



HIGH COURT OF ANDHRA PRADESH
MONDAY ,THE TWENTY SECOND DAY OF MARCH
TWO THOUSAND AND TWENTY ONE

PRSENT

THE HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

THE HONOURABLE MS JUSTICE J. UMA DEVI

WRIT PETITION NO: 5605 OF 2021

Between:

1. M/s. Sri Venkata Satyanarayana Stone Crusher, rep. by its Proprietrix, Mrs. Mummana Lakshmi, 395/31 to 37, Jami to S. Kota Road, Jami Mandal, Vizianagaram District.

...PETITIONER(S)

AND:

1. Commercial Tax Officer (Int.), Vizianagaram Division, Vizianagaram.
2. Joint Commissioner (ST), Vizianagaram.
3. State of Andhra Pradesh, rep. by its Principal Secretary to Government, Revenue (CT-II) Department, Secretariat, Velagapudi, Amaravati, Guntur District.

...RESPONDENTS

Counsel for the Petitioner(s): K V J L N SASTRY

Counsel for the Respondents: GP FOR COMMERCIAL TAX

The Court made the following: ORDER



HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

AND

HON'BLE MS. JUSTICE J. UMA DEVI

Writ Petition No.5605 of 2021

ORDER: *(Per UDPR,J)*

The petitioner seeks writ of certiorari or any other writ or order directing quashing of the order of the 1st respondent dated 15.07.2018 passed in A.O.No.121443 for the tax period 2015-16, 2016-17 and 2017-18 (upto June, 2017) as illegal, arbitrary, without proper authorization and without proper opportunity to the petitioner and pass such other orders as the Court deems fit.

2. The petitioner runs stone crusher unit at S.Kota Road, Jami Village, Vizianagaram District. It is a turnover tax dealer (ToT) under the provisions of the AP VAT Act, 2005.

3. The 1st respondent, basing on the authorization for audit and assessment issued by the 2nd respondent on 09.03.2018, undertook assessment by issuing show cause notice to assess the turnover of the petitioner basing on the electricity consumption. The petitioner did not receive the show cause notice prior to the assessment. Hence, the petitioner was not aware of the best judgment assessment. It was only when a demand notice was issued for payment of tax that the petitioner realized that there was a demand for tax of Rs.3,95,733/- and equal amount towards penalty.



4. The petitioner applied for certified copy on 28.11.2020 and the 1st respondent supplied the same on 08.01.2021 which revealed that tax liability of Rs.3,95,733/- was on an estimated turnover of Rs.75,14,667/- basing on the power consumption for the tax period 2015-16, 2016-17 and 2017-18. The alleged show cause notice dated 25.04.2018 proposing to levy tax or the alleged notice dated 16.05.2018 fixing personal hearing were not at all served on the petitioner and hence, the petitioner had no opportunity to file objections or to appear for personal hearing.

5. On verification of the assessment order, the petitioner found that the assessment was without authorization. In the assessment order, it was claimed by the 1st respondent that he had obtained common authorization for audit and assessment from the 2nd respondent on 09.03.2018 and thereafter initiated assessment. The authorization is defective for more than one reasons i.e., it was not issued by appropriate authority and it was issued both for audit and assessment which is not correct in the eye of law. Therefore, the assessment order is vitiated.

Hence the writ petition.

6. Heard Sri S. Dwarakanath, learned counsel, representing Sri K.V.J.L.N.Sastry, learned counsel for the petitioner and learned Government Pleader for Commercial Taxes.



7. On two main grounds, learned counsel for the petitioner questioned the validity of the impugned order passed by the 1st respondent. Firstly, it is contended that as per Rule 59(7) of the AP VAT Rules, 2005, in respect of a ToT dealer, the best judgment assessment can be made by the Deputy Commercial Tax Officer (DCTO) of the circle concerned as authorized by the Commercial Tax Officer of the circle concerned for the dealers in the circle concerned. However, in the present case, the assessment is done by the Intelligence Officer who is higher in rank and not competent to assess the petitioner. Therefore, the assessment order is bad at law for improper authorization.

8. Secondly and alternatively, it is argued that assuming that the 1st respondent is competent to pass assessment order treating the petitioner is a VAT dealer, even then the assessment is vitiated for the reason that there cannot be a common authorization for audit and assessment as issued by the 2nd respondent. There should be one authorization for audit and a separate authorization for assessment. Even if both authorizations are couched in one order, the Auditing authority shall conduct the audit first and if he finds any under-declaration of the turnover and other mischiefs, he should prepare a report and submit to the higher authority who issued authorization and it is only after recording the satisfaction by such higher authority that in view of the deficiencies and defects narrated in the audit report, there is a requirement for assessment, such higher authority shall issue



separate proceedings for conducting assessment. In the instant case, basing on the common authorization for audit and assessment issued by the 2nd respondent, the 1st respondent directly conducted the assessment basing on his audit report without referring the same to the 2nd respondent. Hence, the assessment is vitiated on that ground also.

9. *Inter alia* he also argued that no sufficient opportunity was given to the petitioner to submit its objections.

