

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.09.2019

CORAM:

THE HONOURABLE Dr. JUSTICE ANITA SUMANTH

Writ Petition Nos.13896 and 13897 of 2007

and M.P.Nos.1 and 1 of 2007

M/s.Filaments & Windings (India) Pvt. Ltd.,
63, SIDCO Industrial Estate,
Coimbatore. ... Petitioner in both W.P.s

vs.

1. The Principal Commissioner &
Commissioner of Commercial Taxes,
Ezhilagam, Chennai.
2. The Commercial Tax Officer,
Podanur Assessment Circle,
Coimbatore. Respondents in both W.Ps.

Petitions filed under Article 226 of the Constitution of India
praying for issuance of a Writ of Certiorari to call for the
records of the second respondent in Asst.No.1800419/2001-02
and 2002-03 and quash the order dated 26.02.2007.

For Petitioner : Mr.S.Ravee Kumar

For Respondents : Mr.Mohd. Shafiq, Spl.G.P.(T)

Assisted by

Mr.V.Haribabu, AGP (T)

C O M M O N O R D E R

Heard Mr.S.Ravee Kumar, learned counsel for the
petitioner and Mr.Mohammed Shafiq, learned special Government
Pleader assisted by Mr.V.Haribabu, learned Additional
Government Pleader for the respondents.

2. The first ground raised and argued by learned counsel
for the petitioner is that the impugned re-assessments dated
26.02.2007 for the periods 2001-02 and 2002-03, passed in
terms of the Tamil Nadu General Sales Tax Act, 1959 (in short
'Act'), constitute a review and are hence, impermissible in
law.

3. The Assessing Authority had originally, vide orders
of assessment dated 24.03.2003 and 20.06.2005 respectively,

passed under scrutiny examined the very same transactions, coming to the conclusion that the concessional rate of tax claimed was in order. He goes so far as to specifically state and record this in the original orders of assessment. While this is so, the petitioner received pre-assessment notices dated 06.12.2006 proposing to bring to tax the very same transactions at regular rate, thus denying the petitioner the benefit of concessional rate of tax. This, according to the petitioner, constitutes a change of opinion or review of the original stand adopted in assessment that is impermissible in law. He points out that neither the pre-revision notices nor the impugned orders of assessment refer to any new material or information gathered by the department or that has come to its notice, warranting the revision of assessments, in law or on facts.

4. He relies on a judgment of the Supreme Court in the case of State of Uttar Pradesh and Others Vs. Aryaverth Chawl Udyog and Others [(2016) 91 VST 1 (SC)], wherein, the Bench, in the context of the U.P. Trade Act, 1948, states that the Assessing Authority can reassess turnover only on the basis of new material and not upon a change of opinion.

5. Per contra, Mr. Mohammed Shafiq, learned Special Government Pleader, assisted by Mr. V. Haribabu, learned counsel appearing for the Revenue relies on the following decisions:

(i) Dinod Cashew Corporation Vs. The Deputy Commercial Tax Officer (61 STC 1);

(ii) Yercaud Coffee Curing Works Ltd. Vs. The State of Tamil Nadu (40 STC 531);

(iii) Surya Fertilisers and Chemicals Vs. The State of Tamil Nadu (40 STC 538).

6. Having heard the learned counsel, my decision on the assumption of jurisdiction by the Assessing Authority is as under. The issue as to whether the authorities of the State Commercial Taxes Department are empowered to initiate proceedings for re-assessment/revision of assessment and the scope and width of such powers, if any, is no longer res integra and has come to be decided by Division Benches of this Court in several cases. Before referring to the same, I deem it appropriate to refer to the provisions of Section 16 itself, dealing with assessment of escaped turnover that reads as under:

Section 16. Assessment of escaped turnover.- (1) (a) Where, for any reasons, the whole or any part of the turnover of business of a dealer has escaped assessment to tax the assessing authority may, subject to the provisions of sub-section (2), at any time within a period of five years from the *[date

of order of the final assessment by the assessing authority], determine to the best of its judgment the turnover which has escaped assessment and assess the tax payable on such turnover after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.

