



W.P.(MD).Nos.16172 and 16173 of 2023

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 12.09.2023

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THE HONOURABLE MRS.JUSTICE S.SRIMATHY

W.P.(MD).Nos.16172 and 16173 of 2023
and
W.M.P.(MD).Nos.13569 and 13570 of 2023

Both the Writ Petitions

Tvl. Vignesh Constructions,
represented by its proprietor: P.Velusamy,
No.B-9/1 2nd Cross, West Extension,
Trichy-18.

... Petitioner

Vs.

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

2.The Assistant Commissioner (ST),
Woraiyur Assessment Circle,
Trichy.

... Respondents

Prayer in W.P.(MD)No.16172 of 2023: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, calling for records pertaining to the impugned proceedings passed by the 2nd respondent in TIN: 33303445221/2013-14, dated 26.05.2023 and quash the same as the same is illegal, arbitrary and without jurisdiction as the same is barred by limitation.



W.P.(MD).Nos.16172 and 16173 of 2023

Prayer in W.P.(MD)No.16173 of 2023: Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, calling for records pertaining to the impugned proceedings passed by the 2nd respondent in TIN: 33303445221/2014-15, dated 26.05.2023 and quash the same as the same is illegal, arbitrary and without jurisdiction as the same is barred by limitation.

Both the Writ Petitions

For Petitioner : Mr.A.Satheesh Murugan

For Respondents : Mr.R.Suresh Kumar,
Additional Government Pleader

COMMON ORDER

These Writ Petitions are filed for Writ of Certiorari, challenging the assessment orders, dated 26.05.2023 passed for the assessment years 2013 to 2014 and 2014 to 2015.

2. The petitioner is doing construction business in the name and style of “Vignesh Constructions”. The said concern is registered under TNVAT Act bearing the TIN No. 33303445221 and the petitioner had regularly filed monthly returns. For the assessment years 2013-14 and 2014-15, deemed assessment order was passed by accepting the total taxable turnover declared in



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the returns filed by the writ petitioner and the same was served to the petitioner on 31.10.2019. The second respondent on 14.09.2020 has passed the order by revising the assessment for the reason that the petitioner's accounts were selected for Desk Audit.

3. The contention of the petitioner is that such an audit is unknown to the provisions of the TNVAT Act, 2006. Hence, the petitioner filed a W.P. (MD)No.15657 of 2020, challenging the order dated 14.09.2020 as barred by limitation and also on the ground of violation of principles of natural justice. The said Writ Petition is disposed on 21.04.2021 directing the second respondent to pass fresh order, after giving opportunity to the petitioner. Pursuant to the order of this Court, the second respondent issued notices dated 27.07.2021, 27.08.2021 and 11.11.2021 and the petitioner has replied on various letters dated 12.08.2021, 13.09.2021 and 26.11.2021 respectively. In one of the above letters, the petitioner has requested to furnish the order passed by the Commissioner shown in the reference, in which the petitioner's accounts has been selected for scrutiny. In the said communication, it is stated that the account of the petitioner has been selected by the Commissioner of Commercial



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Tax for scrutiny of record under desk audit. The contention of the petitioner is that if the Commissioner had granted permission, the reasons for taking up for scrutiny would be stated. Hence, the petitioner sought for the said communication. The petitioner further submitted that after receipt of the same, the petitioner would appear for personal hearing to offer his explanations with material records. The contention of the petitioner is that the second respondent has not given any such documents or evidence which the petitioner has sought for. But the second respondent changed his stand and alleged that he has revised the assessment pursuant to the report forwarded by the Commissioner of GST and Central Excise.

