IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATE: 06.06.2019
CORAM
THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.No.15298 of 2019
&
W.M.P.No.15288 of 2019

M/s.Stromtek Automation Pvt. Ltd.,
Rep. By its Managing Director
Mr.K.S.Raghunathan
S/o.K.S.Srinivasa Rahavan
aged about 72 years
SIDCO Electronic Complex
Block-I, Unit-11-13
Thiru-Vi-Ka Industrial Estate
Guindy, Chennai - 600 032 .. Petitioner

Vs.

1.The Additional Commissioner
Office of the Commissioner of GST & C.Ex.
South Commissionerate
692, M.H.U. Complex, Nandanam
Chennai - 600 035

2.The Central Board of Excise & Customs
Constituted under the Central Board of Revenue Act, 1963
Department of Revenue
North Block, New Delhi- 110 001 .. Respondents

Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari calling for the records in Order in Original No.19/2018-ADC in C.No.V/15/40/2018-CS Adj dated 28.02.2019 on the file of the 1st respondent and quash the same.

For Petitioner : Mr.R.G.Muthukumaran
for Mr.G.Baskar

For Respondent : Mr.V.Sundaraswaran
Senior Panel Counsel

O R D E R

Mr.R.G.Muthukumaran, learned counsel representing the counsel on record for the sole petitioner is before this Court. Mr.V.Sundareswaran, learned senior panel counsel for Goods and Services Tax (GST), accepts notice on behalf of both the respondents.

2.By consent of both learned counsel, the main writ petition itself is taken up for final disposal, heard out and is being disposed of.

3.Short facts necessary for disposal of this writ petition are that the writ petitioner has manufactured and cleared 'Programmed Logic Control' (PLC) Systems, excisable goods chargeable to duty and classifiable under 8537.00 of the schedule to 'Central Excise Tariff Act, 1985' ('CE Tariff Act' for brevity). It is the case of the Revenue that this has been done without Central Excise registration i.e., without payment of Central Excise duty and without following the provisions of 'Central Excise Rules' ('CE Rules' for brevity). Therefore, a show-cause notice dated 23.09.1998 was issued to the writ petitioner.

4. After giving an adumbration of various rules of CE Rules, inter-alia Rules 174, 173B, 9(1) read with Rules 173 F, 52A, 53, 173 B and 173 G and stating that the writ petitioner is guilty of contravention of the same, it was also alleged by the Revenue that the petitioner has wilfully suppressed the manufacture and removal of PLC Systems. It is the pointed case of the Revenue that this has been done with the intention to evade payment of Central Excise duty.

5. In response to the aforesaid show-cause notice, writ petitioner sent written replies on various dates including 28.01.1999, 08.03.1999, 08.04.1999, 26.08.1999, 11.02.2003, 05.05.2003 and 16.08.2003. In the replies to the 'show-cause notice' ('SCN' for brevity), writ petitioner inter-alia submitted that the Additional Commissioner has no jurisdiction to adjudicate the matter, the goods in question are classified under 19.32 as per relevant trade notice and it was also contended that under the proviso to Section 11A of 'Central Excise Act, 1944' ('CE Act' for brevity), the extended period cannot be invoked, as according to the petitioner, the Department was aware of the activities of the petitioner.

6. In the aforesaid backdrop of SCN and replies to the SCN adjudication proceeded. Adjudication proceedings culminated in

an order dated 31.08.2003 made by the first respondent. This was assailed by the writ petitioner by way of an earlier writ petition being W.P.No.31200 of 2003, which came to be disposed of by this Hon'ble Court on 10.07.2017.

