IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :02.07.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

W.P.Nos.3219, 5042, 5055 & 5066 of 2019
and
W.M.P.Nos.5752, 5753, 5773, 5774,
5776, 5777, 3466 & 3468 of 2019

Andavar Construction,
Represented by its
Proprietor Mr.B.Yasu,
No.268, 200 Feet Road,
Mahathma Gandhi Nagar,
Kolathur, Chennai - 600 099 ..Petitioner in all W.Ps

vs

1. The State of Tamil Nadu,
   Represented by its Secretary to Government
   Commercial Taxes and Registration Department,
   Fort St.George, Chennai - 600 009

2. The Commissioner of Commercial Taxes,
   Commercial Taxes Department,
   Ezhilagam, Chepauk,
   Chennai - 600 005

3. The Superintendent / Deputy Commercial Tax Officer,
   Sowcarpet Assessment Circle,
   Chennai - 600 001

4. The State Tax Officer / Commercial Tax Officer,
   Surapattu Assessment Circle,
   No.27, Makkaram Garden,
   Kolathur, Chennai - 600 099 ..Respondents in all W.Ps

Prayer in W.P.No.3219 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records relating to the order of assessment in his TIN/33981369144/2012-13, dated 28.09.2018 and the notice in TIN/33981369144/2012-13/CTO, dated 13.12.2018 and quash the same and to direct the 4th respondent to afford an opportunity of personal hearing and to produce the Form-T the certification of deduction of tax at source and re do the assessment for the Assessment Year 2012-13 and thus render justice.

Prayer in W.P.No.5042 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records relating to the order of assessment in his TIN/33981369144/2015-16, dated 28.09.2018 and the notice in TIN/33981369144/2012-13/CTO, dated 13.12.2018 and quash the same and to direct the 4th respondent to afford an opportunity of personal hearing and to produce the copies of Form-T the certification of deduction of tax at source and re do the assessment for the Assessment Year 2015-16 and thus render justice.

Prayer in W.P.No.5055 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records relating to the order of assessment in his TIN/33981369144/2013-14, dated 28.09.2018 and the notice in TIN/33981369144/2012-13/CTO, dated 13.12.2018 and quash the same and to direct the 4th respondent to afford an opportunity of personal hearing and to produce the copies of Form-T the certification of deduction of tax at source and re do the assessment for the Assessment Year 2013-14 and thus render justice.

Prayer in W.P.No.5066 of 2019: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records relating to the order of assessment in his TIN/33981369144/2014-15, dated 28.09.2018 and the notice in TIN/33981369144/2012-13/CTO, dated 13.12.2018 and quash the same and to direct the 4th respondent to afford an opportunity of personal hearing and to produce the copies of Form-T the certification of deduction of tax at source and re do the assessment for the Assessment Year 2014-15 and thus render justice.

For Petitioner	:	Mr.M.MD.Ibrahim Ali (in all W.Ps)
For Respondents	:	Ms.G.Dhanamadhri Government Advocate (in all W.Ps)

C O M M O N   O R D E R

This common order will govern these four writ petitions. In other words, this common order will dispose of these four writ petitions.

2. Mr.M.MD.Ibrahim Ali, learned counsel on record for writ petitioner in all the four writ petitions is before this Court. Ms.G.Dhanamadhri, learned Government Advocate on behalf of all the respondents in all the four writ petitions is before this Court.

3. With consent of learned counsel on both sides, main writ petitions are taken up, heard out and are being disposed of. This Court is informed that the factual matrix is common and the Assessment Years alone are different in these four writ petitions. Obviously, numerical values are also different.

4. The Assessment Years are 2012-2013(W.P.No.3219 of 2019), 2015-2016(W.P.No.5042 of 2019), 2013-2014(W.P.No.5055 of 2019), 2014-2015(W.P.No.5066 of 2019).

5. More importantly, it is submitted that the core issue or the central theme in all these four writ petitions is the same.

6. Be that as it may, it is pointed out that the trajectory, which this matter took before the Assessing Officer namely 4th respondent alone is slightly different with regard to W.P.No.3219 of 2019, which pertains to Assessment year 2012-2013.

7. All these writ petitions arise under the 'Tamil Nadu Value Added Tax Act, 2006' ['TNVAT Act' for the sake of brevity].

8. There are a set of rules that have been made by the Government by way of Subordinate legislation under the rule making power under TNVAT Act being Section 80 of TNVAT Act. This set of rules goes by the name 'Tamil Nadu Value Added Tax Rules, 2007' ['TNVAT Rules' for the sake of brevity].

9. The Common factual matrix is that the writ petitioner is in the business of doing contract work for Chennai Corporation. It is the case of the learned counsel for writ petitioner that the work done by the writ petitioner for Chennai Corporation is in the nature of civil works.

10. To say with specificity, subject matter of these writ petitions turn on 'Tax Deducted at Source' ['TDS' for the sake of brevity], which is governed by Section 13 of TNVAT Act.

