IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 28.2.2007

CORAM:

THE HON'BLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

W.P.No.16331 of 2003

Fisher Xomox Sanmar Ltd.,
(Formerly known as Xomox Valves India Ltd.)
147, Karapakkam Village
Chennai - 600 096.
rep. by its Director
Mr.Vijay Sankar. .. Petitioner

Vs

The Assistant Commissioner
of Income Tax, Company Circle II(1)
Chennai-600 034. .. Respondent

Petition under Article 226 of the Constitution of India for the issue of a writ of Certiorari to call for the records in GIR.No.FX2-020, dated 2.6.2003 on the file of the respondent for the assessment year 1993-94 and to quash the same.

For Petitioner : Mr.Ramachandran
Senior Counsel
for M/s.Anitha Sumanth

For Respondent : Mrs.Pushya Sitaraman
Sr.Standing Counsel (IT)

O R D E R

(Order of this Court was made by P.D.DINAKARAN,J.)

This is a typical case of exploiting the constitutional remedy of judicial review under Article 226 of the Constitution of India, thereby evading the payment of Rs.10,05,70,539/- towards tax and interest payable for the assessment year 1993-94, without resorting to the regular statutory appeal under the provisions of the Income Tax Act (for brevity, "the Act"), against the impugned order dated 2.6.2003 passed by the respondent holding that the

reopening of assessment under Section 147 of the Act is justified and that the income of the petitioner has escaped regular assessment under Section 143 of the Act.

2.1 Brief facts of the case are: The petitioner company, originally known as Xomox Valves India Limited, and after the sanction of the scheme of amalgamation, called M/s.Fisher Xomox Sanmar Limited, filed its return for the assessment year 1993-94 which was completed under section 143(3) of the Act.

2.2. Then, the Department issued a notice under Section 148 of the Act for reassessment stating that the income had escaped assessment on the basis of transfer of excess assets, etc., as a result of amalgamation and required the petitioner to file a return of income for which the petitioner informed the Department to treat the original return as a return pursuant to the notice under Section 148 of the Act.

2.3. However, the petitioner approached this Court in W.P.No.10065 of 2003 for issue of a writ of Mandamus forbearing the respondent from making assessment under Section 147 read with Section 143 of the Act, on the ground that the respondent had not recorded reasons for reassessment in writing. Under such circumstances, this Court by order dated 31.3.2003 made in W.P.No.10065 of 2003, directed the Assessing Officer to furnish the reasons and to consider the objections, if any, filed by the petitioner and pass appropriate orders.

2.4. On receiving the reasons for reopening of assessment, vide letter dated 24.4.2003 of the respondent, the petitioner filed a detailed reply on 9.5.2003, objecting the reopening of assessment. According to the petitioner, the amalgamation of Xomas India Limited with Xomoax Valves India Ltd., presently known as Fisher-Xomax Sanmar Limited was pursuant to the scheme which was approved by this Court by its order dated 28.4.1993. As per the scheme of amalgamation, as approved by this Court, the properties and liabilities of Xomax India Limited thus vested and stood transferred to the petitioner Company. In terms of Clause 8 of the Scheme of Amalgamation, every member of Xomax India Limited was entitled to be allowed by the petitioner company one equity share of Rs.10/- for every equity share of Rs.10/- held by the share holders in Xomax India Limited as fully paid up shares. In the return filed by the petitioner for the relevant assessment year and audited accounts of the company filed along with the same, particulars of the scheme of amalgamation had been detailed under Schedule IX of the audited accounts for the relevant assessment year which was filed before the Income Tax Department along with returns on 23.12.1993, pursuant to which the original assessment order was made by the Assessing authority. It was

also submitted by the petitioner that all the facts mentioned in the letter dated 24.4.2003, recording the reasons for reopening of the assessment were admittedly before the assessing authority at the time the original assessment was made on 8.2.1996, and therefore, there is no good and sufficient reason for initiating the proceedings under Section 148 of the Act.

2.5. In any event, it was submitted that the notice dated 30.4.2001 under Section 148 of the Act, having been issued beyond the period of seven years after the close of the assessment year is barred by limitation and therefore, the very initiation of reassessment under Section 147 of the Act is without jurisdiction.

2.6. But, not convinced with the reply dated 9.5.2003, the respondent by proceedings dated 2.6.2003 passed an order of reassessment under Section 147 of the Act demanding balance tax payable with interest to the tune of Rs.10,05,70,539/- for the assessment year 1993-94, of course reserving their right to initiate penalty proceedings under Section 271(1)(c) of the Act separately. Aggrieved by the said proceedings dated 2.6.2003, the petitioner has filed the above writ petition.

