

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE: 04-08-2015

CORAM

THE HON'BLE MR.JUSTICE S.VAIDYANATHAN

W.P.NO.2733 OF 2015 AND

M.P.NO.1 OF 2015

Reserved on 01.04.2015

Tvl.Zaitoon Multi Cuisine Family Restaurant,

Rep. by its partner Mr.Fardhan T.K.,

No.1, Vantage Plaza, LB Road,

Thiruvanmiyur,

Chennai-600 041.

.. Petitioner

Versus

The Assistant Commissioner (CT),

Thiruvanmiyur Assessment Circle,

Plot No.141, I Floor, Yazhini Complex,

1 Main Road, Burma Colony,

Perungudi, Chennai-600 096.

.. Respondent

Prayer: This Writ Petition is filed under Article 226 of the Constitution of India, praying for the issuance of Writ of Certiorari, to call for the records relating to the Assessment order TIN/33870926351/2014-15, dated 05.01.2015 passed by the respondent and quash the same as arbitrary and illegal.

For petitioner : Mr.Joseph Prabakar

For Respondent : Ms.Dr.Anita Sumanth, Spl.G.P.

Asstd. By Mr.V.Haribabu, AGP (T)

Mr.AN.R.Jayapratap, AGP (T)

ORDER

The petitioner, Zaitoon Multi Cuisine Family Restaurant, is engaged in the business of running restaurant at Thiruvanmiyur, Chennai, registered with the respondent. The petitioner reported total and taxable turnover at Rs.1,97,33,034/- for the period April 2014 to November 2014 and filed monthly returns and paid VAT 2%

under Section 7(1)(b) of the Tamil Nadu Value Added Tax Act, 2006 (in short, TNVAT Act, 2006).

2. According to the petitioner, the respondent issued a notice, dated 03.12.2014 under Section 25(1) of TNVAT Act, 2006 registration No.2132496, thereby it is evident that the petitioner is selling only branded food, which is liable for levy of tax at 14.5% and further stated that the petitioner has wrongly paid tax at 2% on their entire sale of food stuff. According to the petitioner, the term "Zaitoon" has to be construed only as a House mark (house name) and not as a product mark (brand name) and the name "Zaitoon" is not appearing in any of their products, but used only in the name boards. The petitioner applied for registration of restaurant, catering and restaurant outlet and therefore, the trademark referred to by the respondent is not for any food items prepared and served by the petitioner in their restaurant, but for the services provided by the restaurant as a whole. In other words, the registration of the name "Zaitoon" is not item specific or product specific but service specific. However, without considering all these aspects, the respondent has passed the impugned order in violation of principles of natural justice since it is an ex parte and non-speaking order, it is liable to be set aside.

3. A counter affidavit has been filed on behalf of the respondent, stating that the petitioner got trade mark registration and the sale of branded food is taxable at 14.5% and since the petitioner paid 2% on the total taxable turnover of Rs.1,97,33,034/-, the Assessing Officer issued notice dated 3.12.2014 proposing to revise the assessment under Section 25(1) of TNVAT Act, 2006 for which, the petitioner filed their objections on 18.2.2014 stating that they had taken trade mark registration only for the name of the restaurant and not for the goods manufactured and sold. According to the respondent, as the trade mark registration is meant for the restaurant as well as the products manufactured by them, the goods sold are taxable at 14.5% under the head "branded foods" fall under Section 7 (1)(a) of TNVAT Act, 2006, hence the Assessing Officer, has passed the impugned order assessing turnover at 14.5%. It is stated that the impugned order has been passed only after issuing pre-revision notice dated 3.12.2014 and after considering the objections filed on 18.12.2014. The petitioner got registration under Trade Marks Act having Registration No.2132496 by which it is evident that they are selling only branded food items taxable at 14.5% as per Section 7 (1)(a) of TNVAT Act, 2006. The contention of the petitioner that Zaitoon must be construed as a "house mark" (house name) and not as a product mark (brand name), is not acceptable since the food items that are prepared and sold in the hotel which was having a house mark are synonymously bear the trade mark on their products. Therefore, the food items sold by the petitioner are branded food taxable at 14.5%. The petitioner is a trade, manufacturing and selling food items to the customers which is coming under the purview of sales tax rules and not any relevance with service tax. The petitioner got the registration under Class 43, which is meant for services for providing food, drink and temporary accommodation. But they are not having or doing the business of lodging house

which means, they got the registration of trade mark only for the food items sold by them which have a distinction and dignity of items sold by other hoteliers. Hence, Zaitoon is the trade mark of their food items which can be said as branded food taxable at 14.5%. As against the impugned order, the petitioner is having remedy of filing revision petition before the Joint Commissioner concerned. However, without availing the said remedy, the petitioner has approached this Court by filing the present writ petition, which is not maintainable. Therefore, with these averments, the respondent sought for dismissal of the writ petition.

