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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.10.2021

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THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.No.21643 of 2021 &
WMP.No.2284 of 2021

Tvl.F.M.Sales & Marketing,
Represented by its Proprietor,
Rameshkumar Jain,
No.61, Krishnappa Agraharam Street,
Chennai - 600 001.

... Petitioner

Vs

The State Tax Officer,
Vallalar Nagar Assessment Circle,
Integrated Commercial Taxes Office Complex,
2nd Floor, Survey No.1275/3,
Elephant Gate Bridge Road,
Vepery,
Chennai - 600 003.

...Respondent

Prayer: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari calling for the records on the files of the respondent in TIN/33291162380/2010-11 dated 14.07.2021 and quash the same.

For Petitioner : Mr.R.Senniappan

For Respondent : Ms. Amirta Dinakaran
Government Advocate

ORDER

Captioned writ petition has been filed assailing an 'order dated 14.07.2021 bearing reference TIN/33291162380/2010-11' (hereinafter 'impugned order' for the sake of brevity). This Court is informed that the impugned order has been made under Section 27 of 'the Tamil Nadu Value Added Tax Act, 2006, (Tamil



Nadu Act No.32 of 2006)', which shall hereinafter be referred to as 'TNVAT Act' for the sake of convenience and clarity. Therefore, it is effectively a revision/re-assessment order pertaining to escaped turnover / wrong availment of 'Input Tax Credit' (ITC).

2. Writ petitioner is a registered dealer in the office of the respondent under TNVAT Act. This Court is informed that writ petitioner effected sale of about 5000 packets of what is known as 'Hans Chap Khaini' chewing tobacco vide a tax invoice dated 30.12.2010 to a local buyer in Arumbakkam. In the invoice, it was mentioned that the goods sold is non-taxable goods and exemption was claimed. This consignment shall hereinafter be referred to as 'said goods' for the sake of convenience and clarity. In the course of a routine physical check, the rowing squad of the respondent detained said goods i.e., aforementioned consignment and a writ petition was filed in W.P.No.3212 of 2011 and the Revisional Authority was directed to dispose of the matter. It may not be necessary to dilate further on those aspects of the matter as the impugned order has since been made.

3. Notwithstanding very many averments and several grounds raised in the writ affidavit, learned counsel for writ petitioner made one focused submission and that one focused submission is, the impugned order erred in not following the order dated 05.06.2010 made in R.P.No.11 of 2010 by the Commissioner (CT), Salem Division, in a revision and an order dated 16.12.2010 made by this Court in W.P.No.28080 of 2010. There was a mention about a Tax Case Order dated 27.09.2012 made in Tax Case (Revision) Nos.2054 and 2055 of 2008 also. This order does not mention about Hans Chap Khaini Chewing Tobacco i.e., said goods and therefore, it may not be necessary to go into it.

4. The crucial paragraph in the impugned order to which the attention of this Court is drawn is at Page 7 of the impugned order and the same reads as follows:

'Hence the dealer's claim that "Hans Chap Khaini" is a chewing tobacco and exempted from tax, is not acceptable. I find that the commodity "Hans Chap Khaini" is a taxable commodity @12.5% and the exemption claimed on a turnover of Rs.1,65,79,000.00



for the year 2010-11 is disallowed and is assessed to tax at 12.5% as per the provisions of the TNVAT Act 2006.'

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5. Learned counsel for writ petitioner, therefore, in effect submits that orders of higher authorities have been disregarded and on this ground, the impugned order warrants interference in writ jurisdiction.

