IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 08.09.2016

CORAM

THE HONOURABLE Mr.JUSTICE T.S.SIVAGNANAM

WP.No.34448 of 2015 & MP.No.1 of 2015
and
WP.No.34449 of 2015 & MP.No.1 of 2015

M/s.K.M.C. Constructions Limited,
442/1, 442/2, Pettai Village,
Kangayanor [Post] Polur Taluk,
Thiruvannamalai District 606 803. .. Petitioner in both WPs

Vs

1.The Joint Commissioner [CT],
Vellore Division,
Vellore.

2.The Commercial Tax Officer,
Polur Assessment Circle,
Polur. .. Respondents in both WPs

Writ Petitions filed under Article 226 of the Constitution of India praying for a Writ of Certiorarified Mandamus to call for the records on the file of the 1st respondent in RC C3/990/2012/2005-2006 and RC C3/2336/2012/2006-2007 respectively dated 30.3.2015 and quash the same made therein as illegal erroneous opaque to and refracted to the provisions of Act No.29/2011 direct the 1st respondent to issue certificates of settlement of arrears under section 8[1] of the Act No.29/2011.

For Petitioner : Mr.M.Mahalingam
in both WPs

For Respondents : Mr.K.Venkatesh, GA
in both WPs

C O M M O N O R D E R

Heard Mr.M.Mahalingam, learned counsel appearing for the petitioner; Mr.K.Venkatesh, learned Government Advocate appearing for the respondents and with the consent on either side, the writ petitions are taken up for disposal.

2. In both the Writ Petitions, the petitioner has

challenged the order passed by the Joint Commissioner [CT], Vellore Division, who is the Designated Authority under the provisions of Tamil Nadu Sales Tax [Settlement of Arrears] Act [29 of 2011] [hereinafter referred to as "the Act"] in RC C3/990/2012/2005-2006 and RC C3/2336/2012/ 2006-2007 dated 30.3.2015.

3. The undisputed facts are that the petitioner filed an application under Section 5 of the Settlement Act and the application had to be processed by the Designated Authority in accordance with the provisions of the Act and for which purpose, he is required to issue notice to the dealer so as to determine as to the amount payable at the rate specified in Section 7 of the Act. A notice was issued on 15.12.2012 stating the amount to be paid by the petitioner in terms of Section 7[C] of the Act. The petitioner was informed in the said notice that if the admissible amount is paid, then the petitioner would be eligible for one time settlement and was requested to pay difference amount of 2% tax immediately and may file the application. The petitioner complied with the same and also submitted a representation to the Designated Authority on 13.01.2015. Thereafter, the Designated Authority was required to proceed in accordance with the provisions of the Act to determine the application filed by the petitioner under Section 5 of the Act.

4. However, on a perusal of the impugned proceedings, it is seen that the Designated Authority has gone into the merits of the assessment and in fact confirmed the reasons assigned by the Assessing Officer, forgetting for a moment that the order has to be passed in an application for settlement under the provisions of the Act.

5. This Court had an occasion to consider a batch of cases arising under the same enactment in the case of Cheran Cements Limited Vs Joint Commissioner [CT], Trichy Division, Trichy and Another [2016] 92 VST 63, wherein, the Court took into consideration the scheme of the Act and held as follows:

> "20. It is not in dispute that the first respondent is the designated authority under the provisions of the Act and appointed by the Government under Section 3. The persons, who are eligible for settlement under the Act has to fulfill the conditions under Section 4 and in this case it is not in dispute that the petitioner was entitled to avail the provisions of the Settlement Act. The procedure for filing an application has been spelt out in Section 5 of the Act. Section 6 deals with determination of amount payable by the applicant and Section 7 deals with rate applicable in determining amount payable and they are as follows:
>
> "5. Application for settlement.- (1) An

application for the purpose of section 4 shall be made to the designated authority by an applicant within six months from the date of commencement of this Act or by such later date as the Government may, by notification, specify, from time to time, in such form, and in such manner, as may be prescribed, with proof of payment of the amount payable at the rates specified in section 7.

(2) A separate application shall be made for each assessment year.

(3) The applicant shall send a copy of the application made under sub-section (1) to the assessing authority, appellate authority or revisional authority under the relevant Act, before whom any proceeding or appeal or revision, as the case may be, is pending, within seven days from the date of making such application before the designated authority.

6. Determination of amount payable by the applicant. - (1) The designated authority shall verify the correctness of the particulars furnished in the application made under section 5 with reference to all relevant records and determine the amount payable at the rates specified in section 7.

