IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.04.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

Writ Petition No.6031 of 2018
and W.M.P.No.7428 of 2018

Orders reserved on 09.04.2018	Orders pronounced on 28.04.2018

M/s.Empress Audio,
Rep., by its Proprietrix,
No.19/1-48, Wallers Road,
Chintadripet, Chennai - 600 002. .. Petitioner

Vs.

1.Commissioner of Commercial Taxes,
Ezhilagam, Chepauk, Chennai - 600 005.

2.The Joint Commissioner (CT),
Enforcement-I, Chennai - 600 006.

3.The Deputy Commissioner (CT),
Enforcement (Central),
Greams Road, Chennai - 600 006.

4.The Commercial Tax Officer,
Group-II, Enforcement (Central),
Greams Road, Chennai - 600 006.

5.The Assistant Commissioner, (CT),
Chintadripet Assessment Circle, Chennai. .. Respondents

Petition filed Under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, to call for the records of the fourth respondent and to quash the V.A.068/15-16, TIN 33540581552/15-16, VAT Audit report, dated 25.08.2015, as illegal and not enforceable as the VAT audit was conducted without jurisdiction.

For Petitioner : Mr.C.Backthasiromani

For Respondents: Ms.G.Dhana Madhri, G.A.

For Intervenor : Mr.N.Inbarajan

O R D E R

This Writ Petition has been filed challenging the report submitted by the Commercial Tax Officer, Group-II, Enforcement (Central), pursuant to a VAT Audit conducted in the business premises of the petitioner.

2. The petitioner, who is a registered dealer on the file of the fifth respondent under the provisions of the Tamil Nadu Value Added Tax Act (TNVAT Act) and Central Sales Tax Act, is a wholesale trader in pre-recorded audio & video cassettes and CDs. During September 2015, the business premises of the petitioner was subjected to VAT Audit by the officers of the fourth respondent department, pursuant to which a notice, dated 18.08.2015, was issued by the second respondent, Joint Commissioner (CT), Enforcement-I, directing the petitioner to produce the books of accounts, stock statements, records, registers, etc., for the period from 2007-08 and any other record specified during the audit. The petitioner was directed to afford necessary facility to inspect such books of accounts or other documents, as required and which may be available at such places and afford necessary facility to check or verify the stock, which has been found and furnish such information as required as to any matter, which may be useful for or relevant to any proceedings under the TNVAT Act.

3. Mr.C.Backthasiromani, learned counsel for the petitioner contended that Section 64(4) of the TNVAT Act specifically empowers the first respondent alone to order and authorise the lower level officials like Commercial Tax Officer, Enforcement wing to conduct VAT Audit of the business place of any registered dealer and the VAT Audit conducted in the petitioner's business premises was as per the authorisation issued by the Joint Commissioner (CT), the second respondent, is illegal and without jurisdiction. It is further submitted that the Government has delegated the power to conduct VAT Audit only to the Commissioner of Commercial Tax Department and applying the principle of delegates non potest delegate, the Commissioner cannot further delegate his power to a subordinate officer, like the Joint Commissioner (CT). Therefore, it is submitted that the report submitted pursuant to such an VAT Audit, is not sustainable in law and therefore, the entire proceedings are vitiated. In support of such contention, the learned counsel

placed reliance on the decision in the case of Jeevan Buy N.Save vs. Commissioner of Commercial Taxes, & Ors., [(2018) 50 GSTR 306 (Mad). Reliance was also placed on orders passed in W.P.No.7564 of 2015, dated 18.03.2015, [M/s.Arkema Peroxides India Pvt., Ltd., vs. The Joint Commissioner (CT), Chennai & Ors.,]; W.P.No.31616 of 2015, dated 25.02.2015 [M/s.Cabco Paradise Pvt Ltd., vs. The Joint Commissioner CT & Ors]; and W.P.No.21587 of 2017, dated 27.11.2017, [M/s.M.D.Overseas Ltd., vs. Assistant Commissioner (CT) Peddunaickenpet Circle]. By placing reliance on these decisions, the learned counsel would submit that when the authorisation given by the Joint Commissioner for conducting the VAT Audit, is without jurisdiction, the report prepared based on such audit is equally without jurisdiction and therefore, the same requires to be set aside.

