

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 18.09.2018

Delivered on 23.10.2018

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.Nos.24876 and 24877 of 2017
and

W.M.P.Nos.26265, 26266, 36851 & 36852 of 2017

M/s.Renault Nissan Automotive India Pvt.Ltd.,
Rep. by its Chief Financial Officer,
Plot No.1, SIPCOT Industrial Estate,
Orgadam Expansion Scheme,
Sriperumbudur Taluk - 602 105. ... Petitioner in both the
W.Ps.

vs.

The Deputy Commissioner-II (FAC)
Large Taxpayers Unit,
No.34, Monthieth Road, Egmore,
Chennai - 600 008. ...Respondent in both the W.Ps.

Writ Petitions 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 CST.981508/2014-15 and
CST.981508/2015-16 respectively and quash the order dated
28.07.2017 passed therein.

For Petitioner : Mr.R.L.Ramani,
Senior Counsel
for Mr.B.Raveendran
both WPS

For Respondent : M/s.Narmadha Sampath,
Additional Advocate General,
assisted by
Mrs.G.Dhana Madhri,
Government Advocate(Tax)
both WPS

C O M M O N O R D E R

Both these writ petitions are filed by the very same petitioner challenging the order of the respondent dated 28.07.2017 in revising the assessment made under Central Sales Tax Act, in respect of the assessment years 2014-15 and 2015-16. The issue involved in both the writ petitions is one and the same and therefore, the facts narrated hereunder are common to both these Writ Petitions.

2. The case of the petitioner is as follows:

(a) The petitioner is a manufacturing Company of motor vehicles and also a registered dealer on the file of the respondent under the provision of Tamil Nadu Value Added Tax Act, 2006 and the Central Sales Tax Act, 1956. The petitioner sold the motor vehicles to two of its sister Companies which are marketing Companies and separate entities. The said marketing Companies namely, M/s.Renault India Private Limited and M/s. Nissan Motor Private Limited, are separate business entities and are engaged in the activities of marketing, distribution and selling the motor vehicles manufactured by the petitioner. Those two Companies, besides having stockyard in the State of Tamil Nadu, also have stockyard in Andhra Pradesh. They purchase motor vehicles from the petitioner on payment of appropriate tax on principle to principle basis and sell the same to the dealers, with whom those Companies have business arrangements, on payment of appropriate tax. Those dealers, thereafter, sell the motor vehicles to users on payment of appropriate tax.

(b) In the regular course of business, the marketing Companies place purchase orders on the petitioner with delivery instructions. Those purchase orders are placed by the marketing Companies on the basis of the orders received by them from their dealers. The purchase orders are placed in respect of local sales as well as inter-State sales with delivery instructions to despatch the motor vehicles to particular destination. In the entire chain of events, the petitioner has privity of contract with the marketing Companies alone who are purchasers from the petitioner. There is no privity of contract between those dealers and the petitioner or the customers and the petitioner. In respect of the motor vehicles that are delivered outside the State of Tamil Nadu, the petitioner raises sales invoice on the marketing Companies with instructions to deliver the vehicles at the particular place, as directed by the Marketing Companies and collects and pays tax under the CST Act, 1956, on the sale price mentioned in the sales invoice of the petitioner Company. The sales invoice along with Lorry Receipt and Delivery Chalan are sent to the marketing companies and title to the goods is

transferred to the marketing companies on the basis of the same. In respect of the interstate sales, for which purchase orders are placed by the marketing companies, these marketing companies effect second interstate sale by transfer of documents of title of the goods in favour of the dealers, claiming exemption under section 6(2)(b) of the CST Act, 1956. The respective Branch office of the marketing companies issues "C" declaration form to the petitioner and the petitioner, in return issues "E1" declaration form to them. The petitioner has submitted the "C" declaration forms in support of the interstate sales to the Office of those two Companies situated outside Tamil Nadu and paid tax at 2% on the interstate sales effected by the petitioner. The assessment under CST Act, 1956, for the assessment years 2014-15 and 2015-16 in respect of Andhra Pradesh office of M/s. Nissan Motor India Private Limited, has been completed by the Assessing Officer, Chittoor, and exemption under section 6(2)(b) of the CST Act, 1956, was granted on the second interstate sales effected by them in respect of the motor vehicles sold by the petitioner.

