

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

MONDAY, THE 8TH DAY OF NOVEMBER 2021 / 17TH KARTHIKA, 1943

WP(C) NO. 21798 OF 2021

PETITIONER:

ATLAS JEWELLERY [P] LTD,
NEDUMBASSERRY, ALUVA, ERNAKULAM, THROUGH IT'S
MANAGING DIRECTOR, SRI. M.M. RAMACHANDRAN ,
REPRESENTED BY HIS POWER OF ATTORNEY HOLDER SRI.
JOSE VARGHESE AGED 44 YEARS, S/O. SRI. VARGHESE,
RESIDING AT THETTAYIL HOUSE, NEDUVANNOOR, CHOWARA
P.O, CHENGAMANAD, ERNAKULAM DISTRICT, 683 571

BY ADVS.
AJI V.DEV
ALAN PRIYADARSHI DEV

RESPONDENTS:

- 1 THE DEPUTY COMMISSIONER,
SPECIAL CIRCLE, STATE GOODS AND SERVICE TAX
DEPARTMENT, MATTANCHERRY AT ALUVA-683 101, (FORMERLY
ASSISTANT COMMISSIONER, DEPARTMENT OF COMMERCIAL
TAXES, KERALA).
- 2 THE JOINT COMMISSIONER,
STATE GOODS AND SERVICES TAX DEPARTMENT, STATE TAX
COMPLEX, BAZAR ROAD, MATTANCHERRY-682 002.
- 3 THE COMMISSIONER OF STATE TAX,
TAX TOWER, KILLIPPALAM, KARAMANA
P.O, THIRUVANANTHAPURAM-695 002

DR.THUSHARA JAMES-SR GP

THIS WRIT PETITION (CIVIL) HAVING COME UP FOR ADMISSION
ON 08.11.2021, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

BECHU KURIAN THOMAS, J.

WP(C) No. 21798 of 2021

Dated this the 8th day of November, 2021

JUDGMENT

Petitioner challenges assessment orders under Section 25(1) of the Kerala Value Added Tax Act, 2003, (for short the Act) for the assessment years 2014-15 and 2015-16. The order issued under Section 25A of the Act for the year 2014-15 is also under challenge. Though highly belated in its challenge, petitioner claims to have been deprived of sufficient opportunity to contest the case. An extraordinary situation is alleged to have put those at the helm of affairs of the petitioner in a disadvantageous position, crippling their ability to contest the case.

2. Petitioner is a private limited company which had three Directors, of which the Managing Director was the person in charge, along with his wife. The third Director is alleged to be an employee, who acted as a silent Director

and retired from the company on 12.03.2015.

3. Petitioner contends that the Managing Director of the company was sentenced to imprisonment in the United Arab Emirates and was in jail from 15.11.2015 till 22.05.2018. Petitioner also contends that the wife of the Managing Director was also residing in Dubai during the said period and that she could not move out of UAE and come to India. Ext.P2 is a certificate (a translated copy of which is produced as Ext.P2(a)) which certifies that the Managing Director of the petitioner was sentenced to three years imprisonment and was an inmate at the prison of Dubai Police from 15.11.2015 till 22.05.2018. Ext.P1 is the certificate from the Registrar of Companies showing the details of the Directors of the company.

4. Petitioner was a registered dealer under the Act engaged in the manufacture and export of gold and other jewellery, including precious metals. Petitioner claimed that its Managing Director had commenced his business operations at Kuwait, but during the 'Kuwait war', his

showrooms were looted. Despite the loss, he commenced his business in UAE and soon flourished. Later, he set up showrooms in India and flourished here also. Yet again, ill fate struck him and he was arrested and imprisoned in Dubai.

5. Petitioner claimed that pursuant to the arrest of its Managing Director, its business activities in Kerala fell into ruin and before long his shops were closed and the entire staff left the company. There was none to attend to the notices issued by various Officers and the Bank took possession of his buildings and showrooms. The South Indian Bank is alleged to have taken custody of the entire stock and machinery, including computers containing the books of account and other details.

6. Ext.P5 order of assessment for the year 2014-15 dated 16.05.2017, mentions that the dealer neither responded to the notices issued nor appeared for the personal hearing granted on 27.04.2017. Though the order further mentions about one relative of the Managing

Director as having appeared on 15.05.2017 and produced a copy of export documents, in the absence of any written objections, and failure to produce relevant documents, the assessing officer, after refusing to grant further time to produce documents, proceeded to assess the petitioner. Thereafter, the order of assessment has been issued imposing a huge liability upon the petitioner.

