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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WRIT PETITION(CIVIL) No. 1268/2000**

Date of decision: 15th February, 2018

M/S GARWARE WALL ROPES LTD.

..... Petitioner

Through Mr. Yogesh Kumar Jagia & Mr. Amit Sood, Advocates.

versus

COMMISSIONER OF SALEX TAX & ANR.

..... Respondents

Through Mr. Shadan Farasat, ASC & Mr. Shashi Pratap Singh, Advocate alongwith Mr. Rajesh Rawal, AVATO.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL):

The petitioner, M/s Garware Wall Ropes Limited, is a company, which was registered under the Delhi Sales Tax Act, 1975 and the Central Sales Tax Act, 1956. During the relevant period in question, i.e., Assessment Year 1995-96, the petitioner was engaged in the business of manufacture and sale of all kinds of ropes, cardage strings and twines.

2. The petitioner impugns the notice dated 9th November, 1999 issued by the Sales Tax Officer for the Assessment Year 1995-96 under Section 24 of the Delhi Sales Tax Act, 1975(Act, for short).

3. In order to avoid prolixity, we are not referring to all contentions and issues, which have been raised in the writ petition as we find that the writ petition can be disposed of and decided in view of the statement made by the counsel for the respondents that the original records relating to the present case have been misplaced or weeded out and hence it is not possible to establish and show that the assessing authority had recorded 'reasons to believe' in writing before issuing notice dated 9th November, 1999 under Section 24 of the Act.

4. Section 24 of the Act reads as under:-

“24.Turnover escaping assessment.- (1) Where after a dealer has been assessed under section 23 for any year or part thereof, the Commissioner has reason to believe that the whole or any part of the turnover of a dealer in respect of any period has escaped assessment to tax or has been under-assessed or has been assessed at a rate lower than the rate at which it is assessable, or any deduction has been wrongly made therefrom the Commissioner may—

(a) within six years from the date of final order of assessment, in a case where the dealer has concealed, omitted or failed to disclose fully the particulars of such turnover; and

(b) within four years from the date of final order of assessment, in any other case,

serve a notice in the dealer and after giving the dealer an opportunity of being heard and making such inquiry as he considers necessary, proceeding to determine to the best of his judgement, the amount of tax due from the dealer in respect of such turnover, and the

provisions of this Act shall, so far as may, be apply accordingly.

Explanation.—For the purposes of this section, production before the Commissioner of account books or other evidence from which material evidence could with due diligence have been discovered by the Commissioner will not necessarily amount to disclosure within the meaning of this section.

(2) No order of assessment, reassessment or re-computation shall be made under sub-section (1), after—

(a) the expiry of four years or, as the case may be, six years as specified in sub-section (7) of section 23; or

(b) the expiry of one years or, as the case may be, six years as specified in sub-section (1), whichever is later.”

4. The aforesaid provision was interpreted by a Division Bench of this Court in *M/s Classic Engineering Company versus The Commissioner of Sales Tax*, (2015) 225 DLT 119 and after referring to judgments of this Court in *Samagya Consultants (P) Limited versus Commissioner of Sales Tax*, 2001 (122) STC 512 (Del) and *Jagdish Cold Storage & Ice Factory versus The Commissioner of Sales Tax, Delhi*, 2007-08 (46) DSTC J-1 (Del), it was held as under:-

“55. After the decision of this Court in *Samagya Consultants (P) Ltd. v. CST* 2001 (122) STC 512 (Del) and *Jagdish Cold Storage & Ice Factory v. The Commissioner of Sales Tax, Delhi* 2007-08 (46) DSTC J-1 (Del), the legal position was made clear

that the recording of the reasons by the assessing authority officer before issuing a notice of re-assessment under Section 24 of the DST Act is mandatory and the violation of this requirement would result in invalidating the entire reassessment proceedings. The Commissioner has issued the following directions by way of Circular No.7 of 2001-02 (reported in DSTC N-38 at page 39) in light of the aforementioned decision:

“It is emphasised upon all Assessing Authorities that the aforementioned observations of the Hon’ble Delhi High Court be strictly adhered to and before issuing the notice in Form ST 15 under the aforesaid provision of Section 24, the reasons therefore invariably recorded on the order sheet. Non compliance will be viewed seriously.”

5. Similar view has been taken in *Shruti Fasteners Limited versus Commissioner of Value Added Tax*, 2015 SSC Online Del 12952, wherein it has been held:-

“9. The narration of facts as noted hereinbefore show that no ‘reasons to believe’ were formally recorded by the VATO on the file prior to initiating the proceedings under Section 24 of the DSTA. All that was stated in the order dated 10th October 2007 was that the assessment was being reopened “as per direction of higher authorities.” After it became apparent to the Court that there was no order of the VATO separately recording the „reasons to believe“, learned counsel for the Respondent was asked to produce before the Court the relevant file notings. The original file, as well as the photocopies of the relevant pages, was produced by learned counsel for the Respondent. It showed that a complaint was received

on 24th May 2007 in the office of the Commissioner against the Appellant. This was then forwarded by the Commissioner under cover of letter dated 14th June 2007 to the Deputy Commissioner (IX). On the basis of the said complaint, the VATO on 10th July 2007 issued a show cause notice to the Appellant. This was not in compliance with Section 24 (1) DSTA.

