

(2025) 02 BOM CK 0003

Bombay High Court

Case No: Writ Petition No. 9833 Of 2022

Vijay Vasant Kulkarni

APPELLANT

Vs

Assistant Commissioner of
Income Tax Circle (2)

RESPONDENT

Date of Decision: Feb. 5, 2025

Acts Referred:

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1961 - Section 23, 54F, 142(1), 143(3), 144B, 147, 151

Hon'ble Judges: M. S. Sonak, J; Jitendra Jain, J

Bench: Division Bench

Advocate: R. S. Padvekar, Tanzil Padvekar, Tejal P. Kharkar, Suresh Kumar

Final Decision: Disposed Of

Judgement

Jitendra Jain, J

1. By this petition under Article 226 of the Constitution of India the petitioner challenges re-assessment order passed under Section 147 read with

Section 144B of the Income Tax Act (hereinafter referred to as "the Act") and notice of demand both dated 29 March 2022 for the assessment

year 2015-16.

Brief facts:

2. The petitioner is an individual and has filed his original return of income for the Assessment year 2015-16 on 30 October 2015. The said return of

income was selected for scrutiny and a notice under Section 142 (1) of the Act dated 21 June 2017 was issued seeking details mentioned in annexure

to the letter. The petitioner has enclosed undated replies to this notice in the present petition. On 5 October 2017, an assessment order under Section 143(3) of the said Act came to be passed accepting the return of income. In the said return, there is no discussion of any issue except stating that on change of the officer, the Chartered Accountant of the petitioner attended from time to time and filed various details.

3. The replies said to have been filed during the assessment proceedings do not bear any acknowledgment of the same having been filed with revenue during the assessment proceedings.

4. Post conclusion of the assessment proceedings, the petitioner has filed letters with the assessing officer on 17 August 2018 and 27 August 2018, which are stated to be a reply to the audit objection of the revenue on deduction under Section 54F of the Act and on income from house property.

5. On 28 March 2021, the petitioner was served with a notice under Section 148 of the Act proposing to reassess the income for the assessment year 2015-16. On 30 June 2021, the petitioner was supplied with reasons for reopening. Briefly, the reasons record that deduction under Section 54F must be restricted to the cost of acquisition of petitioner's share in the property. It further states that no rental income has been offered for tax under Section 23 of the Act.

6. The petitioner, vide letter dated 13 July 2021, objected to the reopening. In the objection concerning the issue of deduction under Section 54F, the petitioner has only stated that this issue was verified during the assessment proceedings and an opinion was formed, and therefore, it is a case of change of opinion. In the said objection, there is no reference to any query having been raised by the assessing officer during the assessment proceedings and replies filed by the petitioner during the assessment proceedings. On the issue of taxation of rental income, there is no averment that this issue was examined during the assessment proceedings. The only objection is that the said issue was raised at the behest of the audit party, and hence, it does not constitute "reasons to believe" by the assessing officer. The objection also refers to re-assessment proceedings being initiated at the behest of the audit objections.

7. On 25 March 2022, an order rejecting the above objection came to be passed. Thereafter, on 29 March 2022, an assessment order under Section 147 read with Section 144 B came to be passed, making additions /disallowance on account of "income from house property" amounting to Rs.46,85,625/- and disallowance of deduction under Section 54F to the extent of Rs.3,86,95,545/-. The income was reassessed at Rs.10,86,36,149/- and a demand of Rs.2,65,22,019/- came to be raised.

8. Instead of filing an appeal, the petitioner approached this Court through the present petition on 27 April 2022, challenging the reassessment order and notice of demand dated 29 March 2022. On 20 September 2022, this Court granted ad-interim relief, which continues to date. It is against this backdrop that the present petitioner is before us.

Submission of the Petitioner:

9. Mr. Padvekar, learned counsel for the petitioner, submits that the impugned notice under Section 148 has been issued beyond a period of 4 years from the end of the relevant assessment year. Since there is no failure to disclose fully and truly all material facts necessary for the assessment, the impugned proceedings are barred by the first proviso to Section 147 of the Act as it existed at the relevant time. Learned counsel further submitted that both these issues were examined during the assessment proceeding and, therefore, the impugned proceeding would amount to a change of opinion, which is not permissible under the Act. The petitioner also submitted that the proceedings have been issued without proper sanction under Section 151 of the Act. Learned counsel also submitted that no sufficient opportunity of hearing was given before passing the impugned order since between the date of order rejecting the objection and final assessment order only 3 days were available. He also submitted that reassessment is based on the audit party's borrowed satisfaction.

