BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 07.08.2019

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THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P(MD)Nos.5568, 5569 & 5570 of 2017
and
W.M.P(MD)Nos.4451, 4452 & 4453 of 2017

Tvl.Sri Ganesh Sanitary Wares,
Rep. by its Legal Representative
G.Dhanalakshmi,
W/o.Late K.Ganesan, Proprietor,
3-1-3/2, Cumbum Road,
P.C.Patti,
Theni – 625 531. ... Petitioner in all W.Ps'

Vs.

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

2.The Assistant Commissioner (CT) – I,
Theni I Assessment Circle,
Commercial Taxes Buildings,
Bangalamedu,
Madurai Road,
Theni – 625 531. ... Respondent in all W.Ps'

Common Prayer: Writ Petitions filed under Article 226 of the Constitution of India praying for the issuance of a writ of Certiorari, to call for the records pertaining to the impugned proceedings of the second respondent in TIN No.33295180411 / 2010-11, 2011-12 and 2012-13 dated 27.01.2017 and quash the same.

For Petitioner (in all W.Ps') : Mr.B.Rooban

For Respondents (in all W.Ps') : Mrs.J.Padmavathy Devi, Special Government Pleader.

COMMON ORDER

Three assessment orders are impugned before me in relation to the periods 2010-11, 2011-12 and 2012-13, all dated 27.01.2017 framed under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (in short 'Act').

2.Heard Mr.B.Rooban, learned counsel for the petitioner and Mrs.J.Padmavathy Devi, learned Special Government Pleader for the respondents.

3.The petitioner is a dealer in sanitary ware. The place of business of the dealer was inspected on 25.07.2013 by the Enforcement Wing and the Inspecting Officers noticed certain alleged defects. These defects, relating to purchase of solution, arose on a verification of the profit and loss account and the monthly returns filed by the petitioner. Thus, the authorities proposed to treat the same as purchase suppression to be brought to Tax for all three periods as sales suppression.

4.Based on the report of the Inspecting Authorities, notices dated 15.05.2014 issued by the Assessing Authority proposing additions as sales suppression based on the alleged purchase suppression upon a comparison of the profit and loss account and the monthly returns filed by the petitioner and penalty in terms of Section 27 of the Act was also proposed.

5.In reply, dated 25.07.2014, the proprietor of the petitioner concern brought to the notice of the Assessing Authority that on a reconciliation of the profit and loss account with the monthly returns, the differences that arose were only Rs.429/- for the period 2010-11, Rs.21,140/- for the period 2011-12 and Rs.13/- for the period 2012-13. Thus, the report of the Inspecting Authority and the conclusions arrived at therefrom were contested, as being factually inaccurate. Consequently, the addition proposed towards the probable sales was also contested, as was the penalty.

6.Upon a consideration of the objections, the Assessing Authority appears to have suggested a deviation from the proposals of the Inspecting wing and an international communication, dated 24.05.2016 is placed on record by the petitioner. The Deputy Commissioner, Commercial Taxes, rejects the request for deviation. According to the superior, the details of local and interstate purchases have neither been placed before the Inspecting officials nor before the Assessing Officer. She thus proposed a reconciliation of the purchase turnover with reference to book of accounts and instructed the Assessing Authority to issue notices 'based on the inspection report'. In conclusion, the deviation sought for by the authority based on the reply of the petitioner, dated 25.07.2014, was not accepted.

7.In the meanwhile, it appears that the erstwhile proprietor had passed away on 29.04.2015. Fresh notice was thus issued pursuant to the demise of the proprietor, by the Deputy Commissioner, Commercial Taxes on 03.10.2016. The widow of the erstwhile proprietor respond to the same seeking several documents. After exchange of communication between the petitioner and the respondent, all documents sought for were furnished.

8.It appears, in the meanwhile, that the Assessing Authority, who appears to be thoroughly convinced by the explanation and the material filed by the petitioner before him corresponded yet again with the Joint Commissioner, his superior, pointing out his inclination to deviate from the Enforcement Wing proposals. His request reads as follows:

> 'Sub: TNVAT Act 2006 - O/o the Assistant Commissioner (CT) Theni - 1 - Tvl.Ganesh Sanitary Wares - Surprise inspection proposal - certain details requested - Regarding.
>
> Ref: D3 proposal for Tvl.Ganesh Sanitary Wares.
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> ******
>
> I submit that the place of business in respect of Tvl.Ganesh Sanitary wares was inspected by the Enforcement wing officials on 25.07.2013 and the proposal was received in the officer on 30.04.2016.
>
> Regarding the proposal I request the Joint Commissioner (Enf) to clarify that what is the purchase and sales turnover should be adopted for the year 2010-11, 2011-12 and 2012-13 since I am unable to determined the turnover from the proposed.'

