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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.11.2021

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THE HONOURABLE Mr.JUSTICE M.SUNDAR

W.P.No.23219 of 2021

and

WMP.No.24518 of 2021

M/s.Greenstar Fertilizers Limited,
SPIC House, 7th Floor,
88 Mount Road, Guindy,
Chennai 600 032.
Represented by its Chief Financial Officer
Shri.J.RAVISHANKAR

... Petitioner

-Vs-

1.Additional/Joint/Deputy/Asst Commissioner of Income Tax/
Income Tax Officer,
National Faceless Assessment Centre,
Delhi.

2.The Deputy Commissioner of Income Tax,
Corporate Circle-2(1),
Chennai-600 034.

... Respondents

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, to call for the records of the petitioner on the file of the 1st respondent in PAN:AADCG9451D and quash the impugned order passed u/s.143(3) r.w.s 144B of the Act in DIN:ITBA/AST/S/143(3)/2021-22/1035983393(1) for the Assessment Year 2018-19 dated 28.09.2021 and direct the 2nd respondent to pass fresh order after affording personal hearing.

For Petitioner : Mr.Vijayaraghavan
of M/s.Subbaraya Aiyar Padmanabhan
& Ramamani

For Respondents: Ms.Hema Muralikrishnan
Senior standing counsel

ORDER

Captioned main writ petition has been filed assailing an assessment order dated 28.09.2021 made under Section 143(3) read with 144B of 'the Income-tax Act, 1961 (43 of 1961)' [hereinafter 'IT' Act for the sake of brevity, convenience and



clarity] pertaining to assessment year 2018-19 qua writ petitioner.

2. Mr. Vijayaraghavan of M/s. Subbaraya Aiyar Padmanabhan & Ramamani [Law firm], who was before this virtual Court on behalf of writ petitioner, in his campaign against the impugned order made submissions a broad summation of which is as follows:

- 1) Two additions namely 'Inter Corporate Deposits' ['ICDs'] qua an entity, which goes by the name Xangbo Trading (India) Pvt. Ltd., [hereinafter 'Xangbo' for the sake of brevity] has been erroneously treated to be not an ICD and a payment made regarding high seas sales in 'Indian Currency' ['INR' for the sake of convenience] has been treated as external commercial borrowing both of which are incorrect;
- 2) The above is clearly excess of jurisdiction as the impugned order proceeds on the basis that there is a violation of 'Foreign Exchange Management Act, 1999' ('FEMA') without even issuing notice to the counter party;
- 3) There is a violation of 'Natural Justice Principle' (NJP) and the trajectory of the notice under Section 142(1) of IT Act and draft assessment order culminating in the impugned order will bring to light NJP violation;

3. Ms. Hema Muralikrishnan, learned Senior standing counsel accepted notice on behalf of both the respondents.

4. Owing to the nature of the matter, with the consent of learned counsel on both sides, main writ petition is taken up.

5. Learned Revenue counsel on instructions made submissions, a summation of which is as follows:

- a) Point turning on ICD and payment in INR qua high seas sales turn on merit and therefore do not warrant interference in writ jurisdiction;
- b) There is no excess of jurisdiction issue as the assessment order proceeds on the basis of available materials;
- c) It cannot be gainsaid that there is NJP violation as the writ petitioner has not complained about the time frame within which responses were sought and on the contrary, writ petitioner has responded to the notices.

6. This Court now proceeds to consider the submissions one after the other, discuss the same and give its dispositive reasoning for arriving at a conclusion.



7. First point turning on ICD and high seas sales are clearly matters on merit. The reason is, impugned order i.e., assessment order did not accept the plea of writ petitioner that Xangbo did not provide profit and loss account, it would be evident from the receipt of so called interest which has been pegged at a huge sum of 108.93 crores (added) and the impugned order proceeds on the basis that the transaction of writ petitioner with Xangbo is not in conformity with the norms of FEMA. This is clearly a matter on merits. Regarding the argument posited on payment qua high seas sales being made in INR being treated as external commercial borrowing, indirect foreign investment and FDI in 100% wholesale sector loans extended in INR has been held to be not a business approved and not in the conformity with FEMA norms. The arguments that the norms of FEMA have not been set out with specificity or required approval details have not been set out with specificity in the impugned order are all clearly arguments in the nature of an appeal qua impugned order i.e., not arguments compelling interference in writ jurisdiction. To be noted, impugned order i.e., assessment order proceeds on the basis that Xangbo is non resident owned, non resident controlled with opaque ownership (97.99% share holding being subscribed by a Cayman Island Controlled entity, which has been allowed 'Foreign Direct Investment' (FDI) in 100% wholesale sector). All these turn heavily on facts and therefore, this is also another reason to say that these are clearly matters for legal drill in the nature of an appeal and does not warrant interference in writ jurisdiction.

8. This takes this Court to the next point that turns on FEMA norms. The norms of FEMA not being set out with specificity or a conclusion being arrived at qua alleged FEMA violation without issuing notice to the counter party, cannot be construed as excess jurisdiction. The reason is, impugned order does not mulct the writ petitioner with consequences of alleged FEMA violations (under FEMA) in the impugned order. All that the impugned order does is, it levies income tax and consequences within the Statutory perimeter of IT Act. If there is an error in holding that FEMA norms have not been followed or that the business is not approved under FEMA, these are matters which can be corrected in an appeal. All this turns heavily on facts and on merits of the matter. Excess jurisdiction as an illustration is a case/situation where an Authority exercises jurisdiction which is not vested in it. In this case, if the respondents have levied any fine or have mulcted the writ petitioner with any of the consequences for FEMA violation under FEMA that may well qualify as a case of excess jurisdiction. The consequences under FEMA do not form subject matter of impugned order. If there is no violation of FEMA, it is well open to the writ petitioner to canvass the same in a statutory appeal. Therefore, this is not a case of excess jurisdiction. This Court is unable to accept the argument that this is a case of excess jurisdiction.