4. Mr.N.Inbarajan, with the leave of the Court, appeared as the Intervenor, supporting the stand taken by the petitioner. It is submitted by the learned counsel that Section 22(3) of the TNVAT Act, gives power to the Commissioner to select not exceeding 20% of the total number of assessments for details scrutiny regarding the correctness of the returns submitted by the dealer and in such cases, revision of assessment shall be made wherever necessary. It is submitted that the procedure to be followed is in terms of Rule 10(11) of the Tamil Nadu VAT Rules, which states that the method of selection by the Commissioner referred to in sub-section (3) of Section 22, shall be based on suitable stratified random sampling method and such selection shall not exceed 20% of the cases assessed under Section 22(2) and intimate the details such selection to the Assessing Authority for details scrutiny of accounts. It is further submitted that said Rule requires that the list of such assessments, shall be published on the notice board of the assessment circle and also in the website of the department. The Assessing Authority shall call for the accounts for those assessees for details scrutiny and pass appropriate orders. The learned counsel with a view to draw a distinction between the power conferred on the Commissioner under Section 64(4) of the Act and the power under Section 65 referred to the statutory provisions and submitted that the power under Section 64(4) shall be exercisable only by the Commissioner and not by any other authority, whereas the power under Section 65 to order production of accounts and powers of entry, inspection etc., can be exercised by any officer prescribed by the Government in this behalf. Therefore, when the power under Section 64(4) of the Act is specifically conferred on the Commissioner, he alone can exercise such power. It is further submitted that Section 48 of the Act, deals with 'Appointment of Commissioner of Commercial Taxes, additional Commissioners of Commercial Taxes, Appellate Joint Commissioners of Commercial Taxes, Joint Commissioners of Commercial Taxes, Appellate Deputy Commissioners of Commercial

Taxes, Deputy Commissioners of Commercial Taxes and Assistant Commissioners of Commercial Taxes' and in exercise of the said power, the Government may appoint these officers for the purpose of performing the functions respectively conferred on them by or under the Act. The said provision further states that the Commissioner of Commercial Taxes shall perform the functions conferred on him throughout the State and other officers shall perform their functions within such local limits, as the Government or any other authority or officer empowered in this behalf, may assign to them. Therefore, it is submitted that the Commissioner is functioning as a delegate of the Government and the question of further delegation does not arise.

5. Ms.G.Dhana Madhri, learned Government Advocate for the respondents submitted that in the instant case, the audit under Section 64(4) of the Act, was ordered by the Commissioner of Commercial Taxes vide proceedings dated 16.05.2014 and the name of the petitioner finds place in serial No.168 of the annexure of the Commissioner's proceedings and the Commissioner authorised the Joint Commissioner of the Enforcement Wing, to authorise such officers, not below the rank of Deputy Commercial Tax Officers, who shall comply with the requirements under Section 64(5)(a)&(b) of the TNVAT Act, to conduct the VAT Audit. It is further submitted that as long as the dealers are selected by the Commissioner for the purpose of audit and authorises any officer not below the rank of Deputy Commercial Tax Officers, it is sufficient compliance of Section 64(4) of the TNVAT Act. Further, it is submitted that due to administrative set up of the respondent department, it is not practically possible for the Commissioner to exactly name the Officer, who will go for audit on that particular date. The Commissioner has not delegated his powers under Section 64(4) of the Act and he has selected the dealers on whom VAT Audit will be conducted and authorised the Joint Commissioner to conduct the audit by deputing his field level officers. Therefore, the audit initiated by the Commissioner is in accordance with the provisions of Section 64(4) of the Act. With regard to the administrative set up, Ms.G.Dhana Madhuri, submitted that there are 8 Enforcement Divisions in the Commercial Taxes Department and there are several Commercial Tax Officers and Deputy Commercial Tax Officers working in the Enforcement wing. The daily attendance, leave permissions to the officers, monitoring and supervision of the work of the field officers on daily basis and disciplinary action against the erring officers are all carried out by the respective Joint Commissioners alone. The performance of the Joint Commissioners is monitored and reviewed by the Commissioner. The availability of the officials on duty and their allotment to conduct audit, their efficiency level in carrying out the work of the audit, the monitoring of daily process of audit, and final draft of audit report approval can be monitored by the respecive Joint Commissioners (Enforcement) alone.

6. Distinguishing the decision in Jeevan Buy N.Save (supra), it is submitted that in the said case, the annexure was not appended to the proceedings and was not placed before the Court and hence, the names of the entities identified for conduct of VAT Audit was not known. However, in the instant case, the proceedings of the Commissioner contains an annexure in which the name of the petitioner finds place in serial No.168. Thus, it is submitted that the audit in respect of the petitioner has been conducted in accordance with Section 64(4) of the TNVAT Act and the prayer sought for by the petitioner cannot be countenanced.

