IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:04.12.2019

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P.Nos.12503 to 12507 of 2002 and
W.P.M.P.Nos.16835, 16837, 16839, 16841 & 16843 of 2002

G.Sankaran ... Petitioner in WP.No.12503 & 12506/2002

Ganesh Trading Company,
No.6/2, Rajaji Nagar, Ariyalur.
... Petitioner in WP.No.12504 & 12505 & 12507/2002

Vs.

1.The Deputy Commercial Tax Officer,
Ariyalur.

2.The Appellate Assistant Commissioner
of Commercial Taxes,
Tiruchirapalli - 1.

3.The Joint Commissioner (CT) (SMR) II
Office of the Special Commissioner
and Commissioner of Commercial Taxes,
Chepauk, Chennai - 600 005.

4.The Tamil Nadu Taxation Special
Tribunal, represented by its
Registrar, Second Floor,
Singaravelar Maaligai, Chennai - 600 001.
... Respondents in all WPs

W.P.No.12503/2002: Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorari to call for the records on the files of the fourth respondent herein in T.C.(A).No.117/99 dated 7.2.2002, along with the orders of the third respondent herein in MM2/38391/96 (SMR No.700/96) dated 7.9.1998 and quash the proceedings of the fourth Respondent.

W.P.No.12504/2002: Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorari to call for the records on the files of the fourth respondent herein in T.C.(A).No.54/99 dated 7.2.2002, along with the orders of the third respondent herein in MM2/49774/95 (SMR No.235/96) dated 7.9.1998 and quash the proceedings of the fourth Respondent.

W.P.No.12505/2002: Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorari to call for the records on the files of the fourth respondent herein in T.C.(A).No.119/99 dated 7.2.2002, along with the orders of the third respondent herein in MM2/38392/96 (SMR No.33/97) dated 7.9.1998 and quash the proceedings of the fourth Respondent.

W.P.No.12506/2002: Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorari to call for the records on the files of the fourth respondent herein in T.C.(A).No.118/99 dated 7.2.2002, along with the orders of the third respondent herein in MM2/71941/95 (SMR No.426/96) dated 7.9.1998 and quash the proceedings of the fourth Respondent.

W.P.No.12507/2002: Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorari to call for the records on the files of the fourth respondent herein in T.C.(A).No.64/99 dated 7.2.2002, along with the orders of the third respondent herein in MM2/71940/95 (SMR No.425/96) dated 7.9.1998 and quash the proceedings of the fourth Respondent.

For Petitioners : Mr.N.Inbarajan

For Respondents: Mr.M.Mohammed Shaffiq

Special Government Pleader (Taxes)

COMMON ORDER

(Order of the Court was made by DR.VINEET KOTHARI, J.)

These writ petitions have been filed by the Assessee aggrieved by the order dated 7th February 2002 passed by the Tamil Nadu Taxation Special Tribunal, Chennai - 600 001, dismissing the Tax Appeals filed by the Assessee and holding that the freight charges paid by the Assessee for delivery of Gypsum sold by it to the customer viz., M/s.Tamil Nadu Cements

Corporation Limited at Ariyalur was part of the taxable turnover as defined in Section 2(p) of the Tamil Nadu General Sales Tax Act, 1959 (in short 'TNGST Act').

2.The relevant observations of the learned Tribunal in the impugned order are quoted below for ready reference.

> "As indicated earlier, in the present cases before us, the terms as found in the contract clearly suggest that freight has been realized by the assessee only in pursuance of the transfer of property in the goods at the buyer's place of business after weightment and delivery of gypsum of good quality. In this connection, it is relevant to refer to the recent decision of the Madras High Court in W.P.No.21298 of 2001 dated 20th November 2001 in the case of "M/s.India Meters Limited Vs. State of Tamil Nadu". In that case, the assessee supplied electrical meters manufactured by it to the State Electricity Board. The contract provided that the ownership of the goods will remain with the supplier till they are delivered at the destination station in good and acceptable condition as per the despatch instructions. Thus, the contract contemplated that the transfer of title to the goods was to take place only on delivery of the goods at the customer's place of business and that the customer's obligation to pay would arise after delivery had been so completed. Though the contract provided for payment of ex-factory price and freight charges separately, the claim of deduction under Rule 6(c) of the Rules was negatived by the Madras High Court. The following observations in this decision are quite relevant.
>
> > "When the transfer of the property or the goods is to be at the place of the buyer to which the seller is under an obligation to transport the goods, the expenditure incurred by the seller on freight in order to carry the goods from his place of manufacture to the place at which he is required under the contract to deliver, would thus become part of the amount for which the goods are sold by the seller to the buyer and would fall within the scope of "turnover".
> >
> > "As the freight charge incurred here was a charge which the seller was required to incur prior to the completion of the sale it constituted a part of the pre-sale expense and was, therefore, rightly includable in the taxable turnover."

