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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.07.2021

CORAM:

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.Nos.15465 & 15467 of 2021
and W.M.P.Nos.16398 & 16400 of 2021

PPN Power Generating Company Pvt. Ltd.,
Represented by its Joint Managing Director,
Mr.Harshad Reddy,
1-A, III Floor, Jhaver Plaza,
Nungambakkam High Road,
Chennai 600 034.

..Petitioner in both W.Ps.

Vs.

The Assistant Commissioner of Income Tax,
Central Circle-3(1) Chennai,
Room No.316, New No.46,
Mahatma Gandhi Road,
Chennai 600 034.

..Respondent in both W.Ps.

Common Prayer: Writ Petitions filed under Article 226 of the Consitution of India, to issue a Writ of Certiorari, calling for the records and quash the assessment order bearing DIN ITBA/AST/M/147/2021-22/1033632435 (1) dated 23.06.2021 and DIN ITBA/AST/M/147/2021-22/1033659609(1) dated 24.06.2021, passed by the respondent respectively.

(In both W.Ps.)

For Petitioner : Mr.Aravind Dater P.
(Senior Counsel)
for Mr.Anand Sashidharan

For Respondent : Mr.A.P.Srinivas
(Senior Standing Counsel for IT)

C O M M O N O R D E R

The lis on hand is to assail the orders of assessment dated 23.06.2021 and 24.06.2021, passed by the respondent. The orders of assessment impugned were passed under Section 143 (3) r/w Section 147 of the Income Tax Act, 1961 (hereinafter, referred to as, 'the Act').



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5. Thereafter, the petitioner, vide letter dated 02.11.2020, stated that the notice under Section 148 of the Act was issued after an expiry of four years from the date of assessment and therefore, with reference to Paragraph No.4 at page No.5 of the order of this Court dated 19.07.2019 in W.P.No.989 of 2011, actions are to be initiated. The objections submitted by the petitioner were considered and disposed of by the assessing authority in proceedings dated 23.12.2020 and 22.12.2020 respectively. Detailed orders have been passed. Subsequently, a request for rectification of mistake apparent in the orders of disposing the objections were filed by the petitioner on 11.01.2021. The said applications of request for rectification of mistake were also considered and disposed of by the assessing authority in proceedings dated 01.03.2021. Thereafter, the petitioner has stated that they were unable to file returns electronically. Further, submitted a letter on 18.06.2021. The authority has further passed an order and finally, orders of assessment were passed under Section 143 (3) r/w Section 147 of the Act, which are impugned in the present Writ Petitions.

6. The learned Senior Counsel strenuously contended that it is a case which required an elaborate adjudication. There is a violation of principles of natural justice. The opportunity, as contemplated, were not granted to the petitioner. The authority was lacking in jurisdiction. Therefore, the Writ Petitions are to be admitted and the original files are to be called for, for the purpose of scrutinization.

7. In support of the contentions, the learned Senior Counsel relied on the judgment in the case of International Flavours Fragrances India Pvt. Ltd., vs. Joint Commissioner (LTU) and others, reported in [2020] 429 ITR 28 (Mad), wherein, the Court made the following observations:

"8. Proceedings for re-assessment initiated beyond four years from the end of the relevant assessment year have to satisfy the added condition set out in the proviso to Section 147 of the Act. Normally, the time limit for initiation of re- assessment is four years from the end of the subject assessment year with an extended period of two years provided to the Department conditional upon the Department establishing that the alleged escapement of income was attributable to the failure of the assessee to file a return or to make a full and true disclosure of its income for the relevant period.

.....

12.A perusal of the reasons extracted elsewhere in this order only referred to the issue of classification of royalty on merits and nowhere



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it is stated that there has been any failure by the petitioner in making a disclosure in this regard. To be fair to the Assessing Officer, he does not even make such allegation in the reasons for re-assessment and rightly so, since the material available would show a full disclosure by the petitioner at all stages of assessment.

Thus I am of the view that the impugned order dated 26.08.2019 rejecting the objections to assumption of jurisdiction is liable to be quashed and I do so."

