

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19-08-2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

W.P.No.1896 of 2019

And

W.M.P.No.2098 of 2019

M/s.Marina Ship Brokers,
No.106, 48/39:Wavoo Mansion:
Rajaji Salai,
Parrys,
Chennai-600 001 Represented by
Partner B.Gopi

..Petitioner

vs.

Income Tax Officer,
Non-Corporate Ward 11(2),
2nd Floor, Room No.203,
BSNL Building, Tower II,
No.16, Greams Road,
Chennai-600 006.

.. Respondent

PRAYER : Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, calling for the records leading to the issue of the order of assessment for the year 2013-14 dated 29.11.2018 issued by the respondent against the petitioner and quash the same as illegal, arbitrary and devoid of merit.

For Petitioner : Mr.Sandeep Bagmar R.,
for Mr.K.Gowtham Kumar.

For Respondent : Mr.J.Narayanaswamy,
Senior Standing Counsel (Income-tax).

O R D E R

Mr.Sandeep Bagmar R., learned counsel representing learned counsel on record for writ petitioner and Mr.J.Narayanaswamy, learned Senior Standing Counsel (Income Tax) on behalf of sole respondent, are before this Court.

2. With consent of learned counsel on both sides, main writ petition is taken up, heard out and is being disposed of.

3. An assessment order dated 29.11.2018 made by sole respondent qua writ petitioner assessee for the assessment year 2013-2014 (hereinafter 'said AY' for brevity) has been called in question in the instant writ petition and this 'assessment order made by the sole respondent, being assessment order dated 29.11.2018', shall hereinafter be referred to as 'impugned order' for the sake of brevity, convenience and clarity.

4. Impugned order has been made under Section 143 (3) of the Income Tax Act, 1961 ('IT Act' for brevity), pursuant to order of remand made by the 'Income Tax Appellate Tribunal', Chennai ('ITAT' for brevity) vide order dated 27.09.2017 in a statutory Income Tax Appeal being ITA No.1956/Mds/2017. To be noted, this statutory appeal before ITAT is under Section 254 of IT Act and therefore, for all practical purposes impugned order has been made under Section 143(3) of IT Act read with Section 254 of IT Act.

5. Short facts shorn of micro details/particulars are that the writ petitioner assessee made two donations in said AY. One is Rs.20 lakhs in favour of one 'Herbicare Healthcare Bio-Herbal Research Foundation' (hereinafter 'Herbicare Foundation' for brevity) and another is Rs.3 lakhs in favour of 'School of Human Genetics and Population Health' (hereinafter 'Genetics School' for brevity).

6. According to writ petitioner assessee, these two donations are eligible for exemption under Section 35(1)(ii) of IT Act. However, vide an order of assessment dated 29.3.2016, these two donations were held to be not eligible for exemption/deduction and 175% of the donations were added back to the income of the assessee.

7. To be noted, vide this assessment order dated 29.03.2016, expenses claimed by the writ petitioner assessee under one more head, i.e., business promotion expenses to the tune of little over Rs.13 lakhs (Rs.13,14,362/- to be precise) was disallowed, but this was given quietus by writ petitioner assessee and is not before this Court now.

8. With regard to aforementioned two donations and eligibility under Section 35(1)(ii) of IT Act, writ petitioner assessee carried the matter in appeal by way of a regular statutory appeal under IT Act to the Commissioner of Income Tax Appeals, who vide order dated 04.05.2017 dismissed the appeal confirming the assessment order made by the Assessing Officer. Writ petitioner carried this matter further to ITAT by way of a

further statutory appeal under Section 254 of IT Act (as mentioned supra) and the ITAT, vide aforementioned order dated 27.09.2017 set aside the order of the Assessing Officer as well as the order of the Commissioner of Income Tax Appeals and remitted the matter back to the Assessing Officer with certain directions. The crux and gravamen of the remittal order passed by ITAT is contained/articulated in paragraphs 6 to 8 of the order of ITAT and the same read as follows:

