

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.03.2017

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

Writ Petition No.40361 of 2016
and
WMP.No.34430 of 2016

M/s.Hotel Sky Park
Rep. by its Partner Asraf Ali
No.198, J Block, 15th Main Road,
Anna Nagar, Chennai-600 040. Petitioner

Vs.

The Assistant Commissioner (CT)
Koyambedu Assessment Circle
Market Management Committee Building
Koyambedu, Chennai-600 017. Respondent

Writ petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records on the file of the respondent in TNGST No.1344623/2005-06 dated 21.10.2016 and quash the same as illegal, without jurisdiction and authority of law and barred by limitation U/s.55 of TNGST Act.

For Petitioner: Mr.T.Pramodkumar Chopda

For Respondent : Mr.K.Venkatesh
Government Advocate

O R D E R

The petitioner is aggrieved by the order passed by the respondent dated 21.10.2016, wherein, the proposal made by the respondent under notice dated 27.07.2007 issued under Section 55 of the TNGST Act, 1959, was confirmed.

2. The short facts that arises for consideration in this writ petition are as follows:

The petitioner is a registered dealer under the Tamil Nadu Value Added Tax Act, 2006. In respect of assessment year 2005 - 2006, a pre-assessment notice was issued to the petitioner on

12.01.2007 making certain proposals and calling upon them to file their objections. The petitioner responded to such notice, filed the objections and placed materials in support of their contentions. Consequently, an order of assessment, dated 22.02.2007 was passed by the Assessment Authority by determining the total and taxable turn over as Rs.1,88,41,585/- and Rs.31,39,664/- respectively, thereby determining the tax and surcharge as Rs.55,762/- and Rs.2,437/- respectively. The petitioner has paid the said tax and surcharge, as reflected in the said order of the assessment itself. Thereafter, on 27.07.2007, a notice was issued for revision of the assessment, however by claiming the same as the one under Section 55 of the said Act. It was stated in the said notice that the assessment made under Section 3D(1) of the TNGST Act, 1959 was not in order, as it has to be levied under Item 29 of Part C of the first schedule, since the petitioner-Hotel must be treated as a Star Hotel, as the same is recognized by the Indian Tourism Development Corporation. The second reason for issuance of such notice was that the dealer has purchased snacks for Rs.15,15,099/-, for which no purchase bills were furnished. It was also proposed to levy penalty under Section 12(3)(b) of the said Act. The petitioner gave reply / objections to the said notice on 01.08.2007. They also sought for a personal hearing before passing the revision assessment order, if the objections raised by the petitioner were not accepted. The respondent did not proceed further for nearly nine years. Thereafter, a reminder notice, dated 30.09.2016 was issued to the petitioner calling upon them to file their objections to the revision notice dated 27.07.2007 within 7 days. Since the said notice was issued after a period of 9 years, the petitioner sent a reply on 19.10.2016 calling upon the respondent to furnish a copy of the revision notice, dated 27.07.2007, so as to enable them to trace the relevant records relating to the relevant period and to file their objections. However, the respondent passed the impugned order on 21.10.2016, confirming the proposals made in the notice dated 27.07.2007.

3. The proceedings initiated by the respondent under Section 55 of the TNGST Act by passing an order under such provisions on 21.10.2016 is challenged in this writ petition mainly by contending that the same is barred by limitation as provided under Section 55 (1) of the said Act. Even otherwise on merits, it is contended that the petitioner is not a Star Hotel, as presumed by the respondent, and on the other hand, it is only recognized by the ITDC. Insofar as the allegation that the petitioner had purchased snacks for Rs.15,15,099/- and that they did not produce purchase details is concerned, it is contended that such allegation is totally and factually wrong, in view of the fact that the very assessment order originally made on 22.07.2007 had dealt with such purchase, by specifically giving

a finding that the purchase details were produced by the petitioner for verification, which were found to be in order. Therefore, the petitioner contended that the impugned order is liable to be set aside not only on the reason that it is barred by limitation, but also on the ground that the same is an outcome of non-application of mind. It is also their case that the impugned order is liable to be set aside on the ground of violation of natural justice, as the petitioner was not given personal hearing.

4. A counter affidavit is filed by the respondent, wherein, it is contended that though the notice issued to the petitioner dated 27.07.2007 was quoted as the one issued under Section 55 of the said Act, in effect, it is only a notice under Section 16 of the said Act, and therefore, wrong quoting of provisions, cannot be taken advantage of by the petitioner to contend that the proceedings are barred by limitation. It is further contended by the respondent that, since the petitioner-Hotel is recognized by the ITDC, higher rate of tax is liable to be levied, as rightly done in the impugned order.