9.The tenor of the aforesaid communication is clear to the effect that the Assessing Authority, after receipt of the response dated 25.07.2014 was convinced that there was no significant difference between the profit and loss account and the returned turnover. The contents of the reply, in relation to the period 2010-11, are extracted below, for the sake of clarity:

> '1.First of all, you have alleged that on comparing the monthly return with profit and loss account there was a purchase omission for Rs.33,88,872/- which is not correct. In fact on perusal of the monthly return and profit and loss

account the difference was only for Rs.429/- which is as follows-

	Purchases
As per P & L A/c	32997297
As per monthly return	32996868
	429

Even though the records are readily available with you to ascertain the above fact, any we may given a personal and we undertake to appear in person along with the records to prove our stand effectively.

2.Equal Addition

Besides making estimation towards actual suppression you have proposed to levy an equal addition towards probable omission. We submit that in the absence of proof of continuity of suppression, no addition could be made and the same is not sustainable. We rely on Madras High Court decision reported in 57 STC 212, 103 STC 543, Sankar Oil Mills (TC (R) No.2377/08, dated 08.07.10), 28 VST 199 (Commercial Cloth Manufacturing) and 42 VST 166 (SRS Industries), which is binding on you. Hence to make an equal addition is unlawful and unjustified.

3.In the notice, we have also proposed to levy penalty under Section 27 of the TNVAT Act (Sub-Section not mentioned for invoking the penal provision). In the absence of escapement or omission of turnover nor filing of incorrect or incomplete return, the question of levy of penalty is not warranted to the facts of this case.

Furthermore, you have proposed to levy a penalty at 150% of Rs.12,70,827/-. It is not known as to how such an huge penalty has been proposed to be levied inspite of the fact that the alleged purchase omission was Rs.33,88,872/- at 12.5% for which the tax effect was only Rs.4,23,609/-. But you have added the tax effect for equal addition also and calculated the penalty which is not legally correct. The penal provision if at all warranted it is only for the actual and not for the estimated turnover.'

9.Upon a perusal of the same, it appears clear that the difference as alleged by the Enforcement Authorities is not be correct, particularly, in the light of the categoric reconciliation provided by the petitioner. The Assessing Authority has proposed a deviation based on the reply and reconciliation provided on 25.07.2014 and finally and as a last resort, he requests the Joint Commissioner to clarify what the purchase and sales turnover should be since he was unable or not in a position to determine the same from the proposal (the word 'proposed' in the reply appears to be an error of language). No reply was received as a result that the officer passed the impugned orders, adverse to the assessee.

10.It is trite to state that an assessment should be made based on materials available and after proper and independent application of mind by the Assessing Officer. In the present case, the intention of the Assessing Officer to conclude the assessment based on the objection dated 25.07.2014 appears very clear from his proposal for deviation not once, but twice. Inspite of the same, the insistence of the authorities to confirm the proposals of the Enforcement Wing is clearly contrary to law as well as to the mandate of several Circulars issued by the Principal Commissioner of Commercial Taxes to the effect that an assessment has to be passed on an independent appreciation of the material facts by the Assessing Authority. I have no doubt, in this case, that had the Assessing Officer been allowed to pursue the assessment by independent application of mind, he would have come to a conclusion, as prayed for by the petitioner in his objection, dated 25.07.2014.

11.In the light of the discussions as above, these assessment orders are quashed and these Writ Petitions are allowed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

Sub Assistant Registrar(CS)

To

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

2.The Assistant Commissioner (CT) - I,
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Bangalamedu,
Madurai Road,
Theni - 625 531.

+1 CC to M/s.SPL GP (SR-80728[F] dated 08/08/2019)

+1 CC to M/s.B.ROOBAN, Advocate (SR-81023[F] dated 09/08/2019)

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