

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.08.2016

Date of Reserving the Order	Date of Pronouncing the Order
01.08.2016	04.08.2016

Coram

The Hon'ble Mr.Justice T.S. SIVAGNANAM

W.P.Nos.16087 & 16088 of 2014
&
MP.No.1 of 2014

M/s.Kohinoor Agencies,
Rep., by its Proprietor,
L.Periyasamy,
Kamaraj Salai,
Dindivanam Main Road,
Thattanchavadi,
Puducherry - 605 009.

.... Petitioner in both W.Ps.

Vs

1.The Commercial Tax Officer-IW,
Puducherry.

2.The Appellate Assistant Commissioner (CT),
Commercial Taxes Department,
Puducherry.

... Respondents

Prayer in W.P.No.16087 of 2014 :-This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus, to call for the records on the file of the second respondent in APRR.No.16/PGST/2012-13, dated 30.08.2012, and quash the same as being illegal, invalid and unjustified on facts and law and contrary to the principle of natural justice and further direct the second respondent to pass order afresh and issue such further Writ.

Prayer in W.P.No.16088 of 2014 :-This Writ Petition is filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus, to call for the records on the file of the first respondent in PGST No.101740/2006-07, dated 25.01.2012, and quash the same and further direct the first

respondent to pass order afresh after grant of enquiry and opportunity.

For petitioner .. Mr.R.Senniappan

For Respondent .. Mr.M.Govindaraj G.P., (Pondicherry)
Assisted by
Ms.Reena Ishwariya AGP

C O M M O N O R D E R

Heard Mr.R.Senniappan, learned counsel appearing for the petitioner and Mr.M.Govindaraj, learned Government Pleader (Puducherry), and with the consent on either side, these Writ Petitions are taken up for disposal.

2. The petitioner has filed the Writ Petition in W.P.No.16087 of 2014, praying for issuance of Writ of Certiorarified Mandamus to quash the order passed by the Appellate Assistant Commissioner(CT), dated 30.08.2012. The said order pertains to an appeal filed by the petitioner against the order of assessment, dated 13.02.2009, for the assessment year 2006-07. This appeal memorandum was returned on the ground that he has become functus officio and cannot deal with the matter in the light of the orders passed earlier.

3. In W.P.No.16088 of 2014, the petitioner has challenged the order dated 25.01.2012, which is an order of assessment for the assessment year 2006-07.

4. The facts, which are relevant for the disposal of the Writ Petition, are that the petitioner was carrying on business under the name and style of 'Kohinoor Agencies' doing resale of Petrol, Diesel and Lubricants and it appears that they are chronic defaulters in payment of sales tax and several proceedings were initiated for the other assessment years also. In respect of the subject assessment year, namely, 2006-07, the petitioner was served with a notice of demand, dated 13.02.2009, calling upon the petitioner to pay the tax at the rate of 12% on the turnover of Rs.43,55,05,321/- being a sum of Rs.57,33,431/-. Apart from the tax demand, a separate notice of penalty was also issued on 13.02.2009, directing the payment of penalty of Rs.4,56,58,699/-. The petitioner challenged the same by filing a Writ Petition in W.P.No.5907 of 2009, and an interim order was granted. Subsequently, by order dated 14.06.2009, the Writ Petition was dismissed, wherein it was observed that the petitioner filed a false affidavit before this Court and obtained interim order and since, the appeal was pending, the petitioner was directed to pursue his appeal remedy, however, the petitioner did not pay 25% of the disputed tax to entertain the appeal and therefore, it was rejected by order dated

09.07.2009. As an error occurred in the said order relating to the assessment year, a corrigendum was issued on 15.07.2009, to read the assessment year as 2006-07. In the mean time, the petitioner's registration certificate stood cancelled by order dated 10.11.2009. This was challenged by the petitioner in W.P.No.23549 of 2009 and the Writ Petition was disposed of, giving liberty to the petitioner to file a revision before the revisional authority. Subsequently, the petitioner filed another Writ Petition in W.P.No.23550 of 2009, challenging the order passed by the Appellate Assistant Commissioner, dated 09.07.2009, by which the petitioner's appeal was dismissed for non-compliance of the mandatory pre-deposit. The Writ Petition was disposed of, by directing the petitioner to pay 25% of the disputed tax and if the petitioner makes the payment, the appeal was directed to be taken up for consideration. The petitioner did not comply with the condition and filed a Writ Appeal against the said order in W.A.No.1732 of 2009. The said Writ Appeal was disposed of issuing certain directions.

