

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.07.2018

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.22508 of 2017
and
W.M.P.No.38346 of 2017

M/s.Hyundai Motor India Limited
Plot No.H1, SIPCOT Industrial Park,
Irrungattukottai, Sriperumbudur Taluk,
Kancheepuram District.
Tamil Nadu - 602 117. ..Petitioner

vs

- 1.The Deputy Commissioner of Income Tax,
Transfer Pricing Officer - 2(1),
Room No.506, 5th Floor, Tower-I,
BSNL Building,
No.16, Greams Road,
Chennai - 600 006.
- 2.The Deputy Commissioner of Income-tax(LTU),
Jawaharlal Nehru Inner Ring Road,
Anna Nagar West Extension,
Chennai - 600 101. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, to quash the giving effect order F.No.H-201/TPO-2/A.Y.2008-09 dated 27.03.2017 issued by the 1st respondent and to issue directions to the 1st respondent to give proper and specific effect to the order of the ITAT in Miscellaneous Petition No.93/Mds/2016 in ITA No.2353/Mds/2012 dated 06.09.2016.

For Petitioner : Mr.N.Venkata Raman, Senior Counsel
For M/s.SP.Chidambaram

For Respondents: Mrs.HemaMuraliKrishnan

O R D E R

The relief sought for in this writ petition is to call for the records in pursuant to the orders passed by the 1st respondent in proceedings dated 27.03.2017 and quash the same and to direct the first respondent to give proper and specific effect to the order of the ITAT in Miscellaneous Petition No.93/Mds/2016 in ITA No.2353/Mds/2012 dated 06.09.2016.

2.The learned Senior Counsel appearing on behalf of the writ petitioner made a submission that the order under challenge in the present writ petition is perverse and contrary to the orders passed by the Income Tax Appellate Tribunal (hereinafter referred to as "the ITAT") in M.P.No.93/Mds/2016 in ITA No.2353/Mds/2012 dated 06.09.2016. The first respondent has erroneously come to the conclusion that "the ITAT" has committed an error in respect of fixing the Transfer Prices. The learned Senior Counsel is of an opinion that the order impugned is an error apparent on record in view of the fact that the findings arrived by "the ITAT" ,after adjudication, in its order has been declared as erroneous by the respondents for which the respondent has no jurisdiction or authority. It is contended that no show cause notice was issued in respect of the differences now raised by the first respondent in the notice for revising the royalty payment.

3.The contentions of the writ petitioner is that the issue drawing strength from the earlier decision of the Bench of the Tribunal for the preceding assessment year, wherein there was a categorical finding by the Transfer Pricing Officer(TPO) that the average rate of royalty payment in the industry was 4.7%. Further, the contention of the writ petitioner is that the average royalty payment in automotive sector from the study of 35 licenses is 4.7%, which is higher than the appellant's average rate of royalty payment of 3.60%.

4.By showing the screen shot details, the learned Senior Counsel appearing on behalf of the writ petitioner made a submission that the impugned order is an error apparent on record and the respondents have no authority to override the findings given by "the ITAT" in the matter of the payment of royalty to the foreign entity. Further, it is contended that a show cause notice in this regard in respect of the revised assessment made in relation to royalty payment, must be given to the writ petitioner. Admittedly, no such show cause notice was issued to the writ petitioner and on that ground also, the writ petition deserves to be allowed.

5.The writ petitioner had transactions with associated enterprises and therefore, the case was referred to the Transfer Pricing Officer(TPO)/ the first respondent passed an order dated 28.10.2011 under Section 92CA of the Income Tax Act, 1961. The Transfer Pricing Officer(TPO) has the power only to determine the Arms Length Price in case of international transaction or specified domestic transaction. The order of the Transfer Pricing Officer(TPO) is not an assessment order but an intermediate order with regard to Arms Length Price alone. The assessing officer, while computing the total income and taxable income at the time of passing the assessment order, takes into account the order of the Transfer Pricing Officer(TPO) for the purpose of computation of income relatable to international transaction or specified domestic transaction. Thus, on receipt of the order of the Transfer Pricing Officer(TPO), the assessing officer/the second respondent passed a draft order under Section 144C(1) on 23.12.2011. The petitioner also filed their objections before the Disputes Resolution Panel (DRP) under Section 144C(2) and the Disputes Resolution Panel passed orders and issued directions under Section 144C(5). Thereafter, the second respondent passed an assessment order on 29.10.2012 under Section 144C(15) in accordance with the directions of the Disputes Resolution Panel. The said order dated 29.10.2012 was challenged by the petitioner herein before "the ITAT" under Section 253 of the Income tax Act, 1961. In the meanwhile rectified directions were issued by the Disputes Resolution Panel on 30.03.2013. "The ITAT" passed order in ITA No.93/Mds/2012 on 22.04.2016 and in M.P.93/Mds/2016 dated 06.09.2016 remanding the case to the Transfer Pricing Officer (TPO).

