In the High Court of Judicature at Madras

Date of Reserving the order	Date of Pronouncing the order
01.09.2016	03.10.2016

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

Writ Petition No.14851 of 2005
and WPMP.No.16188 of 2005 and WVMP.No.76 of 2009

M/s.Sri Kumaran Trading Company
Chennai-357. ...Petitioner

Vs

The Deputy Commercial Tax Officer,
Manali Assessment Circle, Chennai-108. ...Respondent

PETITION under Article 226 of The Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus to call for the records on the file of the respondent in his proceedings in TNGST.1081803/2003-04 dated 31.3.2005, quash the same as illegal and against the principles of natural justice and fair play and direct the respondent to furnish the statement and records relied upon and provide opportunity of cross examination of third parties.

For Petitioner : Mr.T.Pramod Kumar Chopda
For Respondent : Mrs.Vasudha Thiagarajan, AGP

ORDER

Heard both.

2. The petitioner is a registered dealer in iron and steel products on the file of the respondent under the provisions of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter called the Act). For the assessment year 2003-04, the petitioner reported a total and taxable turnover of Rs.78.76 crores and Rs.54.43 lakhs respectively. The respondent, on verification, issued a notice proposing to disallow the entire claim of second sale exemption on the basis of certain purchases effected from four registered dealers for Rs.3.05 crores.

3. The petitioner filed their interim objections requesting the respondent to furnish copies of the records and the statements relied upon in the notice, afford an opportunity for cross examination of the third parties, whose records were relied upon with the accounts of the dealer and grant sufficient time to file objections on receipt of the records sought for and opportunity in the matter.

4. The respondent, however, did not accede to the request made by the petitioner, but completed the assessment by passing the impugned order dated 31.3.2005 and confirmed the proposal in the pre-revision notice. This order of assessment has been challenged in this writ petition.

5. Mr.T.Pramod Kumar Chopda, learned counsel for the petitioner submitted that the impugned order having been passed without providing a reasonable opportunity, in spite of a specific request, is against the principles

of natural justice and fair play. According to the learned counsel, the respondent ought to have furnished copies of the records relied upon and provided an opportunity of cross examination with reference to the accounts of the registered dealers before disallowing the claim of exemption. It is further submitted that when the third parties' statements and accounts are relied upon for assessment, unless the petitioner is given the copies of the statements and records with an opportunity to cross examine the third parties, the respondent was not justified in relying upon those documents.

6. It is also submitted by the learned counsel for the petitioner that the petitioner had effected purchases not only from four registered dealers referred by Mr.Mahendra Kumar Jain, but also dealers like M/s.Rashtriya Ispat Nigam Limited and various re-rolling mills, which transactions have not been disputed by the respondent. Therefore, the respondent committed a serious error in disallowing the entire second sale exemption. It is further submitted that those dealers, whose statements and records, which were relied upon by the respondent, are existing dealers and had claimed exemption on their sale. Hence, it is submitted that only those dealers can be assessed to tax in case they fail to prove the sufferance of local tax on their purchases and not the petitioner, which is only a second and subsequent purchaser.

7. In support of his contentions, the learned counsel for the petitioner has referred to the decision of the Hon'ble Division Bench of this Court in the

case of ***M/s.Jeetendra Agencies Vs. CTO, Coonoor Assessment Circle [W.P. No.32711 of 2002 dated 28.8.2002],*** the decision in the case of ***M/s.Vardhaman Steels Vs. CTO, Vallalar Nagar Assessment Circle, Chennai [W.P.No.32133 of 2004 dated 5.11.2004]*** and the decision in the case of ***M/s.AMA Steels Vs. Assistant Commissioner (CT), Harbour III Assessment Circle, Chennai-1 [W.P.No.21238 of 2011 dated 18.10.2011].***

8. The learned counsel for the petitioner has also filed a typed set of papers consisting of details of first purchases made from the registered dealers for the relevant assessment year, details of second and subsequent purchases made from registered dealers, proceedings for cancellation of registration of M/s.Kamalesh Enterprises, M/s.Aashna Enterprises and M/s.Shreyansh Ispat (Chennai) Ltd, which were cancelled only on 10.12.2003 and contended that such cancellation cannot have an impact on the transactions done by the petitioner much prior to the said cancellation.

