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Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

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Avinash Kumar

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

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IMPORTANCE AND EFFECT OF JUDICIAL REVIEW AGAINST ACTION FOR RE-ASSESSMENT – ANALYSIS AND STUDY OF EMERGING TRENDS

AUTHORED BY - SANJAY BANSAL
Ph.D. Research Scholar, MUIT, Noida, E-mail: bansalsenioradvocate@gmail.com

CO-AUTHOR - DR. ANNU BAHL MEHRA
Associate Prof, Dy. Dean, School of Law, MUIT, Noida

Abstract:

The alternative remedy does not oust the jurisdiction of the Supreme court and High court under Articles 32 and 226 of the constitution of India. However, the High courts have put self-imposed limitation on the exercise of power under Article 226 of the constitution of India where the aggrieved party has the alternative remedy available under statute. There is no remedy under the Income Tax Act, 1961 for challenging the validity of the notice issued by an Assessing Officer under Section 147/148 of the said Act before the appellate authorities except after an Order of re-assessment is passed by an Assessing Officer, even if the notice is ultra-vires the Act and/or without jurisdiction or violative of principle of natural justice or where the proceedings/Order itself are an abuse of process of law etc. However, there is plethora of case law which demonstrates the interference by the Supreme Court and High Courts despite existence of alternative remedy both under the taxing as well as under the non-taxing statutes where the notice issued under Section 148/147 of the Act was quashed on account of being without jurisdiction or violative of principle of natural justice or is a result of assumption of jurisdiction or where the proceedings were itself an abuse of process of law etc. The research scholar has undertaken an exercise on basis of judgments where the exercise of constitutional power under Article 226 of the constitution of India is warranted even when alternative remedy is available despite the same being discretionary, so as to prevent the violation of the provisions of Articles 14 and 265 of the constitution of the India.

Key words: *Judicial review, alternate remedy, Articles 226 & 32 of the Constitution of India, Notice U/s 148/147 of the Income Tax Act*

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Introduction:

Article 226 of the Constitution of India provides for effective and speedy remedies for enforcing fundamental and legal rights against laws which violate them. High Courts under Article 226 and the Supreme Court under Articles 32 and 136 of the Constitution have been conferred with the power of judicial review. The basic objective for conferring the power of judicial review is to ensure that the rule of law is maintained and the executive does not transgress the limits of their powers and violate the rights of the citizens . The entrustment of power of judicial review is sentinel on the qui vive. Since the State or public authorities act in exercise of their executive or legislative power, they are amenable to the judicial review. The State, therefore, is subject to *etat de droit*, i.e. the State is submitted to the law which implies that all actions of the State or its authorities and officials must be carried out subject to the Constitution and within the limits set by the law, i.e., constitutionalism and not arbitrarily and/or with malafides. Judicial review of administrative action is, therefore, an essential part of rule of law. The judicial control on administrative action, thus, affords the courts to determine not only the constitutionality of the law but also the procedural part of administrative action as a part of judicial review.[1] All statutory powers conferred on executive officers are subject to supervision by the courts exercising their classic and traditional powers of judicial review.[2] The purpose of judicial review is to keep public authorities within due bounds and for upholding the rule of law and to ensure that the administrative action is not in excess of power.[3] The abuse of power by the statutory authority or as a matter of fact by any authority created by an Act or under an Act does not bar the exercise of jurisdiction under Article 226/227 of the Constitution of India even there is an alternative remedy for the redressal of the grievance against such abuse of power provided on undisputed facts the authority is shown to have assumed jurisdiction.

Judgments on alternative remedy:

In *Calcutta Discount Co. Ltd. v. Income Tax Officer*[4], the assessee, a private limited company incorporated under the Indian Companies Act having its registered office in Calcutta was assessed to income tax for the assessment years 1942 - 43, 1943 - 44 and 1944 – 45 by three separate orders

[1] State of Bihar & Ors v. Subhash Singh, (1997) 4 SCC 430 : JT 1997 (2) SC 463
[2] Observed by Lord Wilberforce in the case of Rossminster Ltd., (1979) 52 TC 160 : (1980) I All ER 80 (p. 84 of 1 All ER)
[3] Wade's Administrative Law, 8th Edition (pg. 33 – 35)
[4] (1961) 41 ITR 191 (SC) : (1961) 2 SCR 241 : AIR 1961 SC 372

of assessment dated January 26, 1944, February 12, 1944 and February 15, 1945, respectively. These assessments were made under section 23(3) of the Indian Income-tax Act upon returns filed by it accompanied by statements of account and tax assessed was duly paid by the assessee - company. On March 28, 1951, three notices purporting to be under section 34 of the Indian Income-tax Act, 1922, were issued by the Income Tax Officer on the ground that in the original assessment of the assessee - company profits realised by the company by sales of shares were not assessed to tax. The High Court dismissed the writ petition. On furthur challenge by way of appeal, Das Gupta, J., spearheading the majority view laid down the following propositions of law:

