In the High Court of Judicature at Madras

Dated : 09.10.2015

Coram :

The Honourable Mr.Justice V.RAMASUBRAMANIAN
and
The Honourable Mr.Justice T.MATHIVANAN

Writ Petition Nos.31985 to 31991 of 2015 and all connected pending MPs

M/s.Amway India Enterprises Pvt.Ltd., rep.by its Power Agent Mr.Abraham Ninan ...Petitioner in all the WPs

Vs

1.State of Tamil Nadu, through its Principal Secretary, Finance Department, Fort.St.George, Chennai-9.

2.The Deputy Commissioner (CT)-III, (FAC), Large Tax Payers Unit, No.34, Dugar Towers, Marshal Road, Egmore, Chennai-8. ...Respondents in all the WPs

PETITIONS under Article 226 of The Constitution of India praying for the issuance of a Writ of Declaration declaring Sections 3(1), 3(2) and 24 of the Tamil Nadu Value Added Tax Act, 2006 as unconstitutional and ultra vires Articles 14, 19(1)(g) and 265 of The Constitution of India and Rule 8(3) of the Tamil Nadu Value Added Tax Rules as ultra vires Section 80 of the Tamil Nadu Value Added Tax Act, 2006.

For Petitioner : Mr.Sujit Ghosh for Mr.Rahul Balaji
For Respondents : Mr.V.Haribabu, AGP(T)

COMMON ORDER
(Order of the Court was made by V.RAMASUBRAMANIAN,J)

The petitioner has come up with the above writ petitions, seeking a declaration that Sections 3(1), 3(2) and 24 of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter called the TNVAT Act, 2006) are unconstitutional and ultra vires Articles

14, 19(1)(g) and 265 of The Constitution and for a declaration that Rule 8(3) of the Tamil Nadu Value Added Tax Rules is ultra vires Section 80 of the TNVAT Act, 2006.

2. We have heard Mr.Sujit Ghosh, learned counsel for the petitioner. Mr.V.Haribabu, learned Additional Government Pleader takes notice for the respondents.

3. The petitioner appears to be a registered dealer under the TNVAT Act, 2006. The petitioner claims to be a direct selling FMCG company and is actually a wholly owned subsidiary of a Corporation known as AMWAY Corporation incorporated in USA, selling various consumer products.

4. It appears that in pursuance of a special audit conducted on the petitioner under Section 64(4) of the TNVAT Act, 2006 by the Enforcement Officials, a notice was issued for the financial year 2009-2010 by the Deputy Commissioner (CT), seeking to reassess the petitioner under Section 27 of the TNVAT Act, 2006, to the tune of Rs.26,52,182/-. The allegations, on the basis of which, a re-assessment was sought to be done, were that there were differences between the monthly returns and the books of accounts; that miscellaneous income had not been subjected to tax; that miscellaneous handling charges had not been subjected to tax; that exemption available on the sale of brochures was disallowed and that the exemption claimed on sale of some products had to be disallowed.

5. The petitioner was issued with similar notices in respect of the financial years 2007-08, 2008-09, 2010-11, 2011-12, 2012-13 and 2013-14. The petitioner submitted a reply dated 27.11.2014 in response to all the notices.

6. However, the second respondent issued a second notice for the financial years 2007-08 to 2013-14, accepting the contention of the petitioner that Section 19(20) of the TNVAT Act 2006 mentioned in the notices in relation to the financial year 2007-08 was inapplicable. But, the second respondent invoked Section 24 instead, through the second notice.

7. Therefore, the petitioner submitted yet another reply on 29.6.2015 pointing out as to why Section 24 would also not be applicable. The petitioner made a further representation on 30.6.2015 summarizing all their submissions. However, overruling the objections of the petitioner, the second respondent passed orders of assessment dated 20.8.2015, holding that the returns filed by the petitioner, reflected a price abnormally low in comparison to the prevailing market rate. The orders of assessment were also followed by a consequential demand notice in Form 'O' and a penalty notice in Form 'RR'.

