IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WP.Nos.12007 to 12011 of 2006
WPMP.Nos.13625 to 13629 of 2006
WPMP.Nos.17015 to 17019 of 2006
WVMP.Nos.68, 69, 61, 62 and 56 of 2009

C.Ramachandran
Industrial Catering Contractor
Chennai-68 Petitioner in all WPs

Vs

The Deputy Commercial Tax Officer
Manali Assessment Circle
Chennai-108 Respondent in all WPs

Prayer:- These Writ Petitions are filed to issue a Writ of Certiorari, to call for the records in RC.No.859/2004 (1997-1998, 2002-2003, 1999-2000, 2000-2001, 1998-1999), dated 24.03.2006, on the file of the Respondent and to quash the same.

For Petitioner : Mr.C.Natarajan, SC for Mr.D.Shivakumaran

For Respondent : Mr.S.Manoharan Sundaram, AGP

ORDER

In these Writ Petitions, the Petitioner seeks to quash the order of the Respondent, dated 24.3.2006 made for the assessment years 1997-1998, 2002-2003, 1999-2000, 2000-2001, 1998-1999, imposing purchase tax and penalty on the Petitioner.

2. The case of the Petitioner is that the Petitioner is running a canteen, on behalf of MFL, in the premises of MFL under the Memorandum of Agreements, dated 26.11.1999 and 12.03.2003. By Notification No.336, dated 17.09.1964, there is an exemption granted for sales in the canteen run under the statutory obligations. As per the agreement, MFL have provided all types of infrastructure facilities for running the canteen. The Petitioner only buys the provisions, cooks and supplies to the MFL employees on subsidise basis. The object of the said notification is not to tax canteens, which

are subsidized as a welfare measure. On 22.03.2003, when the Enforcement Officers conducted an inspection, the books of accounts were not made available, though regularly maintained. On receipt of the proposals from the Enforcement Officers, the Respondent issued a notice dated 22.4.2004, proposing to levy purchase tax and penalty and subsequently, the taxes were paid for MFL coupon receipts. Thereafter, further notice dated 20.05.2004 was issued, proposing to levy penalty under Section 12(3)(a) of the TNGST Act, to which, the Petitioner filed their objections, dated 30.05.2004, stating that the purchases were only from the registered dealers and sales tax was not paid, because there was subsidised supply by MFL as a welfare measure and there was no sale to employees and that there was only a catering service. On 28.05.2004, a further reply was given. The Respondent, by another notice dated 07.06.2004, directed the Petitioner to produce the purchase details. The Petitioner appeared before the Respondent and produced all the documents. However, the Respondent, by letter by dated 18.01.2005, called upon MFL to give break-up data of coupon sales and subsidy. The Petitioner submitted an application dated 31.05.2005, requesting to give one more week time for MFL to furnish the break-up details. On 13.06.2005, a peremptory letter was received, in response to which, the Petitioner requested that free issue sales may be taken as coupon sales and the MFL data was adequate to complete a proper assessment. However, the impugned assessment order dated 24.03.2006, calling upon the Petitioner to pay the purchase tax and penalty for the said assessment years. Hence, these Writ Petitions have been filed for the reliefs as stated above.

3. This Court, by order dated 21.6.2006 in the above miscellaneous petitions, granted an order of interim of stay on condition that the Petitioner shall deposit a sum of Rs.30,00,000/- (Rupees Thirty Lakhs Only). Thereafter, the Respondent filed the above miscellaneous petitions to vacate the said interim order and also filed a common counter affidavit, contending as follows:-

a. In and by the impugned orders, the Petitioner was directed to pay the purchase tax and penalty under Section 7-A of the Tamil Nadu General Sales Tax Act, 1959. Since, on verification, it was found that the dealer did not maintain any books of accounts, the taxable purchases of raw materials from the unregistered dealers liable to tax could not be verified. Hence, 40% of the Total receipt was treated as purchases of taxable materials from unregistered dealers taxable under section 7A of the Act. The Petitioner produced only purchase list with objections. In the absence of the original purchase bills produced for verification, it could not be verified that the purchases had been made from registered dealers or unregistered dealers. The alleged

Memorandum of Agreement does not alter the liability of the petitioner to pay tax under the Act. The Petitioner has not maintained any regular accounts and hence, the assessing officer has no other option except to proceed on the basis of the data available.

b. The claim of the Petitioner that the details received from the MFL, have to be adopted as his sales turnover is not acceptable, since the Petitioner doing the business has to produce the books of accounts and furnish his sales turnover. The Petitioner is not entitled to claim any exemption for the sales of food and drinks, etc. The petitioner had been served with pre-assessment notice proposing to levy tax and penalty and in response to that, the petitioner sent his objections. After giving opportunity to the Petitioner and considering the objections, the assessment was completed. The Petitioner has got alternative remedy to prefer a statutory appeal. In such circumstances, these Writ Petitions are liable to be dismissed.

