
(2014) 07 MAD CK 0184

In the Madras High Court

Case No : W.P. (MD) Nos. 6510, 6511 to 6515 of 2013 and M.P. (MD) Nos. 1, 1, 1, 1 and 1 of 2013

L.S. Mills Limited

APPELLANT

Vs

The Assistant Commissioner (CT)(FACT)

RESPONDENT

Date of Decision : 16-07-2014

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 16(1)(a)
Tamil Nadu Value Added Tax Act, 2006 — Section 27(3), 4, 4(1), 51

Citation : (2014) 07 MAD CK 0184

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

Bench : Single Bench

Judgement

T.S. Sivagnanam, J.—In all these writ petitions, the petitioner is M/s L.S.Mills Limited, No,12, Madurai Road, Theni.

2. The Challenge in all the writ petitions is to the orders of assessment passed by the respondent for the assessment year 2006-07 to 2011- 12. Since the ground of challenge in these writ petitions is identical, it would suffice to take note of the facts in W.P(MD)No.6510 of 2013. The petitioners are dealers in cotton yarn and were assessed on a total and taxable turnover of Rs.5,00,85,319/- for the assessment year 2006-07 under the Tamil Nadu Value Added Tax, 2006 (herein after referred to as TN VAT Act). Similar assessments were made for the assessment years from 2007-08 to 2011-12 and the total and taxable turnover varied for each other assessment year. On 10.2.2009, the Officers of the Enforcement Wing audited the place of business of the petitioners and it was noticed at the time of audit that there were several defects in respect of the assessment year 2006- 07. It was pointed out that the factory buildings were constructed by the petitioners themselves, but the purchase bills relating to the building materials were not produced at the time of audit and therefore, it was construed that the materials were purchased without bills and it was proposed to levy tax on the turnover at 4%. It was further alleged that the petitioners have used leased machinery in the manufacture of yarn and tax due on the right to

use under Section 4(1) was not paid and therefore, there was a proposal to levy tax under the said provision. These are the allegations in respect of the assessment year 2006-07. Apart from these allegations/averments, there are other allegations for the other assessment years, over which, we are not presently concerned in the light of the grounds raised by the petitioners in the writ petitions. For all the assessment years, the authority proposed to levy penalty under Section 27(3) of the TN VAT Act for wilful failure to disclose the taxable turnover under Section 27(3) of the Act and the percentage of penalty varied for each of the assessment year. Based on the above proposals, a show-cause notice was given to the petitioners, which is a pre-revision notice. The petitioner filed their objection on 30.09.2012. In respect of pre-revision notice for the assessment year 2006-07, it was submitted that the purchase bill relating to the building materials was in fact produced before the Audit Department and the allegation that they have not produced factually, is incorrect and even otherwise they have the connected folio from their books which they undertook to produce at the time of special hearing to prove their stand effectively. Similarly, with regard to the leased machinery, it was stated that they are only the lessee and not the lessor and lessor to receive the lease rent, is only liable to pay appropriate tax under section 4 of the TN VAT Act. The copy of the lease agreement was produced along with the objections filed by the petitioners. Therefore, it was submitted that the proposals to revise the turnover is arbitrary and against the provisions of the Act. As regards the levy of penalty under Section 27(3) of the Act, it was submitted that penalty is not automatic and it is leviable only in case of wilful non- disclosure of assessment turnover by the dealer and in their case, there is no wilful non-disclosure and therefore, penalty is not leviable. Similar objection was taken for the other assessment years 2007-08, 2008-09, 2009-10 and 2010-11. There was a demand in respect of dyeing charges and wrong availment of ITC. The petitioners pointed in their objections that a request was made to furnish the details of the supplier, invoice number and date, amount and name of commodity in respect of the goods, where ITC claim was made for purchases effected out side the State. The petitioner stated that in the absence of any particular, they are unable to file their explanation and to their knowledge they have never moved cotton without bringing the same into the books of accounts.

