

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :05.07.2019

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

W.P.No.12370 of 2019
and
W.M.P.No.12675 of 2019

M/s.Saravana International,
Rep.by its Proprietor Mr.C.R.Devanathan,
No.26-B, Murugan Koil Street,
A-Melamampattu,
Panruti - 607 106.

.. Petitioner

vs

The Assistant Commissioner (ST)
Panruti (Town)
Panruti - 607 106.

.. Respondent

Prayer:

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the respondent in TIN No.33264481203/2016-17 dated 04.06.2018 quash the same in view of apparent error and lack of jurisdiction.

For Petitioner : Mr.V.Sundareswaran

For Respondent : Ms.G.Dhanamadhri
Government Advocate (Taxes)

सत्यमेव जयते
O R D E R

Mr.V.Sundareswaran, learned counsel on record for writ petitioner and Ms.G.Dhanamadhri, learned Government Advocate on behalf of sole official 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. Subject matter of instant writ petition arises under the 'Tamil Nadu Value Added Tax Act, 2006' (Tamil Nadu Act 32 of 2006), which shall hereinafter be referred as 'TNVAT Act'.

4. To be noted, under TNVAT Act, there are a set of rules, which go by the name 'Tamil Nadu Value Added Tax Rules 2007', which shall hereinafter be referred as 'TNVAT Rules'.

5. In the instant case, there is no disagreement or disputation with regard to the factual position that the writ petitioner is a dealer under TNVAT Act and that the turnover of writ petitioner was over Rupees one crore in the assessment year concerned namely 2016-2017.

6. The assessment year 2016-2017, which forms subject matter of the instant writ petition shall be referred to 'said AY' for the sake of convenience and clarity.

7. It is not in dispute that the writ petitioner did not file report from the Auditor being Auditor's statement in the prescribed form. To be noted, prescribed form is Form 'WW'. To be noted, under Section 63A of TNVAT Act and Rule 16A of TNVAT Rules, there is a statutory duty / statutory obligation cast on the writ petitioner dealer to file and submit report of Auditor in Form 'WW' on or before end of the Calendar year qua said AY. This in effect means that the writ petitioner dealer ought to have filed Form 'WW' being Auditor's statement in the prescribed form on or before 31.12.2017 in the instant case. There is also no disputation or disagreement that the writ petitioner dealer did not do this.

8. Under such circumstances, the respondent issued a notice dated 01.02.2018 captioned 'NOTICE FOR NON RECEIPT OF FORM 'WW' bearing reference TIN:33264481203/2016-17, calling upon the writ petitioner to send objections if any and also file Form 'WW'. To be noted, in this notice dated 01.02.2018, the respondent had mentioned that the sales turnover of the writ petitioner dealer as per the web report is little over 1.07 crores and the respondent had also made it clear that the respondent intends to add 50% of this turnover namely little over 53.54 lakhs for non submission of Form 'WW'. Though this notice is not happily worded, it is clear that the respondent has done two things under this notice dated 01.02.2018. One is the respondent has called upon the writ petitioner dealer to file Form 'WW' in the prescribed form in accordance with Section 63A of TNVAT Act and Rule 16 of TNVAT Rules. For the purpose of clarity, this Court deems it appropriate to extract entire Section 63A of TNVAT Act and 16A of TNVAT Rules and the same read as follows:

'63-A. Accounts to be audited in certain cases.-

(1) Every registered dealer whose total turnover including zero-rate sale and sale in the course of inter-State trade or commerce as specified in Section 3 of the Central Sales Tax Act, 1956(Central Act 74 of

1956) in a year, exceeds one crore rupees, shall get his accounts in respect of that year, audited by an Accountant and submit a report of such audit in the prescribed Form, duly signed and verified by the Accountant, to the assessing authority, within such period as may be prescribed.

