IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.10.2017

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.45799 & 45800 of 2006 & M.P.Nos.1 & 1 of 2006

M/s.Rajaganapathi Traders,
Rep. by its Partner, M.Chandradasan,
426, Main Road, Shevapet, Salem-2. ..Petitioner in both W.Ps.

Vs.

The Commercial Tax Officer (FAC),
Leigh Bazaar Circle,
Commercial Taxes Buildings,
Fort Main Road, Salem-1. ..Respondent in both W.Ps.

Petitions filed under Article 226 of the Constitution of India praying for issue of Writ of Certiorari, to call for the records of the respondent in his proceedings in TNGST 649212/93-94, 94-95 respectively, dated 29.09.2006 and quash the same as illegal.

For Petitioner : Mr.S.Ramanathan

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

O R D E R

Heard Mr.S.Ramanathan, learned counsel for the petitioner and Mr.S.Kanmani Annamalai, learned Additional Government Pleader for the respondent.

2.The petitioner in these writ petitions has been challenged the order of assessment passed under the provisions of the Tamil Nadu General Sales Tax Act, 1959 (in short “TNGST Act”) for the assessment years 1993-94 & 1994-95. It may not be necessary for this Court to make a roving exercise into the factual matrix as the short issue to be decided in these writ petitions is whether the impugned orders are in compliance with the directions issued by this Court in W.P.Nos.2945 & 2946 of 2005 dated 01.02.2005. The said writ petitions were filed by the petitioner herein challenging the proceedings of the respondent dated 28.12.2004.

3.By the said proceedings, the respondent assessed the petitioner to tax and failed to give effect to the order passed by the Appellate Assistant Commissioner directing an opportunity of cross examination being offered to the petitioner to cross examine the other end dealer viz., Karnataka. The Court considered the matter elaborately and by common order dated 01.02.2005 disposed of the writ petition with point out observations. At this juncture, it would be relevant to quote the order in its entirety.

> "Challenge in these Writ Petitions is to the order of the respondent dated 28.12.2004 which order has been passed after an order of remand made by the Appellate Assistant Commissioner (CT), Salem, specifically directing the respondent to provide an opportunity to cross examine the seller at Bangalore with regard to the alleged purchased of Refined Sunflower Oil for Rs.37,39,000/- during the year 1993-94 and Rs. 9,73,800/- during the year 1994-95. In fact, earlier, when the respondent expressed his inability to summon the concerned seller at Bangalore, the petitioner approached the Tamil Nadu Taxation Special Tribunal, Chennai, in O.P.Nos.1403 and 1404 of 2003 in which an order came to be passed on 09.02.2004, holding that the respondent should invoke the powers vested in him under Section 54 of the Tamil Nadu General Tax Act to summon the seller, namely, one Tvl.KLN Agro Tech (P) Ltd., Bangalore, and grant an opportunity to the petitioner to cross-examine them as directed by the appellate authority and in accordance with law.
>
> 2. Section-54 of the Tamil Nadu General Sales Tax Act discloses that the assessing authority is vested with all the powers conferred on a Court by the Code of Civil Procedure for the purpose of summoning and enforcing the attendance of any person and examining him on oath or affirmation as well as compelling the production of any document. The said provision also enables the respondent to take action in the event of the summoned person failing to attend or produce the document called for.
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> 3. I find that the respondent has stated in the order impugned in W.P.No. 2945/2005 as under:-
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> > "According to the direction of the Appellate Assistant Commissioner (CT), Salem to provide opportunity for cross

> examination, the seller at Bangalore was summoned to produce the accounts for cross examination with the dealer to the alleged purchase of Refined Sunflower Oil for Rs.37,39,000.00 during the year 93-94. The notice issued to the other state dealer was served on 24.03.2004 as per this office reference 7th cited. But the selling dealers has not come forward to appear in this office along with their account and they have not co-operated with the department for cross examination. In the Circumstances, there is no other alternative except to pass orders with reference to the available materials on hand."

4. The above extracted portion of the impugned order only discloses that the respondent was not inclined to exercise all the powers that are vested in him under Section 54 of the Tamil Nadu General Sales Tax Act. The respondent was rest content with merely issuing the summons and stating that since the concerned dealer failed to appear, he had no other alternative except to pass orders based on the available materials on hand. The respondent failed to realise that in the event of such helplessness being recorded by the respondent, at best, he could not have relied upon any of the materials which were relatable to the said dealer for the purpose of determining the tax liability on the petitioner. In other words, in the absence of the concerned dealer being examined, it would not be proper for the respondent to rely on those materials to fasten the liability on the petitioner.

5. In such circumstances, there is not other go except to set aside the orders impugned in these writ petitions and direct the respondent to hold the proceedings afresh, exercising all the powers that are vested in him under section 54 of the Tamil Nadu General Sales Tax Act in order to ensure the presence of the dealer concerned for being offered for cross examination by the petitioner, without which, there would be no scope for the respondent to rely on the materials relating to the said dealer for determination of the tax liability on the petitioner. It is open to the respondent to pass order afresh by complying with the provisions contained in

Section 54 of the Tamil Nadu General Sales Tax Act.

6. Writ Petitions are disposed of accordingly. No costs. Connected Miscellaneous Petitions stand closed."

4.While disposing of the writ petition, the Court took into consideration the power conferred on the assessing authority under Section 54 of the TNGST Act and directed that the assessing authority should exercise all the powers that are vested in him under Section 54 of the TNGST Act, in order to ensure the presence of the dealer concerned for affording an opportunity of cross examination to the petitioner.

5.After making such an observation, the Court specifically held that without affording an opportunity of cross examination of the other end dealer, there was no scope for the respondent to rely on the material relating to the said dealer for determination of the said liability on the petitioner. Though such was the direction issued by the Court directing the respondent to exercise all the powers under Section 54 of the TNGST Act, the respondent appears to have issued summons to the dealer in Karnataka and it is stated in the written instructions given to the learned Special Government Pleader vide communication dated 16.02.2007, six summons were issued to the dealer, but the dealer from Karnataka did not appear.

6.At this juncture, it is relevant to point out that this is the reason why the Court specifically observed that the respondent should exercise all the powers conferred on it under Section 54 of the TNGST Act. If the respondent is unable to produce the other end dealer (Karnataka dealer), the question of using the materials collected from Karnataka against the petitioner does not arise, as this has been specifically prohibited in the orders passed by this Court dated 01.02.2005 (supra).

7.Thus, the impugned assessment order confirming the proposal in the show cause notice on the ground that the dealer has not appeared before the respondent cannot be sustained. Thus, taking note of the observation passed by this Court in the earlier writ petition, the question of remitting the matter to the respondent once again does not arise, as the Court has specifically barred the same by observing that without offering the other end dealer for cross examination, the materials gathered by the respondent from the said dealer cannot be relied on for determination of the tax liability of the petitioner.

For the above reasons, these writ petitions are allowed and the impugned orders are quashed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

abr

To

The Commercial Tax Officer (FAC),
Leigh Bazaar Circle,
Commercial Taxes Buildings,
Fort Main Road, Salem-1.

+ 1 cc to Special Government Pleader Sr.72064
+ 1 cc to M/s. S. Ramanathan, Advocate Sr.71964

W.P.Nos.45799 & 45800 of 2006

RSI(CO)
EU(09/11/2017)