Section 16(1)(b) Where, for any reason, the whole or any part of the turnover of business of a dealer has been assessed at a rate lower than the rate at which it is assessable, the assessing authority may, at any time within a period of five years from the * [date of order of the final assessment by the assessing authority], reassess the tax due after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such re-assessment.

7. In the present case, it is the provisions of sub-Section 1(b) that would be attracted, insofar as we are concerned with re-assessment of turnover at a higher rate than what was initially applied. Section 16 provides for assessment of escaped turnover 'for any reason'. The language utilised is wide and grants unrestricted powers to an assessing authority to bring to tax turnover that has in his opinion escaped assessment for any reason whatsoever.

8. In *Surya Fertilisers (supra)*, a Division Bench of this Court, in considering the validity of an assessment invoking powers under Section 16 of the Act, holds that the Assessing Officer can bring to tax turnover that has escaped on account of an erroneous understanding of the nature of transaction, a wrong understanding of the provisions of the Act or erroneous exclusion of taxable turnover from the ambit of tax. The ratio thereof has been confirmed in *Yercaud Coffee Curing Works Ltd. (supra)* by another Division Bench (Justice Sethuraman being common to both Benches).

9. In the case of *Dinod Cashew Corporation (supra)*, a subsequent Division Bench has reiterated the same view as aforesaid. A specific argument advanced by the petitioner in that case was a comparison of the provisions relating to re-assessment in terms of the Indian Income Tax Act with the Tamil Nadu General Sales Tax Act. The Bench noted that the provisions of the Income Tax Act used the phraseology 'reason to believe' and not 'for any reason', as used in the Sales Tax Act. Thus, the Central enactment imposes a fetter on the powers of the Assessing Authority to re-assess escaped income stating specifically that he had to establish reasonable belief prior to initiating such proceedings. Several judgments have thereafter been rendered by the Supreme Court and High Courts on this anvil of interpretation striking down re-assessments made, in the absence of reasonable belief of escapement of income and absence of tangible/new material upon

which such belief could have rested. I refrain from listing the same as they are not strictly germane to the case on hand. When contra distinguishing the language of the statutory provisions of the Income Tax Act with that of the provisions in pari materia under the TNGST Act, I find such restriction or fetter, absent in the latter.

10. The Madras High Court in Dinod Cashew Corporation (supra) has elaborately dealt with the above comparison in the following terms:

23.The provision of reopening of assessment is a common feature in any tax legislation. In the case of Tamil Nadu General Sales Tax Act, the power under section 16(1)(a) can be exercised not "for any reason" if the whole or any part of the turnover of business of dealer has escaped assessment to tax. Therefore, the only circumstance on which an assessment can be reopened is that the whole or any part of the turnover of business of dealer has escaped assessment to tax. The power under section 16 is a wide power. The only condition is that the assessing officer must be satisfied that the turnover has escaped assessment. The scope of section 16 has been considered by this Court in Yercaud Coffee Curing Works Ltd. v. The State of Tamil Nadu [1977] 40 STC 531. A Division Bench of this Court in that decision has held that under section 16 of the Tamil Nadu General Sales Tax Act, 1959, it is competent for the assessing authority in a reassessment proceeding to assess an item of turnover which had been omitted to be taxed earlier for any reason and the authority has, therefore, power to reassess a turnover even though in the return that turnover was included and the officer then thought that it was exempt. The Division Bench has referred to the earlier decision of a Full Bench of this Court in State of Madras v. Louis Dreyfus and Company Ltd. [1955] 6 STC 318 (FB) at page 329, where the Full Bench observed as follows :

"The 'escape' that serves as the foundation of the jurisdiction to reopen an assessment is that of 'turnover' and not, be it noted, an assessment. 'Turnover' escapes when it is not noticed by the officer either because it is not before him by reason of an inadvertence, omission or deliberates concealment on the part of the assessee, or because of want of care on the part of the officer the turnover though in the books has not been taken notice of. This would be the natural and normal meaning of the expression 'turnover which has escaped' in rule 17(1)."

