

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 13.02.2017

Coram

THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER

W.P.Nos.1814 to 1820 of 2017
and WMP Nos.1801 to 1807 of 2017

Tvl. Daesung Electric India Pvt. Ltd.,
represented by its Manager - Finance,
Mr.T.R.Ramakrishnan,
No.118, Ramanchery Pudur Village,
Kunnavalam, Tiruvalangadu Post,
Tiruvallur District-631 210. ... Petitioner in all WPs

vs.

Commercial Tax Officer,
Tiruttani Assessment Circle,
Tiruttani Station,
No.94, M.P.S. Salai,
Tiruttani. ... Respondent in all WPs

* * *

Prayer in W.P.No.1814 of 2017 : Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari, or any other appropriate writ or directions or order to the respondent calling for the records of the respondent in the order dated 04.11.2016 for the year 2015-2016, 2009-2010, 2010-2011, 2011-2012, 2012-2013, 2014-2015, 2013-2014 respectively and notice dated 04.11.2016 proposing to levy penalty and hold that the order passed was without any base and quash it and pass any orders as may deem fit and proper in the circumstances of the case.

For Petitioner in all the: Mr.N.Prasad, for
Writ Petitions M/s.K.Senguttuvan

For Respondents in all : Mr.K.Venkatesh,
the Writ Petitions Government Advocate

COMMON ORDER

Prefatory Facts :

1. These are seven (7) writ petitions pertain to Assessment Years (AY) 2009-10 to 2015-16.

1.1. By virtue of the captioned writ petitions challenge is laid to seven (7) separate orders of even date, i.e., 04.11.2016.

2. The notices, in these writ petitions, were issued on 27.01.2017, when I had recorded that the cumulative value of tax sought to be imposed on the petitioner was a sum of Rs.2,16,47,414/- (Rupees two crores sixteen lakhs forty seven thousand four hundred and fourteen only).

2.1. It had been further recorded by me, that, out of the said sum, a sum of Rs.2,05,84,001/- (Rupees two crores five lakhs eighty four thousand and rupee one only) pertained to tax, while the balance amount related to interest and penalty levied under Section 27(3) of the Tamil Nadu Value Added Tax Act, 2006 (in short the 2006 Act).

2.2. Furthermore, it has also been observed by me, in the very same order, that out of the tax imposed, via the impugned orders, equivalent to Rs.2,05,84,001/-, a sum of which, Rs.1,83,36,064/- (Rupees one crore eighty three lakhs thirty six thousand and sixty four only), was sought to be recovered on the ground that there was a mismatch in the information, which was available on the Department's website, qua, the sellers, and that, which was reflected in the monthly returns of the petitioner.

2.3. Apart from what is stated above, a perusal of the record would show that a sum of Rs.1,70,013/- (Rupees one lakh seventy thousand and thirteen only), is sought imposed as tax liability, on account of cancellation of registration certificate of the sellers.

3. As a matter of fact, the petitioner has given this information in a tabular chart incorporated in paragraph 10.1 of the affidavit accompanying the writ petition. For the sake of convenience, the same is extracted hereafter :

ISSUE	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	TOTAL
Turnover Difference	19,17,026	0	0	0	0	0	0	19,17,026
Mismatch	0	2,58,028	7,43,057	7,02,164	4,66,147	24,88,471	136,78,197	183,36,064

ISSUE	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	TOTAL
Dealer Cancellation				41,251	1,05,751	21,549	1,462	1,70,013
Reversal of ITS - Section 19 (4)	157	155	24,122	387	3,032			27,853
Reversal of ITS - Section 19 (5)			79,140	53,905				1,33,045
Sub-Total	19,17,183	2,58,183	8,46,319	7,97,707	5,74,930	25,10,020	136,79,659	205,84,001
Interest - Cancellation of Dealers				40,793	47,837	15,634	557	1,04,821
Penalty u/s 27(3) of TNVAT Act	9,58,592							9,58,592
Sub-Total	9,58,592	--	--	40,793	47,837	15,634	557	10,63,413
TOTAL	28,75,775	2,58,183	8,46,319	8,38,500	6,22,767	25,25,654	136,80,216	216,47,414

4. Upon return of notice, Mr.K.Venkatesh, who appears for the respondent, placed before me, a counter affidavit in the matter.

