

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 13.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

W.P.Nos.32077 and 32078 of 2004
and
W.P.M.P.Nos.38851 and 38852 of 2004

Orders reserved on 08.02.2018	Orders pronounced on 13.03.2018
----------------------------------	------------------------------------

M/s.Chennai Polymers (P) Ltd.,
B-7-3, Gemni Parsn Apartments,
599, Anna Salai, Chennai - 6.

.. Petitioner in
both W.Ps.

Vs.

The Commercial Tax Officer,
T.Nagar (East) Assessment Circle,
Chennai.

.. Respondent in
both W.Ps.

COMMON PRAYER: Writ Petitions are filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari to call for the records of the respondent in TNGST No.1561195/2000-01, dated 31.08.2004 and TNGST No.1561195/2001-02, dated 15.09.2004 respectively and quash the same.

For Petitioner : Mr.N.Sriprakash
in both W.Ps. for Mr.Adithya Reddy

For Respondent : Mr.M.Hariharan,
in both W.Ps. Additional Government Pleader.

COMMON ORDER

Since the issue involved in both the writ petitions, is one and the same, they are taken up for hearing together and disposed of by this common order.

2.The petitioner is a trader in plastic raw materials and registered as a dealer on the file of the respondent under the provisions of the Tamil Nadu General Sales Tax Act, 1959 [TNGST

Act] and the Central Sales Act, 1956 [CST Act].

3.The petitioner has challenged the assessment orders passed by the respondent under the provisions of TNGST Act for the assessment years 2000-2001 and 2001-2002. Though, the petitioner has an alternative remedy as against the impugned assessment orders by preferring an appeal, the petitioner has not availed the same and filed the writ petitions on the ground that the impugned orders are patently erroneous and bad in law, apart from being arbitrary and without any material evidence and that apart, as there is no Presiding Officer in the Tamil Nadu Taxation Tribunal, they have approached this Court by way of these writ petitions.

4.It may not be necessary for the Court to test the correctness of these submissions nor relegate the petitioner to avail the alternative remedy available under the TNGST Act, as the writ petitions were filed in the year 2004 and have been pending for all these years and therefore, the Court proceeded to hear the matter on merits and such course was agreeable to the learned counsel appearing for the petitioner.

5.The facts leading to the impugned assessment orders are briefly stated here-under:

(i)The place of business of the petitioner was inspected by the Enforcement Wing Officer, Chennai - 4, on 20.01.2013, 22.01.2003 and 01.02.2013. The result of the inspection was notices dated 25.02.2004 and 05.03.2004, proposing to revise the assessment for the relevant years, apart from levying penalty. The petitioner was given 15 days time to file their objections and the petitioner filed objections, dated 20.04.2014. After considering the objections, the impugned assessment orders were passed on 31.08.2004 and 15.09.2004, respectively.

(ii)The allegation against the petitioner was that he was a del credere agent cum commission agent of M/s.Haldia Petrochemicals Limited, who are registered dealers under the TNGST Act, having their registered office in West Bengal. They are manufacturer of plastic granules such as HDPE, LLDPE, Poly Propylene and chemicals. It was stated that M/s.Nandhini Polymers, Pollachi, had effected interstate purchases of plastic granules through the petitioner during the period 2000-2001 and 2001-2002 and on verification of the records, it was found that the dealer M/s.Nandhini Polymers have not accounted for the purchases and paid taxes due on the first sales in Tamil Nadu. Further, the said dealer is not existing in Pollachi Assessment Circle and enquiries revealed that no such business was carried on and whereabouts of the dealer is not known.

