IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.09.2019

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

Writ Petition Nos.16809, 16814 and 25262 of 2008, 40280 of 2006
6122, 6123 of 2007 and 14533 of 2009
& M.P.Nos.1, 1, 1 of 2008, 1 of 2006, 1, 1 of 2007, and 1 of 2009

Sastha Traders
34, Spur Tank Road,
Chetpet, Chennai - 31.

...Petitioner in W.P.No.16809 of 2008

Mark Associates
Plot No.2028, H Block,
No.63, 4th Street, 12th Main Road,
Anna Nagar West, Chennai - 40.

...Petitioner in W.P.No.16814 of 2008

Swasthik Agencies
70, Station Road,
Chromepet, Chennai - 44
rep. By its Manager

...Petitioner in W.P.No.25262 of 2008

M.R.L. Agencies,
No.1, Roja Nagar,
Bazaar Road,
Madhavaram, Chennai - 60.
rep. By its Partner

...Petitioner in W.P.No.40280 of 2006

Sri Om Sakthi Agencies
MAC Stadium, Bells Road,
Chennai - 600 005
rep. By its Partner

...Petitioner in W.P.No.6122 of 2007

Sri Om Sakthi Cement Marketing
MAC Stadium, Bells Road,
Chennai - 600 005
rep. By its Partner

...Petitioner in W.P.No.6123 of 2007

Tvl.Venkateswara Agencies,
687, Poonamallee High Road,
Amaindakarai, Chennai - 29
rep. By its Partner

...Petitioner in W.P.No.14533 of 2009

Vs

The Commercial Tax Officer,
Egmore II Assessment Circle,
Taluk Office Buildings,
Chennai - 31.

.... Respondent in W.P.No.16809 of 2008

The Commercial Tax Officer,
Amindakari Assessment Circle,
Kuralagam, Chennai - 108.

.... Respondent in W.P.Nos.16814 of 2008

The Assistant Commissioner (Commercial Taxes)
Tambaram II Assessment Circle,
Chennai

.... Respondent in W.P.No.25262 of 2008

The Commercial Tax Officer,
Manali Assessment Circle,
Kuralagam, Chennai - 108.

.... Respondent in W.P.No.40280 of 2006

The Commercial Tax Officer,
Chepauk Assessment Circle,
Chennai.

.... Respondent in W.P.Nos.6122 & 6123 of 2007

The Assistant Commissioner (CT)
Amindakarai Assessment Circle,
Kuralagam, Chennai.-108.

... Respondent in W.P.No.14533 of 2009

Prayer in W.P.No.16809 of 2008: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari to call for the records of the respondent in TNGST/0540884/2003-04 dated 06.06.2008 and quash the same.

Prayer in W.P.No.16814 of 2008: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari to call for the records of the respondent in TNGST/1022757/2004-05 dated 16.06.2008 and quash the same.

Prayer in W.P.No.25262 of 2008: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari to call for the records of the respondent in TNGST/0940688/2004-05 dated 22.09.2008 and quash the same.

Prayer in W.P.No.40280 of 2006: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari to call for the records of the respondent in TNGST/1080650/2004-05 dated 18.08.2006 and quash the same in so far as it relates to the levy of additional sales tax on resale value of cement effected by the petitioner and the consequential levy of penalty.

Prayer in W.P.No.6122 of 2007: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari to call for the records of the respondent in TNGST/0660914/2003-04 dated 30.11.2006 and quash the same in so far as it relates to the levy of additional sales tax on resale value of cement effected by the petitioner.

Prayer in W.P.No.6123 of 2007: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari to call for the records of the respondent in TNGST/0661374/2003-04 dated 30.11.2006 and quash the same in so far as it relates to the levy of additional sales tax on resale value of cement effected by the petitioner.

Prayer in W.P.No.14533 of 2009: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari to call for the records of the respondent in TNGST/1020243/2004-05 dated 02.07.2009 and quash the same .

For Petitioner in the above W.Ps : Mr.S.Raveekumar

For Respondent in the above W.Ps : Mr.Haribabu, AGP

C O M M O N O R D E R

Though W.P.No.14533 of 2009 forms part of this batch, the same was omitted to be listed. Hence, it was listed under a special list and taken up for hearing and disposal with the batch with the consent of both parties.

2. In W.P.No.16809 of 2008, learned counsel for the petitioner states that the assessee has availed the then prevailing Scheme for samadhan/settlement of tax arrears and hence nothing further survives therein. He has also made an endorsement in the bundle to that effect. Accordingly and recording the aforesaid, W.P.No.16809 of 2008 is dismissed. No costs.

3. The petitioners are dealers engaged in trading in cement and are assessees on the files of the respective respondent/assessing officers.

4. In W.P.No.6122 of 2007, the petitioner challenges an order of assessment passed in terms of the provisions of the Tamil Nadu General Sales Tax Act, 1959 (in short 'TNGST Act') dated 30.11.2006 for the period 2003-04.

