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W.P.No.85 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **06.01.2023**

CORAM

THE HONOURABLE MR.JUSTICE M.SUNDAR

**W.P.No.85 of 2023
and W.M.P.No. 80 of 2023**

M/s.Om Sakthi Construction,
Rep. By its Partner .V.Kannan,
No.1, Udayar Street,
Thollamur Village, Earaiyur Post,
Vanur Taluk, Villupuram District,
Pin Code - 604 304.

.. Petitioner

Vs

The Assistant Commissioner,
Circle – V, Audit – II Commissionerate,
Office of the Commissionerate of GST
and Central Excise,
No.692, 6th Floor, MHC Complex,
Annasalai, Nandanam,
Chennai – 600 035.

.. Respondent

Writ petition filed under Article 226 of the Constitution of India praying to issue a writ of certiorarified mandamus to call for the records relating to the impugned notices of the respondent dated 30.08.2022 in Ref. No.GADT / CnG / ADT /GST / 6151 / 2022 -Gr 2- CGST - ADTCIR-5-ADT- II-Chennai -I / 891528 / 2022 and consequential notices dated 23.11.2022 and 22.12.2022 and quash the same.



W.P.No.85 of 2023

For Petitioner : Dr.A.Thiyagarajan
Senior Counsel
for Mr.D.Senthil Kumar

For Respondent : Mr.V.Sundareswaran
Sr.Panel Counsel (GST)

ORDER

In the captioned writ petition, Dr.A.Thiyagarajan, learned senior counsel instructed by Mr.D.Senthil Kumar counsel on record for writ petitioner and Mr.V.Sundareswaran, learned senior panel counsel (GST) on behalf of the lone respondent are before this Court.

2. This order has to be read in conjunction with and in continuation of earlier proceedings made in the previous listing on 04.01.2023 which reads as follows:

'In the captioned writ petition, Dr.A.Thiyagarajan, learned Senior Advocate instructed by Mr.D.Senthilkumar, counsel on record for writ petitioner is before this Court.

2. Learned Senior counsel submits that the captioned matter arises under 'Tamil Nadu Goods and Services Act, 2017 (Act 19 of 2017)' [hereinafter 'TN-G & ST Act' for the sake of convenience]; that 'notice dated 30.08.2022 bearing reference DIN-20220859XS0000222CD3' [hereinafter 'I impugned notice' for the sake of



convenience and clarity] followed by a 'notice dated 23.11.2022 bearing reference DIN:20221159XS000000009E' [hereinafter 'II impugned notice' for the sake of convenience and clarity] and another 'notice dated 22.12.2022 bearing reference DIN:20221259XS000000D864' [hereinafter 'III impugned notice' for the sake of convenience and clarity] have been called in question; that vide I impugned notice, lone respondent had intimated the writ petitioner that it has been decided to undertake audit of books and records of writ petitioner for the Financial Years July 2017 to March 2020 under Section 65 of TN-G & ST Act; that the writ petitioner responded to the same by way of a reply dated 10.09.2022 inter alia saying that writ petitioner is already facing proceedings pursuant to a 'Show Cause Notice' ['SCN'] dated 18.10.2022 bearing reference DIN-202210DSS20000222D05' [hereinafter 'said SCN' for the sake of convenience and clarity]; that notwithstanding such reply, II impugned notice and III impugned notice have been issued emphasising that Section 65 audit proceedings are to be conducted.

3. Learned Senior counsel submitted that post I impugned notice and reply of writ petitioner dated 10.09.2022, said SCN dated 18.10.2022 under Section 74 of C-G & ST Act read with Rule 142(2) of C-G & ST Rules has been issued,



proceedings are under way, therefore, II and III impugned notices do not have legs to stand.

*4. It is the specific case of learned senior counsel for writ petitioner that an audit under Section 65 of C-G & ST and proceedings pursuant to a SCN under Section 74 read with Rule 142 (1) of C-G & ST Rules thereunder cannot proceed simultaneously. In support of his contention, learned Senior counsel pressed into service an order dated 30.09.2022 made in **R.P.Buildcon Private Limited & Anr. Vs. The Superintendent & 10 Ors** by a Division Bench of Hon'ble Calcutta High Court. To be noted, in **R.P.Buildcon** case Section 65 audit was commenced when Section 74 legal drill was under way. In other words, **R.P.Buildcon** is a reverse situation on facts qua case on hand.*

5. Mr.V.Sundareswaran, learned Senior Panel counsel accepted notice for lone respondent and requested for a short accommodation to get instructions and revert to this Court.

6. Registry to show the name of learned Revenue counsel in the next listing.

7. List in the Admission Board day-after-tomorrow. List on 06.01.2023.'



W.P.No.85 of 2023

3. To be noted a typographical/secretarial error has crept in *qua* aforementioned earlier proceedings dated 04.01.2023 in paragraph 2, the date of the reply is not 10.09.2022 but it is 22.11.2022. Therefore, the aforementioned proceedings shall be read accordingly.

4. In the aforementioned backdrop, learned Revenue counsel submitted on instructions that the **R.P.Buildcon** case made by a Honourable Division Bench of Calcutta High Court does not come to the aid of the writ petitioner for two reasons, one reason is that in that case, it has been made clear that if any other material is required by the Department for the assessment period it is open to the Department to put the dealer/assessee on notice. This is captured in paragraph 10 is learned Revenue counsel's say. The second reason is R.P.Buildcon is distinguishable on facts as in that case Section 65 audit had commenced when Section 74 legal drill was underway.