5. Mr.T.Pramodkumar Chopda, learned counsel for the petitioner, by inviting my attention to Section 55(1) of the TNGST Act, submitted that the impugned order passed after a period of five years is barred by limitation. He has also invited my attention to the original order of assessment and the notice for revision dated 27.07.2007 to contend that the respondent has committed error apparent on the face of such proceedings without considering the fact that the petitioner has already furnished the purchase details with regard to purchase of snacks.

6. Per contra, the learned Government Advocate appearing for the respondent supported the impugned order by reiterating the contentions raised therein. He submitted that when once the notice was issued by following the provisions of law, the petitioner is not entitled to claim that the proceedings is barred by limitation.

7. Heard both sides.

8. As the facts and various circumstances of the case are extracted in detail supra, I am not reiterating the same once again. Admittedly, the Assessing Officer passed an order of Assessment on 22.02.2007. There is no dispute to the fact that in the said order of the Assessment, S.No.5 of the commodity was referred to as "snacks unbranded" (re-sale) with the value of Rs.15,15,099/- and the proposed purchase tax towards the same was referred to under Section 7(A) as 4%. It was also referred

to in the said order that the petitioner produced purchase bills and that it was verified and found in order in respect of proposal of Tax at S.Nos.3 to 7 of the items, out of which S.No.7 admittedly is in respect of purchase tax under Section 7 (A) of unbranded (re-sale) at 4%. Therefore, it is evident that the petitioner had produced purchase details in respect of these snacks unbranded item and the same were verified and found in order by the Assessing Authority.

9. That being the factual position, the notice for revision dated 27.07.2007 has referred to the very same purchase of snacks to the tune of Rs.15,15,099/-, as the one without producing the purchase details. Therefore, it is evident on the face of the assessment order and the notice for revision itself that the respondent has factually committed mistake in issuing the revision notice in respect of the purchase of unbranded snacks. Therefore, I find that the said claim of the respondent is erroneous on the face of the original order of assessment and the notice issued for revision. Therefore, there is no necessity for the respondent to re-visit the matter in respect of such items of purchase of snacks.

10. While coming to the next issue with regard to the claim of the respondent that the petitioner-Hotel must be a Star Hotel, a perusal of the notice dated 27.07.2007 would show that the respondent himself has admitted that the original order of assessment was made under Section 3D(1) of the TNGST Act, 1959, instead of levying under Item 29 of Part C of the First schedule to the said Act. It is clearly stated by the authority in the said notice that the assessment made under Section 3D(1) of the TNGST Act, was not in order. The very observation made by the officer, would undoubtedly indicate that he made mistake in the said assessment by levying lower rate of tax and therefore, he wanted to rectify such mistake. No doubt, the notice was issued as if it is for revision, however, by quoting Section 55 of the said Act as the provision of law. As rightly pointed out by the learned counsel for the petitioner, an apparent error on the face of the record can be rectified only within 5 years from the date of passing of the assessment order. In this case, as the assessment order was passed as early as on 22.02.2007, the respondent is not empowered to pass the order impugned in this writ petition after a period of nine years i.e. on 27.10.2016.

11. In order to find out the nature of a proceedings, neither the nomenclature nor the provision of law quoted therein would play as a deciding factor. On the other hand, the intention of such proceedings as could be gathered from the recitals contained therein is important to decide its nature.

12. Therefore, I find that the impugned order cannot be sustained on the ground of limitation as well. Even otherwise, it is seen that the petitioner was not given opportunity of hearing before passing the impugned order. Normally under such circumstances this Court would remit the matter back to the Authority to pass fresh order of assessment after providing such opportunity. However, in this matter, it is not necessary to do so since it is found that the impugned order was passed after the period of limitation and the assessing authority has also factually erred.

13. Accordingly, the Writ Petition is allowed and the impugned order of assessment is set aside. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

The Assistant Commissioner (CT)
Koyambedu Assessment Circle
Market Management Committee Building
Koyambedu, Chennai-600 017.

+1cc to Mr.T.Pramodkumar Chopda, Advocate Sr.16888
+1cc to the Special Government Pleader Sr.16948

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W.P.No.40361 of 2016

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