> Thus, in the present cases before us also, as the transfer of property in gypsum took place at the buyer's place after weighment and testing, we have no hesitation in holding the freight charges included in the sale price so as to bring the turnover as taxable turnover is quite in order and there is no case to interfere with the orders of the Joint Commissioner of Commercial Taxes in all these cases. Accordingly, the tax appeal cases are dismissed."

3.The learned counsel for the Assessee Mr.N.Inbarajan submitted before us that Rule 6(c) of the TNGST Rules provides for a deduction of freight and charges for delivery from the taxable turnover as defined in Section 2(p) of the Act and since there was a separate bargain for the price of the goods viz., Gypsum sold by the petitioner/Assessee to the customer and freight charges as indicated in the Purchase Order itself, therefore, the Assessing Authority as well as the learned Tribunal have erred in holding the said delivery charges and freight charges are part of the turnover and imposing tax on the same under the provisions of the TNGST Act. He submitted that even though the contract of sale was "F.O.R. Destination" at the business place of the customer viz., Tamil Nadu Cements Corporation Ltd., Ariyalur, but since there was a separate bargain for the freight charges which was fixed between the parties at Rs.120 per Metric Tonne, besides the price of the Gypsum sold by the petitioner/Assessee at Rs.137.15 per Tonne of the Gypsum and also Rs.9.80 for unloading and stacking charges at Ariyalur Factory Site of the customer, therefore, such freight charges or delivery charges could not be treated as part of the taxable turnover of the Assessee seller.

4.On the other hand, the learned counsel for the Revenue Mr.Mohammed Shaffiq submitted that since the contract of sale is admittedly "F.O.R. Destination" and the sale concludes only at the business place of buyer viz., Tamil Nadu Cement Corporation at Ariyalur, therefore, all expenses incurred prior to transfer of property in the goods from Assessee to the purchaser company, the same will be pre-sale expenses and will be part of taxable turnover and merely because the price of the goods is bifurcated by the Assessee or by an agreement between the Assessee and the purchaser, that cannot escape from the definition of taxable turnover under the TNGST Act. He submitted that the controversy is covered by a Division Bench decision of this Court in the case of India Meters Ltd. V. State of Tamil Nadu, (2004) 136 STC 285 (Mad), which has also been affirmed by the Hon'ble Supreme Court in the Appeal taken by the Assessee against the said Division Bench decision of the Madras High Court in India Meters Ltd v. State of Tamil Nadu, [2010] 34 VST 273 (SC).

5.He further submitted that Rule 6(c) of the TNGST Rules which provides for deductions from the taxable turnover, is subject to the conditions specified in the said Rules. Drawing the attention to the said Rule 6(c), which was relied upon by the learned counsel for the Assessee, he submitted that under Rule 6(c), all amounts falling under the special heads when specified and charged for by the dealer separately, 'without including them in the price of the goods', only are deductible. The said special three heads are the special heads of 6(c), which include freight as well as the charges for delivery. He therefore submitted that the condition of these charges being not included in the price of goods is not satisfied in the present case, because the goods are admittedly sold only "F.O.R. Destination" and the contract of sale is completed after the receipt of goods at the business place of the buyer and therefore, in such cases, mere mention of freight charges separately in the Purchase Order by the buyer company will not entitle the seller Assessee to claim a deduction with respect of such Rule 6(c) of the TNGST Rules. He submitted that the view of the Hon'ble Supreme Court in this regard was clearly laid down in the earlier Judgments also in the case of Hindustan Sugar Mills V. State of Rajasthan and others [(1978) 4 SCC 271] as well as M/s.Ramco Cement Distribution Co. (P) Ltd., V. State of Tamil Nadu [(1993) 1 SCC 192]. He therefore submitted that the present writ petitions filed by the Assessee against the well reasoned order of the Sales Tax Tribunal deserves to be dismissed by this Court.

