BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 15.04.2021

CORAM

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

W.P.(MD)Nos.19701, 20826,27058 & 27059 of 2019
and
WMP(MD) Nos.16182,17412, 23398 & 23400 of 2019

P.Rajendran ... Petitioner in WP(MD) No.19701/ 2019

M.Krishnamoorthy ... Petitioner in WP(MD) No.20826/2019

K.Annadurai ... Petitioner in WP(MD) Nos.27058 & 27059/2019

Vs.

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

2.The Assistant Commissioner (CT),
Sivagangai Assessment Circle,
Commercial Taxes Office,
No.3, Oversupillai Street,
Sivagangai - 630 561. ... 2nd Respondent in WP(MD)Nos. 19701/2019 and 20826/2019

3.The State Tax Officer,
Devakottai Assessment Circle,
Commercial Taxes officer,
No.10A, Anna Salai Street,
Devakottai,
Sivagangai District - 630 302. ... 2nd Respondent in WP(MD)Nos. 27058/2019 and 27059/2019

COMMON PRAYER: Writ petitions filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records pertaining to the impugned proceedings of the second respondent in TIN:33285401237/2010-11, dated 22.03.2017, TIN:33705401297/2012-2013 dated 18.05.2017, TIN:33075460959/2009-10

(D-7) dated 15.06.2018 and TIN:33075460959/2011-12(D-28) dated 15.06.2018 and quash the same.

For Petitioner : Mr.Raja Karthikeyan
For Respondents : Mrs.J.Padmavathi Devi
Special Government Pleader
(In all WPs.)

COMMON ORDER

These instant Writ Petitions have been filed by the petitioners to quash the impugned proceedings of the second respondent.

2. The petitioners are the work contractors registered with the second respondent. According to the petitioners, the second respondent after passing deemed cum original assessment orders under Section 22(2) of the TNVAT Act, had revised the assessment order under Section 27 of the TNVAT Act, by adding adhoc addition for certain defects in the accounts. The grievance of the petitioners is that the second respondent passed the impugned Revision of Assessment orders even without any new/fresh facts or materials, de hors the records and on mere change of opinion, which is against the provisions of the TNVAT Act.

3.The learned counsel for the petitioner would submit that the alleged purchase suppression pursuant to the web report is totally strange and even the copies of the alleged web report have not been served on the petitioners. To support the aforesaid contention, the learned counsel would rely upon the judgment of this Court in the case of ***Tvl.JKM Graphics Solution Pvt Ltd, reported in 99 VST page 343***, in which, it has been held that the web report shall only be a starting point of enquiry and a detailed intra-department enquiry shall by conducted before making an assessment based on the web report. The learned counsel for the petitioner would also rely upon the similar order of this Court made in batch of Writ Petitions in W.P(MD)Nos.16874 to 16878 of 2018 etc.,and would pray to quash the impugned orders.

4.The learned Special Government Pleader appearing for the respondents would reiterate the contentions set out in the counter affidavit. She would produce the latest circular No.5 of 2021 LW10/12521/2016, dated 24.02.2021 issued by the Office of the Principal Secretary/Commissioner of Commercial Taxes, Chennai before this Court, wherein, procedure has been evolved for all the pending and future litigations pertaining to mis-match issues.

5.Heard the learned counsel appearing for the petitioner and the learned Special Government Pleader appearing for the respondents.

6.As pointed out by the learned counsel for the petitioner that the issues involved in these present writ petitions are squarely covered by the order of this Court in batch of Writ Petitions in W.P (MD)Nos.16874 to 16878 of 2018 etc, wherein, the learned single judge has elaborately discussed the issue in question and the relevant paragraphs are extracted hereunder for better appreciation.

