

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.02.2015

CORAM

The Honourable Mr.JUSTICE R.SUDHAKAR
and
The Honourable Mr.JUSTICE R.KARUPPIAH

Writ Petition Nos.2455 and 2456 of 2015
& M.P.Nos.1 and 2 of 2015

M/s.Salem Tollways Limited
rep. by its Authorised Signatory
Mr.R.Thiyagarajan
NH-47, Valakuttai,
Vaikuntham Post, Sangakiri
Salem - 638 103.

..... Petitioner in both W.Ps
Vs.

1. The Assistant Commissioner (CT)
Chithode Assessment Circle, Erode.
2. The Appellate Deputy Commissioner (CT)
Full Additional Charge (FAC), Erode.
3. The State of Tamil Nadu,
rep. by its Secretary,
Commercial Taxes & Registration Department,
Fort St. George, Chennai - 600 006.

..... Respondents in both W.Ps

W.P.No.2455 of 2015:

PETITION under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus to call for the records of the first respondent in TIN 33753063812/09-10 dated 21.07.2014 and the consequential order in Appeal passed by the second respondent in AP.No.VAT.60/2014 dated 22.09.2014, quash the same and further direct the first respondent to re-consider the claim of the petitioner relating to the sale of Crusher Plant and Crusher under the expanded definition of Capital Goods under Section 2(11) read with the definition of Manufacture under Section 2(27) of the Tamil Nadu value Added Tax Act, 2006 and thereafter pass orders afresh after affording the petitioner an opportunity of being heard.

W.P.No.2456 of 2015:

PETITION under Article 226 of the Constitution of India praying for the issuance of Writ of Declaration to declare the second proviso (a) to section 58(1) of the Tamil Nadu Act 32 of 2006 of the Tamil

Nadu Value Added Tax Act, 2006 making it obligatory to remit the entire disputed tax as ordered by the Appellate Deputy Commissioner or Appellate Joint Commissioner as condition precedent for entertaining the second Appeal before the Tamil Nadu Sales Tax Appellate Tribunal as ultravires of Article 14 read with 19(1)(g), 265 of the Constitution of India since being most unreasonable, confiscatory and illegal extraction of money by placing such unreasonable restrictions under the Tamilnadu Value Added Tax Act, 2006 irrespective of merits of the case and settled decisions of the Supreme Court of India.

For Petitioner : Mr.V.Sundareswaran

For Respondents: Mr.Kanmani Annamalai, Spl.G.P.(T)

C O M M O N O R D E R

(Order of the Court was made by R.SUDHAKAR,J.)

The petitioner, who is a contractor, sold crusher machinery to IVRCL for a value of Rs.5,98,38,755/- for the assessment year 2009-2010 on 10.3.2010 and paid tax at 4% treating the machinery as capital goods as defined under Section 2(11) of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred to as the 'Act'). The assessment was made under Section 22(2) of the Act by the Assessing Officer vide proceedings dated 01.07.2010 based on the returns filed by the dealer. After verification of the records filed, major defect was noticed and the Department was of the view that the machinery sold by the petitioner to IVRCL did not fall under Section 2(11) of the Act and the sale of machinery should be treated as other machinery and therefore, liable for levy of tax at 12.5%. Accordingly, a notice for revision of assessment was issued on 29.5.2014 inviting objections from the petitioner. The dealer, it appears, had filed objection on 20.6.2014 and on receipt of the objection, the Assessing Officer proceeded to pass an order under Section 27(1) of the Act, the relevant portion of which reads as follows:

"A revision of assessment notice was issued on 29.5.14 inviting objections on the above proposals. The dealer has filed objections on 20.6.14 as follows:

"They made sale bill to IVRCL after receiving a letter from them that they are eligible for the concessional rate of tax under Sec.2(11) as a manufacturer/processor of goods, since they use the machinery for the manufacture of Blue metal and pay taxes. Based on this they made the sale under Sec.2(11) and charged tax @4%. Hence they requested to drop the proposal of revision."

The objections filed by the dealer have been perused carefully.

The dealer had stated that they had effected sales only after receiving the letter from IVRCL regarding the eligibility of tax @ 4%. There is no provision under the TNVAT Act 06 to effect sales @ 4% after receiving letter from their buyers. The machinery sold by the dealer is a crusher which is used for crushing blue metals. Sec.2

(11) defines the capital goods for producing, making extracting or processing of any goods or for bringing about any change in any substance for the manufacture of final products. Crushing of blue metal by the Contractor does not amount to manufacturing activity. Hence the sale of machinery to IVRCL cannot be classified under Sec.2(11) of the Act. The objections filed by the dealer are not convincing and acceptable.

