BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: **11.02.2022**
CORAM:
THE HONOURABLE MR.JUSTICE **C.SARAVANAN**
W.P.(MD) No.13729 of 2013
and
M.P.(MD) No.1 of 2013

M/s.Navas Traders,
represented by its Partner A.Navaz Khan,
... Petitioner

/vs./

The Additional Commercial Tax Officer,
O/o. Commercial Tax Officer,
Ramanathapuram. ... Respondent

PRAYER: Writ Petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari, to call for the records pertaining to impugned order in TNGST No.5441075/2002-2003 dated 15.02.2013 passed by the respondent herein for the assessment year 2002-2003 and quash the same.

For Petitioner : Mr.R.R.Thamothar Raj

For Respondent : Mr.M.Prakash
Additional Government Pleader

ORDER

The writ petition has been filed for a Certiorari calling for the records pertaining to the impugned order dated 15.02.2013 passed by the respondent in TNGST No.5441075/2002-2003 for the assessment year 2002-2003 and quash the same.

2.The learned counsel for the petitioner submits that this is the third round of litigation for the assessment year 2002-2003. The petitioner questioned the inspection made by the Enforcement Wing as it was found that in the said premises, there were about four other sister concerns. It is submitted that the returns were filed and assessment was completed on 15.10.2003. The respondent however issued a notice and revised the assessment by an order dated 31.01.2005. This order was challenged by the petitioner in A.No.75 of 2005 before the Appellate Assistant Commissioner (CT) Station, Virudhunagar. The Appellate Assistant Commissioner, by an order dated 11.07.2005, remanded the case back to the respondent to pass orders afresh, pursuant to which the respondent passed an order dated 30.06.2010.

3.The learned counsel for the petitioner further submits that the order passed on 30.06.2010 was without jurisdiction even though the case had been remanded back to the respondent to pass a speaking order by the Appellate Assistant Commissioner (CT) Station, Virudhunagar, vide order dated 11.07.2005 in A.P.No.75 of 2005. In this connection, a reference was made to paragraph No.5 of the decision of the Division Bench of this Court in ***State of Tamil Nadu Vs. M.M.Mohideen Thamby and Company, dated 05.07.1995***, which reads as under:-

> "*5.The fact remains that in the original assessment for the assessment year 1976-77, the assessing officer considered a turnover of Rs. 2,31,237.83. The Deputy Commissioner, while exercising his suo motu power under section 32 of the Tamil Nadu General Sales Tax Act found that a turnover of Rs. 4,00,012 has escaped the assessment. Hence, he directed the assessing officer to reopen the assessment for the purpose of re-doing the assessment. The original assessment for the assessment year 1976-77 was made on February 28, 1978. Limitation for exercising power under section 32 of the Tamil Nadu General Sales Tax Act would end by February 28, 1983. In between this period, the Deputy Commissioner issued a notice dated January 19, 1983, for reopening the assessment. While exercising his suo motu power, the Deputy Commissioner can direct the assessing officer to reopen the assessment if there is time-limit for reopening. While directing the assessing officer to reopen the assessment, the Deputy Commissioner is also bound by the provisions contained in section 16(1) of the Tamil Nadu General Sales Tax Act. According to section 16(1)(a), where for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the assessing authority may, subject to the provisions of sub-section (2) at any time within a period of 5 years from the expiry of the year to which the tax relates, determine to the best of its judgment the turnover which has escaped the assessment and assess the tax payable on such turnover after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment. Therefore, even if a direction was given by the Deputy Commissioner to reopen the assessment, the assessing officer can reopen the assessment only if them is a period of five years for reopening as contemplated under section 16(1)(a) of the Act. In the present case, the period of 5 years under section 16 of the Tamil Nadu General Sales Tax Act runs up to March 31, 1982. Even the notice issued by the Deputy Commissioner dated January 19, 1983, will not save de period of limitation of 5 years as contemplated under section 16(1)(a) of the Act. Therefore, when there is no time to respect*

the direction given by the Deputy Commissioner for reopening the assessment is barred by limitation and therefore, the reassessment made by including the turnover of Rs. 4,00,012 appears to be not in order. Section 16 is also binding upon the Deputy Commissioner. No doubt, with regard to the turnover originally dealt with by the assessing officer, viz., Rs. 2,31,237.83, addition was made since objection was not made by the assessee. When the reassessment is hit by the period of limitation, the escaped turnover cannot be brought to tax and no penalty proceedings can also be initiated."

4.It is therefore submitted that the proceeding, which has culminated the order dated 30.06.2010, was without jurisdiction. It is further submitted that the petitioner nevertheless preferred an appeal before the Appellate Assistant Commissioner (CT) Station, Virudhunagar in A.P.No.50 of 2010 and that the Appellate Assistant Commissioner (CT) Station, by an order dated 01.02.2010, once again remanded the case back to the respondent to pass a speaking order, which has culminated in the impugned order dated 15.02.2013. The learned counsel for the petitioner submits that none of the submissions of petitioner were considered by the respondent and therefore, on merits the impugned order is liable to be set aside.

5.Opposing the prayer, the learned Additional Government Pleader for the respondent submits that the Appellate Assistant Commissioner (CT) Station, Virudhunagar while remanding the case back, by order dated 01.02.2010 in A.P.No.50 of 2010, had directed the petitioner to produce any records so as to disprove any of the figures adopted by the Department within a period of 60 days from the date of receipt of a copy of the order. It is submitted that based on the order of the Appellate Authority, the petitioner was given an opportunity to produce accounts for verification.

