

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 04.09.2018

CORAM

THE HONOURABLE MRS. JUSTICE J.NISHA BANU

W.P.(MD)No.1602 of 2010

and

M.P.(MD)No.1 of 2010

M/s.Ayyan Fireworks Factory (P) Ltd.,
Rep. by its Managing Director,
G.Abiruban

.. Petitioner

Vs.

The Assistant Commissioner (CT)-I (FAC),
Sivakasi.

.. Respondent

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India praying for issuance of a Writ of CERTIORARI, calling for the records on the file of the respondent in CST 490711/04-05 (A.G/X/15-44/09-10) 9/11A/Na.Ka.A1/2284/09 dated 02.09.2009 and consequential demand notice in AG Audit Para No.9/II A (A1/2284/09) CST 4900711/04-05 dated 12.01.2010 and quash the same as illegal.

!For Petitioner : Mr.S.Karunakar

For Respondent : Mr.D.Muruganantham,
Additional Government Pleader

:ORDER

This writ petition has been filed seeking a Writ of Certiorari, to call for the records on the file of the respondent in CST 490711/04-05 (A.G/X/15-44/09-10) 9/11A/Na.Ka.A1/2284/09 dated 02.09.2009 and the consequential demand notice in AG Audit Para No.9/II A (A1/2284/09) CST 4900711/04-05 dated 12.01.2010 and quash the same as illegal.

2. According to the petitioner, though the petitioner has paid the tax for the subject Assessment Year without any default, the respondent has passed the impugned notice, dated 02.09.2009, proposing to levy interest of Rs.98,449/- under Section 24(3) of the TNGST Act, for belated payment, based

on the report of Audit Party. Thereafter, the petitioner has made a detailed representation on 14.09.2009, stating that there is no default on their part. Despite the same, the impugned demand notice dated 12.01.2010, was passed directing the petitioner to pay the interest amount.

3. The grievance of the petitioner is that the opinion of the Audit Party cannot constitute information, on the basis of which the Assessing Officer could reopen the assessment. In support of this submission, the learned Counsel for the petitioner placed reliance on the decision of the Punjab and Haryana High Court, reported in 107 STC 103, in the case of Haryana Co-operative Sugar Mills Ltd., v. State of Haryana.

4. On the other hand, the learned Additional Government Pleader, relying upon the counter affidavit filed by the respondent, would submit that belated payment of tax was brought to their knowledge by way of Audit Party objections and thereafter, the respondent has issued the demand notice under Section 9(2)B of the CST Act, 1956, read with Section 24(3) of the repealed TNGST Act, 1959, for the belated payment of Rs.2,50,000/-. He would further submit that the representation of the petitioner has already been considered by the Assessing Officer while issuing the original assessment order dated 28.09.2007 and for the belated payment of tax, interest was levied.

5. Heard the learned Counsel on either side and perused the documents placed on record.

6. As has been rightly submitted by the learned Counsel for the petitioner, the Assessing Officer could not reopen the assessment based on the opinion of Audit Party alone. In this regard, in the judgment relied upon by the learned Counsel for the petitioner, ie., in the decision of the Punjab and Haryana High Court, reported in 107 STC 103, in the case of Haryana Co-operative Sugar Mills Ltd., v. State of Haryana, it has been held as follows:

?4. The question that arises for our consideration is whether the audit note as received by the Assessing Authority was 'definite information' within the meaning of Section 31 of the Act. In our opinion, the answer has to be in the negative. In the opinion of the audit party, the tax was leviable under Section 9 and on receipt of the note, the Assessing Officer changed his opinion and reopened the assessment so as to levy tax under Section 9 of the Act. The opinion of the audit party cannot constitute information on the basis of which the Assessing Authority could reopen the assessment under Section 31 of the Act. The matter is not res integra. The question whether an audit objection constitutes information so as to entitle the Assessing Authority to reopen the assessment within the meaning of Section 31 stands

concluded against the Revenue and in favour of the assessee by a judgment of the Supreme Court in *Indian and Eastern Newspaper Society v. Commissioner of Income Tax* [1979] 119 ITR 996 and two Division Bench judgments of this Court in *Commissioner of Income Tax v. Aggarwal Textile Mills* [1985] 154 ITR 234 and in *Commissioner of Wealth Tax v. Smt. Savitri Devi* [1983] 144 ITR 345.?

7. The Assessing Officer has to independently record his view for such reopening, if he proposes to reopen and thereafter, notice has to be issued to the parties regarding such reopening and after considering their objections/representations in this regard, order has to be passed. In the counter affidavit, it is averred by the respondent that the contentions of the petitioner have already been considered in the original assessment order dated 28.09.2007 itself. It is necessary to reiterate that the petitioner has made his objections by way of representation on 14.09.2009, ie., after receipt of the notice dated 02.09.2009. Therefore, it is crystal clear that the representation of the petitioner dated 14.09.2009 was not at all considered by the respondent, before passing the impugned demand notice dated 12.01.2010.

8. On this sole ground alone, the impugned demand notice cannot be sustained, since it is a clear violation of principles of natural justice. Accordingly, the impugned demand notice, dated 12.01.2010, is set aside and the matter is remitted back to the respondent for fresh consideration. If the respondent proposes to reopen the assessment, he has to record his view, independently, for such reopening and after considering the objection/representation of the petitioner, necessary orders have to be passed by the respondent, within a period of eight weeks from the date of receipt of a copy of this order. It is made clear that this Court has not expressed anything on the merits of the matter and the respondent has to decide the issue purely on merits and in accordance with law, after affording due opportunity of personal hearing to the petitioner.

9. This writ petition stands allowed in the above terms. No costs. Consequently, connected miscellaneous petition is closed.

To
The Assistant Commissioner (CT)-I (FAC),
Sivakasi.

.