IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.12.2015

CORAM:

THE HON'BLE MR. JUSTICE R. MAHADEVAN

W.P.No.34103 of 2015
and M.P.No.1 of 2015

M/s.K.Rathinavel Mudaliar and R.Selvaraj Mudaliar
Rep by its Partner S.Ravichandran
No.97-99 Bazaar Street ,Chidambaram [Petitioner]

Vs

The Commercial Tax Officer
Chidambaram 1 Assessment Circle
West Car Street
Chidambaram 608 001 [Respondent]

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of certiorari to call for the records of the respondent in TIN 33114440012/2012-13 quash the impugned order dated 9.4.2015.

For petitioner : Mr.V.Sundareswaran
For respondent : Mr.S.Kanmani Annamalai, AGP

O R D E R

Heard the learned counsel appearing for the petitioner and Mr.S.Kanmani Annamalai, learned Additional Government Pleader for the respondent.

2. This writ petition has been filed under Article 226 of the Constitution of India challenging the order of the respondent in TIN 33114440012/2012-13 dated 9.4.2015.

3.1 The petitioner is a partnership firm, carrying on the business in II Schedule goods under the Act as dealer of M/s Bharat Petroleum Corporation Limited for Kerosene, Petrol for Public Distribution System and diesel. The sales tax return with respect to Kerosene, Petrol and Diesel had to be returned in form J and the other goods namely Oil had to be returned in Form I under the Act. It is the case of the petitioner that one Mr.Kamalakumar, who was authorised person, incharge of the entire activities of the firm, fell sick due to renal failure and was indisposed of and finally expired on 26.12.2012, after prolonged illness. During the said illness, the entire commercial activities of the firm viz., filing of monthly returns and payment of tax were taken care of by the Staff resulting in chaos, confusion and deceit and fraud on the firm, which was detected only in 2013 and they were dismissed from service.

3.2 Further, according to the petitioner, the sale of goods such as Petrol, Kerosene and Diesel, which are II Schedule goods are liable to be taxed on the turnover, after deducting the turnover on which tax was paid at the earlier stage. Though all the purchases were accounted for in the books of accounts, they were omitted to be accounted for in the return in form I by the staff. The form J returns does not contain the column for disclosing the purchases of Kerosene, Petrol and diesel but only sales as prescribed under Section 3(5) read with rule 7(1)(b) of Rules. Hence, the petitioner was not able to declare the same.

3.3 According to the petitioner, since they are holding license for the distribution of Kerosene under the Public Distribution System, the sale of Kerosene is exempt and not liable to tax. Further, according to them, after the demise of Late Kamalakumar, the partnership firm was reconstituted by S.Ravichandran, S/o Mr.Selvaraj Mudaliar and Ms.Pavithra Kamalakumar, D/o Late Kamalakumar and the business continued till assessment year 2012-13. While the matter stood thus, the respondent had issued notice dated 09.03.2015 on the dissolved firm, which was served on "gunboy", without verifying whether he was authorized under Rule 19 of the Act to receive any notice, proposing to make revision of assessment under Section 27 of the TNVAT Act, on the basis of undisclosed purchases made by the petitioner from BPCL collected from the web-site of the commercial tax department, along with penalty. It is the further case of the petitioner that after detection of the deceit and fraud committed by the erstwhile staff, the return in form J for the entire year disclosing the sales of the II schedule goods were filed on 19.06.2013 and annual revised return in form I-1 was filed on 17.06.2013 even before ignition of revision of assessment or any audit with available records as on the said date.

3.4 According to the petitioner, since they were not aware of the proceedings regarding the revision of assessment, no objection was filed and the respondent passed the impugned order dated 09.04.2015, which was served on the staff one Mr.Muruganandam, without verifying the fact as to whether he is authorized to receive order of assessment. When the respondent called the petitioner to remit the amount of tax due and also penalty, the petitioner came to understand that the respondent had made a revision of assessment without affording an opportunity of personal hearing. That apart, according to the petitioner, imposition of penalty under Section 27(3) of the Act is not attracted as per the decision of the Division Bench of this Court reported in 104 STC 61.

Aggrieved over the impugned order dated 09.04.2015, the petitioner is before this Court.

4. The learned counsel for the petitioner would submit that the respondent has failed to follow the procedure as contemplated under Rule 19 of the Act for service of notice and the assessment order and hence the impugned order is liable to be quashed. Further, according to the learned counsel for the petitioner, unless there is any enabling provision under the Act to tax the dissolved partnership firm, the impugned order is bad and not enforceable. That apart, according to the learned counsel, the respondent ought to have seen that when the petitioner is a re-constituted firm upon the death of Kamalakumar, there is no jurisdiction for the respondent to make any assessment on the re-constituted firm, in the absence of any enabling provision under the Act. Besides, according to the learned counsel, sale of kerosene falling under Code No.2072 is not taxable at the hands of the petitioner, since it is for the supply in the public distribution system. Thus, according to the learned counsel for the petitioner, the impugned order of the respondent is contrary to law and hence the same is liable to be set aside.

Based on these, the learned counsel for the petitioner seeks quashing of the impugned order.

5. The learned Additional Government Pleader, on the other hand would submit that only after service of notice, the impugned order came to be passed and hence there is no illegality committed by the respondent and the impugned order is sustainable.

6. At this juncture, learned counsel for the petitioner would submit that if one more opportunity is given to the petitioner, they will file necessary objections and produce all documentary evidences before the respondent and on considering the same, necessary orders may be directed to be passed by the respondent.

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

8. There is no illegality caused by the assessing authority while passing the assessment order since notice was served earlier and hence only after affording sufficient opportunity to the petitioner, the impugned order came to be passed. But, according to the petitioner, the active partner Late Kamalakumar, suddenly passed away, which led the petitioner to refrain from taking part in the administration of the business. Hence, the petitioner was not able to file proper reply and produce documentary evidences to the respondent and hence on their failure to do the same, the assessment order came to be passed. However, the learned counsel for the petitioner though raised various grounds on legality, seeks indulgence of this Court for providing them an opportunity for producing documentary evidences along with detailed reply to the notice already issued. Since the partner Mr.Kamalakumar suddenly passed away, this Court is inclined to consider the request made by the learned counsel for the petitioner in the interest of justice.

9. Hence, the impugned order dated 09.04.2015 is set aside and the matter is remitted back to the respondent for passing appropriate orders, after permitting the petitioner to file all the documentary evidences as well as reply to the notice already issued. It is made clear that the petitioner shall file the reply and produce all documentary evidences within a period of two weeks from the date of receipt of a copy of this order and on such filing, after affording due opportunity to the petitioner, appropriate orders be passed by the respondent on merits and in accordance with law. It is needless to mention that if the petitioner fails to avail this opportunity, it is open to the respondent to pass appropriate orders on merits.

The writ petition is disposed of accordingly. No costs. Connected miscellaneous petition is closed.

Sd/
ASSISTANT REGISTRAR(CS-IV)

/TRUE COPY/

SUB-ASSISTANT REGISTRAR

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To

The Commercial Tax Officer
Chidambaram 1 Assessment Circle
West Car Street
Chidambaram 608 001

+1 CC to MR.V.Sundareswaran Advocate. SR.NO. 66134

W.P.No.34103 of 2015

CO-MG
JD 15/12/2015