

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WPT No. 163 of 2016

- Arun Kumar Agrawal S/o Late Shri Shanker Lal Agrawal Aged About 47 Years, 16, Chaitanya Nagar, Raigarh, P.S. Raigarh, District-Raigarh, Chhattisgarh- 496001

---- Petitioner

Versus

1. The Principal Commissioner Of Income Tax Aaykar Bhawan, Near Vyapar Vihar, Bilaspur, Chhattisgarh
2. The Joint Commissioner Of Income-Tax (1) Income Tax Office, Mahima Complex, Vyapar Vihar, Bilaspur, Chhattisgarh
3. The Income-Tax Officer-1, Aaykar Bhawan, Chakradhar Nagar, Raigarh, Chhattisgarh-496001

---- Respondent

And

WPT No. 165 Of 2016

- Arun Kumar Agrawal S/o Late Shri Shanker Lal Agrawal Aged About 47 Years, 16, Chaitanya Nagar Raigarh, P.S.-Raigarh, District-Raigarh (Chhattisgarh) Pin-496001

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Vs

1. The Principal Commissioner Of Income Tax Aaykar Bhawan, Near Vyapar Vihar, Bilaspur (Chhattisgarh)
2. The Joint Commissioner Of Income-Tax (1) Income Tax Office, Mahima Complex, Vyapar Vihar, Bilaspur (Chhattisgarh)
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---- Respondent

For Petitioner : Shri S. Rajeshwara Rao and Shri M.K. Sinha, Adv.
For Respondents : Smt. Naushina Afrin Ali, Advocate.

Hon'ble Shri Justice Prashant Kumar Mishra

Order On Board

01/12/2016

1. The petitioner would assail the legality and validity of the notice under Section 148 of the Income Tax Act, 1961 (for short 'the Act, 1961'). He has also prayed for declaration that the action of initiating re-assessment proceedings under Section 147 of the Act, 1961 solely on the basis of report of District Valuation Officer (DVO) is illegal and bad in law. Since similar notice is assailed in

all the 3 Writ Petitions, they were heard on admission analogously and are being disposed of by this common order.

2. It is argued that issuance of notice for re-assessment being based solely on the report of DVO is illegal as the Assessing Officer has not applied its independent mind before issuing notice. It is also argued that the pre-requisites of re-reopening of assessment proceedings under Section 147 of the Act, 1961 are not satisfied as the Assessing Officer has not reasoned out the belief that the income chargeable to tax has escaped assessment for the reason either of omission or failure on the part of the assessee to make return of his income or omission or failure. Reliance is placed in the matters of **ACIT Vs. Dhariya Construction Company** {(2010) 328 ITR 515 (SC)}, **Sargam Cinema Vs. CIT** {(2011) 197 Taxman 2003 (SC)}, **Calcutta Discount Co. Ltd. Vs. Income Tax Officer & Anr.** {(1961) 41 ITR 191}, **Whirlpool's Corporation Vs. Registrar of Trade Marks** {(1998) 8 SCC 1}.
3. Per contra, learned counsel for the Revenue would oppose the writ petitions at the admission stage on submission that the petition against show cause notice is not maintainable because the officer has jurisdiction under Sections 147 and 148 of the Act, 1961 to initiate re-assessment proceeding whenever the income has escaped assessment.

4. Notice issued to the petitioner under Section 148 of the Act, 1961 for re-opening of assessment for assessing escaped assessment within the meaning of Section 147 (2)(C) (i) records thus:-

“After receiving information from the DDIT (Inv.) – II Raipur case was selected for scrutiny u/s 147 for the A.Y. 2008-09. Assessee has constructed of Commercial and Residential building from 2006-07 to 2010-11. Assessee has invested huge amount for construction. To know actual cost of the building case was refer to the DVO Jabalpur, after valuation of the building, the DVO has submitted his report. On perusal of report, assessee has declared Rs.29,87,162/- against the expenditure of building in his return of income for the A.Y. 2010-11 where as, as per the report assessed cost of construction is of Rs.43,44,387/-. Excess amount of expenditure of Rs.13,46,225/- is escaped income of the assessee.

Therefore, I have reason to believe that the assessee has failed to disclose fully and truly all material hence chargeable to tax Rs.13,46,225/- has escaped assessment for F.Yr. 2009-10 relevant to A.Yr. 2010-11 within the meaning of sec.147 (2) (C)(i).

Issue notice u/s 148 of the income tax Act 1961 for the A.Y. 2010-11. This notice is being issued after getting approval from the Pr. CIT, Bilaspur vide letter dated 29.3.2016.”

5. Based on the above notice, the petitioner was served with notice (Annexure-P/1) proposing to assess/re-assess the income requiring the petitioner to file return in the prescribed form of his income for the relevant assessment year.
6. True it is that in the matter of **Calcutta Discount** (Supra), the

Supreme Court has held that the petition would be maintainable to challenge invocation of proceeding for re-assessment even though it was also open to the assessee to challenge the same before the A.O., however, the said principle would apply when the notice issued to the assessee is without jurisdiction.

