

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.08.2017

Coram

The Hon'ble Mr. Justice T.S. Sivagnanam

Writ Petition Nos. 37324 to 37331 of 2015
and
M.P.No.1 of 2015 (8 in nos.)

M/s. L & T Finance Ltd.,
rep. by Senior Manager (Taxation-All India)
47, Montieth Road,
Egmore, Chennai. ...Petitioner in all W.Ps

Vs.

The Commercial Tax Officer,
Anna Salai II Assessment Circle,
4th Floor, PAPJM Building Annexure,
No.1 Greams Road,
Chennai - 600 006. ...Respondent in all W.Ps

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records of the impugned order of re-assessment in TIN No.33810620349/2006-07, 2007-2008, 2008-2009, 2009-2010, 2010-2011, 2011-2012, 2012-2013 and 2013-2014 dated 20.10.2015, respectively passed by the respondent and to quash the same.

For Petitioner : Mrs. Aparna Nandakumar
For Respondent : Mrs. Narmadha Sampath
Special Government Pleader

C O M M O N O R D E R

Heard Mrs. Aparna Nandakumar, the learned counsel appearing for the petitioner and Mrs. Narmadha Sampath, the learned Special Government Pleader for the respondents. With consent on either side, these Writ Petitions are taken up final disposal.

2. These Writ Petitions are filed, challenging the assessment orders for the year 2006-07 to 2013-14 respectively. Since the common issue arises in all these Writ Petitions, they were heard together and disposed of by this common order.

3. The case of the petitioner is that, they are non-banking Finance Company, engaged in financing activities, including funding for borrowers for purchase of assets required by the borrowers. The petitioner is a registered dealer on the file of the respondent under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter, referred to as 'TNVAT Act') and the Central Sales Tax Act, 1956 (hereinafter, referred to as CST Act).

4. The petitioner's case is that, they provide financing by way of financial and operating lease and term loans to enable business entities to obtain assets, plant and machinery, motor vehicles, computers and assets for their own use. The modus operandi adopted by the petitioner is that, the petitioner herein purchases goods like plant and machinery, motor vehicles, computers and assets and enters into an lease agreement with business entities, who want to hire the goods owned by the petitioner herein. In this type of agreement, the petitioner herein, who is the lessor, is the owner of the assets throughout the agreement. The lease is for a fixed period and on fixed monthly/quarterly rentals. One major clause of the lease agreement, viz., 'Acquisition of Assets', states categorically that the petitioner, being the lessor, appoints the lessee (customer business entity) as the agent to inspect and receive delivery of the assets from the supplier or manufacturer and also to effect the installation at the premises of the lessee.

5. According to the petitioner, in the above referred transaction, the ownership of the goods lie solely with the petitioner, and this is totally different from a Term loan, wherein, it is in essence, an agreement for borrowing. In this regard, the learned counsel appearing for the petitioner referred to relevant clause in operating the lease agreement, a specimen of which has been enclosed in the typed set of papers, and he has drawn the attention of this Court to clauses 4.2, 4.3, 5.1, 7.4, 7.5 and 7.6, and it is submitted that the above transaction falls within the realm of Section 4 of the TNVAT Act, for the purpose of taxability. Therefore, while discharging the out put tax liability under Section 4 of the TNVAT Act, the petitioner is entitled to claim ITC under Section 4 (2) of the Act.

"6. In 2007, a notice was issued to the petitioner on 31.05.2007, stating that the petitioner is not in possession of physical stock of goods, as they are effecting deemed sales by way of transfer of right to use the goods, which were not directly purchased by them. Hence, as per Rule 10 (3) (a) of the TNVAT Rules, 2007, they are not eligible

for the input tax credit claimed by them. The petitioner submitted their reply, dated 21.06.2007. Gist of the reply is as hereunder:- "As regards your contention of the goods not being in our possession physically, we do admit that our lessees already took the delivery of goods and as such the same was not in our possession as on the date of implementation of VAT Act. The taxable event, which is certainly prior to the date of introduction of VAT Act. However, the goods continue to be owned by us and form part of the stock of goods on lease. Thus, goods will be sold and ownership therein transferred only upon completion of the agreement, at which, prior of time VAT under the Tamil Nadu VAT."

6. After the receipt of the reply, the respondent did not take action in the matter, and no final orders were passed. After about seven years, VAT Audit was conducted in the business premises of the petitioner on 29.10.2013, and the statement was recoded from the authorized person on 29.01.2014. After the statement was recorded, the respondent issued a notice on 29.04.2014, stating that, in connection with ITC claim adjusted, cross verification has been made with annexure II of the monthly returns of respective sellers (details enclosed) from whom the dealer had purchased the tax paid goods and noticed that no sales were reported in any of the monthly returns as effected to the dealer. In the above said notice dated 29.04.2014, the respondent has made certain allegations based on cross-verification made with annexure II of the monthly returns of the respective selling dealers. The petitioner, by reply, dated 06.05.2014, explained the nature of transaction and stated that, the mismatch has resulted by wrong declaration by vendors, from whom, they have purchased assets to be leased by the petitioner, and requested for further verification and probe in respect of input tax credit claimed by them. After the reply, dated 06.05.2014, nothing happened for nearly 1 1/2 years, and a fresh notice was issued on 27.08.2015.

