *inter alia*, observing that:

" reasons which have been recorded seeking reopening of the assessment, and as reproduced above show that there is no application of mind by the Assessing Officer which can be said to be the mind of a reasonable person to arrive at a conclusion, which has been arrived at in view of the reasons recorded."

Likewise, there must be a reasonable nexus between the fresh material and its nature, for a sustainable opinion on the part of the ITO to re-open an assessment.

11. In the present case, so far as the New Friends Colony property is concerned, the statement of Shri. Khanna reveals that he is its owner; the petitioner was his lessee for about two years, paying monthly rent of ₹ 33,000/-. Moreover, the assessee was a public servant, who lived in official residences and had no premises of his own when he left public service. He also got a telephone installed in the rented premises; this fact can be reasonably assumed even otherwise. The complainant in the tax evasion petition alleged that in an affidavit sworn at that time and filed in the High Court, the assessee disclosed his address to be the New Friends Colony property. The allegations of ownership stood rebutted through the sworn deposition of Shri Khanna and the documents, which unequivocally showed his ownership and not that of the assessee, whose connection with it was as a tenant for about two years. Naturally, the assessee had a telephone installed in the premises during that period. That he disclosed his address as the New Friends Colony property is but natural, because he lived there at that time. This court is astonished, to say the least that after becoming aware of these facts, the AO persisted – and still persists in submitting that there is some reasonable or credible basis to maintain the reassessment proceedings. This court can only surmise that either the AO is driven by fear, or is party to what the complainant ultimately wishes- in either case, his persistence with reassessment proceedings being devoid of any legal sanction. Such insistence – one may even add obdurate insistence- is the hallmark of whimsicality and a far cry from the reasonable basis for exercise of

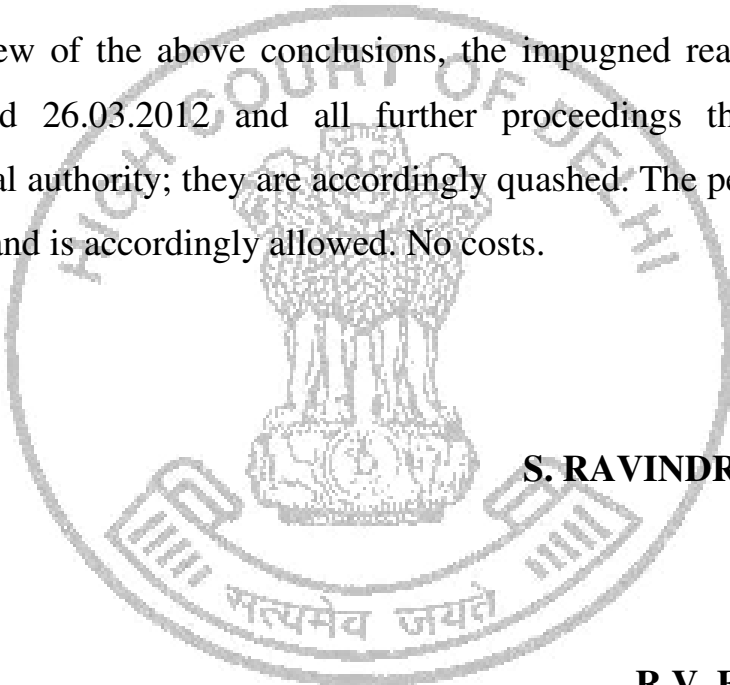
power under Section 147/148 which the court would be bound to uphold.

12. As far as the allegations leveled with respect to construction of the Greenwoods property goes, the assessee clearly revealed all the facts, which unequivocally point out to the circumstance that construction was not taken up or completed on that plot, during the assessment year. The plot was allotted by the society in 1997; partly financed by the assessee's provident fund accumulations and partly through advances arranged by the society, from HDFC. Possession of the plot was taken in 2000 and the assessee was asked to take up construction in 2005. These facts were revealed to the AO. He made no attempt to say that the materials revealed were false, or incomplete; in any case, there was no material, save an unsubstantiated allegation by the complainant that the assessee had acquired the property and concealed all facts relating to it, during the assessment year in question.

13. The declaration of law in *G.K.N. Drive Shafts India Limited* and the opportunity mandated to the assessee to put forth his or her point of view was aimed at a meaningful process whereby the AO could evaluate whether the opinion formed to reassess income, continued to be relevant, in the light of the explanation furnished. Whilst a court under Article 226 would judge the opinion and the reasons to believe, nevertheless a reasonable explanation which might clear doubts of the AO, would have to be dealt with in a reasonable manner. *G.K.N. Drive Shafts* affords a chance to the AO to take a second look at the feasibility or justification for proceeding with Section 148 notice.

Otherwise, the opportunity mandated in *G.K.N. Drive Shafts* is a mere ritual. In the present circumstances, this Court is of opinion that having been given the explanations, the AO acted unreasonably in persisting with the reassessment notice, which also could not be said to have been based on tangible material, given the statement of Shri Khanna and lack of any tangible material supporting the allegations. Sustaining the notice and reassessment proceedings would amount to condoning what is clearly oppression and harassment.

14. In view of the above conclusions, the impugned reassessment notice dated 26.03.2012 and all further proceedings thereto are without legal authority; they are accordingly quashed. The petition has to succeed and is accordingly allowed. No costs.



S. RAVINDRA BHAT
(JUDGE)

R.V. EASWAR
(JUDGE)

MARCH 04, 2014