

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.02.2018

CORAM

THE HON'BLE Mr. JUSTICE M.DURAISWAMY

W.P.No.10666 of 2006

Mala Exports Corporation,
rep by Partner V.Sadasivam,
No.20, Kothari Road,
Chennai - 600 034.

... Petitioner

Vs.

The Assistant Commissioner of Income Tax,
Circle-XV, Chennai - 600 034.

... Respondent

Petition filed under Article 226 of The Constitution of India praying to issue a writ of certiorari to call for the records of the respondent relating to the assessment order dated 30.03.2006 in respect of the Assessment Year 1987-88 and quash the same as being illegal, arbitrary and inoperative.

For Petitioner : Mr.R.Thiagarajan, Senior Counsel
for Mr.V.Sanjeevi

For Respondent : Mrs.Hema Muralikrishnan,
Senior Standing Counsel

O R D E R

The petitioner has filed the above Writ Petition to issue a writ of certiorari to call for the records of the respondent relating to the assessment order dated 30.03.2006 in respect of the Assessment Year 1987-88 and quash the same.

2.It is the case of the petitioner that there was a search and seizure under Section 132 of the Income Tax Act in relation to the transaction during the year 1985-86 (Assessment Year 1987-88) on 13.12.1988. The petitioner's assessment was completed for the Assessment Year 1987-88 under Section 143(3) of the Income Tax Act on 27.03.1989. Thereafter, under Section 263 of the Income Tax Act, the assessment was reopened on 13.09.1989.

2.1.Against the order of reopening of the assessment, the petitioner filed an Appeal before the Income Tax Appellate Tribunal on 01.12.1989. While the said Appeal was pending, the reassessment was completed and an order was passed on 31.03.1992. Challenging the same, the petitioner filed an Appeal

before the Commissioner of Income Tax (Appeals) on 28.04.1992. On 21.09.1992, the Income Tax Appellate Tribunal passed the order in the Appeal filed against the order of reopening of the assessment stating that when fresh assessment was made, the assessee was not given the copies of the statement recorded behind the back of the assessee and further directed to give opportunity of hearing.

2.2. Pursuant to the order of the Tribunal, the Commissioner of Income Tax (Appeals), by order dated 16.02.1993, remanded the matter to the Assessing Officer directing the Officer to record the statements from V. Subramaniam and V.K. Berlia, the Author of the Agreement dated 04.12.1985. Pursuant to the order of remand passed by the Commissioner of Income Tax (Appeals), the Assessing Officer recorded the statement of V. Subramaniam on 10.09.1993. However, the Assessing Officer has not recorded the statement of V.K. Berlia. On 30.07.2003, the Commissioner of Income Tax (Appeals) passed the final order in the Appeal preferred by the petitioner, confirming the assessment order dated 31.03.1992.

2.3. The petitioner contended that the Assessing Officer and the Commissioner of Income Tax (Appeals) had not followed the directions of the Income Tax Appellate Tribunal, dated 21.09.1992, in not recording the statement of V.K. Berlia. As against the order passed by the Assessing Officer dated 31.03.1992, which was confirmed by the Commissioner of Income Tax (Appeals), the petitioner filed a Second Appeal to the Income Appellate Tribunal.

2.4. By order dated 16.06.2004, the Income Tax Appellate Tribunal set aside the orders of the Commissioner of the Income Tax (Appeals) and the Assessing Officer and allowed the Appeal and remanded the matter to the Assessing Officer with certain directions.

