IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED :18.06.2019
CORAM
THE HON'BLE MR.JUSTICE M.SUNDAR
W.P.No.16120 of 2019

M/s.Amman Agencies
Represented by its Proprietor
C.Velusamy,
No.118/1, Mariamman Koil Street,
Anumanthai, Tindivanam T.K.
Villupuram District - 604 303
Tamil Nadu State. ..Petitioner

vs

The Appellate Deputy Commissioner(CT),
Commercial Taxes Department,
Cuddalore,
Tamil Nadu. ..Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records on the files of the Respondent herein in proceedings No.Rc.A/158/2019 dated 08.04.2019 for the assessment year 2011-12, quashing the same and direct the respondent to admit the appeal dated 18.03.2019.

For Petitioner : Mr.P.Suresh

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

O R D E R

Mr.P.Suresh, learned counsel on record, for the sole writ petitioner is before this Court. Ms.G.Dhanamadhri, learned Government Advocate (Taxes) accepts notice on behalf of the sole respondent. To be noted, the sole respondent is an official respondent.

2. This matter is listed under the caption 'FOR ADMISSION' in the Motion List. However, with consent of learned counsel on both sides, main writ petition itself is taken up, heard out and is being disposed of.

3. Short facts shorn of elaboration, details and particulars or in other words, short facts imperative for appreciating this order are as follows:

a) The writ petitioner is a dealer, who has been registered under the 'Tamil Nadu Value Added Tax Act, 2006' ['TNVAT Act' for the sake of brevity]. However, the writ petitioner had not filed monthly returns pursuant to the obligation cast on the writ petitioner. As the writ petitioner was not filing monthly returns under Section 21 of the TNVAT Act, there was no deemed assessment under Section 22(2) of TNVAT Act. Under such circumstances, the Assessing officer, being the State Tax officer of Tindivanam Assessment Circle, adopted the best judgment method and made an assessment on 31.12.2013, imposing a tax of Rs.6,79,955/- and penalty of Rs.5,09,967/- on the writ petitioner. To be noted, this best judgment assessment is under Section 22(4) of the TNVAT Act.

b) There is no disputation before this Court that this order passed by the Assessing Authority i.e., State Tax officer was duly served on the writ petitioner immediately thereafter i.e., sometime in the beginning of January 2014.

c) Thereafter, more than 5 years later, writ petitioner preferred an appeal to the Appellate Deputy Commissioner (CT), Cuddalore, who is the sole respondent before this Court in the instant writ petition. This appeal was received in the office of the Appellate Authority i.e., respondent on 20.03.2019. Thereafter, the Appellate Authority summoned the writ petitioner on 29.03.2019 by sending summons dated 20.03.2019. Ultimately, the writ petitioner appeared before the Appellate Authority on 08.04.2019.

d) It is not in dispute that while preferring the aforesaid statutory appeal under TNVAT Act, the writ petitioner had enclosed a photo copy of the Assessment order made by State Tax Officer on 31.12.2013. In other words, the original impugned order was not enclosed.

e) The Appellate Authority, after giving opportunity of being heard to the writ petitioner i.e., on 08.04.2019, passed an order on the same day i.e., 08.04.2019 bearing 'Rc.A/158/2019' ['Impugned order' for the sake of brevity]. Vide the impugned order, the Appellate Authority, who is sole respondent in instant writ petition, before this Court rejected the writ petitioner's statutory appeal on two grounds. One ground is that the writ petitioner has filed the appeal only with a photo copy of the original order under appeal i.e., original order that is being assailed in

Appeal and had not enclosed the original assessment order. The second ground is more important and that ground is that the delay in filing the appeal that was sought to be condoned is beyond the scope of the respondent.

f) Assailing the aforesaid order i.e., impugned order, instant writ petition has been filed.

4. Learned counsel for writ petitioner, brought to the notice of this Court an order made by a Hon'ble Single Judge of this Court dated 23.04.2015 made in W.P.No.12054 of 2015, to say that in a similar matter, this Court has directed the Appellate Authority to entertain the appeal beyond the permissible limitation cap i.e., permissible condonation period.

