IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.08.2017

CORAM

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

W.P.Nos.24437, 26998, 27330, 27345 and 34269 of 2004
and
W.P.M.P.Nos.33247 & 33264 of 2004

1.M/s.Salem Steel Suppliers,
No.25, Ponnappa Chetty Street,
Chennai 600 003.
... Petitioner in W.P.24437 of 2004

2.M/s.Madras Steel Agencies,
Rep by its Partner Mohanlal Bhandari
No.17/1, Ekambareswarar Agraharam,
Park Town, Chennai 600 003.
... Petitioner in W.P.26998 of 2004

3.M/s.Rajyog Steels,
Rep by its Proprietor
C.Rameshkumar
No.16/6, Ekambareswarar Agraharam,
Park Town, Chennai 600 003.
... Petitioner in W.P.27330 of 2004

4.M/s. Reliable Steels,
rep. By its Proprietor,
H.Sattynarayan
No.16/8, Ekambareswarar Agraharam,
Park Town, Chennai 600 003.
... Petitioner in W.P.27345 of 2004

5.M/s.Myco Steel Agency,
rep. By its Proprietor,
Mr.Nawal Kishore Rathi,
No.4, Ramanan Road,
Chennai - 600 079.
... Petitioner in W.P.34269 of 2004

Vs.

1.The Deputy Commissioner (CT)
Chennai (North) Division,
PAPJM Building, Greams Road,
Chennai - 600 006.

2.The Commercial Tax Officer,
Moore Market (South) Assessment Circle,
191, NSC Bose Road,
Chennai - 600 001.

... Respondents 1 and 2 in W.Ps.
24437, 26998, 27330 & 27345 of 2004

Prayer in W.P.No.24437 of 2004

Writ Petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for the records of the first respondent in T/0360304/98-99/Rc.7958/2004/B4, dated 30.07.2004, and to quash the same, as the same is issued without jurisdiction and also beyond the statutory powers conferred as per Section 32 of the TNGST Act, and also against the law laid down by the Hon'ble Division Bench of this Court, in the case of (Deputy Commissioner of Commercial Taxes Vs. K.M.Thomas and Co.) reported in 31 STC 529 in the case of (M/s.P.Hajee Mohamed Saliah and Co. Vs. The State of Tamil Nadu) reported in 54 STC 62 and in the case of (M/s.P.Narayansamy Vs. State of Tamil Nadu) reported in 104 STC 421.

Prayer in W.P.No.26998 of 2004

Writ Petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorarified mandamus, to call for the records on the files of the first respondent in TNGST No./0360213/98-99/Rc.7958/2004/B4, dated 30.07.2004, and to quash the same, as illegal and beyond the statutory powers conferred as per Section 32 of the TNGST Act, and barred by limitation, and to direct the first respondent to furnish the records relied upon and to grant an opportunity of cross-examination.

Prayer in W.P.No.27330 of 2004

Writ Petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorarified mandamus, to call for the records on the files of the first respondent in TNGST No./0360871/98-99/Rc.7958/2004/B4, dated 30.07.2004, and to quash the same, as illegal and beyond the statutory powers conferred as per Section 32 of the TNGST Act, and barred by limitation, and to direct the first respondent to furnish the records relied upon and to grant an opportunity of cross-examination.

Prayer in W.P.No.27345 of 2004

Writ Petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorarified mandamus, to call for the records on the files of the first respondent in TNGST No./0360377/98-99/Rc.7958/2004/B4, dated 30.07.2004, and to quash the same, as illegal and beyond the statutory powers conferred as per Section 32 of the TNGST Act, and barred by limitation, and to direct the first respondent to furnish the records relied upon and to grant an opportunity of cross-examination.

Prayer in W.P.No.34269 of 2004

Writ Petition filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorarified mandamus, to call for the records on the file of the first respondent in Rc.No.12140/2004, dated 10.11.2004, and to quash the same, as illegal and beyond the statutory powers conferred as per Section 32 of the TNGST Act, and barred by limitation, and to direct the first respondent to furnish the records relied upon and to grant an opportunity of cross-examination.

