



W.P.(MD)No.22420 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.09.2024

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THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P.(MD)No.22420 of 2024

and

W.M.P.(MD)Nos.19001 and 19002 of 2024

S.S.Communications,
Represented by its Proprietor,
Prem Ananth,
No.12, Gandhi Park North Street,
Kumbakonam,
Thanjavur – 612 001.

... Petitioner

Vs.

The Deputy State Tax Officer II,
Kumbakonam Town Assessment Circle,
Kumbakonam Town.

... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, calling for the records of the respondent in GSTIN: 33ADEFS9776N1Z7/2017-18 dated 10.05.2024 and quash the same as illegal, arbitrary, against the provisions of law and against the provisions of law.

For Petitioner : Mr.A.Chandra Sekaran

For Respondent : Mr.R.Suresh Kumar
Additional Government Pleader



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ORDER

The present Writ Petition is filed challenging the assessment order dated 10.05.2024 for the period 2017-2018, whereby Section 74 of the GST Act was invoked without rendering a finding that the alleged short payment of tax was in view of fraud, wilful misstatement or suppression of fact.

2. It is submitted by the learned counsel for the petitioner that unless and until, the impugned order finds that there is fraud, wilful misstatement or suppression of fact to levy taxes, the impugned order of assessment invoking extended period of limitation under Section 74 of the TNGST Act is without jurisdiction.

3. To the contrary, it is submitted by the learned Additional Government Pleader for the respondent that the order in question is an appealable order and in view of existence of an efficacious alternate remedy by way of appeal, the Writ Petition ought not to be entertained.



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4. Considering the submissions made on both sides and perused the material on record.

5. While this Court is conscious of the fact that if there is an effective alternative remedy Courts would be loathe in exercising its discretionary power under Article 226 of the Constitution of India. It is trite law that existence of alternate remedy is a self-imposed restrictions but not an absolute bar. There are exceptions to the rule of alternate remedy. One such exception is lack of jurisdiction.

6. Before proceeding further, it may be relevant to extract to Section 74 of the GST Act, which has been invoked by the respondent vide impugned proceedings:

“74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts.

(1)Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax, he shall serve



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notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.”

A reading of the above provision would show that the extended period would be invoked only where tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax. The existence of the above ingredients is a jurisdictional fact/condition precedent for invoking extending period of limitation under Section 74 of the Act. It is clear that existence of "jurisdictional fact" is *sine qua non* for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. It leaves no room for any doubt that to invoke the extended period, the Assessing Officer ought to show/demonstrate the existence of any of the circumstances set out in Section 74 of the Act. In terms of Section 74 of the Act, fraud, wilful misstatement or suppression of facts to evade tax would constitute the "jurisdictional fact" for invoking extended period of limitation and failure to record the existence of the



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above jurisdictional fact while invoking the extended period under section 74 of the Act, would vitiate the entire proceedings. In this regard, it may be relevant to refer to the following judgments rendered under Section 11A of the Central Excise Act, which contained similar/identical expressions:

a)CCE v. H.M.M. Ltd., 1995 Supp (3) SCC 322

“2. If the department proposes to invoke the proviso to Section 11-A(1), the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso. In the instant case that having not been specifically stated the Additional Collector was not justified in inferring (merely because the assessee had failed to make a declaration in regard to waste or by-product) an intention to evade the payment of duty.”



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b) CCE v. Pepsi Foods Ltd., (2011) 1 SCC 601:

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"25. The aforesaid dictum of Lord Reid has been followed by this Court also. A reference in this connection may be made to Union of India v. Rajasthan Spg. & Wvg. Mills [(2009) 13 SCC 448 : (2009) 238 ELT 3] . This Court considering Section 11-AC of the Act held in ELT para 19 at p. 12 of the Report as follows: (SCC p. 459, para 29)

"29. From the aforesaid discussion it is clear that penalty under Section 11-AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with the intent to evade duty by adopting any of the means mentioned in the section."

26. Following the aforesaid well-settled principles, this Court quashes that part of the order-in-original which imposes penalty without any finding of fraud or misstatement against the respondent. This part of the order-in-original is quashed. Save as aforesaid, the order-in-original is upheld. These appeals filed by the Revenue are allowed to the extent indicated above. No costs."

7. It may also be relevant to refer to the judgment of this Court rendered under the Income Tax Act in the case of **CIT v. Elgi Ultra Industries Ltd. [2008] 296 ITR 573 (Mad)**, which reads as follows:

".. . the reopening of the assessment under section 148 beyond the period of four years at the end of the relevant assessment year can be



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sustained only if it is established that there is a failure on the part of the assessee to disclose fully and truly all material facts. In this case, there is no finding that there is failure on the part of the assessee to disclose fully and truly all material facts."

(emphasis applied)

8. This Court has perused the entire order of assessment and there is not even a whisper about fraud, wilful misstatement or suppression of facts. To a pointed question as to whether the adjudicating authority has anywhere during the course of proceeding indicated that there is fraud, wilful misstatement or suppression of fact, the learned Additional Government Pleader was unable to point out.

9. It is also pointed out by the learned counsel for the petitioner that the impugned proceeding also suffers from procedural infirmities inasmuch as ASMT 10 and DRC 01A has not even been served on the petitioner. However, this Court is not inclined to go into the said aspect.

10. This Court finds that the impugned order of assessment invoking Section 74 of the Act itself is without jurisdiction on the absence of a finding



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that the evasion of taxes was due to or by reason of fraud, misstatement or suppression of fact. In view thereof, the impugned order dated 10.05.2024 is set aside.

11. This Writ Petition is disposed of on the above terms. No costs. Consequently, connected miscellaneous petitions are closed.

20.09.2024

NCC:yes/no
Index:yes/no
Internet:yes/no
Nsr

To:

The Deputy State Tax Officer II,
Kumbakonam Town Assessment Circle,
Kumbakonam Town.



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MOHAMMED SHAFFIQ, J.

Nsr

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