

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.07.2017

CORAM

THE HONOURABLE MR.JUSTICE **T.S.SIVAGNANAM**

W.P.No.8059 to 8061 of 2017 and
WMP.Nos.8819 to 8821 of 2017

M/s.All India Marathon Sports
Represented by its Proprietor
No.35/A, Ezhaimariamman Koil Street,
Muthialpet, Puducherry.

...Petitioner in all WPs

Vs

The Assistant Commercial Tax Officer - I,
Government of Puducherry,
Commercial Taxes Department,
Puducherry.

...Respondent in all WPs

Prayer: Writ petitions filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records of the respondent in the impugned Pre-Assessment Notice Nod.34740001705/2008-09, 2009-10 and 2010-11 respectively, dated 28.02.2017 and quash the same as it is issued beyond the time limit prescribed under Section 30 of the Puducherry Value Added Tax Act, 2007.

For Petitioner : Ms.Radhika Chandrasekhar for
Mr.K.Vaitheeswaran

For Respondents : Mr.J.Kumaran
Government Advocate (Puducherry)

COMMON ORDER

The petitioner, who is a registered dealer on the file of the respondent under the provisions of Puducherry Value Added Tax Act, 2007 (hereinafter, referred to as "PVAT Act") and Central Sales Tax Act (hereinafter, referred to as "CST Act") has challenged the Pre-assessment notices issued under the CST Act for the assessment years 2008-09, 2009-10 and 2010-11.

2. The only ground on which impugned notices have been questioned is that they are barred by limitation, as prescribed under Section 30(2) of the PVAT Act. The said provision states that where, for any reason, the whole or any part of the turnover of business of a dealer has been assessed at a rate lower than the rate at which it is assessable, the assessing authority may, at any time within a period of five years from the expiry of the year to which the return under the Act relates, re-assess the tax due after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such re-assessment.

3. The petitioner's case is that for the assessment year 2008-2009, if at all, the Assessing Officer seeks to re-open the assessment, it should have been done before 31.03.2014 and likewise, for the assessment year 2009-2010, it will be 31.03.2015 and for the assessment year 2010-11, it will be 31.03.2016. The impugned notices issued on 28.02.2017, are beyond the five year period, as stipulated under Section 30(2) of the PVAT Act and therefore, they are liable to be set aside on the ground of lack of jurisdiction.

4. The respondent, Revenue, on the other hand would contend that in the light of Sub-sections (3) and (4) of Section 77 of the PVAT Act, the Assessing Officer, cannot proceed to decide any issue in respect of which an application has been made by an applicant under Section 77 of the PVAT Act and is pending and on such Clarification and Advance Ruling given by the said authority in exercise of its power under Section 77 of the PVAT Act, the same would bind the applicant, who sought Clarification and would bind in respect of the goods or transaction in relation to which a clarification was sought; and bind all the officers other than the Commissioner.

5. Admittedly, the petitioner did not seek for any clarification, but, two other dealers, viz., M/s.Anna Sports Company and M/s.Apoorva Sports International, Puducherry, filed applications before the Authority for Clarification and Advance Ruling and sought for clarification on the rate of tax applicable for the sale of i) Sports treadmill - Motorized & Manual ii) Health fitness cycle, iii) Article and equipments for physical and general exercise and iv) Weight lifting rods, GYM equipment, Joggers (Treadmill) cycle exercises and steppers fall.

6. The authority for Clarification and Advance Ruling has issued a clarification on 23.09.2013 stating that the said goods were residual goods and liable to be taxed at 12.5% upto 31.12.2011 and at 14.5% with effect from 01.01.2012 under Entry No.1 of Part A of Fourth Schedule of PVAT Act. Thus, by referring to the said Clarification and Advance Ruling, the respondent has issued the impugned notices on 28.02.2017 and would state that in view of the embargo placed under Sub-section (3) of Section 77 of the PVAT, the respondent cannot take a decision on the said issue and the issue having been decided by the Advance Ruling authority only on 23.09.2013, the impugned notices issued on 28.02.2017 are well within the period of limitation, which expires only on 22.09.2017. Hence, it is the

contention of the learned Government Advocate that the limitation for reopening the assessment should be computed from 23.09.2013 and therefore, the impugned notices are not time barred.

7. Thus, the case on hand revolves around the interpretation of Sub-sections (3) and (4) of Section 77 and Section 30(2) of the PVAT Act. For better appreciation, the provisions are quoted herein below:-

"Section 77 of PVAT Act, 2007 reads as under:-

77. Clarification and Advance Rulings.- (1) The Commissioner may, subject to the provisions of this Act, constitute a Union Territory level 'Authority for Clarification and Advance Rulings' consisting of, a Chairman in the rank of the Deputy Commissioner or Assistant Commissioner of Commercial Taxes and two other members not below the rank of the Commercial Tax Officer to clarify, in the manner prescribed, any aspect of the implementation of this Act.

