IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.06.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

Writ Petition Nos.1854 to 1856 of 2018
and W.M.P.Nos.2302 to 2304 of 2018

Orders reserved on 04.06.2018	Orders pronounced on 13.06.2018

W.P.Nos.1854 and 1855 of 2018

M/s.Sri Saravana Steels,
Rep. By its Partner,
1/125, Main Road,
Navammal Kappeer Village,
Thennal Post, Villupuram. .. Petitioner

vs.

The Assistant Commissioner (CT) (FAC),
Villupuram – II Assessment Circle,
Villupuram. .. Respondent

Petitions filed Under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the impugned proceedings of respondent in TIN 33284702546/2012-13, 2013-14 respectively and to quash the orders dated 24.11.2017 as passed contrary to the provisions of the TNVAT Act and against the principles of natural justice.

W.P.No.1856 of 2018:-

M/s.Sri Saravana Steels,
Rep. By its Partner,
1/125, Main Road,
Navammal Kappeer Village,
Thennal Post, Villupuram. .. Petitioner

vs.

1.The Assistant Commissioner (CT) (FAC),
Villupuram – II Assessment Circle,
Villupuram.

2.The Commercial Tax Officer (Enforcement),
Group-II, Villupuram. .. Respondents

Petition filed Under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the impugned proceedings of respondent in TIN 33847025462015-16 and to quash the order dated 24.11.2017 as passed contrary to the provisions of the TNVAT Act and against the principles of natural justice.

For Petitioner : Mr.P.Rajkumar

For Respondents : Ms.G.Dhana Madhri, G.A.

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COMMON ORDER

The petitioner, who is a registered dealer on the file of the respondent under the provisions of the Tamil Nadu Value Added Tax Act, 2006, (TNVAT Act) has filed these Writ Petitions challenging the assessment orders for the years 2012-13, 2013-14 & 2015-16.

2. The petitioner deals in iron and copper scrap by purchasing the same from TANGEDCO and other dealers and effects local and inter-state sales. During the assessment year 2012-13, the petitioner is stated to have effected purchases of iron scrap from M/s.Transtonnelstroy Afcons on payment of VAT apart from effecting purchases from other suppliers. The assessment for the said year namely, 2012-13, was deemed to have been completed under Section 22(2) of the Act as an 31.10.2013. After nearly two years, the Enforcement Wing conducted an inspection of the petitioner's business premises on different dates between July 2015 to September 2015. As a sequel to that, a revision notice was issued by the respondent, dated 13.10.2017. The allegation in the notice was based upon the findings recorded by the Enforcement Wing officers, who had inspected the petitioner's place of business during 2015. It is alleged that certain discrepancies has been noticed at the time of inspection, they being (i) input tax credit claim, which had been adjusted have not been maintained in the carry forward register; (ii) The petitioner's registered place of business is No.1/125, Main Road, Navammal Capper village, Thennal post and they have no other registered place of business; (iii) the place of business was inspected on 23.07.2015 and they had no stock in the registered place of business; (iv) the petitioner has stored goods worth Rs.80,68,500/- at a place in Pulichipallam post, which is

not a registered place of business at the time of inspection on 23.07.2015. It was further stated that though the petitioners have mentioned that they have applied for godown certificate on 20.07.2015, the letter given to the Assessing Officer was only on 31.07.2015, after the inspection by the Inspecting Officers; (v) the petitioner did not maintain purchase cum stock account for the goods held at the said place as provided under Rule 6(2)(b) of the TNVAT Rules, 2007, either at the principal place of business or at the place where the goods were stored; (vi) the petitioners have not maintained and produced input tax adjustment account for proof of tax reference of stock of goods as provided under Rule 6(9) of the said Rules. Based on the above allegations, the respondent provisionally concluded that the goods stored are unaccounted and not tax suffered as claimed by the petitioner and the petitioner has suppressed the purchases and sales and accordingly, estimation was made in the notice. The petitioner was directed to show cause as to why the estimation, as proposed in the notice, should not be confirmed. The petitioner was also directed to show cause as to why penalty should not be imposed under Section 27(3)(c) of the TNVAT Act, as the defects would not have come to light but for the surprise inspection. The partner of the petitioner firm who is the deponent to the affidavit filed in support of the Writ Petition, would state that he was unwell and hence, deputed his staff to appear before the respondent and explain the issues and it is the case of the petitioner that the staff appeared before the respondent and informed him that proper explanation was given to the officials of the Enforcement Wing and that the staff have given a letter dated 28.11.2014, informing the opening of the new godown at their own premises in Thennal post and therefore, contended that it cannot be stated that the goods were kept in an unauthorised place of business.

3. Admittedly, the petitioner did not file any reply/objections to the revision notices. The respondent, having waited for a reasonable length of time and finding that the petitioner has not responded to the revision notices, has passed the impugned orders and confirmed the proposal in the notices. Consequently, the input tax credits availed by the petitioner were reversed, apart from levying penalty under Section 27(4)(ii) of the Act.

