

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 03.07.2019

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

W.P.Nos.18676 & 18694 of 2019
and
W.M.P.Nos.18023 & 18040 of 2019

M/s.Sri Venkateswara Timber Mart
Rep. by its Managing Partner
No.1-B1, Namakkal Bye-Pass Road
Paramathi Velur
Namakkal-638 182.

.. Petitioner in
both W.Ps.

Vs.

State Tax Officer (CT)
Namakkal (Town) Assessment Circle
Namakkal.

.. Respondent in
on both WPs

Writ Petitions are filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus, calling for the records of the respondent and quash the order passed by the respondent in TIN 33663100382/2011-12 dated 16.05.2019 and TIN 33663100382/2015-16 dated 22.05.2019 respectively and direct the respondent to pass fresh order after providing an opportunity of personal hearing in this case and pass such further or other order or orders as this Hon'ble High Court may deem fit and proper in the circumstances of this case and render justice.

For Petitioner : Mr.C.Baktha Siromoni

For Respondent : Mr.Mohammed Shaffiq
Special Government Pleader (Taxes)

COMMON ORDER

This common order will govern both these writ petitions.

2. Writ petitioner and the lone official respondent are the same in both these writ petitions.

3. Mr.C.Baktha Siromoni, learned counsel on record for the sole writ petitioner in both these writ petitions is before this Court. Mr.Mohammed Shaffiq, learned Special Government Pleader (Taxes) accepts notice on behalf of lone official respondent in both these writ petitions.

4. With consent of learned counsel on both sides, main writ petitions itself are taken up and are being disposed of.

5. This Court is informed that factual matrix pertaining to both writ petitions is common and only the Assessment Years are different. To be noted, both writ petitions arise under 'Tamil Nadu Value Added Tax Act, 2006 (Tamil Nadu Act 32 of 2006)' ('TNVAT Act' for brevity). 'W.P.No.18676 of 2019' shall be referred to as 'first writ petition' and 'W.P.No.18694 of 2019' shall be referred to as 'second writ petition'.

6. As mentioned supra, this Court is informed that facts are common. While the first writ petition pertains to Assessment Year 2011-12, the second writ petition pertains to Assessment Year 2015-16. In the first writ petition, a revised assessment order dated 16.05.2019 bearing Reference TIN 33663100382/2011-12 made by lone official respondent has been called in question. In the second writ petition, a revised assessment order dated 22.05.2019 bearing Reference TIN 33663100382/2015-16 has been called in question.

7. The 'Revised Assessment Order dated 16.05.2019' which has been called in question in the first writ petition shall be referred to as 'first impugned order' and the 'Revised Assessment Order dated 22.05.2019' which has been called in question in the second writ petition shall be referred to as 'second impugned order'. Both these impugned orders shall collectively be referred to as 'impugned orders' for the sake of brevity, convenience and clarity.

8. There is no dispute or disagreement before this Court that both the impugned orders have been made under Section 22(4) of TNVAT Act, i.e., best judgment method.

9. Impugned orders are assailed by learned counsel for writ petitioner primarily on three grounds. To be noted, notwithstanding various averments in the affidavits filed in support of both these writ petitions and the grounds raised therein, the three points alluded to infra were projected and argued in the hearing.

10. First ground is that writ petitioner, who is a dealer under TNVAT Act, had effected only Intra-State sales in the relevant Assessment Years viz., 2011-12 and 2015-16. In other

words, it is the stated position of writ petitioner that writ petitioner has effected only Intra-State sales in the two relevant Assessment Years, whereas, the impugned assessment orders, on appreciation of material, has come to a different conclusion i.e., that there has been inter state sale. The second ground that has been urged is that lone respondent in making the impugned assessment orders, has taken into account the income tax records for making the best judgment method assessment and according to learned counsel for writ petitioner, this is impermissible. The third ground of attack is that the impugned orders are such that the respondent has not applied his mind independent of the proposal given by the Enforcement Wing Officials and therefore, there is violation of principle laid down in *Narasus Roller Flour Mills Vs. Commercial Tax Officer (Enforcement Wing)*, Sankagiri reported in (2015) 81 VST 560 (MAD).

