

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.09.2020

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THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Writ Petition No.31383 of 2019

and WMP.No.31550 of 2019

Preetha Krishna

...Petitioner

Vs.

The Assistant Commissioner
of Income Tax (INV) Unit-4(3),
Investigation Wing,
Room No.110, 1st Floor,
New No.46, Old No.108,
Nungambakkam High Road,
Chennai-600 034

...Respondent

PRAYER: PETITION filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, calling for the records and quash the impugned order passed by the respondent vide F.No.ADIT/U-4(3)/2019-20 dated 18.10.2019, U/S. 230(1A) of the Income Tax Act, 1961 and consequentially direct the respondent herein to permit the petitioner to travel abroad as and when required in exercise of his fundamental right to travel abroad guaranteed under Article 21 of the Indian Constitution, by permanently removing all travel restrictions whatsoever, with immediate effect.

For Petitioner: Mr.Nithyaesh Natraj

For Respondent: Mr.A.P.Srinivas

Senior Standing Counsel

O R D E R

An interesting and important issue arises in this writ petition. The petitioner has approached this Court challenging an order under Section 230(1A) of the Income Tax Act, 1961 (in short 'IT Act'), the prayer couched in the following terms:

To call for the records and quash the impugned order passed by the respondent vide F.No.ADIT/U-4(3)/2019-20 dated 18.10.2019, U/S. 230(1A) of the Income Tax Act, 1961 and consequentially direct the respondent herein to permit the petitioner to travel abroad as and when required in exercise of his fundamental right to travel abroad guaranteed under Article 21 of the Indian Constitution, by permanently removing all travel restrictions whatsoever, with immediate effect.

2. There is some history to the present litigation. While hearing this writ petition on 07.11.2019, this Court had noticed that Section 230(1A) offered opportunity to an assessee to represent to the assessing officer that satisfactory arrangements had been made to defray the tax and other liabilities, if any, computed, in which case the necessary Tax Clearance Certificate (TCC) could well be issued by the officer permitting the assessee to travel out of the country. The following order thus came to be passed:

Mr.A.P.Srinivas, learned standing counsel takes notice for the respondent.

2. The challenge made in this writ petition is against the order passed under Section 230(1A) of the Income Tax Act, 1961, dated 18.10.2019. Through the impugned proceedings, the respondent called upon the petitioner to obtain a Tax Clearance Certificate under Section 230(1A) from the respondent before leaving the territory of India by land, sea or air.

3. The above said order was issued in pursuant to the search conducted at the premises of the petitioner under Section 132 of the Income Tax Act, 1961, and seizure of cash to the tune of Rs.23.87 Crores, jewellery weighing 5678.800 grams, diamond weighing 433.47 carots and foreign currency of 1.25 million USD.

4. Mr.Sathish Parasaran, learned Senior Counsel appearing for the petitioner submitted that the petitioner is a Teacher of spirituality and philosophy and has to attend conference in a foreign country and thus, she has to leave Chennai immediately and therefore, the interest of the petitioner to travel abroad and come back is to be protected.

5. The learned standing counsel for the respondent submitted that it is for the petitioner to approach

the respondent as per the first Proviso to Section 230 (1A) of the Income Tax Act, 1961.

6. Section 230 of the Income Tax Act, 1961, deals with the Tax Clearance Certificate, more particularly, first Proviso to Section 230(1A) therein contemplates that no person, who is domiciled in India at the time of his departure and in respect of whom circumstances exist, which in the opinion of an income tax authority render it necessary for such person to obtain a Tax Clearance Certificate, leaving the territory of India, unless he obtains a Certificate from the Income Tax Authority stating that he has no liability under this Act or that satisfactory arrangements have been made for the payment of all or any of such taxes, which are or may become payable by that person. Therefore, going by the above provision of law, this Court is of the view that the petitioner, instead of approaching this Court, ought to have approached the respondent and satisfied that the satisfactory arrangements have been made by her for the payment of all such taxes or which are become payable by her. Therefore, it is for the petitioner to approach the respondent, if she intends to leave abroad, even before completion of consequential proceedings pursuant to search and seizure.

7. Accordingly, without prejudice to the contention raised in this writ petition, it is open to the petitioner to approach the respondent even today, itself and satisfy him that the satisfactory arrangements have been made for the payment of all or any of such taxes, which are or may become payable by her.

Post the writ petition on 21.11.2019.

3. The petitioner filed a representation on the same date, that is, 07.11.2019 that came to be rejected by order dated 11.11.2019, challenged in W.P.No 1971 of 2019. The prayer sought in that writ petition was as follows:

To call for the records and quash the impugned order passed by the respondent vide F.No.ADIT/U-4(3)/Preetha/2019-20 dated 11.11.2019, U/S. 230(1A) of the Income Tax Act, 1961 and consequentially direct the respondent herein to permit the petitioner to travel abroad as and when required in exercise of his fundamental right to travel abroad guaranteed under

Article 21 of the Indian Constitution, by permanently removing all travel restrictions whatsoever, with immediate effect.

4. Both writ petitions, the present one as well as W.P.No.31971 of 2019, were listed for hearing together and the latter came to be dismissed as withdrawn by order of this Court dated 13.11.2019. Thereafter, the petitioner has been pursuing the present writ petition alone.

5. A serious objection is raised by Mr.A.P.Srinivas, learned Senior Standing Counsel for the respondent, to the maintainability of the present writ petition. He contends that once W.P.No.31971 of 2019, seeking quash of order dated 11.11.2019 had been withdrawn, the petitioner is not entitled to maintain its challenge to the present impugned order. He states that an order under Section 230(1A) is merely one wherein the respondent expresses his satisfaction of the existence of circumstances that, in his opinion, make it necessary for the petitioner to obtain a tax clearance certificate prior to exiting the territory of India by land, sea or air. This satisfaction is subjective and not one which is amenable to interference in terms of Article 226 of the Constitution of India. He points out that it is always open to the petitioner, pursuant to passing of an order under Section 230(1A), to seek issuance of tax clearance certificate, that might either be granted or rejected, based on the merits of the matter. The impugned order is thus only a preliminary order and does not give rise to a legitimate cause of action, particularly in the light of the withdrawal of W.P.No.31971 of 2019.

6. The order passed by the respondent on 11.11.2019 rejecting the petitioners' request for TCC is in the following terms:

'Whereas, a search & seizure operation u/s 132 of IT Act 1961 was conducted in your case at your residence at No.11, Shyamala Gardens, Akkarai, ECR, Chennai alongwith in the case of Shri.NKV.Krishna and the group concerns including trusts in which you are either a Director/shareholder/trustee on 16.10.2019. Besides, simultaneous search action was also conducted in the case of Shri Sri Bhagavan and Smt Padmavathi VijayaKumar and the trusts/companies run by them in a coordinated operation of the department, 38 premises were covered by various locations - Chennai, Chittoor, Hyderabad, Bengaluru etc.

During the course of search action at your residence at No.11 Shyamala Gardens, ECR, Akkarai, Chennai, unaccounted case of Rs.23.87 crores and foreign currency of 1.25 Million USD (valued

approximately Rs.9 crores) had been found and seized, jewellery worth Rs.5678 grams valued at Rs.1.68 crores and diamond worth 433.47 carots valued at Rs.1.7 crores approximately had been found and placed under 'Prohibitory Order' at your residence.

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13) Further, the search action initiated in your own case and in your group entities had only been temporarily concluded and 'Prohibitory Orders' has been placed at your residence and at the Corporate premises. Hence, a statement u/s.132 (4) of I.T.Act, 1961 has to be recorded for all the findings during the search, for which your presence is imminent as required under the law.

14) Further, investigation has to be completed in a time-bound manner. The investigation status so far is that you and your husband have not provided conclusive explanation for any of the search findings, the details as required in various questions (as per statement recorded to him u/s.132(4)).

15) Hence, in view of the above your presence in India is inevitable, look out notice u/sec.230(1A) of the Income Tax Act, 1961, had been issued, which reads as under:

Provided that no person

(i) Who is domiciled in India at the time of his departure; and

(ii) In respect of whom circumstances exist which, in the opinion of an income-tax authority render it necessary for such person to obtain a certificate under this section,

shall leave the territory of India by land, sea or air unless he obtains a certificate from the income-tax authority stating that he has no liabilities under this Act, or the Wealth-tax Act, 1957 (27 of 1957), or the Gift-tax Act, 1958 (18 of 1958), or the Expenditure-tax Act, 1987 (35 of 1987), or that satisfactory arrangements have been made for the payment of all or any of such taxes which are or may become payable by that person:

"Circumstances exist" had been clarified by CBDT vide its instruction No.1/2004 dated 05-02-2004 (copy

enclosed). Para 3(i) clearly states that ... where a person is involved in serious financial irregularities and his presence is necessary in investigation of cases under the income tax act or the wealth tax and it is likely that a tax demand will be raised against him...

