BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 07.04.2022

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P(MD).No.6728 of 2021
and
W.M.P(MD).Nos.5181 and 5184 of 2021

M/s.Vamsha Retail Ventures Private Limited,
Formerly known as M/s.Maharaja Silks,
Represented by its Director,
Mr.Mohammed Mansoor Ali
No.11 & 12, Thanjai Salai Vijayapuram,
Thiruvarur,
Tamil Nadu-610 001. ... Petitioner

Vs.

The Assistant Commissioner of Income Tax,
Central Circle-2, Trichy,
Trichy-Main Building, Williams Road,
Contonment Trichy,
Tamil Nadu-620015. ...Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, calling for the records on the file of the respondent and quash the impugned order in ITBA/AST/S/143(3)/2020-21/1030736209 (1) dated 18.02.2021 passed by the respondent as illegal and without jurisdiction.

For Petitioner : Mr.R.Sivaraman

For Respondent : Mr.N.Dilipkumar
Senior Standing Counsel

ORDER

The petitioner has challenged the impugned assessment order, dated 18.02.2021 for the assessment year 2018-2019.

2.The specific case of the petitioner is that a survey was conducted on 06.03.2018 in the premises of the petitioner and hard disk of the computer containing Tally software details, was taken by the Income Tax Department.

3.The learned counsel for the petitioner submits that the accounts in the Tally software was a draft and unaudited balance sheet, wherein the petitioner had declared a gross profit of Rs.5,65,98,598.35/-, which had to be further refined and audited. It is submitted that after the audit was completed, the petitioner filed a regular income tax return on 29.10.2018 and declared the net profit as Rs.3,32,84,528/- as against the gross income of Rs.3,41,36,190/-.

4.The learned counsel for the petitioner further submits that for the assessment year 2018-2019 onwards, the assessment was to be completed electronically in E-Proceedings facility through E-filing Website of the Income Tax Department. In this connection, the petitioner was issued with a notice under Section 143(2) of the Income Tax Act on 26.09.2019. The learned counsel for the petitioner submits that thereafter on 06.02.2021, another notice was issued to the petitioner under Section 143(2) of the Income Tax Act and in connection with the above, the petitioner was called upon to give details. Specifically, it was stated that the net profit has been reported for the assessment year 2018 - 2019 to the tune of Rs.2,33,14,070/- [Rs.5,65,98,598-3,32,84,528] should not be treated as undisclosed business income and considered for addition. Paragraph 3 of the said notice reads as under:-

> *''(iii) From the above it is apparent that the net profit has been under reported in the return of income for A.Y.2018-19 to the tune of Rs.2,33,14,070 (Rs.5,65,98,598-3,32,84,528). You are required to explain with necessary evidence as to why the above under reported profit of a sum of Rs.2,33,14,070 should not be treated as undisclosed business income and considered for addition.''*

5.The learned counsel for the petitioner submits that the petitioner has clearly explained that the details that were obtained at the time of survey on 06.03.2018 were not audited and they are incomplete records. Therefore, it cannot be treated as income accrued way for the determination of the profit for the assessment year, as several other entries were required to be made.

6.The learned counsel for the petitioner submits that as per the instruction of the Central Board of Direct Taxes, dated 29.12.2015, the respondents were required to issue a show cause notice, which was also reiterated by another instruction, dated 11.07.2016 in CBDT Circular in F.No.225/162/2016/ITA.II. A specific reference was made to another instruction dated 20.08.2018, bearing Instruction No.03/2018 [No.225/249/2018-ITA.II].

7.It is therefore submitted that the impugned order has to go.

