Court No.24

Writ Petition No.9525 (MB) of 2013

Prashant Chandra ... Petitioner

Versus

Commissioner of Income Tax – 1 and others ... Opposite parties

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Hon'ble Rajiv Sharma,J.
Hon'ble Rakesh Srivastava,J.

Supplementary affidavit filed by the petitioner is taken on record.

Heard Mr.J.N. Mathur, Senior Advocate duly assisted by Mr.Mudit Agarwal and Mr.Anand Prakash Sinha, learned Counsel for the petitioner and Mr.Alok Mathur, learned Counsel for the Revenue.

Through the instant writ petition, the petitioner assails the impugned notice dated 11.9.2013 issued by the opposite party No.2/Deputy Commissioner of Income Tax, Range -2, Lucknow, contained in Annexure No.1 to the writ petition.

The petitioner is an assessee with the Income Tax Department and has been discharging his obligations under Income-tax Act, 1961. The petitioner had filed his returns at Lucknow upto the Assessment Years 2011-12 as his place of principal business was within the territorial area which was assigned to the Assessing Officer, Range- 2, Lucknow by the competent authority in exercise of the powers under Section 120 (3) of the Income-tax Act, 1961. From the Assessment Year 2012-13, related to Financial Year 2011-12, the petitioner has shifted his place of business at New Delhi and accordingly filed his income-tax return at Delhi. Later on, a notice under Section 143 (2) of the Income-tax Act was issued by the Assessing Officer, Range – 2, to which the petitioner tendered his reply that he had already filed his return through e-filing at New Delhi, as he has shifted his place of principal business from Lucknow to New Delhi, copy whereof has been annexed as Annexure No.SA3

to the supplementary affidavit. Thus, it has been contended that the Assessing Authority at Lucknow has no jurisdiction to issue the impugned show cause notice dated 11.9.2013 in view of the provisions of Section 124 of the Income-tax Act.

Mr.Alok Mathur, learned Counsel for the Revenue raised a preliminary objection regarding maintainability of the writ petition against the show-cause notice. According to petitioner, writ petition against show cause notice is not maintainable. He further pointed out that during pendency of the instant writ petition, the demand has also been created and as such the petitioner has an equally efficacious alternative remedy by assailing the said order in Statutory Appeal.

Before dealing with the merits of the case, first of all, we would like to deal with the preliminary objection regarding maintainability of writ petition. In the case of ***Whirlpool Corporation Versus Registrar of Trade Marks, Mumbai and others*** [(1998) 8 Supreme Court Cases 1], the Hon'ble Suprme Court in Para-15 of the judgment has held as follows :-

> "15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of, which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental Rights or where there was been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged."

In ***Harbanslal Sahnia & another v. Indian Oil Corporation Ltd. & others [(2003) 2 SCC 107]***, the Apex Court opined that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the

conclusion that the writ seeks enforcement of any of the fundamental rights; where there is failure of principle of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. While deciding the said case, the Apex Court placed reliance upon its earlier judgment in ***Whirpool Corporation (supra)***.

In ***M. P. State Agro Industries Development Corporation Ltd. v. Jahan Khan [(2007) 10 SCC 88]***, the Apex Court again reiterated held that the rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not of compulsion. In an appropriate case, in spite of the availability of an alternative remedy, a writ court may still exercise its discretionary jurisdiction of judicial review, in at least three contingencies, namely (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) Where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. In these circumstances, an alternative remedy does not operate as a bar.

In ***Kamlakar Bhimrao Patil v. Maharashtra Industrial Development Corporation [(2009) 2 SCC 655]***, the Apex Court, while considering a question as to whether a matter under Specific Relief Act, 1963 is entertainable by a writ Court, held that the writ petition is maintainable.

It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary

jurisdiction under Article 226. (See: State of U.P. vs. Mohammad Nooh, AIR 1958 SC 86; Titaghur Paper Mills Co. Ltd. vs. State of Orissa, (1983) 2 SCC 433; Harbanslal Sahnia vs. Indian Oil Corpn. Ltd., (2003) 2 SCC 107; State of H.P. vs. Gujarat Ambuja Cement Ltd., (2005) 6 SCC 499).

