IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 19.07.2017

Co ram
THE HON'BLE MR.JUSTICE **T.S.SIVAGNANAM**

W.P.Nos.30603 & 30604 of 2004
&
W.M.P.Nos.37088 & 37089 of 2004
&
W.V.M.P.Nos.90 & 91 of 2009

M/s.Sri Kumaran Trading Company,
rep.by its Proprietor Narayan Singh,
No.47, Manali Express Road,
Ernavoor, Chennai 600 057.
... Petitioner in both W.Ps

Vs

The Deputy Commercial Tax Officer,
Manali Assessment Circle,
Kuralagam Annexe,
Chennai 600 108. ...Respondent in both W.Ps

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus, to call for the records on the file of the respondent in TNGST.1081803/2001-02 and TNGST.1081803/2002-03 dated 28.9.2004 respectively and quash the same as illegal and against the principles of natural justice and fair play and direct the respondent to furnish the statement and records relied upon and provide opportunity of cross examination of third parties.

For Petitioner : Mr.T.Pramodkumar Chopda,

For Respondent : Mr.K.Venkatesh,
Government Advocate

COMMON ORDER

Heard Mr.T.Pramodkumar Chopda, learned Counsel for the petitioner and Mr.K.Venkatesh, learned Government Advocate, learned counsel appearing for the respondent.

2. Both writ petitions have been filed by the petitioner, a registered dealer on the file of the respondent under the provisions of Tamil Nadu General Sales Tax Act,1959, (TNGST Act) and Central Sales Tax Act, 1956 (CST Act). The orders impugned in these Writ Petitions are assessment orders for the assessment years 2001-02 & 2002-03, which are revision of assessment under Section 16 of TNGST Act.

3. The petitioner was served with notices dated 07.06.2004 and 07.06.2004 respectively for both the assessment years and they submitted their objections dated 13.09.2004. After considering the objections, the respondent has passed the impugned orders, this Court need not labour much to go into the aspects as the Court had occasioned to consider the correctness of the assessment for the year 2003-04 in respect of the petitioner's dealer in W.P.No.14851 of 2005. There is not much difference in the facts leading to the said assessment and the present impugned assessment and the only subtle

difference being that for the impugned assessment, the respondent, Assessing Officer did not disbelieve the entire transactions done by the petitioner, but has disbelieved the transactions, where Mr.Mahendra Kumar Jain was held to be responsible for those transactions. In other words, in the assessment for the year 2003-04, which was impugned in W.P.No.14851 of 2005. the Assessing Officer has disbelieved all the transactions including the transactions made by the petitioner with the Government of India company, like Steel Authority of India etc. Therefore, the decision rendered 14851 of 2005, dated 03.10.2016, would equally cover in the case on hand . In the said case also, the reason for issuing a pre-revision notice was statements and records from the third parties and certain records which were collected from them. The petitioner wanted the copies of the statements and they wanted to examine those process, so as to establish that the purchases effected by them, were genuine transaction. A case was sought to be projected that, they are registration cancelled dealers and the transaction effected by the petitioner is not entitled for being considered for availment of Input Tax Credit.

4. It was brought to the notice to this Court that the registration of those dealers were cancelled, subsequently i.e, only on 10.12.2003, much after the relevant assessment year. The Court after taking into consideration the earlier orders passed, allowed the Writ Petition issuing certain directions.

5. In the counter affidavit filed by the respondent in both the Writ Petitions which are more or less identical, the respondent has stated that the petitioner has to avail the alternate remedy of filing an appeal as against the impugned assessment orders and in this regard referred to the orders passed by the Division Bench. So far as the availment of the alternate remedy provided under the statue, it is not an universal rule that in all cases, the aggrieved parties have to be relegated to avail the alternate remedy and the Courts have carved out exceptional circumstances where the High Court can exercise jurisdiction under Article 226 of the Constitution, despite existence of an alternate remedy. Therefore, the facts of the each case have to be gone into to decide as to whether the petitioner should be relegated to avail the alternate remedy. As mentioned earlier, this Court had considered the validity of the assessment order in the petitioner's own case for the year 2003-04, the Writ Petition was allowed by issuing certain directions.