9. It is further submitted that the request made for furnishing of the statements and records and to cross examine the persons, who had given their statements, ought to have been acceded to and the failure to do so has resulted in the violation of the principles of natural justice. To support such a contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***Kalra Glue Factory Vs. Sales Tax Tribunal [reported in (1987) 66 STC 292].***

10. On the above grounds, the learned counsel for the petitioner would submit that the impugned order is unsustainable and as the same has been passed in violation of the principles of natural justice, the petitioner need not be driven to avail the alternate remedy. To support such a contention, reliance was placed on the decision of the Hon'ble Supreme Court in the case of ***State of H.P. Vs. Gujarat Ambuja Cement Ltd. [reported in (2005) 142 STC 1].***

11. On the merits of the claim made by the petitioner, it is submitted that in the light of the various decisions of this Court, the petitioner's claim for second sale exemption under the Act could not have been denied. In this regard, a reference was made to the decisions of the Hon'ble Division Bench of this Court in the cases of

> ***(i) Govindan & Co. Vs. State of Tamil Nadu [reported in (1975) 35 STC 50],*** as confirmed by the decision of the Hon'ble Supreme Court in the case of ***State of Tamil Nadu Vs. Govindan & Co. [reported in (1994) 93 STC 185];***
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> ***(ii) Deputy Commissioner (CT) Vs. Sivakumar & Company [reported in (1980) 45 STC 436];***
>
> ***(iii) State of Tamil Nadu Vs. A.R.Duraisamy Chettiar [reported in (1986) 61 STC 560]*** and
>
> ***(iv) State of Tamil Nadu Vs. Sri Alaggar Traders [reported in (2010) 28 VST 228].***

12. It is also submitted by the learned counsel for the petitioner that the retrospective cancellation of registration of the selling dealers does not affect the rights of the purchasing dealer for deduction, when the registration was in force at the time of purchase. To support such a contention, a reference was made to the decision of this Court in the case of ***Jinsasen Distributors Vs. CTO [reported in (2013) 59 VST 256],*** which was confirmed by the Hon'ble Division Bench in ***W.A.No.946 of 2016, etc. batch dated 1.9.2016*** after following the decision of the Hon'ble Supreme Court in the case of ***State of Maharashtra Vs. Suresh Trading Co. [reported in (1998) 109 STC 439].***

13. Per contra, Mrs.Vasudha Thiagarajan, learned Additional Government Pleader appearing for the respondent submitted that the petitioner, which is a dealer in iron and steel, is an assessee on the file of the respondent and their place of business was inspected by the officials of the Enforcement Wing on 1.7.2003 and certain defects were noticed. During the course of inspection, it was found that the petitioner did not have any proof for movement of goods such as lorry receipt, freight payment details and also name and address of the transporters, etc. and initially, the assessee refused to hand over records, which were recovered at the time of inspection.

14. Relying upon a statement given by Mr.Mahendrakumar Jain, Proprietor/Partner/Director of M/s.Aashna Enterprises, M/s.Kamalesh Enterprises and M/s.Shreyansh Ispat Private Limited, the learned Additional

Government Pleader submitted that the said person had categorically admitted before the Inspecting Officers that they never handled any goods, but they issued only sale invoices. Further, the deposition made on behalf of M/s.Balaji Transports also confirmed the same in the statement given to the Department and in the case of M/s.Tulsyan NEC Limited, they admitted the non availability of any records for the movement of goods.

15. It was further submitted by the learned Additional Government Pleader that the petitioner is a bill trader and that the respondent rightly disallowed the petitioner's claim for second sale exemption under the Act. It was also submitted that when the seller - Mr.Mahendrakumar Jain himself had unequivocally declared that he acted as a bill trader by issuing sale bills without actually doing the transactions, there is no error in the order passed by the respondent.

16. According to the learned Additional Government Pleader, the main contention of the petitioner is that the said Mr.Mahendrakumar Jain has not been produced for cross examination and that the petitioner was not given such an opportunity. In this regard, it was submitted by the learned Additional Government Pleader that similar case involving Mr.Mahendrakumar Jain came up for consideration before this Court in ***W.P.Nos.27576 and 27577 of 2006,*** which were disposed of by a common order dated 1.11.2007 by directing the petitioner therein to avail the alternate remedy and the writ appeals filed against the said order were also dismissed by the

Hon'ble Division Bench.

