IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :24.01.2018

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.25567 to 25570 of 2017
& WMP.Nos.26962 to 26965 of 2017

Tvl.Aishvarayhia Flat Promoters,
represented by its proprietor Thiru,K.Sri Murthy,
No.32A, Dhanarajapuram Extension, Kolathur,
Chennai-600 009. ... Petitioner in all W.Ps

Vs.

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

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

3.The Assistant Commissioner (C.T) CEW Enforcement Wing-I,
C.T.Building, Greams Road,
Chennai-600 006.

4.The Commercial Tax Officer,
No.15&16, Maligai Avenue,
Kolathur,
Chennai-600 099. ... Respondents in all W.Ps.

COMMON PRAYER:Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus to call for the records relating to the assessment orders passed by the 4th respondent in his proceedings Nos.TIN 33671369266/2012-13, TIN 33671369266/2013-14, TIN 33671369266/2014-15, TIN 33671369266/2015-16, dated 18.08.2017 received by the petitioner on 29.08.2017 and quash the same and to direct the 4th respondent to pass a speaking order duly considering the detailed objections filed by the petitioner on 04.05.2017 accord a personal hearing.

For Petitioner in all W.Ps : Mr.M.MD.Ibrahim Ali
For Respondents in all W.Ps : Ms.G.Dhanamadhri

COMMON ORDER

Heard Mr.M.MD.Ibrahim Ali, learned counsel for the petitioner and Ms.G.Dhanamadhri, learned Government Advocate appearing on behalf of the respondents.

2. Since the legal issues raised in this writ petition have been decided earlier by this Court, the writ petitions are taken up for final disposal.

3. The petitioner has challenged an order of assessment passed by the 4th respondent dated 18.08.2017 for the assessment year 2012-13, 2013-14, 2014-15 and 2015-16. Challenge to the impugned proceedings is on the sole ground that the orders are passed as a result of Value Added Tax Audit which was authorised by the Joint Commissioner, who has not vested with powers under Section 64(4) of the Tamil Nadu Value Added Tax Act, 2006. On a perusal of the statement recorded from the petitioner by the Inspecting Officer on 04.01.2016, it is seen that there is a clear reference to the authorisation issued by the Joint Commissioner (CT) Enforcement /1, Chennai-6. This inspection is also referred to in the preamble portion of the impugned assessment order. The question would be as to whether the Joint Commissioner is empowered to issue such an authorisation in terms of Section 64 (4) of the Act. In terms of the statutory provisions, audit can be ordered only by the Commissioner. This issue was considered in the case of Jeevan Buy N.Save vs. The Joint Commissioner (CT) and others in WP.No.32566 and 32641 to 32645 of 2016 dated 11.01.2017.

4. In the said writ petition, identical orders were tested for its correctness on the ground that the Joint Commissioner is not empowered to order for an audit. The operative portion of the order reads as follows:

> "7. As indicated, at the very outset, the only issue, which arises for consideration is whether the assessment orders, which are based on a VAT Audit triggered by a Joint Commissioner, could be sustained, in view of the provisions of Section 64 (4) of the 2006 Act.
>
> 7.1. To put it plainly, the petitioner's contention is, that, the audit was ordered by an Officer, who was not vested with the requisite power under Section 64(4) of the 2006 Act, and therefore, once the edifice is removed, the impugned orders should fall by the way side.

7.2. In order to appreciate this submission, it would be pertinent to extract the relevant provisions of the 2006 Act :

"64. Maintenance of upto date, true and correct accounts and records by dealers -

(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 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."

(emphasis is mine)

7.3. A bare perusal of Section 64(4) of the Act would show that 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 selection of dealers for audit is to be made from amongst the dealers, who fall in any one, or, more of the five categories set out in clauses (a) to (e) of Section 64.

8. Quite clearly, as has been correctly argued by Mr.Siromani, the audit can only be ordered by the Commissioner. In this case, as is evident from the statement of the petitioner, as recorded by the second respondent himself, the audit was authorised by the Joint Commissioner.

8.1. The Commissioner, under the provisions of Section 64(4) of the 2006 Act, could not have delegated his power to order an audit qua a dealer to the Joint Commissioner.

8.2. Mr.Annamalai's submission that the power was exercised, in fact, by the Commissioner; is a submission, which is based on the contents of the proceedings dated 16.05.2014. This submission, to my mind, cannot be sustained for the reasons given hereafter.

