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W.P. Nos.10239 and 10241 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.09.2023
Pronounced on : 10.11.2023

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P. Nos.10239 and 10241 of 2021
and W.M.P.Nos.10842 and 10843 of 2021

Mahindra & Mahindra Limited,
Rep. by Shri R.K.Sairam,
Manager Finance & Accounts (AD).
Mahindra Towers, 1st Floor,
No.17/18, Patullos Road,
Chennai - 600 002.

... Petitioner

Vs.

The Deputy Commissioner (CT)-II,
Large Tax Payers Unit,
Integrated Building,
Nandanam,
Chennai 600 035.

... Respondent

PRAYER in W.P.No.10239 of 2021: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records relating to the Assessment Order TIN/33510640011/2014-15 dated 25.03.2021 passed by the Respondent and quash the same as arbitrary and illegal.



W.P. Nos.10239 and 10241 of 2021

PRAYER in W.P.No.10241 of 2021: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records relating to the Assessment Order TIN/33510640011/2015-16 dated 25.03.2021 passed by the Respondent and quash the same as arbitrary and illegal.

For Petitioner : Mr. Joseph Prabakar
For Respondent : Mr.T.N.C. Kaushik
Additional Government Pleader

ORDER

The short question that arises for consideration in these two writ petitions is whether home UPS which is marketed / advertised as meant for use in homes can be classified under S.No. 68 of Part B of the First Schedule to the TNVAT Act which covers Information Technology products notified by the Government.

2.The petitioner had classified the UPS sold by it as falling under S.No. 68 and in particular S.No.27 of Notification No.II (I)/CTR/ (a-6/2007-G.O.No.3 dated 01.01.2007 which reads as under :

THE FIRST SCHEDULE



W.P. Nos.10239 and 10241 of 2021

PART-B

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S.No.	Description of the Goods	Commodity Code Number
68.	Information Technology products as notified by the Government. (The following goods have been notified as falling under this item by Notification No.II (I)/CTR/ (a-6/2007-G.O.No.3 dated 1st January 2007:- 1. Word Processing machines, Electronic typewriters (a) Word processing machines (b) Electronic typewriters 27. <u>“Uninterrupted Power Supply”</u>	2068

The impugned order is made rejecting the petitioner's submission that the UPS sold by them would fall under S.No.68 Part B of the First Schedule to the TNVAT Act attracting 5% instead the impugned order proceeds to treat the UPS as falling under the residuary S.No. 69 Part C of the First Schedule to the TNVAT Act thus liable to tax at 14.5%. The impugned order sets out the following reasons to reject the petitioners claim to classify the UPS sold by it as Information Technology product



W.P. Nos.10239 and 10241 of 2021

falling under S.No. 68 Part B of the 1st Schedule to the TNVAT Act viz.,

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a) UPS used at homes does not aid the development of I.T. Industry, S.No. 68 of Part B covers UPS used with computers and does not cover UPS used at homes in relation to home appliances such as light, fans etc.

b) The brochure of the Petitioner is also relied upon to submit that the petitioner had itself advertised, marketed and understood that the UPS sold by it is used in home appliances such as fans, lights and other home appliances etc and thus not covered under S.No. 68 of Part B of the 1st Schedule to the TNVAT Act.

c) The test report from Electronics Regional Test Laboratory North was rejected by stating that it has not categorically classified the product viz., UPS dealt with / sold by the petitioner as digital UPS.

d) That the Principal Secretary / Commissioner of Commercial Taxes vide clarification dated 14.08.2015 laid down the criteria for a product to be covered by S.No. 68 of Part B of the First Schedule to the TNVAT Act. However, the products sold by the petitioner do not satisfy the above criteria and thus cannot be classified under S.No. 68 of Part B of the First Schedule to the TNVAT Act.



