IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.06.2018

CORAM

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.31935 & 31936 of 2013 &
M.P.Nos.1 of 2013 (2 MPs)

M/s.Tamil Nadu State Marketing Corporation Ltd.
4th Floor, CMDA Tower-II,
Gandhi IRwin Bridge Road
Egmore, Chennai - 600 008
Represented by its Managing Director
Shri T.Soundiah ... Petitioner in both WPs

v.

1.The Chief Commissioner of Income Tax
Chennai - III
124, MG Road
Chennai - 34

2.The Commissioner of Income Tax
Chennai III
124, MG Road
Chennai - 34

3.The Joint Commissionr of Income Tax
Company Circle III (1)
Chennai - 34

4.The Assistant Commissioner of Income Tax,
Company Circle III(1),
Chennai-34. ... Respondents in both WPs

W.P.No.31935/2013 : Writ Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records of the 2nd respondent in PAN/GIR : AAACT296AP and quash the impugned notice in C.No.3033/19/CIT.III/2013-14, dated 30.10.2013 for the assessment year 2004-05.

W.P.No.31936/2013 : Writ Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records of the 2nd respondent in PAN/GIR :

AAACT296AP and quash the impugned notice in C.No.3033/20/CIT.III/2013-14, dated 30.10.2013 for the assessment year 2005-06.

For Petitioner : Mr.Vijayaragavan
Asst. by Mr.R.Venkatanarayanan

For Respondent : Mr. J.Narayanaswamy
Asst. by Mr. Raj Kumar Jhabkah

COMMON ORDER

Heard Mr.Vijayaragavan, learned counsel, assisted by Mr.R.Venkatanarayanan learned counsel for the petitioner and Mr. J.Narayanaswamy, learned Senior Standing Counsel assisted by Mr. Raj Kumar Jhabkah for the respondents.

2. The petitioner is a State owned Corporation, viz., Tamil Nadu State Marketing Corporation Limited, which has been granted the exclusive privilege for wholesale and retail distribution of Indian Made Foreign Liquor (IMFL) and Beer in the State of Tamil Nadu. Challenge in these writ petitions are to the notices issued by the 2nd respondent under section 263 of the Income Tax Act, 1961. Notice for the assessment year 2004-05 is impugned in Writ Petition No. 31935/2013 and notice for the assessment year 2005-06 is impugned in Writ Petition No.31936/2013 Since the facts are identical, both the writ petitions were heard together and disposed of by this common order.

3.1 The 2nd respondent has issued the impugned notices on the ground that he has reason to believe that the order of reassessment is erroneous and prejudicial to the interest of Revenue inasmuch as the diversion of the income by the assessee to the extent of entire additional vend fee, since the retrospective Government Order appropriating the income of the assessee mentioned the entire fee in the order and such order was passed after the close of the financial year. Thus, the 2nd respondent proposed that the enhanced additional vend fee has to only be disallowed in the assessment order dated 15.12.2011 instead of the additional vend fee and hence, the assessment order is liable for revision.

3.2 The 2nd respondent would justify his stand by stating that as per Section 263 of the Act, if the 2nd respondent considers an order to be erroneous and prejudicial to the interest of Revenue, is entitled to invoke the power and the impugned proceeding being only a show cause notice it is well open to the petitioner to submit his reply and raise all contentions before the 2nd respondent and the writ petition challenging the same is not maintainable.

3.3 This preliminary objection regarding maintainability was pointed out by the learned Standing Counsel for the Revenue and also pointed out in the counter affidavit filed by the 2nd respondent.

4. After elaborately hearing the learned counsel for the parties and carefully perusing the materials placed on record, this court is fully convinced to hold that the impugned notices are without jurisdiction. Such conclusion is supported by following reasons, for which purpose I refer to the facts pertaining to the assessment year 2004-05 (W.P.No.31935 OF 2013).

5.1 The petitioner for the assessment year 2004-05 filed return of income on 01.11.2004 admitting a total income of Rs.3,65,84,230/- and subsequently a revised return of income was filed on 30.03.2005 admitting an income of Rs.4,65,43,830/-. During the said year, the petitioner claimed deduction of a sum of Rs.435,17,13,674/- as Special Privilege Fee (SPF) in the profit and loss account for the year ended 31.03.2004. The petitioner adopted the rate of SPF on the basis of G.O.Ms.No.338, dated 29.10.2004 enhancing the rate from Rs.29.78 to Rs.43.37 per bulk litre with retrospective effect from 29.11.2003.

