IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.07.2014

Coram

The Honourable Mr.**SATISH K. AGNIHOTRI, ACTING CHIEF JUSTICE**

and

The Honourable Mr.Justice **M.M.SUNDRESH**

**Writ Appeal Nos.347 to 349 of 2014, W.P.Nos. 19871, 27007, 27609, 29467, 30610, 34985, 34986 of 2012, 201 to 203, 1441, 1924, 1925, 3005, 3413, 6111, 6768, 7044, 7137, 7138, 7275, 7643, 8171, 8252, 10568, 12283, 12357 to 12359, 24770, 31937, 31938, 33844, 33845, 34420 of 2013, 594, 1272, 1941, 2502, 2771, 2772, 3275 to 3277, 3623, 3624, 3847, 5636, 5637, 5744, 6372, 6373 & 8495 of 2014 and miscellaneous petitions**

**Writ Appeal Nos.347 to 349 of 2014**

1. The Joint Commissioner
of Income Tax,
Media Range, No.121,
Mahatma Gandhi Road,
Chennai-600 034.

2. The Deputy Commissioner
of Income Tax,
Media Circle I,
Room No.311, 3rd Floor,
Wanaparthy Block,
No.121, Mahatma Gandhi Road,
Chennai-600 034.

3. The Assistant commissioner
of Income Tax,
Media Circle I,
Room No.311, 3rd Floor,
Wanaparthy Block,No.121,
Mahatma Gandhi Road,
Chennai-600 034. .. Appellants in all WAs

Vs.

Kalanithi Maran .. Respondent in

WA.Nos.347 &
348/2014

Kavery Kalanithi .. Respondent in
WA.No.349/2014

**Prayer:** Writ Appeals filed under Clause 15 of Letter Patent against the order dated 04.02.2014 made in M.P.Nos.1, 1 & 1 of 2014 in W.P.Nos.3275 to 3277 of 2014 for the assessment years 2008-09, 2009-10 and 2009-2010 respectively.

For Appellant in W.A.Nos.347 to 349 of 2014 : Mr.T.Pramodkumar Chopda
Standing Counsel for Income-tax

For petitioner in W.P.Nos. 30610, 34985, 34986 of 2012, 3005, 7044 & 7275 of 2013 : M/s Dr.Anita Sumanth

For petitioner in WP.19871/2012: Mr.S.Sridhar

For petitioner in WP.27007/2012: Mr.S.Kumaradevan

For petitioner in W.P.Nos. 27609/2012, 1924, 1925, 6111, 8171, 8252, 33844 & 33845 of 2013, 594, 1272, 2502, 2771, 2772,3847, 5636 & 5637 of 2014 : Mr.R.Sivaraman

For petitioner in WP.Nos. 29467/2012 & 24770/2013 : Mr.M.P.Senthil Kumar

For petitioner in W.P.Nos.201 to 203 of 2013 : Mr.Vijayanarayanan, S.C.,
for Mr.C.Mani Shankar

For petitioner in WP.1441 for 2013 : Mr.Aravind P.Dattar, S.C.,
for Mr.V.S.Jayakumar

For petitioner in WP.3413 of 2013 : Mr.Srinath Sridevan

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| For petitioner in WPs.6768 & 12357 to 12359 of 2013 | : Mr.Agarval, S.C., for Mr.M.V.Swaroop |
| For petitioner in WPs.7137 & 7138 of 2013 | : Mr.P.Elango |
| For petitioner in WP Nos.7643 of 2013 & 1941 of 2014 | : Mr.Jehangir D.J.Mistri, S.C., for Mr.R.Sivaraman |
| For petitioner in WP.10568 of 2013 | : M/s J.Sree Vidya |
| For petitioner in WP.12283 & 34420 of 2013 | : Mr.Rahul Balaji |
| For petitioner in WP.31937 & 31938 of 2013 | : Mr.P.H.Aravind Pandian, Addl. Advocate General for M/s Subbaraya Aiyar |
| For petitioner in W.P.Nos.3275 & 3276 of 2014 | : Mr.P.S.Raman, S.C., for Mr.B.K.Girish Neelakantan |
| For petitioner in W.P.No.3277 of 2014 | : Mr. AR.L.Sundaresan, S.C., for Mr.B.K.Girish Neelakantan |
| For petitioner in WP.3623, 3624, 6372 & 6373 of 2014 | : Mr.Aravind P.Dattar, S.C., for M/s Sandeep Bagmar R. |
| For petitioner in WP.5744 of 2014 | : Mr.S.Parthasarathy, S.C., for Mr.Suhrith Parthasarathy |
| For petitioner in WP.8495 of 2014 | : Mr.Aravind P.Dattar, S.C., for Mr.M.V.Swaroop |
| For respondents in W.A.Nos.347 & 348 of 2014 | : Mr.P.S.Raman, Senior Counsel for M/s Sneha |
| For respondent in W.A.No.349 of 2014 | : Mr.AR.L.Sundaresan, S.C., for M/s Sneha |
| For respondents in W.A. Nos. 3275 to 3277 of 2014, 19871, 27007, 27609, 29467, 30610, 34985 & 34986 of 2012, 201 to 203, 1441, 1924, 1925, 3005, | : Mr.T.Pramodkumar Chopda Sr.Standing Counsel for Income Tax and Mr.Rajkumar Jhabakh, Jr.Standing Counsel for Income-tax |

