

(1994) 03 AHC CK 0063

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 455 of 1993

G.P. Agarwal

APPELLANT

Vs

Assistant Commissioner of Income Tax

RESPONDENT

Date of Decision : 08-03-1994

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 148, 154

Citation : (1994) 208 ITR 795

Hon'ble Judges : S.K. Keshote, J;B.M. Lal, J

Bench : Division Bench

Advocate : Ravi Kant, for the Appellant;

Final Decision : Dismissed

Judgement

B.M. Lal, J.—This petition under Article 226 of the Constitution of India is directed against a notice dated March 2, 1993, issued by the respondent under Sections 147 and 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), in respect of income which had escaped assessment for the assessment years 1989-90 and 1990-91.

2. The short facts leading to this petition are as under :

The petitioner, who is sole proprietor of Messrs. G. P. Enterprises, derives income from his proprietorship concern, Messrs. G. P. Enterprises, and thus he has been assessed as an individual under the Act.

3. The petitioner has filed Income Tax returns for the assessment years 1989-90 and 1990-91 showing taxable income amounting to Rs. 1,74,770 for the assessment year 1989-90 and Rs. 2,02,390 for the assessment year 1990-91, and claimed deduction u/s 80I of the Act to the tune of Rs. 42,848.40 for the assessment year 1989-90 and Rs. 54,547.54 for the assessment year 1990-91.

4. However, it appears that the Assistant Commissioner, Income Tax, Circle-I,

Ghaziabad, accepted the return as disclosed by the assessee. Later on, on account of some audit objection, it was brought to the notice of the Assistant Commissioner, Income Tax, Ghaziabad, that the petitioner was not entitled to any deduction u/s 80I of the Act since he has not complied with the conditions laid down under that provision.

5. On the basis of the said audit objection, the Assistant Commissioner, Income Tax, Ghaziabad, had issued a notice for rectification of the mistake for the assessment years 1989-90 and 1990-91 informing the assessee that he is not entitled for such deduction as claimed by him u/s 80I of the Act.

6. It appears that on October 22, 1992, the assessee has filed a reply to the rectification proceedings contending that the petitioner is an industrial undertaking and is engaged in the manufacture of flavoured chewing tobacco which is commonly known as "zarda" on job work basis and also explained the total process of manufacturing zarda, and thus contended that rectification proceedings be dropped. However, respondent No. 1 after making necessary enquiry into the matter even from the account books of the petitioner and having been convinced, it appears, dropped the proceedings. On December 16, 1992, the petitioner received notice contemplated under Sections 147 and 148 of the Act for both the assessment years that certain income chargeable to Income Tax has escaped assessment, vide annexure-5 to this petition, which is under challenge.

7. The petitioner's contention is that reopening of the assessment in pursuance of the proceedings under Sections 147 and 148 of the Act, is absolutely illegal and without jurisdiction, and thus reassessment proceedings for both the years are liable to be quashed.

8. The petitioner, however, submitted in the petition that deduction u/s 80I of the Act was duly considered by the Assessing Officer while dropping the proceedings u/s 154 of the Act, and thus it is contended that proceedings under Sections 147 and 148 of the Act would be nothing but a repeating proceeding. In this way, this petition is filed, inter alia, on the ground that once proceedings have been dropped u/s 154 of the Act, reopening of the proceedings under Sections 147 and 148 of the Act is absolutely illegal and without jurisdiction which may cause great harassment to the petitioner.

9. This court by its order dated March 17, 1993, granted three weeks' time to the respondent for filing a counter-affidavit.

10. A counter-affidavit has been filed on behalf of the Revenue justifying issuance of the notice. It is contended that the assessee has wrongly claimed deduction u/s 80I of the Act while filing the return u/s 139, It is also contended that the assessee was not entitled to deduction u/s 80I for the reason that purchase of raw material, manufacturing and sales have not been disclosed nor was the assessee engaged in the activity of manufacturing any articles or things nor was it having any plant and machinery and as such it is not an industrial

undertaking.

11. Yet this petition has not been admitted for hearing the parties, and the case was listed only for admission.

12. Now, norms for invoking the extraordinary jurisdiction of this court under Article 226 of the Constitution are well-settled particularly in respect of show-cause notice. Where objections to such show-cause notice can easily be raised before the authority issuing the notice and full machinery is provided therefor, a writ petition is not maintainable. The assessee should pursue the remedy such as may be available to him under the relevant provisions of the Act. In the instant case, it is not the case of the petitioner that he is remediless and Article 226 of the Constitution is the only remedy available to him.

