IN THE HIGH COURT OF KARNATAKA AT BANGALORE

DATED THIS THE 24TH DAY OF APRIL 2014

BEFORE

THE HON'BLE DR.JUSTICE JAWAD RAHIM

WRIT PETITION NOs.17037-43/2014 (T-IT)

BETWEEN:

M/S. REMCO (BHEL) HOUSE BUILDING
CO-OPERATIVE SOCIETY LIMITED
A CO-OPERATIVE SOCIETY INCORPORATED
UNDER THE KARNATAKA CO-OPERATIVE
SOCIETY ACT HAVING ITS OFFICE AT
NO.36,5TH MAIN, 2ND STAGE
RPC LAYOUT, BANGALORE-40.
REPRESENTED BY ITS PRESIDENT
MR.SHANKAR G. BELLERI
S/O SRI.LATE GURAPPA BELLERI
AGED ABOUT 57 YEARS ...PETITIONER

(BY SRI K.R.VASUDEVAN, ADV.)

AND:

THE INCOME TAX OFFICER (TDS)
WARD 18(1), IV FLOOR
HMT BUILDING, BELLARY ROAD
BANGALORE-32. ...RESPONDENT

(BY SRI K.V. ARAVIND, AGA)

THESE WRIT PETITIONS ARE FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA WITH A PRAYER TO QUASH THE IMPUGNED ORDER 11.3.2014 ISSUED BY THE RESPONDENT PASSED UNDER SECTION 201(1A) AND 201A OF THE ACT FOR THE ASSESSMENT YEARS 2008-2009 TO 2014-15 VIDE ANN-A1-18 & B1-37 AND THE CONSEQUENTIAL DEMAND

NOTICE ISSUED BY THE RESPONDENT DATED 11.3.2014 FOR THE ASSESSMENT YEARS 2008-2009 TO 2014-15.

THESE PETITIONS COMING ON FOR PRELIMINARY HEARING-'B' GROUP THIS DAY, THE COURT MADE THE FOLLOWING:-

O R D E R

The petitioner, a House Building Co-operative Society in these writ actions has brought in question the order dated 11.3.2014 passed by the respondent imposing tax liability under the provisions of Section 201(1), 201(1A) of the Income Tax Act (for short 'the Act') for the assessment year 2008-2009 to 2014-2015 vide Annexures-A1-A7 and B1-B7 and also the consequential demand notices issued on 11.3.2004 for the said period.

2. In response to notice, Sri.K.V.Aravind learned counsel has entered appearance for respondent No.2. I have heard the learned counsel on both sides. Perused the records in supplementation thereto from which the following factual matrix manifests for a decision:

3. The petitioner claims itself a co-operative house building society registered under the provisions of Co-operative Societies Act with the object of providing house sites to its members and has, in furtherance of that object, formed several layouts and proposed to distribute the sites to its members. To fulfill the projects undertaken by it, the petitioner has taken the land through intermediaries and developed the same following the Rules. The petitioner in this regard, has entered into an agreement with certain individuals and parties for development of the land so acquired and has undertaken the process of developing the land into house of sites.

4.There was a survey of the petition premises by the Income Tax department in exercise of power under Section 133(a) on 5.12.2013. The respondent during the survey examined books of accounts and other documents maintained by the petitioner and has also recorded his observation. Later, by letter dated 24.2.2014 respondent asked the petitioner why

petitioner should not be considered as an assessee in default by the notice Annexure-D. The petitioner claims to have filed detailed submission on 10.3.2014 explaining in detail that the petitioner is not liable for deduction of TDS under Section 194(c)of the Act for the payment made to the developers and thus cannot be described as an assessee in default. The explanation so submitted is Annexure-E.

5. The respondent, on receipt of Annexure- E has proceeded to pass the order on 11.3.2014 determining the tax liability as indicated therein chargeable under 201(1) and for default imposed the default invoking provision 201A of the Act. Notice under Section 156 of the Act was given to the petitioner but allowing only seven days time to reply for the payment of the amounts so demanded. The grievance of the petitioner is that even the said demand notice under Section 156 of the Act has curtailed the benefit of 30 days which the petitioner has to appeal against the said order.

6. The petitioner asserts that through a letter dated 23.2.2014, petitioner sought stay of the impugned order to avail benefit of preferring statutory appeal as is permissible, as seen from Annexure-F.

