IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: **26.07.2019**

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.No.22074 of 2019
and
W.M.P.No.21336 of 2019

Tvl.Santhosh Cateres
Rep. by its Proprietor
A.Santhosh Abraham. .. Petitioner

Vs.

The Assistant Commissioner (ST)
Thirumullaivoyal Assessment Circle
No.27, Makkaram Garden
Kolathur, Chennai - 99. .. Respondent

Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorari, calling for the records on the files of the respondent TIN/33081358572/2014-15 dated 04.06.2019 and quash the same being illegal, invalid, without jurisdiction and violated the principles of natural justice and contrary to the law or issue such other writ, direction as this Honorable Court think deem and fit proper in the circumstance of the case and render justice.

For Petitioner : Mr.D.Vijayakumar

For Respondent : Mr.Mohammed Shaffiq,
Special Government Pleader.

ORDER

Mr.D.Vijayakumar, learned counsel on record for writ petitioner and Mr.Mohammed Shaffiq, learned Special Government Pleader (Taxes), who accepts notice on behalf of the lone 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. Main writ petition arises under 'Tamil Nadu Value Added Tax Act, 2006 (Tamil Nadu Act 32 of 2006)', which shall hereinafter be referred to as 'TNVAT Act' for the sake of convenience and clarity.

4. This writ petition is a second round of litigation with regard to the same revised assessment proceedings for the Assessment Year 2014-15.

5. Earlier, a revised assessment order dated 30.10.2018 came to be passed against the writ petitioner for the same assessment year 2014-15, writ petitioner challenged the same by way of an earlier writ petition being W.P.No.294 of 2019 in this Court, complaining that writ petitioner was not served with revisional notice. This Court disposed of the writ petition by an order dated 11.01.2019, directing the respondent to redo the assessment by

treating the impugned assessment order as the revisional notice/ notice of proposal.

6. Thereafter, writ petitioner sent a representation dated 05.03.2019, personal hearing was also held, petitioner sent further representation dated 12.04.2019 and the revised assessment order which was redone in accordance with the aforesaid order of this Court came to be passed on 04.06.2019. This revised assessment order dated 04.06.2019 made by the respondent in accordance with the aforesaid direction of this Court bears reference No.TIN 33081368572/2014-15 and this order shall hereinafter be referred to as 'impugned order' for the sake of convenience and clarity.

7. Main issue with regard to the revised assessment is with regard to LPG cylinders purchased by the writ petitioner and levy of tax on the same. To be noted, 'LPG' stands for 'Liquefied Petroleum case'.

8. There is no disputation or disagreement before this Court that the core issue which constitutes the central theme of the revised assessment is rate of tax that is to be levied on these LPG cylinders. If it is for industrial use, a concessional rate of 5% would be levied and if that not be so, a higher and regular rate of tax of 14.5% would be levied.

9. In the instant case, it comes to light that writ petitioner has given a declaration that LPG cylinders have been procured for industrial purpose. Writ petitioner also contends that they have not purchased the LPG cylinders directly from Indian Oil Corporation (IOC) and they have purchased it only from their dealers.

10. However, after considering the objections of writ petitioner and after the personal hearing, the impugned order came to be passed levying tax as well as penalty under Section 27(3) of TNVAT Act.

11. Learned counsel for writ petitioner submitted that in cases of this nature, levy should be on the seller, where the point of sale happens and not on writ petitioner, who is the purchaser.

12. Responding to the aforesaid contention, drawing inspiration from ***State of Tamil Nadu Vs. Madras Petro Chem Ltd***. reported in ***(1993) 89 STC 438*** rendered by a Hon'ble Division Bench of this Court, learned State counsel submitted that a selling dealer cannot be made liable for a wrong declaration made by the purchasing dealer. Most relevant paragraph is paragraph 7 and the same reads as follows:

*'**7.** By Act 44 of 1986, section 3(3) and 3(4) was recast as follows:*

“2. Amendment of section 3, Tamil Nadu Act 1 of 1959.—In section 3 of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act of 1959),—

(1) for sub-sections (3) and (4), the following sub-sections shall be substituted, namely:—

‘(3) Notwithstanding anything contained in sub-section (1) or subsection (2), the tax payable by a dealer in respect of sale of any goods, other than consumables, to another for use by the latter, in the manufacture inside the State for sale by him of any goods—

mentioned in the First Schedule other than those falling under items 70(b), 70(c) and 107 of the said Schedule

or

involved in the execution of works contract

shall be at the rate of only four per cent on the turnover relating to such sale:

Provided that the provisions of this sub-section shall not apply to any sale unless the dealer selling the goods furnishes to the assessing authority in the prescribed manner within the prescribed period a declaration duly filled in and signed by the dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority:

Provided further that any dealer who, after purchasing the goods in respect of which he had furnished any declaration, fails to make use of the goods so purchased for the purpose specified in the declaration but disposes of such goods in any other manner, shall pay the difference of tax payable on the turnover relating to sale of such goods at the rate prescribed and four per cent:

Provided also that the dealer purchasing the goods maintains a separate stock account for each of the goods purchased by him showing such particulars as may be prescribed.

