

(2011) 12 RAJ CK 0054

Rajasthan High Court

Case No: Writ Petition No"s. 11092 of 2010 and 7752 of 2011

Sushila Kanwar Chauhan

APPELLANT

Vs

Union of India and Others

RESPONDENT

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**Date of Decision:** Dec. 5, 2011**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1961 - Section 142(1), 142A, 143(2), 143(3), 147

**Citation:** (2012) 246 CTR 1**Hon'ble Judges:** Vineet Kothari, J**Bench:** Single Bench**Advocate:** Dinesh Mehta, for the Appellant; K.K. Bissa, for the Respondent**Final Decision:** Dismissed

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**Judgement**

@JUDGMENTTAG-ORDER

Dr. Vineet Kothari, J.

These two writ petitions have been filed by the petitioner-assessee challenging the reassessment proceedings under s. 147/148 of the IT Act, 1961 (for short, hereinafter referred to as Act of 1961") for the asst. yr. 2006-07. The matter arises on account of difference in the cost of construction of a hotel building by the assessee during this assessment year in which the assessee disclosed the cost of construction at Rs. 38,92,848 whereas upon reference to the Departmental Valuation Officer, Ajmer (DVO) in accordance with provision of s. 142A of the Act of 1961 inserted by Finance Act No. 2 of 2004 with retrospective effect from 15th Nov., 1972, the said DVO on 22nd Dec, 2009 estimated the cost of construction of the hotel building at Rs. 1,17,92,000. Thus, to assess the difference amount of Rs. 78,99,152 vide Annex. 6 (Rs. 1,17,92,000 - Rs. 38,92,848) as undisclosed income under s. 69B of the Act of 1961, the assessing authority initiated the impugned reassessment proceedings.

2. The notice under s. 148 of the Act for the said purpose was issued to the petitioner-assessee vide Annex. 4 dt. 24th Feb., 2010, against which the petitioner filed a preliminary reply vide Annex. 5 dt. 8th March, 2010 that he has already filed return of income for the asst. yr. 2006-07 on 27th Dec, 2006; and the assessee also asked for the reasons for reopening, and the said reasons as recorded on 23rd Feb., 2010, were accordingly supplied to the petitioner vide Annex. 6 recording the aforesaid reasons for reopening of assessment proceedings. A notice under ss. 143(2) and 142(1) of the Act along with valuation report was sent to the assessee vide Annex. 7 on 6th Sept., 2010, upon which the assessee again filed preliminary objections before the assessing authority vide Annex. 8 dt. 27th Oct., 2010. The assessing authority overruled the said preliminary objections and a communication Annex. 9 dt. 23rd Nov., 2010 in this regard was sent to the assessee asking him to appear before the assessing authority on 29th Nov., 2010 at 11.00 am.

3. The assessee instead of filing his reply on merits or raising his objections against the assessment under s. 69B of the Act, filed the present writ petition (S.B. Civil Writ Petn. No. 11092 of 2010) on 26th Nov., 2010, on which show-cause notices were issued to the respondents on 29th Nov., 2010 itself.

4. According to learned counsel for the petitioner, Mr. Dinesh Mehta on 29th Nov., 2010, the assessee's Authorized Representative appeared before the assessing authority and apprised him of such issuance of show-cause notice by this Court and also sought further time; however, the said assessing authority passed the impugned assessment order under s. 143 (3)/147 of the Act of 1961 on 27th Dec., 2010 imposing tax on the said undisclosed income representing the difference between valuation of the hotel building as assessed by the DVO and the value disclosed by the assessee, as undisclosed income of the assessee. By seeking amendment in the writ petition, the assessee also challenged the said reassessment order also in the present writ petition. The connected writ petition (S.B. Civil Writ Petn. No. 7752 of 2011) was filed challenging the penalty order under s. 271(1)(c) of the Act imposing penalty upon the assessee to the extent of Rs. 26,70,935 being 100 per cent of the tax evaded by the assessee.