9. This takes us to the last point namely NJP violation. A careful perusal of chronology reveals that notice under Section 144B of IT Act has been issued on 15.09.2021 and writ petitioner has replied on 17.09.2021. Thereafter, a 'Show Cause Notice' ('SCN') under section 144B has been issued and this SCN contains Draft Assessment Order. Thereafter, writ petitioner has sent its objections on 26.09.2021 and ultimately, impugned order has been made on 28.09.2021. As rightly contended by learned Revenue counsel, in this case, writ petitioner has not raised the point that the time granted is not reasonable, adequate or ample. On the contrary, writ petitioner has responded to the notice and the same has culminated in the impugned order. Therefore, it is made clear that this Court has not expressed any opinion or view on the merits of the matter and as to whether time granted is reasonable, ample or adequate as that does not fall for consideration in the case on hand. Suffice to say that the writ petitioner has responded and the impugned order has been made.

10. This takes this order to the alternate remedy rule i.e., availability of alternate remedy which was projected by learned Revenue counsel. Learned Revenue counsel submitted that statutory appeal is available to the writ petitioner against the impugned order and that statutory appeal is under Section 246A of IT Act. Learned Revenue counsel also pointed out that there is no pre deposit condition qua 246A of IT Act, but this was disputed by learned counsel for writ petitioner by saying that there may not be a pre deposit condition, but if one seeks a stay of impugned order, deposit of 20% of the demand is made imperative for grant of stay in the light of circulars that are operating now. This Court does not propose to go into this controversy as to whether the circular would act as pre deposit condition as this Court has come to the conclusion that this is not a fit case for interference in writ jurisdiction and the writ petitioner has to be relegated to the alternate remedy of statutory appeal. Once the writ petitioner chooses to avail the alternate remedy under Section 246A of IT Act, it follows as an inevitable sequitur that limitation and pre deposit conditions if any, will operate.

11. On alternate remedy rule, this Court is clear in its mind that alternate remedy rule is not an absolute rule and it is only a discretionary rule. Alternate remedy rule is self imposed restraint qua writ jurisdiction. However, in a long line of case laws i.e., catena of case laws starting from Dunlop India case, Hon'ble Supreme Court has repeatedly held that when it comes to fiscal law statutes, alternate remedy rule has to be applied with utmost rigour. The long line of authorities will include 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]. To be noted, this is not an exhaustive list of case laws for the principle that alternate remedy rule qua fiscal law will be applied with utmost rigor is attracted, but it is only an illustration. 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)

12. 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



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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)

13. 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 does not burden this order by extracting relevant paragraphs from Satyawati Tondon case law.

14. 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] held that though interference qua writ jurisdiction on the teeth of alternate remedy will be only under exceptional circumstances. 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



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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.'

15. From the narrative thus far, this Court is clear in its mind that none of the exceptional circumstances, which have been culled out by Hon'ble Supreme Court are attracted in the case on hand. To be noted, excess jurisdiction point urged has been negatived by this Court and the same has been delineated supra elsewhere in this order.

16. In the light of the discussion and dispositive reasoning set out supra, this Court has no difficulty in coming to the conclusion that this is a fit case to relegate the writ petitioner to file statutory appeal under Section 246A of IT Act. In other words, there is no ground warranting interference in writ jurisdiction qua impugned order. Though obvious, it is made clear that if the writ petitioner chooses to take the alternate remedy route and file a statutory appeal under Section 246A of IT Act, Appellate Authority shall consider the appeal on its own merits and in accordance with law de hors any observation made in this order. Observations in this order which may have the trappings of some expression touching upon merits is for the limited purpose of disposal of captioned writ petition and therefore, if writ petitioner chooses to avail alternate remedy, statutory appeal shall be dealt with by Appellate Authority untrammelled by any observation made in this order. Though obvious, it is also made clear that alternate remedy if availed by the writ petitioner will be subject to pre deposit [either direct or indirect as contended] and limitation.

17. This Court is informed that the time limit for preferring the statutory appeal is 30 days. If the writ petitioner chooses to seek exclusion of the time spent in this Court qua captioned writ petition for computing this 30 days (by resorting under Section 14 of The Limitation Act, 1963),



the same can be considered by Appellate Authority on its own merits and in accordance with law. This order will neither impede nor serve as an impetus in such a legal drill.

18. The sequitur is, writ petitioner's campaign against the impugned order fails and the writ petition is dismissed. Consequently, captioned WMP is also dismissed. There shall be no order as to costs.

Sd/-
Assistant Registrar (CS-V)

//True copy//

Sub Assistant Registrar

kmi

To

1. Additional/Joint/Deputy/Asst Commissioner of Income Tax/
Income Tax Officer,
National Faceless Assessment Centre,
Delhi.

2. The Deputy Commissioner of Income Tax,
Corporate Circle-2(1),
Chennai-600 034.

+1cc to M/s. Subbaraya Aiyar Padmanabhan, Advocate SR.No.56968

+1cc to Ms. Hema Muralikrishnan, Advocate SR.No.56825

W.P.No.23219 of 2021
and
WMP.No.24518 of 2021

VSN II (CO)
GMY (26/11/2021)