



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.06.2017

CORAM:

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE P.VELMURUGAN

W.A.(MD) Nos.601, 602, 603, 604, 605 & 606 of 2017
and
C.M.P.(MD) Nos.4987, 4988, 4989, 4990, 4991, 4992, 4993,
4994, 4995, 4996 & 4997 of 2017
and
W.P.(MD) Nos.4628, 4629, 4630, 4631, 4632 & 4633 of 2017
and
W.M.P.(MD) Nos.3705, 3706, 3707, 3708, 3709, 3710, 3711,
3712, 3713, 3714, 3715 & 3716 of 2017

M/s.Mayil Mark Mittai Kadai
rep.by its Proprietor S.Rajmohan
No.3/1, Rockins Road, Junction
Trichy-620 001

... Appellant in W.A.(MD) No.601/2017 to
W.A.(MD) No.606/2017

-vs-

Assistant Commissioner (CT)
Palakarai-I Assessment Circle
Trichy-620 001

... Respondent in W.A.(MD) No.601/2017 to
W.A.(MD) No.606/2017

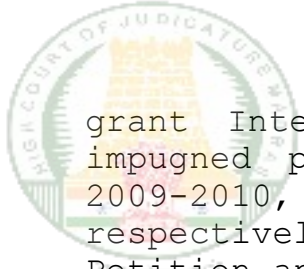
PRAYER in W.A.(MD) No.601 of 2017 to W.A.(MD) No.606/2017

: Writ Appeal filed under Clause 15 of Letters Patent, to set aside the order dated 20.03.2017 in W.M.P.(MD) Nos.3706 of 2017 to 3716 of 2017 in W.P.(MD) Nos.4628 of 2017 to 4633 of 2017 respectively on the file of this Court.

PRAYER in W.P.(MD) Nos.4628 to 4633 of 2017: Petition filed under Article 226 of the Constitution of India, to issue a writ of certiorari calling for the records on the file of the respondent in its impugned proceedings made in TIN:33533521191/2009-10, 2110-11, 2011-12, 2012-2013, 2013-2014 and 2014-2015 respectively dated 06.01.2017, quash the same.

[https://hccourtservices.mca.gov.in/WMP\(MD\)Nos.3706,3708,3710,3712,3714and3716/2017](https://hccourtservices.mca.gov.in/WMP(MD)Nos.3706,3708,3710,3712,3714and3716/2017) :

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to



grant Interim Stay of all further proceedings pursuant to the impugned proceedings of the Respondent made in TIN:33533521191/2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015 respectively dated 06.01.2017 pending disposal of the above Writ Petition and thus render justice.

Prayer in WMP(MD) Nos. 3705, 3707, 3709, 3711, 3713 and 3715:

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to Dispense With the production of the original impugned proceedings of the Respondent in TIN:33533521191/2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015 respectively dated 06.01.2017 for the present in the circumstances of this case and thus render justice.

Prayer in WMP(MD) .No. 3717/2017 :

To dispense with the original impugned order in No.M8/RO/MD/MDU/42585/ENFC/8F/2017 dated 09.03.2017 by the 1st respondent.

For Appellant in : Mrs.R.Hemalatha
W.A.(MD) No.601 to 606/2017

For Respondent in : Mr.R.Karthikeyan
W.A.(MD) No.601 to 606/2017 Additional Government Pleader

C O M M O N J U D G M E N T

[Judgment of the Court by T.S.SIVAGNANAM, J.]

These writ appeals are directed against the interim order granted in W.P.(MD) Nos.4628 to 4633 of 2017, filed by the appellant in the writ appeals.

2. By the impugned order dated 20.03.2017, the learned Single Judge granted an order of interim stay on condition that the appellant shall deposit 10 % of the tax demanded before the respondent on or before 31.03.2017 and deposit further 10 % of the tax demanded within a period of three weeks.

3. With the consent of the learned counsel for the appellant and the learned Additional Government Pleader for the respondent, we have taken up the writ petitions for final disposal along with the writ appeals.