(2) The designated authority shall demand further amount payable by the applicant in the form prescribed, if the amount paid by the applicant along with application falls short of not more than ten per cent of the amount determined under sub-section (1).

(3) If the applicant has not paid ninety per cent of the amount payable under section 7 along with the application, the designated authority shall summarily reject the application.

(4) The amount determined under sub-section (1) shall be rounded off to the nearest rupee and, for this purpose, where such amount contains a part of a rupee, and, if such part is fifty paise or more, it shall be rounded off to the nearest rupee, and if such part is less than fifty paise, it shall be ignored.

7. Rate applicable in determining amount payable. - The amount payable by the applicant and to be waived shall be determined as follows:-

(a) Where it relates to arrears of tax

which was assessed on the best of judgment due to non-production of accounts with corresponding arrears of penalty and interest, the application shall pay forty per cent of arrears of tax pending collection on the date of application along with interest calculated at seven and a half per cent per annum thereon and on such payment of tax, the balance of tax and interest and the entire penalty shall be waived.

(b) Where it relates to arrears of tax, including any arrears of tax accrued due to non-filing of declaration forms which was in excess of the tax admitted as per the returns filed for the year with the corresponding arrears of penalty and interest, the applicant shall pay forty per cent of such arrears of tax pending collection on the date of application along with interest at seven and a half per cent per annum thereon and on such payment of tax, the balance of tax and interest and the entire penalty shall be waived.

(c) Where it relates to arrears of tax, which was admitted as tax due as per returns filed for the year with corresponding arrears of penalty and interest, the applicant shall pay the entire arrears of tax pending collection along with interest at seven and a half per cent. per annum and on such payment, the balance of interest and the entire penalty shall be waived.

(d) Where it relates to arrears of penalty or interest or both and where there is no corresponding arrears of tax pending collection on the date of application, the applicant shall pay ten per cent of the penalty and twenty five per cent of interest, the balance of penalty and interest shall be waived." ...

22. Therefore, the applicant, while submitting application under Section 5 has to calculate the amount payable as per the rates mentioned in Section 7(a) to (d) and remit the same and file proof of payment along with application. A separate application is required to be filed for each assessment. If any application or revision is pending, then the applicant has to forward the copy of the application to the said authority in terms of Section 5(3). Therefore, at the first instance, the

onus lies on the dealer/applicant to determine the payment payable under Section 7. We have noticed that under Section 7, it is a rate applicable for determining the amount payable, which at the first instance is on the dealer/applicant. In terms of Section 6(1), the designated authority is bound to verify the correctness of the particulars furnished in the application made under Section 5 with reference to all relevant records and determine the amount payable at the rate specified in Section 7.

23. Therefore, at that stage the designated authority has to verify as to whether the rates as calculated by the petitioner while submitting application under Section 7 was correct. In the event the designated authority finds any discrepancy, in terms of Section 6(2), shall demand further amount payable in the form prescribed. However, there is an important rider in sub-section 2 to Section 6, which states that if the amount paid by the applicant along with application (in terms of Section 7) falls short of not more than 10% of the amount determined under sub-section (1), then and then alone the question of demanding further amount under Section 6(2) would arise. If the applicant failed to fulfill the conditions under sub-section (2) of Section 6, his application stands summarily rejected in terms of sub-section (3) of Section 6. Thus, the Act being a Settlement Act to give reprieve to the dealer/applicant and bring him out of the misery has first thrown the onus on the dealer/applicant and he has a statutory duty to compute the rate applicable in accordance with Section 7 of the Act, by considering all the relevant records. If the dealer/applicant properly computes the amount and remits the same and encloses proof of such payment along with the application under Section 5, the same will be taken for verification and if the designated authority, on going through the relevant records, finds that further amount is payable and if the same fall short of not more than 10% grant relief to the dealer and if not the application stands summarily rejected. Therefore, the Act operates on strict limits as clearly defined under the Statute. The onus is not only on the dealer to carefully peruse all his records and relevant documents while determining the rate payable by him, but also on the assessing officer while verifying the application as to the correctness of the particulars furnished exercising power, under Section 6(1) by taking into consideration relevant records and then determine