(i) The question of limitation is the question of jurisdiction.;

(ii) When the conditions precedent for the assumption of jurisdiction under Section 34 of 1922 Act which is equivalent to Section 147 of the 1961 Act were not satisfied and the assessee comes to the court at the earliest opportunity there is nothing in its conduct justifying the refusal of proper relief under Article 226 of the Constitution. When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons.;

(iii) It is well settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled, will issue appropriate orders or directions to prevent such consequences.;

(iv) The existence of such alternative remedy is not however always a sufficient reason for refusing a party quick relief by a writ or order prohibiting an authority acting without jurisdiction from continuing such action.; and

(v) The fact that the assessment orders have already been made does not therefore affect the company's right to obtain relief under Article 226. In view, however, of the fact that the assessment orders have already been made we think it proper that in addition to an order directing the Income-tax Officer not to take any action on the basis of the impugned notices a further order quashing the assessment made be also issued.

The aforesaid decision which was rendered as far back as in 1961 holds good even today inasmuch as no contrary decision of a larger Bench has surfaced till date.[5] On the contrary, there is affirmation by the Supreme Court in the case of *Whirlpool Corporation v. Registrar of Trade Marks*[6], wherein with reference to, inter alia, the Constitution Bench decision in Calcutta Discount Co. Ltd.'s case (supra), the Supreme Court held :

"20. Much water has since flown under the bridge, but there has been no corrosive effect on these decisions which, though old, continue to hold the field with the result that law as to the jurisdiction of the High Court in entertaining a writ petition under article 226 of the Constitution, in spite of the alternative statutory remedies, is not affected, specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation."

21. That being so, the High Court was not justified in dismissing the Writ Petition at the initial stage without examining the contention that the show cause notice issued to the appellant was wholly without jurisdiction and that the Registrar, in the circumstances of the case, was not justified in acting as the "TRIBUNAL"."

Exception to the rule of exhaustion of alternative remedy: The correct legal position with regard to the grounds for entertainment of a writ petition despite the existence of alternative remedy has been highlighted in the case of *U.P State Spinning Co. Ltd. v. R. S. Pandey*[7] wherein it stands pronounced:

"... There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the

[5] Techspan India (P.) Ltd. v. Income-tax Officer, (2007) 158 Taxman 182 (Delhi) : (2006) 283 ITR 212 (Delhi) : (2006) 203 CTR 550 (Delhi) affirmed by the Hon'ble Supreme Court of India in Income Tax Officer v. TechSpan India (P.) Ltd., (2018) 92 taxmann.com 361 (SC) : (2018) 255 Taxman 152 (SC) : (2018) 404 ITR 10 (SC) : (2018) 302 CTR 74 (SC)
[6] (1998) 8 SCC 1
[7] (2005) 8 SCC 264. See also: State of H.P. and Others v. Gujarat Ambuja Cement Ltd. and Another, (2005) 6 SCC 499.

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proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in *L. Hirday Narain v. Income Tax Officer* (1970) 2 SCC 355 : AIR 1971 SC 33 that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition." (emphasis supplied)

Reference be also made to the decision rendered by the Division Bench of Hon'ble High Court of Punjab & Haryana in the case of *M/s Jindal Strips Limited v. State of Haryana & Others*[8] wherein the well-known exceptions to the doctrine of exhaustion of alternative remedies have been highlighted:

"26. From the various judicial precedents enumerated above this court is of the considered opinion that availability of an alternative remedy for non-entertainment of a petition under Article 226 of the Constitution cannot be of universal application. It is true that ordinarily when statute provides an alternative remedy and particularly when there is complete machinery for adjudicating the rights of the parties, which by and large depend upon the facts, the High Court should refrain from entertaining the adjudicating upon the rights of the parties but to this principle, there are certain exceptions and a citizen, who can successfully cover his case in either of the exceptions, cannot be shown the exit door of his entry to the High Court and be compelled to go before the authorities concerned. Some of the exceptions under which a petition may lie under Article 226 of the Constitution before the High Court without availing of an alternative remedy are when the very provisions of the statute are challenged being *ultra vires* of the Constitution or repugnant to the Act itself. Obviously, the authorities constituted under the Act having jurisdiction to entertain an