I, therefore, overrule the objections filed by the dealer and confirm the proposals of revision and revise the assessment of the dealer under Sec.27(1) of the Act for the year 2009-10 as follows:

Sale of Machinery	:Rs.5,98,38,755/- @ 12.5%
Tax Due	: Rs.74,79,844/-
Tax paid	: Rs.23,92,550/-
Balance	: Rs.50,86,294/-

2. Since the order passed under Section 27(1) of the Act provides for appeal to the Appellate Deputy Commissioner (CT), Erode, the assessee persuaded the appeal and we extract the grounds taken by the assessee hereunder for necessity:

"GROUNDS OF APPEAL

1. The order of the Assessing officer is not tenable in law and is opposed to facts passed under the Tamil Nadu Value Added Tax Act 2006 (hereinafter referred to as TNVAT Act) for the year under appeal.

2. There is no escapement of any turnover or tax to reopen the completed assessment.

3. The Audit is or other query if any, cannot be an acceptable basis to revise the original Assessment.

4. No fresh material, if any, were stated to have been gathered by the AO subsequent to the passing of the order under section 22(2) of the Act and none of the material/details/data if any, gathered in this regard was furnished/provided to the appellants to enable them to effectively defend their position.

5. The Assessing Officer ought not to have levied 12.5% in respect of sale of "capital goods".

6. The Assessing Officer has not stated any of the specific provisions of the Act or the Rules made there under for the levy of tax at 12.5% for the sale of capital goods.

7. Without any explicit restriction of input tax credit by any specific provisions, the claim made by the Assessing Officer that the goods are taxable at 12.5% is illegal and improper.

8. The goods purchased by the appellants were used as capital goods and spares of capital goods and hence the rate of VAT is 4% as per the Act and the Rules made there under.

9. The Assessing Officer failed to mention any acceptable basis as per law for the adoption of the rate of 12.5% supported by any judicial rulings etc. in this regard while levying 12.5% and not accepting 4%.

10. The activity of crushing of Boulders into a smaller pieces amounts to 'Manufacture' as per the definition clause mentioned in the Act and hence the equipments which are used in this regard is taxable at 4% only and not under 12.5%.

11. The goods dealt with by the appellants falls under the section 2(11) of the Act.

12. Without giving any acceptable basis or reasoning, the Assessing Officer erred in concluding the activity of the appellants is not 'Manufacture' and goods involved is such activity is not capital goods and this view held by the AO is based on surmises and conjectures only."

3. The assessee has also filed written arguments on 10.9.2014 taking a primary ground that the goods sold are capital goods falling under definition 2(11) of the Act and the Authority has not properly interpreted the said provision.

4. The Appellate Authority after considering the grounds of appeal and taking note of the definition of 'manufacture' under Section 2(27) of the Act and the decision of this Court in the case of State of Tamil Nadu V. O.P.Aiyar reported in 87 STC 339 (Mad) has come to the conclusion that the crushing of stone boulders and converted into smaller stones of varying sizes does not involve manufacturing process. For better clarity, we extract the order of the Appellate Authority as under:

"Section 2(27) "manufacture" with its grammatical variation and cognate expression means producing, making, extracting, altering, ornamenting, finishing, assembling or otherwise processing, treating or adapting any goods and includes any process of goods which brings into existence a commercially different and distinct commodity but does not include any activity as may be notified by the Government.

It is settled principles of law that the general prevalent test is whether the article produced is regarded in the trade, by those who deal in it, as distinct in identity from the commodity involved in its manufacture. The apex court in the case of South Bihar Sugar Mills Vs. Union of India, AIR 1968 SC 922, it was held that the word "manufacture" implies a change but every change in the raw material may not be brought about by manufacture; there must be such a transformation that new and different article must emerge from the manufacture having a distinctive name, character or use. It was also held in the case of State of Tamilnadu Vs. O.P.Aiyar (1992) reported in 87 STC 339(Mad) it was held that "when blue metal jelly obtained in the process of crushing of stone boulders and converted in to smaller stones of varying sizes, there is no manufacturing process involved".

Following this principles, the contention of the appellants that there is manufacturing activity at the hands of the purchasers of the machinery sold by the appellants, is not acceptable. Section 2(11) defines capital goods, as the plant and machinery used for manufacture, the result of which emerges a change in any substance for the manufacture of final products.

Considering the statutory position of law in the case of the appellant, I find no reasons to interfere in the matter of levy of tax at the rate of 12.5% on the sales turnover of Rs.5,98,38,755-00 and I hold to sustain the levy of tax made on the above turnover. Accordingly it is sustained and confirmed."