(iii) Further, it is stated that on verification, it was found that the Registration Certificate of M/s.Nandhini Polymers both under the TNGST Act and CST Act were cancelled by the concerned Commercial Tax Officer and they have not renewed their Registration Certificate. Thus, it was stated that the person, thought had taken the registration had disappeared, not transacted any goods, not effected any sale of goods and not accounted for the interstate purchases. It was further stated that every commission agent/broker/del credere agent/auctioneer or other mercantile agent are required to observe the conditions stipulated under the rules and the petitioner has not complied with the conditions. Further, by referring to the agreement entered into between the petitioner and M/s.Haldia Petro Chemicals Limited, it was stated that it contemplates that the agent is responsible for the maintenance of records and payment of sales tax and other statutory levies in the event of default by the customers/buyers. Further, the petitioner has arranged direct supply of goods and invoices raised by Haldia Petrochemicals Limited, West Bengal, for the dealers who are found to be defrauding the exchequer by not reporting the taxable turnover, no business actually done and the proprietor was found to be not available.

(iv) The petitioner in their objections, dated 20.04.2004, stated that they are only a canvassing agent of M/s.Haldia Petrochemicals Limited and they procured orders from the buyers/customers in Tamil Nadu and forwarded those intents to M/s.Haldia Petrochemicals Limited, who effected direct supply to the actual buyers and collects payments from the buyers and on receipt of payment, commission is paid by M/s.Haldia Petrochemicals Limited to the petitioner, as they are del credere agent. Further, it was stated that the petitioner never takes delivery of goods, not handling the goods and no liability can be fixed on the petitioner. The objections raised by the petitioner were overruled and the proposal in the notices, dated 25.02.2004 and 05.03.2014, was confirmed and the impugned assessment orders were passed.

6.Mr.N.Sriprakash, learned counsel, representing Mr.Adhithya Reddy, learned counsel appearing for the petitioner, contended that there is no material evidence to fix tax liability on the petitioner, there is no evidence that the petitioner received goods and effected payment on behalf M/s.Nandhini Polymers and the petitioner never handled the goods and never accepted that they handled the goods, as they are only canvassing agent of M/s.Haldia Petrochemicals Limited and they are genuine transactions. Merely for the reason that M/s.Nandhini Polymers, is not traceable, there is no justification in fixing the liability on the petitioner. The said M/s.Nandhini Polymers was a registered dealer, carrying on business and registration was

granted on 28.06.2000 and was renewed for the period 2000-2001 and cancelled on 01.04.2002, as no further business activities were done by them.

7.The learned counsel appearing for the petitioner has drawn the attention of this Court to various portions of the notices, dated 25.02.2004 and 05.03.2004 and the impugned assessment orders, dated 31.08.2004 and 15.09.2004 and strenuously contended that the notices and impugned orders are replete with inconsistencies, devoid of any evidence to fix liability on the petitioner and no reasonable person could come to a conclusion on the material available, as has been done by the respondent in the impugned assessment orders. It is submitted that the respondent has accepted that the lorry receipts were produced, seeks to disregard the sale on flimsy grounds and having accepted the lorry receipts produced, the respondent states that the petitioner has not produced any proof or evidence for delivery of goods at the said address at Pollachi and the same is an inconsistent statement as found in the impugned orders. Therefore, it is submitted that the show cause notices are absolutely vague with bundle of inconsistency and contradictory statements and therefore, the show cause notices are liable to be rejected.

8.Further, it is submitted that the show cause notices were issued with the closed mind and preconceived notion and such show cause notices have to be held as bad in law and no action can be taken pursuant to such show cause notices. In support of such contention, reliance was placed on the decision of the Hon'ble Supreme Court in Oryx Fisheries Private Limited v. Union of India and others reported in (2010)13 Supreme Court Cases 427.

9.Placing reliance on the decision of the Hon'ble Supreme Court in Joseph Vilangandan v. The Executive Engineer, (PWD), Ernakulam and Others reported in (1978)3 Supreme Court Cases 36, it is submitted that when the show cause notices are not clear, no adverse orders could be passed against the dealer, based upon such unclear and vague show cause notices. Further, it is submitted that though the goods might have moved from West Bengal to Chennai and then proceeded to Pollachi to be delivered to the buyer, the stop over of the goods at Chennai can have no effect to take the transaction outside the purview of an interstate transaction. In support of transaction, reliance was placed on the decision of the Division Bench of this Court in Chesebrough Pond's Inc. v. State of Tamil Nadu reported in (1983) 52 STC 164 (Mad).