17. It was further pointed out by the learned Additional Government Pleader that the common order in *W.P.Nos.27576 and 27577 of 2006* was passed by referring to an earlier of the Hon'ble Division Bench in ***W.A.No. 749 and 750 of 2006 etc. cases,*** in which, the appellant was directed to avail the alternate remedy. Therefore, it was submitted that if the petitioner is aggrieved, they could have filed an appeal before the Appellate Assistant Commissioner (CT) (VI), Chennai and that they are not entitled to by-pass the appeal remedy and approach this Court.

18. Heard the learned counsel for the parties and perused the material documents.

19. The undisputed facts are that the place of business of the petitioner was inspected by the officials of the Enforcement Wing on 1.7.2003 and certain defects were pointed out. Based on the report submitted by the officials of the Enforcement Wing, the respondent issued pre-revision notice proposing to determine the total and taxable turnover for the relevant year and also proposing to impose penalty under Sections 12(3)(b) and 10(3)(1) of the Act.

20. On receipt of the pre-revision notice, the petitioner submitted interim objections on 9.12.2004. The receipt of the interim objections is not in dispute. In the said interim objections, while denying the allegations made in the pre-revision notice dated 16.11.2004, as defamatory and mala fide,

the petitioner requested copies of the records, which were relied upon in the notice, agreeing to pay cost and further requested for an opportunity to enable them to file their objections to the proposal.

21. In the said interim objections, the petitioner also requested the photostat copies of the statements, a file containing 44 pages recovered at the time of inspection on 1.7.2003 and the copies of the statements recorded from Mr.Mahendrakumar Jain, M/s.Tulsyan NEC Ltd., and M/s.Balaji Transports. The petitioner also sought an opportunity to verify the accounts maintained by the three enterprises owned by M/s.Mahendrakumar Jain for the assessment years 1998-99 to 2003-04, as mentioned in the pre-revision notice, so as to verify the details pertaining to purchases/sales, bank account, freight charges, etc. A similar request was made for verification of the accounts of other dealers namely M/s.Tulsyan NEC Ltd. and M/s.Balaji Transport Corporation.

22. It was further stated in the interim objections that in respect of their sister concern M/s.J.R.Industries, which is also a registered dealer on the file of the respondent, the proposal for disallowance of claim for exemption was confined only to the value of the purchases made by the assessees/dealers from the three companies only and no other disallowance/ additions were made and however, in the case of the petitioner, the respondent proposed to disallow the entire claim for exemption for the second sale made by them. It was stated in the interim objections that the

respondent was not justified on facts and law. The petitioner also sought an opportunity for cross examination after the records were furnished to cross examine the concerned persons of the three companies.

23. It was also stated in the interim objections that at the time of inspection, records were verified and they revealed that all the purchases made by the petitioner were from local registered dealers either on payment of tax or tax suffered except inter-State purchases, which were sold as first sale and tax was paid. It was further stated that the details furnished in the Annexure would show that the tax paid purchase is about Rs.37.23 crores and the balance tax suffered purchase from various existing registered dealers as on date on the file of the Department. These purchases were duly reflected in the other dealer's accounts, which were also verified by the respective Assessing Authorities and assessed them either for first sale or for second sale in their hands.

24. With regard to movement of goods, the petitioner stated in their interim objections that they had produced all records at the time of inspection such as freight bill, vouchers, details of freight payment, transportation charges, loading and unloading charges, delivery challan, etc and those expenses were also reflected in their books of accounts furnished at the time of inspection.

25. Hence, it was contended that the allegation that the petitioner has not produced evidence for movement of goods for the entire local purchases

is incorrect. After taking the above stand, the petitioner pointed out that at the time of verification of the petitioner's accounts, several documents were verified and they were listed out in the interim objections. Therefore, it was contended that mere recording of alleged self serving statement of Mr.Mahendrakumar Jain or from any other person cannot be the basis for rejecting the claim for exemption made by the petitioner.

26. The petitioner also objected to the levy of penalty under Sections 12(3)(b) and 10(3)(1) of the Act on the ground that the turnover sought to be assessed is culled out from the books of accounts and according to the petitioner, the question of levy of penalty would not arise. Further reliance was placed on the orders of this Court in *W.P.Nos. 33108 to 33110 of 2004* dated *18.11.2004* wherein under similar circumstances, the Department was directed to furnish D7 records and afford an opportunity to cross examine the third parties before passing the order.

