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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.10.2021

CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA
AND
THE HONOURABLE MR. JUSTICE MOHAMMED SHAFFIQ

W.A.No.2564 of 2021
and CMP No.16791 of 2021

Senthil Andavar Agencies
Rep. by its Partner,
S.Selvapandiyan,
No.5, Jaheer Hussain Street,
Mannargudi-614 001.

.. Appellant/Petitioner

Vs.

The Commercial Tax Officer (CT),
Mannargudi Assessment Circle,
C.T. Buildings,
Mannargudi.

.. Respondents/Respondents

Prayer : Writ Appeal filed under Clause 15 of Letters Patent
against the order dated 06.08.2021 in W.P.No.35086 of 2014.

WP.No.35086 of 2014: Writ Petition is filed under Article 226 of
the Constitution of India, praying for the issuance of a Writ of
Certiorari, calling for the records relating to the proceedings
of the respondent in TNGST 3861679/2005-2006 dated 23.04.2013
and quash the same as illegal, arbitrary and without
jurisdiction.

For Appellant : Mr.K.Soundara Rajan

For Respondent : Mr.V.Nanmaran
Government Advocate

J U D G E M E N T

PUSHPA SATHYANARAYANA, J.

This is an intra-court appeal filed by the writ
petitioner questioning disposal of its writ petition bearing
W.P.No.35086 of 2014 vide order dated 06.08.2021 by the learned



Single Judge of this Court on the ground of not availing the appellate remedy before knocking at the doors of this Court.

2.The assessee, who is the appellant, is a dealer in general goods and a registered dealer under the Tamil Nadu Value Added Tax Act. The appellant was assessed for the Assessment Year (AY) 2005-2006 and there was a taxable turnover of Rs.28,97,065/- and a resale taxable turnover of Rs.28,89,316/-. The said returns were accepted by the respondent on 30.03.2007, which was subjected to tax at 1%, which was also duly paid by the appellant.

2.1.It is stated that during November, 2014, the respondent demanded an arrears of a sum of Rs.3,50,000/- relating to AY 2005-2006. The order relating to AY 2005-2006 dated 30.03.2007 did not indicate the arrears. Therefore, when the arrears was demanded, the appellant had sent a letter dated 26.11.2014 requesting the authorities to furnish the date of original order ; date of revision notice, if any, etc.,. A reply was sent by the respondent informing that the Assessment Order for the AY 2005-2006 was passed on 23.04.2013 and the same was sent by registered post, which was returned as "the Dealer has closed down their business and left the place". Hence, there was a service by Affixture on 21.06.2013. The appellant once again demanded for the pre-revision notice dated 23.04.2013, which was furnished on 11.12.2014. A perusal of the same shows that a revision notice was said to have been issued on 16.07.2012 and thereafter, the impugned proceedings dated 23.04.2013 demanding arrears of tax for the AY 2005-2006 was made.

2.2.According to the appellant, the pre-revision notice copy was not served and it appears to have been served only by affixture, which is against the modes of service mandated under the Act and the Rules. Hence, he filed the writ petition, which was disposed of by the learned Single Judge with certain directions. Aggrieved by the said order, the appellant instituted the instant appeal.

3.Learned counsel for the appellant contended that the pre-revision notice is mandatory as per Section 16(1)(a) of the Tamil Nadu Sales Tax Act, 1959 (in short "1959 Act"). It is alleged that despite furnishing the residential address of the partners, the impugned order has been sent to the place of business, which is said to have been returned. Therefore, without availing the other modes of service, the respondent sought for affixture and thus, the service is not valid and on that ground itself, the assessment order is to be set aside.



4. Heard the learned counsel on either side and perused the materials placed before this Court.

5. Before delving into the factual aspects, it is apposite to refer to the provision under Section 16 of the 1959 Act and Rule 52 of the Tamil Nadu General Sales Tax Rules, 1959. The relevant portions of the said provisions are reproduced as hereunder :

"Section 16. Assessment of escaped turnover. -

(1) (a) Where, for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the assessing authority may, subject to the provisions of sub-section (2), at any time within a period of five years from the date of order of the final assessment by the assessing authority, determine to the best of its judgement the turnover which has escaped assessment and assess the tax payable on such turnover after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.

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(2)- In making an assessment under clause (a) of sub-section (1), the assessing authority may, if it is satisfied that the escape from the assessment is due to willful non-disclosure of assessable turnover by the dealer, direct the dealer, to pay, in addition to the tax assessed under clause (a) of sub-section (1), by way of penalty a sum which shall be -

(a) fifty per cent of the tax due on the turnover that was willfully not disclosed if the tax due on such turnover is not more than ten per cent of the tax paid as per the return;

(b) one hundred per cent of the tax due on the turnover that was willfully not disclosed if the tax due on such turnover is more than ten per cent but not more than fifty per cent of the tax paid as per the return;

(c) one hundred and fifty per cent of the tax due on the assessable turnover that was willfully not disclosed, if the tax due on such turnover is more than fifty per cent of the tax paid as per the return;

(d) one hundred and fifty per cent of the tax due on the assessable turnover that was willfully not disclosed in the case of self-assessment referred to in sub-section (1) of section 12.



