

(2015) 06 SHI CK 0056
In the High Court Of Himachal Pradesh
Case No : CWP No. 1596 of 2015

Samsung India Electronics Pvt. Ltd.

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 20-06-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 35L
Constitution of India, 1950 — Article 141, 141(1), 226, 227, 32
Himachal Pradesh Value Added Tax Act, 2005 — Section 16, 16(8), 21, 45, 45(5)

Citation : (2015) 06 SHI CK 0056

Hon'ble Judges : Mansoor Ahmad Mir, C.J.; Tarlok Singh Chauhan, J

Bench : Division Bench

Advocate : Tarun Gulati, Sanjeev Bhushan and Shashi Mathews, for the Appellant; Shrawan Dogra, Advocate General, Romesh Verma, A.A.G, J.K. Verma and Vikram Singh Thakur, Dy. Advocate Generals, Advocates for the Respondent

Judgement

Tarlok Singh Chauhan, J.—By medium of this petition, the petitioner has called in question the show cause notice issued by respondent No. 4 on 22.12.2014 under section 16(8) of the Himachal Pradesh Value Added Tax Act, 2005 (for short, H.P. VAT Act, 2005). The petitioner has been asked to personally appear alongwith the relevant documents for the years 2010-2012 to 2014-2015 (up to 30.11.2014) for the reason that petitioner was paying VAT at the rate of 5% on the sale of cell-phone chargers and other accessories instead of 13.75%. The petitioner is further aggrieved by the show cause notice dated 30.12.2014 issued under section 46 of the Act by respondent No. 3, which seeks to revise the assessment order dated 16.11.2012 for the year 2011-2012 on the ground that the assessment order is not legal and proper as the same needs to be revised on the grounds that tax on sale of battery charger was levied at 5% whereas the same should have been levied at 13.75% in view of the judgment of Hon"ble Supreme Court in State of Punjab Vs. Nokia India Pvt. Ltd., (2015) 2 AD 196 : (2015) 315 ELT 162 : (2015) 1 RCR(Civil) 569 : (2015) 1 SCJ 673 : (2015) 77 VST 427 .

2. The case initially came up before this court on 5.3.2015, on which date the learned counsel for the petitioner was asked to address arguments on the issue of maintainability of the writ petition and the matter was ordered to be listed on 10.3.2015. On 10.3.2015, the petitioner sought adjournment to lay motion for amendment of the writ petition and the case was ordered to be listed on 1.4.2015. On 1.4.2015 notice on the application for amendment was issued and the respondents prayed one week's time to file reply to the application. Thereafter, the matter was ordered to be listed from time to time to consider the application for amendment. By way of amendment, the petitioner has sought to lay challenge to the order passed by respondent No. 3 on 3.3.2015 whereby it has been directed to pay a sum of Rs. 81,16,112/- (Rupees eighty one lacs sixteen thousands and one hundred twelve) into the appropriate government treasury within 30 days.

3. The learned counsel for the petitioner does not dispute that there is an alternate remedy available by way of an appeal under the H.P. VAT Act 2005, but contends that the same would not operate as a bar for entertainment of a petition under Articles 226, 227 of the Constitution of India. He would contend that the rule of exclusion of writ jurisdiction due to availability of an alternative remedy is a rule of discretion and not one of compulsion and this has been so held by this Bench while deciding CWP No. 4779 of 2014 titled M/s. Indian Technomac Company Ltd. v. State of H.P. and ors. decided on 4.8.2014. He would further contend that in an appropriate case in spite of availability of alternative remedy, a writ court would still exercise its discretionary jurisdiction of judicial review in the following cases:--

"(1) where the writ petitioner seeks enforcement of the Fundamental Right; or

(2) where there is a failure of principle of natural justice; or

(3) where order or proceedings are wholly without jurisdiction or vires of the Act is challenged; or

(4) 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."

4. The learned counsel for the petitioner has further argued that the impugned notice dated 22.12.2014 issued by respondent No. 4 proposing to levy penalty is without jurisdiction as no notice was issued to assess tax at higher rate and therefore, in the absence of assessment at higher rate, question of imposition of penalty would not arise. He further argued that the impugned order dated 3.3.2015 passed under section 16 pursuant to notice under section 16(8) does not impose penalty but seeks to assess tax at higher rate and in absence of notice in form -XXIX under section 21 read with Rule 67, no assessment could be made and therefore, the impugned order is without jurisdiction as it was issued without following the prescribed procedure. The respondent No. 3, who had passed the impugned order, cannot be regarded as an Assessing Authority under

rule 73 and therefore, also the impugned order is without jurisdiction. It is further argued that subsequent judgment of the Hon"ble Supreme Court in Nokia"s case (supra) cannot be used to change the course of past assessment.