4. The learned counsel for the Petitioner submitted that the impugned assessment was made, without examining the books of accounts and the evidence of MFL, as to the extent of supplies as per the certificate given dated 2.6.2005 and that the Respondent erred in ignoring the fact that the statutory canteens, run under obligation and subsidised by the employers, are completely exempted by Notification No.336 dated 17.09.1964. The learned counsel for the Petitioner further submitted that the assessment imposing penalty under section 12(3) of the TNGST Act is contrary to Explanation in section 12(3) of the TNGST Act and that the Petitioner is ready to pay the taxes as per the books of accounts and actuals under the provisions of the Tamil Nadu General Sales Tax Act, 1959.

5. The learned Additional Government Pleader for the Respondent reiterated the averments made in the counter affidavit and supported the impugned orders, by contending that even as per the notification relied on by the Petitioner, the canteen was not run by the employer or on cooperative basis and run by an independent contractor, the Petitioner herein and hence, he is not entitled to be exempted from tax and penalty.

6. This Court heard and considered the submissions made by the learned counsel on either side and also perused the materials placed on record.

7. The admitted facts are that the Petitioner, as an independent contractor, is running a canteen on behalf of MFL, in the premises of MFL. After conducting inspection on 22.03.2003, the Respondent issued a notice dated 22.4.2004,

proposing to levy purchase tax and penalty for the assessment years from 1997-98 to 2002-2003 and subsequently, the taxes were paid for MFL coupon receipts for the said assessment years. Thereafter, further notice dated 20.05.2004 was issued, to which the Petitioner filed objections, dated 30.05.2004 and a further reply dated 28.05.2004. On further notice dated 07.06.2004, the Petitioner produced all the documents. However, the Respondent , by letter by dated 18.01.2005, called upon MFL to give break-up data of coupon sales and subsidy. Thereafter, the impugned assessment order came to be passed. Hence, the Petitioner is before this court.

8. The question that arises for consideration in this Writ Petition is as to whether the turnover in relation to the sales effected in the canteen run by the Petitioner during the relevant assessment years is exempt from sales tax by reason of the Notification No.336 of 1964, dated 01.09.1964.

9. The said Notification No.336, dated 1.9.1964 relied on by the Petitioner, has been issued with effect from 1.9.1964, which reads as under:-

> "Exemption on the sales by all canteens run by an employer or by the employees on cooperative basis on behalf of the employer, under a statutory obligation without profit motive, provided that the employer subsidies at least twenty five per cent of the total expenses including the expenses towards the purchased incurred in running the canteen effective from 1.9.1964."

10. Under the said notification, the exemption granted is for the sales by all canteens run by an employer or by the employees on cooperative basis on behalf of the employer. The further requirement to be satisfied, before the benefit of that notification can be claimed, is that running of such canteen must be under a statutory obligation without profit motive and the employer should subsidise at least 25% of the total expenses incurred in running the canteen.

11. The question herein is whether the petitioner is coming under the category of a canteen run on co-operative basis or not. Under similar circumstances, the Division Bench of this Court in 2003-132-STC-35 (Industrial Catering Services P Limited Vs. Commercial Tax Officer, Chennai), held as follows:

> "14. The notification does not refer to the particulars of the statute under which the employer may have been under an obligation to run the canteen. The terms of the statute, which creates an obligation, therefore, are not material for the purpose of testing the scope of the exemption. What is essential is that there must be an employer, who

has employees for whose benefit a canteen is run, the running of such canteen being an obligation imposed on the employer by a statute and that canteen is run by the employer or by the employees on a co-operative basis, without profit motive, with the employer subsidising to an extent of at least 25% of the total expenses incurred in running the canteen.

17. The notification issued by the State under the provisions of the Sales Tax Act has provided the exemption only for the sales effected in canteens 'run' by an employer or is run by the employees on a co-operative basis on behalf of the employer. These are the only two situations in which the benefit of the exemption can be claimed. The running of the canteen by an independent contractor, even though can be regarded as running of the canteen on behalf of the employer, would not meet the requirements of this notification as the running of the canteen on behalf of the employer would be relevant for the purposes of this notification, only if such running of the canteen is by the employees on a co-operative basis. The two situations contemplated under the notifications are, therefore, the running of the canteen by the employer directly or by the employees on a co-operative basis on behalf of the employer.

18. It is well settled that the benefit of the exemption notification is not to be extended unless the plain language employed in the notification reasonably requires its application to the situation which is brought before the Court. The words used in the notification are to be given their natural meaning and are to be construed in the context of the words actually used in other parts of the notification. The notification, so considered, does not contemplate the extending of the exemption contemplated under that notification to sales in canteens run by the independent contractors.