4.1. Based on the record available in the matter, I proceeded to hear the arguments in the matter.

5. I must indicate, at the very outset, that Mr. Prasad, who appears for the petitioner, adverted to two major issues, on account of which, the petitioner, according to him, had been mulcted with the liability. These issues being, issues pertaining to mismatch in information and cancellation of registration certificate of the corresponding sellers.

5.1. Learned counsel for the petitioner says that the cumulative liability on account of these two issues is a sum of Rs.1,85,06,077/- (Rupees one crore eighty five lakhs six thousand and seventy seven only).

5.2. According to the learned counsel for the petitioner, both issues are covered in favour of the petitioner, by virtue of the judgements rendered by this Court.

5.3. Learned counsel further submits that the cancellation of registration certificate or, even retrospective cancellation of registration certificate could not impact the ITC claimed qua genuine purchases.

5.4. Furthermore, the contention of the petitioner is that the respondent/Assessing Officer passed the impugned orders, without affording a personal hearing in the matter to the petitioner.

5.5. Learned counsel further submitted that in these circumstances, he is authorised to convey to the Court that in respect of the tax demanded qua other issues, the same will be deposited with the respondent/Assessing Officer, albeit, without prejudice to the rights and contentions of the petitioner to contest the same.

5.6. Learned counsel for the petitioner, thus, submits that the grievance of the petitioner could be assuaged without effecting the interest of the Revenue, by setting aside the impugned orders, with liberty to the respondent/Assessing Officer to redo the assessment, after affording due opportunity to the petitioner to place the relevant material on record.

6. Mr. K. Venkatesh, who appears for the respondent, on the other hand, submitted that a statutory remedy by way of an appeal, under Section 51 of the 2006 Act, is available to the petitioner, and therefore, these petitions should not be entertained.

6.1. Learned counsel says that this is, especially so, as despite being given an opportunity, no objections were filed by the petitioner. Reference, in this regard, was made by

Mr.K.Venkatesh, to the pre-assessment notice dated 29.07.2016 and 07.10.2016.

6.2. Thus, in effect, Mr.K.Venkatesh, submitted that no interference was called for by this Court, while exercising power under Article 226 of the Constitution.

7. I have heard the learned counsel for the parties and perused the record.

Supplementary facts :

8. In order to adjudicate upon these writ petitions, the following brief facts are required to be noticed :

8.1. The petitioner claims to be in the business of manufacture and sale of automobile electrical parts. It is the claim of the petitioner that the majority of its sales is made to an entity by the name Hyundai and/or its subsidiaries. The petitioner claims that purchases were made for the purpose of its business and, accordingly, information with regard to the same, along with Inputs Tax Credit (ITC) claim, was disclosed in its monthly returns, as required under the 2006 Act.

8.2. It appears that the Enforcement Wing of the Sales Tax Department inspected the books and accounts as also the records of the petitioner, on 13.01.2016, whereby, it pointed out defects with respect to the five (5) areas, which are referred to in the tabular chart set forth hereinabove.

8.3. Thus, pursuant to the inspection, qua the defects pointed out, during the exercise, pre-assessment notices of even date, i.e., 29.07.2016, were issued to the petitioner for each of the aforementioned Assessment Years. Via these notices, the petitioner was called upon to file its objections to the proposals made, within fifteen (15) days of the receipt of the notice.

8.4. The petitioner, was also, asked to submit the relevant documentary evidence, if, it, chose to object to the proposals made in the pre-assessment notices.

8.5. The petitioner, vide written communication dated 17.08.2016, sought extension of time by a further period of thirty (30) days, to file a reply, to the pre-assessment notices issued for the relevant assessment years. The reason, broadly, given was that the petitioner needed to verify the details of transaction from its records and, since, the staff connected with taxation issues was engaged with financial audit up till 15.09.2016, further time would be required.

8.6. Evidently, the respondent/Assessing Officer issued a communication dated 07.10.2016, calling upon the petitioner to file its objections, within seven (7) days, from the date of the said notice, failing which, orders would be passed, based on the proposals given in the pre-assessment notice.