2.5. On 20.02.2006, the respondent issued a letter calling for a hearing on 23.02.2006. On receipt of the notice, the petitioner sent a letter dated 21.02.2006 to the respondent to fix another date for hearing as their Auditor was away from India. Since no reply fixing any hearing date was fixed, on 14.03.2006, the petitioner himself voluntarily appeared in person before the respondent and requested to furnish all the documents relied upon and provide opportunity for cross examination. On 16.03.2006, the petitioner was furnished with copies of some of the seized documents from Wavin. The petitioner filed a petition under Section 144-A of the Income Tax Act to the Additional Commissioner of Income Tax on 20.03.2006. On 27.03.2006, the petitioner filed his objections, along with a number of relevant documents and notes. The

petitioner also filed the details sought for by the respondent on 28.03.2006. Thereafter, by order dated 30.03.2006, the respondent completed the assessment and passed the impugned order without following the directions of the Income Tax Appellate Tribunal and in violation of principles of natural justice. The petitioner has filed the above Writ Petition.

3.The respondent, in their counter, has stated that opportunity was given to the assessee as directed in the order of the Income Tax Appellate Tribunal and the assessee's submissions were duly taken into account while passing the fresh assessment order dated 30.03.2006. Further, the respondent contended that the impugned order has been passed by the respondent after following the directions given by the Income Tax Appellate Tribunal.

4.Heard Mr.R.Thiagarajan, learned senior counsel appearing on behalf of Mr.V.Sanjeevi for the petitioner and Mrs.Hema Muralikrishnan, learned senior standing counsel for the respondent.

5.Mr.R.Thiagarajan, learned senior counsel appearing for the petitioner submitted that the respondent had passed the impugned order dated 30.03.2006 without following the specific directions given by the Income Tax Appellate Tribunal and therefore, on this ground alone, the impugned order is liable to be set aside and the matter should be remanded to the respondent for fresh consideration. Further, the learned senior counsel submitted that the respondent had passed the impugned order by merely following the earlier orders dated 31.03.1992 and 30.07.2003, which were set aside by the Income Tax Appellate Tribunal. The learned senior counsel submitted that the impugned order should be set aside and the matter should be remanded to the respondent for fresh consideration and to redo the assessment by following the directions given by the Income Tax Appellate Tribunal.

5.1.In support of his contentions, the learned senior counsel relied upon the following judgments:

(i)(2005) 6 Supreme Court Cases 499 [State of H.P. and others Vs. Gujarat Ambuja Cement Ltd., and another] wherein the Hon'ble Supreme Court held as follows:

"...

22.If, as was noted in Ram and Shyam Co. v. State of Haryana and Ors. [(1985) 3 SCC 267 : AIR (1985) SC 1147] the appeal is from "Caeser to Caeser's wife" the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case the writ petitioners had indicated the reasons as to why they thought that the alternative remedy would not be

efficacious. Though the High Court did not go into that plea relating to bias in detail, yet it felt that alternative remedy would not be a bar to entertain the writ petition. Since the High Court has elaborately dealt with the question as to why the statutory remedy available was not efficacious, it would not be proper for this Court to consider the question again. When the High Court had entertained a writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition is found to be palpably unsound and irrational. Similar view was expressed by this Court in *First ITO v. M/s. Short Brothers (P) Ltd.*, [(1966) 3 SCR 84 : AIR 1967 SC 81] and *State of U.P. v. Indian Hume Pipe Co. Ltd.*, [(1977) 2 SCC 724 : 1977 SCC (Tax) 335]. That being the position, we do not consider the High Court's judgment to be vulnerable on the ground that alternative remedy was not availed. 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 proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition."

(ii) 1992 Supp (1) Supreme Court Cases 443 [Union of India and others Vs. Kamalakshi Finance Corporation Ltd.] wherein the Apex Court held as follows:

"...