10. Mr. Padvekar learned counsel for the petitioner relied upon the following decision in the case of Jayant Dave Vs Assistant Commissioner of Income Tax Writ Petition No.5087 of 2022, Union of India Vs Rajiv Bansa I(2024) 167 taxmann.com 70 (SC), Sidhmicro Equities (P.) Ltd. Vs Deputy Commissioner of Incoem-tax (2023) 150 taxmann.com 460 (Bombay), Deputy Commissioner of Income Tax Vs Sidhmicro Equities (P.)

Ltd. (2023) 150 taxmann.com 461 (SC) and Asian Paints Vs Assistant Commissioner of Income-tax (2008) 296 ITR 90 Bombay. Mr.

Padvekar, therefore, prayed that the assessment order is bad in law.

Submission of the Respondent:

11. Per contra, Mr. Suresh Kumar learned counsel for the revenue submits that on account of the Taxation and Other Laws (Relaxation and

Amendment of Certain Provisions) Act, 2022 (TOLA), the period of 4 years specified under the provisions of Section 147 of the Act stands extended

and therefore the petitioner cannot take the benefit of the said provision and consequential notice is not barred by the first proviso of Section 147 of

the Act. Learned counsel for the respondent submitted that there was no query raised during the assessment proceedings concerning taxation of rental

income under the head "house property" and also as per queries raised during assessment proceedings, there does not seem to be any query on

Section 54F, and therefore this is not a case of change of opinion. He further submitted that the approval had been correctly taken following Section

151 of the Act read with TOLA. He further submits that various issues raised in the present petition were not raised in the objection. Mr. Suresh

Kumar further submits that the decisions relied upon by the petitioner do not apply to the facts of the present case. He further submitted that the

issues raised by the petitioner involve the investigation of facts, and this Court, in its exercise of jurisdiction under Article 226 of the Constitution,

cannot delve into disputed questions of facts. He submits that all these issues can be examined in the appeal, the same being an alternate and

efficacious remedy under the Act.

Analysis :-

12. We have heard learned counsel for the petitioner and the respondent and have perused the documents annexed to the petition.

13. At the outset, in the petition, the petitioner has only stated that he has no other efficacious alternate remedy except by way of this writ petition. In

our view, this statement is not correct. Against the reassessment order passed there is an appeal provided under Chapter XX of the Act and this fact

has been communicated to the petitioner in the notice of demand dated 29 March 2022 itself. We may also note that for filing an appeal, there is no

provision under the Income-tax Act of any pre-deposit for entertaining and adjudicating the appeals. Therefore, merely because a demand is raised it

does not mean that the Writ Court should entertain the writ when there is an alternate and efficacious remedy available by way of appeal under the

Act. We have recently in the case of Oberoi Constructions Limited Vs. Union of India & Ors. (2025) 137 GSTR 601 have analysed the law on

this subject, and by following the same, we reject the petitioner's contention that this Court should exercise the extra-ordinary jurisdiction to entertain

the petition.

14. In any case, we propose to examine whether this Court should exercise its extraordinary jurisdiction to examine the validity of re-assessment

proceedings in the present case.

15. The issue of whether, on account of TOLA provisions, proviso to Section 147 of the Act would be applicable or not was not raised by the

petitioner in its objections. This issue has been raised for the first time before this Court. In our view, if the objection has not been raised before the

assessing officer, it would not be fair to raise such an objection in Writ Petition for the first time to challenge the validity of the reassessment

proceedings.

16. The petitioner has filed undated letters to show that the issue of Section 54F was examined during the assessment proceedings and, therefore,

there is a change of opinion. In the annexure to the queries raised, there is no query concerning Section 54F or taxation of rental income. Whether

these undated letters were filed or not during the assessment proceedings in the absence of any document acknowledging the same by the revenue, it

would not be proper for us to enter the arena of investigating this issue as to whether these documents were filed or not. This would involve an

investigation into the facts that this Court, under Article 226 of the Constitution of India, cannot examine. However, the petitioner is free to

demonstrate the same in appeal.

17. Insofar as the issue of rental income under the house property is concerned, no query is raised, and even in the undated letters, there is no reply on

this issue. Therefore, we cannot accept the petitioner's contention that this issue was examined during the assessment proceedings. Learned counsel

for the petitioner was fair in stating that, certainly, this was not examined.

