IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 29.03.2023

CORAM :

The HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.Nos.9263, 9267, 9271, 9274, 9277 & 9280 of 2023
and
W.M.P.Nos.9360, 9364, 9367, 9371, 9374 & 9378 of 2023

W.P.No.9263 of 2023

Madurai Srinivasagam Sunther
No.61, 2nd Street,
Thanthai Periyar Nagar Aynavaram,
Chennai – 600 023. .. Petitioner

vs

Deputy Commissioner / Assistant Commissioner
of Income Tax, Central Circle 3(4),
3rd Floor, Investigation Building,
No.46, (Old No.108),
M.G.Road, Chennai – 600 034. .. Respondent

Prayer in W.P.No.9263 of 2023: Petition filed under Article 226 of the Constitution of India praying to issue a writ of mandamus directing the respondent to dispose of the request letter dated 20.03.2023 seeking the copy of the relevant documents, opportunity to cross examine Shri Rajendra Kothari and Shri Suresh Khatri.

For Petitioner	:	Mr.P.S.Raman Senior Counsel for Mr.M.Velmurugan (W.P.Nos. 9263, 9267 & 9271 of 2023) Mr.Arvind P.Datar, Senior Counsel for Mr.M.Velmurugan (in W.P.Nos. 9274, 9277 & 9280 of 2023)
For Respondent	:	Mr.A.P.Srinivas, Senior Standing Counsel (in all writ petitions)

COMMON ORDER

These writ petitions are filed by an assessee under the provisions of the Income-Tax Act, 1961(in short, 'Act').

2. The prayer in all writ petitions is for a mandamus directing the respondent to dispose request under letter dated 20.03.2023 seeking various documents as well as opportunity to cross examine Mr.Rajendra Kothari and Mr.Suresh Khatri.

3. The matters had come up for admission on 27.03.2023 and Mr.A.P.Srinivas, learned Senior Standing Counsel accepted notice for the Income-Tax Department and sought some time. The

matter was adjourned on the basis of the following order:

> *"Mr.A.P.Srinivas, learned Senior Standing Counsel accepts notice for the respondent and seeks a days' time to obtain instructions and file a counter.*
> *2. Seeing as the matter is time barring as on 31.03.2023, instructions will be obtained on whether the documents as set out in paragraph 16 (4 (a to e)) of affidavit filed in W.P.No.9274 of 2023 have been furnished.*
> *3.Since he states, on instructions, that the Assessing Officer does not intend to rely upon the statements of Rajendra Kothari and Suresh Kumar Khatri, let the same be reduced to writing and filed by way of affidavit.*
> *4. List on 29.03.2023 at the end of admission list."*

4. Today, when it is called, written instructions furnished by the assessing authority are placed on file. The Officer has extracted therein the request of the petitioner for documents and in addition, the petitioners draw attention to their representations. Read together, the following are the materials that have been sought for by the assessees, apart from opportunity to cross-examine the two individuals as aforesaid.

> *"i. Copies of Satisfaction note made by the assessing officer of the searched party and also my Jurisdictional AO so as to assume the jurisdiction u/s 153C.*
>
> *ii. Copy of sworn statement recorded from me by the office of Investigation Department.*
>
> *iii. Copy of sworn statement recorded from me by your good office on 11.03.2023.*

iv. Copies of all sworn statements recorded from Shri Rajendra Kothari since the initiation of the search on 10.11.2020 and thereafter either recorded u/s 132(4) or recorded u/s 131 of the Act.

v. On 18.03.2023, we were provided with the copies of sworn statement recorded from Shri Rajendra Kothari u/s 131 of the Act dated 30.11.2020 wherein in Q.12 he has stated as under:

"SD, Blue (Karti S), Karti S (RTG), TSD – it belongs to Madurai Sunther Srinivasagam, Chennai...."

5. Learned counsels for the petitioners confirm that they have received the material at Sl.Nos. 1, 2 and 3 above. That apart, it is the stand of the assessing officer that all statements of Mr.Rajendra Kothari and Mr.Suresh Khatri have been supplied. However, since there is some difference of opinion on whether the entirety of the statements have been supplied, this Court makes it clear that such statements as have been recorded from the two individuals as aforesaid must be supplied in full to the petitioner.