In view of the above provisions of the law, as appended with the findings of the search (Undisclosed income, Hawala transactions etc) your presence is necessary in investigation under Income Tax Act and Wealth Tax Act, hence the look-out notice issued by the undersigned is in order and the permission for travelling abroad (USA, Ukraine) as per your request cannot be granted. As this will hamper the investigation which are required to be carried are mentioned in para 1 to 15 above.

Accordingly, your request for "Tax Clearance Certificate" for the above mentioned dates (as in your request), is hereby rejected.'

7. The portion that I have not extracted above sets out in extenso between paragraphs 1 and 12, the details of substantial amount of cash, deposits in bank, jewellery, foreign currency and overseas investments alleged to be unaccounted, the details of Companies and Trusts in which the petitioner, her husband and her father-in-law are stated to be involved and details of statements recorded from two individuals, who according to the Department have acquiesced to having engaged in Hawala transactions to send the money abroad, since the details per se are not entirely relevant for the purpose of this Writ Petition. Suffice it to note that the allegations as against the petitioner in the matter of alleged tax evasion are grave, subject to assessments to be made in this regard.

8. This order, rejecting the request of the petitioner, is specific to the travel plans of the petitioner 11th to 18th November, 2019 to Canyon Ranch Arizona USA and 21st to 25th November, 2019 to Kyiv, Ukraine. Such a rejection, in my considered view, will not stand in the way of the larger challenge raised in the present writ petition which turns on a more fundamental premise. The petitioner has advanced multi-pronged arguments on the veracity of the impugned order that, in my view, go to the root of the matter and impinge on whether such an order is jurisdictionally and legally sustainable. In contrast, order dated 11.11.2019 is only a consequential order that takes wings from order dated 18.10.2019. It is specific to the request of the petitioner for travel on specified dates. Order of rejection dated 11.11.2019 will thus not have a bearing on the legal issues raised by the petitioner in the present writ petition. For the aforesaid reasons, the withdrawal of

W.P.No.31971 of 2019 will also not preclude the adjudication of this Writ Petition on merits.

9. The argument of the revenue to the effect that the petitioner can always seek issuance of a TCC afresh also does not impress as the validity of an order passed under Section 230 (1A) has to be tested with reference to that order alone. Moreover, the rejection of a request relates back to a valid order under Section 230(1A) and if one were to take a view that the assumption of jurisdiction under Section 230 (1A) was lacking, all subsequent orders would consequently be rendered bad in law. The grant of a TCC begs the question of whether the order requiring such certificate is itself valid. The latter question has necessarily to be decided first as it forms the substratum of the lis.

10. For the above reasons, this writ petition is held to be maintainable.

11. The petitioner claims to be a teacher of spirituality and philosophy and the founder of various academies that disseminate philosophical concepts to the public at large. The Income Tax Authorities had carried out a search in terms of Section 132 of the Act in the premises of the petitioner on 18.10.2019. The search, according to the counter filed by the respondent, revealed unaccounted cash of a sum of Rs.23.87 crores, foreign currency of Rs.1.25 million USD (valued approximately at INR 9 crores), jewellery of 5678 gms. (valued at Rs.1.68 crores approx.) and diamonds worth Rs.430.74 carats (valued at Rs.1.78 crores approx.).

12. According to the revenue, these assets are unaccounted and have been generated by several companies abroad in which the petitioner is either shareholder or trustee along with her husband N.K.V.Krishna and father in law, Kalki Bhagvan. There are allegations in the counter in regard to the engagement of the petitioner in hawala transactions with dubious companies situated abroad. Statements appear to have been recorded from employees that are also relied upon by the revenue as supporting the hawala transactions engaged in by the petitioner in companies in Dubai, Europe, United States of America and Singapore.

13. I refrain from referring in detail to the transactions, since the investigation is stated to be ongoing and the enquiries/investigations are evidently at a preliminary stage. Suffice it to say that proceedings have been initiated by the Department both in terms of the IT as well as the Black Money Act, 2015 (in short 'BM Act') for the assessment of the income unearthed, found and seized in search. The impugned order being passed in terms of Section 230(1A), the provisions are extracted below as follows:

Tax clearance certificate.

230. (1) Subject to such exceptions as the Central Government may, by notification in the Official Gazette, specify in this behalf, no person,—

(a) who is not domiciled in India;

(b) who has come to India in connection with business, profession or employment; and

(c) who has income derived from any source in India, shall leave the territory of India by land, sea or air unless he furnishes to such authority as may be prescribed—

(i) an undertaking in the prescribed form from his employer; or

(ii) through whom such person is in receipt of the income

to the effect that tax payable by such person who is not domiciled in India shall be paid by the employer referred to in clause (i) or the person referred to in clause (ii), and the prescribed authority shall, on receipt of the undertaking, immediately give to such person a no objection certificate, for leaving India:

Provided that nothing contained in sub-section (1) shall apply to a person who is not domiciled in India but visits India as a foreign tourist or for any other purpose not connected with business, profession or employment.

(1A) Subject to such exceptions as the Central Government may, by notification in the Official Gazette, specify in this behalf, every person, who is domiciled in India at the time of his departure from India, shall furnish, in the prescribed form to the income-tax authority or such other authority as may be prescribed—

(a) the permanent account number allotted to him under section 139A:

Provided that in case no such permanent account number has been allotted to him, or his total income is not chargeable to income-tax or he is not required to obtain a permanent account number under this Act, such person shall furnish a certificate in the prescribed form;

(b) the purpose of his visit outside India;

(c) the estimated period of his stay outside India:

Provided that no person—

(i) who is domiciled in India at the time of his departure; and

(ii) in respect of whom circumstances exist which, in the opinion of an income-tax authority render it necessary for such person to obtain a certificate under this section,

shall leave the territory of India by land, sea or air unless he obtains a certificate from the income-tax authority stating that he has no liabilities under this Act, or the Wealth-tax Act, 1957 (27 of 1957), or the Gift-tax Act, 1958 (18 of 1958), or the Expenditure-tax Act, 1987 (35 of 1987), or that satisfactory arrangements have been made for the payment of all or any of such taxes which are or may become payable by that person :

Provided that no income-tax authority shall make it necessary for any person who is domiciled in India to obtain a certificate under this section unless he records the reasons therefor and obtains the prior approval of the Principal Chief Commissioner or Chief Commissioner of Income-tax.

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14. We are, in this case, concerned with the provisions of Section 230(1A), specifically the second proviso thereto that states that places a restriction on any person domiciled in India at the time of departure from leaving the Country where, circumstances exist which, in the opinion of an income-tax authority render it necessary for that person to obtain a certificate from the authority to the effect that the person has no liabilities under revenue laws or that satisfactory arrangements have been made for meeting liabilities, if any. Admittedly, there are no outstanding arrears of income, wealth, gift or expenditure tax in the case of this petitioner.

15. It is also relevant to note the circumstances under which a Look-out Circular would be issued by the Government of India, Ministry of Home Affairs at the instance of the respondent. The Circular is extracted below:

OFFICE MEMORANDU

Subject: Issuance of Look Out Circulars (LOC) in respect of Indian citizens and foreigners

Under the existing practice, the issuance of LOCs is governed by this Ministry's letter number 25022/13/78-F.I dated 5.9.1979 and OM number 25022/20/98-F.IV dated 27.12.2000.

2. It has, inter-alia, been stated in the letter dated 5.9.1979 of MHA that 'apart from the Govern

India in the Ministry of Home Affairs, circulars are issued by various authorities for keeping a watch on arrival/departure of Indians and foreigners. These authorities include the Ministry of External Affairs, the Customs and Income Tax Departments, Directorate of Revenue intelligence, Central Bureau of Investigation, Interpol, Regional Passport Officers, Police authorities in various States, etc.' It has further been stated that 'unless otherwise specified in the warning circular itself, the circulars issued by any of the various authorities specified above will be regarded as invalid if it is more than one year old and the card will be weeded out. For the future, it is considered that whenever any authority issues a warning circular to the immigration authorities, the period of validity should be clearly specified in the circular. If this is not done, the circular will be considered to be valid only for a period of one year from the date of issue and a watch will be maintained by the person concerned at the immigration check posts only for that period.'