5. The petitioner had filed regular monthly returns offering turnover to tax under the TNGST Act, and taking the stand therein that such turnover would not attract liability under the provisions of the Tamil Nadu Additional Sales Tax Act, 1970 (in short, 'TNAST Act') for the reason that its entire turnover was generated from the resale of cement purchased from its principals. The petitioner, in adopting this stand, relies on a Circular issued by the Commissioner of Commercial Taxes dated 27.06.2002.

6. While this is so, the petitioner received a pre-assessment notice dated 25.07.2005. The books of accounts had been called for and checked that revealed that the computation of turnover as per the petitioner was as follows:

First sale of Cement	Rs. 4,07,95,207.63	@24%
First sale of Cement	Rs.11,58,39,175.71	@16%
First sale of Cement	Rs. 1,76,008.00	@12%
First sale of Cement	Rs. 1,44,207.00	@3%
Taxable turnover as per accounts	Rs.15,69,54,599.75	
Add: Resale of Cement Price less than Rs.135/-	Rs. 1,79,61,488.67	
Resale of cement price more than 135/-	Rs. 70,60,241.56	@1%
Sales Return	Rs. 32,49,440.00	@5%
Total turnover as per accounts	Rs.18,52,25,770.00	

7. The proposal included the levy of additional sales tax on the ground that the taxable turnover, computed at a sum of Rs.18,52,25,770/- as returned by the petitioner, exceeded a sum of Rs.10.00 crores. The Assessing Authority thus proposed to impose additional sales tax at the rate of 3% under TNAST Act. The petitioner, vide reply dated 04.08.2005, enclosed the details of the principals' turnover arguing that there would be no charge to additional sales tax since the turnover of the principals' was, according to the petitioner, below the threshold for taxation. The petitioner, thus prayed that the proposal to levy additional sales tax be withheld.

8. The assessment was completed by order dated 30.11.2006 confirming the assessment proposals. The Assessing Authority considered the objections raised by the petitioner relying on the provisions of Explanation IV to Section 2(1)(aa) of the TNAST Act that provides for the exclusion of resale turnover payable under Section 3H of the TNGST Act in order to compute taxable turnover under the TNAST Act. The relevant provisions of section 2(1)(aa) including Explanation IV read as follows:

> 'Section 2(1)(aa) The tax payable under the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959) (hereafter in this section referred to as the said Act), shall, in the case of a dealer including the principal selling or buying goods through agents whose taxable turnover (for a year exceeds ten crores of rupees) be increased by an additional tax, calculated at the following rates, namely -
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> ....
>
> Explanation I....
>
> Explanation II..
>
> Explanation III....
>
> Explanation IV 'Taxable turnover' for the purpose of this cause does not include the turnover of resale, taxable under section 3-H of the said Act.'

9. Thus the proposal stood confirmed relying on the Circular of the Special Commissioner of Commercial Taxes in Circular No.Act Cell I/7975/2006 dated 05.04.2006 to the effect that the dealer was liable to pay additional sales tax on the entire taxable turnover which included sales in its own capacity as independent dealer and as well as on behalf of the principals

either resident or non-resident. The Assessing Authority placed reliance on the decision of the Madras High Court in the case of Tvl.India Beedi Leaves V.State of Tamil Nadu (57 STC 190) in this regard and the entire turnover of Rs.18,19,76,331/- was held to liable for AST and AST at 1% was levied.

10. The endeavour of Mr.Raveekumar, learned counsel for the petitioner is to state that Explanation (I) to section 2(1)(aa) would exclude the levy of AST in the hands of the dealer, since the entire turnover was to be taxed in the hands of the principal alone and in a case where the turnover has been brought to additional sales tax at the hands of principals, admittedly, it would not be liable to tax in the hands of the dealer. Explanation (I) is extracted below:

> ' Section 2(1)(aa)............
>
> Explanation I - 'Taxable Turnover' for the purpose of this clause in respect of a principal selling or buying goods [...] through agents shall be the aggregate taxable turnover of all his agents relating to the sale or purchase of the goods of such principal within the State.'

11. This issue has not been adjudicated upon by the Assessing Officer in the case of the petitioner in W.P.Nos.6122, 6123 of 2007 and 40280 of 2006. In fact, even before me, no ground is raised to this effect. Though a legal plea, the necessary factual particulars are not on record and at this distance of 15 years, I am not inclined to remand the matter back for consideration of this point.

12. I thus confine myself to examination of the veracity of the petitioners' argument to the effect that Explanation (IV) supports its case. In my view, the turnover referred to in Explanation (IV) relates only to turnover under section 3H of the TNGST Act, which deals with re-sale tax. According to the petitioner, all subsequent sales would tantamount to re-sales. However, the provisions of section 3H, that deal with levy of re-sale tax, are specific to turnover of resale of goods specified in the first and eleventh schedules only.

