

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.2.2021

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HONOURABLE MS.JUSTICE R.N.MANJULA

WRIT APPEAL NO.493 OF 2021 & CMP.NO.1959 OF 2021

Mahindra & Mahindra Ltd.,
rep.by Shri R.K.Sairam, Manager,
CI&S Accounts-Admn., Chennai-2.

...Appellant/Petitioner

Vs

1. The Joint Commissioner (CT)
Appeals, Chennai-6.

2. The Deputy Commissioner (CT)-
II, Large Tax Payers Unit,
Chennai-8.

...Respondents/Respondents

APPEAL under Clause 15 of the Letters Patent against the
order dated 19.11.2020 made in W.P.No.32257 of 2015.

W.P.No.32257 of 2015:-

Writ Petition filed under Article 226 of the Constitution of
India, praying to issue a Writ of certiorari, calling for the
records in order AP.No.24/2014, AP.159/2014 dated 06.03.2015
passed by the 1st Respondent and quash the same as arbitrary and
illegal.

For Appellant : Mr. Joseph Prabhakar

For Respondents : Mr.Mohammed Shaffiq, SGP
assisted by Mrs.G.Dhanamadhri, GA

Judgment was delivered by T.S.SIVAGNANAM, J

We have heard Mr.Joseph Prabhakar, learned counsel for the
appellant and Mr.Mohammed Shaffiq, learned Special Government
Pleader assisted by Mrs.G.Dhanamadhri, learned Government
Advocate accepting notice for the respondents

2. This appeal filed by the appellant - dealer is directed
against the order dated 19.11.2020 made in W.P.No.32257 of 2015,

which was dismissed along with two other connected matters in W.P.Nos. 33878 and 33879 of 2015 challenging the orders 30.1.2014 and 16.9.2014 levying penalty respectively for the assessment years 2008-09 and 2013-14 as well as the consequential garnishee orders.

3. W.P.No.32257 of 2015 was filed by the dealer challenging the order dated 06.3.2015 passed by the first respondent - First Appellate Authority, who partly confirmed the orders of the second respondent - Assessing Officer levying penalty respectively for the assessment years 2008-09 and 2013-14. The learned Single Judge did not go into the merits of the matter, but dismissed all the three writ petitions on the ground that the Court could not exercise its jurisdiction under Article 226 of The Constitution of India.

4. The learned Single Judge placed reliance on the decision of the Hon'ble Supreme Court in the case of ACCT, LTU, Kakinada Vs. Glaxo Smith Kline Consumer Health care Ltd. [reported in 2020 (36) GSTL 305] and in the said decision, it was emphatically laid down that the High Court, in exercise of power under Article 226 of The Constitution of India, ought not to have entertained the writ petition assailing the order passed by the Statutory Authority, which was not appealed against within the maximum period of limitation before the concerned Appellate Authority.

5. In our respectful view, the decision of the Hon'ble Supreme Court in the said decision has not held that a writ petition under Article 226 of the Constitution of India is an absolute bar. We are of the said view after noting the observations/findings rendered by the Hon'ble Supreme Court in the following paragraphs :

"11. In the backdrop of these facts, the central question is: whether the High Court ought to have entertained the writ petition filed by the respondent? As regards the power of the High Court to issue directions, orders or writs in exercise of its jurisdiction under Article 226 of the Constitution of India, the same is no more res integra. Even though the High Court can entertain a writ petition against any order or direction passed/action taken by the State under Article 226 of the Constitution, it ought not to do so as a matter of course when the aggrieved person could have availed of an effective alternative remedy in the manner prescribed by law (see Baburam

Prakash Chandra Maheshwari vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar [AIR 1969 SC 556] and also Nivedita Sharma vs. Cellular Operators Association of India & Ors. [2011 (14) SCC 337]. In Thansingh Nathmal & Ors. vs. Superintendent of Taxes, Dhubri & Ors. [AIR 1964 SC 1419], the Constitution Bench of this Court made it amply clear that although the power of the High Court under Article 226 of the Constitution is very wide, the Court must exercise self imposed restraint and not entertain the writ petition, if an alternative effective remedy is available to the aggrieved person.....