Explanation.-For the purpose of this section "Accountant" means, a chartered accountant as defined in the Chartered Accountants Act, 1949 (Central Act 38 of 1949) or a cost accountant as defined in the Cost and Works Accountants Act, 1959 (Central Act 23 of 1959)

(2) If such registered dealer fails to get his accounts audited and submit a report of such audit within the prescribed period, as required in sub-section(1), the assessing authority may, after giving a reasonable opportunity of being heard, direct such registered dealer to pay by way of penalty of sum of rupees ten thousand, in addition to any tax payable, in respect of the said period:

Provided that, this section shall not apply to the department of Central and State Governments, local authorities, the railway administration as defined under the Railways Act, 1989 (Central Act 24 of 1989), the Tamil Nadu State Road Transport Corporations and similar such registered dealers, as may be notified by the Government.]

16-A. Procedure for filing Audit Report-(1) Every registered dealer liable to get his account audited as per sub-section(1) of Section 63-A shall furnish the [audit report in electronic Form WW within nine months from the end of the [financial year].

[Provided that the audit report in Form WW to be furnished under this sub-rule, by the registered dealer having his principal place of business in the revenue districts of Chennai, Kancheepuram, Thiruvallur, Cuddalore, Thoothukudi, or Thirunelveli, for the financial year 2014-2015 on or before 31st December 2015, may be furnished on or before the 31st January 2016.]

(2) The notice for levy of penalty will be issued in Form-RR.]'

9. The second thing which respondent has done vide this notice dated 01.02.2018 is that the respondent has called upon

the writ petitioner dealer to submit Form 'WW' albeit with a delay as mentioned supra, but writ petitioner had not submitted Auditor's statement in the prescribed form.

10. Admittedly, writ petitioner dealer did not send a reply. Not only the writ petitioner did not send reply, writ petitioner dealer did not respond.

11. Notwithstanding the position that the aforesaid communication dated 01.02.2018 from the writ petitioner dealer did not evoke any response, the respondent sent one more communication to the writ petitioner dealer being communication dated 12.03.2018 bearing reference TIN:33264481203/2016-17 captioned 'PERSONAL HEARING NOTICE'.

12. In this 12.03.2018 communication, respondent has clearly mentioned that this communication is in continuation of earlier communication dated 01.02.2018 and it had also been made clear that best judgment assessment is intended to be adopted. In other words, it has been made clear vide 01.02.2018 notice (though captioned 'NOTICE FOR NON RECEIPT OF FORM 'WW') that respondent intended to embark upon the exercise of best judgment assessment inter-alia under Section 22(4) of TNVAT Act. Not only has it been made clear that the respondent is going to embark upon the exercise of assessment by adopting best judgment method under Section 22(4) of TNVAT Act, but the proposal to add 50% of turnover, which has been taken out from website has also been communicated to the writ petitioner, but the writ petitioner neither responded nor participated in the personal hearing.

13. This is articulated in the impugned order and the relevant paragraph in the impugned order reads as follows:

'A notice was issued to the dealer, which was served on 09-02-2018 and a personal hearing notice was served to the dealer on 26-03-2018 through RPAD. But the dealer has not filed form WW to this office till date. Hence the monthly returns filed by the dealers are rejected as incorrect and incomplete and assess the dealer U/s 22(4) of the TNVAT' 2006.'

14. In the aforesaid undisputed backdrop, this Court heard out learned counsel for writ petitioner and Revenue counsel.

15. Learned counsel for writ petitioner, drawing the attention of this Court to an order made by a Hon'ble Division Bench in Tvl.Nithra Furniture P.Ltd., rep.by its Managing Director vs. The Assistant Commissioner (CT), Chrompet Assessment Circle, Chennai being order dated 11.08.2015 in W.A.Nos.1148 & 1149 of 2015 ['Tvl.Nithra Furniture case' for the

sake of brevity], and submitted that non furnishing of Form 'WW' cannot become a ground to add 50% under best judgment method. It was also pointed out that in that case, Hon'ble Division Bench had directed assessment to be done.

16. This Court has carefully perused the Hon'ble Division Bench judgment and also heard learned Revenue counsel. Learned Revenue counsel drawing the attention of this Court to paragraphs 5 and 6 of the judgment of Hon'ble Division Bench, pointed out that 'Tvl.Nithra Furniture case' was a case, where the best judgment assessment order was not the lone issue, but rejection of request for passing a revised assessment order being negatived was dovetailed with the same.

