BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE T.RAJA

W.P.(MD)No.12207 of 2016
and
W.M.P(MD)No.9296 of 2016

S.Peter : Petitioner

Vs.

The Commercial Tax Officer,
Thuckalay,
Kanyakumari District. : Respondent

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorarified Mandamus to call for the records on the file of the respondent in TIN:33816160989/2010-11, dated 17.05.2016 and quash the same as illegal, arbitrary and in violation of the principles of natural justice and consequently direct the respondent to consider the reply submitted by the petitioner, dated 03.12.2015 and pass fresh orders on merit, after granting to the petitioner an opportunity of personal hearing.

For petitioner :Mr.M.Azeem

For Respondent :Mr.R.Karthikeyan,
Additional Government Pleader

O R D E R

Aggrieved by the impugned proceedings issued by the Commercial Tax Officer, Thuckalay, Kanyakumari District, in TIN:33816160989/2010-11, dated 17.05.2016, reversing the I.T.C and levying penalty under Section 27(4) of the Tamil Nadu Value Added Tax Act, the petitioner has come to this Court, under Article 226 of the Constitution of India, taking a stand that when the petitioner is a civil Works Contractor for the Panchayats, Forest Department and other Government Departments, after execution of the work, the Panchayats and the Government Departments, used to deduct tax at source under Section 13 of the Act and pay the tax to the Sales Tax Department. On production of Form-T Certificate, the Assessing Authority of the petitioner grants credit of the tax to the petitioner. In this process, for the assessment year 2010-2011, after finalising the assessment of the petitioner under Section 22 (2) of the Act on a total and taxable turnover of Rs.2,06,55,796/- and Rs.78,33,647/- respectively, the respondent issued a pre-revision notice, dated 12.10.2015 proposing to reverse the assessment under Section 27 of the Act. The petitioner on receipt of the same, submitted a detailed reply on 03.12.2015. In the said reply a request was made to provide personal hearing before passing final assessment order. However without considering the same, the impugned order has been passed by the respondent on 17.05.2016. Hence, this Writ Petition.

2. The learned counsel for the petitioner would submit that it is a settled Law that under Section 22(4) of the Act, the respondent ought to have provided an opportunity of personal hearing to the petitioner, before reversing the I.T.C., more particularly, when the respondent has proposed to levy tax under Section 27 of the Act. In the present case, in spite of a specific request made in the reply to give an opportunity of personal hearing to the petitioner to properly assist the respondent, overlooking the request and also without mentioning any reason, whatsoever, the impugned assessment order has been passed.

3. Taking support from an order passed by me in W.P.Nos.11916 to 11920 of 201, dated 02.06.2015(M/s.Perumal Constructions rep. By its Proprietor vs. The Assistant Commissioner(CT), Ranipet, Vellore District), it is submitted by the learned counsel for the petitioner that when the request of personal hearing sought from the Assessing Authority, was not granted, this Court has interfered with the same and a direction was given to the Assessing Authority to give personal hearing to the petitioner therein and thereafter to pass final assessment order. Hence, in the present case also the same settled issue may be followed, he pleaded.

4. The learned Additional Government Pleader appearing for the respondent would submit that the impugned order cannot be challenged before this Court under Article 226 of the Constitution of India, as the petitioner has got a right to file an appeal. He would submit that within the limitation period, the petitioner has not filed his reply. Therefore, the petition is barred by limitation.

5. Per contra, it is submitted by the learned counsel for the petitioner that limitation has not started and the petitioner has not suffered any limitation for the reason that even though the impugned order was passed on 17.05.2016, the same was served to the petitioner only on 19.06.2016.

6. Be that as it may, the petitioner immediately on receipt of notice, has filed a reply on 03.12.2015 ie., within the stipulated period. A bare reading of the reply would show that the petitioner has made many points, which had not been reflected in the impugned order on what basis they were discorded. Moreover, the petitioner has asked for a personal hearing to advance their case before passing the final order. Even that request has also been overlooked, which is in clear violation of Section 27(1) of the Act. It is pertinent to extract some relevant portions of the order passed by a Division Bench of this Court in SRC Projects Private

Limited v. Commissioner of Commercial Taxes, Chennai and Another reported in (2010) 33 VST 333 (Mad) as follows:

"In a matter dealing with the taxation, the honourable Supreme Court in the case of Union of Inda v. Azadi Bachao Andolan reported in [2003] 263 [ITR 706(SC); AIR 2004 SC 1107 has explained the principle of contemporanea expositio by quoting Crawford on Statutory Construction, 1940 ed. In the said decision the following passage from Crawford has been quoted with approval (page 728 of ITR):

".... administrative construction (ie., contemporaneous construction placed by administrative or executive officers charged with executing a statute) generally should be clearly wrong before it is overturned : such a construction, commonly referred to as practical construction, although non-controlling, is nevertheless entitled to considerable weight, it is highly persuasive."

This Court, therefore, holds that the provision of Section 16(1)(a) of the said Act has to be construed in accordance with the said circular which is by way of contemporanea expositio. So when a specific demand is made for personal hearing the reasonable opportunity of showing cause should include the same in the interest of fairness in procedure.

The finding of the learned single Judge that the writ petition cannot be entertained in view of the non-exhaustion of alternative remedy by the petitioner cannot be sustained in the facts of the case.

It is well-settled that the existence of an alternative remedy does not oust the jurisdiction of a writ Court under Article 226 of the Constitution. Such jurisdiction is plenary in nature. But the existence of alternative remedy operates as an automatic restrain on the discretion of the writ Court in the exercise of its jurisdiction. But law in this aspect is well-settled and there are well known exceptions where a writ petition is entertained despite non-exhaustion of statutory remedy. If any one of the exceptions exists, it is open to the writ Court to exercise its jurisdiction. Those exceptions are if a writ petition has been filed for an enforcement of any fundamental right where there has been a violation of principles of natural justice at the instance of an inferior authority or where the proceedings are wholly without jurisdiction or ultra vires the statute under which such proceedings have been initiated (see Whirlpool Corporation v. Registrar of Trade Marks [1998] 8

Scc 1 at paragraphs 14 and 15, pages 9 and 10 of the Report), a writ petition can be entertained."

7. In similar circumstances following the same, I have also disposed of W.P.Nos.11916 to 11920 of 2015((M/s.Perumal Constructions rep. By its Proprietor vs. The Assistant Commissioner (CT), Ranipet, Vellore District) in the same above line. Therefore, in view of the settled legal position, as the respondent has passed the impugned order without giving reasonable opportunity of hearing as contemplated under Section 27(1) of the Act, the impugned order is set aside. Consequently, the Writ Petition stands allowed by remitting the matter back to the Assessing Officer to reconsider the issue afresh after providing an opportunity of personal hearing to the petitioner. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (Record)

/True Copy/

Sub Assistant Registrar

pm

TO

The Commercial Tax Officer,
Thuckalay,
Kanyakumari District.

+1 cc to Mr.S.KARUNAKAR,Advocate, Sr.No: 37631

+1cc to M/S Special Government Pleader, Sr No. 37919

JAM/SS 2/19.09.16/4P-4C

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