For Petitioners in W.P.Nos.26998, 27330, 27345 & 34269 of 2004 : Mr.T.Pramod Kumar Chopda

For Petitioner in W.P.No. 24337 of 2004 : Mr.Raj Kumar

For Respondents in all W.Ps. : Mr.S.Kanmani Annamalai Additional Government Pleader (Tax)

COMMON ORDER

Since the issue involved in I) W.P.Nos.24437, 26998, 27330, 27345 of 2004 are identical, and as the relief sought for in II) W.P.No.34269 of 2004 is interconnected to the issue involved in afore mentioned four Writ Petitions, all these Writ Petitions were heard together and disposed of, vide this common order.

I) W.P.Nos.24437, 26998, 27330, 27345 of 2004 :-

2. The petitioners, in all these Writ Petitions are aggrieved by the notices issued by the first respondent, dated 30.07.2004. In the said notice, it was alleged that on perusal of records, it was noticed that the petitioners have purchased stainless steel sheets and coils from various dealers, that one S.Mahendra Kumar Jain, the Proprietor of M/s. Aashana Enterprises, the Power-of-Attorney Holder of M/s.Kamelesh Enterprises, and Director of M/s. Shreyanash Ispat Chennai, Pvt. Ltd., in his statement, dated 20.08.2003, given before the Deputy Commercial Tax Officer, Group IV, Central Enforcement Wing-I, Chennai, has stated that, he has given only sales bills

and the goods were not moved against the bills raised. Therefore, the first respondent proposed that the exemption claimed by the petitioners on the strength of the purchases effected by M/s. Aashana Enterprises and M/s.Kamelesh Enterprises that it had suffered tax at a earlier stage, is not in order and not eligible for exemption. The first respondent further stated that the petitioners have produced fabricated bills, in order to claim exemption and evade tax, both on purchases and sales, and therefore, the exemption claims have to be rejected.

3. After referring to certain case laws, the first respondent referred to Section 10 of the Tamil Nadu General Sales Tax Act, 1959 (henceforth, referred to as 'TNGST Act'), and stated that the petitioners failed to prove that there were anterior real value of goods, and the sales at the hands of the petitioners/dealers are to be treated as sales liable to tax under the TNGST Act. Hence, the first respondent proposed to re-determine the total and taxable turnover for the relevant years and also proposed to impose penalty under Section 12 (3) (b) of TNGST Act and Section 10 (3) of TNGST Act.

4. On a prima facie reading of the impugned notices, one gets an impression that, they are notices issued under Section 16 of TNGST Act, which deals with the assessment of escaped turnover. However, on careful reading of the same, it is seen that the impugned notices have been issued by the Deputy Commissioner of Tax (North) Division, exercising his special powers under Section 32 of TNGST Act.

5. The petitioners contention is that, the impugned notices are wholly time barred, vitiated, on account of the total non-application of mind, and are liable to be set aside. Though the learned counsel appearing for the petitioners had referred to a long line of decisions to substantiate their case, it would suffice to refer to the following reported decisions:-

i) [A. Velayutha Raja Vs. Board of Revenue (CT)] (1970) 26 STC 176.
ii) (Reliance Motor Company Pvt. Ltd., Vs. State of Tamil Nadu) (1992) Vol. 84 STC. 201.
and
iii) (M/s.P.Narayansamy Vs. State of Tamil Nadu) (1997) Vol.104 STC 421.

6. By referring to the above decisions, it is submitted by the learned counsel appearing for the petitioners that the Deputy Commissioner (CT), in exercise of his special power under Section 32 of the Act, could not have issued the impugned notices, which in fact, amounts to revising the assessment made

on the petitioners turnover, by exercising special power beyond the time limit provided under Section 16 of the TNGST Act. It is further submitted that the impugned notices are fall out of a statement, alleged to have been recorded from one S.Mahendra Kumar Jain, on 20.08.2003, and this statement having been recorded much after the assessment were completed, could not have been relied upon for re-opening the petitioners' assessments.

