IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.07.2017

CORAM

THE HON'BLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.Nos.6989 & 6990 of 2004

Jaimurugan Textiles Ltd.,
(formerly known as Jayamurugan
Cotton mills Ltd.),
No.4, Nehru Nagar,
Salem-636 009. ... Petitioner in both W.Ps

Vs.

1. The Commercial Tax Officer,
Leigh Bazaar Assessment Circle,
Salem.

2. The Appellate Assistant
Commissioner (CT),
Salem. ... Respondents in both W.Ps

prayer in both W.Ps : Petitions filed under Article 226 of the Constitution of India praying

1. to issue a writ of certiorari calling for the records of the files of the first respondent herein in CST.42117/98-99 dated 13.08.2001, quash the proceedings of the first respondent herein in CST.42117/98-99 dated 13.08.2001 in WP.No.6989/2004.

2. to issue a writ of Certiorarified Mandamus, to call for the records on the files of the second respondent herein in A.P.CST/59/2002 dated 14.11.2003, quash the proceedings of the second respondent herein in A.P.No.CST/59/2002 dated 14.11.2003 and direct the second respondent to hear and dispose A.P.No.CST/59/2002, filed by the petitioner on the merits. In W.P.No.6990 of 2004.

For Petitioner : Mr.Parthasarathy for
: Mr.N.Inbarajan

For Respondents : Mr.k.Venkatesh,
Government Advocate

COMMON ORDER

Heard Mr.Parthasarathy, learned counsel appearing for the petitioner and Mr.K.Venkatesh, learned Government Advocate, accepts notice for the respondents.

2. The petitioner who is a registered dealer on the file of the respondent under the provisions of the Tamil Nadu General Sales Tax Act, 1959, as well as the Central Sales Tax Act, 1956, has filed these writ petitions challenging the order of assessment dated 13.08.2001, and the order passed by the appellate authority dated 14.11.2003, pertaining to the assessment under the Central Sales Tax Act for the year 1998-1999.

3. I shall first take up for disposal the writ petition in W.P.No.6990 of 2004. The order impugned in the said writ petition is passed by the Appellate Assistant Commissioner (CT), Salem, dismissing the appeal filed by the petitioner on technical grounds. As against the order of assessment dated 13.08.2001, the petitioner filed an application for rectification under Section 55 of the Act. This resulted in an order dated 31.10.2001. Since the petitioner did not get the required remedies before the Assessing Officer in the application filed under Section 55 of the Act, the petitioner preferred an appeal before the Appellate Assistant Commissioner challenging the correctness of the assessment order dated 13.08.2001, and the findings given by the Assessing Officer on the application filed under Section 55 of the Act. The petitioner's contention was that the order passed under Section 55 of the Act merged with the order of assessment. Therefore, it would be sufficient for the petitioner, to challenge the order of assessment . This was rejected by the Appellate Authority on the ground that the order of assessment dated 13.08.2001, remains unassailed. To get over any technical objections, the petitioner has filed the writ petition in W.P.No.6989 of 2004, by separately challenging the assessment order.

4. I had an occasion to consider the very same issue in the case of the P.C.W.Castings Private Ltd., against the Assistant Commissioner, Nandambakkam, in W.P.No.38853 of 2016, dated 08.11.2016. After taking note of various decisions, it was held that as against the order of rectification passed, resulting in the modification of the original order, there was a right of appeal before the Appellate Commissioner. The operative portion of the order reads as follows:

> "5. On perusal of the impugned order, it is seen that the Appellate Authority, after extracting the grounds of appeal, has devoted more than 4 to 5

paragraphs of the order commenting upon the action initiated by the Assessing Officer in the petition filed by the petitioner under Section 84 of the TNVAT Act. In my view, this was uncalled for, since the appeal is by the dealer and not by the revenue. Therefore, all that the Appellate Authority should have seen in the appeal petition is as to whether the petitioner has made out any grounds to interfere with the rectified assessment order, only with regard to the points which have been held against the petitioner.

