BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 18.04.2022

PRONOUNCED ON : 14.06.2022

CORAM

THE HONOURABLE MR.JUSTICE **C.SARAVANAN**

W.P.(MD)Nos.*21894 &21895 of* 2019
and WMP.(MD)Nos.18651 & 18653 of 2019

(Through Video Conferencing)

M/s.V.R.Anbu & Bros.
Represented by its Partner, V.R.Muthu,
No.443, Bazaar,
Virudhunagar 626 001. ... Petitioner in both W.Ps.

vs.

1. The Principal Commissioner & Commissioner of Commercial Taxes,
Ezhilagam, Chepauk, Chennai.

2.The State Tax Officer-1,
Virudhunagar. ... Respondents in both W.Ps.

Prayer in W.P.No.21894 of 2019: Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari, calling for the records of the second respondent in his proceedings in TIN:33815721385/2013-14 and quash the assessment order dated 16.09.2019 passed therein

Prayer in W.P.No.21895 of 2019: Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari, calling for the records of the second respondent in his proceedings in TIN:33815721385/2014-15 and quash the assessment order dated 16.09.2019 passed therein

In both the Cases

For Petitioner : M/s.R.L.Ramani
Senior Counsel
for Mr.S.Raja Jeyachandra Paul

For Respondents : M/s.Veerakathiravan, AAG
assisted by K.S.Selva Ganesan, AGP.

COMMON ORDER

In these two writ petitions, the petitioner has challenged two assessment orders dated 16.09.2019 for the assessment years 2013-2014 and 2014-2015.

2. It is the case of the petitioner that the petitioner's premises was inspected between 24.10.2014 and 27.10.2014 and thereafter, revision notices were issued to the petitioner for these two assessment years on 02.08.2018. Since the inspection was carried by a higher officer, the petitioner filed an application before the Principal Commissioner and the Special Commissioner of Commercial Taxes on 06.09.2018 for appointing the Joint Commissioner to look into the legality or otherwise of the re-assessment proceeding and to complete the assessment. The petitioner was thereafter called for hearing in response to the revision notice. In the reply to the show cause notice, the petitioner submitted an application and the same was pending before the Principal Joint Commissioner and the Special Commissioner of Commercial Taxes for transferring the case to a Joint Commissioner to examine the correctness/legality of the revision notice and therefore, requested the second respondent to await for the same.

3. It is submitted that despite the petitioner's petitions for transfer of the cases to the Joint Commissioner or any other higher officer to look into the issue arising out of the inspection by the Enforcement Directorate, the second respondent proceeded to pass the impugned orders dated 16.09.2019.

4. The learned Senior Counsel for the petitioner submits that under similar circumstances, the Commissioner has exercised power and passed administrative orders for transferring the cases to the Joint Commissioner and the Joint Commissioner, in turn, has disposed the case. In this connection, a copy of the order dated 22.06.2013, bearing Proc.No.A-11/5422-3/2012 in the case of **Tvl. Madras Cements Limited**, **Virudhunagar**, has been filed, where an arbitration proceeding was initiated and orders were passed.

5. It is submitted that without awaiting for the disposal of the request of the petitioner for appointing a Joint Commissioner to look into the matter, the second respondent has proceeded to pass the impugned assessment orders. It is therefore submitted that the impugned assessment orders are liable to be quashed. It is further submitted that without awaiting for reply on merits from the petitioner, the said impugned assessment orders were passed. It is submitted that if the second respondent was inclined to disallow the adjournment letter, the petitioner should have been put on notice before the impugned orders were passed.

6. The learned Senior Counsel for the petitioner further submitted that the proposal in the pre-revision notices are pursuant to the inspection carried out by the Officers from the Enforcement from 24.10.2014 to 27.10.2014 and that the proposals themselves were highly inflated and therefore, it is in this context, the petitioner had sent a representation to the Commissioner to appoint a Joint Commissioner as an Arbitrator to look into the issue. It is submitted that the petitioner was sharing the godown with its Parent concern, the Company called ''M/s.V.V.V. & Sons Edible Oils Limited''.

7. It is submitted that the petitioner is engaged only in the manufacture of containers, which were supplied to M/s.V.V.V. & Sons Edible Oils Limited. It is submitted that M/s.V.V.V. & Sons Edible Oils Limited had stored their seeds in the Godown at No.91/P.P.V.N. Street, Virudhunagar of the petitioner. The only mistake according to the learned Senior Counsel committed by the petitioner was to use their Delivery Challan for transporting oil seeds meant for M/s.V.V.V. & Sons Edible Oils Limited. It is submitted that they cannot be fastened with liability merely because of their delivery notes/challan are used for transporting oil to make it seen as if the petitioner was also manufacturing and selling oil. It is precisely for this reason the petitioner had requested the Commissioner to appoint a Joint Commissioner as an Arbitrator as in the case of Tvl.Madras Cements Limited, Virudhunagar, vide proceeding dated 22.06.2013 bearing Proc.No.A-11/5422-3/2012.

