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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 395 OF 2018

The Shri Saibaba Sansthan Trust (Shirdi)

... Petitioner

Versus

The Union of India and Anr.

... Respondents

Mr. S. Ganesh, Senior Counsel with Mr. Mohan Jayakar, Mr. Sandeep Junarkar, Mr. Ashwin Shette & Mr. Bharat Bagla i/b Junnarkar & Associates for the Petitioner.
Mr. N.C.Mohanty, for the Respondents.

**CORAM: M.S.SANKLECHA &
RIYAZ I. CHAGLA, JJ.**
DATED: 9TH FEBRUARY 2018

PC:-

1. This Petition under Article 226 of the Constitution of the India challenges the order dated 31st December 2017 passed by the Assessing Officer i.e. Respondent No.2, Deputy Commissioner of Income Tax (Exemptions). The impugned order dated 31st December 2017 is an Assessment Order passed under Section 143 (3) of the Income Tax Act, 1961 ("the Act") disposing the assessment for Assessment Year 2015-16.

2. The very outset, we asked Mr. Ganesh, the learned Senior counsel appearing for the Petitioner as to why should we exercise our extra ordinary jurisdiction as an efficacious alternative remedy,

by way of an appeal under Section 246(A) of the Act to the Commissioner of Income Tax (Appeal) (CIT(A)) is available.

3. In response, Mr. Ganesh, the learned senior counsel invited our attention to the impugned order dated 31 December 2017. wherein the anonymous donations received by the Petitioner in 'dakshina boxes' are held to be taxable under Section 115 BBC of the Act as the exclusion provided in Sub-Section (2) thereof would not be available to it. This he submits is contrary to the plain reading of the provision. In support he states the Assessing Officer has refused to follow binding decision in ***Gurudev Siddha Peeth Vs. ITO***¹ of the Mumbai Bench of the Tribunal. In the above case it has been held that a mixed purpose trust (both charitable and religious object) would not be hit by Section 115 BBC of the Act unless the anonymous donations made were accompanied with a specific directions that such donation is for educational and medical institution run by the Trust. Besides, two other decisions of the Tribunal have taken the same view. Mr. Ganesh submits that the Petitioner trust is a mixed purpose trust as is evident from the regulating Act namely Shri Saibaba Sansthan Trust (Shirdi) Act, 2004 and the donations made did not carry any specific

¹ 2015 (59) Taxmann.com 400.

directions with regard to the user of the donation. Therefore the anonymous donations are excluded from the impact of Section 115 BBC of the Act. It is also submitted that the impugned order is without jurisdiction as it ignores not only the binding decision of the Tribunal but also Circular dated 20 December 2006, issued by the Central Board of Direct Taxes (CBDT) which is in favour of the Petitioner to similar effect as the decision of the Tribunal in its favour. It is submitted that the impugned assessment order dated 31 December 2017 is firstly contrary to the binding decision of the Tribunal and the circular of CBDT and secondly as it gives rise to a pure question of law i.e. interpretation. In the above circumstances, it is submitted that this Court should exercise its extra ordinary jurisdiction and entertain the Petition. In support of the above two submissions the Petitioner relied upon the decision of the Apex Court in the case of **AIRCEL Ltd. & Anr. Vs. The Commercial Tax Officer & Anr.**² and the decision of this Court in the case of **Bank of Baroda Vs. H.C. Srivastava**³

4. Mr. Mohanty, the learned counsel for the Revenue submits that an alternative remedy is available under the Act. Further he submits that factual dispute arises as the Petitioner had first

² Writ Petition (Civil) No. 1055 of 2013 decided on 22nd April 2016.

³ 256 ITR P. 385.

claimed it is only a religious trust and on being confronted it made a claim of being a mixed purpose trust i.e. religious and charitable. Thus this issue also requires to be determined.

5. It is axiomatic that our jurisdiction under Article 226 of the Constitution of India is plenary. Therefore, there is no bar in our entertaining this Petition. However, the Courts have over a period of time evolved unwritten terms / rules to not exercise our discretion to entertain a Petition seeking a prerogative writ. One such test to decide not to exercise our discretionary writ jurisdiction is the availability of an efficacious alternate remedy under the statute in which the impugned order is passed. However, we may hasten to add that if we are of the view that the alternate remedy is not efficacious, then we would certainly exercise over jurisdiction. No straitjacket formula can be laid down, it would be decided / determined from case to case.

6. In the present facts, we note that the impugned assessment order dated 31 December 2017 has sought to distinguish the decision relied upon in the present facts. Infact he holds that the trust is not for religious purposes. Therefore will not fall in the exclusion clause under Section 115 BBC (2) of the Act. This

understanding of the nature of the trust not being religious but humanistic, of the Assessing Officer may be absolutely incorrect as contended by the Petitioner. However, there is no reason why it cannot be set right in the appeal under Section 246A by the CIT(A). It is an error, if at all within jurisdiction and not an exercise of power outside jurisdiction.

