IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated 03.03.2015

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THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

W.P.Nos.3862 and 3863 of 2015

M/s.Salem Tollways Limited ..Petitioner in W.P.No.3862/15
M/s.Kumarapalayam Tollways Limited ..Petitioner in W.P.No.3863/15
both
Rep. By its Authorized Signatory-S.Narayanan
No.7, Indira Nagar
Vasavi College (PO)
Erode-638316

Vs.

The Assistant Commissioner (CT)
Chithode Assessment Circle
Erode ... Respondent

Prayer in W.P.No.3862/15:- Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of certiorari to call for the records om the file of the respondent in his proceedings in TIN 33753063812/06-07 dated 17.04.2014 and quash the same.

Prayer in W.P.No.3863/15:- Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of certiorari to call for the records om the file of the respondent in his proceedings in TIN 33663063813/06-07 dated 17.04.2014 and quash the same.

For Petitioner : Ms.R.Hemalatha

For Respondent : Mr.Manoharan Sundaram, AGP (T)

COMMON ORDER

The petitioner has come forward with these writ petitions challenging the proceedings dated 17.04.2014 issued by the respondent and to quash the same.

2. Petitioners are the assessees on the file of the respondent. The petitioners are engaged in the business of works contractor. Petitioners filed Form V on 15.02.2007 and respondent has passed order determining the Input Tax Credit available to the petitioners for closing stock held on 31.12.2006 and the respondent has passed proceedings dated 30.04.2007 determining the input tax

credit available to petitioners for closing stock held on 31.12.2006 in a sum of Rs.47,35,392/- and Rs.39,03,542/- respectively and further stated that this credit shall be availed before 30.06.2007 and the unavailed creidt in the month of July 2007 shall lapse to the Government and passed self-assessment order u/s. 22 (2) of Tamil Nadu Value Added Tax Rules, 2006 dated 29.07.2008 and 22.06.2009. On 30.06.2010 the Enforcement wing officers made suprise inspection at the petitioners place of business. Petitioners deposed that they have been entrusted with four laning of salem Kumarapalayam Section of NH 47 by National Highways Authority of India on Bot(Built operate and Transfer) basis stating that entire work is given to sub contractor M/s. IVRCL infrastructure and Projects Ltd and the said sub-contractor is a registered dealer in the books of Assistant commissioner, Guindy Assessment Circle in TIN.No.33530903743. Sub contractor is the dealer who is reporting all the transactions for the execution of works contract and paying tax in their respective assessment circle on behalf of the petitioners. Petitioners have not made any purchase of material to execute the said shifting work because the same work has been given to the sub contractor. In that turnover NHAI deducted TDS and the amount has been directly remittted to the concerned assessment circle by NHAI. Petitioners have availed input tax credit on the closing stock held on 31.12.2006 for Rs.47,35,392/- and Rs.39,03,542/- as per the order given in Form V by the Assessing Officer. On 17.04.2014 the respondent has issued a notice in TIN Nos.33753063812/06-07 and 33753063813/06-07 stating that the petitioner has been allowed input tax credit of Rs.47,35,392/- and Rs.39,03,542/- for closing stock held as on 31.12.2006 in the proceedings dated 30.04.2007 and 02.05.2007 respectively. On further verification of records it is found that the petitioners had kept the stock for two months. They have neither branch nor godown as per registration granted. In the same place there is another registered dealer is carrying on business where there is no sufficient place to keep huge stock. According to Section 10 of TNGST Act for proving any transaction which is not liable to tax, the burden of proof lies on the petitioner. It is very clear that the respondent has made his mind to invent reasons for the proposed revision when the claim made by the petitioners are in order and order has been passed as early as on 30.04.2007 and 02.05.2007. According to Rule 10(3)(b) of TNVAT Rules, 2007 the petitioner relating to Input tax credit on the stock of goods held on 31.12.2006, now the respondent cannot issue a notice dated 17.04.2014 for the proposed revision after a lapse of five years which is against Section 84(1) of TNVAT Act, 2006. The main contention of the petitioners is that since the respondent has made his mind to to revise the assessment after a lapse of 5 years as it is time barred the petitioners challenged the impugned proceedings of the respondent dated 17.04.2014 by way of present writ petitions.

