



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.09.2021

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

W.A.Nos.2262, 2263, 2264 & 2267 of 2021

and

C,M.P.Nos.14408, 14412, 14409, 14414,
14416, 14428 & 14429 of 2021

T.Azhakesan

...Appellant in all appeals/
Petitioner

Vs

1. The State Tax Officer,
Sholingannalur Assessment Circle,
141, 2nd Floor, Yazhini Complex,
Burma Colony, 1st Main Road,
Perungudi, Chennai - 600 096.

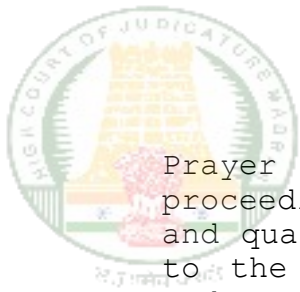
2. The Commercial Tax Officer,
Group-III, Enforcement (East),
Greens Road, Chennai - 600 006.

3. The Deputy Commissioner (CT),
Chennai (East),
PAPJM Building,
Chennai - 600 006.

...Respondents in all
appeals/Respondents

Appeals filed under Clause 15 of Letters Patent to set aside the common order dated 05.07.2021 passed in W.P.Nos.31556, 31564, 31569 and 31606 of 2018.

Prayer in W.P.No.31556 of 2018: To Call for the impugned proceedings of the first respondent in TIN/33630926483/2012-2013 and quash the impugned order dated 04.06.2018 as passed to the Principles of natural justice and to the provisions of the Tamilnadu Value Tax Act 2016 and further direct the 1st respondent to consider the objections and the documents filed by the petitioner and pass a fresh assessment order not being influence by the proposals received from the 2nd and 3rd respondent and pass such further or other order as this Honourable court may deem fit and proper in the facts and circumstances of the case and render justice.



Prayer in W.P.No.31564 of 2018: To Call for the impugned proceedings of the first respondent in TIN/33630926483/2013-2014 and quash the impugned order dated 04.06.2018 as passed contrary to the law laid down by the Honorable Division Bench of the Madras High Court in the case of Commissioner of Income Tax Vs M/s.Kikani Exports Pvt. Ltd. TCA No.330 of 2013 etc batch dated 09.09.2014 and in the case of M/s.K.Ramasamy VS Deputy Commercial Tax Officer Chidambaram-II in W.P.No.12556/2006 dated 18.12.2017

Prayer in W.P.No.31569 of 2018: To Call for the impugned proceedings of the first respondent in TIN/33630926483/2014-2015 and quash the impugned order dated 04.06.2018 as passed contrary to the law laid down by the Honorable Division Bench of the Madras High Court in the case of Commissioner of Income Tax Vs M/s.Kikani Exports Pvt. Ltd. TCA No.330 of 2013 etc batch dated 09.09.2014 and in the case of M/s.K.Ramasamy VS Deputy Commercial Tax Officer Chidambaram-II in W.P.No.12556/2006 dated 18.12.2017

Prayer in W.P.No.31606 of 2018: To call for the impugned proceedings of the first respondent in TIN/33630926483/2015-2016 and quash the impugned order dated 04.06.2018 as passed contrary to the law laid down by the Honorable Division Bench of the Madras High Court in the case of Commissioner of Income Tax Vs M/s.Kikani Exports Pvt. Ltd. TCA No.330 of 2013 etc batch dated 09.09.2014 and in the case of M/s.K.Ramasamy VS Deputy Commercial Tax Officer Chidambaram-II in W.P.No.12556/2006 dated 18.12.2017.

For Appellant
in all appeals : Mr.S.N.Kirubanandam

For Respondent
in all appeals : Mr.M.Venkateshwaran
Government Advocate

COMMON JUDGMENT

T.S.Sivagnanam, J

These writ appeals filed by the writ petitioner are directed against the common order dated 05.07.2021 in W.P.Nos.31556, 31564, 31569 and 31606 of 2018.

2.In all the writ petitions, the appellant had challenged the assessment orders dated 04.06.2018 as being against the law laid down in the case of Commissioner of Income vs. Kikani



Exports Pvt. Ltd., T.C.A.No.330 of 2013, etc. batch dated 09.04.2014 and in the case of K.Ramasamy vs. Deputy Commercial Tax Officer, Chidambaram-II in W.P.No.12556 of 2006 dated 18.12.2017.