5. The petitioner complied with the condition imposed by the Hon'ble Division Bench, and consequently, the registration certificate of the petitioner was restored and he commenced his business activities. Consequently, the appeal filed by the petitioner against the assessment order dated 13.02.2009, was taken up on file and the Appellate Authority disposed of the same by order dated 17.10.2011.

6. On a reading of the above order, it is seen that the Appellate Authority was justified in remanding the matter on the ground that the order of assessment was passed without giving reasonable opportunity to cross verify the documents on hand and thereafter, to proceed in accordance with law. On such remand, the Assessing Officer passed orders on 25.01.2012. After discussing the merits of the matter, the Assessing Officer held that the petitioner has completely paid the arrears of tax, as directed by the Hon'ble Division Bench of this Court in W.A.No.1732 of 2009, and took up for consideration only with regard to the levy of penalty under the provisions of the PGST Act, 1967 read with Section 81 of the PVAT Act, 2007, and granted relief to the petitioner.

7. The petitioner being aggrieved by such order, preferred an appeal before the Appellate Assistant Commissioner, Puducherry (CT), which was taken on file as APRR.No.16/PGST/2012-13. The Appellate Authority returned the appeal as not maintainable for the reason that earlier appeal filed by the petitioner against the Assessment order was allowed and remanded and after the remand, the Assessing Officer has passed the fresh order and such order cannot be appealed against to the extent of the findings confirmed by the appellate or the higher authorities or Court. Further, it was pointed out that

the remand is restricted to reassessment or re-examination of certain specified points, and the other points decided by the Appellate Authority or left undecided by it, acquire finality which cannot be disturbed except by recourse to a review under Section 55 or second appeal under Section 36. In this regard, the Appellate Authority placed reliance on the decision of this Court in the case of Easun Engineering Co., vs. Government of Madras reported in (1977) 40 STC 220 and State Trading Corporation of India vs. State of Tamil Nadu reported in (1995) 96 STC 282. The petitioner has questioned the order passed by the Appellate Authority as well as challenged the assessment order, dated 25.01.2012, which is an order, which was passed after the Appellate Authority remanding the matter for fresh consideration by the Assessing Officer, by his order dated 17.10.2011.

8. This Court heard the learned counsels appearing for the parties. The issues which arise for consideration in these Writ Petition, were framed on the following lines:-

i) Whether the petitioner is estopped from challenging the order of assessment, on the ground that, they effected payment of the entire tax, pursuant to the order passed by the Hon'ble Division Bench of this Court.

ii) Whether the order of the Appellate Authority, remanding the matter for fresh consideration, dated 09.07.2009, is an open remand, or, whether the Appeal itself, was restricted only to the levy penalty.

iii) Whether the Assessing Officer, after the order passed by the Appellate Authority, while completing the assessment, by order, dated 25.01.2012, was justified in making observation that the petitioner has already paid the entire tax.

and

iv) Whether the Appellate Authority is justified in rejecting the Appeal Petition, by order, dated 30.08.2012, on the ground that he has become functus officio.

9. The Court elaborately heard the submissions of the learned counsels for the parties on the above issues and perused the materials placed on record, including the copy of the original file, which was circulated.

Discussion and Findings:-

10. The petitioner is sought to be non-suited on the ground that he has paid the entire tax liability as directed by the Hon'ble Division Bench in W.A.No.1732 of 2009. The operative portion of the order of the Hon'ble Division Bench, is

as follows:-

5. After the matter is heard for some time, learned counsel appearing for the appellant states that out of the amount of Rs.57,33,431/- due towards tax arrears, a sum of Rs.20,00,000/- will be paid within a period of one week and the remaining amount will be cleared within one week thereafter and learned counsel requested that the appellant may be permitted to run the petrol bunk after paying a sum of Rs.20,00,000/-.

6. Learned counsel appearing for the respondents has no objection provided some appropriate security is given for the balance amount towards penalty and interest. This submission is also quite legitimate.