10. Section 24 (1) DSTA states that where, after a dealer has been assessed under Section 23 of the DSTA, the Commissioner has 'reasons to believe' that the whole or any part of the turnover of a dealer in respect of any period had escaped assessment to tax then the Commissioner may reopen the assessment by issuing a notice to the dealer and after giving the dealer an opportunity of being heard proceed to determine the tax payable to the best of his judgment. The power of the Commissioner under Section 24 (1) can in terms of Section 10 DSTA be delegated but not to a person lower in rank to an assessing officer.

11. While in the present case, there is no dispute that the VATO was authorised to reopen the assessment, it is plain that the jurisdictional requirement under Section 24 (1) of the DSTA that reasons must be recorded by the VATO himself, as the officer issuing the notice of reassessment on the ground that there were 'reasons to believe' that the whole or any part of the turnover of a dealer in respect of any period had escaped assessment to tax, was not complied with. All that was said by the VATO was that he was issuing notices for reopening of the assessment under Section 24 (1) DSTA "as per direction of higher authorities." This is not a mere procedural irregularity that can be condoned by remanding the matter to the VATO for a fresh reassessment proceeding. It goes to the very root of the matter since what is sought to be done under Section 24 of the Act is to re-open an assessment.

12. The above legal position has been explained in several decisions. In *Samagya Consultants (P) Ltd. v. CST* T 2001 (122) STC 512 (Del) this Court referred to the decision in *Sales Tax Officer v. Uttareshwari Rice Mills* 1972 (30) STC 567 and held:

“the legislative intent is also clear because of the expression used in Section 24 itself i.e. ‘Commissioner has reasons to believe’. The powers of the assessing officer to reopen assessment, though wide, are not plenary. The words used in the statute are ‘reason to believe’ and not ‘reason to suspect’. The expression ‘reason to believe’ postulates belief and existence of reasons for that belief. It postulates that the assessing officer holds the belief induced by the existence of reasons for holding such belief.”

13. In *Samagya Consultants (P) Ltd.* (supra), since the notice for reopening the assessment was issued without recording such reasons, it was held to be ‘indefensible’. The matter travelled up to the Supreme Court and the Department’s appeal was dismissed by an order dated 23rd April 2008, which read:

“We agree with the view taken by the High Court that in the absence of any recorded satisfaction for re-opening the concluded assessment of the assessee for the year 1996-97 by the assessing authority, the assessment could not be re-opened.”

14. In *Jagdish Cold Storage & Ice Factory v. The Commissioner of Sales Tax, Delhi* 2007-08 (46) DSTC J-1 (Del) a similar issue was addressed to the Court. It is noticed that Circular No.7 of 2001-02 dated 3rd March 2001 has been issued by the Commissioner of Sales Tax after the judgment in *Samagya Consultants (P) Ltd. v. CST* (supra) to the following effect:

“Therefore it is emphasised upon all the Assessing Authorities that the aforesaid observations of the Hon’ble Delhi High Court be strictly adhered to and before issuing the notice in form ST-15 under the aforesaid provision of Section 24, the reasons therefore invariably recorded in the Order-Sheet. Non-compliance will be viewed seriously.”

15. The Court in Jagdish Cold Storage & Ice Factory (supra) noted that in that case there were no reasons recorded for re-opening the assessment. It was then observed in paras 10 and 11 as under:

“10. It is rather unfortunate that in spite of this mandate recorded by the Commissioner, the Respondents have chosen to take a stand that it is not necessary to record reasons before issuing a notice for reopening a completed assessment. It is well settled in law that circulars issued by governmental authorities are binding upon the subordinate authorities. There is absolutely no reason, in this particular case, for the respondents to act in a manner contrary to the Circular issued by the Commissioner. That apart, we have gone through M/s. Samagya Consultant Pvt. Ltd. The Division Bench has specifically recorded that there must be an existence of reason on which belief is founded before a notice is issued. It is not necessary for the notice to state the reasons, but there must be existence of those reasons.

11. An Assessing Officer cannot view the reopening of a completed reassessment as a mechanical task because it can have serious consequences for the assessee and that is why it has been specifically mentioned in the

Income Tax Act that there must be reasons to believe that a completed assessment must be reopened. This is also the interpretation given by this Court to Section 24 of the Delhi Sales Tax Act, 1975. The power to reopen an assessment is quite clearly not a plenary power, even though the power is wide. Therefore, it is mandatory upon the Assessing Officer to have some material on record and also to consider that material and thereafter record reasons why a completed assessment is sought to be reopened.”

