



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 18.07.2018

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

W.P. (MD) No.12060 of 2018

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M/s.Amman Match Company,
29/99A, Krishnamachary Road,
Fathima Nagar,
Virudhunagar - 626 001,
Represented by its General Manager,
Mr.A.Ramesh Prabhu

: Petitioner

Vs.

1. The Assistant Commissioner of GST & Central Excise,
Virudhunagar Division,
Madurai Commissionerate,
130, 8-1, Katchery Road,
Virudhunagar District.

2. The Commissioner of GST & Central Excise,
Madurai Commissionerate,
Income Tax Road, Krishnapuram Colony,
Madurai-625 002.

: Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorarified Mandamus, to call for the records of the impugned Order in Original No.MAD-CEX-000-ASC-196-16, dated 29.07.2016 on the file of the first respondent and quash the same as illegal with a further direction directing the first respondent to adjudicate afresh after providing sufficient opportunity of hearing to the petitioner.

For Petitioner : Mr.A.P.Ravi
For Respondents : Mr.R.Nandakumar

ORDER

This Writ Petition is directed against the order of the first respondent passed in the Order in Original No.MAD-CEX-000-ASC-196-16, dated 29.07.2016, for violation of principles of natural justice.

2. The petitioner submitted a rebate application along with the required documents to the first respondent on 02.05.2016. Pursuant to the application, a show cause notice was issued by the first respondent on 24.06.2016 proposing to reject the rebate claim of Rs.12,40,360/- and it was received by the petitioner on 27.06.2016. Since he has failed to file his objections within 30 days, the impugned order was issued on 29.07.2016 i.e., on the thirty second day.



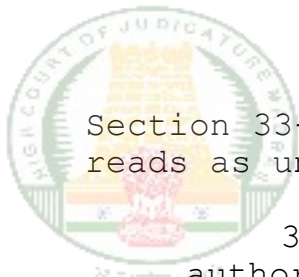
3. The learned counsel for the petitioner would contend that the Central Board of Excise and Customs, New Delhi, Ministry of Finance (Department of Revenue), Government of India, vide Circular No.1053/2/2017-CX, dated 10.03.2017, issued a Master Circular on show cause notice, Adjudication and Recovery - Regarding, in supersession of the previous 89 Circulars. Insofar as the issuance of show cause notice is concerned, it is stated that it is a mandatory requirement according to the principles of natural justice, which are commonly known as audi alteram partem which means no one should be condemned unheard.

4. In respect of personal hearing, at paragraph No.14.3 of the Master Circular, instructions are issued, which read as follows:

"14.3 Personal hearing: After having given a fair opportunity to the noticee for replying to the show cause notice, the adjudicating authority may proceed to fix a date and time for personal hearing in the case and request the assessee to appear before him for a personal hearing by himself or through an authorised representative. At least three opportunities of personal hearing should be given with sufficient interval of time so that the noticee may avail opportunity of being heard. Separate communications should be made to the noticee for each opportunity of personal hearing. In fact separate letter for each hearing/extension should be issued at sufficient interval. The Adjudicating authority may, if sufficient cause is shown, at any stage of proceeding adjourn the hearing for reasons to be recorded in writing. However, no such adjournment shall be granted more than three times to a noticee."

5. The learned counsel would also contend that the show cause notice mandated the petitioner to show cause against the notice within 30 days. As per Paragraph No.15 of the show cause notice, if no cause is shown against the action proposed to be taken within 30 days of receipt of the notice, or if they do not appear before the adjudicating authority, when the case is posted for hearing, the case would be decided ex parte on merits. Therefore, according to him, after the lapse of 30 days, whether a show cause made or not, the adjudicating authority will fix a date of hearing and if the petitioner does not appear on notice, the case would be decided ex parte on merits. However, in the instant case, the order in original was passed within two days after the lapse of time granted in the show cause notice. Therefore, the order passed by the first respondent is in violation of principles of natural justice, since it does not provide any opportunity of personal hearing or any opportunity to submit his objections. Therefore, it should be set aside.

6. Controverting the contentions made by the petitioner, the learned Standing Counsel appearing for the respondents would rely on



Section 33-A Under Chapter VI of the Central Excise Act, 1944, which reads as under:

33-A . Adjudication procedure.- (1) The Adjudicating authority shall, in any proceeding under this Chapter or any other provision of this Act, give an opportunity of being heard to a party in a proceeding, if the party so desires.

