IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.01.2017

Coram

THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER

W.P.Nos.32566 and 32641 to 32645 of 2016

and WMP Nos.28219 and 28280 to 28284 of 2016

M/s.Jeevan Buy N.Save,
rep. by its Proprietrix,
No.52, Ashok Nagar, 10th Avenue,
Chennai-600 083. .. Petitioner in both

Vs.

1 Commissioner of Commercial Taxes
Ezhilagam, Chepauk, Chennai 5 — 1st Respondent in WP.32566/2016

2. The Joint Commissioner (CT),
Enforcement - II,
Chennai-600 006.

3. The Commercial Tax Officer,
Group-I, Enforcement (South),
Greams Road, Chennai-600 006.

4. The Assistant Commissioner (CT),
Ashok Nagar Assessment Circle,
Chennai-600 092. — 2 to 4 Respondents in WP.No.32566/2016 amd 1 to 3 Respondents in WP's.32641 to 32645/2016

Prayer in W.P.No.32566 of 2016 : Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorari, or any appropriate writ or direction, to call for the records of the VAT audit report of the third respondent and quash the same is illegal and VAT audit report of the Enforcement Wing dated 30.04.2015, is against the law as laid down by statute under Section 64(4) of the TNVAT Act and pass such further or other order or orders.

Prayers in W.P.Nos.32641 to 32645 of 2016 : Writ Petitions filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorarified Mandamus to call for the records of the proceedings of the third respondent in TIN33591403260/2010-11 (W.P.No.32641/2016), TIN33591403260 / 2011-12 (W.P.No.32642/2016), TIN33591403260/2012-13 (W.P. No.32643/2016), TIN33591403260/2013-14 (W.P.No.32644/2016) and TIN33591403260/2014-15 (W.P.No.32645/2016), dated 10.08.2016 and quash this order passed therein as illegal and to direct the third respondent to pass revised orders without being influenced by the illegal VAT audit dated 30.04.2015 and by the report of the second respondent based on VAT audit which is against the principles of law as laid down by statute under Section 64(4) of TNVAT Act and pass fresh orders by providing an opportunity of personal hearing to the petitioner.

For Petitioner in all the writ petitions	:	Mr.C.Bakthasiromoni
For Respondents in all the writ petitions	:	Mr.S.Kanmani Annamalai, Additional Govt. Pleader

COMMON ORDER

1. The captioned writ petitions challenge five (5) separate Assessment Orders of even date, i.e., 10.08.2016, pertaining to Assessment Years (AY) 2010-2011, 2011-2012, 2012-2013, 2013-2014 and 2014-2015. To be noted, the orders have been passed by the third respondent.

2. Pertinently, the petitioner's challenge to the impugned orders is made on, one, singular ground, which is, that the said orders are based on the result of a VAT audit, which was authorised by the Joint Commissioner, who was not vested with the necessary power under Section 64(4) of the Tamil Nadu Value Added Tax Act, 2006 (in short “the 2006 Act”).

3. Given the aforesaid submission, the following facts are required to be noticed for the purpose of adjudicating upon the captioned writ petitions :

3.1. The petitioner is a registered dealer on the file of the third respondent. The petitioner claims that he has been regularly filing his monthly returns and paying the requisite taxes.

3.2. It appears that the place of business of the petitioner was audited by the Commercial Officer of the Enforcement Wing Group - I, that is, in effect, the second respondent. Consequent thereto, a VAT audit was conducted, according to the petitioner, on various dates spanning between 14.04.2015 and 30.04.2015.

3.3. It is also the petitioner's case that this VAT Audit was conducted by the second respondent, based on the authorization received from the Joint Commissioner (CT), Enforcement-II, Chennai.

3.4. As indicated above, the petitioner says that the VAT Audit could not have been conducted by the second respondent, based on the authorisation of the Joint Commissioner.

3.5. The submission made on behalf of the petitioner that the VAT audit was conducted, based on the authorisation of the Joint Commissioner, is sought to be established by relying upon an extract of the statement made by the petitioner, before the second respondent, after completion of the VAT audit.

3.6. For the sake of convenience, the said extract is set forth hereafter :

> "On 14.04.2015 at 10.30 A.M. yourself along with the Deputy Commercial Tax Officer have visited our place of business, and introduced yourselves as Officers of Enforcement Wing of Commercial Taxes Department and informed that you have come for VAT Audit of our firm, as per the Authorisation issued by the Joint Commissioner (CT) Enforcement-II, Chennai-600 006. I am the Proprietor of the Firm, and I am well aware with the matters pertaining to Sales Tax, and I was present at that time of your visit and made my help till the completion of verification and furnished all the information's as required by the Audit."