....The argument before the Supreme Court was that section 26 was not applicable to a case where income was returned but was initially held to be not liable to tax. This contention was negatived and the Supreme Court held that the Agricultural Income-tax Officer was competent under section 26 of the Bihar Act to assess an item of income which he had omitted to tax earlier, even though in the return that income was included and the Agricultural Income-tax Officer then thought it was exempt. In paragraph 16 of its judgment the Supreme Court pointed out that the use of the words "any reason" which are of wide import dispenses with those conditions by which section 34 of the Indian Income-tax Act is circumscribed. Having regard to the manner in which section 16 is worded, the restrictions which are based upon the Income-tax Officer for reopening an assessment under section 147 cannot be imported when the validity of the action taken under section 16 is to be judged and having regard to the use of the words "for any reason" it is clear that, even where a turnover was disclosed but it was not subjected to tax, because at the relevant time, the assessing authority thought that particular turnover was exempt under the provisions of section 5(3) of the Central Act, it will be permissible for the assessing authority to reopen the assessment under section 16(1)(a) of the local Act. No infirmity can, therefore, be found in the reassessment proceedings which were either initiated or completed.

24. An argument was advanced before us that in an assessment proceeding under the Income-tax Act, 1961, it is quite possible for an Income-tax Officer, dealing with a case of the dealer, to take the view that any additional tax consequent upon the reassessment under section 16 of the Tamil Nadu General Sales Tax Act would not be treated as deductible expenditure under section 37 of the income-tax Act with the result that as a consequence of the wrong view of the law taken by the assessing authority, the petitioner would be prevented from getting the necessary relief under the Income-tax Act. According to the learned counsel the assessments made under section 16 must be held to be invalid because section 16 cannot be so construed as to take away the benefit of deduction of tax paid for purposes of the Income-tax Act. This contention must be rejected. The provision under section 16 of the Tamil Nadu General Sales Tax Act will have to be construed in accordance with the well-known rules of interpretation of statutes. What impact this reopening of assessments will have on the petitioners' rights under some other Act like the Income-tax Act will be foreign to the question of

construction of validity of the assessment made under section 16 of the Act.

11. Thus, the statutory provision for initiating proceedings for assessment of escaped turnover permits an Assessing Authority under the TNGST Act to initiate proceedings for re-assessment merely if, in his opinion, turnover liable to be brought to tax, has escaped assessment.

12. It is relevant to note that the U.P. Trade Tax Act, 1948 also utilises the phrase 'reason to believe' in Section 21 of the Act dealing with 'Assessment of tax on the turnover not assessed during the year', extracted below:

'21. Assessment of tax on the turnover not assessed during the year - (1) If the assessing authority has reason to believe that the whole or any part of the turnover of a dealer, from any assessment year or part thereof, has escaped assessment to tax or has been under assessed or has been assessed to tax at a rate lower than that at which it is assessable under this Act, or any deductions or exemptions have been wrongly allowed in respect thereof, the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary assess or reassess the dealer or tax according to law'

13. Thus the reliance of the petitioner on this judgment is of no assistance to it. For the aforesaid reasons, the plea regarding lack of jurisdiction is rejected.

14. Now coming to the merits of the matter, the petitioner is a manufacturer of Fibre Glass Reinforced Plastic Products (in short 'FGRP') and is a registered dealer in terms of the provisions of the TNGST Act. FGRP is supplied to its customers, who admittedly are manufacturers themselves. There is no dispute on this position. Upon receipt of Form XVII declarations, from the purchasers, the rate of sales tax chargeable for the aforesaid products would be concessional, at 3% as against 11%, normally leviable.

15. Original assessments were completed for the periods 2001-02 and 2002-03 on 24.03.2003 and 20.06.2005 respectively. In both the assessments, the Assessing Authority has categorically noted that the turnover in respect of which concessional rate of tax was sought was covered by Form XVII declarations, thus entitling it to the benefit claimed.

16. While this is so, there appears to have been an inspection at the petitioners' premises on 22.05.2006 and based on a statement recorded therein, a notice dated 22.05.2006 for revision of assessment was issued by the

Enforcement Officers. The notice alleged that the inspection of the business premises revealed contravention of the provisions of the Act insofar as the sales in respect of which concessional rate was sought were not so eligible to the same and ought to have been taxed under regular rate.

