

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 27.09.2016

CORAM

THE HONOURABLE Mr.JUSTICE T.S.SIVAGNANAM

W.P. No.26312 to 26318 of 2015
and M.P.Nos.1 and 2 of 2015 [14 MPs]

W.P.No.26312 of 2015

Ultra Tech Cement Ltd.,
Arakkonam.

Rep. by its General Manager Kuldeep Kothari

... Petitioner

Vs.

The Commercial Tax Officer,
Arakkonam.

... Respondent

Writ petition filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari to call for the records on the file of the respondent herein in TIN:33644301835/2006-07 dated 22.07.2015 and quash the same in so far as it relates the turnover of Rs.3,75,10,200/- and the penalty thereon.

For Petitioner : Mr.N.Sriprakash

For Respondent : Mr.S.Kanmani Annamalai, AGP

COMMON ORDER

Heard Mr.N.Sriprakash, learned counsel for the petitioner and Mr.S.Kanmani Annamalai, learned Additional Government Pleader appearing for the respondent.

2. As the pleadings were complete, the parties advanced submissions in the main Writ Petition itself and therefore, this court proposes to dispose of the main Writ Petition.

3. The petitioner is a Public Limited Company incorporated under the Companies Act, 1956, having its factory at Arakkonam, engaged in the manufacture of PPC and OPC cement. The Sale of cement is taxable at the rate of 12.5 % at present 14.5% under Entry 14 of part C to the First Schedule of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred to as "the Act"). For the purpose of production of cement, there are several inputs and one of the inputs is fly ash, which has been procured by the petitioner from the power generating station of the Tamil Nadu Electricity Board. An Agreement was entered into by the Petitioner with the TANGEDCO for the year 2002-2003 for procurement of fly ash. The petitioner apart from that had entered into an agreement with M/s.Larsen & Toubro Limited and the Petitioner has taken over the factory in the year 2005.

4. The Notification issued by the Government of India under the Environment Protection Act, 1986 dated 14.09.1999, which barred the sale of fly ash. The petitioner had accordingly procured fly ash from North Chennai Thermal Power Station (hereinafter referred to as "NCTPS") on payment of

service charges. The petitioner also were accounting the payments in their books for the service charges paid to NCTPS. The petitioner's case is that under the provisions of Section 3(2), Section 12 of the Act provides for charge of levy of the tax on sale as per the rate set out in the First Schedule of the Act. Expression "sale" is defined under Section 2(33) of the Act and "turnover" has been defined under Section 2(41) of the Act. Thus, the petitioner's contention is that to attract liability under the Act, there must be a taxable event of sale or purchase. The officers of the Commercial tax department inspected the petitioner's factory during September to November 2013 and one of the objections that was raised, with regard to the purchase of fly ash from NCTPS, which the petitioner had used as input in the manufacture of cement attracting liability for purchase tax under Section 12 of the Act.

5. To the audit query, the petitioner sent a reply on 24.12.2013 stating that there was no purchase at all from NCTPS and the disposal of the fly ash was part of compliance with pollution control norms undertaken by NCTPS and the petitioner had paid only service fee and no price was charged for the procurement of fly ash from NCTPS. After about 2½ months, the petitioner received a notice dated 04.03.2014, which was a notice of demand, demanding purchase tax from the petitioner. The petitioner challenged the same before this Court, by filing W.P.No.8061 of 2014 on the ground that without issuing show

cause notice, such a demand could not have been raised, which was set aside by this Court, by order dated 21.03.2014.

6. It is thereafter, the respondent issued a Pre-Assessment Notice dated 30.06.2014. At this stage, it would be relevant to note that in these writ petitions, the petitioner challenges only two of the findings, one is pertaining to the fly ash and the other pertaining to the Special Economic Zone (hereinafter referred to as "SEZ") and in respect of all other issues which have been dealt with, the petitioner had pursued other remedies available under law.

7. In the Pre-Assessment Notice, it was stated that the petitioner are liable for purchase tax under Section 12 of the Act on the procurement of fly ash and treated the service charges paid by the petitioner as royalty. The Assessing Officer referred to the decision of the Hon'ble Supreme Court in *Behar Contractors' Association and others Vs. The State of West Bengal and others* 103 STC 477. Therefore, it was alleged that while arriving at the value of the material, the respondent wrongly adopted the price paid by the petitioner to other vendors of fly ash as purchase consideration. Apart from that, there was an issue raised on disallowance of exemption claimed by the petitioner under G.O.Ms.No.75 dated 28.06.2005 on clearance to SEZ units.

8. The petitioner submitted the reply to the notice on 30.06.2014. A further reply on 28.04.2014 enclosing Chartered Accountant's certificate dated 28.04.2014, which gave the actual service charges paid to NCTPS for procurement of fly ash. The petitioner also raised various contentions objecting to the proposal for disallowance of exemption on clearance to SEZ units.

