BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED :19.07.2018
CORAM
THE HONOURABLE MR.JUSTICE M.GOVINDARAJ
W.P(MD)No.24631 of 2016
and
W.M.P.(MD) No.17757 of 2016

J.Senthilkumar .. Petitioner

Vs.

The Commercial Tax Officer,
PeriyakulamAssessment Circle,
Periakulam. ... Respondent

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari calling for the records on the file of the respondent in TIN:33875060685 dated 5.10.2016 and quash the same as invalid, illegal and against the principles of natural justice.

For Petitioner : Mr.A.Chandrasekaran
For Respondent : Mr.S.Dhayalan
Government Advocate

O R D E R

This writ petition is filed to quash the assessment order passed by the respondent in TIN:33875060685 dated 5.10.2016.

2. Heard both sides.

3. The petitioner is a registered dealer under the provisions of Tamil Nadu VAT Act, 2006. For the assessment year 2013-14, he filed monthly returns. Pursuant to an inspection conducted by the Enforcement Wing of the Department on 06.12.2013, a revision notice was issued on 12.01.2015. The petitioner filed a reply in the same month. Thereafter a revised pre-revision notice was issued on 05.05.2015. The petitioner has again filed his reply to the same. Once again, assessment was further revised and fresh notice dated 24.08.2015 was served on the petitioner. Thereafter, the final order came to be passed.

4. A Division Bench of this Court, in similar issue in **SRC Projects Private Limited Vs. Commissioner of Commercial Taxes, Chennai and Another** reported in **2010(33) VST 333 (Mad)**, has categorically held as follows:

"8. In order to appreciate the aforesaid contentions, this Court proposes to set out the provision of Section 16(1)(a) of the said Act, which is relevant for our consideration.

16(1)(a): Where, for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the assessing authority may, subject to the provisions of sub-section (2), at any time within a period of five years from the date of order of the final assessment by the assessing authority, determine to the best of its judgment the turnover which has escaped assessment and assess the tax payable on such turnover after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.

9. The relevant part of the circular dated 20.04.2001 (hereinafter, the said circular) is also set out below:

2. Fair opportunity is to be given to the assessee and judicial consideration given to the representations, evidences and materials furnished by him. But personal hearing need not be given unless the statute requires it (eg.Section22(2)) or the assessee asks for it.

10. Since, the questions overlap, all of them are discussed together.

11. Before dealing with those questions, this Court proposes to consider a few authorities on the content of the expression reasonable opportunity to show cause. It may be true if the provision of reasonable opportunity to show cause is considered bereft of the circular, then it may not be held that it includes an opportunity of personal hearing. But then in a case where the question involved is one of determination of certain factual disputes, which are a bit complex and not free from controversy, the Court has to consider whether principles of fairness would encompass personal hearing within the concept of reasonable opportunity to show cause under Section 16(1)(a) of the said Act.

12. Reference in this connection may be made to Professor Wades treatise on Administrative Law (9th Edition). At page 517 of the said treatise the learned author has emphasized that a hearing will normally be an oral hearing. But, in some cases, it is sufficient to give an opportunity to make a representation in writing provided that no adverse materials are disclosed and further the demands of fairness are sufficiently met.

13. Similar views have been expressed in De.Smiths Judicial Review of Administrative Action, (6th Edition) at page 397. The learned author opined that a fair

hearing does not necessarily mean that there must be an opportunity to be heard orally, but one is entitled to an oral hearing where fairness requires that there should be such hearing. But, fairness does not require that there should be an oral hearing in every case. However, the learned author referred to the decision in Sengupta Vs. Holms, (2002) EWCA Civ 1104 at (38) and quoted the views of Laws L.J. where the learned Judge held that central place is accorded to oral argument in our common law adversarial system. The learned Judge further said that ..this I think is important, because oral argument is perhaps the most powerful force there is, in our legal process, to promote a change of mind by the judge. That judges in fact change their minds under the influence of oral argument is not an arcane feature of the system; it is at the center of it(See pages 396 and 397 of the book).

14. In some of the judgments of the Honble Supreme Court similar views have been expressed. In State of Bombay v. Nurul Latif Khan reported in AIR 1966 SC 269, a Three-Judge Bench of the Honble Supreme Court, speaking through Chief Justice Gajendragadkar, was considering the ambit of Rule 55 of Civil Services (Classification, Control Appeal) Rules, 1930. The relevant clause in the rule provides an officer charge sheeted shall be required within a reasonable time to put in a written statement of his defence and state whether he desires to be heard in person. There is a further clause in the Rule, which lays down that if the charge sheeted officer so desires and the concerned authority so directs, an oral enquiry shall be held. Considering the said rule, the learned Judges held that if the charge sheeted officer desires, oral hearing is mandatory. The learned Judges held that this requirement is plainly based on considerations of natural justice and fair play (see para.13 at page 274). In this case also in the representation of the petitioner personal hearing was demanded in terms of the said Circular but the same was declined by the Revenue.

15. In the case of Travancore Rayons v. Union of India reported in AIR 1971 SC 862, which is a case under Central Excise and Salt Act, 1944, the question was whether the appellant company is entitled to a personal hearing in the revisional proceedings. Justice Shah, speaking for a Two-Judge Bench of the Honble Supreme Court, held that It is true that rules do not require that personal hearing shall be given, but, if in appropriate cases where complex and difficult questions requiring familiarity with technical questions are

raised, personal hearing is given, it would conduce to better administration and more satisfactory disposal of the grievances of citizens. This view of the Supreme Court in 1971 is in accord with the views expressed in 2002 by Laws L.J. in Sengupta (supra).

