

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 20755 of 2018****With****R/SPECIAL CIVIL APPLICATION NO. 22471 of 2019****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE J.B.PARDIWALA****and****HONOURABLE MR. JUSTICE ILESH J. VORA**
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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
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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**SUMANDEEP VIDYAPEETH THROUGH PRESIDENT/MANAGING
TRUSTEE DIXIT SHAH**

Versus**ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 2 EXEMPTIONS**
=====**Appearance:**

**MR MIHIR H JOSHI, SENIOR ADVOCATE WITH MR MITUL K SHELAT
ADVOCATE WITH MS DISHA N NANAVATY(2957) for the Petitioner(s) No. 1
MR MR BHATT SENIOR ADVOCATE WITH MRS MAUNA M BHATT(174)
WITH MR KARAN SANGHANI, ADVOCATE for the Respondent(s) No. 1**

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CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA**and****HONOURABLE MR. JUSTICE ILESH J. VORA**

Date : 10/03/2021

CAV COMMON JUDGMENT

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

1 Since the issues raised in both the captioned writ applications are the same, those were taken up for hearing analogously and are being disposed of by this common judgement and order.

2 The Special Civil Application No.20755 of 2018 seeks to challenge the assessment notice issued for the A. Y. 2016-17. Whereas the connected writ application i.e. the Special Civil Application No.22471 of 2019 seeks to challenge the assessment notice issued for the A. Y. 2017-18.

3 For the sake of convenience, the Special Civil Application No.20755 of 2018 is treated as the lead matter.

4 By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

“(A) Issue writ of certiorari or any other appropriate writ, order or direction quashing the impugned show cause notice ITBA/AST/F/143(3)(SCN)/2018-19/1014381634(1) dated 18/12/2018 and further show cause notice bearing no.ITBA/AST/F/143(3)(SCN)/2018-19/1014472868(1) dated 21/12/2018 at Annexure – F and Annexure -G.

(B) Pending the hearing and final disposal of this application, this Hon'ble Court be pleased to stay further proceedings in pursuance of show cause notices ITBA/AST/F/143(3)(SCN)/2018-19/1013381634(1) dated 18/12/2018 and further show cause notice bearing no.ITBA/AST/F/143(3)(SSCN)/2018-19 1014472868(1) dated 21/12/2018 at Annexure-F and Annexure-G.

(C) Award the costs of this petition.

(D) Grant any further or other relief as this Hon'ble Court deems just and proper in the interest of justice, and"

5 A Coordinate Bench of this Court passed the following order dated 27th December 2018:

"1. Learned advocate for the petitioner has tendered draft amendment. The amendment is allowed in terms of the draft. The same shall be carried out forthwith.

2. Mr. Mihir Joshi, Senior Advocate, learned counsel with Ms. Disha Nanavati for the petitioner, invited the attention of the Court to the show cause notice dated 18.12.2018 issued by the respondent to point out that by the show cause notice dated 18.12.2018, the hearing has been fixed on 20.12.2018 whereas the petitioner has been called upon to file its reply within seven days from the date of receipt of the letter. It was pointed out that thereafter another show cause notice dated 21.12.2018 came to be issued referring to an enquiry report of the DDIT (Inv.)-1, Vadodara and fixing the date of hearing on 24.12.2018. It was submitted that the assessment is getting time barred on 31.12.2018 and that the show cause notice appears to be a mere empty formality inasmuch as sufficient time has not been granted to the petitioner to deal with the contents of the show cause notice. It was submitted that moreover, the enquiry report, which finds reference in the notice dated 21.12.2018, has not been furnished to the petitioner. It was submitted that the Assessing Officer is likely to proceed with the assessment without affording proper opportunity to the petitioner, which would result in a high-pitched assessment.

3. Having regard to the submissions advanced by the learned counsel for the petitioner, issue Notice returnable on 08.01.2019. By way of ad-interim relief, the further proceedings pursuant to the impugned show cause notices dated 18.12.2018 and 21.12.2018 are hereby stayed.

Direct service is permitted."

6 We have heard Mr. Mihir Joshi, the learned Senior Counsel assisted by Mr. Mitul Shelat, the learned advocate appearing for the writ applicant and Mr. M. R. Bhatt, the learned Senior Counsel assisted by Mrs. Mauna Bhatt, the learned Senior Standing Counsel appearing for the Revenue.

