BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 27.09.2022

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P.(MD)No.17389 of 2019
and
W.M.P.(MD).No.13903 of 2019

M/s.K.M.Kamatchi Traders,
Represented by its Proprietor,
K.M.Kamatchi,
No.12, Sandhai Veedhi,
Ponnamaravathi,
Pudukkottai District. ... Petitioner

Vs.

The Commercial Tax Officer (Main),
Pudukkottai -II Assessment Circle,
C.T.Buildings,
Mela Raja Veedhi,
Pudukkottai – 622 001. ... Respondent

PRAYER : Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus calling for the records of the Respondent in TIN No.33744120487/2013-14 dated 20.03.2019 and quash the same as illegal, arbitrary and against the principles of natural justice and further direct the Respondent to furnish the required documents and thereafter, summon the 3rd party viz., Tvl.VSSM Distributors, Pudukkottai whose records are relied on by the Respondent for revising the assessment and allow the Petitioner to conduct the cross examination and thereafter, permit the Petitioner to file their final objections and grant a personal hearing.

For Petitioner	:	Mr.K.Soundararajan
For Respondent	:	Mr.M.Siddharthan Additional Government Pleader

O R D E R

The question that arises for consideration is whether the order of assessment stands vitiated for having been made in violation of principles of natural justice and on the ground of abdication of authority by the Respondent.

2. The Petitioner is a dealer in Groceries and General Goods and is a registered dealer under the Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred to as 'the Act'). Section 3(4) of the Act provides for an option whereby if the turnover of a dealer does not exceed Rs.50 Lakhs, the

dealers may opt to pay the tax under Section 3(4) of the Act subject to compliance with the other conditions set out therein. The rate of tax under Section 3(4) of the Act is 0.5%.

3. The learned counsel for the Petitioner submitted that there was an inspection by the Enforcement Wing Officials on 10.12.2014. During the course of inspection, the Enforcement Wing Officials allegedly confirmed that certain purchase of Cigarette and Tobacco was being made by the Petitioner from Tvl.V.S.S.M.Distributors, Pudukkottai for the years 2009-10, 2010-11, 2011-12, 2012-13 and 2013-14. It was further submitted that the Petitioner did not purchase any goods from the said Distributor. Thereafter, the Respondent had issued a notice in TIN No. 33744120487/2013-14 dated 11.08.2016. The Enforcement Wing Officials proposed to arrive at a sales suppression on the basis of the alleged purchase omission which resulted in the Petitioner's turnover exceeding Rs.50 Lakhs. Resultantly, the Petitioner was found ineligible to discharge the tax under the Composition Scheme in terms of Section 3(4) of the Act. Thereafter, a notice was issued on the basis of the alleged defects noticed by the

Enforcement Wing Officials at the time of inspection and sales suppression of cigarette was *inter alia* included. The total turnover was arrived including the purchase omission from the said distributor. Best judgment assessment of the turnover representing sales omission was arrived at by adding freight charges and gross profit to the alleged undisclosed purchase turnover / omission of Cigarette. It was also proposed to levy penalty under Section 27(3)(c) the Act.

4. The Petitioner / dealer submitted their objections vide reply dated 02.09.2016. Thereafter, the Petitioner requested for an opportunity of cross-examination with the alleged suppliers and the same is extracted hereunder:

> *"3.We request your goodself to grant us a chance of personal hearing in this matter to represent our case in detail."*

5. Thereafter another notice was issued on 10.10.2018, wherein, in response to the Petitioner's objection, the following copy of records and documents have been furnished:

> *"Further in your letter dated : NIL received on 09.09.2016, you have requested to furnish the following copies of*

records and documents for your examination to furnish the following copies of records and documents for your examination.

1. All sale bill copies

2. Records relating to mode of supply

3. Records relating to payment of money for each and every delivery

3. Accordingly, further verification was made with Tvl.V.S.S.M.Distributors, Pudukottai, dealers in Pudukkotai – I assessment circle (TIN 33744101669). Thiru A.Mohamed Faizwwn, Managing Partner of Tvl.V.S.S.M.Distributors, Pudukottai, in his sworn deposition given before the State Tax Officer, Pudukottai – I Assessment Circle, on 20.09.2018, has stated that all the sale transactions found in the extract (given to you at the time of personal hearing on 19.09.2016) have been effected by them to you and the vehicle payment for the transactions has been received in cash on the spot and their own vehicle has been used for the transportation of the goods to your place of business."