(c) While so, the respondent herein issued notice dated 26.10.2016 proposing to levy higher rate of tax and disallow exemption for non-filing of declaration forms. Another notice dated 08.12.2016, also was issued to furnish copies of invoices. The petitioner submitted the same. Thereafter, the respondent passed the assessment order dated 23.01.2017, levying tax at 2% in respect of interstate sales turnover covered by "C" declaration forms and higher rate of tax in respect of interstate sales turnover not covered by "C" declaration forms. Likewise, exemption was granted on export sales under section 5 (1) and 5(3) of the CST Act, 1956. The respondent also disallowed the turnover, for which documents and Form 'H' declaration had not been filed. However, on filing of those documents, revised assessment orders dated 14.02.2017 and 28.03.2017 were passed by the respondent.

(d) While so, the respondent issued notice dated 24.01.2017 contending that goods have moved from Tamil Nadu directly to the dealers in pursuant to the orders placed by them on M/s. Nissan India Private Ltd., and M/s. Renault India Private Ltd., who claimed exemption as second and subsequent sale under section 6 (2)(b) of the CST Act, 1956 and therefore, it is a sale falling under section 3(a) of the CST Act and not under section 3(b) of the CST Act. Thus, the respondent claimed that the petitioner is liable to pay the tax on the value at which the goods were sold to the purchasers and not the value on which the petitioner paid tax in CST Act, 1956. The petitioner filed its reply on 24.02.2017 explaining the background and sale process along with set of documents to prove that there was no privity of contract between the petitioner and the dealer and that the petitioner

was liable to pay tax only on the sale consideration received by it from those two marketing Companies. Personal hearing was conducted on 22.05.2017. Thereafter, the respondent passed the impugned order. Hence, the present writ petitions.

3. A common counter affidavit is filed on behalf of the respondent wherein it is stated as follows:

The writ petitions are not maintainable without seeking redressal before the Appellate Forum. The petitioner is a manufacturing Company of motor vehicles and sells the same mainly to their two sister companies, operating as separate entities. The petitioner company has sold the goods on transit sale basis to the other two Companies having stock yard in other States and paid tax at 2% being the first interstate sale. However, the two other marketing Companies has claimed exemption in respect of the second sale under section 6(2)(b) of the Central Sales Tax Act. Subsequent to the assessment, the Assessing Officer issued notice of proposal to levy tax on the value at which the two marketing Companies have sold the vehicles to their dealers in other States, since the vehicles were moved to their dealers in other States against prior order and therefore, the sale falls under Section 3(a) of the Central Sales Tax Act. The petitioner filed their objections claiming that the sale would fall only under section 3(b). The Assessing Officer rejected their objections. Accordingly, the assessment under CST was revised. The assessment was not reopened based on some change of opinion. Only the value of the transaction which represents the sale in the hands of the petitioner alone was enhanced. It was proposed to add 25% to the value of the transaction on best of judgment to the value of goods sold to the other two Companies. The petitioner failed to disprove the estimation made at 25%. The exemption granted by the Assessing Officer at the relevant point of time, cannot alter the power of the Assessing Authority to re-determine the value of turn over. The revised order was passed placing reliance on the findings of the Honourable High Court of Telungana and Andhra Pradesh in the case of Larsen and Toubro reported in (2016) 88 VST 422. For the sale under section 3(a), the movement is under the contract, whereas for the sale under section 3(b), the contract comes into existence only after commencement and before termination of the inter-State movements of the goods. Thus, to attract exemption under Section 6(2), it is essential that the sale must be subsequent to inter-State movement and should be preceded by a prior inter-State sale during transit. The exemption granted under Section 6(2)(b) by the Assessing Authority in other State, would not prevent the respondent from revising the assessment. The decision of the Supreme Court delivered in A & G Projects & Technologies Ltd., vs. State of Karnataka reported in 2009(19) VST 239 is in support of the respondent. The Telungana and Andhra Pradesh High Court in Larsen and Toubro case has followed

the decision of the Supreme Court rendered in A & G Projects and Technologies Ltd. case and therefore, it is binding on the respondent.

4. A rejoinder is filed by the petitioner wherein it is stated as follows:

The enhancement of the value of transaction was based on a mere change of opinion and wrong interpretation of law. The question of re-determination of turn over would arise only when there is any suppression or under reporting of the turn over by the dealer. In this case, it is not even the allegation of the respondent that there has been any suppression or under reporting of turn over by the petitioner. Though the respondent has stated that he neither rejected or assessed the buyers of the petitioner who are located in the other States, the same has been done in an indirect manner by adding 25% to determine the actual value of the sale. The A & G Projects and Technologies Limited case and Larsen and Toubro case are factually distinguishable as the same were dealing with the case of the assessee who was the second seller. In the present case, the concerned sale on which the respondent had levied tax is not the subsequent inter-state sale and only the first sale. Therefore, it is very clear that the respondent has simply mentioned the judgment of the Supreme Court and Andhra Pradesh High Court for the sole purpose of making the assessment beyond his jurisdiction and powers.