8.7. It is the petitioner's case that this communication was received by it, on 15.10.2016.

8.8. Admittedly, as indicated above, the petitioner did not file its objections, which led to the impugned assessment orders being passed. Consequently, the proposals made in the pre-assessment notices were confirmed.

9. The petitioner being aggrieved by the impugned assessment orders has preferred the captioned writ petitions under Article 226 of the Constitution.

AREAS OF CHALLENGE AND DISCUSSION :

10. The broad areas of challenge, articulated by the petitioner, are as follows :

10.1. That the actions of the selling dealers could not emasculate the right of the petitioner to claim ITC. The fact that the information concerning the selling dealers did not match with the information provided by the petitioner in its monthly returns, could not automatically lead to the conclusion that the transactions were bogus and/or were not genuine. Disallowance of ITC on this ground to the extent of Rs.1,83,36,064/- was not merited.

10.2. In support of the aforesaid submissions, reliance was placed on the following judgements :

i) Sri Vinayaga Agencies V. Assistant Commissioner (CT), [2013] 60 VST 283 (Mad);

ii) The Assistant Commissioner (CT) V. M/s.Althaf Shoes (P) Limited, passed in W.A.Nos.1367 and 1368 of 2016, dated 10.11.2016; and

iii) Infiniti Wholesale Limited (formerly known as Woolworths Wholesale (India) Private Limited) V. Assistant Commissioner (CT), [2015] 82 VST 457;

iv) International Flavours and Fragrances India Pvt. Ltd., V. The Assistant Commissioner (CT)., passed in W.P.No.1009 of 2017, dated 12.01.2017.

10.3. Furthermore, counsel for the petitioner submitted that even retrospective cancellation of the registration certificate could not impact the ITC claimed by the petitioner, as the petitioner would have no control over the actions of the selling dealers. In support of this submission, reliance was placed on the decision rendered by this Court in *Indian Products Ltd., V. The CTO*, 2016 (11) TMI 1320 (Mad.).

10.4. As regards imposition of penalty, it was submitted that penalty under Section 27(3) of the 2006 Act was levied, without application of mind and, in violation of principles of natural justice. There being no escapement of turnover or suppression of sales, penalty could not have been levied by the respondent/Assessing Officer. The respondent/Assessing Officer was, necessarily, required to come to the conclusion before levying penalty that a specified amount of turnover had escaped assessment, and that, the escapement was due to wilful non-disclosure of assessable turnover by the dealer, i.e., the petitioner, in this case.

10.5. Lastly, it was submitted that since, aforementioned two major issues, which, led to addition being made to taxable turnover by the respondent/Assessing Officer, are covered against the Revenue by virtue of judgements referred to above, the fact that an alternate remedy is available would be no bar to a writ petition being maintained.

10.6. In this behalf, various judgements were adverted to, including the following decisions : *Union of India V. Kamalakshi Finance Corporation Ltd.*, 1991 (55) E.L.T. 344 (SC), *Union of India V. Tantia Construction Private Limited*, [2011] 5 SCC 697, and *Whirlpool Corporation V. Registrar of Trade Marks*, [1998] 8 SCC 1.

11. Consistent with the stand taken before me, counsel for the petitioner specifically stated that the petitioner would be willing to deposit a sum of Rs.20,77,924/- (Rs.2,05,84,001.00 - Rs.1,83,36,064.00) towards disputed tax, though, without prejudice to its rights and contentions.

12. On the other hand, Mr.K.Venkatesh, who appears for the respondent, noticed above, submitted that in view of the remedy of appeal being available under Section 51 of the 2006 Act, the present writ petitions ought not to be admitted.

12.1. Furthermore, learned counsel had also emphasized the fact that despite adequate opportunity being given the petitioner had chosen not to file objection. In this behalf,

reference was made to the notice dated 29.07.2016 and 07.10.2006 issued by the respondent/Assessing Officer.

12.2. For all these reasons, learned counsel for the respondent submitted that no interference was called for in the impugned assessment orders.

13. The facts, which have been set out above, would show that the large part of the liability imposed on the petitioner on account of tax, interest and penalty relates to reversal of ITC. The reversal of ITC, is on account of two major issues. Firstly, due to mismatch in information, that is, qua information which is available with respect to sellers on the website of the Department, as against the details vis-a-vis subject transaction reflected in the monthly returns filed by the petitioner. Secondly, on account of cancellation of registration certificate of the sellers.

