IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.02.2020

CORAM:
THE HONOURABLE DR.JUSTICE VINEET KOTHARI
AND
THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.P. No.34052 of 2005

S. GOPALSWAMY ... Petitioner

Vs.

1.THE DEPUTY COMMERCIAL TAX OFFICER
POLLACHI (WEST CIRCLE) O/O. THE
COMMERCIAL TAX OFFICER POLLACHI
COIMBATORE DIST.

2.THE APPELLATE ASST COMMISSIONER (CT)
POLLACHI.

3.THE TAMILNADU SALES TAX
APPELLATE TRIBUNAL (ADDL. BENCH)
COIMBATORE. ... Respondents

Writ Petition filed under Art.226 of the Constitution of India praying for a Writ of Certiorarified mandamus calling for the records on the file of the to call for the records of the third respondent dated 13.1.2005 (received on 22.4.2005) in Coimbatore Tribunal Appeal No.388/2001 and quash the same and consequentially direct the second respondent to entertain the appeal filed before him on 11.8.1997 challenging the best of judgment assessment order passed by the first respondent in CST No. 607024/1993-1994 dated 27.1.1997 (received by the petitioner by way of certified copy on 11.8.1997).

For petitioner : Mr.N.Muralikumaran,
for M/s.Mc.Gain Law Firm

For Respondents : Mr.R.Swarnavel,
Government Advocate(Tax)

O R D E R
(made by Dr.VINEET KOTHARI, J.)

The only grievance raised by the Assessee in the writ petition is that both the Appellate Authorities below have dismissed the appeal filed by the Assessee as time barred, for the Assessment Year 1993-94. The contention raised before this Court is that the Assessee was not served with the impugned assessment order in time and he applied for a certified copy and upon receipt of the same, he filed the appeal. However, the First Appellate Authority rejected the appeal as time barred with the following observation:-

> "6. Having refused to receive the order the Petitioner cannot rely on the decision reported in 122 STC 129. His case is clearly distinguishable from the above decision inasmuch as he has existed in the same premises and he has refused to receive the order. This is not a technical mistake as claimed by him. The Petitioner has refused to receive certain notices and the order. He has received one notice. It is not proper on his part to receive the notice order at his whims and fancy. In the decision reported in TCR 2668 and 2669 dated 23.08.2000, the Hon'ble Special Tribunal has held "notice sent in the Tax revision case to the Respondent/Assessee has been returned with the endorsement that the Assessee has left without instructions. Inasmuch as the address in the cover is in accordance with the records we hold that the service of the notice is complete". In the case on hand, the Petitioner has existed in the same address and in spite of the specific intimation by the postal authorities he has not received the order. Hence it has to be concluded that the service by affixture is proper and this date must be taken as the date of service. There is a delay of 190 days in paying the admitted tax and there is a delay of 137 days in filing of the appeal. In the decision reported in 100 STC page 1, it is held that the payment of admitted tax/appeal fees and the filing of the appeal petition within the statutory period is a condition precedent before entertaining the appeal. Hence, I dismiss the miscellaneous petition as not entertainable."

2. The relevant observation made by the Tribunal is also quoted below for ready reference :-

> "6. We have heard the arguments of both sides, perused the connected records and examined the issue involved in this