> the amount payable at the rates specified in Section 7. It is a settled legal principle that any Settlement Act or amnesty scheme have to be strictly interpreted and there cannot be any substitution or reading down the provision and the dealer/applicant cannot seek for reliefs beyond the scope of the scheme of the Settlement Act.
>
> 24. Apart from the above referred provisions, Section 8 of the Act deals with settlement of arrears and issuance of certificate. If the authority is satisfied about the payment of amount determined under Section 6(1), by an order, settle the arrears of tax, penalty or interest and issue a certificate in such form as may be prescribed, and thereupon the applicant shall be discharged from his liability or interest. In terms of sub-section (2) to Section 8, the designated authority, for reasons, to be recorded in writing, may refuse to settle the arrears of tax, penalty or interest and such orders shall be passed after giving reasonable opportunity to the applicant to show- cause against such refusal. In terms of sub-section (3) to Section 8, the authority notified by the Government may, at any time, within ninety days from the date of issuance of certificate under sub-section (1) of Section 8 by the designated authority, modify the certificate by rectifying any error apparent on the face of the record. Therefore, the applicant to be entitled to certificate under Section 8(1) has to first satisfy the designated authority about the payment of the amount determined under sub-section (1) to Section 6. Even if the applicant satisfies such requirements, still the designated authority has power to refuse to settle the arrears of tax, penalty or interest by recording reasons in writing after issuing show-cause notice." ...

6. From a reading of the impugned order, it is evidently clear that the respondent did not follow the procedure contemplated under the Act and has lost sight of the object with which the Settlement Act was enacted. Without proper verification of the application as per provision Section 6 of the Act, the Designated Authority could not proceed further and the error has occurred from the said stage. In fact, in Cheran's case, the Court pointed out as follows :

> "28. In my view, the issue to be decided at the first instance is whether these applications were verified as per the provisions of Section 6(1). It is only thereafter the question of considering the further amount payable would arise under Section 6

(2). This again is a procedural infirmity, which goes to the root of the matter. The designated authority at the time of verification of the correctness of the particulars in the applications filed by the petitioner, under Section 5(1), is entitled to return the applications for rectification of defects in terms of Rule 3 of the Rules. If this had been done, then the designated authority could have communicated the petitioner/applicant that the rates so determined by the petitioner itself is an erroneous calculation. This could have avoided the entire litigation in the matter. It is true that the statute does not specifically provide for an opportunity of personal hearing or issuance of show-cause notice and the only place where the authority is statutorily bound to issue show-cause notice is while deciding a case and refusing to settle the arrears of tax, penalty or interest under Section 8 (2) of the Act. However, there is no statutory prohibition for the designated authority to call for particulars, hear the assessee or scrutiny of the books of accounts etc., while examining the applications under the provisions of Section 6. As noticed above, application has to be verified with reference to all relevant records and then only the correctness of determination done under Section 7 could be considered.

29. In a case, where the designated authority is not in possession of the relevant record, obviously he has to direct the petitioner/applicant to produce the records. In such circumstances, an opportunity of personal hearing is inevitable and in fact the disputed question of facts can very well be thrashed out if the assessee is called upon by the designated authority to state as to how they computed the amount based on their books of accounts or records. Therefore, though the statute does not prohibit an opportunity of personal hearing while considering the application under Section 6(1), going by the scheme of the Act, there is no error on the part of the designated authority to afford an opportunity of personal hearing so as to ensure fairness and transparency in procedure and also to satisfy the cardinal rule, audi alteram partem."

7. Admittedly in the instant case, none of the above mentioned procedures have been followed and the impugned order suffers from very serious procedural defects and this is a good ground to interfere with the impugned order.

8. In the light of the above discussion, the writ petitions are allowed and the impugned orders in RC C3/990/2012/2005-2006 and RC C3/2336/2012/ 2006-2007 dated 30.03.2015 are set aside and the matter is remanded to the respondent for fresh consideration in terms of the provisions of the Settlement Act, after affording an opportunity of personal hearing to the petitioner to produce Books of Accounts and relevant records for the purpose of verifying the correctness of the particulars furnished by the petitioner in the application made under Section 5 of the Settlement Act and the computation made by the petitioner under Section 7 of the Act. The 1st respondent shall pass final orders, on merits and in accordance with law, within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

gya

To
1.The Joint Commissioner [CT],
Vellore Division,
Vellore.

2.The Commercial Tax Officer,
Polur Assessment Circle,
Polur.

1 cc to Special Government Pleader, (Taxes), sr.51182
2 ccs to Mr.M.Mahalingam, Advocate, sr.51121

WP.No.34448 of 2015
& MP.No.1 of 2015
and
WP.No.34449 of 2015
& MP.No.1 of 2015

rk co
kra 04.10.2016