[8] (1996) 100 STC 457 (P&H) : ILR (1996) 1 P&H 323

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appeal or revision, how-so-ever high in the hierarchy of the department cannot quash the provisions of the Act/statute being ultra vires. They are bound to follow the Act and the provisions contained therein. The other exception is when the highest authority under the Act has taken a particular view on question of law and the said view is known to all the subordinate authorities as also when a different or contrary view has not been expressed by the High Court or the Supreme Court. In such a event, the remedy of appeal or revision would be a remedy popularly known as from cesure to cesure or from pole to pole. Subordinate authorities are bound to follow the view expressed by the highest authority in the department constituted under the Act to deal with the appeal or revision, as the case may be. The third exception can be when the Order, complained of, is wholly illegal and without jurisdiction. Such an Order normally would be when it is totally contrary to the provisions of the statute or when there is no power with the authorities constituted under the Act to pass the Order. Yet another exception can be when the orders are actuated on extraneous considerations or mala-fides of the highest dignitaries in the State and the allegations are not frivolous and on the contrary are shown, prima facie, to be in existence. Yet another exception can be when the alternative remedy is not equally efficacious. Yet another exception can be when the matter is not decided in limine and it is taken after several years for hearing and decided on merits and meanwhile the period of limitation prescribed under the Statute for filing an appeal expired. The exceptions can be multiplied but the Court does not wish to be exhaustive in detailing all the exceptions. As mentioned above, by and large, it will be dependent upon the facts and circumstances of each case."

The Hon'ble Supreme Court in the case of *Commissioner of Income Tax v. Chabbil Dass Aggrawal*[9] considered the question as to whether the High Court could interfere with an 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. While answering the aforesaid question, the Supreme Court ruled that the High Court would have jurisdiction to entertain the writ petition questioning the correctness of the notices issued under Section 148 of the Act, the reassessment Orders passed and consequential demand notices issued thereon only if the alternate remedy under the Act was ineffectual or the High Court ascribed cogent and satisfactory reasons for exercising its jurisdiction on the facts of a given case. The observations of the Supreme Court reads as under:

[9] (2013) 357 ITR 357 (SC)

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"15. Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant relief under article 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under article 226. (See:

State of U.P. v. Mohammad Nooh, AIR 1958 SC 86; Titaghur Paper Mills Ltd. v. State of Orissa, (1983) 2 SCC 433; Harbanslal Sahnia v. Indian Oil Corpn. Ltd. (2003) 2 SCC 107; State of H.P. v. Gujarat Ambuja Cement Ltd., (2005) 6 SCC 499).

In Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 the Supreme Court had 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 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."

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. v. 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. 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."(Emphasis supplied)

The said decision rendered by the Hon'ble Supreme Court of India cannot be considered to be an authority for the proposition that the assessee is debarred from challenging the Order passed on the Objections and/or the notice issued under Section 147/148 of the Act on the ground of assumption of jurisdiction by an authority not warranted by the said provisions and/or lack of inherent jurisdiction etc. A decision will have to be understood in the context in which it has been rendered. It cannot be read like a statute.[10] 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 and/or assumption of jurisdiction by an authority which is a nullity. In the garb of Order dismissing the Objections which is not sustainable on the ground of assumption of jurisdiction, the reassessment proceedings cannot be allowed to continue on the ground of availability of an alternative remedy. The exceptions to the doctrine of exhaustion of alternative remedies would not curtail the exercise of power at the hands of the Hon'ble High Courts under Article 226 of the Constitution of India, merely, because alternative remedy under the Act is available to an assessee, more so in view of the settled principle of law that judicial review is a part of basic structure of the Constitution of India[11] and a fundamental right; and an alternative

[10] Amar Nath Om Prakash v. State of Punjab AIR 1985 SC 218.; Haryana Financial Corporation v. Jagadamba Oil Mills (2002) 110 Comp. Cas. 20 (SC); Indian Charge Chrome Ltd. v. Union of India (2003) 2 SCC 533; Rekha Mukherjee v. Ashish Kumar Das AIR 2004 SC 443; General Electric Co. v. Renusagar Power Co. (1987) 4 SCC 137; Rajeswar Prasad Misra v. State of West Bengal AIR 1965 SC 1887; CIT v. K. Ramakrishnan (1993) 202 ITR 997 (Ker.)

