IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :16.08.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

W.P.Nos.11084, 11092, 11107, 11117, 11119, 12126, 12130 of 2019
and
W.M.P.Nos.11514, 11519, 11526, 11529, 11534, 12405, 12408 of 2019

Emrald Resilient Tyre Manufacturers Pvt.Ltd.,
Represented by CEO & Joint Managing Director,
V.Krishnaram,
No.3, 9th Lane, Sastri Nagar,
Adyar, Chennai - 600 020. ..Petitioner in all WPs.

vs

The Assistant Commissioner (ST),
Adyar Assessment Circle,
46, Greenways Road,
Chennai - 600 006. ..Respondent in all WPs.

Common Prayer: Writ Petitions filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records on the files of the respondent-herein in TIN No./33080962239/2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16 dated 25.02.2019, 25.02.2019, 25.02.2019, 28.02.2019, 28.02.2019, 26.03.2019 & 26.03.2019 respectively and quash the same.

For Petitioner (in all) : Mr.K.A.Parthasarathy for Mr.N.Inbarajan

For Respondents : Mr. Mohammed shaffiq, Special Government Pleader (Taxes) ..in all writ petitions

COMMON ORDER

Mr.K.A.Parthasarathy, learned counsel on record for writ petitioner in all these seven writ petitions and Mr.Mohammed Shaffiq, learned Special Government Pleader (Tax) on behalf of sole respondent in all these seven writ petitions, are before this Court.

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

3. This Court is informed that all these writ petitions arise out of a common factual matrix. This Court is also informed that subject matter of these writ petitions arise under 'Tamil Nadu Value Added Tax Act, 2006 (Tamil Nadu Act 32 of 2006)' [hereinafter 'TNVAT ACT' for brevity].

4. It is submitted without any disputation or disagreement that all these seven writ petitions arise out of a common factual matrix. The central theme/core issue is one and the same and only assessment years are different.

5. To be precise, it is submitted that seven assessment years relatable to these seven writ petitions are 2009 - 2010 to 2015 - 2016 (seven successive assessment years).

6. Notwithstanding very many averments made in the affidavit filed in support of these writ petitions and notwithstanding very many grounds urged/contentions canvassed in the affidavit filed in support of these writ petitions, at the hearing, the arguments were focused and projected on one pivotal submission and that one pivotal submission pertains to personal hearing.

7. Short facts shorn of micro details/particulars are to the effect that writ petitioner is a dealer under TNVAT Act, that writ petitioner was filing monthly returns under Section 21 of TNVAT Act, that there was deemed assessment under Section 22 of TNVAT Act, that the business premises of the writ petitioner was inspected by the Enforcement Wing officials of Commercial Tax Department and that during such inspection Enforcement Wing officials noticed, what according to them, are defects. This is the genesis of these instant matters on hand.

8. Continuing with short facts shorn of micro details/elaboration, suffice to say that the Enforcement Wing made proposals, that based on the proposals given by the Enforcement Wing officials revisional notices dated 27.01.2017 was issued, that the writ petitioner dealer filed objections dated 02.03.2017, that post objections, that the respondent issued a notice signed on 29.12.2018 (admittedly received by writ petitioner on 02.01.2019) calling for supporting evidence pertaining to the correctness of the transactions owing to the objections, that the writ petitioner dealer sent a further communication dated 09.01.2019 with enclosures and that thereafter, revised assessment orders which have been called in question in these writ petitions came to be passed on 25.02.2019, 28.02.2019 and 26.03.2019.

9. To be noted, there are seven different revised assessment orders made on these three different dates. These

seven different assessment orders bear Reference TIN Nos./33080962239/2009-10, 2010-11, 2011-12, 2012-13, 2013-14, 2014-15, 2015-16 are dated 25.02.2019, 28.02.2019, 26.03.2019 respectively and the same shall hereinafter be collectively referred to as 'impugned orders' in 'plural' and 'impugned order' in 'singular' both for the sake of brevity. Assailing the impugned orders, these seven writ petitions have been filed.

10. Though the impugned orders do not specify the provisions of law under which revised assessment orders have been passed, it is submitted before this Court, at the hearing, without any disputation or disagreement that the impugned orders have been passed under Section 27(1)(a) and 27(2) of TNVAT Act.

