IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.A.Nos.677 to 681 of 2018
and
CMP Nos.6508, 6510, 6512, 6514 and 6516 of 2018

M/s. Dhanvijay Textiles (P) Ltd.,
Represented by its Director,
Sri.K.Vijayshankar .. Appellant in all W.As.

versus

The Assistant Commissioner (CT) (FAC),
Mettupalayam Circle,
Mettupalayam. .. Respondent in all W.As.

Writ Appeals filed against the common order dated 13.06.2016 in W.P.Nos.28238, 28239, 28240, 28241 and 28242 of 2015 respectively.

W.P.No.28328 to 28242/2015:
These Writ Petitions are filed under article 226 of the constitution of India, seeking for a Writ of Certiorari to call for the records of the respondent in TIN.No. 33742042456/2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012 respectively and quash the impugned order dated 30.07.2015 passed therein.

For Appellant in
a.. W.As : Mr.R.Venkatraman, Sr. Counsel
for Mrs.Lakshmi Sriram

COMMON JUDGMENT
(Order of the Court was delivered by S.MANIKUMAR, J.)

Material on record discloses that earlier, when M/s.Dhanvijay Textiles (P) Limited filed W.P.Nos.32209 to 32213 of 2013, challenging the order of assessment for the years 2007-08, 2008-09, 2009-10, 2010-11 and 2011-12, respectively, after hearing the learned counsel for the parties, by a common order, writ Court, directed the Assistant Commissioner (CT) (FAC), Mettupalayam, respondent therein, to issue fresh notice and thereafter permitted the appellant/petitioner to submit a detailed explanation / objection to the proposals, and after considering the same, the respondent shall pass orders in accordance with law. Pursuant to the directions, pre-revision notice dated 12.02.2015 has been issued to the appellant/petitioner, for the assessment year 2007-08 to 2011-12, respectively. Appellant/petitioner has also submitted objections dated 06.04.2015. Thereafter, separate assessment orders 30.07.2015, has been passed, for the above years.

2. Challenging the assessment orders, appellant has filed W.P.Nos.28238 to 28242 of 2015. After hearing, the learned counsel for the appellant/petitioner and the learned Additional Government Pleader (Taxes), vide common order made in W.P.Nos.28238 to 28242 of 2015 dated 13.06.2016, writ Court, dismissed the writ petitions, as hereunder:

> "3. On a perusal of the impugned order it is seen that the factual aspects have been gone into by the Assessing Officer and he has given reasons to dislodge the objections. Necessarily the petitioner has to plead the factual aspects and establish that factually there has been a defect in the finding of the Assessing Officer. This exercise could not be done in a writ petition for which the petitioner has an effective alternative remedy of appeal before the Appellate Authority. Therefore, the petitioner has to necessarily pursue his appellate remedy and not bypass the same.
>
> 4. Accordingly, while declining to interfere with the orders of assessment, liberty is granted to the petitioner to file an appeal and if such appeal is filed within 30 days from the date of receipt of a copy of this order, the appellate authority shall not reject the appeal petition on the ground of limitation."

Being aggrieved instant W.A.Nos.677 to 681 of 2018, have been filed.

3. Inviting the attention of this Court to Section 22(4) of TNVAT Act, which provides, for personal hearing, request of the appellant to the assessment officer, in that regard, plea before the writ Court in Ground No.'C' and on the basis of the decision in SRC Projects Private Limited Vs. Commissioner of Commercial Taxes, Chennai and Another, reported in [2010] 33 VST 333 (Mad), wherein a Hon'ble Division Bench of this Court held that when personal hearing is sought for, the same should be offered to the assessee, before passing final orders, which has been followed by one of us [Hon'ble Mr.Justice S.Manikumar] in Shri Mariammal Fire Works Vs. Commissioner of Commercial Taxes, Chepauk, Chennai and another, reported in [2011] 38 VST 345 (Mad) and also to a decision in W.A.No.173 of 2018 dated 29.01.2018 between M/s.Delphi Automative Systems P Ltd., and The Assistant Commissioner (CT), Pammal Assessment Circle, Chennai,

decided by this bench, Mr.R.Venkatraman, learned senior counsel submitted that when a specific ground has been raised, writ Court has failed to advert to the same. He further submitted that when statute mandates personal hearing, respondent ought to have provided the same, before passing the assessment order.

