IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.10.2015

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

W.P.No.31498 of 2015
and M.P.No.1 of 2015

Tvl. M.K. Agencies
Petitioner]
Rep. by its Proprietor
No.28/18A West Jones Road
Saidapet Chennai - 600 015 ..Petitioner

Vs

1 The Appellate Deputy Commissioner (CT)
Chennai Central Division
Greams Road Chennai - 600 006

2 The Assistant Commissioner (CT)
Saidapet Assessment Circle
16/55 Dr.Govindan Road
West Mambalam Chennai - 33 ..Respondent

Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified mandamus to call for the records of the Second Respondent in the impugned order in TIN/33336223624/2013-14 dated 02.03.15 as it is violative of Section 27 of the TNVAT Act 2006 and quash the same followed by the Circular No.7/2014 (BB1/3589/2014) dated 03.02.2014 issued by the Commissioner of Commercial Taxes and also against the principles of natural justice and further direct the Second Respondent to pass orders in accordance with law after granting an opportunity of being heard.

For Petitioner : Mr.K.Vaitheeswaran
For Respondents : Mr.V.Haribabu, AGP(T)

O R D E R

Heard the learned counsel for the petitioner and Mr.V.Haribabu, learned Additional Government Pleader (Taxes), who took notice for the respondents and with their consent, the main writ petition itself is taken up for disposal.

2. The writ petition is filed questioning the order of the 2nd respondent dated 02.03.2015 and for a direction to the 2nd respondent to pass orders in accordance with law after granting an opportunity of being heard.

3. The petitioner is a registered distributor of M/s PEPSICO India Holdings Pvt. Limited, discharging applicable VAT and filing monthly returns regularly. On 28.11.2014, the petitioner received a notice, proposing to levy tax on the discount received at 14.5%, for which, a reply dated 15.12.2014 was submitted by the petitioner on merits and also requesting to provide an opportunity of being heard before passing any orders. However, the 2nd respondent, by order dated 21.01.2015 has passed the assessment order for the year 2013-14, confirming the proposal and also by imposing penalty. The petitioner, by their letter dated 02.02.2015, requested the 2nd respondent to adduce reasons for the tax liability in the said order, since all figures were wrongly mentioned. However, the 2nd respondent, without giving any reasoning and without affording an opportunity of being heard, passed the impugned order dated 02.03.2015 by reducing the tax liability and also penalty with reference to assessment year 2013-14 only. Aggrieved over the said order, the petitioner was advised to file an appeal. However, from the month of March 2015, due to the ill health of the petitioner, he was undergoing treatment for five months. But, on 20.05.2015, the petitioner, filed an appeal before the appellate authority by remitting 25% of the disputed tax. On 04.06.2015, the appellate authority, stating that since the appeal was filed after a delay of 59 days, as he is empowered to condone only 30 days delay, returned the appeal as barred by limitation. Hence, the petitioner is before this Court.

4. According to the learned counsel for the petitioner, the impugned assessment order was passed without giving an opportunity of being heard, patently, violating the instructions issued by the Commissioner of Commercial Taxes vide Circular dated 03.02.2014, which clarifies that no order of revision should be made without affording an opportunity to the dealer as provided under Sections 22, 25 and 27 of the Act.

5. That apart, the learned counsel for the petitioner, with respect to return memo of the appellate authority dated 04.06.2015, referring to various decisions of the Hon'ble Supreme Court and also the Judgments of the various High Courts including this Court submitted that the delay can be condoned when it is substantiated with medical certificate proving the illness of the assessee during the relevant period. He would further submit that the Hon'ble Apex Court in Viijayanatabai Baburao Patil vs. Shantaram Baburao reported in (2002) ITR 798 (SC) has observed that in exercising discretion under Section 5 of the Limitation Act, the Courts should adopt a pragmatic

approach and a distinction must be made between a case where the delay is inordinate and a case where the delay is of a few days. He would further add that the Hon'ble Supreme Court in the case of Collector of Land Acquisition vs Mst. Katiji (1987) 167 ITR 471 (SC) has held that the legislature has conferred the power to condone the delay by enacting Section 5 of the Limitation Act, 1963, in order to enable the Courts to do substantial justice to parties by disposing of the matters on "merits". The expression "sufficient cause" employed in the Legislature is adequately elastic to enable the Courts to apply the law in a meaningful manner which sub serves the ends of justice-that being the life purpose of the existence of the institution of Courts. By citing the Judgment rendered by this Court in the case of S.Anthony vs. Registrar, TNTST and another (2009) 20 VST 654, the learned counsel for the petitioner submitted that the delay can be condoned when it is supported by medical evidence.