11. Responding to the first ground, learned State counsel submitted that this turns entirely on facts and the assessments have been made on available material. It was submitted by State Counsel that even if there is any dispute qua facts by writ petitioner dealer, the same cannot be gone into in a writ petition. With regard to the second ground of income tax records, learned counsel for writ petitioner relied on a judgment of this Court made in *Sharoff Syndicate vs. The Assistant Commissioner (CT)* being order dated 13.04.2018 in W.P.Nos.9026 to 9029 of 2018. To be noted, Sharoff Syndicate order is by a Hon'ble Single Judge of this Court.

12. Learned State Counsel pointed out that the writ petitioner dealer under TNVAT Act, as an assessee under 'Income Tax Act, 1961' ('IT' Act for brevity) has been filing reports contradictory to one another and therefore, the records have been looked into. This takes us to Sharoff Syndicate judgment. Paragraph 10 is of relevance and the most relevant portion of paragraph 10 of Sharoff Syndicate judgment reads as follows:

'10.....It was pointed out by the Hon'ble Division Bench of this Court that the courses of taxation under the Income Tax Act and the Sales Tax Act are entirely different, as, in the former, the Income of the dealer is assessed to tax and is quantified by the Income Tax Officer in accordance with the provisions of that Act and the Tamil Nadu General Sales Tax Act, 1959 ordains the Assessing Authorities functioning thereunder to bring to tax sales as such either found in the books of accounts or agreed to be so by the assessee or otherwise proved to be so by circumstantial evidence. Thus, by analyzing the manner, in which, two

statutes operate, the Hon'ble Division Bench held in favour of the Revenue stating that the assessee admitted in his sworn statement that the two sums representing the sales for the two assessment years in question represented unbilled cash sales. Hence, the retraction made to the sworn statement was held to be lacking any bona fide.'

13. Therefore, in the light of the aforesaid observation in Sharoff Syndicate judgment, this Court is of the considered view that the principle is to the effect that Income tax records are not completely forbidden.

14. This takes us to the last ground i.e., Narasus Roller Flour Mill's principle.

15. This Court had the benefit of perusing both the impugned orders. A careful perusal of the impugned orders reveals that the lone official respondent has set out the proposals of the Enforcement Wing Officials, has set out the objections to the same raised by writ petitioner, has conducted a personal hearing and then given independent findings on the same. Therefore, this leaves this Court with the considered opinion that it cannot be gainsaid by the writ petitioner that Narasus Roller Flour Mill's principle has not been adhered to in making the impugned orders. Be that as it may, in response to the third ground, learned State Counsel, pressed into service two judgments of Hon'ble Supreme Court. One is The State of Madras Vs. S.G.Jayaraj Nadar and Sons reported in (1972) 3 Supreme Court Cases 300 and the other is The Commissioner of Sales Tax, Madhya Pradesh Vs. H.M.Esufali and others reported in (1973) 2 Supreme Court Cases 137. To be noted, Esufali has also been reported in Sales Tax cases and the citation is 32 STC 77. These two judgments were pressed into service to highlight the principle that any best judgment assessment involves some amount of approximation and guesswork. Furthering this argument, it was submitted that the test is to see whether the exercise of powers is arbitrary or capricious. If that not be so, there being some element of approximation cannot be a ground to assail best judgment assessment orders is learned Revenue Counsel's say. Most relevant part of Jayaraj Nadar and Sons case is contained in paragraph 4 and the relevant portion of paragraph 4 reads as follows:

'4.... It is well known that the best judgment assessment has to be on an estimate which the assessing authority has to make not capriciously but on settled and recognised principles of justice. An element of guess work is bound to be present in best judgment assessment but it must have a

reasonable nexus, to the available material and the circumstances of each case. (See The State of Kerala Vs. C.Velukutty). Where account books are accepted along with other records there can be no ground for making a best judgment assessment.'