5. Mr.R.L.Ramani, learned senior counsel appeared for the petitioner and made his oral submission. A written submissions on behalf of the petitioner is also filed.

6. The sum and substance of the submissions made on behalf of the petitioner is as follows:

(a) When the goods are sold to the marketing Company situated outside the State, tax at 2% under CST Act, 1956, is paid on the sale consideration received by the petitioner from the marketing Companies. The marketing Companies effect further inter-state sales by transfer of documents of title to the goods during inter-State movement of goods. The petitioner has not challenged the present impugned action of re-assessment by the respondent on its merits. The petitioner contentions are two fold. The first issue relates to violation of principle of natural justice and the second issue relates to jurisdiction. The notice of re-assessment was only on one ground stating that the exemption claimed by the petitioner under section 3(b) of the CST Act was not in accordance with law and the transaction is falling under section 3(a) of the CST Act. In the very same notice, the respondent directed the petitioner to pay taxes and thereafter to file their objection. Therefore, even while issuing a notice of re-assessment, demand is raised and it clearly shows that the respondent has pre-judged the entire

issue. For the first time in the assessment order, the respondent concluded that the subsequent sale should have happened during the movement of goods and that the buyers should not have been identified before the movements of goods. Thus, it is clear that the ground now put forth by the respondent in the impugned proceedings that the sale is a pre-determined sale is not at all mentioned in the show cause notice. The pre-determined sale is prescribed only in respect of the claim under Section 6-A of the CST Act for branch transfer/consignment sales. However, in respect of the inter-State sale, there is no such legal stipulation. The sale stipulated under section 3(b) is only for the purpose of reducing the cascading tax effect. It is not the case of the respondent that the petitioner has received any money over and above its invoice prices so as to make an adhoc addition of 25% to the taxable turnover. No opportunity was given to the petitioner regarding the vital issue about the so called pre-determined sales. Therefore, it violates the principles of natural justice.

(b) On the question of jurisdiction, it is to be seen that section 27 of the Tamilnadu Value Added Tax Act empowers reopening of the assessment only when the turn over of the dealer has escaped assessment. The respondent is not finding fault in any issues contained in the returns filed by the petitioner. He has not even disputed the sales turn over reported by the petitioner. While so, the respondent has enhanced the turn over of the petitioner by 25%, based on the turn over of the marketing Companies and called upon the petitioner to pay the tax on the above. In such circumstance, the respondent has no power at all to invoke section 27 of the said Act. Enhancement of the turn over can be done only under one circumstance. If the dealer shows abnormal low price compared to the prevailing marketing price in order to evade payment of tax, then the revenue can make best judgment of assessment. Therefore, in the absence of the same, the present impugned assessment was made without jurisdiction.

(c) In support of his contention, learned senior counsel relied on 87 STC 240 (Mad) (State of Tamil Nadu v. Mohd. Haneefa).

7. Per contra, learned Additional Advocate General, Mrs. Narmadha Sampath, appearing for the respondent made her oral submission. Written submission is also filed by the learned Special Government Pleader (Tax).

8. The sum and substance of the submission made on behalf of the respondent are as follows:

(a) The petitioner claims that they manufacture cars and sell it to its marketing companies and claim exemption of CST at the rate of 2%. In reality, those two marketing Companies places purchase orders in respect of local sales as well as inter-State

