In the High Court of Judicature at Madras

Dated : 04.07.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

Writ Petition No.12027 of 2018
&
W.M.P.No.14031 of 2018

M/s.Adyar Ananda Bhavan Sweets
India Private Ltd.,
Represented by its Director
Mr.K.T.Srinivasa Raja
No.9, Mahatma Gandhi Road
Shastri Nagar, Adyar
Chennai - 600 020 ... Petitioner

Vs.

1.The Additional Chief Secretary/
Commissioner of Commercial Taxes
Chepauk
Chennai- 600 005

2.The Assistant Commissioner (ST)
Adyar Assessment Circle
No.46, Greenways Road
Chennai - 600 028 ...Respondent

Writ petition filed under Article 226 of The Constitution of India praying for the issuance of Writs of Certiorarified Mandamus calling for the records of the second respondent leading to the order dated 16.04.2018 in TIN 33260963983, relating to the petitioner and quash the same and consequently direct the second respondent to pass suitable revised assessment orders as per the orders of the first respondent dated 26.10.2016 passed in Letter No.D3/28946/2016.

For Petitioners : Mr.K.Ramu

For Respondents : Mr.vijay Narayan
Advocate General and

Ms.Narmadha Sampath
Additional Advocate General
Assisted by
Ms.G.Dhanamadhri
Government Advocate

ORDER

Heard Mr.K.Ramu, learned counsel for the petitioner and Mr.Vijay Narayan, learned Advocate General and Ms.Narmadha Sampath, learned Additional Advocate General, assisted by Ms.G.Dhanamadhri, learned Government Advocate appearing for the respondents.

2.The petitioner has filed this writ petition challenging the notice for recovery of tax and penalty issued by the second respondent dated 16.04.2018 demanding a total amount of Rs. 1,23,89,34,376/- being the tax and penalty payable under the provisions of Tamil Nadu Value Added Tax Act, 2006 for the Assessment years 2007-09 to 2010-11. The petitioner also seek for a consequential relief to direct the second respondent to pass suitable revised Assessment Order as per the orders passed by the first respondent dated 26.10.2016. The issue which caused some concern to this Court was effect of the order passed by the first respondent dated 26.10.2016. The operative portion of the said order reads as follows:

> “Therefore, appears that the provisions under Section 2(a), 7(1)(a), 7(1)(b), 8(1)(a), entry 51 Part 'B' of First Schedule to the Act and Entry 69 of Part C of the First Schedule to the Act and the factual matrix of the Petitioner would not permit the AO to assess the petitioner on the disputed issue at higher rate of tax @12.5%/14.5%.
>
> Hence, the opinion of the Assessing Officer that levy of rate of tax on sale of food products such as Meals (Rice), Tiffin items i.e Idli, Dosa, Pongal, Poori, Vadai, Sweets and Savories, Coffee, Tea, etc @ 12.5% despite the clarification issued for the assessment @ 2% in two instances as mentioned above and absence of registered trade mark for the goods is an

error apparent on the face of record both legally and factually. Therefore I request you to instruct the Assessing Officer to re-examine and consider revision of assessments for the years 2006-07 to 2013-14 u/s 84 of the Act, as requested by the petitioner as per law.”

3.The second respondent on receiving the said order sent a communication to the Deputy Commissioner (ST), Zone VII, Chennai- 6, dated 21.03.2018. On a perusal of the same it is clear that the second respondent was of the opinion that the said direction would cause prejudice to the Revenue. Therefore, he sought for appropriate instructions from his superior officer, the Deputy Commissioner (ST), Zone VII on the following lines:

1.Whether to cancel all the proceedings levying tax at higher rate of tax treating the goods sold as unbranded goods made by Adyar Ananda Bhavan based on the Additional Chief Secretary/Commissioner of Commercial Taxes letter.

2. Whether the arrears accured on revision may be eliminated.

3. Whether deviation proposals may be submitted to Deputy Commissioner Enforcement Chennai (East) based on the Additional Chief Secretary/Commissioner of Commercial Taxes reference.

The copies of BIU report, Deputy Commissioner (East) Enforcement proposals. High Court orders and Additional Chief Secretary/Commissioner of Commercial Taxes letter are submitted for perusal and orders.