6. Ms.Amirta Dinakaran, who accepted notice on behalf of lone respondent, submitted that impugned order is a reasoned order which has been made after giving sufficient opportunity to the writ petitioner i.e., ample and adequate opportunity to the writ petitioner to show-cause. Learned counsel adds that even personal hearings have been granted to the writ petitioner though it is not statutorily imperative. To be noted, this Court has held in State Bank of India officers case law (vide order dated 01.08.2019 in W.P.No.22634 of 2019) that it is not statutorily imperative to give personal hearing as far as revisional orders under Section 27 are concerned. This elucidation was by explaining the expression 'reasonable opportunity to show cause' occurring in common proviso to sub-sections (2) and (1) of Section 27 of TNVAT Act. To be noted, this order was carried in appeal by way of an intra-court appeal vide W.A.No.4073 of 2019 and in and by judgment dated 16.12.2019, a Hon'ble Division Bench dismissed the writ appeal. However, it is not statutorily imperative for an Authority to give personal hearing, but in a given case if the Authority considers it necessary (owing to the complexity or factual controversies or other reasons) a personal hearing can always be given and this is one such case where personal hearing has been given and this is not subjected to any disputation or disagreement. Personal hearing has also been captured in the impugned order. Learned Revenue counsel goes on to state that the contentions of the respondent, more particularly, the written submissions and the submissions made on behalf of the dealer / writ petitioner in the personal hearing have been considered and all this is captured in the impugned order. Learned counsel draws the attention of this Court to a portion of the impugned order which reads as follows:

'The Revision Petition was Remanded back to the Assessing Authority, by the Joint Commissioner (ST) Chennai (North) Division in R.P.No.2/2019/C1 dated 11.2.2021 stating that.



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"It is seen that the dealer had contested in the Hon'ble High Court of Madras the issue of notice issued by the Assistant Commissioner (ST) Vallalar Nagar Assessment circle to disallow, the claim of exemption on the turnover representing the sale of scented chewing tobacco under the brand name Hans Chap Khaini for the assessment year 2010-11 vide notice dated 31.8.2012. The Hon'ble High Court in W.P.No.27582/2012 and M.P.No.1/2012 dated 03.11.2020 had given order as follows:

"It is incumbent upon the Petitioner to submit his explanation with all supporting documents and comply with the requirements as sought in the impugned order by 31.12.2020. The Third Respondent shall, after affording full opportunity of hearing duly consider the explanation of the petitioner, deal with the each of the contentions raised and pass reasoned orders on merits and in accordance with law and communicate decision taken under written acknowledgement. In the event of any decision entailing adverse civil consequences, it would be certainly open to the petitioner to impeach the same before the proper forum in the manner recognized by Law. Though obvious, it is made clear that no opinion has been expressed by this Court on the correctness or otherwise on the merits of the controversy involved in the matter"

Hence the Hon'ble High Court had left the issue of taxability of the commodity Hans Chap Khaini dealt by the petitioner to be decided by the Assessing Officer. In view of the orders of the Hon'ble High Court, the revision petition filed by the dealer involving the same issue is remanded to the Assessing Authority for fresh consideration and passing necessary orders in accordance with law."

Accordingly another personal hearing notice vide this office TIN.33291162380/2010-11 dated 17.2.2021 was issued to the dealer which was received on 17.2.2021 by the dealer.

However, the dealer vide their letter dated 20.2.2021 requested time till 15.03.2021 for personal hearing. Again vide the dealer dated 15.03.2021 requested time till 25.03.2021. Further on



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25.03.2021, Thiru.P.Rajavelu, Advocate of High Court, on behalf of Tvl.F.M.Sales & Marketing, appeared and requested to extend the time for personal hearing till 30.03.2021

On 30.03.2021 the dealer filed their written submission for the year 2010-11, and produced documents in support of their claim which was acknowledged on 30.03.2021.

The reply of the dealer was verified with the following results.'

7. Learned counsel submits that in the paragraph that follows the above extract, the contentions of the dealer/writ petitioner have been examined and the reasons have been given.

8. This takes us to the point as to whether principles laid down by higher Authorities have been disregarded, but a careful perusal of the impugned order reveals that the same have been considered and those are captured in the following manner in the impugned order:

'The Hon'ble Supreme Court in the case of Kesarwani Zarda Bhandar Vs.State of UP and others reported in 19 VST 545 (SC) has held that

"the distinction between "manufactured" and "processed" may not in all situations depending upon the nature of the statute involved. It must pass the requisite test, viz., Whether it is a completely new item. Raw material of a manufactured product has to be distinguished from the manufactured product. When a new form comes into being and in market parlance it is considered to be a new product, the new form would be deemed to be manufactured goods as distinguished from processed goods."