6.Pursuant to the order of "the ITAT", the Transfer Pricing Officer(TPO) had granted several hearings to the writ petitioner and finally passed an order on 27.03.2017, which is under challenge in the present writ petition. Thus, the writ petitioner has made an attempt to maintain the present writ petition on merits of the issues i.e., how the arm's length price has to be determined.

7.This Court is of an opinion that the said issue cannot be adjudicated in a writ petition and these factual disputes are to be adjudicated by the competent authorities and by "the ITAT". Bye-passing all these Appellate Forums, the writ petitioner cannot approach this Hon'ble Court under Article 226 of the Constitution of India for adjudicating these factual issues in respect of considering the arm's length price to be determined.

8.The learned counsel appearing on behalf of the respondents opposed the contentions raised on behalf of the writ petitioner by stating that the writ petition itself is not maintainable.

The present writ petition has been filed, challenging the order passed by the Deputy Commissioner of Income Tax Transfer Pricing Officer(TPO). Based on the records provided by the writ petitioner, the Transfer Pricing Officer(TPO) conducted a scrutiny and arrived a conclusion that there was an error in respect of royalty payment and therefore, the same is to be revised. The said exercise was done based on the records and books of accounts furnished by the writ petitioner themselves. Therefore, if at all, any discrepancy or an error, the writ petitioner is at liberty to file an appeal before the Disputes Resolution Panel, which is a statutory body. The writ petition filed against the order of the Transfer Pricing Officer(TPO) is premature in view of the fact that the Assessing Officer has to pass a final order based on the proceedings of the Transfer Pricing Officer(TPO). Therefore, the order of the Transfer Pricing Officer(TPO) cannot constitute a cause of action for the purpose of moving the present writ petition under Article 226 of the Constitution of India. The learned counsel for the respondents is of an opinion that the writ petitioner has to exhaust the remedy before the Disputes Resolution Panel constituted under the statute and further, they are bound to approach "the ITAT" for redressal of their grievances. By-passing all these statutory remedies, the present writ petition has been filed, challenging the proceedings of the Transfer Pricing Officer(TPO), which is not maintainable.

9.The learned counsel for the respondents relied on the counter statement, showing that the Transfer Pricing Officer (TPO) has not violated the orders of "the ITAT". In fact, the case of the petitioner was originally adjudicated before "the ITAT" and "the ITAT" remanded the case back for re-adjudication. The order of "the ITAT" dated 6th September 2016 is unambiguous that there were certain discrepancies and on that ground alone, "the ITAT" has remanded the matter back for re-adjudication. Paragraphs 6 and 7 of the above said order of "the ITAT" dated 6th September 2016, which are extracted hereunder:

"6.It is submitted by the learned Authorized Representative that for the relevant assessment year also the average rate of royalty in the industry is 4.7% which is higher than the appellant's average rate of royalty payment of 3.6%. Therefore, there is apparent mistake in the order of the Tribunal which is required to be rectified.

7.On this issue, following our decision for the preceding year, we have already decided that the average rate of royalty payment in the industry has to be considered in the case of the assessee for determining the arm's length price and if the same is more than the rate of royalty payment made by the assessee, then no adjustment is required. Since the

Ld.A.R has pointed out that in the case of the assessee the rate of Royalty payment is less than the rate prevalent in the industry we hereby direct the learned TPO to verify the same and decide the matter in the light of our above decision. To that extent, the order of the Tribunal stands corrected and modified."

