IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.06.2019

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.NOS.7402 & 7403 OF 2018
AND W.M.P.NOS.9192 & 9193 OF 2018

Doosan Infracore India Private Limited
Represented by Mr.N.Krishnakumar
General Manager Finance
Thiru-Vi-Ka Industrial Estate
Guindy, Chennai - 600 032.
.. Petitioner in both W.Ps.

vs.

The Assistant Commissioner
Office of the Commissioner of GST
and Central Excise
Chennai-South Commissionerate
692, M.H.U. Complex, Nandanam
Chennai 600 035.
.. Respondent in both W.Ps.

Writ Petitions filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorai, to call for the records in the proceedings of the respondent in Order in Original Nos.39/2017(R) & 40/2017(R) dated 11.09.2017 in C.Nos.IV/16/48/2017/R&R/LC1 and IV/16/49/2017/R&R/LC1 respectively issued by the respondent and quash the same as arbitrary and illegal or pass any other writ, order or direction which this Hon'ble Court may deem it fit and proper in the facts and circumstances of the case and thus render justice.

For Petitioner : Mr. Joseph Prabakar
(In both W.Ps)
For Respondent : Mr.T.L.Thirumalaisamy
(In both W.Ps)
Senior Panel Counsel

COMMON ORDER

Mr.Joseph Prabakar, learned counsel on record for the writ petitioner in both these writ petitions and Mr.T.L.Thirumalaisamy, learned Senior Counsel for Customs and

Central Excise on behalf of the sole respondent in both these writ petitions are before this Court.

2. This matter was listed under the caption 'ADJOURNED ADMISSION' today. However, the sole respondent has filed counter affidavit and additional counter affidavit in both these writ petitions and pleadings are complete.

3. With the consent of learned counsel on both sides, the main writ petitions itself are being taken up and the same are being disposed of.

4. This common order will govern both these writ petitions. In other words, this common order will dispose of both these writ petitions. The only difference between the two writ petitions is that while the first of the two writ petitions viz., W.P.No.7402 of 2018 pertains to the period April to June 2015, the second of the two writ petitions viz., W.P.No.7403 of 2018 pertains to the period July to September 2015.

5. Both these writ petitions pertain to Service Tax.

6. Writ Petitioner is registered with the concerned Department vide Service Tax Registration No.AACCD6529LSD006 for providing 'Information Technology Software Service'.

7. Crux and gravamen of these two writ petitions is that the writ petitioner sought refund for the aforementioned periods inter alia by placing reliance on Notification No.39/2012-S.T. dated 20.12.2018 being a notification issued by the Central Government in exercise of powers under Rule 6A of Service Tax Rules, 1994.

8. Considering the nature of the order, which this Court proposes to pass in these two writ petitions, suffice to say that the respondent vide an order dated 11.09.2017 bearing reference Nos.C.No.IV/16/48/2017/R&R/LC I and C.No.IV/16/49/ 2017/R &R/LC I (referred to as 'impugned order' in singular and 'impugned orders' in plurarl) rejected the refund claims of the writ petitioner and also imposed penalty of Rs.10,000/- each for filing ineligible refund claim.



9. The refund claims have been rejected by the respondent primarily on the ground that the aforesaid notification being notification No.39 of 2012 dated 20.06.2012 which is the fulcrum of these two writ petitions is a conditional notification and the writ petitioner has not complied with the conditions adumbrated therein.

10. As far as the penalty is concerned, as mentioned supra, the same has been imposed alleging that the writ petitioner has

filed ineligible refund claims inter alia under Section 77(2) of the Finance Act, 1994 under which the Service Tax regime operates.

11. Learned counsel for writ petitioner, adverting to paragraph 17 of the impugned order, submitted that the respondent has not objected to the refund claims by holding that the writ petitioner ought to have filed returns prior to the export, though such a plea is being raised now.

12. It was also pointed out that writ petitioner has also submitted proof and papers in response to 'show cause notice' ('SCN' for brevity) dated 16.05.2017 which was issued prior to the impugned orders. It was submitted that in the reply to the SCN, writ petitioner has clearly pointed out that SCN issued asking the writ petitioner to show cause as to why the revision claim of the writ petitioner should not be rejected as CENVAT has allegedly be taken by the writ petitioner in ST-3 return as against the condition that no CENVAT credit has been availed on inputs and input services on which rebate has been claimed.