18. Learned counsel for the petitioner also submitted that the impugned proceedings were initiated at the behest of the audit party and, therefore, the proceedings are bad in law. In our view, it is a settled position that if the audit objection is on facts, then the revenue would have no jurisdiction to reopen the case on audit. However, if the issue raised is a question of law, then certainly, reopening can be done. The issue in the present case, whether it is a question of fact or a question of law, will have to be examined in the light of the submissions made during the course of the assessment proceedings, which would again involve the determination of questions of fact, which this Court cannot go into in writ proceedings. In any view, the reasons recorded do not mention the reopening being done based on audit objections. Therefore, we have our own doubts about whether the petitioner can raise this issue. Also, we cannot comprehend how internal audit objection documents were shared with the petitioner.

19. On perusal of the letter filed on 17 August 2018, in response to the audit party's query, we find various documents annexed to this letter.

Prima facie, we do not find a reference to these documents in undated letters, which the petitioner claims to have filed in assessment proceedings.

20. The petitioner's last submission that the impugned order is contrary to the decision of this Court in the case of Asian Paints (Supra) can be examined by the Appellate Authority, which has the power to adjudicate upon the same and the consequences thereto. It is also important to note that the petitioner has participated in the re-assessment proceedings despite the officer not disposing of the objection observed in the assessment order.

The petitioner, vide letter dated 28 March 2022, has made his detailed submissions on the merits of the case without raising any objection on the

insufficiency of time between the order rejecting objection and the time given for reply. On 17 January 2022, the petitioner has filed detailed

submissions on the merits again without objecting the respondents not having passed any order disposing of the objections. Therefore, in our view, the

petitioner cannot now raise this contention before the Writ Court. However, the petitioner is free to raise this issue before the Appellate Authority.

21. We now deal with the decisions relied upon by the learned counsel for the petitioner. The first decision relied upon by the petitioner in the case of Jayant Dave (Supra) is not applicable since, in that case, there was no issue raised on the applicability or non-applicability of TOLA to the first proviso to Section 147 of the Act. Furthermore, in the present case, the queries raised during the assessment proceedings do not show any queries raised on Section 54F and income from house property. The letters annexed to the petition to show that the details filed during original assessment proceedings concerning Section 54F are undated. Various issues raised in the present matter were not raised in the objections filed, and furthermore, in the present case, the assessee has participated in the assessment proceeding without raising any objections as to the insufficiency of time between the order rejecting the objection and passing the assessment order or the officer not deciding the objection within reasonable time. In our view, therefore, the said decision is distinguishable on facts and not applicable.

22. The next decision relied upon by the petitioner in the case of Rajiv Bansal (supra) and Sidhmicro Equities (P.) Ltd. (supra) would require ascertainment of facts of the present case and the applicability of the Supreme Court decisions to the facts before us. In any case, these issues raised were not raised in the objections before the assessing officer. Therefore, it would not be proper for this Court to adjudicate upon this issue when it is raised for the first time in a writ proceeding. However, liberty is given to raise this issue in appeal.

23. Given the above, we refrain from exercising our jurisdiction under Article 226 of the Constitution of India. However, if the petitioner files an appeal against the assessment order dated 29 March 2022 within four weeks from the date of uploading of the present order, then, the Appellate Authority will adjudicate the appeal without any issue as to limitation since the petitioner had approached this Court within one month from the date of passing of the impugned order and the petition was pending in this Court since then and the petitioner was bona fide pursuing the said petition.

24. We may also further observe that this Court had granted ad-interim relief on 20 September 2022. We extend the said ad-interim relief for four

weeks from the date of uploading the present order to enable the petitioner to make an appropriate application before the appropriate Authority for seeking a stay of the demand.

25. If such an application is made, the appropriate Authority would examine and decide on its own merits without getting influenced by any of our observations made in the present order.

26. We also make it clear that the petitioner is at liberty to raise all the objections raised in this petition before the Appellate Authority on the validity of

jurisdiction under Section 147 of the Act. Our above observations on Section 147 are only limited to concluding whether this Court should exercise its

extraordinary jurisdiction under Article 226 of the Constitution of India despite the alternate and efficacious remedy. Therefore, any observations in

this order should not be construed as our observations or findings on the validity of the impugned orders or notices. We keep all the parties' contentions open for adjudication before the Appellate Authorities.

27. The petition is disposed of in the above terms. No costs.

28. All concerned must act on an authenticated copy of this order.