BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 08.01.2018
CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
and
THE HONOURABLE MRS.JUSTICE R.HEMALATHA

W.A(MD)No.994 of 2016
and
C.M.P.(MD).No.5948 of 2016

Tvl.Rajalakshmi Mills,
rep. by its partner,
Mr.T.Muralidharan .. Appellant/ Petitioner

Vs.

The Commercial Tax Officer - I,
C.T. Buildings,
Madurai Road,
Virudhunagar. .. Respondent/ Respondent

PRAYER: Writ Appeal is filed under Clause 15 of the Letters Patent against the order, dated 02.06.2016, passed in W.P(MD)No.2931 of 2009 on the file of this Court.

PRAYER IN WP(MD)No.2931 of 2009:- Writ Petition is filed under Article 226 of the Constitution of India for the issue of a Writ of Certiorarified Mandamus to call for the records relating to the revised orders passed by the respondent in TNGST 5721207/2000-01, dated 16.03.2009 received by the petitioner on 17.03.2009 and quash the same and to direct the respondent to get the orders relating to the TNGST Act 59 for the Assessment year 2000-2001 from the Central Excise Department and to then proceed with the assessment work.

For Appellant : Mr.K.Vadivelu
for M.MD.Ibrahim Ali

For Respondent : Mr.A.K.Baskara Pandian,
Special Government Pleader

J U D G M E N T

[Judgment of the Court was delivered by M.SATHYANARAYANAN, J.]

By consent, the writ appeal itself is taken up for final disposal.

2. Mr.A.K.Baskara Pandian, learned Special Government Pleader, appeared for the respondent.

3.The appellant / writ petitioner is a registered dealer under the Tamil Nadu General Sales Tax Act, 1959 (in short "TNGST Act") and also an assessee in the books of the respondent. The avocation of the appellant is manufacturing of plastic granules and for that purpose, he purchases plastic waste from the registered dealers within the State of Tamil Nadu and convert them to granules.

4. The appellant / writ petitioner would further state that the documents relating to the accounts and the accounts maintained in the Central Processing Unit (C.P.U.) of the computer, except monitor, were seized by the Central Excise Department on 12.01.2001 for certain verification and till date of filing of the writ petition, the said C.P.U. have not been returned and so also the documents, and as a consequence, they are handicapped for the reason that the maintenance of accounts, such as day book, ledger, stock book, etc. were made only in the said computer C.P.U. It is further averred by the appellant / writ petitioner that the accounts have already been submitted to the respondent for the purpose of final assessment and then, the Assessing Officer in exercise of powers conferred under the TNGST Act had determined the total and taxable turnover as Rs.2,69,94,005/- and Rs.66,95,280/- respectively, for the assessment year 2000-2001 and passed the final assessment order in the proceedings dated 27.02.2004.

5.It is a claim of the appellant / writ petitioner that he had filed all the copies of the purchase and sale bills to the respondent and as the consignors / sellers of the appellant are within the same jurisdiction of the respondent, he had sought for exemption of sales and during the course of checking of the accounts also, he had produced all the records to the Assessing Officer. However, the respondent, vide assessment order dated 27.02.2004, had determined the total turn over as Rs.3,69,94,005/- and based on the said amount, he assessed the tax due as Rs.2,67,811/-. A pre-revision notice, dated 04.11.2004, was also issued to revise certain heads and in response to the same, the appellant / writ petitioner submitted his representation, dated 23.12.2004, praying for dropping of the proceedings. But, the respondent once again issued a notice, dated 30.09.2005, directing the appellant / writ petitioner to file an objection for the proposal for which also the appellant /writ petitioner has submitted his reply on 28.10.2005 stating among other things that there is no tax liabilities since the purchase of plastic waste was from the registered dealers. The respondent once again sent a notice dated 28.02.2006 calling for objections for modified proposals. The appellant / writ petitioner has also again filed his reply on 20.04.2006. However, after a gap of nearly three years, the respondent has issued a notice, dated 20.02.2009, with the proposed reassessment of the tax as detailed below:

"Taxable turnover proposed	Rs.3,16,15,139.00 @ 4%
Exemption allowed	Rs. 73,07,133.00
Total turnover proposed	Rs.3,89,22,272.00

The assessing officer has also proposed penalty at 150% under Section 16(2) of the Act."

6. The grievance of the appellant / writ petitioner is that despite the fact of seizing of C.P.U. by the Central Excise Department and without giving any personal hearing or opportunity, the assessment order, dated 16.03.2009, was made by the respondent and hence, challenging the said order, he came forward to file the writ petition.

7. The writ petition was entertained and notice was ordered. The writ petition was taken up for final disposal on 02.06.2016. The learned Judge, taking note of the fact that there is an effective alternative remedy and no extraneous circumstances made out to bypass the said remedy, disposed of the writ petition granting liberty to the appellant / writ petitioner to file an appeal within 15 days before the appellate authority and on such filing of the appeal, the concerned authority was directed to entertain the same, in the light of the fact of the writ petition was filed within the statutory period. The appellant / writ petitioner, challenging the legality of the said order, came forward to file this writ appeal.