3413, 6111, 6768, 7044, 7275,
7643, 8171, 8252, 10568, 12283,
12357 to 12359, 24770, 31937,
31938, 33844 & 33845 of 2013,
595, 1272, 1941, 2502, 2771, 2772,
3623, 3624, 3847, 5636, 5637,
5744, 6372, 6373 & 8495 of 2014
and for 1st respondent in WPs.7137
& 7138 of 2013 and for respondents
2 and 3 in W.P.No.34420 of 2013

For 2nd respondent in WP.Nos.7137 & 7138 of 2013 : Mr.Velayutham Pichaiya Standing Counsel

For 1st respondent in WP.No.34420 of 2013 : Mr.Haja Mohideen Gisthi

**COMMON JUDGMENT**

The writ petitions in W.P.Nos. 12283 of 2013 and 5636 and 5637 of 2014 are filed challenging the assessment orders.

2. The writ petitions in W.P.Nos.33845 of 2013 and 1272, 2502, 3623, 3624, 6372 and 6373 of 2014 are filed challenging the notice issued under Section 148 or speaking order or show cause notice issued under Section 143(2) of the Act.

3. The writ petitions in W.P.Nos.27007 of 2012, 3413, 8252, 10568, 34420 of 2013 and 594 and 2772 of 2014 are filed challenging the speaking order, wherein the original assessment orders have been passed

under Section 143(1) / under Section 144 and the reassessment notice has been issued within four or six years.

4. The writ petitions in W.P.Nos.201 to 203, 1924, 1925, 3005, 7137, 7138, 7643, 8171, 12357, 24770, 31937, 31938 of 2013 and 1941, 2771, 3275 to 3277 and 8495 of 2014 have been filed challenging the speaking order wherein the notice for reassessment has been issued within four years from the relevant assessment year wherein original orders have been passed under Section 143(3) / under Section 147.

5. The writ petitions in W.P.Nos.19871, 27609, 29467, 30610, 34985, 34986 of 2012, 1441, 6111, 6768, 7044, 7275, 12358, 12359, 33844 of 2013 and 3847 and 5744 of 2014 are filed challenging the speaking order wherein the notice for reassessment has been issued after four years and within six years from the relevant assessment year wherein orders have been passed under Section 143(3) / under Section 147.

6. The Writ Appeals in W.A.Nos.347 to 349 of 2014 are filed by the Revenue challenging the interim orders granted in the writ petitions.

7. Though we heard the arguments at length at the bar, both on the issues of law and facts, we deem it fit to consider the fundamental and primary issues governing the case, which, if decided, would make the other issues as unnecessary. The core issues for consideration before this

Court are:

> "(1) Whether an order passed by the assessing officer on the objections of an assessee can be assailed before the Court under Article 226 of the Constitution of India?
>
> (2) Whether an assessment/re-assessment order passed under Section 147 read with 143(3) of the Income-tax Act, 1961 is to be tested by a Court of law under Article 226 of the Constitution of India?"

8. Heard the learned counsels appearing on either side and perused the documents and the written submissions.

9. **Submissions made by the learned counsels for the petitioners**:- Though number of counsels have made submissions, for the purpose of brevity, we would like to condense them by naming them cumulatively rather than individually. Learned counsel submitted that the decision rendered in **G.K.N.Driveshafts (India) Limited Vs. Income-tax Officer, ((2003) 1 SCC 72 = 259 ITR 19(SC))** cannot be interpreted to hold that the power of this Court to issue a writ under Article 226 of the Constitution of India is taken away. The ratio laid down in **Calcutta Discount Co.Ltd. Vs. Income-tax Officer, (1961) 41 ITR 191 (SC)** still holds the field. The object of passing a reasoned order is to test it before a Court of law. The decision rendered in **G.K.N.Driveshafts (India) Limited Vs. Income-tax Officer, ((2003) 1 SCC 72 = 259 ITR 19(SC))** only

provides for an easy judicial review. Once a speaking order is passed, it partakes the character of quasi-judicial order and therefore the same is amenable to challenge by invoking the jurisdiction of this Court under Article 226 of the Constitution of India. The Order passed rejecting the objections clearly indicates a change of opinion. An income escaping assessment is an exception and therefore the same cannot be adopted as a matter of course. A merger would occur only when an order passed by a higher authority. Therefore, the principle governing merger cannot be adopted between an order rejecting the objections and an assessment order. When a issue is considered in the original assessment, a subsequent reopening is impermissible in law. Merely based upon audit objection, a reopening cannot be done. In most of the cases, where reopening was effected, the objections made have been rejected. Therefore, it is no ground to state that the assessment order would look into the case of the assessee objectively. The alternative remedy is not effective and efficacious. The assessing officer does not have the power to reopen the case which has already been concluded. When the petitioners are harassed by the proceedings initiated by the assessing officer, then the remedy sought for before this Court cannot be denied to them. In support of the submission, learned counsel have made reliance upon the following judgments:

"1. Raza Textiles Ltd., v. Income-tax Officer, Rampur, ((1973) 1 SCC 633);

2. Shrisht Dhawan v. M/s.Shaw Brothers, ((1992) 1

SCC 534);

3. Arun Kumar and others v. Union of India and others, ((2007) 1 SCC 732);

4. Godrej Sara Lee Ltd. v. Assistant Commissioner (AA) and another, ((2009) 14 SCC 338);

5. Calcutta Discount Co.Ltd. v. ITO, [(1961) 41 ITR 191 (SC)];

6. Commissioner of Income Tax and others v Chhabil Dass Agarwal, ( (2014) 1 SCC 603);

7. Chhabil Das Agarwal v UoI (1999 Taxman 326 = 241 CTR 331 (Sikkim);

8. CIT v Foramer France (2003) 264 ITR 566 (SC), affirmed (2001) 247 ITR 436 (All);

9. Whirlpool Corporation v. Registrar of Trade Marks, ((1998) 8 SCC 1);

10. State of Mysore v. P.R.Kulkarni and others, ((1973) 3 SCC 597);

11. B.Lakshmichand v. Government of India, ((1983) 12 ELT 322 (Mad));

12. A.V.Venkateshwaran, Collector of Customs, Bombay v Ramchand Sobhraj Wadhwani and another, ((1962) 1 SCR 753 = AIR 1961 SC 1506);

13. Shri Ambica Mills Co.Ltd. v. S.B.Bhatt and another,

(AIR 1961 SC 970);

14. Sterlite Industries (India) Ltd. v. Assistant Commissioner of Income-tax, ((2008) 305 ITR 339 (Mad));

15. Ram and Shyam Company Vs. State of Haryana and others, ((1985) 3 SCC 267);

16. Mithlesh Kumar Tripathi v Commissioner of Income-tax, ((2005) 149 Taxman 692 (All);

17. Nasir Ahmad v Assistant Custodian General, Evacuee Property, U.P., Lucknow and another, ((1980) 3 SCC 1);

18. Oryz Fisheries Private Limited v. Union of India and others, ((2010) 13 SCC 427);

19. G.K.N.Driveshafts (India) Ltd. v. ITO (2003) 1 SCC 72 = (2003) 259 ITR 19 (SC);

20. G.K.N.Driveshafts (India) Ltd. v. ITO (2002) 257 ITR 702 (Delhi);

21. Commissioner of Income-tax Vs. Sun Engineering Works (P) Limited., ((1992) 4 SCC 363);

22. Garden Finance Ltd. V Assistant Commissioner of Income-tax, ((2004) 268 ITR 48 (Guj) (FB));

23. Caprihans India Ltd v. Tarun Seem, Deputy Commissioner of Income-tax, ((2003) 132 Taxman 123 = 266 ITR 566 (Bom));

24. Ajantha Pharma Ltd. v. Assistant Commissioner of Income-tax, ((2004) 135 Taxman 246= (2004) 267 ITR 200 (Bom);

25.M/s.Ganga Saran & Sons (Pvt.) Ltd. V Income Tax Officer and others, ((1981) 3 SCC 143 = (1981) 130 ITR 1 (SC);

26. CIT V Kelvinator of India Ltd., (2010) 2 SCC 723, affirming (2002) 256 ITR 1 (Del) (FB);

27. CIT v. Kelvinator of India Ltd. (2002) 123 Taxman 433 = 256 ITR 1 (Delhi) (FB);

28. Assistant Commissioner of Income Tax, Mumbai and others vs. ICICI Securities Primary Dealership Limited., ((2012) 13 SCC 514);

29. CIT v Usha International Ltd. ((2012) 25 taxmann.com 200 (Del) (FB)= (2012) 348 ITR 485 (Del) (FB);

30. Indian Oil Corporation v ITO (1986) 3 SCC 409 = (1986) 159 ITR 956 (SC);

31. Cairn Energy India Pvt.Ltd. v. Deputy Director of Income-tax - W.P.No.10910 of 2011 dated 29.10.2011 (Unreported);

32. Communidado of Chicalim v Income-tax Officer, Goa ((2010) 10 SCC 209);

33. Himmatlal Harilal Mehta Vs. State of MP (AIR 1954

SC 403);

34. Tata Engineering and Locomotive Ltd. v. The Assistant Commissioner of Commercial Taxes and another, (AIR 1967 SC 1401);

