

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.01.2021

CORAM :

The Honourable Mr. Justice T.S.SIVAGNANAM
and
The Honourable Ms. Justice R.N.MANJULA

W.A.Nos.1167 & 1168 of 2020
and
C.M.P.Nos.14438, 14444 & 14445 of 2020

M/s.FL Smidth Pvt Ltd.,
Rep by its Authorized Signatory,
Mr.V.Jayaraman-Deputy General Manager,
No.34, Egattor, Kelambakkam,
Rajiv Gandhi Salai,
Chennai - 603 103. ...Appellant in both
cases

Vs

The Assistant Commissioner (CT) (FAC),
Valluvarkottam Assessment Circle,
No.10, Palaniyappa Maligai,
Greens Road, Chennai - 600 006....Respondent in both cases

COMMON PRAYER: Writ Appeals filed under Clause 15 of Letters Patent to set aside the orders dated 05.11.2020 in W.P.No.11124 of 2016 and W.P.No.11125 of 2016 and allow the Writ Appeals.

Prayer in W.P.No.11124 of 2016 and W.P.No.11125 of 2016:- Writ Petitions filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the Respondent in the impugned orders in CST/773780/2007-08 and CST/773780/2008-09 dated 01.03.2016 and quash the same as it is in violation of Section 5(2) and Section 6(2) of the Central Sales Tax Act, 1956 and violative of Article 286(1)(b) of the Constitution.

For Appellant: Mr.ARL.Sundaresan
(in both cases) Senior Counsel
for Mr.K.Vaitheeswaran

For Respondent: Mr.Md.Shaffiq
(in both cases) Special Government Pleader

COMMON JUDGMENT

(Delivered by T.S.Sivagnanam,J)

We have heard Mr.ARL.Sundaresan, learned Senior Counsel appearing for Mr.K.Vaitheeswaran, learned counsel for the appellant and Mr.Mohammed Shaffiq, learned Special Government Pleader appearing on behalf of the respondent.

2. These appeals have been filed challenging the orders passed in W.P.Nos.11124 and 11125 of 2016, dated 05.11.2020. The writ petitions were filed challenging the assessment orders passed under the provisions of the Central Sales Tax Act dated 01.03.2016 for the assessment years 2007-08 and 2008-09. The writ petitions were admitted and order of interim stay was granted in the year 2016 and the writ petitions have been pending. However, the Revenue did not file any counter affidavit nor sought for vacating the interim orders. When the writ petition were taken up for final hearing during November 2020, the learned Single Judge opined that the appellant has to avail the alternate remedy and Article 226 of the Constitution of India is not meant to short-circuit or circumvent the statutory procedures. In this regard, reliance was placed on the decision of the Hon'ble Supreme Court in the case of **Assistant Collector of Central Excise vs Dunlop India Limited [(1985) 1 SCC 260]**.

3. It is no doubt true that this Court while exercising its jurisdiction under Article 226 of the Constitution of India may be very slow in interfering with the orders passed by statutory authorities when appeal is provided for, and this is more so when cases arise under the taxing statutes. However, these are self imposed restriction and each case has to be considered and decided on its own merits. The Hon'ble Supreme Court has observed that whenever an alternate remedy is provided under a taxing statute, the same should not be bypassed as factual matters have to be agitated before the authority who will be the best person to take a decision on the same and in a writ petition under Article 226 of the Constitution of India, disputed question of fact would not be gone into.

4. In the instant case, the appellant's contention in the writ petitions was that the impugned assessment orders are without jurisdiction and in this regard, several decisions were relied on before us, which were referred to in the affidavit filed in support of the writ petitions. What is relevant to note is that identical assessment order in respect of the appellant's own case for the assessment year 2009-2010 dated 24.01.2014 was the subject matter of challenge before this Court by way of a writ petition in W.P.No.4169 of 2014. The grounds canvassed in the present writ appeals were canvassed by the appellant in the

said writ petitions as well. The Court, after elaborately hearing the parties, has allowed the writ petition and remanded the matter back to the authorities for fresh consideration by order dated 19.11.2014. The operative portion of the order reads as follows:

"4. Learned Senior counsel appearing for the petitioner, after elaborately referring to the factual matrix submitted that the impugned order is passed in violation of principles of natural justice and shows clear arbitrary exercise of power and the impugned order is bad in law having not afforded opportunity of hearing. In this regard, reliance was placed on the decision of the Supreme court in the case of Automotive Tyre Manufacturers Association Vs. Designated Authority (2011) 263 ELT 481. Further, it is submitted that the impugned order travels beyond Article 286(1)(b) of the Constitution of India and as per Section 5(2) of the CST Act, 1956, imports are not taxable. Further, it is submitted that the impugned order has been passed travelling beyond the scope of the notice and thereby contrary to the law laid down by the Supreme Court in the case of Indure Ltd., and Another vs. CTO (2010) 34 VST 509 and K.G.Khosla & Co., Vs. DC (1966) 17 STC 473. Further, it is submitted that respondent ought to have appreciated that the high sea sales agreement contemplates endorsement of bill of lading in favour of the petitioner and the bill of entry has been filed by the customer and goods were cleared on payment of customs duty. Further, it is submitted that the contract with the customer clearly stipulated that there would be imported materials and the buyer was clearly aware that the materials would be imported by the petitioner and sold under Section 5(2) of the CST Act. Further, several other contentions have been raised on the merits of the assessment. Therefore, the learned Senior counsel would submit that the impugned order of assessment deserves to be quashed.

5. Learned Additional Government Pleader produced before this court a copy of

an additional written instructions given by the respondent on 17.03.2014, from which it is seen that the Authority has taken the following stand:-

"The notice was issued on 08.11.2013 and the dealers has been granted 15 days time from 11.12.2013 in response to their letter dated 10.12.2013 requesting for time to file their objections. Though over a month has passed by, they have not filed any objection or reply till date. It is now seen that the dealers has nothing to file before the undersigned and also accept the proposals as narrated above."

6. The above stand has been repeated as para wise comment in respect of all the paragraphs in the affidavit filed in support of the writ petition. The manner in which, written instructions have been given by the respondent is deprecated. The respondent, being a quasi judicial authority has to furnish para wise remarks to the Government Counsel by dealing with the merits of the objections raised. In the instant case, para wise remarks, clearly shows non-application of mind, in fact, the same contention has been reiterated in all the paragraphs including the grounds raised. Therefore, the para wise remarks given by the respondent deserves to be outrightly rejected. The Principal Secretary/Commissioner of Commercial Taxes, Chepauk, Chennai-5 is directed to take note of the observations made by this Court for suitable instructions to the concerned officer and give clear instructions as to the manner in which para-wise comments/instructions to be given to the Government Counsel by dealing with each and every factual contention raised by the petitioner/dealer in the writ petitions. This shall be also intimated to all assessing officers in the State, so as to enable the Department to appropriately defend cases filed against the Department.

7. Be that as it may. In the impugned order, it has been accepted that the petitioner prayed for extending time to submit their objections. However, the request made by the petitioner was neither

rejected nor accepted by passing an order but the assessing officer merely confirmed the proposal made in the show cause notice/pre-assessment notice.

8. In the light of the above, the impugned order is held to be illegal as it is violative of the principles of natural justice.

9. As regards the merits of the assessment and the other contentions raised by the learned Senior counsel for the petitioner, this Court is of the view that at this stage of the matter, this Court need not go into those aspects and has not considered as to whether the show cause notice is founded on any legal premise, since such jurisdictional issues can be urged by the petitioner in their objections and adjudicated by the assessing authority, who has issued the notice. (See *Special Director and another Vs. Mohd. Ghulam Ghouse* (2004) 3 SCC 440). Further, the First Bench of this Court in the case of *Muthuraja Traders Vs. Deputy Commercial Tax Officer, Park Road Assessment Circle, Erode* reported in 106 STC 283 held that the reasons which weigh with the authority concerned to come to the conclusion stated in the show cause notice, as also the reasons for arriving at such a prima facie conclusion and it is only a proposal and the authority could not be accused of or attributed with any pre-conceived ideas or notions about the merits of the claims of the case and the assessee has to submit the reply along with evidence.

10. In the light of the above observation of the Division Bench of this Court, there is no basis to hold that the authority has prejudged the matter by issuing a show cause notice. After-all, the respondent has issued only show cause notice and it is always open to the petitioner to raise all contentions including jurisdictional issues. This Court is of the view that the assessment order has to be set aside on the ground that the impugned order has been passed in violation of the principles of natural justice as the petitioner was not afforded opportunity of

personal hearing despite that being a statutory requirement.