7. The respondent declined to consider the relief so sought through Annexure-F and has proceeded further rejecting the application vide Annexure-G by order dated 21.3.2014. Besides, it is alleged that the respondent has initiated coercive recovery action by attaching bank account of the petitioner without giving the petitioner a reasonable opportunity and without furnishing in detail the finding of the survey conducted under Section 138A of the Act. Thus, aggrieved by the order passed under Section under Section 201(1) and 201(1A) and the consequent demand made, the petitioner is in writ action seeking quashing of the proceedings.

8. In support of the relief so sought, the petitioner asserts that the order passed by the

respondent are without jurisdiction. They are in violation of principles of natural justice. They are in utter regard to the mandatory provisions of the Act itself particularly, the proviso to Section 201 of the Act. Alternatively, it is urged that the orders have been passed without proper verification of the material documents and information furnished by the petitioner proving payment of taxes for the receipt of the amount by the recipient which absolves the petitioner of the liability of deducting TDS. Though several grounds are urged in the petition, the counsel's contention is the orders passed are without jurisdiction and are against principles of natural justice and are therefore, to be quashed.

9. To sustain this writ action without availing the benefit of statutory remedy of appeal, the petitioner has placed reliance on the decision of the apex court in the case of *Vodafone India Ltd. Vs. Union of India* reported in [2013] 40 Taxmann.com545 (Bombay), where the Apex Court has allowed the writ action

despite availability of alternative remedy of appeal accepting the ground that there was breach of principles of natural justice in exercise of power purported to be under the I.T.Act by the authority considered.

10. Reliance is also placed on decision in the case of *Calcutta Discount Co. Ltd. v. Income-tax Officer* reported in [1961] 41 ITR 191 (SC) Calcutta to contend that alternate remedy of appeal under the provisions of the Income Tax Act is not always a bar for entertaining writ action when manifest legality is noticed in exercise of power by assessing officer and denial of opportunity to contest which is prerequisite meet the ends of justice.

11. Besides the above grounds, the petitioner has described the steps taken by the authority as harsh and unjustified in freezing the bank account of the petitioner paralyzing its day today functions

resulting in incompensatable hardship to the workers of the company who could not be paid salary.

12. On behalf of revenue, Sri.K.V.Aravind, learned standing counsel has raised objection regarding maintainability of this Writ Petition on the ground that the petitioner has an alternative and efficacious remedy of appeal as provided under provision of Section 246 of the Income Tax Act. He drew my attention to the provision which undoubtedly envisages that any assessee or any deductor aggrieved by any of the following orders (whether made before or after the appointed day) may appeal to the Commissioner (Appeals). He would then refer to provision under Section 251 of the Act to show that the appeal remedy is not only efficacious but also alternate remedy. However, the grievance of the petitioner is that Section 251 of the Act confers on the Commissioner (Appeals) the power to consider and decide any matter arising out of the proceedings in which the order appealed against was passed,

notwithstanding that such issue was not raised before the Commissioner (Appeals) by the appellant and while doing so he shall not enhance an assessment or a penalty or reduce the amount of refund unless the appellant has had a reasonable opportunity of showing cause against such enhancement or reduction and pass orders as envisaged in clause (C) that is in any other case, he may pass such orders in the appeal as he thinks fit. Thus he submits that in appeal action the grounds urged in this writ and such other grounds which the petitioner may feel in his support may be urged and that will receives a judicial consideration of the statutory authority which in writ action this Court may not be in a possible to consider as this Court will not be appreciating the facts.

13. In support of his contentions, the learned counsel for the revenue relies upon the decision in the case of *Commissioner of Income Tax Vs. Chhabil Dass Agarwal* reported in [2013] 36 taxmann.com 36 (SC) where the Apex Court referring to the High Courts

entertaining writ action against assessment order observed thus:

> "14. 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"

14. In the instant case, the only question which arises for consideration and decision is,

> " whether 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 of the Constitution of India when equal efficacious alternative remedy was available to the assessee under the Act?"

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15. In para 16, Apex Court observes that,

> "16. xxxx 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 circumstance may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted."

16. The learned counsel would again refer to the decision of the Apex Court in the case of *M/s. Hindustan Coco Cola Bevarage Pvt. Ltd. Vs. Commissioner of Income Tax*, where the Apex Court dealing with action under Sections 201 and 201(1A) of the Act observes referring to the defence against order under Section 201 thus,

> "Be that as it may, the circular No. 275/201/95- IT(B) dated 29.1.1997 issued

> by the Central Board of Direct Taxes, in our considered opinion, should put an end to the controversy. The circular declares "no demand visualized under Section 201 (1) of the Income- tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest under Section 201 (1A) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty under Section 271C of the Income-tax Act."