5. On the other hand, the learned Advocate General has strenuously argued that the writ petition is not maintainable since the alternative and efficacious remedy by way of statutory appeal is available to the petitioner under section 45 of the H.P. VAT Act, 2005. He further submits that the writ petition has been filed just to avoid the deposit of tax, which is a pre-condition for the maintainability of the appeal under section 45(5) of the H.P. VAT Act, 2005. He therefore, prayed for dismissal of the writ petition at the threshold.

We have heard the learned counsel for the parties and have gone through the records of the case.

6. It is not in dispute that respondents No. 3 and 4 are authorities constituted under the H.P. VAT Act, 2005, and therefore, even if it is assumed that there is an illegal or irregular exercise of jurisdiction the same would not result in the order being without jurisdiction. Even if there has been some defect in the procedure followed during the hearing of the case, it does not follow that the authority has acted without jurisdiction. It may make the order irregular or defective, but the order cannot be a nullity so long as it has been passed by an authority which was competent to pass the order. There is basic difference between want of jurisdiction and an illegal or irregular exercise of jurisdiction and if there is non-compliance of rules of procedure, the same cannot be a ground for granting one of the writs prayed for. In either case, the defect, if any, can according to the procedure established by law be corrected only by a court of appeal or revision.

7. In Janardan Reddy and Others Vs. The State of Hyderabad and Others, AIR 1951 SC 217 : (1951) 2 SCR 344 , the Hon"ble Supreme Court has held as follows:--

"6. But, for the purpose of the present case, it is sufficient to point out that even if we assume that there was some defect in the procedure folld. at the trial, it does not follow that the trial Ct. acted without jurisdiction. There is a basic difference between want of jurisdiction and an illegal or irregular exercise of jurisdiction, and our attention has not been drawn to any authority in which mere non-compliance with the rules of procedure has been made a ground for granting one of the write prayed for. In either case, the "defect, if any, can according to the procedure established by law be corrected only by a Ct. of appeal or revision. Here, the appellate Ct. which was competent to deal with the matter has pronounced its judgment against the petitioners. and the manner having been finally decided is not one to be reopened in a proceeding under Art. 32 of the Constitution."

8. Now in so far as the contention of the petitioner that a subsequent judgment i.e. Nokia"s case (supra) cannot be used to change the course of past

assessment is concerned, it is more than settled that the judgments of the courts declare the law as it was always. Though the courts some time order that the judgments would have prospective effect, but in absence of such restrictions, the law declared by the courts is deemed to be always the law so interpreted i.e. the law as it stood right from the beginning as per its decision.

9. In *Sarwan Kumar and Another Vs. Madan Lal Aggarwal*, AIR 2003 SC 1475 : (2003) 1 JT 607 : (2003) 1 SCALE 722 : (2003) 4 SCC 147 : (2003) 1 SCR 918 : (2003) 1 UJ 513 : (2003) AIRSCW 813 : (2003) 1 Supreme 946 , the Hon"ble Supreme Court has held as follows:--

"20.When the court decides that the interpretation given to a particular provision earlier was not legal, it declares the law as it stood right from the beginning as per its decision. In *Gian Devi Anand's* case (supra) the interpretation given by the Delhi High Court that commercial tenancies were not heritable was overruled being erroneous. Interpretation given by the Delhi High Court was not legal. The interpretation given by this Court declaring that the commercial tenancies heritable would be the law as it stood from the beginning as per the interpretation put by this Court. It would be deemed that the law was never otherwise."

10. Similarly in *Assistant Commissioner, Income Tax, Rajkot Vs. Saurashtra Kutch Stock Exchange Ltd.*, (2008) 219 CTR 90 : (2008) 230 ELT 385 : (2008) 305 ITR 227 : (2008) 10 JT 306 : (2008) 12 SCALE 582 : (2008) 14 SCC 171 : (2010) 18 STR 84 : (2008) 173 TAXMAN 322 : (2009) 11 Vat Reporter 19 , the Hon"ble Supreme Court has held as follows:--

"35. In our judgment, it is also well- settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a "new rule" but to maintain and expound the "old one". In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.

36. Salmond in his well-known work states;

"The theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are *res judicata* or accounts that have been settled in the meantime".

(emphasis supplied)

11. In so far as the maintainability of the writ petition is concerned, the facts herein are similar to the ones in M/s. Indian Technomac Company Ltd. case (supra), wherein this court was confronted with the proposition regarding the maintainability of the petition when an alternative remedy existed under the H.P. VAT Act, 2005 and this court held as follows:--

"6. Before we deal with the question of maintainability of the writ petitions, we deem it proper to make a brief reference to the averments contained in the leading writ petition, (CWP No. 4779 of 2014), which are, by and large, similar in the other writ petitions. It is averred in the writ petition that the Assessing Authority has not heard the petitioners before making the impugned orders, and thus, have been passed without providing sufficient opportunity of being heard to the writ petitioners. It is also pleaded that the impugned orders have been passed in a biased manner, under the dictation of high officials. It is further pleaded that the impugned orders have been passed without jurisdiction, though, during the course of hearing, as discussed hereinabove, no such argument was advanced to substantiate the fact that the Assessing Authority passed the impugned orders without jurisdiction or that the said Authority has acted with bias.

