IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.06.2019

CORAM

THE HON'BLE Mr. JUSTICE M.DHANDAPANI, J.

W.P.No.13853 of 2009

Sri Vinayaga Alloys (P) Ltd.,
Represented by the Managing Director,
28/2-A-1, Salem Main Road,
Akkamapet Post, Sankari Taluk,
Salem District -637 301. ...Petitioner

Vs.

1. The State of Tamil Nadu,
Represented by the Secretary,
Department of Energy,
Fort St.George,
Chennai- 600 009.

2. The Tamil Nadu Electricity Board,
Represented by the Chairman,
800, Anna Salai,
Chennai- 600 002.

3. The Superintending Engineer,
TNEB- Mettur Electricity Distribution Circle,
Mettur Dam.

... Respondents

PRAYER:

Writ Petition is filed under Article 226 of the Constitution of India praying to issue a writ of mandamus or any other writ of direction directing the respondents 1 to 3 to follow the Supreme Court's decision in Civil Application 2551/2007 etc. batch case dated 15-05-2007 reported in 2007 (3) CTC 273 and refund the electricity tax collected on Maximum Demand charges in HT SC No.119 from the petitioners for the period from December 1996 till 15.06.2003 with BPSC collected with 18% interest from the date of collection till the date of refund.

For Petitioner : Mr. S. Sivanandam
For Respondents: Mr. J. Ramesh, AGP for R1
Mr. P. R. Dhilip Kumar for R2 and R3

ORDER

Writ Petition is filed seeking direction to the respondents 1 to 3 to follow the Supreme Court's decision in Civil Application 2551/2007 etc. batch case dated 15-05-2007 reported in 2007 (3) CTC 273 and refund the electricity tax collected on Maximum Demand charges in HT SC No.119 from the petitioners for the period from December 1996 till 15.06.2003 with BPSC collected with 18% interest from the date of collection till the date of refund.

2. However, Mr. S. Sivanandam, learned counsel appearing for the petitioner contended that it is true that the validity of the Act has been upheld by the Hon'ble Supreme Court in the above said decision; but, in respect of demand charges, the Hon'ble Supreme Court has categorically held that such charges cannot be construed as a sale and as such, the demand charges demanded from the petitioner has not been approved by the Hon'ble Supreme Court in the above said decision. Even the amendment brought by the respondent for the purpose of validating the invalid demand under Act 38 of 2007 would not also cover the period for which refund has been sought for by the petitioner.

3. The Act 38 of 2007 is an Act amending the Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003. Sub-clause 2 of Section 1 of the Act provides that all sections except Section 6 shall be deemed to have come into force on the 16th day of June 2003. Section 6 came into force immediately. It is the contention of the learned counsel for the petitioner that the relief sought for by the petitioner is in respect of the period prior to 16.06.2003.

4. Learned counsel for the petitioner would submits that the petitioner has made several representations and in spite of all the same, the Tamil Nadu Electricity Board has raised electricity bill, levying electricity tax on demand charges also. Therefore, the petitioner has demanded refund of the electricity tax paid on demand charges based on the Hon'ble Supreme Court's order. In spite of repeated requests made by the petitioner, the Tamil Nadu Electricity Board has not followed the orders of the Hon'ble Supreme Court under one pretext or the other. In view of the same, the present writ petition is filed for direction to the respondent Electricity Board to give effect to the orders of the Hon'ble Supreme Court in Civil Appeal No.2551 of 2007 etc. Batch dated 15.05.2007, by not levying electricity tax on demand charges and also to pass revised demand of electricity tax, excluding tax on demand charges and corresponding belated payment surcharge (in short "BPSC") for tax on demand charges and also for refund of the electricity tax collected on demand charges with BPSC.

5. Admittedly, the petitioner in this writ petition has not questioned the payment of consumption charges and the main

challenge is refund of electricity tax collected on Maximum Demand Charges. The Hon'ble Supreme Court in the said case, viz., Southern Petrochemical Industries Co.Ltd., Vs. Electricity Inspector and E.T.I.O. [2007 (3) CTC 273 (SC) has clearly held that there exists distinction between actual consumption and maximum demand. The Hon'ble Supreme Court has also held that what is permissible for the purpose of framing a tariff need not necessarily be permissible for levy of tax. Tariff for supply of High Tension energy is on two parts, viz., (i) units consumed and (ii) maximum demand, and ultimately it was held that the maximum demand indicator installed in a factory premises of a consumer of High Tension electrical energy shows the maximum amount of energy drawn during any consecutive 30 minutes in a total month of consumption of electrical energy. The maximum demand charge is fixed on that basis although the connected demand may be much more.

6. While it is the contention of the learned counsel for the petitioner in this Writ Petition that once the Hon'ble Supreme Court has categrorically held that there cannot be any tax on demand charges, it is the duty of the Board to follow the same. It is also his submission that when exemption was granted under the old Act from payment of tax, the same is not taken away by the advent of new law, with reference to Entry No.53 of List II of the Constitution of India.

