IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 05.08.2019

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.Nos.22936, 22939 and 22940 of 2019

M/s.LE-Shark Global LLP
Rep. by its Partner Mr.Anil Laxmichand Shah
SF No.245/1, Opp. Park School,
Tiruppur - 641 605. .. Petitioner in all W.Ps.

Vs.

1.The Joint Commissioner (CT)
CT Building, Dr.Radhakrishnan Road
Coimbatore - 641 018.

2.The Deputy Commissioner (CT)
CT Building, Kongu Nagar
Tiruppur - 641 605.

3.The State Tax Officer
Palladam Assessment Circle
Kongu Nagar, Tiruppur - 641 605. .. Respondents in all W.Ps.

Writ Petitions filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus, calling for the records pertaining to the order No.T.N.Nos.33756246091/2014-15, 33756246091/2013-14 and 33756246091/2012-13 dated 24.05.2019 of the 3rd respondent in respect of the non-payment of interest for the belated refund orders and consequently direct the respondents to pay interest amounting to Rs.8,07,034.00, Rs.18,83,502.00 and Rs.21,09,818.00 to the petitioner Firm for the period 2014-15, 2013-14 and 2012-13 and pass such further or other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioner (In all W.Ps) : Mr.R.Jagadeesan for M/s.K.V.Subramanian Associates

For Respondents (In all W.Ps) : Ms.G.Dhanamadhri, Government Advocate

COMMON ORDER

Mr.R.Jagadeesan, learned counsel of M/s.K.V.Subramanian Associates [Law Firm] on behalf of writ petitioner in all the three writ petitions and Ms.G.Dhanamadhri, who accepts notice on behalf of all the three respondents in all the three writ petitions are before this Court.

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

3. Learned counsel for writ petitioner submits that all the writ petitions arise out of a common factual matrix and the central theme/core issue in all the three writ petitions is the same.

4. Short facts shorn of micro details are to the effect that writ petitioner is engaged in the business of manufacture and export of Hosiery garments. Writ petitioner *inter alia* purchased yarn within the State of Tamil Nadu from various registered dealers on payment of 'Value Added Tax' ('VAT' for brevity), converted said yarn into fabric which was thereafter processed and Hosiery garments were manufactured. This final product of Hosiery Garments were exported by the dealer and the dealer was filing monthly returns 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. To be noted, there is a subordinate legislation under TNVAT Act which goes by the name 'Tamil Nadu Value Added Tax Rules, 2007' and the same shall be referred to as TNVAT Rules, for the sake of convenience and clarity. To be noted, TNVAT Rules is subordinate legislation made by the delegate in exercise of Rule making power under Section 80(1) of TNVAT Act.

5. The central theme is visible and invisible loss qua the loose fiber/yarn in the course of manufacture which had a direct impact on the 'Input Tax Credit' ('ITC' for brevity).

6. This Court is also informed that the central theme/core issue pertains to refund and interest *inter alia* under Section 42(5) of TNVAT Act. With regard to three assessment years viz., 2012-13, 2013-14 and 2014-15, writ petitioner sought refund as well as interest of refund.

7. Complaining of inaction on the part of the respondents, writ petitioner filed an earlier round of litigation in this

Court by way of writ petition being W.P.No.27857 of 2017 and the same came to be disposed of by a Hon'ble Single Judge of this Court in and by an order dated 20.11.2017 after hearing both sides, i.e., after hearing the writ petitioner counsel and the Revenue counsel.

8. Operative portion of the order is contained in paragraph 5, which reads as follows:

> *'5. In the light of the above, there will be a direction to the 1^{st} respondent to consider the petitioner's representation dated 24.07.2017 and pass orders on merits and in accordance with law, after affording an opportunity of personal hearing to the authorised representative of the petitioner. The above direction shall be complied within a period of three weeks from the date of receipt of a copy of this order.'*

9. Pursuant to the aforesaid order, writ petitioner went before the first respondent in the said writ petition (to be noted, first respondent in the said writ petition is first respondent in the instant writ petition also) and a personal hearing was also held. The proceedings before the first respondent culminated in an order of remand. In other words, pursuant to the aforesaid order of this Hon'ble court, first respondent heard the writ petitioner *inter alia* by way of a personal hearing and then remanded the matter to the third respondent to consider the writ petitioner's request for refund and interest. Thereafter, post remand, the third respondent took up the matter, heard out the same in detail and passed three separate orders pertaining to the aforesaid three assessment years bearing Reference Nos. TIN.33756246091/2014-15, 33756246091/2013-14 and 33756246091/2012-13, all dated 24.05.2019, which have been called in question in the instant writ petitions. These orders shall collectively be referred to as 'impugned orders' in plural and 'impugned order' in singular, wherever it becomes necessary.

