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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
11.01.2024	12.02.2024

CORAM:

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
and
THE HONOURABLE MR.JUSTICE C.KUMARAPPAN

W.A.(MD)No.119 of 2016
and
C.M.P.(MD)No.480 of 2016
and
W.A.(MD)Nos.166 to 171 of 2016
and
C.M.P.(MD)Nos.856 to 861 of 2016

R.Devarasan ... Appellant in all the W.As.

vs.

1.The Secretary to the Government,
Commercial Tax and Registration Department,
Fort St. George, Chennai – 9.

2.The Commissioner of Commercial Tax,
Elilgam, II Floor, Chepauk, Chennai – 5.

3.The Assistant Commissioner of Commercial Tax,
Woraiyur Assessment Circle, Trichy.

4.The Commercial Tax Officer,
Woraiyur Assessment Circle, Trichy. ... Respondents in all the W.As.

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Prayer in all the W.As. : Writ Appeals filed under Clause 15 of the Letters of Patent, against the common order dated 16.12.2015, made in W.P.(MD)Nos.22540 to 22546 of 2015.

For Appellant in all the W.As. : Mr.N.Inbarajan
for Mrs.M.Parameswari

For Respondents in all the W.As.: Mr.D.Sachikumar
Additional Government Pleader

COMMON JUDGMENT

DR.G.JAYACHANDRAN, J.
and
C.KUMARAPPAN, J.

The appellant is an Engineering Contractor, doing civil work to the Government Department and Quasi-Government Departments. For the turnover of the work done, he is liable to file annual returns and the same to be assessed to Value Added Tax as per the provisions of the Tamil Nadu Value Added Tax Act, 2006 [hereinafter referred to as "the TNVAT Act"]. As per the TNVAT Act, whenever payment is made for the work done, 2% has to be deducted at source and the same will be taken note while assessing the tax at the end of the assessment year. Prior to 19.06.2012, under Section 22 of the TNVAT Act, the

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assessment in respect of a dealer shall be on the basis of return relating to his turnover submitted in the prescribed manner within the prescribed period. Under sub-section (2) of Section 22 of the TNVAT Act, the assessing authority shall acept the returns submitted for the year, by the dealer, if the returns are accompanied by the proof of payment of tax and the document prescribed, and on such acceptance, the assessing authority shall pass an assessment order.

2. According to the appellant, under this provision, he had been regularly filing his returns every years since 2006-2007 to 2011-2012. Subsequent to the amendment to Section 22 of the TNVAT Act, which provides for a deemed assessment and procedure to be followed by the assessing authority, the proviso to sub-section (2) of Section 22 of the TNVAT Act has been inserted, provided that in respect of returns submitted for the years 2006-2007, 2007-2008, 2008-2009, 2009-2010 and 2010-2011, on which assessment orders are not passed, shall be deemed to have been assessed on the 30th day of June 2012. While so, a revision notice under Section 28 of the TNVAT Act was caused on the appellant for the assessment years 2006-2007 to 2010-2011, giving retrospective effect to the amended provisions.

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3. The contention of the appellant is that, by way of deduction of 2% tax at the time of payment and on his declaration of the turnover for every assessment years, he is entitled for refund of tax. Whereas, the assessing authority after giving retrospective effect to an amended provision, has revised the assessment and caused show cause notice. The same was duly replied by the appellant. However, it was not accepted by the assessing authority and he had passed revised assessment order for the years 2006-2007 and 2007-2008, which are challenged in two different Writ Petitions in W.P.(MD)Nos.22540 and 22541 of 2015 and the revised assessment notice for the subsequent years also challenged before passing of any assessment order, since the act of the assessing authroity resorting to the amended provision of Section 22(2) of the TNVAT Act, without passing any assessment order invoking the deeming provision, in imposing excessive tax by reopening the assessment after lapse of 10 years, is illegal.

4. The learned Judge after considering the contention raised by the assessee and the submissions made by the learned Additional Government Pleader, disposed of the batch of writ petitions, giving liberty to the appellant/assessee to challenge the order before the appellate authority within a period of two weeks.