appeal. The same is the appeal petition filed by the Appellant rejected by Appellate Assistant Commissioner dismissing the same refusing to condone the delay of 137 days caused in filing the appeal. The arguments of the Appellant are that the order served by affixture is improper, other modes are not exhausted, he is doing business properly in his place of business, personal service is not properly, the service by affixture should not be considered as the real service of order, the service of served copy of the order should be considered for deciding the admission of his appeal petition. The arguments of the Additional State Representative are that the appeal rejected considering the service by affixture is proper as the appellant has to receive the notice and order. These have been examined. The appeal petition rejected by the Appellate Assistant Commissioner by way of dismissal relates to assessment made against the Appellant for 1993-94. Final assessment made is on 27.1.97 disallowing claim of exemption on consignment sales. The Appellant has not received the pre-assessment notice issued on various dates on 10.6.96 and 10.9.96. Further, he has refused the said notice and the office assistant has given his endorsement about the same on 20.9.94. Then, the notice is sent by RPAD on 1.10.96 and the same is also returned by postal authorities. Even after intimation given to the Appellant regarding the receipt of notice on 3.10.96, Appellant has refused to receive the notice. The postal authorities have returned the same to the Assessing Officer on 14.10.96 as "not claimed". He has been given another opportunity on 17.12.96. The Appellant has received the notice on 10.1.97 but not responded to the notice. Hence, final order was passed on 27.1.97. The Appellant has not received the said order and the same was served by affixture on 25.2.97. Still then, the Assessing Officer has sent a copy of the assessment order to the Appellant by RPAD on 26.2.97. The same was also returned by the postal authorities with the endorsement that the same is not claimed by the Appellant. Even after specific intimation given to the Appellant about the receipt of the order by RPAD on 1.3.07, the Appellant has refused to receive the order. Thus, the Appellant is existing, also doing business in the same premises and he has wantonly refused to receive the order. The Appellant himself has declared that he has done business in the same place of business filing returns and also paying tax before the Assessing Authority. From this, Appellate Authority has concluded that the Appellant has refused to receive the notice and also the order. Therefore, Assessing Authority has served the order by affixture on 25.2.97 is proper and the same treated as the date of service for deciding the limitation. Still then, complying with the principles of natural justice, Assessing Authority has sent a copy of the order by RPAD on 26.2.97. Even this is also not served for the refusal of the Appellant to receive the same. Therefore, the same was sent by postal authorities with endorsement that the same was not claimed by the Appellant. Further, the specific intimation regarding the receipt of orders by RPAD to the Appellant was intimated by the postal authorities on 1.3.97. Therefore, the Appellant has refused to receive the order. Next day, to the service by affixture on 25.2.97 further opportunity to the Appellant to get the order by RPAD was also made on 26.2.97. The Appellant has refused to receive the same. Therefore, service by affixture resorted is after attempting the personal service to the Appellant. When the Appellant has refused to receive the order, the order served by affixture on 25.2.97 is proper. Further, to comply the principles of natural justice, a copy of the order is also sent by RPAD on 26.2.97 and the same is also refused by the Appellant. The postal endorsement made by the postal authorities is specific about the refusal of the Appellant to receive the order. Therefore, when the order is served on the Appellant and the same is refused, service by affixture made is proper. Further, in order to give opportunity to the Appellant to get the orders by RPAD is also made. Even for this, he has refused to receive the order. The case laws relied on by the Appellants put forth in the grounds of appeal and also those in the written arguments are not applicable to the facts involved in the Appellant case as the personal service is avoided by the Appellant and the service by affixture is made only for the Appellant refusal to receive the personal service of the order. Further, in addition to that, service is by RPAD is also made. For this also, the Appellant has also refused to receive the order. As admitted by the Appellant himself, he is doing business in the same place of business, the service of the order is made to his address and the said is refused by the Appellant. Therefore, the delay condonation considered from 25.2.97 is proper. The delay caused is 137 days in filing the appeal. The same could not be condoned under Section 31 and the same rejected by way of dismissing the appeal petition is proper. Further, Appellate Assistant Commissioner has also established the inapplicability of the decisions relied on by the Appellants for the facts involved in his case. Further, the Appellant has disclosed the taxable turnover of Rs.1,67,352/- representing direct inter-state sales of chillies effected to registered dealers. The tax payable is Rs.6,694/- but the said paid is Rs.5,932/-. Then the admitted tax of Rs.762/- is not paid. The Appellant has not said anything about the payment of the same. Though the same is payable within the statutory prescribed period of 60 days from the date of service of the order as decided in 100 STC 1. the Appellant has not said anything regarding the payment of the balance of admitted tax and the same is actually not paid. The refusal on the part of the Appellant to receive the notice and order has been mentioned by the Assessing Authority in his assessment order clearly. Further, the endorsement by the person making service of the order by affixture is enough. The Appellant argument that the service has to be done in the witness of the Village

Administrative Officer or any independent witness is improper. There is no evidence and authority for the same. The endorsement by the process server relating to the service of the order, also for the refusal of the same and also for affixutre is proper. Therefore, we conclude that the appeal petition rejected by Appellate Assistant Commissioner refusing to condone the delay of 137 days caused in filing the appeal and 190 days caused in payment of admitted tax is proper. Accordingly, the appeal petition is dismissed.

In fine, the appeal stands dismissed.

3. Having heard the learned counsel for the parties, we are satisfied that the learned Appellate Authorities ought to have decided the appeal on merits. Appeal is a valuable statutory right of the Assessee and the power of the Appellate Authority are co-extensive with that of the Assessing Authority and being fact finding authorities, the Appellate Authorities should not have shirked their responsibilities and decided the case on merits. Accordingly, we are inclined to allow the present writ petition by setting aside the impugned orders passed by the Authorities below and restore the matter to the First Appellate Authority to decide the appeal afresh in accordance with law, after affording reasonable opportunity to both the parties, within a period of six months from today. The parties may appear before the First Appellate Authority in the first instance on 18 March 2020.

4. The Writ Petition is disposed of with the above direction. No costs. consequently, WPMP No.36962 of 2005 is also closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1 THE DEPUTY COMMERCIAL TAX OFFICER
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COIMBATORE.

+1cc to M/s.Mc.Gain Law Firm, Advocate, Sr.No.14522.
+1cc to The Special Government Pleader, Sr.No.14698.

PP(CO)
klt (22/05/2020)