6. For this purpose, one may make reference to two judgments of the Hon'ble Supreme Court that has considered the similar issue as to the material that is to be supplied to an entity prior to assessment though in the context of the SEBI (Prohibition of

Fraudulent and Unfair Trade Practices Relating to Securities Market) Regulations, 2003 and the Code of Criminal Procedure, 1973, (i) *T.Takano v Securities And Exchange Board of India and another* (2022) 8 SCC 162 and (ii) *Reliance Industries Limited v Securities and Exchange Board of India and others* (2022) 10 SCC 181.

7. It is the petitioner's case that in order to be able to put up a complete defence, not just a portion of the statements relied upon by the Department, but the entire statements must be furnished. This is to ensure that all material as relating to the petitioner as would have a bearing upon the proceedings in his case are made fully available.

8. Per contra, it is the case of Mr.Srinivas, learned Senior Standing Counsel that it would suffice that those portions of the statements that the officer intends to rely upon may alone be furnished as the remaining part of the statements would be of no relevance to the petitioner. In the case of *T.Takano,* the Hon'ble Supreme Court considered the impact of a disclosure for the purposes of adjudication.

9. The following principles have been culled based on the

discussion therein:

> *"50. The following principles emerge from the above discussion:*
>
> *50.1 A quasi-judicial authority has a duty to disclose the material that has been relied upon at the stage of adjudication; and*
>
> *50.2 An ipse dixit of the authority that it has not relied on certain material would not exempt it of its liability to disclose such material if it is relevant to and has a nexus to the action that is taken by the authority. In all reasonable probability, such material would have influenced the decision reached by the authority.*
>
> *50.3 Thus, the actual test is whether the material that is required to be disclosed is relevant for purpose of adjudication. If it is, then the principles of natural justice require its due disclosure."*

10. Inter alia, they also took note of their earlier judgments in the case of *Natwar Singh v Director of Enforcement* (2010) 13 SCC 255, wherein, the Court had held that all material which was 'relevant' to the subject matter of the proceedings must be disclosed to the person to whom it relates unless the Scheme of the statute indicates to the contrary.

11. The Court had held that non-disclosure of such information would prejudice the proceedings and render them, prima facie, arbitrary. There are certain exceptions to the duty to

disclose, that are inbuilt in the SEBI Act or which constitute privileged information both in terms of Section 129 of the Evidence Act and the Right to Information Act, 2005.

12. After consideration of such exceptions as above, the conclusions that have been arrived at by the Court are as follows:

> *"D. Conclusion*
>
> *62. The conclusions are summarised below:*
>
> *62.1 The appellant has a right to disclosure of the material relevant to the proceedings initiated against him. A deviation from the general rule of disclosure of relevant information was made in Natwar Singh (supra) based on the stage of the proceedings. It is sufficient to disclose the materials relied on if it is for the purpose of issuing a show cause notice for deciding whether to initiate an inquiry. However, all information that is relevant to the proceedings must be disclosed in adjudication proceedings.*
>
> *62.2 The Board under Regulation 10 considers the investigation report submitted by the Investigating Authority under Regulation 9, and if it is satisfied with the allegations, it could issue punitive measures under Regulations 11 and 12. Therefore, the investigation report is not merely an internal document. In any event, the language of Regulation 10 makes it clear that the Board forms an opinion regarding the violation of Regulations after considering the investigation report prepared under Regulation 9.*
>
> *62.3 The disclosure of material serves a three-fold purpose of decreasing the error in the*

verdict, protecting the fairness of the proceedings, and enhancing the transparency of the investigatory bodies and judicial institutions.

62.4 A focus on the institutional impact of suppression of material prioritises the process as opposed to the outcome. The direction of the Constitution Bench of this Court in Karunakar (supra) that the non-disclosure of relevant information would render the order of punishment void only if the aggrieved person is able to prove that prejudice has been caused to him due to non-disclosure is founded both on the outcome and the process.

62.5 The right to disclosure is not absolute. The disclosure of information may affect other third-party interests and the stability and orderly functioning of the securities market. The respondent should prima facie establish that the disclosure of the report would affect third-party rights and the stability and orderly functioning of the securities market. The onus then shifts to the appellant to prove that the information is necessary to defend his case appropriately.

62.6 Where some portions of the enquiry report involve information on third-parties or confidential information on the securities market, the respondent cannot for that reason assert a privilege against disclosing any part of the report. The respondents can withhold disclosure of those sections of the report which deal with third-party personal information and strategic information bearing upon the stable and orderly functioning of the securities market.