7. Now, coming to the core question of maintainability of the writ petitions, in terms of the HP VAT Act, 2005, the Assessing Authority is vested with the authority to pass orders and against such orders, provision of appeal is envisaged, and the orders passed in the appeal, are further appealable to the Tribunal. Section 48 of the HP VAT Act, 2005 further provides that the order of the Tribunal can be assailed by way of revision before the High Court.

8. We deem it proper to reproduce Sections 45, 46 and 48 of the HP VAT Act, 2005 here under:

"45. Appeal. - (1) An appeal from every original order passed under this Act or rules made thereunder shall lie-

(a) if the order is made by an Assessing Authority or by an officer-in-charge of the check post or barrier or any other officer not below the rank of the Excise and Taxation Officer, to the Deputy Excise and Taxation Commissioner;

(b) if the order is made by the Deputy Excise and Taxation Commissioner, to the Commissioner or the Additional Excise and Taxation Commissioner, posted at the State Headquarters;

(c) if the order is made by the Commissioner or the Additional Excise and Taxation Commissioner posted at the State Headquarters any officer exercising the powers of the Commissioner, to the Tribunal.

(2) An order passed in appeal by a Deputy Excise and Taxation Commissioner or by the Additional Excise and Taxation Commissioner posted at the State Headquarters or by the Commissioner or any officer, on whom the powers of the Commissioner are conferred, shall be further appealable to the Tribunal.

(3) Every order of the Tribunal, the Commissioner or any officer exercising the powers of the Commissioner or the Additional Excise and Taxation Commissioner posted at the State Headquarters or the order of the Deputy Excise and Taxation Commissioner or of the Assessing Authority or an officer in-charge of check-post or barrier or any other officer not below the rank of an Excise and Taxation Officer, if not challenged in appeal or revision, shall be final.

(4) No appeal shall be entertained unless it is filed within sixty days from the date of communication of the order appealed against, or such longer period as the Appellate Authority may allow, for reasons to be recorded in writing.

(5) No appeal under sub-section (1) shall be entertained by an Appellate Authority unless such appeal is accompanied by satisfactory proof of the payment of the tax (including interest payable) or of the penalty, if any, imposed or both as the case may be:

Provided that if such Authority is satisfied that the dealer is unable to pay the tax (including interest payable) assessed or the penalty, if any, imposed or both, he may, for reasons to be recorded in writing, entertain an appeal without the tax (including interest payable) or penalty or both having been paid in full or after part payment of such tax (including interest payable) or penalty or both.

(6) Subject to such rules of procedure as may be prescribed, an Appellate Authority may pass such order on appeal as it deems just and proper.

46. Revision.- (1) The Commissioner may, of his own motion, call for the record of any proceedings which are pending before, or have been disposed of by, any Authority subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such proceedings or order made therein and, on finding the proceedings or the orders prejudicial to the interest of revenue, may pass such order in relation thereto as he may think fit:

Provided that the powers under this sub-section shall be exercisable only within a period of five years from the date on which such order was communicated.

(2) The State Government may, by notification, confer on any officer powers of the Commissioner under sub-section (1) to be exercised subject to such conditions and in respect of such areas as may be specified in the notification and such officer shall be deemed to be the Commissioner for the purposes of sub-section (1).

(3) The tribunal, on application made to it against an order of the Commissioner under this section within sixty days from the date of the communication of the order, for the purpose of satisfying itself as to the legality or propriety of such order, may call for and examine the record of any such case and may pass such orders thereon as it thinks just and proper.

(4) No order shall be passed under this section, which adversely affects any person unless such person has been given a reasonable opportunity of being

heard.

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48. Revision to High Court. - (1) Any person aggrieved by an order made by the tribunal under sub-section (2) of section 45 or under sub-section (3) of section 46, may, within 90 days of the communication of such order, apply to the High Court of Himachal Pradesh for revision of such order if it involves any question of law arising out of erroneous decision of law or failure to decide a question of law.

(2) The application for revision under sub-section (1) shall precisely state the question of law involved in the order, and it shall be competent for the High Court to formulate the question of law.

(3) Where an application under this section is pending, the High Court may, or on application, in this behalf, stay recovery of any disputed amount of tax, penalty or interest payable or refund of any amount due under the order sought to be revised:

Provided that no order for stay of recovery of such disputed amount shall remain in force for more than 30 days unless the applicant furnishes adequate security to the satisfaction of the Assessing Authority concerned.

