

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

T.C.(R).No.4 of 2018

Tvl.G.T.C.Industries Limited,
Tobacco House,
Ville Parle (W),
Mumbai - 400 056.

.. Petitioner

Vs.

The State of Tamil Nadu,
Rep by the Deputy Commercial Tax Officer,
Anna Salai II assessment circle,
Chennai.

.. Respondent

Prayer: Tax Case Revision Petition filed under Section 38 of the Tamil Nadu General Sales Tax Act, 1959, to revise the order dated 20.03.2013, passed in C.T.A.No.7 of 2007, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore.

For Petitioner : Mr.Lakshmi Sriram

For Respondent : Mr.V.Haribabu
Additional Govt. Pleader (Taxes)

ORDER

(Order of this Court was made by **S.MANIKUMAR, J.**)

Tax Case Revision Petition is filed to revise the order dated 20.03.2013, passed in C.T.A.No.7 of 2007, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore.

2. Short facts leading to the Tax Case Revision are that, the petitioner company has its registered office in Mumbai and executed a machinery lease agreement from its Delhi Branch with Tamil Nadu Tobacco Company Ltd., Rasipuram, as the lessee. Original order of assessment for the assessment year 1996-97 was passed on 31.03.2000 levying tax under Section 3-A of the Tamil Nadu General Sales Tax Act, on the lessee.

3. On appeal, before the Appellate Commissioner, the issue was remanded back to the Assessing Officer, by order dated 02.02.2001 in A.P.No.476 of 2000, with a direction to consider all the objections of the petitioner, in accordance with the principles of natural justice. A consequential order of assessment was passed by the Assessing Officer on 31.03.2004, once again confirming the earlier proposal and levying tax under Section 3-A of the Tamil Nadu General Sales Tax Act, 1959.

4. The assessment order was challenged before the Appellate Assistant Commissioner for the second time, and the Appellate Assistant Commissioner passed an order dated 27.12.2004 in A.P.No.184 of 2004 remanding the assessment back to the assessing officer, for the second time. The Assessing Officer once again passed the very same order of assessment for the third time on 31.10.2005, confirming the levy of tax in the original assessment order.

5. Aggrieved by the said levy, the petitioner has filed an appeal before the Appellate Assistant Commissioner in A.P.No.3 of 2006, dated 19.10.2006. The appellate authority again confirmed the order of assessment, levying tax, on the lease agreement entered into at Delhi under Section 3-A of the Tamil Nadu General Sales Tax Act, 1959.

6. Against which, the petitioner has filed an appeal before the Sales Tax Appellate Tribunal, in C.T.A.No.7 of 2007, wherein, the Tribunal, while confirming the order of assessment, levying tax under Section 3-A on the lease agreement, held that the machineries are not immovable, as they were fixed on to the earth by bolts and nuts, which could be removed only at the end of the lease period and therefore, fell under the net of taxation, under the Tamil Nadu General Sales Tax Act,

7. The Tribunal also held that the lease agreement executed

between the petitioner and Tamil Nadu Tobacco Company Limited, did not come under the purview of the decision of the Hon'ble Supreme Court in **Twentieth Century Finance Corporation Limited v. State of Tamil Nadu** reported in **119 STC 182 SC**).

8. After considering the facts and circumstances of the case, the Tribunal, vide order, dated 20.03.2013, passed the following order:

"We heard the rival arguments and we have also perused the assessment records, photocopies and lease agreement copy produced by the learned Authorised Representative. It is an admitted fact that the dealer-appellants, Tvl.G.T.C Industries Limited, Mumbai leased out a cigarette making machinery to one Tvl.Tamil Nadu Tobacco Company Limited, Rasipuram, Tamil Nadu for which, the dealer-appellants have received annual rent receipt for Rs.6,23,700/-. It is also an admitted fact that 1.2 ton weight of machinery placed in the business of the lessee and there is transfer of effective control of machinery to lessee. As per the argument of the learned Authorised Representative, this machinery is immovable property as it is permanently embedded to earth. However, the learned Appellate Assistant Commissioner has observed that the machinery is fixed to earth by bolts and nuts and it can be removed after expiry of lease period. In this regard, it is pertinent to note that if the attachment to earth is mainly for the beneficial enjoyment of this movable property, it remains movable

property even though fixed for the time being for proper enjoyment thereof. With the above understanding, we perused the lease agreement copy produced by the learned Authorised Representative. As per Article 2 of the lease agreement, the lessee should not remove the machinery from the place of location without the lessor's written consent. The above Article itself is a clear cut proof for deciding the fact that it is only movable property. Further, the weight of machinery is said to be 1.2 tons and this can be easily removed by removing bolts and nuts and in the above circumstances, it cannot be said that it is permanently attached to earth. Therefore, we came to the conclusion that in this case the machinery is attached to earth mainly for the beneficial enjoyment of the movable property and that transferring effective control of such machine to lessee for right to use is only constructive delivery of the machine.