8. In the case of M/s. Kone Elevators (India) Pvt. Limited, Vs. Assistant Commissioner of Income-Tax, this Court passed the order on 16.06.2021 in W.P.No.43662 of 2016 as under:

"12. Let us now look into the conditions stipulated under Proviso to Section 147 of the Act, which contemplates that where an assessee under sub-Section (3) of Section 147 or Section 147 has been made for the relevant assessment year, no action shall be taken under Section 147 after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub-Section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

.....

14. The language employed in the Provision is to be interpreted constructively and pragmatically so as to understand the purpose and object. Plain meaning would not serve the purpose to meet out the object of the provision. Thus, this Court is of an opinion that the language employed under the Proviso to Section 147 i.e., "to disclose fully and truly all material facts" denotes that there must be an intention or motive on the part of the assessee to suppress certain facts at the time of passing an assessment order by the original authority.

15. Question may arise, if certain non-disclosure can be a ground for reopening. In this regard, absolutely there is no bar for reopening of assessment within a period of four years under Section 147 of the Act and if the reopening of assessment is to be made beyond four years, then



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it must be established that the assessee has not disclosed fully and truly all material evidence with an intention to escape from the payment of tax. Mere non-disclosure is insufficient in view of the fact that the assessee may have certain opinions in the matter of furnishing certain details to the Assessing Officer. Therefore, the motive or intention on the part of the assessee for such non-disclosure is also a material ground to be considered by the Courts as well as by the authority at the time of reopening of assessment beyond the period of four years.

16. In respect of the case on hand, undoubtedly, the assessee had not submitted the ratification certificate to be obtained from the CBDT for claiming exemption under Section 10B of the Act. However, there are certain confusions even within the Department Officials regarding production of such ratification certificate from the CBDT. The dispute arises in view of the fact that the assessee is of an opinion that the approval granted by the STPI under the delegated powers of the Directors of STPI by IMSC is a valid approval for the purpose of claiming exemption under Section 10B of the Act. Therefore, the presumption cannot be construed as suppression on the part of the assessee. It is not a mere presumption in the present case by the assessee. The presumption has got a valid reason because the assessee is holding a valid approval obtained from the STPI and the power to grant approval was delegated to the Directors of STPI by IMSC. It is not as if the assessee claimed exemption under Section 10B without any such approval. It is a case where the order of approval, which was validly granted, was produced before the Assessing Officer at the time of scrutiny and the Assessing Officer also accepted the approval order and granted exemption. Thus, the reason stated in the impugned proceedings that the assessee committed a mistake cannot be accepted. The assessee was possessing a valid approval which was produced before the Assessing Officer and if a ratification is to be obtained, then the Assessing Officer, at the time of scrutiny, ought to have directed the assessee to get any such ratification certificate for the purpose of grant of exemption under Section 10B which the Department had not done. Thus, it was a mistake or omission committed by



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the Assessing Officer at the time of passing of the original assessment order. Even in such cases, if the reopening of assessment is made within a period of four years, then there is a ground for the Department to reopen the same. However, in the present case, the reopening of assessment is made beyond the period of four years and therefore, the statutory requirement contemplated under Section 147 is to be complied with scrupulously. Thus, the ground taken for reopening of assessment that the assessee has not disclosed fully and truly all material facts is not established in the present case and the assessee, in fact, submitted all the particulars regarding the approval granted by the authority and further ratification, if required, must be instructed by the Department which was not done and therefore, there was no suppression or non-disclosure of material facts by the assessee. Thus, the initiation of proceedings under Section 147 of the Act, beyond the period of four years, is not sustainable and consequently, the impugned proceedings are not in consonance with the conditions stipulated in the Proviso to Section 147 of the Act."

9. The three Judges Bench of the Hon'ble Supreme Court of India, in the case of TIN Box Company, New Delhi Vs. CIT, New Delhi, reported in (2001) 9 SCC 725, made an observation as follows:

"2.....That order must be made after the assessee has been given a reasonable opportunity of setting out his case. We, therefore, do not agree with the Tribunal and the High Court that it was not necessary to set aside the order of assessment and remand the matter to the assessing authority for fresh assessment after giving to the assessee a proper opportunity of being heard.

.....

5.....The matter shall now be remanded to the assessing authority for fresh consideration, as aforesaid. No order as to costs."