sales to the petitioner. Though there is no dispute with regard to the local sales, however in respect of the inter-State sales, the marketing Companies places order with an instruction to the petitioner to deliver the goods directly to the customers of the marketing Companies. Thus, in effect, before the goods commences movement, the delivery instruction is given to deliver to a different purchasers which is contrary to the provision of section 3(b) of the CST Act. Thus, it amounts to first sale. In order to avoid tax component for the actual sale value of such first sale, a new arm is created as sale to their marketing unit. Therefore, the levy of tax under section 3(a) is sustainable and well within the jurisdiction of the authority. The writ petition is not maintainable and the impugned order was passed well within the jurisdiction of the respondent. The petitioner has been given sufficient opportunity and during personal hearing, their objections have been dealt with in detail and the respondent has passed a well reasoned order based on judicial decisions. Therefore, both on the ground of principles of natural justice and on the ground of jurisdiction, the writ petitioner is not entitled to maintain the present writ petition. On the other hand, they have to only file a statutory appeal before the appellate authority. The writ petitioner does not satisfy the conditions of section 3(b) of CST Act as there was no subsequent sale during the movement of the goods or in transit, to qualify for exemption as envisaged under section 6 (2) (b) of the CST Act. The ultimate buyer has been identified before the goods started its movement from its location. Therefore, the Assessing Authority has enhanced the sales turn over declared by the petitioner, taking into account, the ultimate price charged on them which is the actual value of the goods sold. The petitioner failed to furnish the difference between the turn over which they paid tax and the value which were realised from the ultimate buyers. As the second sale in this case has happened even before the goods move from the sellers location, the petitioner is not entitled to take shelter under section 3(b) of the said Act. A sample invoice dated 30.12.2016 raised by the petitioner reveals that the petitioner has despatched the goods to the ultimate buyer, whose name has been mentioned as the assignee. This clearly shows that the petitioner himself has identified the buyer and that there was a pre-existing contract that the vehicle has to be despatched to the ultimate buyer's business place. Hence, the transaction only falls under section 3(a) and not under section 3(b) of the CST Act. The petitioner was adopting a price much lower than the price adopted by the marketing company to its buyer and tax was suffered for the lower prices adopted by the petitioner. The difference of turn over portion has escaped from the assessment and thus, the State of Tamil Nadu, which has the jurisdiction to levy tax on the full value of the car, was indirectly restrained to collect taxes for the limited turn over

only. Therefore, the difference of turn over was also subjected to levy of tax in the State of Tamil Nadu.

(b) In the notice dated 24.01.2017, issued to the assessee, the Assessing Officer had very clearly stated his intention for enhancement of turn over at 25%. The dealer had filed letter requesting additional time and the Assessing Officer granted further time of 15 days. The dealer had filed his detailed reply on 24.02.2017 and their objections. They have not objected for the enhancement of turn over. Further two opportunities of personal hearing was granted on 12.05.2017 and 22.05.2017. During the course of personal hearing, they did not raise any objection for the enhancement of the turn over and only objected on the taxation in the hands of the petitioner. From the issuance of notice, the petitioner was aware of the enhancement of turn over. However, they did not object to the same. Hence, the petitioner cannot raise these new issues before this Court.

(c) In support of her contention, the learned Additional Advocate General relied on 2019(19) VST 239(SC) (A& G Projects and Technologies Ltd. vs. State of Karnataka), 2016 (88) VST 422 (Larsen and Toubro Ltd. vs. State of Andhra Pradesh), 1992(86) STC 554 (Sundaram Industries v. state of Tamil Nadu), 2012(49) VST 200(Mad) (State of Tamilnadu vs. Mahaveer Chemicals Industries) .

9. Heard Mr.R.L.Ramani, learned senior counsel appearing for the petitioner and Mrs.Narmadha Sampath, learned Additional Advocate General appearing for the respondent. Perused the materials placed before this Court and given my careful consideration to the submissions made on behalf of the parties.

10. Both the writ petitions are filed against the orders of assessment passed in respect of the assessment years 2014-15 and 2015-16 dated 28.07.2017.

11. I have already narrated in detail the facts and circumstances, which warranted the writ petitioner to file these writ petitions, the contentions of the respondent against these writ petitions and the submissions made on behalf of both parties. Therefore, I am not reiterating the same once again hereunder to avoid multiplication, except to reproduce few facts for the purpose of justifying my conclusion.

12. The petitioner is a manufacturing Company of motor vehicles situated at the State of Tamilnadu. They are the registered dealer on the file of the respondent both under Tamilnadu Value Added Tax Act, 2006 and Central sales Tax Act, 1956. The petitioner Company is having two marketing Companies namely, M/s. Renault India Private Limited and M/s. Nissan Motor India Private Limited. Those two marketing Companies, apart from having stockyard in the State of Tamilnadu, also have

stockyard in Andhra Pradesh. It is stated that the petitioner/manufacturing Company sells the motor vehicles through those marketing Companies, which in turn, sell the same to their dealers. In other words, it is claimed by the manufacturing Company that the vehicles are sold to its marketing Companies on payment of appropriate tax on principle to principle basis, which in turn, sell the same to their dealers on payment of appropriate tax, with whom the said Companies have business arrangements.