4. The learned counsel for the petitioner submitted that though the petitioner has an alternate remedy by way of statutory appeal, the same is not an effective and efficacious remedy, since the impugned orders have been passed contrary to the law laid down by this Court in several decisions, apart from having been passed without granting reasonable opportunity to the petitioner. The learned counsel submitted that the petitioner by letter dated 28.11.2014, intimated the respondent

that they are opening a new godown at Thennal post, which application was received by the office of the respondent on 28.11.2014, and the requisite processing fee of Rs.100/- was also remitted by Demand Draft. In the said letter, the petitioner has stated that they have opened the new godown w.e.f., 05.11.2014. Further, it is submitted that the petitioner by letter dated 31.07.2017, has informed the respondent that they have changed their address w.e.f., 20.07.2015, to a place in Vanur Taluk and also remitted the requisite processing fee for change of address by remitting a sum of Rs.50/- by demand draft. The learned counsel invited my attention to the statement recorded from the partner of the petitioner by the Enforcement Wing, wherein the application given for opening of new godown and change of premises have been stated by the petitioner and these aspects ought to have been considered by the Assessing Officer while completing the assessment, since the statement forms part of the record of the Inspecting Officer. Further, the learned counsel referred to the representation given by the petitioner to the Inspecting Officers, dated 03.09.2015. These letters and correspondence have been referred to support the contention of the petitioner that the goods were not stored in an unregistered place of business and cannot be treated to be goods which are not accounted for or not tax suffered goods.

5. Ms.G.Dhana Madhri, learned Government Advocate for the

respondent raised a preliminary objection regarding the maintainability of the Writ Petitions contending that complicated factual issues are involved in the instant case and the petitioner should not be permitted to byepass the appeal remedy available under the Act, more so when the petitioner has not submitted any objection to the revision notices dated 13.10.2017. It is submitted that for the assessment years 2012-13 & 2013-14, the petitioners have effected purchases from M/s.Transtonnelstroy Afcons Joint Venture, ADS Trading Company, M/s.Vijay Nirmal company Private Limited and claimed input tax credit, but have not shown the respective purchase turnover in the monthly return. For the assessment year 2015-16, the petitioner has stored goods worth Rs.80,68,500/- at a place in Pulichipallam post, which is not a registered place of business at the time of inspection on 23.07.2015. Thus, the petitioner having failed to discharge the statutory burden of proof as enumerated under Section 17 of the Act, the order passed by the Assessing Officer directing reversal of the input tax credit is perfectly in order. Further, it is submitted that those three companies from whom, the petitioner is stated to have effected purchases during the year 2013-14, have not reported the said sales as claimed by the petitioner as having purchased the goods from them. The annexure II filed by the three selling dealers do not carry the transactions on which the petitioner has claimed input tax credit. With regard to the unregistered godown, the learned Government Advocate submitted that the inspection was done on 23.07.2015 at Thennal post and the petitioner appeared before the authority on 03.08.2015, 05.08.2015 and 06.08.2015 and inspection was completed and statement was recorded on 03.09.2015 and the petitioner accepted the deviations and paid a fine of Rs.2,000/-. It is submitted that the petitioner applied for registration of the godown only on 31.07.2015, much after the date of first inspection namely, 23.07.2015. Therefore, it is contended that operating from an unregistered place of business is in violation of the statutory provision and it amounts to a tax evasion practice. Thus, a letter given at a later date, that is after the commencement of the inspection, for registering the place of business is not maintainable, as Rule 5(5)(9) mandates that the registered dealer, who opens a new branch should apply to the Registering Authority with proof of payment of fees within 30 days from the date of opening of the said branch and get the certificate of the registration amended accordingly. Thus, it is submitted that the petitioner, only for the purpose of getting the benefit of 30days time limit, has falsely reported that he has started operation from an unregistered godown only from 20.07.2015 and this has not been established by producing any proof. It is further submitted that the Writ Petitions may not be entertained, as there is an appellate remedy available under the Act and in support of the said contention, reliance was placed on the decisions of the Hon'ble Supreme Court in the case of ***Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai & Ors., [AIR 1999 SC 22]***; ***Tin Plate Co of India Ltd., vs. State of Bihar & Ors., [AIR 1999 SC 74]***; ***Assistant Collector of Central Excise Chandan Nagar, West Bengal vs. Dunlop India Ltd & Ors., [AIR 1985 SC 330]*** **and** ***Titaghur Paper Mills Co.Ltd., and Anr., vs. State of Orissa [(1983) 2 SCC 433]*****.**

6. Heard the learned counsels appearing for the parties and perused the materials placed on record.

7. The first issue to be considered is whether the Writ Petitions have to be entertained, permitting the petitioner to bye-pass the statutory remedy available under the Act.