7. Considering the nature of submissions made and the grounds on which the instant writ petition is predicated, this Court deems it appropriate to extract the entire order dated 10.07.2017 made by another Hon'ble Judge of this Court in W.P.No.31200 of 2003. The same reads as follows:

> 'Heard Thiru.M.P.Senthil Kumar, learned counsel for the petitioner and Thiru.A.P.Srinivas, Senior Central Government Standing Counsel, for the respondents.
>
> 2. The petitioner has filed this Writ Petition challenging the order passed by the respondent dated 31.08.2003 by which, the respondent confirmed the payment of duty of Rs.13,84,945/- under the provisions to Sub section 1 Section 11(A) of the Central Excise Act, 1944, apart from imposing the penalty under Section 11AC of the Central Excise Act, 1944 and Rule 173Q(1) of the Central Excise Rules, 1944.
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> 3. The petitioner has raised two grounds for challenging the impugned order. Firstly, the ground of gross violation of principles of natural justice and secondly, the ground of lack of jurisdiction. The learned counsel for the petitioner would point out that the petitioner had appeared on 8.9.2003 for personal hearing and submitted his written submissions. Therefore, the respondent could not have passed the impugned order on 31.8.2003. The second aspect is with regard to jurisdiction. It is submitted that after 01.10.2003, the jurisdiction of the Assessing Officer had been transferred to the Joint Commissioner and therefore, the respondent had no jurisdiction to pass the impugned order.
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> 4. On the first contention, this Court has carefully perused the impugned order. In paragraph 9, it is seen that the respondent has recorded as if the petitioner had failed to appear for the personal hearing on 18.9.2003 and therefore, the authority was constrained to decide the case based on the written submissions. The case of the petitioner is that he appeared before the authority in August 2003 and submitted written submissions and the personal hearing was adjourned to September 2003 and even assuming that the personal hearing was held on 18.09.2003, the impugned order could not have been passed on 31.08.2003. There is no explanation for this gross error committed by the authority, as no counter affidavit has been filed by the respondent. This Court

is satisfied that the impugned order has been passed in violation of principles of natural justice. Since this Court is convinced that the impugned order is to b set aside on the above ground, the other issue regarding jurisdiction is left out. Accordingly, the Writ Petition is allowed and the impugned order is left open. The matter is remanded back to the authority concerned to take a fresh decision in the matter, after affording reasonable opportunity to the petitioner. No costs. Consequently, W.P.M.P.No.37984 of 2003 is closed.

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

8. Pursuant to the aforesaid order, post remand by this Hon'ble Court, the matter was taken up by the first respondent. First respondent adjudicated upon the matter afresh and passed an order dated 28.02.2019 bearing reference C.S/C.No.V/15/40/2018-CS Adj (hereinafter 'impugned order' for brevity), which has now been called in question.

9. Learned counsel for writ petitioner, submits that the impugned order is being assailed on two main grounds and they are:

a) Lack of jurisdiction on the part of first respondent who passed the same; and

b) Violation of 'natural justice principles' ('NJP' for brevity).

10. This Court embarks upon the exercise of examining both these grounds.

11. With regard to lack of jurisdiction on the part of first respondent, who passed the impugned order, learned counsel for petitioner drew the attention of this Court to a Circular dated 01.10.2003 being Circular No.752/68/2003 issued by the Central Board of Excise and Customs, New Delhi, i.e., second respondent before this Court. Taking this Court through the said circular, learned counsel drew the attention of this Court to Paragraph 2.1 and Sub-paragraph A of the said circular, which read as follows:

'2.1. Adjudication of confiscation and penalty has to be done by Officers specified in Section 33 of the Central Excise Act, 1944. Central Excise Officers have the power to determine duty short paid or not paid, erroneously refunded under Section 11A of the said Act. For this purpose, the Board has decided that the powers of adjudication and determination of duty shall be exercised, based on monetary limit (duty involved in a case) as under:-

A. All cases involving fraud, collusion, any wilful mis-statement, suppression of facts or contravention of Central Excise Act/Rules with an intent to evade duty and /or where extended period has been involved in show cause notices (including classification and valuation of excisable goods and CENVAT credit cases) will be adjudicated as follows:

Central Excise Officers	Powers of Adjudication (Amount of duty involved)
Deputy/Assistant Commissioners	Upto Rs. 5 lakhs
Joint Commissioners	Above Rs.5 lakhs and upto Rs.20 lakhs
Additional Commissioners	Above Rs.20 lakhs and upto Rs.50 lakhs
Commissioners	Without limit

'