8. Therefore, challenging the validity of Sections 3(1), 3(2) and 24 of the TNVAT Act, 2006 and challenging the validity of Rule 8(3) of the TNVAT Rules and also challenging the individual orders of assessment dated 20.8.2015, the petitioner has come up with the above seven writ petitions.

9. The challenges of the petitioner to the statutory provisions contained in Sections 3(1), 3(2) and 24 and Rule 8(3) are on the following grounds:

(a) that though it is well settled, by the decision of the Supreme Court in Govind Saran Ganga Saran Vs. Commissioner of Sales Tax, [1985 (Supp.) SCC 205], that in order that a levy of tax is valid and operative, there must exist four essential components namely (i) taxable event; (ii) the person on whom levy is imposed, (iii) the rate at which levy is imposed; and (iv) the measure or value, to which, the rate will be applied for computing the tax liability, Sections 3(1) and 3(2) are bereft of the measure of tax and hence, they fall foul of Article 265 of The Constitution;

(b) that measure of tax on sale of goods as contemplated under Sections 3(1) and 3(2) has not been provided and hence, the levy is without authority of law;

(c) that in contrast to Sub-Sections (1) and (2) of Section 3, all other charging sections, dealing with other kinds of sale, provided the measure of tax and hence, Sub-Sections (1) and (2) of Section 3 are ultra vires;

(d) that the charging Section namely Section 3 of the Tamil Nadu General Sales Tax Act, 1959, which is the precursor to the TNVAT Act, 2006 provided not only for levy of tax at the prescribed rate, but also specified the point of levy on the turnover relating to goods, but the same is absent in Section 3 of the TNVAT Act, 2006;

(e) that neither of the expressions "taxable turnover" and "turnover" defined in Sub-Sections (38) and (41) of Section 2 finds a place in the charging section namely Sections 3(1) and 3(2) and hence, these expressions cannot even be read into charging sections;

(f) that Section 24 of the TNVAT Act, 2006 that empowers the Assessing Authority to pass a best of judgment assessment, uses a very vague expression "abnormally low" without providing any guideline as to the basis, on which, the same is to be determined and hence, Section 24 is ultra vires and vitiated due to vagueness;

(g) that Rule 8(3) of the TNVAT Rules, 2007 lists out certain factors that could be taken into account by the Assessing Authority in making an assessment under Section 24, but the same is beyond the rule making power conferred under Section 80 of the Act, in as much as the rule uses the expression "prevailing market rate", though Section 80 does not empower the Government to issue rules for determining the prevailing market rate.

10. We have carefully considered the above submissions.

11. Before we look into the provisions that are under challenge and before dealing with the grounds of challenge, we think it would be appropriate to deal with the historical background that lead to the transition from the General Sales Tax Regime to the Value Added Tax Regime.

HISTORICAL BACKGROUND:

12. With a view to bring more efficiency in the tax administration and equal competition and fairness in the taxation system, the Union Government decided in the year 1995 to introduce a taxation structure based on the value added tax (VAT) in the country in the place of the existing General Sales Tax Acts in force since 1957. The object of this switch over was to do away with multiple points of taxation and to rationalise the overall tax burden. The provisions and objects of implementation of value added tax were (i) to help common people, traders and industrialists and (ii) to help the Government by providing a simple and more transparent tax structure.

13. In simple terms, the concept of the value added tax was this. Goods pass through various stages in the manufacturing and distribution chain till they reach the customer and at each stage, some value is added. VAT is a multipoint tax with provision for granting set off or credit for the tax paid on the purchase against the tax payable on sales. A registered dealer collects VAT from the purchasing dealer during sale of taxable goods within the State of registration. The purchasing dealer then becomes eligible for credit for the tax already paid (otherwise known as input tax credit - ITC). This ITC can be set off against total tax liability on sales during the relevant tax period.

14. At least 5 definite benefits were found to have arisen from the VAT Regime over the Sales Tax Regime. They were (i) the dealers were incentivised, so as to avail benefit of ITC; (ii) the facility of set off removes the problem of multiple taxation and rationalise the tax rate; (iii) the system was intended to be built on trust, as they were expected to make assessment and

deposit tax; (iv) with a domain, it was intended to track transactions and conduct non-intrusive and more effective scrutiny of returns; and (v) the risk of differential rates of taxation resulting in unintended diversion of trade was sought to be avoided by presupposing a uniform floor rate of tax.