7. In the circumstances, the appellant will deposit a sum of Rs.20,00,000/- (Rupees Twenty Lakhs only), within a period of one week from today, whereupon the petrol bunk will be permitted to be restarted and the remaining amount will be cleared within one week thereafter. The respondents will have a charge on the petrol bunk for the balance amount of Rs.82,18,566/- which is due towards penalty as per the order dated 13th February, 2009 and that charge will continue until the appeal filed against the order dated 13th February, 2009, is heard and disposed of. In the event of the amount of Rs.20,00,000/- being not paid within one week of subsequent amount within one week thereafter, it is open to the respondents to revive the order dated 10th November, 2009 and act accordingly.

8. In view of what is stated above, the impugned order passed by the learned Single Judge is substituted by this order and the order dated 10th November, 2009 will stand set aside. The writ appeal stands allowed accordingly. Consequently, the connected miscellaneous petition is closed. However, there shall be no order as to costs.

11. The order of the Hon'ble Division Bench was two fold, firstly the petitioner has to deposit Rs.20,00,000/- within one week from the date of the order i.e., 03.12.2009 and on such deposit, he will be permitted to restart the Petrol bunk and the remaining amount was to be cleared one week thereafter. The respondents were permitted to have a charge of the Petrol bunk for the balance of Rs.82,80,561/- which is due towards penalty as per the order of the assessment, dated 13.02.2009 and the

charge will continue until the appeal filed against the order dated 13.02.2009 is heard and disposed of. If the petitioner does not pay a sum of Rs.20,00,000/- within the time stipulated, it was open to the respondents to revive the order dated 10.11.2009. Thus, on a plain reading of the order of the Hon'ble Division Bench, the petitioner was directed to deposit the money of Rs.20,00,000/- and the use of the expression 'deposit' is very crucial and would be relevant, when it is read along with the consequential directions issued in paragraph 7 of the judgment, wherein the petitioner has been permitted to pursue his appeal. It is relevant to note that the charge on the petrol bunk was directed to be retained till the appeal is disposed, which was preferred by the petitioner against an order of assessment, dated 13.02.2009. Therefore, the payments effected by the petitioner pursuant to the judgment of the Hon'ble Division Bench can at best be taken to be a conditional order to enable the petitioner to start the business and contest the appeal and it cannot be construed that the petitioner has accepted his tax liability and paid the amount. If such is the interpretation to be given, then the observation made by the Hon'ble Division Bench that the charge will continue on the petrol bunk to secure the penalty imposed, until the appeal filed against the assessment order is heard and disposed of, would lose its meaning. Therefore, issue No.1 is decided in favour of the petitioner and it is held that the petitioner is not estopped from challenging the order of assessment on the ground that he has paid the tax as per the direction of the Hon'ble Division Bench in the light of the clear directions of the Hon'ble Division Bench.

Issue No.2:-

12. The Appellate Authority after considering the arguments advanced by the petitioner and the Revenue, remanded the matter for fresh consideration by order dated 17.10.2011. The operative portion of the order reads as follows:-

7. After hearing the arguments of both the parties and after careful perusal of the assessment records, the fact remains that:

(a) The assessment order has been passed without giving reasonable opportunity to cross verify the documents on hand. Now, if the AO accepts to make available and cross verify the invoice wise details of the purchases made by the appellant from the oil corporation, and the C-form the dealer has given to oil corporation the assessment order would be precise and proper as held in the judgment passed by the Hon'ble Madras High Court in T.M.Rajaganapathi Traders vs. Commercial Tax Officer, Salem (2005) 142 STC 130.

(b) Further, the AR had contended that Lubricants was purchased locally. On perusal of

the pre-assessment notice, lubricants was not brought under taxation but in the impugned final order it is shown as taxable @ 12% (claimed as 2nd sale but not supported by local purchase details). The purchase details of lubricants may also be verified.

(c) The A.O., is also directed to verify the refund of tax amount, if any, as claimed by the appellant.

8. In view of the above, the case is remanded back to the A.O., with directions to take up the case afresh and pass order/s in accordance with law as may be deemed fit and proper in the circumstances of the case.

13. On a careful reading of the above order, it is clear that the Appellate Authority was convinced that the assessment order was made without reasonable opportunity to the petitioner. That apart, on merits of the assessment also, the Appellate Authority directed verification of the purchase details of lubricants and also to verify the refund of tax amount, if any as claimed by the appellant. Therefore, on a reading of the directions issued by the Appellate Authority, one would clearly decipher that it is an open remand. This is also made further clear by taking note of the directions issued in paragraph (8), where the Assessing Officer has been directed to take up the case afresh.