13. Insofar as the sales made within the State of Tamilnadu, covered by the provisions of Tamilnadu Value Added Tax Act, 2006, are concerned, there is no dispute between the parties. The present dispute, the subject matter in these writ petitions, is in respect of the sale of motor vehicles outside the State of Tamilnadu, in this case, the State of Telungana and Andhra Pradesh. It is claimed by the petitioner that such sale made by them outside the State of Tamilnadu is a sale covered under section 3(b) of the Central Sales Tax Act, 1956, and thus, the Central Sales Tax paid by them at the rate of 2% on such sale is valid and thus, gets exempted under Section 6(2)(b) of the said Act. In other words, it is the claim of the petitioner/manufacturing Company that the sale made by them to their marketing Companies is the first sale and consequently, the sale made by the said marketing Companies to their dealer is the second sale. Thus, it is the claim of the petitioner that the subsequent sale in favour of the dealer of the marketing Companies is effected by transfer of documents of title to the goods during their movement in favour of the dealer and therefore, such sale would fall under section 3(b) of the Central Sales Tax Act.

14. On the other hand, it is the claim of the Revenue that the marketing Companies place orders with an instruction to the manufacturing Companies to deliver the goods directly to the customers of the marketing Company and that even before the goods commence its movement, the delivery instruction is given to the manufacturing Companies to deliver the goods to a different purchaser and thus, such transaction would amount to first sale and consequently, would fall under the scope and ambit of the sale referred to under section 3(a) of the Central Sales Tax Act 1956, which disentitle the manufacturing Company to claim exemption, as envisaged under section 6(2)(b) of the Central Sales Tax Act.

15. The Assessing Officer found that the disputed sale falls under section 3(a) of the Central Sales Tax Act and consequently, such sale is not exempted under section 6(2) of the Central Sales Tax Act.

16. There is no dispute to the fact that as against the

said order of assessment, a statutory appellate remedy is available before the first Appellate Authority, namely, the Joint Commissioner (Appeal), Chennai-6. It is well settled that in fiscal matters, the aggrieved party should first approach, avail and exhaust the statutory appellate remedy, more particularly, when such Appellate Authority is, undoubtedly, a fact finding authority as well. Straight away coming to this Court and filing writ petitions against the orders of assessment made by the Assessing Authority or the orders in original made by the Adjudication Authority, without exhausting the alternative remedy of appeal, should not be entertained or encouraged, as, otherwise, this Court, exercising jurisdiction under Article 226 of the Constitution of India, will be flooded with writ petitions, by short circuiting the procedure, thereby, indirectly forcing this Court to step into the shoes of the Appellate Authority and to go into the disputed factual aspects of the matter and decide the same one way or other. If such practice, which is being done in a routine manner, is permitted, the statutory appellate remedies provided under relevant enactment would be redundant. The following decisions of the Apex Court as well as the Division Bench of this Court in this aspect are very clear that the writ petitions are not maintainable in fiscal matters when there is an effective alternative remedy of appeal is provided under the relevant statute.

- i) (2010) 4 SCC 772 (Rajkumar Shivhare vs. Assistant Director, Directorate of Enforcement and another).
- ii) (2005) 2 MLJ 246 DB (M/s. Nivaram Pharma Private Limited rep. by its Director Sardarmal M.Chordia, Madras vs. The Customs, Excise and Gold (Control) Appellate Tribunal, South Regional Bench, Madras and others).
- iii) (2010) 8 SCC 110 (United Bank of India vs. Satyawati Tondon and others).
- iv) 2010 (259) ELT 37 (Mad) DB (Maritime Collector vs. Madura Coats Limited)
- v) (2010) 4 SCC 554 (Rajeev Kumar and another vs. Hemraj Singh Chauhan and others).

17. No doubt, there are exceptions to the above said principle. They are as follows:

(a) Lack of jurisdiction on the part of the Adjudicating Authority.

(b) Violation of principles of natural justice.

(c) The impugned proceedings is erroneous, on the face of it and such error should apparently shake the judicial conscience of the Court. In other words, the error must be evident on the face of the order, without requiring for a roving probe to arrive at a conclusion, whether it is an error or not.

18. Only under those three circumstances, the aggrieved party can approach this Court and invoke its jurisdiction under Article 226 of the Constitution of India for redressal. Otherwise, such party is not entitled to maintain the writ petition, challenging the orders of assessment or orders in original, in each and every matter, by raising some grounds touching upon the merits of such order, as if this Court is an appellate forum. It is a known fact that most of such writ petitions are filed, in fiscal matters, challenging the order of the original authority, instead of going before the appellate authority, only to avoid the statutory obligation of making pre-deposit of the tax/duty liability while filing such appeal. Certainly, such practice should be discouraged since the liability having been fixed by the original authority after following due process, cannot be allowed to be questioned, without showing the bonafide of the assessee by making such pre-deposit, a mandatory statutory requirement.