63. The Board shall be duty-bound to provide copies of such parts of the report which concern the specific allegations which have been levelled against the appellant in the notice to show cause. However, this does not entitle the appellant to receive sensitive information *regarding third parties and unrelated transactions that may form part of the investigation report."*

13. In *Reliance Industries Limited,* three-Judges of the Hon'ble Supreme Court considered the same question. They refer to the attempt of SEBI to select certain documents from among those seized and disclose only those to the appellant stating in that context, as follows:

> *"63. Observing the facts and circumstances of this case, which have been adumbrated above, we are of the firm opinion that the defence taken by SEBI that they need not disclose any documents at this stage as such a request is premature in terms of the CrPC, cannot be sustained.*
>
> *64. Before we part with the present appeal, another disconcerting aspect of this case that comes to the fore is SEBI's attempt to cherrypick the documents it proposes to disclose. There is a dispute about the fact that certain excerpts of the opinion of Justice (Retd.) B. N. Srikrishna, were disclosed to the appellant herein. It is the allegation of the appellant that while the parts which were disclosed, vaguely point to the culpability of the appellant, SEBI is refusing to divulge the information which exonerate it. Such cherrypicking by SEBI only derogates the commitment to a fair trial.*
>
> *65. In Nea Karteria Maritime Co Ltd v. Atlantic and Great Lakes Steamship Corporation, [1981] Com LR 138 at 139, Mustill J. held as under:*
>
> > *'I believe that the principle underlying the rule of practice exemplified in Burnell v British Transport Commission [1956] 1 QB 187 is that where a party is deploying in court material which would otherwise be privileged, the opposite party and the court*

must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.'

The aforesaid principle is often referred to as the 'Cherrypicking' principle.

66. In the case at hand, SEBI could not have claimed privilege over certain parts of the documents and at the same time, agreeing to disclose some part. Such selective disclosure cannot be countenanced in law as it clearly amounts to cherrypicking."

14. Having heard the parties, my decision is as follows. The primary premise upon which an assessment must be formulated is bearing in mind the principles of natural justice. The submission of the Revenue that the necessary documents, as intended to be relied upon have been supplied and that they would suffice, is unacceptable seen in light of the observations of the Apex Court in the aforesaid two judgments.

15. Selective supply of the documents would be unfair simply for the reason that the petitioners must know the entire context in which the statement has been made. Apart from that, there may be other portions of the statement that might well

support the assessee that it must not be denied.

16. Typically, seizures give rise to several issues for consideration in the assessment of a searched entity. Not all of them would have relevance to a third party in respect of whom also, incriminating material might be found. The Scheme of the Income-Tax Act provides for two modes of assessment in such situations; an assessment under Section 153A in the case of the searched person and Section 153C in the case of the third party.

17. In the present case, the petitioner was in receipt of notices under Section 153C and has filed returns. The status as a third party to the search assessment is not in dispute. Thus, and in these circumstances, it is incumbent upon the authorities to handover such allegedly incriminating materials that have been found by the Revenue in the course of the search and which have been handed over by the Assessing Officer of the searched entity to the assessing officer of the third party.

18. After all, it is these materials that are the basis of the Section 153 proceedings themselves and thus the assessee must have the benefit of the entirety of the material in order to formulate

its defence against the proceedings.

19. As a result, the entirety of the statements as recorded from Mr.Rajendra Kothari and Mr.Suresh Khatri must be supplied to the petitioner.

20. At this juncture, Mr.Srinivas would protest, stating that the petitioner has chosen to approach this Court at the eleventh hour, knowing fully well that the limitation for completion of the assessments is imminent. This contention is not acceptable for the reason that the show-cause notices were issued only on 11.03.2023.

21. Issuance of a show-cause notice is a sine qua non for completion of assessment. Thus mere mention of the issues in the questionnaires under Section 142(1) or notices under Section 142(3) would not suffice as only the proposals contained in the show-cause notices can ultimately fructify into an order of assessment.

22. Thus, and since the show-cause notice have been issued only on 11.03.2023 proposing reliance on the statements, and the

petitioner having made its request for the same on 20.03.2023, there is no delay in the institution of the present writ petitions.

23. The statements shall be handed over within one week from today and an opportunity to cross-examine shall be provided thereafter. The assessments shall be completed on or before 31.05.2023.

24. Writ petitions stand disposed in terms of the aforesaid orders. No costs. Consequently, connected miscellaneous petitions are closed.

29.03.2023

Index:Yes
Neutral Citation:Yes
ssm

To

The Deputy Commissioner / Assistant Commissioner
of Income Tax, Central Circle 3(4),
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No.46, (Old No.108),
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DR. ANITA SUMANTH,J.

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