IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.01.2019
Pronounced on : 07.06.2019

CORAM :
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No. 12600 of 2013

D.R.Rajendran ...Petitioner

vs.

1. The State of Tamil Nadu,
   Rep. by the Secretary to Government,
   Commercial Taxes and Registration Department,
   Secretariat, Chennai - 600 009.

2. The Commissioner of Commercial Taxes,
   Office of the Commissioner of Commercial Taxes,
   Ezhilagam, Chepauk, Chennai-600 005.

Prayer : Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a writ of Certiorari, calling for the records on the file of the 1st respondent in its order in G.O.(2D) No.35, Commercial Taxes and Registration (E1) Department dated 27.03.2013 quash the same.

For Petitioner : Mr.S.Rajasekar

For Respondents: Mr.M.Hariharan
Addl.Govt.Pleader for R1 & R2

O R D E R

The writ of Certiorari is for quashing the order, passed by the 1st respondent in G.O.(2D) No.35, Commercial Taxes and Registration (E1) Department dated 27.03.2013.

2. The petitioner worked as Commercial Tax Officer at Tirupur (South) Assessment Circle. One M/s.ABT Ltd had filed the writ petition bearing Nos.19727 and 19739 of 2003 for refund of excess amount of entry tax for a sum of Rs.90,95,255/- for the assessment year 1996-1997 (in WP.No.19727/2003) and Rs.74,69,178/- for the assessment year 1994-1995 (in WP.No.19739/2003). This Court by an order dated 16.07.2003 and 17.07.2003, directed the State to consider the representation of M/s.ABT Ltd, and dispose of the same on merits within a period of 6 weeks.

3. The writ petitioner, a Commercial Tax Officer, by an order dated 21.08.2003, ordered the refund as prayed for. Departmental enquiry was initiated against the petitioner. The petitioner was put in suspension, pending the departmental proceedings. Three charge memos were initiated against the petitioner on 23.11.2004, 25.07.2005 and 29.11.2005. The same reads under:-

"(i) Charge Memo in CD1/53098/2004 dated 23.11.2004, 4 charges were framed under Rule 17(b) of TNCS (D&A) Rules

Charge No. 1.

Thiru. D. R. Rajendran, Commercial Tax Officer, while functioning as Commercial Tax Officer Saibaba Colony Assessment Circle and while holding Full Additional Charge of the post of Commercial Tax Officer Ramnagar Assessment circle from 04.12.2002 to 26.12.2003, had acted with a malafide motive in the discharge of his official duties and abetted Tvl. Karthikeya paper and Boards limited, Coimbatore.in the attempt of the dealer to evade penalty under section 10-A of the Central Sales Tax Assistant Commissioner for misuse of "C" Forms.

Charge No. 2.

Tampered with Government records with the malafide motive of abetting Tvl. Karthikeya paper and Boards limited, Coimbatore in their said attempt to evade penalty under section 10-A of the Central Sales Tax Act.

Charge No. 3.

Submitted a false report to the Deputy Commissioner (Commercial Taxes) Coimbatore on 3.5.2004 in me issue of inclusion of certain commodities in the Central Sales Ta» Registration Certificate of Karthikeya Paper and Boards limited, Coimbatore and has thus resorted to misleading the superior officer to cover up certain lapses committed by him.

Charge.No.4.

Violated Rule 20(1) of the TNGSC Rules 1973 by the above acts.

(ii) Charge memo in CD1/34133/20054 dated 25.07.2005 were framed under Rule 17(b) of TNCS (D&A) Rules.

Charge No. 1

Issued irregular refund of tax amounting to Rs.37,30,149.00 for the assessment year 1993-94 to Tvl. ABT limited (TNGST No.304979) without going in to the merits of the case as per High Court directions and without waiting for instructions of superior authorities.

Charge No. 2

Issued irregular refund of entry tax amounting to Rs. 1,65,64,433.00 for the assessment years 1994-95 and 1996-97 to Tvl. ABT limited (TNGST No.304979) without going in to the merits of the case as per High Court directions and without waiting for instructions of superior authorities

Charge No.3

Thiru. D. R. Rajendran had issued above said refund in the absence of assessment records and without making entries in the relevant registers which resulted in administrative inconvenience to his successor officer and the superior authorities in setting right the irregularities committed by him.

