

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 01.08.2019

Coram

THE HONOURABLE MR. JUSTICE M.SUNDAR

W.P.No.22634 of 2019

&

W.M.P.No.22099 of 2019

State Bank of India Officer's Association (CC) - SBIOA

Represented by its General Secretary Mr.R.Balaji

SBIOA (CC)

No.86, Fourth Floor, Rajaji Salai

Chennai - 600 001

.. Petitioner

vs.

The Assistant Commissioner (ST)

Muthialpet Assessment Circle

No.199, 2nd Floor, Thambu Chetty Street

Chennai - 600 001

.. Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records in the proceedings in Order Rc.No.1/2017,A4/2016-17 dated 28.05.2019 issued by the respondent and quash the same as arbitrary and illegal.

For Petitioner
Prabakar

: Mr.Joseph

For Respondents
Ms.G.Dhanamadhri

:

Government Advocate

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ORDER

Mr.Joseph Prabakar, learned counsel on record for writ petitioner and Ms.G.Dhanamadhri, learned Government Advocate, who has accepted notice on behalf of sole respondent, are before this Court.

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

3. Subject matter of 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 brevity).

4. To be noted, in exercise of powers conferred under Section 81 of TNVAT Act, a set of Rules, which technically is subordinate legislation, has also been made and the same goes by the name, 'Tamil Nadu Value Added Tax Rules, 2007'. This set of rules shall hereinafter be referred to as 'TNVAT Rules' wherever necessary.

5. Factual matrix in a nutshell i.e., facts that are imperative for appreciating this order are as follows:

a) Writ petitioner is an entity which has been registered as a Trade Union under Indian Trade Union Act, 1926.

b) Writ petitioner embarked upon the exercise of creating a residential township in the name and style "Unity Enclave" consisting of 2100 residential flats in 21 towers at a construction cost of little over Rs.547 Crores at Mambakkam, Chennai - 600 127. This shall hereinafter be referred to as 'said project' for the sake of convenience and clarity. Said project was handed over by writ petitioner to three different contractors and this Court is informed that one is a building contractor, the second is an architect entity and the third entity is a project management consultant. There is no dispute or disagreement that the writ petitioner has not registered itself as a dealer under TNVAT Act.

c) Enforcement Wing officials of the Tax Department conducted a surprise inspection at the office of the writ petitioner on 07.09.2016 and the Enforcement Wing officials pointed out, what according to them, are defects.

d) Suffice to say that what according to Enforcement Wing officials are defects are that the writ petitioner has bought several goods in the Assessment Year 2016-17 for said project notwithstanding the project being handed over to contractors. Besides this, according to Enforcement Wing officials, tax due on

construction works has not been fully realized. It was noted that what is known as 'S' Certificate traceable to Rule 9(2) of TNVAT Rules was filed by one of the contractors, namely the building contractor and that this Form S is dated 24.06.2016. It was noticed that this Form S is for a value of little over 1.87 Crores.

e) On the basis of proposal from Enforcement Wing Officials, respondent issued a notice dated 12.01.2017, which can be referred to as revisional notice as well as 'show-cause notice' ('SCN' for brevity), both being used analogously. In response to SCN, writ petitioner sent a detailed reply dated 08.03.2017. After receipt of reply to revisional notice/SCN, respondent sent one more notice dated 21.08.2018 calling upon the writ petitioner to furnish certain documents for verification. To be noted, there is an adumbration of as many as 7 documents in this communication. Obviously, this 21.08.2018 communication has been sent for examining the writ petitioner's reply to the revisional notice / SCN. In response to this notice, writ petitioner sent a undated reply. This reply bears reference Letter No.5 / 2018. It is pointed out that under cover of this reply, documents sought for were furnished and they were hand delivered in respondent's office on 01.11.2018.

f) Thereafter, respondent embarked upon the exercise of making a revised assessment obviously based on the SCN/revisional notice dated 12.01.2017, reply to the same from writ petitioner dated 08.03.2017, communication from the respondent dated 21.08.2018 calling for certain documents to be furnished for verification and documents furnished by the writ petitioner under cover of aforementioned undated letter. This exercise culminated in respondent passing a revised Assessment Order dated 28.05.2019 bearing reference Rc.No.1/2017, A4/2016-17 (hereinafter 'impugned order' for brevity).

g) It is submitted that impugned order was served on the writ petitioner on 12.06.2019.

h) Assailing the impugned order, instant writ petition has been presented in this Court on 26.07.2019.