17. In reply dated 29.05.2006, the petitioner stated that the notice was itself vague insofar as the proposal to deny concessional rate as per section 3(3) or 3(5) of the Act, was not supported by any material. The notice had also referred to the provisions of section 45(2)(cc) of the Act for non-compliance with the provisions of section 3(3)/3(5). In reply thereto, the petitioner reiterated that it had, in fact, complied with all the conditions set out under section 3(5) of the Act, emphasizing specifically that any penalty/prosecution contemplated should be targeted only at the purchasing dealer/dealer who had issued Form XVII declaration and not the selling dealer. Various decisions in support of its stand were referred to.

18. There was an exchange of communication thereafter and pursuant to a further notice dated 06.12.2006 and objection dated 11.1.2007, the Officer proceeds to pass the impugned orders of assessment confirming the assessment proposals.

19. Upon a perusal of the impugned orders dated 26.02.2007, I find that the petitioner has been denied concessional rate of tax on the following main grounds:

(i) that the goods in respect of which concessional rate has been claimed do not find place in the Eighth Schedule to the Act, which according to the Officer deals only with capital goods;

(ii) that FGRP does not constitute capital goods, or parts of machinery sold for replacement during maintenance and repairs;

(iii) that the decisions relied upon by the assessee deal with section 3(3) and not section 3(5) which is relevant for the purposes of the present case;

(iv) that the sales transactions have been effected with the full knowledge of the petitioner that the goods sold are not entitled to concessional levy of tax.

20. The petitioners' submission that action, if any, for allegedly misusing Form XVII declaration would have to be initiated only as against the purchasing dealer was also rejected on the ground that the Assessing Officer cannot be expected to investigate and confirm whether the goods have been used for the stated purpose or not. A distinction was sought to be made by the Officer between the provisions of Section 3(3) and 3(5), pointing out that the provisions of

section 3(3) granted concessional levy in respect of any goods including consumables, packing material and labels, but excluding plant and machinery sold to a dealer for use by such dealer in manufacturing, assembling, packing or labelling of the goods, whereas section 3(5) granted concessional rate in respect of sale of any goods mentioned in the Eighth schedule and therefore, the decisions relied upon by the assessee, that dealt with the provisions of section 3(3), were inapplicable to its case.

21. Section 3(5) is relevant to the adjudication of the lis in this matter and is extracted below:

Section 3(5) Notwithstanding anything contained in sub-section (2), but subject to the provisions of sub-section (1), the tax payable by a dealer in respect of sale of any of the goods mentioned in the Eighth Schedule to any other dealer for installation of, and use in his factory site situate within the State for the manufacture of any goods shall be at the rate of three per cent on the turnover relating to such sale;

Provided that the provisions of this sub-section shall not apply to any sale, unless the dealer selling such goods furnishes to the assessing authority in the prescribed manner and within the prescribed period, a declaration duly filled in and signed by the dealer to whom the goods are sold, containing the prescribed particulars in the prescribed form obtained from the prescribed authority;

Provided further that any such dealer, who, after purchasing the goods in respect of which he had furnished any declaration, fails to install the goods and make use of the goods so purchased for the purpose specified in the declaration or disposes of such goods in any other manner within a period of five years shall pay the difference of the tax payable on the turnover relating to sale of such goods at the rate prescribed and three per cent. '

22. The Section extends a concessional rate of tax in respect of sale of those goods set out in the Eighth Schedule, the relevant portion of which, reads thus:-

\.....

3. Machineries of all kinds (other than those specifically mentioned in the First Schedule) worked by (i) Electricity (ii) Nuclear power (iii) Hydro-dynamic and steam power (iv) Diesel or petrol (v) Furnace oil (vi) Kerosene (vii) Coal including coke and charcoal or (viii) any other form of fuel or

power (excluding human or animal labour) (ix) parts and accessories of machineries and tools used with the machineries mentioned in sub-item (i) to (viii) above.'

23. The conclusion of the Assessing Authority to the effect that section 3(5) would apply to 'capital goods' alone is clearly incorrect and does not appear to have any basis. Capital goods being machinery as well as parts, accessories and tools thereof fall within the ambit of clause (3) of the Eighth schedule and consequently within the beneficial sweep of section 3(5) as well.