13.1. Apart from the fact that both these issues are covered against the respondent/Assessing Officer, by the judgements rendered by this Court, to which, reference has been made, hereinabove, neither the pre assessment notices nor the assessment orders advert to the sellers qua whom there is a mismatch in the available information. Clearly, there is an absence of material particulars both in the pre-assessment notices, and, in the assessment orders. Admittedly, the bulk of tax liability, amounting to Rs.1,83,76,064/-, is attributable to this issue.

14. In so far as the other aspect is concerned, i.e., cancellation of registration certificate of the sellers, the tax liability is considerably less, as compared to the former aspect. The tax liability qua this issue qua the relevant assessment years amounts to Rs.1,70,013/-.

14.1. Qua this case, while, some broad details have been given, the details as to when the Registration Certificates were cancelled is not given; though there is a column pertaining to the "effective date" in the documents placed on record, which, I would take as the date, from which, effect was given to the factum of cancellation of the Registration Certificate.

14.2. To understand the issue more clearly, one may have to compare the dates of invoices generated by the sellers as provided in the impugned assessment orders, with the effective date of cancellation of Registration Certificate. The relevant dates are set out below :

AY	Invoice No.	Invoice Date	Effective Date
2012-13	947/06.09.20	08.09.2012	07.09.2012
	963/25.09.20	27.09.2012	-do-
	959/20.09.20	20.09.2012	-do-
	977/18.10.20	18.10.2012	-do-
	966/28.09.20	01.10.2012	-do-
	970/11.10.20	12.10.2012	-do-
	1026	20.11.2012	-do-
	1010	08.11.2012	-do-
	1027	20.11.2012	-do-
	1040	28.11.2012	-do-
	1049	05.12.2012	-do-
	1061	13.12.2012	-do-
	1092	25.01.2013	-do-
	1071	26.12.2012	-do-
	1081	08.01.2013	-do-
	1091	19.01.2013	-do-
	1109	26.02.2013	-do-
	1110	26.02.2013	-do-
2013-14	51	17.04.2013	31.03.2013

AY	Invoice No.	Invoice Date	Effective Date
	1144	18.03.2013	07.09.2013
	1161	23.05.2013	-do-
	1188	01.07.2013	-do-
	1251	23.08.2013	-do-
	1282	24.09.2013	-do-
	1299	11.10.2013	-do-
	1309	30.10.2013	-do-
	191	30.04.2013	29.04.2013
	198	2.5.2013	-do-
	213	4.5.2013	-do-
	232	7.5.2013	-do-
	239	8.5.2013	-do-
	248	9.5.2013	-do-
	257	10.5.2013	-do-
	278	14.5.2013	-do-
	296	16.5.2013	-do-
	305	17.5.2013	-do-
	316	17.5.2013	-do-
	318	18.5.2013	-do-
	320	18.5.2013	-do-
	321	18.5.2013	-do-

AY	Invoice No.	Invoice Date	Effective Date
	326	19.5.2013	-do-
	331	20.5.2013	-do-
	347	22.5.2013	-do-
	354	22.5.2013	-do-
	361	23.5.2013	-do-
	385	27.5.2013	-do-
	412	30.5.2013	-do-
	423	31.5.2013	-do-
	486	1.8.2013	-do-
	497	2.8.2013	-do-
	508	5.8.2013	-do-
	556	29.4.2013	-do-
	573	14.8.2013	-do-
	592	17.8.2013	-do-
	629	22.8.2013	-do-
	671	27.8.2013	-do-
	702	30.8.2013	-do-
	748	4.9.2013	-do-
	774	7.9.2013	-do-
	784	10.9.2013	-do-
	822	13.9.2013	-do-

AY	Invoice No.	Invoice Date	Effective Date
	878	20.9.2013	-do-
	919	25.9.2013	-do-
	928	26.9.2013	-do-
	940	27.9.2013	-do-
	928	28.9.2013	-do-
	928	30.9.2013	-do-
2014-15	1162	06.05.2014	01.05.2014
	185	30.07.2014	15.10.2013
	69	28.08.2014	30.03.2014
	52	11.10.2014	31.03.2013
2015-16	100	25.04.2014	31.03.2015
	2445	11.05.2015	01.04.2015

14.3. A perusal of the details set out above would show that in some cases, the effective date of cancellation of registration certificate, precedes the date of the invoice, while in other cases, the effective date follows the date of the invoice.