6. Sri Reddy is perhaps right in saying that the officers were not actuated by any mala fides in passing the impugned orders. They perhaps genuinely felt that the claim of the assessee was not tenable and that, if it was accepted, the Revenue would suffer. But what Sri Reddy overlooks is that we are not concerned here with the correctness or otherwise of their conclusion or of any factual malafides but with the fact that the officers, in reaching in their conclusion, by-passed two appellate orders in regard to the same issue which were placed before them, one of the Collector (Appeals) and

the other of the Tribunal. The High Court has, in our view, rightly criticised this conduct of the Assistant Collectors and the harassment to the assessee caused by the failure of these officers to give effect to the orders of authorities higher to them in the appellate hierarchy. It cannot be too vehemently emphasised that it is of utmost importance that, in disposing of the quasi-judicial issues before them, revenue officers are bound by the decisions of the appellate authorities; The order of the Appellate Collector is binding on the Assistant Collectors working within his jurisdiction and the order of the Tribunal is binding upon the Assistant Collectors and the Appellate Collectors who function under the jurisdiction of the Tribunal. The principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent court. If this healthy rule is not followed, the result will only be undue harassment to assesseees and chaos in administration of tax laws.

7. The impression or anxiety of the Assistant Collector that, if he accepted the assessee's contention, the department would lose revenue and would also have no remedy to have the matter rectified is also incorrect. Section 35-E confers adequate powers on the department in this regard. Under Sub-section (1), where the Central Board of Direct Taxes come across any order passed by the Collector of Central Excise with the legality or propriety of which it is not satisfied, it can direct the Collector to apply to the Appellate Tribunal for the determination of such points arising out of the decision or order as may be specified by the Board in its order. Under Sub-section (2) the Collector of Central Excise, when he comes across any order passed by an authority subordinate to him, if not satisfied with this legality or propriety, may direct such authority to apply to the Collector (Appeals) for the determination of such points arising out of the decision or order as may be specified by the Collector of Central Excise in his order and there is a further right of appeal to the department. The position now, therefore, is that, if any order passed by an Assistant Collector or Collector is adverse to the interests of the Revenue, the immediately higher administrative authority has the power to have the matter

satisfactorily resolved by taking up the issue to the Appellate Collector or the Appellate Tribunal as the case may be. In the light of these amended provisions, there can be no justification for any Assistant Collector or Collector refusing to follow the order of the Appellate Collector or the Appellate Tribunal, as the case may be, even where he may have some reservations on its correctness. He has to follow the order of the higher appellate authority. This may instantly cause some prejudice to the Revenue but the remedy is also in the hands of the same officer. He has only to bring the matter to the notice of the Board or the Collector so as to enable appropriate proceedings being taken under Section 35-E (1) or (2) to keep the interests of the department alive. If the officer's view is the correct one, it will no doubt be finally upheld and the Revenue will get the duty, though after some delay which such procedure would entail."

(iii) (2008) 3 MLJ 852 [N.Sivakumar Vs. K.Vembu, President, Valrakurich Village, Sendurai Taluk and others] wherein this Court held as follows:

"...

8. In the first place, if there is a violation of principles of natural justice, it is not necessary in all cases to avail of the appeal remedy and the aggrieved person can straightaway approach this Court under Article 226. Further, in this case, there is one more reason why the appeal remedy will be of no use to the petitioner. It is seen that on 29.1.2008, the Block Development Officer, who is the first appellate authority has directed the first respondent to take action against the petitioner in accordance with the High Court's decision as follows:

"cau;ePjpkd;w jPu;g;g[iuapd; mog;gilapy;
epakd mYtyu; vd;w Kiwapy; jf;f eltof;if vLj;jpl
Cuhl;rp kd;w jiytUf;F bjuptpf;fg;gLfpwJ"

6. Countering the submissions made by the learned senior counsel appearing for the petitioner, Mrs. Hema Muralikrishnan, learned senior standing counsel appearing for the respondent submitted that the remedy open to the petitioner is to file an Appeal as against the impugned order and that they cannot file a Writ Petition before this Court. Further, the learned standing counsel submitted that the statement of V.K. Berlia could not be obtained by the respondent for the reason that his whereabouts were not known to the respondent. Further, the statement of the said V.K. Berlia was produced by the petitioner and not by the respondent.

