

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.773 OF 2021**

Sony Sales Corporation

...Petitioner

vs.

The State of Maharashtra & Anr.

...Respondents

Mr.Deepak Bapat with Ms.Sonali Bapat and Mr.Sumedh Hinge for
Petitioner.

Ms.Nisha Mehra, AGP for the State.

**CORAM : DIPANKAR DATTA, CJ &
G. S. KULKARNI, J.**

DATE : SEPTEMBER 21, 2021

PC:

1. An order passed by the Sales Tax Officer dated May 16, 2019 under Section 23(5) of the Maharashtra Value Added Tax Act, 2002 ("MVAT Act") has been challenged in this writ petition dated January 07, 2020. In between, the petitioner had applied for rectification under Section 24 of the MVAT Act and such application also stands rejected by the Sales Tax Officer by an order dated October 30, 2019.

2. It is not in dispute that both the original order dated May 16, 2019 and the order rejecting the rectification application dated October 30, 2019, are not part of the records. The latter order dated October 30, 2019 is not even challenged in the writ petition. Having regard to the decision of the Supreme Court reported in

(2001) 9 SCC 344 [**Hindustan Petroleum Corporation Ltd. Vs. Sunita Mehra**], we are not inclined to entertain this writ petition.

3. However, we do not propose to dismiss this writ petition only on the above ground. There are two other weighty reasons to do so.

4. First, an order passed by the Sales Tax Officer could be challenged by an aggrieved assessee in an appeal under Section 26 of the MVAT Act. The time period for filing an appeal, we are informed, is 60 days. Without carrying the orders aforesaid dated May 16, 2019 and October 30, 2019 in an appeal under Section 26 of the MVAT Act within the stipulated time, the writ jurisdiction of this Court has been invoked. There is no reason or explanation as to why the writ petition was not instituted, at least within the stipulated period for preferring an appeal. Although the law of limitation is not applicable to writ proceedings, delay and laches are factors that the Court ought to bear in mind while entertaining a writ petition. Certainly, a litigant cannot knock the doors of the High Court at leisure after lapse of the time period for preferring an appeal. In such a case, the Court may refuse to exercise its discretionary power. We may profitably refer to the decision of the Supreme Court reported in AIR 1961 SC 1506 [**A.V. Venkateswaran, Collector of Customs, Bombay vs.**

Ramchand Sobhraj Wadhwani and Another], where it has been held that:

“12. ... we must express our dissent from the reasoning by which the learned Judges of the High Court held that the writ petitioner was absolved from the normal obligation to exhaust his statutory remedies before invoking the jurisdiction of the High Court under Article 226 of the Constitution. If a petitioner has disabled himself from availing himself of the statutory remedy by his own fault in not doing so within the prescribed time, he cannot certainly be permitted to urge that as a ground for the Court dealing with his petition under Article 226 to exercise its discretion in his favour. Indeed, the second passage extracted from the judgment of the learned C.J. in *Mohammed Nooh (AIR 1958 SC 86)* with its reference to the right to appeal being lost ‘through no fault of his own’ emphasizes this aspect of the Rule.”

5. Secondly, we have perused Section 26 of the MVAT Act. Not only does it provide for a first appeal, a second appeal is also provided thereby to the Maharashtra Sales Tax Tribunal constituted under Section 11 of the MVAT Act. That apart, under Section 27 of the MVAT Act, the order of the said tribunal is amenable to challenge by way of an appeal before this Court itself. Since a remedy is made available to the petitioner by the MVAT before this Court, albeit under a different jurisdiction, the decision of the Supreme Court reported in AIR 1964 1419 [**Thansingh Nathmal vs. Superintendent of Taxes**] would also stand in the way of entertaining this writ petition. There, it has been held that:

“7. ... Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for

obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

6. Mr. Bapat, learned advocate for the petitioner has relied upon a decision of the Supreme Court reported in [2016] 70 taxmann.com 274 (SC) [**Aircel Ltd. vs. Commercial Tax Officer**] to contend that despite availability of an alternative remedy, a writ petition would be maintainable.

7. Existence or availability of an alternative remedy does not oust the jurisdiction of a Writ Court, is well established. It is not the law that a writ petition would not be maintainable because of the party has not exhausted the alternative remedy. The question is one of entertainability of the writ petition, in exercise of sound judicial discretion, despite the aggrieved party having a remedy elsewhere. The exceptions, on the fulfillment whereof the writ jurisdiction could be invoked, have been carved out by several decisions of the Supreme Court. We may only refer to the decision reported in (1998) 8 SCC 1 [**Whirlpool Corporation vs. Registrar of Trademarks**] in this regard.

