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W.A.Nos.1337 of 2024 and etc., batch

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.07.2024

CORAM :

THE HON'BLE MR.R.MAHADEVAN, ACTING CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE MOHAMMED SHAFFIQ

W.A. Nos.1337, 1335, 1336, 1338, 1340 and 1341 of 2024

and

C.M.P.Nos.9646, 9649, 9653, 9654, 9660, 9644 of 2024

W.A.No.1337 of 2024

M/s Renaatus Procon Private Limited,
Represented by its Chairman and Managing Director,
Selvasundaram.P,
156 Mullamprappu, N.G.Palayam Post,
Erode District 638 115.

... Appellant

Vs.

The Assistant Commissioner (ST) (FAC),
Kodumudi Assessment Circle,
2nd Floor, Commercial Taxes Building,
R.D.O. Office Campus,
North Pradhakshanam Road,
Karur 639 001.

... Respondent



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PRAYER: Appeal under Clause 15 of the Letters Patent praying to set aside the order of the learned Judge dated 25.09.2023 made in W.P.No.28023 of 2023 for the Assessment Year TIN 2012-13.

For the Appellant (in all Appeals)	: Mr.P.V.Sudhakar
For the Respondents (in all Appeals)	: Mr.M.Venkateswaran, Special Government Pleader

COMMON JUDGMENT

(Judgment of the Court was delivered by MOHAMMED SHAFFIQ,J.)

The present writ appeals are filed challenging the order of the learned Judge insofar as it has rejected the writ petitions by relegating the appellant to avail the statutory remedy by way of appeal before the Appellate Assistant Commissioner under Section 51 of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred to as “TNVAT Act”).

2. This is the third round of litigation before this Court. The appellant had originally challenged the decision of the Advance Ruling Authority (hereinafter referred to as “ARA”) dated 02.09.2015 relating to classification of “Autoclaved Aerated Concrete Block” (hereinafter referred to as “AAC



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Block”) sold by the appellant in W.P.No.30528 of 2015. This Court was pleased to set aside the order of the ARA on the premise that the appellant was not provided with the opportunity of personal hearing and remitted the matter to the ARA for passing order as afresh. Pursuant thereto, the ARA passed a fresh order on 26.04.2019. This was challenged again in W.P.No.31103 of 2019. The primary ground of challenge was that with the repeal of the TNVAT Act, the constitution and form of ARA stands altered and thus the order of the ARA would not survive. The learned Judge disposed of the writ petition vide order dated 09.09.2022 acceding to the submission of the appellant and concluded that both the applications and the impugned order of ARA may no longer survive. The learned Judge also directed completion of all pending assessments for the period 2012-13 to 2017-18 within a period of 16 weeks. Pursuant to the above orders of this Court, the respondent assessing officer issued fresh notices on 17.04.2023 and completed the assessment vide order dated 01.06.2023.

3. It was these orders of assessment for the periods from 2012-13 to 2017-18 which were challenged by way of writ petitions which stood



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rejected on the ground of existence of alternate remedy. The present appeals are against the above order of the learned Judge.

4. Before proceeding further, we intend to clarify that the learned Judge in W.P.No.31103 of 2019 dated 09.09.2022, found that the application and the order of ARA would not survive while directing the respondent authority to complete the assessment within a period of 16 weeks. The relevant portion of the said order is extracted hereunder:

“5. In the counter filed the respondents, they rely on the provisions of Section 174 of the TNGST Act to take aid from the saving provisions. However, in view of the stand taken by the petitioner, I need hardly address the defence taken by the respondents as I accede to the submissions made by the petitioner, conclude that, both the application and the impugned order would survive no longer.”

5. The learned Judge vide order dated 25.09.2023 after recording the above observations made in the earlier round of litigation, viz., in W.P.No.31103 of 2019 proceeded to find that the ARA would be binding on the appellant in terms of Section 48A(3) of the TNVAT Act. The relevant portion of the said order is extracted hereunder:

“19. Therefore order dated 26.04.2019 are the Authority for Clarification and Advanced Ruling which was impugned in W.P.No.31103



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of 2019 is binding on the petitioner as in terms of Section 48A(3) of the TNVAT Act, 2006.”

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6. We do not intend to express any opinion as to the correctness of the finding that the ARA, in view of the repeal of the TNVAT Act and enactment of the GST, would not survive.

7. Having said that the observations at para 19 of the order of the learned Judge dated 25.09.2023 that the ARA would be binding on the appellant in terms of Section 48A(3) of the TNVAT Act contradict the finding at para 15 of the same order wherein it has been recorded that another Single Judge of this Court vide order dated 09.09.2022 had held that the application and the order of the ARA would not survive any longer.

8. Be that as it may, the learned counsel for the appellant only pressed before us the fact that the impugned orders of assessment are bad for violation of principles of natural justice, which we shall now examine.