10. Notwithstanding very many averments in the affidavits filed in support of the instant writ petitions and notwithstanding several contentions raised/grounds urged in the affidavits filed in support of the writ petitions, learned counsel for writ petitioner confined his submissions to two aspects of the matters.

11. One aspect is that the aforesaid earlier order made by a Hon'ble Single Judge of this Court directed the first respondent to dispose of the writ petitioner's representation, whereas the

impugned orders have been passed by the third respondent.

12. As alluded to supra, first respondent has considered the representation of the writ petitioner dated 24.07.2017 in accordance with the orders of this Hon'ble Court and also afforded a personal hearing opportunity to the writ petitioner. Thereafter, the matters were remanded to the third respondent and that has culminated in the impugned orders.

13. Therefore, this Court is of the considered view that the first ground urged does not carry the writ petitioner any further.

14. The second ground that was urged is that the interest on refund is not merely under Section 42(5) of TNVAT Act, but it is also under Rule 11(2) of TNVAT Rules. Section 42(5) of TNVAT Act and Rules 11(2) of TNVAT Rules read as follows:

> *''Section '42.Payment and recovery of tax, penalty, etc.-*
>
> *(1) .....*
>
> *(2) ......*
>
> *(3) ......*
>
> *(4) ......*
>
> *(5) Where the tax paid under this Act is found to be in excess on assessment or revision of assessment, or as a result of an order passed in appeal, revision or review, the excess amount shall be refunded to the dealer after adjustment of arrears of tax, if any, due from him. Where the excess amount is not refunded to the dealer within a period of ninety days from the date of the order of assessment or revision of assessment and in the case of order passed in appeal, revision or review within a period of ninety days from the date of order giving effect to such order passed in appeal, revision or review, the Government shall pay by way of interest, where the amount refundable is not less than one hundred rupees, a sum equal to a sum calculated at the rate of half per cent or part thereof of such amount for each month or part thereof after the expiry of the said period of ninety days.*
>
> *Rule 11.Refunds.-*
>
> *(1)..*
>
> *(2) The dealer who claims refund due to sale effected by him under sub-section (1) of Section 18*

shall file an application in Form W to the Assessing Authority along with copies of invoices or bills of related purchases within one hundred and eighty days from the date of accrual of such claim. The assessing authority after verification of the correctness of the claim, shall issue refund within ninety days from the date of the receipt of the application in Form W.'

15. Before this Court proceeds further to discuss the second ground of attack, it is necessary to set out that this Court has noticed while there were two issues viz., refund and interest on refund vide the impugned orders, request for refund has been acceded to i.e., at the rate of 5% on invisible loss and at the rate of 1% at the rate of visible loss is concerned. Therefore, what now survives in the impugned orders is only the interest aspect. A perusal of Section 42(5) of TNVAT Act and Rule 11(2) of TNVAT Rules reveals that while 42(5) of TNVAT Act is the substantive law, Rule 11(2) of TNVAT Rules is the procedural aspect of the matter, as Rule 11(2) deals with verification of the relevant forms viz., Form W. Be that as it may, a perusal of the impugned order reveals that there is a clear reference to Rule 11 of TNVAT Rules. Therefore, in the considered view of this Court, it cannot be gainsaid that Rule 11 of TNVAT Rules has not been looked into.

16. Learned Revenue counsel, who has accepted notice on behalf of all the three respondents submits that against the impugned orders, alternate remedy by way of a revisional application to the first respondent is available to writ petitioner under Section 54 of TNVAT Act. Learned Revenue Counsel drew the attention of this Court to Section 54 of TNVAT Act, which reads as follows:

'54. Powers of revision of [Joint] Commissioner.-

(1) Any person objecting to an order passed or proceeding recorded under this Act for which an appeal has not been provided for in section 51 or section 52 may within a period of thirty days from the date on which a copy of the order or proceeding was served on him, in the manner prescribed file an application for revision of such order or proceeding to the Deputy Commissioner:

Provided that the Deputy Commissioner may within a further period of thirty days admit an application for revision presented after the expiration of the first mentioned period of thirty days, if he is *satisfied that the applicant had sufficient cause for not presenting the application within the first mentioned period.*

(2) An application for revision shall be in the prescribed form and shall be verified in the prescribed manner.

(3) On admitting an application for revision, the Deputy Commissioner may call for and examine the record of the order or proceeding against which the application has been preferred and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, pass such order thereon as he thinks fit.

(4) Notwithstanding that an application has been preferred under sub-section (1), the tax, fee or other amount shall be paid in accordance with the order or proceeding against which the application has been preferred:

Provided that the Deputy Commissioner may in his discretion give such directions as he thinks fit, in regard to the payment of such tax, fee or other amount before the disposal of revision, if the applicant furnishes sufficient security to his satisfaction in such form and in such manner as may be prescribed.

