

(2004) 03 CAL CK 0041

Calcutta High Court

Case No: Writ Petition No. 1988 of 1996 9 March 2004

CESC Ltd.

APPELLANT

Vs

ITO

RESPONDENT

Date of Decision: March 9, 2004**Acts Referred:**

- Income Tax Act, 1961 - Section 131, 192

Citation: (2004) 140 TAXMAN 646**Hon'ble Judges:** Bhaskar Bhattacharya, J**Bench:** Single Bench

Judgement

By this writ application, the petitioner No. 1, an assessee under Income Tax Act, 1961 (hereinafter referred to as the "Act") has challenged a letter dated 9th September, 1996 issued by respondent No. 1 by which the said respondent has asked the petitioner No. 1 to produce relevant books of account in order to substantiate the claim of exemption in support of the Return u/s 206 of the Act for the financial year 1992-93.

2. Facts giving rise to filing of the instant writ application may be summarized thus :

(a) The petitioner No. 1 is an Income Tax assessee under the Act and the assessing officer of the petitioner No. 1 who has the jurisdiction to make assessment under the Act is the Deputy Commissioner of Income tax, Special Range-II, Calcutta, under the Commissioner of Income Tax, West Bengal-1.

(b) The petitioner No. 1 had been deducting tax u/s 192 of the Act as also other relevant provisions, and had been depositing the same u/s 200 of the Act and also filed annual return in Form No. 24 u/s 206 of the Act for the financial year 1992-93. The petitioner No. 1 by a letter dated 31st May, 1993 addressed to respondent No. 1, the prescribed Income Tax authority duly filed the annual return u/s 206 of the Act in Form No. 24 and the same was also received by respondent No. 1.

(c) By the letter dated 9th September, 1996, the said respondent No. 1 required the petitioner No. 1 to furnish various information and further asked the petitioners to produce relevant books of account and documents in respect of such information which related to the tax deducted by the petitioner No. 1 u/s 192 of the Act. By the said letter, the respondent No. 1 alleged that there were discrepancies between the figures shown in the annual return in Form No. 24 for the financial year 1992-93 and those shown in the annual reports of the petitioner No. 1 for the said year. By the said letter the respondent No. 1 fixed 18-9-1996 for hearing.

3. By this writ application, the writ petitioners have challenged the jurisdiction of respondent No. 1 to make enquiry or to require the petitioners to furnish any information or to produce any document asked for in the said letter dated 9th September, 1996.

4. This application is opposed by the respondent authority thereby disputing the claim of the petitioners. In the affidavit in opposition, the respondent authority has asserted that respondent No. 1 is quite competent to issue such requisition and there is no lack of jurisdiction as alleged in the writ application.

5. Apart from the aforesaid question, Mr. Mullick, the learned counsel appearing on behalf of Income Tax Authority, has raised a preliminary objection as to the maintainability of this writ application pointing out that the petitioners having alternative remedy under the Act itself, this court should not entertain this writ application. Mr. Mullick submits that by the impugned notice the respondent No. 1 has merely asked the petitioner to produce documents for the purpose of substantiating the claim made in the return of the petitioner No. 1 and, thus at that stage, there is no scope of entering into the question whether the respondent No. 1 acted illegally in demanding those informations.

6. Before I enter into the main question involved in the writ application, viz., whether respondent No. 1 was vested with authority to issue such direction, I propose to deal with the preliminary objection raised by Mr. Mullick.