Charge No. 4.

Failed to discharge his duties as an Assessing officer diligently and to safeguard the interest of revenue.

(iii) Charge Memo in CD1/ 32653/2005 dated 29.11.2005, 6 charges were framed.

Charge No. 1

Thiru. D. R. Rajendran, Commercial Tax Officer during his tenure as Commercial Tax Officer(Full Additional Charge), Ramnagar assessment circle form 04.12.2002 to 26.12.2003 had acted with negligence in the discharge of his duties and assessed the sales of aluminium lithographic plates by Tvl. Purandhara Graphics sales and services (TNGST/1980708/2002-2003 to tax at 10% whereas the commodity is taxable at 12% thereby causing revenue loss of Rs.35,692 to the state Exchequer.

Charge No.2

Failed to levy penalty under section 10A of the CST Act1956 for the misuse of C forms by Tvl. Anugraha Valve Castings (p) ltd. (TNGST/1980744/2002- 2003) causing a revenue loss of Rs.2,15,612 .00 to the State Exchequer.

Charge No. 3

Granted incorrect exemption on claims of second sales of bullion by Tvl. Rishaph Bullion Gem and Jewellery (TNGST/1981479/2001 - 2002) causing a revenue loss of 13,46.500.00 to the State Exchequer.

Charge No. 4

Failed to make entries of the tax demands in D2 and L registers in respect of Tvl. Arthireya Enterprises

(TNGST/1981558/2201-2002 and thereby causing a revenue loss of Rs.30,885. 00 to the state Exchequer."

4. Enquiry was conducted for all the charge memos. In respect of second charge memo bearing No.CD1/34133/2005 dated 25.07.2005, charges 1 and 3 were not proved, charges 2 and 4 were proved. Similarly, in charge memo CD1/53098/2004, all the charges were proved. In respect of charge memo CD1/32653/2005, charges 3,5 and 6 were proved and charge 4 was partly proved. However, the Government disagreed with couple of findings of the Enquiry Officer and gave a findings of those charges which were not proved as proved. The petitioner was dismissed from service. Ultimately by an order dated 27.03.2017, the Government passed G.O.(2D) 35 Commercial Taxes and Registration (E1) Department, came to the following conclusion and advice.

> "The findings of the Inquiry officer reasons for disagreement with the said findings and his further representation on the findings of the Inquiry Officer along with the connected records have decided to hold the charges 1,2 & 4 as proved and charge 3 as partly proved . For the proven charges against him the Government have arrived at a provisional conclusion to impose the punishment on Thiru. D. R. Rajendran, Commercial Tax Officer (under suspension) under major penalties referred in rule 8 (Viii) of the Tamil Nadu Civil Services (Discipline & Appeal) Rules. Accordingly views of the TNPSC sought for under TNPSC Regulations 1954.
> The TNPSC has offered its remarks as below.
> 'The Commissioner has gone through the records of the case carefully.
> From the Inquiry Report and the reasons for deviation of the Government, it is proved that, both in the first and the second charge, the delinquent officer hurriedly issued the refund vouchers to the dealer and acted against the interest of the Government. The Delinquent p Officer did not address the issue to the Government Pleader and obtain his opinion, but he simply addressed the higher authorities and without waiting for their reply, he had deliberately, intentionally and very swiftly issued the refund vouchers for huge sum of rupees without going into the merits of the case. The charges are serious in nature and the punishment commensurate with the charges framed against the Delinquent Officer. Hence the Commission advises the Government to go ahead with the proposed punishment of dismissing the Delinquent Officer from service. Therefore the Government have decided to confirm the provisional conclusion already taken by the Government. Accordingly the Government ordered the punishment of

"Dismissal from service" on Thiru. D.R. Rajendran formerly CTOTirupur (South) Assessment circle. "

Against this order, the petitioner has filed the instant writ petition.