15. In the year 1999, the Government of India set up an Empowered Committee of State Finance Ministers to formulate the basic design of VAT through consensus. After deliberations for over six years, a white paper was presented in January 2005. Since the white paper provided steps for Federal Flexibility, the State Governments could make appropriate variations in their Acts. While Haryana was the first State to introduce VAT in April 2003, the other States shifted from the Sales Tax Regime to VAT Regime from April 2005.

SALIENT FEATURES OF TNVAT ACT:

16. The Government of Tamil Nadu enacted the TNVAT Act, 2006, with a view to consolidate and amend the law relating to the levy of tax on the sale or purchase of goods in the State of Tamil Nadu. Sections 3 to 5, 7, 9 and 11 of the Act deal respectively with the levy of taxes on (i) sale of goods (ii) right to use any goods (iii) transfer of goods involved in works contract (iv) food and drinks (v) bullion and jewellery and (vi) sugar cane. Section 12 deals with levy of purchase tax. Section 15 speaks about exempted sales and Section 16 deals with the stage of levy of taxes in respect of imported and exported goods. Section 19 deals with input tax credit.

17. Sections 20 to 29 deal with assessment, filing of returns, procedure to be followed etc. Sections 30 to 33 deal with the power of the Government to notify exemption or remission or deferred payment of tax.

18. Sections 38 and 39 deal with registration and procedure therefor. Collection of tax, payment and recovery etc., are dealt with in Sections 40 to 42 and 44 to 46. Sections 50 to 58 provide for appeals and revisions to various authorities including the Tribunal. Section 59 provides for an appeal to the High Court and Section 60 provides for a revision to the High Court. Sections 63 to 69 deal with production of accounts, maintenance of records, inspection etc. Sections 71 to 73 deal with offences, penalties, cognizance and compounding of offences. Sections 80 to 84 deal with the power to make rules, power to summon witness, power to remove difficulties etc. Section 86 deals with the power to amend the schedules. Section 88 is the provision for repeal and saving.

PROVISIONS UNDER CHALLENGE

19. Keeping in mind the above scheme of the Act, let us now turn our attention to the provisions that are under challenge. Sub-Sections (1) and (2) of Section 3, which are under challenge, read as follows:

> "3. (1) (a) Every dealer, other than a casual trader or agent of a non-resident dealer, whose total turnover for a year is not less than rupees five lakhs and every casual trader or agent of a non resident dealer, whatever be his total turnover, for a year, shall pay tax under this Act.
>
> (b) Notwithstanding anything contained in clause (a), every dealer, other than a casual trader or agent of a non-resident dealer, whose total turnover in respect of purchase and sale within the State, for a year, is not less than rupees ten lakhs, shall pay tax under this Act.
>
> (2) Subject to the provisions of sub-section (1), in the case of goods specified in Part - B or Part - C of the First Schedule, the tax under this Act shall be payable by a dealer on every sale made by him within the State at the rate specified therein."

20. Section 24 reads as follows:

> "24. (1) If the Assessing Authority is satisfied that a dealer has, with a view to evade the payment of tax, shown in his accounts, sales or purchases of any goods, at prices which are abnormally low compared to the prevailing market price of such goods, it may, at any time within a period of five years from the expiry of the year to which the tax relates, assess or reassess the dealer to the best of its judgement on the turnover of such sales or purchases after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.
>
> (2) The provisions of Sub-Sections (3) to (8) of Section 27, shall, as far as may be, apply to assessment or re-assessment under sub-section (1) as they apply to the re-assessment of escaped turnover under Sub-Section (1) of Section 27."