(2) No application shall be entertained where the question raised in the application,-

(i) is already pending before any officer or authority of the Department or Appellate Tribunal or any Court;

(ii) relates to a transaction or issue which is designed apparently for the avoidance of tax:

Provided that no application shall be rejected under this sub-section unless an opportunity has been given to the applicant of being heard and where the application is rejected, reasons for such rejections shall be recorded in the order.

(3) No officer or any other authority of the Department shall proceed to decide any issue in respect of which an application has been made by an applicant under this section and is pending.

(4) The order of the authority shall be binding,-

- (i) on the applicant who had sought clarification;
 - ii) in respect of the goods or transaction in relation to which a clarification was sought; and
 - (iii) on all the officers other than the Commissioner,
- Provided the dealer does not file an appeal before the Appellate Tribunal within sixty days of the ruling in the manner prescribed.

5) The authority for clarification shall have power to review, amend or revoke its rulings at any time for good and sufficient cause by giving an opportunity to the affected parties. An order giving effect to such review or amendment or revocation shall not be subject to the period of limitation.

6) The Commissioner may also refer any matter for opinion of the authority for clarification without prejudice to his authority.

Section 30 of PVAT Act reads as under:-

(1) Where, for any reason, the whole or any part of turnover of business of a dealer has escaped assessment to tax, the assessing authority may, subject to the provisions of sub-section (3), at any time within a period of five years from the expiry of the year to which the return under this Act relates, determine to the best of its judgment the turnover which has escaped assessment and assess the tax payable on such turnover after making such enquiry as it may consider necessary and after giving the dealer a reasonable

opportunity to show cause against such assessment.

(2) Where, for any reason, the whole or any part of the turnover of business of a dealer has been assessed at a rate lower than the rate at which it is assessable, the assessing authority may, at any time within a period of five years from the expiry of the year to which the return under this Act relates, re-assess the tax due after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such re-assessment".

8. Before we examine the effect of the above provisions, it would be necessary to take note of the legal principle as to what would be effect of a Clarification and Advance Ruling issued by the concerned authorities. On this aspect, I am guided by the decision of the Hon'ble Division Bench in the case of **Amul Ploycure Industries Ltd., Vs. Tamil Nadu Taxation Special Tribunal and others** reported in **2004 Vol. 134 STC 526**, wherein, the Division Bench, while dismissing a writ petition filed by the dealer challenging a Clarification held that Clarification can be assailed in the appeal as well as before the assessing officer on the basis of proper evidence, if the assessee so feels. No compulsion and binding nature on the assessing authority is found in the provisions of Section 28A(3) of the Tamil Nadu General Sales Tax Act, 1959. The Assessing Authority would

certainly be bound only by the appellate order. It is not necessary for the Court to go into the question of correctness of the clarification issued and that would depend on the evidence which would be lead by the assessee before the concerned authorities.

9. The Tamil Nadu Taxation Special Tribunal in **Salt Sales Corporation and another Vs. Deputy Commercial Tax Officer (Additional) and others [2004 Vol.134 STC 529]**, while upholding the vires of Section 28A of the Tamil Nadu General Sales Tax Act, held that any clarification given by the Commissioner under sub-section (1) of Section 28-A, i.e., as to the correct rate of tax on particular goods, will bind the parties who sought the clarification. If it is a society or association it will bind all its members. However, it will be open to them to canvass such clarification in assessment proceedings before the assessing officer and appellate proceedings before the Appellate Assistant Commissioner. The ultimate independent decision should be that of the assessing or the Appellate Assistant Commissioner. It was further held that any clarification given under sub-section (2) of section 28-A of the Act, i.e., as to rate of tax or the procedure relating to assessment and collection of tax, can be canvassed before the assessing officer and the Appellate Assistant

Commissioner, in assessment proceedings and appellate proceedings, respectively on all aspects of the case, and the assessing officer or the Appellate Assistant Commissioner has to give independent decision on the arguments before him. For all administrative purposes, the clarification given under sub-section (1) or (2) shall be binding on the officers subordinate to him by virtue of sub-section (3).

10. The provisions of the TNVAT Act also provides for Clarification and Advance Ruling under Section 49-A, which also contains similar provisions as contained in Sub-Section (4) of Section 77 of PVAT Act, except that there is no provision in *paramateria* under Section 77(3) of PVAT Act. Therefore, this Court has to interpret what would be intent and purport of the legislation, namely Section 77(3) of the PVAT Act. The Assessing Officer would seek to rely upon Sub-section (3) of Section 77 to state that he cannot decide any issue in respect of which an application has been made by an applicant under the said Section and is pending.

11. The crucial words to be interpreted are "an application" and "an applicant" occurring in sub-section (3) of Section 77 of PVAT Act. In my considered view, in the present factual matrix, both these expressions can

refer to only the assessee/dealer, who has approached the authority under Section 77 of the PVAT Act. If any other interpretation is to be given, then it would be expanding the scope of Sub-section 3 of Section 77 of the PVAT Act and would be directly in conflict with Section 30(2) of the PVAT Act, which prescribes an outer time limit for the Assessing Officer to re-do an assessment in the event he comes to a conclusion that the assessee has been assessed to lower rate of tax. In other words, if the interpretation given by the respondent is to be accepted, the finality attached to an order of assessment itself would be lost, as sub-section (2) of Section 30 of the PVAT Act would be rendered otiose.