4.As could be seen from the said communication, the second respondent, being the Assessing Officer, having been bound over by the directions issued by the Commissioner of Commercial Taxes vide his order dated 26.10.2016, probably with a view to ensure that the records are set straight has sent a communication dated 21.03.2018. In the meantime, the petitioner submitted a representation to the Joint Commissioner (CT), Chennai (East) Division, dated 03.05.2018 requesting withdrawal of the notice dated 16.04.2018 demanding tax and penalty and to issue revised Assessment order as per the direction issued by the Commissioner vide his order dated 26.10.2016. On receipt of the same, the Joint Commissioner addressed the Commissioner of Commercial Taxes vide communication dated 28.05.2018 after setting out all the factual details, quoting the relevant statutory provisions, requested the Commissioner for necessary guidance and instructions. The operative portion of the said communication reads as follows:

"....Hence, I submit that when the matter is being subjudice and pending before the Division Bench of the Hon'ble High Court, the instructions issued in the letter in No.D3/28946/2016 dated 26.10.2016 if followed will vitiate the legality of the issue and if any revision is made under Section 84 as instructed in the letter in No. D3/28946/2016 dated 26.10.2016 with respect to Tvl. Adyar Ananda Bhavan Sweets India Private Ltd it may pave way for disposal of the pending Writ Appeal in WA.No.1444/2015 against the revenue.

I submit the above facts for kind perusal of the Commissioner of Commercial Taxes and also humbly request that the instructions issued in the letter in No.D3/28946/2016 dated 26.10.2016 may kindly be considered for withdrawal, so that further action can be followed as per the decision of the Division Bench of the Hon'ble High Court in the pending Writ Appeal in WA.No.1444/2015 and Tvl. Adyar Ananda Bhavan Sweets India Private Ltd may be informed accordingly.

I further submit with reference to the note ninth cited, against the revision of assessments, made with respect to the dealer Tvl. Zaitoon Grills and Barbeque for the years 2013-2014 and 2014-2015, the dealer had filed Writ Petitions in WP.No.15561 of 2015 and WP.No.15624 of 2015 before the Hon'ble High Court of Madras. The Writ Petitions were already disposed and the action taken report is not submitted by the STO, Thiruvallikeni till date and time inspite of my request from last week and hence the delay in submitting the report to the Commissioner of Commercial Taxes.

5. Mr.M.Ravi, Joint Commissioner, Chennai East Division was present on all days when the writ petition was heard and he has stated in open court that there is no written reply received from the Commissioner of Commercial Taxes to his communication dated 28.05.2018. It was further stated that he was called for a meeting by the Commissioner in which a discussion took place and ultimately, the Joint Commissioner(ST), Chennai (East) Division, by proceedings dated 05.06.2018, issued instructions to the second respondent, which is to the following effect:

"In obedience to the above directions, the following instructions are issued for compliance and necessary action;

1. In respect of the assessments made for the years 2010-2011 and 2013-2014, the levy of tax at 12.5%/ 14.5% on the sale of branded Sweets and Savouries is not in order and the same is liable to be taxed at 4% from 01.04.2010 to 11.07.2011 under the notification issued in G.O.Ms.No.33, CTR (B2) dated 29.03.2011 and at 5% from 12.07.2011 under G.O.Ms.No.78, CTR (B2) dated 11.07.2011.

2. As seen from the revision of assessments made for the years 2007-2008 to 2010-2011 and 2013-2014, the revision of assessment was made under Section 27 of the TNVAT Act, 2006 and Penalty under Section 27(3) of the TNVAT were also levied at 150% of the differential tax due which is also not in order. The revisions in this case was not owing any escapement of turnover or wrong availment of Input Tax Credit warranting revision under Section 27(1)(a) of the TNVAT Act, 2006. The revisions made falls under Section 27(1)(b) of the TNVAT Act, 2006 pertains to assessment made at lower rate than at higher rate to which it has to be assessed. All the revisions were made by assessing the reported and deemed assessed turnover at 12.5%/14.5% in-lieu of 2% and such revisions on the basis of differential rate of tax will always fall under Section 27(1) (b) of the TNVAT Act, 2006 and not under Section 27(1)(a) of the TNVAT Act, 2006. The levy of penalty under Section 27(3) will always be applicable only to cases of revisions made under Section 27(1)(a) of the TNVAT Act, 2006 and not for the revisions made under Section 27(1)(b) of the TNVAT Act, 2006. As these revisions made falls under Section 27(1)(b) of the TNVAT Act, 2006, the levey of penalty made under Section 27(3) of the TNVAT Act, 2006 is not in order and the same has to be rectified.

3. With respect to levy of higher rate of tax on the sales of food drinks sold under the brand name, the assessing officer may await the decision of the Hon'ble High Court of Madras which is pending in Writ Appeal in WA.No.1444/2015 as similar issue is pending before the Hon'ble Court and the matter is subjudice at this stage.