7. According to the learned counsel, the Supreme Court has clearly held that the tax levied on demand charges is not valid in law, by virtue of the validating Act, viz., Act 38 of 2007, the definition "consumption charge" in Section 2(7) is substituted including within it, the charge on maximum demand and power factor surcharge and therefore, it cannot be said that the validating Act intends to cure the defects pointed out by the Supreme Court.

8. On the other hand, learned counsel appearing for the respondent Electricity Board has contended that when by virtue of the validating Act 38 of 2007 changes have been effected to the Tamil Nadu Act 12 of 2003, which was consequent to the Judgment of the Hon'ble Supreme Court and the definition of the term "consumption charge" has been newly incorporated and as long as the definition of the word exist in the statute book as on date, no mandamus can be issued against the said provisions. It is his contention that unless and until the newly created law is set aside in the manner known to law, the presumption being always in favour of the constitutionality of any law passed, the writ petition filed for direction cannot be entertained. He would also submit that it is always open to the petitioner to challenge the validating Act.

9. Heard the learned counsel for the petitioner as well as learned counsel for the respondent Electricity Board and perused the entire records.

10. It is true that that the Hon'ble Supreme Court while

construing the provisions of Tamil Nadu Tax on Consumption or sale of Electricity Act, 2003 (Tamil Nadu Act 12 of 2003) has held that there cannot be levy of tax on demand and it can be only as per the consumption and the expression demand means readiness to supply. It was held that the term 'actual consumption' and 'maximum demand' are not one and the same as held by the Hon'ble Supreme Court in Para 158 of the Judgment in Southern Petrochemical Industries Co.Ltd., Vs. Electricity Inspector and E.T.I.O. [2007 (3) CTC 273 (SC)]

11. The State Government has enacted Act 38 of 2007, which was assented by the Governor on 12.11.2007 to amend the Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003. The amendments to the said Act sought to be effected by the Tamil Nadu Act 38 of 2007 except section 6 are deemed to have come into force on 16th July, 2003.

12. Under the Amendment Act 38 of 2007, a new clause has been introduced in Section 2(2-A) in respect of the term 'charge on maximum demand'. The newly introduced Section 2(2-A) is as follows:

" 2(2-A), 'Charge on maximum demand' means the charge levied on the highest value of the average kilovolt-Amperes delivered at the point of supply to the consumer during any consecutive thirty minutes in a month."

13. A reading of Act 38 of 2007, which is the validating Act by way of amendment introduced to the Principal Act 12 of 2003, viz., Tamil Nadu Tax on consumption or Sale of Electricity Act, 2003 shows that the term 'energy charge' in section 2(7) of the original Act 12 of 2003 stands totally changed as 'consumption charge'. In the proviso, it is made clear that in case of High Tension supply of electricity, consumption charge includes the charge on maximum demand and power factor surcharge.

14. That apart, a new definition clause 'charge on maximum demand' has been introduced as Section 2(2-A). In the charging 'consumption charge' has been substituted. Therefore, as on the date of the amending Act, the charging section viz., Section 3 imposed charge on consumption charge, which includes the charge on minimum demand and power factor surcharge.

15. The Hobn'ble Supreme Court in Southern Petrochemical Industries Co.Ltd, Vs. Electricity Inspector and E.T.I.O. [2007 (3) CTC 273 (SC)], while dealing with the earlier decision in M/s. Northern India Iron and Steel Co. Vs. State of Haryana and another (1976 2) SCC 877), where it was held that the price of energy in two part tariff system would mean and include the energy charge as also demand charge, has held that in that case there was no term like 'net energy'

16. It is well settled that there is a presumption of constitutionality in favour of a law unless it is set aside in the manner known to law. The said established principle has been reiterated by the Hon'ble Supreme Court in Greater Bombay Coop. Bank Ltd. V. United Yarn Tax (P) Ltd., (2007) 6 SCC 236)

17. Therefore, the constitutional validity of a provision can be decided only when it is put to challenge. In these circumstances, I do not agree with the contentions of the learned counsel for the petitioner that by virtue of the Amending Ac 38 of 2008, in effect, no change, has been effected to charging section viz., Section 3 and therefore it is still open to the petitioner to insist for the directions as prayed for.

18. It is always open to the petitioner to challenge the validity or otherwise of the validating Act, viz., Act 38 of 2007 and till the said provisions of the validating Act remain in the statute book without being set aside in the manner known to law, I do not think that the prayer sought for in the Writ Petition, viz., for direction against the respondent Electricity Board to refund the electricity tax collected on maximum demand charges with BPSC can be granted. In view of the same, the Writ Petition is dismissed giving liberty to the petitioner to work out the remedy in the manner known to law. No costs.

Sd/-
Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

mrn

To
1. The State of Tamil Nadu,
Represented by the Secretary,
Department of Energy,
Fort St.George,
Chennai- 600 009.

2. The Tamil Nadu Electricity Board,
Represented by the Chairman,
800, Anna Salai,
Chennai- 600 002.

3. The Superintending Engineer,
TNEB- Mettur Electricity Distribution Circle,
Mettur Dam.

+1cc to Mr.S.Sivanandam, Advocate, S.R.No. 49068
+1cc to the Government Pleader, S.R.No. 48673

W.P.No.13853 of 2009

PA(CO)
GN(19/08/2019)