

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.06.2016

CORAM

**THE HONOURABLE MR. JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR. JUSTICE D.KRISHNAKUMAR**

Writ Appeal No.258 of 2016
and
CMP No.4359 of 2016

M/s.HIL LIMITED
(Formerly Hyderabad Industries Ltd.,)
rep.by its General Manager – Operations
and Authorised Signatory,
Mr.C.Gangadharan,
Kannigaiper Village, Manjankarnai Post,
Periyapalayam Road, Uthukottai Taluk,
Tiruvallur – 601 102.

.. Appellant

Vs.

1.The Assistant Commissioner (CT),
Madhavaram Assessment Circle,
170, G.N.T.Road, Puzhal Camp,
Chennai – 601 066.

2.The Commercial Tax Officer,
Group-III Enforcement (Central),
PAPJAM Building,
Greens Road, Chennai – 600 006.

3.The Deputy Commissioner (CT)
Enforcement (Central),
Greens Road,
Chennai – 600 006.

.. Respondents

PRAYER: Writ Appeal under Clause 15 of the Letters Patent filed against
the order dated 23.2.2016 passed in W.P.No.6431 of 2016 on the file of
this Court.

* * *

For Appellant : Mr.P.Rajkumar

For Respondents : Mr.Kanmani Annamalai
Additional Government Pleader

JUDGMENT

(Judgment of the Court was delivered by **D.KRISHNAKUMAR, J**)

This Writ Appeal has been filed against the order dated 23.2.2016 passed in W.P.No.6431 of 2016, which was filed challenging the impugned proceedings of the first respondent in TIN : 33531080477/2011-2012 and seeking quash of the order dated 18.1.2016 as contrary to the provisions of the TNVAT Act and further, to forbear the first respondent from passing a revised Assessment Order for the Assessment year 2011-2012 under the TNVAT Act based on the directions given by the second and third respondents.

2. The appellant , M/s. HIL Ltd., are dealers of fly ash bricks and asbestos sheets, etc., doing business at Red Hills in Chennai, and they have reported a total and taxable turnover of of Rs.57,07,41,717 and Rs.56,95,31,912 respectively claiming an exemption of Rs.12,09,805/- in their monthly return filed in Form I under the Tamil Nadu Value Added Tax Act for the year 2011-12 before the department. Their accounts was assessed under the deemed assessment scheme under Section 22(2) of the Act as on 31.10.2012. In view of stock discrepancies found by the enforcement officials, during their inspection, the first respondent proposed to revise the assessment of the dealer for the year 2011-12.

After considering the objections of the dealer and affording personal hearing, proposals furnished in the Office Note dated 30.7.2015 were confirmed determining the total tax due as Rs.1,97,99,199/- and penalty at 150% as Rs.1,45,99,581 by virtue of the impugned proceedings.

3. Mr.P.Rajkumar, learned counsel appearing for the appellant, would submit that the first respondent merely following the report of the second and third respondents with regard to the alleged excess stock of manufactured goods by adopting the formula based on the money value arrived at the sale value of Rs.3,96,97,406/- and added equal amount towards probable omissions of Rs.3,96,97,406/- and thereon, proposed to levy tax at 5% amounting to Rs.39,69,741/-. The first respondent in order to arrive at the alleged variation discrepancy adopted gross profit at 23.62% as per the appellant's audited Profit and Loss Account of the year 2010-2011. Therefore, the first respondent proceeded to revise the assessment.

4. On receipt of pre-revision notice from the department inviting objections, if any, to the office note dated 30.7.2015, the appellant filed a detailed objection on 2.9.2015 along with statement of documents for the alleged stock variation arrived at by the inspecting officials and for the gross profit at 23.62% arrived at by the inspecting officials and also for the proposal of levy of penalty at 150%. Thereafter, on the request of the appellant, the personal hearing was granted by the first respondent in the last week of October, 2015, with the support of

relevant documents and objections filed by them, the appellant appeared on the hearing date and requested the first respondent to drop the proposal of passing revised assessment.

5. Without considering the objections of the appellant, the first respondent passed the impugned order on 18.1.2016 by rejecting the application filed by the appellant and confirming his proposal of levy of tax. Aggrieved by the said order, the appellant preferred the Writ Petition by alleging that the first respondent being influenced by the report or direction of his higher officials or the enforcement wing officials, without applying his independent mind, made the revised assessment and passed the impugned order. Further, it is contended that the objection of the appellant was not considered and the order of the first respondent is a non-speaking and cryptic order. By relying upon the decision of this High Court, the appellant/writ petitioner challenging the impugned proceedings submitted that the decision of the High Court is binding on the authority.