16. The above legal position was reiterated in the decision dated 17th August 2007 in Writ Petition (Civil) No. 6545 of 2002 (Prashant Software Ltd. v. Commissioner of Sales Tax). It was again observed as under:

“This is an extremely unfortunate situation where despite Circulars issued by the Commissioner of Sales Tax, the Respondent are bent on asserting that it is not at all necessary that reasons should be recorded before initiating steps to reopen a completed assessment. Apart from a violation of the law, it would be of no avail to an Assessee if it does not know what weighed in the mind of the assessing authority for reopening the assessment. It is for this reason that the Commissioner of Sales Tax issued the above circulars that there must be a record of the reasons. Otherwise, it is impossible for any Assessee to know why the assessment was reopened or what prompted the assessing authority to initiate the action taken by it. Even a court which is called upon to judicially review the decision of the assessing authority to reopen

the assessment would be unable to fathom the reasons, if they are not recorded anywhere.”

17. In light of the legal position explained in the above decisions, the Court concludes that in the present case the jurisdictional requirement of the VATO having to record the ‘reasons to believe’ preceding the issuance of the show cause notice to the Assessee under Section 24 (1) DSTA was not complied with. Consequently, the entire re-assessment proceedings are bad in law.”

6. Counsel for the Revenue, however, has submitted that in the present case, the re-opening under Section 24 of the Act was on a specific direction given by the Commissioner vide order dated 26th October, 1999 on an application filed by M/s Bahubali Plastics Private Limited. Our attention is drawn to the last paragraph of the said order, which reads as under:-

“ Accordingly in view of the discussion held above, it is found that “Plastic Ropes” of any kind do not fall within the ambit of aforesaid entry. Not relating to Baan & Rassi of the third Schedule and as such not exempted from tax under the Act. Rather they are unclassified goods taxable @ 7% at last point.

However, since the Ld. Counsel for the applicant has argued that all other manufacturers dealers of various types of “Plastic Ropes” who are selling their products tax free., before, parting with the case, it is ordered that a copy of the order be sent to all the /Acs with the direction to them to check up and ensure that such manufacturers dealers of Plastic Ropes are charging and depositing with the Department tax on this item @ 7% and not selling the same as tax free.”

7. The aforesaid order passed by the Commissioner was on an application by M/s Bahubali Plastics Private Limited on the question

whether plastic ropes manufactured and sold by them were tax free under Entry 54 of the Third Schedule of the Act relating to Baan and Ropes, and if not, what was proper rate of tax applicable on this item. The petitioner was not a party to the said litigation/order. Revenue submits that the order in the case of M/s Bahubali Plastics Private Ltd. was in the nature of directions under Section 49 of the Act.

8. Counsel for the petitioner submits that the observations made by the Commissioner cannot be construed as directions under Section 49 of the Act which should justify re-opening. It is also pleaded that the Commissioner cannot issue such directions in view of decision of a Division Bench of this Court in *SCJ Plastic Limited versus Sales Tax Officer and Others*, 2002 (63) DRJ 604 (DB). Counsel for the respondents, however, submits that the decision in the case of *SCJ Plastic Limited* (supra) did not notice the scope and ambit of power under Section 49 of the Act.

9. In the facts of the present case we need not decide the controversy relating to Section 49 of the Act for the simple reason that the requirement to record "reasons to believe" in writing before issue of notice under Section 24 of the Act is a jurisdictional pre-condition which must be satisfied as held by this Court in *M/s Classic Engineering Company* and *M/s Shruti Fasteners Limited* (supra). In the absence of reasons to believe recorded in writing, notice under section 24 of the Act would be void and bad in law. Even if we assume, that the order of the Commissioner in the case of M/s Bahubali Plastic Private Limited was an order under section 49 of the Act, the petitioner is entitled to succeed as the mandatory requirement to Section 24, i.e. recording of reasons to believe in writing, is not satisfied.

10. In view of the aforesaid position and as the respondents are unable to show and establish that 'reasons to believe' were recorded in writing, we have to allow the present writ petition and quash the impugned notice dated 9th November, 1999 initiating proceedings under Section 24 of the Act. In the present case, proceedings pursuant to notice for re-assessment for the Assessment Year 1995-96 was stayed vide order dated 15th March, 2000. In spite of the stay order, the assessment order was passed. Consequently, the petitioner was allowed to amend the writ petition and challenge the assessment order itself. The writ petition has remained pending in this Court since 2000. Given the aforesaid position, we would also quash the re-assessment order. Accordingly, proceedings pursuant to the impugned notice and the order passed would be treated as null and void.

11. The writ petition is allowed in the afore stated terms. There would be no order as to costs.

SANJIV KHANNA, J.

CHANDER SHEKHAR, J.

FEBRUARY 15, 2018
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