10.The learned counsel appearing for the petitioner submitted that on the above grounds, the impugned assessment

orders deserve to be set aside.

11.Mr.M.Hariharan, learned Additional Government Pleader, appearing for the respondent, has referred to the del credere agency agreement and various clauses contained therein and submitted that fixing of liability on the petitioner is just and proper and the impugned assessment orders call for no interference. Further, it is submitted that non-compliance of Rule 26(6)(a) and (b) is sufficient to hold the petitioner liable for payment of the taxes and penalty, as demanded. Therefore, as per the agreement condition, the petitioner is bound to pay the tax. Further, it is submitted that in the reply given by the petitioner to the show cause notices, they have accepted that they have handled the goods and having taken such a stand, contrary stand cannot be taken in these writ petitions. Further, the plea that there are contradictions in the show cause notices and the averments were vague, were never raised by the petitioner, in their reply dated 20.04.2004 and these points are canvassed for the first time before this Court. Further, it is submitted that whether the goods went to Pollachi and received by M/s.Nandhini Polymers, is a factual issue, which cannot be adjudicated by this Court in a writ petition. Reliance was placed on the decision of the Hon'ble Division Bench, dated 25.11.2002, in W.P.Nos.19262 to 19264 of 2000 [Parikh Metal Corporation v. The Commercial Tax Officer, Peddunaickenpet South Circle, Chennai and Others], in which, the terms of the agreement were interpreted and it was held that the dealer therein has not acted as an agent, but there is only the principal to principal relationship and the said decision will apply to the case on hand. With the above submissions, the learned Additional Government Pleader, sought to sustain the impugned assessment orders.

12.Heard the learned counsel appearing for the parties and carefully perused the material placed on record.

13.The factual position which emerges from the material papers are that the petitioner was both consignment agent and del credere agent of Mr.Haldia Petrochemicals Limited and an agreement to the said effect was entered into on 01.07.2002. Having accepted that the petitioner is a del credere agent, they are bound to comply with the instructions as per Section 40(1) of the TNGST Act read with Rule 26(6)(a) of the Rules. Admittedly, the petitioner has not complied with or observed any of the conditions as contemplated under the Rule. M/s.Nandhini Polymers, who was a registered dealer on the file of the Commercial Tax Officer, Pollachi (Rural), did not account for the purchases nor paid taxes. On enquiry, it was found that M/s.Nandhini Polymers, was a non-existing dealer and no business activities were carried on, in the premises, which they had

furnished as the registered office and ultimately the Registration Certificate granted to M/s.Nandhini Polymers was cancelled on 01.04.2002. As a del credere agent, the petitioner has to sign the indent order acceptance and send the same to M/s.Haldia Petrochemicals Limited, who has to raise delivery challans and invoice on the customers for sale of the products and in the event of invoice being drawn by the principal directly on the customer are handed over to the del credere agent for the purpose of collection and due payment who undertakes not to part with the said delivery order/invoice and other documents, till the payment due in respect of the said invoices are collected by the del credere agent, who shall indemnify and keep indemnified at all times the principals from any damages, deterioration or loss caused while the said product is in transit. The following clauses of the del credere agency agreement, dated 01.07.2002, would be relevant for the purpose of these cases and the same are extracted hereunder:

"1.OBLIGATIONS:

B. The Del Credere Agent undertakes to act as its Del Credere Agent subject to the terms and conditions hereinafter contained and policy/procedures/guidelines which may be prescribed by HPL from time to time for marketing of the said Product in the area as aforesaid by using all its best efforts.

