BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 19.03.2021
CORAM:
THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN
W.P.(MD)No.13800 of 2018
and
W.M.P.(MD)Nos.12515 & 13748 of 2018

Tvl.Siva Foods,
Represented by its Partner A.Kathiresan,
No.2/223, Semboor Road,
Therkutheru, Melur. ... Petitioner

-Vs-

The State Tax Officer,
Commercial Tax Building,
Melur. ... Respondent

PRAYER: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, to call for the records in TIN 33044941686/2015-16, dated 28.03.2018 and consequential order dated 17.04.2018 passed under Section 84 of TNVAT Act and quash both as illegal, arbitrary and without jurisdiction being contrary to the Judgments of this Court reported in the case of State of Tamilnadu Vs. Sayar Jewellery (2012) 54 VST 383 (Mad) and the Assistant Commissioner (CT), Koyambedu Assessment Circle, Chennai Vs. Infiniti Wholesale Limited Vs. Reported in (2017) 99 VST 430 and further, direct the respondent to conduct an enquiry with other end dealers by considering the replies dated 02.12.2017, 27.02.2018 and 28.03.2018 as contemplated under Section 27 of TNVAT Act, 2006 and pass a assessment order afresh in the light of the guidelines enunciated in the batch of writ petitions in the case of M/s.JKM Solutions Private Limited reported in 2017(99) VST 343 (Mad) including the opportunity of personal hearing.

For Petitioner : Mr.N.Sudalai Muthu
for Mr.S.Karunakar
For Respondent : Mr.G.Arjunan
Government Advocate

ORDER

Heard the learned counsel on either side. The assessing officer also appeared before the Court through video conferencing and assisted the Court.

2.The petitioner is a manufacturer. He is also a dealer registered with the respondent. The case on hand pertains to the assessment year 2015-16. Originally, the petitioner's assessment was concluded on deemed assessment basis under Section 22(2) of TNVAT Act. Subsequently, the petitioner's place of business was searched by the Enforcement Wing Officials on 08.11.2016 and 27.02.2016. That was pursuant to the search operation earlier conducted by the Central Excise Officials on 18.11.2015. Based on these developments, the respondent issued pre-revision notice. In fact, the petitioner's counsel would point out that in respect of the single assessment year, as many as three revision notices were issued. Be that as it may, the impugned order came to be passed levying tax and penalty on the petitioner. The same is questioned in the writ petition.

3.This Court, while entertaining the writ petition, granted unconditional interim order of stay. This was because, this Court went by the fact that the impugned proceedings were a direct fall out of the operation conducted by the Central Excise Department. It is stated that when the writ petition was filed, the proceedings initiated by the Central Excise Department were still pending. In similar circumstances, this Court, vide order dated 29.01.2018 in W.P.(MD)Nos.1159 to 1162 of 2018, had directed that the proceedings initiated by the respondents shall be kept in abeyance till the Central Excise Department's proceedings are concluded.

4.But when the writ petition was taken up for final hearing, this ground was no longer available for the assessee. This was because, the petitioner appears to have accepted the demand raised by the central excise department. Therefore, this order can no longer be questioned as having been dictated by the stand taken by the Central Excise Department.

5.The primary ground urged by the learned counsel for the petitioner is that the food product jelly manufactured by the petitioner could have been taxed only at 5%. The respondent has filed a detailed counter affidavit and it is contended therein that the petitioner's food product is a branded item and that therefore, it is liable to be taxed at 14.5%. The expression “branded” is defined in Section 2(9) of the TNVAT Act, as follows:-

> (9) “***branded***” means any goods sold under a name or a trade mark registered or pending registration or pending registration of transfer under the Trade and Merchandise Marks Act, 1958 (Central Act 43 of 1958) or the Trade Marks Act, 1999 (Central Act 47 of 1999).

6.The Government Advocate as well as the assessing officer would claim that the burden to show that the goods in question are not branded items is on the assessee. I do not accept this contention. The stand of the petitioner is that jelly manufactured by them is being sold not as a branded item. The product manufactured by the petitioner can be categorized as branded item only if it has been registered or if it is pending registration. It is not difficult to ascertain this fact.

7.I find that the enquiry conducted by the respondent has not proceeded on these lines. That apart, the learned counsel appearing for the petitioner would strongly contend that the goods in question would fall under Entry No.107 part B of the 1st schedule (commodity code 2017). He would point out that all the goods set out in Part B can be taxed only at 5%, Whether they are branded or not branded. I leave this issue open. In as much as the impugned order has not proceeded on the correct lines and has rather placed the entire burden on the assessee, I am constrained to interfere.

8.Before commencing his arguments, the learned counsel appearing for the petitioner, on instructions, undertook that on or before 31.03.2021, the petitioner would pay a sum of Rs.5,00,000/- and a further sum of Rs.40,00,000/- would be paid before the end of April 2021. Apart from this primary contention, the learned counsel also raised few other issues. He would state that though personal hearing was originally granted by the assessing officer, post three show cause notices, the petitioner was not given any personal hearing. He would emphasize the fact that when the notice has been revised, it is the incumbent on the part of the assessing officer to grant one more opportunity of personal hearing.

9.I find merit in this contentions. The impugned order is vulnerable on another count also. One of the defects pointed out by the respondent rests on mismatch. But then, the procedure laid down in *J.K.M.Graphics Solution Private Limited Case* was not followed. No enquiry with the other end dealer was conducted. The impugned order is finalised atleast partly on that count also. Yet another defect rests on what is known as BIU report. According to the respondent, the petitioner had transacted with the persons mentioned in the report. The petitioner completely denied the said transaction. In that event, it is the assessing officer who has to establish that those transactions had actually taken place and that the petitioner had failed to remit the tax or disclose the same in their returns. In the instant case, again the authority cast the entire burden on the petitioner and accepted the BIU report as a whole. Another defect alleged by the assessing officer is based on stock difference. The petitioner's specific case is that even though he has submitted the relevant records to explain the alleged stock difference, still the assessing officer appears to have gone by what was stated in the notice itself. The respondent has to necessarily redo the entire exercise.

10.Therefore, I am of the view that on this count also, the impugned order may have to be quashed. For all these reasons, the order impugned in the writ petition is quashed. The Writ Petition is allowed. The matter is remitted to the file of the respondent to pass orders afresh in accordance with law. The petitioner is strictly directed to adhere to the undertaking to remit the entire sum of Rs.45,00,000/- in terms of the time line indicated above. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

// 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 State Tax Officer,
Commercial Tax Building,
Melur.

+1 CC to M/s.S.KARUNAKAR, Advocate (SR-12648[F] dated 22/03/2021)

+1 CC to M/s.SPL GP (SR-12768[F] dated 22/03/2021)

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