[11] L. Chandra Kumar v. Union of India (1997) 3 SCC 261 : AIR 1997 SC 1125

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remedy cannot take away such a fundamental right for the enforcement of which Constitutional Court like the High Court under Article 226 of the Constitution of India exists. It is true that when a statutory forum is created by law for redressal of grievance, a writ petition should not be entertained ignoring the statutory dispensation. But, such principles, in a given case, maybe given a go-bye, if the Court is convinced that on the face of it, the impugned Order of reassessment and/or notice under Section 147/148 of the Income Tax Act, 1961 is not sustainable in law.[12] Significantly, the decision rendered in Chabbil Dass case (supra) has not considered the decision rendered in the case of Calcutta Discount Co. (supra). However, the Supreme Court in the case of Jeans Knit Pvt. Ltd. v. Deputy Commissioner of Income Tax and Others (2017) 390 ITR 10 (SC) set aside the judgment[13] of the Karnataka High Court which had held on the basis of the decision in Chabbil Dass Aggarwal (supra) that the assessee would be at liberty to file an appeal after the reassessment Order under Section 147 of the Act challenging the jurisdiction of the Assessing Officer to issue notice under Section 148 of the Act including the Order on Objections, by holding that:

"2. We find that the High Courts in all these cases have dismissed the writ petitions preferred by the appellant/assessee herein challenging the issuance of notice under section 148 of the Income Tax Act, 1961 and the reasons which were recorded by the Assessing Officer for reopening the assessment. These writ petitions are dismissed by the High Courts as not maintainable. The aforesaid view taken is contrary to the law laid down by this Court in Calcutta Discount Ltd. Co. v. ITO [1961] 41 ITR 191 (SC). We, thus, set aside the impugned judgments and remit the cases to the respective High Courts to decide the writ petitions on merits.

3. We may make it clear that this Court has not made any observations on the merits of the cases, i.e. the contentions which are raised by the appellant challenging the move of the Income Tax Authorities to re-open the assessment. Each case shall be examined on its own merits keeping in view the scope of judicial review while entertaining such matters, as laid down by this Court in various judgments.

[12] Engineering Professional Co. (P.) Ltd. v. Deputy Commissioner of Income-tax (2020) 115 taxmann.com 288 (Gujarat) : [2020] 424 ITR 253 (Guj)

[13] Jeans Knit P. Ltd. Deputy Commissioner of Income Tax and Other (2014) 367 ITR 773 (Karn); Judgment rendered by the Hon'ble High Court of Madras in Joint Commissioner v. Kalanithi Maran (2014) 366 ITR 453 (Madras) also set aside.

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4. We are conscious of the fact that the High Court has referred to the Judgment of this Court in CIT v. Chhabil Dass Agarwal [2013] 357 ITR 357/217 Taxman 143/36 taxmann.com 36. We find that the principle laid down in the said case does not apply to these cases."

Recently, the Hon'ble Supreme Court in Radha Krishan Industries v. State of Himachal Pradesh culled out the following principles of law on the question of maintainability of writ petition despite the availability of alternative remedy:

(i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;
(ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;
(iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;
(iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;
(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and
(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.
(vii) The question of jurisdiction is a pure question of law which goes into the root of the case, and the High Court can exercise its writ jurisdiction if the Order of the authority is challenged for want of authority and jurisdiction.

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Thus, the revival of the principle of law laid down with regard to alternative remedy not being a bar to the exercise of the jurisdiction by the High Court in Calcutta Discount Co. case (supra) is apparent from the dictum of law once again reiterated in the cases aforesaid.

The exceptions to the doctrine of exhaustion of alternative remedy may not apply where after the writ petition has been admitted and taken up for consideration for final hearing, unless the case falls in the exceptions. The discretionary jurisdiction under Article 226 is not absolute but has to be exercised judiciously in the given facts of a case and in accordance with law. The normal rule is that a writ petition under Article 226 of the Constitution ought not to be entertained if alternate statutory remedies are available, except in cases falling within the well-defined exceptions.

In *State of U.P. v. U.P. Rajya Khanij Vikas Nigam Sangharsh Samiti*[14], the Hon'ble Supreme Court while dealing with the issue as to whether after admission, the Writ Petition could not be dismissed on the ground of alternate remedy observed:

“38. With respect to the learned Judge, it is neither the legal position nor such a proposition has been laid down in *Suresh Chandra Tewari* v. *District Supply Officer* AIR 1992 All 331 that once a petition is admitted, it *cannot* be dismissed on the ground of alternative remedy. It is no doubt correct that in the headnote of All India Reporter (p. 331), it is stated that "petition cannot be rejected on the ground of availability of alternative remedy of filing appeal". But it has not been so held in the actual decision of the Court.