7. As far as Ext.P6 assessment order for 2015-16 is concerned, it is seen that notice was served on the dealer on 10.04.2017 and hearing was accorded on 27.04.2017 and a final chance for hearing was afforded on 15.05.2017 on which date also a relative of the Managing Director by name Sri.Sajan is alleged to have appeared and produced a copy of export documents. The order of assessment apparently observes that the dealer could not file the remaining documents for the year 2015-16 also. As far as Ext.P7 order under Section 25A of the Act is concerned, the Assessing Officer himself observed that the notice issued to the assessee was returned by the postal authorities with the

endorsement 'addressee refused'.

8. I have heard the contentions of Adv. Aji V. Dev, the learned Counsel for the petitioner as well as Adv. Dr.Thushara James, the learned senior Government Pleader.

9. On a consideration of the entire circumstances in the case, I am of the view that the impugned orders Ext.P5, Ext.P6 and Ext.P7 are in fact, issued in violation of the principles of natural justice. The principle of natural justice has twin ingredients; firstly the person who is likely to be adversely affected by the action of the authorities should be given notice to show cause thereof and be granted an opportunity of hearing and secondly, the orders so passed by the authorities should give reasons for arriving at any conclusion showing a proper application of mind. Violation of either of them could in the given facts and circumstances of the case vitiate the order itself. A reference to **Assistant Commissioner, Commercial Tax Department v. Shukla and Brothers**, (2010 4 SCC 785) would suffice for the above proposition.

10. On an analysis of the facts of the instant case, this Court notices the availability of the above-mentioned twin ingredients. The orders of assessment apart from failing to give a reasonable opportunity of hearing had failed to consider any of the issues that arose and are seen to be non-speaking orders, issued without due application of mind.

11. While reverting to the facts of the case to appreciate the twin ingredients, Ext.P8 letter assumes significance. In the said letter, one of the Directors of the petitioner, who is the wife of the Managing Director of the company, had filed an objection stating that they were ready to produce documents to prove export sales, purchase bills of capital goods and local purchase bills to prove the input claim. It was also specifically mentioned that they were unable to extricate the computers in the showroom in which the accounts are kept, and also that they are contacting the bank authorities to release the computers to enable access to the books of accounts. The

statement in Ext.P8 finds some credence in the observation of the assessing officer. Ext.P6, indubitably mentioned that "all the business places of the dealer are closed down". When the statements of the petitioner, as well as the observations of the assessing officer, are considered in the backdrop of Ext.P2, it becomes lucid that petitioner was in a disadvantageous position during the time when the notices were issued and even when the assessment orders were rendered. In such circumstances, the contention of the petitioner that it was deprived of a reasonable or sufficient opportunity to contest the case, assumes credence, at least to a large extent.

12. The opportunity for contesting a case must be a real opportunity and not an unreal one. The real opportunity arises when the petitioner is accorded a sufficient chance to place all the materials before the assessing officer. The opportunity contemplated must be real and not ritualistic, effective and not illusory. In the instant case, I find that such an opportunity was not available to the petitioner for

reasons beyond the control of the petitioner. Even the request for three months time to produce the documents, requested as per Ext.P8, is seen refused, on the ground that already two months time had been granted. Application of mind to the request was glaringly absent.

13. In cases where decisions like assessment orders are issued, the right to a fair hearing is essential. The Managing Director of the petitioner and even his wife, who is claimed to be the only other Director both, fell into a disadvantaged category during the relevant period. The former was in prison, while the latter could not travel. The computers and books of accounts were locked up in showrooms that were seized by Banks. The case of the petitioner vis-a-vis the impugned orders falls into classic instances of disability impairing opportunity for a fair hearing. A real and substantial prejudice can be seen to be caused to the petitioner, in the peculiar circumstances.

14. The rules of natural justice must depend on the circumstances of each case, the set of facts that surround

each situation, the nature of the inquiry, the rules that govern the procedure and even the subject matter dealt with, apart from prejudice that could be caused to either side. The principles of natural justice are, as observed by the House of Lords in **Lloyd v. McMahon** [1987] AC 625, “not engraved on tablets of stone” and the courts will ensure so much and not more, to be introduced by way of additional procedural safeguards, as will ensure the attainment of fairness. The rules of natural justice are flexible to adapt to situations and circumstances to advance the cause of justice. In the decision in **Union of India and another v. Jesus Sales Corporation** (1996 4 SCC 69), it was held that “under different situations and conditions the requirement of compliance of the principle of natural justice vary”.

15. Rule 38 of the Kerala Value added Tax Rules, 2005 provides a reasonable opportunity of being heard before completing the best judgment assessment. A ritualistic opportunity of hearing as an empty formality is not what

advances the cause of justice. The object of granting an opportunity for hearing is irrefutably to advance the cause of justice. In the circumstances pleaded and argued on behalf of the petitioner, this Court is of the considered view that a reasonable opportunity of hearing was not accorded to the petitioner.