3. The OM dated 27.12.2000 of MHA specifies the steps required to be taken for opening an LOC in respect of an Indian citizen. It has been mentioned in the said OM that the request for opening an LOC in respect of an Indian citizen is required to be made to all the Immigration Check Posts (ICP) in the country in a prescribed proforma. It has further been stated that the request for opening of LOC must invariably be issued with the approval of an Officer not below the rank of Deputy Secretary to the Government of India / Joint Secretary in the State Government / concerned Superintendent of Police at district level. Further, 'Care must be taken by the originating agency to ensure that complete identifying particulars of the person, in respect of whom the LOC is to be opened, are indicated in the Proforma...' It is further provided that 'an LOC is valid for a period of one year. It can, however, be extended further before the expiry of the one year period. In case no request for extension of LOC is received before expiry of one year period, an LOC will automatically be closed by the Immigration Officer concerned after expiry of one year period.'

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6. In a related judgement delivered on 11.8.2010 by the Hon'ble High Court of Delhi in W.P. (CrI.) No. 1315/2008-Sumer Singh Salkan Vs. Asstt. Director & Ors

and CrI. Ref.1/2006-Court on its Own Motion Re: State Vs. Gurnek Singh etc., the Court has answered four questions raised by a lower court on the LOC. These questions are as below:

a) What are the categories of cases in which the investigating agency can seek recourse of Look-out-Circular and under what circumstances?

b) What procedure is required to be followed by the investigating agency before opening a Look-out-Circular?

c) What is the remedy available to the person against whom such Look out-Circular has been opened?

d) What is the role of the concerned Court when such a case is brought before it and under what circumstances the subordinate courts can intervene?

7. The High Court has answered these questions in its judgement dated 11.8.2010 which are reproduced below for guidance of all concerned agencies:

a) Recourse to LOC can be taken by investigating agency in cognizable offences under IPC or other penal laws, where the accused was deliberately evading arrest or not appearing in the trial court despite NBWs and other coercive measures and there was likelihood of the accused leaving the country to evade trial/arrest.

b) The Investigating Officer shall make a written request for LOC to the officer as notified by the circular of Ministry of Home Affairs, giving details & reasons for seeking LOC. The competent officer alone shall give directions for opening LOC by passing an order in this respect.

c) The person against whom LOC is issued must join investigation by appearing before I.O. or should surrender before the court concerned or should satisfy the court that LOC was wrongly issued against him. He may also approach the officer who ordered issuance of LOC & explain that LOC was wrongly issued against him. LOC can be withdrawn by the authority that issued and can also be rescinded by the trial court where case is pending or having jurisdiction over concerned police station on an application by the person concerned.

d) LOC is a coercive measure to make a person surrender to the investigating agency or Court of law. The subordinate courts' jurisdiction in affirming or cancelling LOC is commensurate with the jurisdiction of cancellation of NBWs or affirming NBWs.

8. In accordance with the order dated 26.7.2010 of the High Court of Delhi, the matter has been discussed with the concerned agencies and the following guidelines are hereby laid down regarding issuance of LOCs in respect of Indian citizens and foreigners:

a) The request for opening an LOC would be made by the originating agency to Deputy Director, Bureau of Immigration (BoI), East Block VIII, RK Puram, New Delhi - 66 (Telefax: 011-2619244) in the Proforma enclosed.

b) The request for opening of LOC must invariably be issued with the approval of an officer not below the rank of

i. Deputy Secretary to the Government of India; or

ii. Joint Secretary in the State Government; or

iii. District Magistrate of the District concerned;

or

iv. Superintendent of Police (SP) of the District concerned; or

v. SP in CBI or an officer of equivalent level working in CBI; or

vi. Zonal Director in Narcotics Control Bureau (NCB) or an officer of equivalent level (including Assistant Director (Ops.) in Headquarters of NCB); or

vii. Deputy Commissioner or an officer of equivalent level in the Directorate of Revenue Intelligence or Central Board of Direct Taxes or Central Board of Excise and Customs; or

viii. Assistant Director of IB/Bol; or

ix. Deputy secretary of R&AW; or

x. An officer not below the level of Superintendent of Police in National Investigation Agency, or

xi. Assistant Director of Enforcement Directorate;
or

xii. Protector of Emigrants in the office of the Protectorate of Emigrants or an officer not below the rank of Deputy Secretary of the Government of India; or

xiii. Designated officer of Interpol

Further, LOCs can also be issued as per directions of any Criminal Court in India.

16. The purpose of a lookout circular has to be seen in the context of points (a) and (b) of paragraph 7 extracted above. The necessity or otherwise for seeking the issuance of a lookout circular is only in such cases where the investigating Officer is able to establish a clear intention on the part of the accused or the eminent possibility of the accused absconding from the country in order to frustrate trial/investigation. The threshold for such justification is high. In the present case, the search has taken place on 16.10.2019 and the impugned order has been passed on 18.10.2019, one day after the search. The records reveal that approval was sought from the Director General of Income Tax (Investigation) on 18.10.2019 for issuance of an order under Section 230 of the Act to the Immigration Authorities to prevent the petitioner from leaving India. Reference is made in the letter seeking approval to Instruction No.1 of 2004 dated 05.02.2004. The approval of the DGIT has been conveyed on the same day, i.e., 18.10.2019 and the impugned order under Section 230 (1A) passed on the same date conveying to the petitioner that she is required to obtain a Tax Clearance Certificate before leaving the territory of India. In response thereto, the Bureau of Immigration, Ministry of Home Affairs has opened a look out circular restraining the movement of the petitioner for a period of one year.

17. Let us now examine the purpose and intent of Section 230. Evidently, the provision is intended to protect the interests of the revenue in the case of an assessee, in whose case a demand of tax has been raised or is imminent, and who is expected to frustrate the recovery of the dues by absconding from the country and constituting a flight risk. The twin conditions, of pending or imminent tax dues and flight risk are to be based on tangible materials. My attention is drawn to the Report of the Task Force on Direct Tax, constituted under the

Chairmanship of Dr.Vijay Kelkar, commonly referred to as Vijay Kelkar Committee (2002) Recommendations on Direct Taxes, wherein at Chapter 3, the subject of Income Tax Clearance Certificate has been specifically referred to. This is what the Committee has to say in the context of TCC:

Income Tax Clearance Certificates

3.56 A person leaving India by land, sea or air is required to obtain from the Competent Authority a certificate that he has no liabilities under the direct tax laws or that he has made satisfactory arrangement for payment of his existing liabilities as also for payment of the tax that may become payable by him. The persons requiring income tax clearance are those:

(i) not domiciled in India provided they have stayed in India over a period of 120 days. Generally, a person holding a foreign passport is considered as not domiciled in India;

(ii) domiciled in India at the time of departure but-

(a) intends to leave India as an Emigrant; or

(b) intends to leave India on a work permit for employment or occupation abroad; or

(c) in respect of whom income tax authority considers that a clearance is necessary.

3.57 Case 1 was intended to facilitate collection of taxes from foreigners in respect of income that they may have earned during their stay in India. Case 2 was also intended to ensure that residents do not leave India without discharging their tax liabilities. However, over time the machinery for issuing such clearances has degenerated often leading to complaints of harassment and unethical behavior. In fact, international travel guides advise foreign tourist to budget for a certain sum to obtain such clearances. This is indeed an inhibiting factor for foreign tourists to visit India and stay long periods. It is also learnt from a cross section of officers and staff in the Department that they have yet to come across any case where such a clearance has facilitated recovery of taxes.

3.58 India has a network of treaties for avoidance of double taxation. These treaties do not provide for any bilateral arrangement for assistance in tax recovery

by one country from the residents of another country. It is now learnt that OECD has proposed the incorporation of such an arrangement in all treaties and therefore India will have to renegotiate for this purpose.

3.59 The Group on Tax Policy and Tax Administration set up by the Planning Commission under the chairmanship of Dr. Parthasarathi Shome has recommended that the requirement to obtain tax clearance by foreign tourists must be dispensed with immediately. The Task Force also discussed this issue and endorsed the view of the Group.

3.60 It is therefore recommended that the present requirement of obtaining a tax clearance certificate before leaving the country must be abolished. However, in order to protect the interest of revenue, we can continue to allow the income tax authorities to notify the immigration/custom authorities to prevent any particular person from leaving the country if such person is considered to be a proclaimed offender. As a result only a handful of notified persons will be subjected to the process of tax clearance as against the present practice of requiring all and sundry to comply with the requirement of obtaining tax clearance before leaving the country.

