IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.07.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.Nos.31556, 31564, 31569 & 31606 of 2018
and
W.M.P.Nos.36776, 36778, 36787, 36788, 36791, 36792, 36838
and 36839 of 2018

T.Azhakesan ...Petitioner in all W.Ps

- Vs -

1. The State Tax Officer,
   Sholingannalur Assessment Circle,
   141, 2nd Floor, Yazhini Complex,
   Burma Colony 1st Main Road,
   Perungudi, Chennai – 600 096.

2. The Commercial Tax Officer,
   Group – III, Enforcement (East)
   Greams Road, Chennai – 600 006.

3. The Deputy Commissioner (CT)
   Chennai (East)
   PAPJM Building, Chennai – 600 006.

...Respondents in all W.Ps

Common Prayer : Writ Petitions filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to call for the impugned proceedings of the first respondent TIN/33630926483/2013-2014, TIN/33630926483/2014-2015, TIN/33630926483/2015-2016 and TIN/33630926483/2012-2013, and quash the impugned order dated 04.06.2018 as passed contrary to the law laid down by the Hon'ble Division Bench of the Madras High Court in the case of Commissioner of Income Tax Vs. M/s. Kikani Exports Pvt. Ltd., TCA No.330 of 2013 etc, batch dated 09.09.2014 and in the case of M/s. K.Ramasamy Vs. Deputy Commercial Tax Officer, Chidambaram-II in W.P.No.12556/2006 dated 18.12.2017.

For Petitioner
in all W.Ps : Mr.S.N.Kirubanandam

For Respondents
in all W.Ps : Mr.V.Nanmaran
Government Advocate

COMMON ORDER

The Writ Petitions on hand are filed, challenging the four assessment orders passed for the different assessment years.

2. Pursuant to the inspection in the business place of the petitioner by the Enforcement Wing Officers on 06.01.2017, 30.01.2017, 16.02.2017, 20.03.2017 and 30.03.2017, the defects were identified and accordingly, reports were submitted. The impugned order states that on verification of the records and found that the assesses have not filed option letter for payment of tax under compounding scheme as required under Section 6 (2) of the Act. In the absence of filing of the option letter to the Assessing Officer is not eligible to pay tax under Section 6 of the Act. Hence, Tax liability is arrived.

3. The learned counsel appearing on behalf of the Writ Petitioner made a submission that not filing of option letter for payment of tax, cannot be taken as a criteria for re-assessment and in fact, the High Court of Madras passed an order dated 18.12.2017 in W.P.No.12556 of 2006, holding that the ''respondent committed an error in holding that the petitioner did not exercise his option''. There are several judgments to establish that based on the Enforcement Directorate Authorities Report, re-assessment cannot be done.

4. The learned counsel for the petitioner reiterated that when it is not necessary to file an option letter for payment of tax under compounding scheme as per the Judgment of this Court, there is no reason for passing the impugned order of assessment by the respondents. Thus, the Assessing Officer has exercised his power beyond his jurisdiction and therefore, the orders impugned are liable to be set aside.

5. The learned counsel for the petitioner further contended that regarding the discrepancies in the turn over, the assessee has filed his original return regarding the turnover and those records were also not verified by the respondents and unilateral decision was taken and the impugned orders were passed and thus, the impugned orders are liable to be set aside.

6. The learned Government Counsel for the respondents disputed the said contentions by stating that the assessment orders were passed by following the procedures as contemplated under the provisions of the Act. The impugned assessment orders

are passed not only based on report of the Enforcement Directorate Officials, but, on the basis that there are certain discrepancies in the turn over and other aspects. Thus, it was the considered order passed by following the procedures and thus, the Writ Petitions need not be entertained. If at all, the petitioner has any grievance, he has to prefer an appeal before the Appellate Authority under the Provisions of the Act.

7. Considering the arguments, this Court is of an opinion that the impugned order stipulates that regarding the difference in the turnover, the dealers have file Form WW and Profit and Trading and loss account for the Month of December 2014 only. At the time of filing Form WW, they have reported that the total sales turnover is Rs.56,08,055/- in the Trading Account. At that time of inspection, they have not reconcile the above turnover before the Enforcement Officials. Now, they have stated that the correct turnover is Rs.62,52,658/- only. But the trading account, they have reported the turnover is Rs.56,08,055/- only. At that time personal hearing also, they have not reconcile how they have shown in the Trading Account.

8. On perusal of the above findings in the impugned orders, this Court is of an opinion that an adjudication is required with reference to the disputed facts. Regarding the discrepancies in the turnover, verification of records are required and the Appellate Authority is the final fact finding Authority regarding the adjudication of disputes. Therefore, preferring an appeal is preferable for the purpose of resolving the issues in a full-fledged manner.