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5. Not being satisfied with the said liberty, the assesse has come before this Court by way of filing the Writ Appeals.

6. According to the appellant, the proposal to assess the escaped turnover on best judgment assessment under Section 28 of the TNVAT Act is liable to be quashed, since the deemed effect of self assessment under Section 22(2) of the TNVAT Act had come into force only from 19.06.2012. The returns submitted prior to 19.06.2012, cannot be re-opened and revised giving retrospective effect to the amended provision. The proceedings of the fourth respondent to revise the earlier assessment of the years 2006-2007 to 2011-2012 is contrary to law and the dictum laid in **Mahindra and Mahindra Ltd.** vs. **Joint Commissioner (CT) Appeals, Chennai and another** reported in **(2021) 89 GSTR 269 (Mad)**.

7. The learned counsel for the appellant contended that the order passed by the fourth respondent is a colourable exercise of power and wrongful interpretation of the Statute. The amendment to Section 22 of the TNVAT Act cannot be given retrospective effect by giving an extended period of limitation to

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revise the assessment already made. To butress his argument, the learned counsel tried to draw analogy with the ruling of the Hon'ble Supreme Court in **State of Punjab and others** vs. **Bhajan Kaur and others** reported in **2008 (12) SCC 112**, wherein the Hon'ble Supreme Court has held that Section 6 of the General Clauses Act, saves a right accrued and/or a liability incurred in case of any amendment or substitution of the Statute. Any right conferred to the parties under the new Act will have only prospective effect unless and until it is stated otherwise. This observation was made in connection with the new Motor Vehicles Act, 1988, Section 140 vis-a-vis the old Motor Vehicles Act, 1939, Section 92-A.

8. The learned Additional Government Pleader representing the State submitted that in case of any returns filed for the years 2006-2007 to 2010-2011, on which no assessment order is passed, it shall be deemed that the returns been assessed on 30th day of June 2012. Admittedly, the returns filed by the assessee/appellant from the year 2006-2007 not been assessed and therefore, it should be deemed to have been assessed on 30.06.2012. The legislatures thought fit to introduce the deeming provision clause in Section 22(2) of the TNVAT Act,

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so that, any escaped assessment be subjected to the best judgment of the assessing officer in exercise of power under Section 28 of the TNVAT Act. At the same time, the limitation of six years been fixed for exercising the best judgment assessment by the assessing authority.

9. In this case, the show cause notice under Section 28 read with Section 27(3) of the TNVAT Act was caused on 11.08.2015 well within the period of limitation. The assessee has been given opportunity to file letter of objection and to appear for personal hearing. While the assessee participated in the proceedings in respect of two assessment years, for the rest of the years 2008-2009 to 2013-2014, instead of participating in the proceedings, had appraoched this Court invoking extraordinary jurisdiction without availing the statutory remedy available.

10. We have heard the learned counsels and perused the materials available on record.

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11. Sections 22(1) and (2) and 28 of the TNVAT Act reads as under:-

"*22*. ***Deemed Assessment and procedure to be followed by the assessing authority.-***

(1) The assessment in respect of the dealer shall be on the basis of return relating to his turnover submitted in the prescribed manner within the prescribed period.

(2) The assessing authority shall accept the returns submitted for the year, by the dealer, if the returns are in the prescribed form and accompanied with the prescribed documents and proof of payment of tax. Every such dealer shall be deemed to have been assessed for the year on the 31st day of October of the succeeding year :

Provided that in respect of such returns submitted for the years 2006-2007, 2007-2008, 2008- 2009, 2009-2010 and 2010-2011, on which assessment orders are not passed shall be deemed to have been assessed on the 30th day of June 2012.

28. Assessment of turnover not disclosed under compounding provisions.-

(1) Where for any reason, any part of the turnover of business of a dealer who has opted to pay tax under sub-section (4) of Section 3 or Section 6 or Section 8 has escaped assessment from the tax, the assessing authority may, at any

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time within a period of six years from the date of assessment determine to the best of its judgment the turnover which has escaped assessment and re-assess the tax payable on the total turnover including the turnover already assessed under the said section.