5.2 The petitioner's Assessing Officer, viz., the 4th respondent, selected the case for scrutiny and completed the assessment under section 143(3) of the Act on 15.12.2006 determining the total income at Rs.7,09,84,025/- and the deduction of SPF was allowed as claimed by the petitioner. Subsequently, the 4th respondent reopened the assessment under section 147 of the Act by issuing notice under section 148 on 10.02.2011 in response to which, the petitioner filed reply dated 07.03.2011 requesting the Assessing Officer to treat the return of income originally filed as a return filed in pursuance to notice under section 148 and also requested to furnish the reason for reopening the assessment.

5.3 It appears that the Assessing Officer without furnishing the reasons recorded for reopening of assessment, served a notice under section 143(2) of the Act, dated

04.05.2011 and passed reassessment order on 15.12.2011. While completing the reassessment, the Assessing Officer disallowed a sum of Rs.232,64,49,342/- being the difference in SPF paid and admissible and raised a demand of Rs.1,72,94,81,300/-. The dis-allowance of the SPF amounting to Rs.232,64,49,342/- was on the ground that G.O.Ms.No.338, dated 29.10.2004, was not prevailing as on 31.03.2004 as well as G.O.Ms.No.49, dated 19.02.2004 was not cancelled prior to 31.03.2004 and that the liability on account of enhanced SPF did not accrue as on 31.03.2004 and the liability is not in the nature of statutory liability but in the nature of contractual payment to be allowed under section 43B of the Act and that the charging of SPF on the basis of per bulk litre basis and increasing it every year on the basis of the Government Order is not justifiable, the assessee has adopted methodology to take out profits in the name of SPF before arriving at taxable profits and the tax planning made after the end of the financial year so as to reduce profits.

5.4 The petitioner's liability to pay SPF is as per the provisions of the Tamil Nadu Prohibition Act, 1937, and the Tamil Nadu Indian Made Foreign Spirit (Supply by wholesale), Rules, 1983 (Rules) and it is a statutory liability and such liability will be at the rates prevailing/notified under Rule 15(3) as applicable for the period of sale and even if the Government notifies the rate beyond the previous year, the liability for the year will be based on such notified amount only and very fact that the amount is notified by the Government beyond the previous year will not alter the fact that for the year the rate as amended will apply and the deduction should be on the basis of amount notified by the Government as applicable for the period, even if the notification came beyond the previous year. Further, the petitioner contended that under section 54(2-A) of the Prohibition Act, the Government has issued notification granting permission with retrospective effect.

5.5 The petitioner's Assessing Officer rejected the submission of the petitioner and adopted SPF as Rs.19.29 per bulk litre for the period 01.04.2003 to November 2003 and Rs.19.37 for December 2003 to February 2004 and Rs.29.78 for the period of March 2004 and worked out the dis-allowance of the SPF at Rs.232,64,49,342/-.

5.6 Aggrieved by the said order, the petitioner preferred appeal before the Commissioner of Income Tax (Appeals). The CIT (Appeals), vide order dated 25.05.2012, confirmed the dis-allowance of claim of SPF claimed on the basis of G.O.Ms.No.338, dated 29.10.2004, which was issued after the end of the relevant financial year, however, directed the Assessing Officer to adopt the uniform rate of Rs.19.37 on the basis of G.O.No.336, dated 27.11.2003 for the period 01.04.2003 to 28.11.2003 and Rs.29.78 for the period 29.1.1.2003 to 31.03.2004 on the basis of G.O No.49, dated 19.02.2004.

5.7 Aggrieved by the same, the petitioner filed appeal before the Income Tax Appellate Tribunal, which allowed the petitioner's appeal and dismissed the appeal filed by the Department by following the petitioner's own case in ITA Nos.962/2010 & 964/Mds/2011, dated 18.09.2012 for the assessment year 2007-08 and 2008-09. The order passed by the Tribunal was given effect to after which the impugned notice has been issued by the 4th respondent .

6. On a perusal of the order passed by the Tribunal, it is seen that the Tribunal considered the question as to whether the payment of Special Privilege Fee as ordered by the Government by issuing various Government Orders some of which have been issued beyond the end of the relevant financial year and considered the order in the assessee's own case in I.T.A.Nos.962 of 2010 and 964/Mds/2011 and held that from the language incorporated in the Government Order dated 20.07.2007, the word 'substituted' implies that for all intents and purposes the earlier Special Privilege Fees rate no more exits and it stood 'effaced'. It is further pointed out that there can be no dispute between the parties that this liability is not allowable as a provision for the previous year ended on 31.03.2007, it had to be allowed qua the year ended on 31.03.2008 when actual payment was effected. Therefore, the Tribunal held, having allowed the assessee to follow the very methodology for very many years, it is hardly justifiable for the Revenue to force the assessee for changing its assessment year in hand as it will only result in creation of artificial disturbance and levy of tax. Therefore, the Tribunal concluded that the 'Rule of consistency' in such a case, cannot be given a go bye unless it contravenes a legal provision or the assesses's claim is apparently unallowable by its very nature.