14. The learned Government Pleader by referring to an observation contained in paragraph (iii), in page 3 of the appellate order, would submit that the appeal is only as against the penalty. This submission lacks merit as the said observation has been made while setting out the facts of the case and it is not a finding of the Appellate Authority. Therefore, it is held that the order of remand passed by the Appellate Authority dated 17.10.2011, is an open remand and the Assessing Officer was bound to consider all issues. Therefore, issue No.2, is answered in favour of the petitioner.

Issue No.3:-

15. While implementing the order of remand and passing the assessment order dated 25.01.2012, the Assessing Officer proceeded on the basis that the petitioner has accepted his tax liability and the appeal itself was only for waiver of penalty. While discussing issue No.2, this Court has come to the conclusion that the contention that the appeal was only with regard to penalty is incorrect, since while deciding issue No.1, the Court held that the payment made by the petitioner pursuant to judgment of Hon'ble Division Bench was without prejudice the petitioner's right to contest the appeal. Thus, the Assessing Officer misdirected himself in understanding the scope of the

remand and the proper effect of the amount of tax deposited by the petitioner. Therefore, the findings rendered by the Assessing Officer in the order of assessment, dated 25.01.2012, that the petitioner has accepted his tax liability and the contest is only with regard to the penalty, is an incorrect findings. Accordingly, issue No.3, is decided in favour of the petitioner.

Issue No.4:-

16. In the light of the finding rendered by this Court on issue Nos.1 to 3 above, it has to be necessarily held that the order passed by the Appellate Authority, dated 30.08.2012, also requires interference, because the Court has held that the payment of the tax by the petitioner, cannot prejudice the petitioner to pursue the appellate remedy, more so, in the light of the observations of the Hon'ble Division Bench. Further, the Appellate Authority while considering the appeal took into consideration all issues and remitted the matter for fresh consideration and therefore, it is an open remand and not a restricted remand order to decide the question of penalty alone. At this juncture, it has to be emphasised that the payment effected by the petitioner cannot be construed as an estoppel from pursuing the appellate remedy against the assessment order on all grounds. Therefore, question No.4 is also decided in favour of the petitioner.

17. In the light of the decision arrived at on the above four issues, the resultant position is, the order passed by the Appellate Assistant Commissioner dated 30.08.2012, calls for interference and consequently, W.P.No.16057 of 2013, has to be allowed.

18. The petitioner has also questioned the order of assessment dated 25.01.2012, on several grounds including the ground of serious violation of principles of natural justice and having misunderstood the scope and object of the remand. In my view, the defect which culminated in the order of the Appellate Authority, dated 30.08.2012, commenced from the stage when, the Assessment Officer passed revised order dated 25.01.2012. While doing so the Assessing Officer misconstrued the scope of remand, misconstrued the effect of the payment of the tax made by the petitioner as per the direction of the Hon'ble Division Bench resulting in an erroneous order. Therefore, unless and until, the defect is cured at the hands of the Assessing Officer, no purpose would be served in directing the Appellate Authority to consider the appeal petition inspite of this Court having come to a conclusion that the Appellate Authority's order dated 30.08.2012, is not sustainable. Therefore, necessarily, the assessment has to be redone and for which purpose, the matter requires to be remanded to the Assessing Officer.

19. Accordingly, the Writ Petitions are allowed and the matter is remanded to the first respondent, Assessing Officer, for fresh consideration, who shall afford an opportunity of personal hearing to the petitioner, hear the objections of the petitioner on all issues and redo the assessment in accordance with law. No costs. Consequently, connected Miscellaneous Petitions are closed.

-s/d-
Assistant Registrar(CS-VI)

True Copy

Sub-Assistant Registrar

pbn
To

- 1.The Commercial Tax Officer-IW,
Puducherry.
- 2.The Appellate Assistant Commissioner (CT),
Commercial Taxes Department,
Puducherry.

+1 cc to Mr.R.Senniappan Advocate sr 44626

+1 cc to Government Pleader Puducherry sr.44131 & 44134

W.P.Nos.16087 & 16088 of 2014

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