6. The contention of the appellant/writ petitioner was disputed by the counsel for the department and contended that the same can be decided only by the appellate authority. Therefore, the Writ Petition filed by the appellant/writ petitioner is not maintainable under Article 226 of the Constitution of India.

7. Considering the rival contentions of the parties, by order dated 23.2.2016 in W.P.No.6431 of 2016, the Writ Court dismissed the

Writ Petition with an observation that it is open to the petitioner to challenge the impugned order before the appellate authority.

8. Aggrieved by the aforesaid order, the appellant has preferred the above Writ Appeal on the following grounds:-

(i) The alleged stock variation arrived by the inspecting officials based on the money value is erroneous.

(ii) The Assessing Authority took the decision by following a report received from the second and third respondents without applying his mind independently.

(iii) Without considering the objections dated 2.9.2016 filed along with documents by the appellant, the Assessing Authority passed the impugned order confirming his proposal, for the reason that correct figures were not produced before the inspecting officials.

(iv) Adopting formula methodology in terms of money value is contrary to the decisions of the High Court.

9. In support of the contention of the appellant, the following decisions have been relied on by the appellant to a proposition that a quasi-judicial authority is expected to apply independent mind without being influenced by the report of higher officials:-

(i) *K.S.Shivaji & Co. Vs. Joint Commercial Tax Officer, Esplanade Division II, Madras* reported in 16 STC 769.

(ii) *Madras Granites (P) Ltd., vs. Commercial Tax Officer, Salem and another* reported in [2006] 146 STC 642,

(iii) *Sangam Health Care Products Ltd., Vs. Commercial Tax Officer, Hyderabad and another* reported in [2006] 3 VST 68 (AP)

(iv) *Advantage Computers India Pvt.Ltd., Vs. Commercial Tax Officer, Chennai, in W.P.No.2020 of 2007 dated 20.1.2007,*

(v) *Amutha Metals vs. Commercial Tax Officer, Chennai, reported in [2007] 9 VST 478 (Mad)*

(vi) *Steel Authority of India Ltd., vs. Sales Tax Officer, Rourkela-I Circle and others, reported in [2008] 16 VST 181 (SC),*

(vii) *Sujana Universal Industries Ltd., Vs. Deputy Commercial Tax Officer, Chennai, reported in [2009] 23 VST 118 (Mad),*

(viii) *Concept and Devices vs. State of Tamil Nadu reported in [2010] 29 VST 41 (Mad)*

(ix) *State of Tamil Nadu vs. A.N.S.Guptha and sons reported in [2011] 38 VST 45 (Mad)*

(x) *State of Tamil Nadu vs. K.J.Auto Units, Trichy in Tax Case (Revision) No.617 of 2006*

(xi) *State of Tamil Nadu rep.by the Deputy Commissioner vs. Jalaram Timber Depot in Tax Case (Revision (MD) No.70 of 2012.*

(xii) *Narasus Roller Flour Mills vs. Commercial Tax Office (Enforcement Wing), Sankagiri and another reported in [2015] 81 VST 560 (Mad)*

(xiii) *Nokia Inda Pvt.Ltd. vs. Deputy Commissioner (CT)-IV reported in [2015] 79 VST 137(Mad)*

(xiv) *W.A.Nos.1191 and 1192 of 2008 dated 23.10.2008.*

(xv) *W.A.Nos.521 and 522 of 2013, dated 25.3.2013.*

10. In the light of the above decisions, the appellant prayed that the Writ Petition is maintainable without exhausting the alternative remedy before the appellate authority. Therefore, the Writ Appeal has to be allowed granting the relief as prayed in the Writ Petition.