4. For the sake of convenience, the parties shall be referred to as per the nomenclature in the writ petitions.

5. The petitioner is a Dealer of Sweets and Savouries and



registered on the file of the respondent under the provisions of Tamil Nadu Value Added Tax Act (hereinafter, referred to as "the Act"). In these batch of writ petitions, the petitioner has challenged the assessment orders for the year 2009-2010 to 2014-2015, all dated 06.01.2017.

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6. It is submitted by the learned counsel appearing for the petitioner that in some of the assessment orders, the entire tax demanded has been paid and the impugned orders of the assessment are challenged only with regard to the levy of penalty. In respect of the other assessment orders, the Assessing Officer has not only levied taxes, but imposed penalty as well, and therefore, the petitioner has questioned those assessment orders both with regard to the levy of tax as well as imposition of penalty. The primary ground on which the impugned assessment orders have been challenged is that the Assessing Officer levied tax at 14.5%, when Section 7(1) (a) of the Act specifically states that unbranded sweets are taxable at 2% only.

7. Apart from the above contention, it is submitted that the Assessing Officer is a quasi-judicial authority and in exercise of such function, is not bound by the instructions or directions of the higher authorities and if it is done so, it is illegal. Further, it is submitted that the Assessing Officer cannot be solely guided by the proposal given by the Inspecting Officer as in the instant case and it is a clear abdication of the quasi-judicial power of the Assessing Officer. In support of such contention, reliance was placed on the decision of the Division Bench in the case of **Madras Granites (P) Ltd., v. Commercial Tax Officer, Arisipalayam Circle, Salem**, reported in **(2006) 146 STC 642 (Mad)**.

8. Further, it is submitted that the respondent has made assessment on the basis of one day collection. In **State of Tamil Nadu vs. New Kamaliya Hotel**, reported in **(2000) 147 STC 111 (Mad)**, it has been held that mere one day sales could not be attributed to estimate the whole year without considering the festival season, rainy season and other natural calamities. On the above grounds, the learned counsel seeks for setting aside the orders of assessment and remanding the matter for fresh consideration.

9. The learned Additional Government Pleader appearing for the respondent, while seeking to sustain the impugned assessment orders, contended that the Assessing Officer has analyzed the factual position in detail, applied her mind independently and has passed the assessment orders and if the petitioner is aggrieved, they will have to prefer appeal before the Appellate Authority and the writ petitions are not maintainable. Further, it is submitted that in spite of sufficient opportunity having been granted to the petitioner to submit their objections and produce documents, they have failed to produce the documents and accounts and therefore, it is not a case of violation of principles of natural justice, but a case where, the petitioner failed to avail the opportunity granted



to them.

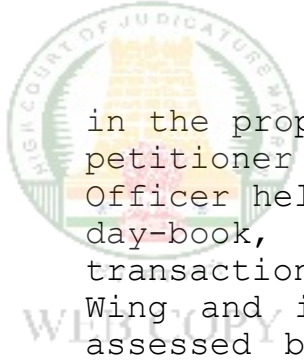
10. We have heard the learned counsel appearing for the parties and carefully perused the materials placed on record.

11. The place of business of the petitioner was inspected by the officials of the Enforcement Wing of the Commercial Tax Department on 17.11.2015. A proposal was sent by the Enforcement Group to the Assessing Officer vide proceedings, dated 29.04.2016. Based on such proposal, notices were issued to the petitioner on 06.05.2016 and 20.07.2016 stating that they have filed monthly returns in Form-L and paid tax at the compounded rate under Section 8 of the Act and in terms of Explanation-I to Section 8(1)(b) of the Act for the purpose of computing the total turnover under the said sub-section, the purchase turnover liable to tax under Section 12 of the Act shall be added to the sales turnover. Further, the petitioner did not maintain any accounts for the relevant years, not produced any invoices and in the absence of accounts and non-production of business transactions, the sales turnover was arrived at by taking average of three days sales and multiplying it by 355 days, after excluding ten days as national holidays.