4. The further contention of the petitioner is that the second respondent has failed to see that in the impugned order, there is no escapement of turnover as stipulated u/s 27(1)(a) of the TNVAT Act. The second respondent has simply adopted the gross profit at 54.91% instead of 15% gross profit reported by the petitioner and the adoption of such gross profit is without any basis and also without properly considering the working of gross profit. Moreover, the second respondent has failed to follow the statutory provisions



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u/s 27(3) of the TNVAT Act and the respondent is not empowered to select the case for scrutiny as per section 22(3) of the TNVAT Act. For all these reasons, the petitioner is before this Court.

5. The respondents have filed counter stating that the revision of assessment has been passed on the ground that the difference between gross profit earned 54.91% as per accounts, but on verification of Form WW it is found that earned gross profit 54.91% along with 15% added which is deemed sale value as per the provisions of the TNVAT Act. Earlier, the petitioner preferred Writ Petition and this Court directed to reassess after giving opportunity to the petitioner. Based on the directions of this Court, the petitioner was granted to personal hearing, but the petitioner has not availed the opportunity. The petitioner is seeking the Desk Audit Report and the Commissioner's report. Since the same is not furnished, the petitioner is alleging that there is violation of principles of natural justice. Under section 85 of the TNVAT Act, it is clearly stated that any record of any proceeding relating to the recovery of a demand, prepared for the purposes of this Act shall be treated as confidential and shall not be disclosed. Since the said report is covered under section 85, the second respondent is not bound to grant the same.



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By taking the order and the evidence stated thereunder, the present impugned order is passed which is acceptable and the same is sustained as per law. Hence, the respondent prayed to dismiss this Writ Petition.

6. Heard Mr.K.Srinivasan, learned counsel appearing for the petitioner, Mr.R.Suresh Kumar, learned Additional Government Pleader appearing for the respondent and perused the materials available on record.

7. It is seen from the original assessment order, the respondents have taken the sale value of used car at Rs.6,10,011/- (Rupees six lakh ten thousand eleven) and proposes to assess tax at 5% i.e. Rs.30,500/- (Rupees thirty thousand five hundred). The petitioner objected to such addition, since the assessment is only for the Vignesh Constructions which is the registered company. But the said car used for the individual purposes and the RC book is in the name of P.Velusamy, not in the name of Vignesh Constructions. The respondent is not accepting the petitioner's claim inspite of RC book stand in the name of the petitioner.



8. The further contention of the petitioner is that the respondent has added the entire gross profit earned as per the accounts which cannot be taken for assessing under best judgment assessment. For which the petitioner relying on the judgment rendered in *Vel Metal Industries Vs. the State of Tamil Nadu* reported in 1987 sales tax case. The relevant portion is extracted hereunder:

9. The point that arises for consideration in this revision is whether the facts and circumstances in the case warrant a "best judgment assessment".

10. Rule 26(14) of the Tamil Nadu General Sales Tax Rules, 1959 reads as follows:

"26. (14) Every producer or manufacturer (other than a manufacturer of jewellery) shall maintain, in addition to the other accounts maintained in the usual course of his business and in accordance with the other sub-rules, an account in form XXX showing the production-cum-stock particulars of the raw materials used and the finished products manufactured by him :

Provided that a producer or manufacturer may maintain a production-cum-stock account in any other form so long as it contains all the substantial information that is required in form XXX prescribed in this sub-rule."

Proviso of rule 26(14) was added by S.R.O. No. A-270 of 1977 dated 2nd September, 1977, and the assessment in the instant case



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before us is 1976-77, and as such the said proviso is not applicable to the facts of the instant case before us.

11. *In R. M. P. Perianna Pillai & Co. v. Commissioner of Income-tax* [1961] 42 ITR 370 (Mad.) it was held that the system of accounting adopted by an assessee cannot be rejected under the proviso to [section 13](#) of the Income-tax Act on the only ground that the gross profits disclosed by his books were low and compared unfavourably with those of others in the same line of business.