6. Having set out the factual matrix in a nutshell, this Court now proceeds to examine the grounds on which the impugned order was assailed by the learned counsel for writ petitioner at the hearing.

7. Though several averments have been made, grounds have been urged and contentions have been raised in the affidavit filed in support of writ petition, the grounds on which impugned order was assailed by the learned counsel writ petitioner at the hearing are broadly as follows:

a) No personal hearing has been granted by the respondent before passing the impugned order and this, according to learned counsel, is violation of 'Principles of Natural Justice' ('NJP' for brevity);

b) The detailed reply sent by the writ petitioner being reply to SCN/revisional notice dated 12.01.2017 (reply is dated 08.03.2017) has not been considered.

c) There are errors in the computations that have been made by the Assessing Officer in the impugned order;

d) The respondent has gone by the proposal given by the Enforcement Wing, which is impermissible.

8. Having set out the submissions made by learned counsel for writ petitioner, before this Court proceeds to set out the stand of the learned Revenue counsel, who has accepted notice on behalf of sole respondent, it is pertinent to mention that impugned order does not mention the provision under which it has been made.

9. Learned Revenue counsel submits that the impugned order has been made under Section 27 of TNVAT Act and more particularly under Section 27(1) of TNVAT Act and this takes us to the submissions made by learned Revenue Counsel, which are as follows:

a) It cannot be gainsaid that personal hearing is statutorily imperative because the impugned order in the instant case has been made under Section 27(1) of TNVAT Act;

b) Adverting to certain portions of the impugned order, it was submitted that it is incorrect to say that the writ petitioner's reply has not been considered.

c) With regard to the errors in the

computation, it was submitted that they, at best, qualify as grounds of appeal and they do not have any relevance to NJP that is being canvassed in the instant writ petition.

d) With regard to the Enforcement Wing proposal, it is submitted that Enforcement Wing proposal is the genesis for the revision and it is inevitable that there is a reference to the Enforcement Wing proposal in any revision of this kind.

e) It is the further contention of learned Revenue Counsel that Section 27(1) will be attracted even in cases where returns are not filed as this is a case of an unregistered dealer or in other words, 'dealer' within the meaning of Section 2(15) not a case of 'registered dealer' under Section 2(30).

10. Having set out the rival submissions, this Court carefully considered the rival submissions and this Court now proceeds to discuss the same and embarks upon the exercise of setting out the dispositive reasoning of this Court in arriving at a conclusion and giving a decision in the paragraphs to follow.

11. DISCUSSION AND DISPOSITIVE REASONING:

a) With regard to the first ground namely, personal hearing and violation of NJP, from the nature of the submissions made at the Bar, it comes to light that this is the sheet anchor submission with regard to challenge to the impugned order. Therefore, it becomes necessary to examine whether grant of personal hearing is statutorily imperative while an Assessing Officer makes a revised assessment under Section 27(1) of TNVAT Act. It is also necessary to examine as to whether it is statutorily imperative for an Assessing Officer to give personal hearing/hold personal hearing in every case in which a revised assessment is made under Section 27(1) of TNVAT Act.

b) This takes us to the provision, namely Section 27(1) and more particularly the proviso to sub-sections (1) and (2) of Section 27. This Court deems it appropriate to extract Section 27(1) and 27(2) together with the proviso to sub-sections (1) and (2) of Section 27 of TNVAT Act.

'27. (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 five

years from the date of assessment order by the assessing authority, 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 five years from the date of order of assessment by the assessing authority, reassess 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 five years from the date of order 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. Adverting to the aforesaid provision, namely proviso to sub-sections (1) and (2) of Section 27, it was submitted by learned Revenue Counsel that the impugned order being a revised Assessment Order made under Section 27(1), the respondent has complied with the mandatory requirement of reasonable opportunity to show-cause as there is no disputation that a show-cause notice dated 12.01.2017 has been issued and after receiving the reply dated 08.03.2017, the respondent has applied her mind to the reply and asked for further documents to be furnished for verification vide a further notice dated 21.08.2018 and the writ petitioner has responded to the same under cover of an undated letter which was hand delivered in the respondent's office on 01.11.2018. Therefore, it was submitted that a reasonable opportunity to show-cause against the impugned order has been given and therefore, it cannot be gainsaid that there is violation of NJP qua the

impugned order.