7. On perusal of the notice, dated 27.08.2015, it is clear that there is no reference to the earlier notice, dated 31.05.2007, petitioner's reply dated 21.06.2007, notice dated 29.4.2014 and the reply given by the petitioner, dated 06.05.2014. Onceagain, very same allegation, which was made in the notice, dated 31.05.2007 was made in the subsequent notice, dated 27.08.2015. The only mistake committed by the petitioner is that, they did not file their objection to the said notice. Consequently, the respondent has passed the impugned orders, confirming the proposals in the notice, dated 12.10.2015. In

the impugned orders, it has been pointed out that tax invoice is not issued in the name of the petitioner as buyer of the goods, and the property in goods are not transferred to the petitioner, but only arrangement is made by the petitioner for finance of the purchase under hypothecation only. Therefore, the respondent held that, it can be concluded that all the local purchases, said to have been made by the petitioner are as the seller is the lessor, and the lessee, who makes payment, as per invoice, is eligible to avail ITC.

8. The learned counsel appearing for the petitioner submits that, in the first notice, dated 31.05.2007, the respondent had admitted that the nature of transaction is deemed sales, and the finding rendered in the impugned orders stating that the tax invoice is not issued in the name of the petitioner, is factually incorrect. To substantiate the same, the learned counsel for the petitioner referred to copies of the specimen invoice to show that the goods were sold by seller to the petitioner, and at instance of the petitioner, it is shifted to the lessee.

9. As rightly pointed out by the learned Special Government Pleader for the respondent, these factual aspects cannot be adjudicated by this Court in a Writ Petition, since the transactions have to be examined as to whether they are transactions pursuant to the operating lease agreement, whether ownership of the goods continue to remain with the petitioner, and what is being transferred to the lessee is only the right to use the goods. In fact, this is the stand taken by the petitioner at the very first instance, while giving reply, dated 21.06.2007, to the notice dated 31.05.2007, the relevant portion of which has been quoted in the preceding para. The respondent has no explanation to offer, as to why, the matter was not taken to the logical end, and after issuance of the notice, dated 31.05.2007, there has been a long gap of more than 7 years before the next notice issued, dated 29.04.2014. Even thereafter, for over nearly 1 1/2 years, nothing happened in respect of the petitioner's reply, dated 06.05.2014, and notice was issued on 27.08.2015, without reference to any of the earlier notices or reply notices given by the petitioner. Thus, to that extent, the entire procedural formalities adopted by the respondent is flawed and amounts to violation of principles of natural justice. However, when the notice dated 25.09.2015 was issued, the petitioner, though received the notice, did not file their objections. The stand taken by them for not being able to file their objection within the time permitted does not appear to be reasonable or acceptable. However, when the respondent had taken up the matter for adjudication, he ought to have taken into consideration what had transpired earlier and what was on their record from 2007 onwards. This Court can safely presume that the respondent was not even aware of the earlier

proceedings, which were initiated in the year 2007. So far as the legal position is concerned, even it is accepted that the nature of transaction done by the petitioner amounts to deemed sales, then, provision under Section 4 (2) of the TNVAT Act 2006 would stand attracted. In terms of sub-section 2 of Section 4, the dealer, who pays tax under Section 4 shall be entitled to input tax credit on the goods specified in the First Schedule, purchased by him in this State to the extent of the output tax paid or payable, as may be prescribed. However, at this juncture, this Court is not inclined to give any factual findings on the petitioner's entitlement, as it can be done only on examination of the records and documents placed by the petitioner before the Assessing Officer.

10. In the light of the above, the Writ Petitions are disposed of with a direction to the petitioner to treat the impugned proceedings as show cause notices, submit their detailed objections in writing within a period of 30 days from the date of receipt of a copy of this order. On objections being received, the respondent shall fix a date for personal hearing of the authorized representative of the petitioner in person, examine the nature of transaction done by the petitioner and call for records, agreement, invoices etc., and complete the assessment within a reasonable time, not later than 90 days from the date on which personal hearing is concluded. No costs. Consequently, connected Miscellaneous Petition is closed.

s/d-
Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

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To

The Commercial Tax Officer,
Anna Salai II Assessment Circle,
4th Floor, PAPJM Building Annexure,
No.1 Greams Road,
Chennai - 600 006.

+1 CC to Sp. Govt. Pleader (Taxes)sr 60100.
+1 CC to Ms. Aparna Nandakumar, advocate sr 59757.

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SV(CO)
sp(21/09/2017)