8. The learned Senior Counsel for the petitioner also relied on the decision of this Court **Madras Granites (P) Limited vs. Commercial Tax Officer and others [MANU/TN/2827/2002 : 2006 (146) STC 642 (Mad)]**, wherein at Paragraph 4, it has been held as under:-

> *''4. No doubt, the assessing officer issued pre-assessment notice including the notice for levy of penalty calling for objections from the dealer and after receiving reply from the dealer, completed the assessment on the basis of D-3 proposal forwarded by the Assistant Commissioner (CT), Enforcement. We find from the records that in D-3 proposal, the Deputy Commissioner (CT), Enforcement, Salem, has not only determined the surplus turnover, but also determined the quantum of penalty that might be imposed on the dealer. Therefore, when the higher officer, viz., the Assistant Commissioner (CT), Enforcement, has directed the assessing officer to complete the assessment on the basis of the proposal in D-3 form, we find that the assessing officer, who is lower in rank in the hierarchy of officers, is bound by the said direction, and the*

records also show that the assessing officer has not independently applied his mind, but adopted the sales turnover as found in D-3 proposal and also levied the penalty in the manner indicated in D-3 proposal. 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. However, it is open to the assessing officer, viz., the first respondent herein, to pass orders of assessment afresh in accordance with law, after giving an opportunity to the petitioner. Both the writ petitions stand allowed. No costs. Connected W.P.M.Ps. are closed.''

9. The learned Senior Counsel for the petitioner has also drawn the attention of this Court to the following decisions of the Hon'ble Supreme Court and that of this Court, as detailed below:-

(i) **Mahadayal Premchandra vs. Commercial Tax Officer, Calcutta and others [MANU/SC/0128/1958 : AIR 1958 SC 667]**, wherein at Paragraph 19, it has been held as under:-

''19. We are really surprised at the manner in which the first respondent dealt with the matter of this assessment. It is clear that he did not exercise his own judgment in the matter and faithfully followed the instructions conveyed to him by the Assistant Commissioner (C.S.) without giving the appellants an opportunity to meet the points urged against them. The whole procedure was contrary to the principles of natural justice. The procedure adopted was, to say the least, unfair and was calculated to undermine the confidence of the public in the impartial and fair administration of the Sales Tax Department concerned. We would, have, simply on this ground, set aside the assessment order made by the first respondent and remanded the matter back to him for his due consideration in accordance with law; but as the matter is old and a remand would lead to unnecessary harassment of the appellants, we have preferred to deal with the appeal on merits.''

ii) The Division Bench of this Court in the case of **Royal Insulation (P) Ltd. vs. The Commercial Tax Officer** reported in **2005 (3) LW 582**, to buttress the point that the requirement of deposit of 25% over and above would become illusory and therefore, the Division Bench of this Court had also recommended the State Government to take steps to issue ordinance to amend Section 31 of the Tamil Nadu General Sales Tax Act, 1959. Paragraph 8 of the said judgment reads as under:-

> *''8. Hence we recommend to the State Government to issue an ordinance forthwith amending Section 31 of the Tamil Nadu General Sales Tax Act and making a provision permitting waiver or stay by the appellate authority (in its discretion) of the pre-deposit amount in appropriate and genuine cases so that the assessees may not face hardship, and the alternative remedy of appeal may not become illusory.''*

10. It is submitted that despite the above said direction, no steps have been taken by the legislative assembly to amend the law. It is submitted that thereafter, the Tamil Nadu Value Added Tax Act, 2006 replaced the Tamil Nadu General Sales Tax Act, 1959 and now the respective GST Enactments are in force from 2017.

11. Opposing the prayer, the learned Additional Advocate General for the respondents would submit that the notices were issued to the petitioner and thereafter, the petitioner was called upon to file a reply and thereafter, the impugned orders have been passed. It is submitted that these orders are appealable orders and therefore, the Writ Petitions are liable to be dismissed. That apart, it is submitted that the petitioner also failed to appear for personal hearing before passing the impugned orders. On this score, these Writ Petitions are liable to be dismissed.

12. Finally, the learned Additional Advocate General submitted that the question of appointing an Arbitrator to look into the issue would not arise, as there was no deviation as in the case of **Madras Granites (P) Ltd.** [supra]. It is submitted that in this case, the records were perused and based on the records, estimations were made in respect of delivery notes, which were not made available by the petitioner and therefore, the impugned orders have been passed. If at all, the petitioner has any grievance, it is for him to work out the remedy before the Appellate Commissioner. Hence, prayed for dismissal of the present writ petitions.

13. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Additional Advocate General for the respondents .