'6. We have considered the rival submissions on either side and perused the relevant material available on record. From the orders of the lower authorities it appears that out of Rs.40 lakhs of net profit, Rs.23 lakhs was donated to two institutions at Kolkata for the purpose of claiming deduction under Section 35(1)(ii) of the Act. On the basis of the survey conducted by the Revenue Authorities in the premises of the above said two research institutions at Kolkata, it was found that the said institutions were providing accommodation entries by receiving bogus donation. One of the Directors who was examined, categorically admitted that the donations were received from various persons across the country and after receiving small amounts of cash at 3% in the initial year to 8% in the later years, the balance amount was returned back to the companies/persons who are identified by the donors. Some of the funds also appear to have been refunded to the donors through banking channel. From the order of the Assessing Officer it appears that one of the institutions, namely, School of Human Genetics and Population Health moved the Settlement Commission and admitted that they have provided accommodation entries in respect of bogus donations received by them. Similarly, the Director of Herbicare Healthcare Bio Herbal Research Foundation has also admitted to have given accommodation entries after receiving commission. The Assessing Officer after reproducing the statement recorded from the respective persons, has concluded that the claim of donation more than 50% of profit was far-fetched one.

7. Now the issue before this Tribunal is whether the assessee is entitled to receive copy of statement and other material which were relied upon by the Assessing Officer in

the assessment order? The Revenue claims that as per Office Manual/ procedure, unless a request was received from the assessee for furnishing of copy of statement and other documents, the Revenue need not provide such statement and documents. The fact remains that the proceeding before the Assessing Officer is a judicial proceeding under Section 136 of the Act. When a statement or other material collected by the Assessing Officer or other income-tax authorities in the course of investigation or enquiry, the same has to be furnished to the assessee and an opportunity shall be given to the assessee to rebut the same. In India, we are following adversary system of judicial administration, therefore, no order can be passed against any person by the judicial authorities/officers who are entrusted with judicial work without furnishing relevant copies of the document and statement on which reliance was placed.

8. In this case, admittedly, the Assessing Officer placed reliance on the statement recorded during the course of survey operation and other material found during the course of survey operation. Principles of natural justice is one of the cardinal rule to be followed in the adversary system of judicial administration. Rule of law is supreme in this country, therefore, unless it otherwise provided in the relevant statute enacted by the Legislature, the principles of natural justice cannot be taken away by means of the procedure or the formalities prescribed in the Office Manual which is meant for the internal administration of Department. In this case, even the Office Manual was not brought to the notice of the Bench even though the Id. D.R. claims that as per Office Manual, copies need to be furnished only on request. This Tribunal is of the considered opinion that irrespective of the request of the assessee for the copies of statement and documents, the same shall be furnished to the assessee in case the Assessing Officer intended to rely on such statement and the documents. In this case, the copies of the statement and other documents relied upon by the Assessing Officer were not furnished to the assessee, therefore, there was gross violation of principles of

natural justice. Accordingly, the orders of the authorities below are set aside and the entire issue is remitted back to the file of the Assessing Officer. The Assessing Officer shall furnish the copies of documents and statement to the assessee and given sufficient opportunity to rebut the same, and thereafter decide the issue afresh in accordance with law.'

9. Post aforesaid order of ITAT, sole respondent before this Court, who is the Assessing Officer, took up the matter. When sole respondent took up the matter in this manner, writ petitioner assessee wrote a letter dated 27.08.2018 to the respondent, making a request to drop the proceedings, the respondent responded by way of communication dated 10.09.2018 and this was followed by exchange of another set of communication between writ petitioner and respondent assessee. This is letter dated 12.10.2018 from the writ petitioner assessee and response to the same from the respondent assessee vide communication is dated 13.11.2018. To capture the sum and substance of these communications between writ petitioner and respondent post remand, this Court considers it appropriate to extract relevant portions from the said communications and the most relevant portions of 27.08.2018 letter from the writ petitioner are contained in paragraph-5 and the next paragraph and the same read as under:

'5. No mention about the receipt of bogus donation from M/s.Marina Shipbrokers in the sworn statement submitted by Mrs.Samdrita Mukherjee Sardar:

a. As per the copies of survey report enclosed with the letter to us we would like to state that on perusal of the sworn statement of Mrs.Samdrita Mukherjee Sardar, there is no mention about the receipt of Bogus donation from us (M/s.Marina Shipbrokers), hence we would like to seek as to how your goodself offices came to conclusion that we had resorted to unfair means and passed an order against us.

b. The sworn statement was recorded under Section 133A wherein there are numerous judicial precedence that the sworn statement cannot be taken

as a basis to reach conclusion in the assessment.

c. Whatever statement is recorded under Section 133A of the Income Tax Act it is not given any evidentiary value obviously for the reason that the officer is not authorised to administer oath and to take any sworn statement which alone has evidentiary value as contemplated under law, vide Paul Mathews and Sons vs. CIT (2003) 263 ITR 101 (Ker).

d. An admission is extremely an important piece of evidence but it cannot be said that it is conclusive and it is open to the person who made the admission to show that it is incorrect and that the assessee should be given a proper opportunity to show that the books of accounts do not correctly disclose the correct state of facts, vide decision of the Apex Court in Pullangode Rubber Producer Co. Ltd. vs. State of Kerala, [1973] 91 ITR 18.

e. Hence as per the point c. stated above we request you to kindly give as evidence with proper supporting material so as to understand that the material was used against us as an evidence for establishing the bogus donation.

It is submitted that there is no acceptable and cogent evidence to show that the claim made by us is not true or correct. Since there are conflicting evidences made available by the same parties, hence it is submitted that it has to be found that this is not a fit case and the assessment proceedings may be dropped.'

10. Respondent responded to the same as mentioned supra vide communication dated 10.09.2018 and the most relevant portion of this reply reads as under:

'As per the directions of the Hon'ble ITAT, documents were furnished to you vide this office letter dated 17.01.2018. The assessment was competed based on the statements recorded at the time of survey from Smt.Samandrita Mukerjee Sardar, Secretary of Ms.School of Human Genetics & Population Health and Sri.Swapan Rajan Das Gupta, Founder Director of Ms.Herbicure Healthcare Bio-Herbal research Foundation. The same documents were furnished to you as per directions of the Hon'ble ITAT. The Documents received from the higher authorities in this Office relates to the Survey report and related papers which are confidential in nature, hence the entire documents cannot be furnished.'

11. This takes us to the next set of communications and with regard to 12.10.2018 communication from the writ petitioner, relevant portion reads as under:

'Kindly provide us with the following as per the directions of the Hon ITAT:

Copy of the investigation report conducted by your good self which clearly implicates US and also establishes that the donation made were bogus in nature.

As per the Principle of Natural Justice, we request you to provide us with an opportunity to cross examine the parties whose sworn statements are being used to implicate US.

Failure to carry out the thorough investigation as per the directions of Hon ITAT will be construed as the contempt of the Court, hence we request you to carry out thorough investigation and provide us with the evidence to prove that the decision to pass an adverse order against us is Justifiable.'

12. Writ petitioner responded vide 13.11.2018 reply and the same reads as under:

'The Hon'ble ITAT vide their order dated 27.09.2017, has categorically directed the Assessing Officer to provide the documents relied upon and not anything beyond that. Hence, your request made in your letter dated 12.10.2018 for cross-examination of the parties from whose statements were recorded, cannot be considered and hence rejected.'

13. After the aforesaid two sets of communications, the respondent has written one more letter dated 19.11.2018, reiterating its earlier request and thereafter the impugned order came to be passed.

14. In the hearing today, learned counsel for writ petitioner, adverting to the impugned order, submitted that it refers to sworn statements from Secretary of Genetics School and Founder Director of Herbicure Foundation. The impugned order mentions that in these sworn statements, these two individuals have admitted to having given accommodation entries by way of commission to different beneficiaries in the guise of donation receipts to be finally given back to the donors in the form of cash or cheque.