Provided that no penalty under this sub-section shall be imposed unless the dealer effected has had a reasonable opportunity of showing cause against such imposition."

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"Rule 52. Service of notices - (1) The service on a dealer of any notice, summons or order under the Act or these rules may be effected in any of the following ways, namely: -

(a). by giving or tendering it to such dealer or his manager or agent or the legal practitioner appointed to represent him or to his authorised representative, or Explanation.- Endorsement by person who delivers the notice, etc., of having tendered or given it will be proof for the purpose of this sub-rule.

(b). if such dealer or his manager or agent or the legal practitioner appointed to represent him, or his authorised representative is not found, by giving or tendering it to any adult member of his family;

(c). if the address of such dealer is known to the assessing authority, by sending it to him by registered post;

(d). if none of the modes aforesaid is practicable, by affixing it in some conspicuous place at his last known place of business or residence."

A reading of the aforesaid provisions would clearly spell out the limitation and the service of notice, which are self-explanatory.

6. In the case on hand, the original Assessment Order was passed on 30.03.2007 and the said order does not mention about any arrears of tax. The pre-revision notice is said to have been issued on 16.07.2012 and the order of revision of assessment, which is now impugned, was passed on 23.04.2013. The time limit permissible for the Assessing Officer to determine to the best of its judgement the turnover which has escaped assessment and assess the tax payable on such turnover is five years from the date of order of the final assessment passed by him and the same should be done after making such enquiry as he may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.

7. The main contention of the appellant was that the impugned order itself is barred by limitation as per Section 16(1) of the 1959 Act, since the alleged notice of pre-revision



itself was issued only on 16.07.2012, when the period of limitation of five years from the date of assessment order, which expired as early as on 29.03.2012. Nevertheless, the said order was also not served in the manner mandated under the rules. When the notice itself is issued beyond the time, the order passed pursuant to the same on 23.04.2013 is non-est in the eye of law. Thus, it is not only the order, but the notice is also barred by limitation. The said order was also served on the appellant only on 11.12.2014, after he made an application on 18.12.2014.

8. In the counter-affidavit filed in the writ petition, it is mentioned that the AG Audit found the suppression during the year 2010, which lead to the initiation of revision of assessment immediately. If that is so, the revision notice ought to have been issued before the expiry of the period of limitation. But the alleged pre-assessment notice was issued only on 16.07.2012 only. Therefore, initiation of revision of assessment by issuance of notice is on 16.07.2012, i.e., 5 years and 109 days from the date of original assessment notice on 16.07.2012 and thus, is barred by limitation.

9. Insofar as the question of limitation is concerned, it is no more res integra that the proceedings under Section 16(1) of the Act should be initiated within the given time and need not be completed within the said period. The following judgments are usefully referred to in this regard : Sales Tax Officer Vs. Sudarsanam Iyengar & Sons reported in (1970) 25 STC 252 SC, Additional Assistant Commissioner of Sales Tax V. Firm Jagmohandas Vijayakumar reported in (1970) 25 STC 74 SC, Lakshmanaswamy Chettiar & Sons V. State of Tamil Nadu reported in (1980) 26 STC 327 Madras, C.G. Natarajan Vs. Deputy Commercial Tax Officer reported in (1981) 48 STC 193 Madras, Jeewanlal V. State of Tamil Nadu reported in (1982) 49 STC 58 Madras. The above judgments make it clear that it is not necessary that the final order should be served or communicated to the assessee within the period of limitation.

10. The learned Single Judge, though had held that the delay is acceptable ground, had dismissed the writ petition on the ground that the alternative remedy was not availed by the appellant and remitted back the matter to the appellate authority. We are of the view that the persons need not be relegated to avail the appellate/alternate remedy in all cases and the necessity to exhaust the alternative remedy may not arise in every case and in such cases, there is no bar to invoke



the jurisdiction of this Court under Article 226 of the Constitution of India.

11. At this juncture, it is relevant to note that the Hon'ble Supreme Court in *Union of India V. Tania Construction Private Limited*, [2011] 5 SCC 697, dealt with the issue of maintainability of a writ petition, when an alternative remedy is provided under the Act and held that the presence of an alternative remedy is not an absolute bar in entertaining a writ petition. In the said judgment, the Hon'ble Supreme Court considered various earlier decisions and held that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion and there could be contingencies in which the jurisdiction under Article 226 of the Constitution of India could be exercised in spite of availability of an alternative remedy.