8.The learned counsel for the petitioner has also drawn the attention of this Court to the instruction of the Central Board of Direct Tax addressed to the Principal Chief Commissioner of Income Tax, Chennai, in the case of **eShakti.com Private Limited Vs The Assistant Commissioner of Income Tax** in W.P.Nos.1260 and 1264 of 2020, wherein in Paragraph 4 in response to Paragraph 14 of the affidavit filed in support of W.P.Nos.1260 and 1264 of 2020, it was categorically stated as follows:-

> *''(iv) However, by following the principles of natural justice, it is expected that an opportunity of being heard is given to the assessee before making any addition/disallowances which are prejudicial to the interests of the assessee. To give effect to the legislative intent as enshrined in Section 143(2) and 143(3) of the Act, CBDT in its guidelines for conduct of assessment proceedings provides for issue of show cause notice, if any adverse view is taken against the assessee in the interest of principles of natural justice though it is not mandatory as per the provisions of Section 143(3) of the Act.''*

9.The learned counsel for the petitioner submits that in the said Writ Petitions, the Court interfered and ultimately, allowed the Writ Petition by taking note of Paragraph 4 of the instruction of CBDT, dated 29.12.2015. It is therefore, submitted that as there is a manifest violation of the procedure prescribed for E-Proceedings, which was implemented from 2018 - 2019, the impugned order has to go. It is submitted that without issuing a proper show cause notice, where there is a proposal for deviation, the order has to go.

10. The learned counsel for the petitioner submits that the notice issued under Section 143 (2) of the Income Tax Act was a notice without any details to be furnished warranting the documents. Unless the petitioner was given a proper opportunity to reply to notice issued under Section 143 (2) of the Income Tax Act, 1961, the question of treating the subsequent notice, dated 06.02.2021 as the show cause notice does not arise. It is therefore submitted that the impugned order has been passed and the matter is remitted back to the respondent.

11. The learned counsel for the petitioner also submits that in terms of CBTD Circular, dated 20.08.2019, where the show cause notice contemplates any adverse issue by the Assessing Officer and assessee should be given personal hearing. The learned counsel for the petitioner submits that personal hearing is mandatory where books of accounts were examined in terms of Paragraph 6 (1) of the CBTD Instruction No.3 of 2018 bearing reference No.225/249/2018-ITA.II.

12. The learned counsel for the petitioner further submits that as per the CBTD clarification, dated 11.01.2021, wherein it has been specifically clarified personal hearing is a must. He drew attention to Paragraph 4 in response to Paragraph 14 of the affidavit filed in support of the writ petition **eShakti.com Private Limited Vs The Assistant Commissioner of Income Tax.**

13. Opposing the prayer, the learned Senior Standing Counsel for the respondent submits that the petitioner has an alternate remedy under Section 246 A of the Income Tax Act. It is therefore submitted that the writ petition is liable to be dismissed on this preliminary ground. That apart, it is submitted that there is no violation of principles of natural justice inasmuch as the petitioner was issued with a notice under Section 143 (2) of the Income Tax Act, 1961 on 26.09.2019. However, the petitioner has failed to reply the same. Thereafter, the show cause notice issued to the petitioner on 06.02.2021, wherein, the basis on which the proposed assessment was to be completed was articulated.

14. The learned Senior Standing Counsel for the respondent submits that the show cause notice, dated 06.02.2021 specifically refers to the statement of the Managing partner of the petitioner and the documents and evidences recovered during the course of survey held under Section 133 A of the Income Tax Act on 06.03.2018 and 07.03.2018. It is submitted that the petitioner has also replied to the allegations in the said notice and it is only thereafter the impugned assessment order has been passed on 18.02.2021. It is therefore submitted that there is no irregularity committed by the Assessing Officer, while passing the assessment order, dated 18.02.2021.

15. The learned Senior Standing Counsel for the respondent further submits that the decision of this Court in **E.Shakti.com Private Limited Vs The Assistant Commissioner of Income Tax** in W.P.(MD).Nos.1260 and 1264 of 2020, vide order dated 17.06.2021 also does not apply to the facts of the case of the petitioner inasmuch as the Court merely reiterated and concluded as follows:

> *"10. Thus and in view of the confirmation by the CBDT, an important issue stands settled. Though the Income Tax Act does not anywhere contemplate issuance of a show cause notice prior to finalisation of scrutiny assessments, as a matter of procedure and good office, the Assessing Authority is expected to crystalise the issues arising from the return of income filed by an assessee, the questionnaires issued under Section 142(1) and notices under Section 143(2) and responses thereto, issue a show cause notice setting out the issues, solicit the response of the assessee and pass orders only thereafter, after hearing the assessee concerned."*