5. Learned Revenue counsel, who had accepted notice, brought to the notice of this Court that the aforesaid order made by a Hon'ble Single Judge of this Court has been reversed by a Hon'ble Division Bench of this Court by order dated 10.07.2017 made in W.A.No.952 of 2015. Therefore, the order of the Hon'ble Single Judge referred to by the writ petitioner cannot be looked into.

6. Be that as it may, relevant portion of the order of Hon'ble Division Bench is contained in Paragraphs 4, 5 and 6, which read as follows:

> '4. In a decision in M/s.Falcon Types Ltd., v. The Customs, Excise & Service Tax Appellate Tribunal, Chennai [C.M.A.No.1161 of 2016, dated 15.06.2016], a Hon'ble Division Bench of this Court, following the decisions in Indian Coffee Worker's Co-op. Society Ltd., v. Commissioner of Commercial Taxes reported in 2002 (I) CTC 406, Singh Enterprises v. Commissioner of Central Excise, Jamshedpur reported in 2008 (221) E.L.T. 163 (SC), Commissioner of Customs & Central Excise v. Hongo India (P) Ltd., reported in 2009 (236) ELT 417 (SC), Gopinath v. CESTAT, Chennai reported in 2013 (32) STR 172 (Mad.), Albert v. Commissioner of Service Tax, Chennai reported in 2015 (37) STR 187 (Mad.) and Saradha Travels v. Commissioner of Service Tax reported in 2015 (3) STR 433 (Mad.), held that the above decisions make it abundently clear that the appellate authority, has no powers to condone the delay, beyond the extendable period.
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> 5. Following the above decisions that the appellate authority has no power to condone the delay, beyond the extendable period, this Court is inclined to set aside the order of the Writ Court, condoning the delay, by setting aside the order of the Appellate

Assistant Commissioner.

6. Hence, the Writ Appeal is allowed. No costs. Consequently, connected Miscellaneous Petition is also closed.'

7. Though this can be the end of the matter, learned Revenue counsel pointed out that whenever a cap has been provided with regard to condonation of delay, the authorities do not have power to condone delay beyond the cap.

8. Before this Court adverts to that submission, it may be necessary to take a look at the provision which is of relevance in the instant case. Relevant provision is First Proviso to Section 51(1) of TNVAT Act and the same reads as follows:

> '51 (1) Any person objecting to an order passed by the appropriate authority under section 22,section 24, section 26, sub-sections (1), (2), (3) and (4) of section 27, section 28, section 29, section34 or sub-section (2) of section 40 other than an order passed by an Assistant Commissioner(Assessment) may, within a period of thirty days from the date on which the order was served on him, in the manner prescribed, appeal to the Appellate Assistant Commissioner having jurisdiction:
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> Provided that the Appellate Assistant Commissioner may, within a further period of thirty days admit an appeal presented after the expiration of the first mentioned period of thirty days if he is satisfied that the appellant had sufficient cause for not presenting the appeal within the first mentioned period:

9. A perusal of the aforesaid provision reveals that the period of limitation prescribed for preferring an appeal is 30 days and the Appellate Authority has power to admit an appeal, presented after the expiry of the period of 30 days, if sufficient cause is shown subject to the rider that it is within a further period of 30 days. In other words, in very simple terms, the time period prescribed for the appeal is 30 days and the Appellate Authority is vested with power to condone delay, but with rider that the delay should not be more than 30 days. In simpler terms, the maximum time limit available for an assessee to prefer an appeal under Section 51 of TNVAT Act is 30 + 30 = 60days as there is a cap qua delay condonation period.

10. Having extracted the relevant provision, this Court now adverts to two judgments of Hon'ble Supreme Court, which were pressed into service by learned Revenue counsel. The first is a case law being Singh Enterprises Vs. Commissioner of Central Excise, Jamshedpur and others, reported in (2008) 3 SCC 70. Most

relevant paragraph is paragraph 8 and the same reads as follows:

'The Commissioner of Central Excise (Appeals) as also the Tribunal being creatures of statute are not vested with jurisdiction to condone the delay beyond the permissible period provided under the statute. The period up to which the prayer for condonation can be accepted is statutorily provided. It was submitted that the logic of Section 5 of the Limitation Act, 1963 (in short “the Limitation Act”) can be availed for condonation of delay. The first proviso to Section 35 makes the position clear that the appeal has to be preferred within three months from the date of communication to him of the decision or order. However, if the Commissioner is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of 60 days, he can allow it to be presented within a further period of 30 days. In other words, this clearly shows that the appeal has to be filed within 60 days but in terms of the proviso further 30 days' time can be granted by the appellate authority to entertain the appeal. The proviso to sub-section (1) of Section 35 makes the position crystal clear that the appellate authority has no power to allow the appeal to be presented beyond the period of 30 days. The language used makes the position clear that the legislature intended the appellate authority to entertain the appeal by condoning delay only up to 30 days after the expiry of 60 days which is the normal period for preferring appeal. Therefore, there is complete exclusion of Section 5 of the Limitation Act. The Commissioner and the High Court were therefore justified in holding that there was no power to condone the delay after the expiry of 30 days' period.'

(Underlining made by me to supply emphasis and to highlight)

11. The other case law referred to by learned Revenue counsel is Commissioner of Customs and Central Excise Vs. Hongo India Private Limited and another, reported in (2009) 5 SCC 791.

12. To be noted, Hongo India Private Limited had been rendered by the Larger Bench i.e., by a three member Bench of Hon'ble Supreme Court of India.

13. Hongo India Private Limited turns on Section 35H of Central Excise Act.

14. Section 35H of the Central Excise Act provides for a reference to the High Court within 180 days from the date of the

order of the Appellate Tribunal.

15. Considering the importance and significance, this Court deems it appropriate to extract 35H of Central Excise Act, which reads as follows:

> '35H Application to High Court. —(1) The Commissioner of Central Excise or the other party may, within one hundred and eighty days of the date upon which he is served with notice of an order under Section 35-C passed before the 1st day of July, 2003(not being an order relating, among other things, to the determination of any question having a relation to the rate of duty of excise or to the value of goods for purposes of assessment), by application in the prescribed form, accompanied, where the application is made by the other party, by a fee of two hundred rupees, apply to the High Court to direct the Appellate Tribunal to refer to the High Court any question of law arising from such order of the Tribunal.'

16. The question before the Larger Bench of Hon'ble Supreme Court of India in the case of Hongo India Private Limited was whether a reference can be made beyond 180 days. Answering this question in the negative, Hon'ble Supreme Court held that the law is well settled that in cases of this nature, the period of limitation is absolute i.e., unextendable by a Court under Section 5 of the Limitation Act. Most relevant part of the conclusion is contained in Paragraph 36 and the same reads as follows:

> '36. The scheme of the Central Excise Act, 1944 supports the conclusion that the time-limit prescribed under Section 35-H(1) to make a reference to the High Court is absolute and unextendable by a court under Section 5 of the Limitation Act. It is well-settled law that it is the duty of the court to respect the legislative intent and by giving liberal interpretation, limitation cannot be extended by invoking the provisions of Section 5 of the Limitation Act.'

17. To be noted, in Section 35-H, there is no provision for condonation of delay at all. Even in such cases i.e., cases where there is neither provision for delay condonation nor cap, the Hon'ble Supreme Court has held that the period of limitation prescribed is absolute and cannot extended. Be that as it may, in Singh Enterprises case, Hon'ble Supreme Court dealt with a case, where there is a provision of condonation of delay, but subject to a cap of 30 days. Dealing with this cap [paragraph 8, which has been extracted and reproduced supra], Hon'ble Supreme Court held that in cases, where such condonation of delay is provided, there is a complete exclusion of Section 5 of the

Limitation Act. Therefore factual matrix in Singh Enterprises and case on hand mirror each other.

18. A perusal of Singh Enterprises case and Hongo India principles, brings to light the indisputable position that this Court cannot extend time by invoking provisions of Section 5 of the Limitation Act in cases of this nature.

19. In the light of the narrative and discussions thus far, writ petition is devoid of merits and the prayer of the writ petitioner cannot be acceded to. Writ petition fails and the same is dismissed. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

The Appellate Deputy Commissioner(CT),
Commercial Taxes Department,
Cuddalore,
Tamil Nadu.

+1cc to Special Government Pleader(Taxes) sr.50822

W.P.No.16120 of 2019

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