5. Learned counsel for the petitioner-assessee, Mr. Dinesh Mehta initially submitted that there was a breach of principles of natural justice in the present matter, as the assessing authority could have very well granted further time to the assessee on 29th Nov., 2010 and even though he did not fix the next date for 27th Dec., 2010 but impugned order was passed on the said date. The said assessing authority ought to have waited for the result of the present writ petition, since the show-cause notices were issued on 29th Nov., 2010 itself; and the assessing authority was apprised of the said fact. In the alternative, he prayed that against the impugned assessment order dt. 27th Dec., 2010 and penalty order under s. 271(1)(c) of the Act passed on 27th June, 2011, the assessee may be permitted to prefer an appeal before the appellate authority, namely, CIT(A) in accordance with s. 246A of the Act and till such

appellate authority decides the appeal on merits, within the time framed by this Court, the coercive process for recovery of impugned demand of tax and penalty may not be taken against the petitioner-assessee subject to payment of some portion of impugned demand and furnishing solvent security to the satisfaction of the assessing authority for the balance amount.

6. On the other hand, learned counsel for the Revenue, Mr. K.K. Bissa countered the submissions of the learned counsel for the petitioner-assessee as far as breach of principles of natural justice is alleged, submitted that the assessing authority had reserved the right to reopen the assessment even while passing the original assessment order itself on 30th Dec, 2008; and after giving the notice under s. 147/148 of the Act itself vide Annex. 4 dt. 24th Feb., 2010, the assessing authority constantly gave the opportunities of hearing to the assessee in the matter and vide Annex. 6 reasons for reopening the assessment were supplied, then vide Annex. 7 on 6th Sept., 2010, the formal notice under ss. 143(2) and 142(1) along with valuation report of DVO were given to the assessee on 15th Sept., 2010 and with the rejection of preliminary objections vide Annex. 9 dt. 23rd Nov., 2010 again the assessee was asked to appear and give his final reply on merits on 29th Nov., 2010, but the assessee preferred present writ petition instead of filing his reply on merits of his contentions before the assessing authority. He, therefore, submitted that there was no breach of principles of natural justice in the present case and the writ petition cannot be entertained on this ground alone in view of availability of alternative remedy by way of appeal to the present assessee.

7. He also submitted that in view of retrospective amendment in law by inserting s. 142A of the Act, the case laws relied upon by the assessee with regard to valuation of DVO and competence of assessing authority to make such reference do not apply to the facts of the present case and consequently the writ petition deserves to be dismissed.

8. I have heard learned counsel at some length and perused the provisions of the Act, relevant pleadings and record of the case.

9. Admittedly, an appeal lies against both the impugned orders under s. 143(3)/147 of the Act passed on 27th Dec., 2010 by the assessing authority for the asst. yr. 2006-07 as also the impugned penalty order under s. 271(1)(c) of the Act passed on 27th June, 2011. Normally, writ jurisdiction under Art. 226 of the Constitution of India cannot be invoked if an equally adequate and efficacious alternative remedy is available to the petitioner, unless the case falls within the compass of well settled exceptions to such norms, namely, (i) if the vires of the Act or rules are under challenge, (ii) if there is a breach of principles of natural justice or (iii) if the impugned notice or order is without jurisdiction of the authority concerned.

10. The two of such exceptions are not even invoked in the present case and only the third ground, namely, the breach of principles of natural justice is alleged by the

petitioner in the present case.

11. From the sequence of dates, noted above, this Court is of the opinion that even this ground of breach of principles of natural justice is not established in the present case. The reopening on the ground of valuation of hotel building in the present case was the right reserved by the assessing authority even while passing the original assessment order itself, even though there was no such requirement in law and the assessing authority could always on the reasons to believe that some income has escaped the assessment for the given reasons, could invoke his powers of reassessment/reopening of assessment vested in it under s. 147/148 of the Act.

