

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.07.2021

CORAM

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.43692 of 2016
and
W.M.P.No.37497 of 2016
and
W.M.P.No.14896 of 2021

Tvl.Archana Sweets
Rep.by its Managing Partner C.S.Raju,
No.16/2, Pinjala Subramaniam Road,
T.Nagar, Chennai - 600 017.

...Petitioner

Vs

1. The Assistant Commissioner (CT)
Nandanam Assessment Circle,
No.46, Greenways Road,
Chennai - 600 028.
2. The Principal Secretary / Commissioner,
Commercial Taxes Department,
Ezhilagam, Chennai - 600 005.
(R2 - Suo Motu impleaded as respondent-R2
as per the orders of this Court made in
W.P.No.43692 of 2016 on 30.07.2021)

...Respondents

Prayer : Writ Petition filed Under Article 226 of the Constitution of India to issue of Writ of Certiorari, calling for the records in TNGST/1540291/2003-04 dated 08.12.2015 and 10.06.2016 on the file of the respondent and quash the same as illegal, excess of jurisdiction and against Section 16 of the TNGST Act.

For Petitioner : Dr.A.Thiagarajan, Senior counsel
Assisted by Mr.R.Sundaram

For Respondent : Mr.V.Nanmaran
Government Advocate

ORDER

The Notice issued under Section 12(2) of the Tamil Nadu General Sales Tax Act, 1959 [hereinafter referred to as 'TNGST Act'] is under challenge in this writ petition.

2. The petitioner is a dealer in sweets and savories and an assessee on the file of the respondent. For the Assessment Year 2003-04, the respondent passed an order dated 31.12.2004. There were no arrears of tax and the order of assessment would show that there was NIL balance. On 09.01.2006, the respondent issued a pre-revision notice on the ground that the sales effected by the petitioner are of branded commodity, which attracts higher rate of tax and therefore, the assessment was sought to be revised. The notice did not specify any provision of law but only referred to Section 12 (1) (b) of the TNGST Act for the purpose of levy of tax. On 27.02.2006, the petitioner filed detailed objections. Thereafter, no order regarding the revision was passed. When the petitioner enquired the respondent, they were informed that only if the objections were rejected, revised order would be passed and if the objections are accepted, the file would be closed. After proper reply was given to the notice, no order was passed. Thus, the matter had reached finality in the year 2006 itself. To the petitioner's surprise, two notices dated 08.12.2015 and on 10.06.2016 were served on the petitioner on 06.07.2016 to revise the assessment on the ground that the petitioner had sold branded commodities. On 11.07.2016, the petitioner had filed objections to the same. The petitioner's commodity is not a branded commodity. The petitioner has not registered under the Trademarks Act. Thus, the impugned notices dated 08.12.2015 and 10.06.2016 are issued without jurisdiction and is also time barred under Section 16(1) (b) of the TNGST Act.

3. The learned Senior counsel appearing on behalf of the writ petitioner mainly contended that the assessment order passed on 31.12.2004 became final. If at all, a revision is to be taken, the same is to be taken within the period of limitation as contemplated under the Act. However, the first notice was issued within the period of limitation on 09.01.2006. The petitioner submitted their explanations/objections on the notice on 27.12.2006. The petitioner has further produced the Registration certificate, showing that they have not made any Registration under the provisions of the Trade and Merchandise Marks Act. The documents and objections were submitted. However, no final order has been passed with reference to the notice issued under Section 12(2) of the TNGST Act dated 09.01.2006. Even the respondent could not able to establish that a final order was passed, based on the first notice issued on 09.01.2006 under Section 12(2) of the TNGST Act.

4. The learned Senior counsel drawn the attention of this Court with reference to Section 12 of the TNGST Act, which enumerates procedure to be followed by the Assessing authority. Section 12(2-A) (a) stipulates that "An assessment in respect of

registered dealers under subsections (1), (1-A) and (2) shall be made within a period of three years from the expiry of the year to which the assessment relates and in the case of other dealers the assessment shall be completed within a period of seven years from the expiry of the years to which the assessment relates." Therefore, the procedure prescribes period of limitation for initiating action. It is not as if the authorities competent may initiate action for revision of the assessment after a prolonged period and beyond the period of limitation prescribed. The assessment and the payments of tax must reach finality at one stage, it can never be a continuing process and therefore, the legislature thought fit and prescribed limitation for completion of assessment in tax Statutes. Thus, the limitation prescribed under the tax laws are mandatory and can never be construed as directory.

5. The importance of period of limitation as contemplated under the Tax laws are repeatedly considered by the Constitutional Courts across the country and it is held that the limitation is to be scrupulously followed by the competent authorities and violation would cause prejudice to the interest of the assessee and assessee cannot be kept always under threat regarding the re-opening of assessment or revision of the proceedings.

6. This being the principles, this Court is of an opinion that the facts in this case is to be considered with reference to the provisions of the Act as well as the principles and the importance of the period of limitation prescribed under the Statute.