9. The respondent has completed the assessment and passed the impugned orders . The finding on the first issue with regard to the fly ash is to the effect that the petitioners themselves has accepted that they have paid certain amount to the power stations for lifting the fly ash and incurred lorry freight, etc in the transportation of the same to their factory and taking note of the said fact, the value of the fly ash arrived at based on the purchase price paid to other suppliers and assess to tax under Section 12(1)(a) of the Act. The proposal was confirmed by rejecting the petitioners claim with regard to the disallowance of exemption on clearance to SEZ. The respondent pointed out certain defects in the certificates produced by the petitioner and observed that sale of cement to the units to SEZ covered by valid certificate issued by the competent authority and declarations are eligible for exemption and related Input Tax Credit will be reversed. In respect of the remaining turnover not covered by documents, it will be treated as sales liable to tax at 14.5%.

Challenging these findings, the petitioner is before this Court.

10. The learned counsel for the petitioner after elaborately referring to the factual details submitted that the impugned order with regard to these two issues suffers from error, which is apparent on the face of record, as the respondent did not properly appreciate the scope of the agreement with TNEB. It is the submission of the petitioner that if such agreement were to be treated as agreement for sale, is contrary to the Notification issued by the Government of India dated 14.09.1999 on account of Section 23 of the Contract Act.

11. It is submitted that the impugned assessment orders had been completed in utter disregard to the factual position with regard to the disallowance of exemption on clearance to SEZ are concerned, it is submitted that G.O.Ms.No.75 dated 28.06.2005 and G.O.Ms.No.193 dated 30.12.2006 gives a clear right of exemption on sales and clearance to SEZ units and developers. Therefore, the respondent ought to have considered the certificates and granted exemption, but has acted in an arbitrary manner, pointing certain alleged defects in the certificates after about ten months after the personal hearing was concluded. Therefore, it is submitted that the matter may be remanded back to the Assessing Officer for reconsidering these two issues.

12. The learned Additional Government Pleader has referred to the counter affidavit and submitted that the agreement entered into between the petitioner and the NCTPS reveals that service charges are collected by the Thermal Power Station, which is nothing but royalty and to support such contention, the decision of the Hon'ble Supreme Court in the case of *Behar Contractors' Association* was relied on. Therefore, the respondent would state that the value of the fly ash collected from Thermal Power Station is arrived at based upon the price per metric ton at which other suppliers supplied the goods. With regard to the denial of exemption for sales effected to SEZ, it is stated that the sale of cement is used in the construction of buildings only not in the manufacture of any goods exported. Hence, the transaction involved is only works contract and the entire sales is liable to be taxed at the rate specified in the first schedule.

13. After hearing the learned counsel for the parties and perusing the materials placed on record, firstly it has to be pointed on the first issue the respondent has referred to the decision of the Hon'ble Supreme Court in the case of *Behar Contractors' Association* to substantiate the plea that the payments effected to the Thermal Power Station is in the nature of royalty. However, the said decision in the case of *Behar Contractors' Association* has held to be no

longer good law in the decision of the Hon'ble Supreme Court in the case of *State of H.P. and others Vs Gujarat Ambuja Cement Ltd. and another* [2005] 142 STC 1. Therefore, the finding to the said effect and the stand taken in that regard in the counter affidavit at paragraph No.7, deserves to be set aside.

14. The next aspect is to be seen, whether the respondent could have given different interpretation to the agreement which was entered into between the TNEB and the petitioner. The specific case of the petitioner is that if the agreement is treated to be as one of the agreement for sale, it would violate the notification issued by the Central Government of India as clearance of fly ash is a part of environmental protection exercise. However, this aspect has not been gone into in a proper prospective by the respondent.

15. With regard to the other issue pertaining to the disallowance of exemption on clearance effected to SEZ, the respondent appears to have put the matter in cold storage for nearly ten months after the personal hearing and all of a sudden, has passed the impugned order that certain certificates produced by the petitioner are defective. However, it is seen that before doing so, no opportunity was granted to the petitioner. This Court had an occasion to consider the aspect, as regards the zero rated sale and exempted sale with regard to the sales effected to the units located in SEZ and a decision was rendered in the

case of *Tulsyani NEC Limited Vs Assistant Commissioner [CT] Harbour-[III], Assessment Circle, Chennai [2015] 82 VST 63 [Mad]*. This decision also should have been borne in mind by the Assessing Officer, since the impugned assessment order was passed, much after the order in the case of Tulsyani. Thus, for all the above reasons, the impugned assessment under these two heads alone require to be reconsidered. In fact, the prayer sought for by the petitioner is only restricted to these two issues and they have restricted their prayer to the turnover under these two heads.

16. In the light of the above, the Writ Petition is allowed and the impugned order is set aside insofar as the findings rendered by the Assessing Officer on the aforesaid two heads and the assessment shall be re-done, after affording an opportunity of personal hearing by clearly appreciating the scope of the agreement between the petitioner and the TNEB and the legal position which is prevailing as on date. No costs. Consequently, connected Miscellaneous Petitions are closed.

17. After the above order was dictated, learned counsel for the petitioner submitted that the petitioner may be permitted to agitate the issue as applicability of Section 12 of the Act before the Assessing Officer and in the event of any finding is rendered, if adverse, they will be able to pursue the

matter before the appellate authority. The liberty sought for is reasonable and it is granted.

27.09.2016

gya/vsi2

Index : Yes / No

Internet : Yes/No

To
The Commercial Tax Officer,
Arakkonam.

T.S.SIVAGNANAM, J.

gya/vsi2

W.P. No.26312 to 26318 of 2015
and
M.P.Nos.1 and 2 of 2015 [14 MPs]

27.09.2016