IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 1997 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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ENGINEERING PROFESIONAL CO. PVT LTD.
Versus
THE DEPUTY COMMISSIONER OF INCOME TAX CIRCLE 1(1)(1)

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Appearance:
MS VAIBHAVI K PARIKH(3238) for the Petitioner(s) No. 1
MRS KALPANAK RAVAL(1046) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 07/01/2020

ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

1 Rule returnable forthwith. Ms. Raval, the learned standing counsel appearing for the Revenue waives service of notice of rule for and on behalf of the Revenue.

2 By this writ application under Article 226 of the Constitution of India, the writ applicant (assessee) has prayed for the following reliefs:

> *"(a) quash and set aside the impugned Assessment Order dated 27.12.2018 at Annexure "A' to this petition;*
>
> *(b) pending the admission, hearing and final disposal of this petition, to stay the implementation and operation of the Assessment Order dated 27.12.2018 at Annexure "A" to this petition;*
>
> *(c) any other and further relief deemed just and proper be granted in the interest of justice;*
>
> *(d) to provide for the cost of this petition."*

2 The facts giving rise to this writ application may be summarised as under:

2.1 The writ applicant seeks to challenge the order passed by the respondent under Section 143(3) read with Section 254 of the Income Tax Act, 1961 (for short, 'the Act, 1961') for the assessment year 2004-2005. The assessee is a company incorporated under the Companies Act, 1956. The assessee is in the business of construction. The return of the income for the year under consideration was filed on 1st November 2004 declaring total income at Rs.11,16,785/- (Rupees Eleven Lakh Sixteen Thousand Seven Hundred Eighty Five only) and the same was processed under Section 143(1) of the Act.

2.2 The case of the assessee came to be selected for scrutiny and various details were called for by the Assessing Officer. In such circumstances, the best judgement assessment came to be framed under Section 144 of the Act vide order dated 8th December 2006 assessing the

income of the assessee at Rs.1,25,93,920/- (Rupees One Crore Twenty Five Lakh Ninety Three Thousand Nine Hundred Twenty only) in view of the provisions of Section 44AD of the Act.

2.3 The writ applicant challenged the assessment order dated 8th December 2006 by preferring an appeal before the CIT (Appeals). The said appeal came to be dismissed by the CIT(Appeals) vide order dated 31st December 2007.

2.4 The writ applicant, thereafter, thought fit to carry the matter before the Income Tax Appellate Tribunal, but, by the time, the writ applicant could prefer the appeal, there was already delay of 329 days in filing such appeal. The Income Tax Appellate Tribunal declined to condone the delay. In such circumstances, the writ applicant came before this Court by filing the Tax Appeal No.1465 of 2011. The Tax Appeal No.1465 of 2011 came to be allowed by this Court vide order dated 11th December 2012 and the matter was remitted to the Appellate Tribunal. The order passed by this Court dated 11th December 2012 referred to above reads as under:

> *"1. Learned counsel Mr. Sudhir Mehta appears for the respondent in response to our notice of final disposal issued on 18.9.2012.*
>
> *2. Assessee has challenged the decision of the Income Tax Appellate Tribunal dated 5.8.2011 by which the appeal of the present appellant came to be dismissed on the ground that there was delay of 329 days in filing the appeal and the assessee, despite several opportunities, had not filed any application explaining such delay and seeking condonation thereof.*
>
> *3. Counsel for the appellant submitted that the assessee is engaged in the business of construction as Civil Contractor and persons responsible for the assessee company need to continuously travel in relation with their work, due to which, instructions could not be immediately supplied to the counsel for filing the application for condonation of delay. She submitted that before the Tribunal request was made for granting one more*

opportunity. However, the Tribunal, considering the passage of time, proceeded to dismiss the appeal only on the ground that there was delay in presenting the appeal and no condonation was sought.

4. Having perused the order of the Tribunal and having heard Counsel for the parties, we are of the opinion that the appellant, of course, subject to certain strict conditions, is required to be granted one last opportunity of filing application for condonation of delay before the Tribunal.