The Constitution Benches of the Apex Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, AIR 1954 SC 207; Sangram Singh vs. Election Tribunal, Kotah, AIR 1955 SC 425; Union of India vs. T.R. Varma, AIR 1957 SC 882; State of U.P. vs. Mohd. Nooh, AIR 1958 SC 86 and K.S. Venkataraman and Co. (P) Ltd. vs. State of Madras, AIR 1966 SC 1089 have held that though Article 226 confers a very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. 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. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

In the instant case, admittedly, the procedure as per provisions of the Income-tax Act is adhered too. In view of series of judgments, the plea of the respondents regarding maintainability of writ petition is rejected.

Now, we proceed to deal with the controversy involved in the instant writ petition. We have considered the rival contentions made by the parties' counsel to the lis.

The petitioner in the instant writ petition has assailed the notice issued by the Deputy Commissioner of Income-tax, Range – II, Lucknow under Section 143 (2) of the Income-tax Act, 1961 in respect of Assessment Year 2012-13 *inter-alia* on the ground that the said notice is *de hors* the provisions contained in Section 124 of the Act and in excess of the jurisdiction vested in opposite party No.2 (Deputy Commissioner of Income-tax, Range – II, Lucknow). According to the petitioner, he is

practicing legal profession at Hon'ble Supreme Court and Delhi High Court besides having practice at Lucknow. He has offices at New Delhi and Lucknow; and has a right to choose his principal place of profession, which he has chosen and shifted to Delhi where he has taken premises on lease and his address is D-27, East of Kailash, New Delhi.

Elaborating his submissions, learned Counsel for the petitioner has pointed out that after shifting of the place of profession, the petitioner has filed the return of income for the Assessment Year 2012-13 at New Delhi. Even the return of income for the Assessment Year 2013-14 has been filed at New Delhi. It has also been pointed out that the petitioner has carried out all the formalities for shifting the place of profession from Lucknow to New Delhi and requisite amendment in the PAN details has also been made.

Inviting our attention towards Section 143 of the Act, learned Counsel for the petitioner has submitted that a notice can be issued by the Assessing Officer having jurisdiction over the assessee. According to him, since the petitioner is assessee having its principal place of profession at New Delhi, the Deputy Commissioner of Income-tax, Range – II, Lucknow has no jurisdiction over the petitioner as the Assessing Authority at New Delhi has territorial jurisdiction over the principal place of profession of the petitioner. It has been contended that once the notice itself is without jurisdiction, the opposite party No.2 has no jurisdiction to conduct any proceedings in pursuance of the same but to transfer the file to New Delhi. The impugned notice does not record the satisfaction of the Assessing Officer and also does not specify the particulars in respect of which evidence is to be produced by the petitioner in support of his claim. Suffice to submit, the opposite party No.2 is not vested with the jurisdiction to hold a roving enquiry and to fish-out material against the petitioner by requiring him to place all possible records before him, even while he does not have the jurisdiction to enquire into the matter as he is not the Assessing Officer of the petitioner.

It has also been pointed out that from a reading of the notice dated 11.9.2013, it is apparently clear that the opposite party No.2 was aware that the petitioner is an assessee at New Delhi, which is apparent from the address incorporated in the said notice but has been scored out and Lucknow address has mischievously been mentioned on account of extraneous consideration and in an arbitrary manner.

To strengthen his above assertions, Mr.J. N. Mathur, Senior Advocate has relied upon the legal proposition laid down in ***Commissioner of Income-tax v. All India Children Care and Educational Development Society*** [2013] 357 ITR 134 (All); ***Commissioner of Sales Tax v. M/s Moti and Jawahar, Varanasi*** 1981 U.P.T.C. 428; and ***Bidi Supply Co. v. Union of India and others*** AIR 1956 SC 479.

In contrast, learned Counsel for the Revenue submitted that the case of the petitioner falls under the jurisdiction of the Deputy Commissioner of Income Tax, Range – II, Lucknow as the PAN of the petitioner is lying in the jurisdiction of Deputy Commissioner of Income-tax, Range – II, Lucknow and also his last known office address 26/I-G, Wazir Hasan Road, Near Gokhale Marg, Lucknow falls under the territorial jurisdiction of Deputy Commissioner of Income-tax, Range – II, Lucknow. Mere change in address in the return of income does not give any right to the petitioner to change his jurisdiction. It has further been argued that the case of an assessee can be transferred from one Assessing Officer to another by the Competent Authority only after passing order under the provisions of Section 127 of the Act and the Deputy Commissioner understands that no such order has been passed in this case so far. Therefore, it is evident from the above that the case of the assessee falls in the jurisdiction of Deputy Commissioner of Income-tax, Range – II, Lucknow and notice under Section 143 (2) was rightly issued by him under the provisions of the Act.

