IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.10.2021

CORAM

THE HONOURABLE MR.JUSTICE **M.SUNDAR**

W.P.No.21363 of 2021
and W.M.P.No.22609 of 2021

M/s.Costal Plastochem Pvt Ltd.,
Rep. By Managing Director,
No.8, Rajiv Tower,
Purasawakkam High Road,
Chennai – 600 010. ... Petitioner

Vs

Assistant Commissioner (ST)
Purasawakkam Assessment Circle,
Chennai – 600 102. ... Respondent

Writ petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus calling for the records of the respondent and quash the assessment proceedings for the reversal of input tax credit under Section 19(4)(i) of the TNVAT Act in TIN 33270483294/2015-16 dated 03.08.2020 and direct the respondent to pass fresh orders as per the request of the petitioner on 16.10.2020.

For Petitioner : Mr.C.Baktha Siromoni

For Respondent : Ms.Amrita Dinakaran
Government Advocate

ORDER

This common order will govern the captioned main writ petition and WMP.

2.Main writ petition has been filed assailing an 'order dated 03.08.2020 bearing reference TIN/33270483294/2015-2016', (hereinafter referred as 'impugned order' for the sake of convenience and clarity).

3.Impugned order arises under 'Tamil Nadu Value Added Tax Act, 2006' (hereinafter referred as 'TNVAT Act' for brevity).

4.This is yet another case where the impugned order has been made without mentioning the provision of law under which it has been made. In the case on hand, this by itself leads to a sea of confusion as would be evident from the narrative that is captured infra.

5.Learned counsel for writ petitioner submits that the impugned order pertains to reversal of input tax credit (ITC) under Section 19(4) of TNVAT Act. Learned State counsel, who accepts notice on behalf of the lone respondent, on instructions, submits that reversal of ITC no doubt is under Section 19(4) of TNVAT Act but the impugned order has been made under Section 27 of TNVAT Act. Learned counsel for writ petitioner points out that there is no mention

about Section 27 of TNVAT Act in the impugned order. This is the reason why the opening remark was made saying this is yet another case where the provision of law has not been mentioned in the impugned order and that by itself has led to a sea of confusion in the case on hand.

6.Be that as it may, notwithstanding very many averments made and very many grounds raised in the writ affidavit, lone pivotal contention of the learned counsel for writ petitioner is that reversal of ITC should be in excess of 5% of tax or in other words, upto 5%, there cannot be reversal.

7.There is no disputation or disagreement that the writ petitioner was given an opportunity to show cause prior to the impugned order and the writ petitioner has shown cause. This is owing to notice dated 30.10.2018 issued by the respondent and reply from the writ petitioner dated 30.11.2018 followed by explanation dated 22.02.2020, another notice from the respondent dated 28.02.2020 and a letter from the writ petitioner dated 09.03.2020. In the letter dated 09.03.2020, writ petitioner has sought for personal hearing. In this regard, in TNVAT Act, two different expressions are used in two different provisions. In the common proviso to sub- sections 1 and 2 of Section 27 of TNVAT Act, the expression '*giving the dealer a*

reasonable opportunity to show cause' has been used. In contra distinction in the proviso to Section 27(4) of the TNVAT Act the expression '*the dealer shall be given a reasonable opportunity of being heard*' has been used. I had dealt with these two expressions and the contra distinction *qua* these two expressions in an elaborate order in *State Bank of India Officer's Association (CC) – SBIOA rep. by its General Secretary Vs. The Assistant Commissioner (ST) Muthialpet Assessment Circle, Chennai (W.P.No.22634 of 2019 dated 01.08.2019)* and the most relevant paragraph therein is paragraph 41. This Court is informed that this order of mine has not been reported in any Law Journal. Therefore, I am mentioning the date of the order and the case number. Paragraph 41 reads as follows:

> *'41. This takes us to the alternate remedy available to the writ petitioner in the instant case. This Court is informed without disputation or disagreement by both sides that an alternate remedy is available to the writ petitioner qua the impugned order by way of an appeal to the jurisdictional Appellate Deputy Commissioner under Section 51 of TNVAT Act. Therefore, with regard to the grounds canvassed on merits, which are more in the nature of errors in computation, it is well open to the writ petitioner to avail alternate remedy of a statutory appeal to the jurisdictional Appellate Deputy Commissioner under*

Section 51 of TNVAT Act.'