24. There is no dispute in this case that the purchaser is an industrial consumer and is not a trader/retailer. Being a manufacturer, the petitioners' case is that the FGRP supplied has been used by the purchasers in their manufacturing activity. This argument has been specifically raised by the petitioner in reply dated 11.01.2007 more than once and has not been controverted or denied by the Assessing Officer. It is hence uncontroverted that the ultimate consumer in this case is a manufacturer. Thus, in summation, the commodities in question fall within the cover of the Eighth schedule and have been purchased for use in the activity of manufacturing by the purchaser. The provisions of section 3(5) are thus applicable on all fours in this case.

25. The objections of the Assessing Officer to the effect that the averments in Form XVII declaration would have to be proved by a selling dealer, is clearly misplaced and does not stand to reason. A Division Bench of this Court in the case of Sree Murugan Engineering Products V. Commercial Tax Officer, Coimbatore (148 STC 419) has considered this very argument of the Revenue, rejecting the same as follows:

'In M/s.Maruthi Handling Equipments v. The Deputy Commercial Tax Officer (Writ Appeal No.994 of 2006 and W.P.No.22331/2006 decided on August 10, 2006 - Madras High Court) following the earlier decisions of this Court and the Supreme Court, this Bench has categorically held that how the purchasing dealer has dealt with the goods is not the concern of the seller and liability can be fastened only upon the purchasing dealer and not the seller.'

26. In the light of the discussion as above, the orders of assessment are quashed on merits and these Writ Petitions are allowed. No costs. Consequently, the connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CS)

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Sub Assistant Registrar

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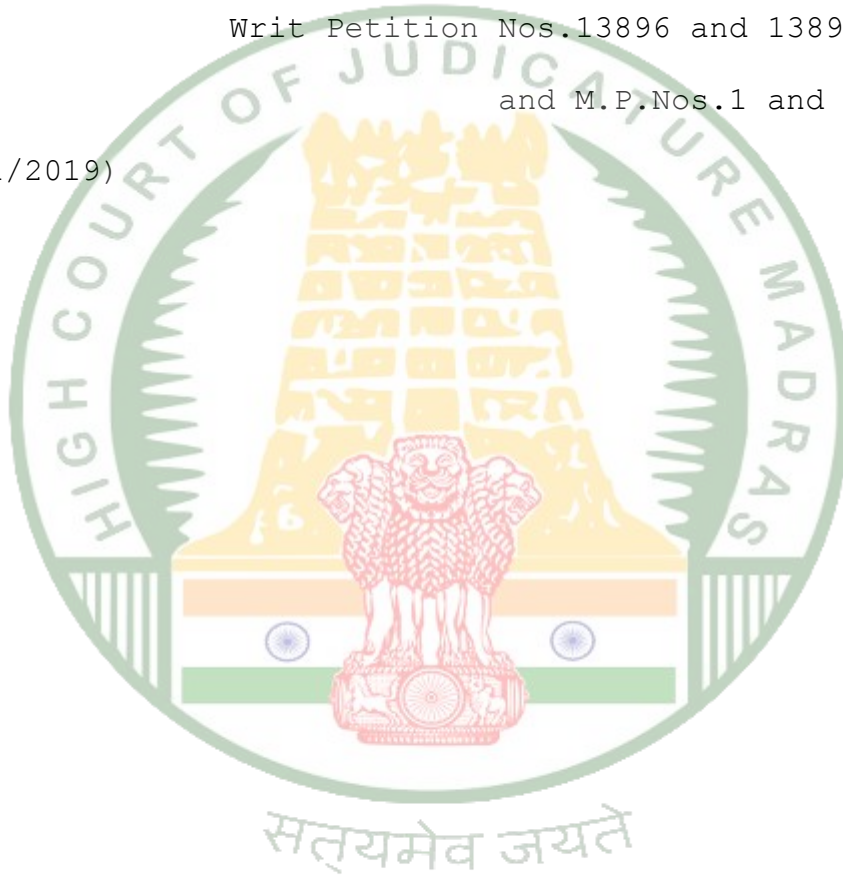
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A.SK(19/11/2019)



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