7. The learned Government counsel appearing on behalf of the respondent relying on the counter affidavit, made a submission that no doubt, the first notice was issued on 09.01.2006. The petitioner also submitted its objections on 27.12.2006. However, the authorities have not passed any orders and subsequently, issued continuous notices on 08.12.2015 and 10.06.2016. Therefore, the issues were not disposed of. Thus, the authorities are competent to dispose of the notices. However, in view of the filing of the writ petition, the respondent have not passed any orders based on the impugned notices dated 08.12.2015 and 10.06.2016.

8. It is further contended that the impugned notices are issued under Section 12(2) of the TNGST Act and therefore, the authorities must be allowed to conclude the proceedings in all respects in respect of the discrepancies noticed in the return of income as well as the assessment orders passed in the year 2004.

9. The learned Government counsel appearing on behalf of the respondent made a submission that the brand name 'Archana Sweets' is not registered under the Trade and Merchandise Marks Act is the question raised before this Court. Further, the petitioner has raised the point of limitation. However, the respondent have initiated action within a period of limitation and received objections from the petitioner. However, no order has been passed. In view of the fact that there was some delay in passing the order based on the first notice, the respondent have issued the second notice on 08.12.2015 and thereafter, another notice on 10.06.2016. The said notices were issued as it is only for change in rate of tax leviable. At the outset, it is contended that the authorities have not intended to revise the entire assessment, but issued notice for change in rate of tax leviable. Thus, no notices were issued under Section 16 of the TNGST Act as there is no incident of escape of assessment to be taxable turnover. However, the impugned notices are issued only under Section 12(2) of the TNGST Act.

10. Let us now consider the scope of Section 12(2) of the TNGST Act, 1959 and the said Section reads as under:

" Section 12(2): If no return is submitted by the dealer under sub-section (1) within the prescribed period, or if the return submitted by him appears to the assessing authority to be incomplete or incorrect, the assessing authority shall, after making such enquiry as it may consider necessary, assess the dealer to the best of its judgement [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 proving the correctness or completeness of any return submitted by him."

11. The respondent has stated that under Section 12 of the TNGST Act, notices dated 09.01.2006 and 08.12.2015 and 10.06.2016 were issued, proposing to assess the sale turnover at 16% (major portion of sales turnover). The respondent have mainly contended that the first notice dated 09.01.2006 was issued within a period of five years and therefore, the actions are not barred by the period of limitation.

12. This Court is of the considered opinion that the respondent has interpreted the procedures contemplated under Section 12 in entirety. Section 12(2) initially contemplates circumstances. Firstly, if no return is submitted by the dealer under Sub Section (1) within the prescribed period and the

second circumstance would be if the return submitted by him appears to the assessing authority to be incomplete or incorrect. In such circumstances, the assessing authority shall, after making such enquiry as it may consider necessary, assess the dealers to the best of its judgment subject to such conditions as may be prescribed.

13. As far as the present writ petition is concerned, the petitioner admittedly had filed return within the period of limitation. The return filed by the petitioner was scrutinized and a final assessment order was passed on 31.12.2004. The petitioner admittedly paid the tax as per the assessment order. Therefore, two circumstances contemplated under Section 12(2) would not fit in with reference to the action taken after passing of the assessment order, which became final. Even in such circumstances, reopening of assessment may be a possible circumstance. However, notice under Section 12(2), if at all to be issued, must be issued before passing the final order of assessment. Therefore, the very purpose and object of Section 12(2) is that in the event of non-filing of return by a dealer or if any return is submitted by the dealer and while considering the return, the assessing authority found that the particulars and details provided by the dealer is incomplete or incorrect, then he shall conduct an enquiry and thereafter, assess the dealer to the best of its judgment. Therefore, the application of Section 12(2) is wrongly interpreted by the respondent in the present case and thus, the notice issued admittedly under Section 12(2) itself in violation of the procedures as contemplated under Section 12(2) of the TNGST Act.

14. This apart, even in such circumstances, where a notice has been issued under different provisions as misquoting of the provisions of law would not vitiate the entire proceedings, this Court is of the considered opinion that the notice initially issued on 09.01.2006 must be acted upon after receiving the objection letter from the petitioner on 27.12.2006. Thus, if at all, the notice is issued under any other provisions of the TNGST Act for revision of assessment or to change of a percentage regarding the revision and re-fixation of rates, the notices issued on 09.01.2006 ought to have been acted upon and a final order should have been passed by the competent authority, considering the objections filed by the writ petitioner on 27.12.2006. Unfortunately, no action was taken by the respondent and admittedly, no final order has been passed based on the notice issued on 09.01.2006. But, the respondent has waited for about 9 years and issued the second notice, extracting the same contentions from notice dated 09.01.2006 and issued notice on 08.12.2015 and further, notice issued on 10.06.2016 also reveals the same facts and circumstances and there is no change of circumstances or facts.