Explanation.— For the purposes of this sub-section 'consumables' means fuels., welding electrodes, welding rods, abrasives, carbide tip tools and lubricating oils.

(4) Where any dealer, after availing the concessional rate of tax under sub-section (3) does not sell the finished goods but despatches them to a place outside the State either by branch transfer or by transfer to an agent, by whatever name called, for sale, or in any other manner, except as a direct result of sale or purchase in the course of inter-State trade or commerce shall pay, in addition to the concessional rate of tax already paid under subsection (3), tax at two per cent on the value of goods so purchased.'

(2) sub-sections (5) and (6) shall be omitted;

(3) in sub-section (7), for the expression 'notwithstanding anything contained in sub-section (1), (2), (3), (4) or (5)', the expression 'notwithstanding anything contained in sub-section (1), (2) or (3), shall be substituted."

13. Be that as it may, besides supporting the impugned order on the aforesaid grounds, it was also contended by learned State Counsel that writ petitioner has alternate remedy by way of an appeal to the jurisdictional appellate Deputy Commissioner under Section 51 of TNVAT Act.

14. In the course of the hearing, as alternate remedy issue was raised by State Counsel, writ petitioner's counsel was given the option of opting for alternate remedy, making it clear that findings that are rendered by this Court will be binding on the appellate Authority. In other words, option was given to writ petitioner to go before the appellate authority without insisting on this writ petition being carried to its logical end, but writ petitioner choose to have this matter carried to its logical end. Therefore, this Court, conscious of the obtaining position that the findings that are returned by this Court on merits would be binding on the appellate authority is dealing with points urged in the hearing. Notwithstanding this aspect, i.e., findings returned by this Court on legal issues, as there may be certain other aspects of the matter, this Court deems it appropriate to leave it open to the writ petitioner to avail alternate remedy and file appeal under Section 51 of TNVAT Act, if writ petitioner is so advised.

15. Before proceeding further, this Court makes it clear that finding that is being returned is the issue of wrong declaration. On wrong declaration, following Madras Petro Chemical Limited ratio, this Court has no hesitation in holding that selling dealer cannot be made liable for a wrong declaration given by the purchasing dealer.

16. This takes us back to the alternate remedy aspect. With regard to alternate remedy, from a long line of authorities and a catena of case laws, legal position has crystallised to the effect that the rule of alternate remedy and exercise of writ jurisdiction on the teeth of alternate remedy, is not a rule of compulsion, but it is a rule of discretion. In other words, it is not an absolute rule. However, though the alternate remedy rule is not an absolute rule, Hon'ble Supreme Court in in ***Satyawati Tandon*** Case [***United Bank of India Vs. Satyawati Tondon and others*** reported in ***(2010) 8 SCC 110]*** has held that when it comes to matters pertaining to Taxes, CESS, Revenue etc., the rule of alternate remedy should be applied with utmost rigour. This ***Satyawati Tondon*** principle has been 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 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)*
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> *"43. Unfortunately, the High Court overlooked the settled law that the* <u>*High Court will ordinarily not*</u>

<u>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</u> 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)

17. Therefore, this Court has no hesitation in holding that though

the rule of alternate remedy is not a rule of compulsion and it is only a rule of discretion, the same has to be applied with utmost rigour when it come to fiscal laws.

18. In this view of the matter, considering the facts and circumstances of the instant case, this Court deems it appropriate to leave it open to the writ petitioner to opt for alternate remedy under Section 51 of TNVAT Act with regard to issues other than the legal issue on which this Court has now returned a finding. Though obvious, it is made clear that if writ petitioner chooses to file an appeal under Section 51 of TNVAT Act, the conditions for pre-deposit will apply. With regard to delay, it is open to writ petitioner to seek condonation of delay as well as exclusion of time spent in the instant writ petition by placing reliance *inter alia* Section 14 of Limitation Act. If writ petitioner chooses to do so, the Appellate Authority shall decide the same on its own merits and in accordance with law.

19. Writ petition fails and the same is dismissed, albeit, preserving the rights of the writ petitioner qua alternate remedy in the aforesaid manner. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

26.07.2019

Speaking order/Non-Speaking Order
Index : Yes/No
vsm

To

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M.SUNDAR, J.,

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