13. On an extreme demurrer, writ petitioner has not demonstrated that prejudice has been caused to it owing to personal hearing not being held. In other words, SCN/revisional notice has been issued to writ petitioner, writ petitioner has sent elaborate reply. After the reply, specific documents have been called for from writ petitioner for verification, writ petitioner has also produced those documents. What writ petitioner could have projected in a personal hearing has not been articulated. Therefore, this court comes to the conclusion that on a demurrer, writ petitioner has not been able to demonstrate that any prejudice has been caused to writ petitioner because of personal hearing not being held.

14. Faced with the above situation, learned counsel for writ petitioner submitted that the impugned order should be construed as one made under Section 22(4) of TNVAT Act.

15. Therefore, this Court deems it appropriate to extract Section 22 (4) together with the proviso thereto.

'22 (1).....

(2)

(3)

(4) If no return is submitted by the dealer for that year, the assessing authority shall, after making such enquiry as it may consider necessary, assess the dealer to the best of its judgment, subject to such conditions as may be prescribed:

Provided that before taking action under this sub-section, the dealer shall be given a reasonable opportunity of being heard.'

(Underlining made by this Court to supply emphasis)

16. Before this Court embarks upon the exercise of resolving the dispute whether the impugned order should be construed as one under Section 27(1) or under Section 22(4) of TNVAT Act, considering the significance of two expressions occurring in aforesaid provisos it is necessary to examine the same.

17. The expression occurring in the proviso to Sub-Sections (1) and (2) of Section 27 of TNVAT Act is 'a reasonable opportunity to show cause' whereas expression occurring in the proviso to Section 22(4) is 'a reasonable

opportunity of being heard.'

18. To be noted, both these expressions have been underlined in the extracts and reproduction of same supra for the sake of convenience, clarity and ease of reference. No elucidation or elaboration is required to say that these two expressions are clearly different and distinct. It is also to be noticed that these two expressions are deployed in the same statute. Most importantly, both these expressions have been deployed with regard to revised assessment proceedings. In the considered view of this Court, both Section 22(4) and Section 27(1) deal with assessment other than deemed assessment. While Section 22(4) deals with a situation where the dealer has not filed returns or if the returns filed are incomplete or incorrect, Section 27(1) visualizes two situations wherein one is escaped assessment and the other is where the dealer has been taxed at a rate lower than the rate at which a dealer ought to have been taxed. This situation is adumbrated and articulated in sub-sections (1) and (2) of Section 27. Therefore, in the considered opinion and view of this Court, the legislature in its wisdom has consciously used two different expressions in the proviso to Sub-sections (1) and (2) of Section 27 and Sub-section (4) of Section 22, though both deal with a situation of assessment by the Assessing Officer which is other than deemed assessment. While Section 22(4) which is referred to in fiscal law parlance as 'best judgment' deals with situation where no return or incomplete returns filed, Section 27(1) and (2) deal with situation where returns have been filed. It may not be necessary to delve into those aspect of the matter any further as the plain reading and plain language in which these two expressions are couched is unambiguous and it is not even ambivalent.

19. This takes us to a circular, which has been issued in this regard.

20. Attention of this Court was drawn to a circular being Circular No.7/2014 (BB1/3589/2014) dated 03.02.2014 (hereinafter 'said circular' for the sake of convenience and clarity). This Court is informed that the said circular was issued by the Office of the Commissioner of State Tax, Chepauk, Chennai.

21. This Court deems it appropriate to extract entire Circular No.7, which reads as follows:

'Guidelines and instructions
regarding disposal of Tax Cases.

(Circular No.7/2014
(BB1/3589/2014), dated the 3rd February, 2014)

Subject: Writ petition/writ
appeal/tax case (revision)-Disposal of cases-
Meeting with Government Advocate - Certain
guidelines and circular instructions issued.

'1. During the course of meeting with the Law Officers of Madras High Court on January 30, 2014, it has been represented by them that many assessing officers are passing orders without giving reasonable opportunity to dealers and violating the principles of natural justice, which has resulted in mounting numbers of writ petitions in the High Court leading to interim stay restraining the authorities proceeding further pursuant to the orders passed. After a considerable period, the writ petitions were disposed of by setting aside the assessment proceedings with direction to the authorities to take necessary action in accordance with law.

2. It is also further represented that in some or other cases, objections raised by the dealers on the pre-assessment/revision notices are not properly examined/discussed in the order and assessment orders simply state "that the objections filed by the dealers are overruled and proposals are confirmed". Such type of orders will not also stand in the test of law. Further, where there is a provision in the Act, requiring the dealer of being given a reasonable opportunity of being heard, which has also not been followed in many cases.