7. Thus, it is the submission of the learned counsel appearing for the petitioners that, if the Deputy Commissioner (CT), in exercise of special power under Section 32 of the Act, proposes to revise/modify the orders of assessment, it cannot be done beyond the period of limitation prescribed under Section 16 of the TNGST Act, as he proposes to exercise the power of the Assessing Officer, and what the Assessing Officer could not have done beyond the period of limitation fixed under Section 16 of the TNGST Act, the Deputy Commissioner (CT) cannot do, in exercise of powers under Section 32 of the TNGST Act.

8. The learned Additional Government Pleader for respondents seek to sustain the impugned notices, by referring to the averments made in the impugned notices and would submit that the dealers have failed to prove the anterior real value of the goods, and therefore, the first respondent rightly treated the same as first sales liable to be taxed under the TNGST Act. It is further submitted that, the impugned proceedings are only notices, and the petitioners should be directed to submit their objections to the impugned notices and the first respondent should be left to take a decision on merits and in accordance with law.

9. Heard Mr. T.Pramod Kumar Chopda, the learned counsel for the petitioners and Mr.S.Kanmani Annamalai, the learned Additional Government Pleader for respondents and perused the materials placed on record.

10. The legal issue, which falls for consideration in these Writ Petitions, is as to whether the first respondent, in exercise of his powers under Section 32 of the TNGST Act, while purporting to pass orders of assessment could do so, beyond the period of limitation stipulated under Section 16 of the TNGST Act, 1959. At this juncture, it would be useful to refer to Sections 16 and 32 of the TNGST Act, which reads as follows:-

> "a) Section 16 (I) (a) Where, for any reason, the whole or any Assessment part of the turnover of business of a dealer has escaped of escaped assessment to tax, the assessing authority may, subject to the provisions of sub-section (2), at any time

within a period of five yews from the expiry of the year to which the tax relates, determine to the best of its judgment the turnover which has escaped assessment and assess the tax payable oil 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.

16 (1) (b) Where, for any reason, the whole or any part of the turnovcr of business of a dealer has escaped assessment to tax or has been assessed at a rate lower than the rate at which it is assessable, the assessing authority, may at any time within a period of five years from the (date of order of the final assessment by the assessing authority) re-assess the tax due after making such enquiry as it may consider necessary and after giving a reasonable opportunity to show cause against such re-assesment.

16 (2) In making an assessment under clause (a) of sub-section (I), the assessing authority may, if it is satisfied that the escape from assessment is due to wilful non-disclosure of assessable turnover by the dealer, direct the dealer to pay, in addition to the tax assessed under clause. (a) of sub-section (1) 2 by way of penalty, a sum which shall be

(a) fifty percent of the tax due on the turnover that was wilfully not disclosed if the tax due on such turnover is not more than ten percent of the tax paid as per the return.

(b) one hundred percent of the tax due on the turnover that was wilfully not disclosed if the tax due on such turnover is more than ten per cent but not more than fifty per cent of the tax paid as per the return.

(c) one hundred and fifty percent of the tax due on the assessable turnover that was wilfully not disclosed, if the tax due on such turnover is more than fifty percent of the tax paid as per the return.

(d) one hundred and fifty per cent of the tax due on the assessable turnover that was wilfully not disclosed, in the case of self-assessment referred to in sub-section 1 of section 12.

Provided that no penalty under sub-section shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such imposition.

16 (3) The powers under sub-section (1) may be exercised by the assessing authority even though the original order of assessment, if any, passed in the matter has been the subject-matter of an appeal or revision.

16 (4) In computing the period of limitation for assessment or re-assessment under this section the time during which the proceedings for assessment or re-assessment remained stayed under the orders of Civil Court or other competent authority shall be excluded.

16 (5) In computing the period of limitation for assessment or re-assessment under this section, the time during which any appeal or other proceeding in respect of any other assessment or re-assessment is pending before the Special Tribunal or the Supreme Court, involving a question of law having a direct bearing on the assessment or re-assessment in question shall be excluded.