27. With the above averments as well as some more facts, the petitioner requested for furnishing of copies and for cross examination and also for an opportunity to file their final objections. The respondent, while admitting the receipt of the interim objections, stated that all the defects were on the basis of the inspection conducted and from the statement recorded from the person, who is said to have sold the goods to the petitioner and all the facts have been clearly mentioned in the pre-assessment notice. It was further observed that the charge is against the

petitioner and it is for them to prove the bona fide of the transaction and there is no necessity to give copies of statements as required by the dealer, which contain other secret facts of the Department and perhaps to that of the other dealers and that the Act does not compel the Assessing Officers to provide for the documents for cross examination and they are required only to give a reasonable opportunity.

28. The extract of the statements and other records have been clearly set out in the pre-revision notice, which is found to be enough. Thus, the respondent concluded that the petitioner has indulged themselves in bill trading purchase menace and that the Department has every reason to doubt other transactions and accordingly confirmed the proposal.

29. The first issue to be considered is as to whether the respondent was justified in completing the assessment without affording an opportunity sought for by the petitioner.

30. It is not in dispute that the cause for issuing the pre-revision notice is the statements recorded from third parties and records collected from them. When such is the situation, the petitioner was fully justified in seeking an opportunity to peruse those documents and also cross examine the persons, who have given those statements and records.

31. The Hon'ble Supreme Court in *Kalra Glue Factory* was considering the case of the assessee, which was a manufacturer of glue and which was assessed under the provisions of the Central Sales Tax Act, 1956. The

Assistant Commissioner set aside the assessment. But on appeal, the Sales Tax Tribunal upheld the assessment. While doing so, the Tribunal relied upon the statements of certain persons to support its conclusion. Challenging the order of the Tribunal, the assessee approached the Allahabad High Court, which dismissed the petition on the ground that there is no substantial question of law.

32. Again challenging the same, the assessee filed a special leave petition before the Hon'ble Supreme Court, contending that the Tribunal was not correct in relying upon the statements of third parties, which have been recorded behind the back of the assessee, as the assessee has no occasion to test those statements by cross examination. Accepting the case of the dealer, the Hon'ble Supreme Court set aside the order of the High Court as well as the Sales Tax Tribunal and remitted the matter back to the Tribunal with liberty to the assessee to produce documents subject to proof of its genuineness and the Tribunal was directed to redo the matter.

33. Therefore, when statements recorded from a third party was the sole basis of revision of assessment, such material is an adverse material to the interest of the dealer. In any event, it cannot be stated that the respondent cannot rely upon those statements, but could have done so only after furnishing copies thereof to the petitioner and when the petitioner disputed the correctness of those statements, the efficacy and admissibility of those statements have to be tested, for which, an opportunity of cross

examination ought to have been afforded.

34. Admittedly, the petitioner submitted their objections to the pre-revision notice vide their letter dated 9.12.2004. They are only interim reply. In the interim reply, the petitioner had clearly set out as to what are the records required by them and that there is a specific request for cross examination of the persons, who are stated to have given statements against the petitioner's interest.

35. Therefore, if the respondent, for any valid reason, was of the view that the statements and records need not have been furnished, he could have rejected the request by passing a separate order and that could not have been done at the time of completing the assessment and passing the impugned order. Thus, the inherent defect, which has crept in the order, affects its very validity. The violation of the principles of natural justice is writ large on the face of the impugned order, which is sufficient to hold that the same is not sustainable.

35. For all the above reasons, the writ petition is allowed, the impugned order is set aside and the matter is remitted back to the respondent with a direction to consider the request of the petitioner for furnishing of statements and records and an opportunity of cross examination and thereafter proceed in accordance with law. No costs. Consequently, the above WPMP and WVMP are closed.

03/10/2016

RS

T.S.SIVAGNANAM,J

RS

Internet : Yes

To
The Deputy Commercial Tax Officer, Manali Assessment Circle, Chennai-108.

P.D.Common Order in
WP.No.14851 of 2005 &
WPMP.No.16188 of 2005
and WVMP.No.76 of 2009

03/10/2016