11. Per contra, the learned Additional Government Pleader, Mr.Kanmani Annamalai, has objected the contention of the appellant by stating that the Assessing Authority has issued a notice in TIN No.33531080477/2011-12 dated 30.07.2015 calling for objections and the objection was submitted by the appellant on 2.9.2015 and thereafter, opportunity of personal hearing was granted to the appellant. It is an admitted fact that the opportunity was given to the appellant and submitted their objections as well for personal hearing. Further, it is submitted that appellant was not represented on the hearing date before

the Assessing Authority. After considering the objections of the appellant/writ petitioner, the Assessing Authority passed the detailed impugned order by rejecting the objection of the appellant. Further, he would submit that Assessing Officer had passed the impugned order only on the basis of the independent decision, not on the basis of any direction or report issued by the enforcement wing officials. Therefore, the contention of the appellant cannot be countenanced. The Assessing Authority had given sufficient opportunity to the appellant under the provisions of the Tamil Nadu Value Added Tax Act. Further, it is not the case of the appellant that the first respondent has violated any provisions of the TNVAT Act. If the appellant is aggrieved by a detailed order passed by the Assessing Authority, the appellant is having efficacious alternative remedy against the order passed under the Act. Therefore, challenging the impugned Assessment Order bypassing the alternative remedy is not at all maintainable under Article 226 of the Constitution of India before this Hon'ble Court.

12. The facts raised by the appellant are disputed facts. Therefore, the following decisions relied on by the learned counsel appellant are not applicable to the facts of the present case.

(i) In the case of ***K.S.Shivaji & Co. Vs. Joint Commercial Tax Officer, Esplanade Division II, Madras reported in 16 STC 769***, the impugned order was quashed for the reason that there was an arithmetical error in quantification leading to huge liability. Insofar as the present case is concerned there is no such apparent error in the impugned

order passed. The dispute in quantification requires deliberation and long drawn process. Therefore, it is not an apparent error.

(ii) In the case of ***Madras Granites (P) Ltd., vs. Commercial Tax Officer, Salem and another reported in [2006] 146 STC 642***, Assessing Officer followed the directions of his higher authorities (Enforcement Officers) who had quantified the surplus turnover as well as penalty. No independent application of mind by the Assessing Officer. In the present case, the Assessing Officer considered the objections and reasons in the impugned order. The assessee has not Assessing Officer had to rely on the details unearthed by the Inspecting Officials from the P & L Account of the Assessee. Hence, the contention of the writ petitioner cannot be countenanced.

(iii) In ***Sangam Health Care Products Ltd., Vs. Commercial Tax Officer, Hyderabad and another reported in [2006] 3 VST 68 (AP)***, cryptic order was passed with no finding on the objections submitted by the assessee. Here, the original authority has passed the order and reasons has been given for rejecting the same found in the impugned order.

(iv) ***Advantage Computers India Pvt.Ltd., Vs. Commercial Tax Officer, Chennai, in W.P.No.2020 of 2007 dated 20.1.2007***, the Assessing Officer has violated the principles of natural justice and there was no independent application of mind. Insofar as the

present case is concerned, there is no allegation for the violation of principles of natural justice. Personal hearing was offered and objections were considered in detail.

(v) ***Amutha Metals vs. Commercial Tax Officer, Chennai, reported in [2007] 9 VST 478 (Mad), State of Tamil Nadu vs. A.N.S.Guptha and sons reported in [2011] 38 VST 45 (Mad), W.A.Nos.1191 and 1992 of 2008 dated 23.10.2008 and W.A.No.521 and 522 of 2013 dated 25.3.2013***, assessment was made following the proposals by the enforcement wing. Objections filed by the assessee was not considered on the ground that assessee should have placed all facts before the Enforcement Officers. There is no independent application of mind by the Assessing Officer. As far as the present case is concerned, objections were considered and reasons were assigned by the Assessing Officer for rejection in the impugned order. Assessee failed to place details even before the Officer concerned. Therefore, the impugned order passed by the first respondent on the basis of the available materials by applying independent application of mind. Hence, the contention of the petitioner cannot be countenanced.

(vi) In the case of ***Steel Authority of India Ltd., vs. Sales Tax Officer, Rourkela-I Circle and others, reported in [2008] 16 VST 181 (SC)***, cryptic order was passed by the first appellate authority. No proper reasoning for rejection of objections raised by the assessee can be found in the impugned order. As far as the present case is concerned,

the respondent has passed the impugned order with reasons. The dispute is as to whether such reasoning is correct or not which should be agitated through appeal.

(vii) In the Case of ***Concept and Devices vs. State of Tamil Nadu reported in [2010] 29 VST 41 (Mad)***, decision regarding addition of equal amount for estimated suppression was taken. The said aspect can only be agitated before the appellate authority. In aforesaid case, the decision was given under the appellate jurisdiction of the High Court. Therefore, the said ratio cannot be followed at the stage of challenging the assessment order.