7. In the case at hand, notice (Annexure-P/2) is not only on the basis of report of DVO, Jabalpur, but the Assessing Officer has issued notice by recording reason that in view of the report of DVO, he has reason to believe that the assessee has failed to disclose fully and truly all materials and hence chargeable to tax which has escaped assessment for the relevant financial year within the meaning of Section 147 (2)(C)(i) of the Act, 1961.
8. In the matter of **Commissioner of Income Tax and Others Vs. Chhabil Dass Agarwal** {(2014) 1 SCC 603}, the Supreme Court was dealing with a case of re-assessment wherein the assessee was issued notice under Section 148 of the Act, 1961. After the assessment was completed, the assessee, instead of preferring an appeal, preferred writ petition before the High Court and the assessment order was quashed occasioning filing of special leave petition before the Supreme Court by the revenue. Allowing the appeal, the Supreme Court held thus in paragraphs- 15 & 16:-

15. Thus, while it can be said that this Court has recognised some exceptions to the rule of

alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in **Thansingh Nathmal case** {AIR 1964 SC 1419}, **Titaghur Paper Mills case** {(1983) 2 SCC 433} and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. In the instant case, the Act provides complete machinery for the assessment/reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In **Ram and Shyam Co. v. State of Haryana** {(1985) 3 SCC 267} this Court has noticed that if an appeal is from “Caesar to Caesar’s wife” the existence of alternative remedy would be a mirage and an exercise in futility.”

9. In the matter of **Indo Asahi Glass Co. Ltd. Vs. ITO** {(2002) 10 SCC 444} the Supreme Court observed thus:-

“5. This and the other facts cannot be taken up for consideration by this Court for the first time. In our opinion, the High Court was right in coming to the conclusion that it is appropriate for the appellants to file a reply to the show-cause notice and take whatever defence is open to them.”

10. In **Bellary Steels and Alloys Limited Vs. Deputy Commissioner, Commercial Taxes (Assessments) and Others** {(2009) 17 SCC 547}, the Supreme Court held thus:-

“3. Before concluding, we may state that we have allowed the appellant(s) to withdraw the original writ petition as the said proceedings came to be filed against the show-cause notice. We have repeatedly held that in the absence of factual foundation, it would be impossible to decide matters of this kind. When the doctrine of promissory estoppel is invoked, the doctrine needs to be based on factual data which has not been pleaded. The High Court should not have interfered in the matter. In these cases, the writ petition was filed without reply to even the show-cause notice. In the circumstances, we could have dismissed these civil appeals only on the ground of failure to exhaust statutory remedy, but for the fact that huge investments involving the large number of industries is in issue.”

11. In the matter of **Commissioner of Income-tax, Gujarat Vs. Vijaybhai N. Chandrani** {2013 AIR SCW 4675}, it has been held thus:-

14. In our considered view, at the said stage of issuance of the notices under Section 153C, the assessee could have addressed his grievances and explained his stand to the Assessing Authority by filing an appropriate reply to the said notices instead of filing the Writ Petition impugning the said notices. It is settled law that when an alternate

remedy is available to the aggrieved party, it must exhaust the same before approaching the Writ Court. In *Bellary Steels and Alloys Ltd. v. CCT*, (2009) 17 SCC 547, this Court had allowed the assessee therein to withdraw the original Writ Petition filed before the High Court as the said proceedings came to be filed against the show-cause notice and observed that the High Court should not have interfered in the matter as the Writ Petition was filed without even reply to the show cause notice. This Court further observed as follows:

"3....In the circumstances, we could have dismissed these civil appeals only on the ground of failure to exhaust statutory remedy, but for the fact that huge investments involving the large number of industries is in issue."

15. We are fortified by the decision of this Court in *Indo Asahi Glass Co. Ltd. v. ITO*, (2002) 10 SCC 444, wherein the assessee had approached this Court against the judgment and order of the High Court which had dismissed the Writ Petition filed by the assessee wherein challenge was made to the show cause notice issued by the Assessing Authority on the ground that alternative remedy was available to the assessee. This Court concurred with the findings and conclusions reached by the High Court and dismissed the said appeal with the following observations:

"5. This and the other facts cannot be taken up for consideration by this Court for the first time. In our opinion, the High Court was right in coming to the conclusion that it is appropriate for the appellants to file a reply to the show-cause notice and take whatever defence is open to them."

16. In the present case, the assessee has invoked the writ jurisdiction of the High Court at the first instance without first exhausting the alternate remedies provided under the Act. In our considered opinion, at the said stage of proceedings, the High Court ought not have entertained the Writ Petition

and instead should have directed the assessee to file reply to the said notices and upon receipt of a decision from the Assessing Authority, if for any reason it is aggrieved by the said decision, to question the same before the forum provided under the Act.”

12. In the case at hand, notice under Section 147 (2)/148 of the Act, 1961 has been assailed only on the ground that the same is based on report of DVO, therefore, it is illegal and void. Jurisdiction of the Assessing Officer to issue notice has not been assailed on the ground that the notice is barred by limitation. As earlier discussed, notice is not based merely on the report of the DVO but having mentioned the same, the Assessing Officer has recorded its own satisfaction of existence of reason to believe that the income of the relevant assessment year has escaped assessment. Thus, the notice cannot be treated as without jurisdiction. Even otherwise, the petitioner would get full opportunity before the Assessing Officer to present his case as to why it is not a case of escapement of income.
13. For the foregoing, all the writ petitions being not maintainable against show cause notice deserve to be and are hereby dismissed.

Sd/-
Judge
(Prashant Kumar Mishra)

HEADLINES

Writ Petition against show cause notice issued by the Assessing Officer under the Income Tax Act, 1961 is not maintainable unless prima facie case of lack of jurisdiction is made out.