11. The short core issue is that, the writ petitioner was proceeded against on the ground that adequate documents with regard to work done by the writ petitioner for Chennai Corporation had not been produced for the said Assessment Years. On this basis, impugned orders in these four writ petitions came to be passed.

12. It has already been mentioned supra that the trajectory before the Assessing Officer alone is slightly different with regard to W.P.No.3219 of 2019, which relates to Assessment Year 2012-2013. In this matter, the Assessment order was originally passed on 30.06.2014, thereafter notice was issued by the 4th respondent being notice dated 13.04.2017 making certain

proposals and calling for objections. Writ petitioner sent a representation dated 09.06.2017. Thereafter, a pre-assessment notice dated 09.01.2018 was sent to the writ petitioner, calling upon the writ petitioner to make objections and specifically, relevant supporting documents were asked for. Admittedly, writ petitioner did not respond to this notice and therefore, the impugned Assessment order came to be passed. Consequent upon the impugned Assessment order, an order of attachment of Bank Account has also been made and the attachment of Bank account is dated 13.12.2018.

13. With regard to the other three writ petitions, pre-assessment notice was issued, calling for objections and supporting documents. Admittedly, writ petitioner did not respond at all and the same culminated in the impugned Assessment orders. Post impugned Assessment orders, consequential orders of attachment have also been passed.

14. Learned counsel for writ petitioner, adverting to Section 13 and more particularly Section 13(2) of TNVAT Act, submitted that the person making deductions i.e., TDS shall deposit the sum so deducted to such authority in such a manner within the time prescribed. It was submitted that it is the 3rd respondent, who is the Authority in this regard.

15. It was submitted by learned counsel for writ petitioner that the Assessment orders originally passed would reveal that the writ petitioner has submitted Forms 'R' pertaining to TDS.

16. However, there was no response to the pre-assessment notice.

17. This is as mentioned supra in W.P.No.3219 of 2019 alone. With regard to other three writ petitions, admittedly, there was no response at all.

18. It is in this backdrop that learned Revenue counsel, adverting to the counter affidavit filed in W.P.No.3219 of 2019 submitted that the modality prescribed pursuant to Section 13(2) of TNVAT Act is adumbrated and contained in Rule 9 of TNVAT Rules. Adverting to Rule 9, learned counsel submitted that submission of Form 'R' would not suffice and there are several other responsibilities that are cast on the writ petitioner under various Sub Rules under Rule 9 of TNVAT Rules. Considering the nature of this case, this Court deems it appropriate to extract entire Rule 9 of TNVAT Rules and the same reads as follows:

> '9. Tax deduction at source.-[(1)(a) Any person liable to make deduction and payment of tax under

section 13 shall apply to the registering authority having jurisdiction over the person for a Tax Deductor Identification Number (TDIN) in electronic Form XX and shall obtain the same before making such deduction:

Provided that the application in electronic Form XX shall be filed by persons who are deducting and paying tax under section 13 of the Act, within thirty days on and from the 29th January 2016.

(b) Any person who makes a deduction under section 13, shall deposit the sum so deducted electronically to the assessing authority having jurisdiction along with a statement in electronic Form R on or before the 20th day of every succeeding month along with proof of electronic payment.]

(2) The certificate that a dealer has no liability to pay or has paid the tax under section 5, referred to in [clause(c)] of the first proviso to sub-section (1) of section 13 shall be in [electronic Form S and it shall be generated by the assessing authority after satisfying that the dealer has paid the tax or the dealer has no liability to pay tax.]

(3) The certificate of deduction of tax referred to in sub-section (3) of section 13 shall be in [electronic Form T and it shall be based on the statement filed in electronic Form R].

(4) The notice in writing, indicating the amount payable under the Act, referred to in sub-section (5) of section 45 shall be in Form U.'

19. Learned counsel for writ petitioner submits that he will be able to show that the TDS amounts have been duly paid and he has the documents in his hand / possession. However, the writ petitioner did not respond to the aforesaid pre-assessment notices with regard to one of the four writ petitions in W.P.No.3219 of 2019. Though cryptic two sentence objections was sent to the original notice, there was no response to the pre-assessment notice.

20. Learned counsel for writ petitioner, brought to the notice of this Court a judgment of this Court in G.V.Cotton Mills(P) Ltd., Vs. Assistant Commissioner(CT), reported in (2019) 60 GSTR 418(MAD).

21. Learned Revenue counsel submits that G.V.Cotton Mills case law is clearly distinguishable on facts.

22. Taking this Court through paragraph 3 and more particularly paragraph 9 of G.V.Cotton Mills case, learned counsel submitted that G.V.Cotton Mills case, is not a case of failure to submit any kind of explanations, taking into account

the incriminating materials seized by the Enforcement Wing. This is articulated in paragraph 9 of G.V.Cotton Mills case and the same reads as follows:

> '9. This is not a case of failure to submit any kind of explanation taking into account the incriminating materials seized by the enforcement wing. The appellant has submitted written objections at least on two occasions to the notices issued by the enforcement wing. The respondent exercised the jurisdiction to re-open the assessment only on the basis of the materials collected by the enforcement wing. Those materials along with the written objections were forwarded to the respondent. The respondent without looking into the objections took cognizance of the alleged incriminating materials and passed an ex parte assessment. The failure to consider the objections received by the enforcement wing and forwarded by them to the respondent would vitiate the assessment orders passed by the respondent.'
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> [underlining made by this Court to supply emphasis and highlight]

In other words, that was a case, where the explanation was submitted but the respondent without looking into the objections, took cognizance of the alleged incriminating materials and passed an ex parte assessment.