11. As already alluded to supra, campaign against the impugned orders are primarily predicated on personal hearing aspect. Therefore, the proviso to Sub-sections (1) & (2) of Section 27 of TNVAT Act, becomes relevant owing to which this Court deems it appropriate to extract Section 27 (1) & (2) together with the common proviso thereto, which read as follows:

> (1) (a) Where, for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax. The assessing authority may, subject to the provisions of sub-section (3), at any time within a period of [six years from the date of assessment], determine to the best of its judgment the turnover which has escaped assessment and assess the tax payable on such turnover after making such enquiry as it may consider necessary.
>
> (b) Where, for any reason, the whole or any part of the turnover of business of a dealer has been assessed at a rate lower than the rate at which it is assessable, the assessing authority may, at any time within a period of [six years from the date of assessment], re-assess the tax due after making such enquiry as it may consider necessary.
>
> (2) Where, for any reason, the input tax credit has been availed wrongly or where any dealer produces false bills, vouchers, declaration certificate or any other documents with a view to support his claim of input tax credit or refund, the assessing authority shall, at any time, within a period of [six years from the date of assessment], reverse input tax credit availed and determine the tax due after making such a enquiry, as it may consider necessary:
>
> Provided that no order shall be passed under sub-sections (1) and (2) without giving the dealer a reasonable opportunity to show cause against such

order.

(underlining made by this Court to supply emphasis and highlight)

12. A perusal of the aforesaid proviso makes it clear that a reasonable opportunity to show cause against the impugned orders would suffice. Unlike some other provisos in TNVAT Act i.e., proviso to Section 22(4), this proviso does not say that reasonable opportunity of being heard should be granted. To be noted, proviso to Section 22(4) says that it is statutorily imperative to give a reasonable opportunity of being heard.

13. This Court has already held that the two provisos under Section 22 (4) and proviso to Section 27(1) & (2) of TNVAT Act, are different as one makes a reasonable opportunity of being heard statutorily imperative, whereas the other merely makes reasonable opportunity to show cause against the impugned orders statutorily imperative. However, considering the nature of this matter, it may not be necessary to delve further into this aspect. To be noted, as in the instant cases on hand, the respondent Assessing Officer in his wisdom and at his discretion has chosen to offer personal hearing or otherwise given an opportunity of personal hearing to the writ petitioner. There is no disputation on this aspect of the matter. In this regard, it will suffice to say that with regard to proviso to Sub Sections (1) & (2) of Section 27, this Court has held that the expression used therein will not impede or denude the discretion of the Assessing Officer to grant personal hearing in a given case depending on the factual matrix in that case.

14. In the cases on hand, the respondent Assessing Officer in his discretion has chosen to give an opportunity of personal hearing.

15. This takes us to personal hearing aspect of the matter, which is the pivotal submission of the learned counsel for petitioner or in other words, sheet anchor submission of the writ petitioner.

16. As already mentioned supra, with regard to trajectory and the chronicle which led to passing of impugned orders post proposal given by Enforcement Wing, respondent issued a revisional notice dated 27.01.2017. The revisional notice dated 27.01.2017 provides for an opportunity of personal hearing to the writ petitioner in the following matter:

> “They are further afforded with an opportunity of being personally heard, in this connection, if they desire, within the above allowed notice time.”

17. To be noted, opportunity of personal hearing has been

afforded, at the discretion of the Assessing Officer though it is not statutorily imperative.

18. Further, as already mentioned above, the writ petitioner sent detailed objections dated 02.03.2017, but the writ petitioner did not go to the office of the respondent and avail the opportunity of personal hearing. It is very fairly submitted that it is not the case of the writ petitioner that they went over to the office of the respondent and an opportunity of personal hearing was not granted.

19. When things stood thus, after examining objections, another revisional notice (also referred to supra) signed on 29.12.2018 was issued by the respondent and this was admittedly received by the writ petitioner on 02.01.2019. For this second revisional notice also again an opportunity of personal hearing was afforded to the writ petitioner and the relevant portion of the second revisional notice reads as follows:

> "They are also given an opportunity of personal hearing within the prescribed time of 15 days or any working day before the undersigned along with evidences."

To this second revisional notice signed on 29.12.2018, writ petitioner responded by way of a detailed reply dated 09.01.2019 and as mentioned to supra, under cover of this detailed reply dated 09.01.2019, writ petitioner has sent as many as four enclosures. To be noted, in the second revisional notice, the respondent Assessing Officer has called notices to appear. Be that as it may, separate objections have been raised by the writ petitioner dealer.

