

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 04.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.S.RAMESH

W.P.Nos.6967 to 6969 of 2010

and M.P.Nos.1,1,1, of 2010

M/s.Perfect Engineering Associates Pvt. Ltd.,
Rep. by Pratiba P. Shah,
Director,
43/2, Vijayaraghava road,
Chennai 17.

.... Petitioner in all the
petitions

Vs.

1. The Joint Commissioner (CT),
Chennai (Central) Division,
C.T.Buildings, Greams road,
Chennai 6.

2. The Deputy Commercial tax officer,
(Now the Commercial tax officer),
T.Nagar (East) assessment circle,
Chennai 28.

.... Respondents in all the petitions

Prayer: Writ petitions filed under Article 226 of the
Constitution of India to issue a Writ of Certiorari to call for
the records on the files
of the 1st respondent in Rc.1491/09/B4/TNGST/1561401/01-02,
Rc.1490/09/B4/TNGST/1561401/02-03 and
Rc.1492/09/B4/TNGST/1561401/03-04, respectively dated
09.09.2009 and quash the same as being without jurisdiction,
barred by limitation and violative of principles of natural
justice and hence invalid and illegal.

For Petitioner सत्यमेव जयते : Mr.C.Venkatraman
(in all the petitions)

For Respondent : Mrs.Dhanamadhri,

G.A.

(in all the petitions)

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C O M M O N O R D E R

The revisional orders passed by the first respondent herein as against the assessment orders of the second respondent, are under challenge in these Writ Petitions. While W.P.No.6967 of 2010 pertains to the assessment order for the year 2001-02, W.P.No.6968 of 2010 and W.P.No.6969 of 2010 pertains to the assessment orders for the years 2002-03 and 2003-04.

2. The learned counsel for the petitioner had primarily raised contentions, submitting that insofar as the assessment year 2001-02 is concerned, the show cause notice was issued on 10.02.2009, which is more than 5 years from the date of the assessment order dated 30.04.2003, which is in contravention of Section 34 (2) (c) of the TNGST Act. Insofar as the assessment orders for the years 2002-03 and 2003-04 are concerned, the learned counsel would submit that under Section 3-B (2) (d) of the Act, the deduction could be allowed on proof that the Sub-contractor is a registered dealer and that the turnover of the sub-contractor is included in the Returns filed by them. Since it has been established that the sub-contractor is a registered contractor and if at all, the Department was under the view that the sub-contractor had not included the turnover in their returns, the Department could proceed against the sub-contractor and that the order of the revisional authority imposing the liability on the dealer, was not proper.

3. Insofar as the assessment year 2002-03 is concerned, the learned counsel would submit that the show cause notice had been dispatched after a period of 5 years from the date of the assessment order and in view of Section 34 (2) (c) of the Act, the impugned order is bad in law. According to the learned counsel, the date of dispatch ought to be considered as the date of show cause notice. In support of his contention, the learned counsel relied upon the decision of the Division Bench of Bombay High Court reported in 2014 (299) E.L.T. 292 (Bom.) (*Visnue Steels Vs. Union of India*).

4. Insofar as the assessment year 2003-04 is concerned, the violation of Section 3-B (2) (d) has been raised, similar to the grounds raised in the other assessment orders.

5. The learned Government Advocate appearing for the respondents, on the other hand, relied upon Section 11 of the TNGST Act and the procedures contemplated in Rule 16 of the Tamil Nadu General Sales Tax Rules and submitted that the assessment order would conclude only on the date when the order of revision is made and till such time, the assessment

proceedings are deemed to be pending. By relying on the date, when the order for refund of excess tax was passed, the learned Government Advocate would submit that since the order for refund was passed within a period of 5 years as contemplated under Section 34 (2) (c) of the Act, there is no violation of Section 34 (2) (c) of the Act. Insofar as the merits of the case are concerned, the learned Government Advocate would submit that Section 3-B (2) (d) of the Act mandates that the dealer has to establish that the turnover of such amounts had been included in the Returns filed by the sub-contractor and as such, the revisional authority had found that only portion of the turnover of the sub-contractor has been included in the Returns, and hence, there is no infirmity in the orders.

