(2013) 01 MAD CK 0141

In the Madras High Court

Case No : Writ Petition No''s. 824 to 833 of 2013 and M.P. No. 1 of 2013

M/s. Nakshatra Service Apartments, No. 28, Cenataph Road, Teynampet, Chennai-600018 — APPELLANT

Vs

The Assistant Commissioner(CT), Mandaveli Assessment Circle, Chennai — RESPONDENT

Date of Decision : 10-01-2013

Acts Referred:
Tamil Nadu Tax on Luxuries in Hotels and Lodging Houses Act, 1981 — Section 6(5)

Citation : (2013) 196 ECR 189

Hon'ble Judges : R. Sudhakar, J

Bench : Single Bench

Advocate : P.V. Sudakar, for the Appellant; Aditya Reddy, Government Advocate, for the Respondent

Judgement

R. Sudhakar, J.—W.P.No. 824 of 2013 is filed praying to issue a Writ of Certiorari, calling for the records of the respondent in his

proceedings in Rc. 1774/2010/2008-2009/TNLTH, and quash the assessment order dated 31.08.2012 made therein. Petitioner in W.P.No. 824

of 2013 is engaged in the business of renting of service apartments. He is running the service apartments for more than 10 years. Petitioner claims

that he is not liable to register himself as a dealer under the provisions of the Tamil Nadu Tax on Luxuries in Hotels and Lodging Houses Act 1981

(Tamil Nadu Act VI of 1981). It appears that the respondent department caused an inspection on 26.5.2010 and gathered relevant materials from

all the service apartments in respect of each one of the writ petitioners and based on that inspection, notice was issued on 16.3.2011 demanding

tax on the rent collected and also on the food and beverage supplied under the provisions of TNVAT Act, 2006. The notice inter alia proposed to levy of penalty u/s 16 of the Tamil Nadu Tax on Luxuries in Hotels and Lodging Houses Act 1981 (Tamil Nadu Act VI of 1981). The petitioner in

each one of the cases submitted their objections to the notice on 15.4.2011. In all the objections identical plea of no liability was pleaded. They

also prayed for furnishing of certain documents and for cross examination of the officers of the Enforcement Department to prove their case of no

liability. The specific plea of the petitioner in the objection in W.P.No. 824 of 2013 is as follows:-

The appellant requests if any D7 records recovered by the Enforcement Wing Officials on the basis of implementation of D3 proposals may be

handed over otherwise the proposal may kindly be dropped and justice rendered as mere statement obtained from the petitioners will not

substantiate to prove the best judgment made by you.

Since you are reluctant to consider our reply and also keen to implement the proposal of the Enforcement Wing Officers, in toto, we have no other

alternative except to cross examine those officers who had sent the proposals. Please refer the following decisions in this regard.

i) T.M. Rajaganapathi Traders Vs. The Commercial Tax Officer,

ii) (2005) 5 VST 392 (Mad) M.M. Enterprises Vs. CTO Moore Market South

As per the rulings of the above decisions, and as a measure of natural justice we are entitled to Cross Examine the Enforcement Wing Officers to

defend ourselves against such arbitrary and unreasonable proposal and addition.

The Assessing Officer has also requested to furnish the turnover details as adopted in the notice.

The figures adopted by you are only guess and not a real turnover which is not based on any records.

You have also not handed the case as per Act wise TNLTH ACT and TNVAT Act you have mingled and issued notice. This is not correct in the

eyes of law. This is only a hasty conclusion. The Turnover proposed to be assessed under VAT Act is below the limit.

We therefore request you to make arrangement for the cross examination of the Enforcement Wing Officers before your presence. The date for

such cross examination may be intimated to us well in advance.

This reply to the notice has been acknowledged. However, final order came to be passed in each one of the cases determining the tax due under the Act VI of 1981. Besides penalty has also been imposed u/s 8(a) of the Act VI of 1981.

2. At the time of admission, the primary plea taken by the counsel for the petitioner is that the provisions of Section 6(5) of the Tamil Nadu Tax on

Luxuries in Hotels and Lodging Houses Act 1981 has not been followed and it reads as follows:-

Section 6. Return:

(5) If no return is furnished in respect of any month, the assessing authority shall, after making such enquiry as he considers necessary and after

giving the proprietor an opportunity of being heard, determine the tax payable for the month. If the assessing authority has reason to believe that the

return, if any, furnished is incorrect or incomplete, he shall issue a notice to the proprietor calling upon him to produce his accounts, registers,

records or other documents or evidence and prove the correctness and completeness of the return at a time and place to be specified in the notice.

