IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 13.12.2018

CORAM:

THE HONOURABLE MR. JUSTICE **T.S.SIVAGNANAM**

AND

THE HONOURABLE MR. JUSTICE **N. SATHISH KUMAR**

Tax Case (Revision) Nos.10 and 11 of 2013

M/s.Larsen & Toubro Limited
No.41, 4th Floor, Jayanth Tech Park
Nandambakkam, Chennai - 600 089. ... Petitioner in both Petitions

-vs-

State of Tamil Nadu Rep. by
The Joint Commissioner (CT)
Chennai (Central) Division,
Chennai. ... Respondent in both Petitions

Tax Case Revisions filed under Section 38 of the TNGST Act against the order of the Tamil Nadu Sales Tax Appellate Tribunal, (Main Bench), Chennai dated 28.08.2012 in STA Nos.89 and 90 of 2009 for the Assessment years 1999-2000 and 2000 - 2001 respectively.

For Petitioner : Ms.P.Kanthi Visalakshi

For Respondent : Mr.V.Haribabu
Addl.Govt.Pleader

JUDGMENT

[Judgment of the Court was delivered by T.S.Sivagnanam, J.]

These appeals by the assessee are filed under Section 38 of the Tamil Nadu General Sales Tax Act, 1959 (for brevity "TNGST Act"), challenging the order passed by the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench) Chennai, dated 28.08.2012 in STA Nos.89 and 90 of 2009.

2. The Tax Case (Revisions) were admitted on 14.02.2013 on the following Substantial Questions of Law:-

> *"1. Whether the impugned order of the Tribunal inasmuch as it disallows the claim of deduction on freight and pumping charges shown separately in the invoice stands vitiated for failing to take into account relevant factors and for taking into account irrelevant factors, illegal, wholly without jurisdiction and suffers from the vice of arbitrariness and completely perverse?*
>
> *2. Whether the impugned order of the Tribunal has erred in disagreeing with the decision of the Tribunal in STA No.28 of 2009 wherein the question as to whether freight and pumping charges*

is excludable from the turnover has already been decided in favour of the petitioner itself holding that freight is post-sale and pumping charges represent labour charges, by relying upon the decision of the Karnataka High Court in ACC Ltd. 52 VST 129.

3. Whether the impugned order of the Tribunal is unsustainable inasmuch as it proceeds on a gross misconception of the law laid down by the Supreme Court in Bangalore Soft Drinks (117 STC 413 (S.C.)

4. Whether the impugned order of the Tribunal holding that RMC can never been sold ex-works is made on the basis of conjecture and surmise and contrary to the documentary evidence let in and the trade practice as recognized by statutory bodies functioning under fiscal legislations through Circular No.368/1/98 dated 6.1.1998".

3. The assessee is engaged in various lines of business and the subject appeals pertain to the claim for deduction made by the assessee in respect of freight and pumping charges of Ready Mix Concrete (RMC) manufactured with the ingredients like jelly, sand, cement etc., at the assessee's factory. The assessee's case is that the RMC so manufactured by them is stored in huge cello's and then sold to the buyers ex-works. The goods sold ex-works are moved in Transit Mixture Vehicle (TMV) on the buyers' request. The assessee's specific case is that they have a dual role one that of seller and the other of transporter as agent of the buyer.

The modus adopted by the assessee was explained by stating that the buyers place a purchase order indicating that the sales price/rate of tax is ex-works. The RMC is then supplied under the cover of invoice which shows that the risk during transit is with the buyer and that the sale is complete ex-works. The freight and pumping charges is shown separately. Thus, the assessee's specific case is that the subsequent transportation done is only as the agent of the buyer, as the assessee has a dual role one as a seller and the other as transporter. Further, the assessee also at the request of the buyer would help them to pump the RMC to the requisite height/floor and the pumping charges is again shown separately in the invoice. The Assessing Officer for the relevant assessment years viz., 1999-00, 2000-01 under the provisions of the TNGST Act by order dated 30.04.2007 disallowed the assessee's claim on number of issues including freight and pumping charges.

4. Aggrieved by the same, the assessee preferred appeal before the Deputy Commissioner (CT) VI, Chennai. The appeal filed before the first appellate authority was allowed by order dated 10.10.2008 allowing the claim of demand of freight and pumping charges and it was held that

the same would not form part of the turnover and thus not liable to tax. The Revenue carried the matter to the Tribunal by way of appeal. The Tribunal allowed the Revenue's appeal by following the decision of the ***HIgh Court of Karnataka in ACC Ltd. v. State of Karnataka, [(2012) 52 VST 129 (Karn)].*** Aggrieved by the said order, the assessee is before us by way of these appeals, which have been admitted on the substantial questions of law quoted above.

5. We have heard Ms.P.KanthiVisalakshi, learned counsel for the assessee and Mr.V.Haribabu, learned Additional Government Pleader on behalf of the respondent/Revenue.

