



IN THE HIGH COURT OF SIKKIM AT GANGTOK
(CIVIL WRIT JURISDICTION)

Writ Petition (C) No. 41 of 2007

1. M/s Yuksom Engineering Works Private Limited, a private limited company incorporated under the Registration of Companies Act (Sikkim) 1961 having its registered office at P.S. Road, Gangtok, East Sikkim.
2. Mr. Rishi Kumar Agarwal (Mittal), Managing Director, P.S. Road, Gangtok, East Sikkim working for gain.

...Petitioners

-Versus-

1. Union of India, service through the Secretary, Ministry Finance, having its Office at North Block, New Delhi.
2. The Chairman, Central Board of Direct Taxes having his office at Vitt Bhawan, North Block, New Delhi-110011.
3. The Deputy Commissioner of Income Tax, Circle-2, Matigara, Siliguri having his Office at Aaykar Bhawan, Paribahan Nagar, Matigara, Siliguri-734010.
4. Joint Commissioner of Income Tax, Range - 2 having his Office at Aaykar Bhawan, Paribahan Nagar, Matigara, Siliguri-734010
5. The State of Sikkim, service through the Principal Secretary, Department of Finance,

A.

Revenue & Expenditure Department,
Government of Sikkim, having its office
at Tashiling, Gangtok, East Sikkim.

6. The Joint Secretary,
Income Tax and Commercial Tax Division,
Finance Department,
Government of Sikkim,
Gangtok, East Sikkim.

...Respondents.

For the petitioners: Mr. Zangpo Sherpa, Advocate.

For the respondents: Mr. A. Moulik, Senior Advocate with
Mr. N.G. Sherpa, Advocate for
Respondents No. 1 to 4.

Mr. J.B. Pradhan, Additional
Advocate General, Sikkim with Mr.
Karma Thinlay, Government
Advocate for the official proforma
Respondents.

Date of Hearing : 01.09.2009


Date of Judgment : 01.09.2009

**PRESENT: HON'BLE THE CHIEF JUSTICE
MR. JUSTICE AFTAB H. SAIKIA
HON'BLE MR. JUSTICE A.P. SUBBA, JUDGE**

JUDGMENT AND ORDER (ORAL)

Saikia, CJ

Heard Mr. Zangpo Sherpa, learned Counsel for the petitioners. Also
heard Mr. A. Moulik, learned Senior Counsel assisted by Mr. N.G.
Sherpa, learned Counsel representing the respondents No. 1 to 4, Union




of India/ Revenue and Mr. J.B. Pradhan, learned Additional Advocate General, Sikkim with Mr. Karma Thinlay, learned State Counsel appearing for official proforma respondents.


2. By means of this writ petition, the petitioners have challenged basically two notices namely dated 06.02.2007 and 12.11.2007 issued by the respondent No. 3, the Deputy Commissioner of Income Tax, Circle-2, Matigara, Siliguri and the respondent No. 4, the Joint Commissioner of Income Tax, Range-2, Siliguri respectively.

3. The impugned notice dated 06.02.2007 was issued under section 147 of the Income Tax Act, 1961 (for short 'the Act') directing the petitioners to submit a return in a prescribed form for the assessment year 2003-04 within 30 days from the date of service of that notice. By the other impugned notice dated 12.11.2007, the petitioners were directed to submit along with other relevant documents a copy of return of income filed and taxes paid as per provisions of Sikkim Income Tax Manual, 1948 for the relevant period of financial year 2002-03, 2003-04, 2004-05, 2005-06 and 2006-07 in connection with the assessment year 2003-04 requiring him to appear before the respondent No. 4, the Joint Commissioner of Income Tax, Range-2, Aayakar Bhawan, Matigara, Siliguri on 21.11.2007.

4. However, the petitioners instead of appearing before the said officer/ authority, has approached this Court by initiating this writ proceeding on 20.12.2007.

5. This Court while entertaining this writ petition by its order dated 03.03.2008 has protected the interest of the petitioners by granting an






interim order in terms of prayer (h) incorporated in the writ petition until further orders of the Hon'ble Court, which speaks of restraining respondents No. 1 to 4 from taking any further steps or coercive measure under the Act for the assessment year 2003-04 on the basis of impugned notices dated 06.02.2007 and 12.11.2007.

6. Be it noted that while the interim order dated 03.03.2008 abovementioned is being in force, no application for vacation, alteration or cancellation of the said interim order has been forthcoming from the end of the Revenue.

