IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13094 OF 2017

Smt. Tarannum A Syed
Proprietrix Benzayan Fuel & Lubes ..Petitioner
versus
The Value Added Tax Officer & Ors. ..Respondents

WITH
WRIT PETITION NO. 13095 OF 2017

Shri Khalid F. Kadri
Proprietor Velugam Gasoline Outlet ..Petitioner
versus
The Value Added Tax Officer & Ors. ..Respondents

WITH
WRIT PETITION NO. 13096 OF 2017

Shri Khalid F. Kadri
Proprietor Velugam Gasoline Outlet ..Petitioner
versus
The Value Added Tax Officer & Ors. ..Respondents

WITH
WRIT PETITION NO. 13097 OF 2017

Smt. Tarannum A Syed
Proprietrix Benzayan Fuel & Lubes ..Petitioner
versus
The Value Added Tax Officer & Ors. ..Respondents

WITH
WRIT PETITION NO. 13101 OF 2017

Smt. Rizwana F. Kadri
Proprietrix Shah Automobiles ..Petitioner
versus
The Value Added Tax Officer & Ors. ..Respondents

WITH
WRIT PETITION NO. 13102 OF 2017

Smt. Rizwana F. Kadri
Proprietrix Shah Automobiles ..Petitioner
versus
The Value Added Tax Officer & Ors. ..Respondents

WITH
WRIT PETITION NO. 13103 OF 2017

Shri Khalid F. Kadri
Proprietor Velugam Gasoline Outlet ..Petitioner
versus
The Value Added Tax Officer & Ors. ..Respondents

WITH
WRIT PETITION NO. 13104 OF 2017

Smt. Rizwana F. Kadri
Proprietrix Shah Automobiles ..Petitioner
versus
The Value Added Tax Officer & Ors. ..Respondents

WITH
WRIT PETITION (STAMP) NO. 31477 OF 2017

Smt. Tarannum A Syed
Proprietrix Benzayan Fuel & Lubes ..Petitioner
versus
The Value Added Tax Officer & Ors. ..Respondents

Mr. Nishit Gandhi, Counsel i/b. Mr. Mukesh Pandey for Petitioner.
Mr. S. S. Deshmukh for Respondents.

CORAM: S. C. DHARMADHIKARI &
SMT. BHARATI HARISH DANGRE, JJ.

DATE : 09TH JANUARY, 2018

P. C. :

1] By these petitions under Article 226 and 227 of the Constitution of India the petitioner assessee challenges the order passed by the Assessing Officer as also by the Appellate Authority functioning under the Dadra and Nagar Haveli Value Added Tax Regulations, 2005 and Dadra and Nagar Haveli Value Added Tax Rules 2005.

2] Since a very short point is involved and a copy of all these petitions has been served on the respondents though Mr. Deshmukh seeks time to respond to these petitions by filing affidavit, in the ultimate view that we take, it is not necessary to adjourn the matters. We therefore reject the request for an adjournment and proceed to dispose of all these petitions by a common order.

3] For the sake of convenience we take the facts in writ petition no. 13094 of 2017. There the petitioner assessee is an individual carrying on business as a trader for resale of petrol, diesel and oil from her proprietorship concern. The 1st respondent is the assessing officer and has been delegated the power of framing an assessment under the above law by the Commissioner of Value Added Tax, Dadra and Nagar Haveli, Silvassa. The 1st respondent passed an order of assessment and raised the demand of Rs.2,01,41,966/- on the petitioner. The petitioner claims to have moved firstly the Assessing Officer seeking to rectify the order of assessment for it was, in the petitioner's submission, vitiated *inter alia* for non observance of the principles of natural justice. The petitioner has stated in the petition that an application for rectification of the mistake which is apparent according to her on the face of the record was not entertained. The rectification application is dated 14th July 2017. The details of such rectification application are found in paragraph 13 of the petition. It is stated that there was no response received by the petitioner on this rectification application rather the Assessing Officer refused it to take it on record.

4] In order to avoid any further damage, the petitioner filed an appeal to the Appellate Authority. The grievance is that the Appellate Authority as well in a short, cryptic and virtually unreasoned order dismissed the petitioner's appeal.

5] In all matters, the petitioner had stated that there are some legal and factual matters which were presented through a representative, viz., the Chartered Accountant. The Appellate Authority does not even note the presence of such a representative. Thus, both the Authorities have not complied with the principles of natural justice.

6] It is on this short point that we have heard Mr. Gandhi appearing in support of these petitions and Mr. Deshmukh appearing for the respondents. We have carefully perused the annexures to the writ petition. It is common ground that the petitioner was issued notice and copy of which is at Annenxure 'A', page 37. That is on the basis of the available information and the satisfaction that the petitioner's registration needs to be cancelled for non payment of the tax difference in the sum of Rs.1,50,03,324/- for the financial year 2016-2017. This notice is dated

16th May 2017. The petitioner on receipt of this notice stated that she will submit her sales and purchase details and other relevant documents in due course and the petitioner prayed for some time either for payment or submission of documents. Then it is stated that there is a seizure memo, copy of which is at Annexure 'C' and number of documents were seized. The petitioner was served with notice for cancellation of registration on 8th June 2017 and the petitioner says that an assessment was also framed in the meanwhile for the assessment years 2013-14 based on the returns but alleging that the dealer petitioner has not filed any audit report. The assessment order proceeds to confirm the demand. However, it is noted therein that the dealer in its periodic returns for the tax periods in the financial year 2013-14 has claimed concessional rate of tax on the interstate sales made to registered dealers on the strength of prescribed declaration forms under the Act amounting to rupees nil. However, the dealer has not made any interstate sales during this financial year. The petitioner was also served with a notice dated 24th June 2017, copy of which is at page 45 of the paper book, together with that several details were provided so that the duty liability and penalty could be levied.