10. In the case of T.M. Hotels Private Limited Vs. The Additional Commissioner of Central Excise, this Court passed an order on 06.07.2021 in W.P.No.14099 of 2014 as under:

"7. This Court is of the considered opinion that in all circumstances, the parties aggrieved



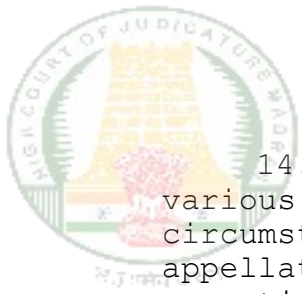
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are bound to prefer an appeal before the appellate authority. However, in certain circumstances, the Courts are bound to consider whether the denial of opportunity caused certain prejudice to the interest of the person aggrieved. In the present case, admittedly, the summons were issued to the petitioner. However, the learned counsel for the petitioner entered appearance in the proceedings before the respondent on 04.03.2014 itself. Thus, there is a possibility that the petitioner would not have informed about the summons to their counsel regarding the personal hearing. Under those circumstances, the counsel was not aware of the date of hearing and the same resulted in passing of the final order without hearing the learned counsel who entered appearance on behalf of the writ petitioner."

11.Relying on the above judgments, the learned Senior Counsel reiterated that the petitioner need not be unnecessarily driven to approach the appellate authority for exhausting the appeal remedy. Instead, the case is to be admitted and the respondent must be directed to file counter in respect of the grounds raised in the present Writ Petitions.

12.The learned Senior Standing Counsel appearing on behalf of the respondent solicited the attention of this Court with reference to the Writ Petition earlier filed by the very same writ petitioner in W.P.No.989 of 2011. The petitioner challenged the 148 notice and the consequential proceedings and this Court considered the case of the petitioner and pass an order on 19.07.2019, granting liberty to the petitioner. The petitioner also submitted various letters and perusal of the said letters would reveal that the petitioner has made an attempt to prolong and protract the matter, instead of defending their case by availing the opportunities provided by the authorities competent, pursuant to the orders passed by this Court. Therefore, the Assessing Officer, after providing opportunity as contemplated, passed the final orders of assessment on merits and in accordance with law. Thus, the petitioner has to avail the remedy provided under the Act. The petitioner may raise all the legal and factual grounds before the appellate authority for effective adjudication. Thus, the Writ Petitions are to be rejected.

13.The question to be considered by this Court is, whether the Court may dispense with the appellate remedy, contemplated under the provisions of the Act, in a routine and casual manner, which would undermine the authorities on appeal.



14. On several occasions, the similar issue was considered by various constitutional Courts across the Country. In all circumstances, the aggrieved person is bound to exhaust the appellate remedy provided under the relevant statutes. Only on exceptional circumstance, where the order in question was issued by an incompetent authority having no jurisdiction under the provisions of the statute or allegations of malafides are raised, then a writ proceedings may be entertained. Even in case of raising an allegation of malafides, the authority against whom such an allegation is raised must be impleaded as party respondent in his personal capacity.

15. The importance of exhausting the appellate remedy is consistently insisted upon by the constitutional Courts. The efficacious remedy provided under the statute need not be undermined, nor an opportunity provided to the aggrieved person under the statute need not be taken away in casual and routine manner. In the event of dispensing with the appellate remedy, the aggrieved person is deprived of an opportunity to adjudicate the disputes/merits with reference to the original documents and evidences. Undoubtedly, the appellate authority is the final fact finding authority and their findings in a appellate proceedings may be of valuable assistance to the constitutional Courts to exercise the power of judicial review, effectively under Article 226 of the Constitution of India, for the purpose of providing complete justice to the parties to the lis. Therefore, the Courts are expected to be cautious, while dispensing with the appellate remedy and casual admissions of writ petitions are to be avoided. Whenever the appellate remedy is contemplated, which is efficacious, then the parties are bound to exhaust the same.

16. The litigants are approaching the High Court without exhausting the remedy. Sometimes, with an idea to avoid pre-deposits, if any prescribed, or by stating that they may not get speedy and efficacious remedy. These grounds cannot be countenanced as the legislative intention for providing an appellate remedy, at no circumstances, be diluted, nor be construed as ineffective. The appellate authorities, undoubtedly are possessing certain expertise in a particular field and their deliberation and findings are of paramount importance for the purpose of exercise of power of judicial review in a writ proceedings. Therefore, in the event of entertaining a Writ Petition against an Order-in-Original, the High Court is compelled to adjudicate the disputed facts. It is pertinent to note that such disputed facts, on some occasions, are adjudicated merely based on the affidavits filed by the respective parties, as well as the selective Xerox copies of the documents filed along with the Writ Petitions. Such an adjudication may result in erroneous consideration of certain



factual aspects and there is a possibility of commission and omission at the instance of the parties. The High Court, therefore, is expected to exercise restraint in adjudicating the disputed facts, which is to be made by the final fact finding authority, based on the original records and materials.

