BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **24.08.2021**

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THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P.(MD)No.11164 of 2014
and
M.P.(MD)No.1 of 2014

M/s. Koya & Company Industries (Pvt) Ltd,
(Now merged with M/s. Koya & Company
Construction Ltd),
Represented by its Managing Director,
T.K.M. Koya. ... Petitioner

Vs.

The Assistant Commissioner (CT),
Thanjavur. ... Respondent

Prayer: Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Certiorari, calling for the records, relating to the Assessment Order passed by the respondent in TNGST 3821966/2004-05, dated 28.05.2014 and quash the same as illegal, without jurisdiction.

For Petitioner : Mr.A.Thiyagarajan
Senior Counsel for S.Karunakar

For Respondent : Mr.R.Sureshkumar
Government Advocate (Civil Side)

ORDER

The prayer sought for is for a Writ of Certiorarified Mandamus, calling for the records, relating to the Assessment Order passed by the respondent in TNGST 3821966/2004-05, dated 28.05.2014 and quash the same.

2.It is the case of the petitioner that, the petitioner is a manufacturer of PSC and MS pipes registered as a Company under the Companies Act. The petitioner is registered as a dealer under the erstwhile Tamil Nadu General Sales Tax Act, (in short “TNGST Act”) in TNGST No.3821966 also registered under the CST Act in CST No.236175.

3.The petitioner was assessed to tax under the TNGST as well as CST Act, as per the returns submitted by the petitioner regularly. Insofar as the assessment year 2004-05 is concerned, which was to be dealt with under TNGST Act, there was no proceedings initiated and was pending as on 01.07.2005, when the Tamil Nadu Value Added Tax Act, 2006, (in short "TNVAT Act") came into effect. Therefore, after 01.07.2007, no action can be taken against the petitioner for the assessment year 2004-05.

4.However, the respondents had issued a best of judgment notice on 23.04.2009 proposing to assess the petitioner on a total and taxable turnover of Rs.24,29,46,466/- with penalty to be levied under Section 12 (3)(b) of the TNGST Act. In response to the same, the petitioner had filed objection explaining the annual returns relating to the facts and figure in the returns regarding works conduct purchase etc. Thereafter, again on 31.12.2010, after the best of judgment assessment notice dated 23.04.2009, it was proposed to assess the petitioner on total and taxable turn over of Rs.11,89,61,888/- at different rate on different turnover. The respondent revenue had also proposed to levy penalty under Section 12(3)(b) of the TNGST Act and also levied additional sales tax and penalty under Section 3(b) of the Additional Sales Tax Act.

5.In this context, it is the definite case of the petitioner that, in response to the said revised pre assessment notice dated 31.12.2010, which the petitioner received on 28.03.2011, the petitioner had given a detailed reply on 18.05.2011 and the copy of the same along with an acknowledgment by way of a local delivery book shows that the said reply had been delivered to the office of the respondent, which have been filed in the typed set of papers.

6.Therefore, the petitioner was in the impression that subsequently, on the basis of the reply submitted by the petitioner dated 18.05.2011, the respondent would consider the same and drop the proceedings. However, a revised notice once again was issued on 16.03.2013 followed by the impugned assessment order dated 28.05.2014, wherein the proposal already made has been confirmed. However, in the order impugned dated 28.05.2014, the earlier revised pre assessment notice dated 31.12.2010 as well as the objection/reply submitted by the petitioner dated 18.05.2011 has not at all even been recorded. Therefore, without even having considered the reply given by the petitioner and even without verifying the pre assessment notice dated 31.12.2010, straight away the present assessment order dated 28.05.2014 has been passed. Therefore, the order impugned is vitiated because of non consideration of the reply given by the petitioner, as there had been no whisper about the pre-assessment notice as well as the objection of the petitioner as referred to above in the very impugned order itself. Hence, Mr.A.Thiyagarajan, learned Senior Counsel for the petitioner seeks indulgence of this Court to set aside the order.