8.Be that as it may, it is also necessary to capture the obtaining position that the aforementioned order of mine was carried in appeal by way of intra-court appeal vide W.A.No.4073 of 2019 and the writ appeal came to be dismissed by a Hon'ble Division Bench vide order dated 06.12.2019. Therefore, the aforementioned order of mine stands confirmed. In the instant case, if the impugned order is under Section 19(4) of TNVAT Act, it may not be necessary to go into the same, is the contention of the learned counsel for writ petitioner. On the contrary, if the impugned order is under Section 27(2) of TNVAT Act, as contended by the learned Revenue counsel, at the highest, reasonable opportunity to show cause against such an order should have been given to the dealer going by the common proviso to sub-sections 1 and 2 of Section 27, which read as follows:

> *27. Assessment of escaped turnover and wrong availment of input tax credit.*
>
> *(1) (a) Where, for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the assessing authority may, subject to the provisions of sub-section (3), at any time within a period of five years from the date of assessment order by the assessing authority, determine to the best of its*

judgment the turnover which has escaped assessment and assess the tax payable on such turnover after making such enquiry as it may consider necessary.

(b) Where, for any reason, the whole or any part of the turnover of business of a dealer has been assessed at a rate lower than the rate at which it is assessable, the assessing authority may, at any time within a period of five years from the date of order of assessment by the assessing authority, reassess the tax due after making such enquiry as it may consider necessary.

(2) Where, for any reason, the input tax credit has been availed wrongly or where any dealer produces false bills, vouchers, declaration certificate or any other documents with a view to support his claim of input tax credit or refund, the assessing authority shall, at any time, within a period of five years from the date of order of assessment, reverse input tax credit availed and determine the tax due after making such a enquiry, as it may consider necessary:

Provided that no order shall be passed under sub-sections (1) and (2) without giving the dealer a reasonable opportunity to show cause against such order.

9.In the instant case, as would be evident from the trajectory which lead to the impugned order has been captured supra, it is clear

that more than reasonable i.e., adequate and ample opportunity has been given to the writ petitioner for showing cause against the impugned order. So there can be no grievance in this regard.

10.This takes me back to the lone pivotal submission that has been canvassed by the learned counsel for writ petitioner in his campaign against the impugned order i.e., the submission that reversal of ITC if at all and if that be so, can be only for excess of 5% of tax and the impugned order has contravened this. This argument may at best qualify as a good ground for an appeal or revision as the case may be. I am constrained to say appeal or revision as the case may be as if the impugned order is construed to be made under Section 19(4) of TNVAT Act, it will be a revision under Section 54 of TNVAT Act and if it is under Section 27(2) of TNVAT Act, as contended by the learned Revenue counsel, it will be an appeal under Section 51 of TNVAT Act.

11.Either way, there is an alternate remedy and in this writ jurisdiction, for the limited purpose of disposal of the captioned writ petition, it will suffice to say that there is an alternate remedy. This takes me to alternate remedy rule. Alternate remedy rule no doubt is not an absolute rule, in other words, it is discretionary rule. It is not only a discretionary rule and it is also a self-imposed restraint *qua* writ

jurisdiction.

12.Though there can be no disputation or disagreement on the aforesaid rule, what is of relevance is Honourable Supreme Court in a catena and series of judgments i.e., a long line of case laws commencing from ***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 Tondon 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*],** has held that when it comes to Revenue matters, the alternate remedy rule should be applied with utmost rigour. Relevant paragraph in ***Dunlop India*** case is paragraph 3 and relevant paragraph in ***K.C.Mathew*** case is paragraph 10, which read as follows:

Paragraph 3 of Dunlop India case

> *'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)

Paragraph 10 of *K.C.Mathew* case

'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 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, paragraph 10 of K.C.Mathew case captures paragraph 10 of ***Satyawati Tondon*** case law and therefore I am not extracting and reproducing relevant paragraphs from ***Satyawati Tondon*** case law separately.