17.As far as exhaustion of appellate remedy is concerned, this Court has elaborately discussed the importance of exhausting the appellate remedy taking note of the judgments of the Hon'ble Supreme Court of India in the case of M/s.Sri Sathya Jewellery Vs. The Principal Commissioner of Customs, in W.P.No.3144 of 2016 dated 15.04.2021, which reads as under:

"14.This Court elaborately discussed the importance of exhausting the appellate remedy in the case of M/s.Hyundai Motor India Limited v. The Deputy Commissioner of Income Tax, Chennai and another [W.P.No.22508 of 2017 dated 16.07.2018], from which, the following paragraphs are extracted :

"19.Unnecessary or routine invasion into the statutory powers of the competent authorities under a statute should be restrained by the Constitutional Courts. Frequent or unnecessary invasions in the executive power will defeat the constitutional perspectives enshrined under the Constitution of India. Undoubtedly, the separation of powers under the Indian Constitution has been narrated and settled in umpteen number of judgments. Separation of powers demarcated in the Constitution of India is also to be considered, while exercising the powers of judicial review in the matter of dispensing with the appeal remedy provided for an aggrieved person under a statute. If the High Courts started interfering with such Appellate powers without any valid and substantiated reasons, then the very purpose and object of the statute and provision of appeal under the statute became an empty formality and the High Courts also should see that the provisions of appeal contemplated under the statutes are implemented in its real spirit and in accordance with the procedures contemplated under the rules constituted thereon. While entertaining a writ petition as narrated by the Apex Court, the provision of efficacious alternative remedy under the statute also to be considered. If the writ petitions are entertained in a routine manner, by not allowing the competent Appellate authority to exercise their powers under the provisions of the statute, then this Court is of an opinion that the power of judicial review has not exercised in a proper manner. Thus, it is necessary for this Court to elaborate the legal principle



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settled in respect of the separation of powers under the Constitution of India.

1. Madras Bar Association vs. Union of India (UOI) (25.09.2014 - SC) : MANU/SC/0875/2014

If the historical background, the preamble, the entire scheme of the Constitution, relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated):

- (1) The supremacy of the Constitution.
- (2) Republican and Democratic form of government and sovereignty of the country.
- (3) Secular and federal character of the Constitution.
- (4) Demarcation of power between the Legislature, the executive and the judiciary.
- (5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.
- (6) The unity and the integrity of the Nation.

2. Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr. [MANU/SC/0445/1973] : (1973) 4 SCC 225].

That separation of powers between the legislature, the **executive** and the judiciary is the basic structure of the Constitution is expressly stated by Sikri, C.J.

3. P. Kannadasan and Ors. v. State of T.N. and Ors. [MANU/SC/0650/1996 : (1996) 5 SCC 670] the Supreme Court noted that the Constitution of India recognised the doctrine of separation of powers between the three organs of the State, namely, the legislature, the executive and the judiciary. The Court said:

It must be remembered that our Constitution recognises and incorporates the doctrine of separation of powers between the three organs of the State, viz., the Legislature, the Executive and the Judiciary. Even though the Constitution has adopted the parliamentary form of government where the dividing line between the legislature and the executive becomes thin, the theory of separation of powers is still valid.



121. On deep reflection of the above discussion, in our opinion, the constitutional principles in the context of Indian Constitution relating to separation of powers between legislature, executive and judiciary may, in brief, be summarized thus:

The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law.

(ii) Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution.

(iii) Separation of powers between three organs--legislature, executive and judiciary--is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality Under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality Under Article 14 of the Constitution.

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rights enshrined in Part III of the Constitution.

(v) The doctrine of separation of powers applies to the final judgments of the courts. Legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on coming to know of it aligned.

In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

(vi) If the legislature has the power over the subject-matter and competence to make a validating law, it can at any time make such a validating law and make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation law it removes the defect which the courts had found in the existing law.

