IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.03.2019

CORAM

THE HONOURABLE Dr. JUSTICE ANITA SUMANTH

Writ Petition No.5899 of 2019
& W.M.P.No.6737 of 2019

M/s. Subros Limited,
Represented by its Authorised Signatory,
No.9/3 Gardia Towers, Sarangapani Street,
T.Nagar, Chennai 600 017 .. Petitioner

vs.

1. The Commissioner of Commercial Taxes,
   Chepauk, Chennai 600 005
2. The Commercial Tax Officer,
   Pondy Bazaar Assessment Circle,
   No.48 Pasumpon Muthuramalinga Thevar Salai,
   Chennai 600 028 .. Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari to call for the impugned rectification order, dated 29.01.2910 issued by the second respondent and to quash the same.

For Petitioner : Mr. P.Sridharan

For Respondents : Ms. G.Dhanamadhri,
Govt. Advocate (Taxes)

O R D E R

The writ petitioner challenges an order of rectification under Section 84 of the Tamil Nadu Value Added Tax Act, 2006 (in short 'Act') on the ground that the order traverses beyond the jurisdiction imposed under Section 84 of the Act and proceeds to revise the assessment itself.

2. Ms.G.Dhanamadhri, learned Government Advocate (Taxes), takes notice for the respondents. By consent of the learned counsel appearing for both sides, the writ petition is taken up for final disposal, at the stage of admission.

3. The impugned order relates to the period 2015-16. The petitioner had effected inter-state sales of roof mounted air-conditioning unit for driver cabs of diesel locomotives to Southern Railways without C-forms. The classification of the aforesaid goods was Commodity Code 2112 as per the petitioner and liability to Central Sales Tax had been discharged at the rate of 5% in terms of Entry 112 of Part B of Schedule 1 of the Act read with Section 8 (2) of the Central Sales Tax Act, 1956 (in short 'CST Act').

4. It appears that, while the annual return filed by the petitioner for the period 2015-16 contained the correct community code, in the monthly returns, instead of mentioning the Code as 2112, the petitioner had mentioned the same inadvertently as 304.

5. The assessment was taken up by the second respondent and completed on the basis of C-forms submitted by the petitioner in relation to a portion of the sales turnover. After due verification, the benefit of concessional rate of tax was granted by the respondents in proportion to that turnover for which valid C-Forms had been submitted.

6. While this is so, a notice dated 27.06.2018 seems to have been issued by the second respondent, in terms of Section 84 of the Act read with Section 9 (2) of the CST Act proposing revision of the original assessment. In fact, Section 84 of the Act does not provide for revision of assessment but only rectification of the same, where there is an error apparent on the face of the record.

7. Be that as it may, notice, dated 27.06.2018 proposed to revise the assessment under Section 84 of the Act read with Section 9 (2) of the CST Act tax levying tax at 14.5% on the turnover of Rs.11,68,42,662/- along with interest. The petitioner has filed objections, dated 10.07.2018, requesting 5% concession in the following terms:-

> '1. Interstate Sales without "C" forms Rs.11,68,42,662/- Railway Sales.
>
> Herewith we are enclosing 5% concession Tamil Vat Commodity Code for your reference Commodity Code No.2112.
>
> Hope the above submission meets your requirement. In case any further documents are required please inform us.'

8. No dispute has been raised by the petitioner with regard to the jurisdiction assumed by the Assessing Officer in terms of Section 84 of the Act and the objection raised has been

overruled vide the impugned order dated 29.01.2018, bringing inter-state sales of the diesel locomotives to Southern Railways to tax at the rate of 15.5%. It is as against the aforesaid order that the petitioner is before this Court.

9. The short point argued by the learned counsel appearing for the petitioner is that no opportunity of personal hearing was granted prior to disposal of the application under Section 84 of Act. The provisions of Section 84 of the Act read thus:-

> '84. Power to rectify any error apparent on the face of the record.-
>
> (a) An assessing authority or an appellate or revising authority (including the Appellate Tribunal) may, at any time within six years from the date of any order passed by it, rectify any error apparent on the face of the record:
>
> Provided that no such rectification which has the effect of enhancing an assessment or any penalty shall be made unless such authority has given notice to the dealer and has allowed him reasonable opportunity of being heard.....'

10. The proviso to Section 84 of the Act specifically refers to notice to be issued to the Assessee, which has been done in this case on 27.06.2018. However, the proviso also mentions 'reasonable opportunity' of being heard which in my view includes a personal hearing. This admittedly has not been granted to the petitioner.

11. This Court has considered the impact of the phrase 'reasonable opportunity' in several cases. In the case of Tvl.SRC Projects Private Limited, Salem v. The Commissioner of Commercial Taxes, Chennai and another, reported in 2010 33 VST 333, a Division Bench of this Court, has held as follows:-

> '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.'

The consistent view taken by courts is thus to the effect that personal hearing is an important component of reasonable opportunity. Ms.G.Dhanamadhri, points out that no such opportunity has been sought for by the petitioner. However, such objection would not lie in the face of the statutory requirement for such opportunity to be granted, prior to rectification.

12. In these circumstances, the impugned order dated 29.01.2019 is set-aside. The petitioner is directed to appear before the authority on 13.03.2019 at 10.30 am, and after affording an opportunity of personal hearing, the respondent shall pass orders, de novo, within a period of four (4) weeks thereafter.

13. With the above directions, this writ petition is disposed of. There shall be no order as to costs. Consequently, connected WMP is closed.

Sd/-
Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

srk

To

1. The Commissioner of Commercial Taxes,
   Chepauk, Chennai 600 005

2. The Commercial Tax Officer,
   Pondy Bazaar Assessment Circle,
   No.48 Pasumpon Muthuramalinga Thevar Salai,
   Chennai 600 028

+1cc to Mr.Lakshmikumaran, Advocate SR.No.19581

+1cc to Special Government Pleader SR.No.19918

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KJ(CO)
GMY(30/05/2019)