3. In the light of the above, the following circular instructions are issued which must be scrupulously followed by assessing officers while passing assessment orders. Joint Commissioners/Deputy Commissioners should verify at random the assessment orders passed by the Assessing Officer while taking up cursory inspection and ensure compliance with these basic procedures while passing orders.

(a) Passing of orders:

Fifteen days time-limit shall be given

as reasonable opportunity to dealers before passing any order and it shall be reckoned from the date of service of the notice. No order shall be passed without being satisfied of the reasonable opportunity and adopting the following process:-

(i) After issue of notice calling for the objections, if any, further time is requested by the dealer within a period of fifteen days, it shall be examined and reply to be given to the dealer regarding granting of time or not, as the case may be, only if there exists a genuine reason.

(ii) Objections filed by the dealer on the pre-assessment/revision notices shall be examined in each and every issue meticulously and speaking order shall be passed addressing the objections raised in short, the speaking order which is complete shall be passed.

(iii) As the provision in the TNVAT Act stipulates the conditions of granting of personal hearing, it may be intimated in the notice and it shall invariably be afforded to the dealer irrespective of whether the dealer has opted for personal hearing or not.

(b) Revision of assessment:

Under the TNVAT Act, 2006, the assessing officers usually issue orders to reverse the ITC on obvious reasons. During the current financial year, the assessing officer may issue notice to reverse the ITC for each month separately under Section 25 of the TNVAT Act, 2006. After closure of the financial year, the assessment should be completed initially under deemed assessment under Section 22 of the Act and then only they should take revision proceedings under Section 27 of the Act. Before passing revision order, the dealer should be given reasonable opportunity and personal hearing it required so as per Section 22(4) of the TNVAT Act, 2006. No order of revision should be made without affording an opportunity to the dealer as provided under Sections 22, 25, 27 of the

Act.

(c) Filing of tax case (R):

In regard to filing of tax case (revision), the time-limit to file tax case is 90 days from the date of receipt of the order of Sales Tax Appellate Tribunal by the Additional State Representative. A delay of 90 days in filing tax case beyond the first 90 days can be condoned by the High Court. In such cases, a delay condone petition should also be filed along with the tax case (revision). If the delay in filing tax case is beyond 90 days, [(i.e.,) 90 + 90 = 180 days], the tax case will not be admitted and it will be dismissed as barred by limitation. So, the Joint Commissioners are requested to file tax case revision well within the period of permissible delay. Wherever necessary, all the Territorial Joint Commissioners including Chennai and Coimbatore divisions are instructed to file "Dummy" as per the standing instructions issued by the CCT to avoid limitation.

(d) Filing of WP/WA/TC:

A review petition on the order of writ petitioner/writ appeal/tax case (revision) may be filed before the High Court within a period of 30 days from the date of receipt of the order of High Court, if there is any fresh facts which have not been brought to the notice of the High Court while passing the order.

(e) Filing of Writ appeal:

In regard to filing of writ appeal, the time-limit prescribed is 30 days from the date of receipt of the order in the writ petition. Hence, the officer should send a copy of the order immediately to the Joint Commissioner (Legal) for review, regarding the feasibility of filing of writ appeal against the said order. If it is a fit case to file writ appeal, the Joint Commissioner (Legal) will take up the issue to the SGP (Taxes), obtain legal opinion and send it to the officer for getting administrative

sanction from the Commissioner through the Joint Commissioner (CT) of the respective Division. On getting orders from the Commissioner, the Officer should meet the SGP(Taxes) along with connected records to prepare Appeal Memorandum and file the writ appeal, if there is any delay in filing writ appeal, the appeal may be filed along with a delay condone petition.

(f) Collection of cheques during the course of inspection/VAT audit:

At present, there is no provision in the Act/Rules for spot collection of cheques from the dealers during inspection. Many writ petitions are being filed challenging the collection of cheques during inspections. In the above cases, the High Court of Madras has also issued directions to the enforcement authorities to return the cheques along with interest stating that there is no express provision in the TNVAT Act, 2006. The Law Officer of High Court has expressed their opinion to handle this issue carefully and not to collect cheques under duress. In such cases, assessing officer shall collect taxes after making assessment as per provision of the Act.

4. The receipt of this circular should be acknowledged by next post and you are requested to communicate this circular and obtain acknowledgement from the assessing officers under your control.'

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22. What is of relevance for the instant case on hand is Point No.3(b) captioned 'Revision of Assessment'.