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9. The issue that arose for consideration in the assessment was whether the “Autoclaved Aerated Concrete block” known as (AAC Blocks) would fall under Entry 22 of part B of First Schedule to the TNVAT Act as claimed by the appellant or under Entry 15 of Part C of the First Schedule of the TNVAT as proposed by the revenue. The relevant entries read as under:

“Part B Entry 22

(a) Bricks of all kinds including fly ash bricks, refractory bricks asphaltic roofing, earthen tiles and refractory monolithic.

(b) Brickbats, brick ballast, hollow block bricks, cement hollow blocks.

(c) Country bricks and Country tiles made of baked clay and (other machine made or hand made other than those specified in the Fourth Schedule) and stoneware.

(d) Crog of (a) to (c).

Part C Entry 15

Cement products of all kinds including Cement tirlle, pavement blocks excluding cement jolleys, doors, window frames made of RCC pipes (Code No.316).”

10. The appellant had submitted its reply vide letter received on 15.05.2023 in support of its contention that AAC Blocks sold would fall under Entry 22 of Part B of the First Schedule to the TNVAT Act in response to the notice dated 17.04.2023 proposing to levy tax on the sales of AAC Blocks at 14.5% treating the same as falling under Entry 15 of Part C of the First Schedule to the TNVAT Act. However, the impugned orders of



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assessment are made levying tax at 14.5% on the sale of AAC Block made by the appellant on the premise that they are liable to be classified under Entry 69 of part I schedule to the TNVAT Act i.e., which reads as “*ANY OTHER GOOD, NOT SPECIFIED IN ANY OF THE SCHEDULE*”

11. It is the case of the appellant that until the impugned orders of assessment the respondent authority had only treated and proposed to classify the AAC Block sold by the Appellant as falling under Entry 22 of Part C of the First Schedule. The impugned orders thus mark a departure from the Show Cause Notice thereby, denying the appellant's opportunity to put forth his case against classification of AAC Blocks under the residuary entry viz., Entry 69 of Part C of the 1st Schedule to the TNVAT Act.

12. To the contrary, it is submitted by the learned counsel for the Respondent that this is the third round of litigation and the order of the learned Judge insofar as rejecting the writ petitions on the ground of existence of alternative remedy does not warrant interference.

13. Heard both sides and perused the materials on record.



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14. We find that there is merit in the submission of the appellant that the impugned order suffers from violation of principles of natural justice inasmuch as the impugned order has been passed confirming the levy under residuary entry viz., Entry 69 of Part C of the First Schedule to the TNVAT Act, an entry different from that which was proposed in the notice dated 17.04.2023. In other words, the impugned order is a departure from the show cause notice as evident from a reading of the following portion of the impugned orders:

“On perusal of the oral and written submissions and reports filed during the Personal Hearing, it is found that the Goods in question are not to be classified as Cement Products as they do not match with the goods listed in the First schedule of Part C SI. No. 15 covers the commodity code 315. At the same time they are not considered at par with the bricks since the inputs and making procedure are traditional in nature for Bricks. Hollow Blocks are also included in the Commodity Category under entry no.22 of Part B of First Schedule to the TNVAT Act 2006. But no specific entry found for the Products manufactured by the dealers.

....

In the result of above discussion, it is concluded that AAC Blocks are not Cement Concrete Products but physically they are different from both FLY ASH BLOCKS / Bricks and Cement Concrete Products and hence they are classified with Commodity Code 301 - ANY OTHER GOOD, NOT SPECIFIED IN ANY OF THE SCHEDULE.

....

Defect No.1: In the result of above detailed discussion, it is concluded that "Autoclaved Aerated Concrete Blocks" shortly known as



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"AAC Blocks", falling under Entry No.1 of Part-C of First Schedule to TNVAT Act, 2006 (Commodity Code: 301) are not Cement Concrete Products but physically they are different form both FLY ASH BLOCKS / Bricks and Cement Concrete Products and hence under the Commodity Code 301 ANY OTHER GOOD, NOT SPECIFIED IN ANY OF THE SCHEDULE, which is liable to tax @ 14.5% at every point of sale.
(emphasis supplied)

14.1. A reading of the above portion of the impugned orders of assessment would show that the assessment orders insofar as they classify the AAC Blocks sold by the appellant under the residuary entry viz, Entry 69 of Part C of First Schedule to the TNVAT Act marks a departure from the Show cause notice.

15. Notice is not an empty formality but a mandatory requirement intended to put the assessee on notice of the reason on the basis of which the revenue intends to assess. It is trite law that a notice must contain the reasons to which the noticee is required to respond. In other words, it is essential to disclose the reasons to enable the noticee to give a reply/ response, for it is rudimentary that the noticee should be made aware of all that which influence the decision maker and which he has to meet. If the



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reasons which are set out in the notice to which the noticee is required to respond and the reasons contained in the order are different, the issuance of the notice would fail to serve its purpose and would be reduced to an empty formality. That means, it would neither qualify as a notice nor serve the object of issuance of notice.