20. What is of utmost significance is, even in this reply to the second revisional notice i.e., reply dated 01.09.2019, where supporting documents were enclosed, the writ petitioner dealer did not request the respondent Assessing Officer to specify the date and time for personal hearing. Here again, it is very fairly submitted that it is not the case of the writ petitioner that the writ petitioner's representative went over to the office of the respondent on any one of the days within 15 days, they waited and personal hearing was not given to them. On the contrary, what has been averred in this regard in the affidavit filed in support of the writ petitions is contained in Paragraph No.9 and the same reads as follows:

> "9. It is respectfully submitted that the person in charge of handling VAT returns is one Mr.S.Shankar Ganesh with designation as AGM - Finance. This person has been consistently appearing for all VAT related assessments besides being in charge of filing of online VAT returns. The respondent is aware of the

> same. The said Mr.S.Shankar Ganesh has also appeared and completed various assessments with the respondent, illustratively for CST assessments which had been completed upto the years 2012-13. Accordingly, the petitioners were awaiting a notice for appearance on a particular date and time after filing the evidence along with letter dated 09.01.2019 filed on 11.01.2019.”

21. Therefore, it is clear that though the writ petitioner was given an opportunity of personal hearing not once but on two occasions, the writ petitioner did not go over to the office of the respondent. On the contrary, writ petitioner now avers in the affidavits filed in support of the writ petitions that the writ petitioner was awaiting a notice for appearance on a particular date and time for filing evidence along with under cover of reply letter dated 09.01.2019. In this regard also, what is of utmost significance in the considered view and opinion of this Court is, the clincher is that the writ petitioner has not articulated in the reply dated 09.01.2019 (second revisional notice) that they are expecting the respondent Assessing Officer to specify a date and time for personal hearing. On the contrary, reply to the second revisional notice dated 09.09.2019 is completely silent about personal hearing and the opportunity of personal hearing that is being afforded to the writ petitioner for the second time.

22. Therefore, these are cases where personal hearing has not been availed by the writ petitioner though an opportunity was given not once but on two occasions. More importantly, it is not writ petitioners case that they had responded by requesting the respondent authority to specify a date and time. With regard to personal hearing, learned counsel for writ petitioner pressed into service two orders of this Court, one being an order dated 16.08.2017 made in W.P.Nos.21193 to 21195 of 2017 and the other being an order dated 21.03.2017 made in Albis Constructions Private Limited vs. Assistant Commissioner, 2017 (102) VST 131 (Mad.). In the considered view of this Court, a careful reading of these two orders reveal that they are clearly distinguishable on facts. They are not cases where opportunity of personal hearing was granted more than once. They are cases where personal hearing was afforded along with revisional notice and without waiting for objections, the authorities went on to pass revised assessment orders.

23. In the instant case, this Court notices that there is no explanation, as to why the writ petitioner did not mention in the reply to the second revisional notice (at least) for a specific date and time for personal hearing. Even if that not be so, it has not even been mentioned in both replies i.e., replies

to first revisional and second revisional notices that the writ petitioner is expecting a communication from the respondent Assessing Officer regarding personal hearing. If that had been so, that would have been a communication that the writ petitioner is expecting a communication with the date and time of personal hearing with specificity. This is not the case. Such a plea has been raised for the first time only in the affidavits filed in support of instant writ petitions i.e., plea that the writ petitioner was expecting the respondent Assessing Officer to send a communication, mentioning the date and time of personal hearing with specificity. Therefore, the aforesaid two orders are clearly distinguishable and therefore, it does not help the writ petitioner further his case as rightly pointed out by learned Revenue Counsel.

24. One another ancillary submission made by learned counsel for writ petitioner is that the respondent vide the impugned orders, with regard to sales suppression, has mentioned that the writ petitioner dealer has not produced documentary evidence and on that basis overruled the objections, whereas documentary evidence has in fact been submitted. All these turn on facts and therefore, this is a fit case to relegate the writ petitioner to alternate remedy of statutory appeal under Section 51 of TNVAT Act. There is no disputation or disagreement before this Court that alternate remedy of statutory appeal to the jurisdictional appellate Deputy Commissioner is available to the writ petitioner. As mentioned above, the statutory appeal is under Section 51 of TNVAT Act and the Appellate Authority is the jurisdictional Deputy Commissioner (herein after 'Appellate Authority' for brevity).

25. The rule of alternate remedy no doubt is a self imposed restraint by Courts exercising writ jurisdiction. In other words, rule of alternate remedy is not a rule of compulsion, but it is a rule of discretion. Be that as it may, with regard to rule of alternate remedy, one important case law of the Hon'ble Supreme Court is Dunlop India case [Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd. and ors.] reported in (1985) 1 SCC 260, relevant paragraph is Paragraph 3 and the same reads as follows:

> '3......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. This practice needs to be strongly discouraged.'