23. A careful reading of Point 3(b) of said Circular reveals that Circular also has noticed the difference between the two expressions used in the two provisos i.e., proviso to Section 22(4) and proviso to Sections 27(1) and 27(2). The reason is, Circular makes it clear that the dealer should be given 'reasonable opportunity and personal hearing' as per Section 22(4) whereas while making a reference to Sections 22, 25 and 27, circular says that order should not be made without 'affording an opportunity to the dealer'. Therefore, even the circular has instructed the Assessing officer to give personal hearing only when the exercise is under Section 22 (4). With regard to generic Sections 22, 25 and 27, the circular only says that no order should be made without affording an opportunity to the dealer. Therefore, it follows as an inevitable and in the considered view of this Court indisputable sequitur that opportunity to the dealer to be afforded under Section 22 and the opportunity to be afforded to the dealer under Section 27 are different and distinct as alluded to supra. In other words, while it is personal hearing under Section 22 (4) of TNVAT Act, it is reasonable opportunity to show-cause under Section 27 of TNVAT Act.

24. This takes us to the question as to whether expression used in the proviso to Section 27(1) and (2) completely excludes a personal hearing. In the considered view of this Court it may not be so after considering the reply to the show-cause notice. If the Assessing Authority considers it necessary to hold a personal hearing, it is well open to the Authority to hold a personal hearing if it appears necessary based on the nature of the issue raised in the SCN/revisional notice and reply or response from the dealer to the same whereas with regard to Section 22(4), it is statutorily imperative.

25. Therefore, even according to Circular No.7, if it is a best judgment assessment under Section 22(4), personal hearing is imperative and if it is revised assessment under Sections 27(1) and/or (2), only affording an opportunity to show-cause is imperative. In the considered view of this Court, personal hearing for revision of assessments under Section 27(1) and/or 27(2) is optional depending on the nature of the issues involved.

26. This takes us to one another significant aspect in this matter. The term used in this provision is 'dealer'. This Court notices the term 'dealer' as well as term 'Registered dealer' are defined in TNVAT Act. The terms 'dealer' and 'registered dealer' are defined terms having been defined in sub- sections (15) and (30) respectively of Section 2 of TNVAT Act. In other words, while the term 'dealer' is defined in Section 2(15), the term 'registered dealer' is defined in Section 2(30).

27. With regard to two expressions occurring in proviso to Section 22(4) and proviso to section 27(1) and (2) of TNVAT Act, there is no disputation or disagreement before me. In other words, both counsel agree that while in a case of best judgment assessment under Section 22(4), personal hearing is statutorily imperative, in revised assessment under section 27(1) or (2), only sufficient opportunity to show cause is statutorily imperative and personal hearing is optional. Therefore, the issue so narrowed down in this matter that it is narrowed down to the question as to whether impugned order in the instant case should be treated as one under section 27(1) as contended by learned Revenue counsel or one under section 22(4) as contended by learned counsel for writ petitioner. In the instant case, no doubt, writ petitioner has not registered itself as a dealer, therefore, is not a registered dealer within the meaning of section 2(30) of TNVAT Act and therefore, has not filed returns.

28. On first blush, the argument of learned counsel for writ petitioner that this is a case of no returns comes across as an attractive submission, but on a closer scrutiny, it becomes clear that impugned order qualifies as a revised assessment order under section 27(1) and not as a best judgment assessment under section 22(4) for more than one reason and they are :

(a) Section 22(4) does not deal with no returns alone. It also deals with incomplete returns and / or returns filed with insufficient supporting documents scenario and therefore, section 22(4) is not a stand alone section for no returns situations;

(b) Section 22(4) does not deal with a situation of escaped assessment, whereas in the instant case on hand, it is clearly a case of escaped assessment which came to light in the surprise inspection made by the Enforcement Wing officials of Tax department;

(c) In any case, there is a proposal by Enforcement Wing before the assessing officer, the assessing officer has called for particulars and thereafter embarking upon the exercise of assessing the escaped assessment;

(d) As a corollary to preceding point, this is a case where assessment has not been made by adopting any approximation or thumb rule which is the case in a section 22(4) exercise. This is a case where objections as well as documents have been called for from writ petitioner, the same have been scrutinized and an assessment with exactitude and specificity has been made;

(e) If the statute had used the term 'dealer' (within the meaning of section 2(15) of TNVAT Act) in section 22(4) and contradistinguished the same by using the term 'registered dealer' within the meaning of section 2(30) of TNVAT Act in section 27(1), the argument of writ petitioner may hold water. However, that is not the case. Though both the terms, namely, 'dealer' and 'registered dealer' are terms which have been defined under TNVAT Act separately under two sub sections of the definition clause, the statute uses the term 'dealer' in both sections 22(4) and 27(1). In other words, if the argument of writ petitioner that writ petitioner never registered itself as a dealer under TNVAT Act and therefore, section 27(1) is not attracted does not hold water, as section 27(1) uses the term 'dealer' and not 'registered dealer'.