(4) The application for revision under sub-section (1) or the application for stay under sub-section (3) shall be heard and decided by a bench consisting of not less than two judges.

(5) No order shall be passed under this section which adversely affects any person unless such person has been given a reasonable opportunity of being heard."

9. Provision of sub section (1) of Section 45 of the HP VAT Act, 2005 clearly provides that if the order is made by an Assessing Authority or by an officer-in-charge of the check post or barrier or any other officer not below the rank of the Excise and Taxation Officer, the appeal against such order shall lie to the Deputy Excise and Taxation Commissioner; if the order is made by the Deputy Excise and Taxation Commissioner, the same can be appealed before the Commissioner or the Additional Excise and Taxation Commissioner, posted at the State Headquarters; and if the order is made by the Commissioner or the Additional Excise and Taxation Commissioner posted at the State Headquarters any officer exercising the powers of the Commissioner, the same is appealable before the Tribunal. Sub Section (2) of Section 45 of the HP VAT Act, 2005 further provides that an order passed in appeal by a Deputy Excise and Taxation Commissioner or by the Additional Excise and Taxation Commissioner posted at the State Headquarters or by the Commissioner or any officer, on whom the powers of the Commissioner are conferred, shall be appealable before the Tribunal.

10. Admittedly, the impugned orders, in the present cases, have been issued by the Assistant Excise and Taxation Commissioner-cum-Assessing Authority.

Therefore, remedy of appeal is available to the petitioners as per Section 45 of the HP VAT Act, 2005.

11. Now, the question which arises for determination is - when an Act provides mechanism to have remedy(ies), can a writ lie in the given circumstances? The answer is in the negative for the following reasons. It is well settled principle of law that High Courts have imposed rule of self limitation in entertaining the writ petition in terms of writ jurisdiction when alternative remedy is available. High Court must not interfere if there is adequate efficacious alternative remedy available and the practice of approaching the High Court, without availing the remedy(ies) provided, must be deprecated, unless express case is made out."

12. The Apex Court in Union of India (UOI) and Another Vs. Guwahati Carbon Ltd., (2013) 19 GSTR 506 : (2012) 11 SCC 651 , while dealing with the similar question, has observed in paragraphs 8, 9, 10, 11, 14 and 15 as under:

"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram and Others Vs. Municipal Committee, Chheharta, AIR 1979 SC 1250 : (1979) 118 ITR 488 : (1979) 3 SCC 83 : (1979) 3 SCR 463 : (1979) 11 UJ 443 . In the said decision, this Court was pleased to observe that: (SCC p.88, para 23)

"23. when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all the -other forums and modes of seeking remedy are excluded."

9. A Bench of three learned Judges of as Court, in Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, AIR 1983 SC 603 : (1983) 34 CTR 393 : (1983) 142 ITR 663 : (1983) 1 SCALE 437 : (1983) 2 SCC 433 : (1983) 2 SCR 743 : (1983) 53 STC 315

"11..... The Act provides for a complete-machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where right or liability is created by a statute which gives a special remedy for 1 enforcing it, the remedy provided by that statute must be availed...."

10. In other words, existence of an adequate alternate remedy is a factor to be considered by the writ court before exercising its writ jurisdiction (See Rashid Ahmed Vs. The Municipal Board, Kairana, AIR 1950 SC 163 : (1950) 1 SCR 566 .

11. In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, AIR 1999 SC 22 : (1998) 7 JT 243 : (1998) 5 SCALE 655 : (1998) 8 SCC 1 : (1998) 2 SCR 359 Supp : (1998) AIRSCW 3345 : (1998) 8 Supreme 176 , this Court held:

"15. Under Article 226 of the Constitution, the High Court, having regard to the

facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of the Fundamental Rights or where there has been a violation of the principle of natural justices or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged..... "

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14. Having said so, we have gone through the orders passed by the Tribunal. The only determination made by the Tribunal is with regard to the assessable value of the commodity in question by excluding the freight/transportation charges and the insurance charges from the assessable value of the commodity in question. Since what was done by the Tribunal is the determination of the assessable value of the commodity in question for the purpose of the levy of duty under the Act, in our opinion, the assessee ought to have carried the matter by way of an appeal before this Court under Section 35L of the Central Excise Act, 1944.

15. In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the Tribunal. The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution. Therefore, the learned Single Judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first. The order passed by the learned Single Judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent/assessee."