7. Heard the learned counsels for the parties and perused the materials placed on record.

8. The prayer sought for by the petitioner is only to quash the VAT Audit report and the consequential notice issued, calling upon the petitioner to produce records on a particular date. The challenge to the VAT Audit is on the ground that it is without jurisdiction, as the VAT Audit has been authorised by the Joint Commissioner and not the Commissioner.

9. The learned counsel for the petitioner referred to the sworn statement of the proprietrix of the petitioner, Tmt.Manisha, recorded by the Commercial Tax Officer, Group-II, Enforcement (Central), on 23.09.2015, to show that the said Officer had visited the place of business of the petitioner along with Deputy Commercial Tax Officer, Group-II, Enforcement (Central) and informed the petitioner that they have come to the petitioner's place of business for the purpose of conducting VAT Audit, under Section 64(4) of the TNVAT Act, as per the authorisation issued by the Joint Commissioner, the second respondent. By placing heavy reliance on the said observation as recorded in the sworn statement, it is submitted that the authorisation was made by the Joint Commissioner and not the Commissioner and therefore, the entire proceedings are without jurisdiction.

10. To appreciate the correctness of the submissions made by the learned counsel for the petitioner, it is first necessary to look into the statutory provision and more particularly, Section 64(4), which reads as follows:-

> 64.(1)......
> (2).....
> (3).....
> (4) The Commissioner may order for audit of the business of any registered dealer by an officer not below the rank of 1[Deputy] Commercial Tax Officer. For the purpose of this section, the selection of dealers for audit

shall be made from amongst the dealers,-
(a) who have not filed returns within the prescribed period; or
(b) who have claimed exorbitant amount of refund of tax; or
(c) who have filed returns, but in the opinion of the Commissioner he is not satisfied with the correctness of any return filed, any claim made, deduction claimed or turnover disclosed in any such return; or
(d) on the basis of any other criteria or on a random selection basis by the Commissioner ; or
(e) where detailed scrutiny of the case is necessary in the opinion of the Commissioner.

11. In terms of the above, the Commissioner may order for audit of the business of any registered dealer by an officer not below the rank of Deputy Commercial Tax Officer. The said provision gives the guidelines for selection of the dealers, who have to be subjected to audit, as contained in clause (a) to (e) of Section 64(4).

12. The petitioner's case is that the statute prescribes the manner in which, the VAT Audit has to be authorised, by the Commissioner alone, which power, conferred by the Government on the Commissioner cannot be sub-delegated to any other authority, as the Commissioner himself is a delegate of the Government. Further, argument being, a delegate cannot sub-delegate in the absence of any such specific statutory power.

13. In Jeevan Buy N.Save (supra), the petitioner dealer contended that VAT Audit was conducted based on authorisation of the Joint Commissioner by placing reliance on the statement recorded from the said dealer, which mentioned that the VAT Audit is pursuant to authorisation by the Joint Commissioner. Similar arguments as advanced in the instant case were put forth in the said case and the Court, after examining the contentions which were advanced, pointed out that though it has been stated that along with the order of authorisation, there is an annexure appended, but the same was not placed on record by the respondent before the Court and therefore, the names of entities, supposedly, identified for conduct of VAT Audit are not known. Therefore, the Court observed that it is quite possible that the petitioner's case was not even picked up for conduct of audit. Further, the Court pointed out that on a reading of the proceedings of the Commissioner in the said case would show that the Commissioner appears to have delegated the power to authorise conduct of VAT Audit, to the Joint Commissioners, which according to the Court, is not in consonance with the plain provisions of Section 64(4) of the

TNVAT Act. In the said case, the dealer not only challenged the VAT Audit report, and authorisation, but also the assessment orders. Therefore, the Court while accepting the case of the petitioner, allowed the said Writ Petition and set aside the VAT Audit report as well as the assessment order giving liberty to the respondents to conduct fresh VAT Audit, if necessary.

14. A careful reading of the decision in Jeevan Buy N.Save (supra), would show that the Court considered that the submissions of the said dealer merits acceptance on the ground that there was no record placed before the Court to show that the said dealer's case was picked up for conduct of audit. This was so because, the annexure, which was stated to have been appended to the proceedings of the Commissioner, was not placed before the Court. Therefore, the Court came to the conclusion that it appears that the Commissioner has delegated their power to authorise conduct of VAT Audit to the Joint Commissioner of the Enforcement Wing.