3.61 In terms of the policy of the Government of India, patronage in the form of grant of license, government contracts, permits, etc should be extended only to honest taxpayers. All the Ministries, their attached and subordinate offices, public sector undertakings, ordnance factories, Directorate-General of Supplies and Disposals and Central Public Works Department strictly ensure that those who fail to discharge their tax obligations do not get any patronage from them. The concerned Department/Agencies, before granting the contract insist on the production of Income Tax clearance certificate from the Assessing officer to the effect that the concerned person has paid his taxes unless stayed by the competent authority; he has cooperated with the department in the completion of assessments by filing return of income and complying with the notices and in the past three years, she/he has not been penalized or prosecuted for tax defaults. It is also learnt that some banks have also been insisting on income tax clearance certificate before granting loans.

3.62 Application for the tax clearance is required to be made to the Assessing officer having jurisdiction over his case in a specific form. This form brings out the state of tax compliance by the concerned person. On

receipt of the form, the Assessing Officer verifies from his records the facts stated therein. He looks into the position regarding payment of taxes, assessee's cooperation in completing assessment and whether he was penalised or prosecuted. Thereafter, the certificate of tax clearance is recorded by the Assessing Officer on the Application form. 3.63 The certificate is valid for one year. Application for fresh certificate can be made one month prior to the date on which the validity of the previous certificate is due to expire. Those firms of repute who have clean tax records are by Government notification exempted from the production of income tax clearance certificate. Such exemption certificate is issued on the recommendation of the Commissioner.

18. The opinion of the Committee was that the requirement of obtaining TCC be abolished in order to minimize or remove the harassment that it has often resulted in. However, to balance the interests of the Revenue, the Committee has suggested that if any person has been declared to be a proclaimed offender, then in such cases alone, the Income Tax Authorities could continue to notify the Immigration/Customs Authorities to prevent his flight. The provisions of Section 230 should only be invoked in such cases, after ascertaining such necessity and not in a general manner, so as to cause great prejudice to the personal liberty of tax payers.

19. I now discuss the case law cited by the petitioner. The Calcutta High Court, In the matter of Recols (India) Ltd. [(1953) 4 STC 271], considered the question as to when sales tax is to be treated as a preferential debt for the purposes of Section 230 of the Companies Act, whether from date of demand or date of receipt of sale price. This is not the question raised in this writ petition.

20. In The Income Tax Officer (Collection) Vs. Mrs. A. Sattlar [(1974) 4 SCC 847], the Supreme Court and in Laura Hamilton V. Vs. K.P.Menon, Tax Recovery Officer [(1990) 184 ITR 252] a learned single Judge of the Bombay High Court considered the veracity of orders under section 230(1) in cases where assessments had been completed and, according to the revenue, there were pending arrears. In Mrs.A.Sattlar's case (supra), the assessment originally framed had itself been set aside and there was thus no basis for the order under Section 230(1). In Laura Hamilton's case (supra), the petitioner therein had stood guarantee for the income tax arrears of one Lisbet Holmes for the purpose of issue of TCC in the latter's case. Lisbet Holmes left India in 1966. There appear to have arrears of tax in her case for the subsequent periods, that is, 1969-70 to 1972-73 on the basis of which the Department passed an order under Section 230(1) in the petitioner's case. Since the guarantee had been

executed to cover the tax arrears for a stipulated period, that is, till 1966 only, the Court held that the order under Section 230(1) issued to Laura Hamilton in 1983, 17 years after the date of the execution of the guarantee, went beyond the scope of the guarantee, and thus quashed the same.

21. In Dr. Jayanti Dharma Teja Vs. Secretary, government of India, Ministry of Finance, New Delhi and Others [(1984) 148 ITR 316], a Bench of the Andhra Pradesh High Court considered several issues arising from an order under Section 230(1). Two of the challenges raised preliminary questions, one on the ground that the restriction placed by virtue of an order under Section 230(1) militated against the right of a person to travel, unfettered, and the second that a notice must be issued to the assessee prior to issuance of an order under Section 230(1). The conclusions of the Court are as follows:

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8. The first question is whether the right to go abroad is a fundamental right guaranteed under art.19. It is not one of the enumerated rights in the various clauses of art.19. In Menaka Gandhi's case, (1978) 1 SCC 248 :AIR 1978 SC 597, Bhagwati J., speaking for the court, observed that "the right to go abroad cannot in all circumstances be regarded as included in freedom of speech and expression," (para.77) and in that view, the Supreme Court held that the impugned order in that case did not interfere with any of the fundamental rights of freedom of speech or expression or the right to carry on any profession. But the real question for consideration is whether art.21 is infringed in any way. The procedure contemplated by art.21 must undoubtedly satisfy the test of reasonableness. It, therefore, follows that though s.230(1) does not provide a notice to be given to a party before arriving at an opinion so as to make the income tax authority insist upon a clearance certificate, we are of the view that a notice must be given. The law is now well settled that even in administrative proceedings which involve civil consequences, the doctrine of natural justice is applicable. Therefore, for application of s.230(1), a notice is necessary, as insistence on a clearance certificate affects, though remotely, the holder of a passport to go abroad. But it is contended by the learned counsel for the Department that if prior notice is given, the very object of s.230(1) will be stultified as the person concerned may leave the country without complying with the section. We see considerable force in this submission of the learned counsel for the

Department. If prior notice is given, there is a possibility of the section becoming unworkable.

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22. The object and purpose of the provision cannot be faulted in principle or theory. What remains to be tested is the satisfaction of the conditions and parametres contemplated in the provision in a specific case to then decide whether the invocation was warranted and justified from the reasons and materials on record or whether it is an excess of authority. In the case of Jayanthi Dharma Teja (supra) wherein the Bench of the AP High Court dismissed the challenge to an order under Section 230(1), there are several material distinctions on facts from the present case.

23. Assessments of income and wealth had been finalized in that case for several years raising substantial demands. There had been no co-operation extended by the assessee therein and no attendance in the hearings/proceedings. After the finalization of the assessments exparte, the department was unable to recover the demands as the assessee has left the country. After a period of five years, when the assessee returns to India, the Department issues a notice to Panam Airways putting them to notice that no travel of the assessee be permitted on account of the pending tax arrears and stating that if a ticket were issued to facilitate travel of the assessee, the Airways would be deemed to be as 'assessee in default', liable for the liabilities of Dr.Teja. The assessee then expresses his inability to meet the pending demands stating that he had no assets in his name or to his account either in India or abroad that he could liquidate. He pleaded that he had approached the Finance Minister and Chairman of the Central Board of Direct taxes seeking a review of the tax claims and compensation payable to him and a settlement of the demands once and for all.

24. The notice issued by the income tax authority to Panam not to book any passage or issue a ticket for travel came to challenged and the findings on fact by the Court were to the effect that (i) there had been no co-operation extended by the assessee in the assessment proceedings (ii) the assessee had left the country and all efforts to serve notices had proved futile (iii) proceedings were thus completed ex parte (iv) substantial demands of income and wealth tax had been raised (v) attempts to recover the pending demands were also futile with the assessee therein refusing service of notices for recovery or such notices issued to the assessee's known address outside the country being returned as unserved (vi) the assessee acknowledged that he had no assets with which the demands could be met and was actively seeking a review/waiver of the demands raised (vii) the assessee was arrested in London in July, 1970,

and brought to India for trial (viii) he was convinced on several counts including criminal breach of trust, cheating, and, after his release from prison in 1975 he again left India.

25. It was in the above circumstances that the Bench declines to interfere in the matter. The Bench states that though the existence or otherwise of 'circumstances' for curtailing the right of the assessee to travel was subjective, and thus beyond the pale of judicial review, such subjective satisfaction must be arrived at in an objective manner. To quote the Bench at paragraph 6:

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It is thus seen that the insistence on the clearance certificate or the exemption certificate is based on the opinion of the income-tax authority that a person is not likely to return to India. It is argued by the learned counsel for the Department that the expression "of the opinion" indicates that it is the subjective satisfaction of the authority and beyond the pale of judicial review. It is no doubt true that the words in s. 230(1) "in the opinion of the income-tax authority" means subjective satisfaction of the authority. But that subjective satisfaction must be arrived at in an objective way, that is to say, there must be some material on the basis of which such opinion could be reasonably formed as it affects the right to go abroad which is part of the right of liberty. The question, therefore, is whether any such material exists in the present case. The petitioner was living mostly outside India. His presence could not be secured when prosecutions were launched. The Government of India had to take extradition proceedings. All the assessments under the tax enactments were made ex parte as the notice to his known address abroad were returned either unserved or refused. He left India in 1977 and returned only in February, 1983, after a period of five years. These facts speak for themselves. In the counter-affidavit filed on behalf of the respondents, it is stated that the petitioner was arrested in London in July, 1970, and brought to India for trial, that he was convinced on several counts including criminal breach of trust, cheating, and forget, that after his release from prison in 1975 he again left India in 1977, that assessment for the year 1961-62 were made ex parte as his presence could not be secured, that efforts were made for recovery of the compensation payable to the

petitioner consequent on the "Jayanti" being nationalised and after protracted correspondence a sum of rupees 3 crores odd was realised and adjusted towards the outstanding tax demands, that there was a furore in the Indian Parliament as to how Dr. Teja was allowed to go outside India when tax arrears to the tune of some crores was outstanding, that he left India in 1977 and that he returned only in February, 1983. These facts are sufficient to warrant the formation of an opinion on the part of the income-tax authority that the petitioner is not likely to return to India. We are, therefore, unable to appreciate the argument advanced on behalf of the petitioner that there is no material on the basis of which such opinion could have been formed. Whether a person has intention or not is a matter to be inferred from the circumstances. Such an inference, in the present case, is wholly permissible, in our view.