6. I have given careful consideration to the submissions made by the respective counsels and perused the materials available on record.

7. The ground of limitation as prescribed under Section 34 (2) (c) of the Act, has been raised insofar as the assessment years 2001-02 and 2002-03 are concerned. For the sake of convenience, Section 34 (2) (c) of the Act is extracted hereunder:

"34. Special power of Joint Commissioner of Commercial Taxes:-

(1) The Joint Commissioner of Commercial Taxes may of his own motion call for and examine an order passed or proceeding recorded by the appropriate authority under Section 4-A, Section 12, Section 12-A, Section 14, Section 15 or sub-section (1) or (2) of Section 16 or an order passed by the Deputy Commissioner under sub-section (1) of Section 32 or sub-section (3) of Section 33 and if such order or proceeding recorded is prejudicial to the interests of revenue, may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act, may initiate proceedings to revise, modify or set aside such order or proceeding and may pass such order thereon as he thinks fit.

(2) The Joint Commissioner of Commercial Taxes shall not initiate proceedings against any such order or proceeding referred to in sub-section (1) if:

.....

(c) more than five years have expired after the passing of the order:

Provided that if the order passed or proceeding recorded by the appropriate authority, or Deputy Commissioner referred to in sub-section (1) involves an issue on which the Special Tribunal has given its decision adverse to the revenue in any other proceedings, and an appeal to the Supreme Court against the order of the Special Tribunals pending, the period of time between the date of the above said order of the Special Tribunal and the date of the order of the Supreme Court shall be excluded in computing the period referred to in clause (c)."

8. Section 34 (2) (c) of the Act empowers the authority to revise the order of the assessing officer, within a period of 5 years from the date of the assessment order. The submission of the learned counsel for the petitioner that 5 year period commences from the date of the assessment order is disputed by the learned Government Advocate appearing for the respondents, stating that the assessment is deemed to be pending till the Revision orders are passed.

9. The assessment order for the year 2001-02 was passed on 30.04.2003 and the assessment order for the year 2002-03 was passed on 31.03.2004. Reliance was placed on Rule 16 of the TNGST Rules, which pertains to the procedures to be adopted after final assessment is made under Sub-Rule (5) or (6) of Rule 15 of the Rules. The sub-rule (5) and (6) of Rule 15 provides that either on receipt of the Returns or when no Returns are submitted, the assessing authority shall finally assess the tax in accordance with the provisions of the said Act. In other words, the final assessment concludes the moment when the assessing authority complies with the procedures contemplated under Sub-Rule (5) or (6) of the Rule 15 of the TNGST Rules.

10. Thereafter, for determining the refund, as provided in the assessment orders, the authority had proceeded therefrom and passed the consequential order to implement the order of refund. As such, it cannot be said that just because the order of refund was pending, after passing of the assessment order, the assessment proceedings themselves are not concluded. Even assuming that the submissions of the respondent is acceptable that pendency of Revisional proceedings would amount to pendency of the final assessment, the provisions of the said Act or the Rules, do not contemplate or provide that the proceedings for refund of tax paid in excess could be termed to be revisional

proceedings. In view of the wordings in Sub-Rule (5) and (6) of Rule 15, it can only be said that the assessment was finally completed and consequential order of refund will not amount to pendency of the assessment order.

11. If such a preposition is applied to the facts of the present case, the show cause notice issued for the assessment year 2001-02 on 10.02.2009 would be beyond the period of 5 years from the date of assessment order, i.e., 30.04.2003 and as such, the first respondent may not be justified in passing the impugned order for the assessment year 2001-02.