16. While considering the concept of granting an opportunity for hearing, it also assumes significance, as mentioned earlier, that no prejudice would be caused to the revenue if an opportunity of hearing is granted afresh to the petitioner, especially, since the learned Counsel for the petitioner contends that, at present, the petitioner is in a position to contest the case on merits.

17. As regards the second ingredient, this Court notices that the orders of assessment are not speaking orders, since the specific issues arising in the case were not considered by a proper application of mind. Non-application of mind as mentioned earlier is also a case of violation of principles of natural justice. This Court had, in a case where

the assessing officer merely adopted the conclusions in the order of penalty, without applying his mind independently, held in **Yeses International v. State of Kerala** (2008 4 KLT 454) “ *The order of assessment should definitely indicate the application of mind by the assessing authority even while completing the best judgement assessment and is not expected to emboss his seal of approval to the orders made by the intelligence officer of the department for the purpose of imposing penalty order under section 45A of the act. As we have already observed that the assessing officer is quasi-judicial authority and while exercising his quasi-judicial function he has to apply his mind independently and while doing so can also take into consideration the findings of the intelligence officer of the department and at any rate, that cannot be the sole basis.*”

18. In the instant case, there is no application of mind at all. The assessing officer had merely proceeded on the basis of non-reply by the assessee, without independently applying his mind to the case. The only reason stated to reassess the petitioner is *‘in order to safeguard the state revenue the assessment for the year ... is completed as*

proposed with slight modification...' In the aforesaid circumstances, I find that Ext.P5, Ext.P6 and Ext.P7 are non-speaking orders too. The orders are therefore liable to be set aside.

19. While setting aside Ext.P5, Ext.P6 and Ext.P7, I direct the petitioner to appear before the first respondent on 15.12.2021 and file necessary objections if any, on the same day, without fail. No further adjournment for filing objections shall be sought for by the petitioner. Thereafter, the Assessing Officer shall hear the petitioner and pass appropriate orders within an outer period of three months from the date of receipt of a copy of this judgment.

20. Petitioner shall treat this as sufficient notice for appearance on the date as aforesaid and no further notice need be given by the Assessing Officer to the petitioner.

The writ petition is allowed as above.

sd/-
BECHU KURIAN THOMAS
JUDGE

APPENDIX OF WP(C) 21798/2021

PETITIONER EXHIBITS

- Exhibit P1 A TRUE COPY OF THE COMPANY MASTER DATA,
AVAILABLE FROM THE WEBSITE OF THE REGISTRAR OF
COMPANIES WITH REGARD TO THE PETITIONER.
- Exhibit P2 A COPY OF THE CERTIFICATE ISSUED BY THE GENERAL
DEPARTMENT OF PUNITIVE AND CORRECTIONAL OF THE
GOVERNMENT OF DUBAI DATED 18.03.2019 (IN ARABIC
LANGUAGE) .
- Exhibit P2(A) A TRUE COPY OF THE TRANSLATION OF THE SAME TO
ENGLISH BY A LICENSED LEGAL TRANSLATOR
- Exhibit P3 A TRUE COPY OF THE NEWS ITEM PUBLISHED IN THIS
REGARD IN KHALEEJ TIMES (ONLINE VERSION), DATED
09.06.2018.
- Exhibit P3(A) A TRUE COPY OF NEWS ITEM PUBLISHED IN THE NEW
INDIAN EXPRESS (ONLINE VERSION) ALSO, DATED
09.06.2018.
- Exhibit P4 A TRUE COPY OF THE CERTIFICATE ISSUED BY MADEOR
HOSPITAL DATED 03.06.2021.
- Exhibit P4(A) A TRUE COPY OF THE CERTIFICATE ISSUED BY MEDCARE
HOSPITAL DATED 22.06.2021.
- Exhibit P4(B) A TRUE COPY OF THE CERTIFICATE ISSUED BY GETWELL
MEDICAL CENTRE DATED 29.05.2021.
- Exhibit P4(C) A TRUE COPY OF THE CERTIFICATE ISSUED BY MED
HOSPITALS DATED 04.07.2021.
- Exhibit P5 A TRUE COPY OF THE ASSESSMENT ORDER PASSED FOR
2014-15 DATED 16.05.2017.
- Exhibit P6 A TRUE COPY OF THE ASSESSMENT ORDER PASSED FOR
2015-16 DATED 16.05.2017.
- Exhibit P7 A TRUE COPY OF THE ASSESSMENT ORDER PASSED FOR
LEVY OF INTEREST FOR 2014-15 DATED 19.03.2019.
- Exhibit P8 A TRUE COPY OF THE REPLY FILED BY SMT. INDIRA
RAMACHANDRAN DATED 30.03.2017.