IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :20.12.2017

CORAM

THE HON'BLE MR.JUSTICE T.SIVAGNANAM

W.P.NOS.32826 TO 32830 OF 2017
AND W.M.P.NOS.36173 TO 36182 OF 2017

G.Mohammed Rafiq .. Petitioner in all W.Ps.

..Vs..

1. The State of Tamil Nadu
   Represented by the Principal Secretary to Government
   Department of Commercial Taxes
   Fort St.George, Chennai 600 009.

2. The Assistant Commissioner
   Commercial Tax Office
   Muthialpet Assessment Circle
   Old No.199, New No.270
   Thambu Chetty St., Chennai 600 001.

3. Deputy Commercial Tax Officer
   Commercial Tax Office
   Muthialpet Assessment Circle
   Old No.199, New No.270
   Thambu Chetty St.,
   Chennai 600 001. .. Respondents in all W.Ps.

Prayer in W.P.No.32826 of 2017: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, to call for records relating to Notice vide No.CST/876420/2011-12 dated 21.03.2017, Letter vide No.CST/876420/2011-12 to 2015-16/A3 together with notice of recovery annexed thereto dated 25.07.2017, and the letter vide No.CST/876420/2011-12 dated 09.08.2017 issued by the third respondent and quash the same and direct the second respondent to re-open the assessment and to pass final orders thereon by affording full opportunity of hearing including personal hearing to the petitioner.

Prayer in W.P.No.32827 of 2017: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, to call for records relating to Notice vide No.CST/876420/2012-13 dated 21.03.2017, Letter vide No.CST/876420/2011-12 to 2015-16/A3 together with notice of recovery annexed thereto dated 25.07.2017, and the letter vide No.CST/876420/2012-13 dated 09.08.2017 issued by the third respondent and quash the same and direct the second respondent to re-open the assessment and to pass final orders thereon by affording full opportunity of hearing including personal hearing to the petitioner.

Prayer in W.P.No.32828 of 2017: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, to call for records relating to Notice vide No.CST/876420/2013-14 dated 21.03.2017, Letter vide No.CST/876420/2011-12 to 2015-16/A3 together with notice of recovery annexed thereto dated 25.07.2017, and the letter vide No.CST/876420/2013-14 dated 09.08.2017 issued by the third respondent and quash the same and direct the second respondent to re-open the assessment and to pass final orders thereon by affording full opportunity of hearing including personal hearing to the petitioner.

Prayer in W.P.No.32829 of 2017: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, to call for records relating to Notice vide No.CST/876420/2014-15 dated 21.03.2017, Letter vide No.CST/876420/2011-12 to 2015-16/A3 together with notice of recovery annexed thereto dated 25.07.2017, and the letter vide No.CST/876420/2014-15 dated 09.08.2017 issued by the third respondent and quash the same and direct the second respondent to re-open the assessment and to pass final orders thereon by affording full opportunity of hearing including personal hearing to the petitioner.

Prayer in W.P.No.32830 of 2017: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, to call for records relating to Notice vide No.CST/876420/2015-16 dated 21.03.2017, Letter vide No.CST/876420/2011-12 to 2015-16/A3 together with notice of recovery annexed thereto dated 25.07.2017, and the letter vide No.CST/876420/2015-16 dated 09.08.2017 issued by the third respondent and quash the same and direct the second respondents re-open the assessment and to pass final orders thereon by affording full opportunity of hearing including personal hearing to the petitioner.

For Petitioner in all W.Ps. : M/s.Giridhar and Sai
: Mr.G.S.Vivekmani

For Respondents in all W.Ps. : Mr.K.Venkatesh
Government Advocate

COMMON ORDER

Heard Mr.G.S.Vivekmani, learned counsel for M/s.Giridhar and Sai, learned counsel for the petitioner and Mr.K.Venkatesh, learned Government Advocate for the respondents.