7] The petitioner claims that she has an explanation for all this for she addressed a letter, a copy of which is at page 69 of the paper book, in which she says that she has been assessed for the assessment years 2013-2014, 2014-15 and 2015-16 for the value added tax. All the returns pertaining to the period of assessment were filed with the ward office and the tax as per returns has been paid. However the assessing authority has enhanced the sales turnover and imposed tax at 20% on the entire enhanced turnover without reference to the commodity. The imposition of tax at 20% flat rate on all commodities results in excess payment. The order was passed without giving opportunity of being heard. The

Assessing Officer was requested to rectify the order to the extent of wrong application of rate of tax. The petitioner claims that the rate of tax applied on diesel at 20% is disputed and notification issued thereunder specifies the rate at 15%. The petitioner also explained that she is engaged in the business of sales of lubricant oil taxable at 12.5%, petrol at 20% and diesel at 15%. The turnover of diesel comprised almost 94% of her total turnover. Hence applying the flat rate results in excess payment of tax and interest. There are separate calculations which have been forwarded but those have not been considered.

8] The rectification application has several annexures but the petitioner was treated as a defaulter and the notice of demand was issued based on this assessment. That is how the appeal was filed and in appeal also these contentions were reiterated including that no cognizance was taken of the rectification application nor was the assessment framed after giving due and proper opportunity of being heard to the petitioner.

9] The Appellate Authority in a cryptic and short order disposed of the appeal but without adverting to all the contentions. We find that there is a specific contention raised that the oral hearing before the Appellate Authority as well it was urged that the flat rate should not be applied as the major purchases are of diesel. The Appellate Authority says that all taxes assessed by the Assessing Authority have to be deposited and the grounds cannot be considered as it is not possible to ascertain whether the difference between the sale and purchase is mostly diesel and not petrol hence calculation of VAT at 20% is correct.

10] We find that in matters of this nature, the Appellate Authority was the last fact finding authority, as it is conceded by Mr. Deshmukh before us that for the region in question there is no tribunal unlike the State of Maharashtra. Therefore, the Appellate Authority was the last fact finding authority and it ought to have ascertained as to whether the assessment is correctly framed, whether the appellant / petitioner before us had ample opportunity of being heard and put across her case with supporting documents, whether the record indicates and justifies imposition of flat rate of 20%. We do not see any application of mind to these vital matters and issues raised both in rectification application as also in the appeal proceedings.

11] We therefore put to Shri Deshmukh that it will not be possible to sustain such orders and there is no alternate but to quash and set aside the same. Since the orders speak for themselves and for what they are Mr. Deshmukh finds it difficult to support at least the conclusions in the appellate order. We therefore called upon Shri Gandhi to decide as to whether the petitioner would press her rectification application first and in the event that is not entertained the remedy of appeal to challenge the initial order can be availed for. We made it clear that we will quash the appellate order and allow the petitioner to press the rectification application and to file a fresh Appeal after the same is disposed of or to revive the existing appeal by quashing and setting aside the appellate order.

12] On taking instructions, Mr. Gandhi states that the petitioner would prefer to press her rectification applications since they are on file of the Assessing Officer and let him first pass order on the same. He would submit that in the event the rectification application is not entertained then an opportunity be given to the petitioner to revive her appeals which are directed against the initial order.

13] On perusal of the petition and all the annexures it is apparent to us that looked at from either angle and in any which way, there is complete non application of mind as to the tax liability. The nature of the business, the transactions whether in petrol, diesel and other oil would have to be noted completely and segregated or if it is not possible to segregate the same on petitioner's record then to reason out and justify the assessment on a flat rate. That having not been done, we quash and set aside the appellate order. Since the rectification applications are on file of the Assessing Officer and the petitioner desires to first press the same, we direct that the Assessing Officer shall consider the rectification application in accordance with law. We at once clarify that we have not said whether this rectification application is maintainable or otherwise. We leave it open to the Assessing Officer to decide whether such rectification application be entertained and if at all can any reliefs in terms thereof be granted. In the event the rectification application is allowed then nothing would survive in the appeal which is filed before the Appellate Authority and depending upon the modifications or changes effected in the assessment order, the petitioner would have to decide whether to further challenge it. In that event a fresh appeal can be filed by the petitioner. In the event the rectification applications are dismissed or disposed of as not maintainable then the petitioner is allowed to press the existing appeals and when those are pressed, we direct that the petitioner, either in person or through her representative, should be granted a personal hearing, allowed to produce and rely upon all the records and make oral submissions. On all these materials, a fresh order will have to be passed by the Appellate Authority assigning reasons. That speaking order shall be passed uninfluenced by any earlier observations, findings and conclusions. We clarify that we have not expressed any opinion on the merits of the controversy.

14] Since the above issues and controversy is common to all the petitions, no separate order and direction is necessary on each of these petitions. The other petitions also shall be treated as disposed of with the same order and directions.

15] Rule is made absolute in above terms.

16] In the circumstances, there will be no order as to costs.

(SMT. BHARATI H. DANGRE, J.) (S. C. DHARMADHIKARI, J.)

Chandka