12. A perusal of the impugned order reveals that it was also contended before the first respondent that this Court has already decided the issue of jurisdiction. To be noted, though there is a reference to W.P.No.6175 of 1999 in the impugned order, learned counsel for petitioner says that the relevant writ petition i.e., earlier writ petition filed by the writ petitioner is W.P.No.31200 of 2003. To be noted, the entire order made by a Hon'ble single Judge of this Court has been extracted and re-produced supra. The submission of learned counsel that the earlier writ petition is not W.P.No.6175 of 1999 and that it is W.P.No.31200 of 2003 is recorded. To be noted, order dated 10.07.2017 made in W.P.No.31200 of 2003 is annexed as part of the typed-set of papers and more particularly at Page 113.

13. A perusal of the impugned order reveals that the Adjudicating Authority has held that this Hon'ble Court has left the jurisdiction issue open. A perusal of the earlier order of this Hon'ble Court and more particularly Paragraph 4 therein, makes it clear that the learned Adjudicating Authority has understood the order of this Hon'ble Court correctly and the Adjudicating Authority is correct in understanding that this Court has left the issue of jurisdiction open. Therefore, the Adjudicating Authority has embarked upon the issue of jurisdiction and has relied on the latest circular dated 10.03.2017 bearing a reference 1053/02/2017-CX (F.No.96/1/2017-CX.I). Relevant portion of this circular being Paragraph 24 has been extracted in the impugned order and the same reads as follows:

> ''24. De novo or Adjudication remanded by appellate authority:
>
> In cases of de novo adjudication in pursuance of the order of Appellate Authority, such cases should be decided by the adjudicating authority of the same rank who had passed the order which was in appeal before the Appellate Authority, notwithstanding the enhancement of the power of adjudication of the officers...................''

14. In addition to this, Mr.V.Sundareswaran, learned Revenue counsel also drew the attention of this Court to Section 12E of the Central Excise Act wherein it has been held that any Central Excise Officer may exercise powers and discharge the duties conferred or imposed on any other Central Excise Officer, who is subordinate to him. It is also submitted that this provision has been noticed by the Adjudicating Authority i.e., Respondent No.1, in the impugned order and it is contained in Paragraph 5.3 of the impugned order.

15. To be noted, it is not in dispute that amount of duty involved in instant case is Rs.13 lakhs and therefore, it falls in the 5 to 20 lakhs category/slab.

16. In sum and substance, there are three aspects with regard to jurisdiction. First aspect is that this Hon'ble Court has left open the issue in the earlier order. Second aspect is that there is a latter circular dated 10.03.2017 which says that where the matter is remanded to an Authority, the adjudication process shall be done by the Authority in the same rank who passed the order prior to remand notwithstanding any violation in order. The third aspect is Section 12E of CE Act. In the light of there being no dispute that Additional Commissioner i.e., Respondent No.1, being superior to the Joint Commissioner and in other words, Joint Commissioner being subordinate to the Additional Commissioner, Section 12E was also followed. Owing to these aspects, the campaign of the writ petitioner with regard to jurisdiction comes to an end.

17. This takes us to the second ground on which the impugned order is being assailed i.e., violation of NJP. A perusal of paragraphs 4.1 and 5.0 of the impugned order reveals that a learned counsel has made submissions and the same have been recorded and considered.

18. This Court expresses no opinion on the merits of the findings which have been arrived at. Considering the position that the impugned order is being assailed on the ground of violation of NJP, this Court deems it appropriate to extract Paragraph 4.1 and 5.0, which read as follows:

'4.1. However Ms.Sushma Harini A, Advocate, vide her letter dated 25.01.2019 (on a plain white sheet) stated that the subject was remanded to the appropriate authority for fresh adjudication after providing sufficient and reasonable opportunity. Further she contended that one of the grounds raised in the writ petition was that the Additional Commissioner no longer held jurisdiction to decide the above case in view of the Circular dated 01.10.2003 (No.752/68/2003-X) and consequently the jurisdiction no longer vested with the learned Additional Commissioner. She also contended that in view of the order of the High Court in W.P.No.31200/2003 dated 10.07.2017, the case had to be posted for hearing before appropriate authority. She also requested to transfer the case to the officer holding jurisdiction and to post for hearing of the case.

