IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.03.2021

CORAM :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Ms.Justice R.N.MANJULA

W.A.No.683 of 2021
and
C.M.P.No.3729 of 2021

West Asia Maritime Limited,
Represented by G.N.Krishnan,
Chief Financial Officer. ...Appellant/Petitioner

Vs

Assistant Commissioner of GST &
Central Excise,
Nungambakkam Division,
Chennai North Commissionerate,
12, NH Road, Nungambakkam,
Chennai - 600 034. ...Respondent/Respondent

PRAYER: Writ Appeal filed under Clause 15 of Letters Patent to set aside the order dated 30.11.2020 passed in W.P.No.11796 of 2018 on the file of this Court.

Prayer in W.P.No.11796 of 2018:

Writ Petition filed under Article 226 of the constitution of India, praying to issue a Writ of Certiorari, Calling for the records of the respondent in proceedings C.No.IV/16/ 374/2017-Tech in Order in Original No.12/2017-18 dated 15.11.2017 and quash the same.

For Appellant: Mr.Joseph Prabakar

For Respondent:Mrs.Hema Muralikrishnan, SSC

JUDGMENT

(Delivered by T.S.Sivagnanam,J)

We have heard Mr.Joseph Prabakar, learned counsel for the appellant and Mrs.Hema Muralikrishnan, learned Senior Standing Counsel accepting notice for the respondent.

2. The appellant filed a writ petition in W.P.No.11796 of 2018 challenging the Order-in-Original dated 15.11.2017 passed by the respondent confirming the demand of service tax to the tune of Rs.28,59,004/- including Education Cess, SHE Cess, demanding interest at the appropriate rate under Section 75 of the Finance Act, 1994 and imposing a penalty of Rs.2,85,900/- under Section 76(1) of the Finance Act with an observation that the penalty payable shall be reduced to 25%, provided the service tax amount demanded is paid within 30 days from the date of receipt of the Order-in-Original and a penalty of Rs.10,000/- was also imposed under Section 77(2) of the Act.

3. The writ petition was entertained and interim order was granted on 04.05.2018 following an earlier order in W.M.P.No.35103 of 2016 in W.P.No.41112 of 2016 dated 23.11.2016. The interim order was in force from 2018 onwards. The respondent-department did not file counter affidavit. The writ petition was heard by the learned Single Bench and has been dismissed on the ground that the same cannot be entertained in the light of the decision of the Hon'ble Supreme Court in the case of Assistant Commissioner (CT) LTU, Kakinada Vs. Glaxo Smith Kline Consumer Health Care Limited (Civil Appeal No.2413 of 2020 dated 06.05.2020).

4. We had an occasion to consider the correctness of similar orders, where writ petitions were dismissed, following the said decision of the Hon'ble Supreme Court and held that there is no absolute bar for the Writ Court to test the correctness of the Order-in-Original, if the challenge falls under any one of the exceptions, which have been drawn by the Hon'ble Supreme Court for entertaining writ petitions against orders in Revenue matters where appeal remedy has been provided. One such decision is in the case of Mahindra & Mahindra Ltd. Vs. The Joint Commissioner (CT) and another in W.A.No.493 of 2021 dated 18.02.2021. The operative portion of the judgment reads as follows:

> "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 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."

5. In the light of the above decision, we are constrained to interfere with the order passed in the writ petition. One more contention which appeal to us to interfere with the order is because identical issue is pending before the learned Single Bench in other writ petitions as well and the appellant herein is the petitioner in those writ petitions, namely W.P.Nos.24483 of 2016, 41112 of 2016 and 18838 of 2020.

6. Mr.Joseph Prabakar, learned counsel for the appellant submitted that the issue raised by the appellant in the writ petition is squarely covered in favour of the appellant by the decision of the Hon'ble Supreme Court in the case of State of West Bengal Vs. Calcutta Club Limited [(2019) 29 GSTL 545], wherein it was held that incorporated clubs or associations are not liable to pay service tax both for the period prior to 1st July 2012 and for the period post 1st July, 2012 under the new Section 65B introduced in Finance Act, 1994.

7. The learned counsel has drawn our attention to other decisions as well, namely Ranchi Club Ltd. Vs. Chief Commissioner of Central Excise & Service Tax [(2012) 26 ITR 401 (Jhar)] and Sports Club of Gujarat Ltd. Vs. Union of India [(2013) 31 STR 645 (Guj), which were rendered much earlier to the decision of the Hon'ble Supreme Court in Calcutta Club Ltd., which were confirmed in the said decision. Further, the learned counsel submitted that by applying the decision in Calcutta Club Ltd., the learned Single Bench in W.P.No.15960 of 2016, in the case of Railway Officers Club Vs. Additional Commissioner of Service Tax, has allowed the writ petition by order dated 02.01.2020.

8. Mrs.Hema Muralikrishnan, learned Senior Standing Counsel appearing for the respondent submitted that in the Order-in-Original, the first respondent has elaborately discussed as to how the theory of mutuality cannot be pleaded by the appellant

and how those decisions, which were relied on by the appellant, are not tenable to the appellant's case.

9. In any event, these issues have to be agitated in the writ petition for which a counter affidavit has to be filed by the respondent.

10. Furthermore, the learned Senior Standing Counsel submitted that the writ petition itself is not maintainable as an effective alternate remedy is available to the appellant and without availing the same, the appellant could not have approached the Writ Court. This issue could also be canvassed by the respondent in the writ petition by filing a counter affidavit.

11. We say so because the issue is pending before the Court since 2016 onwards and the present writ petition was filed in the year 2018 and we are informed that the appellant has also filed another writ petition in W.P.No.18838 of 2020, which is also pending and in the two cases, interim orders are still in force.

12. Therefore, we are of the view that the writ petition could be heard and disposed of on merits leaving it open to the respondent to raise all contentions as was canvassed before this Court both on merits as well on the question of maintainability of the writ petition.

13. For the above reasons, the writ appeal is allowed and the order passed in the writ petition is set aside and the writ petition is restored to the file of this Court to be heard along with W.P.Nos.24483 of 2016, 41112 of 2016 and 18838 of 2020. Since the appellant has the benefit of interim stay of the Order-in-Original dated 15.11.2017 from 04.05.2018, the Order-in-Original dated 15.11.2017 shall remain stayed till the aforesaid writ petitions are disposed of. No costs. Consequently, connected miscellaneous petition is closed.

14. Liberty is granted to the counsel on either side to move the Registry for the early listing of all the writ petitions.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

hvk

To

Assistant Commissioner of GST & Central Excise,
Nungambakkam Division,
Chennai North Commissionerate,
12, NH Road, Nungambakkam,
Chennai - 600 034.

+1cc to M/s.Hemamuralikrishnan, Advocate Sr.15596

W.A.No.683 of 2021
and
C.M.P.No.3729 of 2021

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srg 15/04/2021