10.It is urged before this Court that "the ITAT" has not decided the matter in respect of the factual details and the particulars involved in the case of the writ petitioner. Contrarily, "the ITAT" remanded the matter back for re-adjudication. When the process of re-adjudication is undertaken by the competent authority/respondents, they are duty bound to verify all the records once again and decide the matter on merits and in accordance with law. On receipt of the order of remand from "the ITAT", the respondents had undertaken the process of scrutiny and the writ petitioner also had participated in three personal hearings. The documents submitted by the writ petitioner was scrutinised and considered in all respects. The objections from the representative of the writ petitioner Company also had been considered. By providing all opportunities to re-present their case, the Transfer Pricing Officer(TPO) found that there were certain discrepancies in the matter of royalty payment. Thus, there was no violation on the part of the respondents in respect of implementing the orders passed by "the ITAT", remanding the matter for re-consideration.

11.Question of issuing show cause notice, does not arise in the case of the writ petitioner in view of the fact that it is a case, which was remanded by "the ITAT". The writ petitioner was aware of all the facts and circumstances and the records. Thus, the writ petitioner was invited for personal hearing and the writ petitioner had participated in three personal hearings and submitted their case before the respondents. Such being the factum of the case, now, the learned Senior Counsel appearing on behalf of the writ petitioner cannot plead that no show cause notice has been issued. It is not a fresh case, wherein a show cause notice is mandatory. It is a remanded case. Further, even while re-considering the issues, the notice was issued to the writ petitioner and they participated in three personal hearings. Therefore, the principles of natural justice had been complied with and the contentions in this regard by the learned Senior Counsel appearing on behalf of the writ petitioner deserves no merit consideration.

12.The contentions of the learned Senior Counsel appearing on behalf of the writ petitioner is that the erroneous implementation of the order of "the ITAT", resulted in issuance of the present impugned order dated 27.03.2017 by the Transfer Pricing Officer(TPO). Once, it is recorded by "the ITAT" that

the average rate of royalty payment in the industry was 4.7% and the writ petitioner had paid only 3.6%, there is no reason to disbelieve the statement of "the ITAT" recorded during the hearing of the matter. In the absence of any incriminating, contrary evidences or records, the respondents cannot disbelieve or disrespect the findings made by "the ITAT" in its order.

13. This Court is of an opinion that certain factual details based on the records can be re-adjudicated or verified once again when the matter was remanded back for re-consideration. Though there is a finding recorded by "the ITAT" during the course of presenting the case, ultimately the case was remanded to the original authority for re-consideration by "the ITAT". When the case was remanded back for re-adjudication, the findings made by "the ITAT" cannot be taken or relied upon as it is. The very purpose of remanding the matter to the original authority by the Courts/Tribunals are to ensure that all the records and relevant factors are to be re-considered, re-adjudicated and a revised order is to be passed. When the order of "the ITAT" is unambiguous and when the case of the writ petitioner was remanded back for reconsideration in the hands of the original authorities, then the original authorities are bound to conduct an enquiry by verifying the original records once again and re-adjudicate the matter, re-consider the factual aspects and accordingly, pass a final order. The said exercise was done in the present case. Thus, this Court do not find any error on the part of the Transfer Pricing Officer (TPO) in reconsidering the entire books of accounts submitted by the writ petitioner for the purpose of assessing the average rate of royalty payment in the industry. The findings made by "the ITAT" in the order need not be directly taken into account for the purpose of considering the average rate of royalty payment in the industry in view of the fact that, if that is taken into account, then there is no point in remanding the matter for reconsideration. The very purpose and object of the Courts/Tribunals to remand the matter is that the authorities must reconsider the case in all respects independently and pass a revised order on merits and in accordance with law. This being the scope of the order of remanding the contentions raised on behalf of the writ petitioner that the average rate of royalty payment in the industry was already fixed by "the ITAT" can have no sanctity. These all are the points raised by the respective parties before "the ITAT" and the same was recorded in the order passed by "the ITAT". When "the ITAT" itself was not decided the issues raised before the Tribunal and remanded the case back for reconsideration, then there is no point in recording the findings of "the ITAT" by the Transfer Pricing Officer (TPO) at the time of exercising the powers of reconsideration of the entire issues. The very contention raised in this regard also deserves no merit consideration.