5. Under the circumstances, order of the Tribunal is reversed. Proceedings are placed back before the Tribunal to permit the appellant to file application for condonation of delay. This shall, however, be subject to following conditions that the appellant :-

1) shall deposit sum of Rs.5000/- with the Gujarat State Legal Services Authority latest by 31.12.2012;

2) shall file appropriate application for condonation of delay before the Tribunal also latest by the said date.
Appeal is disposed of accordingly."

2.5 The Appellate Tribunal partly allowed the appeal preferred by the writ applicant herein holding as under:

"6 We have carefully perused the contents of the application for condonation of delay along with the affidavit. In our considered opinion, the assessee prevented by reasonable and sufficient cause for not filing the appeal on time. Therefore, in the interest of Justice and fair play, the delay is condoned.

7. Coming to the merits of the case, we find that the assessment order was made ex parte u/s. 144 of the Act which was confirmed by the ld. CIT(A).

8. A perusal of the order of the authorities below shows that because of non attendance by the assessee, the A.O. proceeded by applying rate of 8% following guidelines of Section 44AD of the Act.

9. In our considered opinion and the understanding of the facts in issue, since e return was accompanied with Audit Report u/s 44AB of the Act provisions of Section 44AD are not applicable.

10. Therefore, in the interest of justice, we deem it fit to restore the issue to the files of the A.O. The Assessee is directed to attend the assessment proceedings and justify its claim of lower rate of profit in accordance with its books of accounts. The A.O. is directed to verify the same and decide the issue afresh after giving a reasonable and fair opportunity of being heard to the assessee.

11 In the result, the appeal filed by the Assess is treated as allowed for statistical purpose."

3 Thus, the Appellate Tribunal took into consideration the following:

[a] The assessment order was *ex parte* under Section 144 of the Act.

[b] The authority ought not to have proceeded by applying the rate of 8% following the guidelines of Section 44AD of the Act.

[c] As the return was accompanied with the audit report under Section 44AB of the Act, the provisions of Section 44AD would not be applicable.

4 In such circumstances referred to above, the Appellate Tribunal thought fit to direct the Assessing Officer to reconsider the claim of the assessee of lower rate of profit in accordance with its books of account. The direction issued by the Tribunal is very specific. The Tribunal directed the Assessing Officer to verify the claim of lower rate of profit and decide the issue a fresh after giving reasonable opportunity of hearing to the writ applicant.

5 On the matter being remitted to the Assessing Officer, the Assessing Officer appears to have travelled beyond the scope of the issue

on which the Tribunal remitted the matter. In the fresh assessment order, the Assessing Officer held as under:

> *"12 After discussion and on the basis of the data made available on record, the total income of the assessee for the year under consideration is assessed as under:*
>
> ***Computation of income***

		In Rs.
Total income as per return of income		*11,18,785/-*
Add:		
On account of disallowance of sundry creditors as discussed in para 8	*33,03,66,066/-*	
On account of disallowance of unexplained expenses in para 9	*84,83,340/-*	
On account of unexplained investment as discussed in para 10	*19,85,627/-*	
On account of disallowance of depreciation as discussed in para 10.3	*94,317/-*	
On account of disallowance of trade payable as discussed in para 11	*1,28,38,395/-*	*5,37,67,745/-*
Assessed income		*5,48,84,530/-*

> *13 Assessed u/s. 143(3) r.w.s. 254 of the Income Tax Act, 1961. Give credit for prepaid taxes, after the verification. Charge interest u/s. 234A, u/s.234B, 234C & 234D of the I.T. Act, 1961 as applicable. Issued show cause notice u/s. 274 r.w. Section 271(1)(c) of the Act. Issue demand notice and challan accordingly."*

6 Being dissatisfied with the order passed by the Assessing Officer, the assessee is here before this Court with the present writ application.

● **SUBMISSIONS ON BEHALF OF THE WRIT APPLICANT:**

7 Mr. Hemani, the learned senior counsel assisted by Ms. Vaibhavi K. Parikh, the learned counsel appearing for the writ applicant vehemently submitted that the impugned order passed by the Assessing Officer is without jurisdiction. The learned senior counsel would submit

that what cannot be done directly could not have been done indirectly. It is submitted that the order of the Tribunal remitting the matter, more particularly, the last part of the direction is very specific and clear. According to the learned senior counsel, the Assessing Officer was asked to look into the claim of the assessee with regard to lower rate of profit and while undertaking such exercise, the Assessing Officer appears to have travelled much beyond the issue upon which he was asked to look into. This is the principal and the only argument of the learned senior counsel while assailing the order passed by the Assessing Officer.