16 (6) In computing the period of limitation for assessment or re-assessment under this section, the time during which any appeal or other proceeding in respect of any assessment or re-assessment of the same or part of the turnover made under under any other enactment was pending before the Special Tribunal or the Supreme Court shall be excluded.

16-A. Assessment of turnover not declared under Section 7 (or Section 7-b) (1) Where for any reason, any part of the Assessment turnover of business of a dealer who has been permitted of turnover to pay the tax under section 7 [or section 7-B) has escaped assessment from the tax, the assessing authority may, at any time within a period of five years from the expiry of the year to which the tax relates, determine to the best of its judgment the turnover which has escaped assessment and reassess the tax payable on the total turnover (including the turnover already assessed. (under section 7 or section 7-B."

Section 32 1) The Deputy Commissioner may, of his own motion,call for and examine an order passed or proceeding recorded by the appropriate authority '(Section 4-A, [under sub-section (3) of Section 10], Section 12, Section 12-A, Section 14, Section 15 , or sub-Sections (1) and (2) of Section 1 and if such order or proceeding recorded is prejudicial to the interests of the revenue, may make such an enquiry or cause such inquiry to be made and, subject to the provisions of' this Act, may pass such order thereon as he thinks fit.

(2) The Deputy Commissioner shall not initiate proceedings against any such order or proceeding referred to in sub-section (1) if,

a) the time for appeal against the order has not expired

(b) the order has been made the subject of an appeal to the Appellate Assistant Commissioner or thc Appellate Deputy Commissioner or the Appellate Tribunal, or of a revision in the Special Tribunal or

or

(c) more than [five years] have expired after the passing of the order.

(3) No order under this section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard.

(4) In computing the period referred to in clause (c) of sub-section(2), the time during which the proceedings before the Deputy Commissioner remained stayed under

the orders of a Civil Court or other competent authority shall be excluded.]"

11. Section 16 of the TNGST Act has been enacted to bring to tax any turnover, which escaped assessment in original proceedings and also in cases, where, any lower rate of tax than what is legally applicable had been adopted in the assessment. Thus, power under Section 16 has to be exercised for bringing to tax, the turnover, which have not been subjected to tax earlier, i.e., escaped assessment or had been under assessed by levying lower rate of tax, and this power is not a power to revise or review the turnover on change of opinion. The power can be exercised by the Assessing Officer at any time within a period of five years from the expiry of the year, to which the tax relates. Therefore, this power cannot be exercised by the Assessing Officer endlessly, but within the timeline prescribed under Section 16 of the Act.

12. Section 32 of the TNGST Act confers special power on the Deputy Commissioner, who, on his own motion, call for and examine an order passed or proceedings recorded by the appropriate Authority under Section 4-A, Sub-Section (3) of Section 10, Section 12, 12-A, 14, 15 , or sub-Sections (1) and (2) of Section 16 and if such order or proceedings recorded is prejudicial to the interests of the Revenue, the Deputy Commissioner may make such enquiry or cause such enquiry to be made and, subject to the provisions of this Act, may initiate proceedings to revise or modify or set aside such order or proceeding. The power of sub-section (1) of Section 32 shall not be exercised if, i) the time for appeal against the order has not expired; ii) order has been made the subject of an appeal or a revision and iii) more than five years have expired after the passing of the order. Thus, the power under Section 32 is a suo-moto power, to scrutinize the orders of the Assessing Officer, which have been passed under various provisions stated above.

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 photo stat 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.

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.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

sd/gsk

To

1.The Deputy Commissioner (CT)
Chennai (North) Division,
PAPJM Building, Greams Road,
Chennai - 600 006.

2.The Commercial Tax Officer,
Moore Market (South) Assessment Circle,
191, NSC Bose Road,
Chennai - 600 001.

+2cc's to Mr.T.Pramod Kumar, Advocate, S.R.Nos.57133 & 57134
+1cc to Mr.P.Rajkumar, Advocate, S.R.No.57116
+1cc to the Special Government Pleader(T), S.R.No.57533

W.P.Nos.24437, 26998, 27330,
27345 and 34269 of 2004

VG II(CO)
CA(03/10/2017)