21. Rule 8 (3) of the Tamil Nadu Value Added Tax Rules, 2007 reads as follows:

> "8. Procedure for assessment.—
>
> (3) In making an assessment under section 24, the assessing authority shall take into account such of the following factors as may be relevant to the determination of the prevailing market price of the goods, namely:-- (a) The price charged by other dealers at the relevant stage of sale of similar goods during the relevant period; (b) The difference between the price charged by a dealer towards the purchase of the goods from the earlier seller and the price charged on the resale of the same goods; (c) The difference between the price paid by the dealer towards the purchase of the goods from the earlier seller and price charged for the resale of the same goods; and (d) The differential price charged on sales against bulk orders and small orders in respect of the same goods. If the difference in prices, exclusive of the tax element, is more than fifteen per cent (15%), the assessing authority shall examine the reasons for the variation, taking into account the relationship between the parties to the transactions, the charges for after sales services, packaging, transport and other expenses incurred by subsequent sellers which add to the cost of the goods at each stage of sale by successive dealers. The assessing authority shall also examine whether there is such difference in the price charged on the sales of the same goods to different customers and whether the goods are made available to all distributors or other customers in unlimited quantities and at the same prices. After making due allowance towards the variation in prices and normal profit margin, the assessing authority shall arrive at the market price that should have been charged by the dealer and levy tax on the taxable turnover so arrived at."

GROUNDS OF CHALLENGE

Contention (i)

22. The first contention of the learned counsel for the petitioner is that Sub-Sections (1) and (2) of Section 3 of the

Act do not even indicate the measure of tax and that therefore, they do not satisfy the parameters for a valid levy as laid down in Govind Saran Ganga Saran.

23. A careful perusal of Sub-Section (1) would show that two types of persons are sought to be covered by Sub-Section (1). The first type of persons are dealers other than casual traders or agents of a non resident dealer. The second type of persons are casual traders or agents of non resident dealers. In so far as the first type of dealers is concerned, they are made liable to tax, if their total turnover for a year is not less than Rs.5 lakhs. In respect of the second type of dealers, Sub-Section (1) stipulates that they are liable to pay tax irrespective of what their total turnover is.

24. The contention of the learned counsel for the petitioner is that though Sub-Section (1) of Section 3 indicates the persons, on whom, a levy is made, it simply says that the dealer shall pay tax under the Act. According to the learned counsel for the writ petitioner, such a stipulation in Sub-Section (1) does not satisfy the four components of a valid levy as laid down in paragraph 6 of the decision in Govind Saran Ganga Saran, which reads as follows :

> "The components, which enter into the concept of a tax are well known. The first is the character of the imposition known by its nature, which prescribes the taxable event attracting the levy, the second is a clear indication of the person on whom the levy is imposed and who is obliged to pay the tax, the third is the rate at which the tax is imposed and the fourth is the measure or value to which the rate will be applied for computing the tax liability. If those components are not clearly and definitely ascertainable, it is difficult to say that the levy exists in point of law. Any uncertainty or vagueness in the legislative scheme defining any of those components of the levy will be fatal to its validity."

25. But, we do not think that that the said contention is sustainable. Sub-Section (1) not only indicates the character of the imposition and prescribes the taxable event attracting the tax, but it also indicates the person, on whom, the levy is imposed and who is obliged to pay the tax. The rate at which the tax is imposed, is traceable to the Schedules. The measure of tax is prescribed under the other provisions of the statute. The Act, in entirety, does not leave any uncertainty or vagueness in the legislative scheme in defining any of the components of the levy.

26. Sub-Section (1) uses the expression "total turnover" and the expression "tax". The expression "total turnover" is defined in Section 2(40) of the Act to mean the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not, the whole or any portion of such turnover is liable to tax. Even the expression "turnover" is defined in Section 2(41).

27. The expression "turnover" is defined to indicate the amount, for which, goods are bought or sold or delivered or supplied or otherwise disposed of in any of the ways referred to in Clause (33) of Section 2. Clause (33) of Section 2 defines the expression "sale". It is a very exhaustive definition and it may be extracted usefully as follows :

> "Section 2(33) : "sale" with all its grammatical variations and cognate expressions means every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration and includes -
>
> (i) a transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;
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> (ii) a transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;
>
> (iii) a delivery of goods on hire-purchase or any system of payment by instalments;
>
> (iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;
>
> (v) a supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration;
>
> (vi) a supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash, deferred payment or other valuable consideration, and such transfer, delivery or supply of any

goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made;

Explanation I.- The transfer of property involved in the supply or distribution of goods by a society (including a co-operative society), club, firm or any association to its members, for cash, or for deferred payment or other valuable consideration, whether or not in the course of business, shall be deemed to be a sale for the purposes of this Act.