7.Per contra, Mr.R.Sureshkumar, learned Government Advocate appearing for the respondent, by relying upon the averments made in the counter affidavit as well as after having perused the original files would submit that, the best of judgment notice was given on 23.04.2009 and subsequently, on two occasions, the petitioner had given request letters to the respondent Department seeking adjournments or seeking some time to reply. According to the learned Government Advocate, on first time, the said request letter had been given on 30.03.2013 and one more request letter was given seeking time. Therefore, according to the learned Government Advocate, relying upon the original of the two letters referred to above of the petitioner assessee, which are available in the original files, the learned Government Advocate would submit that, except these letters, no reply whatsoever had been filed by the petitioner. Therefore, the present stand taken by the petitioner that he had given reply on 18.05.2011, which has not been considered by the respondent before passing the assessment order, is untenable. Therefore, on that ground, no interference is called for in the impugned order and the learned Government Advocate therefore seeks dismissal of this writ petition.

8.I have considered the said rival submissions made by the learned counsel appearing for both parties and have perused the original files produced by the learned Government Advocate in this matter.

9.It is the definite case of the petitioner that there has been a revised pre assessment notice dated 31.12.2010, having receipt of the same by the petitioner on 28.03.2011, petitioner had replied on 18.05.2011 and the reply had been given personally by direct hand delivery and acknowledgment to that effect recorded in the local delivery book, maintained by the petitioner assesse has also been filed before this Court. Relying upon these documents, learned Senior Counsel appearing for the petitioner would vehemently contend that, without having recourse to the said revised pre assessment notice as well as the objection/reply submitted by the petitioner, since the assessment order, which is impugned herein, has been passed, the impugned order itself is vitiated.

10. In order to ascertain the same, the entire records produced by the learned Government Advocate were perused by this Court, in which, nowhere, a copy of the revised pre assessment notice dated 31.12.2010 as well as the reply dated 18.05.2011 of the petitioner are found.

11. In this regard, It is pertinent to note that, if it is a case of the petitioner that it has given reply on 18.05.2011, as the same has not been form part of the records maintained by the respondent, a defence can be taken by the respondent that no such reply has been taken.

12. However, the very revised pre assessment notice dated 31.12.2010, which has been replied by the petitioner on 18.05.2011 itself is not available in the original files. Therefore, there has been some missing of papers, where cogently the issue has not been followed by the respondent, it seems. If at all any revised pre assessment notice dated 31.12.2010 has been served on the petitioner and the copy of the same has been filed in the typed set of documents of the petitioner, certainly, that should be form part of the original files. Since only pursuant to the said revised pre assessment notice dated 31.12.2010, it is the claim of the petitioner that it has given reply on 18.05.2011, that should also form part of the records.

13. Neither notice nor reply since have been made available in the original records, this Court draws an adverse conclusion that there has been missing of some papers in the original files. Therefore, without having considered the said developments, where notice has been given sometime in the year 2010, for which reply had been given by the petitioner in 2011, the impugned order since has been passed on 28.05.2014 without even having any reference to those documents, it is *prima facie* unjustifiable and untenable. Therefore, on that ground, as rightly contended by the learned Senior Counsel appearing for the petitioner assessee, the impugned order can be interfered with.

14. In that view of the matter, this Court is inclined to dispose of this Writ Petition with the following order:

> that the impugned order is hereby set aside and the matter is remitted back to the respondent for reconsideration. A copy of the reply dated 18.05.2011 submitted by the petitioner can be obtained from the petitioner once again and apart from the same, if any further reply or objection or input if the petitioner wants to supply to the respondent for reconsideration, that can also be permitted to be collected from the petitioner and after collecting all those documents, it is open to the respondent to go into the merits of the said claim made by the petitioner and accordingly, an opportunity of being heard to the petitioner can be given, thereafter, the needful shall be undertaken and final order shall be passed by the respondent, within three months.

15. With these directions, this Writ Petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

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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

The Assistant Commissioner (CT).
Thanjavur.

+1 CC to M/s.GP (SR-27212[F] dated 25/08/2021)

+1 CC to M/s.S.KARUNAKAR, Advocate (SR-27335[F] dated 25/08/2021)

W.P.(MD)No.11164 of 2014
Dated:
24.08.2021

RK(12.10.2021) 5P 4C