26. In the present case investigation is itself at a very nascent stage and assessments will be finalised in due course. The question of arrears, arising from assessments concluded post the search, does not thus arise. Admittedly, there are no arrears that are outstanding in the case of this petitioner from earlier assessments. Having said so, a plain reading of Section 230(1A) does not reveal any requirement of a completed assessment or pending demand, since the phrase used is 'satisfactory arrangements have been made for the payment of all or any of such taxes which are or may become payable by that person'. Thus, Section 230(1A) also stands triggered in the case of anticipated demands. However, the threshold for the application of the provision is high and the provision cannot be invoked unless the material available on file indicates circumstances that support the position that the assessee in question is a habitual offender, has criminal antecedents or is an assured flight risk all leading to the inevitable and justifiable apprehension that the anticipated demands of tax will not be met or satisfied. More so in the present case, where the search has taken place on 16.10.2019 and the respondent proceeds to pass the impugned order on 18.10.2019, just a day later.

27. The revenue has filed a counter dated 20.01.2020. Reference is made to the search and seizure operation conducted on 15.10.2019 in the residential premises of the petitioner as well as Kalki Bhagwan and Companies and Trusts run by them, in all 38 premises at various locations in Chennai, Chittoor, Hyderabad, Bangalore and other places. In the petitioners' residence cash of Rs.23.87 crores, foreign currency of 1.25 Million USD (INR 9 crore approx), jewellery worth 5678 grams

valued at Rs.1.68 crores and diamond worth 4.33 carats valued at 1.7 crore was found and seized. In addition, cash receipts generated by the companies and trusts, in which the petitioner was either a shareholder or trustee, had been found amounting to Rs.630 crores, wherein a sum of Rs.221 crores had been deposited into the bank. Reference is also made to a sum of Rs.131 crore transferred to various company bank accounts in Dubai, allegedly, through hawala channels. This allegation is made based on statements recorded from Sitaram Chandra Raju and Badrinarayanan, persons connected to the entities managed by the petitioner.

28. According to the revenue, investments have been made by the petitioner and her husband in several companies in Dubai, Europe and USA through Light Lotus Capital Investment holding, a company based in Singapore, which is a subsidiary of an Indian Company Global Arkitekts Pvt. Ltd. wherein the petitioner holds 50% of the shareholding. A bank account belonging to one Golden Import Pvt. Ltd. is stated to be undisclosed, wherein the petitioner and her husband hold substantial shares where the total credit was estimated at a figure of Rs.116 crores. Allegations are made in regard to purchase of huge tracts of land in the names of their employees for which on-money in cash is said to have been paid. This allegation is based on a sworn statement recorded from M.Savana Kumar, stated to be the manager-accounts of the group companies. During the search in the residential premises of Badrinarayan Chaudri Kota, the existence of two bank lockers were ascertained containing gold jewellery valued at 3.7 crores (approx) stated to belong to the petitioner.

29. The counter thereafter proceeds to detail the modus operandi by which the petitioner is alleged to have transferred substantial funds to OWA holding, based in UK and Singapore Expensive Event L&C, based in US. According to the Revenue, participants overseas in spirituality courses conducted by the petitioner were asked to remit the course fee in undisclosed bank accounts abroad including in the account of one EHEYI Development (Shanghai) Co. Ltd and utilized for investment and asset creation outside the country.

30. In rejoinder dated 30.01.2020, the petitioner denied the allegations primarily on the ground that they are baseless and highly premature. She points out that the affidavit had been filed by an Investigating Officer, who is a part of the search team and whose duty was merely to collate the details of assets and evidences found in search for appraisal and further action by the Assessing Officer of the petitioner. She has filed an affidavit of undertaking dated 06.02.2020 pointing out that she has co-operated thus far in the enquiry conducted by the Department, substantial assets including cash have been seized

at the time of search which would, she anticipates, be more than sufficient to settle tax liabilities even if assessments are finalized as projected by the Income Tax Department, that her visits abroad are only for the purposes of disseminating spirituality, that she travels on temporary tourist visas which require her return to India within the stipulated period and that her family including her husband and daughter live in India permanently. She emphasizes that there are no permanent assets or properties in her name in any other country other than India and reiterates that she has been and will always extend full co-operation with the on-going investigation.

31. Per contra, reply dated 15.02.2020 is filed to the letter of undertaking estimating the demands expected to be raised in the assessments pending finalization. In the course of the hearing, the Revenue has indicated broadly the anticipated demand in the petitioners' case but I refrain from recording any amount here, conscious that this may hamper the on-going proceedings that should be allowed to evolve and proceed unfettered by a pre-conceived target.

32. The other ingredient to determine conduct of an assessee and determine whether the assessee might be a flight risk is to evaluate the co-operation or otherwise extended by such assessee. A tabulation of dates is set out in counter dated 20.01.2020 detailing the summons/notices issued both under IT as well as BM Act as follows:

Details regarding Summons issued and response received.

S.N o	Name of the assessee	Summons/Letters/Noti ces issued under Income Tax Act and Black Money Act, 2015 date	Hearing date	Remarks
1.	Smt. Preetha Krishna	27.12.2019	30.12.2019	Not appeared
2.	Smt.Preetha Krishna	27.12.2019	30.12.2019	Not appeared
14.	Smt.Preetha Krishna	25.11.2019	02.12.2019	Not appeared
22.	Smt.Preetha Krishna	25.10.2019	29.10.2019	Not appeared

Name	Act	Date of Issue of summon/Notice/Let ter	Required date of Appearanc e	Remarks
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Smt.Preet ha	Income Tax Act, 1961	25-10-2019	29-10- 2019	Not appeared and not furnished any details
Smt.Preet ha	Income Tax Act, 1961	25-11-2019	02-12- 2019	Not appeared and not furnished any details
Smt.Preet ha	Black Money (Undisclose d Foreign Income and Assets) and Imposition of Tax Act, 2015)	23-10-2019	29-10- 2019	Not appeared and not furnished any details
Smt.Preet ha	Black Money (Undisclose d Foreign Income and Assets) and Imposition of Tax Act, 2015)	25-11-19	02-12- 2019	Not appeared and not furnished any details

33. In the course of hearing on 13.02.2020 it was noted that there were errors in the dates and comments as above and the revenue was permitted to file an amended counter, filed on 15.02.2020. As per the amended counter, it is seen that summons issued on 22.10.2019 under the IT Act listed the assessment for hearing on 24.10.2019, in response to which the petitioner had appeared. This fact has not mentioned in the original counter. Then again there is reference to summons dated 25.10.2019 listing the matter for hearing on 29.10.2019 where the remark is that the petitioner has appeared and a sworn statement recorded. In the original counter the respondent had remarked that there had been no response from the petitioner to the summons dated 25.10.2019.