16. The learned Senior Standing Counsel for the respondent submits that indeed the petitioner was issued with a show cause

notice in this case to which the petitioner has also replied on 12.02.2021. Therefore, there is no merits in this present writ petition. The learned Senior Standing Counsel for the respondent submits that the failure on part of the petitioner to respond to notice under Section 143 (2) of the Income Tax Act, dated 26.09.2019 shows that the petitioner was not serious.

17. The learned Senior Standing Counsel for the respondent further submits that it is not open for the petitioner to state that the reply to the show cause notice, dated 06.02.2021 has to be treated as a reply to the notice under Section 143 (2) of the Income Tax Act, 1961 issued on 26.09.2019. He therefore submits that circular of the board, which has relied upon by the respondent would not come to rescue the petitioner in CBTD circular, dated 11.07.2021, bearing reference F.No.225/162/2016/ITA.II.

18. The learned Senior Standing Counsel for the respondent submits that notice under Section 143 (2) of the Income Tax Act, was squarely covered survey under Section 133 A conducted on 06.03.2018 and 07.03.2018. It is therefore submitted that the present writ petition is liable to be dismissed. The issue relating to merits can be considered only in adjudication in an appellate proceedings in the hierarchy of authorities prescribed under the Income Tax Act, 1961.

19. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Senior Standing Counsel for the respondent. I have also perused the decisions of the learned Single Judge of this Court in **eShakti.com Private Limited Vs The Assistant Commissioner of Income Tax**. I have also pursued the documents filed in support of the present writ petition and circulars issued by the CBTD and instructions of the CBTD in connection with the **eShakti.com Private Limited Vs The Assistant Commissioner of Income Tax.**

20. The facts are not in dispute. A survey under Section 133 A of the Income Tax Act took place on 06.03.2018 and 07.03.2018. At that time there was a verification and information were retrieved from the petitioner’s books of accounts. The Managing partner also appears to have given certain statements to the effect that the net profit of the petitioner’s company was around Rs.5,65,98,598/- and few other entries were to made that the net profit would be around Rs.4,00,00,000/-for the Assessment Year 2018-2019. However, the petitioner filed the returns of income under Section 139 of the Income Tax Act, the petitioner declared a sum of Rs.3,32,84,528/-. It is in this back ground the notice under Section 143 (2) of the Income Tax Act was issued to the petitioner. However, the petitioner failed to reply to the same. The notice specifically states Survey under Section 133 A of the Income Tax Act. Thus, the petitioner was aware of the context in which the notice under Section 143 (2) of the Income Tax Act, 1961 was issued on 26.09.2019. However, the petitioner failed to reply to the same. Thereafter, the petitioner

was issued with a show cause notice dated 06.02.2021 wherein, which proposed assessment to be completed.

21. The notice issued on 06.02.2021 is the show cause notice for the purpose for completing the assessment. The notice stated that the petitioner should reply on 12.02.2021 and in case no response was given by the due date and it is presumed that the petitioner has no objection to the proposed condition and assessment has been completed accordingly. The petitioner has also filed a detailed reply on 12.02.2021. The reply reads as under:-

> *"9. In the notice under Section 143 (2) dated 26.09.2019 there were no specific queries and only a general direction to submit response with supporting document further, para No.4 of the said notice states that "in course of assessment proceedings, if required, specific questionnaire(s) or requisition(s) for further information/document may be issued subsequently". We honestly believed that such queries will be raised susbequently and a reasonable opprotunity will be given to address them. Therefore, we have requested to be informed about such queries so that it can respond to it."*