6. At the first blush, when we examine the order passed by the Tribunal we thought that the order passed by the Tribunal is very elaborate and well-reasoned one, given the fact that the order is of 26 pages. However, on a closer scrutiny, we find that the order is so lengthy because the Tribunal extracted the entire decision of the High Court of Karnataka in ACC Limited (supra). Though the Tribunal may be justified in extracting the portion of the judgment, the Tribunal is required to give a finding as to

how the decision in the said case can be made applicable to the assessee's case, for which purpose, the factual matrix of the case should have been discussed. We find no such discussion made by the Tribunal and the only conclusion as could be seen from page 17 of the order passed by the Tribunal is by solely referring to and relying on the decision of the High Court of Karnataka. The assessee had placed reliance on the decision in its own case in STA No.28/2009 which was decided in favour of the assesee. This decision was not followed by the Tribunal. Judicial discipline demands that the Tribunal has to follow the earlier decision and more particularly, when the decision arose out of the assessee's own case. However, if the Tribunal was of the view that the earlier decision taken even in the assessee's own case is not in accordance with law, then the option open is to refer the matter to a larger bench for consideration. Therefore, we wholly disapprove the finding rendered by the Tribunal in not following the decision in the assessee's own case in STA No.28/2009.

7. As pointed out earlier, the Tribunal has not given any reason to discredit the factual findings recorded by the first Appellate Authority. We find the order to be a well reasoned order. The first Appellate Authority

has taken into consideration the contentions raised by the assessee; the documents produced by it and found that the goods have been delivered to the customers on ex-RMC plan basis and the subsequent activity of freight and pumping i.e., unloading charges to be construed as post sale services.

8. Further, the first Appellate Authority found that the sale price on ex-works as per invoice on record is being credited to sale account as per books of accounts and the other charges to freight and unloading charges as per the books of accounts. Reference was made to the decision in the case of ***State of Karnataka v. Bangalore Soft Drinks (P) Ltd. reported in (2000) 117 STC 413*** and the decision of the Division Bench of this Court in ***Ram Oxygen Private Limited v. Joint Commissioner (SMR) of Commercial Taxes [(1999) 115 STC 629]***. Further, the first Appellate Authority relied on the decision of the Hon'ble Supreme Court in the case of ***Vinod Coal Syndicate*** reported in 73 STC 317, wherein, it was held that where the cost of freight was charged separately, that amount cannot be included in the taxable turnover of the assessee. Further, in STA No.1028 of 2004 dated 28.02.2004 in the assessee's own

case, the Sales Tax Appellate Tribunal, Bangalore, held that in the facts and circumstances of the case, it is fallacious to draw conclusion that the selling price is inclusive of freight and pumping charges which is contrary to facts of the transaction as supported by documents as well as the provisions of the Act. After rendering the above finding, the first Appellate Authority held that the tax levied in the assessment order on RMC pumping charges and freight charges is illegal and therefore, liable to be set aside. Unfortunately, the Tribunal did not even make an attempt to consider as to whether the finding rendered by the first Appellate Authority was correct or not. We disapprove the manner in which the Tribunal has decided the assessee's case.

9. The learned Additional Government Pleader appearing on behalf of the respondent would vehemently contend that the decision in the case of Ram Oxygen Private Limited (supra) cannot be applied to the case on hand as the product dealt with by the said assessee was different from that of the product dealt with by the assessee in the case on hand.

10. In our view what is required to be seen from the judgment is the *ratio decidendi* which has been rendered by explaining the meaning of the word "sale price" as defined under the provisions of the Central Sales Tax Act, 1956. For better appreciation, we quote paragraph 9 of the judgment.

> *"9. It is clear from a reading of this definition that cost of freight or delivery or cost of installation is excluded from the sale price where they are separately charged. It has been found by the Joint Commissioner that the assessee had in fact separately charged for the amounts of freight and delivery. What has been excluded in the definition itself cannot be made a part of the sale price, on the basis of the definition of "Sale price" in another enactment. Moreover, the transportation, in this case was undertaken on behalf of the buyer."*

11. Thus, the law laid down in the above decision is that cost of freight or delivery or cost of transportation cannot be included in the sale price, where they are separately charged. In the instant case, as a matter of fact, the first Appellate Authority found that the freight charges, pumping charges have been separately shown in the invoices without

including the same in the cost of the goods. Further, the purchase order also clearly says that the delivery is ex-RMC Works. Further, the Assessing Officer has not pointed out even a single instance of collection of consolidated amount and that the sale is completed only after delivery of RMC at the site of the customer and not even a single buyer was enquired and there was no material available with the Assessing Officer. Thus, we are of the firm view that the Tribunal committed a serious error in deciding the questions against the assessee.

12. For the above reasons, the appeals filed by the assessee are allowed and the substantial questions framed for consideration are decided in favour of the assessee. No costs.

[T.S.S.,J.] **[N.S.K.,J.]**
13.12.2018

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Index : Yes
Speaking order

To

1.The Joint Commissioner (CT)
The State of Tamil Nadu,
Chennai (Central) Division,
Chennai.

2.Tamil Nadu Sales Tax Appellate Tribunal, (Main Bench), Chennai

T.S. SIVAGNANAM J.
AND
N.SATHISH KUMAR,J.

(svki)

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