7. On a careful consideration of the materials available on record and the submissions made by the learned counsel on either side, the only contention raised by Mr. R. Thiagarajan, learned senior counsel for the petitioner is that the respondent had passed the impugned order dated 30.03.2006 without following the directions given by the Income Tax Appellate Tribunal and erroneously following the orders dated 31.03.1992 and 30.07.2003, which were set aside by the Income Tax Appellate Tribunal.

8. On a perusal of the order passed by the Income Tax Appellate Tribunal dated 16.06.2004, it could be seen that the Tribunal had set aside the order dated 31.03.1992 passed by the Assessing Officer and also the order dated 30.07.2003 passed by the Commissioner of Income Tax (Appeals) XII and remanded the matter to the Assessing Officer with a direction to decide the issue afresh after giving sufficient opportunity to put forward the case of the assessee. Further, the assessee was given an opportunity to cross examine those persons from whom the Assessing Officer recorded the statement. The relevant portion of the order passed by the Income Tax Appellate Tribunal reads as follows:

5. The learned D.R. submitted that now he is prepared to furnish copies of the seized material and therefore, suggested that the appeal may be decided by the Tribunal on merit or a remand report may be called from the Assessing Officer if required. In our view, the suggestion of the learned D.R. to decide the appeal on merit after furnishing the copies of the seized material to the assessee or call for a remand report would not meet the ends of justice in this case. Normally, this Tribunal would call for remand report when a particular issue was not considered by the lower authority or a particular material was not considered by the lower authority. In this case, the entire material seized from M/s. Wavin India Ltd. was not furnished to the assessee. Therefore, we do not know what would be the objection of the assessee after seeing the copies of the material that was seized from M/s. Wavin India Ltd. After seeing the material seized from M/s. Wavin India Ltd., the assessee may put forward their objection to the Assessing Officer. The Assessing Officer may or may not accept the objection. But, when the Assessing Officer does not accept the objection of the assessee, in our view, a detailed enquiry has to be made on the basis of the objection that may be raised. Such a kind of enquiry would be effectively made at the Assessing Officer level since examination and cross

examination of witness may also be required. This Tribunal being the final fact finding authority, it is better to give an opportunity to the lower authorities to examine the whole facts afresh on the basis of the objection that may be put forward by the assessee after looking into the seized material that would be furnished to them so that both parties will get an opportunity to agitate the matter on appeal before this Tribunal.

5. In view of the above, we are unable to accept the suggestion put forward by the learned D.R. In our view, the ends of justice will be met if the matter is remanded back to the Assessing Officer to examine the whole facts afresh after furnishing the copies of the seized material and giving an opportunity to the assessee to put forward their objection.

6. In view of the above discussion, we set aside the order of the lower authorities and remand back the issue to the file of the Assessing Officer. We direct the Assessing Officer to furnish all copies of the material that were seized from M/s. Wavin India Ltd. and relied upon by the Assessing Officer in the assessment order, to the assessee and decide the issue afresh after giving sufficient opportunity to put forward the case of the assessee. The assessee shall be given an opportunity to cross examine those persons from whom the Assessing Officer recorded the statement. Thereafter, the Assessing Officer shall decide the issue in accordance with law."

9. After remand, the Assessing Officer issued a notice to the petitioner on 20.02.2006 calling upon them to appear for hearing on 23.02.2006. Thereafter, the petitioner filed their objections along with the documents on 27.03.2006. According to the petitioner, the respondent has not furnished the copies of the documents seized at the time of seizure on 13.12.1988. The respondent, without following the directions of the Income Tax Appellate Tribunal, had passed the impugned order on 30.03.2006.

10. On a perusal of the impugned order dated 30.03.2006, it is clear that the respondent had followed the order dated 31.03.1992 passed by the then Assistant Commissioner of Income Tax, City Circle-I (INV), Chennai and also the order passed by the Commissioner of Income Tax (Appeals) XII dated 30.07.2003. When both these orders were set aside by the Income Tax Appellate Tribunal on 16.06.2004, the respondent should not have followed the orders which were set aside by the Tribunal. That apart, the respondent has not followed the directions given by the Income Tax Appellate Tribunal and also has not furnished the copies of the documents to the petitioner. When the order passed

by the Assessing Officer on 31.03.1992 and the order passed by the Commissioner of Income Tax (Appeals) XII dated 30.07.2003 were set aside in the impugned order dated 30.03.2006, the respondent had, in several places, approved the orders dated 31.03.1992 and 30.07.2003. The finding given by the Assessing Officer is erroneous in view of the order passed by the Income Tax Appellate Tribunal.

