

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Order reserved on 14-11-2018****Order delivered on 05-04-2019****WPT No. 69 of 2018**

1. Hariom Rice Mill Private Limited NH-200 Having Its Office At Masturi Road, Post And Village Darrighat, Bilaspur 495001, (Chhattisgarh) Through Its Director Mr. Subhash Agrawal, Aged About 48 Years S/o Radheshyam Agrawal, R/o B-104, Sheela Park, R.K. Nagar Bilaspur Chhattisgarh.
2. Mr. Subhash Agrawal, S/o Radheshyam Agrawal, Aged About 48 Years R/o B-104, Sheela Park, Raj Kishore Nagar, Bilaspur Chhattisgarh.

---- Petitioner**Versus**

1. Assistant Commissioner Of Income Tax Circle -2 (1) Bilaspur, Aaykar Bhawan, Vyapar Vihar, Bilaspur Chhattisgarh.
2. Principal Commissioner Of Income Tax, Bilaspur, Aaykar Bhawan, Vyapar Vihar, Bilaspur Chhattisgarh.
3. Income Tax Officer-2(1), Bilaspur Office Of Income Tax Officer-2(1), Bilaspur Aaykar Bhawan, Vyapar Vihar, Bilaspur Chhattisgarh.
4. Income Tax Officer (Tech. & TPS-2) Bilaspur, Aaykar Bhawan, Vyapar Vihar, Bilaspur Chhattisgarh.
5. Union Of India Through Its Secretary Department Of Revenue, Ministry Of Finance, North Block, New Delhi 110001

---- Respondent**WPT No. 70 of 2018**

1. Hariom Rice Mill Private Limited NH-200 Having Its Office At Masturi Road, Post And Village Darrighat, Bilaspur 495001, (Chhattisgarh) Through Its Director Mr. Subhash

Agrawal, Aged About 48 Years S/o Radheshyam Agrawal,
R/o B-104, Sheela Park, R.K. Nagar Bilaspur Chhattisgarh.

2. Mr. Subhash Agrawal, S/o Radheshyam Agrawal, Aged About 48 Years R/o B-104, Sheela Park, Raj Kishore Nagar, Bilaspur Chhattisgarh.

---- Petitioner

Versus

1. Assistant Commissioner Of Income Tax Circle -2 (1) Bilaspur, Aaykar Bhawan, Vyapar Vihar, Bilaspur Chhattisgarh.
2. Principal Commissioner Of Income Tax, Bilaspur, Aaykar Bhawan, Vyapar Vihar, Bilaspur Chhattisgarh.
3. Income Tax Officer-2(1), Bilaspur Office Of Income Tax Officer-2(1), Bilaspur Aaykar Bhawan, Vyapar Vihar, Bilaspur Chhattisgarh.
4. Income Tax Officer (Tech. & TPS-2) Bilaspur, Aaykar Bhawan, Vyapar Vihar, Bilaspur Chhattisgarh.
5. Union Of India Through Its Secretary Department Of Revenue, Ministry Of Finance, North Block, New Delhi 110001

---- Respondent

For Petitioners	Shri Salil Kapoor, Adv. with Shri Siddharth Dubey & Ms Ananya Kapoor, Advocates
For Respondent/Revenue	Ms. Naushina Ali, Adv. with Shri Ajay Kumrani, Advocate
For Respondent/UOI	Shri Krishna Gopal Yadav, Adv. on behalf of Shri B. Gopa Kumar, ASG

C A V Order

By

Prashant Kumar Mishra, Ag. CJ.