9. The respondents in their counter statement also has stated that there are variations between the turnover reported in the monthly returns filed and the one reported in the Trading Account / Form WW Return. Thus, the Assessing Officer / Respondent has not only acted based on the Enforcement Directorate Officials Report, but verified the returns and considered the merits.

10. The respondents have stated that inasmuch as the returns filed by the dealers are incorrect and incomplete, a notice proposing to re-determine and assess the turnover at the appropriate rate of 5% and 14.5% on the difference of turnover after adopting the ratio of 60:40 for civil contract performed by the dealer in the absence of split figures in the books of accounts. The notice issued on 16.10.2017, the dealers had not appeared before the Assessing Authority and produced the books of accounts for verification. Therefore, opportunity of personal hearing was granted to the dealers on 12.12.2017 and 21.03.2018. In reply to this personal hearing notice, the dealer filed a representation dated Nil along with copies of

Form T and Form R Certificates and requested to drop the assessment proposed. The reply filed by the dealers was perused with reference to the Inspection Report received from the Enforcement Wing. It was observed that the dealer had not reconciled the figures during the time of inspection and hence, the variation as pointed out by the Enforcement Wing Authorities still persist. Even during the time of assessment also, the dealer was not interested in reconciling the figures. Hence, in the absence of reconciliation being made and since the dealer had not proved with documentary evidences that they had filed option to pay tax under the compounding scheme and that the turnover as pointed out by the Enforcement Wing Officials were already included in the returns and tax due paid thereon, the Assessing Authorities having no other alternative, has passed orders, confirming the revision proposed.

11. The above facts would reveal that the respondents had provided opportunity to the Writ Petitioner to submit all his books of accounts etc., and the opportunities provided were not availed by the petitioner. Contrarily, they have sent representation, which was also considered by the Authorities and the decision is taken and orders passed .

12. This Court is of the considered opinion that persons, who have not availed the opportunities while adjudication under a Statute and thereafter approaching the Court by filing Writ Petition under Article 226 of the Constitution of India cannot be encouraged. All such persons, if at all aggrieved from and out of any such orders passed, they are bound to prefer an appeal provided under the Act. Exhausting the Appellate remedy is of paramount importance. Exhausting the appeal remedy is the rule. Entertaining a writ is an exception.

13. The disputes regarding the turnover, re-conciliation etc., can never be entertained under Article 226 of the Constitution of India nor based on the affidavit and considering one point, the High Court cannot exonerate from the liability to pay sales tax, otherwise in accordance with law. The intricacies involved in business transactions, trading procedures are to be gone into by the Competent Original Authorities as well as by the Appellate Authorities for the purpose of forming a clear opinion in accordance with law. The Appellate Authority is the final fact finding Authority. Thus, exhausting the appellate remedy would be of better assistance for the High Court for exercise of power of judicial review under Article 226 of the Constitution of India in an effective and efficient manner.

14. All such disputed facts regarding turnover, reconciliation, determination of Tax, etc., cannot be done by the High Court based on the affidavits filed by the respective parties. There is a possibility of omission, commission or errors and such an error may cause prejudice to either of the parties. Thus, High Court is expected to be cautious in the matter of dispensing with the appeal provision and entertain a Writ Petition regarding the certain disputed facts.

15. The petitioners are projected that it is a legal question. However, all legal questions, limitation, jurisdiction, etc., shall be adjudicated by the Appellate Authority and they are exercising the quasi-judicial powers and therefore, they are empowered to consider both factual and legal grounds and pass appropriate orders on merits in accordance with law. Hence, such powers are conferred on the Appellate Authority. The institution of Appellate Authority need not be undermined by the High Court. The avenue for an appeal provided under the Statue to the aggrieved persons cannot be taken away by the High Court by entertaining a Writ Petition directly with reference to certain disputes. In the event of entertaining the Writ Petition, opportunity of redressing the grievances before the Appellate Authority is taken away, which is not preferable.

16. The practice of filing the Writ Petitions are in ascending mode without exhausting the appeal remedy mostly with an idea to avoid payment of pre-deposit for filing an appeal. Such a practice can never be encouraged. In all circumstances, the parties are bound to exhaust the appeal remedy in the manner prescribed. This being the principles settled by the Courts, this Court is of an opinion that such disputed questions raised in the Writ Petition cannot be decided by this Court based on the affidavit or based on the orders passed by this Court, holding that the option letters need not be submitted by the assessee. All these issues are to be decided on merits and with reference to the documents and evidences to be produced.