3. The core contention of Mr.Ramachandran, learned senior counsel for the petitioner is that the very initiation of impugned proceedings is barred by limitation and therefore, the order of reassessment made under Section 147 of the Act is without jurisdiction and in which case, the petitioner is entitled to seek the relief as prayed for.

4.1. Per contra, the respondent Revenue in their detailed counter affidavit had stated that the initiation of the proceedings for reassessment is well within the time as per Section 149 of the Act, as in force during the relevant assessment year 1993-94, which reads as under:

> "149. Time limit for notice.--(1) No notice under section 148 shall be issued for the relevant assessment year,--
>
> (a) in a case where an assessment under sub-section (3) of section 143 or section 147 has been made for such assessment year,--
>
> (i) if four years have elapsed from the end of the relevant assessment year, unless the case falls under sub-clause (ii) or sub-clause (iii) ;
>
> (ii) if four years, but not more than seven years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped

assessment amounts to or is likely to amount to rupees fifty-thousand or more for that year ;

(iii) if seven years, but not more than ten years, have elapsed from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to more than rupees one lakh or more for that year ;

(b) in any other case,--

(i) if four years have elapsed from the end of the relevant assessment year, unless the case falls under sub-clause (ii) or sub-clause (iii) ;

(ii) if four years, but not more than seven years, have elapsed from the end of the relevant assessment year, unless the income charegeable to tax which has escaped assessment amounts to or is likely to amount to rupees twenty-five thousand or more for that year ;

(iii) if seven years, but not more than ten years, have elasped from the end of the relevant assessment year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year.

Explanation.--In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section.

(2) The provisions of sub-section (1) as to the issue of notice shall be subject to the provisions of section 151.

(3) If the person on whom a notice under section 148 is to be served is a person treated as the agent of a non-resident under section 163 and the assessment, reassessment or recomputation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year."

(emphasis supplied)

4.2. According to the respondent, regular assessment, in the instant case, was reopened and notice under Section 148 of the Act was issued on 31.5.2001, invoking sub-clause (iii) of Section 149 (a) of the Act referred to above. Clauses (a) and (b) of Section 149 were substituted by the Finance Act, 2001 and came into force

with effect from 1.6.2001. But, in the instant case, the notice under Section 148 of the Act was issued on 31.5.2001 itself, i.e., prior to the commencement of the amended provisions. Therefore, the unamended provision of Section 149, which was in force prior to 1.6.2001 is alone applicable to the instant case. Hence, it is contended that the initiation of the proceedings under Section 148 of the Act is well within the time.

4.3. In any event, on merits, it is contended by the learned standing counsel for the respondent that the share holding pattern of M/s.Xomax Valves (I) Limited changed many times as upto 31.3.1991, it had a team of 19 shareholders, between 27.2.1992 to 31.3.1992, it had three shareholders and between 1.4.1992 to 31.12.1992, it was reduced to only one major shareholder M/s.Xomox (I) Ltd and its six nominees. Therefore, it is contended by the Revenue that the case of the petitioner is a cross merger between the M/s.Xomax India Ltd., and M/s.Xomas Valves India Ltd., and these facts are not disclosed by the assessee during the course of original assessment proceedings under Section 143(3) of the Act. These facts as noted by the Assessing Officer, as a result of detailed enquiry, after the completion of the assessment proceedings under Section 143(3) of the Act, reveal that the old theory of merger appears to be a transaction to avoid capital gain as well as regular tax.

4.4. It is also contended that even though the petitioner forwarded the scheme of amalgamation approved by this Court on 28.4.1993 along with the returns, the material details as to the exchange value of the shares were not furnished, and unless such exchange value of shares is furnished, the petitioner is not entitled to claim that it furnished all the material facts relating to the amalgamation along with the return, which necessitated the Revenue to invoke the reassessment proceedings for the escaped income.

4.5. In any event, it is contended that the material details as to the exchange value of the shares are all disputed facts which cannot be gone into under judicial review invoking Article 226 of the Constitution of India and therefore, the writ petition is not maintainable in law.

5. Of course, the petitioner filed a reply affidavit dated 17.12.2003, reiterating their claim that the revenue failed to furnish the details originally and then the petitioner approached this Court in W.P.No.10065 of 2003, wherein this Court by order dated 31.3.2003, directed the Assessing Officer to furnish the reasons and to consider the objections, if any, filed by the petitioner and pass appropriate orders.