4. The aforementioned facts are not disputed before me, by Mr.S.Kanmani Annamalai, who appears for the respondents.

4.1. It is, however, the contention of Mr.Annamalai, based on the proceedings dated 16.05.2014, that, in fact, the Commissioner of Commercial Taxes, Chepauk, Chennai, had exercised the power of ordering VAT audit under Section 64(4) of the 2006 Act, and that, only the execution of the audit was left, albeit, to the respective Joint Commissioners of the Enforcement Wing.

4.2. Mr.Annamalai, also submits that while, issuing the proceedings dated 16.05.2014, care was taken by the Commissioner of Commercial Taxes that the audit was conducted by Officers, not below the rank of the Deputy Commercial Tax Officer.

5. Mr.Bakthasiromani, who appears for the petitioner, submits that the said proceedings cannot come to the rescue of the respondents, as Joint Commissioners under the provisions of Section 64(4) of the 2006 Act, have no power to authorise initiation of a VAT audit against registered dealer.

5.1. In support of his submissions, learned counsel for the petitioner seeks to place reliance on the order dated 18.03.2015, passed in W.P.No.7564 of 2015, titled : M/s.Arkema Peroxides India Pvt. Ltd., Vs. The Joint Commissioner (CT) and Others; and the order dated 25.02.2016, passed in W.P.No.31616 of 2015, titled : M/s.Cabco Paradise Pvt. Ltd., Vs. The Joint Commissioner (CT) and Others.

5.2. Furthermore, Mr.Siromani, also states that, since, the statute has provided a particular mode and manner, in which, the power had to be exercised, it can be exercised only in that manner, and not otherwise.

5.3. For this purpose, learned counsel seeks to place reliance on the judgement of the Supreme Court in Meera Sahni Vs. Lt. Governor of Delhi, 2008 (9) SCC 177.

6. I have heard the learned counsel for the parties and perused the record.

7. As indicated, at the very outset, the only issue, which arises for consideration is whether the assessment orders, which are based on a VAT Audit triggered by a Joint Commissioner, could be sustained, in view of the provisions of Section 64(4) of the 2006 Act.

7.1. To put it plainly, the petitioner's contention is, that, the audit was ordered by an Officer, who was not vested with the requisite power under Section 64(4) of the 2006 Act, and therefore, once the edifice is removed, the impugned orders should fall by the way side.

7.2. In order to appreciate this submission, it would be pertinent to extract the relevant provisions of the 2006 Act :

"64. Maintenance of upto date, true and correct accounts and records by dealers -

(1) .....

(2) .....

(3) .....

(4) The Commissioner may order for audit of the business of any registered dealer by an officer not below the rank of Deputy Commercial Tax Officer. For the purpose of this section, the selection of dealers for audit shall be made from amongst the dealers,-

(a) who have not filed returns within the prescribed period; or

(b) who have claimed exorbitant amount of refund of tax; or

(c) who have filed returns, but in the opinion of the Commissioner he is not satisfied with the correctness of any return filed, any claim made, deduction claimed or turnover disclosed in any such return; or

(d) on the basis of any other criteria or on a random selection basis by the Commissioner ; or

(e) where detailed scrutiny of the case is necessary in the opinion of the Commissioner."

(emphasis is mine)

7.3. A bare perusal of Section 64(4) of the Act would show that the Commissioner may order for audit of the business of any registered dealer by an officer not below the rank of Deputy Commercial Tax Officer. The selection of dealers for audit is to be made from amongst the dealers, who fall in any one, or, more of the five categories set out in clauses (a) to (e) of Section 64.

8. Quite clearly, as has been correctly argued by Mr.Siromani, the audit can only be ordered by the Commissioner. In this case, as is evident from the statement of the petitioner, as recorded by the second respondent himself, the audit was authorised by the Joint Commissioner.

8.1. The Commissioner, under the provisions of Section 64(4) of the 2006 Act, could not have delegated his power to order an audit qua a dealer to the Joint Commissioner.

8.2. Mr.Annamalai's submission that the power was exercised, in fact, by the Commissioner; is a submission, which is based on the contents of the proceedings dated 16.05.2014. This submission, to my mind, cannot be sustained for the reasons given hereafter.