12. Based on the above allegations, notices were issued calling for objections from the petitioner. From the perusal of the impugned assessment orders, it is seen that the petitioner sought for time to submit their objections on two occasions, vide letter dated 24.05.2016 and 14.06.2016. On 14.07.2016, a request was made for providing an opportunity of personal hearing and accordingly, the date was fixed as 29.07.2016, in which representative of the petitioner had appeared and filed reply, which was in the nature of interim reply, and requested for certain information from the Department as to under which provision of the Act, the revision notices were issued and which are documents, which were the basis for the proposed revision and which documents have been relied on for the proposal.

13. The Assessing Officer is stated to have furnished the required information, vide notice dated 17.10.2016. On receipt of the same, the petitioner sought for further thirty days time to file their reply. However, time was granted upto 07.11.2016. A reply was filed by the petitioner on 07.11.2016 and additional reply on 14.11.2016. Personal hearing was fixed on 22.11.2016, but the proprietor did not attend the same citing health problem and the personal hearing was adjourned and notice was issued on 05.12.2016 and once again the petitioner sought for time. Therefore, the Assessing Officer was of the opinion that the petitioner has been dragging on the matter and therefore, proceeded to complete the assessment, after analyzing the stand taken by the petitioner in their interim reply and completed the assessment.

14. On a perusal of the assessment orders, we find that the Assessing Officer was largely guided by the observations contained

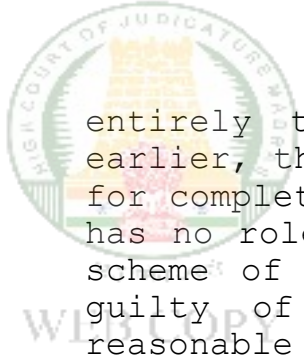


in the proposals of the Enforcement Group and the stand taken by the petitioner before the Enforcement Officials. Further, the Assessing Officer held that the dealer had not submitted any documents such as day-book, ledger, profit and loss account, trading account, bank transaction details, at the time of inspection by the Enforcement Wing and in the absence of any records, the turnover had to be assessed based on the sales made from 17.11.2015 to 19.11.2015, which were recorded at the time of inspection. Ultimately, the assessments were completed and the objections raised by the petitioner were rejected and the proposals in the notices, dated 06.05.2016, were confirmed.

15. On a careful reading of the impugned assessment orders, two issues come to light, namely, the Assessing Officer was largely guided by the proposal of the Enforcement Wing and the stand taken by the petitioner before the Enforcement Officials as the pre-revision notices itself were a sequel to the report of the enforcement group, dated 29.04.2016. It is well settled legal proposition that the Assessing Officer is an independent authority and quasi-judicial authority, who is required to complete the assessment based on the materials placed before it and not to be guided or act on the dictates of its superiors. If it is so done, it would amount to a clear case of abdication of the duties and responsibilities of the Assessing Officer.

16. The second issue, which emerges from the impugned assessment orders, is with regard to conduct of the petitioner. We do not approve the manner in which the petitioner has responded to the notice issued by the Assessing Officer. The various dates on which replies and representations were made by the petitioner (referred supra) would clearly indicate that there was a clear attempt on the part of the petitioner to drag the matter. However, ultimately, a reply was submitted by the petitioner on 07.11.2016 followed by the additional reply on 14.11.2016. The personal hearing fixed was adjourned twice. When notice was issued fixing personal hearing in December, 2016, the petitioner sent a reply on 12.12.2016 that he would not be in a position to appear during the said month.

17. From a perusal of the impugned assessment orders, it is not clear as to whether the Assessing Officer sent further notice to the petitioner fixing a specific date for personal hearing and warning the petitioner that if he fails to avail the opportunity, the Assessing Officer would constrain to complete the assessment on the available materials. In the narrative portion of the impugned assessment orders, there is no reference to any such intimation. Therefore, we can safely presume that after the petitioner's reply, dated 12.12.2016, the Assessing Officer did not issue any further notice and proceeded to complete the assessment *ex parte*. Paragraph No.3 of the impugned assessment order sets out the findings of the Assessing Officer and on a perusal of the said finding, we are able to see that what weighed in the mind of the Assessing Officer is