15. There is no disputation or disagreement before this Court that relevant portions of the Survey Report was no doubt furnished to the writ petitioner assessee post remand by ITAT. Therefore the pivotal issue on which the writ petition was argued is writ petitioner's request to cross-examine aforesaid two individuals namely Secretary of Genetics School and Founder Director of Herbicure Foundation.

16. To support his argument, learned counsel for writ petitioner pressed into service a judgment of this Court in Commissioner of Income-Tax vs. S.Khader Khan Son reported in [2008] 300 ITR 157 (Mad). Before this Court adverts to Khader Khan case, reported in [2008] 300 ITR 157 (Mad) [rendered by a Division Bench of this Court], it is necessary to mention that Khader Khan case was carried to Supreme Court and Hon'ble Supreme Court vide order dated 20.09.2012 made in Civil Appeal No.6747 of 2012 confirmed the order of the Division Bench of this Court vide judgment of Hon'ble Supreme Court in Commissioner of Income-Tax vs. S.Khader Khan Son reported in [2013] 352 ITR 480 (SC). What is of utmost relevance is [2013] 352 ITR 480 (SC) order was made by Hon'ble Supreme Court post leave, i.e., in the second part of Article 136 of Constitution of India. Therefore there is doctrine of merger and therefore Division Bench order in Khader Khan case has merged with the Supreme Court order and resultantly precedent value of Khader Khan case is that of a ratio of the Hon'ble Supreme Court. Khader Khan case was pressed into service by learned counsel on this basis. The principle in Khader Khan's case is that a statement made under Section 133A of IT Act does not have evidentiary value as an Officer of the Income Tax Department is not authorized to administer oath and take any sworn statement. Relying on Khader Khan principle, it was submitted that the sworn statement made by two individuals in the instant case, namely, Secretary of Genetics School and Founder Director of

Healthcare Foundation does not have any evidentiary value and therefore the respondent assessee ought not to have relied on the same without giving an opportunity to the writ petitioner to cross-examine the two individuals. Furthering his argument in this direction, learned counsel for writ petitioner referred to relevant portions of the Survey Report which was furnished to the writ petitioner post remand by ITAT and submitted that Founder Director of Healthcare Foundation has deposed that the accommodation of bogus donations was facilitated by one Kishan Bhawasingka. It was submitted that neither Kishan Bhawasingka's statement was furnished to the writ petitioner nor any cross-examination permitted.

17. Furthering his submissions in this direction, learned counsel for writ petitioner submitted that this is clearly violation of 'natural justice principle' ('NJP' for brevity).

18. Responding to the aforesaid submissions, learned Revenue Counsel submitted that what is of utmost importance is that the aforesaid two sworn statements from the two individuals alone do not constitute the basis of the impugned order. In other words, it was submitted by learned Revenue Counsel that there are other corroborating material before the Court and the impugned order was passed based on such corroborating material.

19. It was also pointed out that respondent has come to the conclusion that it is not just a case of accommodation being provided, but it is also a case where the cash was rerouted to the writ petitioner assessee. In this regard, learned Revenue Counsel drew the attention of this Court to paragraph-8 of the counter-affidavit which reads as under:

'8. It is submitted that in all the petitioner had given a donation to claim weighter deduction of 175% to the organisation which in turn had merely issues a receipt by providing an accommodation entry and thereby the cash was rerouted to the petitioner itself. It was clearly brought out by the Investigation Wing of the Calcutta Region and therefore, it is not a fit case for entertaining in the writ jurisdiction and is liable to be rejected as it involves appreciation of facts. Therefore, the writ petition is liable to be rejected on the ground of alternative remedy as well as devoid of merits.

(Underlining made by this Court to supply emphasis and highlight)'

20. This Court notices that the writ petitioner has not filed any rejoinder and disputed this aspect of the matter.

21. In this regard, it is also to be noted that even in the first round of assessment order i.e., assessment order dated 29.03.2016, as pointed out by learned Revenue Counsel, there is a clear mention that the alleged donations were routed back to the writ petitioner. This is articulated in paragraph-6 of the earlier assessment order dated 29.03.2016 and the relevant portion in paragraph-6 reads as under:

'However, evidences gathered during the course of the surveys found that the transactions were not genuine as the donors merely took accommodation entries and the alleged donations were routed back to them after deduction of commission by the entry provider at various stages.'