6. In the light of the above conflicting contentions, we propose to decide

(i) whether the reassessment proceedings made under Section 147 of the Act is barred by limitation and consequently, the impugned proceedings dated 2.6.2003 is without jurisdiction? and

(ii) to what relief the petitioner is entitled to?

7.1. Issue: (i) - Whether the reassessment proceedings made under Section 147 of the Act is barred by limitation and consequently, the impugned proceedings dated 2.6.2003 is without jurisdiction?

7.2. Concededly, the impugned proceedings relate to the assessment year 1993-94 and the petitioner has submitted their return on 31.12.1993 and the assessment under Section 143(3) of the Act was completed on 8.2.1996, after furnishing of the scheme of amalgamation approved by this Court on 28.4.1993, but, Mr.Ramachandran, learned senior counsel for the petitioner, even before this Court today, could not satisfy us that the petitioner has furnished the exchange shares value along with the returns for the assessment year 1993-94. On the other hand, it is not in dispute that the scheme of amalgamation approved by this Court on 28.4.1993, does not contain the material details as to the exchange share value pursuant to the amalgamation.

7.3. Moreover, the reassessment notice was issued on 31.5.2001, but Section 149 was amended only w.e.f 1.6.2001 and therefore, the pre-amended provision of Section 149 referred to above is applicable and in which case, we have no hesitation to hold that the issuance of notice for reassessment under Section 148 is well within the time as per clause (iii) of Section 149(a) of the Act. Hence, the contention that the impugned reassessment is barred by limitation and suffers for want of jurisdiction fails.

8.1. Issue (ii) - To what relief the petitioner is entitled to?

8.2. When the petitioner has concededly not furnished the relevant materials as to the exchange share value, the same is a disputed question of fact, which, in our considered opinion, cannot be gone into in judicial review exercising the power conferred under Article 226 of the Constitution of India. On the other hand, against the order dated 2.6.2003 a statutory appeal lies to the Commissioner of Income Tax (Appeals).

8.3. The remedy under Article 226 by way of judicial review is purely a discretion and where the petitioner fails to avail the

effective statutory alternative remedy within the prescribed time due to his own fault, he cannot be permitted to urge that as a ground to exercise the discretion conferred under Article 226 of the Constitution of India in his favour, vide A.V.Venkateswaran v. R.S.Wadhwani, AIR 1961 SC 1506.

8.4. In the instant case, it is not a mere exercise of discretion conferred under Article 226 of the Constitution of India, but it is a matter which revolves on the disputed question of fact relating to the exchange share value pursuant to the scheme of amalgamation relied on by the petitioner. In which case, the refusal to exercise the discretion cannot be complained as grossly erroneous.

8.5. Again in Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 =AIR 1983 SC 603, a Bench of Three Judges of the Apex Court held that where efficacious statutory alternative remedy is available in the statute by way of an appeal and second appeal under the Sales Tax Act, and the petitioner failed to avail relief in the appeals, the writ petition is not maintainable in law. In the said decision, it is held that:

> "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 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."
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> (emphasis supplied)

8.6. The same view is reiterated by another Bench of Three Judges in CCE v. Dunlop India Ltd., (1985) 1 SCC 260 = AIR 1985 SC 330 in the following words:

> "Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of the Constitution. But then the Court must have good and

sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are available are not such matters."

(emphasis supplied)

8.7. Following the ratio laid down in:

i.G.Veerappa Pilla v. Raman and Raman Ltd., AIR 1952 SC 192;

ii.Union of India v. T.R.Varma, AIR 1957 SC 882;

iii.C.A.Abraham v. ITO, AIR 1961 SC 609;

iv.Titaghur Paper Mills Co. Ltd. v. State of Orissa, AIR 1983 SC 603;

v.Asst. Collector of Central Excise v. Dunlop India Ltd., AIR 1985 SC 330;

vi.Sheela Devi v. Jaspal Singh, AIR 1999 SC 2859; and

vii.A.Venkatasubbiah Naidu v. S.Chellappan, 2000 (7) SCC 695,

a Division Bench of this Court in Dr.K.Nedunchezhian v. Deputy CIT, [2005] 279 ITR 342, held that when there is an alternative remedy, it may not be proper for this Court to invoke Article 226 of the Constitution of India and the above principles apply with great force in tax proceedings.