14. The learned counsel for the respondents urged this Court that the royalty has been computed by three different methods as under:-

"It may be seen from the chart that royalty has been computed by three different methods as under:-

(a) 5% of sales value for models like Santro, Accent, Sonata, Getz, Elantra and Verna in domestic market

(b) 100\$ per i-10 car sold in domestic and export market

(c) 8% of sales value for models like Santro, Accent and

Getz in export market.

Sales Value has been computed as under:-

Gross sales	=	xxxx
Less:		
Excise Duty	=	xxx
Landed cost of imported components	=	xxx
Cost of standard bought-out components	=	xxx
Sale Value for computation of royalty	=	xxxx

Royalty has been computed @ 5% or 8% of the above sale value and paid.

But for Transfer Pricing purposes, the Petitioner has computed a higher sales value by reducing only the Excise duty from the gross sales and not reducing the other two items, viz, landed cost of imported components and cost of standard bought-out components. This has been done only to bring down the royalty ratio as seen from the chart, which is re-presented in a comparative form in the table below to enable totaling of crucial columns which has been avoided by the Petitioner:

(Figures in Rs.in crores)

Market	Model	Net Sales as per RBI guidelines	Sales for royalty ratio purposes	Royalty Rate	Royalty Ratio*	Royalty amount
(1)	(2)	(3)	(4)	(5)	(6)	(7)

Market	Model	Net Sales as per RBI guidelines	Sales for royalty ratio purposes	Royalty Rate	Royalty Ratio*	Royalty amount
Domestic	Santro	2533.97	2953.85	5% of value in col.3	4.29	126.70
	Accent	218.32	279.02	5% of value in col.3	3.91	10.92
	Sonata	16.23	48.99	5% of value in col.3	1.66	0.81
	Getz	343.45	519.58	5% of value in col.3	3.31	17.17
	Elantra	3.95	13.43	5% of value in col.3	1.47	0.20
	Verna	692.20	1251.71	5% of value in col.3	2.77	34.61
	i-10	1080.52	1240.37	100 \$ each for 44488 cars	1.44	17.84
Export	Santro	1164.36	1605.37	8% of value in col.3	5.80	93.15
	Accent	149.33	329.67	8% of value in col.3	3.62	11.95
	Getz	500.64	888.95	8% of value in col.3	4.51	40.05
	i-10	572.97	782.03	100 \$ each for 26691 cars	1.37	10.71
Total		7275.94	9912.97		3.67	364.11

*Royalty Ratio=Royalty amount in col.7/Sales figure in Col.4 * 100

If the total royalty paid(364.11 crores) is worked out as a percentage of net sales as per RBI guidelines(7275.94 crores), the average royalty rate works out to 5.0043 or 5%. But since the Petitioner adopted different sales figures to compute the royalty ratio, the royalty ratio worked out to 3.67%.

15.The learned counsel for the respondents citing the above paragraph of the counter statement filed by the respondents emphasized that there is a logic behind the re-assessment of the payment of royalty. The authorities competent now came to a

conclusion that the average royalty rate works out to 5.0043 or 5%. But since the petitioner adopted different sales figures to compute the royalty ratio, the royalty ratio worked out to 3.67%. Thus, the revised calculation now arrived by the authorities are to be enforced, which was done after verifying the books of accounts and the records produced by the petitioners themselves.

16. This Court is of an opinion that all these disputed factual details cannot be gone into deep by this Court under Article 226 of the Constitution of India. The preliminary ground raised on behalf of the writ petitioner is that the order impugned in the present writ petition is an error apparent and the findings recorded by "the ITAT" had been violated. In such an event, the parties need not be driven to exhaust the appeal remedies provided under the statute. When there is an error apparent in the impugned order or violation of principles of natural justice, then a writ petition can be entertained by the High Courts under Article 226 of the Constitution of India.

17. In respect of these two grounds, the respondents replied that the question of issuing show cause notice does not arise at all, in view of the fact that the case of the writ petitioner had already been adjudicated before "the ITAT" and it was remanded back for reconsideration and accordingly, the respondents invited the writ petitioner for personal hearings and the writ petitioner also participated in three personal hearings and submitted all their books of accounts and records. Thus, the principles of natural justice has been complied with and there is no question of issuing any further show cause notice in respect of the discrepancies now arrived by the Transfer Pricing Officer (TPO). This apart, if at all the writ petitioners are aggrieved, they are at liberty to approach the Disputes Resolution Panel and thereafter "the ITAT" for complete adjudication of their grievances, if any exists.