34. The revised details of proceedings under the IT and BM Act in the case of the petitioner are as follows:

Proceedings of Income Tax Act

S.No .	Summon/Letter date	Hearing date	Descripti on	Remarks	Rebuttal
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1	22.10.2019	24.10.2019	Summons	Appeared	
2	25.10.2019	29.10.2019	Summons	Appeared & Sworn statement recorded	
3	25.11.2019	02.12.2019	Summons	Not appeared	Not granted any such adjournment
4	27.12.2019	30.12.2019	Summons	vide letter dt.27.01.20	
5	27.12.2019	30.12.2019	Letter calling for details (Encl.131)	assessee stated that "I sought adjournment in writing and granted".	
6	17.01.2020	22.01.2020	Penalty Show-cause for non appearance to 131 dt 25.11.2019	Not appeared vide letter dt.27.01.20 assessee stating the reasons and pray to drop the penalty proceedings u/s.272A.	
8	17.01.2020	22.01.2020	Penalty Show-cause for non appearance to 131 dt 27.12.2019		

Proceedings of Black Money Act

S.No.	Notice/Letter date	Issued on	Hearing date	Remarks	Rebuttal
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1.	Notice u/s 10(1)	23.10.2019	29.10.2019	Not appeared - Letter dt 8.11.19 seeking adjournment till 18.11.2019. Letter dated 4.2.20 stating that she has appeared before the undersigned on 29.10.2019.	Required assessee to furnish details of foreign investments. However, assessee did not furnish details called for.
2.	Summons u/s sec.8	25.11.2019	02.12.2019	Not appeared vide letter dt.4.2.2020 stating that I was waited in your office upto 1:30 PM on 28.11.2019 in compliance with the summon. No case for levy of penalty	Summons issued to assessee requiring her to appear on 02-12-1029 not on 28-11-2019
3.	Notice u/s 10(2)	14.01.2020	22.01.2020	Not appeared, vide letter dt. 4.2.2020 stating that adjournment was granted though email.	Not granted any such adjournment
4.	Summons u/s sec.8	28.01.2020	03.02.2020	Appeared and sought time for filing submissions	

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5.	Penalty Show-cause letter for non-appearance to summon u/s.8 dated 25.11.2019	31.01.2020	04.02.2020	Not appeared, vide letter dt.04.02.2020 requested to drop penalty proceedings.	
6	Penalty Show cause letter for non-appearance to 10(2) notice dated 14.01.2020	31.01.2020	04.02.2020		
7	Penalty show-cause letter for non-appearance to 10(1) notice dated 23.10.2019	31.01.2020	04.02.2020		

35. One of the obvious arguments to determine the veracity or otherwise of an order under Section 230(1A) is the anticipation that an assessee will not co-operate with proceedings initiated by the Department and one of the parametres to determine this is the response of the assessee to notices, summons and communications from the Department. Details in regard to hearing dates and appearance/co-operation or otherwise of an assessee to the posting of matter, are thus critical. To this end, affidavit dated 20.01.2020 falls far short of expectation and requirement. The second/corrected counter, dated 15.02.2020 casually brushes away the earlier mistakes and errors as 'inadvertant'.

36. The Revenue would also emphasise the non-co-operation by the petitioner to the on-going investigation. As regards this aspect, the revised details of hearings that have been circulated vide additional affidavit make it clear that the petitioner has attended two of the five hearings scheduled, has sought an adjournment on two of the four occasions when summons was issued and on two other occasions, i.e., 02.12.2019 and 30.12.2019. A letter dated 27.12.2019 calling for details to be filed on 30.12.2019 was also responded to by way of a request for adjournment. In response to penalty notices for non-appearance to summons dated 25.11.2019 and 27.12.2019, the petitioner, while not appearing, has filed a letter dated 27.01.2020 setting out certain reasons for non-appearance and praying for dropping of the proposed penalty.

37. At the outset, all hearings referred to have all been scheduled post the date of impugned order dated 11.11.2019 and this one fact would be sufficient to decide that the impugned order has been passed in haste and pre-maturely. Events post the date of impugned order can hardly support the order itself as the order has to be tested on the materials available as on its date. Even otherwise, in my considered view the above sequence of proceedings do not give rise for alarm or apprehension that the petitioner would abscond. It also does not legitimize the allegation that the petitioner has not been co-operating with the Department. There has been attendance, either in person or a communication seeking adjournment, on almost all the dates when hearings had been fixed. There is nothing amiss at this stage to lead me to the conclusion that the petitioner has been avoiding the hearings or subverted the same, to procrastinate or drag the proceedings needlessly.

38. As regards the submissions relating to the scope of Section 230A, no specific submissions have been adverted to by the revenue except to say that the volume of assets seized are sufficiently large to prima facie incriminate the petitioner and require such certification to be obtained. In my view, this, by itself, is insufficient for the Revenue to have arrived at a proper satisfaction that the petitioner is a flight risk or would not co-operate with the Department or that the demands anticipated would not be remitted. In fact, in the communication seeking approval, the respondent himself only states that 'it is likely that a tax demand will be raised against him'. The communication is clearly mechanical, since it is a cut and paste effort in the case of not just the petitioner but others as well who were involved in the search proceedings, such as Kalki Bhagwan, Padmavathi, N.K.V. Krishna and Sita Ramachandra Raju and are couched in identical language in all five cases.

39. The petitioner next argues that the impugned order is vitiated by lack of approval by the competent authority. Section 230(1A) requires that an order under Section 230(1) be passed after satisfaction/approval is recorded by the Chief Commissioner of Income Tax, that such order was, in fact, necessary to protect the interests of the Revenue. The approval in this case has been obtained from the Director General of Income Tax (Investigation) (in short 'DGIT') and not the Chief Commissioner of Income Tax (in short 'CCIT') as statutorily required. The argument of the revenue is that the roles of a DGIT and CCIT are interchangeable for the purposes of granting of approval in terms of Section 230(1A).

40. My attention is drawn to the provision itself which is categoric in regard to the requirement of approval from the CCIT as well as Instruction No.1 of 2004 dated 05.02.2004, which reiterates this requirement. The Instruction is extracted below:

INSTRUCTION NO.1/2004

SECTION 230 OF THE INCOME-TAX ACT, 1961- COLLECTION AND RECOVERY OF TAX- TAX CLEARANCE CERTIFICATES CIRCUMSTANCES IN WHICH TAX CLEARANCES CERTIFICATE, AS REQUIRED UNDER THE FIRST PROVISIO TO SECTION 230(1A), MAY BE REQUIRED TO BE OBTAINED BY PERSONS DOMICILED IN INDIA

INSTRUCTION NO.1/2004, DATED 5-2-2004

1. Section 230 of the Income-tax Act, 1961 relating to tax clearance certificates was amended by the Finance Act, 2003. The section was amended, inter alia, by way of insertion of a new sub-section (1A) which provides for the information to be furnished by persons domiciled in India at the time of leaving India. As per the said sub-section, persons who are domiciled in India are only required to furnish permanent account number, purpose of visit outside India and estimated period of stay outside India.

2. However, persons, in respect of whom circumstances exist which, in the opinion of an income tax authority, make it necessary for such person to obtain a tax clearance certificate, will be required to obtain such certificate. A person can be asked to obtain a tax clearance certificate only after taking approval from the Chief Commissioner of Income-tax.

3. In this regard, the Board hereby directs that tax clearance certificate, as required under the first proviso to sub-section (1A) of section 230, may be required to be obtained by persons domiciled in India in the following circumstance:

(i) where the person is involved in serious financial irregularities and his presence is necessary in investigation of cases under the Income-tax Act or the Wealth-tax Act and it is likely that a tax demand will be raised against him, or

(ii) where the person has direct tax arrears exceeding Rs.10 lakh outstanding against him which have not been stayed by any authority.

4. The Chief Commissioner of Income-tax, after satisfying himself that the departure of such persons from India will prejudicially affect the interest of revenue, may authorise the Assessing Officer to require that such persons obtain a tax clearance certificate. The Assessing Officer, thereafter,

shall inform the immigration authorities accordingly.'

41. According to the petitioner, a comparison of the definitions of CCIT and DGIT would bring home the fact that the CCIT/PCIT and DGIT/DIT are separate and distinct categories of officials who are to each exercise a distinct set of functions. While the positions of CCIT/PCIT or CIT/DIT/PDIT are interchangeable, no such overlap is envisaged as between the functions of CCIT and DGIT.

42. Finally, Part IX Rule 42 of the Income Tax Rules, 1962 dealing with Tax Clearance Certificate and the prescribed authority for Tax Clearance Certificate states as follows:

PART IX

TAX CLEARANCE CERTIFICATES

[Prescribed authority for tax clearance certificates.

42.(1) For the purposes of sub-section (1) of section 230, the prescribed authority shall be the Chief Commissioner of Income-tax or the Director-General of Income-tax, as the case may be, who has jurisdiction over the persons not domiciled in India or any other income-tax authority authorized by such Chief Commissioner or Director-General in this behalf.

(2) For the purpose of sub-section (1A) of section 230, the prescribed authority shall be the Chief Commissioner of Income-tax having jurisdiction over the persons domiciled in India or any other income-tax authority authorized by him in this behalf:

Provided that in the case of a person domiciled in India referred to in the first provision to sub-section (1A) of section 230, the application shall be made to the Assessing Officer who has jurisdiction to assess such person.]

43. The petitioner draws a distinction between Rules 42(1) and 42(2) as per which, the authority authorized to issue a TCC for the purpose of Section 230(1) shall be the CCIT or the DGIT, whereas for the purpose of Section 230(1A), the prescribed Authority shall be the CCIT. A clear distinction has thus been drawn, according to the petitioner, between the appropriate authority for grant of approving for those categories of persons enumerated under Section 230(1) and those enumerated in Section 230(1A). In the light of such clear categorization, the

argument of the Revenue to the effect that CCIT shall be equated to DGIT must, according to the petitioner, fail.

