IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 05.04.2018

Coram

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

Writ Petition No.7983 of 2018
and
W.M.P.No.9943 of 2018

TJSV Steel Fabrication and Galvanising (India) Ltd.,
Formerly known as M/s. TJSV Petroleum Ltd.,
rep. by its Manager, (Administration),
Mohankumar, Kottampatti (P.O.) Gudimangalam,
Udumalpet - 642 201. ...Petitioner

Vs.

The Assistant Commissioner (CT)
Udumalpet North Circle,
Udumalpet. ...Respondent

Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for records from the files of the respondent, in TIN No.33642482503/2011-12, dated 26.02.2018, and to quash the same.

For Petitioner : Mr.N.Prasad

For Respondent : Mr.M.Hariharan
Government Advocate

O R D E R

Heard Mr.N.Prasad, the learned counsel appearing for the petitioner and Mr.M.Hariharan, the learned Government Advocate, accepting notice on behalf of the respondent. With consent of the learned counsel on either side, the Writ Petition is taken up for disposal.

2. The petitioner, who is a registered dealer on the file of the respondent, under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (the Act, for brevity), has filed this Writ Petition, challenging the order of assessment, dated 26.02.2018, for the year 2011-12.

3. The petitioner has earlier approached this Court, and filed W.P.Nos.21193 to 21195 of 2017, challenging the assessment orders for the years 2009-10, 2010-11 and 2011-12 respectively. So far as the assessment order for the year 2009-10 is concerned, since the revision notice was issued by the Assessing Officer himself, the assessment order, dated 30.06.2017, was set aside, giving liberty to the petitioner to submit their objections to the revision notice, dated 28.07.2017. With regard to the assessment order for the year 2010-11 is concerned, the Court found three issues for consideration, viz., i) short payment of tax, treating the galvanizing as works contract; ii) availment of Input Tax Credit on ineligible rules; and iii) non-payment of TDS, as per Section 13 of the Act on construction of the building.

3.1) The Court, after considering the submission made on either side, found that the petitioner-concern had given an elaborate explanation to the revision notice, and submitted several documents to support their stand that, the galvanizing work done by them, is a job work. The petitioner also pointed out the scope of the expression 'Works Contract', as defined under Section 2 (43) of the Act, and also referred to certain decisions in support of their stand, as to how, the transaction has to be taxed under the provisions of the Act in contra-distinction with the computation of tax under the provision of Central Sales Tax Act, etc.

3.2) The Court further held that the Assessing Officer has not dealt with the objections in proper manner and the order was very sketchy. Furthermore, the Court found that a specific date has to be fixed for personal hearing, and it cannot be rolled into a show cause notice. Ultimately, the Writ Petition, challenging the assessment order for the years 2010-11 and 2011-12 were allowed and the orders were set aside and the matters were remanded to the respondent for fresh consideration, after affording an opportunity of personal hearing to the petitioner. Pursuant to the direction issued in the earlier Writ Petitions, the assessment has been completed for the year 2010-11 and the petitioner has filed an Appeal as against the said order before the Deputy Commissioner of Commercial Taxes, Pollachi. In this Writ Petition, the challenge is to the assessment order for the year 2011-12.

4. The learned counsel appearing for the petitioner contended that the Assessing Officer misdirected himself, in not considering the judgments placed by the petitioner, and the assessment has been completed on a totally wrong premise, and therefore, argued that the case should be remanded for fresh consideration. Further, it is pointed out that, though on the basis of the assessment order, revision notices, dated

07.03.2017 and 06.09.2017 were issued, the respondent issued another notice, dated 08.12.2017, that too, after receiving the petitioner's reply, in which, totally a different stand was taken, stating that, if the details called for are not furnished, it will be construed that the petitioner is manufacturing goods, which are not falling under Entry 89 of Part -B of the first schedule to the Act and the entire sales turnover will be proposed to be taxed at 12.5% or 14.5%, under the Act.

4.1) The learned counsel submitted that the petitioner was taken by surprise on receiving the notice, dated 08.12.2017, in which, the Authority took a totally different stand from that of the stand taken in the revision notices, dated 06.09.2017 and 22.09.2017. On receipt of the notice, dated 08.12.2017, the petitioner submitted a representation/reply on 19.12.2017, requesting for four weeks time to collect details for seven years old records. However, without affording opportunity, the impugned order has been passed. The learned counsel further submitted that, confirmation of the tax demand on the entire value of the article delivered by the petitioner to their clients after completion of galvanizing work is contrary to the judgement of the Hon'ble Supreme Court, in Moriroku UT (India) Pvt. Ltd., Vs. State of U.P.) reported in [(2008) 4 S.C.C. 548], wherein, it was held that, there is liability only to the extent of cost of material transferred. The learned counsel further submitted that, if the principle laid down by the Hon'ble Supreme Court, in the aforementioned decision is applied, then, the liability on the petitioner is only to the extent of cost of material, which, read with Rule 8 of the TNVAT Rules, was only to the extent of 70% of the amount, billed by the petitioners and 1/3rd was eligible for deduction as labour charges.

4.2) Further, it is submitted that, the respondent misdirected himself in law, in addressing to the definition of 'Manufacture', without taking note of the fact that the petitioner was doing only 'Galvanizing Work'. Furthermore, the respondent has wrongly applied the principle of valuation under the Central Excise Law, when the said enactment does not deal with the cost of transfer, but only with the value of the goods. Further, it is submitted that the impugned order has been passed without taking into consideration the detailed replies given by the petitioner, dated 28.03.2017, and the common written submission, dated 05.07.2017, filed on 06.07.2017, as there is no reference to the same in the impugned order.