12. In the present case, notices under s. 147/148 of the Act were issued by the assessing authority as soon as the report of the DVO upon reference was made to him under s. 142A of the Act was given on 22nd Dec., 2009. The formal notice was served upon the assessee vide Annex. 4 dt. 24th Feb., 2010 followed by a number of occasions, on which the assessee was called upon to give his explanation and furnish his objections, if any, vide Annex. 4 notice under s. 148 itself on 24th Feb., 2010 vide Annex. 7 dt. 6th Sept., 2010 and thereafter vide Annex. 9 dt. 23rd Nov., 2010. The preliminary objections filed by the assessee were duly rejected by the assessing authority, and he was called upon to file his objections on 29th Nov., 2010. However, it appears that instead of showing the cause before the assessing authority or raising his objections on merits before the assessing authority on 29th Nov., 2010 approached this Court by way of present writ petition, which was filed on 26th Nov., 2010.

13. The connected writ petition against the impugned penalty order dt. 27th June, 2011 was filed on 1st Aug., 2011.

14. Even though the show-cause notices were issued to the respondent-assessing authority by a Co-ordinate Bench of this Court on 29th Nov., 2010, however, no stay was granted to the assessee petitioner against the impugned reassessment proceedings and accordingly when on 29th Nov., 2010, the assessee did not file his reply or objections on merits of his contentions, the assessing authority passed the impugned assessment order after about 28 days on 27th Dec, 2010. For this interregnum period, neither the assessee bothered to file his objections before the assessing authority nor it appears that the assessing authority again gave a fixed date to the assessee after 29th Nov., 2010. However, no blame can be laid at the doors of the respondent-assessing authority after 29th Nov., 2010 when despite opportunities having been granted by the assessing authority the assessee or his Authorized Representative failed to file his objections on merits against assessment of escaped income under s. 69B of the Act. More so, in the absence of any stay order granted by this Court, the assessing authority could very well pass the assessment order on the given date or on any subsequent date. Having done that, now raising the plea of breach of principles of natural justice, does not lie with the assessee. This Court sees no breach of principles of natural justice in the present case. Therefore,

on this ground, the writ petition cannot be entertained.

15. Admittedly, an appeal lies against the impugned reassessment order as well as penalty order before the appellate authority, namely, CIT(A) as per s. 246A of the Act. Even as per s. 253, a second appeal is provided before the Tribunal, and thereafter on substantial questions of law an appeal is provided to High Court under s. 260A of the Act. Thus, the Act provides for a complete mechanism of remedies, if an assessee is aggrieved by an order of assessment for raising demand of tax. In such circumstances, the case does not fall within the exceptional categories for invoking extraordinary jurisdiction of this Court under Art. 226 of the Constitution of India and the present writ petition is not maintainable, since the impugned assessment order and penalty order are under challenge.

16. As far as merits of the contentions of the assessee as to whether such difference in valuation of hotel building could be taxed as concealed income of the assessee under s. 69B of the Act is concerned, the same is a mixed question of fact and law, which can certainly be raised before the appellate forums provided under the Act and such appellate authorities have all necessary powers to examine/re-examine the validity of impugned reassessment order as well as penalty order. Their powers are not only comprehensive but co-extensive with that of the assessing authority and, therefore, the challenge to reassessment sought to be raised in the present writ petition, could have been very well raised before the appellate forums also.

17. The last and alternative prayer of the learned counsel for the petitioner that the assessee may be left free to prefer such appeals even now and the appellate authority may be directed to decide such appeal within stipulated time frame and subject to such decision of appeal, coercive process for recovery of impugned demand may be stayed subject to the conditions, which this Court thinks fit, appears to be reasonable and proper and same is not strongly opposed also, fairly and rightly so by the learned counsel for the Revenue. Accordingly, while dismissing this writ petition, the assessee-petitioner is given liberty to file appeals before the CIT(A) within a period of one month from today, and if such appeals are filed by the assessee, the appellate authority is expected to decide the same within six months thereafter. The petitioner-assessee shall deposit 25 per cent of the impugned demand of the tax and penalty with the assessing authority and for remaining amount of tax and penalty, he shall furnish solvent security to the satisfaction of the assessing authority within a period of one month from today and subject to the same, the remaining demand shall remain stayed till the appellate authority decides the appeals on merits in accordance with law during the aforesaid period of six months. No costs.