6. After furnishing the same, a notice dated 08.11.2018 was issued. The Petitioner submitted its objection on 10.11.2018, wherein, the Petitioner reiterated its request for cross-examination of the alleged sellers as the entire assessment has been made on the basis of the statement

allegedly obtained from the 3rd parties. However, the order is made confirming the proposal on 20.03.2019, which is under challenge before this Court primarily on the ground that the Petitioner's request for cross-examination has not been granted and the entire assessment has been made on the basis of the Enforcement Wing Officials.

7. To the contrary, the learned Additional Government Pleader appearing for the Respondent submitted that the assessment order has been passed only after making enquiry and after affording reasonable opportunity to the Petitioner.

8. Heard the learned counsel appearing for both sides and perused the materials placed before this Court.

9. This Court is of the view that the assessment order suffers from the following infirmities:

(i) The Assessing Officer as a *quasi-judicial* authority must act independently and cannot make assessment on the dictates of any external authority / agency for it would constitute abdication of authority, vitiating the entire proceedings. In this regard it may be useful to refer to the decision of this Court in the case of ***Madras Granites (P) Ltd., vs. Commercial Tax Officer, Arisipalayam Circle, Salem and another*** reported in ***(2006) 146 STC 642*** and the relevant portion is extracted hereunder:

> *"5....It is well-settled that the assessing officer is a quasi-judicial authority and in exercising his quasi-judicial function of completing the assessment, he is not bound by the instructions or directions of the higher authorities. We find that in both the matters the assessing officer has acted on the basis of the directions of his higher authority in completing the assessments. We hold that the assessments are not sustainable in law. Accordingly, the orders of assessment in both the matters are liable to be quashed and consequently, the orders of the Special Tribunal confirming the orders of assessment are also liable to be quashed."*

The above decision was followed by this Court in the case of ***Bush Nest, Represented by its partner Sudhir Sharma Vs. Assistant Commissioner (CT), Karur (East) Assessment Circle*** reported in ***2019***

SCC Online Mad 24103 and ***Floor Fixers rep. by its Partner, Mrs.D.Asha No. 6, Ranjith Road, Kotturpuram, Chennai Vs. The Commercial Tax Officer, Kotturpuram Assessment Circle, No. 46, Greenways Road, Chennai*** reported in ***2016 SCC Online Mad 20010***, which reads as under:

(i)Bush Nest, Represented by its partner Sudhir Sharma Vs. Assistant Commissioner (CT), Karur (East) Assessment Circle reported in ***2019 SCC Online Mad 24103:***

> *7. The Enforcement Wing Officials come under the wing of the respondent and they are not an independent body. The Division Bench of this Court in the case of Madras Granites (P) Limited v. Commercial Tax Officer, Arisipalayam Circle, Salem reported in (2006) 146 STC 642, quashed the assessment on the ground that the Assessing officers completed the assessment adopting turnover found in D-3 proposal forwarded by the Deputy Commissioner (CT) Enforcement. Being a quasi judicial function, the Assessing Officer will have to take an independent decision and he is not bound by the instructions or directions of the higher authorities. This decision has also been followed by various Benches of this Court including a decision rendered on 02.08.2016 by the learned Single Judge of this Court in W.P.(MD) No. 20364 to 20366 of 2016 in the case*

of Floor Fixers v. the Commercial Tax Officer, Chennai.

8. *From the aforesaid decisions, it is clear that the Assessing Officer must take an independent decision and should not blindly accept the Enforcement Wing Officer's report of the Department. For the forgoing reasons, this Court is of the considered view that the respondent has passed the impugned order by total non-application of mind and therefore, all the impugned orders will have to be necessarily quashed."*

(ii)Floor Fixers rep. by its Partner, Mrs.D.Asha No. 6, Ranjith Road, Kotturpuram, Chennai Vs. The Commercial Tax Officer, Kotturpuram Assessment Circle, No. 46, Greenways Road, Chennai reported in ***2016 SCC Online Mad 20010:***

"8. *The manner, in which, the Assessing Officer has to function, has been pointed by the Hon'ble Division Bench of this Court, in the case of Madras Granites (P) Ltd. v. C.T.O., Arisipalayam Circle [(2006) 146 STC 642], and the relevant portion of the decision is quoted hereinbelow:—*

> *"It is well settled that the Assessing Officer is a quasi judicial authority and in exercising his quasi judicial function of completing the assessment, he is not bound by the instructions or directions of the higher authorities. However, it is found that in both the matters, the Assessing Officer has acted on the basis of the directions of the higher authority in completing*

the assessment. We hold that the assessments are not sustainable in law."

