BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 25.06.2019
CORAM:

THE HON'BLE DR.JUSTICE ANITA SUMANTH

W.P.(MD)Nos.16015 to 16022 of 2015
and M.P.(MD).Nos.1,1,1,1,1,1,1 and 1 of 2015

Tvl.NEW BOMBAY STORES,
represented by its Proprietor
A.Samsudeen, aged about 44 years,
S/o S.Abdullah,
No.34, Main Road,
Thirukkattupalli,
Thanjavur District 613 104. ... Petitioner(in all petitions)

Vs.

1.The Commissioner of Commercial Taxes,
O/o The Principal and Special Commissioner of Commercial Taxes,
Ezhilagam, Chepauk,
Chennai - 600 005.

2.The Deputy Commercial Tax Officer,
Thanjavur - II Assessment Circle,
Commercial Tax Building,
No.20/3, Sachidhanandha Mooppanar Road,
Thanjavur - 1. ... Respondents(in all petitions)

COMMON PRAYER: Petitions are filed under Article 226 of the Constitution of India, to issue a writ of Certiorari, to call for the records pertaining to the impugned proceedings of the 2nd respondent in TIN (R.C.)/980/2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2013-2014, 2014-2015 respectively, antedated as 31.07.2015 and quash the same.

For Petitioner : Mr.B.Rooban(in all cases)
For Respondents : Mr.R.Murugan,
Additional Government Pleader
(in all cases)

COMMON ORDER

These writ petitions challenge assessments made for eight years ie., from 2007-08 to 2014-15.

2.The admitted facts are that the petitioner is an unregistered dealer and a proprietor of a business concern based in Thanjavur District, dealing in Tobacco products and general goods. The petitioner, according to it, did not require registration as a dealer, since the threshold for registration under the provisions of the Act was an amount of Rs.10 lakhs. It states that is also exempted from taxation in the present GST regime.

3. There was an inspection on 13.12.2014 by the officials of the Enforcement Wing of the Commercial Taxes Department. Consequent upon the said inspection, a statement was recorded from the petitioner, according to it, under coercion, to the effect that the sales per day of the concern was a sum of Rs.11,000/-. Neither a copy of the inspection statement nor inspection report have been provided to the petitioner till date.

4. Subsequently, pre-assessment notices for the periods in question were issued on 15.06.2015 proposing to estimate the annual sales turnover on the basis of the per day sales figure adopted by the Department. Though at the time of inspection, the per day sales turnover was restricted to a sum of Rs.11,000/-, the amounts varied in estimate over the eight years in question between Rs.10,000/- and Rs.17,000/-. Since the petitioner had sought copies of the Inspection report and statements recorded and the same had not been furnished to it, the petitioner could not, according to it, raise any further objection on the merits of the matter. This culminated in the impugned orders of assessment.

5. According to the petitioner, various discrepancies are evident in the orders of assessment in question. Insofar as the per- day sales adopted in the assessments are concerned, they differ from the amounts stipulated in the pre-assessment notices. That apart, the assessing officer has completed the assessment relying substantially upon the statement recorded from the proprietor at the time of inspection. Hence, the present writ petitions.

6. Heard the detailed submissions made by Mr.Rooban, learned counsel for the petitioner and Mr.Murugesan, learned counsel for the respondent.

7. A Common counter has been filed by the respondents to the effect that the writ petitions are not maintainable, since the petitioner has an efficacious alternative statutory remedy; that while inspection was carried out by the officials, various discrepancies and violations in running of the business by the petitioner were found; that the assessee had accepted the discrepancies even at the time of inspection; that no accounts are maintained by the assessee and thus, the estimated per-diem rate was proper; that no objections were filed by the assessee to the pre-assessment notices, despite time being extended for the same. On

the basis of the aforesaid arguments of the respondents, it is submitted that these writ petitions are liable to be dismissed.

8. On the question of alternate remedy, I reject the argument of the respondents. The legal as well as factual arguments that have been put forth reveal flaws in the impugned orders that go to the root of the matter. It is a settled position that where the impugned orders contain errors apparent on the face of the record that go to the root of the matter and there is a violation of principles of natural justice, the assessee cannot be faulted for choosing the remedy in terms of Article 226 of the Constitution of India.