22. Adverting to the aforesaid scenario, learned Revenue Counsel submitted that this is not a case of improving the impugned order by way of a counter-affidavit as even in the earlier round, it was clearly put against the writ petitioner that donations were routed back to the writ petitioner and this remains unrefuted.

23. Responding to the above, learned counsel for writ petitioner submitted that they will now be in a position to refute and demonstrate that there was no routing back. This, in the considered opinion of this Court, turns on factual aspects of the case.

24. In this regard, learned counsel for writ petitioner pointed out that a statutory appeal remedy is available to the writ petitioner, by way of a statutory appeal to the Commissioner of Income Tax Appeals under Section 246A of IT Act. A perusal of Section 246A of IT Act reveals that the instant case will fall under Section 246A(1) (a).

25. Before adverting to alternate remedy, it is also necessary to notice that the question of permitting cross-examination will turn heavily on the facts and circumstances of each case. In the instant case, the question as to whether there was routing back at all is a very crucial question, which will impact the writ petitioner's right to seek cross-examination. In this regard, a judgment of Hon'ble Supreme Court in Andaman Timber Industries vs. Commissioner of Customs Excise, Kolkata-II reported in MANU/SC/1250/2015 is of significance, relevant paragraph is paragraph-6 and the same reads as under:

'6. As mentioned above, the Appellant had contested the truthfulness of the

statements of these two witnesses and wanted to discredit their testimony for which purpose it wanted to avail the opportunity of cross-examination. That apart, the adjudicating authority simply relied upon the price list as maintained at the depot to determine the price for the purpose of levy of excise duty. Whether the goods were, in fact, sold to the said dealers/witnesses at the price which is mentioned in the price list itself could be the subject-matter of cross-examination. Therefore, it was not for the adjudicating authority to presuppose as to what could be the subject-matter of the cross-examination and make the remarks as mentioned above. We may also point out that on an earlier occasion when the matter came before this Court in Civil Appeal No.2216 of 2000, order dated 17-3-2005 [2005 (187) E.L.T. A33 (S.C.)] was passed remitting the case back to the Tribunal with the directions to decide the appeal on merits giving its reasons for accepting or rejecting the submissions.'

26. In this view of the matter, it is also necessary to examine as to whether alternate remedy in the instant case will be effective and efficacious. In other words, it would be appropriate to make a contra-test as to whether the alternate remedy will become ineffectual or not efficacious in the light of the discussion thus far.

27. With a view to carry out this contra-test, this Court examined the procedure for the 'Commissioner of Income Tax Appeals' ('CIT-A' for brevity). The procedure for CIT-A to hear the statutory appeal under Section 246A(1)(a) is adumbrated in Section 250 of IT Act. Most relevant portion of Section 250 is sub-section (4) and this Court deems it appropriate to extract Section 250(4) of IT Act which reads as under:

'250. Procedure in appeal.

(1)

(2)

(3)

(4) The [Commissioner (Appeals)] may, before disposing of any appeal, make such further inquiry as he thinks fit, or may direct the Assessing Officer to make further inquiry and report the result of the same to the [Commissioner (Appeals)].'

28. A perusal of sub-section (4) of Section 250 of IT Act makes it clear that the Statutory Appellate Authority namely CIT-A has powers to make further inquiry by himself or direct the Assessing Officer to make further inquiry, report the result and thereafter dispose of the statutory appeal on the basis of such inquiry conducted by himself or on the basis of post inquiry report from the Assessing Officer in this regard.

29. In the light of sub-section (4) of Section 250, it is clear that if the writ petitioner is relegated to alternate remedy of appeal under Section 246A(1)(a) of IT Act, in the instant case, the appeal will not be ineffectual or not efficacious. In other words, the appeal has ample and adequate scope to permit the writ petitioner to raise this issue of cross-examination and the Appellate Authority can also look into the same in the light of factual disputes pertaining to the factual issue of re-routing and thereafter decide the appeal.