4. Though, several grounds have been raised in the instant writ appeals, Mr.R.Venkatraman, learned senior counsel, urged that the statutory requirement ought to have been complied with.

5. On the above submissions, we heard, Mr.Hariharan, learned Additional Government Pleader, who submitted that when there are factual disputes, it is always open to the appellant to take recourse to alternate remedy of filing an appeal, in which, right of hearing can also be insisted. For the abovesaid reasons, he prayed for dismissal of the writ appeals.

6. Heard the learned senior counsel for the appellant and perused the materials available on record.

7. Section 22(4) of the Tamil Nadu Value Added Tax Act, 2006, is extracted hereunder:

> (4) If no return is submitted by the dealer for that year, the assessing authority shall, after making such enquiry as it may consider necessary, assess the dealer to the best of its judgment, subject to such conditions as may be prescribed:
>
> Provided that before taking action under this sub-section, the dealer shall be given a reasonable opportunity of being heard."

8. In SRC Projects Private Limited Vs. Commissioner of Commercial Taxes, Chennai and Another, reported in [2010] 33 VST 333 (Mad), a Hon'ble Division Bench of this Court, observed as under:

> "8. In order to appreciate the aforesaid contentions, this Court proposes to set out the provision of Section 16(1)(a) of the said Act, which is relevant for our consideration.
>
> > "16(1)(a): Where, for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the assessing authority may, subject to the provisions of subsection (2), at any time within a period of five years from the date of order of the final assessment by the assessing authority, determine to the best of its judgment the turnover which has escaped assessment and assess the tax payable on such turnover after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity

to show cause against such assessment."

9. In Shri Mariammal Fire Works Vs. Commissioner of Commercial Taxes, Chepauk, Chennai and another, reported in [2011] 38 VST 345 (Mad), this Court observed thus.

"9. Though the second respondent has filed a detailed counter-affidavit on the merits of the case, this court is not inclined to delve into the same, as it would affect the interests of the writ petitioner. Suffice it to consider as to whether the petitioner was afforded personal hearing, before finalisation of the assessment CST 2004-05. In this context, it is useful to extract the relevant paragraph from the circular, dated April 20, 2001, issued by the Special Commissioner of Commercial Taxes, Chennai, the first respondent herein.

Office of the Special Commissioner
and Commissioner of Commercial Taxes, Chepauk, Chennai 600 005

Ref. Acts Cell-VJ/13134/2001 Dated April 20, 2001

Circular

Sub. : Assessment - Best of judgment assessment - Procedures for making best judgment assessment - Certain guidelines - Issued - Reg.

Ref. : This office circular in Acts Cell-VI/3 7801/99 dated August 25, 1999.

"2. Fair opportunity is to be given to the assessee and judicial consideration given to the representations, evidences and materials furnished by him. But personal hearing need not be given unless the statute requires it, (e.g., section 22(2)) or the assessee asks for it."

10. Considering the scope of the circular in revision of assessment under section 16(1)(a) of the TNGST Act, 1959 a Division Bench of this court in a judgment reported in SRC Projects' case [2010] 33 VST 333; [2008-09] 14 TNCTJ 220, after extracting the relevant portion of the circular, which deals with an opportunity of personal hearing, at paragraph No. 26, of the judgment held that "... in cases where a dealer seeks for a personal hearing, such dealer should be afforded the same in all cases where the Commissioner proposes to record a finding, which is adverse to the dealer, and such adverse order to the assessee can only be made after giving the assessee a hearing". The Division Bench further held that "... the impugned order

by way of revision of assessment should not have been passed without giving the assessee an opportunity of personal hearing. But, since the same has been denied, the impugned order is hereby quashed".