16. Most relevant part of H.M.Esufali case is contained in paragraph 8 and the most relevant portion of paragraph 8 reads as follows:

'8..... In such a situation, it was not possible for the Sales Tax Officer to find out precisely the turnover suppressed. He could only make an estimate of the suppressed turnover on the basis of the material before him. So long as the estimate made by him is not arbitrary and has nexus with facts discovered, the same cannot be questioned. In the very nature of things the estimate made may be an over-estimate or an underestimate. But that is no ground for interfering with his 'best-judgment'. It is true that the basis adopted by the officer should be relevant to the estimate made. The High Court was wrong in assuming that the assessing authority must have material before it to prove the exact turnover suppressed. If that is true, there is no question of 'best-judgment' assessment. The assessee cannot be permitted to take advantage of his own illegal acts. It was his duty to place all facts truthfully before the assessing authority. If he fails to do his duty, he cannot be allowed to call upon the assessing authority to prove conclusively what turnover, he had suppressed. That fact must be within his personal knowledge. Hence the burden of proving that fact is on him. No circumstance has been placed before the assessing authority to show that the assessee's dealings during September 1, 1950 to September 19, 1960, outside his accounts were due to some exceptional circumstance or that they were proportionately more than his dealings outside his accounts, during the remaining periods. The assessing authority could not have been in possession of any correct measure to find out the escaped turnover during the periods November 1, 1959 to August 31, 1960 and September 20, 1960 to October 20, 1960. The task of the assessing authority in finding out the escaped turnover was by no means easy. In

estimating any escaped turnover, it is inevitable that there is some guess-work. The assessing authority while making the 'best judgment assessment' no doubt should arrive at its conclusion without any bias and on rational basis. That authority should not be vindictive or capricious. If the estimate made by the assessing authority is a bona fide estimate and is based on a rational basis, the fact that there is no good proof in support of that estimate is immaterial. Prima facie, the assessing authority is the best judge of the situation. It is his 'best-judgment' and not of any one else's. The High Court could not substitute its 'best-judgment' for that of the assessing authority. In the case of 'best-judgment' assessments, the courts will have to first see whether the accounts maintained by the assessee were rightly rejected as unreliable. If they come to the conclusion that they were rightly rejected, the next question that arises for consideration is whether the basis adopted in estimating the turnover has a reasonable nexus with the estimate made. If the basis adopted is held to be a relevant basis, even though the courts may think that it is not the most appropriate basis, the estimate made by the assessing authority cannot be disturbed. In the present case, there is no dispute that the assessee's accounts were rightly discarded. We do not agree with the High Court that it is the duty of the assessing authority to adduce proof in support of its estimate. The basis adopted, by the Sales Tax Officer was a relevant one whether it was the most appropriate or not. Hence the High Court was not justified in interfering with the same. 'जयते'

17. This Court as already alluded to supra, after perusing the impugned orders, has come to the conclusion that it cannot be gainsaid by writ petitioner that Narasus Roller Flour Mill's principle has not been adhered to, as the respondent Assessing Officer has considered the proposals made by Enforcement Wing Officials, has also set out the objections of writ petitioner assessee and has returned findings. If there is any error in these findings returned, at best it can be canvassed by way of an appeal being a statutory appeal under Section 51 of TNVAT Act as the same turns heavily on facts.

18. With regard to appeal provision under Section 51 of TNVAT Act, learned counsel for writ petitioner raised an

interesting argument. Learned counsel for writ petitioner submitted that the proposals made by Enforcement Wing Officials are approved by a Joint Commissioner and therefore, a Deputy Commissioner cannot be an Appellate Authority qua impugned orders.

19. This Court has carefully considered the submissions. This Court has also noticed that learned counsel for writ petitioner is pressing into service Narasus Roller Flour Mills case [Narasus Roller Flour Mills Vs. Commercial Tax Officer (Enforcement Wing), Sankagiri reported in (2015) 81 VST 560 (MAD)]. Narasus Flour Mill's principle is based on Madras Granites Private Limited Vs. CTO, Arispalayam Assessment Circle, Salem reported in (2006) 146 STC 642, besides Yousuff Radio Vs. Board of Revenue reported in (1979) vol.43 STC 525.