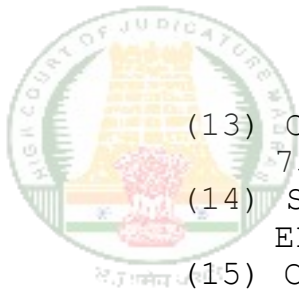
(2) The Adjudicating authority may, if sufficient cause is shown, at any stage of proceeding referred to in sub-section (1), grant time, from time to time, to the parties or any of them and adjourn the hearing for reasons to be recorded in writing:

Provided that no such adjournment shall be granted more than three times to a party during the proceeding."

7. According to the learned Standing Counsel appearing for the respondents, a show cause notice was issued and the petitioner failed to respond to the show cause notice and has not expressed his wish to be heard in person. In the absence of any request for personal hearing, the statutory provision does not mandate the adjudicating authority to provide personal hearing. In support of his contention, the learned Standing Counsel would rely on the judgments in 2010 (253) E.L.T. 722 (Mad) [Optigrab International vs. Government of India], 2008(221) E.L.T. 496 (Kar.) [Bharath Hospital & Inst. of Oncology vs. Dir.Gen.of Health Services] and 2005(185) E.L.T. 227 (Cal.) [Nellimarla Jute Mills Co. Ltd. vs. Zonal Dir.Gen. of Foreign Trade].

8. On the other hand, in support of adherence of the principles of natural justice in affording an opportunity of personal hearing, the learned counsel for the petitioner would rely on the following judgments.:

- "(1) Swadeshi Cotton Mills v. Union of India [1981(1) SCC 664];
- (2) JT (India) Exports vs. UOI [2002(144) ELT 288 (Del)];
- (3) Alfred Berg & Co.(I) (P)Ltd vs. Cestat, Chennai [2011(273) ELT 373 (Mad)];
- (4) Automotive Tyre Manufacturers Association vs. Designated Authority [2011(263) ELT 481(SC)];
- (5) Khaitan Chemicals & Fertilizers Ltd vs. UOI 2013(292) ELT 44(Bom)];
- (6) Tinsplate Co. of India Ltd vs. UOI [2013(288) ELT 59 (Jhar)];
- (7) Manohar Vs. State of Maharashtra [2013(295) ELT 358 (SC)];
- (8) Reema Gases (P) Ltd. vs. Commissioner [2014(309) ELT A50 (Cal)];
- (9) Kantilal B.Mohite vs UOI 2014(306) ELT 51 (Bom)];
- (10) Baboo Ram Hari Chand vs. UOI [2014(304) ELT 371 (Guj)];
- (11) Logic Transware India Pvt Ltd vs. CC. [2014(302) ELT 228 (Del)];
- (12) Adhunik Power Transmission Ltd. vs. UOI [2015(325) ELT 865 (Jhar)];



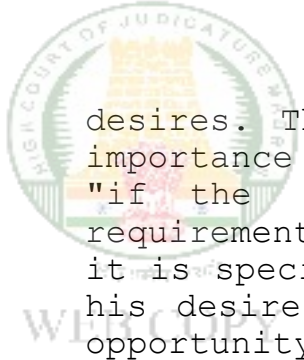
- (13) CC, Bangalore vs. Fly Jac Logistics Pvt Ltd [2015(323) ELT 730 (Kar)];
- (14) Shrushthi Plastics Pvt Ltd vs. CCE, Puducherry [2015(323) ELT 515(Mad)];
- (15) Confidence Petroleum India Ltd. vs. ADDL.C.C., C.E. & S.T., Coimbatore [2015(322) ELT 237 (Mad)];
- (16) General Mills India Pvt Ltd. vs. UOI [2015(322) ELT 95 (Bom)];
- (17) Deputy Commissioner of Central Excise, Chennai vs. Dorcas Market Makers Pvt. Ltd., [2015(321) ELT 45(Mad.)];
- (18) JSL Lifestyle Ltd. vs. Union of India [2015(326) ELT 265 (P&H)];
- (19) Panoli Intermediate (India) Pvt. Ltd. vs. Union of India [2015(326) ELT 532(Guj)];
- (20) Data Field India Ltd., vs. Dy Commissioner of Customs (EOU), Chennai [2016(331) ELT 557 (Mad)]; and
- (21) Electronics Corporation of India Ltd. vs. UOI [2018-TIOL-484-HC-AP-CX-LB].

9. I have considered the submissions made on both sides.

10. Admittedly, an application claiming rebate was filed by the petitioner on 02.05.2016 and pursuant to the same, a show cause notice was issued by the first respondent on 24.06.2016, which was received by him on 27.06.2016. The show cause notice directed the petitioner to submit his explanation within 30 days. In case he fails to submit his show cause and he does not appear for the hearing posted by the adjudicating authority, the case would be decided exparte on merits, which means that whether a cause is shown before the adjudicating authority or not, there will be a personal hearing before deciding the case on merits.