entirely the report of the Enforcement Wing. As pointed out earlier, the report of the Enforcement Wing cannot be the sole basis for completing the assessment and if it is so, the Assessing Officer has no role to play and obviously that is not the intention of the scheme of the Act. It is no doubt true that the petitioner is guilty of non-production of books and documents in spite of reasonable time having been granted to them. It is to be noted that the Assessing Officer is not expected to endlessly wait for the dealer to appear before the Officer and produce documents and the provisions of the Act only provides for reasonable opportunity to the dealer. Assuming the dealer fails to appear, the Assessing Officer is entitled to complete the assessment on the available materials or in other words, make a best of judgment assessment, even in such cases, the Assessing Officer has to record specific reasons as to why the stand taken by the dealer in the reply to the notice is not tenable and the Assessing Officer cannot solely rely upon the findings rendered by the Enforcement Wing Official in their proposal.

18. A perusal of the impugned Assessment Orders, more particularly from Paragraph No.3, clearly indicates that the Assessing Officer found fault with the petitioner for failure to produce documents before the Enforcement Wing or before her. Thus, considering the facts and circumstances of the case and the issue as to whether the product sold by the petitioner is to be taxed at 14.5% or 2% is required to be decided, we are of the view that the matter can be remanded to the Assessing Officer for fresh consideration subject to stringent conditions.

19. The learned counsel appearing for the petitioner submitted that the Writ Court had granted an order of interim stay on condition to pay 20% of the tax demanded, of which 10% has already been paid by the appellant and in respect of the assessment years, where only penalty has been levied, it would not be reasonable to impose a condition to pay 10% of the penalty when no such pre-condition is required to be complied with if an appeal is filed before the Appellate Authority challenging the levy of penalty alone. Therefore, it is submitted that some indulgence may be granted to the petitioner and the petitioner may be given liberty to appear before the Assessing Officer, produce the books of accounts and all documents and substantiate their case before the Assessing Officer.

20. In the light of the above, we dispose of the writ petitions with the following directions:

- (i) The petitioner is directed to deposit further 5% of the tax demanded by the respondent for the relevant assessment years where there is levy of tax within a period of three weeks from the date of receipt of a copy of this Judgment.
- (ii) The petitioner is directed to furnish a bond within a period of three weeks from the date of



receipt of a copy of this Judgment for the full value of the penalty levied on them and keep the bond alive till the conclusion of the *de novo* proceedings.

- (iii) The petitioner, on complying with the above conditions i.e., payment of further 5% of the tax and furnishing of bond within the time limit, would be entitled to treat the impugned proceedings (assessment orders) as show-cause notices and submit their objections.
- (iv) The objections shall be submitted within a period of fifteen days from the date of expiry of the three weeks period stipulated in Clauses (i) and (ii) above.
- (v) On receipt of the reply, the Assessing Officer shall fix a date for personal hearing and direct the petitioner to produce all books of accounts and documents and the petitioner shall appear before the Assessing Officer on the stated date and time without seeking for any adjournment and make their oral submissions and produce all documents in support of their stand.
- (vi) On conclusion of the personal hearing, the Assessing Officer shall complete the assessment by passing fresh orders on merits and in accordance with law, within a period of three weeks from the date on which the personal hearing is concluded.
- (vii) The Assessing Officer shall not adjudicate the dispute, which is now pending before this Court in W.P.(MD) Nos.6668 and 6669 of 2015.
- (viii) If the petitioner fails to comply with the conditions imposed in Clauses (i) and (ii) within the time permitted, the benefit of this Judgment would not enure to them and all the writ petitions would stand automatically dismissed and the assessment orders shall stand revived and the Assessing Officer is directed to recover the tax, penalty and interest levied / imposed on the appellant in the assessment orders by following the procedures under the Act.

21. In the light of the above orders passed in the writ petitions, the writ appeals are closed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

/True Copy/



To:

The Assistant Commissioner (CT),
Palakarai-I Assessment Circle,
Trichy-620 001.

+ 1 CC TO Mrs.R.HEMALATHA, ADVOCATE IN SR No. 61154

KRK/IA/ARUL/SKM

TE/KP/SAR-I : 12/07/2017 : 7P/3C

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