9. *The said decision was followed by me, in the case of Narasus Roller Flour Mills v. C.T.O., Enforcement Wing, Sankagiri [(2015) 81 VST 560], wherein, it was pointed out that the Assessing Officer cannot be solely guided by the proposals given by the Inspecting Officers, but has to independently apply his mind and discharge duties enshrined on him under the provisions of the Act, otherwise, it would amount to abdication of his statutory duties. However, this Court is not advocating a principle that the report of the Enforcement Wing has to be totally scrapped, and at best, it can be treated only as a material for causing notice on the dealer to clarify certain issues. In the instant cases, it is prima facie clear that the respondent/Assessing Officer is convinced with the explanation/objection/reply offered/filed by the petitioner along with supportive documents, disagreeing with the views expressed by his Superior Officer, and sent a deviation proposal, however, the same having been rejected by the Deputy Commissioner (CT) Enforcement South with directions to comply with the proposal, dated 21.09.2011, the Assessing Officer confirmed the proposal and passed the impugned orders.*

10. *At the risk of repetition, this Court states that the Assessing Officer, under the Act, has been conferred powers to* *independently consider the matter, and, at best, the information furnished by the Enforcement Wing, or Inspecting Officer, could be considered to be in the nature of a first information, and based on such information, if the Assessing Officer proposes to issue a show cause notice, then, he is required to call for explanation from the dealer, and then, it is incumbent upon the Assessing Officer to give his/her own independent reasons, and to pass orders, either accepting the case of the dealer, or rejecting it. However, this basic principle, as to how the assessment has to be made, has not been followed in the instant cases, and since the assessment has been made by the respondent/Assessing Officer, blindly accepting the proposal sent by the Deputy Commissioner (CT) Enforcement South, the impugned orders have to be held to be not sustainable, calling for interference."*

(ii) Secondly, the assessment has been made on the basis of third party statement, however, the request for cross-examination has been rejected. In this regard, it may be relevant to refer to the counter-affidavit filed by the learned Additional Government Pleader for the Respondent which is again indicative of the fact that the entire assessment proceedings has been made on the basis of the assessment and the rejection of the request for cross-examination has been justified by stating as under:

> *"12. ......I submit that when there are sufficient evidence for the sale of goods by the suppliers to the petitioner the Respondent considered that cross examination is not necessary in this case and passed revision orders and levied tax and penalty as per law.*
>
> *13. I submit that the respondent had considered that no cross examination is necessary when other records requested by the petitioner had been furnished. In this case, the respondent had applied his mind and found that the proposal received from the Enforcement Wing is in order and hence implemented the proposal after proper verification of records produced by the selling dealers through their Assessing Authority. I submit that in my opinion the revision of assessment made based on the supporting records is correct and lawful and the petitioner is always demanding other records one by one and dragging the matter and hence the request by the petitioner for cross verification is considered as not necessary and the writ petition may kindly be dismissed a devoid of merits."*

The above reasoning of the Respondent is unjustified and contrary to the judgment of the Supreme Court in the case of ***State of Kerala vs. K.T.Shaduli Yusuff ETC*** reported in ***(1977) 39 STC 478,*** wherein, it was held as under:

"..... It can hardly be disputed that cross-examination is one of the most efficacious methods of establishing truth and exposing falsehood. Here, it was not disputed on behalf of the Revenue that the assessee in both cases applied to the Sales Tax Officer for summoning Haji Usmankutty and other wholesale dealers for cross-examination, but his application was turned down by the Sales Tax Officer. This act of the Sales Tax Officer in refusing to summon Haji Usmankutty and other wholesale dealers for cross-examination by the assessee clearly constituted infraction of the right conferred on the assessee by the second part of the proviso and that vitiated the orders of assessment made against the assessee."

Thus, the assessment having been made on the basis of the 3rd party statement, the request for cross-examination ought to have been considered and opportunity granted if the 3rd parties are available.

10. In view of the above, the impugned order cannot be sustained and liable to be set aside. This would not preclude the Respondent to re-do the assessment on applying his mind independently to the issue raised and

by complying with principles of natural justice including opportunity to cross-examine, if the 3rd parties are available.

11. Accordingly, the Writ Petition is disposed of and the impugned order passed by the Respondent in TIN No.33744120487/2013-14 dated 20.03.2019, is hereby set aside. No costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes / No
Speaking Order : Yes / No
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2. The Proprietor,
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MOHAMMED SHAFFIQ, J.

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