(2) Before making the re-assessment under sub-section (1), the assessing authority may make such enquiry as it may consider necessary and give the dealer concerned a reasonable opportunity to show cause against such re-assessment.

(3) The amount of tax already paid by the dealer concerned in pursuance of the option to compound under sub-section (4) of Section 3 or Section 6 or Section 8 shall be adjusted towards the amount of tax due as the result of re-assessment under sub-section (1).

(4) The provisions of sub-sections (3) to (8) of Section 27 shall, as far as may be, apply to reassessment under sub-section (1) as they apply to the reassessment of escaped turnover under sub-section (1) of Section 27."

12. The prayer in the Writ Petitions is to issue Writ of Certiorari calling for the records pertaining to the show cause notice and revised order issued by the fourth respondent. The learned Judge while hearing the batch of Writ Petitions

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filed by the appellant, had rightly observed that the show cause notice was issued affording the right to file objections and participate in the proceedings. The learned Judge further observed that whether the amended provision will apply to the assessee or not could have been agitated in the proceeding before the assessing authority, who is a fact finding authority.

13. The assessee without exercising the statutory remedy available and allow the assessing authority as well as the appellate authority to consider the objections if any, had resorted to file Writ Petitions, which cannot be permitted. The learned Judge has also relied upon the dictum of the Hon'ble Supreme Court to butress his opinion.

14. For easy reference, the operative portion of the order passed by the learned Judge is extracted hereunder:-

> *"2. The learned counsel appearing for the petitioner submitted that one of the grounds raised in these writ petitions is to the effect that the amendment referred to in the impugned proceedings cannot be applied retrospectively and therefore, on that ground, this Court can entertain the writ*

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petitions. I do not think that the writ petitions can be entertained on that ground, as the very same ground can also be raised before the appellate authority, who in turn will consider the same and decide as to whether the subject matter amendment is to be applied prospectively or retrospectively. Therefore, I reject the above contention of the learned counsel appearing for the petitioner. Even otherwise, it is to be seen that the prayer sought for in these writ petitions is only challenging the assessment order and not the said amendment. Therefore, I find that the present writ petitions are not maintainable solely on the reason that the petitioner has to exhaust alternative remedy of filing an appeal as provided under the statute. It is made clear that this Court is not expressing any view on the merits of the matter as it is for the appellate authority to consider and decide the same in the appeal. It is well settled that in fiscal matters resorting to file writ petitions before the High Court without exhausting the statutory remedy of appeal before the appellate authority cannot be entertained or permitted. In this connection, the following decisions can be usefully referred to:

1) ***(2010) 4 SCC 772*** *(Rajkumar Shivhare vs. Assistant Director, Directorate of Enforcement and another).*

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*2) **(2005) 2 MlJ 246 DB** (M/s.Nivaram Pharma Private Limited rep. by its Director Sardarmal M.Chordia, Madras vs. The Customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench, Madras and others.*

*3) **(2010) 8 SCC 110** (United Bank of India vs. Satyawati Tondon and others.*

*4) **2010 (259) ELT 37 (Mad) DB** (Maritime Collector vs. Madura Coats Limited).*

*5) **(2010) 4 SCC 554** (Rajeev kumar and another vs. Hemraj Singh Chauhan and others)*

3. The very same view was already taken by me in W.P(MD)No.1409 of 2015 dated 05.02.2015 to dismiss the same by following the above said decisions on the ground that the writ is not proper remedy, when the alternative remedy by way of filing an appeal is available to the petitioner therein. It is not the case of the petitioner herein that he was not put on notice or that the authority, who passed the order of assessment, is not having the jurisdiction. On the other hand, the competent authority has passed the order of assessment, after giving due opportunity of hearing to the petitioner and by considering the objection raised by them. Needless to say that if the consideration of

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objection was not proper or erroneous, that cannot be a ground to maintain the writ petition, since the alleged erroneous consideration or improper consideration cannot be stated as violation of principles of natural justice. On the other hand, it may be a good ground for filing an appeal. Therefore, when the present assessment order having been passed by the competent authority, after giving opportunity of hearing to the petitioner, the same cannot be questioned under Article 226 of the Constitution of India, as the petitioner has to raise all those grounds only before the appellate authority who is also a fact finding authority.