17. He would also refer to the decision of this court in W.P.NO.29238/2013 dated 24.7.2013 relied on by the petitioner's counsel to distinguish the facts. The decision has been relied on to contend that though the learned Single Judge of this court opined, since the survey report was not furnished to the assessee the assessee was unable to answer to the grounds and therefore, the assessment order based

on such report was against the principles of natural justice, the facts in the instant case are different.

18. Lastly he would oppose the grounds urged in the Writ Petition that the petitioner has no statutory liability to deduct TDS on the amount paid to the builder.

19. On merit, learned counsel for the petitioner has used the proviso to Section 201 of the Act to absolve the petitioner of TDS which envisages "*where any person, including the principal officer of a Company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident –*

(i) has furnished his return of income under Section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed.

20. Basing on the proviso, it was urged that as the recipient of the money paid by the petitioner has filed his returns for the relevant period under the provisions of Section 139 of the Act, liability of the petitioner seizes under Section 201 of the Act. The returns filed by the recipient became the basis and if the assessee had declared no tax liability, there is no question of invoking the penal provision under Section 201(1)(a) of the Act.

21. To support this plea, learned counsel refers to the reply submitted by the petitioner at the earliest point of time to the respondent-Officer vide Annexure

'E', informing the Officer that the recipient of the amount has already submitted his returns and the income so received for the relevant period and that should be taken into consideration to hold that no TDS was liable to be deducted by the petitioner. This is the major ground on which jurisdiction of the respondent is questioned. In other words, learned counsel submits, the Officers invoked jurisdiction to pass order under Section 201(c) of the Act without determining whether the petitioner is liable to pay TDS under Section 201 of the Act. He has no jurisdiction to pass any consequential order like the order of assessment or attachment.

22. In negation of these grounds, Sri K.V.Aravind, learned Standing counsel submits the proviso would make it clear that the petitioner can avail the benefit of proviso only if the petitioner produces the certificate from the Accountant of the recipient before the Assessing Officer that the recipient of the amount paid by the petitioner has filed

his returns and paid tax on the ground of tax liability so determined. He submits the petitioner has not produced such documents. Therefore, the submission of returns by the resident named in the Statute who is the recipient does not give immunity to the petitioner as provided by the proviso to Section 201 of the Act. Thus, he contends petitioner is liable to deduct TDS under Section 201 of the Act which it failed and thus the petitioner is liable for further action for imposing liability under Section 201(1)(a) of the Act.

23. He would submit in terms of the decision of the Apex Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd., Vs. CIT, the liability under Section 201(c) of the Act also rests and interest is liable to be paid by the petitioner.

24. From the contentions urged by both sides, what clearly emerges is respondent has inspected the premises of the petitioner, seized the books of accounts, other documents and formed an opinion

that the petitioner has been making payments to the developers and therefore was liable to deduct tax at source for the payments so made. Therefore, the books of accounts and ledgers maintained by the petitioner is a basis for further action in the matter. The respondent has collected such information in a survey conducted under Section 133(a) of the Act and has intimated the petitioner through a letter dated 24.2.2014 vide Annexure 'D'.

25. It is material to note that the petitioner has sent a detailed reply to it vide Annexure 'E', making it clear that payments made by the petitioner to the persons/concerns named in the ledgers does not come within the mischief of Section 194(c) of the Act, as there was no bilateral transaction of service or contract between the parties. The petitioner claims that it is a Housing Co-operative Society and has entered the joint venture with the developers for the formation of layouts. Money is paid by the members of the Society which it in turn passed on to the

developers who had incurred the expenditure for the development. Thus, payment is not in relation to any contract between the parties inter alia to attract the provisions of Section 194(c) of the Act. Besides, the petitioner has also disclosed in the letter that the recipient of the amount has filed returns and therefore based on the returns, the tax liability of the recipient has to be determined.