7. So far as the current assessment years are concerned, the Tribunal took note of the earlier decision and pointed out that for the relevant assessment years similar Government Orders have been passed by the State Government enhancing the Special Privilege Fees from retrospective date and the case of the assessee is squarely covered by the order passed by the Coordinate Bench of the Tribunal.

8. Pursuant to the order passed by the Tribunal, the Assessing Officer has given effect to the order and passed an order on 24.12.2012, after which, the impugned notice came to be issued on 30.10.2012.

9.1 In my considered view, interpretation sought to be given by the 2nd respondent in the impugned notice is in effect sitting in judgment over the decisions of the ITAT, which analysed the effect of the Government Orders, the language adopted by it and held that the Special Privilege Fee which was revised by subsequent Government Orders substitutes the rates fixed in the earlier Government Order, therefore, it is untenable on the part of the Revenue to contend that they will consider as to whether the claim of additional vend fee amounting to Rs.435,17,13,674/- is admissible or not. The fundamental error which has crept in on account of usage of wrong terminology. The Prohibition Act and the Rules framed thereunder have fixed a fee payable by the petitioner corporation to the Government and this is termed as the Special Privilege Fee payable on account of special status given to the Corporation with regard to distribution of sale of IMFL in the State of Tamil Nadu.

9.2 The 2nd respondent appears to have used the word 'additional vend fee' on account of the difference between the fee payable by the assessee at the first instance when G.O.Ms.No.336 was issued and subsequent increase effected by G.O.Nos. 48 and 338.

9.3 As pointed out by the ITAT, the Government Order issued subsequently substituting the SPF as fixed in the earlier order, therefore, the proper method of reading the Government Order is to read the substituted figure as the SPF. Therefore, the terminology adopted by the 2nd respondent in the impugned notice as 'additional vend fee' is incorrect.

10. Mr.J.Narayanasamy, learned counsel for the Revenue contended that as against the order of the Tribunal, Tax Case Appeal has been filed by the Department and they are entitled to contest as to whether the order giving effect to the order of the Tribunal for the entire claim is justified or not, for which the impugned notice has been issued.

11. If the said submission by the Revenue is permitted, this would clearly contravene Section 263 (1) of the Act. This is

so because the ITAT has considered and decided the effect of the subsequent Government order revising the SPF. Therefore, the issue which has been considered and decided by the Tribunal in the assessee's own case cannot be sought to be reopened by exercise of powers under section 263(1) of the Act.

12. Mr. J.Narayanaswamy, learned counsel for the Revenue referred to explanation to section 263 (1), particularly, clause A under the said explanation and submitted that the Commissioner has power to invoke the said provision, if an order has been passed without making enquires or verification. This argument is not sustainable on account of undisputed facts in the instant case.

13. The Assessing Officer enquired and passed an assessment order allowing the relief. Subsequently the assessment was reopened and an order was passed. This order was tested and ultimately a decision was arrived in favour of the assessee. The only issue to be decided is Special Privilege Fee payable by the petitioner. This has been dealt with by the Tribunal in the assessee's own case for the current assessment year as well as earlier and held that the subsequent Government orders will have to be taken into consideration for arriving at the SPF payable for the said year. Thus, in my considered opinion, no further enquiry is required or any verification is required as only the legal interpretation to be given is to the effect of the subsequent Government Orders which have been held to be substitutive in nature, therefore deemed to be retrospective with effect from issuance of the first Government Order.

14. Thus for the above reasons, I hold that the impugned show cause notices are without jurisdiction and not sustainable in law. In the result the writ petitions are allowed and the impugned notices are quashed. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

Rj

To

1.The Chief Commissioner of Income Tax
Chennai - III, 124, MG Road
Chennai - 34

2.The Commissioner of Income Tax
Chennai III, 124, MG Road
Chennai - 34

3.The Joint Commissionr of Income Tax
Company Circle III (1)
Chennai - 34

4.The Assistant Commissioner of Income Tax,
Company Circle III(1),
Chennai-34.

+2cc to Mr.J.Narayanaswamy, Advocate Sr.40487, 40488

W.P.Nos.31935 & 31936 of 2013 &
M.P.Nos.1 of 2013 (2 Mps)

ss[co]
srg 06/07/2018