IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.06.2020

CORAM:

THE HON'BLE MR. JUSTICE R.MAHADEVAN

Writ Petition No.25934 of 2014
& M.P.No.1 of 2014

M/s. Cibi Sago Factory,
represented by its Proprietor,
76/2 Attur Main Road,
Ayilpatty P.O.
Rasipuram Taluk,
Namakkal District ... Petitioner

..vs..

The Assistant Commissioner (CT),
Rasipuram Assessment Circle,
Namakkal ... Respondent

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 proceedings of the respondent in TNGST No.3161925/ 2004-2005, quash the impugned order dated 09.05.2014 as the same has been passed without considering the objections dated 23.01.2013 filed by the petitioner and also contrary to the law laid down in the decisions of this Court, reported in 32 STC 542, 60 STC 94, 5 VST 223 and 63 VST 346.

For Petitioner : Mr. P.Rajkumar
For Respondent : Ms. Dhanamadhri, AGP

O R D E R

Challenging the revised order dated 09.05.2014 passed by the respondent relating to the assessment year 2004-05, the petitioner has come up with this writ petition.

2.According to the petitioner, they are the manufacturer of sago and starch and registered dealer on the file of the respondent under the TNGST Act and now under the TNVAT Act. In respect of the assessment year 2004-05, they filed their returns reporting a total turnover of Rs.76,07,110/- and claimed exemption on the same. On receipt of the same, the respondent, after verification of the books of accounts, passed the assessment order on 10.10.2007 determining the total and taxable turnover of the petitioner at Rs.76,07,110/- and Rs.nil respectively, after granting exemption. Thereafter, without issuing any notice, the respondent served an assessment order dated 31.05.2012 to the petitioner, alleging that as per the inspection conducted on 27.07.2004 by the Enforcement Wing Officials, it was found that there was suppression of sales turnover to the tune of Rs.1,17,77,400/- on the basis of electricity consumed during the assessment year in question and hence, the petitioner was directed to pay tax along with penalty under Section 12(3)(b) of the TNGST Act. Challenging the said order, the petitioner filed a writ petition in WP.No.21753 of 2012, which was disposed of, vide order dated 16.08.2012. As per the direction of this Court, the respondent sent a notice dated 31.12.2012, calling upon the petitioner to file their objections. Accordingly, the petitioner filed their objections in detail, on 23.01.2013. Without considering the same and without providing due opportunity to the petitioner for production of relevant documents i.e., books of accounts etc., the respondent passed the revised order on 09.05.2014 for the assessment year in question, estimating the total and taxable turnover of Rs.1,18,04,031/- and levying tax along with penalty. Aggrieved over the same, the petitioner has approached this Court with the present writ petition.

3.Upon notice, the respondent filed a detailed counter affidavit, inter alia stating that pursuant to the direction of this Court in WP.No.21753/2012, the petitioner was issued with a notice dated 31.12.2012 for fresh consideration and they filed their objections; after duly considering the said objections, the respondent passed the impugned revised order for the assessment year 2004-05. It is further averred therein that based on D3 proposal received from the Enforcement Wing Officials, the petitioner has been summoned for production of books of accounts, but they have not produced the same for verification and hence, the original assessment was revised determining the turnover to the best of judgment based on power consumption and hence, there is no arbitrariness or illegality in the order impugned herein. Stating so, the respondent sought to dismiss this writ petition.

4.The learned counsel for the petitioner submitted that the respondent has arbitrarily revised the original assessment on the basis of the consumption of electricity by the petitioner. According to him, the electricity consumption cannot be adopted as the sole basis for rejecting the income tax returns and for making an estimate of the taxable turnover of the petitioner. In support of his contention, he relied on various decisions of this Court and one such decisions is Kalyani Oil Mills v. State of Madras [(1973) 32 STC 542], wherein, it is held that “the estimate based on the electricity consumption cannot be said to be a correct basis”. The learned counsel further submitted that the respondent, without considering the objections dated 23.01.2013 and without providing reasonable opportunity to the petitioner to produce the books of accounts for the assessment year in question, has passed the revised assessment order, which is arbitrary, illegal and in violation of the principles of natural justice and hence, the same is liable to be set aside.

5.Reiterating the averments made in the counter affidavit filed by the respondent, the learned Additional Government Pleader (Taxes) submitted that though the petitioner was granted opportunity to produce the books of accounts for the assessment year in question, they have not turned up and hence, the respondent has no other alternative except to pass the impugned order to best of judgment, based on the proposal of the Enforcement Wing Officials, on the basis of electricity consumed by the petitioner.

6.Heard both sides and perused the documents placed before this Court.

7.Admittedly, the revised assessment made by the respondent for the year 2004-05, is based on the consumption of electricity by the petitioner. It is also an undisputed fact that the respondent, while passing the revised assessment order, has not verified the books of accounts maintained by the petitioner for the relevant year.

8.It is the specific plea of the learned counsel for the petitioner that the respondent before making revised assessment, has not provided reasonable opportunity to the petitioner to furnish the books of accounts maintained for the relevant year. Whereas, according to the respondent, though the petitioner was summoned to produce the books of accounts, they have not turned up and hence, the order impugned herein, came to be passed, based on the power consumption.

9.It is well settled that the electricity consumption cannot be adopted as the sole basis for rejecting the accounts of the assessee and for making an estimate of the taxable turnover of the assessee. In this regard, this Court would like to recollect the principles emerged from the decisions in Kalyani Oil Mills v. State of Madras, [(1973)32 S.T.C. 542] and Madurai Soft Drinks (Private) Limited v. State of Tamil Nadu [(1985) 60 S.T.C. 94], which read as under:-

> i) The assessing authority should have material to doubt the correctness or genuineness of the entries in the account books before proceeding to make the best judgment assessment, taking the electricity consumption as the basis for making an estimate.
>
> ii) Actual test check should be done in the assessee's own factory.
>
> iii) The assessing authority should gather comparable data from other similar oil mills.
>
> iv) In the absence of actual test check, adopting a particular rate of consumption for estimation would be an arbitrary basis and therefore a best judgment

assessment based on such arbitrary figure cannot legally be upheld.

10.Such being the legal position, irrespective of the submissions made by the learned counsel on either side, this Court, having regard to the aforesaid admitted facts, feels it just and appropriate to set aside the the order impugned herein.

11.Accordingly, the impugned revised order dated 09.05.2014 passed by the respondent relating to the assessment year 2004-05 is set aside and the matter is remanded back to the respondent for fresh consideration. Though it is stated that the petitioner already filed a detailed objections on 23.01.2013, it is open to them to file their objections afresh, along with the required documents viz., books of accounts maintained by them, etc., within a period of two weeks from the date of receipt of a copy of this order. On receipt of the same, the respondent shall consider the same and pass appropriate orders, on merits and in accordance with law, after affording due opportunity of personal hearing to the petitioner, within a period of four weeks thereafter.

12.This writ petition stands allowed to the extent as indicated above. No costs. Consequently the connected MP is closed.

Sd/-
Assistant Registrar( )

//True Copy//

Sub Assistant Registrar

To

The Assistant Commissioner (CT),
Rasipuram Assessment Circle, Namakkal.

Mg(co)
krd 20/7

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