7 The assesment proceedings in the case of the writ applicant were initiated by issuing notice under Section 143(2) of the Act on 28th July 2017. Various notices were issued from time to time calling for the necessary information / details. Certain information was received under a confidential letter dated 11th December 2018 from the Commissioner of Income Tax (Exemption). After perusing the document so received, the impugned show cause notice dated 18th December 2018 came to be issued to the writ applicant. Even after issuance of the said notice, opportunities were given to the writ applicant. During the pendency of the said proceedings, further information was received under letter dated 20th December 2018 from the investigation wing. Therefore, a further show cause notice dated 21st December 2018 came to be issued to the writ applicant. Thus, adequate and reasonable opportunity was given to the writ applicant from time to time. Further, the writ applicant is well acquainted with the facts of the pending Court proceedings in the various Courts.

8 In the aforesaid context, we may refer to few relevant averments made in the affidavit-in-reply filed on behalf of the Revenue. We quote the relevant observations:

"I submit that in order to cross verify the findings of Enforcement Directorate's charge sheet of 06/2018 u/s 45 of PMLA Act, 2002 and applicability of these findings, in the petitioner's case in AY 2016-17 (F.Y. 2015-16), a notice u/s 142(1) of the Act was issued on 03./12.2018 asking the petitioner trust to furnish copy of Return of Income, Acknowledgment, Personal Balance sheet, Profit & Loss A/c of each trustees for AY 2016-17 along with the other relevant details related to trust. In response to the same, the petitioner trust submitted its reply on 06.12.2018.

Thereafter, upon perusing the documents thoroughly as well as duly considering the instructions issued by the Board and the higher authorities in the matter of scrutiny assessment, impugned show cause notice dated 18.12.2018 came to be issued requesting the petitioner to reply to the show-cause notice within 07(seven) days from the receipt of the notice. However, the petitioner sought adjournment till 26.12.2018

under letter dated 20.12.2018 and the same was granted. The deponent – assessing officer did not proceed to conclude the assessment proceedings. However, the petitioner trust submitted its reply under its letter dated 24.12.2018 on 25.12.2018 through ITBA portal.

Meanwhile, the deponent – assessing officer also received information from the Investigation wing of Baroda through the Jt. CIT(E)/R-2/SV/Information/2018-19 dated 20/12/2018 in which Enforcement Directorate's findings with regard to bogus Long Terms Capital Gain claim of trustees was examined. Further, an issue with respect to unexplained credit was also intimated in the report of investigation wing. Accordingly, another show cause notice dated 21.12.2018 came to be issued to the petitioner trust requesting to submit the reply by 24.12.2018. In response, the petitioner trust vide letter dated 24.12.2018 asked for adjournment which was granted. The deponent – assessing officer did not proceed to conclude the assessment proceedings. Finally, the petitioner trust submitted its reply on 26.12.2018 through ITBA portal.

5. *I submit that the above narrated sequence of events would clearly go to show that the plea of the petitioner regarding affording reasonable opportunity of being heard is not true. I submit that the petitioner is well acquainted with facts of the pending court proceedings in various courts. The contents of the show cause notices are basically findings of the Enforcement Directorate and its corresponding effect on undisclosed income under the Act. Furthermore, I submit that on the same facts and findings based on ACB action and complaint u/s. 45 of PMLA Act, 2002 in 06/2018 (charge-sheet) filed by the Enforcement Directorate, the officer of CIT(E), Ahmedabad has also initiated the proceedings with regard to cancellation of registration u/s 12AA and 10(23C)(vi) of the Act. I submit that the facts brought to the notice of the petitioner under impugned show cause notices were not new facts, for which petitioner needs to put special efforts to present its case. The petitioner was very much aware of the facts enumerated in the show cause notices and ample opportunity of hearing has been provided to the petitioner as narrated hereinabove. Therefore, the contention of the petitioner regarding not affording sufficient opportunity of hearing is baseless.”*

9 It was brought to the notice of this Court that during the pendency of the present writ application, the case has been centralized to the Central Charge. All the necessary and relevant documents upon which reliance has been placed by the writ applicant have been furnished to the writ applicant.

10 The principal argument of Mr. Joshi appearing for the writ applicant is that in the notice issued under Section 143(2) of the Act dated 28th July 2017, the issues raised in the impugned notices dated 18th December 2018 and 21st December 2018 respectively have not been referred to or stated. We do not find any merit in this contention raised on behalf of the writ applicant.