8.3. Paragraph 1 of the proceedings dated 16.05.2014, would show that the registered dealers, whose names are, evidently, mentioned in the Annexure said to be appended to the said proceeding, have, apparently, been selected based on the parameters set out in the aforesaid paragraph. These parameters are summarised in paragraph 1, which, for the sake of convenience, are extracted hereafter:

Sl. No.	Parameters
(i)	Dealers whose total turnover (VAT + CST) is more than Rs.50 crores in 2013-14 and who have not been subjected to audit so far since 01/01/2017.
(ii)	Dealers (Traders only) whose total output tax < 90% of total input tax in 2013-14.
(iii)	Dealers whose value of inter-state branch/consignment transfer has increased more than 20% in 2013-14 over previous year.
(iv)	Dealers who made import / interstate purchase / transfer of taxable goods in 2013-14 and whose output tax <90% of VAT payable on value of such inward goods.
(v)	Dealers who effected total purchase of goods from R.C. Cancelled dears and claimed ITC of more than Rs.10,000/- in 2013-14.

Sl. No.	Parameters
(vi)	Dealers who had paid average net VAT of Rs.50,000/- and above every month in 2013-14 and such payment of tax remained within the range of + or - 5% of the average for atleast 9 months.

8.4. Paragraph 3 of the very same proceedings is indicative of the fact that the Joint Commissioners of the Enforcement Wing have been asked to authorise the Officers to conduct an audit, keeping in mind that the audit was conducted by the Officers, who were not below the rank of Deputy Commercial Tax Officer.

8.5. Pertinently and rather curiously, the annexure appended to the aforesaid proceedings has not been placed on record by the respondents. Therefore, the names of the entities, supposedly, identified for conduct of VAT audit are not known. Therefore, it is quite possible that the petitioner's case was not even picked up for conduct of audit.

8.6. Furthermore, a plain reading of paragraph 3 of the proceedings dated 16.05.2014, would show that the Commissioner appears to have delegated the power to authorise conduct of VAT audit, to the Joint Commissioners of the Enforcement Wing. This, according to me, is not in consonance with plain provisions of Section 64(4) of the 2006 Act.

8.7. Therefore, as indicated above, this submission made by Mr.Annamalai, on behalf of the respondents, cannot be sustained.

9. Mr.Siromoni, in support of his submissions, has relied upon the order of this Court, i.e., order dated 18.03.2015, passed in W.P.No.7564 of 2015, titled : M/s.Arkema Peroxides India Pvt. Ltd., Vs. The Joint Commissioner (CT) and Others, and the order dated 25.02.2016, passed in W.P.No.31616 of 2015, titled : M/s.Cabco Paradise Pvt. Ltd., Vs. The Joint Commissioner (CT) and Others.

9.1. To be noted, the first order, i.e., order dated 18.03.2015, pertains to a case, where, challenge was made to an intimation dated 31.12.2014, which is a stage, prior to the passing of the assessment order. The second order pertains to a challenge laid to the VAT Audit report dated 24.01.2014.

9.2. As indicated above, this is a case, where, after the VAT Audit was over, the assessment orders were passed.

9.3. The record, however, shows that after the audit was conducted and the statement of the petitioner was recorded, it was placed before him and the petitioner appears not to have signed the statement. There is, in that sense, no acquiescence on the part of the petitioners, though, based on the VAT audit report, respondent No.3, proceeded to pass the assessment orders.

9.4. It is, therefore, the argument of Mr.Siromani that the legal validity of that VAT Audit was not accepted by the petitioner, and therefore, the impugned assessments orders were without jurisdiction.

9.5. I am inclined to accept the submission of the petitioner that the jurisdiction to conduct VAT audit, which was authorised by the Joint Commissioner was not accepted by the petitioner and therefore, the assessment orders passed were also without jurisdiction.

10. Accordingly, the prayer made in the writ petition is allowed. The assessment orders and the VAT Audit reports are set aside. Liberty is, however, given to the respondents to conduct a fresh VAT audit, if necessary, and pass fresh assessment orders, albeit, in accordance with law.

11. The writ petitions are closed in the aforesaid terms. Resultantly, pending applications shall also stand closed. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

gg
To

1. The Joint Commissioner (CT),
Enforcement - II,
Chennai-600 006.

2. The Commercial Tax Officer,
Group-I, Enforcement (South),
Greams Road, Chennai-600 006.

3. The Assistant Commissioner (CT),
Ashok Nagar Assessment Circle,
Chennai-600 092.

+1cc to Mr.C. Bakthasiromoni, Advocate, S.R.No.3287

rsy(CO)
md(09/02/2017)