15. In my considered view, the Court did not render a positive finding that the proceedings of the Commissioner is infact a delegation of his power to the Joint Commissioner. The Court use the expression "appears". Therefore, on facts, the Court came to the conclusion that it appears that there has been delegation of power by the Commissioner to the Joint Commissioner, which in terms of Section 64(4), was impermissible and therefore held the VAT Audit to be without jurisdiction.

16. In the case on hand, the Ms.G.Dhana Madhuri has produced the proceedings of the Commissioner, dated 16.05.2014, which states that under the powers vested on the Commissioner under Section 64(4) of the TNVAT Act, the registered dealers noted in the annexure are selected on the basis of the following risk parameters for conducting VAT Audit by Enforcement wing officials. The risk parameters being as follows:-

Sl.No.	Parameters
(i)	Dealers whose total turnover (VAT+CST) is more than Rs.50 crores in 2013-14 and who have not been subjected to audit so far since 01/01/2007.
(ii)	Dealers (Traders only) whose total output tax < 90% of total input tax in 2013-14.
(iii)	Dealers whose value of inter-state branch/consignment transfer has increased more than 20% in 2013-14 over previous year.
(iv)	Dealers who made import/interstate purchase/transfer of taxable goods in 2013-14 and whose output tax < 90% of VAT payable on value of such inward goods.

Sl.No.	Parameters
(v)	Dealers who effected total purchase of goods from R.C. cancelled dears and claimed ITC of more than Rs.10,000/- in 2013-14.
(vi)	Dealers who had paid average net VAT of Rs.50,000/- and above every month in 2013-14 and such payment of tax remained within the range of + or - 5% of the average for atleast 9 months.

17. The Commissioner further directed that the procedure initiated in the VAT Audit manual shall be strictly followed and ordinarily all audit shall be completed within 15 days of commencement. The VAT Audit proposals were directed to be sent to territorial not later than 30 days from the date of commencement of audit. The Officers were warned that any violation of the time limit shall be dealt with sternly. Further, the Commissioner directed that the Joint Commissioner of Enforcement Wing shall authorise officers for such audit not below the rank of Deputy Commercial Tax Officer and officers shall comply with the provisions of the Section 64(5)(a)&(b) of the TNVAT Act and also follow the instructions issued in the VAT Audit manual during the course of audit of the business of the dealers. The Joint Commissioners were directed to review the programmes monthly and also organise one day refresher training for all groups to ensure that the groups are brought up-to-date on procedures and relevant case laws. The annexure to the said proceedings contains a list of dealers. The annexure, which was placed before the Court contains the names of 288 dealers. The petitioner's name finds place in serial No.168. Thus, the factual matrix in the present case is different from that of the case dealt with by the Court in Jeevan Buy N.Save (supra), in the sense that the name of the petitioner finds place in the proceedings of the Commissioner. As mentioned above, the Commissioner has exercised his power under Section 64(4) of the TNVAT Act and it is he who has authorised the VAT Audit.

18. The petitioner has come forward before this Court by referring to the word “authorised” used while recording sworn statement from the proprietrix of the petitioner on 23.09.2015. This presumably has been used on account of paragraph 3 of the order passed by the Commissioner, dated 16.05.2014, where he has directed the Joint Commissioners of Enforcement Wing to authorise officers for such audit not below the rank of Commercial Tax officer. Unfortunately, the petitioner has confused the usage of the expression 'authorised' in the statement to mean, as if, it is the Joint Commissioner who has authorised the audit. On facts, the respondents have been able to establish before this Court that authorisation has been done by the Commissioner and not by the Joint Commissioner. The

directions issued to the Joint Commissioner of Enforcement Wing is to depute the field level officers and senior officers, who will conduct the audit.

19. I agree with the submissions made by Ms.G.Dhana Madhurai, that it is impossible for the Commissioner to name Deputy Commercial Tax Officers or Commercial Tax Officers, who will conduct the VAT Audit in respect of a particular dealer. The Commissioner being the Head of Department is required to discharge several duties, which are onerous. Therefore, the manner in which the office and the staff have to be utilised and administrated is well open to be regulated by the Head of Department. It is not for the dealer to dictate terms as to how the Commercial Tax Department should organise its business. The directives issued to the Joint Commissioner to take forward the direction to conduct audit is an administrative decision by the Commissioner and being the Head of Department, it is well within his jurisdiction to issue such direction for effective and efficient administration of his department. Thus, the petitioner by placing reliance on the expression "authorised" used in the statement cannot discredit the entire proceedings alleging the same to be without jurisdiction. The Court being fully satisfied that VAT Audit has been authorised by the Commissioner in accordance with Section 64(4) of the Act, is not inclined to accept the case of the petitioner.