44. In Commissioner of Income Tax Vs. SPL's Siddhartha Ltd. [(2012) 345 ITR 223], the Court held at para 7 and 8:

7. Section 116 of the Act also defines the Income Tax Authorities as different and distinct Authorities. Such different and distinct authorities have to exercise their powers in accordance with law as per the powers given to them in specified circumstances. If powers conferred on a particular authority are arrogated by other authority without mandate of law, it will create chaos in the administration of law and hierarchy of administration will mean nothing. Satisfaction of one authority cannot be substituted by the satisfaction of the other authority. It is trite that when a statute requires, a thing to be done in a certain manner, it shall be done in that manner alone and the Court would not expect its being done in some other manner. It was so held in the following decisions:

(i) CIT Vs. Naveen Khanna (dated 18.11.2009 in ITA No.21/2009 (DHC).

(ii) State of Bihar Vs. J.A.C. Saldanna & Ors. AIR (1980) SC 326.

(iii) State of Gujarat Vs. Shantilal Mangaldas, AIR (1969) SCN 634.

8. Thus, if authority is given expressly by affirmative words upon a defined condition, the expression of that condition excludes the doing of the Act authorised under other circumstances than those as defined. It is also established principle of law that if a particular authority has been designated to record his/her satisfaction on any particular issue, then it is that authority alone who should apply his/her independent mind to record his/her satisfaction and further mandatory condition is that the satisfaction recorded should be "independent" and not "borrowed" or "dictated" satisfaction. Law in this regard is now well-settled. In Sheo Narain Jaiswal & Ors. Vs. ITO, 176 ITR 35 (Pat.), it was held:

"Where the Assessing Officer does not himself exercise his jurisdiction under Section 147 but merely acts at the behest of any superior authority,

it must be held that assumption of jurisdiction was bad for non-satisfaction of the condition precedent."

5. The Apex Court in the case of Anirudh Sinhji Karan Sinhji Jadeja Vs. State of Gujarat, (1995) 5 SCC 302 has held that if a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If discretion is exercised under the direction or in compliance with some higher authorities instruction, then it will be a case of failure to exercise discretion altogether.

45. In Dhanajaya Reddy Vs. State of Karnataka [(2001) 4 SCC 9], the Court held as follows:

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23 It is settled principle of law that where a power is given to do a certain thing in a certain manner, the thing must be done in that way or not at all. This Court in State of Uttar Pradesh v. Singhara Singh [AIR P.361 para 8) held

"A Magistrate, therefore, cannot, in the course of investigation, record a confession except in the manner laid down in Section 164. The power to record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down".

46. The Revenue relies upon the provisions of Section 116 which enumerates various Income Tax Authorities constituted for the purposes of the Act. Section 116(b) states as follows:

'116. There shall be the following classes of income-tax authorities for the purposes of this Act, namely :-

(a)

(aa)

(b) Directors-General of Income-tax or Chief Commissioners of Income-tax,'

47. Thus, according to them the role played by a DGIT is the same as that played by a CCIT, since the word used in Section 116(b) is 'or'. In using the word 'or' Legislature has intended that a DGIT and CCIT being of equal rank, their functions are interchangeable. Reliance in this regard is placed on a decision of a Division Bench of this Court in the case of Srinidhi Karti Chidambaram Vs. Principal Chief Commissioner of

Income-Tax [411 ITR 49], particularly the paragraph extracted below:

223. Respondents in their counter affidavit have contended that as per section 2(16) of the Income-tax Act, 1961, the word "Commissioner" has been defined, inter-alia, to include a person appointed as Principal Director of Income-tax and since the Commissioner is also one of the competent authority for according sanction under section 55 of the Black Money Act, the same covers the Principal Director of Income-tax also. Except Mr.ARL.Sundaresan, learned Senior Counsel for the petitioners, no serious contentions, on the above aspect, were made. Respondents have explained the competence of the Principal Director of Income Tax, and other authorities under the Income Tax Act, 1961, to accord sanction for prosecution and going through the provisions of the Income Tax Act, 1961, we do not accept the contention of the petitioners that the Principal Director of Income Tax is not an authority, jurisdiction/competence under Section 55 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015, to sanction prosecution or file a prosecution complaint for offences, under Section 50 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.

48. Having considered the rival submissions, I am inclined to accept the position that the statutory mandate for approval by the CCIT must be understood as that of the CCIT only and not as interchangeable with that of the DGIT. The provisions of Section 2(15A) have been amended vide Finance Act, 2020 (Act 12 of 2020) with effect from 01.04.2021 and it is only consequent thereupon that a CCIT is a person also meaning DGIT or Principal DGIT or Principal CCIT. Post amendment, a Chief Commissioner is defined as follows:

(15A) "Chief Commissioner" means a person appointed to be a Chief Commissioner of Income-tax ³[or a Director General of Income-tax] or a Principal Chief Commissioner of Income-tax ³[or a Principal Director General of Income-tax] under sub-section (1) of section 117;

The portions in brackets have been inserted by the Finance Act 2020 specifically to take effect with effect from 01.04.2021 only. Thus, prior to A Y 2021, a Chief Commissioner while being equal in rank to a DGIT as per section 116, was functionally, a different and distinct authority from the DGIT. Any approval that was required to be granted by a CCIT for the period prior to 01.04.2021 could not be replaced by the approval of the DGIT,

even though equal in rank. The decision of this Court in the case of Srinidhi Karti Chidambaram (supra) in on the question of whether a 'Commissioner' would include a person appointed as 'Principal Director of Income-tax' for the purpose of determining competence for according sanction under section 55 of the Black Money Act. This is not the question that arises in the present case and the case relied upon by the revenue is thus distinguishable.

49. Evidently, there is a statutory distinction envisaged as between the roles and responsibilities of a CCIT and a DGIT till the time of the amendment in 2020, as had this not been the position, there would have been no requirement for the amendment in the first place. The effect of the amendment is that reference to Chief Commissioner in the Statute can well be read to read and connote Director-General of Income tax. The office of the CCIT is thus functionally at par with that of the DGIT only w.e.f. 01.04.2021, though not vice-versa as the definition of DGIT in Section 2(21) remains unaltered, reading as below:

(21) "Director General or Director" means a person appointed to be a Director General of Income-tax or a Principal Director General of Income-tax or, as the case may be, a Director of Income-tax or a Principal Director of Income-tax, under sub-section (1) of section 117, and includes 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;

50. In this case, the Assessing Authority has parallelly initiated proceedings under the Black Money Act. One question that would arise is whether at all, the provisions of Section 230 would stand attracted to proceedings under The Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015.

51. India has long been grappling with the recoupment of undisclosed assets and income that are stashed overseas and the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 has been enacted with effect from 26.05.2015 to deal with 'black money', that is, undisclosed foreign income and assets. It sets out the procedure for dealing with such income and assets and to provide for the imposition of tax on such undisclosed assets held outside India and this enactment marks a great milestone in the march of law.

52. Section 6 of the Black Money Act coming under Chapter 3 dealing with Tax Management states that the Income Tax

Authorities specified in Section 116 of the Income Tax Act shall be tax authorities for the purpose of the Black Money Act as well. The procedure for assessment is set out under Section 10 of the Black Money Act and the limitation for completion of assessment or re-assessment under Section 10 is two years from the end of the financial year in which the notice under Section 10(1) is issued by the Assessing Officer.

53. Section 84 is critical to the list in this matter and sets out the application of certain provisions of the Income Tax Act to the Black Money Act. Section 84 reads as under:

'Application of provisions of Income-tax Act

84. The provisions of clauses (c) and (d) of sub-section (1) of section 90, clauses (c) and (d) of sub-section (1) of section 90A, sections 119, 133, 134, 135, [138, 144A], Chapter XV and sections 237, 240, 245, 280, 280A, 280B, 280D, 281, 281B and 284 of the Income-tax Act shall apply with necessary modifications as if the said provisions refer to undisclosed foreign income and asset instead of to income-tax.'