3.We have elaborately heard Mr.S.N.Kirubanandam, learned counsel appearing for the appellant and Mr.M.Venkateshwaran, learned Government Advocate appearing for the respondents.

4.The appellant is a registered dealer on the file of the respondent under the provisions of the Tamil Nadu Value Added Tax Act, 2006 [TNVAT Act]. For the assessment years under consideration, the appellant filed their return in Form-L and opted to pay lumpsum tax at 2% under the compounding levy scheme in terms of Section 6 of the TNVAT Act. The appellant had also remitted the tax along with the returns as mandated under the Act. The returns were deemed to have been accepted by the respondent/Assessing Officer. While so, the place of business of the appellant was inspected by the Enforcement Wing Officers on several dates and stated that there were several defects. Based on such inspection, the Assessing Officer issued notice dated 16.10.2017 stating that on verification of the records, it was found that the appellant has not filed the option letter for payment of tax under compounding scheme as required under Section 6(2) of the TNVAT Act and in the absence of filing of option letter, the assessee is not eligible to pay tax under Section 6 of the TNVAT Act and therefore, re-computed the liability.

5.The appellants had filed their objection and also attended the personal hearing and the proposal in the notice was confirmed which included the proposal to impose penalty. The appellant filed writ petitions challenging the assessment orders only questioning the assessment orders on the ground that the revision of assessment stating that the appellant has not filed the option letter in terms of Section 6(2) of the TNVAT Act is not sustainable. The writ petitions were dismissed by the impugned order on the ground that the appellant has to avail an alternate remedy of appeal provided under the provisions of the TNVAT Act and by-passing the remedy is not permissible. The correctness of the said order is called in question before us. The question to be answered in these appeal is whether there is a need for a registered dealer to file an option letter in a particular format and does the Act prescribed any such format.

6.Section 6 of the TNVAT Act deals with payment of tax at compounded rates by works contractor. Sub-section (1) of Section 6 states that notwithstanding anything contained in the TNVAT Act, every dealer, other than the dealer who purchases or receives goods from outside the State or imports goods from the outside the Country may, at his option, instead of paying tax in accordance with section 5, pay, on the total value of the works



contract executed by him in a year, and the rate of tax will be 2% of the total contract value of the civil works executed in so far as the civil works contract. Sub-section (2) of Section 6 stated that any dealer, who executes works contract, may apply to the assessing authority along with the first monthly return for the financial year or in the first monthly return after the commencement of the works contract, his option to pay the tax under sub-section (1) and shall pay the tax during the year in the monthly installments and for this purpose, he shall furnish such return within such period and in such manner as may be prescribed. Sub-section (3) of Section 6 stated that the option exercised under sub-section (1) shall be final for that financial year.

7. The appellant's case is that when they filed their return under the provisions of the TNVAT Act in Form-L, they have exercised such an option and they have paid tax at 2% being lumpsum payment in terms of Section 6(1) of the TNVAT Act. The Assessing Officer did not raised query and the returns were accepted along with the proof of payment of tax. It is much after when the Enforcement Wing inspected the business premises of the appellant, they pointed out several defects, one of which, which is the subject matter in these appeals is with regard to the absence of an option letter for payment of tax under Compounding Scheme in terms of Section 6(2) of the TNVAT Act. The moot question would be whether the option letter may be in writing or can it be inferred that the dealer having paid lumpsum tax at 2% while filing his return, is deemed to have been exercised option in terms of Section 6(1) of the TNVAT Act.

8. Identical issue came up for consideration in the case of K. Ramasamy [supra]. In the said case, as that of the appellant before us, the petitioner therein was a registered dealer under the provisions of the Tamil Nadu General Sales Tax Act [TNGST Act]. Two issues arose for consideration in the said writ petition, first of which would be relevant, namely, whether the Assessing Officer in the said case was justified in holding that the said petitioner has not opted to pay tax under Section 7-C of the TNGST Act. The dealer in the said case had filed the return and paid the tax at 2% and the return was processed and the nature of work done by the petitioner therein being works contract, the benefit of Section 7-C of the TNGST Act was extended and the rate of tax was fixed at 2% and the returns were accepted. Subsequently, the assessment was sought to be revised by invoking the power under Section 55 of the TNGST Act and revised orders were passed, in which the Assessing Officer took a stand that the petitioner therein has not opted to pay tax under Section 7-C of the TNGST Act. Thus, the Court framed the question as to whether the dealer was required to exercise an option to pay tax under Section 7-C of the TNGST Act by means of a separate letter or a petition. It also noted that under