13. Learned counsel for Revenue adverting to the counter affidavit and additional counter affidavit submitted that the aforesaid notification being Notification No.39/12 dated 20.06.2012, which is pivotal for these two writ petitions, is a conditional Notification and the writ petitioner has not complied with the conditions particularly the condition that the writ petitioner should file declaration prior to the date of export service. Learned counsel for Revenue drew the attention of this Court to paragraph 3.1 of the Notification. This was disputed by learned counsel for writ petitioner by saying that this is completely incorrect as the writ petitioner has in fact complied with the conditions. Suffice to say that these submissions turn on factual dispute.

14. Aforesaid factual disputes cannot be decided on affidavits and counter affidavits in a writ petition.

15. This takes us to alternate remedy aspect of the matter.

16. There is no disputation before this Court that alternate remedy qua impugned orders are available to the writ petitioner by way of an appeal to the Commissioner (Appeals-II) at Newry Towers, No.2054, I Block, II Avenue, 12th Main Road, Anna Nagar, Chennai - 600 040.

17. With regard to alternate remedy, Hon'ble Supreme Court has repeatedly held that exercise of writ jurisdiction under Article 226 of the Constitution of India qua alternate remedy is not an absolute rule. In other words, Hon'ble Supreme Court has held that alternate remedy is not a rule of compulsion, but it is a rule of discretion. Further, Hon'ble Supreme Court has

also held that though alternate remedy is a rule of discretion, the writ jurisdiction will be exercised for interfering with the orders of this nature only in cases of certain specific exceptions and particularly the exceptions (a) lack of jurisdiction, (b) violation of 'natural justice principles' ('NJP' for brevity) or it should be a case of alternate remedy being ineffectual or not efficacious.

18. In the instant case, it is nobody's case that impugned orders have been passed without jurisdiction. It is also not anybody's case that impugned orders have been passed in violation of NJP.

19. It is certainly nobody's case that the aforesaid alternate remedy by way of an appeal to the Commissioner (Appeals-II) available to the writ petitioner is either ineffectual or not efficacious.

20. Therefore, this Court is of the considered view that writ petitioner has not made out a case for interfering with the impugned orders in writ jurisdiction on the teeth of an available alternate remedy more so when alternate remedy is in the form of an appeal. As alluded to supra, the grounds that are being canvassed turn on facts i.e., factual disputes and therefore, this Court is of the considered view that it would be appropriate to relegate the writ petitioner to the aforementioned alternate remedy.

21. With regard to alternate remedy, this court is of the considered view that two judgments 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] are of relevance. In K.C.Mathew case, Hon'ble Supreme Court while reiterating Satyawati Tandon principle held as follows in paragraph 10, which 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 Court to supply emphasis and highlight)

22. A perusal of paragraph 10 of K.C. Mathew case would bring to light that Hon'ble Supreme Court reiterated Satyawati Tondon principle and held that alternate remedy Rule applies with great rigour in matters involving recovery of taxes, cess, fees and other types of public money. Therefore, this being a case of fiscal law and the question turning on factual disputes, this Court considers it appropriate to dispose of the writ petition holding that it is open to the writ petitioner to file an appeal before the aforesaid appellate authority assailing the impugned orders. Though obvious, it is made clear that all questions including the grounds agitated in instant writ petitions are left open for the writ petitioner to be assailed

before the appellate authority. It is open to the writ petitioner to seek condonation of delay inter alia by pleading extension of time under Section 14 of Limitation Act and if the writ petitioner chooses to take such a recourse, such applications shall be disposed of on their own merits by the Appellate Authority.

23. Both these writ petitions are disposed of with the above directions. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

vsm

To

The Assistant Commissioner
Office of the Commissioner of GST
and Central Excise
Chennai-South Commissionerate
692, M.H.U. Complex, Nandanam
Chennai 600 035.

+1cc to Mr.Joseph Prabakar, Advocate, S.R.No.47762
+1cc to Mr.T.L.Thirumalaisamy, Advocate, S.R.No.47178

W.P.Nos.7402 & 7403 of 2018
and W.M.P.Nos.9192 & 9193 of 2018

LN(CO)
CS/24/07/2019