5. The learned counsel for the writ petitioner would state that, the orders passed by the petitioner have not been taken on appeal by the Government. The orders have not been reversed. The counsel for the petitioner would therefore contend that, it cannot be said that any financial loss has been caused to the exchequer. He would therefore contend that, if no financial loss has been caused to the exchequer and petitioner being an quasi-judicial authority, could not be processed against the departmental proceedings. The petitioner would state that, the High Court of Madras by its order in WP.Nos.19739 & 19727 of 2003, in the case of M/s.ABT Ltd Vs.The Commercial Tax Officer, directed to refund the excess amount and consider the case of the petitioner. The petitioner had written to his superior authorities and since no reply was forthcoming from his superiors, the petitioner has no alternative except to pass the orders in accordance with law. The counsel for the petitioner would state if the petitioner had not passed the orders, the department would had to face contempt proceedings. The petitioner stated that, he has done only his duty and had passed orders in compliance to the directions of the High Court. It is his contention that, he should not be penalized for inaction on the part of his superiors who did not responded to his letters.

6. The order dated 27.03.2013 would give the defense of the petitioner on various charges. The same has been reproduced hereunder:-

1) The delinquent officer has stated that he had no intention to neglect the instructions of the Superiors and he was not at guilty in refunding the amount of the M/s. ABT Ltd. He has submitted his explanation as follows:

1. Section 4 of the Entry Tax Act provides act on set off towards the liability of Sales Tax. The preamble of the Entry Tax also would emphasis this. The intention of the Legislature is to safeguard the revenue of Sales taxes.

The delinquent officer has quoted the judgement of the High Court of Madras reported in 134 STC 272 in the case of State of Tamil Nadu Vs. Ganesh Automobiles, which is as follows:

"In view of the clear provisions of Section 11 of the Act, the petitioner-firm is entitled for refund of Entry Tax paid after adjusting the tax payable by the petitioner under the Tamil Nadu General Sales Tax Act. Therefore, I am of the view that the respondents are bound to refund the tax collected by way of Entry Tax after deducting the tax payable by the petitioner under the Tamil Nadu General Sales Tax Act. In the instant case, there is some dispute with regard to the amount of the tax payable by the petitioner-firm under the Tamil Nadu General Sales Tax Act. In view of the above, the writ petition is allowed with the direction to the second respondent to hold an enquiry with regard to the sales tax payable by the petitioner firm during materials time. The petitioner is entitled to adjust a sum of Rs.1,15,150/- from the amount of sales tax due and the balance shall be refunded to the petitioner. The second respondent shall give adequate opportunity to the petitioner before passing any order. Ordered accordingly. No order as to costs."

3.Now, it is clear that the Entry Tax if any excessively paid more than the Tamil Nadu General Sales Tax Act, Surcharge Act and Additional Sales Act, the residuary amount has to be refunded. This main concept was also emphasized by the Supreme Court in 107 5TC 586 in the case of Anand Commercial Agencies and 134 STC 303 in the case of Jindal Strips Ltd. The Supreme Court has clearly hold that the Entry Tax snail not exceed the Sales Tax leviable on that commodity.

4. While the above legal concepts did exist, M/s.ABT Ltd. has claimed refund as they have paid more Entry Tax than the Sales Tax payable. For illustration, he shall submit the refund claimed by them for the year 1993-94. They have given their petition on 3.7.2003 and simultaneously, they have filed writ petition. The High Court in WP No.19193/2003, dt.11.7.2003 has directed to issue refund order to The sum of Rs.37,30,149/- within 2 weeks. Even after the receipt of orders of the Court, he has sought for instructions from the Assistant Commissioner (Commercial Taxes), Zone-II, Coimbctore by his letter dt. 29.7.2003. There naturally happened to be no response from the superior officers to give any negative instructions on the existence of specific directions of the Court. In the meanwhile, he had come across a judgement of the same High Court in Wf? No.8017 and 8018/03, dt.2C.3.2003 issued in the case of M/s. CAG (P) Ltd. Vs. Commercial Tax Officer, Peelamedu South Circle, Coimbatore where the pronouncement of judgement would go as under:

"An identical question has been decided in WA No.l228/1995. It is however stated by the counsel for the respondents that against the aforesaid Division Bench Judgement, a SLP has beer, filed and the same is pending before the Supreme Court. However, it has been fairly submitted by the learned counsel for the respondents that no stay order has been passed. Since a

Division bench decision is holding the field he was bound by the ratio of the said decision.
Keeping in view of the aforesaid decision, which has been subsequently followed in WP No.10187/1995 dt.22.4.2002 and several other cases, I allow the present writ petitions with a direction to the respondents to enquire into the matter and if it is found that excess amount has been paid at the time of payment of entry tax, the balance amount should be refunded to the petitioner by adjusting the tax payable under the Tamil Nadu General Sales Tax Act!.; This may be done within a period of six weeks from the date of communication of the order. The writ petitions are disposed of accordingly. No costs. Consequently, the connected miscellaneous petitions are closed."

The decision of the High Court would refer the Writ Appeal decision Automobiles (134 STC 272) and also the Classic Motors' case in Writ Petition No. 10187/95.

a) Apex Courts have already neid to refund the excess entry tax after the adjustment towards sales tax payable. This would signify that the Entry Tax is nothing but in compensating nature as held by the Supreme Court.

b) The judgement of the Court given in the case of M/s.CAG (P) Ltd., Coimbatore is prior to the judgement given in the case of M/s.ABT Ltd. The decision in TvI.CAG (P) Ltd., would specifically state that the decision of the Division Berch in M/s. Ganesh Automobiles cannot be overcome.

c) While he has addressed the Assistant Commissioner (Commercial Taxes), Zone-II, Coimbatore for instructions, the above position would prevail and the whole Coimbatore division superior officers were at the knowledge of the decision in the case of M/s. CAG (P) Ltd., Coimbatore as the later decision is a. decision in REM i.e. applicable to the whole community at large. So following the 30/3/2003 decision in M/s.CAG(P) Ltd. and refund given to them, it had so happened for him to refund the amount to M/s.ABT Ltd., Coimbatore.

The delinquent officer has stated that on getting the similar decision from the Court, the Commercial Tax Officer, Peelcmedu South Circle, Coimbatore has informed to the claimant that the refund will be considered only on the disposal of SLP in case of Ganesh Automobiles. The SLR has been dismissed. Since the directions of the Court was ignored by the Commercial Tax Officer, Peelcmedu South Circle, the litigant has again moved the court and this has resulted in the issue of judgement on 30.3.2003 once again directing to issue the refund, stating that the decision of writ appeal is bound by the single judge. In the case of M/s. CAG(P) Ltd., the assessing officer has got opinion from the Government Pleader to refund the amount in order to honour the 30.3.2003 decision of the Court.

2) The delinquent officer has stated that he had no intention to neglect the instructions of the Superiors and he was not at guilty in refunding the amount of the M/s. ABT Ltd. He has submitted his explanation as follows:

1. Section 4 of the Entry Tax Act provides act on set off towards the liability of Sales Tax. The preamble of the Entry Tax also;..yvould emphasis this. The intention of the Legislature is to safeguard the revenue of Sales taxes.

2. The delinquent officer has quoted the judgement of the High Court of Madras reported in 134 STC 272 in the case of State of Tamil Nadu Vs. Ganesh Automobiles, which is as follows:

"In view of the clear provisions of Section 11 of the Act, the petitioner-firm is entitled for refund of Entry Tax paid after adjusting the tax payable by the petitioner under the Tamil Nadu General Sales Tax Act. Therefore, I am of the view that the respondents are bound to refund the tax collected by way of Entry Tax after deducting the tax payable by the petitioner under the Tamil Nadu General Sales Tax Act. In the instant case, there is some dispute with regard to the amount of the tax payable by the petitioner-firm under the Tamil Nadu General Sales Tax Act. In view of the above, |fhe writ petition is allowed with the direction to the second respondent to hold an enquiry with regard to the sales tax payable by the petitioner firm during materials time. The petitioner is entitled to adjust a sum of Rs.I5,150/- form the amount of sales tax due and the balance shall be refunded to the petitioner. The second respondent shall give adequate opportunity to the petitioner before passing any order. Ordered accordingly. No order as to costs."