> "4.In all these cases, the assessing officer had imposed penalty by separate orders. As pointed out by the learned counsel appearing for the writ petitioners, the penalty can be imposed by separate orders only under Section 22(5) of the TNVAT Act. If penalty is to be imposed under Section 27(3) of the TNVAT Act, then it has to form part of the assessment order and not by a separate order. This principle is no longer res integra. It has been so held as early as in the decision reported in (1976) 38 S.T.C. 382(Mad) (The Deputy Commissioner (C.T), Coimbatore Vs. V.S.R.Ramaswami Chettiar and Bros). The said decision was followed in the decision reported in (2011) 37 V.S.T. 592 (mad) (Rainbow Foundations Ltd., V.Assistant Commissioner (C.T)(FAC), T.Nagar (South) Assessment Circle, Chennai). It has been held that an order passed by the assessing authority levying penalty through an independent order is bad in law. Therefore, respectfully following the aforesaid decisions, the orders of penalty imposed in these writ petitions stand set aside.
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> 5.A mere look at the impugned orders indicates that the impugned exercise was undertaken not pursuant to any discovery of new material. The very recital paragraph starts as follows:-
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> "Verification of the assessment records reveals that..."
>
> It has been consistently held that the reopening of assessment by change of opinion is impermissible. This proposition was reiterated by the Honourable Supreme Court in the decision reported in (1993) V.S.T.441 (Ravi Prakash Refineries (P) Ltd, Vs.State of Karnataka).
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> 6.The learned counsel appearing for the writ petitioners also placed reliance on the decision of this Allahabad High Court reported in (1998) 109 S.T.C 631 (All) (Parikh and Sons V.Trade Tax Officer, Sector 6) in which it has been stated that irrespective of the amplitude of the language used in the statutory provisions, reassessment proceedings are not

permissible on mere change of opinion by the statutory authority at a subsequent stage.

7.In the present case, it appears that reassessment proceedings have been initiated following the raising of objections of the internal audit.

8.The petitioners herein are works contractors. The purchase tax under Section 12 of the TNVAT Act has been levied on them. It has been held in the decision reported in (1986) 61 S.T.C 337 (The State of Tamil Nadu Vs.East Coast Constructions and others) that where the goods have been used in the construction of buildings, such user cannot be said to be a disposal of goods as contemplated by clause (b) of Section 7-A(1) of the Tamil Nadu General Sales Tax Act, 1959. The said provision is in pari materia with Clause (b) of Section 12 of the TNVAT Act. The transaction in which the petitioners are engaged is said to constitute deemed sales.

9.Therefore, when the petitioners have already been visited with tax on that count, they cannot also be saddled with levy of purchase tax. Therefore, for all these reasons, the orders impugned in these writ petitions are set aside. The Writ Petitions stand allowed, accordingly. No costs. Consequently, connected Miscellaneous Petitions are closed”

7.Admittedly, in all these cases, penalty has been imposed vide separate orders. It has been held that when imposing penalty under Section 27 of the Act, the same will have to form part of the assessment order and they cannot be levied though a separate order. Therefore, imposition of penalty in these cases is bad in law. Likewise, the petitioners being works contractors engaged in civil construction, cannot be levied with purchase tax. Therefore, levying purchase tax also will have to go. But then, this Court accepts the submission of the petitioner's counsel that the impugned proceedings will have to be questioned on the ground of change of opinion. The impugned orders would indicate that the revision is an outcome of the verification of the assessment records. It is also a fact that the assessing officer proceeded based on the web report which indicates mismatch. Therefore, the impugned proceedings cannot be characterized as being grounded only on change of opinion. But then, when according to the assessing officer, there is a purchase omission, the assessing officer could not have simultaneously resorted to adhoc addition. But then, while revising the petitioner's assessment on the ground of purchase omission as disclosed by the web report, the assessing officer will have to follow the procedure contemplated in Circular No.5 of 2021 LW10/12521/2016, dated 24.02.2021 issued by the Office of the Principal Secretary/Commissioner of Commercial Taxes, Chennai.

8.The Writ Petitions stand allowed, accordingly. The matter is remitted to the file of the second respondent to pass orders afresh in accordance with law. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/
Assistant Registrar(Records)

/True copy/

/ /2021
Sub Assistant Registrar(CS-)

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

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),
Sivagangai Assessment Circle,
Commercial Taxes Office,
No.3, Oversupillai Street,
Sivagangai - 630 561.

3.The State Tax Officer,
Devakottai Assessment Circle,
Commercial Taxes officer,
No.10A, Anna Salai Street,
Devakottai, Sivagangai District - 630 302.

+1 cc to Mr.B.Rooban, Advocate in SR No.16069
+1 cc to The Special Government Pleader in SR No.15992 & 16041)

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and
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