12. For the assessment year 2002-03 is concerned the assessment order was passed on 31.03.2004. I have already observed in the earlier paragraphs that the revisional proceedings should be initiated within a period of 5 years from the date of show cause notice. The learned counsel for the petitioner has produced a copy of the envelope enclosing the date of dispatch of the envelope enclosing the show cause notice, which evidences the notice having been dispatched on 07.05.2009 only, which apparently is after the period of 5 years from the date of the assessment order. The question which therefore arises is whether the date of the show cause notice or the date of dispatch should be construed as the date for reckoning the period of five years?

13. The learned counsel for the petitioner relied upon the decision of the Bombay High Court in the case of *Vishnu Steels (cited supra)*, in which, the settlement application filed by the assessee therein before the date of dispatch of the order of application before the Settlement Commission, was held to be maintainable. While coming to such a conclusion, the Division Bench of the Bombay High Court had placed reliance on various decisions of the Supreme Court as well as the Delhi High Court. The relevant portion of the said order reads as follows:

"7. Section 32E stipulates that an assessee may, in respect of a case relating to him, make an application before adjudication to have the case settled. The assessee is, however, required to make a full and true disclosure of its liability which has not been disclosed to the Central Excise officer, the manner in which such liability has been derived, the additional amount of excise duty which is accepted to be payable and such other particulars as may be described. The expression "case" is defined to mean any proceeding under the Act or in any other Act for the levy, assessment or collection of excise duty which is pending before an adjudicating authority on the date on

which an application under Section 32E(1) is made. Section 32E provides two points in time which define the maintainability of an application before the Settlement Commission. The first point in time is a point before which an application cannot be filed for settlement of a case. Proviso (b) stipulates that an application cannot be filed unless a show cause notice for recovery of duty issued by the Central Excise Officer has been received by the applicant. The second point in time is a point after which an application for settlement cannot be filed. An application for settlement has to be filed before adjudication. In other words, no application for settlement of a case is maintainable after adjudication. The issue in the present case turns upon the meaning to be ascribed to the words "before adjudication".

8. Supreme Court had occasion to consider similar issues in the context of a variety of statutory provisions. In certain situations a statutory provision may set out a period of limitation to seek recourse to a remedy against an order. Where the making of the order provides for the commencement of limitation, the issue arises as to when the order is said to be made. In *Raja Harish Chandra Raj Singh vs. Deputy Land Acquisition Officer-1962* (1) SCR 676, the Supreme Court construed the provisions of Section 18(1) of the Land Acquisition Act, 1894, the proviso to which stipulates that where the person seeking a reference was not present before the collector at the time when the award was made, the period of limitation would be six weeks of the receipt of the notice from the Collector under Section 12(2) or within six months from the date of the award of the Collector whichever expires first. The Supreme Court held that where the rights of a person are affected by an order and limitation is prescribed for the enforcement of a remedy by the person aggrieved against the order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the order to the party concerned. In the context of an order of suspension against a government servant, *State of Punjab vs. Khemi Ram-AIR 1970 SC Page 214* the Supreme Court held that an order of suspension against a government servant would take effect once it was issued and sent out to the government servant no matter when it was actually received. In *Commissioner of Central Excise vs. M.M. Rubber and Co. - 1992 Supplementary* (1) SCC 471 = 1991

(55) E.L.T. 289 (S.C.) the Supreme Court held, while construing the provisions of Section 35E(3) of the Central Excise Act, 1944 that if an authority is authorised to exercise a power or to do an act affecting the rights of the parties, he shall exercise that power within the period of limitation prescribed therefor. The order or decision of such authority comes into force or becomes operative or becomes an effective order or decision on and from the date when it is signed by him. The date of such order or decision is the date on which the order or decision was passed or made; that is to say when the adjudication officer ceases to have any authority to tear it off and draft a different order and when he ceases to have any locus penitentiae.