13. The Apex Court in Nivedita Sharma Vs. Cellular Operators Assn. of India and Others, (2012) 4 RCR(Civil) 850 : (2011) 13 SCALE 584 , after discussing its various earlier decisions, held that the High Court had committed error in entertaining the writ petition without noticing and referring to the relevant provisions of law applicable in that case, which contained statutory remedy of appeal and accordingly set aside the order of the High Court in terms of which the writ petition was entertained. It is apt to reproduce paragraphs 24 and 25 hereunder:

"24. Section 19 provides for remedy of appeal against an order made by the State Commission in exercise of its powers under sub-clause (i) of Clause (a) of Section 17. If Sections 11, 17 and 21 of the 1986 Act which relate to the jurisdiction of the District Forum, the State Commission and the National Commission, there does not appear any plausible reason to interpret the same in a manner which would frustrate the object of legislation.

25. What has surprised us is that the High Court has not even referred to Sections 17 and 19 of the 1986 Act and the law laid down in various judgments of this Court and yet it has declared that the directions given by the State Commission are without jurisdiction and that too by overlooking the availability of statutory remedy of appeal to the respondents."

14. The Apex Court in a recent decision in Commissioner of Income Tax and Others Vs. Chhabil Dass Agarwal, (2013) 8 AD 620 : (2013) 261 CTR 113 : (2013) 357 ITR 357 : (2013) 11 JT 387 : (2013) 10 SCALE 326 : (2013) 217 TAXMAN 143 , has discussed the law, on the subject, right from the year 1859 till the date of judgment i.e. 8th August, 2013. We deem it proper to reproduce paragraphs 12, 13, 15, 16 and 17 hereunder:

"12. The Constitution Benches of this Court in K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., AIR 1954 SC 207 : (1954) 25 ITR 167 : (1954) 1 SCR 738 ; Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, AIR 1955 SC 425 : (1955) 2 SCR 1 ; Union of India (UOI) Vs. T.R. Varma, AIR 1957 SC 882 : (1958) 2 LLJ 259 : (1958) 60 PLR 126 : (1958) 1 SCR 499 ; The State of Uttar Pradesh Vs. Mohammad Nooh, (1958) 1 SCR 595 and K.S. Venkataraman and Co. Vs. State of Madras, AIR 1966 SC 1089 : (1966) 60 ITR 112 : (1966) 2 SCR 229 : (1966) 17 STC 418 , have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. (See: N.T. Veluswami Thevar Vs. G. Raja Nainar and Others, AIR 1959 SC 422 : (1959) 1 SCR 623 Supp ; Municipal Council, Khurai and Another Vs. Kamal Kumar and Another, AIR 1965 SC 1321 : (1965) 2 SCR 653 ; Siliguri Municipality and Others Vs. Amalendu Das and Others, AIR 1984 SC 653 : (1984) 55 CompCas 506 : (1984) 146 ITR 624 : (1984) 1 SCALE 278 : (1984) 2 SCC 436 : (1984) 2 SCR 344 : (1984) 16 UJ 303 ; S.T. Muthusami Vs. K. Natarajan and Others, AIR 1988 SC 616 : (1988) 1 JT 159 : (1988) 1 SCALE 149 : (1988) 1 SCC 572 : (1988) 2 SCR 759 : (1988) 1 UJ 531 ; Rajasthan State Road Transport Corporation and Another Vs. Krishna Kant and Others, AIR 1995 SC 1715 : (1995) 2 CTC 208 : (1995) 71 FLR 211 : (1995) 4 JT 348 : (1995) 2 LLJ 728 : (1995) 3 SCALE 440 : (1995) 5 SCC 75 : (1994) 1 SCC 268 Supp : (1995) 3 SCR 1118 : (1995) 2 UJ 318 ; Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, AIR 2000 SC 2573 : (2000) 8 JT 167 : (2000) 5 SCALE 202 : (2000) 6 SCC 293 : (2000) 1 SCR 581 Supp : (2000) AIRSCW 2647 : (2000) 5 Supreme 158 ; A. Venkatasubbiah Naidu Vs. S. Challappan and Others, AIR 2000 SC 3032 : (2000) 4 CTC 358 : (2000) 10 JT 599 : (2000) 6 SCALE 398 : (2000) 7 SCC 695 : (2000) 3 SCR 303 Supp : (2000) 2 UJ 1300 : (2000) AIRSCW 3307 : (2000) 6 Supreme 269 ; L.L. Sudhakar Reddy and Others Vs. State of A.P. and Others,

