IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.09.2021

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

W.P.NO.20130 OF 2021
AND
W.M.P.NOS.21402, 21404 & 21406 OF 2021

Tata Sky Limited
Rep. by its General Manager - Field Service Delivery
Mr.T.Shanmugamanivel
1st Floor, SYMTEC, F-5
3rd Phase, Ekkaduthangal
Chennai-32.

... Petitioner

-Vs.-

1. The State of Tamil Nadu
   Represented by the Secretary
   Commercial Taxes and Registration Department
   St. George Fort,
   Chennai.

2. The State Tax Officer
   Guindy Assessment Circle
   Integrated Commercial Taxes and Registration
   Department Building (South Tower)
   Room No.253, 2nd Floor
   Nandanam, Chennai-600 035.

.. Respondents

Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the records relating to the impugned order dated 30.07.2021 bearing reference No.TIN.33100561230/2014-15 along with Form O and Form RR issued thereon by the 2nd respondent and to set aside the same as arbitrary, unconstitutional and against law and consequently, direct the 2nd respondent to hold reassessment of the matter by reconsidering the submissions made by the petitioner on merits.

For Petitioner : Mr.Sujit Ghosh
for Mr.A.K.Rajaraman

For Respondent : Ms.Amirta Dinakaran,
Government Advocate

O R D E R

Captioned writ petition arises under 'the Tamil Nadu Value Added Tax Act, 2006, (Tamil Nadu Act No.32 of 2006)' [hereinafter 'TNVAT' for the sake of convenience and clarity].

2. An 'order dated 30.07.2021 bearing reference No.33100561230/2014-15' [hereinafter 'impugned order' for the sake of convenience and clarity] made by the second respondent has been called in question/assailed in the captioned main writ petition.

3. Though the impugned order does not mention the provision of law under which it has been made, it is submitted that a perusal of the impugned order brings to light that it has been made under Section 27 of TNVAT Act, which deals with assessment of escaped turnover and wrong availment of 'Input Tax Credit' [ITC].

4. Mr.Sujit Ghosh, learned counsel appearing on behalf of Mr.A.K.Rajaraman counsel on record for writ petitioner is before me.

5. Short facts shorn of elaboration or in other words, short facts imperative for appreciating this order are that the writ petitioner provides DTH services; that DTH stands for 'Direct to Home'; that it is on the basis of contract with another company; that it is provided through what is known as 'Tata Sky Hardware'; that the revenue received by the company for providing service qua installation is subject to service tax; that a surprise inspection was conducted inter-alia under Section 65 of TNVAT Act by Enforcement Wing; that post surprise inspection, objections were called for from the writ petitioner;

writ petitioner did give objections inter-alia setting out their business modules, providing a copy of contract by highlighting the position qua transfer of goods; that the second respondent considered these objections and inter-alia came to the conclusion that charges collected by writ petitioner are nothing but sale price and are therefore, taxable under TNVAT Act; that the captioned writ petition has been filed assailing the impugned order.

6. Notwithstanding very many grounds raised and very many averments in the writ affidavit, in the hearing learned counsel appearing on behalf of counsel for writ petitioner made focused submissions and assailed the impugned order on the following points:

> (a) Learned counsel, elaborating on perversity, submitted that the second respondent called for objections, the writ petitioner gave objections along with a contract captioned 'Specific Terms and Conditions of Tata Sky Subscription Contract' and drew the attention of second respondent to Clause 10 therein, but in the impugned order the second respondent has proceeded on the basis that crux of the issue is transfer of goods involved and transmission of signals without the goods, would not be possible as the subscribers cannot make use of the broadcasting services for viewing the programmes. Learned counsel went on to say that the second respondent has noticed the correct provision of law but has arrived at this conclusion which is clearly perverse. Elaborating further on perversity, learned counsel, notwithstanding very many case laws (slew of case laws rather) that were placed before this Court pressed into service one case law and that is Seema Ghosh case law [Seema Ghosh Vs. Tata Iron and Steel Co., reported in (2006) 7 SCC 722];
>
> (b) The impugned order has been made without appreciating the correct obtaining position of law and it has levied tax resulting in a jurisdictional impediment and therefore, this is effectively violation of Article 265 of the Constitution of India;