15. Question arises, whether the second notice is permissible or not. If at all such notice can be issued after a lapse of 9 years from the date of issuance of the first notice and after submission of the objections by the petitioner/assessee, this Court is of the considered opinion that there is no procedure of issuing statutory notice in a repeated manner. Once a statutory notice is issued, invoking the powers under the provisions of the Statute and the person concerned submits his objections / explanations for the notice, then the authority competent is bound to consider the same and pass final orders on merits and in accordance with law. Therefore, the actions of the respondent in issuing the impugned show cause notices after a lapse of 9 years is crystal clear to cover up the misdeeds committed by the officials of the Department. The officials, who were dealing with the files slept over and issued another notice after a lapse of 9 years in order to cover up the misdeeds and such an action would certainly infringe the right of assessee and beyond the period of limitation as contemplated under the procedures and therefore, the impugned notices are to be construed as lacking jurisdiction.

16. The case on hand is a classic case, where official lapses are apparent. The procedures as contemplated under the Act are clearly violated. There is no provision under the Act to issue three show cause notices on the same allegations and in different periods. Admittedly, the first notice was issued on 09.01.2006. The petitioner submitted objections on 27.12.2006. They kept the file pending and after a lapse of 9 years, the impugned notices were issued on 08.12.2015 and 10.06.2016. This being the factum, the impugned notices are issued without jurisdiction and beyond the period of limitation and therefore, no legs to stand under the scrutiny of law. Accordingly, the impugned notices are quashed.

17. State Revenue is a Constitutional mandate. Therefore, the State is bound to protect the interest of Revenue for the welfare of the people at large. Public policies can be effectively implemented only if the State Revenue is protected. Therefore, it is the duty mandatory on the part of the State to protect the Revenue. It is the Constitutional duty of the day of the Government. Court being the custodian of the Constitution, must ensure that violations of tax laws at the instance of the officials must be seriously viewed and such officials working in the Tax Department are expected to be prudent and initiate action strictly by following the procedures as contemplated under the Statute. In the event of any violation by the authorities, such violations cannot be treated lightly and all suitable actions are to be initiated. Indian Constitution is a

visionary document. It is not a provisions of law, but Constitution has got a greater vision and the inherent visions within the Constitution are to be culled out by the Constitutional Courts for the development of democracy in our country. This exactly is the march of law and duty of the Constitutional Courts to trace out the visions, which all are inbuilt within the Constitutional provisions to make the democracy more vibrant, so as to ensure that there is a consistent development in the society as a whole.

18. For the purpose of bringing the visionaries, within the Constitution, the protection of State Revenue is of paramount importance. Only if the Revenue of the State is protected, it is possible to attain the vision as well as the improve the Status of the people in an equal manner. Equality in economic status is a directive principle. Equality in economic status being a principle enunciated under the Constitution. State and the Citizen are bound to thrive hard to achieve the principles to remove the inequalities and wider differences amongst various classes of people across the country. In the event of dereliction of duty, irregularity, illegality and lapses in the matter of protecting the State Revenue, undoubtedly, the rich will become richer and the poor will remain as poors. Take a case, where the business community is allowed to escape from the clutches of tax laws, evasions etc., they became richer and richer. However, the poor man always pays the tax as they are purchasing the essential commodities from such traders. Thus, the poor persons are forced to pay tax as applicable. However, the rich persons / traders are trying to evade or escape from the clutches of taxes, which creates and develops an inequality, which is opposed to the Constitutional principles.

19. Taking note of the facts and circumstances, this Court is of an opinion that the Principal Secretary / Commissioner, Commercial taxes Department, must look into these aspects as many such writ petitions are filed with reference to the lapses on the part of the authorities in pursuing the action, which causes prejudice to the interest of the State Revenue. Thus, such lapses, if at all identified, suitable departmental actions are to be initiated against the officials, who all are responsible and accountable. The loss of Revenue, if any identified, must be recovered from those officials. Unless such actions are initiated, this Court is of the opinion that the department is failing in its duty to protect the interest of the State Revenue as mandated under the Constitution of India.

20. Thus, the Principal Secretary / Commissioner, Commercial Taxes Department, Ezhilagam, Chepauk, Chennai- 600 005, is suo motu impleaded as Respondent No.2 in this writ petition and directed to issue suitable actions in all such cases, where the

files are kept pending years together without any actions and identify the possibility of collusion, inactions, corruptions, lapses, dereliction of duty, negligence etc., and initiate all further actions.

21. Accordingly, the impugned notices dated 08.12.2015 and 10.06.2016 in proceedings in TNGST/1540291/2003-04 is quashed and the writ petition stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

Kak

To

1. The Assistant Commissioner (CT)
Nandanam Assessment Circle,
No.46, Greenways Road,
Chennai - 600 028.
2. The Principal Secretary / Commissioner,
Commercial Taxes Department,
Ezhilagam,
Chennai - 600 005.

+1 cc to Mr.R.Sundaram,Advocate Sr.No.37148
+1 cc to the Government Pleader,Advocate Sr.No.37428

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SS[co]
NSK 20/09/2021