(f) What can be deduced clearly is that the argument that section 27(1) can never apply to an entity, which has not registered itself as a dealer and filed returns is clearly unacceptable as the statute has deployed the term 'dealer' in section 27(1);

(g) It can also be further deduced that a close examination definitions 'dealer' and 'registered dealer' reveals that it can be safely inferred that while 'dealer' is a family, 'registered dealer' is a spices. Neither section 22(4) nor section 27(1) are restricted to the spices of 'registered dealer';

(h) The fact that it is a case of escaped assessment, does not per se mean that it has to

be best judgment assessment. It only means that there is assessment which ought to have happened. Therefore, there is notional assessment and that is being revised. This is the reason why the statute has deployed the term 'dealer' in both section 22(4) and section 27(1). Therefore, reading it otherwise, more so in the manner in which learned counsel for writ petitioner wants this court to interpret section 22(4) is clearly impermissible.

29. If section 22(4) of TNVAT Act is dissected, it provides for assessing officer assessing the dealer to the best of assessing officer's judgment after making such enquiry that is considered necessary under five different circumstances and they are : (a) dealer not submitting any return for any period of the year, (b) return filed by the dealer being incomplete, (c) return filed by the dealer being incorrect, (d) return filed by the dealer not being accompanied by prescribed documents and (e) return filed by the dealer not being accompanied by proof of payment of tax. Likewise, similar dissection of section 27(1) and (2) of TNVAT Act brings to light that it provides for assessing officer assessing the dealer to the best of assessing officer's judgment after making such enquiry that is considered necessary under six different circumstances and they are (a) when the whole of the turnover of business of a dealer has escaped assessment, (b) where any part of the turnover of business of a dealer has escaped assessment, (c) where whole of the turnover of business of a dealer has been assessed at the rate lower than the rate at which it is assessable; (d) where 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; (e) where Input Tax Credit (ITC) has been availed by the dealer wrongly and (f) where ITC has been availed by the dealer by producing false bills, vouchers, declaration certificates or other documents.

30. A careful perusal of aforesaid two provisions reveals that while section 22(4) makes no return being furnished for any 'period of the year', it does not talk about whole of the year, whereas section 27 provides for whole of the turnover of business of a dealer escaping assessment. In the instant case, even according to writ petitioner, no return is submitted, but that is not for any period of the year, but for the entire year/years. Therefore, it is clearly a case where whole of the turnover of a dealer has escaped assessment to tax. While section 22

(4) deals with assessment qua dealer, section 27(1)(a) deals with determination of turnover, section 27(1)(b) deals with reassessment of tax due and section 27(2) deals with determination of tax after reversal of ITC. In this view of the matter, owing to the facts and circumstances of the instant case, this court finds no infirmity in respondent Assessing Officer resorting to assessment under section 27(1) of TNVAT Act. Owing to the facts and circumstances of the case on hand, this court has no difficulty in accepting the submission of the Revenue counsel that impugned order has been made under section 27(1) of TNVAT Act.

31. In the instant case, from the factual matrix set out supra and the discussion thus far, it comes to light that this is a case where the writ petitioner has not registered itself as a dealer and therefore, it would be a case of 'dealer' within the meaning of Section 2(15). Considering the scope of instant writ petition, it may not be necessary to delve further into this aspect. It would suffice to say that this Court has noticed that terms 'dealer' as well as 'registered dealer' are terms of art which have been defined under Section 2(15) and 2(30) of TNVAT Act respectively.

32. This takes us to the next aspect of argument i.e., the reply to the show-cause notice/revisional notice not being considered.

33. A perusal of the impugned order reveals that there is a reference to the reply to the show-cause notice. The impugned order also says that reply has been examined carefully. What according to the Assessing Officer are salient points in the reply have been set out and the same have been answered. This portion of the impugned order reads as follows:

'For the above defects notice issued from this office vide the reference second cited. They have filed their reply with records. This reply filed by them has been examined carefully.

(a) In respect of purchase of Fire Fighting Pipes, the invoice was raised in the name SBIOA. Though the material supplied to the work spot, the payment made by SBIOA. It is proved from the payment statement filed with the reply.