7. It is true that a writ court can refuse to entertain a writ application if the petitioner has efficacious alternative remedy elsewhere; but law is equally settled that existence of an efficacious alternative remedy is not a total bar in entertaining a writ application, particularly in a case, where the authority against whom writ application is filed is shown to have no jurisdiction or such authority had purported to usurp jurisdiction without any legal foundation. In such cases, a writ court is quite competent to grant appropriate reliefs notwithstanding existence of efficacious alternative remedy. (See [Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others](#),). Earlier, in the case of [Dr \(Smt.\) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur \(U.P.\) and Others](#), the Supreme Court reiterated the same principle that when an authority acted wholly without jurisdiction, existence of alternative remedy did not come into the way of

the writ court in deciding a writ application. Apart from the aforesaid fact, in my view, the question of existence of alternative remedy should be considered by court at the time of entertaining a writ application, but if a direction has already been given for filing affidavit, at the time of final hearing, such plea cannot be raised (See [Union of India \(UOI\) and Another Vs. Brij Fertilizers Pvt. Ltd. and Others](#), . This writ application was entertained in the year 1996. Therefore, at this stage, long after eight years, this court should not reject the application on the ground of existence of efficacious alternative remedy when the respondent has already come out with affidavit on the question involved in this application. I, therefore, overrule the preliminary, objection raised by, Mr. Mullick and propose the enter into the merit of the only point advanced by Dr. Pal, appearing on behalf of the petitioner questioning the authority of respondent No. 1 to issue the impugne requisition.

8. Dr. Pal, the learned counsel appearing on behalf of the petitioners, draws and attention of this court to the fact that respondent No. 1, the author of the impugned notice not being the assessing officer of the petitioner No. 1, could not ask the petitioners to produce those materials before him in support of the claim of the petitioner No. 1. By referring to the definition of assessing officer appearing in section 2(7A) of the Act. Dr. Pal contends that in the present case, the respondent No. 1 not being vested with relevant jurisdiction by virtue of direction or orders issued under sub-section (1) or sub-section (2) of section 120 or any other provisions of the Act, could not exercise any of the powers, duties or functions conferred on or assigned to an assessing officer under this Act. Dr. Pal points out that Deputy Commissioner of Income Tax, Special Range-II, Calcutta under the Commissioner of Income Tax, West Bengal¹, is the assessing officer of the petitioner No. 1.

9. The aforesaid. contention of Dr. Pal has been seriously disputed by Mr. Mullick appearing on behalf of the revenue. Mr. Mullick, in this connection, has placed strong reliance upon a notification dated 1-5-1989 being No. 3/89-90 issued in exercise of power conferred under sub-sections (1) and (2) of section 120 of the Act by Chief Commissioner of Income Tax (Administration), Calcutta.

10. Dr. Pal, at this stage, contended that column 3 of such notification which enumerates the jurisdiction conferred upon the respondent No. 1, did not indicate that the Respondent No. 1 was vested with the power of an assessing officer regarding discovery, production of evidence, etc. u/s 131 of the Income Tax, 1961, Dr. Pal in this connection, refers to subsequent notification dated 15th September, 1999 issued b v the Chief Commissioner of Income Tax where similar notification was issued in exercise of power under sub-section (1) of section 120 of the Act and at the last page, it was specifically mentioned that in performance of the functions indicated in the said notification, the concerned officer shall have also the power of an assessing officer tinder following section of Income Tax Act, 1961 read with relevant rules of Income Tax Rules, (1962) :

(a) power regarding discovery, production of evidence, etc., u/s 131 of Income Tax Act, 1961."

11. Dr. Pal thus, contends that such notification having been issued on 15th September, 1999 whereas the present case being prior to issue of such notification by taking aid of the notification of 1st May, 1989, the respondent No. 1 cannot exercise his power regarding discovery, production of evidence etc. u/s 131 of the Act when such power was not conferred by the notification dated 1-5-1989.

12. After hearing the learned counsel for the parties and after going through the two notifications, viz., (1) dated 15-9-1999 and the (2) 1-5-1989, I find that in the (1st) Notification of 1999 though the concerned officer was given additional power u/s 131, such power is absent in the notification dated 1-5-1989.

