IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P. No.47913 of 2006
and
M.P. No. 1 of 2006

V.R.S.Confectionery
3-B, V.Nagar 3rd Cross
Rasipuram – 637408
Namakkal District
Rep by its Proprietor ... Petitioner

Vs.

1.The Commissioner of Commercial Taxes
Commercial Taxes and
Religious Endowments Dept.
Ezhilagam, Chepauk
Chennai.

2.The Commercial Tax Officer
Rasipuram Assessment Circle
Namakkal District. ... Respondents

Prayer : Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, call for the records of the second respondent in TNGST/3161453/2004-05 dated 25.10.2006, quash the same.

For Petitioner .. M/s.S.Ravee Kumar
M.Hari Haran
For Respondents.. Mr.S.Kanmani Annamalai
Additional Government Pleader

O R D E R

Heard Mr.S.Ravee Kumar, learned counsel for the petitioner and Mr.S.Kanmani Annamalai, learned Additional Government Pleader for the respondents. With consent of the learned counsel for both sides, the writ petition itself is taken up for final disposal.

2.The petitioner who is a registered dealer on the file of the 1st respondent under the provisions of the Tamil Nadu General Sales Tax Act [in short "the Act"] and the Central Sales Tax

Act, is aggrieved by the assessment order dated 25.10.2006 under the provisions of the TNGST Act.

3.The petitioner has been assessed to higher rate of tax on the ground that the confectionery items produced by him and packed in covers containing the name V.R.S. Confectionery, Rasipuram is to be treated as a brand name and since the petitioner has not registered the same under the Trade and Merchandise Marks Act, 1958, they have to be taxed under the residuary entry 40 of Part D of the first schedule of the TNGST Act at 12% plus surcharge instead of 4% etc.

4.The assessments for the years 2002-2003 and 2003-2004 were completed by the Assessing Officer accepting the fact that the petitioner is a producer of the unbranded confectionery and they have charged to tax at 4%. The problem arose during the year 2004-05 and it appears that the Assessing Officer informed the petitioner that he should approach the Commissioner of Commercial Tax and obtain clarification as regards the rate of tax for the confectionery products produced by them. The Commissioner of Commercial Taxes by clarification dated 29.08.2005 in clarification No.111 of 2005 clarified that the confectionery items produced by the petitioner, which are branded, but the brand name is not registered and hence, taxable at 12% under the residuary entry no.40 of Part D of the first schedule of the TNGST Act. The Commissioner having given such a clarification, the Assessing Officer was left with no other option and followed the clarification and assessed the petitioner to tax at 12%. The question would be whether the name of the petitioner mentioned in the packing would amount to a brand name.

5.Admittedly, the petitioner has not coined a word or a mark and the packing contains the petitioner's name, namely, V.R.S.Confectionery, Rasipuram, to indicate as to who produced those confectionery items and wherefrom it has been produced. Therefore, to state that the name V.R.S.Confectionery would amount to a brand or a trade name or a trade mark is a wrong interpretation. So far as the clarification is concerned, admittedly, the petitioner did not have an opportunity of personal hearing before the clarification was issued. Though, the petitioner sought for revision of the clarification, the same was rejected by letter dated 31.07.2006.

6.In my considered view, the mentioning of the name of the petitioner being the producer of those goods in the packing materials cannot be construed as a brand or a brand name or a trade mark or a trade name. At best, it can be taken to indicate the name of the producer of goods, which are contained in the packs.

7.As pointed out above, the clarification dated 29.08.2005 having been issued without notice to the petitioner, cannot be thrust upon the petitioner and he cannot be made to suffer by paying higher rate of tax. Thus, the clarification is held to be not enforceable against the petitioner, on account of the fact that they did not have adequate opportunity to object to the views of the Commissioner. As a consequence of these findings, the impugned assessment order has to be set aside.

8.One more point is to be noted that the confectionery items have been specifically mentioned in entry item-4 (iii) of Part-B of first schedule of the TNGST Act taxable at 4%. This being a specific entry the general entry or residuary entry, could be invoked only when a product can be dealt with in any of the entries. Even assuming the respondents construe the products produced by the petitioner as a bakery product, even then, regardless of the product with a brand name or without a brand name registered under the Trade and Merchandise Marks Act, 1958, it would fall under entry Item-11 (ii) of Part-B of first schedule of the TNGST Act.

9.Therefore, the respondent committed serious error in clarifying the petitioner under residuary entry and accordingly, levying tax at 12%.

10.In the case of Pepsico India Holdings Pvt. Ltd vs. Commissioner of Commercial Taxes in Writ Appeal No.551 of 2009, one of the issues which was considered by the Hon'ble First Bench was under what circumstances the Taxing Authority can resort to classify the product under residuary entry. After referring to the decision of the Hon'ble Supreme Court in Bharat Forge & Press Industries (P) Ltd. Vs. Collector of Central Excise reported in 1990 (45) E.L.T. 525 (SC) and in the case of M/s.Mauri Yeast India Private Limited Vs. State of Uttar Pradesh reported in (2008) 5 S.C.C. 680, it was held that under a residuary entry only such goods, which cannot be brought under various specific entries in the tariff, can be taxed as per the residuary entry. It was further pointed out that unless the department can establish that the goods in question can by no conceivable process of reasoning be brought under any of the tariff items, resort cannot be had to the residuary.

11.By applying the above decision to the facts of the case, it has to be necessarily held that the clarification issued by the Commissioner dated 29.08.2005 is clearly unsustainable and consequently, the impugned order assessing the petitioner to higher rate of tax is liable to be set aside.

12.In the result, the writ petition is allowed and the impugned order is quashed and it is held that the petitioner is liable to the taxed only at 4%. If any excess tax amount is collected from the petitioner, the same shall be refunded/adjusted.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1.The Commissioner of Commercial Taxes
Commercial Taxes and
Religious Endowments Dept.
Ezhilagam, Chepauk
Chennai.

2.The Commercial Tax Officer
Rasipuram Assessment Circle
Namakkal District.

+1cc to Mr.S.Ravee Kumar, Advocate Sr.No.79941
+1cc to Special Government Pleader SR.No.80034

W.P. No.47913 of 2006

RK(CO)
sm:6.12.2017