9. These decisions have been made having regard to the statutory provision involved and the underlying purpose and object of the provision. The common thread in the line of authority is that a purposive meaning has to be ascribed to the making of an order. Where an authority, by making an order affects the rights of parties, the order or decision takes effect from the date on which the order or decision assumes a character such that the maker of the order places it out of his control. Where the statute provides a period of limitation for challenging an order, the period of limitation for a person aggrieved by the order commences to run from the date of the communication of the order. On the other hand, if it is a case involving a limitation for an authority to make an order, the date of exercise of that power and in the event of the exercise of the suo motu power the date on which such power was exercised are relevant dates for determining the period of limitation.

10. In the context of Section 32E, an application before the Settlement Commission cannot be filed before the receipt of a notice of the Central Excise Officer for the recovery of duty. An application can be filed before adjudication, to the Settlement Commission. An application before the Settlement Commission is not maintainable after adjudication. A purposive interpretation has to be placed on the expression "before adjudication". An adjudication cannot be regarded as being complete merely upon the signing of an order by the adjudicating authority. If the adjudicating authority were to keep the order in his own drawer without dispatching it to the assessee the latter would have no means of knowing of the making of

the order. An order of adjudication must be placed by the adjudicating authority out of his control by dispatching it to the assessee. For it is once that stage is achieved that the adjudicating authority ceases to have any locus penitentiae. Once the authority dispatches the order, the adjudicator places it out of his control. There can be no possibility then of the adjudicating authority tearing off the order or making a different order.

11. As a principle of interpretation, it is well settled that while the charging provisions of a taxing statute are to be construed strictly, provisions which lay down a machinery have to be construed so as to make it workable. Machinery provisions have to be read in a reasonable, practicable and liberal manner. This principle has been elucidated in Justice G.R. Singh's treatise on Interpretation of Statutes which read thus :

" It must also be borne in mind that the rule of strict construction in the sense explained above applies primarily to charging provisions in a taxing statute and has no application to a provision not creating a charge but laying down machinery for its calculation or procedure for its collection, and such machinery provisions have to be construed by the ordinary rule of construction [Gursahai v. CIT, AIR 1963 SC 1062, p.1064]. One important consideration in construing a machinery section is that it should be so construed as to effectuate the liability imposed by the charging section and to make the machinery workable- *ut res magis valeat quam pereat* [N.B.Sanjana v. Elphinston Spinning & Weaving Mills - AIR 1971 SC 2039, p.2047]. Similarly a machinery provision which enables the assessee to avail of a concession or benefit conferred by a substantive provision in the Act is liberally construed [C.I.T. v. Kulu Valley Transport Co. Pvt. Ltd. - AIR 1970 SC 1734]. And on the same principle statutory provisions touching and conferring a right of appeal have to be read in a reasonable, practical and liberal manner [Commissioner of Income-Tax, A.P. v. Ashoka Engineering Co. - AIR 1993 S.C.858, p.860]".

12 In Qualimax Electronics Private Limited (supra), a Division Bench of the Delhi High Court, after referring to the judgments of the Supreme Court on the subject, held that under Section 32E the adjudication of a case by an adjudicating authority closes the window of opportunity which the assessee had for seeking a settlement of the case. The Delhi High Court held that the date of receipt of an order-in-original is not of any significance for the purpose of Section 32E since the Settlement Commission can only proceed to settle a case which is pending adjudication on the date the settlement application is received by it. In that context, the Delhi High Court observed as under :-

"32. Of course, there is the danger that to prevent an assessee from seeking a settlement of his case, the adjudicating authority may quickly pass the adjudication order the moment he gets an inkling that the assessee is about to approach the Settlement Commission. There is also the danger that the adjudicating authority may back date an order. Adjudicating authorities are not supposed to behave in this manner and are presumed to function within the boundaries of law but, these things can happen. Would not a literal construction of the provisions then come in aid of such errant officers and run counter to the legitimate hopes of assesseees who want to come clean, pay their taxes and have their cases settled by the Settlement Commission? The answer to this would lie in construing the date of adjudication to be the date on which the adjudicating authority loses his locus poenitentia, or opportunity to tear off, destroy or alter the adjudication order. In other words, when the order goes out of his control. And, that happens when the order is signed and the one-way process of sending it to the assessee is put in motion either directly or indirectly through some other agency."