20. These principles are to the effect that the Assessing Officer should apply his/her mind independently i.e., independent of the proposal given by the Enforcement Wing Officials and come to a conclusion. Therefore, on the teeth of the obtaining position that Enforcement Wing proposals are approved by Joint Commissioner, this Court has held that the Assessing Officer should independently apply his/her mind. This leads us to the inevitable sequitur that principle is to the effect that even though the Enforcement Wing Official's proposal is approved by Joint Commissioner, an authority much below the rank of Deputy Commissioner for that matter below the rank of even the Assistant Commissioner viz., a Commercial Tax Officer (CTO) would apply his mind independently and come to a conclusion by going through the proposal of Enforcement Wing Officials on one side and objections of the dealer on the other. If this is the principle, the argument that a Deputy Commissioner, who is without any disputation above the CTO in the hierarchy, cannot act as an Appellate Authority merely because Enforcement Wing proposals are approved by Joint Commissioner, who is above a Deputy Commissioner is clearly untenable. Therefore, this Court has no difficulty in coming to the conclusion that this argument though attractive in first flush does not stand further scrutiny.

21. With regard to alternate remedy itself, it is, no doubt, not an absolute rule. In other words, it is not a rule of compulsion, but it is a rule of discretion. Though it is a rule of discretion, Hon'ble Supreme Court in Satyawati Tandon Case [United Bank of India Vs. Satyawati Tandon and others reported in (2010) 8 SCC 110] has held that when it comes to matter pertain to Taxes, CESS, Revenue etc., the rule of alternate remedy has to be applied with utmost rigour. This Satyawati Tandon principle has been reiterated by Hon'ble Supreme Court in K.C.Mathew case [Authorized Officer, State Bank

of Travancore Vs. Mathew K.C. reported in (2018) 3 SCC 85]. Relevant paragraph is paragraph 10 and the same reads as follows:

'10. In Satyawati Tondon the High Court had restrained further proceedings under Section 13(4) of the Act. Upon a detailed consideration of the statutory scheme under the SARFAESI Act, the availability of remedy to the aggrieved under Section 17 before the Tribunal and the appellate remedy under Section 18 before the Appellate Tribunal, the object and purpose of the legislation, it was observed that a writ petition ought not to be entertained in view of the alternate statutory remedy available holding: (SCC pp.123 & 128, Paras 43 & 55)

"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this Rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.'

(Underlining made by Court to supply emphasis and highlight)

22. Therefore, this Court, in the light of discussion/dispositive reasoning thus far, is convinced that it is a fit case to relegate the writ petitioner to the alternate remedy of an appeal to the jurisdictional Deputy Commissioner or in other words, Appellate Deputy Commissioner having jurisdiction.

23. If writ petitioner, chooses to avail the alternate remedy all the conditions for pursuing an appeal will operate and apply. If there is any delay in preferring the appeal, it is open to the writ petitioner to seek condonation, besides seeking exclusion of time spent in the instant writ petition by applying Section 14 of Limitation Act. If the writ petitioner makes such a plea/prayer for condonation and/or exclusion of time under Section 14 of Limitation Act, the Appellate Authority shall deal with the same and decide such prayers/pleas on their own merits.

24. Owing to all that have been set out supra, these writ petitions fail and the same are dismissed, albeit, preserving the rights of writ petitioner to file statutory appeals and leaving it open to the writ petitioner to raise all questions available to them including the questions that have been raised in the instant writ petitions. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-VI)

//True Copy//

Sub Assistant Registrar

vsm

To

Tax Officer (CT)
Namakkal (Town) Assessment Circle
Namakkal.

+1cc to Mr.C.Baktha Sironmoni, Advocate, S.R.No. 55734
+1cc to the Government Pleader, S.R.No. 56138

W.P.Nos.18676 & 18694 of 2019 and
W.M.P.Nos.18023 & 18040 of 2019

JP(CO)
GN(06/08/2019)