2.PROCEDURE:

B. HPL shall make available to the Del Credere Agent, a format of indent/order for securing order from the Customer. The Customer shall fill in and sign the indent/order acceptance and submit to HPL directly or through The Del Credere Agent. HPL shall raise necessary delivery challans and invoices and other documents on the customers for the sale of the said Product. In the event of bills/invoices drawn by HPL directly in favour of the Customer/Buyer are handed over to the Del Credere Agent for the purpose of collection and due payment. The Del Credere Agent undertakes not to part with the said delivery order/invoices and other documents till the payment due in respect of the said invoices are received/collected by the Del Credere Agent. The Del Credere Agent shall indemnify and keep indemnified at all times HPL from any damages, deterioration or loss caused while the said Product is in transit.

3.BANK GUARANTEE/CASH DEPOSIT:

A. The delivery of the said Product by HPL to the customer will be effected upon furnishing of requisite Bank Guarantee (in the proforma acceptable to HPL) and

making cash Deposit by the Del Credere Agent, as required.

B. The amount of the Bank Guarantee and cash deposit to be furnished/deposited for the next quarter in advance shall be increased or decreased at the discretion of HPL based on the assessment of the estimated volume of the business.

5.REALISATION:

A. The Del Credere Agent guarantees and undertakes that the buyers of the said Product will fulfill its obligations to HPL in respect of the sales effected or the said Product delivered to the customers/buyers. The Del Credere Agent further guarantees the payment of the said price due and payable for the said Product and in the event of the default by the buyers or the customers in paying the prices within the due date. The Del Credere Agent undertakes to pay the same and/or HPL shall have the right to realize the price for the said Product from the cash deposit/encash the Bank Guarantee.

13.RULES AND REGULATIONS:

The Del Credere Agent will comply with the requirements of all the statutes, laws and regulations for the sale of the said product to the customers and shall exclusively be liable for the collection and payment of sale proceeds of said Product including all taxes, dues and levies (whether sales tax, central excise or octroi, etc.) in respect of the sale of the said Product effected by HPL to the customers. The Del Credere Agent shall at all times indemnify and keep HPL indemnified from and against all taxes, interest, penalty and all costs, charges and expenses of whatsoever nature".

14.The methodology adopted in the transactions have been brought out in the impugned assessment orders. The specific finding is that the payments stated to have been made by M/s.Nandhini Polymers, Pollachi by demand drafts were untraceable or from financially incapable persons, which were forwarded to Haldia Petrochemicals Limited. The petitioner who is said to have procured orders from M/s.Nandhini Polymers for being supplied by M/s.Haldia Petrochemicals Limited, could not prove by documents, the existence of the said dealer, M/s.Nandhini Polymers. The petitioner has clearly breached the terms and conditions of the del credere agreement in ascertaining the financial status of the buyer. This is clear from the stand taken by the petitioner as regards their role

played in the transaction. Thus, in the absence of any records produced by the petitioner, the respondent was fully justified in holding that the goods were handled by the petitioner and the ownership and domain over the goods always vested with the petitioner.

15. The petitioner does not deny the fact that they are del credere agent and commission agent of M/s. Haldia Petrochemicals Limited. If that be the factual position, the petitioner was required to comply with Rule 26(6)(a) and (b) of the TNGST Rules, 1959. Having not complied with such a stipulation, the petitioner cannot wriggle out of the transaction by raising a specious plea that they never handled the goods and they have absolutely no control over the transaction.

16. So far as the lorry receipt is concerned, though it contains the signature and seal, there is no address. The despatch of the goods by M/s. Haldia Petrochemicals Limited was only after payment was made by the petitioner and the domain over the goods remained with the petitioner, as the despatch was after receipt of the payment. Interestingly, in the indent, the petitioner buyer code has been noted/mentioned and this is sufficient to hold that the petitioner had domain over the goods and the right over the goods always vested with the petitioner.