(viii) In the case of ***State of Tamil Nadu vs. K.J.Auto Units, Trichy in Tax Case (Revision) No.617 of 2006***, the issue decided was regarding adoption of quantitative analysis method to arrive at stock variation. Insofar as the present case is concerned, decision was given under the appellate jurisdiction of the High Court on the appeal remedy was availed by the assessee. Therefore, the ratio cannot be followed or applied at writ stage.

(ix) In the case of ***State of Tamil Nadu rep.by the Deputy Commissioner vs. Jalaram Timber Depot in Tax Case (Revision (MD) No.70 of 2012***, the issue decided was regarding adoption of formulae to arrive at stock variation. Insofar as the present case is concerned, decision was given under appellate jurisdiction of the High

Court. Appeal remedy was not availed by the assessee. Ratio cannot be followed/applied at writ stage.

(x) In the case of ***Narasus Roller Flour Mills vs. Commercial Tax Office (Enforcement Wing), Sankagiri and another reported in [2015] 81 VST 560 (Mad)***, principles of natural justice was violated. Personal hearing was denied and records produced by the assessee refused to be admitted by the Assessing Officer. Insofar as the present case is concerned, there is no violation of principles of natural justice. Personal hearing was offered. Necessary documents were not submitted by the assessee before the authority concerned.

(xi) In the case of ***Nokia Inda Pvt.Ltd. vs. Deputy Commissioner (CT)-IV reported in [2015] 79 VST 137(Mad)***, decision was on equal addition for probable omission given in Writ Petition. Writ Petition was held to be maintainable because principles of natural justice were violated. Jurisdiction of assessing officer was questioned and settled law was not followed by the Assessing Officer. Insofar as the present case is concerned, there is no allegation of violation of principles of natural justice and there is no issue raised pointing to the jurisdiction of the assessing officer. Whether judicial precedents were followed or not is a question to be decided by the appellate authority.

13. Heard Mr.P.Rajkumar learned counsel appearing for the appellant and Mr.Kanmani Annamalai, learned Additional Government Pleader appearing for the respondents.

14. The point for consideration in this Writ Appeal is –

Whether the Writ Petition filed under Article 226 of the Constitution of India is maintainable without exhausting alternative remedy?

15. On the facts of the case, inspection was conducted between 9.12.2011 and 22.12.2011 by the second respondent. Accounts of the appellant was assessed under the deemed assessment under section 22 (2) of the TNVAT Act. The appellant has claimed exemption of Rs.12,09,805/- in their monthly returns filed in Form I under the TNVAT Act for the year 2011-12. The first respondent requested to file the details for claiming exemption otherwise, appropriate tax will be levied. Further, at the time of inspection, the enforcement wing officials found stock discrepancy. Along with the pre-revision notice, stock reconciliation statement was also enclosed in view of the proposed revised assessment of the dealer for the year 2011-2012. The objection was received from the appellant through a representation on personal appearance before the Assessing Officer. On the request of the appellant, personal hearing was postponed to last week of October 2015 and in the last week of October 2015, opportunity of personal hearing was given. The dealer has not availed the opportunity of personal hearing afforded to them. On perusal of the materials available, the Assessing officer has examined the objections and passed the impugned order by

confirming the revised assessment. It is the case of the department that, at the time of inspection, details were not furnished before the inspecting the officials as to the stock variation.

16. The burden of proof is on the petitioner under Section 17 of the TNVAT Act to disprove the findings of the Enforcement Wing Officials regarding stock verification. This burden can only be discharged before the assessing officer or the appellate authority. As the disputed facts are involved in the case for decision, the same can be decided by the appellate authority going into the facts of the case. This Court cannot go into the alleged facts. Therefore, there are disputed facts involved in the Writ Petition. In the facts and circumstances of the case, we are first to deal with the maintainability of the Writ Petition under Article 226 of the Constitution in the light of the following decisions:-

(a) In ***Karnataka Chemical Industries & vs. Union of India & Others reported in 1999 (113) ELT 17 SC : (2000) 10 SCC 13***, the Hon'ble Supreme Court has held that there is no reason why the Writ Petition has been filed bypassing the alternative remedy which is provided under the statute. Therefore, the party must exhaust statutory remedy before resorting to the writ jurisdiction.

(b) In ***C.A.Abraham, Uppotttil, Kottayam vs. The Income Tax Officer, Kottayam reported in 1961 AIR 609 : 1961 SCR (2) 765***, the Hon'ble Supreme Court has held that the appellant

could not be permitted to invoke the jurisdiction of High Court under Article 226 of the Constitution of India when he had adequate remedy open to him by way of appeal to the Tribunal.