13. However, learned counsel appearing for the petitioner, Sri Ravi Kant, submitted a list of the following cases, Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, ; Raunaq and Co. Pvt. Ltd. Vs. Income Tax Officer and another, ; Gemini Leather Stores Vs. The Income Tax Officer, "B" Ward, Agra and Others, ; Mrigendra Shum Sher Jung Bahadurra Vs. The Income Tax Officer and Others, ; Claridges Hotel P. Ltd. and another Vs. Income Tax Officer, Company Circle X, New Delhi and another, ; Mohindra Mohan Sirkar Vs. Income Tax Officer and Another, and Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta, , and contended that where issuance of the notice prima facie appears to be without jurisdiction, proceedings under Article 226 of the Constitution are not barred and the assessee cannot be directed to avail of the remedy available to him under the relevant provisions of the statute, and thus he canvasses that issuance of the notice contained in annexure-5 under Sections 147 and 148 of the Act is without jurisdiction and, therefore, the petitioner is not precluded from invoking Article 226 of the Constitution of India irrespective of the fact that the petitioner has an alternative remedy under the Income Tax Act.

14. No doubt, much emphasis has been laid on the words "without jurisdiction", but how respondent No. 1 is lacking jurisdiction in issuing the impugned notice (annexure-5) initiating proceedings under Sections 147 and 148 of the Act, has not precisely been pointed out from the provisions of the Act itself.

15. The mere contention that once proceedings u/s 154 are initiated against the assessee and subsequently dropped, the same attaches finality to the assessment order, and no further proceedings for reopening the assessment even in the case of escaped assessment, can be started, is not sufficient until and unless a bar or legal impediment is pointed out from the provisions of the Act itself.

16. Therefore, where the provisions of the Act provide a self-contained machinery for determination of the questions arising out of the Act, in such cases only, show-cause notices issued should not normally be interfered with under Article 226 of the Constitution of India save in the cases where the authority

concerned has no jurisdiction to issue such show-cause notice. We have pointed out earlier that learned counsel for the petitioner failed to point out any specific provision under the Act that proceedings under Sections 147 and 148 of the Act for which show-cause notice has been issued, vide annexure-5, is without any authority inasmuch as the Act does not give such jurisdiction to respondent No. 1 and, therefore, in the considered opinion of this court, the authorities referred to and relied upon by learned counsel mentioned in the preceding paragraphs of this judgment, have no application to the facts and circumstances of the instant case.

17. We may observe here that the scope, powers and jurisdiction of this court under Article 226 of the Constitution particularly in tax matters are very limited and where the assessee has enough remedies under the taxing statute by way of appeal where each and every aspect of the matter could be gone into, the practice of allowing the assessee to invoke Article 226 of the Constitution must not be encouraged.

18. We have already observed that the petitioner has a remedy under the Act.

19. At this stage, the decision in *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, , cannot be lost sight of wherein while dealing with the point in issue the apex court ruled that where the petitioner has an efficacious remedy by way of appeal and second appeal against the order of assessment or even show-cause notices, it is for the assessee to get relief invoking the provisions of the relevant Act. Writ jurisdiction in such cases is not available.

20. Learned counsel for the petitioner also contended that since notices have been issued by this court to the respondents and the counter-affidavit has also been filed, therefore, the matter may be decided finally.

21. We have already expressed our opinion that since no specific provision has been pointed out from the Act itself that issuance of the notice under Sections 147 and 148 is barred by the provisions of the Act, respondent No. 1 is certainly within its authority to issue such notices, and since the petitioner has a remedy by way of invoking the provisions of the Act itself, he should avail of the same by showing cause to the impugned notice. There are cases wherein even after admission of the petition if it is found that the petitioner has a remedy and the notice is not without jurisdiction, this court certainly can dispose of the petition directing the petitioner to avail of the statutory remedy available to him.

22. From the discussion aforesaid, without expressing any opinion on the merits of the case so that the case of either side may not become prejudiced, we direct that the assessee may show cause to the notice and avail of the statutory remedy available to him under the Act.

23. In the result, the petition fails and is dismissed on the ground of alternative remedy.