8 In such circumstances referred to above, the learned senior counsel appearing for the writ applicant prays that there being merit in this petition, the same be allowed and the impugned order be quashed and set aside and the Assessing Officer may be asked to once again look into the matter in accordance with the original directions of the Tribunal.

● **SUBMISSIONS ON BEHALF OF THE REVENUE:**

9 On the other hand, Ms. Raval, the learned standing counsel appearing for the Revenue has vehemently opposed this writ application. Ms. Raval would submit that no error, not to speak of any error of law could be said to have been committed by the Assessing Officer in passing the impugned order. Ms. Raval has raised a preliminary objection with regard to the maintainability of this writ application. According to Ms. Raval, the writ applicant ought to have preferred a statutory appeal before the CIT (Appeals) and could not have come straight before this Court invoking the extraordinary jurisdiction under Article 226 of the Constitution of India.

10 Ms. Raval, without prejudice to her preliminary objection as

regards the alternative remedy available to the writ applicant, further submitted that the direction of the Appellate Tribunal is being misconstrued or rather misinterpreted. According to her, it would not be correct to interpret the order of the Tribunal to the extent of only asking the Assessing Officer to consider the claim of the writ applicant of lower rate of profit. The learned standing counsel would submit that once the Tribunal takes the view that Section 44AD would not be applicable, the entire assessment would be vast open and it would be within the jurisdiction of the Assessing Officer to look into other aspects also of the matter.

11 In such circumstances referred to above, the learned standing counsel prays that there being no merit in this writ applicant, the same be rejected.

12 Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following two questions fall for our consideration:

> [1] Whether we should entertain this writ application in view of the fact that there is an alternative remedy available to the writ applicant by preferring an appeal before the CIT (Appeals)?
>
> [2] If we take the view that this writ application is maintainable, then whether the impugned order passed by the Assessing Officer is sustainable in law?

13 Having regard to the basic infirmity in the impugned order passed by the Assessing Officer, we are of the view that we should not reject this writ application only the ground that the writ applicant has an

alternative efficacious remedy of preferring an appeal before the CIT (Appeals). In this context, we may refer to a decision of the Supreme Court in the case of **Commissioner of Income Tax vs. Chhabil Dass Agarwal [2013] 357 ITR 357 (SC)**. We rely upon the observations made in paras 15 to 20. The same reads thus:

> *"15. Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. 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 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).*
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> *16. The Constitution Benches of this 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 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.*
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> *(See: N.T. Veluswami Thevar vs. G. Raja Nainar, AIR 1959 SC 422; Municipal Council, Khurai vs. Kamal Kumar, (1965) 2 SCR 653; Siliguri Municipality vs. Amalendu Das, (1984) 2 SCC 436; S.T. Muthusami vs. K. Natarajan, (1988) 1 SCC 572; Rajasthan SRTC vs. Krishna Kant, (1995) 5 SCC 75; Kerala SEB vs. Kurien E. Kalathil, (2000) 6 SCC 293; A. Venkatasubbiah Naidu vs. S. Chellappan, (2000) 7 SCC 695; L.L. Sudhakar Reddy vs. State of A.P., (2001) 6 SCC 634; Shri Sant Sadguru*

Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha vs. State of Maharashtra, (2001) 8 SCC 509; Pratap Singh vs. State of Haryana, (2002) 7 SCC 484 and GKN Driveshafts (India) Ltd. vs. ITO, (2003) 1 SCC 72).