20. This Court is of a strong opinion that institutional respects are to be maintained by the constitutional Courts. Whenever there is a provision for an appeal under the statute, without exhausting the remedies available under the statute, no writ petition can be entertained in a routine manner. Only on exceptional circumstances, the remedy of appeal can be waived, if there is a gross injustice or if there is a violation of fundamental rights ensured under the Constitution of India. Otherwise, all the aggrieved persons from and out of the order passed by the original authority is bound to approach the Appellate Authority. The Constitutional Courts cannot make an appeal provision as an empty formality. Every Appellate Authority created under the statute to be trusted in normal circumstances unless there is a specific allegation, which is substantiated in a writ proceedings. Thus, the institutional functions and exhausting the appeal remedies by the aggrieved persons, are to be enforced in all circumstances and writ proceedings can be entertained only on exceptional circumstances. Rule is to prefer an appeal and entertaining a writ is only an exception. This being the legal principles to be followed, this Court cannot entertain the writ petitions in a routine manner by waiving the remedy of appeal provided under the statute.

21. Now, let us look into the legal principles



settled by the Apex Court for exhausting the efficacious alternative remedy provided under the statute.

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22. When an effective alternative remedy is available, a writ petition cannot be maintained

1. In *City and Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwalla and Ors.* MANU/SC/8250/2008 : (2009) 1 SCC 168, this Court had observed that:

The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the Petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

2. *Kanaiyalal Lalchand Sachdev and Ors. vs. State of Maharashtra and Ors.* (07.02.2011 - SC) : MANU/SC/0103/2011

It is well settled that ordinarily relief Under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See *Sadhana Lodh v. National Insurance Co. Ltd.*; *Surya Dev Rai v. Ram Chander Rai* and *SBI v. Allied Chemical Laboratories.*)

3. *Commissioner of Income Tax and Ors. v. Chhabil Dass Agarwal*, MANU/SC/0802/2013 : 2014 (1) SCC 603, as follows:

Para 15. 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, *Titaghur Paper Mills* case and other similar judgments that the High Court will not



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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.

4. Authorized Officer, State Bank of Travancore and Ors. vs. Mathew K.C. (30.01.2018 - SC) : MANU/SC/0054/2018

The petitioner argued that the SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debt Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent. The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Reliance was placed on United Bank of India vs. Satyawati Tandon and others, 2010 (8) SCC 110, and General Manager, Sri Siddeshwara Cooperative Bank Limited and another vs. Iqbal and others, 2013 (10) SCC 83. The writ petition ought to have been dismissed at the threshold on the ground of maintainability. The Division Bench erred in declining to interfere with the same. The Supreme Court agreed to the arguments and held the same also noted that the writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the Appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum.

5. State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd. reported at AIR 2005 SC 3856, the Supreme Court explained the rule of 'alternate remedy' in the following terms

Considering the plea regarding alternative remedy as raised by the appellant-State. Except for a period when Article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed



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limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

6. K.S. Rashid and Sons v. Income Tax Investigation Commission and Ors., AIR (1954) SC 207; Sangram Singh v. Election Tribunal, Kotah and Ors., AIR (1955) SC 425; Union of India v. T.R. Varma, AIR (1957) SC 882; State of U.P. and Ors. v. Mohammad Nooh, AIR (1958) SC 86 and M/s K.S. Venkataraman and Co. (P) Ltd. v. State of Madras, AIR (1966) SC 1089,

Constitution Benches of the Supreme Court held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

7. First Income-Tax Officer, Salem v. M/s. Short Brothers (P) Ltd., [1966] 3 SCR 84 and State of U.P. and Ors. v. M/s. Indian Hume Pipe Co. Ltd., [1977] 2 SCC 724.

There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the



principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition."