2.The petitioner is aggrieved by a communication sent by the third respondent dated 09.08.2017 stating that the third respondent cannot revise the assessment order dated 24.05.2017, as only an appeal lies against the said order. In the impugned communication, the third respondent accepts the fact that the petitioner has filed export documents but would state that they have not filed Form C declarations and even the export documents were filed after the orders of assessment dated 24.05.2017 were passed. The petitioner's case is that the assessment orders were not served on the petitioner. In any event, the petitioner is entitled to produce the Form C declaration, even after the assessment is over and the Assessing Officer can consider the same. To the said effect, the petitioner has given a representation on 17.08.2017 which has been sent by speed post and received in the office of the respondent.

3.The issue as to under what circumstances the respondent can exercise its power under Section 84 of the Tamil Nadu Value Added Tax Act (TNVAT Act) was considered by this Court in the case of Padmavathi Electricals Vs. The Commercial Tax Officer (MANU/TN/2292/2016). The Court took into consideration the decision of the Hon'ble Full Bench in the case of State of Tamil Nadu Vs. Arulmurugan reported in 51 STC 381 and partly allowed the writ petition and remanded the matter back to the Assessing Officer with a direction to accept Form I declaration given by the petitioner and proceed to pass revised orders in exercise of the powers conferred under Section 9(2) of the CST Act read with 84 of the TNVAT Act. The operative portion of the decision reads as follows:

> "5.An identical issue came up for consideration before the Hon'ble Full Bench of this Court in the case of State of Tamil Nadu Vs. Arulmurugan [51 STC 381] wherein it has been held as follows :
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> "16.We would proceed now to advert to the different ways in which the discretion to allow further time for filing C forms is conferred by

the proviso to Section 84 of the Act, on the one hand, and the proviso to Rule 12(7) of the Central Sales Tax (Registration and Turnover) Rules, on the other. The proviso in the Act simply says that the C forms shall be filed before the prescribed authority either within the prescribed time or "within such further time as that authority may, for sufficient cause, permit". As a matter of construction of the proviso in the statute, if there is sufficient cause, further time will have to be allowed. The proviso to the Section does not insist that the assessee should establish before the prescribed authority that he was prevented by sufficient cause from filing the C forms in time. The "sufficient cause" spoken of by Parliament in Section 84 is sufficient cause which appeals to the mind of the authority concerned, and which enables it to allow further time without bothering about any onus on the assessee. The proviso to Rule 12(7), however, is a study in contrast. The power to allow further time under this rule is severely circumscribed by thelanguage of its proviso. This proviso is more or less fashioned after Section 5 of the Limitation Act. Under the requirement laid down by the rule-making authority, the burden is on the assesse to make out sufficient cause by explaining why he did not file, and what prevented him from filing, the C forms before the completion of the assessment. What is more, it is for the assessing authority to be satisfied about the existence of sufficient cause and its having prevented the assessee from filing the declarations within time. The difference between the two provisos is not merely one of language or of emphasis. The difference lies in the basic approach to the substance of the power to allow further time. Under the statutory provision, the prescribed authority can allow further time for sufficient cause, without bothering to see whether anything or any occurrence prevented the assessee from filing the C forms within time, and whether the assessee could have filed the C forms within time even in the position is which he actually found himself. The rule, however, casts the burden on the assessee and makes the position more difficult for him to invoke the power successfully. It also narrows down the discretion of the authority concerned. The question, however, is which is to be the master, the proviso in the Section or the proviso in the rule ? There can be no doubt about the legal position that a rule cannot prevail against the statute, by being repugnant to the statute. A study of the structure of the proviso to Section 84 shows how Parliament's peculiar preferences had worked in this regard. While Parliament was content to leave to the rule-making authority, namely, the Central Government, the task of prescribing a rule laying down the time-limit for furnishing C forms, the power to allow further time, however, was not relegated to the Rules, but deliberately enacted into the very text of the provisos to Section 84. In this statutory format, with Parliament clearly expressing its mind on the subject, the Central Government must be held to possess no authority whatever to make any rule as respects the power to allow further time, let alone prescribe the conditions subject to which any such power could be exercised. In this sense, the proviso to Rule 12(7) must be held to be ultra vires the rule-making power, to the extent that it is inconsistent with, or lays down tests or standards different from, the proviso to Section 84. It is quite clear that the proviso to Rule 12(7) is both superfluous and badly drafted. The indifferent drafting is all the more regrettable when the remember the legislative history which brought into the statute book the proviso to Section 84 as a necessary part of the taxing enactment. Avowedly, the proviso was introduced by Parliament in Section 84 to fill in the lacuna disclosed by the previous litigations in the country, culminating in the decision of the Supreme Court in Abraham's case . It is a matter for comment that Parliament's effort at clarity should have been neutralized, in part at least, by clumsy and unwanted rule-making. Be that as it may, we are clear in our minds that where an assessee seeks to file C forms beyond the stage of assessment, the relative power which the concerned authority should invoke is the power defined in the proviso to Section 84 and not the power defined in the proviso to Rule 12(7).