At this juncture, it would be useful to reproduce Section 124 of the Act on which much emphasis has been laid:-

124. Jurisdiction of Assessing Officers

(1) Where by virtue of any direction or order issued under sub-section (1) or sub-section (2) of section 120, the Assessing Officer has been vested with jurisdiction over any area, within the limits of such area, he shall have jurisdiction --

(a) in respect of any person carrying on a business or profession, if the place at which he carries on his business or profession is situate within the area, or where his business or profession is carried on in more places than one, if the principal place of his business or profession is situate within the area, and

(b) in respect of any other person residing within the area.

(2) Where a question arises under this section as to whether an Assessing Officer has jurisdiction to assess any person, the question shall be determined by the Director General or the Chief Commissioner or the Commissioner, or where the question is one relating to areas within the jurisdiction of different Directors General or Chief Commissioners or Commissioners, by the Directors General or Chief Commissioners or Commissioners concerned or, if they are not in agreement, by the Board or by such Director General or Chief Commissioner or Commissioner as the Board may, by notification in the Official Gazette, specify.

(3) No person shall be entitled to call in question the jurisdiction of an Assessing Officer --

(a) where he has made a return [under sub-section (1) of section 115WD or] under sub-section (1) of section 139, after the expiry of one month from the date on which he was served with a notice under sub-section (1) of section 142 or sub-section (2) of section 115WE or sub-section (2) of section 143 or after the completion of the assessment, whichever is earlier;

(b) where he has made no such return, after the expiry of the time allowed by the notice under sub-section (2) of section 115WD or sub-section (1) of section 142 or under sub-section (1) of section 115WH or under section 148 for the making of the return or by the notice under the first proviso to section 115WF or under the first proviso to section 144 to show cause why the assessment should not be completed to the best of the judgment of the Assessing Officer, whichever is earlier.

(4) Subject to the provisions of sub-section (3), where an

assessee calls in question the jurisdiction of an Assessing Officer, then the Assessing Officer shall, if not satisfied with the correctness of the claim, refer the matter for determination under sub-section (2) before the assessment is made.

(5) Notwithstanding anything contained in this section or in any direction or order issued under section 120, every Assessing Officer shall have all the powers conferred by or under this Act on an Assessing Officer in respect of the income accruing or arising or received within the area, if any, over which he has been vested with jurisdiction by virtue of the directions or orders issued under sub-section (1) or sub-section (2) of section 120.]

On perusal of the aforesaid statutory provisions of Section 124 (1) (a) and (b), it is abundantly clear that the territorial jurisdiction which has to be vested with the Assessing Authority is to be determined by the Chief Commissioner/Commissioner on the basis of principal place at which the assessee carrying his business or profession and in respect of others, the person residing within the area. In case where the assessee raises any dispute, with regard to jurisdiction of any Assessing Officer, then the Assessing Officer shall, if not satisfied with the correctness of claim, refer the matter for determination under Section 124 (2) before the assessment is made in view of provisions of Section 124 (4).

As regard the question of determining the jurisdiction, we may be point out that in ***Commissioner of Sales Tax v. M/s Moti and Jawahar, Varanasi, 1981 U.P.T.C. 428***, which has been relied upon by the petitioner, the Court observed that a point which goes to the root of the matter and which affects the very existence of the jurisdiction of an authority can be raised at any time, be it in appeal or revision. In the instant case the assessee was claiming total exemption that he was not making any sales at all but whatever he was preparing he was serving it at his own premises and hence in respect of the same sales tax was not eligible. This contention goes to the very root of the matter and certainly it could be taken for the first time even in revision.

