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Andhra Pradesh High Court

Case No: W.P. No. 7339 of 2014

Schwing Stetter India Private Limited		APPELLANT
	Vs	
The Commercial Tax Officer		RESPONDENT

Date of Decision: April 4, 2014

Acts Referred:

- Andhra Pradesh Value Added Tax Act, 2005 - Section 31
- Constitution of India, 1950 - Article 226

Citation: (2014) 58 APSTJ 170

Hon'ble Judges: M. Satyanarayana Murthy, J; Ashutosh Mohunta, J

Bench: Division Bench

Advocate: Bhaskar Reddy Vemireddy, Advocate for the Appellant

Judgement

@JUDGMENTTAG-ORDER

M. Satyanarayana Murthy, J.

M/s. Schwing Stetter India Private Limited filed this petition for issue of a direction in the nature of writ of Mandamus to declare the impugned order dated 28.02.2014 passed by the 3rd respondent for the year 2010-11 under AP VAT Act, 2005 is arbitrary and illegal, alleging that the petitioner is a private limited company manufacturer of construction machinery like concrete mixing plants, concrete mixers (transit mixers). The petitioner being a registered dealer, for the assessment years 2010-11, 2011-12 and 2012-13, reported turnovers scored by it has paid applicable taxes @ 5% on the turnover of sale of batching plants, concrete mixers (transit mixers), spares and @ 14.5% on the turnover of concrete pumps and spares along with the monthly returns and has claimed the applicable input tax credit. Thus, the petitioner has been paying 4% tax on the turnover of batching plants, transit mixers and spares as clarified by the Commissioner of Commercial Taxes vide proceedings dated 22.10.2007, wherein it was clarified that batching plants,

concrete mixers (transit mixers) falling under HSN Code 847431-10 are taxable at 4% under Sub Entry 39 of Entry 102 of IV Schedule to AP VAT Act. The audit for the years 2007-08 and 2008-09 was completed by the audit officer i.e., Commercial Tax Officer, Srinagar Colony, levied tax @ 4% on the turnover of batching plants and concrete mixers (transit mixers) vide proceedings dated 31.03.2011. The rate of tax was revised from 14.09.2011 on wards from 4% to 5% on batching plants, concrete mixers (transit mixers) and 12.5% to 14.5% on concrete pumps and spares etc. After conducting audit of petitioner''s account, a show cause notice was issued by the 1st respondent in Form 305-A dated 06.03.2013 for the assessment years 2010-11, 2011-12 and 2012-13 proposing to levy tax @ 14.5% on the sale turnover of concrete mixers (transit mixers) opining that they fall under V Schedule to the AP VAT Act, 2005 and directed the petitioner to file objections.

2. The writ petitioner filed objections raising several contentions mostly contending that tax levyable on turnover of concrete mixers (transit mixers) is only 5% under Sub Entry 39 of Entry 102 of IV Schedule to AP VAT Act and he also relied on the clarification issued by the respondent-Commissioner of Commercial Taxes and denied his liability to pay tax @ 14.5%. However, the 1st respondent has confirmed the proposal and levied tax @ 14.5% on the turnover of concrete mixers (transit mixers) classifying them as goods falling under V schedule as unclassified goods. Thus, the concrete mixers were assessed @ 14.5%. But whereas concrete mixers of other competitive manufacturers were assessed @ 4%, thereby the business of the petitioner was badly affected. Thus, the impugned order passed by the 1st respondent is illegal and contrary to law, thereby prayed to set aside the impugned order passed by the 1st respondent revising the tax payable on turnover of concrete mixers from levying 14.5% on the turnover. The learned counsel for the petitioner has drawn the attention of this Court to unreported Division Bench judgment of this Court in W.P. No. 38481, 38482 and 38484 of 2013. The Division Bench set aside the order remanding the matter to the concerned authorities for disposal. The petitioner''s counsel requested to pass the same order.

3. At the stage of admission, we heard the learned counsel for the petitioner and the special Government Pleader for Sales Tax, at length.

4. The learned counsel for the petitioner reiterated the grounds urged by him in the grounds of appeal, whereas the learned special Government Pleader for Sales Tax contended that the impugned order passed by the 1st respondent dismissing the appeal filed by the petitioner by order dated 28.02.2014 levying tax @ 14.5% on the turnover of concrete mixers is an appealable order u/s 31 of AP VAT Act, when an alternative statutory remedy is available, this Court cannot exercise its extraordinary power of judicial review and prayed to dismiss the petition.

5. Considering rival contentions, perusing the material available on record, the points that arise for consideration are:

"1) Whether this Court can exercise its extraordinary power of judicial review under Article 226 of Constitution of India when a remedy by way of an appeal against the impugned order is available under the statute?