18. In respect of the ground of error apparent on record, it is contended on behalf of the respondents that the findings made by "the ITAT" need not be taken into account as a conclusive one in view of the fact that "the ITAT" had a doubt in respect of these factual aspects and remanded the matter back. The very intention of "the ITAT" for remanding the matter back is to make the authorities to reconsider the entire issues, more specifically, the royalty payment. Such being the scope of the order passed by "the ITAT", the respondents had not violated the orders passed by "the ITAT" and the petitioner cannot insist the respondents that the average rate of royalty payment recorded by "the ITAT" should be followed as it is mechanically without verification of any records thereafter. Such an idea is ill-motivated and the competent authorities are empowered to look

into the records and the books of accounts submitted by the writ petitioner to find out the discrepancies or otherwise, if any exists, during the course of arriving the average rate of royalty payment.

19. Unnecessary or routine invasion into the statutory powers of the competent authorities under a statute should be restrained by the Constitutional Courts. Frequent or unnecessary invasions in the executive power will defeat the constitutional perspectives enshrined under the Constitution of India. Undoubtedly, the separation of powers under the Indian Constitution has been narrated and settled in umpteen number of judgments. Separation of powers demarcated in the Constitution of India is also to be considered, while exercising the powers of judicial review in the matter of dispensing with the appeal remedy provided for an aggrieved person under a statute. If the High Courts started interfering with such Appellate powers without any valid and substantiated reasons, then the very purpose and object of the statute and provision of appeal under the statute became an empty formality and the High Courts also should see that the provisions of appeal contemplated under the statutes are implemented in its real spirit and in accordance with the procedures contemplated under the rules constituted thereon. While entertaining a writ petition as narrated by the Apex Court, the provision of efficacious alternative remedy under the statute also to be considered. If the writ petitions are entertained in a routine manner, by not allowing the competent Appellate authority to exercise their powers under the provisions of the statute, then this Court is of an opinion that the power of judicial review has not exercised in a proper manner. Thus, it is necessary for this Court to elaborate the legal principle settled in respect of the separation of powers under the Constitution of India.

1. Madras Bar Association vs. Union of India (UOI)
(25.09.2014 - SC) : MANU/SC/0875/2014

If the historical background, the preamble, the entire scheme of the Constitution, relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the constitutional structure. (These cannot be catalogued but can only be illustrated):

- (1) The supremacy of the Constitution.
- (2) Republican and Democratic form of government and sovereignty of the country.
- (3) Secular and federal character of the Constitution.

(4) Demarcation of power between the Legislature, the executive and the judiciary.

(5) The dignity of the individual secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV.

(6) The unity and the integrity of the Nation.

2. Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and Anr. [MANU/SC/0445/1973 : (1973) 4 SCC 225].

That separation of powers between the legislature, the executive and the judiciary is the basic structure of the Constitution is expressly stated by Sikri, C.J.

3. P. Kannadasan and Ors. v. State of T.N. and Ors. [MANU/SC/0650/1996 : (1996) 5 SCC 670] the Supreme Court noted that the Constitution of India recognised the doctrine of separation of powers between the three organs of the State, namely, the legislature, the executive and the judiciary. The Court said:

It must be remembered that our Constitution recognises and incorporates the doctrine of separation of powers between the three organs of the State, viz., the Legislature, the Executive and the Judiciary. Even though the Constitution has adopted the parliamentary form of government where the dividing line between the legislature and the executive becomes thin, the theory of separation of powers is still valid.

4. State of Tamil Nadu and Ors. vs. State of Kerala and Ors. (07.05.2014 - SC) : MANU/SC/0425/2014

121. On deep reflection of the above discussion, in our opinion, the constitutional principles in the context of Indian Constitution relating to separation of powers between legislature, executive and judiciary may, in brief, be summarized thus:

(i) Even without express provision of the separation of powers, the doctrine of separation of powers is an entrenched principle in the Constitution of India.

The doctrine of separation of powers informs the Indian constitutional structure and it is an essential constituent of rule of law.

