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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.09.2021

CORAM :

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

W.A.No.2241 of 2021
and
C.M.P.No.14194 of 2021

M/s.J.P.R.Textiles,
Rep.by its partner - M.Jaganathan,
No.195/4-C, Vadugampalayam,
Pollachi Road,
Palladam,
Tirupur District.

...Appellant/Petitioner

Vs.

The Deputy Commercial Tax Officer,
Palladam,
Tirupur District.

...Respondent/Respondent

Writ Appeal has been filed under Clause 15 of the Letters Patent to set aside the order dated 05.10.2020 passed in W.P.No.9861 of 2006.

Prayer in W.P.No.9861 of 2006 : Filed under Article 226 of the Constitution of India, to issue a writ of Certiorari or any other appropriate writ order or direction in the nature of a writ calling for the records on the file of the respondent in its proceedings in TNGST No.6241814/2002-2003 dated 02.01.2006 and quash the same.

For Appellant : Mrs.R.Hemalatha

For Respondent : Mr.M.Venkateswaran
Government Advocate



J U D G M E N T
(Judgment was delivered by T.S. SIVAGNANAM, J.)

This Writ Appeal filed by the writ petitioner is directed against the order, dated 05.10.2020, passed in W.P.No.9861 of 2006.

2.The appellant is a registered dealer under the provisions of the Tamil Nadu General Sales Tax Act, 1959 ("the Act" for brevity), engaged in the business of manufacture of cloth. The appellant had filed their returns for the Assessment Year 2002-03 and the returns were accepted and the assessments were completed. The appellant had claimed deduction on 2nd sales of clothes, which was allowed. Subsequently, the Assessing Officer issued notice to the appellant under Section 16 of the Act stating that, on verification, it revealed that the sellers at the other end were not the actual dealers in Yarn and were non-existing dealers. Therefore, the Assessing Officer stated that the appellant has effected the purchase of Yarn from unregistered dealers or Registration Certificate canceled dealers. Therefore, there was a proposal to revise the turnover and assess the Tax at 4%, after adding 10% towards Freight and Gross Profit.

3.The appellant submitted their objections to the notice by letter, dated 27.04.2002, which was received by the Assessing Officer on 16.06.2005. Even earlier, the appellant had submitted that their sellers are M/s.Shree Anjaneya Textiles, Pollachi, and they have valid Registration Certificate under the Act and they produced a copy of the renewal of the Registration Certificate, copies of the bills, payment details and other details about the seller to enable the Assessing Officer to cause verification. The Assessing Officer did not accept the stand taken by the appellant and completed the assessment by order dated 02.01.2006. This order was put to challenge by filing the writ petition, which was filed during the year 2006 and an order of interim stay was granted. The respondent/Department, represented by the State Tax Officer, Palladam, had filed their counter affidavit sometime in February, 2019, reiterating the stand taken in the Assessment Order, stating that the Cotton Yarn purchase of the petitioner had not suffered Tax already, as the seller was non-existent and had not paid the legitimate tax dues to the Government on the sale of Cotton Yarn, and therefore, the appellant is deemed to be the first purchaser of the Cotton Yarn and liable to pay Tax to the Department.

4.The learned Writ Court, by the impugned order, dismissed the Writ Petition, taking note of the memo filed by the respondent, stating that the Assessment Order was passed on



02.01.2006 and served on the appellant on 12.01.2006 and if the appellant had filed an appeal before the first Appellate Authority in terms of Section 31(1) of the Act, they should have filed it by 10.02.2006 or at least by 12.03.2006 and the writ petition was filed only on 06.04.2006. It appears that the respondent had placed reliance on the decision of the Hon'ble Supreme Court in the case of Assistant Commissioner (CT) LTU, Kakinada v. Glaxo Smith Kline Consumer Health Care Limited [Civil Appeal No.2413 of 2020 dated 06.05.2020].

5.The appellant filed a reply memo before the learned Writ Court, contending that the decision in Glaxo Smith Kline Consumer Health Care Limited is distinguishable on facts and in the said case, the Assessment Order was challenged by filing a statutory appeal along with petition to condone the delay in filing the appeal and the Appellate Authority was not satisfied with the reasons given for the delay and refused to condone the delay, which was put to challenge by filing the writ petition. The appellant placed reliance on the decision of the Hon'ble Supreme Court in the case of Superintending Engineer v. Excise & Taxation Officer reported in (2019) 71 GSTR 1 (SC), wherein, it was held that the express exclusion of the provisions of the Limitation Act, particularly Section 5 thereof, should be expressly provided to oust the powers of the High Court under revisional jurisdiction under Section 48 of the Himachal Pradesh Value Added Tax Act, 2005. Therefore, it was submitted that, in the absence of any express exclusion of Section 5 of the Limitation Act, the said provision would apply and this aspect has not been dealt with in the decision in the case of Glaxo Smith Kline Consumer Health Care Limited. Therefore, the appellant prayed the Writ Court to consider the case on merits.

6.The learned Writ Court, by the impugned order, has dismissed the writ petition, solely by placing reliance on the decision in the case of Glaxo Smith Kline Consumer Health Care Limited, as the appellant had challenged the order of assessment by filing the writ petition beyond the period of limitation stipulated under Section 31(1) of the Act.

7.We find from the impugned order that the contentions raised by the appellant on distinguishing the decision in Glaxo Smith Kline Consumer Health Care Limited, have not been dealt with.

