IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATE: 15.09.2016
CORAM
THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
W.P.Nos.13648 & 13649 of 2003 &
W.M.P.Nos.17122 & 17123 of 2003

M/s.V.S.G.Engg. Industries,
7, Avarampalam Road,
Ganapathy P.O.,
Coimbatore. .. Petitioner in both Writ Petitions

Versus

1.The Joint Commissioner,
III (SMR) of Commercial Taxes (FAC),
Chepauk, Chennai-600 005.

2.The Appellate Assistant Commissioner,
(CT), Coimbatore.

3.The Commercial Tax Officer,
Avarampalayam Assessment Circle. .. Respondents in both Writ Petitions

Prayer in both Writ Petitions: These Writ Petitions are filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus to call for the records of the first respondent in SMR Nos.91 and 92 /97 and quash the impugned order dated 23.12.2002, consequently, direct the first respondent to grant relief to the petitioner for the Assessment years 1992-93 and 1993-94 respectively.

For Petitioner in both Writ Petitions : M/s.R.Bhavya
For M/s.Subbaraya Aiyar,

For Respondents in both Writ Petitions : Mr.S.Kanmani Annamalai
Additional Government Pleader (Taxes)

COMMON ORDER

Heard M/s.R.Bhavya learned counsel appearing for the petitioner in both Writ Petitions and Mr.S.Kanmani Annamalai, learned Additional Government Pleader appearing for the respondents in both Writ Petitions.

2. In each of the above Writ Petitions, the petitioner has challenged the order passed by the first respondent, by exercising the suo-motu revisional power under the provisions of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred as "the TNGST Act").

3. The first issue to be considered is as to whether there was any justification in invoking the suo motu revisional power and whether the order passed by the first respondent contains any reasons for setting aside the order passed by the Appellate Assistant Commissioner on the Appeal filed by the petitioner as against the orders of Assessment for the years 1992-93 and 1993-94, dated 28.02.1995 and 15.02.1995 respectively.

4. The petitioner is a manufacturer of motors and pumps and they were assessed to tax by the third respondent for the Assessment years, viz., 1992-93 and 1993-94. The Assessing Officer has completed the Assessment, disallowed the claim in respect of the consignment sales and assessed turnover at the rate of 10.70% and levied penalty under Section 12(3)(b) of TNGST Act. Aggrieved by the said order, the petitioner preferred an Appeal to the second respondent and the Appeal was heard, records were verified and Appeal was allowed and the penalty was deleted. After which, the third respondent has also given effect to an order passed by the second respondent. After more than two years, the first respondent issued a notice, dated 13.12.1997 and sought for revision of the order passed by the second respondent, by invoking the power under Section 34 of the TNGST Act. Detailed reply was given by the petitioner to the said notice and ultimately, the first respondent has passed the impugned orders.

5. The first aspect to be noted is, while exercising the power under Section 34 of the TNGST Act, the first respondent is required to take note of the fact as to whether any order passed by either the Assessing Officer or the Appellate Authority is prejudicial to the interests of the Revenue and if so may make such enquiry or cause such enquiry to be made and subject to the provisions of the Act, may initiate proceedings to revise, modify or set-aside the order. Thus, the pre-requisite is that, if the revisional authority found that such order passed by the

second respondent was prejudicial to the interests of the Revenue, then, he may make enquiry or cause enquiry (to be made) and it is only thereafter, he may revise, modify or set-aside the order of the second respondent. However, in the instant case, it appears to be that no such endeavour has been made by the first respondent. The first respondent failed to take note of the fact that the agreement copies were produced by the petitioner substantiating the claim of consignment sales. Furthermore, the order passed by the Appellate Assistant Commissioner is a detailed order, after considering all the facts and there is nothing on record to show that the first respondent found the factual findings recorded by the second respondent as erroneous. In such circumstances, the revisional power ought not to have been invoked. At the first blush, the orders impugned in these Writ Petitions appear to be speaking orders, but on a closure scrutiny, it is seen that what the first respondent has done was, he only referred to the findings of the Assessing Officer and discussed about the findings rendered by the Appellate Assistant Commissioner/second respondent and has observed that the Appellate Assistant Commissioner has not verified the following the three aspects:-

> "(i) Whether the goods are ascertained or unascertained goods. Whether the goods of the principal are stored separately. Such details were not produced before the Appellate Authority.
>
> (ii) Whether the agreement between principal and agent has been renewed properly every year.
>
> The agreement made between principal and agents was not produced before the Assessing Officer at the time of checking the accounts.
>
> (iii) a) Whether the freight charges are paid by the agent and whether the documents are discounted"

6. Next, the first respondent has stated that the Assessing Officer has examined the fact that 95.5% of the value was realized by the principal and the rest proportional to other expenses such as freight charges etc. and the documents were discounted. Therefore, the first respondent concluded that the orders of the Assessing Officer has to be confirmed in full. With the above reasons, he proposed to revise the orders passed by the second respondent. However, in the next paragraph, the first respondent has recorded the objections given by the authorized representative of the petitioner and the impugned orders have been passed by allowing the revisions, in a single line by stating that "in the absence of fresh material, the Suo-motu Revision Proposal made in the above notice is hereby ordered to be confirmed".

7. There is no finding recorded by the first respondent that the order passed by the Appellate Assistant Commissioner is prejudicial to the interest of the Revenue nor there is any

finding recorded by the first respondent that on his assessment and enquiry, he found that the orders of the Appellate Assistant Commissioner were incorrect. The power of Suo motu Revision is not a power exercisable as a second appellate authority. Section 34 of the TNGST Act, clearly states that the Revisional Authority should be satisfied that the order of the Appellate Authority is prejudicial to interest of Revenue. That apart, he is required to make an enquiry or cause an enquiry to be made. Though a Statue has used the expression 'may', in the context of the extraordinary power given to the first respondent, it should be read as 'shall', since unless the Revisional Authority makes an independent enquiry, he cannot record a finding that the order of the Appellate Authority is prejudicial to the interests of the Revenue. However, all those aspects have not been complied with by the first respondent. Therefore, all the above issues pointed out clearly show that the impugned orders are unsustainable in law and it is a mere change of opinion, which cannot be a ground to invoke the power under Section 34 of the Act.

8. For all the above reasons, these Writ Petitions are allowed and the impugned orders are quashed. No costs. Consequently, connected miscellaneous petitions are closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

r n s

To
1.The Joint Commissioner,
III (SMR) of Commercial Taxes (FAC),
Chepauk, Chennai-600 005.

2.The Appellate Assistant Commissioner,
(CT), Coimbatore.

3.The Commercial Tax Officer,
Avarampalayam Assessment Circle.

+1 cc to M/s.Subbaraya Aiyar Padmanabhan Advocate sr52561
+1 cc to the Special Government Pleader (Taxes) sr52407

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