54. A critical omission from Section 84 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 is Section 230 of the Income Tax Act, 1961. It is a settled position that an omission in a statutory provision or an enactment cannot be deemed to be inadvertent. One expects that Legislature has applied its mind consciously to every word that has been selected in the framing of a statutory provision. The question that then arises is why Section 230 does not form part of Section 84. The objects and reasons for the enactment of Black Money Act are set out below:

STATEMENT OF OBJECTS AND REASONS

Stashing away of black money abroad by some people with intent to evade taxes has been a matter of deep concern to the nation. 'Black Money' is a common expression used in reference to tax-evaded income. Evasion of tax robs the nation of critical resources necessary to undertake programs for social inclusion and economic development. It also puts a disproportionate burden on the honest taxpayers as they have to bear the brunt of higher taxes to make up for the revenue leakage caused by evasion. The money stashed away abroad by evading tax could also be used in ways which could threaten the national security.

2. The Central Government is strongly committed to the task of tracking down and bringing back undisclosed foreign assets and income which legitimately belong to

the nation. Recognising the limitations of the existing legislation, it is proposed to introduce a new legislation to deal with undisclosed assets and income stashed away abroad.

3. The Supreme Court of India has also expressed concern over this issue. The Special Investigation Team constituted by the Central Government to implement the decision of the Supreme Court, has also expressed the views that measures may be taken to curb the menace of black money. Internationally, a new regime for automatic exchange of financial information is fast taking shape and India is a leading force in this effort.

4. The new legislation will apply to all persons resident in India and holding undisclosed foreign income and assets. A limited window is proposed to persons who have any undisclosed foreign assets. Such persons may file a declaration before the specified tax authority within a specified period, followed by payment of tax at the rate of 30 per cent and an equal amount by way of penalty. Exemptions, deductions, set off and carried forward losses etc. shall also be not allowed under the new legislation. Upon fulfilling these conditions, a person shall not be prosecuted under the Bill and the declaration made by him will not be used as evidence against him under the Wealth-tax Act, the Foreign Exchange Management Act (FEMA), the Companies Act or the Customs Act. Wealth-tax shall not be payable on any asset so disclosed. It is merely an opportunity for persons to become tax compliant before the stringent provisions of the new legislation come into force.

5. The Undisclosed Foreign Income and Assets (Imposition of Tax) Bill, 2015 inter alia provides for the following, namely:-

(i) Concealment of income in relation to a foreign asset will attract penalty equal to three times the amount of tax (i.e., 90 per cent of the undisclosed income or the value of the undisclosed asset). Failure to furnish return of income by person holding foreign asset, failure to disclose the foreign asset in the return or furnishing of inaccurate particulars of such asset shall attract a penalty of Rs.10 lakh.

(ii) The Bill provides for criminal liability with enhanced punishment. Wilful attempt to evade tax in relation to a foreign income will be punished with rigorous imprisonment from three years to ten years and with fine. Failure to furnish a return of income though

holding a foreign asset, failure to disclose the foreign asset or furnishing of inaccurate particulars of the foreign asset will be punishable with rigorous imprisonment for a term of six months to seven years. The provisions will also apply to banks and financial institutions aiding in concealment of foreign income or assets of resident Indians or falsification of documents.

(iii) Second and subsequent offence will be punishable with rigorous imprisonment for a term of three years to ten years and with fine of Rs.1 crore to Rs.25 lakh. In prosecution proceedings, the wilful nature of the default shall be presumed and it shall be for the accused to prove the absence of the guilty state of mind. 31 32

(iv) To facilitate enquiry and investigation, authorities under the Act have been vested with the powers of discovery and inspection, issue of commissions, issue of summonses, enforcement of attendance, production of evidence, impounding of books of account and documents.

(v) The Central Government has been empowered to enter into agreements with other countries, specified territories and associations outside India inter alia for exchange of information, recovery of tax and avoidance of double taxation.

(vi) Safeguards to prevent misuse have been embedded in the Bill. It will be mandatory to issue notices and grant of opportunity of being heard, record reasons for various actions and pass written orders. Appeal to the Income-tax Appellate Tribunal, and to the jurisdictional High Court and the Supreme Court on substantial questions of law have been provided for.

(vii) Persons holding foreign accounts with minor balances which may not have been reported out of oversight or ignorance have been protected from criminal consequences.

(viii) The Bill also proposes to amend Prevention of Money Laundering Act (PMLA), 2002 to include offence of tax evasion under the proposed legislation as a scheduled offence under PMLA.

6. The enactment of the proposed new Bill will enable the Central Government to tax undisclosed foreign income and assets acquired from such undisclosed foreign

income, and punish the persons indulging in illegitimate means of generating money causing loss to the revenue. It will also prevent such illegitimate income and assets kept outside the country from being utilised in ways which are detrimental to India's social, economic and strategic interests and its national security.

7. The Notes on clauses explain, in detail, the provisions of the Undisclosed Income and Assets (Imposition of Tax) Act, 2015.

8. The Bill seeks to achieve the above objectives.

NEW DELHI;

ARUN JAITLEY

The 19th March, 2015.

55. The avowed object being to deal with the issue of stashing of black money abroad, it is incumbent upon the Legislature to have extended the provisions of Section 230 to cover the Black Money Act as well. In my view, urgent amendment is called for to include reference to Section 230 of Income Tax Act, 1961 in Section 84 of the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 as well.

56. Learned counsel for the petitioner also argues that the counter affidavit cannot improve upon the reasoning in the impugned order. The order impugned should speak for itself and cannot be improved upon by additional reasons set out in the counter. He relies, in this regard, upon the judgment of the Supreme Court in the case of Mohinder Singh Gill and Another Vs. Chief Election Commissioner, New Delhi and Others [(1978) 1 SCC 405]. To this, Mr. Srinivas would state that the order does speak for itself and has been passed in line with the requirements of Section 230(1A) that makes it necessary for the respondent to obtain a certificate from an assessee if he is of the belief that such certificate were warranted. The position vests extraordinary power that vests in the authority to curtail the freedom of movement of an assessee and can be involved only in a situation where, 'circumstances exist which, in the opinion of an income-tax authority render it necessary for such person to obtain a certificate under this section'.

57. While the reasons recorded are no doubt, subjective, the circumstances on the basis of which the satisfaction is recorded must be a matter of record as should be any and all material on the basis of which the authority comes to the decision that the assessee should be called upon to obtain a TCC. The satisfaction must be based on tangible material including (i) a history of previous incidents or events that establish the reluctance of the assessee to co-operate with the

authorities or comply with statutory requirements, (ii) substantial outstanding arrears under tax enactments (iii) attempts by the assessee to evade the payment of the arrears (iv) difficulties faced by the authorities in collecting outstanding arrears or in ensuring appearance of the assessee in pending proceedings (v) non-co-operation on the part of the assessee in pending proceedings, to name a few illustrative situations.

58. An order under Section 230(1A) cannot be arbitrary or capricious based simply on a mere assumption or presumption of the circumstances referred to therein. A general or overreaching perception of the authority that such circumstances exist is also not sufficient in the absence of more tangible material indicating a cause for alarm. In the present case, there is absolutely no material to indicate the existence of such circumstances as seen from the record. The request seeking approval from the superior authority must contain the details of the circumstances that justify such request. I have perused the relevant file and find that it contains the reasons recorded by the respondent authority as well as the approval issued by the DGIT. Nowhere is there any mention any of the circumstances that would justify the invocation of Section 230(1A) as the reasons merely refer to voluminous assets found during search as well as material indicating connections abroad. These, by itself, would not justify invocation of the provision.

59. Section 230(1A) vests substantial power upon an authority to restrain and restrict the mobility of a citizen and with such great power must come great responsibility. One must be conscious of the extent of the power available and ensure that the same is exercised only in those cases where tangible circumstances and evidences justify its deployment. The requirement of prior consent by the superior authority must not be mechanical or automatic but must be preceded by a proper examination as to whether such intrusive and extraordinary measures as advocated under Section 230(1A) are warranted in that specific case. After all, that is the purpose of seeking consent of a superior authority who is expected to examine the circumstances involved and ratify the reasons recorded by the authority. In the present case, both the reasons recorded by the authority as well as the consent of the DGIT are based only on the seizure of substantial assets and the alleged connection of the petitioner with various entities abroad. In my view, these materials do not justify invocation of the rigour of Section 230(1A) that call for evidences and material of a far greater degree and gravity.

60. The impugned order dated 18.10.2019 is set aside and this writ petition allowed. Miscellaneous petitions are closed with no order as to costs.

Sd/-
Assistant Registrar(L.A)

//True Copy//

Sub Assistant Registrar

To

The Assistant Commissioner
of Income Tax (INV) Unit-4(3),
Investigation Wing,
Room No.110, 1st Floor,
New No.46, Old No.108,
Nungambakkam High Road,
Chennai-600 034.

+1cc to Mr.A.P.Srinivas, Advocate Sr.29344

Writ Petition No.31383 of 2019

WMP.No.31550 of 2019

vm[co]

srg 02/12/2020

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