35. Mukesh Modi vs DCIT (267 CTR 409); and

36. Ajanta Pharma Ltd. Vs. ACIT, (267 ITR 200 (Bombay).

10. **Submissions made by the learned counsel for revenue:**

Per contra, Mr.T.Pramodkumar Chopra, learned counsel appearing for the revenue submitted that none of the writ petitioners made a challenge that there is no "reason to believe", which is available in terms of Section 147 of the Act. An issue regarding a change of opinion is nothing but an adjudicatory fact. There is no challenge to the jurisdictional fact to assess/re-assess. After the judgment rendered in **G.K.N.Driveshafts (India) Limited Vs. Income-tax Officer, ((2003) 1 SCC 72 = 259 ITR 19(SC))**, the only option open to the assessee is to exhaust the statutory remedy under the Act. The reopening has been made only by exercising power that is available under the Act. The petitioners have not challenged the provisions of the Act. The petitioners have misconstrued a speaking order with the assessment order. Learned counsel also submitted that even on merits, the petitioners do not have any case. The assessing officer is entitled to decide the issue, which is not decided before the higher

forums. In support of his contention, learned counsel has made reliance upon the judgment of the Supreme Court in **Commissioner of Income Tax and others Vs. Chhabil Dass Agarwal, ((2014) 1 SCC 603).**

11. **Scope of Article 226 of the Constitution of India:-**

We need not reiterate the settled law on the scope and ambit of Article 226 of the Constitution of India. A Writ in exercise of the power under Article 226 of the Constitution of India is discretionary and extraordinary, that too, when a complete mechanism is provided under the statute, more so, a fiscal one. In a writ of certiorari, the Court is concerned with the decision making process adopted by an authority, rather than the decision itself. Such a writ cannot be issued to cure all the defects even assuming they are available on record. The High Court will have to adopt a dignified reluctance in fiscal matters. A wrong assessment order cannot be presumed. Till the assessment order is passed, the proceedings are under adjudication before assessing officer. The power of the assessing Officer under Section 147 of the Act is not in dispute. A challenge made to an order passed on the objections of the assessee would in effect is a challenge made to a notice under Section 148 of the Act. Such an order passed by the assessing officer is only at the stage of process of determination and not a determination by itself. The process of assessment is not required to be challenged before Court of law, as it is a still born child. Therefore, the petitioners cannot have a legal right as there

is no legal injury suffered by them at that stage.

12. While holding so, we are quite aware that the jurisdiction vested with High Court under Article 226 of the Constitution of India can be exercised in a given case. In other words, the restriction is self-imposed and nothing else. There may be a case, where an assessment is sought to be reopened by an Officer, who is not competent to do so. Similarly, there may be cases, where on the face of it would appear that the reopening is barred by limitation or lacks inherent jurisdiction. To put it differently, in a case, where no adjudication is required on facts, then certainly jurisdiction of this Court under Article 226 of the Constitution of India can very well be invoked. Therefore, to such a limited extent, we are inclined to hold that the jurisdiction of this Court under Article 226 of the Constitution of India can be exercised.

13. Considering the said principle, the Supreme Court in **Commissioner of Income Tax and others Vs. Chhabil Dass Agarwal, ((2014) 1 SCC 603),** was pleased to hold as under:

> *"15. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of*

*natural justice, the proposition laid down in Thansingh Nathmal case, (AIR 1964 SC 1419), Titagarh Paper Mills case ((1983) 2 SCC 433) and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."*

We do not find any of the circumstances as laid down by the Supreme Court available before us. As discussed earlier, such a situation has not arisen in these cases, as the stage is premature, where the rights and liabilities are yet to be crystallised.

14. **Ratio laid down in Commissioner of Income Tax and others Vs. Chhabil Dass Agarwal, ((2014) 1 SCC 603)**:-

The entire issues framed, in our considered view, are covered by the recent judgment of the Supreme Court referred above. Considering the jurisdiction of this Court under Article 226 of the Constitution of India, it has been held therein in the following manner:

*"10. In the instant case, the only question which arises*

*for our consideration and decision is whether the High Court was justified in interfering with the order passed by the assessing authority under Section 148 of the Act in exercise of its jurisdiction under Article 226 when an equally efficacious alternate remedy was available to the assessee under the Act."*

15. The Supreme Court, while considering the said issue, has also taken into consideration the decision rendered in **G.K.N.Driveshafts (India) Limited Vs. Income-tax Officer, ((2003) 1 SCC 72 = 259 ITR 19(SC)).** In this connection, it is apposite to refer paragraph No.12 of the said decision, which reads as follows:-

*"12. The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, (AIR 1954 SC 207); Sangram Singh vs. Election Tribunal, Kotah, (AIR 1955 SC 425); Union of India vs. T.R. Varma, (AIR 1957 SC 882); State of U.P. vs. Mohd. Nooh, (AIR 1958 SC 86) and K.S. Venkataraman and Co. (P) Ltd. vs. State of Madras, (AIR 1966 SC 1089) have held that though Article 226 confers a very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or the procedure required for decision has not been adopted. (See: N.T. Veluswami Thevar vs. G. Raja Nainar, (AIR 1959 SC 422);*

