

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.12.2017

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.12556 of 2006

K.Ramasamy

... Petitioner

Vs.

The Deputy Commercial Tax Officer,
Chidambaram-II.

... Respondent

Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, to call for the records of the respondent in TNGST No.4461075/2000-01, and quash the impugned revised order of assessment dated 30.09.2005.

For Petitioner : Mr.V.Sundareswaran

For Respondent : Mr.K.Venkatesh,
Government Advocate

O R D E R

Heard Mr.V.Sundareswaran, learned counsel for the petitioner and Mr.K.Venkatesh, learned Government Advocate for the respondent.

2.The petitioner, who is a registered dealer on the file of the respondent under the provisions of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as "the TNGST Act") has filed this writ petition challenging the assessment order dated 30.09.2005, for the assessment year 2000-01.

3.Two issues arise for consideration in this writ petition. Firstly, whether the respondent can be justified in holding that the petitioner has not opted to pay tax under Section 7-C of the TNGST Act. The second issue for consideration is whether the respondent can re-open the assessment without there being a prior order from the Commissioner in accordance with Rule 15(5-B) of the TNGST Rules. On the first issue, it is seen that the petitioner while filing the return for the relevant assessment year, opted to pay tax in accordance with Section 7-C of the TNGST Act and computed the tax payable at 2% viz., Rs.37,600/-.

This return was processed and the nature of work done by the petitioner being 'works contract', the benefit of Section 7-C of the TNGST Act was extended and the rate of tax was fixed at 2% and the returns were accepted. Subsequently, the petitioner filed applications under Section 55 of the TNGST Act for revision of assessment, since they had, by then, procured TDS certificates and those TDS certificates were given due consideration and the assessments were accordingly revised by orders dated 26.09.2003 and 29.10.2003. Thus, at no point of time, the respondent treated the petitioner's return as return other than what was presented under Section 7-C of the TNGST Act. However, for the first time in the impugned order, a stand has been taken by the respondent stating that the petitioner has not opted to pay tax under Section 7-C of the TNGST Act. This finding is clearly contrary to the factual position. Thus, on fact, it has been established by the petitioner that he has exercised the option under Section 7-C of the TNGST Act and remitted the tax at 2%, which was accepted by the assessing officer while completing the assessment vide order dated 29.05.2003.

4. Be that as it may, it has to be seen as to whether the petitioner was required to exercise an option to pay tax under Section 7-C of the TNGST Act by means of a separate letter or a petition. Admittedly, the TNGST Act and the Rules framed therein do not prescribe any such procedure, that such option should be exercised in a particular form or format.

5. In this regard, useful reference can be made to the decision of the Hon'ble Division Bench of this Court in the case of Commissioner of Income-tax v. M/s. Kikani Exports P. Ltd., in TCA No.330 of 2013 etc., batch dated 09.09.2014. The substantial question of law, which arose for consideration before the Hon'ble Division Bench was whether the return of income filed by the assessee under Section 139(1) of the Income Tax Act claiming depreciation can be treated as exercising of option before the due date as prescribed in second proviso to Rule 5(1A) of the Income Tax Rules. This question was answered in favour of the assessee and against the revenue on the following terms:-

"16. Short of repetition, the issue that arise for consideration is for the purpose of claiming depreciation, whether the assessee should exercise an option before the due date in the manner other than by filing return of income in terms of sub-section (1) of Section 139 of the Income Tax Act. According to the Revenue, each one of the assessee should file a separate application or a letter indicating their intention to avail depreciation in terms of Section 32 read with Rule 5(1) of the

Income Tax Rules and since the assessee in each case has not exercised such an option before the due date for furnishing the return of income, they will not be entitled to the benefit of Rule 5(1) Appendix I, but depreciation only under Rule 5(1A) Appendix 1A.