17. It is hard to believe that the petitioner was unable to produce any documents to prove delivery of goods at Pollachi, especially, when the position of the petitioner who stated to have procured the supply order. Therefore, the respondent was right in holding that the petitioner received the goods in the name of a non-existing buyer and disposed of it as his own goods. Further, as pointed out earlier, if the transaction done by the petitioner was as a del credere agent, they ought to have maintained and furnished particulars and records as per Rule 26(6)(a) and (b) of the TNGST Rules, 1959 and claimed exemption thereon. Further, they had admitted before the Assessing Officer that they had handled the goods. Thus, the Court is fully satisfied with the finding recorded by the Assessing Officer that the petitioner was liable for payment of the tax is fully justified and it is clear that the transaction on hand is one of outright suppression of sales. Though, under Clause 2(B) of del credere agreement, dated 01.07.2002, states that the customer shall fill in and sign the indent/order acceptance and submit to HPA directly or through the del credere agent, the petitioner buyer's code has been mentioned, which is sufficient to hold that the petitioner remained as the owner of the goods. Furthermore, in terms of Clause 13, the del credere agent was required to comply with the requirements of all the statutes, laws and regulations for the sale of the product to the customers and shall exclusively be liable for the collection and

payment of sale proceeds of the products including the taxes, dues and levies (whether sales tax, central excise or octroi, etc.) in respect of the sale of the said product effected by HPL to the customer. Further, the petitioner shall at all times indemnify and keep HPL indemnified from and against all taxes, interest, penalty and all costs, charges and expenses of whatsoever nature. All these factors work against the petitioner and directly hits at them to disregard the defence taken by them to escape from the rigour of law.

18.The decision in the case of Joseph Vilangandan v. The Executive Engineer, (PWD), Ernakulam and Others reported in (1978) 3 Supreme Court Cases 36, is clearly distinguishable on facts, as in the said case, the question was with regard to the validity of an order passed by the Executive Engineer, debarring the appellant therein, from taking any further contract under the Buildings and Roads Division. The Hon'ble Supreme Court pointed out that the show cause notice, issued prior to debarment, was only for a particular work and therefore, the order debarring the said appellant from any further contract, was held to be unsustainable, as there was no clear notice about debarment from further contract.

19.The decision in Oryx Fisheries Private Limited v. Union of India and others reported in (2010)13 Supreme Court Cases 427, was cited to substantiate the contention that the show cause notices are improper and with closed mind and bundle of inconsistencies. The factual position in the instant case has been set out in the preceding paragraphs and the Court finds that there is no inconsistencies, but the facts have been brought out in the show cause notices cogently and it is the petitioner, who was not in a position to offer a proper explanation. What is important to note is that the petitioner candidly admitted that they have handled the goods, but, now seeks to advance a different version, as if they have not handled the goods. Therefore, the said decision has no application to the facts of the instant case.

20.The decision in the case of Chesebrough Pond's Inc. v. State of Tamil Nadu reported in (1983)52 STC 164 (Mad) was cited for the reason that if there is a stop over of the goods in between before it is delivered to the dealer does not take away the character of the transaction as an interstate sale. In the said case, the assessee was a manufacturer of face powder at Madras and had branches at Bombay and other places. The Canteen Stores Department, Bomay, placed orders at their Bombay branch, which was forwarded to the Madras office, who in turn, consigned the goods to their Bomay Branch warehouses, from there, it was supplied to the Canteen Stores Department, immediately after raising invoices in terms of orders already placed. I find that

the said decision can render no assistance to the case of the petitioner.

21.The decision in Parikh Metal Corporation v. The Commercial Tax Officer, Peddunaickenpet South Circle, Chennai - 600 001 [W.P.Nos.19262 to 19246 of 2000], relied upon by the Revenue, could be applied to the facts of the instant case. It was held that the mere fact that the word agent or agency is used or the words buyer and seller are used to describe the status of the parties concerned, is not sufficient to lead to the irresistible inference that the parties did in fact intend that the said status would be conferred. What is required to be seen is the predominant intention of the parties as could be culled out from the agreement and on facts it was found that it was a principal to principal relationship.