6. In other words, what can be seen by the Appellate Authority is with regard to the correctness of the order passed by the Assessing Officer, which is not to the satisfaction of the dealer. This is so because the revenue did not prefer any appeal against the order passed by the Assessing Officer entertaining the petition under Section 84 of the TNVAT Act and rectifying the mistakes in the assessment order dated 30.12.2014. Thus, the exercise adopted by the second respondent was uncalled for.

7. Secondly, it has to be seen as to whether the second respondent was justified in rejecting the appeal as not entertainable. This conclusion of the second respondent is incorrect, since the order passed by the Assessing Officer under Section 84 of the TNVAT Act stood merged with the order of assessment dated 30.12.2014. Thus, in effect, the order of assessment passed against the petitioner is a modified order or rectified order passed pursuant to the exercise of powers under Section 84 of the TNVAT Act.

8. In the light of the said fact, the conclusion arrived at by the Appellate Authority that the appeal is not entertainable is incorrect. I am supported by the decision of the Hon'ble Division Bench of this Court made in the case of State of Tamil Nadu v. Sabarigiri Industries reported in [2013] 58 VST 454 (Mad). Among other issues which were considered by the Hon'ble Division Bench, the first issue which was taken for consideration was regards the maintainability of the appeal. The facts of the said case also was more or less identical to the case on hand and while deciding the question relating to the maintainability, the Hon'ble Division Bench has held as follows:

'6. As far as the first issue on the maintainability of the appeal is concerned, in the decision reported in 39 STC 260 State of Tamil Nadu

Vs. Crompton Engg. Co., this Court held that there is a clear and a real distinction between an order allowing an application for rectification and thereby rectifying or modifying the original order of assessment and an order rejecting an application for rectification. When the rectification proceedings resulted in a positive action, which has the effect of destroying the finality of original assessment, thereby reopening the assessment order itself, then the provisions relating to appeal would lie. On the other hand, when the Assessing Officer refuses to interfere with the original order and that order is allowed to remain intact, the said order would not be amenable normally to appeal remedy. In so holding, this Court referred to the provisions under Section 55 (4) of the Tamil Nadu General Sales Tax Act, 1959, inserted by Amendment Act No.31 of 1972, providing for appeal and revision remedy when an order of rectification is made, and not when the authority concerned refuses to pass an order of rectification.

7. Similar view was also taken in the decision of this Court reported in 114 STC 359 State of Tamil Nadu Vs. Speedline Agencies. This Court, in paragraph 5 of the judgment, pointed out as follows:-

"Any order made by an authority declining to correct any alleged errors has the effect of leaving the original order intact. It is only when rectification is ordered, and as consequence, one of the parties is aggrieved by such modification, a remedy is required to be provided. For that purpose, Section 55(4) of the Act has been introduced. That new Sub-Section (4) of Section 55 does not confer a right on an applicant who successfully seeks rectification, to file appeal or revision against the order declining to rectify. If the authority which made the original order is of the view that there are in fact no errors in the order which need to be rectified, or can be rectified under Section 55 of the Act, no further proceedings can be taken by applicant, against the refusal of the authority to make an order in favour of the person applying for rectification."

Thus, by applying the above decision to the facts of the case, the only conclusion that could be arrived at is to hold that the impugned order passed by the Appellate Assistant Commissioner calls for interference. Accordingly, W.P.No.6990 of 2004 is allowed and the order passed by the Appellate Assistant Commissioner is set aside and the matter is remanded to the Appellate Assistant Commissioner for fresh consideration, who shall consider the validity of the assessment order as well as the order under Section 55 of the Act, afford an opportunity of personal hearing to the petitioner and pass a speaking order on merits and in accordance with law.

5. In the light of the above order, the writ petition in W.P.No.6989 of 2004 is closed. Since the petitioner had the benefit of interim stay in these writ petitions for all these years and they have also effected pre-deposit of 25% at the time of filing the appeal, the remaining amount of tax and penalty shall remain stayed till the disposal of the appeal by the Appellate Commissioner. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

gsk/tar

To

1. The Commercial Tax Officer,
Leigh Bazaar Assessment Circle,
Salem.

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

+1cc to Mr.N.Inbarajan, Advocate, S.R.No.47931

W.P.No.6989 & 6990 of 2004

PPA(CO)
CS/18/08/17