4. Accordingly, all these writ petitions are dismissed, however, with liberty to the petitioner to challenge the order impugned in these writ petitions before the appellate authority within a period of two weeks from the date of receipt of a copy of this order. No costs. Connected Miscellaneous Petitions are closed."

15. The only point left to be decided in these Writ Appeals is that whether the judgment rendered in **Mahindra and Mahindra Ltd.** [cited supra] has any bearing to the case in hand.

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16. The judgment in **Mahindra and Mahindra Ltd.** [cited supra] relied upon by the learned counsel for the appellant is in respect of entertaining a Writ Petition without exhausting alternate remedy. In the above referred case, without affording opportunity, order levying penalty was issued and therefore, without preferring statutory appeal, the assessee approached this Court. In the said circumstances, the Division Bench of this Court held that existence of alternate remedy will not disentitle the writ petitioner to invoke Article 226 of the Constitution when the action of the statutory authority is unfair and against the principles of natural justice.

17. The facts involved in the case cited is different from the facts of the case in hand. It is not the case of the appellant that he was not given an opportunity. In fact, the impugned notice of the fourth respondent clearly indicates that the notice is to afford an opportunity for being heard and for participating in the proceedings. Therefore, by no stretch of imagination, the dictum laid in **Mahindra and Mahindra Ltd.** [cited supra] will apply to the case in hand.

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18. This Court is also duty bound to record that the amendment brought to the TNVAT Act through the Amendment Act 23 of 2012 is with respect to self assessment return and to review such returns even if no order is passed as deemed to be assessed. While giving benefit of deeming fiction to the assessee, the interest of the revenue also been protected by making suitable amendment to Section 28 of the TNVAT Act, enabling the assessing authority to revise the assessment and make best judgment assessment. At the same time, the assessing authority while exercising the power under Section 28 of the TNVAT Act is expected to cause notice and give an opportunity to the assessee to ensure the principle of natural justice is adhered.

19. Section 22(2) and amendment to Section 28 of the TNVAT Act to be read together to understand the intention of the legislature. The returns filed prior to 19.06.2012 under the self assessment scheme, but no explicit assessment orders are passed in these cases. By introducing the deeming clause, the assessee gets the privilege of assessment. At the same time, to prevent escaped assessment, the authority is vested with the power to revise any return, which has been deemed to

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have been assessed by virtue of Section 22(2) of the TNVAT Act and such power to revise, is restricted to the period of six years. In this case, the revision sought to be made within three years that is well within the time prescribed. Hence, no illegality could be attributed. Further, unless the amendment is given retrospective effect, the amendment brought to Section 28 of the TNVAT Act will become otiose.

20. In this case, the assessing authority while causing the show cause notice has given opportunity to the assessee to participate in the proceedings. The order of the assessing authority is not final. The statute provides for appeal remedy. Hence, this Court finds that the Writ Petitions are frivolous litigations initiated by the assessee to circumvent the procedure established. Hence, this Court finds no merit in the Writ Appeals. Accordingly, the Writ Appeals are dismissed and the order of the learned Judge is confirmed. There shall be no order as to costs. Consequently, connected Miscellaneous Petitions are closed.

Index : Yes
NCC : Yes

[G.J., J.] & [C.K., J.]
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To

1.The Secretary to the Government,
Commercial Tax and Registration Department,
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Elilgam, II Floor, Chepauk, Chennai – 5.

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DR.G.JAYACHANDRAN, J.
and
C.KUMARAPPAN, J.

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PRE-DELIVERY COMMON JUDGMENT MADE IN W.A.(MD)Nos.119 & 166 to 171 of 2016

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