9. The legal issue argued in present case turns upon an interpretation of Sections 27 and 22 of the Act. Section 27 provides for re-assessments in the case of escaped turnover and wrong availment of input tax credit, and reads thus:

> ***'Section27. Assessment of escaped turnover and wrong availment of input tax credit. -*** *(1) (a) Where, for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the assessing authority may, subject to the provisions of sub-section (3), at any time within a period of five years from the date of assessment order by the assessing authority, determine to the best of its judgments the turnover which has escaped assessment and assess the tax payable on such turnover after making such enquiry as it may consider necessary.'*

10. The procedure to be followed by the assessing authority in completion of assessments is provided for under Section 22, which is as follows:

> ***'Section 22. Procedure to be followed by assessing authority. -*** *(1) The assessment in respect of the dealer shall be on the basis of return relating to his turnover submitted in the prescribed manner within the prescribed period.*
>
> ***Section 22(2).*** *The assessing authority shall accept the returns submitted for the year, by the dealer, if the returns are accompanied by the proof of payment of tax and the documents prescribed, and on such acceptance, the assessing authority shall pass an assessment order.*
>
> ***Section 22(3).*** *Notwithstanding anything contained in sub-section (2), not exceeding twenty per cent of the total number of such assessments shall be selected by the Commissioner in such manner as may be prescribed for the purpose of detailed scrutiny regarding the correctness of the return submitted by the dealer and in such cases, revision of assessment shall be made, wherever necessary.*
>
> ***Section 22(4)*** *If no return is submitted by the dealer for that year, the assessing authority shall, after*

making such enquiry as it may consider necessary, assess the dealer to the best of its judgment, subject to such conditions as may be prescribed.

Provided that before taking action under this sub-section, the dealer shall be given a reasonable opportunity of being heard.'

11. A plain reading of the aforesaid provisions of law reveal that the procedure to be followed in the matter of assessment and re-assessment is as follows:

(a) Once monthly returns are filed by assessee, assessments are deemed to be completed on the basis of monthly returns.

(b) If such returns are accompanied by proof of payment of tax and the documents prescribed, assessments shall be framed accepting the same.

(c) In the event that, there is no return filed, the assessing officer shall undertake an enquiry by issue of notice and complete the assessment, after providing an opportunity of personal hearing.

(d) If the assessing authority finds that the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the assessing authority may, subject to the provisions of sub-section (3), at any time within a period of five years from the date of assessment order, determine and reassess the tax payable on such turnover.

12. In the present case, the assessee has not filed returns. According to the petitioner, this is because there is an exemption in respect of its turnover. Be that as it may, it is pertinent to note that the word used in Section 22(4) is 'shall', denoting that, if in the opinion of the assessing authority, an assessment of any income is called for, then, after making necessary enquiry, and after affording reasonable opportunity to the dealer/he will assess the dealer in accordance with law.

13.Therefore, it is incumbent on the part of the assessing authority to have issued notice in terms of Section 22(4) initiating enquiry and completed the original assessments thereafter.

14.The provisions of Section 27, provide for a limitation of five years from the date of original assessment for re-assessment or assessment of escaped turnover. It automatically follows that an original order of assessment has necessarily to be passed in the case of a dealer, prior to initiating proceedings for re-assessment since the computation of limitation for the latter is with reference to the date of completion of original assessment. This has not been done in the present case and thus impugned orders are liable to be set aside on the ground of lack of jurisdiction.

15. For the sake of completion, I deal with the merits as well. I have perused the records of Inspection. The surprise inspection report contains the history of the case. An official of the inspecting team has stated as follows:-

> *'I submit that no incriminating record pertaining to the business transactions was found & recovered during the course of inspection.'*

Thereafter at para 4 the officials states as

> *'4) The above said person had not maintained any accounts. It is clearly shown that he had added the tax in the sale value of goods & collected the amount in the chittai & then he had destroyed the chittai. Hence the dealer had evaded the payment of tax to the government from 2007 - 08 onwards.'*

16. There is a clear discrepancy between two statements in the Report. Admittedly, no accounts have been maintained. The surprise inspection report in Form VSI - I states categorically that no day book, ledger, stock book or delivery notes have been maintained and only chittai was being maintained. In the absence of any authentic records having been maintained by the assessee/petitioner, no doubt, the assessing authority are armed with powers to estimate the turnover.