We respectfully concur with this view.

13. In the present case, the detailed narration of events in the order of the dissenting member of the Settlement Commission would indicate that on 13

September 2010, 28 September 2010 and 15 December 2010, the Petitioner had sought before the adjudicating officer a disclosure of documents which were relied upon in the notice to show cause. On 29 October 2010, a letter had been dispatched by the Superintendent (Adjudication) to the Additional Director General, DECEI, Mumbai calling upon him to arrange for the supply of documents which were relied upon in the notice. On 15 December 2010, the adjudicating officer was informed by the Petitioner that it was contemplating the possibility of filing a settlement application and requested that the proceedings may be adjourned since even the documents had not been received from the DGCEI. On 10 January 2011, the Advocate for the Petitioner informed the Commissioner that the Petitioner had decided to file a settlement application and produced a copy of the GAR-7 Challan reflecting the payment of the fee for filing the settlement application. The Commissioner was informed that the duty and interest components were being worked out and the settlement application would be filed probably within that week itself. On 11 January 2011, a further letter was addressed by the Superintendent (Adjudication) to DECEI for supply of the documents relied upon in the notice to show cause. However, the Commissioner, without waiting for receipt of the documents of which disclosure was sought and without paying heed to the request of the assessee proceeded to pass an order of adjudication in haste on 13 January 2011. The order was actually dispatched to the assessee on 19 January 2011 when the assessee had already moved a settlement application on 14 January 2011. The adjudicating officer put his order of adjudication out of his control by dispatching it to the assessee only after the filing of the settlement application. In these circumstances, the settlement application could not have been dismissed as being not maintainable. The view which has been taken by the majority of two members of the Settlement Commission is patently erroneous. The view of the majority postulates that the moment the order of adjudication was signed by the adjudicating officer, no application for settlement could be maintainable. Such a construction would defeat the object and the underlying purpose of the statute. Section 32E stipulates that no application for settlement can be filed before a notice to show cause is received. An application for settlement has to be filed before adjudication. The expression "before

adjudication" under Section 32E must be given a purposive interpretation. The object of Section 32E is to enable an assessee to come before the Settlement Commission with a clean, complete and candid disclosure and with a payment of the excise duty with interest. A literal construction of the words "before adjudication" would defeat the purpose and intent of Parliament. As this case itself shows, the Commissioner proceeded in undue haste, without waiting for the supply of documents to the assessee and even after being informed that the assessee was in all probability moving the Settlement Commission during the course of the week. The majority of the Settlement Commission was of the view that there was no reason for the assessee not to have filed a settlement application before 13 January 2011. What this view clearly misses is that proceedings before the adjudicating officer were pending. The assessee was still to obtain copies of the documents which were relied upon in the show cause notice. As a matter of fact, two letters had also been addressed to the DGCEI by the Superintendent (Adjudication) for such a disclosure on 29 October 2010 and 10 January 2011. Despite the assessee informing the Commissioner on 10 January 2011, that it had paid the filing fee and would file the settlement application within a week, the Commissioner proceeded to pass an order in utter haste on 13 January 2011. A purposive interpretation as we have indicated earlier will provide a safeguard against such and other abuses of power by adjudicating officers and will further the legislative intent implicit in Section 32E and other cogent provisions of the Chapter.

14. For these reasons, we are of the view that the settlement application which was filed by the assessee before the date of the dispatch of the order of adjudication is maintainable before the Settlement Commission."

14. By applying the ratio laid down in the aforesaid decision, this Court is also of the view that the date of notice is to be construed only from the date it had been dispatched, from which date, the authority would be out of his control over the notice. This proposition as held in the aforesaid decision, is self explanatory. Even otherwise, this Court is unable to appreciate as to how the notice which is dated 10.02.2009, came to be dispatched only on 07.05.2009, particularly, when there is a time limit contemplated under the Statute. When the fact remains that the notice had been dispatched only on 07.05.2009,

it would be deemed to be beyond the period of limitation prescribed under Section 34 (2)(c) of the Act. On this ground, the order under revision for the assessment year 2002-03 is liable to be set aside.