10. *Per contra*, learned Government Pleader argued that there are no procedural violations as alleged by the petitioner. He would submit, as per 59(1)(7) of AP VAT Rules, 2005, the best judgment assessment can be made in respect of ToT dealer by DCTO of the circle as authorized by the CTO of the circle and in the instant case the assessment was made by the 1st respondent who is CTO (Intelligence) and he is higher in the rank than the DCTO. Further, he made the assessment on the authorization issued by the Joint Commissioner (ST) and therefore it cannot be argued for a moment that he had no inherent lack of power to make assessment. He would argue that if only when the assessing officer was below the rank of DCTO, would the question of inherent lack of authority/power arise to test the validity of his order. Since that is not the case here, the assessment order cannot be challenged on the ground that the 1st respondent was not competent to pass assessment order. In this regard, he relied upon the decision of a Division Bench of the common High Court of Andhra Pradesh in *Progressive Constructions*



Ltd. Vs. The State of Andhra Pradesh Revenue (CT)-I, Department and Ors¹. He further argued that since the composite authorization to audit and assessment was already given by the Joint Commissioner, there was no requirement for the 1st respondent to place the audit report before the Joint Commissioner and seek permission for making assessment. He thus prayed to dismiss the writ petition.

11. The point for consideration is, whether the assessment order dated 15.07.2018 passed by the 1st respondent is legally and procedurally defective one and liable to be set aside?.

12. We gave our anxious consideration to the above arguments.

Rule 59(7) of the AP VAT Rules, 2005 reads thus:

“59. Authority prescribed

(1)For the purpose of exercising powers specified in column (2) of the table below, the authorities specified in column (3) thereof, shall be the authorities prescribed.

<i>Sl.No. (1)</i>	<i>Powers (2)</i>	<i>Authority (3)</i>	<i>Section/Rule (4)</i>
<i>(7)</i>	<i>TOT-Unilateral Assessment/Best Judgment assessment</i>	<i>DCTO of the circle, concerned, as authorized by the CTO of the circle, concerned for the dealers in circle concerned.</i>	<i>Sections 20(3)(a)&(b), 21(1), 21(3)(4)&(5) and Rule 25(1) & 25(5)</i>

13. Thus, according to the above Rule, in respect of ToT dealer the best judgment assessment can be made by a DCTO of the circle concerned as authorized by the CTO of the circle concerned for the dealers in the circle concerned. In the instant case, the impugned

¹ MANU/AP/0839/2017 = 2018(3)ALD119, (2018) 66 APSTJ 64



assessment order No.121443 dated 15.07.2018 depicts that the said order was passed by the Commercial Tax Officer (Intelligence) (now Assistant Commissioner) (ST) Vizianagaram Division on the authorization for audit and assessment issued by the Joint Commissioner (ST), Vizianagaram, dated 09.03.2018. Admittedly the 1st respondent is higher in rank than the DCTO. So also Joint Commissioner, who issued authorization is higher in rank than the CTO. Therefore, as rightly argued by learned government pleader, it cannot be contended that the 1st respondent lacks inherent jurisdiction to make best judgment assessment. In terms of Rule 59(1)(7) of the AP VAT Rules, the conferment of authorization on 1st respondent by the Joint Commissioner may, at the worse, be termed as a procedural deviation but not as lack of inherent power/jurisdiction on the part of both the Joint Commissioner and the 1st respondent. Running the risk of pleonasm, it is not a case of want of jurisdiction but only a irregular assumption of jurisdiction. In similar circumstances, in *Progressive Constructions' case (1 supra)*, a Division Bench of the common High Court of Andhra Pradesh observed that while an assessment order passed by an officer below the rank of DCTO would suffer from inherent lack of jurisdiction, the assessment orders passed by an officer in the rank of DCTO and above, without authorization from the competent authority to make assessment, would, at best, constitute irregular assumption of jurisdiction which can be either waived by the dealer or cured on an authorization being given in their favour by the competent authority. In our case as already discussed supra, since the



1st respondent is higher in rank than the DCTO of the circle who is competent to make best judgment assessment and as the authorization was given by the Joint Commissioner, the petitioner's first argument that the assessment was made by a higher ranked officer than DCTO and on that ground the assessment fell foul of law, cannot be countenanced.

14. Now the 2nd argument of the petitioner has to be analyzed. It is contended by the petitioner that even though the 1st respondent is assumed to have authority by virtue of the composite authorization for audit and assessment accorded by the Joint Commissioner, still the 1st respondent cannot directly and automatically proceed with assessment without tabling the audit report before the Joint Commissioner seeking a separate authorization for making assessment. In which case, the Joint Commissioner, while recording his satisfaction that the deficiencies and defects narrated in the audit require assessment, grants the authorization for assessment. Since such exercise is not done, it is argued, the assessment order is liable to be set aside. In this regard, the petitioner relied upon the decisions of the common High Court of Andhra Pradesh in *Sri Balaji Flour Mills Vs. The Commercial Tax Officer and others*², *Dekars Fires & Security Systems Pvt. Ltd. Vs. The Deputy Commissioner (CT)*³ and *Arihant Automobiles Vs. Deputy Commercial Tax Officer-I and others*⁴.