19. Keeping the above principles in mind, let me first consider whether the present writ petitions are maintainable and if so, whether this Court has to interfere with the impugned orders of assessment.

20. Fairly, it is contended on behalf of the writ petitioners that the petitioner is not challenging the impugned assessment orders on its merits. This stand is made very clear in their written submission. Thus, it is evident that the impugned assessment orders are challenged only on two grounds, namely, violation of principles of natural justice and want of jurisdiction. Needless to say that jurisdictional issue has to be considered first as it goes to the root of the matter. Only when this Court finds that the respondent has jurisdiction to pass the impugned order, then the question of considering the next question on the alleged violation of principles of natural justice would arise. Therefore, I proceed to consider the jurisdictional issue first as follows.

21. It is the contention of the petitioner that the Assessing Authority is empowered to reopen the assessment under Section 27 of the Tamilnadu Value Added Tax Act only when the turn over of a dealer has escaped assessment and in this case, there is no escapement of assessment. In other words, it is the case of the petitioner that the amount shown in the invoice raised by the petitioner in respect of the disputed sale is the actual amount received by them for the sale of the goods. Therefore, it is contended that insofar as the petitioner is concerned, it cannot be said that any amount has escaped the assessment.

22. On the other hand, it is contended by the Revenue

that only when the disputed sale fall under section 3(b) of the Central Sales Tax Act, the return filed by the petitioner and the tax paid thereon at the rate of 2% on such sale value, is acceptable and only under such circumstance, the question of escapement of turn over may not arise. On the other hand, it is their claim that if the disputed sale falls under section 3(a) of the said Act, the petitioner is liable to pay tax on the value at which the goods were sold by their marketing Companies to their dealers and not the value on which the petitioner paid tax under Central Sales Tax Act.

23. I have already stated supra, the rival contentions of the parties is with regard to the nature of the disputed sales. While the petitioner claims the disputed sale as the one falling under Section 3(b), the Revenue claims the same as the one under section 3(a). Needless to say that whether the disputed sale would fall under section 3(a) or section 3(b), is purely a question of fact which needs to be considered and decided, by appreciating factual aspects of the matter and by considering the relevant documents in support of such sale. In other words, the nature of the disputed sale has to be ascertained and determined going by the manner in which it had taken place.

24. Undoubtedly, as claimed by the Revenue, if the disputed sale fall under section 3(a), the sale to the dealer of the marketing Companies should be the first sale and consequently, the turn over covered by such sale is liable to be taxed and not the turn over as shown by the petitioner, being the sale price received from its marketing company. On the other hand, if the case of the petitioner is to be accepted that the sale would fall under section 3(b), since the second sale was effected by transfer of document of title to the goods during the movement from one State to another, certainly, the petitioner is entitled to get exemption under section 6(2)(b) of the Central Sales Tax Act. Therefore, it is evident that the nature and manner, in which, the sale was effected by the petitioner to the purchaser at the other State are certainly, crucial factors to be considered and decided as to whether the turn over has escaped assessment. Such scope of consideration, undoubtedly, is not outside the jurisdiction of the respondent, merely because the marketing Companies have got the benefit of exemption under section 6(2)(b) of the Central Sales Tax Act at the hands of their Assessing Officer at Chittoor, Andhra Pradesh. When admittedly the goods have moved from the territorial jurisdiction of the respondent, he is certainly, vested with jurisdiction under section 27 to reopen the assessment for deciding such issue, when he finds sufficient materials to do so.