11. It will be beneficial to read the Master Circular issued by the Central Board of Excise and Customs, New Delhi, which goes to say that the adjudicating authority had proceeded to fix a date and time for personal hearing in the case and request the assessee to appear before him for a personal hearing by himself or through his authorized representatives. At least three opportunities of personal hearing should be given with sufficient interval of time so that the noticee may avail opportunity of being heard. Separate communication should be made to the noticee for each opportunity of personal hearing. From this, it can be inferred that while adjudicating the issues, it is incumbent on the adjudicating authority to provide opportunity of personal hearing, not one, at least three, with sufficient interval of time, so that, the noticee may avail the opportunity of being heard. The very object of the Master Circular issued by the Central Board of Excise and Customs mandates that the provision of personal hearing is very essential before deciding any issue by a quasi judicial authority.

12. Section 33-A of the Act reads that the adjudicating authority shall give an opportunity of hearing, if the party so



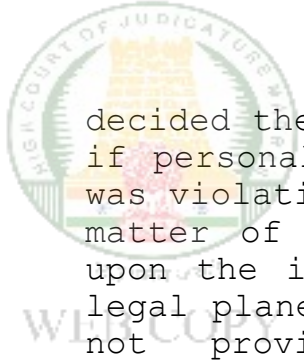
desires. The word "shall" employed in the provision envisages the importance of compliance of principles of natural justice. The words "if the party so desires" further exemplify the compulsory requirement of personal hearing by the adjudicating authority, when it is specifically asked for. What if, the person does not express his desire for personal hearing?. In the view of this Court, the opportunity of being heard is an inbuilt procedure in any adjudicatory process and it cannot be dispensed with. Even when a person is set exparte, he has the right to restore the proceedings to be decided on merits. He is entitled to substantive justice. "Justice not only be done but it should manifestly seem to be done". With that object only, the Board of Central Excise issues circular after circular setting out the procedures for adjudication. It only amplifies the provision, where it is silent and the provision shall not be read to give a meaning that it excludes personal hearing to those not asked for it.

13. The very issuance of the show cause notice, as specified at Paragraph No.2.1 of the Master Circular, is that the object of following the principles of natural justice is no one should be condemned unheard. In this context, we see that the Circular issued by the Central Board makes personal hearing mandatory and is binding on all the quasi judicial authorities. They cannot disobey or ignore the circular, as it has the binding force on them.

14. Coming again to the provision under Chapter VI of the Central Excise Act, 1944, with regard to adjudication of confiscation and penalties, Section 33-A reads that the opportunity of being heard to a party in a proceeding, if the party so desires, shall be given. Sub-Section (2) of Section 33-A mandates that if sufficient cause is shown, at any stage of proceeding, that time shall be granted for reasons to be recorded in writing. Further, it provides for three adjournments to a party, which means that adjudicating authority shall not arbitrarily curtail the opportunity, but shall give opportunity in letter and spirit. The provision, if read as a whole and cogently, compels the adjudicating authority to adhere to the principles of natural justice by affording personal hearing.

15. It is not a penal proceeding to apply the provisions in strict sense. When an authority has the power to demand duty levied, he equally has a duty to refund the excess duty collected. It cannot be knocked off on technical grounds.

16. The learned Standing Counsel for the respondents would rely on a few judgments in support of his contention. A Division Bench of this Court in the judgment in 2010 (253) E.L.T. 722 (Mad) [Optigrab International vs. Government of India], while dealing with the issue of personal hearing in an appeal proceeding, held that the Additional Bench of Customs and Central Excise Settlement Commission examined the application and other connected records and has taken into consideration the reply filed by the appellant therein and



decided the issue. In such an appeal proceeding, it is observed that if personal hearing is not given, it could not be said that there was violation of principles of natural justice. More so, the subject matter of controversies/disputes between the parties only impinge upon the interpretation of various Sections of the Customs Act on legal plane and, therefore, no prejudice was caused to the party in not providing opportunity of hearing to its authorised representative. Whereas, in the instant case, a show cause notice was issued by the adjudicating authority to the petitioner and it requires explanation directly by him and in cases of clarification, requires his presence in person to explain the factual issues. The issue decided by this Court in the above said case is with regard to the appeal proceeding and that cannot be equated with the original proceedings, where the presence of the noticee is very much essential.