6.We have heard the learned Counsels at length and perused the materials on record.

7.We find considerable force in the contentions raised by the learned counsel for the Revenue. The Division Bench of this Court in the case of India Meters Ltd. V. State of Tamil Nadu [(2004) 136 STC 285 (Mad)] was concerned with almost similar controversy where the Assessee/Dealer supplied power meters to the State Electricity Board under a "F.O.R. Destination" contract and claimed under Rule 6(c) of the TNGST Rules that the freight charges were not part of taxable turnover. Negativing the said contention of the Assessee, the Division Bench of this Court held as under:

> "12. It is no doubt true that Rule 6(c) of the Rules permits deduction of the cost on freight while determining the taxable turnover. However, that provision must be read in the context of the definition of "turnover" as also the definition of "sale" in Sections 2(r) and 2(n), respectively, of the Act. "Turnover" is defined in the Act, inter alia, to mean

"the aggregate amount for which goods are bought or sold, or delivered or supplied or otherwise disposed of in any of the ways referred to in Clause (n)....". "Sale" is defined in Section 2(n), inter alia, as meaning "every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration...". The definition goes on to include a number of other transactions also within that definition of "sale". The turnover of an assessee/dealer would include the aggregate amount for which goods are bought or sold. It is, therefore, the amount for which the goods are bought or sold, which form part of the turnover and a thing can be said to be sold only when the transaction falls within the scope of the definition of "sale".

13. When the transfer of the property or the goods is to be at the place of the buyer to which the seller is under an obligation to transport the goods, the expenditure incurred by the seller on freight in order to carry the goods from his place of manufacture to the place at which he is required under the contract to deliver, would thus become part of the amount for which the goods are sold by the seller to the buyer and would fall within the scope of "turnover".

14. The decision of this Court, in the case of S. Vadivel Mudaliar and Sons v. State of Tamil Nadu [1983] 52 STC 189, merely examined the words in Rule 6(c), without considering the effect of the definitions of "turnover" and "sale" and also without referring to the decisions of the apex Court in the case of Hyderabad Asbestos Cement Products Ltd. v. State of Andhra Pradesh [1969] 24 STC 487 and Dyer Meakin Breweries Ltd. v. State of Kerala [1970] 26 STC 248. The decision of the apex Court in Hindustan Sugar Mills Ltd. v. State of Rajasthan [1979] 43 STC 13 has considered elaborately the various modes in which also can be effected. Having regard to that decision, which also has not been noticed in S. Vadivel Mudaliar and Sons v. State of Tamil Nadu [1983] 52 STC 189 (Mad.), it must be held that the law declared by this Court in the case of S. Vadivel Mudaliar and Sons v. State of Tamil Nadu [1983] 52 STC 189, cannot be regarded as having laid down the law correctly, as it has been decided ignoring the binding decisions of the apex Court."

8.We respectfully agree with the view expressed by the Coordinate Bench of this Court in the case of India Meters Ltd (supra).

9.The said Judgment was also later on affirmed by the Hon'ble Supreme Court of India, in India Meters Limited V. State of Tamil Nadu [2010] 34 VST 273 (SC) with the following observations:

> "14. In the instant case, the obligation to pay the freight was clearly on the appellant as there was no sale at all, unless the goods were delivered at the premises of the buyer and in order to so deliver, the assessee necessarily had to incur freight charges.
>
> 15. The transfer of title to the goods as provided in clause 10 read with clause 6 of the agreement was to be at the place of delivery in the premises of the buyer. Though the contract mentioned the price of the electric meters as ex-factory price, the delivery was not at the factory gate. The specification of what the price would be at the factory gate, therefore, does not in the context of the term subject to which the sale was agreed to be effected, render it the point or the location at which the sale can be said to have been completed. Had the sale been completed at the factory gate, the expenses incurred thereafter by way of freight charges would then be capable of being regarded as expenditure which was in the nature of a post-sale expenditure and, if paid by the seller, regarded as an amount paid by such seller on behalf of the buyer.
>
> 16. Both the aforementioned cases emphasise the fact that expenses incurred by a seller on freight would be part of the sale price, as until the transfer of title to the goods takes place that being the only way made in which sale could have taken place prior to the introduction of clause 29A of Article 366 of the Constitution.
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> ...
>
> 18. It is no doubt true that Rule 6(c) of the Rules permits deduction of the cost on freight while determining the taxable turnover. However, that provision must be read in the context of definition of "turnover" as also the definition of "sale" in Sections 2(r) and 2(n) respectively of the Act. "Turnover" is defined in the Act, inter alia, to mean "the aggregate amount for which goods are bought or sold or delivered or supplied or otherwise disposed of in any of the ways referred to in clause (n)".

