

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:17.11.2017

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

Writ Petition No.29464 of 2017 & WMP.Nos.31761 & 31762 of 2017

Krishnaswami Vijayakumar

...Petitioner

Vs

The Principal Director of Income Tax
(INV), New No.46, Old No.108,
Nungambakkam High Road,
Chennai-34.

...Respondent

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorari to call for the records of the respondent in F. No.Pr.DIT(Inv)/Prosecution/2017-18 in issuing show cause notice dated 31.10.2017 and quash the same.

For Petitioner : Mr.R.Sivaraman

For Respondent : Mr.A.P.Srinivas, SSC

ORDER

Mr.A.P.Srinivas, learned Senior Standing Counsel accepts notice for the respondent. Heard both.

2. The petitioner has filed this writ petition challenging a show cause notice dated 31.10.2017 prior to initiation of prosecution proceedings under Section 276C(1) of the Income Tax Act, 1961 (hereinafter referred to as the Act). The impugned show cause notice states that a search under Section 132 of the Act was conducted in the petitioner's residence on 24.4.2016 and during the course of search operations, unaccounted cash for a sum of Rs.4,93,84,300/- was seized. It further states that during the course of search, a sworn statement was recorded from the petitioner wherein the petitioner admitted to have earned the unaccounted income of Rs.4,93,84,300/- through various activities like mediating for contracts, working as a commission agent for various transactions with the Government for the financial year 2016-17. It also states that in the return of income filed for the assessment year 2017-18, the petitioner declared -NIL- income.

3. With the above details, the respondent stated that the petitioner willfully concealed the particulars of his income for the assessment year 2017-18 and that therefore, there is reason to believe that the petitioner concealed the particulars of income in the return of income filed, which would not have been brought to tax but for the search operations. In such circumstances, the petitioner has been directed to show cause as to why prosecution under Sections 277 and 276C(1) of the Act and under the provisions of the Indian Penal Code for concealment of income and filing of false statements in the return of income should not be initiated against the petitioner for the assessment year 2017-18.

4. The petitioner has also been granted time to file reply on or before 21.11.2017. The show cause notice further states that in the show cause notice, for the sake of clarity, a reference has been made to Sections 279 and 2(16) of the Act. It is also stated that the prosecution proceedings are separate and distinguishable from assessment proceedings and that there is no requirement under the Statute that assessment proceedings should be completed before launching prosecution.

5. The respondent further stated that one of the functions of the Income Tax Department is to take deterrent action against the large tax evaders and since the prosecution is the most potential weapon in the fight against tax evasion, it is required that prosecution should be filed at the earliest. The show cause notice also states that the proposition that prosecution can be launched without waiting for assessment to be completed is upheld by the decision of the Hon'ble Supreme Court in the case of Jayappan Vs. S.K. Perumal, First ITO [reported in (1984) 149 ITR 696].

6. The learned counsel for the petitioner would submit that the impugned show cause notice is without jurisdiction in view of the fact that Sub-Section (1) of Section 279 enumerates officers, who are competent to issue show cause notices. But, the impugned show cause notice has been issued by the Principal Director of Income Tax (Investigation), who is not one of the officers enumerated in the said provision.

7. Elaborating further on the said submission, he has submitted that in terms of Sub-Section (1) of Section 279, a person shall not be proceeded against for offence under various provisions enumerated therein except with the previous sanction of the Principal Commissioner or the Commissioner or the Commissioner (Appeals) or appropriate Authority and that the respondent is not one of the Authorities enumerated nor he is an Appellate Authority over an order of assessment that would be passed by the Assessing Officer.

8. It is also submitted by the learned counsel for the petitioner that the returns were filed for the year 2017-18, that the returns are yet to be processed, that no conclusion has been arrived at by the Assessing Officer on the petitioner's return and that therefore, the impugned show cause notice is premature. In support of this submission, the learned counsel for the petitioner has referred to Section 276C of the Act and submitted that in terms of Clause (i) of Section 276C(1) of the Act, the amount sought to be evaded should exceed Rs.25,000/- for initiating prosecution and when the returns filed by the petitioner are yet to be processed and no tax demand has been quantified, the question of initiation of prosecution does not arise.

9. In support of his contention, the learned counsel for the petitioner has placed reliance on the decision of the Hon'ble Supreme Court in the case of Babita Lila Vs. Union of India [reported in (2016) 73 Taxmann.com 32] and submitted that in the said case, the Hon'ble Supreme Court considered as to whether the Deputy Director of Income Tax has jurisdiction to initiate prosecution. The Hon'ble Supreme Court ultimately held that it is only the Deputy Commissioner (Appeals), as is apparent from Section 246(1), who has been conferred with the appellate jurisdiction to entertain the appeals, albeit from specified orders passed by the Assessing Officer and the Deputy Director of Income Tax, in particular, has not been designated to be the Appellate Authority or Forum from such orders or any other order of the Assessing Authority and therefore, it was held that the proceedings are without jurisdiction.