22.As pointed out earlier, the terms and conditions of the del credere agreement entered into between the petitioner and M/s.Haldia Petrochemicals Limited and the conditions contained therein clearly show that the nature of transaction between M/s.Haldia Petrochemicals Limited and the petitioner is a principal to principal basis and the theory that the petitioner was an agent of M/s.Haldia Petrochemicals Limited is absolutely false.

23.An argument was advanced by the learned counsel appearing for the petitioner that if the Court accepts that the show cause notices are vitiated, then the Court may consider granting liberty to the respondent to issue fresh show cause notices. As already pointed out, when the Court is convinced that the show cause notices are proper and the findings recorded in the impugned assessment orders are proper and the Court having tested the correctness of the impugned orders in these writ petitions and held that the contentions advanced by the petitioner do not merit consideration, it is left with no other option, except to affirm the impugned assessment orders.

24.Thus, for all the above reasons, the Court finds that the petitioner has not made out any case for interference with the impugned assessment orders and accordingly, the writ petitions fail and the same are dismissed. No costs. Consequently, connected Miscellaneous Petition are dismissed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

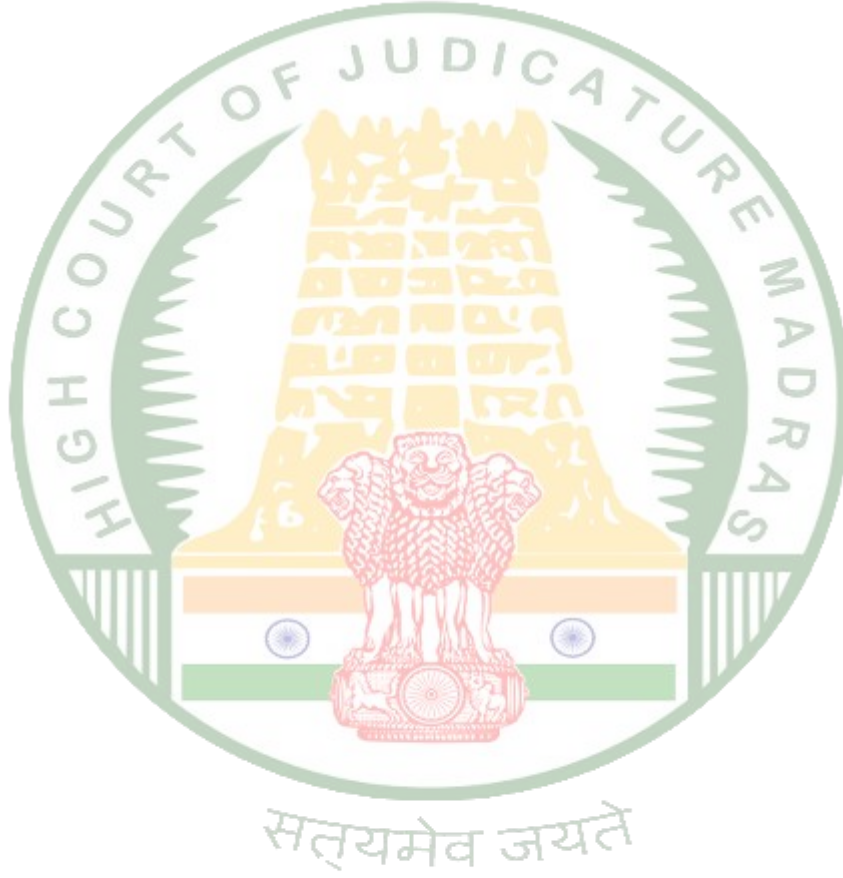
smn

To

The Commercial Tax Officer,
T.Nagar (East) Assessment Circle,
Chennai.

W.P.Nos.32077 and 32078 of 2004
and
W.P.M.P.Nos.38851 and 38852 of 2004

GJ(CO)
CS/03/04/18



WEB COPY