Therefore, the proposal is confirmed and tax levied at Rs.93,30,893.00 and levied penalty

at 100% on Tax due amount.

(b) In respect of works contract awarded, the association failed to furnish the details of tax recovery (TDS) for the contract value of Rs.547,88,09,797.00.

When the Enforcement Officials insisted to furnish the TDS recovery details, the dealers have furnished Form S for Rs.187,75,27,174.00 for the balance contract value till date they have not furnished Form S, or Form R and Form T for recovery and remittance of the TDS.

34. Therefore in the considered view of this Court, it cannot be gainsaid that the reply of the writ petitioner being reply to the SCN/revisional notice has not been considered at all. It has certainly been considered. This Court refrains from expressing any opinion on the Assessing Officer considering the reply and on the findings returned by the Assessing Officer on the reply to the SCN. The reason is, this Court would deal with alternate remedy aspect also and if any opinion is expressed herein, it will impede and impact the alternate remedy if the writ petitioner chooses to avail the same. To be noted, this Court will be dealing with alternate remedy aspect also infra.

35. This takes us to next ground pertaining to errors in computation. Errors in computation are clearly in the nature of grounds which can be canvassed only in a statutory appeal and therefore, this Court deems it appropriate to not even discuss the same. It is best left open for the Appellate Authority to deal with the computation error plea. Suffice to make a passing reference that it was argued that while deemed sales value has been shown as little over 93 lakhs, when it comes to reference to Form S, which has been alluded to supra, Rule 9(2) of TNVAT Rules talks about 9.39 Crores which is the turnover covered under Form S. As already mentioned, this Court, considering the nature of the instant case refrains itself from expressing any opinion on these merits of the matter.

36. The last aspect canvassed turns on the proposal of the Enforcement Wing. A perusal of the impugned order reveals that there is no doubt a reference to the inspection conducted by the Enforcement Wing officials and the proposal. As mentioned supra, this Court has no hesitation in accepting the submission of the

learned Revenue Counsel that the inspection by the Enforcement Wing officials and the proposal made by the Enforcement Wing is the genesis for the revision and therefore, it is inevitable to make a reference to the Enforcement Wing inspection and their proposal. Therefore, the moment there is a reference to the proposal of the Enforcement Wing officials in the Assessment Order, it cannot be gainsaid that it is in violation of Narasus's principle. To be noted, Narasus principle as laid down in Narasus Roller Flour Mills Vs. Commercial Tax Officer (Enforcement Wing), Sankagiri reported in (2015) 81 VST 560 (MAD).

37. Narasus principle is to the effect that Assessing Officer should apply his/her mind independent of the proposal made by the Enforcement Wing and should arrive at a conclusion. In the instant case, after referring to the proposal of the Enforcement Wing, the Assessing Officer has certainly applied her mind to the SCN / revisional notice as well as the objections to the same and given some finding, however correct or however erroneous the same may be, but not preposterous. No ground warranting interference in writ jurisdiction has been made out and it does not qualify as case of violation of NJP also in the light of dispositive reasoning alluded to supra.

38. This takes us to alternate remedy rule. In other words, question of exercise of writ jurisdiction notwithstanding alternate remedy. With regard to exercise of writ jurisdiction on the teeth of alternate remedy, this Court is clear that alternate remedy is a rule of discretion. In other words, alternate remedy is not an absolute rule and is therefore not a rule of compulsion. This Court also clear that alternate remedy rule is a self-imposed restraint as far as this Court exercising writ jurisdiction is concerned. Notwithstanding the obtaining position that alternate remedy rule is a rule of discretion and that it is a self-imposed restraint, Hon'ble Supreme Court in Dunlop India case [Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and others] reported in (1985) 1 SCC 260 held that alternate remedy rule should be applied strictly in cases pertaining to tax laws. 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. The practice certainly needs to be strongly discouraged. "

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

39. Thereafter, Satyawati Tandon principle was laid down by Hon'ble Supreme Court in United Bank of India Vs. Satyawati Tandon and others reported in (2010) 8 SCC 110) wherein it has been held that when it comes to cases pertaining to taxes, cess etc., i.e., fiscal laws in general, rule of alternate remedy has to be applied with utmost rigour. Satyawati Tandon principle was 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 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.