17. In Nivedita Sharma vs. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows:

> *"12. In Thansingh Nathmal v. Supdt. of Taxes, AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).*
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> > *"7. … The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."*
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> *13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11) "11. … It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford, 141 ER 486 in the following passage: (ER p. 495) '… There are three classes of cases in which a liability may be established founded upon a statute. … But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.' The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd., 1919 AC 368 and has been*

reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd., 1935 AC 532 (PC) and Secy. of State v. Mask and Co., AIR 1940 PC 105 It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

14. In Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77) "77. … So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."" (See: G. Veerappa Pillai v. Raman & Raman Ltd., AIR 1952 SC 192; CCE v. Dunlop India Ltd., (1985) 1 SCC 260; Ramendra Kishore Biswas v. State of Tripura, (1999) 1 SCC 472; Shivgonda Anna Patil v. State of Maharashtra, (1999) 3 SCC 5; C.A. Abraham v. ITO, (1961) 2 SCR 765; Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433; H.B. Gandhi v. Gopi Nath and Sons, 1992 Supp (2) SCC 312; Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1; Tin Plate Co. of India Ltd. v. State of Bihar, (1998) 8 SCC 272; Sheela Devi v. Jaspal Singh, (1999) 1 SCC 209 and Punjab National Bank v. O.C. Krishnan, (2001) 6 SCC 569)

18. In Union of India vs. Guwahati Carbon Ltd., (2012) 11 SCC 651, this Court has reiterated the aforesaid principle and observed:

"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, (1979) 3 SCC 83. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).

> *"23. … when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.""*

19. Thus, while it can be said that this Court has recognized 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, Titagarh Paper Mills case 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.

20. In the instant case, the Act provides complete machinery for the assessment/re-assessment 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. vs. 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. In the instant case, neither has the assessee-writ petitioner described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case."

14 Thus, the dictum of law, as laid in the aforesaid decision, is that although 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, yet the remedy under the statute, however, must be effective and not a mere formality with no substantial relief. It is true that when a statutory forum is created by law for redressal of grievance, a writ petition should not be entertained ignoring the statutory dispensation. But, such principles, in a given case, may be given a go-bye, if the Court is convinced that on the

face of it, the impugned order is not sustainable in law. We are of the view that we should look into the matter on merits while overruling the preliminary objection raised on behalf of the Revenue.

15 We are convinced that the impugned order passed by the Assessing Officer is not sustainable in law. We once again fall back on the directions issued by the Appellate Tribunal. The directions are plain and simple. The Tribunal takes the view that Section 44AD of the Act is not applicable. It directed the assessee to attend the assessment proceedings and justify its case on lower rate of profit in accordance with its books of account. The Assessing Officer was directed to verify the same and decide the issue a fresh (the Tribunal says that "decide the issue a fresh" means the issue with regard to the claim of lower rate of profit).

16 Mr. Hemani, the learned senior counsel appearing for the writ applicant invited our attention to a decision of the Supreme Court in the case of **MCorp Global P. LTD vs. Commissioner of Income Tax [2009] 309 ITR 434 (SC)** wherein the Supreme Court has observed as under:

> *"In the case of Hukumchand Mills Ltd. v. CIT reported in [1967] 63 ITR 232 this Court has held that under section 33(4) of the Income Tax, 1922 (equivalent to section 254(1) of the 1961 Act), the Tribunal was not authorized to take back the benefit granted to the assessee by the Assessing Officer. The Tribunal has no power to enhance the assessment."*

17 The whole idea in relying upon the aforesaid decision of the Supreme Court is that the Tribunal could not have done two things: first it could have allowed the appeal and quashed and set aside the order of the Assessing Officer or it could have dismissed the appeal of the writ applicant.

18 If the appeal would have been dismissed without there being any direction of remitting the matter to the Assessing Officer, then the effect would have been as if the Tribunal has accepted that the case would fall within the Section 44AD of the Act thereby justifying 8% rate of profit. Here is a case where the Assessing Officer, by its impugned order, has absolutely created new liability for the writ applicant and that too, contrary to the directions issued by the Appellate Tribunal.

19 For the foregoing reasons, we are convinced that the impugned order passed by the Assessing Officer is not sustainable in law.

20 In the result, this writ application succeeds and is hereby allowed. The impugned order passed by the Assessing Officer is hereby quashed and set aside. The matter is remitted to the Assessing Officer for fresh consideration of the issue as specifically directed by the Appellate Tribunal. We once again clarify that the Assessing Officer now needs to reconsider the issue with regard to claim of the writ applicant for lower rate of profit and not at the rate of 8%. Rule is made absolute to the aforesaid extent.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

CHANDRESH