*Municipal Council, Khurai vs. Kamal Kumar, ((1965) 2 SCR 653); Siliguri Municipality vs. Amalendu Das, ((1984) 2 SCC 436); S.T. Muthusami vs. K. Natarajan, ((1988) 1 SCC 572); Rajasthan SRTC vs. Krishna Kant, (1995) 5 SCC 75; Kerala SEB vs. Kurien E. Kalathil, ((2000) 6 SCC 293); A. Venkatasubbiah Naidu vs. S. Chellappan, ((2000) 7 SCC 695); L.L. Sudhakar Reddy vs. State of A.P., ((2001) 6 SCC 634); Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha vs. State of Maharashtra, ((2001) 8 SCC 509); Pratap Singh vs. State of Haryana, ((2002) 7 SCC 484) and GKN Driveshafts (India) Ltd. vs. ITO, ((2003) 1 SCC 72).”*

16. **Statutory remedy:-**

When in a fiscal statute, hierarchy of remedy of appeals are provided, the party has to exhaust them instead of seeking relief by invoking the jurisdiction of this Court under Article 226 of the Constitution of India and as held in **Commissioner of Income Tax and others Vs. Chhabil Dass Agarwal, ((2014) 1 SCC 603),** the Court will have to take into consideration of the legislative intent enunciated in the enactment in such cases. It is not as if the alternative remedy is neither efficacious nor effective. In the above said judgment, the Supreme Court held as under:

*“**13.** In Nivedita Sharma vs. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows (SCC pp.343-45, paras 12-14)*

*"12. In Thansingh Nathmal v. Supdt. of Taxes, (AIR 1964 SC 1419), this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).*

> *"7. … The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."*

*13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)*

*"11. … It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford, 141 ER 486 in the following passage: (ER p. 495)*

*'… There are three classes of cases in which a liability may be established founded upon a statute. … But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to.'*

*The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd., 1919 AC 368 and has been reaffirmed by the Supreme Today With All High Courts Page 4 of 6 Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd., 1935 AC 532 (PC) and Secy. of State v. Mask and Co., AIR 1940 PC 105 It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."*

*14. In Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 B.P.Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)*

*"77. … So far as the jurisdiction of the High Court under Article 226—or for that matter, the*

*jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment."*

*(See: G. Veerappa Pillai v. Raman & Raman Ltd., AIR 1952 SC 192; CCE v. Dunlop India Ltd., (1985) 1 SCC 260; Ramendra Kishore Biswas v. State of Tripura, (1999) 1 SCC 472; Shivgonda Anna Patil v. State of Maharashtra, (1999) 3 SCC 5; C.A. Abraham v. ITO, (1961) 2 SCR 765; Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433; H.B. Gandhi v. Gopi Nath and Sons, 1992 Supp (2) SCC 312; Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1; Tin Plate Co. of India Ltd. v. State of Bihar, (1998) 8 SCC 272; Sheela Devi v. Jaspal Singh, (1999) 1 SCC 209 and Punjab National Bank v. O.C. Krishnan, (2001) 6 SCC 569)*

*14. In Union of India vs. Guwahati Carbon Ltd., (2012) 11 SCC 651, this Court has reiterated the aforesaid principle and observed: (SCC p.653, para 8)*

*"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee,*

*Chheharta, (1979) 3 SCC 83. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).*

*"23. … when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded."*

17. A decision will have to be understood in the context in which it has been rendered. It cannot be read like a statute. A decision must be read in the context in which it appears to have been stated. Such a decision cannot be read in the manner as to nullify the express provisions of an enactment. Our view is fortified by the decisions of the Supreme Court in (1) **Bihar School Examination Board Vs. Suresh Prasad Sinha, ((2009) 8 SCC 483)** and (2) **Central Bureau of Investigation and others Vs. Keshub Mahindra and others, ((2011) 6 SCC 216)).**

18. Ratio decidendi - **G.K.N.Driveshafts (India) Limited Vs. Income-tax Officer, (259 ITR 19(SC))**:-

What was challenged in G.K.N.Drive Shafts (India) Limited Vs. ITO and others case is the notice issued under Section 148 and 143(2) of the

Income-tax Act, 1961. The notice issued under section 148 was issued for the following reason:-

> *"Warrantee has wrongly been claimed on provision basis in excess of actual payment by Rs.10,91,854/-". Similarly notice under Section 143(2) has been issued in connection with the return of income as further information was required by the Department.*

19. The Division Bench of the Delhi High Court dismissed the writ petition by holding that the petitioner therein was not justified in invoking the extraordinary jurisdiction of the Court at that stage as it was pre-mature. A challenge was made to the Supreme Court, wherein, by a brief order, the appeals were dismissed with certain observations. The following paragraph is apposite:

> *"5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment*

*years.*

*6. Insofar as the appeals filed against the order of assessment before the Commissioner (Appeals), we direct the appellate authority to dispose of the same, expeditiously."*