13. At this stage, it will be profitable to refer to the provisions contained in section 131 of the Act :

"Power regarding discovery, production of evidence, etc.-(1) The assessing officer, Deputy CIT(A), Dy. CIT, CIT(A) and Chief CIT or CIT shall, for the purposes of this Act, have the same powers as are vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), when trying a suit in respect of the following matters, namely :

(a) discovery and inspection;

(b) enforcing the attendance of any person, including any officer of a banking company and examining him on oath;

(c) compelling the production of books of account and other documents; and

(d) issuing commissions.

(IA) If the Director General or Director or Deputy Director or Assistant Director, or the authorised officer referred to in sub-section (1) of section 132 before he takes action under clauses (1) to (v) of that sub-section, has reason to suspect that any income has been concealed, or is likely to be concealed, by any person or class of persons, within his jurisdiction, then, for the purposes of making any enquiry or investigation relating thereto, it shall be competent for him to exercise the powers conferred under sub-section (1) on the Income Tax authorities referred to in that sub-section, notwithstanding that no proceedings with respect to such person or class of persons are pending before him or any other Income Tax authority.

(2) Omitted by the Direct Tax Laws (Amendment) Act, 1987, with effect from 1-4-1989.

(3) Subject to any rules made in this behalf, any authority referred to in sub-section (1) or sub-section (1A) may impound and retain in its custody for such period as it thinks fit any books of account or other documents produced before it in any proceeding under this Act :

Provided that an assessing officer or an Assistant Director shall not-

(a) impound any books of account or other documents without recording his reasons for so doing, or

(b) retain in his custody any such books or documents for a period exceeding fifteen days (exclusive of holidays) without obtaining the approval of the Chief Commissioner or Director General or Commissioner or Director therefor, as the case may be."

The aforesaid provision makes it clear that unless an Income Tax Officer is an assessing officer by virtue of section 2 clause (7A) of the Act, he cannot issue directions in terms of section 131 as-done by the impugned letter.

14. Therefore, the only question that arises for determination is whether by virtue of the notification dated May 1, 1989 the respondent No. 1 has become "assessing officer" of the petitioner No. 1 in respect of the Return u/s 206 of the Act.

15. To appreciate the aforesaid question the notification dated May 1, 1989 and the provisions contained in section 2(7A) of the Act are quoted below :

"Government of India

Office of the Chief Commissioner of Income Tax (Admn)

Aayakar Bhawan.

P-7, Chowringhee Square, Calcutta-700 069

Calcutta, the 1-5-1989.

Notification No. 3/89-90 in exercise of power conferred under sub-sections (1) and (2) of section 120 of the Income Tax Act, 1961, and all other powers enabling me in this behalf, I, the Chief Commissioner of Income Tax (Administration), Calcutta, hereby create a new Range, viz., Range-21 under the jurisdiction and administrative control of the Commissioner of Income Tax, West Bengal-VII, Calcutta. I also create six new wards under the administrative control and jurisdiction of Range-21, as detailed in column (2) of the Schedule annexed hereto. A Deputy Commissioner of Income Tax will be posted at Range-21 and he will be known as Deputy Commissioner of Income Tax, Range-21, Calcutta. An Income Tax Officer posted at a Ward under Range 21 will be known as Income Tax Officer, TDS. The jurisdiction assigned to each Ward is mentioned in Column (3).

2. This Notification will come into effect from May 8, 1989 and is issued with the concurrence of the Chief Commissioner of Income Tax (Technical), Calcutta.

SCHEDULE

New Range under CIT WB-VII. Cal.	New Ward created under Range-21	Jurisdiction
(1)	(2)	(3)
DC, Range-21.	Income Tax Officer (TDS), WARD-21(1), Calcutta.	All matters relating to all the sections in Chapter XVI1B except section 195 and also relating to section 221 of the Income Tax Act, 1961 for the assessee deemed to be in default in respect of the tax under sub section (1) of section 201 of the said Act, in respect of all the assessees who are or would come under the jurisdiction of CIT, WB-1 (excepting Mofussil District under his jurisdiction) and WB-VII, Calcutta.