(5) No order under this section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard.'

17. With regard to alternate remedy, to convince this Court to exercise writ jurisdiction on the teeth of alternate remedy, writ petitioner should be able to demonstrate that writ petitioner falls under one or some of the specified exception to the rule of alternate remedy. Some of the exceptions are, authority passing order without jurisdiction i.e., order called in question itself turning on a jurisdictional fact, alternate remedy ineffectual or not efficacious and orders disregarding settled position of law. To be noted, this is not an exhaustive list of exceptions, but is illustrative to the extent that is necessary to dispose of this case on hand.

18. One other aspect that was projected by learned counsel for writ petitioner is that earlier order of this Court has directed the first respondent Joint Commissioner to consider the writ petitioner's representation dated 24.07.2017 and therefore, the first respondent Joint Commissioner cannot now be the

revisional authority. This Court is convinced that this ground is not tenable and it does not aid the writ petitioner's case and it does not advance the case of the writ petitioner any further as the first respondent Joint Commissioner has afforded an opportunity of personal hearing to the writ petitioner in accordance with the order of this Court and thereafter, remitted the matter to the third respondent for consideration, as it turns on facts. Therefore, the impugned orders which have been called in question in these writ petitions, have been passed post remand and therefore, they give a fresh cause of action. In other words, for the sake of absolute clarity and specificity, it is made clear that the impugned orders in the instant writ petitions, which have been passed post remand orders are not orders passed pursuant to the directions of this Court, but are orders that have been passed pursuant to an order of remand made by the first respondent, who had considered the representation of the writ petitioner. The first respondent considered the representation of the writ petitioner i.e., after affording an opportunity of personal hearing in accordance with the directions of this Hon'ble Court. Therefore, this Court is convinced that it cannot be gainsaid by writ petitioner that a revision will not lie to the first respondent. It also comes out clearly that first respondent has remanded the matter to the third respondent without expressing any opinion or view on the merits of the matter. Therefore, it is also not a case where the revisional authority has already expressed any opinion.

19. This takes us to the alternate remedy aspect. Rule of alternate remedy is a self imposed restraint qua Courts exercising writ jurisdiction. In other words, it is not a rule of compulsion, but a rule of discretion. Though it is a rule of discretion, Hon'ble Supreme Court in Dunlop India case [*Assistant Collector of Central Excise, Chandan Nagar, West Bengal vs. Dunlop India Ltd. and ors.*] reported in *(1985) 1 SCC 260* held in Paragraph 3 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. This practice needs to be strongly discouraged.'

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

20. Thereafter, Hon'ble Supreme Court 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 has to 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)

"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 Court to supply emphasis and highlight)

21. Therefore, what follows from a long line of authorities and more particularly *Satyawati Tondon* principle as reiterated in *K.C.Mathew case* is that alternate remedy rule has to be applied with utmost rigour when it come to fiscal laws, though the alternate remedy rule itself is not an absolute rule/a rule of compulsion being a rule which is self imposed restraint qua Courts exercising writ jurisdiction.

22. There is one more aspect of the matter with regard to alternate remedy. This matter turns on facts. As already alluded to supra, the issue regarding refund is concluded and only with regard to interest on the refund is to be considered. Therefore examination of records and certain other supporting documents, with regard to interest liability if any is imperative for arriving at a conclusion one way or the other. It may not be possible to do such an exercise in a writ petition which is decided on affidavits and counter affidavits. In other words, quantification if any cannot be done in this writ petition.

23. owing to all that have been set out supra, this Court has no hesitation in holding that this is a case where the writ petitioner has to necessarily seek alternate remedy by filing an application for refund to the first respondent seeking revision of the impugned orders and though obvious it is made clear that such revision application will be under Section 54 of TNVAT Act.

24. Certain periods of limitation have been set out in Section 54 of TNVAT Act. It is open to the writ petitioner to seek condonation of delay as well as exclusion of time spent in the instant writ petition by applying the principles adumbrated in Section 14 of Limitation Act. If the writ petitioner chooses to do so, the first respondent revisional authority shall decide such pleas on their own merits and in accordance with law.

25. Writ petitions fail and the same are dismissed, albeit, preserving the rights of the writ petitioner to avail alternate remedy by way of revision to the revisional authority first respondent. There shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Joint Commissioner (CT)
CT Building, Dr.Radhakrishnan Road
Coimbatore - 641 018.

2.The Deputy Commissioner (CT)
CT Building, Kongu Nagar
Tiruppur - 641 605.

3.The State Tax Officer
Palladam Assessment Circle
Kongu Nagar, Tiruppur - 641 605.

Copy to : The Section Officer, E.R.Section,
High Court, Madras.

+1cc to The Government Pleader Sr.No.67242

AKM/16.09.19 /10P-6C/