20. The Supreme Court did not find any justifiable reason to interfere with the order passed by the Division Bench of the Delhi High Court. The remaining part of the order was made by way of a clarification. Once a notice was issued under Section 148, the assessee will have to file the return. If he desires so, he can seek for reasons for issuing notice. The assessing Officer is bound to furnish the reasons within a reasonable time. Thereafter, the assessee is entitled to file the objections over which the assessing officer has to pass a speaking order. In the said case, as reasons were made known, the assessing officer was directed to dispose of the objections, if filed by passing a speaking order before proceeding with the assessment. Since the assessee has already filed appeals against the orders of assessment for some of the years, the appellate authority was directed to dispose of the same. The Supreme Court adapted a novel method to make way for the statutory authorities to deal with the adjudication covering assessments. In other words, in clear terms, the Supreme Court has indicated that an assessee is not required to run to the Court before the passing of the assessment order by challenging a notice issued under Section 148 of the Act. However, in order to provide an element of fairness in the process of adjudication and create an

atmosphere of transparency, a mechanism, which was not found in the Statute was evolved by asking the assessing officer to pass a reasoned order. It is only a part of the procedural law. Such an order is only a preliminary order, which can only be said to be an expansion of the reasons which are supposed to be assigned under Section 148(2) of the Act. It neither creates a right nor takes away the one accrued. It is not an adjudication in the strict sense of the term. It is only meant for the purpose of understanding the basis of the notice. Therefore, the decision has to be understood to mean that a pre-adjudication proceedings not deciding the issues shall not be put into challenge while exercising the discretionary power under Article 226 of the Constitution of India, which in the process, takes away the right of the assessing officer to proceed further. Therefore, the Order passed, as directed by the Supreme Court, cannot be termed as a substitute to the assessment order. To put it differently, it does not take away the power of the assessing officer to decide the issue on the plea of the assessee or on a consideration of the records. It is to be remembered that the assessing officer was directed to pass orders only on the objections given by the assessee. The further fact that such an order is required to be passed before proceeding with the assessment would make the said position clear. Furthermore, if the order on the objections can be entertained, then the Supreme Court would not have directed the appeals to be disposed of by the appellate authority instead of setting them aside. This also indicates that the assessee could raise all the pleas including those considered against him by the assessing officer while

passing orders on his objections. Hence, such a preliminary order, which does not have a statutory flavour not deciding the dispute between the parties, cannot be challenged by invoking the extraordinary jurisdiction before us. The Supreme Court merely provided safeguards to the assessee at the pre-adjudicative stage. The decision has been given to make sure that the assessing officer complies Section 148(2) in letter and spirit. There is no certainty in the order passed by the assessing officer. If the Order passed is set aside, it would only mean the notice issued under Section 148 is liable to be interfered with. The object of the decision of the Supreme Court is not only to avoid interference by the Courts but not to give way for it. Any other interpretation would make the entire remedial mechanism provided under the Act as redundant.

21. **Ratio decidendi**:-

After going through the decision of the Supreme Court **Commissioner of Income Tax and others Vs. Chhabil Dass Agarwal, ((2014) 1 SCC 603),** we are of the view that the ratio laid down therein squarely governs the case on hand. Before the Supreme Court, challenge was made to the correctness or otherwise and the notices under Section 148 of the Act, re-assessment orders passed and the consequential demand notices. The learned counsels appearing for the petitioners have also raised similar contentions before us and are trying to impress to go into the merits of the case. A fruitful extraction of the following passages

would make the said position clear, which reads as under:

*"16. In the instant case, the Act provides complete machinery for the assessment/reassessment 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.*

*17. 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. 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.*

*18. In view of the above, we allow this appeal and set aside the judgment and order passed by the High Court in Writ Petition (Civil) No.44 of 2009. We grant liberty to the respondent, if he so desires, to file an appropriate*

*petition/appeal against the orders of re-assessment passed under Section 148 of the Act within four weeks' time from today. If the petition is filed before the appellate authority within the time granted by this Court, the appellate authority shall consider the petition only on merits without any reference to the period of limitation. However, it is clarified that the appellate authority shall not be influenced by any observation made by the High Court while disposing of the Writ Petition (Civil) No.44 of 2009, in its judgment and order dated 05.10.2010.*

22. **Calcutta Discount Co.Ltd. Vs. Income-tax Officer, (1961) 41 ITR 191 (SC)**:-

Learned counsel appearing for the petitioners have made strong reliance on this decision. We are of the considered view that this decision was rendered was much prior to the judgment of the Supreme Court in **G.K.N.Driveshafts (India) Limited Vs. Income-tax Officer, ((2003) 1 SCC 72 = 259 ITR 19(SC)).** Further, the then fact situation at the time of rendering the said judgment is no longer in existence today. The Supreme Court was pleased to observe that a writ of certiorari can be issued when it is likely to subject a person to lengthy proceedings and unnecessary harassment. It is a known fact that even substantial delay occurs in the High Courts as well in view of the huge flow of cases over the years. Furthermore, the decision therein was rendered on a factual premise that the condition precedent to the exercise of jurisdiction did not exist. Even in the said decision, it has been only observed that the High Courts have

power to issue in a fit case a writ against an Executive authority from acting without jurisdiction. Therefore, we are of the view that the said decision does not help the case of the petitioners.