Explanation II.- Every transfer of property in goods by the Central Government or any State Government for cash or for deferred payment or other valuable consideration, whether or not in the course of business, shall be deemed to be a sale for the purposes of this Act.

Explanation III.- Every transfer of property in goods including goods as unclaimed or confiscated or unserviceable or scrap surplus, old, obsolete or discarded materials or waste products, by the persons or bodies referred to in Explanation III in clause (15) of section 2 for cash or for deferred payment or for any other valuable consideration whether or not in the course of business, shall be deemed to be a sale for the purposes of this Act.

Explanation IV.- The transfer of property involved in the purchase, sale, supply or distribution of goods through a factor, broker, commission agent or arhati, del credere agent or an auctioneer or any other mercantile agent, by whatever name called, whether for cash or for deferred payment or other valuable consideration, shall be deemed to be a purchase or sale, as the case may be, by such factor, broker, commission agent, arhati, del credere agent, auctioneer or any other mercantile agent, by whatever name called, for the purposes of this Act.

Explanation V.- (a) The sale or purchase of goods shall be deemed for the purposes of this Act, to have taken place in the State, wherever the contract of sale or purchase might have been made, if the goods are within the State —

(i) in the case of specific or ascertained goods, at the time the contract of sale or purchase is made; and

(ii) in the case of unascertained or future goods, at the time of their appropriation to the contract of sale or purchase by the seller or by the purchaser, whether the assent of the other party is prior or subsequent to such appropriation.

(b) Where there is a single contract of sale or purchase of goods, situated at more places than one, the provisions of clause (a) shall apply as if there were separate contracts in respect of the goods at each of such places.

Explanation VI.- Notwithstanding anything to the contrary contained in this Act, two independent sales or purchases shall, for the purposes of this Act, be deemed to have taken place --

(a) when the goods are transferred from a principal to his selling agent and from the selling agent to the purchaser, or

(b) when the goods are transferred from the seller to a buying agent and from the buying agent to his principal, if the agent is found in either of the cases aforesaid-

(i) to have sold the goods at one rate and to have passed on the sale proceeds to his principal at another rate, or

(ii) to have purchased the goods at one rate and to have passed them on to his principal at another rate, or

(iii) not to have accounted to his principal for the entire collections or deductions made by him in the sales or purchases effected by him on behalf of his principal."

28. Therefore, the contents of Sub-Section (1) have to be understood in the context of the definition of the expressions "turnover" and "total turnover". If Sub-Section (1) is read along with the definitions of the expression "sale", "total turnover"and "turnover" stipulated in Sub-Sections (33), (40) and (41) of Section 2, it will be clear that there is no uncertainty or vagueness in the measure of tax.

29. Sub-Section (2) of Section 3 stipulates that subject to the provisions of Sub-Section (1), the tax under the Act shall be payable by a dealer on every sale made by him within the State, at the rate specified in Part B or Part C of the First Schedule. This Sub-Section takes care of at least three components namely (i) the taxable event (ii) the measure of tax and (iii) the person, on whom, the levy would fall. Therefore, it is impossible to think that the four components mentioned in paragraph 6 of the decision in Govind Saran Ganga Saran do not stand satisfied.

30. Inviting our attention to the decision in State of Kerala Vs. Alex George [2005 (1) SCC 299], it is contended by the learned counsel for the petitioner that the taxable event is the one, which creates a liability on its occurrence to tax. The said proposition laid down in Goodyear India Limited Vs. State of Haryana [1990 (2) SCC 71] as well as the decision in Govind Saran Ganga Saran were cited with approval by the Supreme Court in Alex George.