4.3) Further, it is submitted that, levy of Value Added Tax (VAT) on the entire value of the bill, including the service component, is without jurisdiction. So far as the service charges are concerned, petitioner has discharged the service tax liabilit and paid service tax on the labour charges, and therefore, levy of VAT on the entire value of the bill is contrary to the judgment of the Hon'ble Supreme Court, in Bharat Sanchar Nigam Ltd., Vs. Union of India) reported in 145 STC 91. Further, without prejudice to the aforesaid contention, it is argued that the rate of tax cannot exceed 4% for the period upto 11.07.2011 and 5% for the period after 11.07.2011, since the components cleared after job work of galvanizing were only industrial input to be taxed at lower rate under Entry 67 of Part-B of the first schedule.

4.4) Further, it is submitted that, in terms of Rule 6 (3) (b) of TNVAT Rules, 2007, the production of Industrial Input Certificate is only directory and not mandatory, and obligates the buyer to issue the said certificate and there is no further obligation on the part of the seller to file the same. On the other issues, which were raised in the revision notice, the learned counsel made an elaborate submission on the factual matrix. Further, it is submitted that, one of the major clients is Bharat Heavy Electricals Ltd., and the petitioner have requested them to issue Industrial Input Certificate, by their letter, dated 27.03.2018, and that the certificate will be collected without prejudice to the submission made by the petitioner that the transaction is only job work in respect of bulk of the clearances. Therefore, even after obtaining certificate, the petitioner would be entitled to file the same without prejudice to their rights and contention under protest.

5. Heard the learned Government Advocate for the respondent on the above submissions.

6. Considering the factual issue, involved in this Writ Petition, the impugned assessment proceedings, this Court is of the opinion that, no useful purpose would be served by remanding the matter to the Assessing Officer, as the Assessing Officer has not taken note of the written submissions given by the petitioner, dated 05.07.2017, (filed on 06.07.2017) and the earlier detailed representation/reply, dated 28.03.2017. That apart, the major issue is, whether the respondent was justified in referring to the definition of the term 'Manufacture', under the provisions of the Central Excise Tariff Act, 1985. Since the facts are complicated and already the respondent appears to have a closed mind to the issue, presumably, because of a report of the Enforcement Wing Officials, in the best interest of the petitioner, they should pursue the matter before the Deputy Commissioner of Commercial Taxes, Pollachi. This is more so, because, for the earlier assessment year 2010-11, identical issue has arisen and the petitioner has rightly preferred an Appeal before the Appellate Authority. That apart, the Court has been informed that, similar issue arises for subsequent

assessment years also, and also, it is in the fitness of things that the Appellate Authority should take a decision in the matter, so that, a finality could be arrived at. This is more so, because, in the instant case, two major issues arise for consideration, first of which being the value of the goods, as to how, it has to be arrived at. The petitioner's specific case is that, they are only job workers. After taking a decision on the value of the goods, then, the next question, that should be decided, is the rate of tax. Admittedly, the petitioner has paid the tax at the rate of 4%/5%, and what is now demanded from the petitioner is a differential tax.

7. Thus, considering the factual situation involved in the matter, and also taking note of the fact that this is the second time, the petitioner is before the Court, raising very same contentions and that, similar issue is pending before the Appellate Authority, for the assessment year 2010-11, this Court would direct the petitioner to file Appeal before the Appellate Authority. The learned counsel appearing for the petitioner pleads that the petitioner is in extreme financial difficulty, as one of the major clients is a Government of India Undertaking. Thus, taking note of the payment already effected by the petitioner, this Court is inclined to pass an order of interim protection till the disposal of the Appeal by the Appellate Authority, however, subject to the certain conditions (mentioned infra).

8. In the result, the Writ Petition is disposed of, by directing the petitioner to pay a sum of Rs.25,00,000/- (Twenty Five Lakhs only) within six weeks from the date of receipt of a copy of this order. If this amount is paid by the petitioner, within the time permitted, then, the petitioner would be entitled to file Appeal within 7 days from the date on which, the payment is effected to the Appellate Authority. As and when, such an Appeal is filed, the Appellate Authority shall entertain the Appeal without rejecting it on the ground of limitation and decide the merits of the matter in accordance with law along with pending Appeal, pertaining to the AY 2010-11. It is made clear that, the sum of Rs.25,00,000/-, which is being remitted by the petitioner, be reckoned as full compliance of the pre-deposit to be made for entertaining the Appeal and no further amount shall be directed to be paid by the petitioner before the Appellate Authority, and the remaining demand, as computed in the impugned assessment orders shall remain stayed till the disposal of the Appeal. This direction issued, considering the peculiar facts of the case and this being second round of litigation, the opinion of the Assessing Officer has largely been based on the observation of the Enforcement Wing Officials and similar issue is pending before the Appellate Authority for the earlier year. Therefore, this order should

not be treated as a precedent. In the event, the petitioner fails to comply with the condition within the time permitted, then, the benefit of this order will not enure to the petitioner and the petitioner has to work their remedies under the provisions of the Act. No costs. Consequently, connected Writ Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

sd

To

1.The Assistant Commissioner (CT)
Udumalpet North Circle, Udumalpet.

2.The Deputy Commissioner
Commercial Taxes
Pollachi.

+1cc to Mr.Inbarajan, Advocate, S.R.No.25042

+1cc to the Government Pleader, S.R.No.25728

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PPA(CO)

RRK(11/04/2018)