17. In paragraph 6, Hon'ble Division Bench had categorically held that the Assessing Officer is justified in passing an assessment by resorting to best judgment assessment under Section 22(4), when the respondent does not respond to notices but what was faulted was the rejection of request for further revision.

18. In response, it was pointed out by learned Revenue counsel that adequate opportunity had been given to the writ petitioner by way of issuing aforesaid notices dated 01.02.2018 and 12.03.2018, which have been alluded to supra and therefore, even according to Nithra Furniture Principle, respondent resorting to best judgment method cannot be found fault with.

19. There is no difficulty in accepting the submission that adequate opportunity had been given to the writ petitioner.

20. This Court also notices that Hon'ble Supreme Court in Commissioner of Sales Tax, Madhya Pradesh Vs. H.M.Esufali reported in (1973) 2 SCC 137 ['H.M.Esufali principle' for the sake of brevity] equivalent being 33 STC 42, had held that in best judgment assessment methods, some amount of approximation is inevitable. Hon'ble Supreme Court has also held that as long as the estimate made by the Assessing Officer is not arbitrary, the same cannot be questioned.

21. In the instant case, unlike 'Tvl.Nithra Furniture case', best judgment assessment was not revisited solely because of Form 'WW' issue. This becomes clear from the personal hearing notice issued by the respondent dated 12.03.2018 captioned 'PERSONAL HEARING NOTICE'. A perusal of this notice reveals that the respondent has asked for atleast three documents with clarity and specificity. For the purpose of ease of reference, this Court deems it appropriate to extract the contents of this letter dated 12.03.2018, which read as follows:

'In continuation of this office best judgment assessment Notice dated 01.02.2018. You have not submitted the form WW to this office so far. Hence you are requested to appear before me along with the following documents.

1) ITC Adjustment Register as per Rule 6(9) of the TNVAT Rule 2007.

2) Stock Register for commodity wise under section 63(1) of the TNVAT Act 2006.

3) Transport documents under Section 17 of the TNVAT Act 2006.

2. You are therefore afforded a personal hearing to appear before the undersign to file your objections/explanation on 27.03.2018, failing which it will be construed that you have got no objections on the proposed levy of tax and penalty and orders will be passed accordingly without further notice.' [Underlining made by this Court to supply emphasis and highlight.]

22. Therefore, in the instant case, the respondent has asked for at least three distinct / specific documents and the same has not been furnished by the writ petitioner dealer. It is not a case of mere non submission of Form 'WW'. Therefore, it comes out clearly that even while making the proposal, vide notice dated 01.02.2018, the respondent has made some approximation and has taken into account whatever material was available before him. Writ petitioner has not produced any contra material thereafter though the respondent had specifically asked for three different sets of documents, which were not produced.

23. Therefore, this Court is inclined to accept the submission that the instant case is distinguishable on facts from 'Tvl.Nithra Furniture case'.

24. Now that the instant case is distinguishable on facts from 'Tvl.Nithra Furniture case', it takes us back to the 'H.M.Esufali principle'. 'H.M.Esufali principle', in turn flows from an earlier judgment of Hon'ble Supreme Court in the case of The State of Madras Vs. S.G.Jayaraj Nadar and Sons reported in (1972) 3 Supreme Court Cases 300, which is equivalent to 28 STC 700 [hereinafter 'S.G.Jayaraj Nadar principle' for brevity]

25. Most relevant part of S.G.Jayaraj Nadar principle is contained in paragraph 4 and the relevant portion of paragraph 4 reads as follows:

'4.... It is well known that the best judgment assessment has to be on an estimate which the

assessing authority has to make not capriciously but on settled and recognised principles of justice. An element of guess work is bound to be present in best judgment assessment but it must have a reasonable nexus, to the available material and the circumstances of each case. (See The State of Kerala Vs. C.Velukutty). Where account books are accepted along with other records there can be no ground for making a best judgment assessment.'