8. The settled legal position is that under normal circumstances, a party should not be permitted to bye-pass the statutory remedy available under the Act. This is more so when a case arises out of a taxation statute. No doubt, there are exceptions to this Rule and the Hon'ble Supreme Court has carved out these exceptions and under what circumstances a party can be permitted to bye-pass the statutory remedy available under an enactment and these exceptions cannot be stated to be fully exhaustive, but are broad parameters laying down circumstances under which the Court can exercise its extraordinary

jurisdiction under Article 226 of the Constitution of India. Some of such exceptions being total lack of jurisdiction, violation of principles of natural justice, an order devoid of reasons, an order which suffers from perversity and unreasonableness, an order passed by an incompetent authority etc. The petitioner, in the affidavit filed in support of the Writ Petitions, does not deny the fact that he has an effective alternate remedy under the Act, but the learned counsel for the petitioner would vehemently contend that the appellate remedy is not efficacious, since the impugned orders have been passed against the settled legal principles of this Court in certain decisions.

9. To be noted that the petitioner did not submit its objections to the Assessing Officer, though sufficient opportunity was granted to them. The allegation that the partner was sick and unable to submit objections to the revision notices, has not been substantiated. Therefore, the petitioner cannot contend that the impugned orders have been passed in violation of the principles of natural justice, but it is the case where the petitioner has failed to avail the opportunity granted to them and therefore, the petitioner cannot be permitted to take advantage of their own wrong. The learned counsel for the petitioner strenuously contended that intimation was given to the respondent about the change

of godown and in this regard referred to the letter dated 28.12.2014, wherein it is alleged that the petitioners have shifted the godown, w.e.f. 05.11.2014, and submitted the letter on 28.11.2014, and stated that they have paid the processing fee on 24.09.2014. The letter states that they are opening a new godown and it is not clear in the said letter as to which was the registered godown earlier to 28.11.2014. The second letter which was referred to by the petitioner is dated 31.07.2015, wherein the petitioner claimed that they have changed their branch address w.e.f. 20.07.2015. The processing fee has been remitted by demand draft dated 08.07.2015. To be noted is that the inspection of the petitioner's place of business was conducted on 23.07.2015 and the letter for change of branch address was admittedly given after the date of inspection. The dates mentioned in the letter as to be the date on which the godown started functioning has been mentioned by the learned Government Advocate to be, to bring it within the ambit of Rule 5(5)(a) of the Rules, which prescribes a 30 days' time limit. The learned Government Advocate further submitted that the letter dated 31.07.2015, is a self-serving document and an application made for registration of godown after inspection would clearly show that it is an afterthought. Prima facie, the Court is of the view that there is no clear record to show as to on which date the new godowns were opened, and when they commenced operation etc. However, the Court does not propose to dwell further into the matter, as the issues are disputed questions of fact, which obviously cannot be adjudicated in a Writ Petition.

10. The reason assigned by the learned counsel for the petitioner to bye-pass the appellate remedy available under the Act is not convincing. Unless and until the petitioner is able to factually establish that they had, infact carried on business in a particular premises from a particular date and shifted from the premises to an another premises, the question of applying the legal principles in various decisions relied on by the petitioner, does not arise. The burden of proof lies on the petitioner to establish that they had been functioning at a particular location, which is the registered place and shifted to a different venue from 05.11.2014 and thereafter, shifted to another venue on 20.07.2015. Admittedly, the petitioner has not placed any documents before me to establish that the business commenced in these two godowns on the dates mentioned by the petitioner in their representation as well as in the Writ Petitions. Above all, the petitioner ought to have responded to the revision notices dated 13.10.2017 and placed materials before the respondent for consideration. Without doing so, to refer to the statement recorded by the Enforcement Wing and to state that the Assessing officer should have perused the statement is an

argument, which is stated to be rejected.

11. The learned counsel for the petitioner produced a tabulated statement of the sales turnover for the assessment year 2015-16 and took strenuous efforts to convince the Court that there is absolutely no purchase suppression and whatever has been dealt with by the petitioner has been reflected in their returns and appropriate tax paid on the transactions. Once again, it has been pointed out that this Court cannot dorn the role of an Assessing Officer or the Appellate Authority and peruse the statement of accounts, details of sales turnover and to examine the conduct of the assessee. Thus, for the above reasons, this Court is not inclined to entertain the Writ Petitions on the ground that the petitioner has an effective alternate remedy under the Act. Thus, the merits of the case are left open to be agitated before the Appellate Authority, who shall decide the appeal on merits and in accordance with law uninfluenced by any observations made in this order.

12. For all the above reasons, the Writ Petitions are held to be not maintainable and accordingly, they are dismissed. The petitioner is granted 30 days time from the date of receipt of a copy of this order to file an appeal before the Appellate Authority along with copy of this order and if the appeal is filed within the time permitted by this court, the Appellate Authority shall entertain the appeal petition without rejecting the same on the ground of limitation. The Writ Petitions are dismissed with the above directions. No costs. Consequently connected Miscellaneous Petitions are closed.

13.06.2018

pbn

Index : Yes/No

Note:Registry is directed to return the original impugned orders after substituting the same with a certified copy of the same.

To

1.The Assistant Commissioner (CT) (FAC),
Villupuram – II Assessment Circle,
Villupuram.

2.The Commercial Tax Officer (Enforcement),
Group-II, Villupuram.

T.S.SIVAGNANAM, J.

pbn

Pre-delivery order made in
W.P.Nos.1854 to 1856 of 2018

13.06.2018