15. The High Court may accede to such a challenge and can also non suit the petitioner on the ground that alternative efficacious remedy is available and that be invoked by the writ petitioner. However, if the writ petitioner chooses to approach the High Court after expiry of the maximum limitation period of 60 days prescribed under Section 31 of the 2005 Act, the High Court cannot disregard the statutory period for redressal of the grievance and entertain the writ petition of such a party as a matter of course. Doing so would be in the teeth of the principle underlying the dictum of a three Judge Bench of this Court in Oil and Natural Gas Corporation Limited (supra). In other words, the fact that the High Court has wide powers, does not mean that it would issue a writ which may be inconsistent with the legislative intent regarding the dispensation explicitly prescribed under Section 31 of the 2005 Act. That would render the legislative scheme and intention behind the stated provision otiose.

19..... Pertinently, no finding has been recorded by the High Court that it was a case of violation of principles of natural justice or non compliance of statutory requirements in any manner. Be that as it may, since the statutory period specified for filing of appeal had expired long back in August, 2017 itself and the appeal came to be filed by the respondent only on 24.9.2018, without substantiating the plea

about inability to file appeal within the prescribed time, no indulgence could be shown to the respondent at all."

6. On a reading of the above extracted paragraphs, it is seen that the Hon'ble Supreme Court, after referring to the decision of the Constitution Bench in the case of Thansingh Nathmal, held that although the power of the High Court under Article 226 of the Constitution is very wide, the Court must exercise self imposed restraint and not entertain the writ petition. Further, in paragraph 15, the Hon'ble Supreme Court observed that the High Court may accede to such a challenge and can also non suit the petitioner on the ground that alternative efficacious remedy is available and that be invoked by the writ petitioner. In addition, in paragraph 19, the Hon'ble Supreme Court took note of the fact that when the High Court refuses to exercise the jurisdiction under Article 226 of The Constitution of India, it would be necessary for the Court to record that there was no case of violation of the principles of natural justice or non compliance of statutory requirements in any manner.

7. Therefore, there are certain broad parameters, within which, the Court has to exercise its jurisdiction under Article 226 of The Constitution of India, which read as hereunder :

(i) if there is unfairness in the action of the Statutory Authority;

(ii) if there is unreasonableness in the action of the Statutory Authority;

(iii) if perversity writs large in the action taken by the Authority;

(iv) if the Authority lacks jurisdiction to decide the issue and

(v) if there has been violation of the principles of natural justice,

the Court will step in and exercise its jurisdiction under Article 226 of The Constitution of India.

8. Further, it would be highly beneficial to refer to the celebrated decision of the Constitution Bench of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. Vs. Union of India [reported in 1997 (5) SCC 536] wherein it was held that the jurisdiction of the High Courts under Article 226 and that of the Hon'ble Supreme Court under Article 32 of The Constitution of India could not be circumscribed by the provisions of the Enactment (Central Excise Act) and they would certainly have due regard to the legislative intent evidenced by the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the Act. Further, the Court

directed that the writ petition would be considered and disposed of in the light of and in accordance with the provisions of Section 11B of the Central Excise Tax Act and for such a reason, the power under Article 226 of The Constitution of India has to be exercised to effectuate rule of law and not for abrogating it.

9. In the light of the above, we have no hesitation to hold that the observation of the learned Single Judge to the effect that there is absolute bar for entertaining a writ petition does not reflect the correct legal position. Hence, we are inclined to interfere with the observation made in the impugned order.

10. Next we go to the merits of the matter, as we are required to see as to whether the appellant's case would fall under any one of the exceptions, which have been carved out by various decisions of the Hon'ble Supreme Court for exercise of jurisdiction under Article 226 of The Constitution of India, when there is a statutory appellate/revisional remedy available to the aggrieved person. One such factor, which would be taken into consideration for exercising jurisdiction is as to whether there has been violation of the principles of natural justice.

11. In this regard, we have elaborately heard Mr. Joseph Prabhakar, learned counsel appearing for the appellant and Mr. Mohammed Shaffiq, learned Special Government Pleader assisted by Mrs. G. Dhanamadhri, learned Government Advocate appearing for the respondents.