6.It is submitted that though the petitioner appeared and orally explained details, he did not produce any records respect of his explanation. It is further submitted that the petitioner merely filed a Xerox copy of the day book for the year 2002-2003 in respect of M/s.Navas Traders, ie., the petitioner. It is submitted that the petitioner did not produce any records to disprove any of the figures adopted by the Enforcement Wing Officer. Hence, there was a possibility of preparation of second reconsideration statement as ordered by the Appellate Authority.

7.The learned Additional Government Pleader for the respondent submits that the petitioner has an alternate remedy by way of filing a statutory appeal before the appellate Tribunal under Section 31 of the TNGST Act, 1959 and that the present writ petition has been filed only to avoid 25% of the tax as affirmed by the Division Bench of this Court in W.A.(MD) Nos.423 and 424 of 2008 (P.K.Mookanambalam Vs. CTO, Tallakulam Assessment Circle, Madurai) dated 18.06.2008.

8.The learned Additional Government Pleader during the course of the hearing has filed a Xerox copy of the report of the Deputy Commercial Tax Officer (Enforcement), Paramakudi dated 27.09.2004. The report indicates that the petitioner's father had deposed that the stock of all five sister concerns found mingled and available at the above place and that the stock of each concern could not be segregated.

9.I have heard the learned counsel for the petitioner and the learned Additional Government Pleader for the respondent.

10.Though elaborate arguments were advanced on merits, considering the scope of the jurisdiction of this Court under Article 226 of the Constitution of India, I am refraining from adverting into any of the submissions made by the learned counsel for the petitioner and the learned Additional Government Pleader for the respondent on the merits of the dispute regarding the turnover demand. The petitioner has to workout the remedy against the impugned order only before the appellate Tribunal, if the proceeding initiated by the respondent pursuant to the demand was within time and within the jurisdiction of the respondent.

11.The decision of the Division Bench of this Court in ***State of Tamil Nadu Vs. M.M.Mohideen Thamby and Company, dated 05.07.1995***, which was relied upon by the learned counsel for the petitioner, is applicable to the facts of the present case. In the said case, the assessment year was 1976-1977 and the notice was issued for the first time by the Deputy Commissioner on 19.01.1983 when indeed the limitation had expired on 28.02.1983.

12.This Court in the said judgment had further held that while exercising his *suo motu* power, the Deputy Commissioner can direct the Assessing Officer to reopen the assessment if there is time-limit for reopening. While directing the Assessing Officer to reopen the assessment, the Deputy Commissioner is bound by the provisions of Section 16(1) of the TNGST Act, 1959. This Court had therefore held that under Section 16 (1) (a) of the Act, where for any reasons, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the Assessing Authority may subject to the provisions of sub-Section (2) at any time within a period of 5 years from the expiry of the year to which the tax relates, determine to the best of its judgment the turnover, which has escaped the assessment and assess the tax payable on such turnover after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.

13.In this case, the assessment was originally completed on 15.02.2013. The proceeding invoking Section 16 of the TNGST Act, 1959 was made before the expiry of 5 years. In fact, the first assessment order itself was passed on 31.01.2005, which had lead to string of proceeding ie., two appeals before the Appellate Assistant Commissioner (CT) Station, Virudhunagar and two remand orders, one of which dated 15.02.2013 has been challenged before this Court. The decision of the said case therefore does not apply to the facts of the present case. If the invocation of Section 16 of the TNGST Act, 1959 was beyond the period of limitation and the first assessment order was also passed beyond the limitation, such decision can be applicable to the present case, whereas in this case the assessment was reopened and the reassessment order was passed on 31.01.2005, which was well within the 5 years period of limitation. The subsequent remand order will not mean that the subsequent remand orders made by the Authority would be time barred. The observation that even if a direction was given to the Deputy Commissioner to reopen the assessment, the Assessing Officer can reopen the assessment only if it is within a period of 5 years.

14.On these grounds, I do not find any merits in this writ petition. Though a reference was made to the report dated 27.09.2004, I am refraining from making any opinion on the same, as the matter can be decided on merits by the appellate Tribunal under Section 31 of the TNGST Act, 1959. The petitioner has managed to extend the longevity of the litigation over a period of two decades and the petitioner ought to have pre-deposited the amount at the time of filing of the appeal in A.P.No.75 of 2005.

15.Considering the fact that the amount would have been predeposited when the appeal was filed in the first round I am inclined to grant liberty to the petitioner to file a statutory appeal before the appellate Tribunal within a period of 30 days from the date of receipt of a copy of this order. The appellate Tribunal shall entertain the appeal, is such appeal is filed by the petitioner within the aforesaid time and dispose of the same on merits and in accordance with law without reference to the limitation/jurisdiction of the respondent to pass orders.

16.In view of the foregoing discussions and directions, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Deputy Registrar (Accounts)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

mm

To

The Additional Commercial Tax Officer,
O/o. Commercial Tax Officer,
Ramanathapuram.

+1 CC to M/s.SPL GP (SR-5965[F] dated 14/02/2022)

W.P.(MD)No.13729 of 2013
11.02.2022

RK(16/03/2022) 6P 3C