

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

JODHPUR

D.B. CIVIL SPECIAL APPEAL (WRIT) No.246 OF 2016

Smt Kiran Kanwar widow of late Shri Rajendra Singh Khetasar,
Legal heir of Shri Rajendra Singh Khetasar, village- Taliya
Khetasar, Tehsil- Osian, District- Jodhpur (Raj.)

.... APPELLANT

VERSUS

Union of India through Revenue Secretary, Ministry of Finance
(Department of Revenue), Central Secretariat, North Block, NEW
DELHI.

... RESPONDENT

PRESENT

HON'BLE THE CHIEF JUSTICE NAVIN SINHA
HON'BLE MR JUSTICE PANKAJ BHANDARI

Mr N.M. Ranka, Sr. Advocate assisted by
Mr N.K. Jain, Mr Kuldeep Mathur, for the appellant
Mr K.K. Bissa, Sr. Standing Counsel for Income-tax Department,
assisted by Mr H.G. Chanda and Mr G.S. Chouhan

Order on Board (Per Navin Sinha CJ)

02nd August 2016

The present appeal arises from order dated 15th February 2016 dismissing S.B. Civil Writ Petition No.4531/2015 declining interference with the notice dated 27.3.2015 under Section 148 of the Income-tax Act, 1961 (herein after referred as 'the Act') for fresh assessment with regard to Assessment Year 2008-09.

Learned Senior Counsel for the Appellant submitted that earlier during assessment proceedings, a sum of Rs. Twenty lacs was disallowed as expenditure shown in the profit and loss

account by the Assessing Officer. The Commissioner Income-Tax (Appeals) allowed the same on. The Respondent was unsuccessful before the Income Tax Appellate Tribunal on 25.11.2013. The application by the Respondent under Section 154 of the Act was also rejected by the Tribunal on 31.7.2014. The assessment thus attained finality. The assessing officer issued notice on 5.3.2015 why re-assessment be not ordered under Section 148 of the Act. The assessee filed objections on 16.3.2015. Fresh assessment was permissible under Section 147 of the Act if the Assessing Officer has reason to believe that income had escaped assessment and that this was occasioned due to failure of the assessee to disclose true and material facts. The sine qua non for assuming jurisdiction was availability of information and/or material not placed by the assessee before the Assessing Officer and which was discovered or surfaced subsequently. Mere rhetorical repetition of words of the statute in the notice dated 27th March 2015 of *reason to believe that income had escaped the assessment* will not vest jurisdiction in the Assessing Authority to re-open the assessment. The reasoned order for reassessment discloses that there was no fresh material for *reason to believe* or that the assessee had failed to disclose true and material facts, leading to income escaping assessment. The assessment was sought to be re-opened on basis of the same materials apparent from the recitals "*on examination of the assessment record, it is found ...*". Reliance was placed on (1961) 41 ITR 191 (Calcutta Discount Co. Ltd. v. Income-tax Officer, Companies District-I, Calcutta).

Counsel for the Respondent submitted that no writ petition

would lie against a show cause notice, relying on 259 ITR 19 (G.K.N. Driveshafts (India) Ltd v. Income-tax Officer & others) and a Division Bench order of this Court reported in [2005] 144 Taxman 292 (Raj.) (Assistant Commissioner of Income-tax v. Banswara Syntex Ltd). So long as Assessing Officer has power to re-open the assessment, for reasons recorded to his satisfaction the assessee must file his reply and if aggrieved can pursue his remedies in appeal. The writ petition challenging the notice for re-assessment was not maintainable. If an alternative statutory remedy is available the discretionary jurisdiction under Article 226 must not be exercised and that too against a show cause notice.

We have considered the submissions on behalf of the parties. Further proceedings for re-assessment by the Assessing Officer were stayed by this Court on 23rd May 2016.

There can be no quarrel with the proposition that normally a writ petition will not lie against a show cause notice especially when there be an alternative statutory remedy of appeal available. But there is no invariable rule that a writ petition will never lie against a show cause notice. If the show cause notice suffers from illegality apparent on the face of it a writ petition will be maintainable.

In Calcutta Discount Co. Ltd. (supra) Section 34 of the Income-tax Act, 1922, which is similarly worded, fell for consideration. It was observed as follows:

"To confer jurisdiction under this section to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year two conditions have therefore

to be satisfied. The first is that the Income-tax Officer must have reason to believe that income, profits or gains chargeable to income- tax have been under-assessed. The second is that he must have also reason to believe that such " under assessment " has occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income under s. 22, or (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income-tax Officer could have jurisdiction to issue a notice for the assessment or re-assessment beyond the period of four years but within the period of eight years, from the end of the year in question."

