IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.10.2021

CORAM

THE HONOURABLE Mr.JUSTICE M.SUNDAR

W.P.No.22074 of 2021
and
WMP.No.23290 of 2021

M/s.Eureka Systems and Electrodes (P) Ltd.,
rep. by its Managing Director K.Chandrashkar,
11/15A, Selvarajapuram, Chinthamanipudur,
Coimbatore-641 103.

... Petitioner

-Vs-

The Assistant Commissioner (ST)
Palladam-2 Assessment Circle,
Palladam.

... Respondent

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records of the respondent in his proceedings in CST No.750340/2000-01 dated 02.09.2021 and quash the same.

For Petitioner : Mr.S.Ramanathan

For Respondent : Ms.Amirta Dinakaran
Government Advocate

ORDER

Captioned main writ petition has been filed assailing an 'order dated 02.09.2021 bearing reference No.CST No.750340/2000-01' (hereinafter 'impugned order' for the sake of brevity).

2. Impugned order has been made inter alia under Section 16 of 'Tamil Nadu General Sales Tax Act, 1959 (Act 1 of 1959)' [hereinafter 'TNGST' Act for the sake of brevity, convenience and clarity]. To be noted, Section 16 of TNGST Act deals with assessment of escaped turnover.

3. Mr.S.Ramanathan, learned counsel for writ petitioner, notwithstanding very many averments in the writ affidavit and several grounds raised in the writ affidavit made focussed submissions in his campaign against the impugned order and a summation of his submissions are as follows:

a) Impugned order has given a go-by to the Ashok Leyland principle i.e., ratio laid down by Hon'ble Supreme Court in Ashok Leyland Ltd., Vs. State of Tamil Nadu and another reported in 134 STC 473. Furthering his submission in this direction, learned counsel submitted that once declaration under Section 6A of 'The Central Sales Tax Act, 1956' [hereinafter 'CST Act' for the sake of convenience and clarity] is made by a dealer and accepted by the department reopening if at all can only be in cases of (i) collusion, (ii) fraud, (iii) misrepresentation or (iv) suppression, but none of these facets are present in the case on hand.

b) The same Assessing Officer has accepted Ashok Leyland principle and dropped proceedings for another assessment year i.e., 2001-2002 qua same writ petitioner-assessee vide order dated 24.12.2019. To be noted, impugned order pertains to 2000-2001.

c) In the impugned order, penalty has been levied under Section 12(3)(b) of TNGST Act though this is proceedings under Section 16 of TNGST Act. Furthering his submission in this direction, learned counsel placing reliance on Sri Ram Packages case being judgment of a Hon'ble Division Bench of this Court vide State of Tamil Nadu Vs. Sri Ram Packages reported in [2012] 47 VST 59 (Mad) submitted that penalty under Section 16 proceedings can at best be only proceedings under Sub-Section (2) and that too where best judgment method is adopted.

4. Ms.Amirta Dinakaran, learned Revenue counsel accepted notice on behalf of lone respondent.

5. Owing to the short points that arise in the case on hand, captioned main writ petition was taken up with the consent of learned counsel on both sides.

6. Responding to the aforementioned arguments of learned counsel for writ petitioner, learned Revenue counsel made submissions, a summation of which is as follows:

(i) It cannot be gainsaid that Ashok Leyland principle has been given a go-by as the impugned order vide paragraph 5 (i) (b) and (c) has clearly returned a finding that sales invoices/proforma invoices for the assessment year (2000-2001) have been found and this is suppression. In this regard, learned Revenue counsel submitted that the respondent need not accept the submission of department representative as gospel truth as in this case the department representative appears to have represented that no direct purchase orders corresponding to 2000-2001 assessment year were recovered unlike other assessment years.

(ii) The order dated 24.12.2019 made pertaining to another assessment year 2001-2002, is a case where no incriminating records were found during inspection and therefore, Ashok Leyland principle was followed. It was also pointed out that the incumbents are different and it is not the same officer as contended by learned counsel for writ petitioner.

(iii) Regarding penalty, it was submitted that penalty with regard to assessment of escaped turnover if at all and if that be so, should have been under Section 16(2), but it may be a case of quoting the wrong provision of law.

7. By way of reply submissions, learned counsel for writ petitioner reiterated his opening submissions and pointed out that this case warrants interference in writ jurisdiction, as this is a case of giving a go-by to settled legal principle i.e., aforementioned Ashok Leyland principle.