12. A Three-Judge Bench of the Hon'ble Supreme Court in a recent judgment in *Magadh Sugar & Energy Ltd. v. State of Bihar and Others*, 2021 SCC OnLine SC 801, held as follows :

"25. While a High Court would normally not exercise its writ jurisdiction under Article 226 of the Constitution if an effective and efficacious remedy is available, the existence of an alternate remedy does not by itself bar the High Court from exercising its jurisdiction in certain contingencies. This principle has been crystallized by this Court in *Whirlpool Corporation v. Registrar of Trademarks*, Mumbai [1998] 8 SCC 1 and *Harbanslal Sahni v. Indian Oil Corporation Ltd.* [2003] 2 SCC 107. Recently, in *Radha Krishan Industries v. State of Himachal Pradesh*, 2021 SCC OnLine SC 334, a two judge Bench of this Court of which one of us was a part of (Justice DY Chandrachud) has summarized the principles governing the exercise of writ jurisdiction by the High Court in the presence of an alternate remedy. This Court has observed:

"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



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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."

(emphasis supplied)

26. The principle of alternate remedies and its exceptions was also reiterated recently in the decision in Assistant Commissioner of State Tax v. Commercial Steel Limited (Civil Appeal No. 5121 of 2021). In State of HP v. Gujarat Ambuja Cement Ltd. (2005) 6 SCC 499, this Court has held that a writ petition is maintainable before the High Court if the taxing authorities have acted beyond the scope of their jurisdiction. This Court observed:

"23. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be



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entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in *L. Hirday Narain v. ITO* (1970) 2 SCC 355 that if the High Court had entertained a petition despite availability of alternative remedy and heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition."

27. The above principle was reiterated by a three-judge Bench of this Court in *Executive Engineer v. Seetaram Rice Mill* (2012) 2 SCC 108. In that case, a show cause notice/provisional assessment order was issued to the assessee on the ground of an unauthorized use of electricity under Section 126(1) of the Electricity Act 2003 and a demand for payment of electricity charges was raised. The assessee contended that Section 126 was not applicable to it and challenged the jurisdiction of the taxing authorities to issue such a notice, before the High Court in its writ jurisdiction. The High Court entertained the writ petition. When the judgment of the High Court was appealed before this Court, it held that the High Court did not commit any error in exercising its jurisdiction in respect of the challenge raised on the jurisdiction of the revenue authorities. This Court made the following observations:

"81. Should the courts determine on merits of the case or should they preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given



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case. We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where they involve primary questions of jurisdiction or the matters which go to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act.

82. It is argued and to some extent correctly that the High Court should not decline to exercise its jurisdiction merely for the reason that there is a statutory alternative remedy available even when the case falls in the above stated class of cases. It is a settled principle that the courts/tribunal will not exercise jurisdiction in futility. The law will not itself attempt to do an act which would be vain, *lex nil frustra facit*, nor to enforce one which would be frivolous-*lex neminem cogit ad vana seu inutilia*-the law will not force anyone to do a thing vain and fruitless. In other words, if exercise of jurisdiction by the tribunal *ex facie* appears to be an exercise of jurisdiction in futility for any of the stated reasons, then it will be permissible for the High Court to interfere in exercise of its jurisdiction. This issue is no longer *res integra* and has been settled by a catena of judgments of this Court, which we find entirely unnecessary to refer to in detail..." (emphasis supplied in original)

13. When the impugned action of the respondent is weighed with the touchstone of the principles laid down by the Hon'ble Supreme Court in the aforesaid decisions, we are of the view that the manner in which the statutory power was exercised by the Assessing Officer does not adhere to the principles of natural justice warranting interference from the Court of law. From the narration of facts and the above discussion, we have no hesitation to hold that the Writ Petition ought to have been entertained in the case hand and it cannot be rejected solely on the ground that the statute provides for an alternate remedy.

14. Further, we are of the view that when the revision of assessment itself is barred limitation, it would be an unnecessary exercise to relegate the matter of AY 2005-2006 to the appellate authority. In such view of the matter, the order impugned is liable to be quashed.



15. Accordingly, the writ appeal is allowed and the order of the learned Single Judge is set aside. As a corollary, the impugned revision order dated 26.04.2013 is also set aside. However, there shall be no order as to costs. C.M.P.No.16791 of 2021 is closed.

Sd/-
Assistant Registrar (CS-VI)

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Sub Assistant Registrar

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To

The Commercial Tax Officer (CT),
Mannargudi Assessment Circle,
C.T. Buildings,
Mannargudi.

+1cc to Mr.K.Soundararajan, Advocate SR.No.56102
+1cc to the Special Government Pleader(Taxes) SR.No.56372

W.A.No.2564 of 2021

CA(CO)
GN(20/01/2022)