7. Mr. Sherpa, the learned counsel appearing for the petitioners, has forcefully submitted that the basic grievance of the petitioners is that they have been subjected to double taxation as they have been compelled to tax under the original Sikkim Income Tax Manual, 1948 (for short, 'the Manual') as well as under the Act. According to the learned counsel, initially the petitioners were paying taxes under the Manual and although the Act has been extended to the State of Sikkim on 23.02.1989, petitioners are continued to be the assesseees within the meaning of the Manual and they have been paying their income tax as per the Manual to the Government of Sikkim from the date of incorporation of the petitioner No. 1, the Company in the year 1994. That being so, the petitioners are not liable to pay any tax under the Act. Hence, under such circumstances, the impugned notices deserve interference of this Court and thereby both are liable to be quashed and set aside.



8. Renouncing the allegations and statements made on behalf of the petitioners, Mr. Moulik, the learned senior counsel, appearing for the Revenue, strongly relying upon the counter affidavit filed on behalf of the Revenue, has submitted that the fact of double taxation, as alleged, is wholly incorrect and untenable. According to him, the first and foremost thing is that since the Act is being operational in the State of Sikkim, the petitioners are liable to pay taxes not under the Manual but in terms of the Act. In his second leg of argument, it is submitted by Mr. Moulik, the learned senior counsel that the petitioners have been evading the authorities concerned by not appearing before them in terms of the impugned notices. It is contented that on the other hand the petitioners have straightway approached this Court for the reliefs as evident from the prayers mentioned in the writ petition itself.

9. Mr. Moulik, the learned senior counsel has further categorically stated that after issuance of the impugned notices and due to the failure of the petitioners to appear before the concerned authorities and to submit the return as indicated in the impugned notices itself, the Revenue has proceeded against the petitioners and made the best judgment assessment under section 144/147 of the Act on 27.12.2007 and the said facts and circumstances have been duly communicated to the petitioners by sending a demand notice under section 156 of the Act by Registered Post with A/D receipt which has been duly acknowledged by the petitioners on 31.12.2007. There is absolutely no disagreement to such facts on the part of the petitioners because the same is reflected from paragraph (vii) of the rejoinder filed on 27.07.2009 on behalf of the petitioners.



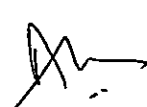
10. Under such circumstances, an argument has been made on behalf of the Revenue that since the petitioners have preferred not to challenge the subsequent development of making the best judgment assessment on 27.12.2007 to which the petitioners are well aware of, the writ petition itself has been rendered infructuous.


11. We have given our thoughtful consideration to the arguments and submissions advanced on behalf of the parties and also have carefully perused the averments and statements made in the pleadings exchanged between and by the parties including all the impugned notices with the relevant documents appended thereto.

12. It transpires that the petitioners, instead of appearing before the competent authority and submitting the returns as directed in the impugned notices above, have approached this Court for reliefs with the following prayers:


- a) A declaration that the notifications dated 7th November, 1988 and 23rd November, 1989 being annexure "P1" hereof collectively including section 26 of the Finance Act of 1989 passed by the Central Government of India, Ministry of Finance, as set out in paragraph 9 hereinabove, are illegal, unconstitutional, dehors the powers vested under Article 371F (n) of the Constitution of India, bad in law and hence null and void ab initio insofar as the aforesaid provisions seek to enforce/implement/extend the Central Income Tax act, 1961 to the State of Sikkim in cessation of the Sikkim Income Tax Manual, 1948 and further that, the Sikkim Income Tax Manual, 1948 is a true, correct, legal, constitutional and valid piece of legislation in respect of incidence, determination, assessment, levy and collection of income tax and procedures relating thereto and hence applicable and operative in the State of Sikkim.



- b) A writ of and/or order and/or direction in the nature of Mandamus do issue commanding the respondent nos. 1 to 4 and/or each of them, their men, agents servants and/or assigns to forthwith recall and/or revoke and/or withdraw and/or rescind and/or cancel and/or quash and/or set aside the notice dated 6th February, 2007 issued by the respondent no. 3 under Section 148 of the Income Tax Act, 1961 being annexure "P4" hereof including all purported steps taken and/or sought to be taken by the respondent nos. 1 to 4 against your petitioner no. 1 for the Assessment Year 2003-04 under the aforesaid Act of 1961 on the basis thereof.
- c) A writ of and/or order and/or direction in the nature of Mandamus do issue commanding the respondent nos. 1 to 4 and/or each of them, their men, agents, servants and/or assigns to forthwith recall and/or revoke and/or withdraw and/or rescind and/or cancel and or quash and/or set aside the notice dated 12/11/2007 issued by the respondent no. 3 under Section 142 (1) of the Income Tax Act, 1961 being annexure "P6" hereof including all purported steps taken and/or sought to be taken by the respondent nos. 1 to 4 against your petitioner no. 1 for the Assessment Year 2003-04 under the aforesaid Act of 1961 on the basis thereof.
- d) A writ of and/or order and/or direction in the nature of Prohibition do issue prohibiting the respondent Nos. 1 to 4 and/or each of them their men, agents, servants and/or assigns from taking any steps and/or any further steps and/or coercive measures against your petitioners under the Income Tax Act, 1961 for the Assessment Year 2003-04 on the basis of and/or pursuant to the notice dated 6th February, 2007 issued by the respondent No. 3 under Section 148 of the aforesaid Act of 1961 being annexure "P4" hereof and/or on any other basis as a consequence of the notice dated 6th February, 2007.
- e) A writ of and/or order and/or direction in the nature of Certiorari do issue commanding the respondents and/or each of them, their men, agents, servants and/or assigns to forthwith certify and transmit to this Hon'ble Court all records pertaining to the instant case so that after perusing the same declaration as prayed for may be granted and the notice dated 6th
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February, 2007 including the purported steps and/or actions taken/sought to be taken against your petitioner no.1 on the basis thereof for the Assessment Year 2003-04 by the respondent nos. 3 and 4 may be quashed and/or set aside and further so that conscionable justice may be rendered to your petitioners.