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

40 . Therefore, from a long line of Authorities and catena of case laws, it crystallizes as a proposition that while alternate remedy is not a rule of compulsion and only a rule of discretion, when it comes to application to fiscal laws, the same has to be applied with utmost rigour. Having said that it is a rule of discretion, Court would interfere on the teeth of alternate remedy only when it falls within the exceptions set out in a long line of

authorities. Exceptions can broadly be enumerated and adumbrated and they are (a) lack of jurisdiction on the part of the Authority issuing notice; (b) violation of principles of natural justice; (c) a well settled position of law settled by a higher fora being disregarded; and (d) alternative remedy being ineffectual or not efficacious. The instant case does not fall in any one of the exceptions. To be noted, exceptions enumerated are not exhaustive, but are only illustrative exceptions as required for the limited extent qua factual matrix of this case.

41. This takes us to the alternate remedy available to the writ petitioner in the instant case. This Court is informed without disputation or disagreement by both sides that an alternate remedy is available to the writ petitioner qua the impugned order by way of an appeal to the jurisdictional Appellate Deputy Commissioner under Section 51 of TNVAT Act. Therefore, with regard to the grounds canvassed on merits, which are more in the nature of errors in computation, it is well open to the writ petitioner to avail alternate remedy of a statutory appeal to the jurisdictional Appellate Deputy Commissioner under Section 51 of TNVAT Act.

42. This Court has also examined the limitation aspect of the matter. As already alluded to supra, the impugned order is dated 28.05.2019 and this Court is informed by learned counsel for writ petitioner, on instructions, that it was served on the writ petitioner on 12.06.2019. A perusal of Section 51 of TNVAT Act it reveals that the time limit available for preferring a statutory appeal is 30 days from the date on which the order is served on the dealer. Within 30 days in the instant case is on or before 11.07.2019. As already mentioned supra, instant writ petition has been presented in this Court on 26.07.2019. Therefore, 15 days have elapsed between the expiry of 30 days and presentation of the instant writ petition in this Court. This takes us to the question as to whether this 15 days delay can be condoned, if the period spent by the writ petitioner in the instant writ petition is excluded under Section 14 of the Limitation Act.

43. First Proviso to Section 51 of TNVAT Act, which is the appeal provision vests the Appellate Authority with power to condone the delay in preferring the appeal, however, with a cap of 30 days. This Court deems it

appropriate to extract Section 51 (1) and first proviso thereto, which 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, section 34 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:

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'

44. Therefore, if the time spent by the writ petitioner in the instant writ petition is excluded while computing the period of limitation, the delay which is sought to be condoned by the Appellate Authority will only be 15 days, which is well within 30 days cap. Therefore, this Court deems it appropriate to hold that in computing limitation for the statutory appeal under Section 51 before the Appellate Authority, if the writ petitioner chooses to avail the alternate remedy, the time spent in the instant proceedings i.e., proceedings in the instant writ petition being W.P.No.22634 of 2019 shall be excluded. For the purpose of absolute clarity and specificity, it is made clear that the time period from 26.07.2019 to the date on which a certified copy of this order is made available by this Registry will stand excluded while computing limitation. Now that such exclusion has been made by this Court, the period of delay which needs to be condoned by the Appellate Authority will be only 15 days if the writ petitioner chooses to avail the alternate remedy and if the writ petitioner files the appeal forthwith on copy of this order being made available by Registry. In any event, there is a leeway and width of 15 more days as the cap is 30 days.

45. In the light of all that have been set out supra, this Court holds that there is no ground for

interfering with the impugned order in writ jurisdiction and therefore, this writ petition is dismissed but preserving the right of the writ petitioner to avail alternate remedy if the writ petitioner chooses to do so by filing an appeal to the jurisdictional Appellate Deputy Commissioner under Section 51 of TNVAT Act assailing the impugned order. Therefore, if the writ petitioner chooses to take recourse to alternate remedy, it is open to the writ petitioner to seek condonation of delay and such application for condonation of delay shall be dealt with by the Appellate Authority bearing in mind exclusion of time ordered by this Court supra in this order. Though obvious it is made clear that all other conditions, formats and procedure adumbrated in TNVAT Act and TNVAT Rules for an appeal under Section 51 of TNVAT Act including the pre-deposit condition will govern the writ petitioner if the writ petitioner chooses to avail the statutory appeal. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

gpa

To

The Assistant Commissioner (ST)
Muthialpet Assessment Circle
No.199, 2nd Floor, Thambu Chetty Street
Chennai - 600 001

+1cc to Mr.Joseph Prabhakar , Advocate SR.No. 66182

+1 cc to spl Government Pleader Sr.No. 66483

W.P.No.22634 of 2019 &

W.M.P.No.22099 of 2019

A.SK(20/09/2019)

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