17. This Court has elaborately considered the importance of exhausting the appeal remedy in W.P.No.3144 of 2016 dated 15.04.2021 and the relevant paragraphs are extracted hereunder:

> ''7. In order to avoid the Pre-Deposit, which is contemplated under the Statute, the practice of filing writ petitions is prevailing in the High Court and the High Court cannot encourage such practice and the appellate remedy contemplated under the Act is to be exhausted in all circumstances and only under extraordinary circumstances, in order to mitigate injustice, the High Court can intervene and

not otherwise. Such power of dispensing with the appeal remedy is to be exercised sparingly and not in a routine manner. The learned Senior Standing Counsels reiterated that, in respect of the writ petitions on hand, the original assessment order has been passed either by the Joint Commissioner or by the Commissioner of Customs. Against such original orders passed by the original authorities under the provisions of the Customs Act, an appeal is contemplated under Sections 128 and 129 of the Customs Act, respectively. Without exhausting the appellate remedy, the writ petitioners have filed these writ petitions, and therefore, the writ petitions are liable to be dismissed.

8.With reference to the appellate remedy, the Hon'ble Division Bench of this Court in W.A.No.640 of 2021 [M/s.Fourceess Diamond Pvt. Ltd. and another v. The Joint Commissioner of Customs (Air Cargo), Meenambakkam, Chennai] delivered a judgment on 25.02.2021 and the relevant paragraphs are extracted hereunder :

> "8.After elaborately hearing the learned counsel for the appellants and the learned Senior Standing Counsel appearing for the respondent, we are of the view that the issues raised in the writ petition are not purely questions of law, but mixed questions of fact, which would require a process of adjudication. Such matters cannot be decided by a Writ Court based on affidavits. Therefore, we do agree with the ultimate conclusion of the learned Writ Court that the appellant should avail the alternate remedy available under the Act.
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> 9.For the reasons, which we have assigned in the preceding paragraph, the Writ Appeal stands dismissed and the appellants are granted 60 days time from the date of receipt of a copy of this judgment to file an appeal before the Commissioner of Customs (Appeals) and if the same is filed, the Commissioner of Customs (Appeals) shall entertain the appeal, without reference to the limitation as the writ petition was filed before this Court in the year 2016, which is well within the period of limitation, had the appellants filed appeals before the Commissioner of Customs (Appeals) at the relevant point of time.
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> 10.Since the learned counsel for the appellants submitted that the certified copy of

the impugned order was filed in the writ petition, the Registry is directed to return the impugned original order filed in the writ petition, after retaining a photostat copy. No costs. Consequently, connected miscellaneous petition is closed.”

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11.This Court is of the considered opinion that all such grounds raised on merits are to be adjudicated with reference to the documents and evidences to be produced and the scope of the writ petition under Article 226 of the Constitution of India cannot be expanded so as to exercise the powers of the appellate authority in the matter of examination or scrutiny of original documents and evidences produced by the respective parties. The very purpose of the statutory appeal is to scrutinize the orders passed by the original authorities, and therefore, the legislative intention in this regard is to be scrupulously followed in the mater of adjudication of merits with reference to the documents and evidences.

12.In common parlance, Statutes contain appeal provisions. In some of the Statutes, there are two-tier appeal provisions in order to ensure that the facts, grounds, evidences are appreciated and the grievances are redressed in the manner known to law. Such appeal provisions are provided with the legislative intention to provide remedy to the aggrieved persons. The High Court, in normal circumstances, would not interfere nor dispense with the appellate remedy.

13.The High Court cannot adjudicate the facts and merits with reference to documents and evidences. Trial is not entertainable under Article 226 of the Constitution of India. All such procedural aspects are to be followed by complete adjudication/trial by the original authorities as well as by the appellate authorities under the provisions of the Statute and the powers under Article 226 of the Constitution of India is limited to find out whether the processes contemplated under the Statutes and the procedural aspects are followed by the competent authorities as well as the appellate authorities or not. The High Court, under Article 226 of the Constitution of India, is not expected to usurp the powers of the appellate authorities by adjudicating the merits of the matter on certain documents and evidences. In the event of adjudication of merits under Article 226 of the Constitution of India in the absence of complete trial with reference to the documents and evidences, there is a possibility of miscarriage of justice, and therefore, the High Court is expected to be cautious, while entering into the venture of adjudication of certain merits with reference to the original documents and evidences produced by the respective parties to the lis. This being the legislative intention, High Court is expected to trust the institutional authorities as well as the hierarchy of institutions contemplated under the Statutes. Institutional respects are of paramount importance for providing complete justice to the parties and the various stages of adjudication are important for the purpose of correcting omissions, commissions, errors in appreciation of evidence, etc. Powers of the High Court under Article 226 of the Constitution of India cannot be extended nor widened so as to allow lay hands on the facts and circumstances by conducting the trial, nor certain facts and circumstances with reference to documents and evidences can be assumed or presumed or inference can be drawn, which is not preferable.