- f) Rule Nisi in terms of prayers (a), (b), (c), (d) and (e) above.
 - g) An order be passed directing the respondent nos. 1 to 4 and/or each of them, their men, agents, servants and/or assigns to forthwith recall and/or revoke and/or withdraw and/or rescind and/or cancel and/or quash and/or set aside the notice dated 6th February, 2007 issued by the respondent no. 3 under Section 148 of the Income Tax Act, 1961 and notice dated 12.11.2007 issued by the respondent no. 3 under Section 142(1) of the Income Tax Act, 1961, which are marked as Annexure "P4" and "P6" respectively.
 - h) An order of injunction be passed restraining the respondent nos. 1 to 4 and/or each of them their men, agents, servants and/or assigns from taking any steps and/or any further steps and/or coercive measures against your petitioners under the Income Tax Act, 1961 for the Assessment Year 2003-04 on the basis of and/or pursuant to the notice 6th February, 2007 issued by the respondent no. 3 under Section 148 of the Income Tax Act, 1961 and notice dated 12.11.2007 issued by the respondent no. 3 under Section 142(1) of the Income Tax Act, 1961, which are marked as Annexure "P4" and "P6" respectively, hereof and/or on any other basis as a consequence of the notice dated 6th February, 2007 and notice dated 12.11.2007.
 - i) Stay of operation of the notice dated 6th February, 2007 issued by the respondent no. 3 under Section 148 of the Income Tax Act, 1961 and notice dated 12.11.2007 issued by the respondent No. 3 under Section 142(1) of the Income Tax Act, 1961, which are marked as Annexure "P4" and "P6" respectively, hereof and/or on any other basis as a consequence of the notice dated 6th February, 2007 and notice dated 12.11.2007.
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- j) Ad interim orders in terms of prayers (f), (g), (h) and (i) above.
- k) Necessary orders as to cost.
- l) Such further or other order or orders be passed and/or direction or directions be given as to this Hon'ble Court may deem fit and proper.

13. It also transpires from a close perusal of the records that no representation has ever been submitted before the authorities against those impugned notices. It is noticed that after filing of this writ petition on 20.12.2007, the best judgment assessment was made by the Revenue on 27.12.2007 with due information to the petitioners. However, for the reasons best known to the petitioners, the said best judgment assessment dated 27.12.2007 has not been assailed before this Court.

14. Nevertheless, considering the seriousness of the matter which involves the payment of a huge amount as tax to the tune of Rs.68,91,889/- under demand notice dated 27.12.2007 on the basis of best judgment assessment due to failure of the petitioners to appear before the competent authority in terms of the impugned notices as well as upon hearing of the learned counsel for the parties, we are of the considered view that the interest of justice would be satisfied if the petitioners are directed to appear before the competent authority i.e. respondent No. 4, the Joint Commissioner of Income Tax, Range-2, Aayakar Bhwana, Matigara, Siliguri on or before 16.09.2009 with all relevant papers/documents as indicated in the impugned notices and thereafter on their such appearances with all required materials, the authority concerned shall consider and decide the grievances of the petitioners in accordance with the law.



15. Till the final disposal of the issue raised before the respondent No. 4, it is provided, reiterating the interim order dated 03.03.2008 passed by the Court, that no coercive measure shall be taken by the authority against the petitioners.

16. Be it made clear that in the event of failure on the part of the petitioners to appear before the concerned authorities on the date fixed as indicated above, the respondents, particularly, respondent No. 4 shall be at liberty to take appropriate action according to law.

17. In view of what has been stated and observed hereinabove, this writ petition stands disposed of. However, there shall be no order as to costs.

Judge.

Chief Justice.

rsr/jks