12. The learned Government Advocate appearing for the respondent referred to Section 77(4)(ii) of the PVAT Act and submitted that clarification would be binding in respect of the goods or transaction in relation to which a clarification was sought.

13. Admittedly, the respondent has already assessed the petitioner to tax in respect of the three assessment years and what the Assessing Officer seeks to do by issuing impugned notices is to revise the assessment, that too, based upon a Clarification given by the Advance

Ruling authority at the instance of third party dealers. Therefore, the respondent cannot be given the advantage of reopening the assessment under the guise that the Advance Ruling authority has given a clarification, which will bind the goods dealt with by the petitioner. If the interpretation given by the respondent is to be accepted once again, this will run counter to the finality attached to an order of assessment as mentioned in Section 30(2) of the PVAT Act. One more submission made by the learned Government Advocate is that the authority while exercising the power under Section 77 of the PVAT Act does not enact a law or lays down a new principle, but clarifies what is in existence and such clarification could be applied retrospectively. Though, at the first blush, this argument appears to be impressive, but on a closer scrutiny, it is otherwise. If such interpretation is to be accepted, then all assessments made prior to the date of clarification can very well be reopened by the assessing officer by computing the period of limitation from the date on which the authority issued clarification. This obviously cannot be done as Section 30(2) of the PVAT Act, clearly bars/prohibits re-assessment beyond a period of 5 years from the expiry of the year to which return under the Act relates. Therefore, there is no room for reckoning the date on which the clarification was issued by the Advance Ruling authority into Section 30(2),

where the relevant date will be the year to which the return under the Act relates. Therefore, this Court is of the clear view that the impugned notices are clearly barred by limitation and the respondent is not entitled to reopen the assessment beyond the expiry of 5 years in respect of each of the assessment years, namely, 2008-09, 2009-10 and 2010-11, which came to an end on 31.03.2014, 31.03.2014 and 31.03.2016 respectively.

14. For the above reasons, the writ petitions are allowed and the pre-assessment notices are quashed. No costs. Consequently, connected miscellaneous petitions are closed.

27.07.2017

svki

Speaking/Non-speaking order

Index : Yes

Internet: Yes

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To

The Assistant Commercial Tax Officer - I,
Government of Puducherry,
Commercial Taxes Department, Puducherry.



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T.S.SIVAGNANAM,J.

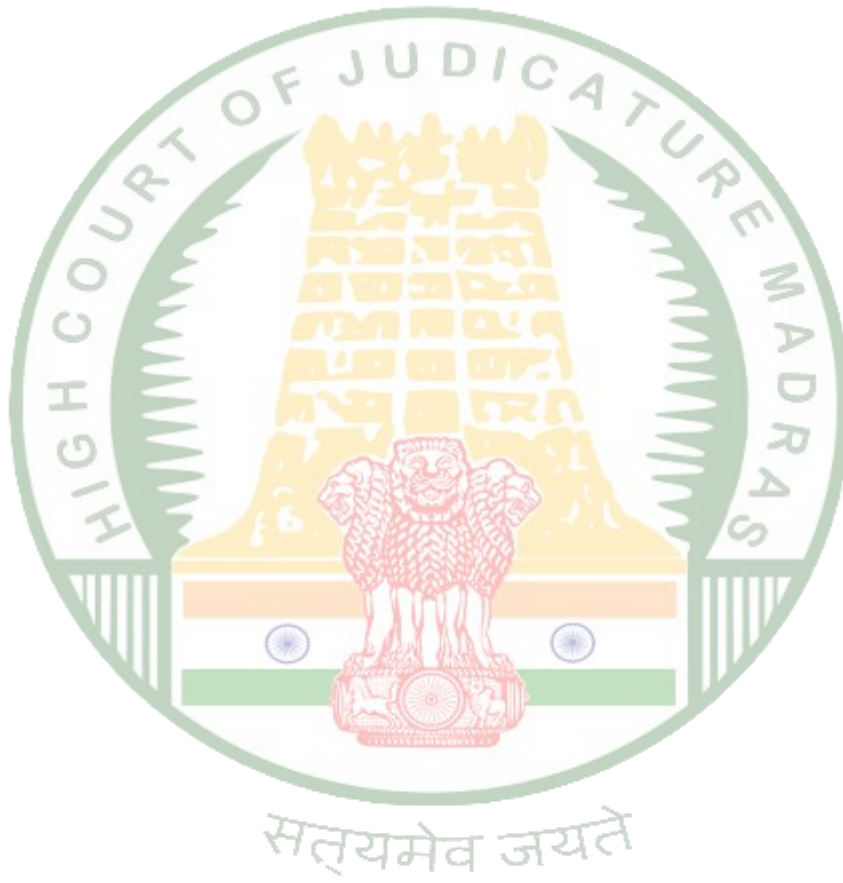
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