In other words, the doctrine of separation of power though not expressly engrafted in the Constitution, its sweep, operation and visibility are apparent from the scheme of Indian Constitution. Constitution has made demarcation, without drawing formal lines between the three organs- legislature, executive and judiciary. In that sense, even in the absence of express provision for separation of power, the separation of power between legislature, executive and judiciary is not different from the constitutions of the countries which contain express provision for separation of powers.

(ii) Independence of courts from the executive and legislature is fundamental to the rule of law and one of the basic tenets of Indian Constitution.

Separation of judicial power is a significant constitutional principle under the Constitution of India.

(iii) Separation of powers between three organs-- legislature, executive and judiciary--is also nothing but a consequence of principles of equality enshrined in Article 14 of the Constitution of India. Accordingly, breach of separation of judicial power may amount to negation of equality Under Article 14. Stated thus, a legislation can be invalidated on the basis of breach of the separation of powers since such breach is negation of equality Under Article 14 of the Constitution.

(iv) The superior judiciary (High Courts and Supreme Court) is empowered by the Constitution to declare a law made by the legislature (Parliament and State legislatures) void if it is found to have transgressed the constitutional limitations or if it infringed the rights enshrined in Part III of the Constitution.

(v) The doctrine of separation of powers applies to the final judgments of the courts. Legislature cannot declare any decision of a court of law to be void or of no effect. It can, however, pass an amending Act to remedy the defects pointed out by a court of law or on coming to know of it aligned.

In other words, a court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances.

(vi) If the legislature has the power over the subject-matter and competence to make a validating law, it can at any time make such a validating law and

make it retrospective. The validity of a validating law, therefore, depends upon whether the legislature possesses the competence which it claims over the subject-matter and whether in making the validation law it removes the defect which the courts had found in the existing law."

20. This Court is of a strong opinion that institutional respects are to be maintained by the constitutional Courts. Whenever there is a provision for an appeal under the statute, without exhausting the remedies available under the statute, no writ petition can be entertained in a routine manner. Only on exceptional circumstances, the remedy of appeal can be waived, if there is a gross injustice or if there is a violation of fundamental rights ensured under the Constitution of India. Otherwise, all the aggrieved persons from and out of the order passed by the original authority is bound to approach the Appellate Authority. The Constitutional Courts cannot make an appeal provision as an empty formality. Every Appellate Authority created under the statute to be trusted in normal circumstances unless there is a specific allegation, which is substantiated in a writ proceedings. Thus, the institutional functions and exhausting the appeal remedies by the aggrieved persons, are to be enforced in all circumstances and writ proceedings can be entertained only on exceptional circumstances. Rule is to prefer an appeal and entertaining a writ is only an exception. This being the legal principles to be followed, this Court cannot entertain the writ petitions in a routine manner by waiving the remedy of appeal provided under the statute.

21. Now, let us look into the legal principles settled by the Apex Court for exhausting the efficacious alternative remedy provided under the statute.

22. When an effective alternative remedy is available, a writ petition cannot be maintained.

1. In *City and Industrial Development Corporation v. Dossu Aardeshir Bhiwandiwalla and Ors.* MANU/SC/8250/2008 : (2009) 1 SCC 168, this Court had observed that:

The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

- (a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;
- (b) the petition reveals all material facts;
- (c) the Petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors.

2. Kanaiyalal Lalchand Sachdev and Ors. vs. State of Maharashtra and Ors. (07.02.2011 - SC) : MANU/SC/0103/2011

It is well settled that ordinarily relief Under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See *Sadhana Lodh v. National Insurance Co. Ltd.*; *Surya Dev Rai v. Ram Chander Rai* and *SBI v. Allied Chemical Laboratories.*)

3. Commissioner of Income Tax and Ors. v. Chhabil Dass Agarwal, MANU/SC/0802/2013 : 2014 (1) SCC 603, as follows:

Para 15. while it can be said that this Court has recognised some exceptions to the Rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in *Thansingh Nathmal case*, *Titaghur Paper Mills case* and other similar judgments that the High Court will not entertain a petition Under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