10. Reliance was also placed on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Bhupen Champak Lal Dalal [reported in (2001) 116 Taxmann.com 746] wherein the Hon'ble Supreme Court while noting the fact that the prosecution in Criminal Law and proceedings arising under the Act are, undoubtedly, independent and pointed out that when the conclusions arrived at by the Appellate Authority have relevance and bearing upon the conclusions to be reached in the case, necessarily, one authority will have to await the outcome of the other authority.

11. On the above points, the learned counsel would submit that the impugned show cause notice is wholly without jurisdiction and liable to be set aside.

12. The learned Senior Standing Counsel for the Revenue would contend that the writ petition is not maintainable and it is premature and that the impugned proceedings being only a show cause notice, the petitioner should submit his objections to the show cause notice. It is his further submission that before

initiation of prosecution, the question of issue of a show cause notice does not arise and this has been clearly elucidated by the Hon'ble Supreme Court in the case of Assistant Commissioner Vs. Velliappa Textiles Limited [reported in (2003) 132 Taxmann.com 165] wherein the Supreme Court held that the grant of sanction being an administrative act, the need to provide an opportunity of personal hearing to the accused before according sanction does not arise.

13. It is further stated by the learned Senior Standing Counsel for the Revenue that though the statutory provisions do not provide for an opportunity of personal hearing, with a view to provide an opportunity, the show cause notice was issued and the reply to be given by the petitioner will be considered and thereafter, the proceedings will be initiated in accordance with law and that therefore, the impugned notice is valid.

14. By referring to the decision of this Court in the case of N.Athimoolam Vs. ITO [reported in (2010) 327 ITR 603], it is submitted by the learned Senior Standing Counsel that the findings of the Tribunal can have no binding effect on the proceedings of Criminal Court and that the view taken by this Court in the case of ACIT Vs. N.K.Mohamed Ali [reported in (2010) 325 ITR 661] was held to be the correct position of law, as it has been rendered after taking note of the various decisions of the Hon'ble Supreme Court. It is further submitted that the Proviso under Section 279(1) of the Act provides that the Principal Chief Commissioner or the Chief Commissioner, as the case may be or the Principal Director General or the Director General may issue such instructions or directions to the Income Tax Authorities as he deems fit for institution of proceedings under Section 279 of the Act. Therefore, the Principal Director has sufficient jurisdiction to issue the impugned show cause notice.

15. After elaborately hearing the parties and carefully considering the materials placed on record, this Court is of the considered view that the present writ petition is premature. Firstly, the impugned proceedings is only a show cause notice and therefore, the petitioner has to respond to the same and it cannot be questioned in a writ petition.

16. The sheet anchor of the submissions of the learned counsel for the petitioner is by referring to Section 279(1) of the Act.

17. However, the Proviso under Section 279(1) of the Act enumerates officers, who may issue such directions or instructions to the authorities, who have been enumerated under Section 279(1) of the Act. Therefore, to say that the respondent

has no jurisdiction even to issue the show cause notice is a plea, which is stated to be rejected.

18. The decisions, which were referred to by the learned counsel for the petitioner in the cases of Babita Lila and Bhupen Champak Lal Dalal were all matters, in which, proceedings were initiated after the criminal law was set in motion before the concerned criminal courts. Therefore, in my considered view, it is too early for the petitioner now to place reliance on those decisions and if, ultimately, the authorities are of the opinion that prosecution has to be launched, then, it is well open to the petitioner to raise all defenses.

19. As held by the Hon'ble Supreme Court in the case of Velliappa Textiles Limited, there is no necessity at all to issue a show cause notice before granting an order of sanction, as it has been held to be an administrative act. Nevertheless, the respondent issued the show cause notice with a view to provide an opportunity to the petitioner, which he has to avail. Hence, this Court is not inclined to interfere with the impugned show cause notice. This Court holds that the respondent is one of the authorities enumerated in the Proviso to Section 279(1) of the Act and therefore, has sufficient jurisdiction to issue the impugned show cause notice.

20. For all the above reasons, the writ petition is dismissed. No costs. Consequently, the connected WMPs are also dismissed.

Sd/-
Deputy Registrar

//True Copy//

Sub Assistant Registrar

To
The Principal Director of Income Tax (INV), New No.46, Old No.108,
Nungambakkam High Road, Chennai-34.

+1cc to Mr.R.Siva Raman, Advocate SR.No.81826

+1cc to Mr.A.P.Srinivas, Advocate SR.No.81881

WP.No.29464 of 2017& WMP.
Nos.31761 & 31762 of 2017

SM:30.11.2017