8.3. Paragraph 1 of the proceedings dated 16.05.2014, would show that the registered dealers, whose names are, evidently, mentioned in the Annexure said to be appended to the said proceeding, have, apparently, been selected based on the parameters set out in the aforesaid paragraph. These parameters are summarised in paragraph 1, which, for the sake of convenience, are extracted hereafter:

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 01/01/2017.
(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.

Sl. No.	Parameters
(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.

8.4. Paragraph 3 of the very same proceedings is indicative of the fact that the Joint Commissioners of the Enforcement Wing have been asked to authorise the Officers to conduct an audit, keeping in mind that the audit was conducted by the Officers, who were not below the rank of Deputy Commercial Tax Officer.

8.5. Pertinently and rather curiously, the annexure appended to the aforesaid proceedings has not been placed on record by the respondents. Therefore, the names of the entities, supposedly, identified for conduct of VAT audit are not known. Therefore, it is quite possible that the petitioner's case was not even picked up for conduct of audit.

8.6. Furthermore, a plain reading of paragraph 3 of the proceedings dated 16.05.2014, would show that the Commissioner appears to have delegated the power to authorise conduct of VAT audit, to the Joint Commissioners of the Enforcement Wing. This, according to me, is not in consonance with plain provisions of Section 64(4) of the 2006 Act.

8.7. Therefore, as indicated above, this submission made by Mr.Annamalai, on behalf of the respondents, cannot be sustained.

9. Mr.Siromoni, in support of his submissions, has relied upon the order of this Court, i.e., order dated 18.03.2015, passed in W.P.No.7564 of 2015, titled : M/s.Arkema Peroxides India Pvt. Ltd., Vs. The Joint Commissioner (CT) and Others, and the order dated 25.02.2016, passed in W.P.No.31616 of 2015, titled : M/s.Cabco Paradise Pvt. Ltd., Vs. The Joint Commissioner (CT) and Others.

9.1. To be noted, the first order, i.e., order dated 18.03.2015, pertains to a case, where, challenge was made to an intimation dated 31.12.2014, which is a stage, prior to the passing of the assessment order. The second order pertains to a challenge laid to the VAT Audit report dated 24.01.2014.

9.2. As indicated above, this is a case, where, after the VAT Audit was over, the assessment orders were passed.

9.3. The record, however, shows that after the audit was conducted and the statement of the petitioner was recorded, it was placed before him and the petitioner appears not to have signed the statement. There is, in that sense, no acquiescence on the part of the petitioners, though, based on the VAT audit report, respondent No.3, proceeded to pass the assessment orders.

9.4. It is, therefore, the argument of Mr.Siromani that the legal validity of that VAT Audit was not accepted by the petitioner, and therefore, the impugned assessments orders were without jurisdiction.

9.5. I am inclined to accept the submission of the petitioner that the jurisdiction to conduct VAT audit, which was authorised by the Joint Commissioner was not accepted by the petitioner and therefore, the assessment orders passed were also without jurisdiction.

10. Accordingly, the prayer made in the writ petition is allowed. The assessment orders and the VAT Audit reports are set aside. Liberty is, however, given to the respondents to conduct a fresh VAT audit, if necessary, and pass fresh assessment orders, albeit, in accordance with law.

11. The writ petitions are closed in the aforesaid terms. Resultantly, pending applications shall also stand closed. There shall, however, be no order as to costs."

5. The legal principles as laid down in the above referred decision cannot be disputed by the respondents as it appears that the order referred to above has been accepted by the Department and no appeal has been filed.

6. Thus, following the above referred decision, as in the instant case, the audit has been authorised by the Joint Commissioner, who has no jurisdiction to do so, the impugned order calls for interference.

7. In the result, the writ petition is allowed and the impugned assessment order and the Value Added Tax audit report are set aside. Liberty is however granted to the respondents to conduct fresh audit if necessary and pass fresh assessment

order in accordance with law. No costs. Consequently connected miscellaneous petitions are also closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

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To

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

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

3.The Assistant Commissioner (C.T) CEW Enforcement Wing-I,
C.T.Building, Greams Road,
Chennai-600 006.

4.The Commercial Tax Officer,
No.15&16, Maligai Avenue,
Kolathur,
Chennai-600 099.

+1 cc to the Special Govt Pleader Taxes High Court Madras sr 6111
+1 cc to Mr.M.MD.Ibrahim Ali Advocate sr 5570

W.P.Nos.25567 to 25570 of 2017

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aa19/02/2018