(underlining made by this Court to supply

emphasis and highlight)

26. Post Dunlop India case, in Satyawati Tandon Case [United Bank of India Vs. Satyawati Tondon and others reported in (2010) 8 SCC 110], Hon'ble Supreme Court held that when it comes to cases pertaining to tax, cess etc., rule of alternate remedy should be applied with utmost rigour.

27. This Satyawati Tandon principle was subsequently reiterated by Hon'ble Supreme Court in K.C.Mathew case [Authorized Officer, State Bank of Travancore Vs. Mathew K.C. reported in (2018) 3 SCC 85], 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)

"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)

28. From a long line of authorities, more particularly, the three celebrated judgments, which have been set out supra, it comes out clearly that the rule of alternate remedy is not a rule of compulsion, but it is a rule of discretion . Though it is not an absolute rule, the same has to be applied with utmost rigour when it comes to matters relating to tax, cess etc., In the instant case, the writ petitioner not having availed personal hearing and the contentions turning on facts, this Court is of the view that it is a fit case to relegate the writ petitioner to alternate remedy of statutory appeal.

29. This Court also makes it clear that it is well open to the Appellate Authority to provide personal hearing and to hear the writ petitioner with regard to submissions which the writ petitioner wants to make or which the writ petitioner would have made if the writ petitioner had availed the opportunities of personal hearing which were granted by the Assessing Officer. Therefore, this Court is clear in its mind that with regard to personal hearing aspect, no prejudice would be caused to the writ petitioner by relegating the writ petitioner to alternate

remedy.

30. As mentioned supra, alternate remedy is by way of an appeal to the Appellate Authority under Section 51 of TNVAT Act. A perusal of Section 51 of TNVAT Act, makes it clear that a statutory appeal under Section 51 has to be filed within a period of 30 days from the date on which the order was served on the dealer. In the instant case, this Court is informed that the impugned orders, were served on the writ petitioner/dealer on 15.03.2019 and 03.04.2019. These writ petitions have been presented before this Court on 09.04.2013 and 22.04.2019.

31. This takes us to delay condonation aspect. A perusal of first proviso to Sub Section (1) of Section 51 of TNVAT Act, makes it clear

that the Appellate Authority has powers to condone delay in filing the appeal albeit with a cap from the date on which impugned orders were served on the writ petitioners. These writ petitions were filed in this Court on 09.04.2019 and 22.04.2019, owing to which it comes out clearly that the writ petitioner is well within the cap if the time spent by the writ petitioner in these writ petitions is excluded by placing reliance on Section 14 of the Limitation Act.

32. This Court is of the considered view that time spent by the writ petitioners in these seven writ petitions can be excluded by this Court by applying principles of Section 14 of the Limitation Act. Therefore, the time spent by the writ petitioner in these writ petitions i.e., from the date of presentation of the writ petitions to the date on which certified copies of this order are made available to the writ petitioner will stand excluded for the purpose of computing limitation under Section 51 of TNVAT Act. Post exclusion of this period, with regard to whatever delay that may remain within the cap condonation of the same shall be sought before the Appellate Authority and Appellate Authority shall decide the same on its own merits and in accordance with law.

33. Obviously, it is made clear that if the writ petitioner choses to avail alternate remedy, all other conditions adumbrated in Section 51 of TNVAT Act, including conditions of predeposit would apply.

34. Owing to all that have been set out supra, instant writ petitions are dismissed albeit without expressing any opinion or view on the merits of the matter so as to ensure that an effective appeal remedy is available to the writ petitioner. In other words all questions including questions raised in the instant writ petitions irrespective of whether the same have

been dealt with in this order or not are left open. It is open to the Appellate Authority to afford an opportunity of personal hearing to the writ petitioner. Appellate Authority can still go into facts and examine all objections of the writ petitioner.

35. All seven writ petitions stand dismissed, albeit preserving the rights of the writ petitioner to file statutory appeals in the manner articulated supra in these orders. Consequently, connected miscellaneous petitions are also dismissed. No costs.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

Pns

To

The Assistant Commissioner (ST),
Adyar Assessment Circle,
46, Greenways Road,
Chennai - 600 006.

+7cc to Mr.N.Inbarajan, Advocate SR.No.69946,69947

+2cc to Special Government Pleader (Taxes) SR.No.70983, 70984

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GJII(CO)
GMY(23/09/2019)