31. We have no quarrel with the proposition that a levy should satisfy all the four components as laid down in Govind Saran Ganga Saran and also the fact that a taxable event is one, which, on its occurrence, creates a liability to tax. But, we do not know as to how the aforesaid propositions are applicable to invalidate Sub-Sections (1) and (2) of Section 3.

33. As a matter of fact, the decision in Govind Saran Ganga Saran does not state that all the four components of a valid levy should be found in one particular Sub-Section of one Section and that it would become invalid otherwise. A survey of the charging sections of the VAT Acts of various States would show that each of them chose their own language and scheme. The charging sections of the VAT Acts of the States of Kerala, Maharashtra, Andhra Pradesh, Pondicherry, Assam, Bihar, Haryana, Gujarat, Utter Pradesh, Delhi, Karnataka, Madhya Pradesh and Jharkhand can be usefully referred to, in this regard. They are as follows :

> "Kerala VAT Act :
>
> 6. Levy of tax on sale or purchase of goods.-
>
> (1) Every dealer whose total turnover for a year is not less than ten lakh rupees and every importer or casual trader or agent of a non-resident dealer, or dealer in jewellery of gold, silver and platinum group

metals or silver articles or contractor or any State Government, Central Government or Government of any Union Territory or any department thereof or any local authority or any autonomous body whatever be his total turnover for the year, shall be liable to pay tax on his sales or purchases of goods as provided in this Act. The liability to pay tax shall be on the taxable turnover, -

Maharashtra VAT Act :

3. Incidence of Tax, -

(1) Every dealer, who, immediately before the appointed day, holds a valid or effective certificate of registration or licence under any of the earlier laws or, who is liable to pay tax under any of the earlier laws, in the year ending immediately before the appointed day shall, if his turnover of sales or purchases has, in the said year under any of such earlier laws, exceeded rupees 1[five lakh], or, as the case may be, who was an importer in the said year 2[and his turnover of sales or purchases in the said year had] exceeded rupees one lakh, be liable to pay tax, with effect from the appointed day, in accordance with the provisions of this Act, till his certificate or licence is duly cancelled under this Act.

Andhra Pradesh VAT Act :

Sec.4. Charge to tax:-

(1) Save as otherwise provided in the Act, every dealer registered or liable to be registered as a VAT dealer shall be liable to pay tax on every sale of goods in the State at the rates specified in the Schedules.

Pondicherry VAT Act :

14. Incidence and Levy of Tax

(1) Every dealer registered or liable to be registered under this Act, (other than a casual trader, a non-resident dealer) whose total turnover for a year exceeds rupees five lakhs and every casual trader or agent of a non-resident dealer, whatever be his turnover for the year, shall pay a tax on the taxable turnover in each tax period at the rate and at the point as specified in the Schedules.

Assam VAT Act :

7. Incidence of Tax

(1) Subject to other provisions of this Act, every dealer who has been liable immediately before the appointed day to pay tax under the Assam General Sales Tax Act, 1993, shall, with effect from the appointed day for the purpose of this section, be liable to pay tax in accordance with the provisions of this Act.

Bihar VAT Act :

3. Charge of Tax

Every dealer who is registered under the Bihar Finance Act, 1981, as it stood before its repeal by section 94, shall be liable, on or after the commencement of this Act, to pay tax under this Act on sale or purchase, made by him.

Haryana VAT Act :

3. Incidence of Tax

(1) Every dealer who would have continued to be liable to pay tax under the Act of 1973 had this Act not come into force, and every other dealer whose gross turnover during the year immediately preceding the appointed day exceeded the taxable quantum as defined or specified in the Act of 1973, shall, subject to the provisions of sub-section (4), be liable to pay tax on and from the appointed day on the sale of goods effected by him in the State.