8. The learned counsel for the appellant / writ petitioner has drawn the attention of this Court to Section 16(1)(A) of the TNGST Act and he would submit that the assessment order was passed on 27.02.2004 and after issuing fresh notice and the appellant's response, the impugned order came to the passed on 16.03.2009, which is beyond the period of five years and as such the impugned order is liable to be quashed. In the alternative, it is also the submission of the learned counsel for the appellant, in the light of the circular No.7/2014, BB1/3589/2014, dated 03.02.2004, before passing the revision order, the dealer should be given a reasonable opportunity and personal hearing, if required, under Section 22(4) of the TNGST Act and admittedly, the personal hearing was not given to the appellant / writ petitioner and therefore, he prays for interference.

9. Per contra, the learned Special Government Pleader appearing for the respondent would contend that as per Section 16(1)(a) of the TNGST Act, within a period of five years from the date of order of final assessment by the Assessing Authority the steps to be taken with regard to the assessment of escaped turn over and that in this case, notices were issued to the appellant / writ petitioner well within the time and as such Section 16(1)(a) of the TNGST Act has no application to the case on hand. It is the further

submission of the learned Special Government Pleader that the appellant / writ petitioner is also having an alternative remedy under Section 31 of the TNGST Act and he ought to file an appeal within 30 days from the date of receipt of the order and since he failed to avail alternative remedy, the learned Judge, taking into consideration the writ petition was filed within the said period, granted liberty to file an appeal and as such the impugned order does not warrant interference and thus, he prays for dismissal of the appeal.

10. This Court has carefully considered the rival submissions and also perused the materials placed on record.

11. The assessment order was issued on 27.02.2004. The pre-revision notice was issued on 28.02.2006 for which the petitioner has submitted his response on 20.04.2006 and thereafter, submitted one more representation on 06.03.2009 praying for time to file objection for the reason that the records is in C.P.U., which was seized by the Central Excise Department. However, it was rejected and the impugned order came to be passed on 16.03.2009. In the considered opinion of this Court, in the light of the said fact, Section 16(1)(a) of the TNGST Act would not come to the aid of the appellant / writ petitioner.

12. No doubt the appellant / writ petitioner is having an effective alternative remedy under Section 31 of the TNGST Act within a period of 30 days from the date of receipt of the assessment and as per the second proviso to Section 31, for the purpose of preferring an appeal, there must be satisfactory proof of the payment of the tax admitted by the appellant to be due or of such instalments thereof as might have payable, as the case may be and 25% of the difference of the tax assessed by the assessing authority and the tax admitted by the appellant.

13. Attention of this Court was drawn to the order, dated 29.09.2006, made in W.A.(MD)No.1323 of 2016 (Tvl.Anthony & Company, Tuticorin District Vs. State) (in which one of us (MSNJ) was a party). A perusal of the said judgment would disclose that as per the above said circular, before passing the revision order, reasonable opportunity of personal hearing is to be afforded and the relevant portion is extracted hereunder:

> "<u>b) Revision of Assessment :</u>
>
> Under the TNVAT Act, 2006, the assessing officers usually issue orders to reverse the ITC on obvious reason. During the current financial year, the assessing officer may issue notice to reverse the ITC for each month separately under Section 25 of the TNVAT Act, 2006. After closure of the financial year, the assessment should be completed initially under Deemed Assessment under Section 22 of the Act and then only they should take revision proceedings under Section 27 of the Act. Before

passing the revision order, the dealer should be given reasonable opportunity and personal hearing, if required so, as per Section 22(4) of the TNVAT Act, 2006. No order of revision should be made without affording an opportunity to the dealer as provided under Sections 22, 25, 27 of the Act.”

14. A perusal of the impugned order, dated 16.03.2009, disclosed that before passing the said order, an opportunity of personal hearing have not been afforded to the appellant / writ petitioner and on the said short and the sole ground, the impugned order dismissing the writ petition as well as the original impugned order warrant interference.

15. In the result, this writ appeal is partly allowed; the impugned order, dated 02.06.2016, passed in W.P.(MD).No.2931 of 2009 as well as the impugned order, dated 16.03.2009, passed by the respondent are set aside subject to the condition that the appellant / writ petitioner shall deposit 15% of tax admitted by the appellant / writ petitioner to the credit of the respondent within a period of four weeks from the date of receipt of a copy of this order and upon receipt of the same, the respondent is directed to afford an opportunity of personal hearing to the appellant / writ petitioner and thereafter, decide the revision of assessment, within a further period of six weeks thereafter and communicate the decision taken to the appellant / writ petitioner. It is also made clear that if the appellant / writ petitioner fails to deposit 15% of the admitted tax within the time stipulated, this writ appeal would stand automatically dismissed without further reference to this Court. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-
Assistant Registrar(CSI)

/True Copy/

Sub-Assistant Registrar

To

The Commercial Tax Officer - I,
C.T. Buildings,
Madurai Road, Virudhunagar.

Gcg
RL/2C/5P/MR/SAR4/23/1/2018

JUDGMENT MADE IN
W.A(MD)No.994 of 2016

09.01.2018