Hence raw tobacco when it is cut into small pieces by shearing machine, the resulting tobacco is called "nice tobacco". The "nice tobacco" is allowed to dry for few days and then flavouring essence are being sprinkled on it and this stage this tobacco is known as 'Chewing Tobacco'. Then thereafter, menthol, geru, lime and spices, etc, are being homogeneously mixed with the same, either from electric machine or by the manually operated machine. The items get inseparably mixed with



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the processed tobacco and the resulting tobacco is called 'Zafrani Zarda' and 'Zafrani patti'. In this way, the raw tobacco loses its original identity and its physical and chemical properties are changed. It is a different commodity in the commercial world as well as amongst the consumers. The quality, cost and liking amongst the consumers vary according to the material mixed with it.

In the instant case the commodity scented khaini by brand name "Hans Chap Khaini" is having ingredients such as Tobacco, Lime water, oil, Menthol, Mixed spices, Natural & Artificial flavours with are homogeneously manufactured is not an ordinary chewing tobacco. It is not chewed but to be kept between lips and teeth and sucked. It is not edible and should not be eaten or swallowed. It is in a powder form after several manufacturing process. The manufacturer has also paid excise duty for this product. It is different commodity on the lines of Zarda, Hans, etc., which are not exempted commodity but taxable at 12.5% as held in the later part of the judgment cited above.'

9. A perusal of the aforesaid portion of the impugned order makes it clear that the matter turns on facts and Hans Chap Khaini is only a brand and it is not a product. Whether the product would qualify as 'Tobacco' is a matter which turns on facts and in the considered view of this Court, in the light of the aforementioned extracts in the impugned order, the reasoned impugned order does consider the principles qua earlier orders and the same stand distinguished.

10. To be noted, with regard to Tax case order, which has already been alluded to supra, it does not mention about Hans Chap Khaini and therefore that does not fall for consideration.

11. This takes us to the order of this Court in a writ petition being order dated 16.12.2010 made in W.P.No.28080 of 2010, paragraph 5.1 of order of the Hon'ble single Judge is of relevance and the same reads as follows:

'5.1. On the other hand, on instructions, it is the contention of Mr.R.Mahadevan, learned Additional Government Pleader (Taxes) appearing for the respondents that on the face of it the decision of the



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Joint Commissioner is not valid in law and the exemption granted as per the government order cannot be extended to the said commodity viz., Hans Chap Khaini Chewing Tobacco. He would submit that the Joint Commissioner has exceeded his limit by even referring to the various items like Zarda, Sukha, Surki and Khara Masala as the commodities produced by mixing tobacco leave cuttings with lime, spices and some flavoring agents and that the Department has taken steps to file appeal against the said order.'

12. Learned counsel for writ petitioner fairly submits that it is not clear as to whether the order of Joint Commissioner has been assailed. Therefore, these are all matters which (at best) have to be considered in an appeal. In other words they do not warrant interference in writ jurisdiction.

13. This takes us to the alternate remedy rule. In the case on hand, there is no disputation or disagreement that the impugned order is appealable. In other words, statutory appeal qua impugned order is available to the writ petitioner, which will be under Section 51 of TNVAT Act.

14. Regarding alternate remedy rule, the law is well settled that it is not an absolute rule and it is a discretionary rule. While holding it is not an absolute rule i.e., a discretionary rule and a self-imposed restraint qua writ jurisdiction, Hon'ble Supreme Court in a long line of authorities starting from 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 Case [United Bank of India Vs. Satyawati Tandon and others reported in (2010) 8 SCC 110] and K.C.Mathew case [Authorized Officer, State Bank of Travancore Vs. Mathew K.C. reported in (2018) 3 SCC 85] has held that the alternate remedy rule has to be applied with utmost rigour when it comes to fiscal statutes. Relevant paragraph in Dunlop India case is paragraph 3 and relevant paragraph in K.C.Mathew case is paragraph 10, which read as follows:

Paragraph 3 of Dunlop India case

'3. Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-



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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)

Paragraph 10 of K.C.Mathew case

'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



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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)

15. To be noted, the aforementioned paragraph 10 in K.C.Mathew's case, Satyawati Tondon principle has been reiterated and therefore relevant paragraph in Satyawati Tondon is not being extracted and reproduced separately.