22. The petitioner has not insisted for a personal hearing in their response, dated 12.02.2021. It is in this back ground that the impugned assessment order has been passed on 18.02.2021. It is noticed that the date of hearing was mentioned as 09.10.2019, which is a typographical mistake. It appears to be the date given for the petitioner to respond to notice under Section 143 (2) of the Income Tax Act, 1961 issued on 26.09.2018. As per paragraph 4 of Instruction No.3 of 2018 bearing reference No.225/249/2018-ITA.II dated 20.08.2019 for the purpose of completing assessment under Section 143 of the Income Tax Act, where the assessment proceedings have to be completed through e-proceedings, personal hearing attendance is required under the following situations:

> *"i. Where books of account have to be examined;*
>
> *ii. Where Assessing Officer invokes provisions of Section 131 of the Act;*
>
> *iii. Where examination of witness is required to be made by the concerned assessee or the Department;*
>
> *iv Where show-cause notice contemplating any adverse view is issued by the Assessing Officer and assessee requests through their 'E-filing' account for personal hearing to explain the matter."*

23. The facts on record seems to indicate that the department has proceeded to conclude that the income in book of account as the

net profit as on date of survey. Thereafter, few more weeks were there before the period came to an end. The facts on record also indicates that the value of the stock that was determined on the date of survey was Rs.13,95,97,064/- on the MRP and the book value of the stock maintained by the petitioner as on date was Rs.9,99,08,215/-. The value of the physical stock was arrived by deducting the G.P. ratio at 21.53% and thus the excess stock of RS.96,63,062/- was arrived as detailed below:

(iii) A comparison of the actual physical stock available at your premises with the stock as per books revealed excess stock to the tune of Rs.96,33,602/- as under:-

Physical Stock Found	:	*Rs.13,95,97,064*
Less: G.P.Ratio @ 21.53%	:	*Rs. 3,00,55,247*
Value of Physical Stock	:	*Rs.10,95,41,817*
Less: Stock as per Books	:	*Rs.9,99,08,215*
Excess Stock	:	*Rs. 96,33,602*

24. The undisclosed business profit have been arrived from the net profit in the books of accounts as on the date of survey and the amounts declared in the income tax. This would have definitely required a proper assessment by calling the petitioner for a personal hearing. Therefore, the impugned order seems to indicate that there is a procedural infraction. It has not complied with the requirements of instructions of the board in its clarification dated 11.07.2016 bearing reference F.No.225/162/2016/ITA.II.

25. Though the petitioner has not specifically requested for a personal hearing, the fact remains that where the books of accounts have to be examined for arriving at a proper conclusion, a personal hearing is mandatory. Under these circumstances, I am inclined to quash the impugned orders and the case is remit back to the respondent to pass an appropriate order preferably within a period of three months from the date of receipt of copy of this order. The impugned order which stands quashed shall now be treated as a show cause notice for the purpose of completing the assessment. The petitioner may file any reply or objection to it within a period of thirty days from the date of receipt of copy of this order. The petitioner shall upload relevant entries of the books of accounts that may be required for completing the assessment. (*)''the petitioner shall appear before the respondent, submit the documents and thereafter, after affording an opportunity of personal hearing, the assessement would be processed in accordance with law. The time limit of three months for the respondent to pass appropriate orders, is extended from 27.06.2022.''

26. The writ petition stands allowed in terms of the above observations. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar (CS III)

(*)Modified as per order of this Court dated 24/06/2022 made in WP(MD)6728 of 2021

Sd/-

Assistant Registrar (CO)

// True Copy //

27/06/2022
Sub Assistant Registrar(CS)

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To

(*)To be Substituted to the order which already despatched on 25/04/2022

The Assistant Commissioner of Income Tax,
Central Circle-2, Trichy,
Trichy-Main Building, Williams Road,
Contonment Trichy,
Tamil Nadu-620015.

+1 CC to M/s.M.P. SENTHIL, Advocate (SR-17627[F] dated 08/04/2022)

+1 CC to M/s.N. DILIPKUMAR, Advocate (SR-28352[F] dated 27/06/2022)

W.P(MD).No.6728 of 2021
07.04.2022

RD(22.04.2022) 8P 4C
MGJ(24.06.2022) 8P 4C