

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21.09.2022

CORAM:

THE HONOURABLE MRS.JUSTICE J. NISHA BANU

and

THE HONOURABLE MR.JUSTICE N. ANAND VENKATESH

W.A(MD)No.1258 of 2013

and

M.P.(MD)Nos.1 & 2 of 2013

M/s. V.R.Muthu & Bros.,
Rep. by its Partner,
443, Main Bazaar,
Virudhunagar.

... Appellant/Petitioner

Vs.

1.The Joint Commissioner (CT) (Enforcement),
Tirunelveli.

2.The Commercial Tax Officer,
Virudhunagar - I Assessment Circle,
Virudhunagar.

...Respondents/Respondents

PRAYER: Writ Appeal filed under Clause 15 of the Letters Patent
praying this Court to set aside the order passed by this Court in
W.P(MD)No.16205 of 2013, dated 03.10.2013.

For Appellant : Mr.S.Raja Jeya Chandra Paul

For Respondents : Mr.R.Baskaran,
Additional Advocate General

JUDGMENT

J. NISHA BANU, J.

AND

N. ANAND VENKATESH, J.

The subject matter of challenge in this writ appeal pertains to the order passed by the learned Single Judge allowing the writ petition, but however, granting liberty to the Commissioner (CT) Chennai, to delegate the power to an Officer not below the rank of Deputy Commissioner (CT) and to conduct the enquiry. The liberty that was granted by the learned Single Judge alone has been put to challenge in this writ appeal.

2. The petitioner challenged the impugned proceedings of the first respondent, dated 16.09.2013, whereby, the Joint Commissioner (CT), Tirunelveli Division, has passed an order to the effect that the petitioner must prepare themselves for a proposed VAT audit and to co-

operate with the audit officers by producing the monthly returns, books of accounts, stock statements, etc., for the period from 2008-2009 to 2013-2014.

3. The learned Single Judge, after referring to Section 64 (4) of the TNVAT Act, came to a conclusion that the first respondent namely, the Joint Commissioner (CT), Tirunelveli Division, did not have the approval on the authority given by the Commissioner to issue the impugned proceedings. Hence, while allowing the writ petition, the Commissioner was directed to delegate the power in terms of Section 64(4) of the TNVAT Act.

4. Heard Mr.S.Raja Jeya Chandra Paul, learned counsel appearing for the appellant and Mr.R.Baskaran, learned Additional Advocate General appearing for the respondents.

5. The issue that has been raised in the present appeal is no longer *res integra* and the Division Bench of this Court has settled the issue in **Joint Commissioner (CT), Chennai and others Vs. M/S. Original Vel Sporting News, Rep. by its Manager, Mr. Dinesh Kumar**

Soman in W.A.(MD) No.1757 of 2019 by order, **dated 04.06.2019**. The Division Bench was considering the scope of Section 64 (4) of TNVAT Act and it was held as follows :

"8.Coming to the provisions of the Act itself, let us first quote Section 64, which deals with the "Maintenance of upto date, true and correct Accounts and Records by the Dealers", particularly Sub-Section (4), thereof with which we are concerned in the present case. The said provision in its entirety is quoted below for ready reference.

"64 - Maintenance of upto date, true and correct accounts and records by dealers:-

(1) Every person registered under this Act, every dealer liable to get himself registered under this Act, and every other dealer who is required so to do by the prescribed authority by notice served in the prescribed manner, shall keep and maintain an up-to-date, true and correct account showing full and complete particulars of his business and such other records as may be prescribed in any of the languages specified in the Eighth Schedule to the Constitution or in English, showing such particulars as may be prescribed and different particulars as may be prescribed for different classes of dealers.

(2) (a) Every registered dealer shall keep at the

place of business specified in the certificate of registration, books of account for the current year. If more than one place of business in the State is specified in the certificate of registration, the books of account relating to each place of business for the current year shall be kept in the place of business concerned.

(b) Every registered dealer shall also ordinarily keep the books of account for the previous 2[six years] at such place or places as he may notify to the registering authority. If the registered dealer decides to change the place or places so notified, he shall, before effecting such change, notify the same to the registering authority.

(3) Every registered dealer or person who moves goods in pursuance of a sale or purchase or otherwise from one place to another shall send along with the goods moved a bill of sale or delivery note or such other documents, as may be prescribed.

(4) The Commissioner may order for audit of the business of **any registered dealer** by an officer not below the rank of [Deputy] Commercial Tax Officer. For the purpose of this section, the selection of dealers for audit shall be made from amongst the dealers,-

(a) who have not filed returns within the

prescribed period; or

(b) who have claimed exorbitant amount of refund of tax; or

(c) who have filed returns, but in the opinion of the Commissioner he is not satisfied with the correctness of any return filed, any claim made, deduction claimed or turnover disclosed in any such return; or

(d) on the basis of any other criteria or on a random selection basis by the Commissioner; or

(e) where detailed scrutiny of the case is necessary in the opinion of the Commissioner."

9.The provisions of sub-Section (4) of Section 64 empowers the Head of the Department viz., the Commissioner to order for an audit of the business of any registered dealer by an officer not below the rank of the Deputy Commercial Taxes Officer, who is much lower authority in the hierarchy. The criteria of selection of dealers of such audit as enumerated in clauses (a) to (e) of Sub-Section (4) could be broadly construed to be "Defaulter Dealers" viz., those Dealers

- i) who have not filed returns;
- ii) who have claimed exorbitant refund of tax;
- iii) whose returns are not correct;
- iv) any other criteria or on a random selection

basis.

v) where details, are to be scrutinized in the opinion of the Commissioner.