9. The next argument of the learned Authorised Representative is that the dealer-appellants entered into agreement with the lessee in Delhi and therefore situs of sale is only at Delhi. In the above circumstances, the Tamil Nadu Government has no jurisdiction to levy tax u/s.3-A of the TNGST Act as per the judicial decision of the Hon'ble Supreme Court of India reported in 119 STC 182 in the case of 20th Century Finance Company Limited v. State of Maharashtra. In this regard, the Assessing Authority himself has recorded that the agreement was not executed in stamp paper and not a

registered documents, and that the name and designation of the person signed on behalf of the lessee is not known and it is left blank. We have also perused the copy of lease agreement produced by the learned Authorised Representative. As pointed out by the Assessing Authority himself it is not executed in stamp paper and it is also not a registered document. Normally a lease exceeding a term of one year can be made only by a registered instrument. Where a lease is not registered such document cannot be admitted in evidence for the purpose of proving the duration of the lease. In view of the above, the lease agreement produced by the learned Authorised Representative cannot be acceptable and therefore the argument of the learned Authorised Representative that the situs of transfer is at Delhi is discredited. From the above facts of the case and discussion made, we came to the conclusion that the Assessing Authority rightly levied tax u/s.3-A of the Act on the lease rent receipt for leasing out of machinery along with penalty since they had not filed any return reporting the same. Therefore, we are not inclined to interfere with the order of the learned Appellate Assistant Commissioner confirming the order of the Assessing Authority and hence the appeal filed by the dealer-appellants is dismissed.

In the result, the appeal stands Dismissed."

been filed, on the following substantial question of law:-

“Whether, on facts and in the circumstances of the case, the Tribunal was right in law in confirming the order of assessing authority on the turnover of Rs.6,23,700/- and treating it as lease rent receipt taxable under Section 3-A of the Act and confirming the levy of consequential penalty”

10. In Support of the above substantial question of law, the petitioner has raised the following grounds:

"a) The law relating to the movable and immovable nature of goods has been settled by the Hon'ble Supreme Court in **Duncan Industries Ltd Vs State of UP & Ors. [(2000) 1 SCC 633]** and the same shall squarely applies to the instant case. In the above mentioned case, the Hon'ble Supreme Court has held that the machineries, which formed the fertilizer plant were permanently embedded in the earth, with an intention of running the fertilizer factory and while embedding these machineries, the intention of the party was not to remove the same for the purpose of any sale of the same, either as a part of a machinery or scrap and in the very nature of the user of these machineries, it was necessary that these machineries be permanently fixed to the ground. Therefore, the Hon'ble Supreme Court came to the conclusion that these machineries were immovable property, which were permanently attached to the land. The situation found in the instant case is identical to the one narrated in Duncan Industries Ltd v. State of UP.

b) The Tribunal ought to have seen that the cigarette making machines had to be fixed on the floor with nuts and bolts in order to run the machinery and that the electric cabling running under the equipment were buried deep inside the flooring.

c) The Tribunal ought to have seen that the machinery cannot be kept floating above the surface of the floor and hence the attachment to the earth was made out of necessity and for functioning of the equipment. The law laid down by the Hon'ble Supreme Court has also been followed by the Hon'ble Rajasthan High Court in CTO v. Sadulshahar Krai Vikrai Sahakari Samiti and other cases (2004 91 STC 90 Raj).

d) In the law laid down by the Hon'ble Bombay High Court in J.H.Subbiah v. Govindrao Bhiwaji, AIR 1953 Nag 224, in order to determine what is and what is not immovable property as a result of attachment or annexation to land, two tests have been laid down, viz. (i) the degree or mode of annexation, and (2) the object of annexation; and that of the two tests, the latter is the more important, and the answer to that must depend upon the particular circumstances of each case. The Tribunal ought to have seen that cigarette making machines used by the petitioner were embedded to the ground in order to render the machines usable and available thereby giving them the character of immovable goods.