The Assistant Commissioner (ST), Adyar Assessment Circle is informed accordingly and instructed to take action and report compliance early. The Assistant Commissioner (ST), Adyar Assessment Circle is also instructed not to take any coercive action on the isuue relating to sale of food and drinks under the brand name as the issue is pending before the Hon'ble High Court of Madras and is also informed that further course of action be taken based on the decision of the Hon'ble High Court of Madras."

6. Pursuant to such directions, now the second respondent Assessing Officer of the petitioner has passed revised Assessment Order dated 07.06.2018 dropping the levy of penalty. Thus, portion of the relief sought for by the petitioner has been granted by the respondent themselves.

7. The respondent was directed to file counter affidavit in the matter on account of certain observations made by this Court in its order dated 19.06.2018, wherein three questions were posed to the Department, pursuant to which an additional counter affidavit has been filed by the Commissioner of Commercial Taxes. In sum and substance, the stand taken in the counter affidavit is that the order passed by the Commissioner dated 26.05.2016 is not binding upon the Assessing Officer and the Commissioner has not in any way usurped the powers of the Assessing Officer as statutory authority. The 1st respondent has stated that the clarification which has been made in the order dated 26.10.2016 have no legal force or are in no way binding on the Assessing Officer and the Department is of the view that food and drinks sold in establishments having trademark is branded in nature and should be taxed accordingly.

8. Though such a stand has been taken by the Commissioner, unfortunately his officers have not understood the matter in the manner now projected by the Commissioner. The second respondent/ Assessing officer understood the order as a clarification or in other words as a positive direction. However, the Assessing Officer taking note of the fact that the issue is sub-judice, had addressed the Deputy Commissioner seeking clarification vide his letter dated 21.03.2018 in which he specifically asked for guidance whether to cancel all the proceedings levying penalty at higher rate and treating the goods sold by the petitioner as unbranded goods. He wanted specific direction as to whether the arrears accrued on revision may be eliminated and whether deviation proposal may be submitted to the Deputy Commissioner, Enforcement Chennai (East) based on the communication of the Additional Chief Secretary/Commissioner of Commercial Taxes (dated 16.10.2016). Further, copies of the Business Intelligence Unit report, Deputy Commissioner (East) Enforcement Proposals, High Court orders and order of the Additional Chief Secretary/Commissioner of Commercial Taxes were enclosed. Thus, I reject the stand taken by the Commissioner in the additional Counter affidavit dated __.06.2018 as an afterthought as the Department has understood the order dated 26.10.2016 as a positive direction for implementation.

9. The manner in which the order dated 26.10.2016 is sought to be explained in the additional counter affidavit by the

Commissioner is wholly unacceptable, in the sense that the order should be read as a whole and not in a truncated fashion as done in the counter affidavit. Before looking into what has been said in the last paragraph of the order, it is necessary to read the entire narration, especially the unnumbered paragraph before the last paragraph. It is not only this Court has understood the order to the said effect, it is the subordinate officers of the Commissioner themselves have understood the same in such fashion. The Assistant Commissioner understood the order to be a positive direction and he was under the prima facie opinion that entire levies need to be cancelled. Apart from that, the next higher level officer, namely Joint Commissioner also did not concede to the direction contained in the order dated 26.10.2016. In the preceding paragraph of this order, I have referred to the portion of the communication wherein the Joint Commissioner has specifically stated that the order dated 26.10.2016, if followed will vitiate the legality of the issue. Despite that, it appears that on a oral direction given by the Commissioner, the Joint Commissioner had issued directions to the Assistant Commissioner on 05.06.2018 and consequently, the Assistant Commissioner has passed revised Assessment Orders. Thus, as of now the Department supports the stand taken by the dealer. On account of the departmental action, the petitioner is entitled to succeed.

10. As pointed out earlier, part of the prayer sought for by the petitioner has been granted by the Department inasmuch as revised Assessment orders have been passed on 07.06.2018. Consequently, the impugned demand cannot survive any longer. This is not on account of any interpretation of the statute or applying a legal principle, but solely attributable to the orders passed by the Commissioner in favour of the assessee.

11. Thus, this writ petition is allowed to the extent indicated above. No costs. After the order was dictated, learned counsel for the petitioner submitted that the respondent may issue a fresh demand, pursuant to the impugned revised Assessment orders. Accordingly, the second respondent is directed to issue fresh demand notice pursuant to the revised Assessment Orders. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

1.The Additional Chief Secretary/
Commissioner of Commercial Taxes
Chepauk
Chennai- 600 005

2.The Assistant Commissioner (ST)
Adyar Assessment Circle
No.46, Greenways Road
Chennai - 600 028

+1cc to the Special Government Pleader Sr.43707
+1cc to Mr.K.Ramu, Advocate Sr.43313

WP.No.12027 of 2018

srg 13/07/2018