the provisions of the TNGST Act and the Rules framed thereunder, there is no prescribed format or procedure as to how the option should be exercised. After taking note of the decision of the Hon'ble Division Bench in the case of M/s.Kikani Exports P. Ltd. [supra], wherein it was held that in the absence of any separate form provided for under the Rules or a separate method provided for exercising option to pay tax under Section 7-C of the TNGST Act, it can be safely concluded that the assessee by filing a return and paying tax at compounded rate has exercised the option under the said provision and therefore, the Assessing Authority committed error in holding that the dealer did not exercised his option and accordingly, the said question was answered in favour of the dealer. The operative portion of the order reads as follows:

"5. In this regard, useful reference can be made to the decision of the Hon'ble Division Bench of this Court in the case of Commissioner of Income-tax v. M/s.Kikani Exports P. Ltd., in TCA No.330 of 2013 etc., batch dated 09.09.2014. The substantial question of law, which arose for consideration before the Hon'ble Division Bench was whether the return of income filed by the assessee under Section 139(1) of the Income Tax Act claiming depreciation can be treated as exercising of option before the due date as prescribed in second proviso to Rule 5(1A) of the Income Tax Rules. This question was answered in favour of the assessee and against the revenue on the following terms:-

"16. Short of repetition, the issue that arise for consideration is for the purpose of claiming depreciation, whether the assessee should exercise an option before the due date in the manner other than by filing return of income in terms of sub-section (1) of Section 139 of the Income Tax Act. According to the Revenue, each one of the assessee should file a separate application or a letter indicating their intention to avail depreciation in terms of Section 32 read with Rule 5(1) of the Income Tax Rules and since the assessee in each case has not exercised such an option before the due date for furnishing the return of income, they will not be entitled to the benefit of Rule 5(1) Appendix I, but depreciation only under Rule 5 (1A) Appendix 1A.

17. It is relevant to note that while filing the return of income, a procedure has been prescribed for claiming depreciation as pointed out above. The assessee has to set out



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the manner in which depreciation is claimed for the assessment years in question. All the details required for claiming depreciation under various heads are set out thereunder. Rule 5 of the Income Tax Rules is in relation to determination of profits and gains of business or profession and depreciation forms part of such determination. Therefore, there cannot be an option exercised in isolation (i.e.,) depreciation with regard to determination of profits and gains of business or profession in the manner other than the procedure prescribed under Section 139(1) of the Income Tax Act. The assessee is liable to file the return of income and claim depreciation in accordance with the various provisions and state in exactitude what he claims under different heads of depreciation. Schedules DOA and DEP in Form ITR # 6 contain the break up of various heads under which depreciation can be claimed. All that the second proviso to Rule 5(1A) of the Income Tax Rules states is that the assessee has to exercise the option before the due date for furnishing the return of income. In other words, if the option is exercised after furnishing of the return of income under sub-section (1) of Section 139, it is of no avail. This assumes importance, as no procedure is prescribed for exercising the option. Form ITR-6 gives the methodology on which depreciation can be claimed and therefore, the statute did not provide for any other method to exercise the option except through filing of return. Therefore, to read something more into the second proviso to Rule 5(1A), that an option should be exercised separately would make the returns filed meaningless."

6.The above referred decision can very well be applied to the facts of the present case, as under the TNGST Act or the Rules framed thereunder, there is no separate form provided or any separate method provided for exercising the option to pay tax under Section 7-C of the TNGST Act. Therefore, it can be safely concluded that the assessee by filing a return and paying tax under Section 7-C of the TNGST Act amounts to exercising option under the said provision. Thus, the respondent committed an error in holding that the petitioner did not exercise his option. Therefore, the first question is answered in



favour of the petitioner and against the revenue."