Gujarat VAT Act :

3. Incidence of Tax

(1) Subject to the provisions of this Act, every dealer,-

(i) whose total turnover during the year immediately preceding the appointed day exceeded rupees five lakhs and whose taxable turnover exceeded rupees ten thousand in a year (the aforesaid amounts of total turnover and taxable turnover are hereinafter referred to as "thresholds of turnover"), or

(ii) who was registered under the earlier law or under the Central Act as on the appointed day, or

(iii) whose total turnover and taxable turnover in any year first exceed the thresholds of turnover, or

(iv) who is registered or liable to be

registered as a dealer under this Actor under the Central Act at any time after the appointed day,

shall be liable to pay tax in accordance with the provisions of this Act

Uttar Pradesh VAT Act :

3. Incidence and Levy of Tax

(1) Subject to the other provisions contained in this Act, every dealer shall be liable to pay tax under this Act, for each assessment year, on his taxable turnover of sale or purchase or both, as the case may be, of taxable goods, at such rates and at such point of sale or purchase as provided under section 4 or section 5.

Delhi VAT Act :

3. Imposition of Tax

(1) Subject to other provisions of this Act, every dealer who is -

(a) registered under this Act; or

(b) required to be registered under this Act; shall be liable to pay tax calculated in accordance with this Act, at the time and in the manner provided in this Act

Karnataka VAT Act :

3. Levy of Tax

(1) The tax shall be levied on every sale of goods in the State by a registered dealer or a dealer liable to be registered, in accordance with the provisions of this Act.

Madhya Pradesh VAT Act :

5. Incidence of tax

(1) Every dealer whose turnover during a period of twelve months immediately preceding the commencement of this Act exceeds the prescribed limits, which shall not exceed rupees five lacs, shall from such commencement be liable to pay tax under this Act in respect of sales or supplies of goods effected by him in Madhya Pradesh. Different limits may be prescribed for different category of dealers.

Jharkand VAT Act :

8. Incidence of tax

Every dealer -

(a) whose gross turnover of sales or purchases during the year immediately preceding the commencement of this Act, -

(i) exceeded the specified quantum, or
(ii) who is registered or liable to be registered under the adopted Bihar Finance Act, 1981 or the Central Sales Tax Act, 1956, shall be liable to pay tax in accordance with the provisions of this Act ."

Therefore, the first contention is not sustainable.

Contention (ii)

34. The next contention of the learned counsel for the petitioner is that Section 24(1) of the Act, which empowers the Assessing Officer to pass a best of judgment assessment, confers a power upon the Assessing Officer to determine whether the price shown by a dealer in his accounts is abnormally low compared to the prevailing market price of such goods. According to the learned counsel, what is abnormally low is neither defined nor any guidelines provided in the Act for the Executive Authorities to find out. The contention of the learned counsel in this regard is that what is abnormally low cannot be left to the whims and fancies of the individual Assessing Officers. As a consequence, the power conferred upon the Assessing Officer by Section 24(1), according to the learned counsel for the petitioner, is an unguided and unbridled power. Therefore, the learned counsel contends that such a power cannot be upheld.

35. However, the very same contention in relation to Section 12A of the Tamil Nadu General Sales Tax Act, 1959 was rejected by a Division Bench of this Court in Jayalakshmi Traders Vs. Government of Tamil Nadu [1997 (105) STC 337 (Madras)]. Section 12A of the erstwhile Tamil Nadu General Sales Tax Act, which was actually in pari materia with Section 24(1) of the TNVAT Act, 2006, empowered the Assessing Officer to pass a best of judgment assessment, in cases where the prices indicated in the books of accounts of a dealer were found to be abnormally low compared to the prevailing market price. Therefore, the contention raised before a Bench of this Court in Jayalakshmi Traders was that Section 12A conferred unguided and unbridled power upon the Assessing Officer. But, this Court rejected the said contention, based upon the decision of the Supreme Court in K.P. Varghese Vs. I.T.O. [1981 (131) I.T.R. 597].

36. However, the learned counsel for the petitioner sought to distinguish the decision in Jayalakshmi Traders, on the basis of a decision of a learned Single Judge of this Court in B.Narasimhalu Chettiar Vs. Government of Tamil Nadu [89 LW 55]. In the said decision, a learned Judge of this Court struck down Rule 3(ee) of the Gold Control (Licensing of Dealers) Rules, 1969 as ultra vires on the ground that it used the expression "a low turnover". Finding that the said Rule did not contain any

guidelines for the Licensing Authorities to determine what could be sought to be "too low a turnover" and also finding that the rule will work differently to different individuals depending upon the particular officer, the learned Judge sustained the challenge to the said provision.