16. Very recently in Commercial Steel case law [The Assistant Commissioner of State Tax Appellant(s) and Others Vs.M/s Commercial Steel Limited] being order made by Hon'ble Supreme Court on 03.09.2021, Hon'ble Dr Dhananjaya Y Chandrachud speaking for a three member Bench of the Hon'ble Supreme Court, dealt with this Alternate remedy rule and to be noted ,this is qua an appeal under Section 107 of 'The Central Goods and Services Tax Act, 2017' (hereinafter 'C-GST Act' for the sake of brevity and convenience) {to be noted, a fiscal statute again} relevant paragraphs are paragraphs 11 and 12, which read as follows:

'11 The respondent had a statutory remedy under section 107. Instead of availing of the



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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.'

17. A perusal of the aforementioned paragraphs makes it clear that the case on hand does not fall under any of the aforementioned exceptions. The above is the obtaining position of law qua alternate remedy rule qua fiscal Statutes. Though obvious, for the purpose of completion of this narrative, discussion and dispositive reasoning, this Court deems it appropriate to mention that exceptions qua alternate remedy rule have been adumbrated in Whirlpool case law [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]. Relevant paragraphs in Whirlpool case is paragraph 15, which reads as follows:

'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



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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.'

18. This Court deems it appropriate to not to burden this order with further extracts from Harbanslal case also. Suffice to say that exceptions to alternate remedy rule are set out i.e., adumbrated in Whirlpool case (come to be known and has come to stay as 'Whirlpool exceptions' in litigation parlance). Suffice to say that captioned writ petition does not fall under any of the exceptions adumbrated in Whirlpool case. On the contrary, in the considered view of this Court, this is a case which has to be dealt with by Appellate Authority if the writ petitioner / dealer chooses to prefer an appeal as it turns heavily on facts. As already alluded to supra, 'Hans Chap Khaini' is a brand name and though the written submission talks about packets, it is understood that it is effectively sachets. The contents of sachets have to be necessarily gone into. One of the aforementioned extracts from the impugned order makes it clear that the respondent in the impugned order has clearly gone into the ingredients and has even gone into process and making of 'nice tobacco'. Respondent has gone into and examined that products such as menthol, geru, lime and spices etc., are homogeneously mixed with the same either by a electric machine or by a manually operated machine. As all these details turn on facts, it would be appropriate that the Appellate Authority examines this if the writ petitioner chooses to file an appeal and therefore, this Court refrains itself from expressing any opinion on these aspects of the matter in this order. This is



more so as this Court is relegating the writ petitioner / dealer to the alternate remedy of an appeal.

19. Captioned writ petition is therefore dismissed albeit leaving a window open to the writ petitioner / dealer to file an appeal under Section of 51 of TNVAT Act if the writ petitioner chooses to do so. If the appeal is entertained subject to limitation and other conditions ingrained therein (conditions such as pre-deposit), Appellate Authority shall deal with the appeal on its own merits and in accordance with law uninfluenced or untrammelled by any observations that might have been made in this order.

Captioned writ petition is dismissed albeit preserving the limited rights of the writ petitioner in the aforesaid manner. Consequently, connected WMP is disposed of as closed having become unnecessary. There shall be no order as costs.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

gpa

To

The State Tax Officer,
Vallalar Nagar Assessment Circle,
Integrated Commercial Taxes Office Complex,
2nd Floor, Survey No.1275/3,
Elephant Gate Bridge Road,
Veperiy, Chennai - 600 003.

Copy To:

The Section Officer,
E.R.Section, High Court, Madras.
(To Return the Original Impugned order)

+1cc to Mr.R.Senniappan, Advocate, S.R.No.52586

+1cc to the Special Government Pleader, S.R.No.52881

W.P.No.21643 of 2021 &
WMP.No.2284 of 2021

SVI(CO)
SB(26/10/2021)