39. The relevant para 2 of the decision reads thus: (*Suresh Chandra Tewari case* (*supra*)

"2. At the time of hearing of this petition a threshold question, as to its maintainability was raised on the ground that the impugned order was an appealable one and, therefore, before approaching this Court the petitioner should have approached the appellate authority. *Though there is much substance in the above contention, we do not feel inclined to reject this petition on the ground of alternative remedy having regard to the fact that the petition has been entertained and an interim order passed*." (emphasis supplied)

[14] (2008) 12 SCC 675; See also: Genpact India (P.) Ltd. v. Deputy Commissioner of Income Tax (2019) 111 taxmann.com 402 (SC) : (2020) 268 Taxman 299 (SC) : (2019) 419 ITR 440 (SC)

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Thus, the well-known exceptions to the doctrine of exhaustion of alternative remedy are:

(a) If the impugned action is violative of the principles of natural justice; or
(b) If it is vitiated by an apparent bias or is mala fides the authority taking the decision; or
(c) If the decision has been taken in flagrant disregard of a fundamental statutory provision; or
(d) If the situation is such that the remedy will become fruitless, viz., the authority which is to give remedy has expressed its mind or has committed itself to an unalterable stand in the proceeding; or
(e) Where the action taken is wholly without jurisdiction; or
(f) Where it infringes any fundamental right of the person aggrieved; or
(g) Where the assessee has raised a prima facie and strong case that the action has been taken under a law which is *ultra vires* the Constitution; or
(h) Where gross injustice is done justifying interference, the existence of alternative remedy by way of appeal or revision would be no bar to exercise writ jurisdiction. That also provides safeguard against the assessing authorities passing a highhanded or palpable illegal Order.

GKN Driveshafts (India) Ltd case:

In GKN Driveshafts (India) Ltd. v. Income-tax Officer[(2002) 125 Taxman 963 (SC) : (2003) 259 ITR 19 (SC) : (2003) 179 CTR 11 (SC) : (2003) 1 SCC 72], the Hon'ble Supreme Court has set out the procedure to be adopted by the assessee in the matter of reassessment proceedings. The decision of the Supreme Court in GKN Driveshafts (India) Ltd.'s case (supra) was in an appeal arising from the decision of High Court of Delhi in GKN Driveshafts (India) Ltd. v. ITO[(2002) 123 Taxman 802 (Delhi) : (2002) 257 ITR 702 (Delhi)], where a petition challenging the notices issued to assessee by Income Tax Officer under Section 148 of the Income Tax Act, 1961 had been filed. The High Court of Delhi held that the petitioner was not justified in invoking the extraordinary jurisdiction of the Court at the stage of notice issued, and therefore the petition being premature was dismissed. Plain reading of the decision of High Court of Delhi would therefore, disclose that the petition was dismissed merely observing that the exercise of extraordinary jurisdiction was not called for at the stage when the petitioner had approached the High Court merely on receipt of the notices under Sections 148 and 143(2) of the said Act. The decision did not disclose any other reason for dismissing the petition. In an appeal against the said decision,

the Hon'ble Supreme Court while upholding the decision of the Hon'ble High Court of Delhi and dismissing the Civil Appeal pronounced:

"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 a 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."

Plain reading of the decision of the Supreme Court in GKN Driveshafts (India) Ltd.'s case (supra) would therefore, show that it had refused to interfere in the order of the High Court of Delhi dismissing the writ petition on the ground that the same was premature as the petitioners had approached the High Court immediately on receipt of the notice without availing an opportunity of filing the reply and the objections to the notice. Simultaneously, it was observed that "proper course of action for the noticee is to file a return and if he so desires, to seek reasons for issuing notices when a noticee receives a notice under section 148 of the said Act." The Supreme Court has further observed that the noticee is entitled to insist for adjudication of the objections to the issuance of notice and to invite a speaking order from the adjudicating authority in relation to such objections, whereupon, the Assessing Officer would be enjoined to dispose of such objections by a speaking order. In other words, the Supreme Court has held that when the authorities issue notices under section 148 of the Income Tax Act, 1961 the proper course of action for the assessee is first to file a reply and raise all his objections and invite a speaking order on such objections.