17. Likewise, the judgment relied on by the learned Standing Counsel for the respondents reported in 2008(221) E.L.T. 496 (Kar.) [Bharath Hospital & Inst. of Oncology vs. Dir.Gen.of Health Services] is also not applicable to the case on hand. Whereas, the letter was issued on 10.04.2000 by the concerned authority to ascertain whether the institution fulfills the conditions for obtaining/retaining CDEC for import of hospital equipments/spares under Notification No.64/88-Cus., dated 01.03.1988. In order to comply with the principles of natural justice, two reminders were issued on 05.07.2000 and thereafter, on 28.07.2000. Almost, more than two years was spent on the proceedings. Several opportunities were given to the petitioner therein. In spite of that, the person did not appear, that is why, the Court has held that there is no violation of principles of natural justice in the absence of any response from the petitioner therein.

18. In the instant case, after giving show cause notice granting 30 days time, the authority, without waiting for any reply, on the 32nd day, passed an order. Therefore, the judgment of the Karnataka High Court cannot be applied to the case on hand.

19. Again, the learned Standing Counsel for the respondents relied on the judgment of Calcutta High Court reported in 2005(185) E.L.T. 227 (Cal.) [Nellimarla Jute Mills Co. Ltd. vs. Zonal Dir.Gen. of Foreign Trade], wherein the adjudicating authority, after lapse of time granted to the petitioner therein, has extended further time of seven days and served notice on the petitioner therein and thereafter, proceeded with the adjudication. In such circumstances, it cannot be said that the order was passed hastily. Another opportunity was given in compliance with the principles of natural justice. Therefore also, the said judgment is of no avail in favour of the respondents.

20. The Hon'ble Supreme Court in Swami Devi Dayal Hospital and Dental College vs. The Union of India and others [2013 (10) Scale 608] at Paragraph Nos.21 and 23, has observed as follows:



"21. It is trite that even in the absence of specific provision of giving hearing, the hearing is required in such cases unless specifically excluded by a statutory provision. In such a situation the proviso to Sub-section (4) of Section 10A has to be liberally construed to encompass the cases of renewal of permission as well.

22.....

23. The significance of principle of natural justice was highlighted in the case of Managing Director, ECIL, Hyderabad, Etc. v. Karunakar, etc. (1993) 4 SCC 727. Though, it was a case of disciplinary enquiry against an employee, the rationale given justifying the furnishing of enquiry report and giving an opportunity to meet, explain and controvert the same would apply here as well, as would be clear from the following passage in that judgment.

"The reason why the right to receive the report of the Inquiry Officer is considered an essential part of the reasonable opportunity at the first stage and also principle of natural justice is that the findings recorded by the Inquiry Officer form an important material before the disciplinary authority which along with the evidence is taken into consideration by it to come to its conclusion. It is difficult to say in advance, to what extent the said findings including the punishment, if any, recommended in the report would influence the disciplinary authority while drawing its conclusions. The findings further might have been recorded without considering the relevant evidence on record, or by misconstruing it or unsupported by it. If such a finding is to be one of the documents to be considered by the disciplinary authority, the principles of natural justice require that the employee should have a fair opportunity to meet, explain and controvert it before he is condemned. It is the negation of the tenets of justice and a denial of fair opportunity to the employee to consider the findings recorded by a third party like the Inquiry Officer without giving the employee an opportunity to reply to it. Although it is true that the disciplinary authority is supposed to arrive at its own findings on the basis of the evidence recorded in the inquiry, it is also equally true that the disciplinary authority takes into consideration the findings recorded by the Inquiry Officer along with the evidence on record. In the circumstances, the findings of the Inquiry Officer do constitute an important material before the disciplinary authority which is likely to influence its conclusions. If the Inquiry Officer were only to record the evidence and



forward the same to the disciplinary authority, that would not constitute any additional material before the disciplinary authority of which the delinquent employee has no knowledge. However, when the Inquiry Officer goes further and records his findings, as stated above, which may or may not be based on the evidence on record or are contrary to the same or in ignorance of it, such findings are an additional material unknown to the employee but are taken into consideration by the disciplinary authority while arriving at its conclusions. Both the dictates of the reasonable opportunity as well as the principles of natural justice, therefore, require that before the disciplinary authority comes to its own conclusion, the delinquent employee should have an opportunity to reply to the Inquiry Officer's findings. The disciplinary authority is then required to consider the evidence, the report of the Inquiry Officer and the representation of the employee against it."