(2001) 6 AD 275 : AIR 2001 SC 3205 : (2001) 6 JT 410 : (2001) 5 SCALE 201 : (2001) 6 SCC 634 : (2001) AIRSCW 3044 : (2001) 7 Supreme 411 : (2001) 6 Supreme 148 ; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj); Shri Sant Sadguru Janardan Swami (Moingirid Maharaj) Sahakari Dugdha Utpadak Sanstha and Another Vs. State of Maharashtra and Others, (2001) 8 AD 84 : AIR 2001 SC 3982 : (2001) 8 JT 287 : (2001) 6 SCALE 585 : (2001) 8 SCC 509 : (2001) AIRSCW 3959 : (2001) 7 Supreme 362 ; Pratap Singh Vs. State of Haryana and Others and Shri Bhajan Lal and Others, AIR 2002 SC 3385 : (2003) 96 FLR 169 : (2002) 7 JT 278 : (2002) LabIC 3275 : (2002) 7 SCALE 8 : (2002) 7 SCC 484 : (2002) 4 SCT 471 : (2003) 1 SLJ 82 and GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, (2003) 179 CTR 11 : (2003) 259 ITR 19 : (2002) 9 JT 574 : (2003) 1 SCC 72 : (2002) 125 TAXMAN 963 .

13. In Nivedita Sharma Vs. Cellular Operators Assn. of India and Others, (2012) 4 RCR(Civil) 850 : (2011) 13 SCALE 584 , this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows: (SCC pp. 34345 paras 12-14)

"12. In Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes, AIR 1964 SC 1419 : (1964) 6 SCR 654 : (1964) 15 STC 468 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).

"7. ... The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up."

13. In Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others, AIR 1983 SC 603 : (1983) 34 CTR 393 : (1983) 142 ITR 663 : (1983) 1 SCALE 437 : (1983) 2 SCC 433 : (1983) 2 SCR 743 : (1983) 53 STC 315 this Court observed: (SCC pp. 440-41, para 11)

"11. ... It is now well recognised that 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. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford, 141 ER 486 in the following passage: (ER p. 495)

"... There are three classes of cases in which a liability may be established founded upon a statute. ... But there is a third class viz. where a liability not

existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."

The rule laid down in this passage was approved by the House of Lords in *Neville v. London Express Newspapers Ltd.*, 1919 AC 368 and has been reaffirmed by the Privy Council in *Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd.*, 1935 AC 532 (PC) and *Secretary of State vs. Mask and Co.* AIR 1940 105 (Privy Council) . It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine."

14. In *Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and Others*, (2002) 83 ECC 85 : (1997) 68 ECR 273 : (1997) 89 ELT 247 : (1996) 11 JT 283 : (1996) 9 SCALE 457 : (1997) 5 SCC 536 : (1996) 10 SCR 585 Supp : (1998) 111 STC 467 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

"77. ... So far as the jurisdiction of the High Court under Article 226--or for that matter, the jurisdiction of this Court under Article 32--is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/ Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment." (See: *Veerappa Pillai Vs. Raman and Raman Ltd. and Others*, AIR 1952 SC 192 : (1952) 1 SCR 583 ; *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, AIR 1985 SC 330 : (1985) 4 ECC 103 : (1985) ECR 4 : (1985) 19 ELT 22 : (1985) 154 ITR 172 : (1984) 2 SCALE 819 : (1985) 1 SCC 260 : (1985) 2 SCR 190 : (1985) 17 UJ 368 ; *Shri Ramendra Kishore Biswas Vs. The State of Tripura and Others*, (1998) 9 AD 225 : AIR 1999 SC 294 : (1999) 1 CTC 28 : (1999) 81 FLR 398 : (1998) 8 JT 402 : (1999) LabIC 178 : (1999) 2 LLJ 192 : (1998) 6 SCALE 454 : (1999) 1 SCC 472 : (1999) SCC(L&S) 295 : (1998) 3 SCR 400 Supp : (1998) AIRSCW 3815 : (1998) 9 Supreme 260 ; *Shivgonda Anna Patil and Others Vs. State of Maharashtra and Others*, AIR 1999 SC 2281 : (1999) 2 JT 132 : (1999) 2 SCALE 1 : (1999) 3 SCC 5 : (1999) 1 UJ 659 : (1999) AIRSCW 2340 : (1999) 2 Supreme 510 ; *C.A. Abraham, Uppoottil, Kottayam Vs. The Income Tax Officer, Kottayam and Another*, AIR 1961 SC 609 : (1961) 41 ITR 425 : (1961) 2 SCR 765 ; *Titaghur Paper Mills Co. Ltd. and Another Vs. State of Orissa and Others*, AIR 1983 SC 603 : (1983) 34 CTR 393 : (1983) 142 ITR 663 : (1983) 1 SCALE 437 : (1983) 2 SCC 433 : (1983) 2 SCR 743 : (1983) 53 STC 315 ; *H.B. Gandhi v. Gopi Nath and Sons*, 1992 Supp (2) SCC 312 ; *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, AIR 1999 SC 22 : (1998) 7 JT 243 : (1998) 5 SCALE 655 : (1998) 8 SCC 1 : (1998)