23. It was also brought to the notice of this Court that G.V.Cotton Mills case is distinguishable on another aspect of the matter also. The yet another aspect of the matter is alternate remedy. It was submitted that the question of alternate remedy was not raised in G.V.Cotton Mills case at all. Learned counsel submitted that the writ petitioner has an effective and efficacious alternate remedy by way of an appeal to the jurisdictional Appellate Deputy Commissioner under Section 51 of TNVAT Act.

24. With regard to alternate remedy, a long line of authorities of Hon'ble Supreme Court is of significance.

25. From the long line of authorities of Hon'ble Supreme Court, it becomes clear that the rule of alternate remedy or the rule pertaining to exercise of writ jurisdiction under Article 226 notwithstanding alternate remedy, is not an absolute rule, but is a rule of discretion. Though it is not a rule of compulsion and it is a rule of discretion, this Court deems it appropriate to refer to two judgments of Hon'ble Supreme Court viz., Satyawati 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]. 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 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 statues, 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 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)
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>> "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.'

26. As rightly pointed out by the learned counsel for Revenue counsel, alternate remedy issue and the long line of authorities of Hon'ble Supreme Court in this regard, had not been projected by parties concerned in G.V.Cotton Mills case. In any event, G.V.Cotton Mills case is clearly distinguishable on facts as that was not a case of no explanation at all albeit with minor variations in W.P.No.3219 of 2019. In any event, that minor variation also pales into insignificance as there was no response to the pre-assessment notice. There is one more reason as to why this Court is persuaded to relegate the writ petitioner to alternate remedy. The reason is that the submissions made brings to light that the matter turns on facts. Even if the documents are now produced by the writ petitioner, (writ petitioner has not chosen to respond to the pre-assessment order) this Court is of the considered view that it would not serve the ends of justice to permit one more round of litigation, before the original authority as appellate authority under Section 51 of TNVAT Act can also look into facts.

27. Owing to this reason and the discussions thus far, this Court is convinced that this is a fit case of relegation to alternate remedy of an appeal to the jurisdictional Deputy Commissioner under Section 51 of TNVAT Act.

28. This Court therefore passes the following order:

a) This Court does not interfere with the impugned orders leaving it open to the writ petitioner to avail alternate remedy by filing appeal to the jurisdictional Appellate Deputy Commissioner i.e., the Appellate Authority under Section 51 of TNVAT Act.

b) If the writ petitioner chooses to file appeals under Section 51, all the conditions adumbrated therein will govern the writ petitioner.

c) If there is delay in filing the appeals and if the writ petitioner takes out applications for condonation of delay / or applications for exclusion of time spent in the instant writ petitions under Section 14 of Limitation Act, such applications shall be dealt with and disposed of by the Appellate Authority on their own merits. If the writ petitioner avails alternate remedy as the Appellate authority is also an authority, dealing with facts, it is well open to the writ petitioner to file additional documents, which were not before the original authority to demonstrate that they have complied with all the obligations particularly qua Rule 13 of TNVAT Rules. If the writ petitioner adopt this course, the Appellate Authority being an authority, with no impediment to deal with facts, shall look into these documents and take a decision.

29. At this juncture, learned counsel for writ petitioner request for return of original impugned orders. Original Revised Assessment orders shall be returned to the learned counsel on record for writ petitioner with due acknowledgment by the Registry to enable the writ petitioner to pursue the alternate remedy of appeal.

30. All these four writ petitions are disposed of with the above said observations. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Secretary to Government
   Commercial Taxes and Registration Department,
   Fort St.George,
   Chennai - 600 009

2. The Commissioner of Commercial Taxes,
   Commercial Taxes Department,
   Ezhilagam, Chepauk,
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3. The Superintendent / Deputy Commercial Tax Officer,
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   Chennai - 600 001

4. The State Tax Officer / Commercial Tax Officer,
   Surapattu Assessment Circle,
   No.27, Makkaram Garden,
   Kolathur, Chennai - 600 099

+4 ccs to Mr.M.Md.Ibrahim Ali, Advocate, S.R.No.54848

+1 cc to the Special Government Pleader(Taxes), S.R.No.55480

copy to: The Section Officer,
E.R Section, High Court, Madras.

(To return Original impugned order to Counsel for the Petitioner)

W.P.Nos.3219, 5042, 5055 & 5066 of 2019
and
W.M.P.Nos.5752, 5753, 5773, 5774,
5776, 5777, 3466 & 3468 of 2019

BR(CO)
SSM(02/08/2019)