e) "Moveable property" is defined in Section 2, clause (9), Registration Act, as including, standing timber, growing crops and grass, fruit upon and juice in trees, and property

of every other description, except immovable property. The definition of "immovable property" in Clause (6) of the same section states as follows:- "includes land, buildings... and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass". This Court in Mohammed Ibrahim v. Northern Circars Fibre Trading (AIR 1944 Mad 492) has held that what is really movable property may become immovable property, if it is attached to the earth or permanently fastened to anything, which is attached to the earth. The Transfer of Property Act, 1882, relating to transfer of immovable property contains in Section 3 a definition of the expression "attached to the earth" for purposes of that Act. The definition is this:

"attached to the earth means-(a) rooted in the earth, as in the case of trees and shrubs; (b) imbedded in the earth, as in the case of walls or buildings; or (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. The Hon'ble Division Bench of the Madras High Court therefore held that under the provisions of the Registration Act, Machinery of a mill which was fixed to a cement platform and attached to iron pillars fixed in the ground was regarded as immovable property.

f) When the Tribunal itself has stated that the machinery has been attached to the earth for proper enjoyment of the property even for a fixed time, it erred in stating that the lease agreement prescribing that the machinery not be removed without the petitioner's consent should be treated as a proof to decide that the machinery

was movable in nature. The Tribunal having found the fact and admitted that the machinery is immovable property for a particular time, this conclusion is erroneous in law as much as the nature of immovable property could not be decided on the basis of the period of time of fixation to the earth.

g) Once the Tribunal has found that the movement has been established from outside the State, the transaction was inextricably connected with the lease.

h) The Tribunal has overlooked the principle of law that in order to decide the nature of transaction as to whether it is a local or an interstate dealing, the movement from the other state alone is the relevant condition and not the existence of any agreement containing the provision regarding the movement and that the order of the Tribunal is contrary to the law laid down by this Hon'ble Court in,

i) The Tribunal has failed to see that the Appellate Assistant Commissioner in the earlier round of appeal in the same issue had stated in his order dated 27.12.2004 (para 11) that no tax could be levied on the immovable property and the machinery of a factory was immovable property which could not be taxed.

j) The Tribunal ought to have seen that in the absence of definition of immovable property under the Tamil Nadu General Sales Tax Act, the definition under the General Clauses Act which defines immovable property under Section 3(14) of the General Clause Act, Madras, 1981 and in Section 3(26) of the General Clauses Act, 1897 (Central Act) will prevail.

k) The Tribunal ought to have seen that as per the law

laid down by the Hon'ble Supreme Court of India in Twentieth Century Finance v. State of Maharashtra (119 STC 182 SC) the situs of sale would be where the contract is entered into. The Hon'ble Supreme Court has held that the States in exercise of power under entry 54 of List II read with Article 366(29A)(d) are not competent to levy sales tax on the transfer of right to use goods, which is a deemed sale, if such sale takes place outside the State or is a sale in the course of inter state trade or commerce or is a sale in the course of import or export. The Tamil Nadu Taxation Special Tribunal in Kodal Industries Limited v. State of Tamil Nadu (2001 124 STC 52) has followed the law laid down by the Hon'ble Supreme Court and has held that it was therefore not necessary to decide the question as to where the agreement was executed to determine the situs of the sale. The Tribunal ought to have seen that it is an undisputed fact that the goods have moved from outside the State to Tamil Nadu to Rasipuram in Tamil Nadu and that the law laid down by the Tamil Nadu Taxation Special Tribunal is binding on the Tribunal.

l) The Tribunal erred in upholding the levy of tax under the Tamil Nadu General Sales Tax Act, 1959 when the transaction is purely and admittedly an interstate transaction wherein the goods have moved from outside the State to Tamil Nadu. The Tribunal is bound by the law laid down by the Hon'ble Division Bench of this Hon'ble Court in Aspick Engineering Pvt Ltd v. State of Tamil Nadu (2013 62 VST 216 Mad) wherein this Hon'ble Court has held that the criteria for consideration the transaction as an interstate

sale was the movement of goods intimately connected with the sale. This Hon'ble Court has thus laid down the law laid down by the Hon'ble Supreme Court in 1993 90 STC 1 SC in Union of India v. K.G.Khosla & Co Ltd.