11. The contention of the learned counsel for the petitioner that the judgment in SRC Projects Private Limited, Salem v. Commissioner of Commercial Taxes, Chennai reported in [2010] 33 VST 333; [2008-09] 14 TNCTJ 220, came to be decided subsequent to the finalisation of the assessment, cannot be countenanced for the reasons that even in the absence of the judgment, clause 2 circular, dated April 20, 2001, can still be made applicable to the case of an assessee, when a request for personal hearing is sought for. The further objection that the writ petition is not maintainable for the reason that the petitioner had not availed of the alternative remedy provided under section 31 of the TNGST Act also, cannot be countenanced in law. It is well-settled that existence of an alternative remedy would not oust the jurisdiction of this court to entertain a writ petition, where there is a violation of principles of natural justice. The said issue has also been considered by the Division Bench at paragraph Nos. 24 and 25, which are extracted :

> "24. 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 (Whirlpool Corporation v.

Registrar of Trade Marks [1998] 8 SCC 1), a writ petition can be entertained.

25. In Whirlpool Corporation [1998] 8 SCC 1, the learned judges have considered the various judgments in coming to the aforesaid conclusion. In this connection, learned counsel for the appellant also cited a judgment of a Division Bench of this court in the case of Sree Murugan Engineering Products v. Commercial Tax Officer, Coimbatore reported in [2006] 148 STC 419. In paragraph 14 of the said judgment, the learned Chief Justice quoting the judgment of the Supreme Court in the case of State of H.P. v. Gujarat Ambuja Cement Limited reported in [2005] 142 STC 1, wherein the same principles have been reiterated, held that in a case where there is violation of principles of natural justice, alternative remedy will not be a bar. We respectfully concur with the views expressed in the said judgment."

12. Inasmuch as the right of an assessee is protected under the circular, and following the above Division Bench judgment of this court, the impugned order, dated July 30, 2007, is set aside and the matter is remitted back to the Deputy Commercial Tax Officer - 3, Virudhunagar District, the second respondent herein, for fresh consideration, in accordance with law. The second respondent is directed to provide an opportunity of personal hearing before passing a final order. The said exercise shall be completed within a period of two months from the date of receipt of a copy of this order. Accordingly, this writ petition is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

10. In W.A.No.173 of 2018 dated 29.01.2018 between M/s.Delphi Automative Systems P Ltd., and The Assistant Commissioner (CT), Pammal Assessment Circle, Chennai, we held as follows:

" In the light of the above circular, and the decision in SRC Projects Private Limited V. Commissioner of Commercial Taxes, Chennai and Another reported in (2010) 33 VST 333 (Mad), impugned order is set aside. Matter is remitted back to the Assessing Officer, to consider afresh, provide opportunity to the appellant, and pass order in accordance with law."

11. Perusal of the common order made in W.P.No.28328 to 28242 of 2015 dated 13.06.2016, does not indicate that the writ Court has adverted to the mandatory requirement of personal hearing, contemplated under Section 22 (4) of Tamil Nadu Value Added Tax Act, 2006. But, having regard to the alternate remedy available under the statute, writ court has dismissed the writ petitions.

12. In the light of the decisions, cited supra, common order made in W.P.Nos.28238 to 28242 of 2015, is set aside. Impugned assessment orders in TIN 33742042456/2007-08, 2008-2009, 2009-2010, 2010-2011 and 2011-2012, respectively, are set aside. Matter is remanded to the Assistant Commissioner (CT), (FAC), Mettupalayam Circle, Mettupalayam, assessing officer, who shall provide opportunity of personal hearing, to the appellant/writ petitioner, on the basis of the material available on record and pass orders in accordance with law, within a period of one month from the date of receipt of a copy of this order. It is made clear that fresh materials need not be entertained.

13. With the above direction, writ appeals are allowed. No costs. Consequently, the connected Civil Miscellaneous Petitions are closed.

s/d-
Assistant Registrar(CS VII)

True Copy

Sub-Assistant Registrar

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The Assistant Commissioner (CT) (FAC),
Mettupalayam Circle,
Mettupalayam.

+1 CC to The Spl. Govt. Pleader (T) sr 24686.
+5 Ccs to Ms. Lakshmi Sriram, advocate sr 24154.

W.A.Nos.677 to 681 of 2018
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CNR(CO)
SP(19/04/2018)