> 19. "Sale" is defined in Section 2(n), inter alia, as meaning "every transfer of the property in goods (other than by way of a mortgage, hypothecation, charge or pledge) by one person to another in the course of business for cash, deferred payment or other valuable consideration". The definition goes on to include a number of other transactions also within that definition of "sale". The turnover of an assessee/dealer would include the aggregate amount for which goods are bought or sold. It is, therefore, the amount for which the goods are bought or sold, which form part of the turnover, and a thing can be said to be sold only when the transaction falls within the scope of the definition of "sale".
>
> 20. When the transfer of the property or the goods is to be at the place of the buyer to which the seller is under an obligation to transport the goods, the expenditure incurred by the seller on freight in order to carry the goods from his place of manufacture to the place at which he is required under the contract to deliver, would thus become part of the amount for which the goods are sold by the seller to the buyer and would fall within the scope of "turnover".

10.In view of the aforesaid binding legal precedents, we are of the clear opinion that mere bifurcation of the sale price of the goods in a mutual contract between the parties under a separate bargain or even a common bargain will not be material and so long as the contract of sale is "F.O.R. Destination" and the contract of sale of goods results in the transfer of property of goods at the door steps of the buyer, all pre-sale expenses incurred by the selling dealer will be part of the sale price or taxable turnover. The deduction under Rule 6(c) of the TNGST Rules cannot be claimed by the selling Dealer, contrary to the specific terms of the "F.O.R. Destination" contract. Dealing with the Rule 6(c) itself, the Division Bench of this Court and later on the Hon'ble Supreme Court in the case of India Meters Limited (supra), has upheld this very proposition of law and therefore, the contention of the learned counsel for the Assessee that the separately fixed price for freight at the rate of Rs.120 per Metric Tonne should not form part of taxable turnover, is liable to be rejected. The condition in Rule 6(c), as quoted above, that such separately fixed price of freight or charges for delivery should not be included in the price of goods is a question of fact to be determined by the authorities. Once the terms of the contract clearly specified, the contract of sale was "F.O.R. Destination", the bifurcation of total sale price in two or three parts, as has been done in the present case like price for Gypsum, freight charges and loading and stacking charges will not be material, insofar as the question of determination of the taxable turnover is concerned. It is trite law that the Rule cannot go beyond the four corners of the main statutory provisions. The definition of taxable turnover does not make any such exclusions and as held by the Hon'ble Supreme Court in various Judgments supra, it is clear that all pre-sale expenditure incurred by the seller/dealer are part of sale price including the freight as in the present case will fall under taxable turnover.

11.Consequently, in our opinion, the learned Sales Tax Tribunal as well as the Assessing Authority were justified in upholding the imposition of the tax on such part of the freight charges on the Assessee in the present case.

12.Accordingly, the Writ Petitions filed by the Assessee is found to be without merit and they are liable to be dismissed. No costs. Consequently, connected Miscellaneous Petitions are also dismissed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

Sgl

To

1.The Deputy Commercial Tax Officer,
Ariyalur.

2.The Appellate Assistant Commissioner
of Commercial Taxes,
Tiruchirapalli - 1.

3.The Joint Commissioner (CT) (SMR) II
Office of the Special Commissioner
and Commissioner of Commercial Taxes,
Chepauk, Chennai - 600 005.

4.The Tamil Nadu Taxation Special
   Tribunal, represented by its
   Registrar, Second Floor,
   Singaravelar Maaligai,
   Chennai - 600 001.

+1cc to Mr.N.Inbarajan, Advocate SR.101241
+1cc to the Special Government Pleader Sr.101809

W.P.Nos.12503 to 12507 of 2002

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