3. Now, it is clear that the Entry Tax if any excessively paid more than the Tamil Nadu General Sales Tax Act, Surcharge Act and Additional Sales Act, the residuary amount has to be refunded. This main concept was also emphasized by the Supreme Court in 107 STC 586 in the case of Anand Commercial Agencies and 134 STC 303 in the case of Jinda Supreme Court Has clearly hold that the Entry Tax shall not Tax leviable on that commodity.

4. While the above legal concepts did exist, M/s.ABT Ltd. has claimed refund as they have paid more Entry Tax than the Sales Tax payable. For illustration, he shall submit the refund claimed by them for the year 1993-94. .They have given their petition on 3.7.2003 and simultaneous y, they have filed writ petition. The High Court in WP No.19193/2003, dated 117.2003 has directed to issue refund order to issue the sum of Rs.37,30,149/- within 2 weeks. Even after the receipt of orders of the Court, he has sought for instructions from the Assistant Commissioner (Commercial Taxes), Zone-II, Coimbatore by his letter dated 29:7.2003. There naturally happened to be no response from the superior officers to give any negative instructions on the existence of specific directions of the Court. In the meanwhile!, he had come across a judgement of the same High Court in Writ Petition No.8017 and 8018/03, dt.20.3.2003 issued in the case of M/s. CAG(P) Ltd. Vs. Commercial Tax Officer, Peelamedu South Circle, Coimbatore where the pronouncement of judgement would go as under:

"An identical question has been decided in Writ Appeal No.1228/1995. It is however stated by the counsel for the respondents that against the aforesaid Division Bench Judgement, c SLP has been filed and the same is pending before the Supreme Court. However, it has been fairly submitted by the learned counsel for the respondents that no stay order has been passed. Since a Division bench decision is holding the field he was bound by the ratio of the said decision.
Keeping in view of the aforesaid decision, which has been subsequently followed ini WP No.10187/1995 dt.22.4.2002 and several other cases. I allow the present writ petitions with a direction to the respondents to enquire into the matter and if it is found that excess amount has been paid at the time of payment of entry tax. The balance amount should be refunded to the petitioner by adjusting the tax payable under the Tamil Nadu General Sales Tax Act. This may-be done within a period of six weeks from the date of communication of the order. The writ petitions are disposed of accordingly. No costs. Consequently, the connected miscellaneous petitions are closed."
The decision of the High Court would refer the Writ Appeal decision of Ganesh Automobiles (134 STC 272) and also the Classic Motors' case Writ Petition No.10187/95. The above aspects are summarized in brief as under:

The Apex Courts have already held to refund the excess entry tax paid after the adjustment towards sales tax payable. This would signify that the Entry Tax is nothing but in compensating nature as held by the Supreme Court.

The judgement of the Court given n the case of M/s.CAG (P) Ltd., Coimbatore is prior to the judgement given in the case of M/s.ABT Ltd. The decision in Tvl.CAG(P) Ltd., would specifically state that the decision of the Division Bench in M/s. Ganesh Automobiles cannot be overcome.
While he has addressed the Assistant Commissioner (Commercial Taxes), Zone-II, Coimbatore for instructions, the above position would prevail and the whole Coimbatore division superior officers were at the knowledge of the decision in the case of M/s. CAG(P) Ltd., Coimbatore as the later decision is a decision in REM i.e. applicable to the whole community at large. So following the 30/3/2003 decision in M/s.CAG(P) Ltd. and refund given to them, it had so happened for him to refund the amount to M/s.ABT Ltd., Coimbatore.
The delinquent officer has stated that on getting the similar decision from the Court, the Commercial Tax Officer, Peelamedu 6oth Circle, Coimbatore has informed to the claimant that the refund will be considered only on the disposal of SLP in case of Ganesh Automobiles. The SLP has been dismissed! Since the directions of the Court was ignored by the Commercial Tax Officer, Peelamedu South Circle, the litigant has again moved the court and this has resulted in the issue of judgement on 30.3.2003 once again directing to issue the refund, stating that the decision of writ appeal is bound by the single judge. In the case of M/s. CAG(P) Ltd., the assessing officer has got opinion from the Government Pleader to refund the amount in order to honour the 30.3.2003 decision of the Court.
The delinquent Officer had replied that he had handed over the relevant assessment files and payment details made by the dealers to his successor in the charge list. Hence he stated that the charge might be termed as incorrect, as the relevant records are still kept under the safe custody of the successor in order to be produced before the audit."

