

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.10859 of 2018

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Alkem Laboratories Limited, a Limited Company incorporated under the Companies Act, 1956, having its office at Exhibition Road, Patna G.P.O., P.S. Gandhi Maidan in the town and District of Patna through its Regional Director, Ashok Kumar, Son of Lalan Kumar Singh resident of F- 145, P.C. Colony, Kankarbagh, Patna- 800020, P.O. & P.S.- Kankarbagh, District- Patna.

.... Petitioner/s

Versus

1. Principal Commissioner of Income Tax-1, Patna 2nd Floor, Central Revenue Building Beer Chand Patel Path, Patna.
2. The Additional/Joint Commissioner of Income Tax, Range-1, 3rd Floor, Lok Nayak Jai Prakash Bhawan, Dak Bunglow Chowk, Patna.
3. The Deputy/Assistant Commissioner of Income Tax, Circle-1, 3rd Floor, Lok Nayak Jai Prakash Bhawan, Dak Bunglow Chowk, Patna.

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Ajay Kumar Rastogi, Adv.

For the Respondent/s : Smt. Archana Sinha, Adv.

Mr. Alok Kumar, Adv.

Mr. Sanjeev Kumar, Adv.

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CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date: 02-08-2018

This writ application has been preferred questioning the notice under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') dated 12.01.2018 for the assessment year 2011-12 issued by the Assistant Commissioner of Income Tax, Circle-1, Patna (hereinafter referred to as the 'Assessing Officer') initiating proceedings for reassessment against the petitioner. The petitioner has also prayed for quashing of the preliminary order dated 25.04.2018 passed by the Assessing Officer whereby the petitioner's objection to the issuance of notice and assumption of jurisdiction by respondent no.3 has been rejected.



Mr. Ajay Kumar Rastogi, learned advocate, representing the petitioner, has placed before us the relevant provisions of Section 148 of the Act. It is his submission that under proviso to Section 148 unless the twin pre-conditions of “reason to believe” and “any income chargeable to tax has escaped assessment for any assessment year” are satisfied, there cannot be initiation of reassessment proceeding. It is his case that during the assessment year 2011-12 weighted deduction of Rs.54,72,75,816/- claimed by the petitioner under Section 35(2AB) stood disallowed during course of original assessment proceedings and, therefore, the same cannot be said to have escaped assessment. Learned counsel submits that belief formed by the Assessing Officer that income of Rs.54,72,75,816/- has escaped assessment is contrary to the materials on record and is a mere pretence, moreover the proceeding under Section 148 of the Act cannot be initiated at this stage when the Commissioner of Tax, Circle-1 in exercise of power under Section 263 of the Act has not found any illegality, irregularity or infirmity in disallowance of weighted part of deduction under Section 35(2AB) and allowance of research and development expense actually incurred by the petitioner amounting to Rs.48,51,70,541/- by the Assessing Officer in assessment order under Section 143(3) dated 28.03.2014. The attention of this Court has been drawn towards Annexure-2 by which objection raised by the petitioner has been rejected by the Assessing Officer. According to Assessing Officer, the mere fact that the earlier Assessing Officer had examined the issue related to deduction claimed under Section 35(2AB) does not absolve the petitioner from



satisfying the conditions required to avail the benefits of scheme wherein investment in R&D is being promoted by the government. First condition to avail this benefit is that the institution claiming deduction under Section 35(2AB) must be registered for R&D work with the DSIR, Ministry of Science and Technology. The recipient of the beneficiary is further obliged to present annually to DSIR the account books which it separately maintains to account for the expenses incurred towards R&D. In the opinion of the Assessing Officer in one of the files pertaining to period assessment year 2011-12 to assessment year 2015-16 there exists any indication to the correct amount of expenditure towards R&D. Mr. Rastogi has relied upon the various judgments including the judgment of this Court in the case of Commissioner of **Income-Tax v. Agarwalla Brothers** reported in [1991] 189 ITR 786 (Pat) and the judgment of the Hon'ble Supreme Court of India in the case of **Income Tax Officer Ward No.16(2) Vs. M/S TechSpan India Private Ltd. & Anr.** It is submitted that this Court in the case of **Agarwalla Brothers** (supra) was of the view that in the light of law laid down by the Hon'ble Supreme Court, this Court can always enquire and ascertain whether the reasons to believe entertained by the Income-Tax Officer can validly afford a foundation for assumption of jurisdiction by him or it is a mere pretence and an effort to undergo a change of opinion. This Court had upheld the view taken by the Tribunal cancelling the entire assessment under Section 147(a) of the Act.

In the case of **M/S TechSpan India Private Ltd. & Anr.** (supra), the Hon'ble Apex Court was considering as to whether the



reopening of the completed assessment is justified in the facts and circumstances of the said case. In the said case return for assessment year in the year 2001-02 was selected for regular assessment under Section 143(3) of the I.T. Act, a show cause notice was issued to the respondents as to why the expenses claimed with regard to the allocation of common expenses between the two heads, viz., software development and human resource development do not reveal any basis for such allocation. The issue was duly contested and decided vide order dated 29.11.2004 and the proceedings ended with a rectification of the assessment order under Section 154 of the Act while arriving at an income of Rs.31,63,570/- which was fully set-off against the loss brought forward and the income was assessed as 'Nil' for the assessment year 2001-02. When a notice dated 10.02.2005 was issued by the revenue for reopening the assessment under Section 148 of the Act on the ground that the deduction under Section 10A of the Act has been allowed in excess and the income escaped assessment works, the High Court set aside the show cause notice as well as the reassessment order dated 17.08.2005. In that context of the matter, the Hon'ble Supreme Court considered the provision of Section 148 to 153 referred the judgment of the Hon'ble Supreme Court in the case of **Commissioner of Income Tax, Delhi Vs. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)**. The Hon'ble Apex Court found that the point on which the reassessment proceedings were initiated was well considered in the original proceedings and, therefore, the very basis of issuance of show notice was merely because of the fact that the Assessing Officer had changed his opinion as



regards the deduction under Section 10A of the Act.