1. This order shall govern disposal of both the writ petitions as the facts and grounds involved are similar. However, for the sake of convenience, the documents filed in WPT No.69 of 2018 are being referred.
2. Challenge in these two writ petitions is to the approval accorded by the Principal, Commissioner of Income Tax, under Section 151 (1) of the Income Tax Act, 1961 (for short “the Act”) (Annexure P-2) for issuance of notice under Section 148 of the Act and the consequent notices (Annexure P-3) under the said provision. The petitioners would also challenge the reasons recorded under Section 148 (2) of the Act (Annexure P-5) to opine that income has escaped assessment for the Assessment Year 2011-12 and 2012-13, respectively by the respondent No.2 as without jurisdiction.
3. Learned counsel appearing for the petitioners would argue that re-assessment notice is required to have prior sanction under Section 151 (1) by satisfying the condition prescribed in the said provision, however, proper reasons to believe for issuance of notice being absent in both the cases the sanction under Section 151 of the Act and the consequent notices are illegal.
4. Learned counsel would further argue that there is only reason to suspect that income has escaped without there being any

foundational fact or tangible material withheld by the petitioner at the time of assessment. Mere suspect that the companies in question were paper companies by itself is insufficient to re-open the assessment unless the Assessment Officer had further information that these companies were non-existent after making further enquiries into the matter. Learned counsel would next submit that the petitioners having made true and full disclosure at the time of assessment, the reasons recorded and the consequent re-assessment notice is only change of opinion, which is not permissible in law.

5. To buttress his contention, learned counsel would place reliance upon the decisions rendered by the Supreme Court in **Calcutta Discount Co. Ltd. v Income-tax Officer**¹ Delhi High Court in **Sabh Infrastructure Ltd. v Asstt. Commissioner of Income Tax**² and that of the Supreme Court in **Income-tax Officer v Madnani Engineering Works Ltd.**³.
6. Learned counsel appearing for the Revenue, *per contra*, would submit that the Principal, CIT has recorded cogent reasons as required under Section 151 (1) read with Section 148 (2) of the Act before granting sanction for re-opening of

¹ [1961] 41 ITR 191 (SC)

² WPC No.1357 of 2016 (decided on 25-9-2017)

³ [1979] 118 ITR 1 (SC)

assessment. Learned counsel would further submit that there are tangible material as is referred in the order under Section 148 (2), therefore, it is not a case of change of opinion.

7. Further contention of the learned counsel for the Revenue is that re-assessment proceedings having already been done, the petitioner has remedy of filing an appeal, therefore, the present petitions are not maintainable. Learned counsel would next submit that whether or not the income has escaped re-assessment is to be decided by the Assessment Officer and the same cannot be questioned in a writ petition.
8. In support of her contention, learned counsel would refer to the law laid down by the Supreme Court in **Raymond Wollen Mills Ltd. v Income-Tax Officer and Ors.**⁴. Reference is also made to the Division Bench decision of the Gujarat High Court in **Lalita Ashwin Jain v Income Tax Officer**⁵, the Single Bench judgment rendered by this Court in **Arun Kumar Agrawal v The Principal, Commissioner of Income Tax & Others**⁶ and the decision of the High Court of Delhi in **Sonia Gandhi v Assistant Commissioner of Income Tax, Circle 52(1) and Ors.**⁷

4 (1999) 236 CTR SC 34 : 1999 236 ITR 34 SC

5 2014 SCC Online Guj 2021 : (2014) 363 ITR 343

6 WPT No.163 of 2016 & Other connected matters (decided on 1-12-2016)

7 WPC No.8482 of 2018 and other connected matters (decided on 10-9-2018)

9. Bare perusal of the order passed under Section 148 (2) of the Act containing the reasons recorded for initiation of action under Section 147 of the Act would demonstrate that after a detailed discussion the Principal, CIT reached to the conclusion that certain information about introduction of funds in form of share capital, share premium and share application money during A.Y. 2011-12, 2012-13 & 2016-16 by the three companies namely; M/s Desire Procon Pvt. Ltd.; M/s Aprajita Enclave Pvt. Ltd.; and M/s Bholanath Vanijya Pvt. Ltd. was not available during the scrutiny proceedings made earlier, but was found during survey under Section 133A of the Act and, thus, the assessee has failed to disclose fully and truly on material facts during assessment made earlier.
10. The law as to when exercise of power to record reasons under Section 151 (1) read with Sections 147 & 148 (2) of the Act for issuance of re-assessment of notice under Section 148 (1) would be treated as a valid exercise of power has been dealt with by the Supreme Court, time and again.
11. In Assistant Commissioner of **Income-Tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd.**⁸ the Supreme Court spelt out the