6. Therefore, in my considered view, the earlier decision in W.P.No.14851 of 2005, would apply with full force to the present Writ Petition as well. At this stage, it would be relevant to take note of the operative portion of the order passed in W.P.No.14851 of 2005, dated 03.10.2016:-

> *29. The first issue to be considered is as to whether the respondent was justified in completing the*

assessment without affording an opportunity sought for by the petitioner.

30. It is not in dispute that the cause for issuing the pre-revision notice is the statements recorded from third parties and records collected from them. When such is the situation, the petitioner was fully justified in seeking an opportunity to peruse those documents and also cross examine the persons, who have given those statements and records.

31. The Hon'ble Supreme Court in Kalra Glue Factory was considering the case of the assessee, which was a manufacturer of glue and which was assessed under the provisions of the Central Sales Tax Act, 1956. The Assistant Commissioner set aside the assessment. But on appeal, the Sales Tax Tribunal upheld the assessment. While doing so, the Tribunal relied upon the statements of certain persons to support its conclusion. Challenging the order of the Tribunal, the assessee approached the Allahabad High Court, which dismissed the petition on the ground that there is no substantial question of law.

32. Again challenging the same, the assessee filed a special leave petition before the Hon'ble Supreme Court, contending that the Tribunal was not correct in relying upon the statements of third parties, which have been recorded behind the back of the assessee, as the assessee has no occasion to test those statements by cross examination. Accepting the case of the dealer, the Hon'ble Supreme Court set aside the order of the High Court as well as the Sales Tax Tribunal and remitted the matter back to the Tribunal with liberty to the assessee to produce documents subject to proof of its genuineness and the Tribunal was directed to redo the matter.

33. Therefore, when statements recorded from a third party was the sole basis of revision of assessment, such material is an adverse material to the interest of the dealer. In any event, it cannot be stated that the respondent cannot rely upon those statements, but could have done so only after furnishing copies thereof to the petitioner and when the petitioner disputed the correctness of those statements, the efficacy and admissibility of those statements have to be tested, for which, an opportunity of cross examination ought to have been afforded.

34. Admittedly, the petitioner submitted their objections to the pre-revision notice vide their letter dated 9.12.2004. They are only interim reply. In the interim reply, the petitioner had clearly set out as to what are the records required by them and that there is a specific request for cross examination of the persons, who are stated to have given statements against the petitioner's interest.

35. Therefore, if the respondent, for any valid reason, was of the view that the statements and records need not have been furnished, he could have rejected the request by passing a separate order and that could not have been done at the time of completing the assessment and passing the impugned order. Thus, the inherent defect, which has crept in the order, affects its very validity. The violation of the principles of natural justice is writ large on the face of the impugned order, which is sufficient to hold that the same is not sustainable.

35. For all the above reasons, the writ petition is allowed, the impugned order is set aside and the matter is remitted back to the respondent with a direction to consider the request of the petitioner for furnishing of statements and records and an opportunity of cross *examination and thereafter proceed in accordance with law. No costs. Consequently, the above WPMP and WVMP are closed.*

7. Thus following the above order, these Writ Petitions are allowed, the impugned orders are set aside and the matter is remitted back to the respondent with a direction to consider the request of the petitioner for furnishing the copies of the statements and records and an opportunity of cross examination and thereafter, proceed in accordance with law. No costs. Consequently, connected Miscellaneous Petitions are closed.

19.07.2017

Index : Yes/No
Internet:Yes/No
klt/pbn

To
The Deputy Commercial Tax Officer,
Manali Assessment Circle,
Kuralagam Annexe,
Chennai 600 108.

<u>T.S.SIVAGNANAM J</u>
klt/pbn

W.P.Nos.30603 & 30604 of 2004

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