3. Heard learned counsel for petitioners and learned Additional Government Pleader (Tax)

4. Learned counsel for petitioners relied on Section 84(of TNVAT Act, 2006 wherein the power to rectify an erro rapparent on the face of the record is extracted below:

> "(1) An assessing authority or an appellate or revising authority (including the Appellate Tribunal) may, at any time within five years from the date of any order passed by it, rectify any error apparent on the face of the record.
>
> Provided that no such rectification which has the effect of enhancing an assessment or any penalty shall be made unless such authority has given notice to the dealer and has allowed him reasonable opportunity of being heard."

Rule 10(3)(b)(viii) of Tamil Nadu Value Added Tax Rules, 2007 states as follows:

> "(viii) the registered dealer shall ordinarily keep all original purchase invoices and connected documents relating to the claim for input tax credit under this Rule, for a period of five years from the date of commencement of the Act and shall produce such documents to the authority for scrutiny, if required."

5. Learned counsel for petitioners relied on the judgment of Hon'ble Apex court reported in 2007(1) CTC 844, Siemens Ltd vs. State of Maharashtra and Others wherein it has been held as follows:

> "10. Although ordinarily a writ court may not exercise its discretionary jurisdiction in entertaining a writ petition questioning a notice to show cause unless the same inter alia appears to have been without jurisdiction as has been held by this Court in some decisions including State of Uttar Pradesh v. Brahm Datt Sharma and Anr. AIR 1987 SC 943, Special Director and Another v. Mohd. Ghulam Ghouse and Another, (2004) 3 SCC 440 and Union of India and Another v. Kunisetty Satyanarayana, 2006 (12) SCALE 262], but the question herein has to be considered from a different angle, viz, when a notice is issued with pre-meditation, a writ petition would be maintainable. In such an event, even if the courts directs the statutory authority to hear the matter afresh, ordinarily such hearing would not yield any fruitful purpose [See K.I. Shephard and Others v. Union of India and Others (1987) 4 SCC 431 : AIR 1988 SC 686]. It is evident in the instant case that the respondent has clearly made up its mind. It explicitly said so both in the counter affidavit as also in its purported show cause.
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> 11. The said principle has been followed by this Court in V.C. Banaras Hindu University and Ors. v. Shrikant [2006 (6) SCALE 66], stating:

"The Vice Chancellor appears to have made up his mind to impose the punishment of dismissal on the Respondent herein. A post decisional hearing given by the High Court was illusory in this case.

In K.I. Shephard & Ors. etc. etc. v. Union of India & Ors. [AIR 1988 SC 686], this Court held :

"...It is common experience that once a decision has been taken, there is tendency to uphold it and a representation may not really yield any fruitful purpose."

12. See also Shri Shekhar Ghosh v. Union of India & Anr. 2006 (11) SCALE 363 and Rajesh Kumar & Ors. v. D.C.I.T. & Ors. 2006 (11) SCALE 409]

13. A bare perusal of the order impugned before the High Court as also the statements made before us in the counter affidavit filed by the respondents, we are satisfied that the statutory authority has already applied its mind and has formed an opinion as regards the liability or otherwise of the appellant. If in passing the order the respondent has already determined the liability of the appellant and the only question which remains for its consideration is quantification thereof, the same does not remain in the realm of a show cause notice. The writ petition, in our opinion, was maintainable.

6. Admittedly, the impugned order dated 17.04.2014 was passed after the lapse of more than five years, wherein the stock was held during the period 2006. The respondent cannot issue a notice for the proposed revision after a lapse of five years which is against Section 84(1) of TNVAT Act, 2006 and Rule 10(3)(b) of TNVAT Rules, 2007 cited supra and furthermore when the worksites are not the additional place of business of the works contractor they need not register such work site as their branch or godown vide circular No.18 of 2014 Q4/7752/2014 dated 08.04.2014. In view of the assessing authority has no jurisdiction to proceed with the matter as five years had already been lapsed and in view of the judgment of the Hon'ble Apex court referred to above, these writ petitions are allowed and the impugned proceedings made in TIN No.33753063812/06-07 and 33753063813/06-07 are set aside. No costs. Connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The Assistant Commissioner (CT)
Chithode Assessment Circle
Erode

+ 2 ccs to M/s. R. Hemalath, Advocate SR.11630

+ 1 cc Government Pleader Sr.11969

W.P.Nos.3862 and 3863 of 2015

PPA(CO)
EU 21.03.2015