On the other hand, Ms. Archana Sinha, learned counsel representing the Revenue while filing the counter affidavit submits that there is no illegality in initiation of the proceeding for reassessment in the facts of the present case. Learned counsel submits that the initiation of reassessment of proceeding is based upon certain facts which have given reasons to believe that income chargeable to tax has escaped assessment. Learned counsel submits that from information received from the DSIR it is found that the petitioner had not complied with the requirements which would have made it eligible to get the benefit of R&D expenses. Learned counsel submits that out of total deduction of claim of Rs.103,24,46,357/- under Section 35(2AB) of the Act, the amount of Rs.54,72,75,816/- was disallowed and Rs.48,51,76,541/- was allowed without any basis. It is submitted that the Assessing Officer has reasons to believe that such amount is escaped amount and, therefore, it is being a pure question of fact cannot be gone into in a writ proceeding. Learned counsel submits that the judgments relied upon on behalf of the petitioner would not be applicable in the facts and circumstances of the present case. It is further submitted that the notice under Section 148 has been issued within the time limit as provided under Section 149 of the IT Act. A further objection has been taken that maintaining the hierarchical system for redressal of the grievance, the petitioner should have approached the statutory remedy before moving this Court in its writ jurisdiction. Learned counsel has relied upon a judgment of the Hon'ble Apex Court in the case of **Commissioner**



of Income Tax & Ors. Vs. Chhabil Dass Agarwal. Learned counsel submits that the Hon'ble Supreme Court has in a catena of decision held that though Article 226 confers a very wide powers in the matter of issuing writs, the remedy of writ is absolutely discretionary in character and if the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. Reference has been made to paragraphs 19, 20 and 21 of the judgment of the Hon'ble Apex Court in the case of **Chhabil Dass Agrawal** (supra).

Having heard learned counsel for the parties and on perusal of the records, we find that at this stage it would not be just and proper for the writ Court to entertain the present writ application. In the case of **Agarwalla Brothers** (supra), this Court was dealing with a case which was referred to this Court by the Income Tax Appellate Tribunal under Section 256(1) of the Act. The Tribunal had referred two questions of law to this Court. Those two questions were in the following terms:-

“1. Whether, on the facts and in the circumstances of the case, the Tribunal is justified in law in cancelling the entire assessment under section 147(a) of the Income-tax Act, 1961 for the assessment year 1962-63? (referred in Tax Case No.39 of 1978).

2. Whether, on the facts and in the circumstances of the case, the cancellation of the penalty under Section 271(1) (c) of the Income-tax Act, 1961, by the Tribunal was legal? (referred in Tax Case No.40 of 1978).”

This Court found that in the said case, it was not necessary for this Court to come to an independent finding to ascertain whether, by



reason of any omission or failure on the part of the assessee to disclose fully and truly all materials facts necessary for his assessment for the assessment year in question, any income chargeable to tax has escaped or not, the Court observed that it is essentially a question of fact and because in the said case, the Tribunal, after examining the entire records, have recorded that, at the time of the original assessment, the facts were disclosed by the assessee and the Income-Tax officer found the investments shown to be reasonable, this Court proceeded to hold that the Tribunal had rightly quashed the entire assessment order.

In the present case, we do not have benefit of concluded finding of facts because the petitioner has directly approached this Court in its writ jurisdiction. We agree with the submissions of Ms. Archana Sinha, learned counsel representing the Revenue that the Act of 1961 provides for certain statutory authorities vested with the powers to examine the materials based on which a finding may be recorded. Paragraph 19, 20 and 21 of the judgments of the Hon'ble Apex Court in **Chhabil Dass Agarwal** (supra) would be important to take note of hereinabove:-

“19. Thus, while it can be said that this Court has recognized 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, Titagarh Paper Mills case 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.

20. In the instant case, the Act provides complete machinery for the assessment/re-assessment 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. vs. 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. In the instant case, neither has the assessee-writ petitioner described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case.

21. In light of the same, we are of the considered opinion that the Writ Court ought not to have entertained the Writ Petition filed by the assessee,



wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the re-assessment orders passed and the consequential demand notices issued thereon.”

In the aforementioned case, the Hon’ble Supreme Court while setting aside the judgment and order of the Hon’ble High Court passed in Writ Petition (C) No.44 of 2009 by which the High Court had interfered with the notice under Section 148 of the Act, granted liberty to the respondents to file an appropriate petition/appeal against the order of reassessment passed under Section 148 of the Act.

We are of the considered opinion that in absence of any concluded facts being available before us, it would not be proper to interfere with the impugned notice and order in the present writ proceeding. We, therefore, dismiss the writ application giving liberty to the petitioner to avail statutory alternative remedies, if so advised, in the facts and circumstances of the case.

(Rajendra Menon, CJ)

(Rajeev Ranjan Prasad, J)

Arvind/-

AFR/NAFR	AFR
CA V DATE	N/A
Uploading Date	06.08.2018
Transmission Date	