8 [2007] 291 ITR 500 (SC)

twin requirements which had to be satisfied as a sine qua non for a valid reassessment notice:

"firstly the AO must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the AO could have jurisdiction to issue notice under Section 148 read with Section 147(a). But under the substituted Section 147 existence of only the first condition suffices. In other words, if the assessing officer for whatever reason has reason to believe that income has escaped assessment, it confers jurisdiction to reopen the assessment."

12. The Supreme Court in **Phool Chand Bajrang Lal and Another v Income Tax Officer and Another** emphasised on the veracity of information supplied previously by the assessee during the course of the regular assessment, while considering the validity of a reassessment notice; it stated as follows:

"From a combined review of the judgments of this Court, it follows that an Income-tax Officer acquires jurisdiction to reopen an assessment under Section 147(a) read with Section 148 of the Income-tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to

income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming this belief is not for the court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief."

13. **In Income Tax Officer, Calcutta v Selected Dalubrand**

Coal Co. Pvt. Ltd.⁹, the Supreme Court held as follows:

"At the stage of the issuance of the notice, the only question is whether there was relevant material, as stated above, on which a reasonable person could have formed the requisite belief. Since we are unable to say that the said letter could not have constituted the basis for forming such a belief, it cannot be said that the issuance of notice was a invalid. Inasmuch as, as a result of our order, the reassessment proceedings have now to go on, we do not and we ought not to express any opinion on merits."

14. **In Phool Chand Bajrang Lal** (supra) the Supreme Court has

held that the Assessment Officer may start reassessment proceedings either because some fresh facts had come to light

⁹ (1997) 10 SCC 68

which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. It is held therein that since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming this belief is not for the court to judge.

15. In view of the reasons recorded by the Principal, CIT, as mentioned above, it is clear that the information found during survey under Section 133A was not available earlier at the time of assessment. It is further recorded that the Director of the petitioner assessee company could not properly explain the transactions in shape of infusion of share capital, share premium and share application money by the above three companies, therefore, it is not a case where the reasons recorded were without any basis. Moreover, the reassessment proceedings have already been completed after filing of the writ petitions.

16. In **Commissioner of Income Tax and Others v Chhabil Dass Agarwal**¹⁰, the Supreme Court was dealing with a case

¹⁰ (2014) 1 SCC 603

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.”

17. Even at the inception the writ petition was only for questioning the notice under Section 148 (1), the sanction under Section 151 (1) and the reasons recorded under Section 148 (2), the same may not be maintainable to question the recording of reasons in view of the law laid down by the Supreme Court in **Indo Asahi Glass Co. Ltd. v ITO**¹¹ wherein 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.

18. In **Bellary Steels and Alloys Limited Vs. Deputy Commissioner, Commercial Taxes (Assessments) and Others**¹², the Supreme Court held thus:-

¹¹ (2002) 10 SCC 444

¹² (2009) 17 SCC 547

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.

19. In **Commissioner of Income-tax, Gujarat Vs. Vijaybhai N.**

Chandrani¹³, 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

13 2013 AIR SCW 4675

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."

20. In view of the above discussion, the Principal, CIT, having recorded reasons that certain information found during survey under Section 133A of the Act was not available during the

scrutiny assessment, the sanction appears to be in accordance with law. Moreover, the assessment proceeding having already been complete, the petitioners have remedy of preferring an appeal, therefore, both the writ petitions deserve to be and are hereby dismissed.

21. There shall be no order as to costs.

Sd/-

(Prashant Kumar Mishra)
Acting Chief Justice

Gowri