6. The learned counsel for the petitioner would further submit that challenging the correctness of the assessment order in question the petitioner preferred appeals before the appellate authority, however with a delay of more than 59 days. The learned counsel for the petitioner would further submit that the delay was occurred in view of fact that the petitioner was suffering viral hepatitis, as a result, the appeal was filed belatedly after a period of 59 days. But, the appellate authority, declining to condone the delay beyond a period of 30 days, return the appeal by memo dated 04.06.2015 as barred by limitation. He would further submit that the delay was occurred due to the ill health of the petitioner and not due to certain malafide reason. Therefore, according to the learned counsel for the petitioner, the delay has to be condoned and the matter has to be heard by the appellate authority on merits.

7. The learned Additional Government Pleader (Taxes), appearing for the respondents, on the other hand submitted that the revised assessment order was passed after considering the reply filed by the petitioner and the assessing officer has correctly reduced the tax and penalty and assessed only for the assessment year 2013-14. He would further add that since the appeal was filed beyond the limitation period, the appellate authority has rightly rejected the appeal.

8. This Court heard the submissions made by the learned counsel on either side and perused the materials available on record.

9. Admittedly, the petitioner filed appeals belatedly beyond the period of 60 days (30+30). As per Section 51(1) of the TNVAT Act, any person objecting to an order passed by the assessing authority within a period of 30 days from the date

on which the order was served on him can file an appeal. As per the first proviso to sub section (1) of Section 51 of the Act, the assessee can file an appeal before the appellate authority within a further period of 30 days and such appeal can be admitted if the assessee has sufficient cause for not presenting the appeal within the first 30 days. As far as the case in hand are concerned, the petitioner has filed the appeal after a period of 119 days (i.e, 60+59). Admittedly, the appellate authority having found that the petitioner has filed the appeal belatedly and also violated the 2nd proviso to Section 51 (1) of the Act, which stipulates that no appeal shall be entertained unless the same is accompanied by satisfactory proof of the payment of the tax admitted by the appellant to be due or of such instalments thereof as might have become payable, as the case may be, and 25% of the difference of the tax assessed by the assessing authority and the tax admitted by the appellant and since the petitioner has not paid the same within a period of 30 days and also within a a further period of 30 days, returned the appeal vide memo dated 04.06.2015.

10. In view of the fact that the petitioner has filed the appeal with 59 days delay and the reason for the said delay was due to the ill health of the petitioner, which is supported by the Certificate given by the Doctor annexed in the typed set of papers and having been satisfied with the reasons stated in the affidavit filed in support of the writ petition and in the interest of justice, and considering the fact that one of the ground raised by the petitioner in this writ petition is that there is violation of principles of natural justice to the extent of not providing an opportunity of personal hearing before passing the assessment order, this Court is of the view that the delay may be condoned and the appellate authority may be directed to entertain the appeal since this Court is of the considered view that the matter has to be dealt with by the appellate authority on merits.

11. In view of the same, by condoning the delay, this Court permits the petitioner to re-present the appeals before the appellate authority within a period of two weeks from the date of receipt of a copy of this order and on such re-presentation, the appellate authority is directed to entertain the same and pass orders on merits and in accordance with law. The writ petition is disposed of accordingly. No costs. Connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

To

1 The Appellate Deputy Commissioner (CT)
Chennai Central Division
Greams Road Chennai - 600 006

2 The Assistant Commissioner (CT)
Saidapet Assessment Circle
16/55 Dr.Govindan Road
West Mambalam Chennai - 33

+1cc to Spl Government Pleader (Taxes) Sr.54217)
+1 cc to Mr.K.Vaitheeswaran,Advocate(sr.54194)

W.P.No.31498 of 2015

skv(co)
cp 26/10/2015