FINDINGS

5.1. I have gone through the records of the case and the written submissions made by the noticee.

The issue for determination before me are as follows:

(i) whether the value of bought out items cleared as traded goods has to be added to the value of the manufactured goods.

(ii) whether the impugned product is classifiable under CH 85.37 or 90.32 of Central Excise Tariff and

(iii) whether the extended period under proviso to Section 11A is invokable.'

19. Learned counsel for petitioner submitted that no written submissions were filed by the writ petitioner. However, it is not in dispute that the submissions were made. Therefore, it cannot be gainsaid by the writ petitioner that no opportunity has been given to the writ petitioner and therefore, principles of NJP have been violated.

20. This takes us to the alternative remedy aspect. There is no dispute or disagreement between the two learned counsel before this Court that there is an alternate remedy to the writ petitioner by way of statutory appeal to the Commissioner (Appeals)-II, Newry Towers No.2054-I,II Avenue, Anna Nagar, Chennai - 600 040.

21. The exercise of writ jurisdiction when alternate remedy is available, is an issue, which has been dealt with in a long line of authorities by the Hon'ble Supreme Court. Suffice to refer to K.C.Mathew case [Authorized Officer, State Bank of

Travancore Vs. Mathew K.C. reported in (2018) 3 SCC 85] and Satyawati Tandon Case [United Bank of India Vs. Satyawati Tondon and others reported in (2010) 8 SCC 110].

22. To be noted, in Satyawati Tandon Case, Hon'ble Supreme Court has held that with regard to alternative remedy the same has to be construed strictly when it comes to cases pertaining to taxes, CESS etc., To put it otherwise, fiscal laws in general.

23. Be that as it may, what can be inferred from the long line of authorities is, alternate remedy is essentially not an absolute rule. It is a rule of discretion and it is not a rule of compulsion. However, the long line of authorities also bring into sharp focus that writ jurisdiction will be exercised notwithstanding alternate remedy only when there are certain specific exceptions. There is no difficulty in accepting that lack of jurisdiction and violation of NJP are two such exceptions. However, in the instant case, considering the facts and circumstances of the case, which have been alluded to supra i.e., lack of jurisdiction in first respondent passing the order and violation of NJP, do not find favour with this Court. In other words, this Court is unable to convince itself in the facts and circumstances of this case that there is lack of jurisdiction on the part of first respondent and that there is violation of NJP.

24. Therefore, in the considered opinion of this Court this is a fit case to relegate the writ petitioner to alternate remedy of filing an appeal to Commissioner (Appeals)-II, Newry Towers No.2054-I,II Avenue, Anna Nagar, Chennai - 600 040. It is made clear that if the writ petitioner chooses to avail alternate remedy, the writ petitioner is at liberty to raise all the issues including the issues raised in this writ petition except the issue of jurisdiction, which has been decided by this Court now in this order. If the writ petitioner chooses to avail the alternate remedy, it is open to the writ petitioner to file an application for condonation of delay and also plead exclusion under Section 14 of the Limitation Act. If the same is done, such pleas shall be decided and disposed of on its own merits by the Appellate Authority. If alternate remedy is availed by writ petitioner, the Appellate Authority is also directed to consider the appeal filed by the petitioner on its own merits and dispose of the same as expeditiously as possible.

This writ petition is disposed of as above. There shall be no order as to costs,. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1.The Additional Commissioner
Office of the Commissioner of GST & C.Ex.
South Commissionerate
692, M.H.U. Complex, Nandanam
Chennai - 600 035

2.The Central Board of Excise & Customs
Constituted under the Central Board of Revenue Act, 1963
Department of Revenue
North Block, New Delhi- 110 001

3. The Section Officer,
E.R Section,
High Court, Madras

+1cc to Mr.G.Baskar, Advocate sr.45130
+1cc to Mr.V.Sundaraswaran, Advocate sr.45495
+1cc to Special Government Pleader sr.46535

W.P.No.15298 of 2019 &
W.M.P.No.15288 of 2019

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