9. We are informed that the above order has become final as the revenue has not carried the matter on appeal.

10. The only distinction in the case on hand is that the present assessment is under the provisions of the TNVAT Act and the said Act does not provide for any separate procedure or method or form of application for exercising option under Section 6(1) of the Act. Therefore, it is to be held that the appellant/dealer having filed their return in Form-L had opted to pay lumpsum tax at 2% is deemed to have exercised his option to pay tax at compounded rates in terms of Section 6(1) of the TNVAT Act.

11. Since the appellant had questioned the very jurisdiction of the authority to treat the returns filed by the appellant as returns other than exercising option under Section 6(1) of the TNVAT, it is one of the exceptions which has been carved out to enable the aggrieved person to approach this Court under Article 226 of the Constitution of India though an alternative remedy is provided for. That apart, we find that the writ petition has been pending from the year 2018 onwards and the issue being a legal issue, namely, as to whether in the absence of a written form or procedure or exercising the option whether a return filed by payment of compounded rate of tax would deem to be an option exercised by the dealer to pay taxes at compounded rates is a legal question which cannot be decided by the Appellate Authority under the provisions of the TNVAT Act and this is all the more a reason that the appellant should be permitted to approach this Court. Therefore, we hold that the writ petitions were maintainable.

12. In this regard, we are guided by the recent decision of the Hon'ble Supreme Court in the case of Radha Krishan Industries vs. State of Himachal Pradesh and others [2021 SCC Online SC 334], wherein the Hon'ble Supreme Court while considering the issue regarding the maintainability of writ petition before the High Court held as follows:

25. The High Court has dealt with the maintainability of the petition under Article 226 of the Constitution. Relying on the decision of this Court in Assistant Commissioner (CT) LTU, Kakinada v. Glaxo Smith Kline Consumer Health Care Limited, the High Court noted that although it can entertain a petition under Article 226 of the Constitution, it must not do so when the aggrieved person has an effective alternate remedy available in law. However, certain exceptions to this "rule of alternate remedy" include where, the statutory authority has not acted in accordance with the provisions of the law or acted in defiance of the



26. In this background, it becomes necessary for this Court, to dwell on the "rule of alternate remedy" and its judicial exposition. In Whirlpool Corporation v. Registrar of Trademarks, Mumbai , a two judge Bench of this Court after reviewing the case law on this point, noted:

15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principle of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case-law on this point but to cut down this circle of forensic whirlpool, we would rely on some old decisions of the evolutionary era of the constitutional law as they still hold the field."

27. Following the dictum of this Court in Whirlpool (supra), in Harbanslal Sahnia v. Indian Oil Corpn. Ltd. , this court noted that:

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clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed is concerned, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies : (i) where the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged. (See Whirlpool Corpn. v. Registrar of Trade Marks [(1998) 8 SCC 1].) The present case attracts applicability of the first two contingencies. Moreover, as noted, the appellants' dealership, which is their bread and butter, came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."

(emphasis supplied)

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;



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(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.

29. These principles have been consistently upheld by this Court in Seth Chand Ratan v. Pandit Durga Prasad, Babubhai Muljibhai Patel v. Nandlal Khodidas Barot and Rajasthan SEB v. Union of India among other decisions."

13. On facts, as observed the appellant's case would fall within the third exception as pointed in paragraph 28 of the aforesaid judgment.

14. For all the above reasons, the writ appeals are allowed, the order passed in the writ petitions are set aside, consequently the orders of assessment passed by the respondent are set aside and the matter is remanded to the Assessing Officer to treat the returns filed by the assessee under Section 6(1) of the TNVAT Act and proceed to complete the assessment in accordance with law. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS-V)

//True Copy//

Sub Assistant Registrar

cse

To

1. The State Tax Officer,
Sholingannalur Assessment Circle,
141, 2nd Floor, Yazhini Complex,
Burma Colony, 1st Main Road,
Perungudi, Chennai - 600 096.



2. The Commercial Tax Officer,
Group-III, Enforcement (East),
Greens Road, Chennai - 600 006.

3. The Deputy Commissioner (CT),
Chennai (East),
PAPJM Building, Chennai - 600 006.

+1cc to the Government Pleader, S.R.No.45648

+1cc to Mr.S.N.Kirubanandam, Advocate, S.R.No.45648

W.A.Nos.2262, 2263, 2264 & 2267 of 2021

PVS (CO)

RGA(28/09/2021)