18. The Hon'ble Supreme Court of India, in the case of M/s. Canon India Private Limited v. Commissioner of Customs [Civil Appeal No. 1827 of 2018, dated 09.03.2021] dealt with the jurisdiction aspect with reference to the provisions of the statute in paragraph Nos. 9, 12, 13 and 15, which all are extracted hereunder:

"9. The question that arises is whether the Directorate of Revenue Intelligence had authority in law to issue a show cause notice under Section 28(4) of the Act for recovery of duties allegedly not levied or paid when the goods have been cleared for import by a Deputy Commissioner of Customs who decided that the goods are exempted. It is necessary that the answer must flow from the power conferred by the statute i.e. under Section 28(4) of the Act. This Section empowers the recovery of duty not paid, part paid or erroneously refunded by reason of collusion or any wilful mis-statement or suppression of facts and confers the power of recovery on "the proper officer". The obvious intention is to confer the power to recover such duties not on any proper officer but only on "the proper officer". This Court in Consolidated Coffee Ltd. and Another vs. Coffee Board, Bangalore has held:-

"14. ... Secondly, and more importantly, the user of the definite article 'the' before the word 'agreement' is, in our view, very significant. Parliament has not said 'an agreement' or 'any agreement' for or in relation to such export and in the context the expression 'the agreement' would refer to that agreement which is implicit in the sale occasioning the export."

In Shri Ishar Alloy Steels Ltd. vs. Jayaswals Neco Ltd. has held:-

"9. ... 'The' is the word used before nouns, with a specifying or particularising effect as opposed to the indefinite or generalizing force of 'a' or 'an'. It determines what particular thing is meant; that is, what particular thing we are to assume to be meant. 'The' is always mentioned to denote a



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particular thing or a person." ...

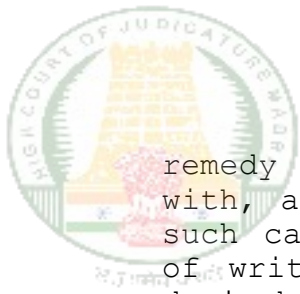
12.The nature of the power to recover the duty, not paid or short paid after the goods have been assessed and cleared for import, is broadly a power to review the earlier decision of assessment. Such a power is not inherent in any authority. Indeed, it has been conferred by Section 28 and other related provisions. The power has been so conferred specifically on "the proper officer" which must necessarily mean the proper officer who, in the first instance, assessed and cleared the goods i.e. the Deputy Commissioner Appraisal Group. Indeed, this must be so because no fiscal statute has been shown to us where the power to re-open assessment or recover duties which have escaped assessment has been conferred on an officer other than the officer of the rank of the officer who initially took the decision to assess the goods.

13.Where the statute confers the same power to perform an act on different officers, as in this case, the two officers, especially when they belong to different departments, cannot exercise their powers in the same case. Where one officer has exercised his powers of assessment, the power to order re-assessment must also be exercised by the same officer or his successor and not by another officer of another department though he is designated to be an officer of the same rank. In our view, this would result into an anarchical and unruly operation of a statute which is not contemplated by any canon of construction of statute.

...

15.It is obvious that the re-assessment and recovery of duties i.e. contemplated by Section 28 (4) is by the same authority and not by any superior authority such as Appellate or Revisional Authority. It is, therefore, clear to us that the Additional Director General of DRI was not "the" proper officer to exercise the power under Section 28(4) and the initiation of the recovery proceedings in the present case is without any jurisdiction and liable to be set aside."

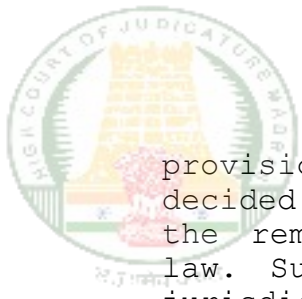
19.The Appellate Tribunal, formed an opinion that the issuance of show cause notice itself was by an improper authority. Thus, by citing the said finding, the appellate



remedy otherwise provided under the Statute cannot be dispensed with, and in the event of accepting the said contention, in all such cases, every litigant will approach the High Court by way of writ petition bypassing the appellate remedy, which is not desirable and cannot be accepted. As observed earlier, Institutional respect is of paramount importance. Even the point of jurisdiction, limitation, error apparent on the face of the record, are on merits and all are to be adjudicated before the appellate authority and the appellate authority, more specifically, the Appellate Tribunal or the Commissioner (Appeals), as the case may be, is empowered to adjudicate all such legal grounds raised by the respective parties and make a finding on merits. Thus, usurping the powers of the appellate authorities by the High Court by invoking its powers under Article 226 of the Constitution of India is certainly unwarranted. The parties must be provided an opportunity to approach the appropriate authorities for redressal of their grievances in the manner known to law. In the event of entertaining all such writ petitions, the High Court will not only be over-burdened, but usurping the powers of the appellate authority is certainly not desirable.