7. The remedy they seek here can be effectively obtained from the Appellate Authority under the Act. Even if we accept the Petitioners contention is correct that the impugned order is contrary to the binding decisions of the Mumbai Bench of the Tribunal and the circular of the CBDT, then the CIT(A) would on examination of the case certainly set it aside. The Petitioner could also approach the CIT(A) for a stay of the impugned order if the same is contrary to binding decisions of the Tribunal. So far the apprehension of recovery proceedings being commenced, the Petitioner can under Section 220(6) of the Act approach the Assessing Officer and thereafter the Commissioner of Income Tax as the administrative head to stay the recovery till the disposal of the appeal by the CIT(A). The application for stay has to be

determined in terms of the parameters laid down by this Court in the ***KEC International Ltd. Vs. B.R. Balakrishnan***⁴.

8. The decision of the Apex Court in the case of ***AIRCEL (Supra)*** where the Supreme Court set aside the order of the High Court refusing to entertain the Petition on the ground of alternate remedy being available under the Tamil Nadu Value Added Tax Act, 2006. The Supreme Court proceeded to hold that in the issue arising therein *"it is not disputed that these questions are pure questions of law and could be gone into in a writ petition under the peculiar circumstances. In our considered opinion the questions that have been raised by the appellant being absolutely pure questions, the High Court should have decided these matters"*

9. From the above view it is clear that in the facts of the case before it, the Apex Court was of the view that the questions are pure questions of law and could be gone into a writ petition therefore, the writ court should have entertained the Petition. It appears that because the questions are pure questions of law which were formulated before the Supreme Court and no decision on it were available, that the Court was of the view that in the facts

4 251 ITR 158.

of the case, the writ Court should have entertained the Petition. Therefore, in the facts of that case, the Apex Court set aside the order of the High Court and restored the matter to the High Court to decide the issue on merits. In the present facts, we find that even according to the Petitioner the issue stand concluded by virtue of the Tribunal orders. We see no reason why the CIT(A) would not set aside the order of the Assessing Officer, if the same is contrary to the binding decisions of the Tribunal. Therefore, to our mind, the facts arising in the present case are different from the facts which arose before the Apex Court in **AIRCEL (Supra)**. The CIT(A) would be as much bound by the orders of the Tribunal in **Gurudev Siddha Peeth (Supra)**, as every Income Tax Officer functioning within the State of Maharashtra. Therefore, the Petitioner does have an efficacious alternative remedy available under the Act for the same reliefs as it is seeking before us.

10. The reliance upon the decision of this Court in **Bank of Baroda (Supra)** was in support of its submission that the Assessing Officer is bound by the decisions of the Tribunal. This is undisputable. It is so in our hierarchical system of jurisprudence. For the purpose of entertaining the Petition in our extra ordinary jurisdiction, this decision has no application as the writ was filed

from an order of the Commissioner of Income Tax under Section 264 of the Act. Admittedly, there is no appeal under the Act from an order under Section 264 of the Act. In any case, the proposition of law laid down by this Court was at the final hearing of a Petition admitted in 1990. At the final hearing of the Petition the Court set aside the order, while in this case we are today at the stage of admitting a Petition, therefore the consideration whether the remedy available provided under the Act is equally efficacious or not does arise for our consideration. The decision of this Court in ***Bank of Baroda (Supra)*** that the Assessing Officer is bound by the orders of the Tribunal would be equally binding upon the CIT(A). Therefore, if the Petitioner is right in its contention, then impugned order dated 31 December 2017 of the Assessing Officer order would be set aside by the CIT(A).

11. The relief that the Petitioners are seeking before us are reliefs which are equally available before the CIT(A). Therefore, in these circumstances, we are not exercising extra ordinary jurisdiction under Article 226 of the Constitution of India to entertain this Writ Petition.

12. The Petitioner should have challenged the impugned order dated 31 December 2017 of Assessing Order by way an appeal. However, keeping in mind that it is a trust and the fact that this Petition was filed before the time to file appeal under the Act to the CIT(A) expired, we direct the CIT(A) to entertain the Petitioners Appeal, if any, filed within two weeks from today, without taking any objection with regard to delay.

13. Mr. Mohanty, the learned counsel appearing for the Revenue very fairly on instructions from the Deputy Commissioner of Income Tax – Respondent No.2 states that no coercive proceedings would be taken against the Petitioner trust till the disposal of two rectification applications dated 18th January 2015 and 25th January 2015 and for a period of one week from communication thereof.

14. The Writ Petition is disposed of with the above directions.

(RIYAZ I. CHAGLA J.)

(M.S.SANKLECHA, J.)