19.We do not think there is any room for the perplexity given expression to by the learned Government Pleader. Given the assessing authority's undoubted power to allow further time for C forms to be filed on sufficient cause, the rest of it is mere procedure or follow up action. Where the assessing authority is satisfied, in a given case, about the existence of sufficient cause, it must necessarily be followed up by appropriate action, such as reopening the assessment already completed. Perhaps the requisite corrective action can be taken by invoking the assessing authority's statutory power of rectification of mistakes. Even otherwise, the implementation, in appropriate cases, of the power to allow further time cannot be withheld on the excuse that there is not express provision either in the statute or in the statutory rules for reopening the assessment. When the power is there and the facts are there demanding its exercise, the implementation must be done as a matter of course, on the doctrine of implied or ancillary powers. Where there is a power, and where there is a will, there will be a way. It is, however, unnecessary to pursue the line of discussion further, because the particular problem we are concerned with in the two cases before us is quite different. What we are asked to consider, and what we have been engaged in discussing so far, is whether an appellate authority has the same power as the assessing authority to allow further time for accepting C forms, and not how and by what process the assessing authority itself could exercise the power after the completion of the assessment."

6.The above referred to decision was followed by R.Mahadevan,J in Ultrust Solution (India) Pvt. Ltd. Vs. CTO [W.P.Nos.3084 to 3092 of 2016 dated 27.1.2016]. From the decision of the Hon'ble Full Bench of this Court, it is clear that the Authority is entitled to extend time to submit forms.

7.Furthermore, a reading of Section 9(2) of the CST Act shows that it is exhaustive and clearly specifies that the Authorities under the State Law can exercise all or any of the functions under the State for assessment, review, revision, re-convey measures, etc., for the purpose of assessment and recovery of tax due under the Central Act. Therefore, the respondent has power to invoke Section 84 of the TNVAT Act and revise the assessment under the CST Act."

4.The case on hand is one such case where the petitioner states that they are now in possession of the relevant declaration forms and if opportunity is granted, the petitioner would be able to produce the same. In the light of the above factual position, this Court is inclined to grant one opportunity to the petitioner to remedy the breach and produce the necessary documents.

5.In the result, the writ petitions are disposed of by directing the petitioner to file a petition under Section 84 of the TNVAT Act along with a copy of this order enclosing all the declaration forms and on receipt of the same, the third respondent is directed to consider the documents and re-do the assessment in accordance with law. No costs. Consequently, connected Miscellaneous Petitions are also closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

dna/cse

To

1. The Principal Secretary to Government
   Department of Commercial Taxes
   Fort St.George, Chennai 600 009.

2. The Assistant Commissioner
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   Commercial Tax Office
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   Old No.199, New No.270
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+5ccs to M/s.Giridhar and Sai, Advocate, S.R.No.91056 to 91060
+1cc to the Government Pleader, S.R.No.91776

W.P.Nos.32826 to 32830 of 2017

rv(co)
CS/11/01/18