IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 09.09.2021

CORAM:

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HON'BLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

W.A.NOS.2316 & 2317 OF 2021
AND
C.M.P.NOS.14692 & 14690 OF 2021

PPN Power Generating Company Private Limited,
Represented by its Joint Managing Director,
Mr.Harshad Reddy,
1-A, III Floor, Jhavar Plaza,
Nungambakkam High Road,
Chennai - 600 034. ... Appellant in both WAs/ Petitioner

.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 WAs/ Respondent

PRAYER IN W.A.NO.2316/2021:-

Appeal filed under Clause 15 of the Letters Patent praying to set aside the order dated 28.07.2021 made in W.P.No.15465 of 2021 and allow the appeal by calling for the records and quash the assessment order bearing DIN ITBA/AST/M/147/2021-22/ 1033632435 (1) dated 23.06.2021 passed by the respondent.

PRAYER IN W.P.NO.15465 OF 2021:-

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ, Order or Direction more particularly a Writ of Certiorari to call for the records and quash the assessment order bearing DIN ITBA/AST/M/147/2021-22/1033632435 (1), dated 23.06.2021 passed by the respondent and pass such further or other orders as this Honourable Court may deem fit in the facts and circumstances of the case.

PRAYER IN W.A.NO.2317/2021:-

Appeal filed under Clause 15 of the Letters Patent praying to set aside the order dated 28.07.2021 made in W.P.No.15467 of 2021 and allow the appeal by calling for the records and quash the assessment order bearing DIN ITBA/AST/M/147/2021-22/1033659609 (1) dated 23.06.2021 passed by the respondent.

PRAYER IN W.P.NO.15467 OF 2021:-

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ, Order or Direction more particularly a Writ of Certiorari to call for the records and quash the assessment order bearing DIN ITBA/AST/M/147/2021-22/1033659609 (1), dated 24.06.2021 passed by the respondent and pass such further or other orders as this Honourable Court may deem fit in the facts and circumstances of the case.

In both WAs

For Appellant : Mr.Arvind Datar
Senior Counsel
For Mr.Anand Sashidharan

For Respondent : Mr.A.P.Srinivas
Senior Standing Counsel

COMMON JUDGMENT

These appeals have been filed by the assessee questioning the correctness of the order passed in W.P.Nos.15465 & 15467 of 2021 dated 28.07.2021.

2. The writ petitions were filed by the appellant/assessee challenging the assessment orders dated 23.06.2021 and 24.06.2021 respectively passed by the respondent. The primary ground on which the assessment orders were questioned is on the ground that the orders are in total violation of the principles of natural justice, the writ petitions were dismissed at the admission stage. The Court posed a question as to the maintainability of the writ petitions as the appellant had to exhaust the appeal remedy provided under the Act, the assessee contended that the assessment orders have been passed in violation of the principles of natural justice, the orders being devoid of jurisdiction for not following the mandatory provisions of Section 147 of the Income Tax Act, 1961 ('the Act' for brevity), the writ petitions are maintainable.

3. The learned Single Bench did not agree with the said contention, referred to various decisions and dismissed the writ petitions directing the appellant to avail the alternative remedy.

4. First we shall consider as to under what circumstances the writ petitions would be maintainable.

5. When an alternate remedy is provided under the relevant Act, we need labour much time to take a decision on this point as there are guided by several decisions of the Hon'ble Supreme Court which have clearly laid down the legal principles as regards the maintainability of the writ petitions under Article 226 of the Constitution of India despite availability of an alternative remedy.

6. We refer to the latest judgment of the Hon'ble Supreme Court in this regard, in a case of Radha Krishnan Industries Vs. State of Himachal Pradesh and others 2021 SCC OnLine SC 334, para 28 of the judgment, would be relevant which is quoted hereunder:

> "28. The principles of law which emerge are that:
>
> (i) The power under Article 226 of the Constitution to issue writs can be exercised not only for the enforcement of fundamental rights, but for any other purpose as well;
>
> (ii) The High Court has the discretion not to entertain a writ petition. One of the restrictions placed on the power of the High Court is where an effective alternate remedy is available to the aggrieved person;
>
> (iii) Exceptions to the rule of alternate remedy arise where (a) the writ petition has been filed for the enforcement of a fundamental right protected by Part III of the Constitution; (b) there has been a violation of the principles of natural justice; (c) the order or proceedings are wholly without jurisdiction; or (d) the vires of a legislation is challenged;
>
> (iv) An alternate remedy by itself does not divest the High Court of its powers under Article 226 of the Constitution in an appropriate case though ordinarily, a writ petition should not be entertained when an efficacious alternate remedy is provided by law;

(v) When a right is created by a statute, which itself prescribes the remedy or procedure for enforcing the right or liability, resort must be had to that particular statutory remedy before invoking the discretionary remedy under Article 226 of the Constitution. This rule of exhaustion of statutory remedies is a rule of policy, convenience and discretion; and

(vi) In cases where there are disputed questions of fact, the High Court may decide to decline jurisdiction in a writ petition. However, if the High Court is objectively of the view that the nature of the controversy requires the exercise of its writ jurisdiction, such a view would not readily be interfered with.

7. On facts, if the assessee is able to bring their case within the exception as mentioned in paragraph 28 (iii) above, then the writ petitions would be maintainable, bearing this principle in mind, we proceed to consider the matter.