14.4. Quite clearly, if, the effective date of cancellation of registration certificate follows the date of invoice, then, the fact the registration certificate was valid on the date, when, the transaction took place, is an aspect, which attains criticality.

14.5. The petitioner's/assesse's transaction cannot be impacted by subsequent cancellation of registration. In such like cases, therefore, logically, the petitioner should be able to claim ITC, on such transactions.

14.6. As regards, cases, where, the effective date of cancellation of registration certificate precedes the invoice date, it also cannot have any impact, if, the order cancelling the registration certificate was passed, after the transaction had been concluded between the seller and the purchaser, i.e., in this case, the petitioner.

15. These are aspects that the respondent/Assessing Officer will have to examine, in the light of the observations made hereinabove and the judgements of this Court rendered in : Sri Vinayaga Agencies V. The Assistant Commissioner (CT), [2013] 60 V.S.T. 283 (Mad.); Indian Products Ltd., V. The CTO, 2016 (11) TMI 1320 (Mad.); and the order dated 12.01.2017, passed in W.P.No.1009 of 2017, titled : International Flavours and Fragrances India Pvt. Ltd., V. The Assistant Commissioner (CT).

15.1. Consequently, the mere fact that objections had not been filed cannot give jurisdiction to the respondent/Assessing Officer to confirm the proposals. The respondent/Assessing Officer is required to come to a definitive conclusion before reversing the ITC that the subject transaction was bogus and/or not genuine, based on cogent and substantial material. Furthermore, if, such material was available with respondent/Assessing Officer, it had to be supplied to the petitioner.

15.2. The observations, in this regard, were made in the order dated 01.02.2017, passed in W.P.No.2325 of 2017, titled : Tvl.Sun Powers rep. by its Proprietrix V. The Commercial Tax Officer. The relevant observations are extracted hereafter :

"..... 7. The respondent i.e., Assessing Officer, in my view, could have only come to a conclusion that the subject transactions were bogus, based on substantive material, and not that because objections were not filed by the petitioner, the assertions made in the pre-assessment notice would have to be deemed to be correct. Furthermore, if, material was available with respondent to come to the conclusion that the transaction were bogus, adequate opportunity had to be given to the petitioner to meet the charge. The impugned order shows that there is no discussion on this aspect of the matter. The respondent i.e., Assessing Officer has merely proceeded to confirm the proposal on the ground that no objections were filed by the petitioner i.e., assessee. This approach cannot be countenanced in law.

16. Therefore, for the foregoing reasons, the impugned assessment orders are set aside, subject to the petitioner depositing a sum of Rs.20,77,924/- (Rs.2,05,84,001.00 -

Rs.1,83,36,064.00) towards tax, as offered of its own volition, without prejudice to its rights and contentions.

16.1. The said amount will be deposited by the petitioner within a period of two (2) weeks from the date of receipt of a copy of the order.

16.2. The respondent/Assessing Officer will, thereafter, redo the assessment. For this purpose, a reasonable opportunity will be provided to the authorised representative of the petitioner, which would include an oral hearing in the matter. Relevant material and/or information available with the respondent/Assessing Officer will also be supplied to the authorised representative of the petitioner.

16.3. The petitioner will have liberty to file objections, once written notice is given in that behalf and the material and/or information is supplied.

17. The aforesaid exercise will be carried out with due expedition, though, not later than eight (8) weeks from the date of receipt of a copy of the order.

18. Accordingly, the captioned writ petitions are disposed of, in the aforementioned terms. Resultantly, the pending applications shall stand closed. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To
The Commercial Tax Officer,
Tiruttani Assessment Circle,
Tiruttani Station,
No.94, M.P.S. Salai,
Tiruttani.

+2cc to M/S.K.Senguttuvan, Advocate Sr.10943
+1cc to the Special Government Pleader Sr.9601

W.P.Nos.1814 to 1820 of 2017
and WMP No.1801 to 1807 of 2017

rsi[co]
srg 17/03/2017