30. This takes us to alternate remedy as a principle.

31. With regard to exercise of writ jurisdiction on the teeth of alternate remedy, the restraint which the Writ Courts have placed on themselves is a self-imposed restraint. In other words, Rule of alternate remedy is clearly a self-imposed restraint. It follows as a sequitur that the alternate remedy rule is not a rule of compulsion and it is a rule of discretion. To put it differently, alternate remedy rule is not an absolute rule, but it is a rule of discretion. Though alternate remedy rule is a rule of discretion and it is a self-imposed restraint qua Writ Courts, Hon'ble Supreme Court has repeatedly held that alternate remedy rule has to be applied with utmost rigour when it comes to matters pertaining to recovery of tax, cess, etc.,

32. This Court reminds itself of Dunlop case, being Assistant Collector of Central Excise vs. Dunlop India Ltd reported in (1985) 1 SCC 260 and relevant paragraphs in Dunlop case are paragraphs 3 and 4 and the same read as under:

'3. In Titaghur Paper Mills Co. Ltd. v. State of Orissa [(1983) 2 SCC 433 : 1983 SCC (Tax) 131 : 1983 Tax LR 2905 : (1983) 142 ITR 663 : (1983) 53 STC 315] A.P. Sen, E.S. Venkataramiah and R.B. Misra, JJ. held that where the statute itself provided the petitioners with an efficacious alternative remedy by way of an appeal to the Prescribed Authority, a second appeal to the tribunal and thereafter to have the case stated to the High Court, it was not for the High Court to exercise its extraordinary jurisdiction under Article 226 of the

Constitution ignoring as it were, the complete statutory machinery. That it has become necessary, even now, for us to repeat this admonition is indeed a matter of tragic concern to us. Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.

4. In *Union of India v. Oswal Woollen Mills Ltd.* [(1984) 2 SCC 646 : 1984 SCC (Cri) 348] we had occasion to consider an interim order passed by the Calcutta High Court in regard to a matter no part of the cause of action relating to which appeared to arise within the jurisdiction of the Calcutta High Court. In that case the interim order practically granted the very prayers in the writ petition. We were forced to observe: [SCC para 4, pp. 649-50: SCC (Cri) p. 352]

"It is obvious that the interim order is of a drastic character with a great potential for mischief. The principal prayer in the writ petition is the challenge to the order made or proposed to be made under clause 8-B of the Import Control Order. The interim order in terms of prayers (j) and (k) has the effect of practically allowing the writ petition at the stage of admission without hearing the opposite parties. While we do not wish to say that a drastic interim order may

never be passed without hearing the opposite parties even if the circumstances justify it, we are very firmly of the opinion that a statutory order such as the one made in the present case under clause 8-B of the Import Control Order ought not to have been stayed without at least hearing those that made the order. Such a stay may lead to devastating consequences leaving no way of undoing the mischief. Where a plentitude of power is given under a statute, designed to meet a dire situation, it is no answer to say that the very nature of the power and the consequences which may ensue is itself a sufficient justification for the grant of a stay of that order, unless, of course, there are sufficient circumstances to justify a strong prima facie inference that the order was made in abuse of the power conferred by the statute. A statutory order such as the one under clause 8-B purports to be made in the public interest and unless there are even stronger grounds of public interest an ex parte interim order will not be justified. The only appropriate order to make in such cases is to issue notice to the respondents and make it returnable within a short period. This should particularly be so where the offices of the principal respondents and relevant records lie outside the ordinary jurisdiction of the court. To grant interim relief straightaway and leave it to the respondents to move the court to vacate the interim order may jeopardise the public interest. It is notorious how if an interim order is once made by a court, parties employ every device and tactic to ward off the final hearing of the application. It is, therefore, necessary for the courts to be circumspect in the matter of granting interim relief, more particularly so where the interim relief is directed against orders or actions of public officials acting in discharge of their public duty and in exercise of statutory powers. On the facts and circumstances of the present case, we are satisfied that no interim relief should have been granted by the High Court in the terms in which it was done."