8. This Court carefully considered the rival submissions. This Court now proceeds to set out its discussion, give its dispositive reasoning and arrive at a conclusion.

9. Regarding the first point turning on Ashok Leyland principle, there can be no disputation that Ashok Leyland principle is to the effect that assessment qua escaped turnover post Section 6A of CST Act returns can only be in cases of collusion, fraud, misrepresentation or suppression. In the case on hand, respondent has clearly returned a finding after seeing the entire records, considering the rival submissions in detail and after giving a personal hearing and the findings inter alia are to the effect that certain incriminating material (alluded to supra) were before Assessing Officer. This is captured in sub paragraphs (b) and (c) of paragraph 5(i) of the impugned

order, which read as follows:

'5.FINDINGS:

DEFECT: Disallowance of Exemption on Stock Transfer and Consignment sales

(i) The Proforma invoices and Sale Invoices recovered at the time of inspection were carefully perused. On perusal of records and dealer's reply, the following points are noted as reasons for disallowance of stock transfer.

a. ......

b. Sale invoices are raised to different customers exactly to the same value immediately after branch transfer. For instance, as mentioned in the table above, 4 sale invoices have been raised on 14.11.2000, the very next day against the same 4 quantity of goods.

c. Similarly, the proforma invoices raised by the head office and the sale invoices raised by the branch exactly correlate with each other. As seen from the proforma invoices, the corresponding goods are sole at same quantity through the sale invoice as referred in the table above (page number:6-8).'

10. Therefore, the above will qualify as incriminating material and suppression, but any disputation in this regard warrants examination of records which can be done only in an appeal. This Court is not inclined to embark upon such a exercise in writ jurisdiction. It is made clear that this Court is of the view that it cannot be gainsaid that the impugned order has disregarded the Ashok Leyland principle, but whether the material is incriminating is a fact examination which will be done by Appellate Authority. There will be some discussion on alternate remedy i.e., statutory appeal infra in the later portion of this order.

11. This takes us to the next point that turns on another order made with regard to another assessment year namely 2001-2002 being order dated 24.12.2019. Three paragraphs of the said order are of significance and the same read as follows:

'Finally, the dealer requested in their objection letter dated 25.11.2019 to drop the proposed rejection of exemption already allowed as per the original orders passed on 31.03.2003, and follow the guidelines laid down by the Honourable Supreme Court of India in the decision reported in 137 STC 437 in the case of M/s.Ashok Leyland Ltd., and also requested to delete the proposed levy of penalty.

The dealers objection and other records had been considered in details carefully. They were met out as follows.

At the time of passing original orders passed under CST Act 1956, for the year 2001-02 by the Assessing Officer in CST No.750340/2001-02 dated 31.03.2003. The Assessing officer had checked and verified their books of accounts and then allowed the exemption on the branch transfer for Rs.71,75,188/- on the strength of form 'F' declaration for and other supported documents. Further, no incriminating records were found during the time of inspection very particularly to the assessment year 2001-02. Based on the judicial judgment reported in 134 STC 473 in the case of M/s.Ashok Leyland Ltd., rendered by the Honourable Supreme Court of india which was squarely applicable to the dealer's case, and also the observation of the Honourable High Court, Madras in dealer's own case in WP.No.39386 of 2004 dated 31.07.2019, the dealers objections were found to be reasonable and acceptable after considering facts of the case. Further, the entire branch transfer value was covered by valid form 'F' which were already verified by the Assessing officer while passing original orders on 31-03-2003 for the year 2001-02.'

12. As rightly pointed out by learned Revenue counsel, that was a case where there was no incriminating material and therefore, it is clearly distinguishable on facts. This Court has no difficulty in agreeing with learned Revenue counsel that the incumbents who made the earlier order and the impugned order are different as the names mentioned in the orders make this position very clear. In any event, the argument that the same officer took a different view is incorrect and the further factual submission that it is the same officer is also incorrect. This draws the curtains on the second point that has been raised by learned counsel for writ petitioner.