W.P. Nos.10239 and 10241 of 2021

WEB COPY

e) The uninterrupted power supply notified vide G.O.Ms.No.3 dated 01.01.2007 covers only UPS attached to a computer with an inbuilt battery and the range of input is brought down to 200-240V AC in UPS and has a short backup duration and the output is pure Sine Wave. To the contrary it is stated that the Home UPS / Inverters sold by the petitioner has an external battery and has a wide range of input from 170V-270V AC and its output is a Modified Sine Wave which cannot be equated with the UPS covered under S.No. 68 of Part B of the First Schedule read with G.O.Ms.No.3 dated 01.01.2007. Thus the UPS sold by the petitioner would not fall within S.No. 68 of Part B of the First Schedule to the TNVAT Act read with G.O.Ms.No.3 dated 01.01.2007 but would fall under residuary entry viz., S.No. 69 of Part C of the First Schedule of the TNVAT Act.

3.The impugned order is challenged *inter alia* on the following grounds :

a) S.No. 27 of G.O.Ms.No.3 covers Uninterrupted Power Supply. It has no conditions attached with regard to the nature of use nor does it contemplate that the UPS must have an inbuilt battery and the output



W.P. Nos.10239 and 10241 of 2021

WEB COPY

must be a pure sine wave. In the absence of the Entry under the notification containing any such condition the addition of these conditions vide circular / clarification is unsustainable.

b) The test of exclusive use with Computer / Information Technology products for the UPS to be covered under S.No.7 of G.O.Ms.No.3 is unfounded. That the question as to whether the mere fact that the products notified under S.No. 68 of Part B of the First Schedule to the TNVAT Act is capable of multiple uses i.e., both with computer / Information Technology product and other than a computer / Information Technology product would by itself take the product out of S.No. 68 of Part B of the First Schedule to the TNVAT Act stands resolved by the judgment of the Division Bench of this Court in the case of *Canon India*, reported in 2014 (305) ELT 255.

c) The impugned order insofar as it completely disregards the Test Report issued by the Electronic Regional Test Laboratory which has categorically classified the product as digital UPS stands vitiated for failing to take into account relevant factors / aspects.

d) The Respondent had failed to see that the sole difference between UPS and an inverter is the time taken for switching from main



W.P. Nos.10239 and 10241 of 2021

WEB COPY

mode to UPS mode and switching from UPS to mains mode. The requirement for classification as UPS is that the time taken for switching should be less than 10 milliseconds. If the time taken exceeds 10 milliseconds then the computer would reboot and the data would be lost. The Electronics Regional Test Laboratory had tested the product of the petitioner with reference to the time taken for switching from UPS to main mode and from main mode to UPS and found the time taken is less than 10 milliseconds and had accordingly certified the product of the petitioner as "Digital UPS".

4. To the contrary the learned counsel for the respondent supported the impugned order inter alia on the strength of the following submissions:

a) The reliance upon the decision of *Canon India* is misplaced for the question that arose for consideration in the said judgment was whether the printer is an Electrical / Electronic gadget used exclusively in Information Technology. Unlike UPS dealt with by the petitioner the printer does not have general / multiple use but can be used only with



W.P. Nos.10239 and 10241 of 2021

computer or laptops and thus reliance on the above judgment is misplaced.

b) The Test Report does not categorically classify the product of the petitioner as digital UPS for test has been done only to find out / verify parameter of switching mode of the UPS inverter from main mode to UPS and vice versa and not for classification of the product itself.

c) The clarification by the Commissioner dated 14.08.2015 wherein conditions have been laid down for any product to qualify as Information Technology product under S.No.68 of Part B of the First Schedule to the TNVAT Act covers the entire issue and unless the test laid down therein are satisfied, the UPS sold by the petitioner cannot be classified as an Information Technology product.

d) The advertisement in the brochure of the petitioner itself is indicative of the fact that the petitioner had sold UPS as intended for running home appliances such as lights, fans etc and thus liable to be



W.P. Nos.10239 and 10241 of 2021

classified under S.No. 68 of Part C of the 1st Schedule to the TNVAT Act.

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6.Heard both sides and perused the material on record.