4. Authorized Officer, State Bank of Travancore and Ors. vs. Mathew K.C. (30.01.2018 - SC) : MANU/SC/0054/2018

The petitioner argued that the SARFAESI Act is a complete code by itself, providing for expeditious recovery of dues arising out of loans granted by

financial institutions, the remedy of appeal by the aggrieved under Section 17 before the Debt Recovery Tribunal, followed by a right to appeal before the Appellate Tribunal under Section 18. The High Court ought not to have entertained the writ petition in view of the adequate alternate statutory remedies available to the Respondent. The interim order was passed on the very first date, without an opportunity to the Appellant to file a reply. Reliance was placed on *United Bank of India vs. Satyawati Tandon and others*, 2010 (8) SCC 110, and *General Manager, Sri Siddeshwara Cooperative Bank Limited and another vs. Iqbal and others*, 2013 (10) SCC 83. The writ petition ought to have been dismissed at the threshold on the ground of maintainability. The Division Bench erred in declining to interfere with the same. The Supreme Court agreed to the arguments and held the same also noted that the writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the Appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum.

5. *State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd.* reported at AIR 2005 SC 3856, the Supreme Court explained the rule of 'alternate remedy' in the following terms

Considering the plea regarding alternative remedy as raised by the appellant-State. Except for a period when Article 226 was amended by the Constitution (42nd Amendment) Act, 1976, the power relating to alternative remedy has been considered to be a rule of self imposed limitation. It is essentially a rule of policy, convenience and discretion and never a rule of law. Despite the existence of an alternative remedy it is within the jurisdiction of discretion of the High Court to grant relief under Article 226 of the Constitution. At the same time, it cannot be lost sight of that though the matter relating to an alternative remedy has nothing to do with the jurisdiction of the case, normally the High Court should not interfere if there is an adequate efficacious alternative remedy. If somebody approaches the High Court without availing the alternative remedy provided the High Court should ensure that he has made out a strong case or that there exist good grounds to invoke the extraordinary jurisdiction.

6. K.S. Rashid and Sons v. Income Tax Investigation Commission and Ors., AIR (1954) SC 207; Sangram Singh v. Election Tribunal, Kotah and Ors., AIR (1955) SC 425; Union of India v. T.R. Varma, AIR (1957) SC 882; State of U.P. and Ors. v. Mohammad Nooh, AIR (1958) SC 86 and M/s K.S. Venkataraman and Co. (P) Ltd. v. State of Madras, AIR (1966) SC 1089,

Constitution Benches of the Supreme Court held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

7. First Income-Tax Officer, Salem v. M/s. Short Brothers (P) Ltd., [1966] 3 SCR 84 and State of U.P. and Ors. v. M/s. Indian Hume Pipe Co. Ltd., [1977] 2 SCC 724.

There are two well recognized exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

23. Considering the above judgments of the Apex Court, this Court is of an opinion that the writ petitioner has not established that there is a violation of principles of natural justice nor there is an error apparent on record. No exceptional circumstances have been established in the present writ petition. If at all, the writ petitioner is aggrieved in respect of the fixing of average rate of royalty payment, then it is left open to them to approach the Disputes Resolution Panel and thereafter, if they are further aggrieved in respect of the fixing of average rate of royalty payment, then they are liberty to approach "the ITAT" constituted for the purpose of

adjudicating the issues. This being the efficacious remedy available under the statute for the writ petitioner, there is no reason to entertain a writ petition under Article 226 of the Constitution of India, so as to adjudicate the merits and the demerits now raised before this Court in the present writ petition in respect of fixing of average rate of royalty payment.

24. Under these circumstances, this Court is of an undoubted opinion that the writ petitioner has not made out any case for the purpose of waiving the efficacious alternate remedy available to the writ petitioner under the provisions of the Act and therefore, this Court is not inclined to entertain the writ petition on merits and adjudicate the issues involved in respect of fixing of average rate of royalty payment.

25. Accordingly, the writ petition stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Deputy Commissioner of Income Tax,
Transfer Pricing Officer - 2(1),
Room No.506, 5th Floor, Tower-I, BSNL Building,
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Chennai - 600 006.

2. The Deputy Commissioner of Income-tax (LTU),
Jawaharlal Nehru Inner Ring Road,
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+ 1 cc to Mr. S.P.Chidambaram, Advocate Sr.46798

+ 1 cc to Mrs. Hema Muralikrishnan, Advocate Sr.46407

W.P.No.22508 of 2017

(CCC)

EU(27/07/2018)