If the proprietor fails to comply with the terms of the notice or if the return is found to be incorrect or incomplete after such verification, the

assessing authority shall after giving the proprietor an opportunity of being heard, determine to the best of its judgment, the tax payable for the

month. The tax payable as determined under this sub-section shall be paid in the prescribed manner within the prescribed time.

The counsel for the petitioner relied upon the last portion of the reply/objection submitted to contend that they have made a request for cross

examination of the officer of the Enforcement Wing Department as a measure to comply with the principles of natural justice and such hearing will

be in terms of Section 6(5) of the Act. Since the proceedings initiated by the respondent department entails a demand for tax and for imposing

penalty, the mandatory provision of giving an opportunity of personal hearing should have been followed and that having not been complied with by

the respondent the proceeding is bad. The order is challenged on that short ground as above.

3. Considering the nature of issue involved, by consent, all the writ petitions are taken up together for disposal.

4. Learned Government Advocate appearing for the respondent in all the cases pleaded that since the objections were filed, there was no

requirement of personal hearing. He relied upon a decision of the Andhra Pradesh High Court rendered on 18.1.2000 in Andhra Cements Ltd. Vs.

Government of A.P. and others, . He contended that in that case, Rule 12 of the Mineral Concession Rules, 1960 provide for opportunity of being

heard while considering a case for refusal of application for prospecting licence and the said rules reads as follows:

12. Refusal of application for prospecting licence:- (1) The State Government may after giving an opportunity of being heard and for reasons to be

recorded in writing and communicated to the applicant, refuse to grant or renew a prospecting licence over the whole or part of the area applied

for.

In Andhra Cements case (referred to above), the learned single Judge of the Andhra Pradesh High Court held that if the objections or request has

been considered, there is no requirement of personal hearing.

5. In the instant case, the petitioner is held to be liable for tax as well as penalty under the provisions of the Tamil Nadu Tax on Luxuries in Hotels

and Lodging Houses Act, 1981. Section 6(5) of the Tamil Nadu Tax on Luxuries in Hotels and Lodging Houses Act, 1981 provides for

opportunity of being heard. Since the proceedings initiated entails penal consequences, the provisions of Section 6(5) of the Act will have to be

strictly complied with by giving an opportunity of personal hearing.

6. In all the cases, the petitioners have made a specific request for furnishing documents and for cross examination so as to comply with the

principles of natural justice and the said plea has been extracted above. Therefore, the requirement of hearing becomes necessary as a specific

request was made for cross examination. In such view of the matter it is incumbent on the respondent department to have granted opportunity of

personal hearing before deciding the issue on merits. The decision of the Andhra Pradesh High Court in Andhra Cements Case as above, does not

apply to the facts of the present case as in that case the question was whether a personal hearing is mandatory in a case of refusal to grant

prospecting licence.

It was clearly held in that case that no citizen has vested right for grant of prospecting licence and none can claim a vested right for grant of

prospecting licence. It is the prerogative of the Government to decide the claim.

In those circumstances, the plea of oral hearing was declined. In

the same decision it has been clearly held that an order or decision which may have the tendency to adversely effect the liberty to property rights

may have to be preceded by a notice and oral hearing.

7. In the instant cases the respective petitioner is mulcted with tax liability and penalty. Section 6(5) of the Tamil Nadu Tax on Luxuries in Hotels

and Lodging Houses Act, 1981 provides for opportunity of being heard in such a situation. In such circumstances, the decision relied upon by the

learned Government Advocate appearing for the respondent will not apply to the facts of the present case.

Since the order adverse to the petitioner has been passed demanding tax and penalty has been imposed without giving them an opportunity of

hearing as contemplated u/s 6(5) of the Act, the impugned proceedings require to be interfered with.

8. In view of the above, the impugned proceedings in all the writ petitions are set aside and the matters are remitted back to the authorities for

passing fresh orders after giving personal hearing to the respective petitioners.

Insofar as cross examination is concerned it is left to the discretion of the officer to either accept the said plea or decline it by giving sufficient

reasons for the same. At this stage, this court is not inclined to issue any specific direction with regard to the plea for cross examination and such a

request has to be considered by the authority on merits.

All the Writ Petitions are ordered as above. No costs. Consequently, connected miscellaneous petitions are closed.

