In the High Court of Judicature at Madras

Dated : 30.10.2018

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mrs.Justice V.BHAVANI SUBBAROYAN

Writ Appeal No.2372 of 2018 & CMP.No.18836 of 2018

M/s.SCM Garments Pvt. Ltd.,
rep.by its Director Thiru
T.Loganathan, Tirupur-641603 ...Appellant

Vs

The Assistant Commissioner (CT),
Tirupur North Assessment Circle,
CT Main Building, Kumaran Road,
Tirupur-641601. ...Respondent

APPEAL under Clause 15 of the Letters Patent against the order dated 13.8.2018 made in W.P.No.4019 of 2017.

W.P.No.4019 of 2017:
Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of certiorari calling for the records in respect of the impugned order TIN No.33502307107/ 2012- 13 dated 11.01.2017 of the Respondent under the Tamil Nadu Value Added Tax Act 2006 quash the same.

For Appellant : Mr.R.L.Ramani, SC for Mr.B.Raveendran
For Respondent: Mr.Mohammed Shaffiq, SGP
assisted by Mr.V.Haribabu, AGP

Judgment was delivered by T.S.SIVAGNANAM,J

Mr.Mohammed Shaffiq, learned Special Government Pleader accepts notice for the respondent. We have heard Mr.R.L.Ramani, learned Senior Counsel, assisted by Mr.B.Raveendran, learned counsel on record for the appellant and Mr.Mohammed Shaffiq, learned Special Government Pleader, assisted by Mr.V.Haribabu, learned Additional Government Pleader.

2. This appeal is directed against the order dated 13.8.2018 made in W.P.No.4019 of 2017.

3. The appellant/assessee, which is a registered dealer on the file of the respondent under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter called the TNVAT Act) and the Central Sales Tax Act, 1956, challenged the assessment order dated 11.1.2017 under the provisions of the TNVAT Act for the year 2012-13 by filing the said writ petition. The learned Single Judge, by the impugned order dated 13.8.2018, disposed of the said writ petition directing the appellant to file the statutory appeal before the Appellate Authority and granted four weeks' time to do so. There was also a direction to the Appellate Authority to consider and dispose of the appeal on merits and in accordance with law without reference to the period of limitation.

4. The learned Senior Counsel appearing on behalf of the appellant contends that since the assessment order dated 11.1.2017 is in gross violation of the principles of natural justice, as it had been passed without issuance of any show cause notice and without an opportunity of personal hearing, the Writ Court ought to have entertained the said writ petition and quashed the assessment order dated 11.1.2017. Therefore, it is submitted that the matter may be remanded to the Assessing Officer for a fresh decision in the matter with due opportunity to the appellant.

5. Mr.Shaffiq Mohammed, learned Special Government Pleader, on the other hand, submits that by notice dated 25.11.2016, documents were called for wherein it was clearly mentioned that if the appellant fails to produce the documents, the claim made by them would be disallowed. The appellant having submitted their objections dated 08.12.2016, the same were considered by the Assessing Officer and the assessment was completed vide order dated 11.1.2017. It is further submitted that if the appellant is aggrieved by the order of assessment, then they have an effective alternate remedy of appeal before the Appellate Commissioner and without filing the same, the writ petition was not maintainable. According to him, the learned Single Judge rightly declined to entertain the said writ petition and directed the appellant to file the statutory appeal.

6. We have carefully considered the submissions made by the learned counsel on either side.

7. The appellant is in the business of garments and also owns wind mills. The appellant sold three business units, each consists of one wind mill by way of sale of business as a whole. By this, the appellant meant that all the assets including intangible assets stood transferred in favour of the purchaser/assignee. Further, in the memorandum of understanding dated 28.8.2011, the assignee - M/s.GEE AAR Kaush Energy Private Limited also took over the employees of the undertaking and

therefore, the appellant contended that the transfer falls within the ambit of Explanation III to Section 2(41) of the TNVAT Act and hence, it should not be included in the turnover of the assets of the appellant.

8. The Assessing Officer issued the notice dated 30.11.2015 stating that the appellant sold two wind mills and that the sale could not be considered as a slump sale under Section 2(41) of the TNVAT Act, proposed to tax the appellant on the sale value of the two wind mills being a sum of Rs.2,10,74,632/- at 5% and called upon the appellant to show cause as to why a sum of Rs.10,53,732/- should not be demanded as tax.

9. The appellant submitted their objections dated 29.12.2015 reiterating their stand that they made transfer of the wind mills by way of slump sale and that the consideration received was on the basis of assignment of the business as a going concern. They also attached the memorandum of understanding dated 26.8.2012 along with the objections dated 29.12.2015.