Most relevant part of H.M.Esufali principle is contained in paragraph 8 and the most relevant portion of paragraph 8 reads as follows:

'8..... In such a situation, it was not possible for the Sales Tax Officer to find out precisely the turnover suppressed. He could only make an estimate of the suppressed turnover on the basis of the material before him. So long as the estimate made by him is not arbitrary and has nexus with facts discovered, the same cannot be questioned. In the very nature of things the estimate made may be an over-estimate or an underestimate. But that is no ground for interfering with his 'best-judgment'. It is true that the basis adopted by the officer should be relevant to the estimate made. The High Court was wrong in assuming that the assessing authority must have material before it to prove the exact turnover suppressed. If that is true, there is no question of 'best-judgment' assessment. The assessee cannot be permitted to take advantage of his own illegal acts. It was his duty to place all facts truthfully before the assessing authority. If he fails to do his duty, he cannot be allowed to call upon the assessing authority to prove conclusively what turnover, he had suppressed. That fact must be within his personal knowledge. Hence the burden of proving that fact is on him. No circumstance has been placed before the assessing authority to show that the assessee's dealings during September 1, 1950 to September 19, 1960, outside his accounts were due to some exceptional circumstance or that they were proportionately more than his dealings outside his accounts, during the remaining periods. The assessing authority could not have been in possession of any correct measure to find out the escaped turnover during the periods November 1, 1959 to August 31, 1960

and September 20, 1960 to October 20, 1960. The task of the assessing authority in finding out the escaped turnover was by no means easy. In estimating any escaped turnover, it is inevitable that there is some guess-work. The assessing authority while making the 'best judgment assessment no doubt should arrive at its conclusion without any bias and on rational basis. That authority should not be vindictive or capricious. If the estimate made by the assessing authority is a bona fide estimate and is based on a rational basis, the fact that there is no good proof in support of that estimate is immaterial. Prima facie, the assessing authority is the best judge of the situation. It is his 'best-judgment' and not of any one else's. The High Court could not substitute its 'best-judgment' for that of the assessing authority. In the case of 'best-judgment' assessments, the courts will have to first see whether the accounts maintained by the assessee were rightly rejected as unreliable. If they come to the conclusion that they were rightly rejected, the next question that arises for consideration is whether the basis adopted in estimating the turnover has a reasonable nexus with the estimate made. If the basis adopted is held to be a relevant basis even though the courts may think that it is not the most appropriate basis, the estimate made by the assessing authority cannot be disturbed. In the present case, there is no dispute that the assessee's accounts were rightly discarded. We do not agree with the High Court that it is the duty of the assessing authority to adduce proof in support of its estimate. The basis adopted, by the Sales Tax Officer was a relevant one whether it was the most appropriate or not. Hence the High Court was not justified in interfering with the same. '

26. In the instant case, it is nobody's case that while making best judgment assessment, it has been made arbitrarily. Respondent had added 50% of the returns taken out from the web report, but that is based on absence of documents, which were sought for under 12.03.2018 notice. In the absence of documents, the respondent has no option other than making approximation.

27. Therefore, at the risk of repetition, it is made clear that this is not a case of non production of Form 'WW' alone. It

is a case of not producing specific Registers and documents, which were sought for with clarity and specificity by the respondent.

28. Therefore, this Court is of the considered view that the aforesaid two notices dated 01.02.2018 and 12.03.2018 should be read along with the impugned order. Ideally, the two notices and the contents of the same should be read as an integral part and parcel of the impugned order.

29. If the two notices are read as an integral part and parcel of the impugned order, the position that emerges clearly is that best judgment assessment under Section 22(4) of TNVAT Act has been resorted to by the respondent as the same became inevitable. In this regard, it is relevant to notice that even in 'Tvl.Nithra Furniture case' (which has been held to be distinguishable on facts), the Hon'ble Division Bench had very clearly held that the Assessing Officer is fully justified in passing assessment in best judgment method, when the assessee fails to respond to show cause notices. This is articulated in paragraph 6 of the judgment of the Hon'ble Division Bench which reads as follows:

'6.The fact that the appellant failed to respond to show cause notices dated 12.11.2014 and 10.02.2015 may justify passing of the best of judgment assessment orders dated 20.03.2015 and 23.03.2015.'