12. *In Veeriah Reddiar v. Commissioner of Income-tax* [1960] 38 ITR 152 (Kerala), the following observation at page 168 is relied on by the learned counsel for the revision petitioner in support of her contention :

"In *Pandit Bros. v. Commissioner of Income-tax* [1954] 26 ITR 159, the Punjab High Court has said :

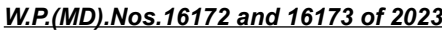
'The wording of this proviso makes it quite clear that before the Income-tax Officer can reject the final statement of profit and loss given by the assessee he must either hold that there is no method of accounting or that the method employed is such that it does not disclose the true profits and losses of the firm in this case there is no definite finding by the Income-tax Officer that the case falls within the proviso to [section 13](#), for he does not say that the method of accounting employed by the assessee was such that in his opinion "the income, profits and gains could not properly be deduced therefrom". In the second place, even if such a finding were to be implied from his order it cannot be said that there was material before him which would enable him to come to this



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*finding. The fact that the profits appeared to him to be insufficient and the fact that there was no stock register maintained by the assessee are not in my view materials upon which such a finding can be given, but these are circumstances which may provoke an enquiry. The Income-tax Officer must discover evidence or material aliunde before he can give such a finding.' If the assessee has regularly employed a method of accounting even if the profit as entered in his accounts is not the true profit, the Income-tax Officer will not, in the opinion of the Privy Council, be justified in rejecting his method of accounting. Their Lordships say in *Commissioner of Income-tax v. Sarangpur Cotton Manufacturing Company Ltd.* [1938] 6 ITR 36, 40 :*

'..... the section relates to a method of accounting regularly employed by the assessee for his own purposes - in this case for the purposes of the company's business and does not relate to a method of making up the statutory return for assessment to income-tax. Secondly, the section clearly makes such a method of accounting a compulsory basis of computation unless in the opinion of the Income-tax Officer the income, profits and gains cannot properly be deduced therefrom. It may well be that, though the profit brought out in the accounts is not the true figure for income-tax purposes the true figure can be accurately deduced therefrom. The simplest case would be where it appears on the face of the accounts that a stated deduction has been made for the purpose of a reserve. But there may well be more complicated cases in which, nevertheless, it is possible to deduce the true profit from the accounts, and the judgment of the Income-tax Officer



13....

15. In Commissioner of Sales Tax Vs. H.M. Esufali H.M. Abdulali, it was held that in estimating any escaped turnover, it is inevitable that there is some guess-work. The assessing authority while making the best judgment assessment, no doubt, should arrive at his conclusion without any bias and on a rational basis. That



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authority should not be vindictive or capricious. If the estimate made by the assessing authority is a bona fide estimate and is based on a rational basis, the fact that there is no good proof in support of that estimate is immaterial. Prima, facie, the assessing authority is the best judge of the situation. It is his best judgment and not anyone else's. The High Court cannot substitute its best judgment for that of the assessing authority. The Supreme Court also held that penalty of Rs. 2,000 imposed on the footing of the revision of the amount of turnover for the whole year was justified.

16.....

17. In the instant case before us, it is relevant to note that there had been no adequate ground for rejecting the accounts and as such there is no justifiable reason for resorting to best judgment assessment in the instant case before us.

18. In Ravi Vs. State of Tamil Nadu [1981] 48 STC 274 at page 276, it was observed by this Court as follows :

"..... A look at the trading account leaves us an impression that the assessing officer seems to have an unreasonable suspicion and there was no real basis for rejection of the return submitted by the assessee. It may also be pointed out that neither the assessing officer nor the appellate authorities have found any particular sale or purchase omission. It is only on the general impression that 20 per cent profit should have been derived by the assessee that the account books were rejected and the taxable turnover was determined at best of judgment basis. Even for adopting 20 per cent as the normal gross profit for such transaction, we do not