10. It appears that the Assessing Officer did not pass any orders thereon. But, nearly after a year, the Assessing Officer issued the notice dated 25.11.2016 wherein the Assessing Officer stated that the appellant had sold the wind mills for a value of Rs.16,77,16,189/- (vide schedule 10 of the fixed assets), but did not pay tax on the sale of the wind mill during the year 2012-13. In this connection, the appellant was directed to submit various documents to support their claim for exemption and they were granted 15 days' time to put forth their explanation. The appellant was also granted liberty to appear before the Assessing Officer in person for a personal hearing. The appellant was further informed that if they fail to produce the documents, the claim for exemption would be disallowed.

11. The appellant sent a reply dated 08.12.2016 wherein the appellant was stated to have enclosed all the documents called for. The appellant reiterated that there was no tax leviable on the transaction, as it was a transfer of business as a going concern and that the business has separate identifiable assets, liabilities, income and expenditure and should be considered as a going concern and would not attract any sales tax liability. The Assessing Officer did not afford any opportunity of personal hearing, but, passed the impugned order dated 11.1.2017.

12. We are agreeable with the stand taken by the appellant for the reason that after the reply dated 29.12.2015, for nearly a year, there was no action on the part of the Assessing Officer. The notice dated 25.11.2016 cannot be taken as a show cause notice, as it is a notice calling upon the appellant to produce certain documents. Though in the said notice dated

25.11.2016, one line was included, which states that if the documents are not produced, the claim for exemption would be rejected, that, by itself does not satisfy the principles of natural justice. The notice dated 25.11.2016 does not qualify as a show cause notice and the Assessing Officer should have considered the documents and made it explicitly clear as to why he is of the opinion that the transaction cannot be treated as a transfer of business as a going concern. This is significantly absent in the instant case.

13. Furthermore, we find from the notice dated 25.11.2016, there were inter-departmental communications in various levels, including the Additional Commissioner (Audit), Chennai, the Deputy Commissioner (CT), Tirupur, the Accountant General (Economic & Revenue Sector Audit), the Commercial Tax Officer, Special Circle-I, Tirupur and the Joint Commissioner (CT), Coimbatore. All these inter-departmental communications are much after the first notice dated 30.11.2015 and the appellant's objections dated 29.12.2015.

14. If the Department does not claim any privilege over such inter- departmental communications, the appellant would be entitled to copies of those documents or the appellant would be entitled to know the contents of those documents, which appear to be the basis for the issuance of the notice dated 25.11.2016. Without issuing a show cause notice and making it known to the appellant as to why their case cannot be accepted as a transfer of business as a going concern, the Assessing Officer should not have completed the assessment.

15. In the first notice dated 30.11.2015, the sale value has been mentioned as Rs.2,10,74,632/- whereas in the second notice dated 25.11.2016 calling for documents, the value is taken as 16,77,16,189/- presumably from the income tax records. In any event, the appellant would be entitled to know as to what is the case they have to face and without such an opportunity, if the assessment is completed as done in the instant case, it would be undoubtedly in violation of the principles of natural justice. However, this Court is of the view that while granting liberty to the appellant to put forth their objections, the interests of Revenue should also be safeguarded. Therefore, this Court is inclined to put the appellant on terms, which shall be a condition precedent for the appellant to be entitled to an opportunity.

16. For all the above reasons, the writ appeal is allowed, the writ petition is also allowed and the impugned order in the writ petition dated 11.1.2017 is set aside. The appellant is directed to pay a sum of Rs.5,00,000/- (Rupees five lakhs only) to the respondent within a period of three weeks from the date of receipt of a copy of this order. This condition shall be

without prejudice to the rights and contentions of the appellant and on such payment, the Assessing Officer shall issue a fresh notice to the appellant clearly indicating as to what is the basis, on which, he proposes to come to a conclusion that the transaction in question cannot be considered as a transfer of business as a going concern. If there are any directives issued by the higher level officers, the same need to be disclosed in the notice and the appellant shall be granted a minimum of clear 15 days' time to submit their objections. Thereafter, a date shall be fixed for personal hearing and after hearing the appellant, the respondent is directed to take a fresh decision in the matter without, in any manner, influenced by any of the observations made by her in the order dated 11.1.2017. No costs. Consequently, the connected CMP is closed.

-s/d-
Assistant Registrar(CS-II)

True Copy

Sub-Assistant Registrar

RS

To
The Assistant Commissioner (CT), Tirupur North Assessment Circle,
CT Main Building, Kumaran Road, Tirupur-641601.

+1 CC to Mr.B.Raveendran, advocate sr 74547.
+1 CC to Spl. Govt.Pleader(T) sr 75012.

WA.No.2372 of 2018 &
CMP.No.18836 of 2018

SPD(CO)
SP(04/12/2018)