7.This Court finds that the impugned order suffers from the following infirmities and has misdirected itself in determining the classification of UPS dealt by the petitioner as falling under residuary entry viz., S.No. 69 of Part C of the First Schedule to the TNVAT Act as would be evident from the following:

a) Information Technology products that are covered by S.No. 68 of Part B of the First Schedule to the TNVAT Act are those products notified by the Government vide G.O.Ns.No.3 dated 01.01.2007. It may be relevant to note that S.No.27 to G.O.Ms.No.3 only mentions “Uninterrupted Power Supply” with no conditions attached. The attempt by the revenue to add conditions and thereby restricting the scope of the notification in G.O.Ms.No.3 in exercise of the powers under S.No. 68 of Part B of the First Schedule of the TNVAT Act is untenable inasmuch as it is contrary to the settled rule that fiscal statutes should be strictly



W.P. Nos.10239 and 10241 of 2021

WEB COPY

construed and there is no room for addition or omission of any words. A construction which requires addition of words ought to be avoided for the Court cannot aid the legislature, it cannot add or amend the provision. It is contrary to all rules of construction to read words into an Act. Similarly it is wrong and dangerous to proceed by substituting some other words for words of the statute. The court cannot re-frame the legislation for the reason that it has no power to legislate. In this regard it may be relevant to refer to the following judgments:

i) CIT v. Vadilal Lallubhai, (1973) 3 SCC 17 : 1973 SCC (Tax)

“To accept the contention of the Revenue, we have to adopt three- fold assumptions. Firstly the fictional dividend contemplated by Section 2(6-A)(c) is an “income” within the meaning of Section 44-F. Secondly we must assume that that dividend is capable of being deemed to accrue day to day and lastly we must assume that the day to day distribution contemplated in Section 44-F commences from the commencement of the relevant accounting year and ends with the distribution of the assets as contended on behalf of the Department. To do so we have to read into the section many more words than it contains at present which is wholly impermissible in construing any provision much less a taxing provision.

ii) Polestar Electronic (P) Ltd. v. Addl. CST, (1978) 1 SCC 636 : 1978 SCC (Tax) 68 at page 6527.

“Crawford in his book on *“Construction of Statutes”* (1940 Edn.) at p. 269 explains the rule in the following terms:



W.P. Nos.10239 and 10241 of 2021

“Where the statute's meaning is clear and explicit, words cannot be interpolated.

In the first place, in such a case they are not needed. If they should be interpolated, the statute would more than likely fail to express the legislative intent, as the thought intended to be conveyed might be altered by the addition of new words. They should not be interpolated even though the remedy of the statute would thereby be advanced, or a more desirable or just result would occur. Even where the meaning of the statute is clear and sensible, either with or without the omitted word, interpolation is improper, since the primary source of the legislative intent is in the language of the statute.”

(emphasis supplied)

b) In the absence of the entry providing for the user test it may not be permissible to add words whereby the user test is incorporated in the entry, to do would be addition of words which is impermissible. The user test has been found to be inconclusive in matters of classification unless expressly provided in the notification or Act. In this regard it may be useful to refer to the following judgment in *Porritts & Spencer (Asia) Ltd. v.*

State of Haryana, (1979) 1 SCC 82 : 1979 SCC (Tax) 38 at page 85

“5. The use to which it may be put is also immaterial and does not bear in its character as a textile. It may be used for making wearing apparel, or it may be used as a covering or bedsheet or it may be used as tapestry or upholstery or as duster for cleaning or as towel for drying the body. A textile may have diverse uses and it is not the use which determines its character as textile. It is, therefore, no argument against the assessee that “dryer felts” are used only as absorbents of moisture in the process of manufacture in a paper manufacturing unit. That cannot militate against



W.P. Nos.10239 and 10241 of 2021

WEB COPY

“dryer felts” falling within the category of “textiles”, if otherwise they satisfy the description of “textiles”.

(emphasis supplied)

c)The impugned order also stands vitiated insofar as it places reliance on the advertisement / brochure to determine the classification. It is trite law that the classification cannot be made on the basis of advertisement or label for these are meant to attract customers, instead the classification must be made on the basis of the nature of the product and its description in the relevant schedule. In this regard it may be useful to refer to the following judgment:

Union of India v. T.S.R. & Co., reported in 1985 SCC Online Mad

335 : (1985) 22 ELT 701 : (1985) 5 ECC 177.

