IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2017

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.45412 of 2006 & M.P.No.2 of 2006

Tvl.Subhyog Steels Ltd.,
rep. by A.Srikanth,
100, Rasappa Chetty Street,
Chennai-3. ... Petitioner

Vs.

The Commercial Tax Officer,
Moore Market (N) Assessment Circle,
Chennai. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, to call for the records on the file of the respondent in TNGST 0380772/1999-2000 dated 20.10.2006, and quash the same being illegal and arbitrary.

For Petitioner : Mr.S.N.Kirubanandam

For Respondent : Mr.S.Kanmani Annamalai,
Additional Government Pleader

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O R D E R

Learned counsel on either side agreed that the issue involved in this writ petition is squarely covered by the decision of this Court in the case of Salem Steel Suppliers and others vs. The Deputy Commissioner and another in W.P.Nos.24437 of 2004 etc., batch dated 08.08.2017. The said writ petitions arose out of an identical issue pertaining to transactions done by the dealers with other persons, who were termed as bill traders. The cases covered in the earlier batch were under two categories. One such category being the assessing officer itself has reopened the proceedings and the other category, where the revisional authority exercised his power of suo motu revision.

2.The Court after elaborately considering the factual matrix and the legal position, allowed the writ petitions. The operative portion of the order reads as follows:

> 13. Bearing in mind the above two statutory provisions, if we examine the impugned notices, it is seen that the notices issued to the petitioners contain seven pages, which are common to all the petitioners. In fact, these seven pages appear to be photostat copies, which are commonly prepared and the name of the dealer has been filled up in hand at the appropriate place. Thus, the entire purpose behind issuing impugned notices is to re-open the concluded assessment. The averments set out in the impugned notices do not reveal that any independent enquiry has been done by the first respondent before issuing the impugned notices. In fact, identical notice was issued to the petitioner in W.P.No.24437 of 2004 (M/s.Salem Steel Suppliers) for the assessment year 1999-2000, dated 10.06.2004, and curiously enough, the allegations, that are made in the present impugned notices were contained in the said earlier notice also.
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> 14. Thus, the pattern adopted by the first respondent is identical to that of the pattern adopted by the respective Assessing Officers for either earlier or subsequent assessment years. Hence, the first respondent had no new material to come to the conclusion that the assessments have to be re-opened, as it is prejudicial to the interest of the Revenue, and he forms such opinion on enquiry being made. If that is the factual position, then, obviously, the first respondent cannot exercise the powers, what could not have been done by the Assessing Officer, as the statement was recorded much after the assessments were completed, and the same are clearly barred by limitation, as it is beyond the period of five years. At this juncture, it is relevant to note that, the Hon'ble Division Bench, in the case of A.Velayutha Raja (cited supra) has pointed out that the revisional powers exercised by the Board of Revenue under Section 34 of the Madras General Sales Tax Act, 1959, are subject to the other provisions of the Act, and therefore, a best

Judgment assessment or an original assessment by the Board under Section 34 on the ground of escapement of turn over is bad in law and unsustainable. It is not a mere subjective satisfaction that is envisaged in Section 34, but, it should stand the test of objectiveness as also prescribed guidelines set in the section itself, and it should be in accord with the other provisions of the Act. It was further pointed out in the said case that the provisions as to the period of limitation, within which, escaped turnover can be brought to tax as provided in Section 16(1) equally apply, when such an order is sought to be passed by the Board in exercise of its powers under Section 34.

15. The power under Section 16(1) is wide enough and cannot be said to be limited to assessment of assessable turnover under that sub-section by the Assessing Authority only. It is to be invoked in all cases, where, a statutory functionary under the Act assumes jurisdiction to assess the escaped turnover. Therefore, it was held that, in passing an original order of assessment, the Board exceeded its powers under Section 34, and that the order was also passed beyond time. Therefore, the order was held to be unenforceable in law.

16. Following the decision rendered in the case of A.Velayutha Raja (cited supra), the Hon'ble Division Bench, in the case of Reliance Motor Company Private Limited (cited supra), while examining the power of the Joint Commissioner under Section 34 of the TNGST Act to bring the escaped turnover to tax, when it was neither a subject matter of assessment proceedings nor appellate proceedings, it was held that, 'even if the Joint Commissioner could otherwise have brought the escaped turnover to tax for the first time, since the notice issued by him was beyond the period of limitation prescribed under Section 16 (1) of the Act, the order passed by him was without jurisdiction'.

17. In the case of (M.M.Mohideen Thamby & Co. Vs. The Deputy Commissioner) reported in (1996) STC Mad 87, it was contended that the Deputy Commissioner has no jurisdiction to enhance the turnover and the revision was barred by limitation. After taking note of

Sections 16 and Section 32 of the TNGST Act, the Hon'ble Division Bench pointed out that, according to Section 16(1)(a), where, for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the assessing authority may, subject to the provisions of the sub-section (2) at any time, within a period of 5 years from the expiry of the year to which the tax relates, determine to the best of its judgment, the turnover, which has escaped the assessment, and assess the tax payable on such turnover after making such enquiry, as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment. Therefore, even if a direction was given by the Deputy Commissioner to reopen the assessment, the Assessing Officer can reopen the assessment only if there is a period of five years for reopening as contemplated under Section 16(1)(a) of the Act.

18. In the case of P.Narayanasamy (supra), the question was whether, while exercising jurisdiction under Section 34 of the TNGST Act, 1959, the Joint Commissioner can revise the order passed by the authorities below only on the basis of the materials available on record. The Hon'ble Division Bench held that the Joint Commissioner cannot rely upon the extraneous materials, which were not on record before the order was passed by the lower authorities.

19. In the instant case, the material sought to be relied upon was available with the Assessing Officer for the relevant assessment year. As noticed, the Assessing Officer himself, in the subsequent assessment orders has referred to the very same materials, which are contained in the earlier notice, and hence, the impugned notices are unsustainable. One more important factor to be noted is that the petitioners' sellers, viz., i) M/s. Aashana Enterprises, ii) M/s.Kamelesh Enterprises, and iii) M/s. Shreyanash Ispat Chennai, Pvt. Ltd. have been assessed to tax for the assessment year, viz., 1998-99 vide the assessment orders, dated 16.02.2000, 14.02.2000 and 27.01.2000, and those assessment orders are intact, and this one more reason to hold that the impugned

notices are unsustainable.

20. For the above reasons, it is held that the impugned notices are wholly without jurisdiction. Accordingly, Writ Petition Nos.24437, 26998, 27330 and 27345 of 2004 are allowed and the impugned orders are quashed.

II) W.P.No.34269 of 2004

21. Insofar as W.P.No.34269 of 2004 is concerned, the legal issue involved herein is squarely governed by the orders passed by this Court in the aforementioned four Writ Petitions, viz., W.P.Nos.24437, 26998, 27330 and 27345 of 2004, following the same, W.P.No.34269 of 2004 is also allowed, and the impugned order is set aside. No costs.

22. In the result, all these Writ Petitions are allowed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Following the above, this writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

abr

To
The Commercial Tax Officer,
Moore Market (N) Assessment Circle,
Chennai.

+1 cc to the Special Govt Pleader Taxes sr 81412

+1 cc to Mr.S.N.Kirubanandam Advocate sr 81833

W.P.No.45412 of 2006

rj(co)

aa13/12/2017