30. The reason, which has impelled this Court to read the contents of the aforesaid two notices namely notices dated 01.02.2018 and 12.03.2018 as an integral part and parcel of the impugned order is, there is a clear reference to these notices in impugned order, giving even the dates of service with specificity. This is articulated in the paragraph in the impugned order, which has been extracted and reproduced supra. This shows that notice for non receipt of Form 'WW' was issued to the dealer, which was served on the writ petitioner on 09.02.2018 and the 12.03.2018 communication was served on the writ petitioner on 26.03.2018, both by registered post with acknowledgment due. To be noted, in any event there is no dispute in this regard before this Court. In other words, it is the admitted position that these two notices were duly served on the writ petitioner. There is also no dispute that these two notices did not evoke any response or reply from the writ petitioner as alluded to supra.

31. Therefore, applying the 'H.M.Esufali principle' and 'S.G.Jayaraj Nadar principle' laid down by Hon'ble Supreme Court, this Court is left with the considered view that this is not a fit case calling for interference qua impugned order.

Before parting with the case, it is also necessary to notice that there is a statutory appeal available against the impugned order dated 04.06.2018.

32. It is open to the writ petitioner to avail this statutory alternate remedy of filing a statutory appeal under Section 51 of TNVAT Act.

33. With regard to alternate remedy and exercise of writ jurisdiction on the teeth of alternate remedy, from a long line of authorities of Hon'ble Supreme Court, it can be safely deduced that alternate remedy rule qua exercise of discretionary writ jurisdiction on the teeth of alternate remedy is a self imposed restraint which is not a rule of compulsion, but is a rule of discretion. In other words, it is not an absolute rule. Though it is not an absolute rule, Hon'ble Supreme Court in Satyawati Tandon Case [United Bank of India Vs. Satyawati Tandon 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 Tandon principle was reiterated in latter of the two i.e., K.C.Mathew. In Satyawati Tandon 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 Tandon 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 is paragraph 10 and the same reads as follows:

'10. In Satyawati Tandon 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.'

34. Therefore, this being a matter arising under fiscal law pertaining to tax and cess, this Court respectfully follows the ratio of Hon'ble Supreme Court that alternate remedy rule has to be applied with utmost rigour when it comes to fiscal statutes notwithstanding it being a rule of discretion. If the writ petitioner chooses to avail alternate remedy by filing an appeal, which this Court is informed lies to the jurisdictional Appellate Deputy Commissioner under Section 51 of TNVAT Act, it is open to the writ petitioner to seek condonation of delay in filing alternate remedy and also seek exclusion of time spent in the instant writ petition inter-alia by relying on Section 14 of Limitation Act. If the writ petitioner chooses to avail the alternate remedy and also makes such prayers for condonation and exclusion under Section 14 of Limitation Act, such prayers shall be dealt with and decided by the Appellate authority on their own merits.

35. Most importantly, it has become necessary for this Court to deal with certain aspects of the matter on merits. Therefore, if the writ petitioner chooses to avail alternate remedy, it will be open to the appellate authority to deal with the matter afresh, untrammelled by observations made by this Court in this order as such observations made by this Court are for the limited purpose of disposal of instant writ petition. This is owing to the trajectory of the hearing today.

36. In other words, this Court is convinced that this is a fit case to relegate writ petitioner to the alternate remedy of a statutory appeal under Section 51. One more aspect with regard to the writ petitioner choosing to avail alternate remedy is, the appellate authority no doubt can still look into facts and therefore, it will be open to the appellate authority to look at Form 'WW' and other documents, which have been sought for by the respondent and decide the appeal on its own merits.

37. At this juncture, learned counsel for writ petitioner makes a prayer for return of the original impugned order, for availing alternate remedy, Registry is directed to return the original impugned order to learned counsel on record for writ petitioner under due acknowledgment forthwith.

38. All pre-conditions under Section 51 would operate.

39. This writ petition is dismissed albeit preserving the rights of the writ petitioner to avail alternate remedy in the aforesaid manner. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

kak
To

The Assistant Commissioner(ST)
Panruti(Town),Panruti - 607 106.

+1cc to Mr.V.Sundareswaran, Advocate, S.R.No.57119
+1cc to the Government Pleader,S.R.No. 57132

W.P.No.12370 of 2019
and
W.M.P.No.12675 of 2019

KS (CO)
CS/03/09/2019