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15.As far as the judgment of the Hon'ble Supreme Court of India in the case of M/s.Canon India Private Limited (supra) is concerned, as rightly pointed out by the learned Senior Standing Counsels appearing on behalf of the respondents that the matter went to the Hon'ble Apex Court by way of regular appeal and the Hon'ble Supreme Court of India, while adjudicating the final orders passed by the Appellate Tribunal, formed an opinion that the issuance of show cause notice itself was by an improper authority. Thus, by citing the said finding, the appellate remedy otherwise provided under the Statute cannot be dispensed with, and in the event of accepting the said contention, in all such cases, every litigant will approach the High Court by way of writ petition bypassing the appellate remedy, which is not desirable and cannot be accepted. As observed earlier, Institutional respect is of paramount importance. Even the point of jurisdiction, limitation, error apparent on the face of the record, are on merits and all are to be adjudicated before the appellate authority and the appellate authority, more specifically, the

Appellate Tribunal or the Commissioner (Appeals), as the case may be, is empowered to adjudicate all such legal grounds raised by the respective parties and make a finding on merits. Thus, usurping the powers of the appellate authorities by the High Court by invoking its powers under Article 226 of the Constitution of India is certainly unwarranted. The parties must be provided an opportunity to approach the appropriate authorities for redressal of their grievances in the manner known to law. In the event of entertaining all such writ petitions, the High Court will not only be over-burdened, but usurping the powers of the appellate authority is certainly not desirable.

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18.Large number of writ petitions are filed without exhausting the statutory appeal remedies and High Court is also entertaining such writ petitions in a routine manner. Keeping such writ petitions pending for long time would cause prejudice to the interest of the assessee also. Thus, such statutory provisions regarding the appeal are to be decided at the first instance, enabling the litigants to avail the remedy by following the procedures as contemplated under law. Such writ petitions are filed may be on the ground of jurisdiction or otherwise. However, the Courts are expected to ensure that all such legal grounds available to the parties are adjudicated before the proper Forum and only after exhausting the statutory remedies, writ petitions are to be entertained. In the absence of exhausting such remedies, High Court is loosing the benefit of deciding the matter on merits as the High Court cannot conduct a trial or examine the original records in the writ proceedings under Article 226 of the Constitution of India. Thus, the Courts shall not provide an unnecessary opportunity to the assessee to escape from the liability merely on the ground on jurisdictional error, which is rectifiable.

19.This being the facts and circumstances established, this Court has no hesitation in arriving at a conclusion that the petitioners are bound to exhaust the appellate remedy, either under Section 128 or Section 129 of the Customs Act, respectively. Thus, the petitioners are at liberty to approach the appellate authority and file an appeal by following the procedures contemplated and by complying with the conditions to prefer the appeal, within a period of 60 days from the date of receipt of a copy of this order, and in the event of filing of appeal(s) by the writ petitioners within a period of 60 days, all such appeals are directed to be entertained without reference to the period of limitation, and the matters are to be adjudicated on merits and in accordance with law and by affording opportunity to all the parties, and the appeals are to be disposed of as expeditiously as possible.''

18. In view of the principles laid down in the Judgment cited supra, the petitioner has to exhaust the Appellate remedy as contemplated under the provisions of the Act. Accordingly, the petitioner is at liberty to prefer an appeal in a prescribed format by applying the provisions of Statute and Rules, within a period of six weeks from the date of receipt of a copy of this order. If any such appeal is received from the petitioner, the Appellate Authority shall condone the delay, if any, entertain the appeal and dispose of the same on merits in accordance with law by affording an opportunity to the Writ Petitioner and independently without reference to the observations made in this order.

19. With these directions, the Writ Petitions stand disposed of. No costs. Consequently, connected miscellaneous petitions are closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

dh/ssn
To
1. The State Tax Officer,
   Sholingannalur Assessment Circle,
   141, 2nd Floor, Yazhini Complex,
   Burma Colony 1st Main Road,
   Perungudi, Chennai - 600 096.

2. The Commercial Tax Officer,
   Group - III, Enforcement (East)
   Greams Road, Chennai - 600 006.

3. The Deputy Commissioner (CT)
   Chennai (East), PAPJM Building,
   Chennai - 600 006.

Copy to
The Commissioner(CT)
Chennai

+1 CC to Mr.S.N.Kirubanandam, Advocate sr 31227
+1 CC to The Special Government Pleader sr 31441

W.P.Nos.31556, 31564, 31569
& 31606 of 2018

SKY(CO)
SP(02/08/2021)