14. The facts on record seems indicate that there was surprise inspection conducted at the petitioner's place of business and the petitioner's sister concern namely, M/s.V.V.V & Edible Oils Limited on 24.10.2014 to 27.10.2014 and certain irregularities and omission were noticed. Though it sought to be explained by the petitioner that the petitioner and the aforesaid petitioner's sister concern were sharing a common godown and that inadvertently and by oversight gingelly seeds issued for production from the aforesaid Godown to the factory of the petitioner's sister concern with the delivery challans of the petitioner. Thereafter, D3 report was forwarded by the Enforcement Wing based on which, revision notices dated 02.08.2018 were issued to the petitioner. Apart from these notices similar notice were not only issued for the Assessment Years 2013-14 and 2014 -15 but also for the Assessment Years 2009-10 – 2012-13 on 29.07.2016.

15. Assessment Order dated 28.11.2017 for the Assessment Years 2009-10 to 2011-12 were passed. For the Assessment year 2012-13 and Assessment Order dated 29.08.2018 was passed. The petitioner challenged the same before the second respondent under Section 51 of the TNVAT Act, 2006. However, for the respective Assessment Orders for Assessment Year 2013-14 and Assessment Year 2014-15, the impugned Assessment Orders both dated 16.9.2019 have been challenged in these writ petitions instead of filing Statutory Appeal before the Appellate Authority under Section 51 of TN VAT, 2006.

16. As far as the Assessment Year 2013-14 is concerned, the petitioner requested for appointment of a Joint Commissioner to arbitrate the legality or otherwise of the re-assessment notice dated 02.08.2018 issued to the petitioner. In the replies, the petitioner merely requested the second respondent to await for consideration of the representation dated 06.09.2018 of the petitioner before the first respondent and the same was reiterated in the reply to the notice dated 20.05.2019. It is thereafter the impugned order has been passed.

17. The petitioner asked the first respondent to appoint the Joint Commissioner vide representation dated 06.09.2018 which was not resulted in any favourable orders. In fact, the petitioner's aforesaid sister concern M/s.V.V.V & Sons Edible Oils Ltd has filed WP(MD).No15388 of 2018 for mandamus to direct the first respondent therein who is the first respondent herein to appoint a Joint Commissioner in the Commercial Taxes Department to consider the legality of the assessment orders passed by the second respondent relating to the assessment years 2011-12, 2012-13 and 2013-14 following the D3 proposals issued by the Enforcement Wing and decide the issues in accordance with law.

18. An interim order came to be passed by this Court on 01.08.2018 in W.P.(MD) No.15388 of 2018. In the said proceedings,

petitioner also prayed for stay of further proceedings in A.P.Nos.1,2 and 3 of 2017 on the file of the Appellate Deputy Commissioner (CT) Virudhunagar. These proceedings pertain to assessment years 2011-12 to 2013-14, on this background, the impugned order came to be passed.

19. The provision of TNVAT Act, 2016 does not contemplate the appointment of an Arbitrator to look into correctness or otherwise of the revision notices issued for reversing the deemed assessment order. Therefore, I do not find any merits in the present writ petition. The petitioner should have filed a reply to the revision notices on merits and awaited for final orders. Instead, the petitioner resorted to dilatory tactics with request to appoint a Joint Commissioner. It is noticed that the impugned order came to be passed without a reply to the respective Revision Notices dated 02.08.2018, I am inclined to quash the respective Assessment Orders. Before passing the impugned Assessment Orders, the second respondent should have informed the petitioner that the case was being taken up for hearing and there is no question of any order being passed by the first respondent for appointing an Arbitrator to decide the legality or correctness of the revision notice.

20. Considering the same, I am inclined to quash the impugned assessment orders dated 16.09.2019 for the Assessment Years 2013-14 and 2014-15 and remit the case back to the second respondent. The petitioner shall file reply if any to the revision notices dated 02.08.2018, within a period of 30 days from the date of receipt of a copy of this order. On such receipt of the same, the second respondent shall pass a speaking order on merits within a period of 60 days from the date of receipt of a copy of this order. The impugned Assessment Order dated 16.09.2019 shall be treated as corrigendum to the revision notices dated 02.08.2018.

21. These writ petitions stand disposed with the above observation. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CO)

// True Copy //

/07/2022

Sub Assistant Registrar(CS)

smn

<u>To</u>

1. The Principal Commissioner & Commissioner
   of Commercial Taxes,
   Ezhilagam, Chepauk, Chennai.

2.The State Tax Officer-1,
Virudhunagar.

+1 CC to M/s.S. RAJA JEYA CHANDRA PAUL, Advocate (SR-25629[F] dated 14/06/2022)

+1 CC to M/s.SPL.GP (SR-26109[F] dated 16/06/2022)

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14.06.2022

MGJ(01.07.2022) 8P 5C