IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 12.06.2018

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.14984 of 2017
and W.M.P.No.16231 of 2017

Tvl.Sri Ganesh Saw Mill,
Rep. by its Prop. D.Ganeshan,
S.No.242, Devathannam Road,
Wallajapet-632 513,
Vellore District. ... Petitioner

vs.

1.The State of Tamil Nadu,
Rep. by its Secretary to Government,
Department of Commercial Taxes,
Fort St. George, Chennai-600 009.

2.The Commissioner of Commercial Taxes,
2nd Floor, Ezhilagam, Chepauk,
Chennai-600 005.

3.The Joint Commissioner of
Commercial Taxes,
Enforcement Wing, C.T.Buildings,
Vellore.

4.The Commercial Tax Officer,
(Enforcement-Wing-II)
Ranipet, Vellore District.

5.The Assistant Commissioner,
Ranipet Assessment Circle,
Ranipet, Vellore District. ... Respondents

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus to call for the records relating to the inspection by the Enforcement Wing 4th respondent on 07.04.2017 and obtained statement from the petitioner and to quash the same and to direct the respondents to conduct the VAT Audit as per Section 64(4) of the TNVAT Act.

For Petitioner : Mr.M.Md.Ibrahim Ali
For Respondents : Mrs.G.Dhanamadhri,
Government Advocate (Taxes)

O R D E R

Heard Mr.Md.Ibrahim Ali, learned counsel for the petitioner and Mrs.G.Dhanamadhri, learned Government Advocate (Taxes) for the respondents.

2. The petitioner has filed this writ petition challenging the VAT Audit directed to be conducted by the second respondent as being wholly without jurisdiction, since the authorization can be granted only by the Commissioner.

3. When the case came up for hearing on 06.06.2018, this Court pointed out that identical issue was considered by this Court in M/s.Empress Audio vs. Commissioner of Commercial Taxes and Others in W.P.No.6031 of 2018 dated 28.04.2018 and identical contention was rejected. Learned counsel for the petitioner sought time to go through the order and make submissions.

4. Today, when the case is taken up for hearing, the learned counsel for the petitioner fairly submitted that the order passed by this Court in M/s.Empress Audio is squarely applicable to the case of the petitioner herein and therefore, the challenge to the VAT Audit has to necessarily fail. At this juncture, it will be useful to refer to the order passed in M/s.Empress Audio and the reasons as to why the Court rejected the contention raised by the petitioner therein, which is identical to that of the contention raised by the petitioner before this Court. The relevant paragraphs of the said decision are as follows:-

> "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.
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> 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.
(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."

5. In the light of the above, this writ petition is liable to be dismissed.

6. The learned counsel for the petitioner pointed out that during the course of inspection, the inspecting officers have collected four cheques totaling a sum of Rs.10,00,000/-. It is a settled legal principle that the Enforcement Wing Officers are not entitled to collect taxes from the dealer, as if it is advance tax. In this regard, useful reference can be made to the decision in the case of Hotel Blue Nile vs. State of Tamil Nadu reported in (1992) 87 STC 513, wherein it was held that the collection of cheques from the dealer by the Enforcement Wing Officers is without jurisdiction. Accordingly, direction was issued to return those cheques. Though such a direction has not been sought for in the main writ petition, the petitioner has sought for an interim relief. Since the collection of cheques by the Enforcement Wing Officers from the dealer during the course of inspection is without jurisdiction, the four cheques, totaling a sum of Rs.10,00,000/-, has to be returned to the petitioner.

7. The learned counsel for the petitioner further pointed out that with regard to the differences when compared with the P & L account and with that of the returns, the petitioner's case is that for obtaining bank loan, the petitioner has given boosted figures and there is no willfulness to evade taxes and there is no element of sale of property of goods transfer, which falls under Section 2(33) of the Tamil Nadu Value Added Tax Act, 2006. In support of such contention, the learned counsel placed reliance on the decision of the Hon'ble Supreme Court in 90 STC 7.

8. In my considered view, this submission cannot be considered at this stage in this writ petition, wherein the challenge is to the VAT Audit report and it is well open to the petitioner to raise such contention before the assessing officer, as and when show cause notice is issued.

9. In the result, this writ petition is dismissed with a direction to respondents 3 to 5 to return the four cheques collected from the petitioner during the course of inspection, which totals a sum of Rs.10,00,000/- within a period of three weeks' from the date of receipt of a copy of this order. The fifth respondent is further directed to issue show cause notice to the petitioner pursuant to the findings recorded in the VAT Audit report within a period of fifteen days' from the date of receipt of a copy of this order and give the petitioner reasonable time to submit their objections and after receiving the objections, the fifth respondent shall afford an opportunity of personal hearing to the petitioner and pass orders on merits

and in accordance with law. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS IX)

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Sub Assistant Registrar

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To

1.The Secretary to Government,
The State of Tamil Nadu,
Department of Commercial Taxes,
Fort St. George, Chennai-600 009.

2.The Commissioner of Commercial Taxes,
2nd Floor, Ezhilagam, Chepauk,
Chennai-600 005.

3.The Joint Commissioner of
Commercial Taxes,
Enforcement Wing, C.T.Buildings,
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4.The Commercial Tax Officer,
(Enforcement-Wing-II)
Ranipet, Vellore District.

5.The Assistant Commissioner,
Ranipet Assessment Circle,
Ranipet, Vellore District.

+1cc to Mr.M.MD.Ibrahim Ali, Advocate SR.No.36563
+1cc to Government Pleader (Taxes) SR.No.37648

W.P.No.14984 of 2017

GN(03/07/2018)