7. In respect of charge No.1, it can be seen that, it is not the case that the order of the petitioner is legally wrong. The only reason for disagreement given to the findings of the Enquiry Officer is that, he ought to have waited for instructions of the superior. Similarly, in case of charge No.2, the defense of the petitioner is that, he has followed the judgment of this Court and passed orders. The findings of the Government is that the petitioner ought to have waited for the

instructions regarding the issue of refund, but he did not do so and hurriedly he issued the refund vouchers in contravention of the provision of the Tamil Nadu Tax on Entry of Motor Vehicles into Local Areas Act,1990.

8. The department has found that, since there is no scope to refund tax paid under the Entry Tax Act, unless there is excess payment by virtue of higher rate of tax adopted at the time of payment of tax refund could not have been ordered and even at the time of passing refund vouchers, it was duty of the petitioner either to take opinion of the higher authorities or get the opinion from the Government Pleader. The question of consideration is therefore as to whether extreme penalty of dismissal from service should be imposed against the petitioner, whose refund orders cannot said to be legally incorrect. The only reason given is the petitioner acted in hurried manner and passed the orders without waiting for instructions from the superior or getting opinion from the Government Pleader.

9. The conduct of the petitioner in proceeding ahead with passing orders of refund was in compliance with the order of this Court and it cannot said to be a reckless order. The petitioner is correct in contending that had he not passed the order then department would have to face contempt proceeding. There is nothing in the order which suggests that there has been any pecuniary loss to the Government.

10. Similarly for charge No.3, the Inquiry Officer has not offered clear-cut findings that the assessment files for the three years were with the office of the Commissioner of Commercial Taxes and that the refunds were made without original records, though necessary entries regarding refund have been made by the Charged Officer in the respective ledgers.

11. Similarly for charge No.4, the finding that for the assessment year 1993-94, the delinquent officer had issued the refund refund voucher within the prescribed time limit of 2 weeks from the date of receipt of the orders, but for the assessment years 1994-95 and 1996-97, he has failed to follow the instructions of the High Court in as much as the direction were only to dispose of the representation dt.3.7.2003 of the dealer "in accordance with the law and on its own merits" and that having addressed the higher authorities for instructions regarding issue of refund, he should have waited for the instructions and the petitioner has deliberately, intentionally, willfully and hurriedly issued the refund voucher in contravention of the Entry Tax Act 1996, and thus has acted in a reckless manner and caused undue pecuniary loss to the State Exchequer cannot be sustained.

12. In view of the above, this Court is therefore constrain to observe that, the order of dismissal from service is completely disproportionate to the conduct and the petitioner who had passed the orders to avoid contempt proceedings. It is not the case of the petitioner that the orders of refund were legally wrong orders or that the opinion of the Government or the public prosecutor would have been to the contrary or that the refund is not in accordance with law settled by this Court in various decisions.

13. Consequently, the order of dismissal from service is set aside. The matter is remanded back to the Disciplinary Authority to once again consider the quantum of punishment, because the petitioner has not followed the procedure that has to be adopted for passing refunds. The writ petition is allowed. No Costs.

Sd/-
Assistant Registrar(CS V)

//True Copy//
Sub Assistant Registrar

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To

1. The Secretary,
   State of Tamil Nadu,
   Commercial Taxes and Registration Department,
   Secretariat, Chennai - 600 009.

2. The Commissioner of Commercial Taxes,
   Office of the Commissioner of Commercial Taxes,
   Ezhilagam, Chepauk,
   Chennai-600 005.

+1cc to the Government Pleader, S.R.No.46539
+1cc to Mr.S.Rajasekar, Advocate, S.R.No.46045 (01/08/2019)

W.P.No.12600 of 2013

SSP(CO)

RRS(02/07/2019)