2) Whether levy of tax @ 14.5% treating the concrete mixers as goods is in accordance with law?"

POINT No. 1:

6. Admittedly, the impugned order was passed by the 1st respondent-Commercial Tax Officer, Jubilee Hills, Hyderabad, levying tax @ 14.5% treating concrete mixers as goods without considering the objections of the writ petitioner who paid tax @ 4% on the turnover of concrete mixers (transit mixers), taking advantage of the clarification issued by the Commissioner of Commercial Taxes. But the 1st respondent passed the impugned order without considering such objections and clarification issued by the Commissioner of Commercial Taxes. However, it is clear from Section 31 of AP VAT Act, an appeal is provided by the statute which is an effective, efficacious, alternative statutory remedy against the order passed by the authorities in the hierarchy, under the Act.

7. It is settled law that when an alternative remedy is available under the statute, this Court cannot entertain the writ petition. In catena of decisions, time and again it was held that when an alternative, effective, statutory remedy is available, this Court cannot exercise its extraordinary power of judicial review.

8. It is axiomatic that a writ petition would not, ordinarily, be entertained where alternative remedy of appeal is provided by the statute. Though that is not explicit, the exercise of power of judicial review under Article 226 of the Constitution of India is always subject to certain limitations; one such being the availability of effective, efficacious, alternative remedy. When the tax statutes create the hierarchy of appellate/second appellate and revisional authorities as well as quasi judicial Tribunals to adjudicate grievances and give effective redressal, ignoring all such remedies, the writ petition would not, ordinarily, be entertained straightaway. Liberal approach dehors the settled law would result in adding to bulging dockets of the High Court. In I. Salam Khan Vs. The Tamil Nadu Wakf Board and Others, , His Lordship Sri Justice Markandey Katju (as He then was), dealt with this aspect of the matter and made the following observations:

"No doubt, alternative remedy is not an absolute bar to the filing of writ petitions, but at the same time it is well settled that writ jurisdiction is discretionary jurisdiction and when there is an alternative remedy, ordinarily a party must resort to that remedy first before approaching this court. Entertaining writ petitions straight away without insisting that a party should first avail of the alternative remedy is an over liberal approach which has caused immense difficulties to the High Courts in the country because they have added to the huge arrears. The Courts have already become overburdened by this over liberal approach instead of

following the settled legal principle that a writ petition should ordinarily be dismissed if there is an alternative remedy. The High Courts in India are already tottering and reeling under the burden of massive arrears which have flooded the dockets of the Court, and such kind of over liberal approach has only multiplied this problem manifold. If this approach is further continued a time will surly come when the High Courts will find it impossible to function. All this has happened because unfortunately some Courts have departed from well-settled legal principles."

(emphasis supplied)

9. There cannot be any dispute that as laid down by the two Judge Bench of the Supreme Court in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , the alternative remedy does not operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental Rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. But a three Judge Bench in C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another, held that the remedy under Article 226 cannot be invoked by an assessee abandoning the remedy provided by the statute.

10. In MAREDDI KRISHNA REDDY Vs. Income Tax OFFICER, TENALI., . In Appeal with Certificate of High Court, Supreme Court considered two questions, namely, whether High Court could have entertained a writ petition ignoring alternative remedy provided by the Act and whether the provisions imposing penalty can be interpreted by pointing out deficiencies. On the first question, it was held that, "assessee cannot abandon to resort to machinery provided under the Act and directly invoke remedy under Article 226 of Constitution of India". The observations are as follows:

"In our view, the petition filed by the appellant should not have been entertained. The Income Tax Act provides a complete machinery for assessment of tax and imposition of penalty and for obtaining relief in respect of any improper orders passed by the Income Tax authorities, and the appellant could not be permitted to abandon resort to 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 Tribunal."

11. In Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others, the Commissioner of Income Tax issued a notice to the appellant u/s 33-B of the Income Tax Act, 1922 to show cause as to why the orders of assessment for AYs 1953-1954 to 1960-1961 should not be revised. Copies of the notices were sent to the addresses disclosed in the IT Returns. On the date of hearing, none appeared for the assessee. Commissioner set aside orders and directed ITO to make fresh assessment after enquiry and investigation. Against the said order, appellant moved

High Court of Calcutta by filing a writ petition. Holding that notice u/s 33-B was not served on the assessee, learned single Judge set aside the order of the Commissioner. The Division Bench reversed holding that notice was served. Supreme Court dismissed the appeal and reiterated that when Income Tax Act provides complete and self-contained machinery for redressal of grievances, no party can be allowed to invoke extraordinary remedy under Article 226 of Constitution of India. The relevant observations are as follows:

"We deem it necessary once more to emphasize that the Income Tax Act provides a complete and self-contained machinery for obtaining relief against improper action taken by the departmental authorities, and normally the party feeling himself aggrieved by such action cannot be permitted to refuse to have recourse to that machinery and to approach the High Court directly against the action.... A writ of certiorari is discretionary; it is not issued merely because it is lawful to do so. Where the party feeling aggrieved by an order of an Authority under the Income Tax Act has an adequate alternative remedy which he may resort to against the improper action of the authority and he does not avail himself of that remedy the High Court will require a strong case to be made out for entertaining a petition for a writ. Where the aggrieved party has an alternative remedy the High Court would be slow to entertain a petition challenging an order of a taxing authority, which is ex facie with jurisdiction. A petition for a writ of certiorari may lie to the High Court, where the order is on the face of it erroneous or raises question of jurisdiction or of infringement of fundamental rights of the petitioner."

12. Chanan Singh and Sons Vs. Collector Central Excise and Others, was a case where a writ petition was filed before the P&H High Court challenging the order of the CEGAT (now CESTAT) allowing the department''s appeal. The High Court dismissed holding that there is a statutory alternative remedy available. Aggrieved by the same, appeal was carried to Supreme Court. Confirming the High Court, Supreme Court observed (para 2) as under.

"The appellant challenged before the High Court an order of the Tribunal allowing the appeal of the Revenue. The High Court simply said that the appellant had a statutory alternative remedy and the appellant had to avail that statutory remedy instead of filing writ petition. Accordingly, the High Court dismissed the writ petition. The appellant instead of challenging the order of the Tribunal by availing the statutory alternative remedy, has filed this appeal by special leave challenging the order of the High Court. We are of the view that the High Court was right in dismissing the writ petition directing the appellant to avail the statutory alternative remedy."

13. In view of the binding judgment of the three Judge Bench in C.A. Abraham''s case (3 Supra) we are not inclined to go into the merits of the case.

14. In view of the principles laid down in the above judgments, when an effective efficacious alternative statutory remedy is available, this Court cannot exercise its power of judicial review under Article 226 of Constitution of India.

15. In a recent judgment of the Apex Court in Commissioner of Income Tax and Others Vs. Chhabil Dass Agarwal, , it was held as follows:

"Non-entertainment of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than a rule of law. It is within the discretion of the High Court to grant relief under Article 226 despite the existence of an alternative remedy, however, the High Court must not interfere if there is an adequate efficacious alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under Article 226. However, when a statutory forum is created by law for redressal of grievances, a Writ Petition should not be entertained ignoring the statutory dispensation. In the instant case, the Act provides complete machinery for the assessment/re-assessment 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 invoke the writ jurisdiction when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). Assessee in the instance case neither described the available alternative remedy under the Act as ineffectual and non-efficacious nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case. Writ Court accordingly, as held, should not have entertained the Writ Petition."

16. In view of the principle laid down in the above judgment, the bar not to entertain a petition exercising power under Article 226 of Constitution of India is a self-imposed limitation to minimize burden. However, if extraordinary circumstance or statutory violation is shown, jurisdiction under Article 226 of Constitution of India can be exercised, if there is a material to show that the points which are urged before this Court cannot be urged in the appeal and that the remedy is non-efficacious and ineffective.

17. In the instant case on hand, no extraordinary circumstances are pleaded and brought to the notice of this Court in the entire affidavit and there is absolutely no pleading that alternative remedy by way of appeal u/s 31 is non-efficacious and ineffective that this ground regarding variation of percentage (%) of tax levyable on concrete mixers (transit mixers) cannot be urged before appellate authority. In the absence of any such allegation, in view of self-imposed limitation as observed by the Apex Court, we are not inclined to exercise our extraordinary power of judicial review under Article 226 of Constitution of India to grant relief. Therefore, on this ground the writ petition is not maintainable. Accordingly, point No. 1 is held.

Point No. 2:

18. Since, we held that the writ petition is not maintainable in view of the availability of effective, efficacious, alternative statutory remedy under the statute; the real dispute regarding the percentage of tax levyable on the turnover of concrete mixers (transit mixers) can be decided by the appellate authority u/s 31 of AP VAT Act as effectively as possible. Since, it is a disputed question of fact, we are constrained to exercise our jurisdiction under Article 226 of Constitution of India.

19. In view of our foregoing discussion and finding on point No. 1, we need not decide the percentage of tax levyable. Accordingly, the point No. 2 is decided.

20. In view of our findings in point Nos. 1 and 2, we find no merits in the writ petition and the writ petition deserves to be dismissed. In the result, the writ petition is dismissed. However, liberty is given to the petitioner to exhaust statutory remedy u/s 31 of AP VAT Act, if advised. No costs. In consequence, Miscellaneous Petitions, if any pending in this petition shall stand closed.