
(1996) 04 AHC CK 0052

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1619 of 1993

Shambhu Saran Sanjeev Kumar

APPELLANT

Vs

Income Tax Officer and Another

RESPONDENT

Date of Decision : 16-04-1996

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 143(3), 254(2), 256(1), 43B
Income Tax Act, 1961 — Section 143(3), 254(2), 256(1), 43B
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 143(3), 254(2), 256(1), 43B
Constitution of India, 1950 — Article 226

Citation : (1999) 151 CTR 318 : (1998) 230 ITR 394 : (1997) 90 TAXMAN 85

Hon'ble Judges : M. Katju, J;B.S. Chauhan, J

Bench : Division Bench

Advocate : A.K. Gupta, for the Appellant;

Judgement

1. After we had passed the order dated April 15, 1996, Shri A.K. Gupta learned counsel for the petitioner, appeared and requested that since he had not been heard the case may be fixed for the next day, i.e., April 16, 1996. Hence we did not sign the order dated April 15, 1996, and we fixed the case for today for hearing.

2. We have heard Shri A.K. Gupta, learned counsel for the petitioner. Shri Gupta has relied on the decision in Commissioner of Income Tax Vs. Bansi Dhar and Sons, and urged that a writ petition is maintainable against the order of the Income Tax Appellate Tribunal. There is no doubt that an alternative remedy is not an absolute bar to a writ petition but ordinarily this court insists that a petitioner should resort to his alternative remedy if it is available and this court ordinarily does not exercise its discretionary jurisdiction under Article 226 if an alternative remedy is available.

3. In the present case, it appears that an assessment order was passed u/s 143(3) against the petitioner on June 27, 1986, vide annexure 2 to the petition.

Against that order, the petitioner filed an appeal before the Commissioner of Income Tax (Appeals) which was allowed. Against the order of the Commissioner of Income Tax (Appeals), the Department filed an appeal to the Income Tax Appellate Tribunal and the Tribunal by order dated June 5, 1991, allowed the appeal of the Department vide annexure-4 to the petition. Thereafter, the petitioner filed Miscellaneous Application No. 53 of 1991 before the Tribunal which was rejected by the Tribunal on October 21, 1991, vide annexure-5. Thereafter, the petitioner filed another miscellaneous application being Miscellaneous Application No. 94 of 1991, before the Tribunal which was rejected on May 13, 1992, vide annexure 6. The petitioner then filed a reference application before the Tribunal which was rejected as time-barred on December 8, 1992, vide annexure 7. The petitioner then filed a third Miscellaneous Application No. 26 of 1993 on February 22, 1993, a true copy of which is annexure 8 and this application was rejected on August 17, 1993, vide annexure 12.

4. A perusal of the above facts show that after the main order of the Tribunal dated June 5, 1991, annexure 4 to the petition, the petitioner has moved three miscellaneous applications. It may be noted that the order of the Tribunal dated June 5, 1991, was on the merits of the case holding that any liability existing for tax and not paid, is to be disallowed u/s 43B of the Income Tax Act. If the petitioner was aggrieved against the aforesaid order dated June 5, 1991, of the Tribunal its remedy was to file a reference application u/s 256(1) within the time allowed in the said provision but instead the petitioner had chosen to file a miscellaneous application apparently u/s 254(2) before the Tribunal. This first miscellaneous application was rejected by the order dated October 21, 1991, in which it was held that there was no mistake in the order of the Tribunal and the attempt of the assessee was only to get the said order reviewed which cannot be done u/s 254(2). If the petitioner was aggrieved against the order dated October 21, 1991, its remedy was to file a reference application u/s 256(1) against the said order, because as can be seen from a perusal of Section 256(1), a reference application can be filed before the Tribunal not only against the original order of the Tribunal u/s 254(1) but such reference application can also be filed against the order on the rectification application filed before the Tribunal u/s 254(2). Hence, the petitioner had an opportunity to file a reference application u/s 256(1) against the order dated October 21, 1991, but he did not do so and instead he moved a second miscellaneous application which was rejected on May 13, 1992, vide annexure 6, thereafter the petitioner moved a reference application u/s 256(1) which was dismissed as time-barred by order dated December 8, 1992, annexure 7 to the petition. By the said order the Tribunal held that it could condone a delay only up to 30 days and not more u/s 256(1) whereas the reference application was filed after a lapse of 174 days which suggests that it was late by 110 days. Thereafter the third miscellaneous application was filed which was rejected as already stated above.

5. From a perusal of the above facts, it is evident that a remedy was available to

the petitioner, namely, to file an application u/s 256(1), against the original order of the Tribunal dated June 5, 1991, but he did not nor did he file a reference application against the order dated October 21, 1991, in the rectification application. Since he failed to avail of his alternative remedy we are not inclined to exercise our jurisdiction under Article 226 of the Constitution in such a case where the petitioner has been filing miscellaneous applications one after another instead of availing of his statutory remedy of reference application. It may be mentioned that the Income Tax Act prescribes the various channels of filing appeal, reference, etc., and if a party is aggrieved against an order of the Tribunal his remedy is to file a reference application and not a writ petition ; this has been held by this court in *Chemicals and Allied Products Vs. Income Tax Appellate Tribunal*, and this view has also been taken in *Writ Petition No. 1324 of 1993, Smt. Poonam Kumari v. ITAT* decided on September 27, 1995. Hence, we dismiss the petition on the ground that the petitioner had an alternative remedy of filing a reference application.

6. As regards the decision of the Supreme Court in the case of *Commissioner of Income Tax Vs. Bansi Dhar and Sons*, , in our opinion, that decision does not lay down the proposition that the High Court should interfere in writ jurisdiction against the order of the Income Tax Appellate Tribunal, that decision only lays down that since there is no power to grant stay in reference proceedings, the High Court in appropriate cases, can issue a writ under Article 226 where such a reference proceeding is pending if the petitioner had applied for a reference .against the order of the Income Tax Appellate Tribunal. If the reference application was pending or if a reference had been made to the High Court then in appropriate cases, the assessee can also apply for stay of the demand by filing a writ petition in addition to filing of reference application, but, in our opinion, the assessee cannot, without filing any such reference application, only file a writ petition to challenge the order of the Tribunal. In the present case, the assessee has never made any attempt to file a reference application against the order of the Tribunal dated June 5, 1991, or even against the order dated October 21, 1991. He filed a belated reference application after his second miscellaneous application has been rejected on May 13, 1992. Since the petitioner did not avail of alternative remedy u/s 256 of the Income Tax Act we are not inclined to exercise our writ jurisdiction under Article 226 of the Constitution.

7. The writ petition is dismissed. Interim order if any is vacated.