25. The petitioner also questioned the action of the

respondent in enhancing the turn over by 25% by treating the same as sales turn over of the marketing Companies. Therefore, it is contended by the petitioner that the respondent lacks jurisdiction to do so. I do not think that the petitioner is justified in contending so, especially, when the core dispute between the parties is in respect of the nature of sale. Further, the respondent is relying upon the invoices raised by the petitioner to arrive at the conclusion that the disputed sale falls under section 3(a) and not under section 3(b). According to the respondent, it is the first sale from the petitioner directly to the dealer through the marketing company and that the delivery instruction given in the invoices is to deliver the goods to a different purchaser other than the marketing company. Thus, it is contended by the Revenue that even before the movement of the goods commenced, transfer of title had already taken place in favour of the end purchaser and therefore, the petitioner cannot claim such sale under section 3 (b) and consequently, exemption under Section 6(2)(b). On the other hand, it is contended by the petitioner that the invoice was raised only in the name of the marketing company as the purchaser, which in turn, sold the goods to the dealer and therefore, such sale in the hands of the dealer is only a second sale covered by section 3(b). For proving such contention, the petitioner has to establish that such second sale was effected by a transfer of documents of title to the goods "during their movement" from one State to another. When such issue requiring probing is within the domain of the respondent as conferred under section 27 of the Tamil Nadu value Added Tax Act, I do not think that the petitioner is justified in contending that the respondent lacks jurisdiction to pass the present impugned order.

26. If it is a first sale, what was the actual price of such first sale, is again a question touching upon the factual aspects of the matter. Likewise, if it is a second sale, what is the price shown by the marketing companies to the buyer/dealer is once again a question touching upon the factual aspects of the matter.

27. Learned senior counsel relied on 1992(87) STC 240 (State of Tamil Nadu v. Mohamed Haneefa), in support of his contention that only when the turn over of the business has escaped assessment of tax, the power is vested on the authority to subject the escaped turn over to assessment. There is no quarrel about the said proposition. However, in view of the discussions made supra, I do not think that the above decision on the general proposition of law would in any way help the petitioner, based on the present facts and circumstances. On the other hand, as I found that the Assessing Officer has jurisdiction under section 27, the said decision is not helping

the petitioner in any manner and on the other hand, it only supports the case of the Revenue.

28. Thus, the next question that arises is on the alleged violation of the principles of natural justice. It is contended by the petitioner that even while issuing the pre-assessment notice dated 24.01.2017, the respondent called upon the petitioner to pay tax on the value at which the marketing Companies sold the goods to the dealers, though the said notice called upon the petitioner to file their objection along with documentary evidence, if any. Perusal of the said notice, no doubt, shows that the respondent had requested the petitioner to pay such tax. However, while concluding the said notice, the respondent had only called upon the petitioner to file their objection against such proposed demand. The notice clearly indicated that if the petitioner fails to give objections within 15 days, the proposal made in the said notice would be confirmed. Therefore, it is evident that though the respondent indicated in the said notice as though the petitioner has to pay the tax, in effect, it is evident that it was only a proposal and not a demand as such. Therefore, it cannot be stated that the said notice was issued with pre-determination. Even otherwise, the fact remains that the petitioner has not come before this Court and challenged the said notice by raising the above issue. On the other hand, the petitioner, admittedly, submitted to the jurisdiction of the respondent, filed their objection and participated in the assessment proceedings. Therefore, I do not find that the above objection raised by the petitioner on the maintainability of notice of proposal, could anyway be construed as violation of principles of natural justice.

29. It is further contended by the petitioner that even though the impugned order referred that the subsequent purchasers had been identified much before the starting of movement of the cars and therefore, the sale comes within the ambit of section 3(a), the notice of proposal, nowhere states as if the petitioner had identified the subsequent purchaser much before the starting of movement of the cars. Therefore, it is contended that a new fact is stated in the impugned proceedings without disclosing the same in the notice of proposal. I am not convinced with the above said submissions, solely on the reason that the very notice of proposal dated 24.01.2017 commenced by stating that verification of the invoice furnished by the petitioner in pursuant to the notice dated 08.12.2016, issued by the respondent, revealed that when those two marketing companies were shown as buyers, the distributors/dealers in other States were shown as the consignees and thus, it appears that the goods were moved from the Tamilnadu directly to the distributors/ dealers in pursuant

to the orders placed by those marketing Companies. Therefore, it is evident that the cause of action for issuing such notice by the respondent had arisen on verification of the invoices furnished by the petitioner. Hence the invoices, being the documents emanated from the petitioner, cannot be stated as new materials or contents of such invoices cannot be termed as new facts referred to in the impugned proceedings. In fact, a sample invoice was placed before this Court by the Revenue to show that two entries are made one by showing the marketing company as the buyer and other by showing the respective distributor/dealer as the consignee. I am not going to express any view on the effect of such entries made in the said invoice, as any observation or view expressed by this Court on the same, at this stage, would certainly affect the mind of the next fact finding authority, namely, the first Appellate Authority while deciding the issue as to whether the disputed sale falls under section 3(a) or 3(b) of the said Act.