14.Be that as it may, following the decisions in *Dunlop, Satyawati Tondon and K.C. Mathew* (cited supra), I have held that in revenue matters, alternate remedy rule has to be applied with utmost rigour. This Court took this view on alternate remedy vide orders dated 28.06.2019 made in W.P.No.17804 of 2019 **[*M/s.Sekar Exports Pvt. Ltd., Vs. The Appellate Deputy Commissioner and another*]**. This was carried in appeal vide an intra-court appeal in W.A.No.196 of 2020 and the writ appeal came to be dismissed by a Hon'ble Division Bench of this Court vide order dated 10.02.2020. Therefore, this view of mine has been sustained by a Honourable Division Bench i.e., the view pertaining to alternate remedy rule in revenue matters.

15.To cap it all, in a very recently rendered judgment, Honourable Supreme Court in ***Commercial Steel*** case [*The*

Assistant Commissioner of State Tax Appellant(s) and Others Vs.M/s Commercial Steel Limited] vide order dated 03.09.2021 in Civil Appeal No.5121 of 2021 has clearly held that though the alternate remedy rule is not absolute, a writ petition under Article 226 of the Constitution of India can be entertained only in exceptional circumstances (in revenue matters) and the exceptions have been carved out and adumbrated in paragraph 11. Paragraph 12 of ***Commercial Steel*** case is also of relevance. Paragraphs 11 and 12 of ***Commercial Steel*** case 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 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.'

16.None of the aforesaid exceptions are attracted in the case on hand. To be noted, the argument that Section 19(4) reversal of ITC can be only for 5% and above of tax will not qualify as excess of jurisdiction and it would at the highest qualify only as an error. To be noted, this Court is not expressing any view as it is relegating writ petitioner to alternate remedy of revision/appeal. Even if this argument is to be accepted, it would only qualify as an error and it may not qualify as excess of jurisdiction. To be noted, besides the aforesaid exceptions carved out by Hon'ble Supreme Court in ***Commercial Steel*** case penned by Hon'ble Dr.Dhananjaya Y.Chandrachud, the exceptions to alternate remedy rule are well settled vide ***Whirlpool principle*** **[*Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and others*** reported in **(1998) 8 SCC 1]** and ***Harbanslal principle*** **[*Harbanslal Sahnia and***

another Vs. Indian Oil Corpn. Ltd., and others reported in ***(2003) 2 SCC 107].***

17. To be noted, the above exceptions are so well settled and well entrenched in litigation circuit that it has come to stay as '***Whirlpool exception***' in litigation parlance.

18.From the narrative that has been captured supra, it is very clear that none of the exceptions are attracted in the case on hand.

19.If the writ petitioner chooses to file appeal under Section 51 or revision under Section 54 as the case may be (subject to limitation) the same can be dealt with on its own merits and in accordance with law by the appellate authority or revisional authority as the case may be.

20.If the appellate authority or the revisional authority as the case may be entertains the appeal or revision (subject of course to limitation), the observation made in this order will neither be an impediment nor serve as an impetus *qua* appeal or revision, in other words, the appellate authority or revisional authority shall deal with it on its own merits and in accordance with law untrammeled by any observation made in this order.

21.Captioned writ petition is dismissed *albeit* preserving a small window for the writ petitioner *qua* appeal or revision in the aforesaid manner. No costs. Consequently, connected WMP is closed.

05.10.2021

Index: Yes/No
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Post Script:

After the order was passed Mr.C.Baktha Siromoni, learned counsel on record for the writ petitioner on instructions submitted that he would pursue appeal/revision and requested for the original impugned order to be returned. Registry to return the original of the impugned order forthwith to the counsel on record for the writ petitioner (under due acknowledgement).

To

The Assistant Commissioner (ST)
Purasawakkam Assessment Circle,
Chennai – 600 102.

M.SUNDAR, J.,

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W.P.No.21363 of 2021

05.10.2021