17.As far as reliance upon the statement recorded from the assessee at the time of inspection is concerned, the credence given to such stated has to be weighed against other evidence found in the course of inspection itself and certainly cannot form the sole basis of assessment.

18.The assessing authority, in the absence of any other material produced by the assessee, has no other recourse but to estimate the turnover. This estimate, however, has to be made adopting a realistic basis and acceptable methodology. In the present case, the estimate made is for the period 2007-2008 to 2014-2015, which is over a period of eight years. An estimate of one day sale of Rs.11,000/- has been made for the period 2014-2015 as the inspection had taken place in the year 2015. This however has been taken to be the basis for fixing the turnover for the period 2007-2008 onwards. This is clearly not the proper approach as various factors, year-wise would have to be taken into account to determine the estimate the turnover for the entire period of eight years.

19.A Division Bench of this Court, in the case of *State of Tamilnadu Vs. New Kamaliya Hotel* (147 STC 111), has to state in the context of one day sales:

> *'4.We heard the counsel. The Assessing Officer made estimates based on the one day sales. Normally, sales may differ from auspicious day and inauspicious day. So, taking the one day average*

for estimation is not a scientific method sanctioned by law. It is only a crude method which has no substance. At least in order to arrive one day sales, either the Assessing Authority or the Enforcement Wing Officers should have made surveys every month taking into consideration the normal day, auspicious day and inauspicious day. Both the authorities below also found that there was no omission established by the Revenue. Mere one day sales could not be attributed to estimate the whole year without considering the festival season, rainy season and other natural calamities. It is also seen that the first Appellate Authority as well as the second Appellate Authority had considered all the relevant materials and came to the correct conclusion. The Assessing Officer had only relied on the one day sale for making estimation. The Tribunal is correct in holding that the Assessing Officer was wrong in estimating the additions which was solely based on one day sales. We are of the first view that the Assessing Officer cannot make estimate based on one day sales.'

20. The Allahabad High Court in *Swadeshi Udyog Vs. Trade Tax Officer, Kanpur and another* reported in (*(2011) 45 VST 111 (All)*) and the Kerala High Court in *Chilton Regrigeration Vs. State of Kerala* (*(2004) 138 STC 472)* have held that materials found during the course of inspection can and should relate only to the specific period of assessment.

21.While it is true that in cases where a dealer does not maintain regular accounts, the department is bound to make an estimated assessment of the turnover for the periods in question, such an estimate should be reasonable, in accordance with general trends is that specific line of business and appear reasonable and not arbitrary or mechanical. It should be seen to be in consonance with logic and in tandem with accepted business principles and parameters.

22. In the case on hand, though the assessments have been made for the period 2007-2008 to 2014-2015 the fact remains that the per-diem sales for all years are based more or less upon the figure of one day sales adopted for the period 2015-2016. In my view, the amount should be scientifically fixed for each period and the methodology for such fixation should be revealed by the officer in the pre-assessment proposal itself. In the present case, the per-diem amount for each year has been determined mechanically and rather arbitrarily and there is except the amount estimated for the last year no basis that I can see, for the same. For the reasons as

aforesaid, the impugned orders are liable to be set aside on merits as well.

23.These writ petitions are allowed. No costs. Consequently connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (P&A)

// True Copy //

Sub Assistant Registrar(CS)

To

1.The Commissioner of Commercial Taxes,
O/o The Principal and Special Commissioner of Commercial Taxes,
Ezhilagam, Chepauk,
Chennai – 600 005.

2.The Deputy Commercial Tax Officer,
Thanjavur – II Assessment Circle,
Commercial Tax Building,
No.20/3, Sachidhanandha Mooppanar Road,
Thanjavur – 1.

+1 CC to Mr.B.ROOBAN, Advocate (SR-71620[F] dated 26/06/2019)
+1 CC to SPL GP (SR-71557[F] dated 26/06/2019)

W.P.(MD)Nos.16015 to 16022 of 2015
25.06.2019

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