(2016) 10 MAD CK 0048

In the Madras High Court

Case No : Writ Petition Nos. 35694-35702 of 2016 and W.M.P Nos. 30681-30689 of 2016

J.A. Motor Sport APPELLANT

Vs

State of Tamil Nadu RESPONDENT

Date of Decision : 07-10-2016

Acts Referred:

Citation : (2017) 345 ELT 205

Hon'ble Judges : T.S. Sivagnanam, J.

Bench : Single Bench

Advocate : Shri R.L. Ramani, SC and B. Raveendran, Advocate, for the Petitioner; Shri K. Venkatesh, GA, for the Respondent

Final Decision : Disposed Off

Judgement

T.S. Sivagnanam, J.—Mr. K. Venkatesh, learned Government Advocate accepts notice for the respondents. Heard both. On account of the manifest errors, which are apparent on the face of the record and which cannot be defended by the second respondent even if an opportunity is granted to file a counter, by consent, the writ petitions are taken up for joint disposal.

2. The brief facts, which are necessary for the disposal of these writ petitions, are that the petitioner leased out engine text beds, which are permanently embedded to earth and is collecting and remitting service tax before the fourth respondent-Department under the heading ''Renting of Immovable Property Service''. The petitioner is a registered dealer on the file of the second respondent under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter called the TNVAT Act) and the Central Sales Tax Act, 1956 (hereinafter called the CST Act) and registered before the Service Tax Commissionerate under the control of the fourth respondent.

3. The petitioner''s place of business was inspected by the officials of the Enforcement Wing on 31-12-2015 and various details were sought for from the

petitioner from the assessment year 2007-08 onwards. The officials of the Enforcement Wing appeared to have pointed out certain defects to the petitioner and the petitioner explained that the text bed is a machinery, which is permanently embedded to earth and not exigible to levy of value added tax.

4. However, it appears that the petitioner was called upon to record a statement accepting the liability, which was refused to be done. However, the Manager (Accounts) of the petitioner company had given a statement before the Commercial Tax Officer (Enforcement) Group III, Coimbatore on 31-12-2015. In the said statement, the Manager (Accounts) of the petitioner stated that the petitioner, though does not accept any of the defects pointed by the officials of the Enforcement Wing, would file a reply to the audit points along with correct and complete accounts details before the concerned Assessing Officer within a month. Subsequent to the statement dated 31-12-2015, clarifications were sent to the concerned Commercial Tax Officer on all the issues. A copy of the said clarifications dated 8-2-2016 has been filed in the typed set of papers at Pages 54 to 71. Further, a copy of the said clarifications dated 8-2-2016 was sent to the Deputy Commissioner of Commercial Taxes (Enforcement), Coimbatore and the Joint Commissioner of Commercial Taxes (Enforcement), Coimbatore.

5. After about four months, the impugned notices have been issued by the second respondent stating that he has received certain proposals and defects were noticed. This statement is found in the sub-column of the impugned notices. After referring to the inspection of the officials of the Enforcement Wing, the notices proposing to levy tax on lease rent of machinery, proposing to reverse the input tax credit without C-Forms, demanding short levy of tax on machinery sales, proposing to reverse the input tax credit on account of mismatch, proposing to reverse the input tax credit alleging that the petitioner has purchased from registration certificate cancelled dealers and demanding tax not collected on raw materials, sale of assets not reported, sales suppression, etc., were issued.

6. On perusal of the impugned notices dated 2-6-2016, it is seen that they are not show cause notices, but the second respondent prejudged the issue, as he directed the petitioner to pay the tax due or else file a reply with documents. The primary requisite for a show cause notice is that it should have been issued with open mind and the person, who has been called upon to show cause, should be of the clear view that there is only a proposal and if a reply is given by the noticee, the concerned Authority will consider his reply in an effective manner.

7. This is so, because issuance of a show cause notice is not empty formality, but a statutory requirement and a requirement should be complied with by the Authority to satisfy the principles of natural justice. If the Authority has pre-judged the issue at the stage of a show cause notice, the submission of the reply to the show cause notice itself would become a farce.

8. The learned Government Advocate appearing for the respondents has pointed

out that in the show cause notices, the second respondent has given an option to the petitioner to pay tax or file a reply.