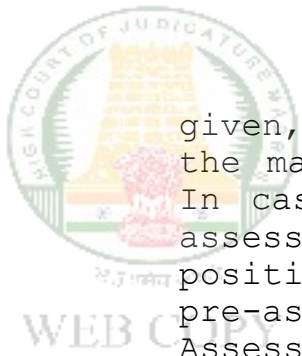
21. Further, in the judgment reported in General Mills India Pvt Ltd. vs. UOI [2015(322) ELT 95(Bom)]; a Division Bench of Bombay High Court at Paragraph No.4 has held as follows:

"4..... We do not see how the approach of the officer in this case can be countenanced even in the present matter. When he is aware of the requirement of giving a personal hearing before a adverse order is passed, then, the impugned order shows either a uncalled for or undue enthusiasm which could safely be termed as arrogance as well. We do not approve of such a hasty course and, therefore, proceed to quash and set aside the impugned order. The refund claim of the petitioners shall be now decided in accordance with law meaning thereby after hearing the petitioners and giving them an opportunity of producing the relevant material and a reasoned order shall thereafter be passed by the authority and uninfluenced by the earlier action. All contentions on merits of the claim of refund are kept open. The petitions are allowed. No costs. Our order and directions does not mean that we have adjudicated the claim of refund and that the authorities are oblige to grant it."

22. Likewise, a Division Bench of this Court in a batch of Writ Appeals in W.A(MD).Nos.234 to 240 of 2015 [G.V.Cotton Mills (P) Ltd., Vs. The Assistant Commissioner (CT), Avarayampalayam Assessment Circle, Coimbatore] dated 16.03.2018, has held as under:-

"Denial of Personal hearing:

"10.The respondent denied the appellant opportunity of hearing only on the ground that objection was not given to the pre-assessment notices. Even if objection was not



given, still the assessing authority was expected to post the matter for hearing by issuing notice to the assessee. In case the assessee fail to appear, it is open to the assessment authority to pass orders on merits. We make the position clear that the failure to submit objection to the pre-assessment notice would not give a right to the Assessment Officer to deny opportunity of personal hearing to the assessee.

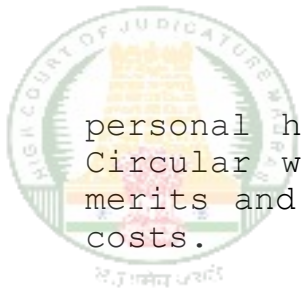
23. Insofar as the issue of approaching this Court without exhausting the alternative remedy is concerned, a Full Bench of Hyderabad High Court in Electronics Corporation of India Ltd. vs. UOI [2018-TIOL-484-HC-AP-CX-LB], at Paragraph No.23, has observed as under:

"23. In the result, the reference is answered holding that the decisions in M/s.Resolute Electronics Pvt. Ltd. and Star Enterprises do not constitute good law. A writ petition would lie against an Order-in-Original, against which an appeal was filed and dismissed as time-barred or no appeal had been preferred as it would have been time-barred, provided sufficient grounds are made out warranting exercise of the power of judicial review under Article 226 of the Constitution. In this regard, it would also not be necessary for the writ petitioner to assail the orders, if any, dismissing his appeals as time-barred, be it by the appellate authority or the Tribunal, in the event, he chose to invoke such appellate remedies."

24. When an order is passed in violation of principles of natural justice, a Writ Petition under Article 226 of the Constitution of India can be entertained. The availability of alternative remedy is not a bar for entertaining the Writ Petition. In such circumstances, the Writ Petition is maintainable.

25. Insofar as the impugned order in original passed by the first respondent dated 29.07.2016 is concerned, it is passed without affording any opportunity of personal hearing, in contravention of the statutory provision, circular issued by the department as well as contrary to Paragraph No.15 of the show cause notice. The impugned order passed within two days from the date of lapse of the time granted in the show cause notice is certainly in violation of principles of natural justice and, therefore, it is liable to be set aside.

26. In the result, the Writ Petition is allowed and the impugned order in original dated 29.07.2016 passed by the first respondent is set aside and the matter is remanded back to the first respondent for consideration afresh. The petitioner shall file all his objections, within a period of one month from the date of receipt of a copy of this order. On receipt of objections from the petitioner, the first respondent shall afford an opportunity of



personal hearing at least three times, as mandated in the Master Circular with sufficient intervals and thereafter, pass orders on merits and in accordance with law, as expeditiously as possible. No costs.

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Sd/-

Assistant Registrar (CS-I)

Sub Assistant Registrar (CS-IV)

+1CC to Mr.S.JAIKUMAR, Advocate, SR.No. 73983

+1CC to Mr.R.NANDAKUMAR, Advocate, SR.No. 73751

W.P. (MD) No.12060 of 2018

18.07.2018

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