8.8. Of course, Mr.Ramachandran, learned Senior Counsel appearing for the petitioner brought to the notice the recent decision of the Apex Court in State of H.P. & Ors. v. Gujarat Ambuja Cement Ltd., JT 2005 (6) SC 228, wherein the Apex Court held that writ petition filed by the assessee and allowed by the High Court is maintainable and valid. But, a careful reading of the said decision makes it clear that a relief under Article 226 of the Constitution of India can be granted in spite of the availability of alternative remedy under the statute, only based on undisputed facts, but when the High Court finds that factual disputes are involved it would not be desirable to deal with them in a writ petition. In Paragraphs 15, 16 and 17 of the said decision, it is held as follows:

"15. If, as was noted in Ram and Shyam Co. v. State of Haryana & Ors., AIR 1985 SC 1147, the appeal is from "Caesar to Caesar's wife" the existence of alternative

remedy would be a mirage and an exercise in futility. In the instant case the writ petitioners had indicated the reasons as to why they thought that the alternative remedy would not be efficacious. Though the High Court did not go into that plea relating to bias in detail, yet it felt that alternative remedy would not be a bar to entertain the writ petition. Since the High Court has elaborately dealt with the question as to why the statutory remedy available was not efficacious, it would not be proper for this Court to consider the question again. When the High Court had entertained a writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court's reasoning for entertaining the writ petition is found to be palpably unsound and irrational. Similar view was expressed by this Court in First Income Tax Officer, Salem v. M/s.Short Brothers (P) Ltd., 1966 (3) SCR 84, and State of U.P. v. Indian Hume Pipe Co. Ltd., 1977 (2) SCC 724. That being the position, we do not consider the High Court's judgment to be vulnerable on the ground that alternative remedy was not availed. There are two well-recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

16. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute. It was noted by this Court in L. Hirday Narain v. ITO, AIR 1971 SC 33 that if the High Court had entertained a petition despite availability of alternative remedy and

heard the parties on merits it would be ordinarily unjustifiable for the High Court to dismiss the same on the ground of non-exhaustion of statutory remedies; unless the High Court finds that factual disputes are involved and it would not be desirable to deal with them in a writ petition.

17. At this juncture, it would be appropriate to take note of the few expressions in Reg v. Hillingdon, London Borough Council, 1974 (1) QB 720, which seems to bring out well the position. Lord Widgery, C.J. stated in this case:

> "It has always been a principle that certiorari will go only where there is no other equally effective and convenient remedy. …"
> The statutory system of appeals is more effective and more convenient than an application for certiorari and the principal reason why it may prove itself to be more convenient and more effective is that an appeal to [say] the Secretary of State can be disposed of at one hearing. Whether the issue between them is a matter of law or fact or policy or opinion or a combination of some or all of these … whereas of course an application for certiorari is limited to cases where the issue is a matter of law a nd then only it is a matter of law appearing on the face of the order."
>
> "An application for certiorari has however this advantage that it is speedier and cheaper than the other methods and in a proper case therefore it may well be right to allow it to be used…. I would, however, define a proper case as being one where the decision in question is liable to be upset as a matter of law because on its face it is clearly made without jurisdiction or in consequence of an error of law."
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> (emphasis supplied)

8.9. In the instant case, concededly, the very reassessment was initiated for the escaped assessment as the petitioner/assessee has not furnished the exchange share value pursuant to the amalgamation along with his return even though they had enclosed the scheme of amalgamation approved by the Court by order dated 28.4.1983. What is exchange share value is a material fact, which goes to the root of the issue and it is factually disputed, which in our considered opinion, cannot be gone into under Article 226 of the Constitution of India. Hence, the petitioner is not entitled for the relief as prayed for in the above writ petition.

9. Before closing our pen, we have no hesitation to add that it is matter of regret and great pity that by way of interim orders, great public mischief has been committed restraining the respondent from collecting the public revenue to the tune of Rs.10 Crores due since assessment year 1993-94, which jeopardizes and prejudices the welfare measures of the Government and we feel greatly disturbed in this regard.

The writ petition is therefore, dismissed. No costs. Consequently, W.P.M.P.No.20433 of 2003 is closed.

sasi

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To:

The Assistant Commissioner
of Income Tax, Company Circle II(1)
Chennai-600 034.

+ 1 cc to Mrs. Pushya Sitaraman, Sr Standing Counsel for Income Tax SR 12490

+ 1 cc to Ms. Anitha Sumanth, Advocate SR 12200

KV(CO)
SR/27.3.2007

W.P.No.16331 of 2003