“9.Thus, the appellants have given varying reasons for their conclusions that the thailams prepared by the respondent are perfumed hair oils. The figure of the woman displaying her lavishly grown and flowing hair in the outer cover cannot indicate the purpose for which the oils are to be used. It has been held by the Bombay High Court in Ramtirth Yogashram v. State of Maharashtra, [1968] 22 STC 76 that the mode in which a person may choose to advertise his commodity cannot be decisive in determining its real nature and that the expression “perfumed oil” must connote an oil to which perfume has been imparted by way of a positive and deliberate act, and not as meaning an article which just



WEB COPY



W.P. Nos.10239 and 10241 of 2021

happens to have a perfume. In this case, the cover contains the expression “bath oil”. The label of a woman in that style cannot be suggestive of the use of the thailams as hair oils and will depict, according to the respondent, only the beauty of a woman and the refreshing effect the woman may have with the use of the thailams as bath oils. In any event, it has only an advertising effect or value and nothing more. Further, tax on a product cannot be levied merely on the basis of a suggestive aspect of a picture found in the label which is intended to attract the customers to use the thailams.

(emphasis supplied)

d) The impugned order also stands vitiated for the reason that it has failed to take into account expert opinion which is relevant in matters of classification. In this regard, it may be relevant to refer to the decision in *CCE v. Damnet Chemicals (P) Ltd.*, (2007) 7 SCC 490 : 2007 SCC OnLine SC 1099 at page 495

14.....It is well settled and needs no restatement at our hands that the test reports given by the chemical examiner are binding upon the Department in the absence of any other acceptable evidence produced by it in rebuttal. In the present case, the Department has neither produced any evidence to rebut the reports of the chemical examiner nor impeached the findings of the test reports.

(emphasis supplied)



W.P. Nos.10239 and 10241 of 2021

Parle Agro (P) Ltd. v. CCT, (2017) 7 SCC 540 : 2017 SCC OnLine SC 659 at

WEB COPY

page 574

62. The above materials which were filed by the appellant before the Clarification Authority were relevant materials for understanding the manufacture process and the nature and contents of ultimate product. The expert authority and its opinion which were relied on by the appellant were required to be adverted to both by the Clarification Authority as well as by the High Court and we are of the opinion that expert opinion and materials have been erroneously discarded.

.....

64. We, thus, conclude that orders of the Food Safety Authority and expert opinion regarding process of manufacture relied on by the appellant were relevant materials and Clarification Authority and High Court erred in law in discarding these materials.

(emphasis supplied)

8. This Court finds that the impugned order has been made in perfunctory manner and thus liable to be set aside. However there is lack of clarity as to whether the product namely the UPS in question is capable of being used along with Information Technology products. The matters are remanded back to the assessing authority for the limited purpose of examining whether these UPS sold by the petitioner are capable of being used with Information Technology products. If it is found that it is capable, the assessing authority shall levy tax at 5% treating it as falling under S.No. 68 of Part B of the First



W.P. Nos.10239 and 10241 of 2021

WEB COPY

Schedule to the TNVAT Act, though it is capable of multiple uses and some of such use being general in nature and not in relation to Computers / Information Technology. The above exercise shall be carried out after providing the petitioners an opportunity of hearing and the same shall be completed within a period of 8 weeks from the date of receipt of copy of this Order.

9. The writ petition stands disposed of on the above terms. No Costs. Consequently, connected miscellaneous petitions are closed.

10.11.2023

Speaking (or) Non Speaking Order
Index: Yes/No
Neutral Citation: Yes/No
spp/shk

MOHAMMED SHAFFIQ, J.



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W.P. Nos.10239 and 10241 of 2021

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To:

The Deputy Commissioner (CT)-II,
Large Tax Payers Unit,
Integrated Building,
Nandanam,
Chennai 600 035.

W.P. Nos.10239 and 10241 of 2021
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10.11.2023