7. I have carefully considered the submissions advanced by learned counsel appearing on behalf of writ petitioner, I am not inclined to interfere qua the impugned order and the reasons are as follows:

(a) There is a statutory appeal provided under TNVAT Act as against the impugned order and this statutory appeal is available to writ petitioner under Section 51 of TNVAT Act. Therefore, there is an alternate remedy;

(b) There is nothing to demonstrate that alternate remedy is not efficacious;

(c) Alternate remedy does not fall in any of the exceptions adumbrated by Hon'ble Supreme Court in a recent judgment rendered in Commercial Steel Limited case [The Assistant Commissioner of State Tax and others Vs. M/s.Commercial Steel Limited in Civil Appeal No.5121 of 2021] by a three Judge Bench on 03.09.2021. To be noted, there will be a little more discussion on this elsewhere infra in this order;

(d) Prior to aforementioned case law, Hon'ble Supreme Court, in a long line of authorities including but not limited to Dunlop India case [Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd., and others reported in (1985) 1 SCC 260], Satyawati Tandon [United Bank of India Vs. Satyawati Tondon and others reported in (2010) 8 SCC 110] and K.C.Mathew [Authorized Officer, State Bank of Travancore and another Vs. Mathew K.C. reported in (2018) 3 SCC 85] has held that alternate remedy no doubt is not an absolute rule, it is a self imposed restraint and it is discretionary, but it has to be applied with utmost rigour when it comes to fiscal Statutes;

(e) Relevant paragraph in aforementioned Dunlop case law is paragraph No.3 and most relevant portion of the same reads as follows:

'3. .... Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.'

(Underlining made by this Court to supply emphasis and highlight)

(f). Satyawati Tandon principle was reiterated by Hon'ble Supreme Court in K.C.Mathew case. Relevant paragraph in K.C.Mathew case is paragraph 10 and the same reads as follows:

'10. In Satyawati Tondon the High Court had restrained further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding: (SCC pp.123 & 128, Paras 43 & 55)

"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

55.It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.'

(underlining made by this Court to supply emphasis and highlight)

(g). Relevant paragraphs in Commercial Steel case are paragraph Nos.11 and 12 and the same read as follows:

'11 The respondent had a statutory remedy under section 107. Instead of availing of the remedy, the respondent instituted a petition under Article 226. The existence of an alternate remedy is not an absolute bar to the maintainability of a writ petition under Article 226 of the Constitution. But a writ petition can be entertained in exceptional circumstances where there is: (i) a breach of fundamental rights; (ii) a violation of the principles of natural justice; (iii) an excess of jurisdiction; or (iv) a challenge to the vires of the statute or delegated legislation.

12 In the present case, none of the above exceptions was established. There was, in fact, no violation of the principles of natural justice since a notice was served on the person in charge of the conveyance. In this backdrop, it was CA 5121/2021 7 not appropriate for the High Court to entertain a writ petition. The assessment of facts would have to be carried out by the appellate authority. As a matter of fact, the High Court has while doing this exercise proceeded on the basis of surmises. However, since we are inclined to relegate the respondent to the pursuit of the alternate statutory remedy under Section 107, this Court makes no observation on the merits of the case of the respondent.'

(h). This takes us to Seema Ghosh case law which was pressed into service by the learned counsel for writ petitioner;