5. Learned senior counsel for writ petitioner pressed into service two more case laws. One is **S.M.Overseas Pvt. Ltd., Vs. Commissioner of Income Tax** reported in **(2023) 450 ITR 1 (SC)** and the other is **Sonam Berlia Vs. State of Odisha** reported in **MANU/OR/0306/2021** being the judgment



W.P.No.85 of 2023

rendered by a Honourable Division Bench of the Orissa High Court.

6. Before discussion of aforementioned case laws *qua* factual matrix of the case on hand, it is necessary to record the chronicle. The chronicle is that inspection and seizure of documents was on 16.03.2020, the first impugned notice (Section 65 of '*Tamil Nadu Goods and Services Act, 2017 (Act 19 of 2017)*' [hereinafter '*TN-G & ST Act*' for the sake of convenience] is dated 30.08.2022, 'show cause notice' ('SCN' for the sake of convenience and clarity) is dated 18.10.2022, reply to the SCN is dated 22.11.2022, second and third impugned notices are dated 23.11.2022 and 27.12.2022. In this backdrop, learned senior counsel submits that audit under Section 65 TN-G & ST Act has to necessarily culminate in Section 74 of C-G & ST Act. In the case on hand, before discussing the aforementioned case laws, this writ Court based upon the ratio nay declaration of law made by Honourable Supreme Court in ***Padma Sundara Rao*** case [***Padma Sundara Rao Vs. State of Tamil Nadu*** reported in **(2002) 3 SCC 533**] reminds itself factual matrix *qua* precedents is significant, most relevant paragraph in ***Padma Sundara Rao*** is paragraph 9 and the same reads as follows:

'9.Courts should not place reliance on



W.P.No.85 of 2023

decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case, said Lord Morris in Herrington v. British Railways Board [(1972) 2 WLR 537 : 1972 AC 877 (HL) [Sub nom British Railways Board v. Herrington, (1972) 1 All ER 749 (HL)]] . Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases.'

7. As regards the *S.M.Overseas* case law rendered by Honourable Supreme Court, that arises under the Income Tax Act and that is a case where re-assessment proceedings were initiated when rectification proceedings were pending and there was no material to demonstrate that the rectification proceedings were withdrawn. In this fact setting, considering the scheme of the two statutes and the factual distinction, this writ Court has no hesitation in coming to the conclusion that *S.M.Overseas* case does not come to the aid of the writ petitioner. As regards the *Sonam Berlia* case, the factual matrix thereat makes it clear that a separate order had been made under Section 74(9) of OGST Act and thereafter a show cause notice was issued. Therefore, *Sonam*



W.P.No.85 of 2023

Berlia case also is clearly distinguishable on facts and does not come to the aid of the writ petitioner. A careful perusal of *Sonam Berlia* brings to light that it is a reverse situation *qua* the facts of the case on hand and there is no difficulty in accepting the submission of learned Revenue counsel that in *R.P.Buildcon* case, Honourable Division Bench of the Calcutta High Court has made it clear that it is open to the Department to put the assessee on notice if further materials are required.

8. In this backdrop, learned senior counsel for writ petitioner emphasises that documents have already been recovered by the Department and this is articulated in paragraph 3 of the SCN dated 18.10.2022 which reads as follows:

'3.SUBMISSION OF DOCUMENTS

The following documents had been recovered/obtained during the course of the search and further course of the investigation.

i.Sample copies of the Letter of Acceptance (LOA)/Work-order as awarded by various departments under Government of Tamil Nadu. (RUD-1)

ii.Copy of the payment bills/Running Account Bills raised by various



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W.P.No.85 of 2023

departments under the Government of Tamil Nadu wherein, work was completed in the pre-GST era and payment received after 01.07.2017 and invariably the taxpayer had declared such works contract services under Exempted/NIL rated supplies in the periodic GSTR 3B returns. (RUD 2)

iii.Income Tax Returns along with Audited Financials for the FY 2017-18, FY 2018-19, FY 2019-20 and FY 2020-21. (RUD 3)

iv.Copies of Form-26AS for the FY 2017-18, FY 2018-19, FY 2019-20 and 2020-21. (RUD 4)

v.Bank account statement of the taxpayer for the period 01.07.2017 to 01.03.2020.'

9. Learned Revenue counsel submits that paragraph 3 lists out documents that were recovered and the documents now sought for are different. This writ Court refrains itself from expressing any opinion on the same.

10. This Court carefully considered the rival submissions in the light of the fact situation of the case on hand. On such consideration, this writ Court is of the considered view that the writ petition does not cut ice or pass muster, it can only



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W.P.No.85 of 2023

(extracted and reproduced supra). Therefore, there is neither prejudice to the writ petitioner nor any illegality;

(d) The argument that Section 65 lead to Section 74 does not really make any headway *qua* writ Court owing to the chronicle which has been set out supra. The chronicle itself will make it clear that the inspection was followed by notice *qua* Section 65 audit and thereafter show cause notice came to be issued.

11. In the light of what has been alluded to earlier, it is delineated and made clear that there is nothing to demonstrate that when the audit under Section 65 has been kick started by way of a notice, show cause notice under section 74 is impermissible. Therefore, it is not necessary to even dilate on the principles governing interference by a writ Court *qua* show cause notice.

12. The argument predicated on subsection 7 of Section 65 also pales into insignificance in the light of the chronicle



W.P.No.85 of 2023

as Section 65 has preceded Section 74 in the case on hand.

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13. Sequiter is, captioned writ petition fails and the same is dismissed. Consequently captioned WMP is also dismissed. There shall be no order as to costs.

06.01.2023

Index : Yes/No
Neutral Citation : Yes/No
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To

The Assistant Commissioner,
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Office of the Commissionerate of GST
and Central Excise,
No.692, 6th Floor, MHC Complex,
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Chennai – 600 035.



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W.P.No.85 of 2023

M.SUNDAR,J.,

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W.P.No.85 of 2023

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