10. It is clear that the said sub-section (4) does not empower the Commissioner to delegate the power to pass order to any lower authority. Therefore, the application of mind by the Commissioner himself about the nature of the default by the particular Assessee concerned and therefore there is a need to audit the books of accounts and other revenue records of the business of that Assessee has to be recorded by the Commissioner himself. The words "any registered dealer" in Sub-Section (4) indicates a singular dealer and not a group of Dealers. Therefore, such orders under Section 64(4) cannot be passed for a group of registered dealer in one go. The recording the opinion about the default of the assessee cannot be construed to be an administrative function or administrative order passed by the Commissioner. Therefore, such an order under Section 64(4) of the Act can be nothing but a quasi-judicial order, entailing civil consequences for the Assessee or Dealer concerned. In view of this, the orders to be passed under Section 64(4) of the Act have to meet the principles of natural justice viz., the compliance of the principles of audit alteram partem,

giving of a notice and opportunity of hearing to the assessee concerned. The Assessee before the Commissioner can always contend that no such default as stipulated in Section 64(4) clauses (a) to (e) is made out against him and if he places such a case before the learned Commissioner, it is incumbent upon of the Commissioner to apply mind and pass appropriate speaking and reasoned order in this regard. Therefore, passing of an omnibus or general order to audit of business of dealers like done in the present case, does not fit in the scheme of Section 64(4) of the Act at all. Laying down of certain criteria, as has been done in the order dated 16.05.2014, is nothing but specifying certain limits of the criterias specified in Section 64(4) of the Act.. Even in the provision itself, the Commissioner under Section 64(4) of the Act is not expected to issue a general guideline or a Circular for guiding all the lower authorities. Section 64(4) of the Act envisages an individual order for audit of the books and accounts and other revenue records of the assessee for a particular period and it has to be individual order showing the application of mind to the facts and circumstances of each case for each period. The power to delegate further is not provided under Section 64(4) of the Act. Therefore, the manner in which the

impugned order dated 16.05.2014, has been passed by the learned Commissioner laying down certain limits or criterias quoted above leaving it free for the Joint Commissioner to authorise officers below to undertake such audit is wholly untenable and unsustainable order.

11. The audit of the books and accounts of an assessee is required not only under the provisions of Section 64 (4) of the Act but such provisions, which may be applicable to the assessee concerned, may be under the other relevant statutes also like the provisions of the Companies Act, if an assessee is a limited Company, under the provisions of the Income Tax Act, vide Section 142(2A) thereof as well. The Income Tax Act even contains a provision in Section 142(2A) for direction of the special audit by the Authority concerned after giving an opportunity of hearing to the assessee. Therefore, directing the audit of the accounts of the company of the assessee is a serious matter and is not a simple administrative act. A reference hereto the judgment of Karnataka High Court in **M/s.Karnataka Industrial Area Development Board vs Assistant Commissionr of Income Tax in W.P.No.1863 of 2017 connected with W.P.No.25223 of 2016 dated 02.01.2018** is

appropriate.

12. The report or material collected through such proceedings is liable to be used as a material or evidence against the Assessee during the course of assessment proceedings under the provisions of the Act. Paragraph 2 of the said order itself envisages such audit proposals to be sent to the territorial authorities. It is not supposed to be exercise in vacuum, but it is for collecting necessary material against the assessee and as an Antievasion measure. Therefore, while such a provision could have been incorporated in the scheme of Act as have been done in Section 64(4) of the Act, the fact remains that the conditions and circumstances for applying the said provisions to the Assesseees have to be strictly construed and it cannot be left at the free and sweet will of the concerned authorities to order audit of any business of the registered dealers just like that.

13. Therefore, we are of the considered view that the order of the learned Commissioner under Section 64(4) of the Act is a quasi-judicial order, requiring a prior notice of hearing to the assessee and passing of a reasoned speaking order in individual cases of registered dealers for conducting audit by the

specified Authority as directed by the Commissioner.

The order dated 16.05.2014 does not meet these requirements of law at all."

6. It is clear from the above that under Section 64(4) of the Act, it does not empower the Commissioner to delegate the power and to pass orders to any lower authority and the Commissioner himself will have to pass orders.

7. In view of the same, the direction given by the learned Single Judge directing the Commissioner to delegate the power, is not sustainable. Hence, the consequential direction issued by the learned Single Judge is liable to be interfered with by this Court in line with the earlier Division Bench referred supra.

8. In view of the above discussion, it is left open to the Commissioner to exercise his powers under Section 64(4) of the Act, after giving an opportunity to the appellant as mentioned by the Division Bench in the above judgment. The order passed by the learned Single Judge is interfered to that extent.

9. This writ appeal is allowed in the above terms. No costs.

Consequently, connected miscellaneous petitions are closed.

[J.N.B, J.] & [N.A.V., J.]
21.09.2022

Index:Yes/No
Internet:Yes/No
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To

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- 2.The Commercial Tax Officer,
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JUDGMENT MADE IN

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