(i). A careful perusal of Seema Ghosh case law brings to light that it pertains to Labour law and it pertains to an award made by a Labour Court. That was a case where Hon'ble Supreme Court held that the Labour Court passed an award contrary to law laid down by Hon'ble Supreme Court as a measure of what has been described as 'misplaced sympathy' by Hon'ble Supreme Court and was thus perverse. Therefore, Seema Ghosh case law stands entirely on a different footing. Applying Seema Ghosh principle to the case on hand, which arises under a fiscal Statute would tantamount to comparing Apples and Oranges or like comparing chalk and cheese. Suffice to say that Seema Ghosh case law does not aid the writ petitioner in the case on hand and I would rather go by Commercial Steel Limited judgment rendered recently on 03.09.2021 by Hon'ble Supreme Court which is preceded by a long line of authorities/catena of case laws including but not limited to Dunlop India case law, Satyawati Tandon principle and K.C.Mathew case all of which arose under fiscal law Statute and have been alluded to supra. This takes us to exceptions to alternate remedy. As would be evident from Paragraph No.11 of Commercial Steel Limited case law, it will be clear that exceptions adumbrated herein by Hon'ble Supreme Court are four in number and in the case on hand, from the narrative thus far, it will be clear that none of these exceptions are attracted. Even if this adumbration is construed to be illustrative and exhaustive there is noting before me to demonstrate any other exception as settled in lead case laws in this regard i.e., Whirlpool principle [Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others reported in (1998) 8 SCC 1] Whirlpool principle [Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others reported in (1998) 8 SCC 1] and Harbanslal principle [Harbanslal Sahnia and another Vs. Indian Oil Corpn. Ltd., and others reported in (2003) 2 SCC 107]. This is such an oft quoted case law that it has come to stay as 'Whirlpool exceptions' in litigation parlance. Without burdening order with extracts in this regard, it will suffice to say that the challenge qua impugned order is predicated on points urged in the hearing (notwithstanding very many averments/grounds in writ affidavit and case law compilations) qualify only as grounds of appeal in a regular Statutory appeal and do not warrant interference in writ jurisdiction. For an illustration, arguments such as impugned order has misread contract covenants or has noticed correct provision of law, but has come to wrong conclusion are typical appeal grounds and are far from persuasions calling for writ jurisdiction interference on the teeth of alternate remedy, that too in fiscal law;

(j). On perversity, learned counsel for writ petitioner may have a good ground of appeal. I refrain myself from expressing any opinion on the submissions made by learned counsel for writ petitioner on this as that can impact the Appellate authority. Pointed submission made by learned counsel for writ petitioner on the impugned order noticing the correct position of law, but coming to wrong conclusion that charges collected are effectively sale price and taxable in accordance with the provisions of TNVAT Act is a point which is not something which cannot be corrected in appeal if the argument finds favour with the Appellate authority. Interference on such grounds at the first tier of a multi-tiered redressal mechanism under fiscal Statute gives scope to an assessee to perambulate in the first orbit i.e., first tier without moving to the second orbit. This does not serve the purpose of either side. As a sequitur, this Court observes that this only leaves the assessee with uncertainty and Revenue not being able to move to next tier of mechanism, so that it can ultimately recover tax dues if the liability is finally and conclusively confirmed;

(k). I am unable to persuade myself to believe that the Appellate Authority cannot correct the aforementioned error (if that be so) and on a demurrer, even if it be a case of perversity, that can always be corrected by the Appellate Authority and it does not involve an exception warranting interference under Article 226 of the Constitution of India in fiscal law, more particularly, when the objections have been considered and when Hon'ble Supreme Court has repeatedly held that exceptions have to be applied strictly in fiscal law;

(l). Interestingly and intriguingly, I find that the writ affidavit refers to modus operandi. I can understand if the contract is referred to as business module as modus operandi has a negative connotation. However, I refrain myself from saying anything further on this as I intend to relegate the writ petitioner to alternate remedy under Section 51 of TNVAT Act. Constitution Bench Judgement of Hon'ble Supreme Court in Oudh Sugar Mills Ltd., Vs. Union of India reported in 1978 (2) ELT (J 172) was referred to as a last desperate effort to convince this Court. That was a case where Hon'ble Supreme Court came to the conclusion that there was inference involving unwarranted assumptions. That was a case under Central Excise where there were certain calculations made based on certain assumptions. For instance, difference of 56 maunds noticed by the Assistant Chemical Examiner during the two and quarter hours test conducted by him was uniform for certain specific hours working throughout the working hours of the crushing season which began beyond the day when the test was conducted and there was another assumption that the persons in-charge of the operation of letting in mixed juice filled the tanks uniformly upto a level beyond the fixed mark and never below that level or at that level and there were several assumptions. This is not a matter which turns on such a factual matrix is my considered view. In this regard, I remind myself of law laid down nay law declared by another Constitution Bench Padma Sundara Rao principle [Padma Sundara Rao Vs. State of Tamil Nadu reported in (2002) 3 SCC 533] i.e., that a case law has to be interpreted to the facts situation of the case on hand more particularly, emphasizing that the facts have to be mentioned while referring to case laws and principles laid down. I respectfully follow Padma Sundara Rao principle which is also a constitution Bench judgement and therefore, a declaration of law. If I read Oudh Sugar Mills case law in the light of Padma Sundara Rao principle, I find that it does not aid the writ petitioner in the case on hand;