5. In this order, it has been clearly stated that appeal will lie to the Tamil Nadu Sales Tax Appellate Tribunal under Section 58 of the Act.

6. It is seen that without pursuing the appeal remedy and to avoid the condition of pre-deposit of entire amount as required by the Statute, the petitioner has filed W.P.No.2455 of 2015 challenging the order of the first Appellate Authority. As an offshoot and to buttress the merits of the case, another Writ Petition in W.P.No.2456 of 2015 has been filed by the petitioner to declare Section 58(1) of the Act as ultravires of Article 14 read with Article 19(1)(g) and 265 of the Constitution of India.

7. Learned counsel appearing for the petitioner relied upon various decisions, viz., the decision of Madhya Pradesh High Court reported in 79 STC 149, the decision of Division Bench of the Madras High Court dated 25.10.1990, Division Bench of Madhya Pradesh High Court 75 ELT 273, Rajasthan High Court in 126 STC 372, Division Bench

of this Court in 147 STC 246 and of the Apex Court in 271 ITR 331 (details of the decisions are not enclosed) to state that the machinery was used in the process of manufacturing only and it would attract the provisions of Section 2(11) of the Act.

8. Heard learned counsel appearing for the petitioner and perused the materials placed before this Court. It is relevant to note that that relevant papers have not been filed and the decisions cited has not been furnished by the petitioner.

9. We find that the so called objection dated 20.6.2014 recorded in the order passed under Section 27(1), has not been filed in the typed set of papers. In the grounds of appeal, which we extracted above, there is no plea to show that the argument now taken before us, had been taken before the Authority. Except reiterating that the goods are capital goods and the process amounts to manufacture, no specific details of the decisions contrary to the one rendered by this Court, which has been relied upon by the Appellate Authority, has been addressed by the learned counsel appearing for the petitioner. There was no reason for the Appellate Authority to take a contra view in the light of the decision rendered by this Court, more so, when the petitioner did not canvass such a plea in detail. Vague statements made in the grounds of appeal at this stage is of no avail.

10. It is to be noted that it was not the case of the petitioner that there is violation of principles of natural justice or arbitrariness in the proceedings. The issue raised by the petitioner is a question of fact. It has to be finally decided by the Tribunal and the statute provides for the same. Whatever point that has been addressed by the petitioner before the Original Authority and First Appellate Authority, has been considered by the Authority and a decision has been rendered on the merits of the case. It is therefore for the petitioner to pursue the next form by way of appeal as provided in the statute. We, therefore, find no reason to entertain this Writ Petition under Article 226 of the Constitution of India, more so, there is an effective and alternative remedy. It is only to avoid the rigors of Section 58 of the Act that Writ Petition in W.P.No.2455 of 2015 has been filed along with the Writ Petition in W.P.No.2456 of 2015 challenging the vires of the Act. Since we have held that the issue raised in W.P.No.2455 of 2015 is pure questions of fact, it has to be agitated before the Tribunal, which is a final fact finding authority. We are not inclined to entertain the Writ Petition in W.P.No.2455 of 2015 on this score. Accordingly, W.P.No.2455 of 2015 stands dismissed. No costs. Consequently, M.P.Nos.1 and 2 of 2015 are also dismissed.

11. The subsequent Writ Petition, viz., W.P.No.2456 of 2015 is filed as a consequence to the Writ Petition W.P.No.2455 of 2015 to avoid pre-deposit. Since we hold that Writ Petition challenging the

appellate order has to be dismissed on account of alternative remedy, the Writ Petition challenging the vires of the Act could be raised at the appropriate stage, if required. In view of the dismissal of W.P.No.2455 of 2015, the Writ Petition in W.P.No.2456 of 2015 is not maintainable as a stand alone Writ Petition for which no cause of action subsists. In view of the order passed in W.P.No.2455 of 2015, W.P.No.2456 of 2015 is also dismissed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sl

To

1. The Assistant Commissioner (CT)
Chithode Assessment Circle, Erode.
2. The Appellate Deputy Commissioner (CT)
Full Additional Charge (FAC), Erode.
3. The State of Tamil Nadu,
rep. by its Secretary,
Commercial Taxes & Registration Department,
Fort St. George, Chennai - 600 006.

2 ccs to Mr.V. Sundareswaran, Advocate SR.No.7749
+ 1 cc to Special Government Pleader Sr.7579

W.P.Nos.2455 and 2456 of 2015
& M.P.Nos.1 and 2 of 2015

BUR(CO)
Eu 25.02.15

WEB COPY