23. **Jurisdictional fact, Adjudicatory Fact and the fact in issue**: In the case on hand, the assessing officer has exercised his jurisdiction under Section 147 of the Act. He performs a twin role in passing the assessment order. The assessment process also involves an adjudication. Therefore, the role of the assessing officer is distinct and different from that of a Tribunal with limited jurisdiction.

24. The jurisdictional fact deals with the jurisdiction of an authority to deal with the matter . An adjudicated fact involves adjudication of issues on merit. A fact in issue is a fact, which pertains to the issue to be decided. Therefore, the difference between a jurisdictional fact, fact in issue and an adjudicated fact is at times artificial and illusory. A jurisdictional fact may also involve an adjudicated fact and it may also be a fact, it can be safely divided into two parts, the first part, being an authority concerned, on the face of it, does not have any power that can be exercised under Section 147 of the Act. The second part, being on the determination of a fact in issue or an adjudicated fact, the authority justifies his jurisdiction. First, he assumes jurisdiction and on completion of assessment confirms it. In the first category, there is no adjudication of any fact that is required. In the second category, a fact has to be necessarily adjudicated, which will have

a bearing on the jurisdiction of the authority concerned. Such a jurisdictional issue is ancillary or prelude to an adjudicating fact. As we discussed earlier, regarding the first part of the jurisdictional fact, there is no difficulty in invoking the discretionary jurisdiction of this Court. However, where element of adjudication is required, then the said exercise will have to be done by the assessing officer or by the appellate authority before approaching the Court of law. Therefore, what is required is the mere existence of a jurisdictional fact apparent on the face of it. Once this is done, then the process of adjudication would start.

25. The Supreme Court in **CARONA LTD. V. PARVATHY SWAMINATHAN & SONS (2007) 8 Supreme Court Cases 559)** held as follows:-

> ***"JURISDICTIONAL FACT AND ADJUDICATORY FACT***
>
> *29. But there is distinction between 'jurisdictional fact' and 'adjudicatory fact' which cannot be ignored. An 'adjudicatory fact' is a 'fact in issue' and can be determined by a Court, Tribunal or Authority on 'merits', on the basis of evidence adduced by the parties. It is no doubt true that it is very difficult to distinguish 'jurisdictional fact' and 'fact in issue' or 'adjudicatory fact'. Nonetheless the difference between the two cannot be overlooked.*
>
> *36. It is thus clear that for assumption of jurisdiction by a Court or a Tribunal, existence of jurisdictional fact is a condition precedent. But once such jurisdictional fact is found to exist, the Court*

*or Tribunal has power to decide adjudicatory facts or facts in issue."*

26. Similarly, the Supreme Court in **Arun Kumar and others Vs. Union of India and others, ((2007) 1 SCC 732)**, has held as under:

*"74. 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 jurisdiction of a court, a tribunal or an authority. It is the fact upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which it otherwise does not possess.*

*75. In Halsbury's Laws of England, it has been stated:*

*"Where the jurisdiction of a tribunal is dependent on the existence of a particular state of affairs, that state of affairs may be described as preliminary to, or collateral to the merits of the issue. If, at the inception of an inquiry by an inferior tribunal, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether to act or not and can give a ruling on the preliminary or collateral issue; but that ruling is not conclusive."*

27. The judgments referred supra will have to be construed and understood in the context of the present case. Accordingly, we hold that

where an adjudicatory process is involved on merits, then the only remedy open to an assessee is to go through the procedure provided under the enactment.

28. **Provisions of the Income-tax Act, 1961**:-

We would like to go through the provisions governing the case only for the purpose of deciding the issues framed. Section 148 of the Act deals with the issuance of notice when an income has escaped assessment. Section 148(2) of the Act mandates that the assessing officer has to record his reasons for doing so before issuing any notice under the said Section. Section 148(1) prescribes a procedure, which is required to be done before making the assessment, reassessment or recomputation, as the case may be. Accordingly, the assessing officer is required to ask the assessee to furnish a return of his income as required to be furnished under Section 139.

29. Under Section 147 of the Act, the assessing officer has the power to assess or re-assess the income. Such a power has to be exercised by the assessing officer alone. The pre-requisite of “has reason to believe” must be in existence for exercising the power under Section 147. The power can be exercised over any income which is chargeable to tax that has escaped assessment. While doing so, the assessing officer is required to follow the provisions contained in Sections 148 to 153, which are more procedural in nature. Under Section 147, the power is available

to the assessing officer to assess any other income chargeable to tax, which has escaped assessment comes to his notice subsequently in the course of proceedings as well. Such a power can be exercised notwithstanding the fact that the reasons for such issue have not been included in the reasons recorded under Section 148(2) of the Act.