[Underlining made by this Court to supply emphasis and highlight]

33. More than one and half decades after Dunlop case, in Satyawadi Tandon Case, [United Bank of India Vs. Satyawati Tondon and others reported in (2010) 8 SCC 110] and K.C.Mathew case [Authorized Officer, State Bank of Travancore Vs. Mathew K.C. reported in (2018) 3 SCC 85] were restated. To be noted, Satyawati Tondon principle was reiterated in latter of the two i.e., K.C.Mathew. In Satyawati Tondon case and K.C.Mathew case regarding rule of alternate remedy, the principle that such a rule, though a rule of discretion and not a rule of compulsion, should be exercised with greater rigour in fiscal law statutes has been laid down. More importantly, in Satyawati Tondon case, Hon'ble Supreme Court held that such a rule has to be applied with utmost rigour when it comes to cases involving taxes, cess, fees etc., In other words, when it comes to fiscal statutes, these rules have to be applied with greater rigour and it is to be applied very strictly with regard to recovery of taxes, CESS, fess etc., Relevant paragraph in K.C.Mathew case (cited supra) is paragraph 10 and the same reads as follows:

'10. In Satyawati Tondon the High Court had restrained further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding: (SCC pp.123 & 128, Paras 43 & 55)

"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto

themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

[underlining made by this Court to highlight and supply emphasis]'

34. In the light of the narrative thus far, this Court is clear that it is a fit case to relegate the writ petitioner to alternate remedy making it clear that all questions raised by the writ petitioner including questions pertaining to cross-examination can be raised by the writ petitioner before CIT-A and the issue of whether the cash was rerouted to the writ petitioner being a factual dispute can also be gone into by CIT-A for taking a decision on writ petitioner's request for cross-examination.

35. With regard to the alternate remedy of statutory appeal before CIT-A under Section 246A(1)(a) of IT Act in the instant case, the same has to be filed within 30 days from the date of service of notice of demand. In the instant case, the notice of demand as per usual practice was served along with the impugned order dated 29.11.2018 and it was served on the writ petitioner on 24.12.2018. Before the expiry of 30 days therefrom, instant writ petition has been presented before this Court on 22.01.2019. Therefore, this Court deems it appropriate to exclude the period spent by the writ petitioner in the instant writ petition i.e., the period from 22.01.2019 to the date on which copy of this order is made available, by applying the principle adumbrated in Section 14 of Limitation Act.

36. Notwithstanding such exclusion, even if delay occurs, the same is condonable under Section 249(3) of IT Act and there is no cap for the same. The power to condone the delay is vested with CIT-A. If the need arises to the writ petitioner to seek condonation of delay, notwithstanding exclusion of time spent in the instant writ petition, it is open to the writ petitioner to file a delay condonation application before CIT-A and the same shall be decided by CIT-A on its own merits and in accordance with law.

37. As this Court is now relegating the writ petitioner to alternate remedy of a statutory appeal before CIT-A, though obvious it is made clear that all questions raised by the writ petitioner in the instant writ petition, including grounds canvassed and contentions urged are left open. With regard to scope of the appeal itself, the same has been alluded to and set out supra elsewhere in this order. If the writ petitioner chooses to file a statutory appeal, the same shall be decided by the Appellate Authority namely CIT-A keeping in mind observations of this Court regarding the scope of the appeal, more particularly, Section 250(4) of IT Act.

38. Writ petition is disposed of with the above directions. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

Svn
To

The Income Tax Officer,
Non-Corporate Ward 11(2),
2nd Floor, Room No.203,
BSNL Building, Tower II,
No.16, Greams Road,
Chennai-600 006.

+1cc to Mr.K.Gowtham Kumar. Advocate, S.R.No.71999
+1cc to Mr.J.Narayanaswamy, Advocate, S.R.No.71424

MG(CO)
CB(27/09/2019)

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