Consequences of Breach of principles of natural justice :

The Assessing Officer on the receipt of the Objections after reasons had been supplied to the assessee is under a duty to dispose the Objections after affording an opportunity of hearing to the assessee by a speaking Order. Where Assessing Officer did not furnish reasons for issuing reassessment notice so as to enable assessee to file objections and passed reassessment order without hearing assessee, it would be a breach of principles of natural justice against which writ

petition could be filed before High Court.[15] The failure to comply with the procedure prescribed by the judgment rendered in GKN Driveshaft's case (supra) renders the assessment Order invalid with the consequence that the Hon'ble High Court may send the matter back to the Assessing Officer for passing a speaking Order on the Objections filed by the assessee. However, when reasons for reopening the assessment were furnished to the assessee but it had not chosen to file Objections to the reasons and the Assessing Officer rightly passed consequential assessment Order, the assessee was not entitled to question such re-opening before the High Court by way of filing writ petition.[16] Where on receipt of objections to reassessment notice, revenue directed assessee to produce relevant documents, however, without waiting for assessee to file said documents, a reassessment order was passed making additions to income of assessee, same was unjustified and the writ petition was allowed after the impugned order was set aside and the matter remitted back to the Assessing Officer for a fresh consideration after affording an opportunity of personal hearing to the assessee.[17]

In *Allana Cold Storage Ltd. v. Income Tax Officer*[18], notices under Section 148 of the Income Tax Act, 1961 was served on the assessee - companies who were sister concerns wrote to the Assessing Officer seeking copy of reasons recorded for re-opening of assessments from time to time but the reasons were not supplied. Instead, notices under Section 143(2) of the said Act was issued on each occasion whenever assessees requested for reasons. In two cases, reasons were furnished at end of assessment year and, on filing of the Objections, the assessees requested for personal hearing. The Assessing Officer straightaway passed the assessment Orders including the decisions on the Objections filed by the assessees. In other two cases, reasons was supplied late and, on receipt of Objections, common assessment Orders were passed which included decisions on assessee's Objections whereas in another matter straightaway assessment order was passed without decisions on objections filed by the assessee. The assessees challenged the said action of the Assessing Officer before the Hon'ble High Court of Bombay relying on the judgment of the Supreme Court in *GKN Driveshafts (India) Ltd.* (supra), wherein it was laid down that when a

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[15] North Eastern Electric Power Corporation v. Principal Commissioner of Income-tax (2019) 104 taxmann.com 268 (Meghalaya) : (2019) 416 ITR 425 (Meghalaya); See also: Mrs. Kanchan Agarwal v. Income Tax Officer (2019) 106 taxmann.com 23 (Karnataka) : (2019) 263 Taxman 682 (Karnataka)

[16] Hanon Automotive Systems India (P.) Ltd. v. Dy. CIT (2019) 101 taxmann.com 514 (Madras)

[17] Kovalam Santhana Krishnan Mohan v. Income-tax-Officer (2017) 88 taxmann.com 239 (Madras) : (2018) 252 Taxman 289 (Madras) : (2018) 404 ITR 597 (Madras); Scan Holding (P.) Ltd. v. Asstt. CIT (2018) 90 taxmann.com 396 (Delhi); Home Finders Housing Ltd. v. Income Tax Officer (2018) 93 taxmann.com 371 (Madras); Raninder Singh v. Commissioner of Income-tax, Patiala (2019) 101 taxmann.com 210 (Punjab & Haryana) : (2019) 261 Taxman 214 (Punjab & Haryana)

[18] (2006) 287 ITR 1 (Bombay) : (2006) 206 CTR 401 (Bombay)

notice under section 148 is issued, the noticee is expected to file the return and if he so desires he may seek reasons for issuing the notice; that on the assessee seeking such reasons, the Assessing Officer is bound to furnish the reasons within a reasonable time and that on receipt of reasons, the noticee is entitled to file objections and the Assessing Officer is bound to dispose of the same by passing a speaking order. Whereas, on the other hand, the Revenue contended that when the assessee's had availed of the remedy under the Act by filing appeals against impugned Orders, the Court ought not to interfere assuming that there was an error on the part of the Assessing Officer concerned. After considering, the contentions of both the sides, the Court held:

". . . The law as laid down by the apex court is binding on this court as well as on the authorities functioning under the statute. This being the position, we fail to understand as to why the first respondent did not decide the objections separately which he is duty bound to decide. The whole idea in laying down the law in the above referred judgment of the apex court is to give an opportunity to the assessee to know as to what is the decision on his objections, which decision has also to be arrived at after giving an opportunity to the assessee. In the present case, the assessee has been denied this opportunity. Not only that but in the first three writ petitions what we find is that a common order has been passed on the objections as well as for the reassessment In the fourth matter, the assessment order does not disclose any decision on the objections at all and undoubtedly no such decision has been given separately on the objections.

8. Having noted this scenario, in our view the proper course will be to interfere with the assessment orders passed in all four matters by the concerned officer. We are aware that when an alternative remedy is resorted to, the writ jurisdiction is not to be exercised, but that is a rule of self-limitation. The orders challenged in the present matter are clearly against the law laid down by the apex court and, therefore, the exercise of writ jurisdiction is called for. That being so, we allow all these petitions and quash and set aside the orders of assessment passed in all these four petitions. Inasmuch as the assessment orders are set aside, the appeals filed by the petitioners no longer require to be prosecuted. The same will stand disposed of.