4. Heard the learned counsel appearing on either side and perused the entire documents available on record.

5. Mr. Joseph Prabakar, learned counsel appearing for the petitioner would raise the following contentions, viz.,

- i) that the petitioner is running a multi cuisine restaurant providing Arabian, north-indian, mughlai and Chinese food preparations and as per the choice of the customer, the food is prepared and served and they are not selling any branded food and there is no package, seal, trade name or bar code on the prepared food and hence, the assessment of turnover at 14.5% treating the same as sale of branded food and drinks under Section 7(1) of TNVAT Act, 2006 by the respondent, is ex-facie illegal and arbitrary;
- ii) that the term "Zaitoon" has to be construed only as a House Mark" (house name) and not as a "produce mark" (brand name) and it is used only in the name boards and no trade mark is provided on the package or on food items that are prepared and sold in the restaurant and hence, the food items cannot be treated as branded food items to attract levy of tax at 14.5%;
- iii) that the petitioner has made application on 20.4.2011 for registration of restaurant, catering and restaurant outlet under Class 43 and therefore, the trademark referred to by the respondent is not for any food items prepared and served by the petitioner in their restaurant, but for the service provided by them as a whole and hence, it has to be construed that the name 'Zaitoon' is not item specific or product specific, but service specific and thus the selling food has to be considered as service under Service Tax law and the Trade Marks Act, 1999, which provides for registration of the mark or name for any service including 'services for providing food and drink and temporary accommodation' and hence, mere applying for registration under the Trade Marks Act, 1999 by the petitioner, it would not mean that they are selling branded food.

6. With the above contentions, the learned counsel would submit that the impugned assessment order passed by the respondent cannot be sustained and it is liable to be set aside. As regards the alternative remedy, the learned counsel would contend that since the impugned order has been passed in violation of principles of

natural justice without giving personal hearing to the petitioner, the petitioner can work out the remedy by invoking extraordinary jurisdiction under Article 226 of the Constitution by way of writ petition and hence, the writ petition is maintainable.

7. On the other hand, the learned counsel appearing for the respondent would contend that admittedly, the petitioner got registration under the Trade Marks Act and selling only branded food prepared by them which attracts tax at 14.5% as per the provisions of the TNVAT Act, 2006 and the respondent having served the pre-revisional notice, dated 3.12.2014 and after considering the objections filed by the petitioner on 18.12.2014, has passed the impugned order, which requires no interference and hence, the learned counsel sought for dismissal of the writ petition.

8. It is not in dispute that the petitioner got Trade Mark Registration No.213496. The provisions of the Trade Marks Act, 1999 as well as Rules thereof would apply to the petitioner. The Fourth Schedule of the Trade Marks Rules, 2002 envisages 'Classification of Goods and Services-Name of the Classes', wherein, though Item Nos.29 and 30 would refer to food items, however, they are not prepared and served in the restaurants. Item 35 to 45 would refer 'services', which, as per the Act, they are trademark services and Item 43 specifically mentioned as "Services for providing food and drink; temporary accommodation". Therefore, as rightly contended by the learned counsel for the respondent, the trade mark registration is meant for the restaurant as well as the products manufactured by it and when the activity of service for providing food and drink is considered as a trade mark under the Act, the food items also are to be considered as 'branded items' and therefore, levy of tax on such branded food and drink items would be at 14.5% as prescribed under Section 7(1)(a) of the TNVAT Act, 2006 and the respondent has rightly passed the impugned assessment order.