13. This takes us to the last point on penalty. This Court carefully considered Section 16(2) of TNGST Act, in the light of the oft-quoted Sri Ram Packages case law rendered by a Hon'ble Division Bench of this Court. A careful perusal of this oft quoted case law makes it clear that penalty can be imposed in cases of escaped turnover assessment also but that will be

limited to cases where best judgment method is adopted and not in cases where Section 16 assessment is made by placing reliance on the accounts furnished by the dealer. This is clearly not a case where best judgment method has been adopted. The materials which according to the impugned order are incriminating material have been relied on. Therefore, the penalty levied definitely calls for interference in writ jurisdiction on the ground that it is contrary to Sriram Packages principle. Therefore, paragraph 7 of the impugned order is set aside.

14. This Court now reverts to the alternate remedy Rule.

15. There is no disputation or disagreement before this Court that statutory appeal qua impugned order is available to the writ petitioner under Section 31 of TNGST Act. Alternate remedy Rule, no doubt is not an absolute rule or in other words, it is a rule of discretion. It is a self imposed restraint qua writ jurisdiction. Notwithstanding this position, Hon'ble Supreme Court in a long line of authorities i.e., 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 Tondon 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 repeatedly held that when it comes to fiscal law statutes, alternate remedy rule has to be applied with utmost rigour. To be noted, these three case laws do not constitute a exhaustive list, but are only some amongst the several celebrated and oft quoted case laws on this alternate remedy rule touching upon fiscal laws. In Dunlop India case, relevant paragraph is paragraph 3 and 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)

16. In K.C.Mathew case, relevant paragraph 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)

17. To be noted, in K.C.Mathew's case more particularly, paragraph 10, which has been extracted and reproduced supra, Satyawati Tondon principle has been captured. Therefore, this Court deems it appropriate to not to burden this order with extracts from Satyawati Tondon case law.

18. Be that as it may, very recently i.e., on 03.09.2021 a three member Hon'ble Bench of Hon'ble Supreme Court speaking through Hon'ble Dr.Dhananjaya Y Chandrachud in Commercial Steel case law [The Assistant Commissioner of State Tax Appellant(s) and Others Vs.M/s Commercial Steel Limited] set out the exceptions to alternate remedy rule and held that interference qua writ jurisdiction should be by way of huge exceptions and the exceptions have been adumbrated in Commercial Steel. Relevant paragraphs in Commercial Steel case law are Paragraphs 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.'

19. In the instant case, of the exceptions adumbrated in paragraph 11 of Commercial Steel case, excess of jurisdiction i.e., 11(iii) is attracted but that is only with regard to penalty aspect of the impugned order i.e., paragraph 7 of the impugned order as Sri Ram Packages principle clearly forbids levy of penalty absent adoption of best judgment method.

20. Therefore, this is a fit case for relegating the writ petitioner to alternate remedy of statutory appeal under Section 31 (except penalty which is set aside) i.e., tax due portion of impugned order subject of course to pre deposit condition and limitation with regard to the tax due part of the impugned order, if the writ petitioner chooses to do so.

21. Owing to all that have been set out supra, following order is passed:

a) impugned order is partly set aside i.e., set aside with regard to penalty alone. To state with specificity, paragraph 7 of the impugned order captioned 'Penalty' is set aside;

b) it is axiomatic to the previous limb that rest of the impugned order i.e., impugned order other than paragraph 7 captioned 'PENALTY' is sustained;

c) regarding the sustained part of the impugned order, it is open to the writ petitioner to file a statutory appeal inter alia under Section 31 of TNGST Act subject of course to pre deposit condition if any and limitation, if so desired. If the writ petitioner chooses to file a statutory appeal, the Appellate Authority shall deal with the appeal on its own merits and in accordance with law uninfluenced by the observations made in the instant case. In other words, statutory appeal regarding the tax due portion, if there is one, shall be dealt with on its own merits and in accordance with law.

22. Ergo, the sequitur is, writ petition is partly allowed [to the extent indicated above] and dismissed in all other aspects. To state with specificity, writ petition is allowed with regard to the penalty levied in the impugned order [paragraph 7 of impugned order] and writ petition is dismissed

with regard to the remaining portion of the impugned order [Paragraph 6 which deals with tax due]. Consequently, connected WMP.No.23290 of 2021 is also dismissed. There shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

kmi

To

The Assistant Commissioner (ST),
Palladam-2 Assessment Circle,
Palladam.

+1cc to Mr.S.Ramanathan, Advocate, S.R.No.54522

+1cc to the Special Government Pleader(T), S.R.No.54694

W.P.No.22074 of 2021
and
WMP.No.23290 of 2021

PVS(CO)
SU(22/11/2021)