12. On a perusal of both the orders dated 30.1.2014 and 16.9.2014 respectively for the assessment years 2008-09 and 2013-14 passed under the provisions of the Central Sales Tax Act, 1956 (for short, the CST Act), we find that the Assessing Officer had issued the notices respectively dated 06.8.2012 and 28.7.2014 proposing to levy penalty on the ground that the dealer purchased SAP software at concessional rate of tax against C Form Declarations without having included the same in the registration certificate issued under the CST Act. Hence, the Assessing Officer was of the prima facie view that the software was not capable of being used in manufacturing and therefore, had proposed to levy penalty under Section 10A(1) of the CST Act.

13. For the assessment year 2008-09, the appellant - dealer submitted two letters requesting for adjournment to enable them to submit their detailed objection. It appears that the matter was adjourned and the appellant - dealer submitted their objections on 16.10.2012 justifying their purchase of SAP software at concessional rate of tax against C Form Declarations. For the assessment year 2013-14, the appellant

sent the reply dated 18.8.2014 and the order was passed on 16.9.2014.

14. It is worthwhile to point out that the order levying penalty for the assessment year 2008-09 is dated 30.1.2014. Though the dealer's objections were received on 16.10.2012, the Assessing Officer did not afford any opportunity of personal hearing to the appellant though more than one year had lapsed. This, in our considered view, is a serious issue because the dealer has taken a specific stand that the software is being used in the manufacture. Furthermore, the dealer's case is that in their registration certificate issued under the CST Act, as mentioned in Clause 9 in the annexure, computer software is also one of the items mentioned in their certificate of registration. Had an opportunity of hearing been granted to the dealer, especially when the Assessing Officer took more than one year to complete the assessment, the dealer would have explained the same. That apart, the proposal to levy penalty was made by an officer, who was not the officer, who passed the order dated 30.1.2014, as there has been a transfer of the officer and the new officer took over charge. This is also one more aspect, which should have weighed in the mind of the Assessing Officer to afford an opportunity of personal hearing because the officer, who completed the assessment, was not the officer, who made the proposal to levy penalty.

15. It is also seen that even in respect of the assessment year 2013-14, no opportunity of personal hearing was granted to the dealer.

16. Thus, we are of the considered view that the case of hand having fallen under one of the exceptional circumstances as mentioned above warranting exercise of jurisdiction under Article 226 of The Constitution of India and as the defect, which has occurred by levying penalty without affording an opportunity of personal hearing would go to the root of the very levy itself, we are inclined to interfere with the impugned order, the assessment orders and remand the matters to the Assessing Officer for a fresh consideration.

17. It is relevant to point out, at the risk of repetition, that W.P. No.32257 of 2015 was disposed of along with two other writ petitions namely W.P.Nos.33878 and 33879 of 2015, which pertain to challenge to the orders levying penalty respectively (i) dated 30.1.2014 for the assessment year 2008-09 and (ii) dated 16.9.2014 for the assessment year 2013-14 and the consequential garnishee order passed therein. Now that we are inclined to remand the matters to the Assessing Officer for a fresh consideration, it is inevitable that (i) the orders both dated (i) 30.1.2014 and (ii) 16.9.2014 as well as the

consequential garnishee orders passed therein both dated 07.10.2015 also require to be set aside, otherwise, the connected and consequential proceedings would be lingering before various Authorities.

18. Accordingly, the following order is passed :

(i) the writ appeal is allowed;

(ii) the impugned order dated 19.11.2020 passed by the learned Single Judge in W.P.No.32257 of 2015 is set aside; W.P.No.32257 of 2015 is allowed; the common order dated 06.3.2015 passed by the first respondent in A.P.Nos.24 and 159 of 2014 is set aside; and

(iii) The orders levying penalty both (i) dated 30.1.2014 and (ii) dated 16.9.2014 as well as the consequential garnishee orders dated 07.10.2015 are set aside and the matters are remanded to the second respondent - Assessing Officer to redo the entire exercise after affording an opportunity of personal hearing, during which, it will be open to the appellant to place their additional submissions both on facts and in law. No costs. Consequently, the above CMP is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

RS

To

- 1.The Joint Commissioner (CT) Appeals, Chennai-6.
- 2.The Deputy Commissioner (CT)-II,
Large Tax Payers Unit, Chennai-8.

+1cc to Mr.Joseph Prabhakar, Advocate, S.R.No.10204
+1cc to the Special Government Pleader, S.R.No.10054

WA.No.493 of 2021 &
CMP.No.1959 of 2021

AAB (CO)
CS/19/03/2021