8. In the present case, none of the exceptions is satisfied. In **Aircel Ltd.** (supra), the Court held that there were pure questions of law arising for decision, which could be examined while hearing the writ petition "*under peculiar circumstances*". The said decision

is, therefore, one which turns on its facts and is, thus, not applicable here.

9. It would not be inapt, at this juncture, to notice certain other decisions of the Supreme Court in relation to the approach to be adopted by the High Courts in exercising jurisdiction under Article 226, while in *seisin* of proceedings challenging orders passed under taxing statutes without the suitor having exhausted the alternative remedy made available by the statute under which the impugned order has been made.

10. In the decision reported in AIR 1966 SC 142 [**Sales Tax Officer vs. Shiv Ratan G. Mohatta**], the Supreme Court was considering an appeal carried against an order of the Rajasthan High Court quashing an order passed by the Sales Tax Officer holding that the writ petitioners had collected and retained certain amount, which should have gone to the Government. Although the issues involved in the appeal were decided on merits, the Court observed as follows:

“12. We are of the opinion that the High Court should have declined to entertain the petition. No exceptional circumstances exist in this case to warrant the exercise of the extraordinary jurisdiction under Article 226. It was not the object of Article 226 to convert High Courts into original or appellate assessing authorities whenever an assessee chose to attack an assessment order on the ground that a sale was made in the course of import and therefore exempt from tax. It was urged on behalf of the assessee that they would have had to deposit

sales tax, while filing an appeal. Even if this is so does this mean that in every case in which the assessee has to deposit sales tax, he can bypass the remedies provided by the Sales Tax Act? Surely not. There must be something more in a case to warrant the entertainment of a petition under Article 226, something going to the root of the jurisdiction of the Sales Tax Officer, something to show that it would be a case of palpable injustice to the assessee to force him to adopt the remedies provided by the Act. ***"

11. The next decision requiring consideration is reported in AIR 1967 SC 549 [**Bhopal Sugar Industries Ltd. vs. D.P. Dube, Sales Tax Officer**]. The Madhya Pradesh High Court had dismissed the writ petition of the appellant by which quashing of the order of the respondent imposing liability for payment of sales tax was prayed. The Court held that the High Court committed an error in dismissing the writ petition on a ground not set up by the respondent in his counter affidavit. While dismissing the appeal on merits considering the other contentions that were raised in the writ petition, this is what the Court said:

"7. The legislature has set up an elaborate and self-contained machinery for investigating whether a transaction is liable to be taxed because it is of the nature of a retail sale within the meaning of the Act. The Taxing Officer is invested with authority to determine the nature of the transaction and its liability to tax, and against his decision there is an appeal to the Appellate Authority and a further right of revision to the Commissioner. It is true that the jurisdiction of the High Court under Article 226 is extensive, but normally the High Court does not exercise that jurisdiction by entertaining petitions against the

order of taxing authorities, when the statute under which tax is sought to be levied provides a remedy by way of an appeal or other proceeding to a party aggrieved and thereby by-pass the statutory machinery. That is not to say that the High Court will never entertain a petition against the order of the Taxing Officer. The High Court has undoubtedly jurisdiction to decide whether a statute under which a tax is sought to be levied is within the legislative competence of the legislature enacting it or whether the statute defies constitutional restrictions or infringes any fundamental rights, or whether the taxing authority has arrogated to himself power which he does not possess, or has committed a serious error of procedure which has affected the validity of his conclusion or even where the taxing authority threatens to recover tax on an interpretation of the statute which is erroneous. The High Court may also in appropriate cases determine the exigibility to tax of transactions the nature of which is admitted, but the High Court normally does not proceed to ascertain the nature of a transaction which is alleged to be taxable. The High Court leaves it to the tax payer to obtain an adjudication from the taxing authorities in the first instance."

12. The Supreme Court in its decision reported in (1983) 2 SCC 433 [**Titaghur Paper Mills Co. Ltd. vs. State of Orissa**], was considering the order under challenge passed by the Orissa High Court dismissing a writ petition on the ground of availability of an efficacious alternative remedy. The Court ruled:

"6. We are constrained to dismiss these petitions on the short ground that the petitioners have an equally efficacious alternative remedy by way of an appeal to the Prescribed Authority under sub-section (1) of Section 23 of the Act, then a second appeal to the Tribunal under sub-section (3)(a) thereof, and thereafter in the event the

petitioners get no relief, to have the case stated to the High Court under Section 24 of the Act.