9. Now that the impugned orders are set aside, the first respondent, after hearing the petitioners, will pass separate speaking orders on the objections which the petitioners have filed. We further add that in the event the objections are rejected, the assessment order will not be passed for a period of four weeks thereafter."

The Hon'ble High Court of Delhi similarly, in the case of *Smt. Kamlesh Sharma v. B.L. Meena, Income-tax Officer*[19], rejected the contention of the Revenue that the Objections filed by the assessee touched upon the merits of the controversy and the failure of the Assessing Officer to deal with the Objections before passing the assessment Order was only a technical error by holding that the Assessing Officer cannot try to hide behind niceties, which are not even legal. Following the decision of the Hon'ble Supreme Court in the case of *GKN Driveshafts (India) Ltd.* (supra) and the decision of the coordinate Bench rendered in the case of *Sita World Travels (India) Ltd.* v. *Commissioner of Income-tax*[20], set aside the Order of re-assessment and directed the Assessing Officer to deal with the Objections filed by the assessee by passing a speaking order. In line with the decisions of the High Courts of Bombay and Delhi, the Hon'ble High Court of Gujarat in the case of *Mgm Exports v. Deputy Commissioner of Income-tax*[21] following the decision rendered in the case of ***GKN Driveshafts (India) Ltd. (supra)***, came to the conclusion that the position in law was well settled and the Assessing Officer is required to decide the preliminary objections and pass a speaking order disposing of the objections raised by the assessee. Until such a speaking order is passed, the Assessing Officer cannot undertake reassessment.

The Hon'ble High Court of Bombay in *Aroni Commercials Ltd. v. Deputy Commissioner of Income-tax*[22] quashed the Order of assessment exercising its power under Article 226 of the Constitution of India, wherein the assessee had challenged the notice issued under Section 148 of the Income Tax Act, 1961, the order passed by the Assessing officer rejecting the assessee's Objection to reopening of assessment and the Order of assessment order passed by the Assessing Officer under Section 143(3) read with Section 147 of the Act by way of writ petition. Repelling the contention of the Revenue by way of a preliminary objection to the maintainability of the writ petition on the ground that as an Assessment Order had already been passed, the issue of challenge to re-opening of assessment could be challenged by filing an appeal under the Act, therefore, on this short ground alone, the writ petition was liable to be dismissed, the High Court following its earlier decision in Asian Paints Ltd. v. Dy. CIT [2008] 296 ITR 90 (Bom) wherein it had been laid down that when an assessment is sought to be reopened under Section 148 of the Act and the objections of the assessee have been over ruled by the Assessing Officer, then in such a case the Assessing Officer will not proceed further in the matter for a period of four weeks from the date

[19] (2007) 159 Taxman 330 (Delhi) : (2006) 287 ITR 337 (Delhi) : (2006) 205 CTR 569 (Delhi)
[20] (2004) 140 Taxman 381 (Delhi) : (2005) 274 ITR 186 (Delhi) : (2005) 193 CTR 84 (Delhi)_
[21] (2010) 323 ITR 331 (Gujarat)
[22] (2014) 44 taxmann.com 304 (Bombay) : (2014) 224 Taxman 13 (Bombay)(Mag.) : (2014) 362 ITR 403 (Bombay) : (2014) 267 CTR 228 (Bombay)

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of receipt of the order rejecting the objections of the assessee, set aside the order passed by the Assessing Officer under Section 143(3) read with Section 147 of the Act. Similarly, following the aforesaid decision rendered in Aroni Commercials Ltd (supra), the Hon'ble High Court of Bombay yet again in *Bharat Jayantilal Patel v. Union of India*[23] set aside the Order of assessment where Assessing Officer passed assessment order within period of four weeks from date of rejection of assessee's objections to reopening of assessment.