m) The Tribunal ought to have seen that the burden of proof to bring a transaction under the net of the TNGST Act rested on the Revenue has not been discharged and hence its order wrongly throwing the burden on the assessee and making the assessee liable under the TNGST Act is void and without jurisdiction.

n) The Tribunal ought to have seen that the requirement of law relating to interstate transactions have been fulfilled by the petitioner and that the reasons stated for sustaining the TNGST assessment are misconceived and perverse.

o) From the above well established principles of law laid down by the Hon'ble Supreme Court and Hon'ble High Courts, it is clear that machine, which weighs 1.5 tons, is immovable property and it acquires the nature of immovable property once embedded on earth. The Tribunal ought to have seen that immovable property cannot be taxed under the Tamil Nadu General Sales Tax Actn as it is outside the purview of State Legislature under the Entry 54 of List II of 7th Schedule of the Constitution of India. When the Constitution of India does not permit the levy and collection of tax save by the force of law, the Tribunal ought to have set aside the demand of tax of Rs.6,23,700/- and consequential levy of penalty of Rs.97,998/- as it is violative of Article 19(1)(g), Article 265 and Article 301 of the

Constitution of India."

Heard the learned counsel appearing for both sides and perused all the materials available on record.

11. The main issue, which arise for consideration, in this revision, is whether, machineries fixed on the earth by bolts and nuts, are moveable or immovable property.

12. Though the words "immovable property" are not defined in TNGST Act, 1959, we deem it fit to consider the definition of the said words from the General Clauses Act, 1897, Transfer of Property Act, 1892 and Registration Act 1908. The relevant sections in General Clauses Act, 1897, are as follows:

(i) Section 3(26) of the General Clauses Act, 1897 reads as under:-

"Immovable property" shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth;"

(ii) Section 2(6) of the Registration Act 1908 defines "immovable property" and reads as under:-

"Immovable property" includes land, buildings, hereditary allowances, rights to ways, lights, ferries,

fisheries or any other benefit to arise out of land, and things attached to the earth or permanently fastened to anything which is attached to the earth, but not standing timber, growing crops nor grass;"

(iii) Section 3 of the Transfer of Property Act, 1892 merely says that "Immovable property" does not include standing timber growing crops or grass.

(iv) Section 3(6) defines the expression "attached to the earth" as follows:

"Attached to the earth" means (a) rooted in the earth, as in the case of trees and shrubs; (b) imbedded in the earth, as in the case of walls or buildings; or (c) attached to what is so embedded for the permanent beneficial enjoyment of that to which it is attached."

13. Movable property has been defined in the General Clauses Act, 1897, as "property of every description except immovable property". Registration Act, 1908, defines movable property "to include property of every description, except immovable property, but including standing timber, growing crops and grass". It is wide enough to include all types of movable property other than what is expressly excluded. According to the General Clauses Act, 1897, things attached to or forming part of the land are treated as immovable property.

14. In the instant case, machineries are embedded, only on the

basis of the lease agreement and after the expiry of the lease period, attachment of the machineries on earth, can be removed and that there is no evidence on record to show that it is a permanent one. Even the lease agreement has a termination clause, by which, the lessee has an option to terminate the agreement, by giving a notice, not less than 15 days, before the end of the lease period.

15. Transfer of interest in an immovable property, requires mandatory registration under the Registration Act, 1908. Lease, mortgage or charges on immovable property also require registration. In the instant case, the Assessing Authority has recorded that the agreement was not executed, in a stamp paper and not registered and that the name and designation of the person, who had signed on behalf of the lessee, was not known and left blank.

16. Upon perusal of the same, the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore, has opined that the Assessing Authority has recorded a finding that the lease agreement was not executed, in a stamp paper, and was not a registered document.

17. The Tribunal has further stated that normally a lease exceeding a term of one year can be made only by a registered

instrument, and that where a lease is not registered, such a document cannot be admitted, in evidence for the purpose of proving the duration of the lease.

18. On the above principles of law, the Tribunal has held that the lease agreement, cannot be accepted and therefore, held that the Assessing Authority has rightly levied tax, under Section 3-A of the TNGST Act, 1959, on the lease rent receipt, for leasing out of machinery along with penalty. Considering the fact that the petitioner has not filed any return, reporting the same.