30. There is no dispute to the fact that in pursuant to the said notice of proposal, the petitioner had given a detailed explanation where they clearly stated that mere indication of dealers' name of the marketing Company in the invoice, should not be construed as a direct delivery from the petitioner to dealers of the marketing Company. This statement of the petitioner would show that they are fully aware of the issue which they had to face, pending before the Assessing Officer. Only with that knowledge they participated in the assessment proceedings by giving their explanation. It is also not in dispute that the petitioner was given opportunity of personal hearing which they availed on two occasions namely 12.05.2017 and 22.05.2017. There is no presumption that the issue dealt with in the impugned order have not been discussed at the time of personal hearing. On the other hand, the very fact that the petitioner was issued with a notice of proposal, followed by furnishing the reply by them and affording an opportunity of personal hearing twice, would only drive this Court to arrive at a reasonable presumption that the issues discussed and decided in the impugned proceedings are the issues within the knowledge of the petitioner and that those issues have been discussed at the time of personal hearing as well. Therefore, I do not find any justification on the part of the petitioner in contending that the respondent has not followed the principles of natural justice in any manner, before passing the impugned order. Therefore, I find that the order does not suffer on the ground of violation of principles of natural justice as well.

31. Learned Additional Advocate General relied on the following decisions, viz., 2019(19) VST 239(SC) (A& G Projects and Technologies Ltd. vs. State of Karnataka), 2016 (88) VST 422 (Larsen and Toubro Ltd. vs. State of Andhra Pradesh), 1992(86) STC 554 (Sundaram Industries v. state of Tamil Nadu),

2012(49) VST 200(Mad) (State of Tamilnadu vs. Mahaveer Chemicals Industries), touching upon the merits of the assessment to justify that the disputed sale, would fall under section 3(a) and not under section 3(b). I do not think that there is any necessity to go into all these decisions, since I am fully convinced that it is for the petitioner to question the correctness or otherwise of the assessment order before the next fact finding authority namely, the appellate authority. Certainly, this factual aspect, disputed by both parties, needs to be considered and decided only by the next fact finding authority, viz., Appellate Authority, and not by this Court, exercising its discretionary jurisdiction under Article 226 of the Constitution of India, as the said disputed question of fact requires probing of the matter once again on appreciation of material facts and documents placed. Only the next fact finding authority viz., Appellate Authority has to consider and decide whether such reasoning of the Assessing Officer out of such probe can be justified or not.

32. Since the disputed question of fact is to be considered and decided only by the next fact finding authority, I am of the view that the petitioner has to agitate the matter only by way of filing regular statutory appeal without insisting upon this Court to decide the matter as an appellate authority. Needless to say that jurisdiction vested on this Court under Article 226 of the Constitution of India is a discretionary jurisdiction and therefore, it is not necessary to exercise such jurisdiction, even though the petitioner has made out a case. At the same time, I am not saying even for a minute that this Court is powerless under Article 226 of the Constitution of India. The question is whether such power has to be exercised under the given facts and circumstances. It is well settled that the writ jurisdiction is to be exercised only to find out as to whether the decision making process was in order and not the very decision itself.

33. Considering the above stated facts and circumstances, this Court is of the view that the present writ petitions are not maintainable against the orders of assessment. Consequently, these Writ Petitions are disposed of by granting liberty to the petitioner to file a statutory appeal before the Appellate Authority within a period of 30 days from the date of receipt of a copy of this order by observing all other statutory requirement for filing such appeal. If any such appeal is filed within the time stipulated supra, the same shall be taken up and considered by the said Appellate Authority on its own merits and appropriate orders in accordance with law shall be passed, after giving due opportunity of hearing to the respective parties, without reference to the period of limitation. Such exercise shall be done by the Appellate Authority within a

period of six weeks from the date of receipt of appeal. Since this Court has granted liberty to the petitioner to file the statutory appeal as observed supra, the respondent is directed not to take any coercive steps against the petitioner till such appeal is filed within the time stipulated as stated supra. It is also made clear that this Court is not expressing any view on the merits of the assessment. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (CS-IV)

//True copy//

Sub Assistant Registrar

vsi

To

The Deputy Commissioner-II (FAC)
Large Taxpayers Unit, No.34, Monthieth Road,
Egmore, Chennai - 600 008.

+1cc to M/s.B.Raveendran, Advocate SR.No.71958

+1cc to Special Government Pleader (Taxes) High Court SR.No.72668

W.P.Nos.24876 and 24877 of 2017

RSK (CO)

GMV (02/11/2018)

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