Sd/

(SK Gangopadhyay)

Chief Commissioner of Income Tax (Admn), Calcutta."

"Section 2(7A). assessing officer means the Assistant Commissioner or Assistant Director or the Income Tax Officer who is vested with the relevant jurisdiction by virtue of Directions or orders issued under sub-section (1) or sub-section (2) of section 120 or any other provision of this Act, and the Deputy Commissioner or Deputy Director who is directed under clause (b) of sub-section (4) of that section to exercise or perform all or any of the powers and functions conferred on, or assigned to, an assessing officer under this Act;"

16. After going through the aforesaid notification dated May 1, 1989, I find that the Chief Commissioner of Income Tax (Admn), Calcutta, in exercise of power conferred under sub-sections (1) and (2) of section 120 of the Act conferred power upon the respondent No. 1 in respect of all matters relating to all the sections in chapter XVIIIB except section 195 and also relating to section 221 which falls under chapter XVIII) for the assessee deemed to be in default in respect of tax under sub-section (1) of section 201 of the Act in respect of assessees who are or would come under the jurisdiction of CIT, W.B.-1 (excepting Mofussil District) and W.B.-VII, Calcutta,

although, otherwise, the respondent No. 1 was not the regular assessing officer of the petitioner No. 1. The petitioner No. 1 is an assessee within the meaning of the aforesaid expression. Now, once power u/s 221 is conferred upon the respondent No. 1, it gives power upon him to assessee penalty as an assessing officer of the petitioner No. 1 and it necessarily follows that the respondent No. 1 also became assessing officer of the petitioner No. 1 in respect of Return filed u/s 206 of the Act. A power u/s 221 can be exercised only by an assessing officer as it appears from the language employed in section 221. Now, the moment the respondent No. 1 is held to be the assessing officer of the petitioner No. 1, exercise of power u/s 131, at his instance, is implicit.

17. It is true that in the subsequent notification dated 15-9-1999, it is further clarified that the respondent No. 1 is also given power u/s 131 but even in the absence of mention of section 131 in the earlier notification, those powers inhere in an assessing officer. To obviate ambiguity, by way of clarification, existence of power u/s 131 was specifically mentioned in the subsequent notification.

18. I, however, find substance in the contention of Dr. Pal that the two decisions cited by Mr. Mullick, one in the case of [Reckitt and Colman of India Ltd. and Another Vs. Assistant Commissioner of Income Tax \(TDS\) and Others](#), and the other in the case of [Peerless General Finance and Investment Co. Ltd. and Another Vs. Assessing Officer and Others](#), cannot be relied upon as precedent. In the case of Reckitt Colman of India Ltd. (supra) a Division Bench of this court was considering an appeal preferred against dismissal of a writ application involving a similar point in a situation after the issue of the aforesaid notification dated 15th September, 1999. Thus, in the notification dated September 15, 1999, power u/s 131 having been specifically noted, the Division Bench had no occasion to deal with the question whether an officer who was vested with the authorities referred to in section 221 without conferring the power u/s 131 could exercise such power. Therefore, the observation of the Division Bench in the said decision was really obiter dictum and cannot be cited as precedent.

19. Similarly, the decision of the Allahabad High Court in the case of Peerless General Finance & Investment Co. Ltd. (supra) has been set aside by the Supreme Court on a different point and the point involved herein has been kept open. Thus, the said decision by Allahabad High Court should not be treated as final.

20. Be that as it may, as indicated earlier, I find that the notification dated May 1, 1989 invested the respondent No. 1 with the authority to issue the requisition dated September 9, 1996 by virtue of his power of being the assessing officer.

21. Thus, this application is devoid of any substance and is dismissed. Interim order granted earlier stands vacated.

22. In the facts and circumstances, there will be, however, no order as to costs.

Petition dismissed.