11.The judgments relied upon by the learned senior counsel reported in 1992 Supp (1) Supreme Court Cases 443 [Union of India and others Vs. Kamalakshi Finance Corporation Ltd.] and (2005) 6 Supreme Court Cases 499 [State of H.P. and others Vs. Gujarat Ambuja Cement Ltd., and another] squarely applies to the facts and circumstances of the present case.

12.The respondent has to follow the order passed by the higher Appellate Authority. When the Appellate Authority has given some directions to the Assessing Officer, the Assessing Officer must follow the directions without taking any divergent view. When the orders passed by the Assessing Officer and the Commissioner of Income Tax (Appeals) were set aside, the respondent should not have followed those orders.

13.With regard to the maintainability of the Writ Petition, since there is a violation of principles of natural justice and that the respondent had passed the impugned order following the orders which were set aside by the Tribunal, this Court has jurisdiction to entertain the Writ Petition challenging the order passed by the respondent.

14.The ratio laid down by this Court in the judgment reported in (2008) 3 MLJ 852 [N.Sivakumar Vs. K.Vembu, President, Valrakurich Village, Sendurai Taluk and others] applies to the present case.

15.With regard to the examination of V.K.Berlia, in the order dated 30.07.2003, the Commissioner of Income Tax (Appeals) XII had observed as follows:

"...

12.The appellant had further relied on the statements given by Sri V.K.Berlia in his affidavit dt. 30.9.193. Again, this affidavit is dated 30.9.93 but had been notarised by the Notary Public on 5.10.93. And actually, this affidavit was not signed by Sri V.K.Berlia in the presence of the Notary Public."

From the above, it is clear that the petitioner had relied upon the statement given by the said V.K.Berlia.

16.The learned counsel appearing for the respondent

submitted that the Department is not in a position to obtain the address of V.K.Berlia, therefore, summons could not be sent to him to appear for examination.

17.In these circumstances, since the affidavit was produced by the petitioner, the petitioner should furnish the address of V.K.Berlia to the respondent, enabling the respondent to send notice to the said V.K.Berlia for examination.

18.In these circumstances, the impugned order dated 30.03.2006 is liable to be set aside. Accordingly, the same is set aside. The matter is remitted back to the respondent for fresh consideration. The respondent is directed to furnish all copies of the documents that were seized from M/s.Wavin India Limited and relied upon by the Assessing Officer in the assessment order dated 31.03.1992 to the assessee within a period of two weeks from the date of receipt of a copy of this order. The petitioner is directed to furnish the address of V.K.Berlia to the respondent within two weeks from the date of receipt of a copy of this order, enabling the respondent to send notice to the said V.K.Berlia for his examination. It is also open to the petitioner to file their objections/reply, after perusing the copies of the documents to be furnished by the respondent within two weeks from the date of receipt of the copies of the documents. The parties are at liberty to examine/cross examine the witnesses. The respondent is directed to redo the assessment after giving due opportunity of personal hearing to the petitioner.

19.With these observations, the Writ Petition is allowed. No costs.

Sd/-
Assistant Registrar (CS-IX)

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

va

To

The Assistant Commissioner of Income Tax,
Circle-XV, Chennai - 600 034.

+1cc to Mr.HEMA MURALIKRISHNAN, Advocate, S.R.No.14215
+1cc to Mr.V.SANJEEVI, Advocate, S.R.No. 14363

W.P.No.10666 of 2006

KAN(CO)
TR(01/03/2018)