8. The assessee filed the original return of income for the assessment years under consideration AY-2003-04 and 2004-05 on 01.11.2003. The assessments were completed under Section 143(3) of the Act. Thereafter, notices for reopening were issued on 25.02.2010 under Section 148 of the Act. The assessee filed their objections to the reopening after seeing the copy of the reasons for reopening. The assessee filed W.P.No.3241 of 2011 and W.P.No.989 of 2011, challenging the reopening proceedings in W.P.No.3241 of 2011 which pertains to assessment order 2004-05 was dismissed by order dated 05.02.2020 directing the appellant to participate in the proceedings by furnishing the information called for by the Deputy Commissioner of Income Tax in the questionnaire and the Assessing Officer was directed to pass appropriate orders in accordance with law. The assessee preferred appeal before the Division Bench in W.A.No.855 of 2020. The Division Bench, taking note of the decision of the Hon'ble Supreme Court in GKN of Driveshafts (India) Limited Vs. ITO [2003 (259) ITR 19 (SC)], held that the Assessing Officer was bound to dispose of the objections raised by the assessee to the reopening of the proceeding and taking note of the objections filed by the assessee, which were not disposed of, the Division Bench agreed with the ultimate conclusion arrived at by the learned Single Bench, but made a slight modification to the directives which were issued, accordingly, there was a direction to the Assessing Officer to consider the objections filed by the assessee and pass a reasoned order and communicate the same to the assessee within a time frame and thereafter, it

was open to the assessee as well as the Assessing Officer to proceed in accordance with law.

9. Thereafter, the Assessing Officer issued notice dated 08.09.2020 as there was change of officer wherein he has mentioned that as per the order passed in the writ petition in W.P.No.3241 of 2011 dated 05.02.2020, the Assessing Officer has to pass orders, since this notice was prior to the judgment in W.A.No.855 of 2020 dated 28.09.2020, the Assessing Officer had no knowledge of the said judgment. The assessee, by communication dated 06.10.2020, brought to the notice of the Assessing Officer about the judgment of the Division Bench in the said writ appeal and the directions issued therein. Thereafter, the Assessing Officer, without discussing the case with the assessee, straight away disposed of the objections, by proceedings dated 01.03.2021 and proceeded to complete the assessment under Section 143(3) read with Section 147 by order dated 24.06.2021. This was questioned by the assessee by filing the writ petition stating that the reopening itself is in violation of the provisions of the Act and the assessment orders which have been passed upon the reopening was in violation of the principles of natural justice. The assessee has also raised other issues on the factual aspects, such as, as to how clause (c) of the Explanation 1 to Section 115 JB does not apply to the provisions for book profits etc. Thus, the facts clearly disclose that the assessee did not have any opportunity to put forth their submissions while the assessment was completed and orders were passed on 23.06.2021 and 24.06.2021. This is precisely the reason why the assessee was before the Writ Court stating that there is gross violation of the principles of natural justice. There is nothing on record to establish that the assessee was heard before the assessment was completed. Therefore, we are fully satisfied that the assessment orders dated 23.06.2021 and 24.06.2021 are in violation of the principles of natural justice and if it is so, it would be a good ground to approach this Court under Article 226 of the Constitution and the availability of an alternative remedy would not be a bar and the assessee would fall within the exceptions as mentioned by the Hon'ble Supreme Court in Radha Krishnan case in paragraph 28 (iii). There are other decisions of the Hon'ble Supreme Court as well as the decisions of the Division Bench of this Court which were relied on by the learned Senior Counsel for the appellant and it would suffice to note that the decision of the Hon'ble Supreme Court in TIN Box Company, New Delhi Vs. CIT, New Delhi reported in (2001)9 SCC 725. In the said case, the assessment order having been passed without giving an opportunity was put to challenge. The question which framed for consideration before the High Court was whether the Tribunal was justified in not setting aside the assessment order in spite of a finding arrived at by it that the Income Tax Officer had not

given a proper opportunity of hearing to the assessee. This question was answered in favour of the assessee and the appeal was allowed and the matter was remitted to the Assessing Officer for fresh consideration. It may be true that the said decision arose out of an order passed by the Tribunal, where the assessee had availed the appellate remedy and then approached the Tribunal and then the High Court. However, as held by the Hon'ble Supreme Court in Radha Krishnan case, if there is violation of any principles of natural justice, the availability of alternative remedy will not be a bar for entertaining the writ petition. As held by the Hon'ble Supreme Court, opportunity by the High Court or by the Tribunal or the First Appellate Authority cannot be a substitute for an opportunity to be given by the Assessing Officer to the assessee at the first instance. Therefore, the writ petitions are maintainable and the challenge to the assessment orders only on the ground of violation of principles of natural justice are succeed.

10. For all the above reasons, these writ appeals are allowed. Consequently, the writ petitions are allowed and the assessment orders dated 23.06.2021 and 24.06.2021 for the assessment years 2003-04 and 2004-05 respectively are quashed and the matter is remanded to the Assessing Officer for fresh consideration. The Assessing Officer shall issue a notice to the assessee fixing a date for personal hearing of the Authorised Representative of the assessee within 15 days from the date of receipt of a copy of this judgment and on the date so fixed by the Assessing Officer, the Authorized Representative of the assessee shall appear and produce all records and details in support of their contentions and after discussing the case with the Authorized Representative of the assessee and by calling for further information if needed and thereafter, the Assessing Officer shall proceed to complete the assessment afresh in accordance with law. It is needless to state that the assessee shall be entitled to canvas all legal and factual issues including the validity of the reopening of the assessments. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

Sgl

To

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

+2ccs to Mr.Anand Sashidharan, Advocate, S.R.No.45764

W.A.NOS.2316 & 2317 OF 2021

SJ(CO)
PBS/26/10/2021