(c) In ***Punjab National Bank vs. O.C.Krishnan and others reported in 2001 Supp (1) SCR 466***, the Hon'ble Supreme Court has held that the Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal under section 20 and this last track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act.

(d) A Division Bench of this Court in ***Nivaram Pharma Pvt.Ltd., v. CEGAT, Madras reported in (2005) 2 MLJ 246 : 2006 (205) ELT 9 (Mad)***, considered similar issue of bypassing alternative remedy in Paragraphs 5 and 6:-

"5. It is well settled by a series of decisions of the Supreme Court that particularly in tax matters there should be no short circuiting of the statutory remedies, vide *Titaghur Pape Mills Co.Ltd., v. State of Orissa* – AIR 1983 SC 603, *Assistant Collector of Central Excise, Chandan Nagar v. Dunlop India Limited*, 1985 (19) E.L.T 22 (SC) = AIR 1985 SC 330 etc.,.

6. It is well settled that when there is an alternative remedy ordinarily writ jurisdiction of this Court under Article 226 of the Constitution should not be invoked. This principle applies with greater force regarding tax proceedings. As observed by the Supreme Court in *Titaghur Paper Mills Co.Ltd., v. State of Orissa* – AIR 1983 SC 603: "Where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of.

(e) In the case of ***Sadhana Lodh vs. National Insurance Co.Ltd., and another reported in (2003) 3 Supreme Court Cases 524***, it has been held that "the right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Article 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those

enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act.

(f) In the case of ***Commissioner of Income Tax and others vs. Chhabil Dass Agarwal reported in (2014) 1 Supreme Court Cases 603*** following the proposition laid down in ***Thansingh Nathmal v. Superintendent of Taxes reported in AIR 1964 SC 1419*** and as also in ***Titaghur Paper Mills Co.Ltd., v. State of Orissa reported in (1983) 2 SCC 433*** and other similar judgments

“15.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.

16. In the instant case, the Act provides complete machinery for the assessment/reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had

adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals).

17. In the instant case, neither has the writ petitioner assessee described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of the instant case. In the light of the same, we are of the considered opinion that the writ Court ought not to have entertained the writ petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the act, the reassessment orders passed and the consequential demand notices issued thereon.

(g) In the case of ***Union of India (UOI) vs. Rubber Products Ltd., reported in MANU/SC/1481/2015***, it has been held as follows:-

"3. We are of the opinion that the aforesaid view taken by the High Court is unsustainable on two grounds. In the first instance, writ petition itself was not maintainable when there was alternate remedy available to the Assessee under the provisions of the Central Excise Tariff Act and the Assessee should have exhausted those statutory appeals."

17. It has been clear from the aforesaid judgments of the Honourable Supreme Court that 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 principles of natural justice, the High Court will not entertain a petition under 226 of the Constitution of India, 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.

18. Therefore, in the light of the aforesaid decisions, we are of the considered view that where there is a mechanism for redressal by way of filing an appeal before the appellate authority, especially, in the case of assessment and re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper order passed by the revenue authority, the assessee could not be permitted to abandon the machinery and invoke the jurisdiction of High Court under Article 226 of the Constitution of India. The assessee can very well approach the appellate authority and raise all the grounds urged before this Hon'ble Court. Therefore, there is no warranting circumstances requiring interference with the order passed by the Writ Court and hence, the same is confirmed. Since we find that the Writ Petition itself is not maintainable,

before this Court, the appellant may agitate the issue in question before the appellate authority.

19. In the result, the Writ Appeal fails and the same is dismissed. Liberty is granted to the appellant to file an appeal if so advised within a period of four weeks from today. In the event of filing an appeal by the assessee, the appellate authority shall consider the same only on merits and independently without being influenced by any observations of this Court. No order as to costs. The connected Civil Miscellaneous Petition is closed.

(S.M.K., J.) (D.K.K., J.)

20.06.2016

Index : Yes

Internet: Yes

asvm/mvs.

Note: Registry is directed to return the original Assessment Order, as the writ petition has been held as not maintainable, subject to obtain a attested copy of the same for record purpose.

To

- 1.The Assistant Commissioner (CT),
Madhavaram Assessment Circle,
170, G.N.T.Road, Puzhal Camp,
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- 2.The Commercial Tax Officer,
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- 3.The Deputy Commissioner (CT)
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S.MANIKUMAR, J
AND
D.KRISHNAKUMAR, J

asvm/mvs.

Pre-delivery judgment
in
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