17. It is relevant to note that while filing the return of income, a procedure has been prescribed for claiming depreciation as pointed out above. The assessee has to set out the manner in which depreciation is claimed for the assessment years in question. All the details required for claiming depreciation under various heads are set out thereunder. Rule 5 of the Income Tax Rules is in relation to determination of profits and gains of business or profession and depreciation forms part of such determination. Therefore, there cannot be an option exercised in isolation (i.e.,) depreciation with regard to determination of profits and gains of business or profession in the manner other than the procedure prescribed under Section 139(1) of the Income Tax Act. The assessee is liable to file the return of income and claim depreciation in accordance with the various provisions and state in exactitude what he claims under different heads of depreciation. Schedules DOA and DEP in Form ITR # 6 contain the break up of various heads under which depreciation can be claimed. All that the second proviso to Rule 5(1A) of the Income Tax Rules states is that the assessee has to exercise the option before the due date for furnishing the return of income. In other words, if the option is exercised after furnishing of the return of income under sub-section (1) of Section 139, it is of no avail. This assumes importance, as no procedure is prescribed for exercising the option. Form ITR-6 gives the methodology on which depreciation can be claimed and therefore, the statute did not provide for any other method to exercise the option except through filing of return. Therefore, to read something more into the second proviso to Rule 5(1A), that an option should be exercised separately would make the returns filed meaningless."

6. The above referred decision can very well be applied to the facts of the present case, as under the TNGST Act or the Rules framed thereunder, there is no separate form provided or any separate method provided for exercising the option to pay tax under Section 7-C of the TNGST Act. Therefore, it can be safely concluded that the assessee by filing a return and paying

tax under Section 7-C of the TNGST Act amounts to exercising option under the said provision. Thus, the respondent committed an error in holding that the petitioner did not exercise his option. Therefore, the first question is answered in favour of the petitioner and against the revenue.

7. So far as the second question is concerned, on perusal of the original assessment order dated 29.05.2003, the respondent has clearly stated that such order is subject to random selection for detailed scrutiny under Section 12(1-A) of the TNGST Act. Thus, the respondent was fully aware that the assessment can be revised only subject to random selection under Section 12(1-A) of the TNGST Act. In order to effect such revision, the procedure under Rule 15(5-B) of the TNGST Rules have to be followed. The said rule provides for orders to be passed by the Commissioner of Commercial Taxes by random sampling method, where twenty five percent of the assesseees are selected and their registration numbers are to be intimated to the assessing officer on or before 15th June of every year for detailed scrutiny of accounts and passing assessment orders. The petitioner's specific case is that the procedure under Rule 15(5-B) of the TNGST Rules has not been followed.

8. In the written instructions given to the learned Special Government Pleader by the assessing officer vide his letter dated 20.12.2007, there is no whisper about adherence to the procedures contemplated under Rule 15(5-B) of the TNGST Rules. Therefore, the petitioner is entitled to succeed on the second question as well. In the written instructions, the respondent has referred to the power conferred under Section 16-AA of the TNGST Act, which is exercisable for assessment of turnover not declared under Section 7-C of the TNGST Act. Therefore, only if part of the turnover of business of a dealer, who has been permitted to pay tax under Section 7-C of the TNGST Act has escaped assessment from the tax, the assessing officer is entitled to invoke the power conferred under Section 16-AA of the TNGST Act, in terms of the conditions contained therein and within the time permitted. However, the case on hand is a case where the assessing officer holds that the petitioner has not exercised option under Section 7-C of the TNGST Act and he has to be assessed under Section 3-B of the TNGST Act, that being a regular assessment in respect of levy of tax on the transfer of goods involved in 'works contract'. Thus, the respondent cannot trace his power to Section 16-AA of the TNGST Act. This issue was considered by this Court in the case of M/s. Trident Interwood Pvt Ltd. v. The Deputy Commercial Tax Officer and another in W.P.Nos.5420 and 5424 of 2008 dated 19.11.2010. In the said case, the assessee had filed writ petitions challenging the notices issued by the assessing officer based on inspection conducted in their place of business. It was submitted by the assessee therein that the nature of transaction done by the

assessee falls under the heading 'works contract'. In such circumstances, to examine the correctness of the notices issued by the assessing officer proposing to revise the assessment and while deciding the case in favour of the assessee, it was held as follows:

"As rightly pointed out by the learned counsel for the petitioner, the question of apportionment at 70:30 would be only in respect of regular assessment and not in the case of assessment opted for composition under Section 7-C of the Tamil Nadu General Sales Tax Act. Given the fact that the method of composition of payment of tax is a choice of assessment given to the assessee as an alternative to the regular assessment and the process of the assessment being on the entire turnover to be assessed at 4%, the mere fact that the petitioner's business was subjected to inspection and there are incriminating materials, by itself is no ground for rejecting the prayer of the petitioner for assessment under Section 7-C of the Act and thereby, compel the petitioner to go for regular assessment process under Section 3B of the Act. It may be pointed out herein that like Section 16 to deal with escaped assessment/ under assessment in case of regular assessment, Section 16AA of the Act is a specific provision for revision of assessment falling under Section 7C of the Act."

9. Thus, for all the above reasons, the two questions, which were framed for consideration are answered in favour of the petitioner and against the revenue. Accordingly, this writ petition is allowed and the impugned proceedings are quashed. No costs.

Sd/-
Asst. Registrar (CS III)

/true copy/

Sub Asst. Registrar

abr

To

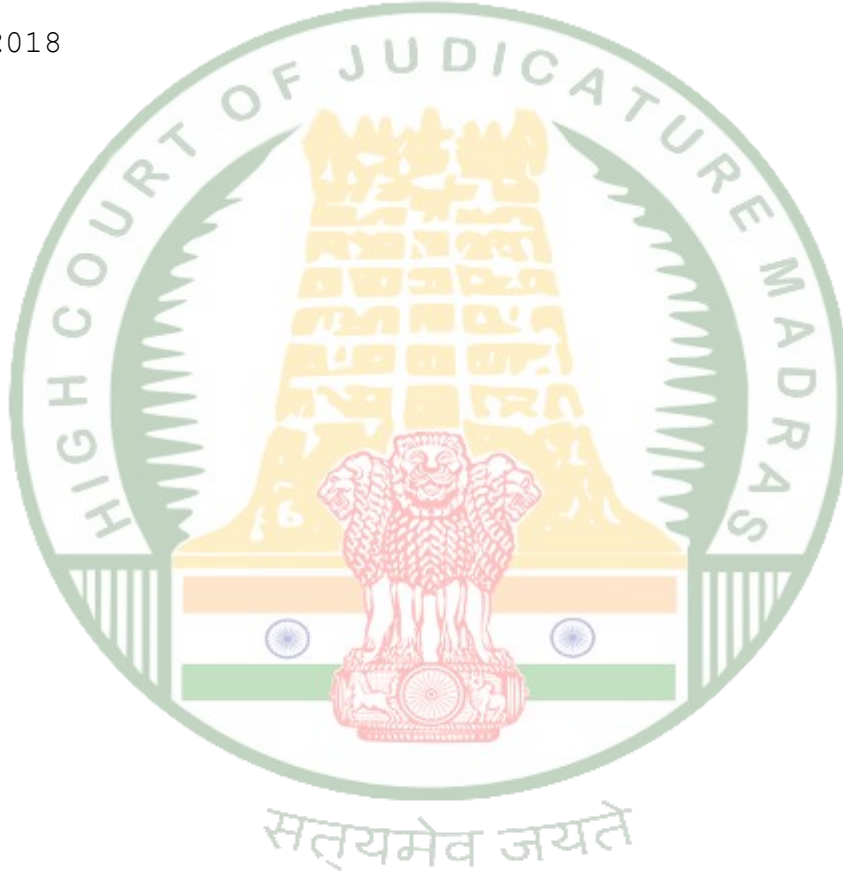
The Deputy Commercial Tax Officer,
Chidambaram-II.

+ 1 cc to Mr.V.Sundareswaran Advocate,SR.91217

+ 1 cc to The Special Govt.Pleader, SR.90217

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