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have any evidence or comparable data with reference to the business of other dealers in this line. This Court has been repeatedly pointing out that even a best judgment assessment cannot be a wild guess but a reasonable and justifiable guess based on some material at least. As we have pointed out earlier, in this case there was absolutely no material by which one can justifiably say an addition of 20 per cent to the purchase turnover was reasonable. Further, in the Full Bench judgment in Kathiresan Yarn Stores Vs. State of Tamil Nadu [1978] 42 STC 121 this Court had held that the mere fact that there is a best judgment assessment, particularly when the assessment is based on the inference flowing from the inability of the assessee to establish the case pleaded by him, will not be sufficient for the purpose of imposition of penalty, for the degree of proof required for the imposition of penalty is quite different from and is of a much higher order than that required for the purpose of making a best judgment assessment. The Full Bench further observed that though an estimate made on best judgment basis may be legal, for the purpose of imposing penalty something more concrete is required which would enable the judicial mind to reach the conclusion that the dealer actually had the turnover which was fixed by best judgment. As we have already pointed out, no such material is available for us to conclude that there was any wilful suppression of the taxable turnover warranting a penalty under [section 12\(3\)](#). Therefore, the order of the Tribunal imposing penalty is not sustainable and accordingly we set aside the penalty and allow the tax revision case."



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19. *On a careful and anxious scrutiny of the entire facts in the instant case before us, we do find that there is absolutely no real basis for rejection of the accounts maintained by the revision petitioner herein, and there is also no ground warranting for a "best judgment assessment". In view of the decision arrived at by us with regard to this aspect, we do not find any necessity to discuss the second point raised on behalf of the revision petitioner.*

20. *In the result, we allow the tax revision case and set aside the order of the assessing officer as confirmed by the Appellate Assistant Commissioner and the Tribunal. Under the circumstances, there is no costs.*

9. The respondents have clearly stated in the assessment order the gross profit earned has been taken as 54.91% along with 15% which is not on rational basis. As held in the judgment stated supra even a best judgment assessment cannot be a wild guess but a reasonable and justifiable guess at least based on some material. In the present case the respondents have not found any such evidence. It is only on the general impression the books of account was rejected and the taxable turnover was determined at best of judgment basis. Even for adopting some percent as the normal gross profit for such transaction, there is no evidence. As stated in the aforesaid said judgment the Courts have repeatedly pointed out that even a best judgment assessment cannot be a wild



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guess but a reasonable and justifiable guess based on some material at least. In the present case there is absolutely no material for an addition of 54.91% along with 15% turnover. Therefore, this Court is of the considered opinion, that the impugned order cannot be sustained. Even though it is based on the deemed assessment, the respondents ought to have applied reasonable addition based on the real evidence. Therefore, this Court is of the considered opinion the impugned order is liable to be quashed.

10. The next contention that was raised by the petitioner is the desk audit report should be granted to the petitioner. The respondents vehemently opposed claiming such report, since it comes under section 85 of TNVAT Act. Therefore, this Court directed the respondents to submit the report before this Court in order to scrutinize whether it is covered under section 85 of TNVAT Act. The respondents have produced the same and on perusing the said desk audit report, it is seen that the report has taken the order-in-original passed by the Commissioner of GST and Central Excise and the show cause notice issued by the said authorities. These two orders cannot be stated as a secret document. Therefore, the respondents cannot claim the show cause notice and the order-in-original passed by the Commissioner of GST as secret document covered



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under section 85 of TNVAT Act. Hence the claim of the respondents cannot be legally sustained and the impugned order is liable to be quashed.

11. The next contention of the petitioner is that the order passed by the Commissioner of Central Excise and Customs authority cannot be taken as such and pass orders by any other tax authorities. It is settled proposition of law that the order passed by one tax authority cannot be the basis for levying tax by another authority. The tax ought to be levied based on the relevant provisions of law.

12. In view of the above observations and directions, these Writ Petitions are allowed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

12.09.2023

NCC : Yes/No
Index : Yes / No
Internet : Yes/ No

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To

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Commercial Taxes,
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