16. Notice forms the foundation of the case and any departure without putting the appellant on notice would prove fatal to the validity of the proceedings for being in violation of principles of natural justice. In this regard, it may be relevant to refer to the following judgments:

i) CIT v. ICICI Bank Ltd., reported in 2012 SCC OnLine Bom 917 : (2012) 349. ITR 482:

“16..... Thus, the basis of the order is completely different from the reasons recorded for reopening the assessment. This is clearly not permissible as held by this court in CIT v. Jet Airways (I) Ltd. (2011) 331. ITR 236 (Bom).

(emphasis supplied)

ii) CCE v. Champdany Industries Ltd., reported in (2009) 9 SCC 466:

“38. Apart from that, the point on Rule 3 which has been argued by the learned counsel for the Revenue was not part of its case in the show-cause notice. It is well settled that unless the foundation of the case is made out in the show-cause notice, the Revenue cannot in Court argue a case not made out in its show-cause notice. (See Commr. of Customs v. Toyo Engg. India Ltd. [(2006) 7 SCC 592]) Similar view was expressed by this Court in CCE v. Ballarpur Industries Ltd. [(2007) 8 SCC 89] In



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para 27 of the said Report, learned Judges made it clear that if there is no invocation of the Rules concerned in the show-cause notice, it would not be open to the Commissioner to invoke the said Rules.”

(emphasis supplied)

iii) CCE v. Shital International, reported in (2011) 1 SCC 109 :

“19.As regards the process of electrifying polish, now pressed into service by the Revenue, it is trite law that unless the foundation of the case is laid in the show-cause notice, the Revenue cannot be permitted to build up a new case against the assessee. (See Commr. of Customs v.Tooyo Engg. India Ltd. [(2006) 7 SCC 592], CCE v.Ballarpur Industries Ltd.[(2007) 8 SCC 89] and CCE v. Champdany Industries Ltd. [(2009) 9 SCC 466]) Admittedly, in the instant case, no such objection was raised by the adjudicating authority in the show-cause notice dated 22-6-2001 relating to Assessment Years 1988-1989 to 2000-2001. However, in the show-cause notice dated 12-12-2000, the process of electrifying polish finds a brief mention. Therefore, in the light of the settled legal position, the plea of the learned counsel for the Revenue in that behalf cannot be entertained as the Revenue cannot be allowed to raise a fresh plea, which has not been raised in the show cause notice nor can it be allowed to take contradictory stands in relation to the same assessee.”

(emphasis supplied)

iv) CCE v. Ballarpur Industries Ltd., (2007) 8 SCC 89 : 2007 SCC OnLine SC. 1076 at page 99

27.Before concluding, we may mention that, in the present case, the second and the third show-cause notices are alone remitted. The first show-cause notice dated 21-5-1999 is set aside as time-barred. However, it is made clear that Rule 7 of the Valuation Rules, 1975 will not be invoked and applied to the facts of this case as it has not been mentioned in the second and the third show-cause notices. It is well settled that the show-cause notice is the foundation in the matter of levy and recovery of duty, penalty and interest. If there is no invocation of Rule 7 of the Valuation Rules, 1975 in the show-cause notice, it would not be open to the Commissioner to invoke the said Rule.”

(emphasis supplied)

16.1. From a reading of the above judgments, it leaves no room for



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any doubt that an order made in departure of the show cause notice without putting the assessee on notice cannot be sustained as the same is in violation of principles of natural justice. While it is true that existence of alternative remedy is a factor which would weigh in the mind of the Courts while exercising its discretionary power of judicial review under Article 226 of the Constitution, however, the same is not an absolute bar to examine jurisdiction under Article 226 of the Constitution. It is trite law that there are well recognized exceptions to the rule of alternative remedy for exercise of power of judicial review under Article 226 of the Constitution. Violation of principles of natural justice is one such exceptions.

16.2. In view of the above settled position in law and having found that the orders of assessment suffer from violation of principles of natural justice, we are inclined to direct the appellant to treat the orders of assessment dated 01.06.2023 as show cause notice and submit its objection within a period of two weeks. Accordingly, the order of the learned Single Judge stands modified with a direction to the appellant to treat the orders of assessment challenged in the writ petitions as show cause notice and submit



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its objections within a period of four weeks from the date of receipt of a copy of this judgment. If such objections are filed within the stipulated period, the adjudicating authority shall proceed to pass orders within a period of eight weeks thereafter.

17. All these writ appeals are disposed of with the above directions.

No costs. Consequently, connected miscellaneous petitions are closed.

[R.M.D.,A.C.J.] [M.S.Q.,J.]

12.07.2024

Index: Yes/No
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