19. The running of the canteen by such contractor is not without profit motive. Such contractor who is in business, in order to make a profit, agrees to run the canteen for the employer on such terms would as would ensure a profit to the contractor. The running of the canteen, in so far as such contractor is concerned, is only with a profit motive. This fact would further underscore the scope of the notification as being limited in its application to the employer or the employees running

> it on co-operative basis, as the possibility of the canteen being run without a profit motive would be real only in their case, as an employer does not normally seek to make a profit of his own employees nor would the employees, who run a canteen on co-operative basis for the benefit of their members, seek to make a profit at the cost of their members. In case the employer, who runs a canteen or the co-operative of the employees, who run it for the employer, run the canteen with a profit motive, they would be ineligible to claim the benefit of this notification."

12. Admittedly, in the case on hand, the Petitioner is an independent contractor and he is not running the canteen on cooperative basis. Therefore, the Petitioner is not entitled to claim exemption provided under the said notification dated 17.09.1964, as he did not satisfy the essential requirements laid down in the notification for claiming the benefit therefor. Further, since the Petitioner doing business has to produce the books of accounts, but the Petitioner did not maintain and produce the same, in the absence of original purchase bills, the Respondent assessed on the basis of the data available and passed the impugned order, the Petitioner is liable to pay tax.

13. Insofar as the imposition of penalty is concerned, in the impugned assessment orders, penalty has been levied at the rate of 150% which is the maximum. The assessing officer has proceeded on the basis that he is bound to levy the penalty. Though the penalty is leviable under the provisions of the Act in the event of a dealer not filing a return, the levy of that penalty is discretionary and while exercising that discretion, the assessing officer is required to take note of the bona fides of the assessee.

14. The Division Bench in the above referred decision in 2003-132-STC-35 (Industrial Catering Services P Limited Vs. Commercial Tax Officer, Chennai), has further held as follows:-

> "28. So far as the imposition of penalty is concerned, though the penalty is leviable under the provisions of the Act in the event of a dealer not filing a return, the levy of that penalty is discretionary, and while exercising that discretion, the assessing officer is required to take note of the bona fides of the assessee. The assessing officer in this case, when he imposed the penalty, did not address himself to that factor. The appellate authority had set aside the levy of penalty while making the remand. As to whether the assessee should be subjected to a penalty should be

examined afresh by the assessing officer having regard to the law laid down by this Court in the case of State of Madras vs. M/s. Fairmacs Trading & Co. (35 (1975) S.T.C. 177) and other later decisions including the one in the case of Appollo Saline Pharmaceuticals (P) Ltd. vs. Commercial Tax Officer (Fac) and others[125 (2002) S.T.C. 505].

29. We are informed by counsel at the bar that during the pendency of these petitions, the assessing officer has completed the assessments pursuant to the order of the appellate authority remanding the matter for the purpose of making fresh assessments and that in those assessment orders, penalty has been levied at the rate of 150% which is the maximum. The assessing officer has proceeded on the basis that he is bound to levy the penalty as, in his reading of the order of the Tribunal which is now impugned before us, the levy of penalty had been upheld. Counsel also informs us that, that orders of assessment have been appealed against unsuccessfully.

30. As these orders of fresh assessments were made pursuant to the order of remand which order itself was the subject matter of the appeal before the Taxation Special Tribunal whose order is now being examined by us, we consider it just to set aside that order levying penalty in the fresh orders of assessment, leaving the other parts of that order undisturbed, with a direction to the assessing officer to re-examine the question of penalty in the light of the law referred to by us in the course of this order. Petitioner is entitled to the reliefs to this extent. The writ petitions are disposed of accordingly. Connected miscellaneous petitions are closed."

15. Coming to the test of the bona fides of the Petitioner, it is seen from the averments of the miscellaneous petitions filed by the Petitioner that pursuant to the interim order of stay of this court, the Petitioner deposited a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs Only), out of Rs.30 lakhs as directed by this court and sought for time for depositing the balance amount. Further, the taxes were paid for MFL coupon receipts by the Petitioner and the Petitioner has also undertaken that he is ready and willing to pay the taxes as per the books of accounts and actuals under the provisions of the Tamil Nadu General Sales Tax Act, 1959.

16. Since the issue raised in this Writ Petition is covered by the decision cited supra, wherein the Division Bench of this Court, considering each and every aspect of the

case, justified the levy of tax, but at the same time, deleted the penalty, the same yardstick can be followed in this case also.

17. Accordingly, in view of the above reasons, discussions and in the light of the decision of this court cited supra, while setting aside the penalty liability alone, with a direction to the Respondents to re-examine the question of penalty, the impugned orders are confirmed, in so far as the levy of tax liability is concerned.

18. With the above directions, this Writ Petition is disposed of. No costs. Consequently, the connected MPs are closed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

Srcm/rsb

To:

The Deputy Commercial Tax Officer,
Manali Assessment Circle,
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Chennai-108

+1 cc to Mr.D.Shivakumaran, Advocate, sr.68677
+1 cc to Special Government Pleader (Taxes), sr.69032

WP.Nos.12007 to
12011 of 2006

gj co
kra 11.03.2016