3. The petitioner relying upon the decision of the Honourable Supreme Court reported in *Kirloskar Oil Engines Ltd. Vs. Union of India (UOI) and Others*, submitted that assumption without material cannot be a ground to levy tax and revision of tax must be based on definite material and it cannot be initiated on mere surmise or possibilities of gathering more material. The assessing authority for all the assessment years, after extracting the allegations in the show-cause notice/pre-revision notice, extracted the contends of the objections filed by the petitioners and observed that the explanation given by the dealer was carefully examined and assigned three reasons for rejecting the stand taken by the petitioners. The first reason the petitioners failed to produce the bills and books

to the audit party and having not produced the same till the close of the audit, their contention cannot be accepted. So far as the ITC claimed on dyeing charges, it was held that the dealer has to fail to prove. It was further stated that though the petitioner have put forth all their explanations and reasons for omission, the same having been done only after the completion of audit on their account. The objection filed by the dealers is an after thought and therefore, they were rejected.

4. A perusal of the order of assessment makes it clear that none of the objections raised by the petitioners were considered item-wise. In certain cases, the petitioners requested for copies of the documents. The request was not considered nor rejected. Further, the petitioners specifically requested for an opportunity of personal hearing. This was also not afforded. For all the above reasons, the order of assessment is liable to be interfered with on the ground of violation of principles of natural justice.

5. The learned Special Government Pleader appearing for the respondent submitted that the writ petitions are not maintainable since the petitioners have an effected alternative remedy of appeal provided under Section 51 of the TN VAT Act. In this regard, the learned Special Government Pleader placed reliance on the decision of the Honourable Division Bench of this Court in W.A(MD)Nos.423 and 424 of 2008 dated 18.06.2008 in the case of P.K.Mookanambalam vs. the Commercial Tax Officer, Tallakumam Assessment Circle. Further, the learned Special Government Pleader after referring to the averments made in the counter affidavit, submitted that all the points convinced by the petitioners could be raised before the appellate authority.

6. Heard the learned counsel for the parties and perused the material placed on record.

7. As noticed above, the order of assessment does not deal with the objections raised by the petitioners item-wise. While issuing pre-revision notice for all the six assessment years, each assessment year contains a different allegation or more than two allegations. The petitioners have submitted their objections in respect of all the pre-assessment notices specifically raising a contention in respect of each of the allegation in the notice. Therefore, the assessing authority bound to consider the objections item-wise and accept or reject the same or partially accept the same. However, by a three paragraphs order, the order of assessment has been finalized and the proposal in the pre-revision notice has been confirmed.

8. According to the department, the petitioners did not produce the records before the audit party. Nevertheless, a show notice has been issued by the Assessing Officer, in which, the petitioners should be given an opportunity to show-cause as to why the assessment should not be revised and while showing cause, it is always open to the petitioners to produce the records to substantiate the same. If there are no records available, then the petitioners can substantiate

their stand by raising objections. In such circumstances, there is a duty enjoined upon the Assessing Officer to consider the objections and passes speaking order rejecting the same. These aspects which are primarily necessary to be followed while finalizing an order of assessment, especially a revision of assessment has been given a go by by the assessing officer. The petitioners in respect of the pre-revision notices, for two assessment years specifically requested for an opportunity of personal hearing. This opportunity has not been rejected nor granted.

9. The Honourable Supreme Court in the case of SRC Projects Private Limited vs. The Commissioner of Commercial Taxes reported in [2010]33 VST 333 (Mad) held that where the question involved was one of determination of certain factual disputes which were a bit complex and not free from controversy the principles of fairness would encompass personal hearing within the concept of "reasonable opportunity to show cause" under Section 16(1)(a) of the TNGST Act. It was further held that Section 16(1)(a) of the Act had to be construed in accordance with the circular dated April 20, 2001 providing for oral hearing where dealer demanded it and an order passed by way of revision of assessment without giving the petitioner an opportunity of personal hearing was liable to be quashed. The decision of the Honourable Supreme Court is squarely applicable to the facts of the present of the case and in such circumstances, the impugned orders are liable to be interfered with on the ground of violation of principles of natural justice.

10. Accordingly, these Writ Petitions are allowed and the impugned orders are set aside and the matter is remanded to the respondent for fresh consideration. The respondent shall afford an opportunity of personal hearing to the petitioner, heard their objections and pass fresh orders in accordance with law, as expeditiously as possible, preferably within a period of two months from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petitions are closed.