19. In **Duncan Industries Ltd v. State of UP & Ors.** reported in (2000) 1 SCC 633, ICI India Ltd executed an agreement of sale of its fertilizer business in favor of Chand Chhap Fertilizer and Chemicals Ltd. (CCFCL), which was renamed as, M/s.Duncans Industries Limited. Pursuant to an agreement, a deed of conveyance was executed by the said ICI India Ltd., in favour of CCFCL. When presented for registration, it was sent by the concerned Revenue Authority to the Collector for proper valuation. On estimation, stamp duty and penalty were levied on account of its being movable property.

20. The Hon'ble Supreme Court in **Duncan Industries Ltd's** case (cited supra) examined, as to whether, installation of the machinery was

intended to be temporary or permanent. On examination of the facts, the Hon'ble Supreme Court, concurred with the view of the High court, and held that machineries of the fertilizer plant which were attached to land, as immovable. While deciding the issue, the Hon'ble Supreme Court took into consideration the intention of the parties in embedding the machinery.

21. In **Duncan Industries Ltd's** case (cited supra), the Hon'ble Supreme Court found that the machineries, which formed the fertilizer plant, were permanently embedded, in the earth with an intention of running the fertilizer factory. On facts, it was also found that there was no intention to remove it. It was embedded in order to use it for the manufacture of fertilizer at various stages of its production.

22. In the instant case, lease agreement was not executed in a stamp paper and it was also not a registered document. After careful consideration of the material on record, all the authorities have categorically held against the assessee. Having given our due consideration to the submissions of the learned counsel, appearing for both parties, we are of the view that the conclusions arrived at, does not require any interference.

23. For the reasons stated, substantial questions of law raised by the appellant, is answered against the assessee. Hence, the instant Tax Case Revision is dismissed.

[S.M.K., J.] [V.B.S., J.]

15.02.2018

Index : Yes/No

Internet : Yes/No

skm/dm

To

The Deputy Commercial Tax Officer,
State of Tamil Nadu,
Anna Salai II assessment circle,
Chennai.

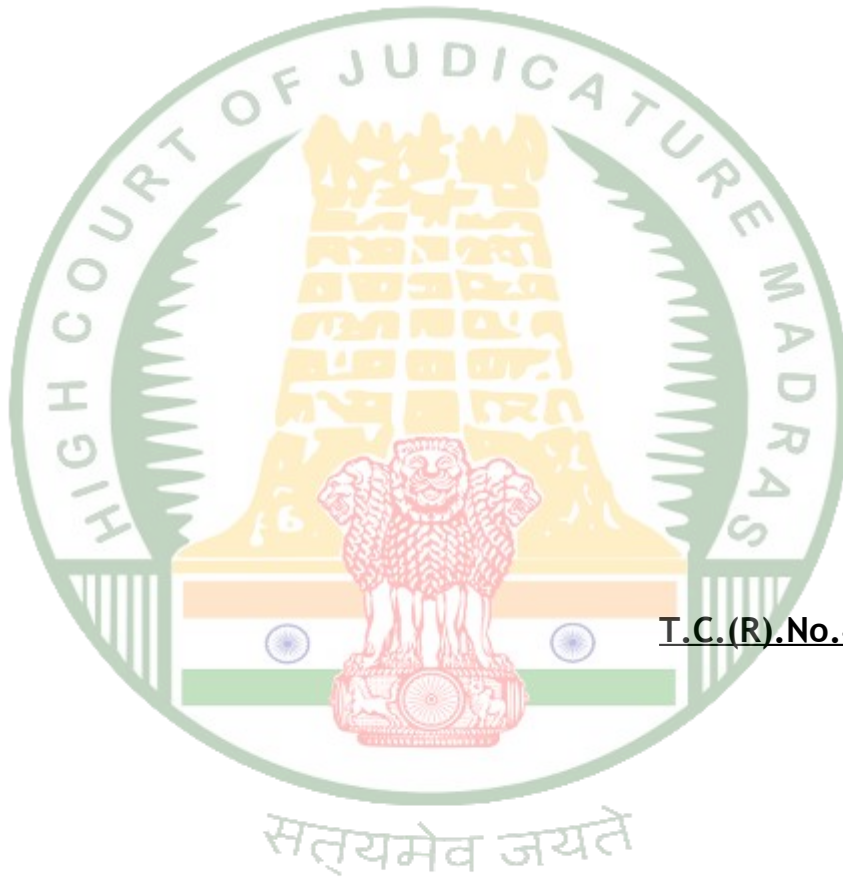
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