11 As per the scheme of the Act, once the return of income is filed under Section 139 of the Act, the department would either accept the said return under Section 143(1) of the Act or frame an assessment under Section 143(3) of the Act after complying with the requirement of sub-Section (2) of Section 143 of the Act. Once a notice under Section 143(2) has been issued, the assessment is at large and in the event any adverse view with regard to the accounts of the assessee is to be taken by the Revenue, the assessee is required to be put to notice, which in the instant case has been complied. When the assessment is at large by issuing the first notice under Section 143(2), within the time prescribed and in the course of the ongoing assessment proceedings, if further information is received, the same has to form a part of the assessment proceedings. It is not the case of the writ applicant that the notice dated 28th July 2017 issued under Section 143(2) of the Act is time barred. The only contention of the writ applicant is that during the course of the assessment proceedings, the Assessing Officer could not have called for further information by issuing the impugned show cause notice dated 18th December 2018 and 21st December 2018 respectively. This contention is thoroughly fallacious and not tenable in view of the scheme of the Act.

12 The contention with regard to the documents not provided is also fallacious and not borne out from the record. The evidence upon which the department seeks to rely upon, is already within the knowledge of

the writ applicant, as enumerated in the affidavit-in-reply referred to above. In any view of the matter, the assesment in the case of the writ applicant has been transferred from the Exemption to Central Charge. Thus, the contention of adequate opportunity not being given is also factually incorrect.

13 There is one another good reason why we should entertain this writ application. If the impugned show cause notice, ultimately, culminates in an order of assessment, then such order would be an appealable order. A show cause notice can be questioned before a Writ Court provided the writ applicant is able to establish that the show cause notice has been issued without any jurisdictional fact in existence. In other words, a jurisdictional fact is a fact which must exist before a Court, Tribunal or an authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends the jurisdiction of a Court, a Tribunal or an authority. The underlying principle is that by erroneously assuming the existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess. The case on hand is not one in which it can be said that the jurisdictional fact did not exist.

14 The Supreme Court in the case of **Srinivasa Rice Mills vs. ESI Corporation** reported in (2007) 1 SCC 705 has observed in para 84 as under:

"....it is clear that existence of 'jurisdictional fact' is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of 'jurisdictional fact', it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction or vulnerable provided essential or fundamental fact as to existence of jurisdiction is present."

15 Keeping the aforesaid in mind, we may now refer to and rely upon a decision of the Supreme Court in the case of **Commissioner of Income Tax and others vs. Chhabil Das Agarwal** [Civil Appeal No.6704 of 2013 decided on 8th August 2013], wherein the following has been observed:

*“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.*

21. In light of the same, we are of the considered opinion that the Writ Court ought not to have entertained the Writ Petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the re-assessment orders passed and the consequential demand notices issued thereon.”

16 We take notice of the fact that the writ applicant came rushing to this Court way back in the year 2018 complaining that by the impugned show cause notice dated 18th December 2018, the hearing had been fixed on 20th December 2018, whereas the writ applicant was called upon to file its reply within seven days from the date of receipt of the letter. A grievance was redressed that the Assessing Officer was likely to proceed with the assessment without affording proper opportunity to the writ applicant, which may result in a high-pitched assessment. On these

two grounds, the writ applicant obtained ad-interim relief, by which, the further proceedings pursuant to the impugned show cause notices came to be stayed. This stay of the further proceedings has operated for more than two years. Even at the time when the Coordinate Bench thought fit to issue notice and stay the proceedings, it was not the case of the writ applicant that no jurisdictional fact existed for the purpose of assuming jurisdiction to issue the impugned show cause notices.

17 In the overall view of the matter, we are convinced that we should not interfere with the impugned show cause notices.

18 In the result, both the writ applications fail and are hereby rejected. The interim relief earlier granted stands vacated forthwith in both the case.

(J. B. PARDIWALA, J)

(ILESH J. VORA, J)

FURTHER ORDER

After the judgement is pronounced, Mr. Mihir Joshi, the learned Senior Counsel appearing for the writ applicant made a fervent request that his client may be given an opportunity of hearing before the concerned authority so far as the proceeding which has led to the filing of the Special Civil Application No.22471 of 2019 is concerned. According to Mr. Joshi, the hearing has not been concluded and there is some scope for his client to make few relevant submissions before the final decision is taken by the concerned authority. Mr. M. R. Bhatt, the learned Senior Counsel would submit that if the writ applicant wants to make submissions before the concerned authority, there should not be

any objection at the end of the Revenue. In such circumstances, we clarify that the concerned authority shall hear the writ applicant in the concerned proceedings before taking the final decision in the matter. It goes without saying that the same shall be subject to the aspect of limitation. We clarify that even if the department is of the view that the hearing has concluded, still, an opportunity may be given to the writ applicant to make few submissions.

(J. B. PARDIWALA, J)

(ILESH J. VORA,J)

CHANDRESH