2 SCR 359 Supp : (1998) AIRSCW 3345 : (1998) 8 Supreme 176 ; Tin Plate Co. of India Ltd. Vs. State of Bihar and Others, AIR 1999 SC 74 : (1998) 79 ECR 497 : (1998) 7 JT 442 : (1998) 6 SCALE 36 : (1998) 8 SCC 272 : (1998) 2 SCR 547 Supp : (1999) 112 STC 543 : (1998) AIRSCW 3398 : (1998) 8 Supreme 305 ; Sheela Devi Vs. Jaspal Singh, AIR 1999 SC 2859 : (1999) 1 SCC 209 : (1999) AIRSCW 2214 and Punjab National Bank Vs. O.C. Krishnan and Others, (2001) 6 AD 207 : AIR 2001 SC 3208 : (2001) 2 BC 642 : (2001) 107 CompCas 20 : (2001) 4 CompLJ 179 : (2001) 6 JT 408 : (2001) 5 SCALE 196 : (2001) 6 SCC 569 : (2001) 2 UJ 1491 : (2001) AIRSCW 2993 : (2001) 6 Supreme 81

14. In Union of India (UOI) and Another Vs. Guwahati Carbon Ltd., (2013) 19 GSTR 506 : (2012) 11 SCC 651 , this Court has reiterated the aforesaid principle and observed: (SCC p.653, para 8)

"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram and Others Vs. Municipal Committee, Chheharta, AIR 1979 SC 1250 : (1979) 118 ITR 488 : (1979) 3 SCC 83 : (1979) 3 SCR 463 : (1979) 11 UJ 443 . In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).

"23. ... when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.""

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15. Thus, while it can be said that this Court has recognized 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 and Others Vs. A. Mazid, Superintendent of Taxes, AIR 1964 SC 1419 : (1964) 6 SCR 654 : (1964) 15 STC 468 , Titagarh Paper Mills case 1983 SCC (Tax) 131 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.

16. 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 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). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In *Ram and Shyam Company Vs. State of Haryana and Others*, AIR 1985 SC 1147 : (1985) 1 SCALE 1237 : (1985) 3 SCC 267 : (1985) 1 SCR 541 Supp : (1986) 1 UJ 539 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility.

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 instant case. In 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 re-assessment orders passed and the consequential demand notices issued thereon."

15. The decisions referred to by the learned counsel for the petitioners have been discussed by the Apex Court in the decisions of *Union of India and another v. Guwahati Carbon Limited*, *Nivedita Sharma v. Cellular Operators Association of India and others* and *Commissioner of Income Tax and others v. Chhabil Dass Agarwal*, referred to hereinabove.

16. The sum and substance of the above discussion is that the writ petitioners-Company have remedies of appeal(s), before approaching the High Court by way of the writ petitions, for the redressal of their grievances. The petitioners ought to have exhausted the remedy of appeal before the Deputy Excise and Taxation Commissioner or Additional Excise and Taxation Commissioner or the Excise Commissioner, as the case may be, and if the petitioners were not successful in those appeal proceedings, another remedy available to them was to challenge the said order(s) by the medium of appeal before the Tribunal, and again, if they were unsuccessful, they could have availed the remedy of revision before the High Court in terms of Section 48 of the HP VAT Act, 2005. Keeping in view the above discussion, read with the fact that the dispute raised in these writ petitions relates to revenue/tax matters, it can safely be concluded that the petitioners have sufficient efficacious remedy(ies) available.

17. It also appears that these writ petitions are aimed at to give a slip to law for the reason that the petitioners have to deposit the tax liability, alongwith interest payable, as assessed, and penalty, if any, imposed, in terms of Section 45(5) of HP VAT Act, 2005, referred to above, which provides that no appeal has to be entertained unless it is accompanied by satisfactory proof of the payment of tax including interest payable alongwith penalty, if any, imposed, subject to exception provided by proviso to sub section (5) of Section 45 of the HP VAT Act, 2005.

18. Having said so, we are of the considered view that the writ petitioners have alternative efficacious remedy available and these writ petitions are not maintainable. Accordingly, the same merit to be dismissed in limine. However, it is made clear that the observations made herein shall not cause any prejudice to the petitioners in case they intend to file appeal(s) before the prescribed Authority and the period spent by the petitioners for prosecuting these writ petitions shall be excluded by the Appellate Authority while computing the period of limitation."

12. The judgment in M/s. Indian Technomac Company Ltd. case (supra), has attained finality, inasmuch as, the same has been upheld by the Hon''ble Supreme Court vide its order dated 22.8.2014 in SLP (C) Nos. 22626-22641 of 2014.