9. In the considered view of this Court, this submission will not cure the defect, as the show cause notice can only be a proposal and the proposal can fructify into a demand only after objections are submitted. Therefore, on this ground, the impugned show cause notices are liable to be set aside.

10. One more ground, on which, the impugned show cause notices are to be held as bad in law is that the notices are bereft of particulars and in the sub-column, it is stated as ''proposal received''. Obviously, this proposal is from the officials of the Enforcement Wing. If such is the case, then the petitioner is entitled to know as to why the officials of the Enforcement Wing sent a proposal, though the petitioner had given an elaborate reply to the officials of the Enforcement Wing on 8-2-2016 as undertaken by them in their statement recorded by the officials of the Enforcement Wing on 31-12-2015.

11. Thus, if the proposals of the Enforcement Wing Officials are to be accepted as such and based on the report of the Enforcement Wing Officials, the Assessing Officers are to proceed against the petitioner for recovery of tax or reversal of input tax credit, etc., then the reasons assigned in the proposals should form part of the show cause notices, which will be issued by the concerned Assessing Officer. Otherwise, the petitioner would not be in a position to know as to what was the basis of the proposals given by the officials of the Enforcement Wing. This observation is made in the light of the peculiar factual issues, which have arisen in the present case.

12. As already pointed out, in the statement of the Manager (Accounts) of the petitioner company having not admitted any of the defects pointed out by the officials of the Enforcement Wing, they have undertaken to file a detailed reply. They also submitted a reply. Therefore, in spite of the reply given by the petitioner, if the Enforcement Wing Officials wanted to send a proposal to the petitioner through the Assessing Officer demanding tax or reversal of input tax credit, then the petitioner is entitled to know the basis of such proposal. Even assuming that such a decision is taken behind the back of the petitioner, if it is sought to be put against the petitioner and if a demand is raised on the petitioner, such material is an adverse material to the interests of the petitioner, as the petitioner is entitled to know as to what is the stand of the officials of the Enforcement Wing. Otherwise, the petitioner would not be in a position to effectively submit their objections.

13. Even assuming that the petitioner should be directed to submit their objections to the impugned notices, all that the officials of the Enforcement Wing do is to reiterate what the petitioner stated in their reply to the Commercial Tax Officer (Enforcement), Group III, Coimbatore dated 8-2-2016 and that is of no use because the Assessing Officer, who is bound over by the proposals of the Enforcement Wing Officials, is expected to act independently. This Court can take

judicial note of the fact that in several cases, though the Assessing Officers are convinced that the proposals of the Enforcement Wing Officials, are not tenable, yet because of the hierarchy of the Authorities and the power, which is exercised by the Enforcement Wing Officials, the Assessing Officers abdicate their statutory duty and mechanically pass assessment orders, which have been repeatedly set aside by this Court on several occasions. In the light of the above discussions, it is held that the impugned notices dated 2-6-2016 are unsustainable in law.

14. The petitioner has given detailed objections/clarifications to the Commercial Tax Officer (Enforcement), Group III, Coimbatore on 8-2-2016. The fate of such objections/clarifications is not known to the petitioner. If, for any reason, the Enforcement Wing Officials do not agree with the objections/clarifications given by the petitioner, the petitioner is entitled to know the basis and reasons for such disagreement. This having not been furnished, the conduct of the officials of the Enforcement Wing also does not satisfy the principles of natural justice.

15. Accordingly, the writ petitions are allowed and the impugned notices are set aside. No costs. Consequently, the above WMPs are closed.

16. There will be a direction to the Commercial Tax Officer (Enforcement) Group III, Coimbatore to consider the petitioner''s objections/clarifications dated 8-2-2016, afford an opportunity of personal hearing, consider all the documents and thereafter give a reply after recording reasons. The above exercise shall be completed within a period of eight weeks from the date of receipt of a copy of this order. Till then, the Assessing Officer or any other Authority shall not initiate any coercive action against the petitioner. Since the Commercial Tax Officer (Enforcement), Group III, Coimbatore is not a party to these writ petitions, he is suo motu impleaded as the fifth respondent in these writ petitions.