9. Section 2(9) of the TNVAT Act, 2006 defines "branded", means any good sold under a name or trade mark registered or pending registration or pending registration of transfer under the Trade and Merchandise Marks Act, 1958 (Central Act 43 of 1958) or the Trade Marks Act, 1999 (Central Act, 47 of 1999). Therefore, when the above definition applies to the present case, it is not in dispute that the petitioner restaurant is a registered under the provisions of the Trade Marks Act, 1999 and whatever food prepared and served would certainly fall under the definition "branded" as per Section 2(9) of the TNVAT Act 2006 and hence, this Court is unable to accept the contention of the petitioner that they got only registration towards restaurant and it has to be construed as 'House Mark' and not as a 'Product Mark' and thereby, whatever they prepared food items cannot be considered as branded items since such foods items were only being consumed inside the restaurant. It is admitted fact that the petitioner is only serving the food which are exclusively prepared by them and a customer who enters the restaurant of the petitioner by recognizing the name "Zaitoon", he would be ensured that the food items prepared by the petitioner Zaitoon Restaurant alone would be served to him. If the petitioner is serving the food items which are not prepared by it, the matter is a different and there would be no purpose in getting

trade mark. Therefore, when the petitioner restaurant "Zaitoon" has got registration of trade mark for services providing by it, certainly, the food items prepared and served by them would fall within the definition of 'branded'.

10. Section 7(1)(a) of the TNVAT Act, 2006 reads as under:

"Levy of taxes on food and drinks.-(1) Notwithstanding anything contained in this Act, but subject to the provisions of this Act,-

a) every dealer shall pay tax on the sale of ready to eat un-branded foods including sweets, savouries, un-branded non-alcoholic drinks and beverages served in or catered indoors or outdoors by star hotels recognized as such by Tourism Department of the State Government or Government of India and restaurants attached to such hotels at the rate of fourteen and half per cent of the taxable turnover;

b)"

The above said provision is a charging section in respect of in respect of sale of unbranded food and drinks by hotels, restaurants, caterers, sweet-stalls, etc., By virtue of this section, the recognized star hotels shall pay tax at 14.5% of the taxable turnover. This section will not apply to branded foods and drinks for which tax rates have been specified in the first schedule. It is brought to the notice of this Court that by mistake, the above said provision has been wrongly mentioned, however, in the notice, dated 3.12.2014, the respondent has mentioned that it was proposed to revise the assessment under Section 25(1) of the TNVAT Act, 2006, as per which, the authority is empowered to determine the tax payable by the dealer to the best of its judgment. Therefore, as per Section 3(2) of the TNVAT Act, 2006, the petitioner is liable to pay tax at 14.5%.

11. It is also contended on behalf of the petitioner that VAT is leviable on goods only if purchase and sales or consignment takes place within the State and as per Amendment of Article 269 of the Constitution (Forty-Sixth) Amendment, 1982, the service of meals whether in a hotel or restaurant does not constitute a sale of food for the purpose of levy of sales tax, but must be regarded as the rendering of service in the satisfaction of a human need or ministering to the bodily want of human beings, it would not make any difference whether the visitor to the restaurant is charged for the meal as a whole or according to each dish separately. It is also pointed out that Section 2(9) of the TNVAT Act, 2006 defines "branded" means any goods sold under a name or a trade mark registered and such goods alone are attracted for levy of tax and as per Section 2(33)(vi) of the TNVAT Act, it should be deemed to be a sale, whereas, the petitioner has not sold any goods. To this, the learned counsel appearing for the respondent has rightly argued that the so-called amendment pertains to the year 1982 and the law as on date has to be interpreted and applied and hence, the amendment is not helpful to the petitioner. She pointed out that Section 2(33)(vi) of the TNVAT, 2006 is the law as on date and as per which, "sale" includes, a supply, by way of or as part of any service or in any manner whatsoever, of goods, being food or any other article for human consumption or any drink, where such supply

or service is for cash and such transfer, delivery or supply of any good shall be deemed to be a sale and thereby, it would certainly attracts levy of tax. I find considerable force in the contention of the learned counsel appearing for the respondent.

12. For the foregoing reasons, I do not find any illegality or irregularity in the impugned order, dated 5.1.2015 passed by the respondent in order to interfere with the same.

Accordingly, the Writ Petition fails and it is dismissed.No costs. Consequently, connected MP is closed.

Sd/-
Asst.Registrar (CS II)

/true copy/

Sub Asst. Registrar

suk

To
The Assistant Commissioner (CT)
Thiruvannamiyur Assessment Circle,
Plot.No.141, I floor, Yazhini Complex,
1, Main Road, Burma Colony,
Perungudi, Chennai - 600 096.

+1 cc to Mr.Joseph Prabakar, Advocate, sr.40159.

W.P.NO.2733 OF 2015

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