8.Questioning the correctness of the order passed in the writ petition, the appellant is before us.

9.We have heard Mrs.R.Hemalatha, learned counsel for the appellant and Mr.M.Venkateswaran, learned Government Advocate, accepting notice for the respondent.



10. The first issue to be considered is whether, the writ petition, which was admitted and pending before this Court from 2006 and interim stay was operating against the respondent, could have been rejected on the ground mentioned by the learned Writ Court in the impugned order. Parallely, the other issue would be whether, there is an absolute bar for the Writ Court to entertain a challenge to an Assessment Order and is there any such specific observation in the decision in Glaxo Smith Kline Consumer Health Care Limited.

11. Identical issue came up for consideration before this Court in the case of Mahindra & Mahindra Ltd. v. The Joint Commissioner (CT) Appeals, Chennai and another [W.A.No.493 of 2021 dated 18.02.2021]. In the said case also, the writ petition was dismissed by the learned Single Bench by placing reliance on Glaxo Smith Kline Consumer Health Care Limited and the Division Bench, to which one of us (TSSJ) was a party, had interfered with the said order and entertained the writ petition and decided the matter on merits. The following paragraphs of the said judgment would be of relevance.

"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



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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



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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



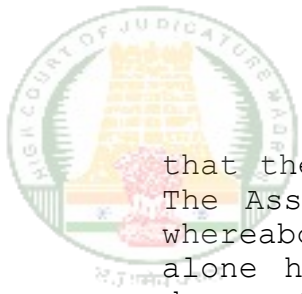
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Bench of the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd. Vs. Union of India [reported in 1997 (5) SCC 536] wherein it was held that the jurisdiction of the High Courts under Article 226 and that of the Hon'ble Supreme Court under 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."

12. The above decision would be equally applicable to the case on hand, as the applicant's case before the learned Writ Court was that the Assessing Officer lacks jurisdiction to tax the transactions in the hands of the assessee, as the appellant cannot be made liable for non-payment of the tax by the selling dealer and it is not necessary for the appellant to prove that the first sale has suffered tax at the hands of the selling dealer. Further, the appellant had challenged the Assessment Order on the ground of unfairness in the action of the statutory authority and on the other grounds of violation of principles of natural justice and non-consideration of the documents which were placed before the authority. If these were the grounds raised by the appellant, then it goes without saying that the correctness of the Assessment Order could be tested in a writ petition under Article 226 of the Constitution of India. Thus, we hold that the writ petition was maintainable.

13. With regard to the merits of the matter, the appellant's specific case was that the selling dealer is an existing dealer, to prove the stand, the appellant produced a copy of the renewal of the Registration Certificate of the selling dealer, the bill copies, payment details, etc. However, the Assessing Officer, though accepts the production of these documents, would state



that the same are not sufficient to decide the issue before him. The Assessing Officer continues to maintain the stand that the whereabouts of the selling dealer are not known and sale bills alone have been issued. This finding is not supported by any document or any report, which was called for and obtained by the Assessing Officer. In such circumstances, it has to be held that the Assessing Officer did not enquire into the matter, particularly, with regard to the aspects pointed out by the appellant that the selling dealer's registration was valid and sale bills have been issued and payments have also been effected by the appellant.

14.If such is the factual position, we need to take note of the legal position as to whether, the appellant is required to prove that the selling dealer had paid taxes. This issue is no longer res integra and one of the earlier decisions on the said issue is the decision of the Hon'ble Division Bench of this Court in Govindan and Co. v. State of Tamil Nadu reported in 1975 (35) STC 50 (Mad). The facts are more or less identical and it was held in the said decision that the purchasing dealer need not show that the sellers have in fact paid tax and it is enough for them to show that the earliest sales are taxable sales and that the tax is really payable by their sellers. This decision was followed in the case of State of Tamil Nadu v. Chamundeeswari Enterprises reported in (1983) 52 STC 124. In Deputy Commissioner (CT) Trichy Division v. V.R.Kuppusamy Gounder & Sons reported in (1995) 98 STC 408, a similar issue arose for consideration, wherein, the Revenue took a stand that the bills issued by the alleged sellers were bogus and they were non-existent and therefore, the purchasing dealer had to pay tax. The Revenue stated that the assessee therein have not proved the movement of goods, but the assessee had produced certain documents before the Tribunal to establish that the goods moved pursuant to the sale transaction. The Hon'ble Division Bench pointed out that, admittedly, the Registration Certificates of the selling dealers were in force and their services were not canceled and there is no explanation on the side of the Revenue for not examining the selling dealers. Further, dealing with the issue that the bills were bogus, the Division Bench pointed out that, in the bills, the Registration Number and names of the sellers were given, but the Department failed to identify the sellers and make them available for cross-examination. In the case on hand also, the Assessing Officer took no steps to enquire into the matter, pursuant to the objections filed by the appellant.

15.Thus, for all the above reasons, we are of the clear view that the revision of assessment made on the appellant is not sustainable in law. In the result, this Writ Appeal is allowed and the order passed in the writ petition is set aside.



Consequently, the Writ Petition is allowed and the revision of assessment by the respondent, by order dated 02.01.2006, is set aside. No costs. Connected Miscellaneous Petition is closed.

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Sd/-
Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

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To

The Deputy Commercial Tax Officer,
Palladam,
Tirupur District.

+1cc to the Special Government Pleader, (Taxes) S.R.No.45981

W.A.No.2241 of 2021

PVS (CO)
RGA (27/09/2021)