11. In the light of above all, the Writ Petition is allowed and the impugned order is set aside and the matter is remanded to the respondent for fresh consideration. The petitioner is directed to submit their reply to the show cause notice within a period of six weeks from the date of receipt of a copy of this order. Thereafter, the respondent shall afford an opportunity of personal hearing to the petitioner and examine the objections raised and the documents produced and pass a reasoned order within eight weeks after the conclusion of personal hearing. No costs. Connected MP is closed."

5. It appears that the Department did not agitate the matter further and they accepted the order passed in the writ petition and the Assessing Officer took up the matter for denovo adjudication in terms of the order of remand and the proceedings have ultimately culminated in an assessment order dated 29.04.2019, which according to the learned counsel for the appellant is in favour of the appellant.

6. Thus, taking note of the above factual situation qua the prayer sought for by the petitioner and also taking note of the earlier orders passed by this Court remanding the matter back to the Assessing Officer and also the fact that the Assessing Officer has passed consequential orders dated 29.04.2019, we are inclined to follow the same procedure for the subject assessment years as well.

7. For the above reasons, the Writ Appeals are allowed and the orders passed in the writ petitions are set aside and the matters are remanded to the Assessing Officer for fresh consideration. The appellant is directed to treat the impugned assessment orders as show cause notices and submit their objections within a period of three weeks from the date of receipt of a copy of this judgment. Thereafter, the Assessing Officer shall afford an opportunity of personal hearing to the appellant and pass orders on merits and in accordance with law. Consequently, connected miscellaneous petitions are closed. No costs.

Sd/-

Assistant Registrar (CS.VI)

/True Copy/

Sub Assistant Registrar

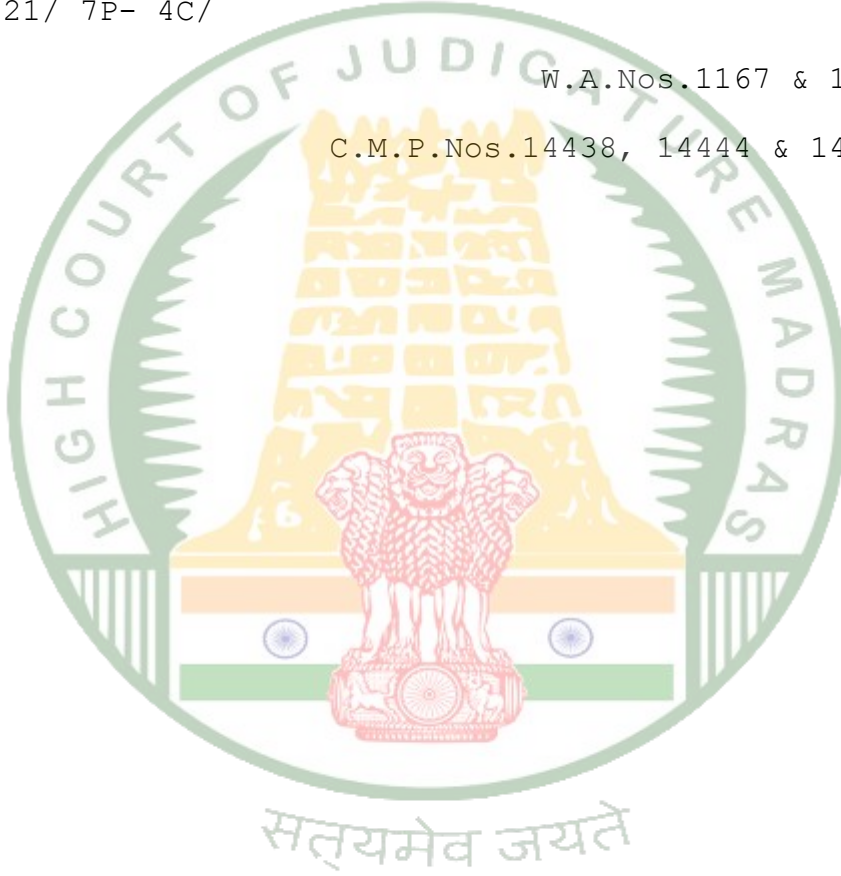
To

The Assistant Commissioner (CT) (FAC),
Valluvarkottam Assessment Circle,
No.10, Palaniyappa Maligai,
Greens Road, Chennai - 600 006.

+1cc to Mr.K.Vaiteeswaran, Advocate SR.NO.1155
+1cc to The Government Pleader SR.NO.1402

AKM/26.02.21/ 7P- 4C/

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