IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.11.2017

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.No.19350 of 2010
and M.P.No.1 of 2010

M/s.Mark Engineers,
Rep. by its Partner T.Balasubramanian,
30, P.S.A. Estate Colony,
Peelamedu, Coimbatore-4. .. Petitioner

..Vs..

The Assistant Commissioner (CT) FAC
Peelamedu (South) Circle,
Corporation Complex,
Dr.Nanjappa Road, Coimbatore-18. .. Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari, calling for the records of the respondent in his proceedings in TNGST No.2100900/2005-06 dated 13.07.2010 and quash the same as illegal.

For Petitioner : Mr.S.Ramanathan
For Respondent : Mr.S.Kanmani Annamali
Additional Government Pleader

O R D E R

Heard Mr.S.Ramanathan, learned counsel appearing for the petitioner and Mr.S.Kanmani Annamalai, learned Additional Government Pleader appearing for the respondents.

2.The petitioner is a registered dealer under the provisions of the Tamil Nadu General Sales Tax Act (TNGST Act) on the file of the respondent and carrying on works contract of supply, erection and commissioning of generator sets on contract basis. During the assessment year 2005-2006, the petitioner had entered into an agreement with M/s.PSG College of Arts and Science for supply, erection and commissioning of generator sets. The petitioner filed their returns and in respect of the turnover under the works contract, they exercised the option under Section 7C of the TNGST Act and consequently, assessment was completed by order dated 23.10.2007 charging the petitioner to tax at 4%. After about three years, this assessment is sought to be revised by stating that verification of records reveal that the petitioner has effected supply of Genset to various customers and hence taxable at 16% as first sales.

3.The first issue to be considered is when the petitioner has exercised the option of payment of tax at the compounded rate and the Department had accepted tax at the rate of 4% whether such option could be withdrawn by exercising power under Section 16 of the TNGST Act. This is no longer *res integra* and has been decided in the case of ***Sinetech vs. Commercial Tax Officer, Korattur Assessment Circle, Chennai*** reported in ***(2008) 15 VST 398 (Mad)***. In the said case also, the dealer agreed to pay tax in terms of Section

7C of the TNGST Act at a compounded rate and also filed returns in Form A1 and the Assessing Officer issued notice to reopen the assessment by resorting to Section 16 of the TNGST Act. It was held that the Assessing Officer has no such power to withdraw the option exercised by the petitioner/dealer. The operative portion of the judgment reads as follows:

> *"7.A Division Bench of this Court in 47 STC 264 Deputy Commissioner of Commercial Taxes, Vellore v. Devendran & Co.[1981] 47 STC 264 dealt with the application of Section 16 of the TNGST Act wherein it was held that if earlier assessment is made on a particular percentage and subsequently, if the assessing authority wanted to reopen the assessment by taking away part of the sales turn over from the turn over already assessed for finding out the corresponding purchase turn over of raw hides and skin and subject it to a tax at 13% by invoking Section 16 of the TNGST Act, the same power is not available to the authorities. The funding of the Tribunal was affirmed by the Division Bench in the following lines:*
>
> *"In this case, as we pointed out already and as admitted, the entire sales turnover relating to the tanned hides and skins had been assessed at 1-1/2 per cent under item 7(b) and the sales turnover was assessable only under that item. Only if the whole or any part of this turnover had escaped such assessment, the whole or any part of the turnover can be said to have been assessed at a lower than the rate at which the same was assessable so as to attract the provisions of Section 16(1)(b). That not being the case, the order of the Tribunal*

cannot be said to be erroneous in law and consequently the tax revision case is dismissed."

The said judgment was affirmed by the Supreme Court in State of Tamil nadu v. Devendran & Company [1996] 103 STC 95.

8.The learned Counsel also produced the work order issued by Indian Oil Corporation in favour of the petitioner, which was also submitted to the respondent. Therefore, the only question that remains for consideration is whether the respondent had power under Section 16 of the TNGST Act to reopen the assessment on the basis of the judgment of the Supreme Court in State of Andhra Pradesh vs. Kone Elevators (India) Ltd., (2005) 140 STC 22. The reliance placed upon the said judgment of the Supreme Court in Kone Elevators case [2005] 140 STC 22 is totally misconceived as in the present context, the petitioners have agreed to compound rate by paying the tax in terms of Section 7C of the TNGST Act and also filed the returns in Form A-1. In such a case, the question of revising the compounding order does not arise especially when a dealer is exercising option in payment of rates in compound rate and the petitioner was also made to pay tax at 4% on the entire contract value. Section 16 of the TNGST Act is not intended to withdraw the said option exercised by the petitioner dealer.

9.In the light of the above and in view of the judgment of the Supreme Court in Devendran and Company case [1996] 103 STC 95, the writ petition will stand allowed. The impugned order dated 13.7.2007 will stand set aside. No *costs. Connected Miscellaneous Petition is closed."*

4.Thus, following the decision in ***Sinetech*** case (supra) which was referred following the decision in ***Devendran & Company*** case (supra), this writ petition is allowed and the impugned order is quashed. No costs. Consequently, connected miscellaneous petition is closed.

10.11.2017

cse

Index:Yes/No

Internet:Yes/No

Speaking/Non-Speaking order

To

The Assistant Commissioner (CT) FAC
Peelamedu (South) Circle,
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T.S.SIVAGNANAM, J.

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