15. Insofar as the assessment year 2003-04 is concerned, as well as the other assessment years 2001-02, 2002-03, the revisional authority was of the view that the petitioner had not proved that the sub-contractor had paid the taxes at his end and in view of Section 3-B (2) (d) of the TNGST Act, the benefits cannot be extended to him. Section 3-B (2) (d) along with the proviso, reads as follows:

"3-B. Levy of tax on the transfer of goods involved in works contract:-

.....

(2) The taxable turnover of the dealer of transfer of property involved in the execution of works contract shall, on and from the 26th day of June 1986, be arrived at after deducting the following amounts from the total turnover of that dealer:

.....

(d) all amounts paid to the sub-contractors as consideration for execution of works contract whether wholly or partly:

Provided that no such deduction shall be allowed unless the dealer claiming deduction, produces proof that the sub-contractor is a registered dealer liable to pay tax under this Act and that the turnover of such amounts is included in the return filed by sub-contractor;"

16. Section 10 of the TNGST Act places burden on the dealer of proving that any transaction or turnover of a dealer, is not liable to tax. When the proviso to Section 3-B (2) (d) clearly states that the dealer should produce proof evidencing that the sub-contractor had disclosed the amounts in his turnover, it cannot be said that the Department has to proceed against the sub-contractor in such case, and not against the dealer.

17. As a matter of fact, the benefit extended under Section 3-B(2) is subject to such proof, which requires to be established by the dealer as contemplated in the proviso therein. The revisional authority had remarked that the records of the assessment were perused and it was found that only a portion of the turnover was assessed and substantial amount of the turnover was not included in the Returns. Observing so, the first respondent had held that the petitioner had not furnished the complete details of the activities carried out by them and

their sub-contractors and that the petitioner had also not proved that the sub-contractor had paid taxes at their end, which is prejudiced to the interest of revenue. In view of the specific provision of Section 3-B (2) (d) and the provisos therein, I do not find any infirmity in such finding of the first respondent.

18. Nevertheless, the assessment order of the second respondent is not clear on the disclosure of payment of taxes by the sub-contractor. However, the dealer has made such disclosure in the present Writ Petition. In view of the same, it would be appropriate that this issue is again revisited by the second respondent herein, for which purpose, the matter can be remanded in respect of the assessment year 2003-04.

19. For all the foregoing reasons, the Writ Petitions in W.P.Nos.6967 and 6968 of 2010 insofar as it relates to assessment years 2001-02 and 2002-03, respectively, are allowed and the impugned orders passed by the first respondent dated 09.09.2009, respectively are quashed. Insofar as the assessment year 2003-04 in W.P.No.6969 of 2010 is concerned, the matter is remanded back to the second respondent herein, for the purpose of determining the objections raised by the petitioner for reconsideration of the assessment order, in the light of the observations made in this order. While passing fresh order, the second respondent shall give due opportunity to the petitioner herein to putforth his objections and on consideration of such objections, if any, the assessing officer / second respondent shall pass the order, preferably within a period of three months from the date of receipt of objections.

20. The Writ Petitions stand disposed of in the above terms. No costs. Consequently, connected miscellaneous petitions are closed.

सत्यमेव जयते

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Joint Commissioner (CT), Chennai (Central) Division,
C.T.Buildings, Greams road, Chennai 6.
 2. The Deputy Commercial tax officer, (Now the Commercial tax officer), T.Nagar (East) assessment circle, Chennai 28.
- +1 cc to M/s.V.Srikanth, Advocate Sr.No. 56104
AKM/06.09.19/13P-4C / W.P.Nos.6967 to 6969 of 2010