20.The growing practice in the High Court is to file writ petitions under Article 226 of the Constitution of India without exhausting the statutory remedies provided under the Act. The point raised in this regard are statutory violations. However, such statutory violations can be dealt with by the Appellate authorities or the Appellate Tribunals. This apart, in a writ petition, if such orders passed with jurisdictional errors are quashed without any remand, then an injustice would be caused to the very spirit of the Statute enacted for the benefit of the public at large. The procedures to be followed in the department for assessment is well settled. Thus, the authorities competent are not expected to commit patent jurisdictional errors in a routine manner. In these circumstances, review of such orders by the higher authorities are imminent to form an opinion that there is any willful or intentional act for commission of such jurisdictional errors, enabling the assessee to get exonerated from the liability. Liability and jurisdictional errors are distinct factors, and therefore, Courts are expected to provide an opportunity to the Department to decide the liability on merits and in accordance with law with reference to the provisions of the Act and Rules and guidelines issued by the Department.

21.Large number of writ petitions are filed without exhausting the statutory appeal remedies and High Court is also entertaining such writ petitions in a routine manner. Keeping such writ petitions pending for long time would cause prejudice to the interest of the assessee also. Thus, such statutory



provisions regarding the appeal to be preferred are to be decided at the first instance, enabling the litigants to avail the remedy by following the procedures as contemplated under law. Such writ petitions are filed may be on the ground of jurisdiction or otherwise. However, the Courts are expected to ensure that all such legal grounds available to the parties are adjudicated before the proper Forum and only after exhausting the statutory remedies, writ petitions are to be entertained. In the absence of exhausting such remedies, High Court is loosing the benefit of deciding the matter on merits as the High Court cannot conduct a trial or examine the original records in the writ proceedings under Article 226 of the Constitution of India. Thus, the Courts shall not provide an unnecessary opportunity to the assessee to escape from the liability merely on the ground on jurisdictional error, which is rectifiable.

22.Regarding the contentions raised on behalf of the writ petitioner with reference to the jurisdiction and violations of the principles of natural justice, they are not striking the conscious of this Court, so as to invoke the extraordinary jurisdiction, as the adjudication on disputed facts became necessary. The point of jurisdiction and principles of natural justice are pleaded commonly, which all are deeply associated with the disputed facts and circumstances. Thus, an elaborate adjudication with reference to the original documents and records are necessary. Undoubtedly, the appellate authority or the Tribunal, as the case may be, are the quasi-judicial authorities and competent to adjudicate the ground raised regarding jurisdiction and violations of principles of natural justice. Thus, the opportunity of an aggrieved person to adjudicate the legal grounds must be allowed to be provided before the appellate authority or before the Tribunal, as the case may be. The High Court cannot adjudicate the disputed facts in a writ proceedings for the purpose of considering certain legal grounds. When the appellate authority is competent to adjudicate such legal grounds, the opportunity and the benefit of an appeal cannot be denied to an aggrieved person. In such circumstances, the aggrieved persons are loosing one opportunity of adjudication for the purpose of redressing their grievances.

23.In view of the discussions made above, this Court emphatically made it clear that all the Orders-in-Original are to be decided before the appellate authority, in the event of an appeal provision under the statute concerned. Thus, in the present case, the petitioner is at liberty to prefer an appeal before the jurisdictional appellate authority in the prescribed format and by complying with the provisions of the statute and in the event of filing any such appeal, the appellate authority is bound to adjudicate the issues on merits and in accordance with law and dispose of the same as expeditiously as possible.



With these observations, both the Writ Petitions stand disposed of. No costs. Consequently, connected Miscellaneous Petitions are closed.

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Sd/-
Assistant Registrar(CS-VI)

//True Copy//

Sub Assistant Registrar

gsa

To

The Assistant Commissioner of Income Tax,
Central Circle-3(1) Chennai,
Room No.316, New No.46,
Mahatma Gandhi Road,
Chennai 600 034.

+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.36359
+1cc to Mr.Anand Sashidharan, Advocate, S.R.No.36595

W.P.Nos.15465 & 15467 of 2021

GPL(CO)
RGA(26/08/2021)