13. In the present case, the commodity is Cement, which admittedly falls under the fifth schedule. Thus, subsequent sale of cement can only constitute second sales and cannot be equated to a re-sale. The protection available under Explanation (IV) would thus not be available to the petitioner.

14. Reliance is placed by the petitioner on the decisions of this Court in the case of Tvl.Saraswathi Agencies V. The Deputy Commercial Tax Officer (T.C.(R) No.9 of 2018 dated 15.02.2018), State of Tamil Nadu V. National Time Co. ((2011) 39 VST 247 (Mad) and The State of Tamil Nadu V. Tvl. Hindustan Lever Limited (T.C.(R) No.64 of 2017 dated 08.01.2018. However, these decisions are of no assistance to him in the light of factual as well as legal discussions in those matters.

15. Reliance is also placed on the case of Tvl.P.Selvaraj V. The Commercial Tax Officer and another (W.P.No.14068 of 2007 dated 19.09.2007), where a learned single Judge of this Court considered whether the levy of additional sales tax at 1% on turnover relating to resale of cement is sustainable or not. In that case, the assessee had taken a specific stand before the Assessing Authority relying on Explanation (I) to Section 2(1)(aa). The finding by the learned Judge therein, noting the specific objection raised, is that it was not considered by the Assessing Authority. This position does not arise in this matter. Accordingly the orders of assessment on merits are confirmed.

16. As far as levy of penalty is concerned, it is clear that the Assessing Authority has proceeded only on the basis of the petitioners' books of accounts, the same not having been rejected. Thus the decision of this Court in Apollo Saline Pharmaceuticals Limited V. Commercial Tax Officer (125 STC 505) will apply on all forms to buttress the position that the provisions relating to levy of penalty would not apply in such a situation. The levy of penalty is cancelled.

17. W.P.Nos.6122, 6123 of 2007 and 40280 of 2006 are disposed in the above terms.

18. As far as W.P.No.16814 of 2008 is concerned, it is seen that the petitioner has in objection dated 15.11.2017, specifically raised the issue of applicability of Section 2(1)(aa) and the Explanation, as follows:

> '......... The turnover that has been purchased by us within the state majorly, has already suffered AST at the hands of our suppliers. Despite that very same turnover has been proposed to be assessed to AST at our hands, so the very same turnover cannot be assessed at the hand of the re-seller.'

19. This has neither been examined or rejected in the assessment order. Though raised as ground (b) in the Writ affidavit, this ground has neither been answered nor denied in the counter.

20. Thus, the order of assessment is set aside and consequently, the levy of penalty does not arise. W.P.No.16814 of 2008 is allowed. No costs.

21. In W.P.No.25262 of 2008, the petitioner has only challenged notice dated 22.09.2008 to which a reply dated 30.09.2008 also appears to have been filed. In W.P.No.14533 of 2009 also, the petitioner has challenged notice dated 02.07.2009 to which no reply has been filed.

22. In the light of the fact that both matters are only at the stage of pre-assessment notice, I believe that W.P.Nos.25262 of 2008 and 14533 of 2009 are pre-mature. The petitioners agree that they will appear before the Assessing Authority on 04.10.2019 at 10.00 a.m and no further notice need be issued in this regard. After permitting the petitioners to submit their submissions and supporting evidence, if any and hearing them in person, orders of assessment shall be passed within four (4) weeks thereafter, i.e., on or before 01.11.2019.

23. W.P.Nos.25262 of 2008 and 14533 of 2009 are disposed in the above terms.

24. In the result, W.P.No.6122, 6123 of 2007 and 40280 of 2006 are disposed in the above terms, W.P.No.16814 of 2008 is allowed, W.P.Nos.25262 of 2008 and 14533 of 2009 are disposed and W.P.No.16809 of 2008 is dismissed as infructous. No costs. Consequently, connected Miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1.The Commercial Tax Officer,
Egmore II Assessment Circle,
Taluk Office Buildings,
Chennai - 31.

2.The Commercial Tax Officer,
Amindakari Assessment Circle,
Kuralagam, Chennai - 108.

3.The Assistant Commissioner (Commercial Taxes)
Tambaram II Assessment Circle,
Chennai

4.The Commercial Tax Officer,
Manali Assessment Circle,
Kuralagam, Chennai - 108.

5.The Commercial Tax Officer,
Chepauk Assessment Circle,
Chennai.

6.The Assistant Commissioner(CT)
Amindakarai Assessmetn Circle,
Kuralagam, Chennai-108.

+5cc to Mr.S.Raveekumar, Advocate Sr.84101 and 84102, 84085 to 84087
+1cc to the Special Government Pleader Sr.83487

Writ Petition Nos.16809, 16814 and 25262 of 2008, 40280 of 2006
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srg 29/01/2020