37. But, there are two reasons as to why we cannot go with the said contention. The first is that what this Court was concerned with in B. Narasimhalu Chettiar was a subordinate legislation. But, what another Bench of this Court was concerned in Jayalakshmi Traders and what we are concerned in this case relate to a statutory provision. Therefore, this Court has to see whether, by a subordinate legislation, certain guidelines have been stipulated for determining what is abnormally low. If that has been done, the statutory prescription would certainly stand.

38. The second reason as to why we could not go on the basis of the decision of the learned Judge in B.Narasimhalu Chettiar is that Section 12A that was upheld by a Bench in Jayalakshmi Traders, used exactly the very same expression that is found in Section 24(1). Therefore, the ratio of the Two Member Bench in Jayalakshmi Traders applies in all force to the present challenge to Section 24(1).

Contention (iii) :

39. The next challenge of the petitioner is to Rule 8(3) of the TNVAT Rules, 2007.

40. Rule 8 of the Rules prescribes the procedure for assessment. While Sub-Rule (1) of Rule 8 prescribes the amounts, which shall not be included in the turnover of a dealer, in pursuance of Explanation II to Clause (41) of Section 2, Sub-Rule (2) of Rule 8 stipulates that while determining the taxable turnover, the post sale charges and amounts specified in the clauses under Sub-Rule (2), shall be deducted from the total turnover.

41. After stipulating in Sub-Rules (1) and (2), what are not to be included in the turnover and what are to be deducted from the total turnover, Sub-Rule (3) indicates the factors that are relevant for the Assessing Authority to take note of, for determining the prevailing market price of the goods. Sub-Rule (3) of Rule 8 has already been extracted in the preceding paragraph.

42. It could be seen from Sub-Rule (3) that an Assessing Authority is obliged to take into account, before making a best of judgment assessment, certain factors such as (i) price

charged by other dealers for the sale of similar goods during the relevant period (ii) the difference between the price charged by a dealer towards the purchase of goods from earlier seller and the price charged on the re-sale of the same goods (iii) the difference between the price paid by the dealer towards purchase and the price charged for the re-sale (iv) the differential price charged on sales against bulk orders and small orders.

43. Clause (d) of Sub-Rule (3) of Rule 8 makes it clear that if the difference in prices, exclusive of tax limit, is more than 15%, the Assessing Officer shall examine the reasons for variation. We do not think that anything more could have been done by the Rule Making Authority, to indicate as to how a best of judgment assessment could be carried out under Section 24(1). The question as to whether the difference in prices is more than 15% or not, is also not left to the whims and fancies of the Assessing Officer. The later part of Clause (d) of Sub-Rule (3) of Rule 8 makes it clear that the Assessing Authority is even obliged to look into the reasons for the variation, take into account the relationship between the parties to the transactions and see if there are after sales services, etc. Therefore, the contention that Section 24(1) is hit by vagueness and the contention that the power is unbridled and unguided does not appeal to us. As a matter of fact, in Jayalakshmi Traders, this Court was concerned with a similar rule in Rule 18C. Hence, we are of the considered view that the challenges to the statutory prescriptions are devoid of merits.

44. Accordingly, the writ petitions are dismissed. No costs. Consequently, the above MPs are also dismissed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

GR/RS

To

1.The Principal Secretary to
the Government of Tamil Nadu,
Finance Department,
Fort.St.George, Chennai-9.

2.The Deputy Commissioner (CT)-III, (FAC),
Large Tax Payers
Unit, No.34, Dugar Towers,
Marshal Road, Egmore, Chennai-8.

+7ccs to M/s. Satish Parasaran, Advocate, S.R.No.55764

+1cc to the Special Government Pleader, S.R.No.55760

VD(CO)
EU(04/01/2016)

W.P.Nos.31985 to 31991 of 2015
& all connected pending MPs