26. The impugned order at Annexures A-1 to A-7 shows, for different financial assessment years, action has been initiated only under Section 201 of the Act and as could be seen from the preamble of the order itself, the assessing officer has referred to calling for information under Section 133(6) of the Act for verification of the payments made to the developer/contractor. Therefore, it is not in dispute that the petitioner claims payment is made to the developers engaged in the project with the petitioner for and on behalf of its members. There is an observation that the petitioner has not furnished the

reply as on 21.2.2014 necessitating issuance of show cause notice on 24.2.2014. The filing of detailed submission by the assessee on 7.3.2014 is clearly documented in the assessment order. Necessarily, the officer had to take into account the grounds so urged while proceeding to declare, the petitioner as "assessee in default'.

27. At this juncture, I am satisfied that though the petitioner had submitted a submission note, the same has not been considered by the respondent with reference to the survey conducted under Section 133 of the Act nor he has referred to the documents produced by the petitioner. There is no dispute, the petitioner has produced information about the filing of returns by the recipient of the amount from the Society and thus, petitioner rightly opposed action.

28. In this context the proviso gains importance. Section 201 of the Act no doubt requires, *where any person, including the principal officer of a company,-*

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(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of Section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax.

29. But meaningful proviso is added that any *person, including the principal officer of a Company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident --*

(iv) has furnished his return of income under Section 139;

(v) has taken into account such sum for computing income in such return of income; and

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(vi) has paid the tax due on the income declared by him.

30. Therefore, it is clear from the phraseology of the proviso that if returns has been filed by the recipient and he has computed tax liability and/or has paid the tax, the payer referred to under Section 201 of the Act is not liable for payment of tax or to deduct TDS. These are all factual issues and there is no reason why the respondent-Officer should hesitate or shy from enquiring into this issue. When the Statute creates liability, there has to be a fact finding on the issue. Though the petitioner has not produced the certificate from the accountant with respect to the income of the recipient, it is hard to accept that benefit of the provision will not be available to the petitioner.

31. In this view, it is to be held there has to be a realistic assessment of the fact situation and in that any material information regarding filing of returns/

payment of tax by recipient furnished by the petitioner should receive consideration.

32. The grievance of the petitioner is on receipt of show cause notice, the petitioner has not only sent reply but has sought to support its contention. Despite such request from the petitioner, the assessing officer has failed to consider its request pragmatically and appears to have pre-judged the issue. The manner in which he has conducted the proceedings would show the officer gave no credence to the show cause statement nor examined the documents filed by the petitioner. Even if the assessing officer was of the opinion, the petitioner is liable to deduct TDS on the amount paid to the contractors. The officer should have examined the truth or otherwise of the statement made by the petitioner that the recipient of the amount had filed its returns for tax assessment. Had the petitioner been given an opportunity of personal hearing as sought for, a realistic assessment could have been done. The

object of the Act could have been achieved if the respondent had given due opportunity to the petitioner to substantiate its defense. The impugned order of assessment has no reference to the information furnished by the petitioner regarding filing of returns by the recipient of the amount nor does it contend any opinion as to why such statement of the petitioner was not considered.

33. I am satisfied, the grievance of the petitioner is justified. The order passed by the authority is an order without granting due opportunity to the petitioner which has resulted in treating the petitioner as assessee in default. Consequent to such opinion of the Officer, the petitioner has been saddled with not only the tax liability but even penalty. The officer has also proceeded in haste to resort to coercive steps to freeze the bank account to paralyze its function. The manner in which proceedings are initiated and culminated by the impugned order and

demand notice, speaks of arbitrariness and no judicious approach.

34. From the reasons discussed above, I am satisfied, non suiting the petitioner from this writ action to resort to appeal remedy as provided under the provisions of Section 246(1) of the Act will be unjust. As the main ground is, impugned order is passed without giving any opportunity to the petitioner, the order is seriously impacted. The case laws cited by the petitioner's counsel referred to in the paras supra aid the petitioner in sustaining writ action in this Court even though, alternate, efficacious remedy of appeal is provided.

35. Consequently, the impugned order, at Annexures A-1 to A-7 dated 11.3.2014 are quashed. The assessing officer is directed to commence fresh proceedings after giving due opportunity to the petitioner by way of show cause against the proposed action and if the petitioner files show cause statement

and seeks opportunity to produce documents and personal hearing, the officer shall grant the petitioner full opportunity and then proceed to pass appropriate orders as permissible in law.

In view of this order, the attachment order issued by the respondent vide Annexure 'C' freezing the bank account of the petitioner is also quashed. Rule is made absolute. In the circumstances, no order as to costs.

Sd/-
JUDGE

RS*/nas.

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