20. At this juncture, it would be relevant to take note of the submissions made by Mr.N.Inbarajan. Section 48 of the Act, gives power to the Government to appoint officers of the Commercial Taxes Department for the purpose of performing the functions conferred on him by under the Act. Thus, when a power is delegated by the Government to a particular officer by designation, such officer alone shall exercise the power. There can be no quarrel over this legal position. The Government at least in two instances, has conferred this power on the Commissioner namely, the power under Section 22(3) and Section 64(4). Therefore, it is the Commissioner, who shall exercise this power and select assessments for the purpose of detailed scrutiny, regarding the correctness of the returns submitted by the dealer. There is a cap with regard to the power exercisable under Section 22(B) by prescribing 20%, as the total number of cases to be selected for scrutiny. The Rule, namely Rule 10(11) lays down as to the method of selection to be done by the Commissioner. Thus, the Government while delegating its power to the Commissioner has also circumscribed the manner in which the power has to be exercised. The power under Section 64(4) of the Act, is undoubtedly a much wider power than Section 22(3). This provision confers power on the Commissioner to order for audit of the business of any registered dealer. While exercising the power under Section 64(4) what the Commissioner

of Commercial Taxes is expected to do, is to order for an audit of the business of any registered dealer. The statute prescribes the rank of the officer, who can be authorised to conduct an audit. Therefore, the requirement under the provision is for ordering for audit of the business of a dealer and upon such order being passed, the officials in the hierarchy are to carry out the directions of the Commissioner. Thus, when the Commissioner orders for an audit, which would be state wide obviously, as the Head of the department, he cannot be expected to name the officer, who will go to the business premises of the dealer for the purpose of audit. These matters have to be assigned to the official hierarchy and to be carried out as per the Rules of business followed by the department. Thus, the statute states that the Commissioner is the authority, who may order for an audit and once the order is passed by the Commissioner, it is for the officials of the department to carry out the order.

21. In my considered view, this is precisely what has been done in the instant case. As pointed out earlier mere usage of the expression authorised by the Joint Commissioner in his proceedings, does not mean that the Joint Commissioner has commenced the audit on his own accord. It has to be borne in mind that the statute uses the expression “order”, and does not use the expression “authorise”. Thus, what is required under Section 64(4) is an order of the Commissioner and if there is an order to the said effect, then authorisation of lower level officers, by officers subordinate to the Commissioner, cannot be termed as ordering an audit, but it is a proceedings by which the order passed by the Commissioner, is implemented or carried forward.

22. As mentioned above, the decision in the case of Jeevan Buy N.Save (supra), is clearly distinguishable on facts. Sofar as the decision in the case of M/s.Arkema Peroxides India Pvt., Ltd., (supra), is also distinguishable on facts, because the department did not produce any document to dislodge the claim made by the petitioner. Similarly the decision in the case of M/s.Cabco Paradise Pvt Ltd., (supra), was rendered following decision in M/s.Arkema Peroxides India Pvt., Ltd.,. In the case of MD Oversees, Ltd.,(supra) this Court followed the decision in the case of Jeevan Buy N.Save (supra) as the respondent Department did not place any record before the Court to show that it is the Commissioner who had authorised the VAT Audit. Thus, all decisions relied on by the learned counsel for the petitioner are clearly distinguishable on facts.

23. For all the above reasons, the Writ Petition being devoid of merits, is dismissed. It is open to the petitioner to work out his remedies in accordance with law. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1.The Commissioner of Commercial Taxes,
Ezhilagam, Chepauk, Chennai - 600 005.

2.The Joint Commissioner (CT),
Enforcement-I, Chennai - 600 006.

3.The Deputy Commissioner (CT),
Enforcement (Central),
Greams Road, Chennai - 600 006.

4.The Commercial Tax Officer,
Group-II, Enforcement (Central),
Greams Road, Chennai - 600 006.

5.The Assistant Commissioner, (CT),
Chintadripet Assessment Circle, Chennai.

+1cc to Special Government Pleader(T), sr.no.32691

W.P.No.6031 of 2018

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