30. Proviso to Section 147 deals with limitation for exercise of the power under certain circumstances. While it places fetters on the power of the assessing officer after the expiry of four years from the end of the relevant assessment year in respect of scrutiny assessment only, it does give certain latitude when any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year. The third proviso also gives a further power to the assessing officer to assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment. If one looks at Explanation 2, it deals with the cases which are deemed to be involving income chargeable to tax escaping assessment. Accordingly, if an income chargeable to tax has been underassessed; or such income has been assessed at too low a rate; or such income has been made the subject of excessive relief under

this Act; or excessive loss or depreciation allowance or any other allowance under this Act has been computed or where a person is found to have any asset (including financial interest in any entity) located outside India, having deemed to be the cases of escaped assessment, it would come under the purview of Section 147. Thus, the above said provision would make it clear that the power of the assessing officer is rather wide.

31. We are concerned in all these cases not on the sufficiency of reasons on the part of the assessing officer for his belief at this stage. The legislative intent is to allow the assessing officer to go through the process of assessment. Even under Section 147 of the Act, a Court of law cannot presume a lack of jurisdiction, when a fact in issue requires an adjudication. It has to be exercised in terms of Sections 139, 143(2) and 143(3). Therefore, considering the scheme of the enactment, particularly, with reference to Sections 147 to 153 of the Act, we are of the view that an order passed on the objections of the assessee over adjudicating facts is not open to challenge by way of filing a writ petition.

32. Learned counsels appearing for the petitioners submitted that the objections raised have not been considered properly by the assessing officer. It is also submitted that when a speaking order is required to be passed, the same is amenable to challenge. We are not able to countenance the said argument. We have already held that the order passed on a consideration of the objections raised cannot be termed as

the order having civil consequences. The assessing officer is not required to consider the objections in detail. On the contrary, he is required to indicate the basis for his re-opening the assessment. When under Section 147 the assessing officer can even assess any other income chargeable to tax, which has escaped assessment, which comes to his notice subsequently during the course of the proceeding, the power being wide, it cannot be challenged on the ground of improper or inadequate consideration of objections. In any case, the conclusion arrived at can also be challenged after the assessment is concluded. There is no bar in law for the assessee to raise his contentions before the assessing officer based upon new materials. The assessee can also raise his contentions including those grounds urged before the assessing officer at the time of passing orders on them. Therefore, we are of the view that the order passed on the objections raised by the assessee would not prevent the assessing officer from exercising his power on merits while passing the assessment order.

33. Learned counsels appearing for the petitioners submitted that the assessing officer is not required to indicate the reasons in the assessment order and he has to pass a separate order on the new objections raised. Therefore, under those circumstances, the issues raised will have to be decided in the writ petitions by this Court alone. The said submission made by the learned counsel for the petitioners cannot be accepted. Passing a separate order giving reasons or incorporating it in

the assessment order itself on the further objections of the assessee is procedural in nature. In any case, the same would not give any right to the assessee to approach this Court. However, we would only like to clarify that if any new contentions/objections are raised by the assessee concerned, the assessing officer concerned will have to consider the same and incorporate it either in the assessment order or by passing a separate order.

34. Submissions have been made by the learned counsel appearing for the petitioners that the proceedings have been initiated by the assessing officer on a change of opinion that the material facts have been disclosed fully and truly and the very same issues have been decided by the higher forums earlier. The learned counsel appearing for the revenue submitted that the said contentions are not correct. We are not inclined to go into the said issues involving conclusion arrived at earlier on the exercise of power under Article 226 of the Constitution of India. As all these issues involve an adjudicatory process, we leave them open to be decided by the authorities concerned.

35. For the foregoing reasons, both the issues are answered against the assessees and in favour of the revenue and **the writ petitions are dismissed**, subject to the general observations made above. In pursuant

to the appeals filed in W.A.Nos.347 to 349 of 2014 against the interim orders made in M.P.Nos.1 of 2014 in W.P.Nos.3275 to 3277 of 2014, arguments have been heard in W.P.Nos.3275 to 3277 of 2014. Accordingly, those writ petitions are also dismissed and consequently the Writ Appeals are allowed. However, in cases, where the assessment/ reassessment orders are passed, we are inclined to grant a further period of four weeks from the date of receipt of copy of this judgment to file statutory appeals before the appellate authority. As and when the statutory appeals are filed, the appellate authority is directed to decide the same on merits and in accordance with law without taking note of the period of limitation. However, there is no order as to costs. Consequently, the connected miscellaneous petitions are closed.

**(S.K.A., A.C.J.)** **(M.M.S., J.)**
**04.07.2014**

Index:Yes
Internet:Yes
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The Hon'ble the Acting Chief Justice
and
M.M.Sundresh,J.

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**Judgment in**
**W.A.Nos.347 to 349 of**
**2014 etc. batch**

04.07.2014