BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 25.11.2016

C O R A M

THE HON'BLE DR.JUSTICE S.VIMALA

W.P.(MD) No.22714 of 2016
and
W.M.P.(MD)No.16252 of 2016

Tvl. Sri Maheswari Traders,
Rep. By its Proprietor, S.Saravanan,
S/o. Sundarrajan,
No.886-D, First Floor, Tenkasi Road,
Rajapalayam 626 117
Virudhunagar District ... Petitioner

Vs.

The Commercial Tax Officer (CT)-II,
Commercial Tax Department,
Rajapalayam, Virudhunagar District .. Respondent

Prayer:- Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari to call for the records pertaining to the impunged order passed by the respondent herein, in TIN No.33166063037/14-15, dated 22.09.2015 and to quash the same.

For Petitioner : Mr. T.Bashyam
For Respondents : Mr. R.Karthikeyan, AGP.,

O R D E R

This Writ of Certiorari has been filed by the petitioner, seeking to quash the impugned order passed by the respondent herein, in TIN No.33166063037/14-15, dated 22.09.2015.

2. Heard both sides. By consent of the learned counsel appearing for both sides, the writ petition is taken up for final disposal at the stage of admission itself.

3. It is the case of the petitioner company that the petitioner is carrying on business of trading in hardwares. The petitioner is regularly filing its returns and for the assessment year 2014-15, the petitioner has filed return and paid tax. The petitioner's place of business was inspected by the Enforcement Wing Officials and found that there was a difference of stock. A Statement has been obtained by the petitioner and the petitioner

has tendered a cheque for Rs.1,09,229/-. Based on the report of the Enforcement Wing Officials, the respondent has issued a Revision Notice, on 26.03.2015, stating that the Inspecting Officials had taken actual stock held at the time of inspection and compared with the stock, as noted in the records maintained by the dealer. The dealers have paid the compounded tax, but the purchases of the dealer were more than Rs.50 lakhs.

3.1. Even though notice was issued to the petitioner, due to medical reasons, the petitioner was not able to file reply. On 22.09.2015, the respondent has passed the impugned order, confirming the proposal and further demanded tax and penalty. Aggrieved over the impugned assessment order of the respondent, the petitioner has filed the present writ petition.

4. The main contention raised by the learned counsel for the petitioner in this writ petition is that the Assessing Authority made the assessment only based on the report made by the Enforcement Wing Officials and there was no independent application of mind in fixing the tax.

5. A perusal of the impugned order would only go to show that the assessment has been made based on the report given by the Enforcement Wing Officials.

6. The learned counsel for the petitioner seeks one more opportunity to produce records before the Assessing Authority and to convince him.

7. The learned Additional Government Pleader would insist upon atleast 10% of the tax demanded, in order to show the bonafides on the part of the petitioner in prosecuting the case and also to avail fresh opportunity to submit the objections to the pre-assessment notice, including the notice for levy of penalty.

8. The learned counsel for the petitioner relied upon the decision of this Court reported in **2006 146 STC 642 (Mad) (Madras Granites (P) Ltd., v. Commercial Tax Officer and another)** whereunder, it has been held that, when the orders are passed by the Assessing Authority, not by the application of independent mind, but based on the instructions issued by the higher officials, the Assessment is unsustainable in law. It is relevant to extract paragraph 4, of the decision, which reads thus:-

> "4. No doubt, the assessing officer issued pre-assessment notice including the notice for levy of penalty calling for objections from the dealer and after receiving reply from the dealer, completed the assessment on the basis of D-3 proposal forwarded by the Assistant Commissioner (CT), Enforcement. We find from

the records that in D-3 proposal, the Deputy Commissioner (CT), Enforcement, Salem, has not only determined the surplus turnover, but also determined the quantum of penalty that might be imposed on the dealer. Therefore, when the higher officer, viz., the Assistant Commissioner (CT), Enforcement, has directed the assessing officer to complete the assessment on the basis of the proposal in D-3 form, we find that the assessing officer, who is lower in rank in the hierarchy of officers, is bound by the said direction, and the records also show that the assessing officer has not independently applied his mind, but adopted the sales turnover as found in D-3 proposal and also levied the penalty in the manner indicated in D-3 proposal. It is well-settled that the assessing officer is a quasi-judicial authority and in exercising his quasi-judicial function of completing the assessment, he is not bound by the instructions or directions of the higher authorities. We find that in both the matters the assessing officer has acted on the basis of the directions of his higher authority in completing the assessments. We hold that the assessments are not sustainable in law. Accordingly, the orders of assessment in both the matters are liable to be quashed and consequently, the orders of the Special Tribunal confirming the orders of assessment are also liable to be quashed."

9. This decision applies to the facts of the present case. Therefore, the impugned order, is set-aside. However, the matter is remitted back to the respondent with a direction to provide sufficient opportunity to the petitioner, including personal hearing, and then to decide the matter afresh, on merits and in accordance with law. The opportunity of hearing is subject to the payment of 10% of the demanded tax, which shall be paid, within a period of four weeks from the date of receipt of a copy of this order. This payment is subject to the result of the final orders being passed by the respondent.

10. With the above terms, the writ petition stands disposed of. Consequently, the connected WMP is closed. No costs.

Sd/-
Assistant Registrar(AS)

/True Copy/

Sub Assistant Registrar

srk

To

The Commercial Tax Officer (CT)-II,
Commercial Tax Department,
Rajapalayam, Virudhunagar District

+1cc to Mr.T.BASHYAM, Advocate Sr.No. 73981

JAM/09.02.17/CM-MSA/ 4P-3C

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