13. At this stage, we may also take note of recent decision of the Hon''ble Supreme Court in Union of India and others v. Major General Shri Kant Sharma and another 2015 AIR SCW 2497 , wherein the Hon''ble Supreme Court was confronted with the similar proposition regarding maintainability of writ petition when alternative remedy was available to the aggrieved party under the Armed Forces Tribunal Act and the Hon''ble Supreme Court after making a reference to the judgments as cited in M/s. Indian Technomac Company Ltd. case (supra) and in addition thereto after taking into consideration the judgment rendered by it in Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others, (2010) 1 BC 698 : (2011) 101 CLA 146 : (2011) 162 CompCas 337 : (2011) 2 CompLJ 1 : (2011) 3 JT 159 : (2011) 2 RCR(Civil) 676 : (2011) 2 SCALE 233 : (2011) 2 SCC 782 : (2011) 106 SCL 1 : (2011) 2 SCR 602 : (2011) AIRSCW 1194 : (2011) AIRSCW 5913 : (2011) 1 Supreme 655 , The Executive Engineer and Another Vs. Sri Seetaram Rice Mill, (2011) ELR 1498 : (2011) 12 JT 386 : (2012) 3 RCR(Civil) 633 : (2011) 12 SCALE 243 : (2012) 2 SCC 108 : (2011) 6 UJ 3973 , Cicily Kallarackal Vs. Vehicle Factory, (2012) 6 CTC 217 : (2012) 7 JT 426 : (2013) 169 PLR 571 : (2012) 4 RCR(Civil) 901 : (2012) 7 SCALE 328 : (2012) 8 SCC 524 and Union of India (UOI) and Others Vs. Brigadier P.S. Gill, AIR 2012 SC 1280 : (2012) 133 FLR 403 : (2012) 4 SCALE 1 : (2012) 4 SCC 463 : (2012) 2 SLJ 340 : (2012) AIRSCW 2021 culled out the following principles:

"34.(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.(Refer: L. Chandra Kumar Vs. Union of India and others, AIR 1997 SC 1125 : (1997) 83 CLT 815 : (1997) 92 ELT 318 : (1997) 228 ITR 725 : (1997) 3 JT 589 : (1997) 3 SCALE 40 : (1997) 3 SCC 261 : (1997) SCC(L&S) 577 : (1997) 2 SCR 1186 : (1997) 105 STC 618 : (1997) AIRSCW 1345 : (1997) 3 Supreme 147 and S.N. Mukherjee Vs. Union of India, AIR 1990 SC 1984 : (1990) CriLJ 2148(1) : (1990) 3 JT 630 : (1990) 4 SCC 594 : (1990) 1 SCR 44 Supp : (1991) 1 SLJ 1 .

(ii) The jurisdiction of the High Court under Article 226 and this Court under

Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.(Refer: Mafatlal Industries Ltd.).

(iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma).

(iv) 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. (Refer: Nivedita Sharma)."

14. Thereafter the Hon"ble Supreme Court further took into consideration the provisions of Article 141 of the Constitution of India and held as follows:--

"35.Article 141. Law declared by Supreme Court to be binding on all courts.- The law declared by the Supreme Court shall be binding on all courts within the territory of India.

36. In Executive Engineer, Southern Electricity Supply Company of Orissa Limited(SOUTHCO) this Court observed that it should only be for the specialized tribunal or the appellate authorities to examine the merits of assessment or even the factual matrix of the case.

In Chhabil Dass Agrawal this Court held that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

In Cicily Kallarackal this Court issued a direction of caution that it will not be a proper exercise of the jurisdiction by the High Court to entertain a writ petition against such orders against which statutory appeal lies before this Court.

In view of Article 141(1) the law as laid down by this Court, as referred above, is binding on all courts of India including the High Courts."

15. The aforesaid exposition of law makes it abundantly clear that where an effective alternative remedy is available to the aggrieved person, a writ petition should not be entertained.

16. Like in M/s. Indian Technomac Company Ltd. case (supra), this petition also appears to be aimed at to give a slip to law for the reason that the petitioner has to deposit the tax liability alongwith interest payable as assessed and penalty, if any imposed in terms of section 45(5) of the H.P. VAT Act, 2005, which clearly provides that no appeal would be entertained unless it is accompanied by a statutory proof of the payment of tax including interest payable alongwith penalty, if any subject to the exception provided by proviso to sub-section (5) of section 45 of H.P. VAT Act, 2005.

17. Having said so, we are of the considered view that the writ petitioner has not only an alternative and efficacious, rather a proper remedy under the provisions of H.P. VAT Act, 2005 and therefore, the present petition is not maintainable. Accordingly, the same is dismissed in limine. However, it is made clear that the observations made hereinabove shall not cause any prejudice to the petitioner in case it intends to file an appeal(s) before the prescribed authority and the period spent by the petitioner for prosecuting this petition shall be excluded by the appellate authority while computing the period of limitation.

18. In view of the aforesaid discussion, the writ petition is dismissed in limine alongwith all pending application(s), if any. The parties are left to bear their own costs.