16. In the case of Ram Chander v. Union of India reported in AIR 1986 SC 1173, the learned Judges of the Supreme Court held that though the expression appellate authority shall consider may not include an opportunity of hearing, but objective consideration is possible only if the delinquent servant is heard and given a chance to satisfy the Authority regarding the final orders that may be passed on his appeal. Considerations of fair play and justice also require that such a personal hearing should be given.

17. In State of U.P. Vs. Maharaja Dharmander Prasad Singh, AIR 1989 SC 997 in paragraph 29 at pages 1010 & 1011 of the report, the learned Judges held that where the grounds require determination of factual matters of some complexity the statutory authority should in the facts of the case have afforded a personal hearing to the lessee.

18. The principle of contemporanea exposito has been applied by the Supreme Court as a principle to expand and elucidate the meaning of statutory provision in National and Grindlays Bank Vs. Municipal Corporation for Greater Bombay, reported in AIR 1969 SC 1048. The Supreme Court has approved that the Court may resort to contemporaneous construction namely., construction which the authorities have put upon the law for the usage and conduct for longer period of time. The Court applied the said principle in construing the provision of Section 146(2) of the Bombay Municipal Corporation Act. In doing so, the Court referred to and relied upon an old English decision in the case of The Queen Vs. Commrs. of Inland Revenue, (1891) 1 QB 485. Reliance was placed by the Court on the judgment of Justice Stephen at page 489 of the report. In the instant case also the ambit of reasonable opportunity of showing cause under Section 16 (1)(a) must be interpreted in line with the said Circular where it has been provided in a case where the assessee demands for oral hearing such oral hearing should be given. The said Circular has been issued by the Commissioner who has to administer the provisions of the said Act.

19. Subsequently also, in the case of R.S.Nayak Vs. A.R.Antulay, (1984) 2 SCC 183 a Constitution Bench of the Supreme Court has referred to the principle of

contemporanea exposito. In construing the provision of Section 21 of the Indian Penal Code the Supreme Court applied the principle of contemporanea exposito and held that an M.L.A. is not a public servant.

20. The Honble Supreme Court in the case of Supreme Court Advocates-on-Record Association Vs. Union of India, (1993) 4 SCC 441 referred to the actual practice in the matter of interpretation of constitutional provisions in the appointment of superior Judges. The interpretation on the basis of the actual practice is the principle of contemporanea exposito (See pages 694 and 695 of the report).

21. In a matter dealing with the taxation, the Honble Supreme Court in the case of Union of India and another Vs. Azadi Bachao Andolan and another, reported in AIR 2004 SC 1107 has explained the principle of contemporanea exposito by quoting Crawford on Statutory Construction, 1940 Ed. In the said decision the following passage from Crawford has been quoted with approval.

"..administrative construction (i.e., contemporaneous construction placed by administrative or executive officers) generally should be clearly wrong before it is overturned: such a construction commonly referred to as practical construction, although non-controlling, is nevertheless entitled to considerable weight, it is highly persuasive".

22. This Court, therefore, holds that the provision of Section 16(1)(a) of the said Act has to be construed in accordance with the said Circular which is by way of contemporanea exposito. So when a specific demand is made for personal hearing the reasonable opportunity of showing cause should include the same in the interest of fairness in procedure."

5. As held by the Hon'ble Division Bench of this Court, affording of an opportunity of personal hearing is mandatory and if an opportunity of personal hearing is not given, it will amount to violation of principles of natural justice.

6. In the instant case, the respondent has not considered the objections at all and has passed a very cryptic order without giving any reason for rejecting the objections. The operative portion of the impugned order reads as under:

"The objections are considered carefully the enforcement wing officers have formulated proposals based on the documents produced by the dealers and

stock reconciliation has been made with reference to the date available. The objection of the dealers could not be accepted as they are not having any opening stock as on 01.04.2014.

The dealers are PWD/high way contractors and the work in on-going process of constructions, which could not be completed, over-night, and therefore there is every possibility of stock at the end of the year".

7. The wordings mentioned in the impugned order that ''the Enforcement Wing officials formulated the proposals and that there is every possibility of stock at the end of the year'' clearly shows that the proposals were not formulated by the Assessing Officer and the decision was based on possibilities as indicated by the enforcement wing officials. From the order, it can be clearly inferred that the Assessing Officer has not formulated the proposals independently applying his mind and also passed the order on his assumption and not on the basis of materials. Had he given an opportunity of personal hearing to the dealer, he could have explained the defects with supporting materials. Therefore, the impugned order stands vitiated for non-application of mind and violation of principles of natural justice.

8. In such circumstances, this Court is inclined to set aside the impugned order and remand back the matter to the respondent for fresh consideration. Accordingly, the order passed by the respondent in TIN:33875060685, dated 05.10.2016 is set aside and the matter is remanded back to the respondent for fresh consideration. The Assessing Officer is directed to apply his mind to the report filed by the Enforcement Wing officials and if any defect is found, independently formulate the proposals on his own and communicate the same to the petitioner. After receiving the objections from the petitioner, the authorities shall proceed with the matter and pass final orders uninfluenced by the report of the enforcement wing officials on merits and in accordance with law. It is again reiterated that affording of an opportunity of personal hearing is mandatory and the authority shall follow the instructions issued by the Department as well as the judicial pronouncements on this aspect.

9. In the result, this Writ Petition is allowed. No costs. Consequently, connected W.M.P.(MD) No.17757 of 2016 is closed.

Sd/-
Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar(CS-III)

To,

The Commercial Tax Officer,
PeriyakulamAssessment Circle,
Periakulam.

+1cc to Mr.A.Chandrasekaran, Advocate Sr.No.74025
+1cc to Spl.Government Pleader Sr.No.74147

CM

VB/KAK/SAR3/13.08.2018/7P/4C

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