The duty of the assessee extended to fully and truly disclosing all primary and relevant facts and if the Assessing Authority was of the opinion, on reasonable grounds, that there had been any non-disclosure of primary fact, which could have been a material bearing on the question of under-assessment, it would give him jurisdiction.

We may profitably refer in this regard to 79 ITR 603 (SC) (Chhugamal Rajpal v. S.P. Chaliha & others) followed in 1972 (3) SCC 234 (Sheo Nath Singh v. Appellate Assistant Commissioner of Income Tax, Calcutta) holding as follows:-

"9. It is abundantly clear that the two reasons which have been given for the belief which was formed by the Income Tax Officer hopelessly fail to satisfy the requirements of the statute. In a recent case – *Chhugamal Rajpal v. S.P. Chaiiha and Others*, which came up before this Court, a similar situation had arisen and under the directions of the Court, the Department produced the records to show that the Income Tax Officer had complied with the conditions laid down in the statute for issuing a notice relating to escapement of notice. There also, the report submitted by the Officer to the Commissioner and the latter's orders thereon were produced. In his report, the Income Tax Officer referred to some

communications received by him from the Commissioner of Income-Tax, Bihar and Orissa from which it appeared that certain creditors of the assessee were mere name-lenders and the loan transactions were bogus and, therefore, proper investigation regarding the loans was necessary. It was observed that the Income Tax Officer had not set out any reason for coming to the conclusion that it was a fit case for issuing a notice under Section 148 of the Income Tax Act, 1961. The material that he had before him for issuing notice had not been mentioned. The facts contained in the communications which had been received were only referred to vaguely and all that had been said was that from those communications, it appeared that the alleged creditors were name-lenders and the transactions were bogus. It was held that from the report submitted by the Income Tax Officer to the Commissioner it was clear that he could not have had reasons to believe that on account of assessee's omission to disclose fully and truly all material facts, income chargeable to tax had escaped assessment.

10. In our judgment, the law laid down by this Court in the above case is fully applicable to the facts of the present case. There can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income Tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income Tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The Court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the Court.

In the present case, Rs.60,27,000/- Lacs were claimed as expenses for land consolidation but the Assessing Authority disallowed Rs.20 Lacs thereof. In the appeal preferred by the appellant, the Commissioner of Income-tax (Appeals) allowed the same. Aggrieved, the respondent-Department preferred an appeal unsuccessfully before the Tribunal. Not satisfied with the same, the respondent then filed an application under Section 154 of the Act for re-consideration of the order, which was also dismissed. It is only thereafter that the present notice dated 27th

March 2015 came to be issued. It states that the Assessing Officer has reason to believe that income assessable to tax has escaped assessment and that it was proposed to be re-assessed. The appellant sought the reasons on 09th April 2015. The reasons were then furnished that on examination of the assessment record, which is but a re-examination of the same record, without any fresh material, that the appellant had claimed land consolidation expenses of Rs.60,27,000/- in terms of agreement between the assessee and M/s PACL Limited, which was not allowable as expenditure to the assessee.

It is to be seen that on the earlier occasion the Assessing Officer himself had disallowed it to the extent of Rs.20 Lacs only after consideration of the materials on the record. It is the very same return which is sought to be re-opened. Furthermore, though the Department on 05th March 2015 wrote to the assessee that M/s PACL Limited had denied the agreement, no date of denial is mentioned much less is there any reference to it in the reasons recorded for issuing notice under Section 148 of the Act.

G.K.N. Driveshafts (India) Ltd relied upon by the appellant has no application in the facts of the case and is distinguishable as the Supreme Court was of the opinion that it was open for the assessee to raise all objections before the Assessing Officer in response to the notice and Assessing Officer was required to furnish reasons within a reasonable time.

The Learned Single Judge in the order under appeal observed that on factual aspects the reply submitted by the Revenue was vague and evasive. There was no reason to hold

that the Appellant had not disclosed fully and truly all material facts in the earlier assessment. Apparently the learned Single Judge was not satisfied that the order for re-assessment was sustainable and yet dismissed the writ petition only on the ground for availability of alternative remedy by way of first appeal and second appeal under the Act against any fresh orders passed in re-assessment.

The order under appeal dated 15th February 2016 declining interference with the notice for re-assessment on the ground of availability of alternative remedy only is, therefore, held to be not sustainable. The notice for re-assessment dated 27th March 2015 is therefore set aside and the appeal is allowed.

[PANKAJ BHANDARI],J.

[NAVIN SINHA],C.J.