² MANU/AP/0850/2010 = (2011) 52 APSTJ 85, (2011)40VST150(AP)

³ MANU/AP/1281/2011 = (2011) 53 APSTJ 45

⁴ MANU/AP/0472/2013 = (2013) 56 APSTJ 78, (2013)62VST254(AP)



15. In the light of above argument, when perused, the impugned assessment order dated 15.07.2018 shows that the 1st respondent passed the assessment order on the strength of composite authorization for audit and assessment issued by the Joint Commissioner. In the assessment order we do not find any mentioning to the effect that audit report was placed before the Joint Commissioner who, upon being satisfied that an assessment was required to be made, issued a separate authorization to the 1st respondent to make the assessment. During hearing also no such order was placed before this Court by the respondents.

16. Be that it may, in *Sri Balaji Flour Mills' case* (2 supra), under similar circumstances, a Division Bench of the High Court of Andhra Pradesh observed thus:

“47.The VAT Audit Instructions issued by the Commissioner vide circular dated 19.06.2006 also clarify that after completion of authorization, the notice of assessment of VAT in Form 305A shall be issued “wherever necessary”. This indicates that authorization of audit and completion of audit need not necessarily lead to an assessment unless the next higher authority authorizes such assessment as per paragraph 7.2(e) of Chapter VII quoted above. Indeed, as rightly pointed out by the counsel for petitioners, Section 43 is a self-contained provision dealing with inspection, search, seizure and confiscation, and does not contemplate any audit related assessment in every case. Therefore, we are convinced that authorization of audit under Rule 59(1)(7) does not have the effect of authorizing or empowering the officers mentioned in Rule 59(1)(4)(ii)(b) and (d) to undertake assessment.”

Upon the above observation, ultimately, the Division Bench ordered as follows:



55. xxxx xxxx xxxx xxxx xxxx xxxx xxxx

(b) In view of our holding that the authorization to audit under Section 43 read with Rule 59(1)(7) by itself does not enable audit officer to undertake assessment, we set aside all the assessment orders and consequential orders, if any under Section 53 of the VAT Act, in all the writ petitions;

(c) All the impugned assessment orders shall stand remitted to the respective audit officers who shall submit audit reports as contemplated under Chapter VII of the VAT Audit Manual for appropriate Post Audit Action. If the competent controlling and/or supervising authority like Deputy Commissioner issues separate orders authorizing assessment, it shall be open to such authorizing officer or authority prescribed, as the case may be, to undertake assessment in accordance with law.”

17. In *Dekars Fires’ case* (3 supra), the Division Bench of the High Court of Andhra Pradesh by following its earlier judgment in *Sri Balaji Flour Mills’ case* (2 supra) ordered as follows:

“5. Following the same, these writ petitions shall stand disposed of in the following manner. The assessment orders/penalty orders/orders for payment of interest shall stand set aside. The matters shall now go to the Audit Officers (who passed orders), who shall submit audit reports to the Deputy Commissioner for appropriate action in accordance with the judgment of this Court in Balaji Flour Mills.”

18. Then, in *Arihant Automobiles’ case* (4 supra), the Division Bench of the High Court of Andhra Pradesh stressed the need for recording the satisfaction of higher authority who accorded authorization for auditing. In that case when audit report was forwarded by the 1st respondent therein to the Deputy Commissioner (CY), Kurnool, the said authority passed an order authorizing the 1st respondent to make assessment, in case of detection of any under-declaration of turnover. In that context, the Division Bench observed



that the Deputy Commissioner failed to record its satisfaction (on perusal of the report of audit) that under-declaration of turnover was detected and therefore an assessment should be made. Instead, he delegated the task of recording of satisfaction to the Assessing Authority and hence, the order of authorization and consequent order of assessment fell foul of law.

19. So, the above jurimetrical jurisprudence delineates that though a composite/common authorization to audit and assess was issued by a higher authority, still the obligation is on the auditing officer to place before the higher authority the audit report and the higher authority shall upon recording its satisfaction about the requirement of assessment, issue authorization to make such assessment. Adherence to such procedure is not evident in the instant case. Therefore, the assessment order is liable to be set aside.

20. Accordingly this Writ Petition is allowed and the impugned Assessment order No.121443 dated 15.07.2018 passed by the 1st respondent is set aside and the 1st respondent is directed to place the audit report before the Joint Commissioner for post audit action and in case, the Joint Commissioner records his satisfaction for making assessment, then the 1st respondent or the other assessing authority shall issue a pre-assessment show cause notice to the petitioner and after receiving objections and according personal hearing, pass Assessment order afresh. There shall be no order as to costs.



As a sequel, interlocutory applications, if any, pending for consideration shall stand closed.

U.DURGA PRASAD RAO, J

J. UMA DEVI, J

22nd March, 2021
krk/cbs



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HON'BLE SRI JUSTICE U.DURGA PRASAD RAO

AND

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