(m). Though it was not emphasised, I deem it appropriate to reiterate that in State Bank of India officers case law, I had explained proviso to Section 27(2) of TNVAT Act vide order dated 01.08.2019 in W.P.No.22634 of 2019 and WMP therein. I am informed that this order has not been reported in any journal. I am also informed that this order was carried in an appeal by way of a writ appeal being W.A.No.4073 of 2019 and a Hon'ble Division Bench vide order dated 16.12.2019 has confirmed this order. Most relevant paragraph of my order is paragraphs Nos.23 and 24. This is mentioned to say that this is not a case where reasonable opportunity to show cause has not been given to writ petitioner. This is also not a case where the second respondent has not closed his eyes and accepted the submissions made by Enforcement Wing. In other words, the second respondent has applied his mind and made the impugned order (on a demurer, erroneous may be as contended by writ petitioner) and therefore, it does not warrant interference in exercise of powers under Article 226 of Constitution of India on this facet also. As I am taking the view that this case does not warrant interference under Article 226 of Constitution of India, in the light of alternate remedy, I refrain from expressing any opinion or view on merits of the matter and traces or trappings of observations on merits which may appear to have been made in this order are for the limited purpose of disposal of captioned writ petition and therefore, the same should not come in the way of a Statutory appeal i.e., this order should not in any way either impede or serve as a impetus if the writ petitioner chooses to avail alternate remedy and statutory appeal under

Section 51 of TNVAT Act. In other words, the Appellate Authority shall consider the appeal on its own merits and in accordance with law without being either impeded or getting an impetus from this order (if the writ petitioner chooses to file a statutory appeal);

8. I had refused to interfere in writ jurisdiction owing to alternate remedy (in similar fact setting) vide order dated 28.06.2019 made in W.P.No.17804 of 2019 [M/s.Sekar Exports Pvt. Ltd., Vs. The Appellate Deputy Commissioner and another], matter was carried in appeal by way of an intra Court appeal and was confirmed by Hon'ble Division Bench vide order dated 10.02.2020 in W.A.No.196 of 2020.

9. The above draws the curtains on captioned writ petition, W.M.P.Nos.21404 and 21406 of 2021 therein and the same stand dismissed albeit preserving rights of writ petitioner to avail alternate remedy of statutory appeal under Section 51 of TNVAT Act, if so advised and if the writ petitioner chooses to do so. As regards W.M.P.No.21402 of 2021, which has been filed to dispense with the production of original copy of impugned order dated 30.07.2021, a photocopy of the impugned order has been produced before this Court, and therefore, the dispense with prayer is answered in affirmative owing to reasons adduced in supporting affidavit. In other words, dispense with prayer alone i.e., W.M.P.No.21402 of 2021 alone is acceded to. There shall be no order as to costs.

Sd/-
Assistant Registrar(CS-IX)

// True Copy //

Sub Assistant Registrar

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To

1. The Secretary
   Commercial Taxes and Registration Department
   St. George Fort, Chennai.

2. The State Tax Officer
Guindy Assessment Circle
Integrated Commercial Taxes and Registration
Department Building (South Tower)
Room No.253, 2nd Floor
Nandanam, Chennai-600 035.

+1cc to Mr.A.K.Rajaraman, Advocate, S.R.No.49168

+1cc to the Special Government Pleader (Taxes), High Court, Madras, S.R.No.49560

W.P.No.20130 of 2021
and
W.M.P.Nos.21402, 21404 & 21406 of 2021

AK-II(CO)
RLP(22/10/2021)