11. Under the scheme of the Act, there is a hierarchy of authorities before which the petitioners can get adequate redress against the wrongful acts complained of. The petitioners have the right to prefer an appeal before the Prescribed Authority under sub-section (1) of Section 23 of the Act. If the petitioners are dissatisfied with the decision in the appeal, they can prefer a further appeal to the Tribunal under sub-section (3) of Section 23 of the Act, and then ask for a case to be stated upon a question of law for the opinion of the High Court under Section 24 of the Act. The Act provides for a complete machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.
*****"

13. Not too long ago, the Supreme Court in its decision reported in (2014) 1 SCC 603 [**CIT vs. Chhabil Dass Agarwal**], upon considering a host of decisions had the occasion to opine that:

"15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in *Thansingh Nathmal* case (AIR 1964 SC 1419), *Titaghur Paper Mills* case [(1983) 2 SCC 433] and other similar judgments that the High Court will

not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.”

14. Reading of the aforesaid authorities makes the position clear that insofar as taxing statutes are concerned, interference by a writ court should be few and far between. It cannot be disputed that the MVAT Act was introduced with the object of consolidating and amending the law relating to the levy and collection of tax on the sale and purchase of certain goods in the State of Maharashtra. A complete machinery is envisaged for the purposes of levy of tax and its collection, which is in the nature of a liability for the assessee, as well as providing avenues to seek relief in respect of improper or erroneous orders made by the authorities vested with power to levy and collect tax, which is in the nature of a right of the assessee. The MVAT requires the relevant authority, at or about the time an adjudication is in progress, to ascertain facts and apply the law that are applicable to a particular situation, to return findings on each and every point that would arise in course of the proceedings and to end his order by recording his conclusions. Should the party proceeded against feel aggrieved by an order passed under the MVAT Act, a complete hierarchy of appellate

authority/court is provided thereunder. Invocation of the High Court's power to issue high prerogative writs under Article 226 of the Constitution in matters relating to levy and collection of tax, in view of such fora made available by the statute, ought not to be permitted as a matter of course or else the will of the people expressed by the legislature in the relevant enactment would be rendered nugatory. It is only in very exceptional cases when a party complains of infringement of fundamental rights, or where facts are not disputed and such party establishes assumption of jurisdiction by an authority without being possessed thereof, or the complaint of violation of natural justice is so pronounced and gross, that a writ court in the judicious exercise of its discretion may choose to interfere.

15. In view of the above, there is no question of entertaining this writ petition.

16. At this stage, Mr. Bapat submits that if at all the petitioner is to be relegated to the statutory remedy of appeal, it may not be required to pre-deposit 10% of the amount of tax as referred to in Section 26(6B)(b) of the MVAT Act. He has referred to the decision of the Division Bench of this Court in Sales Tax Appeal No.2 of 2018 **[M/s. Anshul Impex Private Ltd. vs. State of Maharashtra & Ors.]** to contend that the petitioner would not be required to pre-deposit 10% of the disputed tax.

17. We find that the challenge in **M/s. Anshul Impex** (supra) was to Section 26(6B) of the MVAT Act and whether for presenting an appeal before the said tribunal, the assessee was required to pre-deposit 10% of the disputed tax. Section 26(6A) of the MVAT Act is specifically not under challenge, though it could well be contended that if Section 26(6B) of the MVAT Act were held *ultra vires*, Section 26(6A) would not independently survive. However, the decision in **M/s. Anshul Impex** (supra) has not been concurred with by a subsequent Division Bench and the matter is pending before a larger bench for a decision.

18. This writ petition, accordingly, stands dismissed, without costs.

19. However, this order shall not preclude the petitioner to present a proper appeal under Section 26 of the MVAT Act before the appropriate appellate authority in accordance with law. In view of Section 81 of the MVAT Act, the petitioner would be at liberty to apply for condonation of delay and if sufficient cause is shown to the satisfaction of the appellate officer, an appropriate order may be passed.

20. All contentions on merits are left open.

(G. S. KULKARNI, J.)

(CHIEF JUSTICE)