It is a well settled principle of administrative law that whenever administrative action is found to be suffering from breach of principle of natural justice i.e., one of its facets being passing of a speaking Order and therefore, the Assessing Officer has to apply his mind to the Objections raised by the assessee and deal with each and every Objection objectively by dealing with the same in the Order deciding Objections.[24] The High Court of Bombay in the case of *Pransukhlal Bros. v. Income-tax Officer* has taken the view that if the Order disposing of the Objection raised by the assessee was beyond reasons recorded for reopening of assessment, the same was not sustainable in law in view of the settled position in law that the validity of reopening of an assessment can only be tested by the reasons recorded at the time of issuing the notice for re-opening an assessment and the grounds for re-opening of assessment can neither be substituted and/or supplemented, therefore the re-opening of assessment would either stand or fall only upon the reasons recorded before issuing the notice; thus, the Order disposing of the Objections raised by the assessee which were not a part of the reasons recorded makes the same unsustainable in law. Accordingly, the Assessing Officer was directed to decide and dispose of Objections of the assessee to notice, afresh keeping in mind reasons recorded for issuing notice under Section 148 of the Act.[25]

Conclusion:

The power of the High Court to issue prerogative writs under article 226, is untrammelled by any ordinary piece of legislation, whether enacted by Parliament or a State Legislature. The Income-tax Act, 1961, is one such piece of legislation which does not and cannot in the constitutional scheme of things affect the power of the superior courts in the country to issue appropriate writs

[23] (2015) 59 taxmann.com 333 (Bombay) : (2015) 233 Taxman 98 (Bombay) : (2015) 378 ITR 596 (Bombay)
[24] Jay Bharat Maruti Ltd. v. Assistant Commissioner of Income-tax (2013) 33 taxmann.com 361 (Delhi) : (2013) 215 Taxman 113 (Delhi)(Mag.) : (2013) 351 ITR 342 (Delhi) : (2013) 258 CTR 462 (Delhi)
[25] Pransukhlal Bros. v. Income-tax Officer (2015) 54 taxmann.com 327 (Bombay) : (2015) 229 Taxman 444 (Bombay)
[26]. Techspan India (P.) Ltd.(supra)

in appropriate cases. The writ jurisdiction is not only discretionary but equitable in nature. A court need not interfere, just because it is lawful to do so. The courts have, therefore, evolved certain self-imposed restrictions for the exercise of their power under article 226. A writ court would not interfere where the petitioner is not acting bona fide or where he has not come with clean hands. So also, a court would not interfere where the grant of relief would involve investigation into disputed questions of fact. Availability of an equally efficacious alternative remedy is yet another situation where the court may refuse to step in, unless the case involves violation of the principles of natural justice or a palpable lack of jurisdiction on the part of the authority passing the order, or a challenge to the provisions of the statute under which the impugned order has been passed. Suffice it to say that while the jurisdiction of the court is discretionary, the exercise of discretion is not uncanalised or arbitrary. The discretion has to be exercised along judicial lines. Whether or not a case for interference has been made out, would, therefore, depend upon the facts and circumstances of each case. And since the facts of a case are rarely if ever similar to that of another case, the court will have to examine the matter each time its jurisdiction is invoked by a litigant. This is particularly so in cases where the assessees challenge notices issued under section 148 of the Income-tax Act, proposing to reopen concluded assessments, on the ground that income that was taxable has escaped assessment for a given year or years. Just because the court has interfered in one case may not in such cases, be a reason enough to interfere in every case; nor can the colour of facts be matched between two cases to show that interference in one must necessarily justify interference in the other [26]. Despite the legal position with regard to the inflexibility of the rule of filing Objections and passing Order on Objections formulated by the Supreme Court in *GKN Driveshaft's case (supra)* which though falling within the domain of procedural law is a result of judicial activism in the absence of any provision expressly provided for by the Legislature in the provision of Section 147/148 of the Income Tax Act, 1961 and the assessee being well within its rights to challenge the validity of notice including the Order on Objections directly by invoking the jurisdiction of the High Court under Article 226 of the Constitution of India on the strength of the judgment in the case of *Jeans Knit (supra)* is in quandary as for now the High Courts are free to choose their options depending solely upon their discretion under the garb of self-imposed restrictions, depending upon the fact and circumstances of each case, just as equity varies with the foot of the chancellor. The entire exercise of filing Objections and passing Order on the same by the Assessing Officer as had been mandated by the Supreme Court in *GKN Driveshaft's case (supra)* though becomes controversial with the Supreme Court now in *Jeans Knit case (supra)* taking a different view by directing the High Court to decide the validity of notice and initiation

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of reassessment proceedings undertaken the Assessing Officer keeping in view the scope of judicial review under Article 226 of the Constitution of India as per the decision of the Constitutional Bench rendered in the case of *Calcutta Discount Co. (supra)*, the right of the assessee to invoke the jurisdiction of the High Court under Article 226 of the Constitution despite the existence of alternative remedy and exercise of power in regard thereto by the High Court as its constitutional duty would still continue to be protected by *Calcutta Discount Co. (supra) particularly in view of the provisions of Articles 14 and 265 of the Constitution of India.*