Thus, the question of jurisdiction with regard to place of assessment is to be decided first. In the case of ***Commissioner***

of Income-tax v. All India Children Care and Educational Development Society; 1981 U.P.T.C. 428, a Division Bench of this Court observed that no benefit can be given when the question regarding jurisdiction is not raised at the first instance. The Division Bench observed as under:-

> "*The question of jurisdiction could have been raised before the Assessing Officer within the period of one month from the date of filing of return as envisaged under sub-section (3) (a) of Section 124, but it was not raised. Even after assessment before the first appellate authority, any such plea was not put forward. This fact finds mention in paragraph 5 of the order of Commissioner of Income-tax that no objection regarding jurisdiction or otherwise was raised during all these proceedings.*"

In the instant case, admittedly, on receiving the notice under Section 143 (2) of the Act, the petitioner tendered his reply, contained in Annexure No.SA1 to the supplementary affidavit, and the same has not been controverted by the department by filing an affidavit. In the reply, it has been specifically stated by the petitoner that he has shifted his place of business to Delhi and as such, the Assessing Authority at Lucknow, has no jurisdiction to issue notice under Section 143 (2) of the Act at Lucknow. In case, the Assessing Officer was not satisfied with the reply then he should have referred the matter as required under Section 124 (2) of the Act. Thus, in absence of any return for income, the Assessing Authority cannot proceed further by passing an assessment order and creating a demand.

It may be added that, as per Scheme of Income-tax Act, after filing of return, the same has to be processed under Section 143 (1) of the Act within one year from the date of filing and if there is any concealment of income or the income is exorbitant, then a notice under Section 143 (2) of the Act has to be issued. In absence of return, no such exercise was carried out by the Assessing Authority prior to issuing notice under Section 143 (2) of the Act. Further, no notice requiring the assessee to file returns under Section 148 of the Act has been issued. Thus, we are of the opinion that the Assessing Authority has exceeded its jurisdiction while issuing notice under Section 143 (2) of the

Act.

The issuance of notice dated 11.9.2013 by the opposite party No.2 is palpably without jurisdiction inasmuch as a perusal of notice itself indicates that the address of petitioner has been printed as D/27, East of Kailash, New Delhi which has been scored out and substituted by the Lucknow address of the petitioner. We are also of the view that the assertion of the respondents that the assessment can be transferred from one Assessing Officer to another pursuant to orders passed by the competent authority under Section 127 of the Act is in respect of proceedings which may be transferred from one Assessing Officer to another subordinate to the same CIT. The said Section is not attracted in respect of matters falling beyond the jurisdiction of the CIT.

It may be pointed out that from the record, it emerges out that during pendency of writ petition, a notice dated 3.11.2014 was sent to the petitioner by the present Assessing Officer in which information has been required to be submitted on several points. The said notice is cyclostyled format which is reportedly sent to the assessees who are manually selected for scrutiny and does not conform to requirements as prescribed in Section 142 and 143 and seek to hold a roving enquiry to fish out the material against the assessee.

A perusal of Annexure SA-3 annexed with the supplementary affidavit dated 31.3.2015 shows that in response to the notice dated 3.11.2014, the petitioner preferred written objection to the Assessing Officer bringing to his notice the pendency of the aforesaid writ petition and also apprising him that Section 127 was not even remotely attracted. Therefore, it was incumbent upon the opposite party No.2 to have waited for the outcome of the writ petition, but he proceeded with the matter which shows prejudicial and impartial attitude of the authority. It may be noted that transparency and fairness is the essence of the state action. Therefore, the authorities are expected to proceed in disciplined manner without creating any doubt in the mind of the asseessees. As averred above, it was

the duty of the Assessing Officer to have referred the question of jurisdiction to the Chief Commissioner or the Commissioner as the case may be under sub-section (2) of Section 124 of the Act and not doing so, this vitiated the further proceedings.

Here, there is complete departure from the settled procedure. It comes out from the record that when the petitioner refused to submit to the jurisdiction of the said Assessing Officer at Lucknow, the authority/respondent No.2 proceeded ex parte and dispatched a demand of almost Rs.52 lacs. At the cost of repetition, we would like to mention that in the notice dated 11.9.2013, which is computer generated clearly reveals that the Delhi address of the petitioner was scored out and in handwriting, the local address has been added. Therefore, it is incorrect to say that the Delhi Address was not in the knowledge of the respondents and we find force in the submissions of the petitioner that local address was inserted deliberately to create jurisdiction, which, in fact, legally was not vested with the opposite party No.2. Therefore, the opposite party No.2 exceeded its jurisdiction, which not only vitiates the impugned show cause notice but the entire proceedings. In these circumstances, the entire proceedings being ab initio illegal, without jurisdiction and in violation of Section 143 (1) (a) of the Income-tax Act.

For the reasons aforesaid, the writ petition is allowed and the impugned notice dated 11.9.2013 is quashed. As the notice notice has already been quashed, consequential orders, if any, are also quashed.

Dt.31.3.2015
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