

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.04.2019

Delivered on : 29.05.2019

CORAM:

THE HON'BLE MR. JUSTICE SENTHILKUMAR RAMAMOORTHY

W.P.No.50274 of 2006

M/s.Spencers Travel Services Ltd.,
Sudarsan Building, 6th Floor,
No.27, Whites Road,
Chennai - 600
014.

.... Petitioner

Vs.

The Commercial Tax Officer,
Anna Salai III Assessment Circle,
Chennai- 600 006.

.... Respondent

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus calling for the records of the Respondent herein in his proceedings in TNGST/0641062/2003-2004 and quash the Order dated 28.11.2006 made therein and further direct the Respondent to refund the taxes already remitted by the Petitioner under the provisions of the TNGST Act,1959, under a mistake of law.

For Petitioner : Mr.R.L.Ramani, Senior Counsel
for M/s.B.Raveendran

For Respondent : Mr.Mohammed Shaffiq
Spl. G.P. (Taxes)

O R D E R

This Writ Petition is filed for a Writ of Certiorari cum Mandamus to quash the Order dated 28.11.2006 in TNGST / 0641062/2003-2004 and consequently direct the Respondent to refund the taxes already remitted by the Petitioner under the provisions of the Tamil Nadu General Sales Tax Act, 1959(the TNGST Act).

2.The case of the Petitioner is that it is a travel agent engaged in the business of providing services related to air travel, including as General Sales Agent for many international airlines. The head office of the Petitioner is at Chennai and the Petitioner has Branch Offices at various places such as Cochin, Calicut, Trivandrum, Bangalore, Hyderabad and Kolkatta. The Petitioner further states that it is registered under the category of Air Travel Agent Services for the purposes of service tax and is regularly paying service tax on the value of charges received.

3.The Petitioner further states that it purchased a Beechjet 400 Aircraft from M/s.RPG Enterprises Ltd., Kolkotta, for its own use. The said inter-state purchase was subjected to Central Sales Tax at 10% in Kolkatta. The said aircraft is said to have been originally imported into India in July 1992 by M/s.Aerial Services Pvt. Ltd., Mumbai and a Certificate of Registration was issued by the Director General of Civil Aviation. The said aircraft was, thereafter, sold by M/s.Aerial Services Pvt. Ltd., Mumbai to M/s.Pressman, Kolkatta, and, in turn, M/s.Pressman, Kolkatta, sold it to M/s.RPG Enterprises, Kolkatta from whom the Petitioner ultimately purchased the aircraft. The Petitioner further states that the said aircraft was, thereafter, sold by the Petitioner to the Orient Flying School, Chennai, on 08.03.2004. In respect of the said transaction of sale, the Petitioner obtained registration as a Casual Dealer on the file of the Respondent under the provisions of the TNGST Act. Subsequently, the Petitioner filed the monthly return in respect of the sale of aircraft and remitted the applicable 12% sales tax thereon. It is further stated that the Respondent completed the original assessment by accepting the return filed by the Petitioner.

4.The Petitioner states that it, thereafter, received a pre-revision notice from the Respondent seeking to revise the original assessment of the Petitioner by proposing to levy a higher rate of tax, i.e. at 20%, on the basis that it is an imported aircraft. The Respondent further proposed to levy tax on the turnover relating to sale of old and discarded materials and on the miscellaneous income. In response to the said notice, the Petitioner filed its detailed objections and contended that it is not a dealer under the TNGST Act. As regards the proposal to levy higher rate of tax on the sale of aircraft, the Petitioner submitted that the subject aircraft was imported into India in the year 1992 upon payment of customs duty and other consequential levies. The Petitioner further submitted that upon the imported goods crossing the customs frontiers, they get mixed with the general mass of goods and thereby lose their identity and character as imported goods.

The Petitioner further contended that the said aircraft had undergone two previous sales within India and that the higher rate of tax on imported goods was introduced only with effect from 01.07.2002 and, therefore, the said entry cannot be relied upon with respect to the sale by the Petitioner. In so far as the sale of old and discarded materials is concerned, the Petitioner submitted that these materials were purchased locally upon payment of tax. In spite of the said objections and explanation, the Petitioner states that the Respondent issued the revised assessment order dated 28.11.2006 whereby the taxable turn-over of Rs.5,76,93,750/- was taxed at 20% under Entry 9 of the XI Schedule to the TNGST Act, which relates to imported goods, including aircraft. The Petitioner states that the revised assessment order is unsustainable and the said order is the Impugned Order in this Writ Petition.

5. At the hearing, Mr. R. L. Ramani, the learned Senior Counsel appearing for the Petitioner submitted that the Petitioner is a travel agent and not a registered dealer. He further submitted that tax was paid on the sale by the Petitioner to the Orient Flight School, Chennai at 12%. He further submitted that the Petitioner obtained a certificate of registration on 28.04.2004 wherein the Petitioner was classified as a casual dealer for the period from 28.04.2004 to 31.03.2005. He further submitted that the original assessment order dated 18.02.2005 for the assessment year 2004-05 was on the basis that the sale was taxable at 12% along with surcharge at 5%. The learned Senior Counsel also referred to the service tax return of the Petitioner so as to establish that the Petitioner paid service tax under the category of business auxiliary services. He further submitted that the Petitioner should not be treated as a casual dealer because the Petitioner has a place of business within Tamil Nadu. He further submitted that Section 3(2-C) was introduced by an amendment made in the year 2002 with effect from 01.07.2002 and the said Section 3(2-C) reads as under:-

"Sec.3(2-C) Subject to the provisions of sub-section(1), in the case of goods mentioned in the Eleventh Schedule, the tax under this Act shall be payable by a dealer at the rate and at the point specified therein on the turnover or quantity in each year relating to such goods."

6. The learned Senior Counsel, thereafter, referred to the Impugned Order at Page 30 of the typed set of papers to point out that the Petitioner was treated as an unregistered dealer for the purposes of the revised assessment order and that the revised assessment order at page 35 shows that the claim is in respect of differential tax. He further submitted that the procedure for re-opening the assessment of a casual dealer as per Rule 14 of the TNGST Act was not followed in the instant

case.

7. In response, Mr. Mohammed Shaffiq, the learned Special Government Pleader (Taxes), appearing for the Respondent submitted that the Sales Tax Department is only concerned with sales and purchases that take place within Tamil Nadu. Accordingly, he submitted that the sale of the aircraft on 08.03.2004 by the Petitioner is the first sale for purposes of the TNGST Act. Consequently, he submitted that the said sale is taxable at 20% as per Entry 9 of the XI Schedule of the TNGST Act which deals with imported goods falling in Part-D and E of the I Schedule. In this connection, he pointed out that aircraft admittedly are listed in Part-D of the I Schedule. Consequently, he submitted that if the aircraft is treated as an imported aircraft, it is liable to be taxed at 20% as per Entry 9 of the XI Schedule read with Entry 2 of Part-D of the I Schedule, whereas if it is treated as the first sale of a non-imported aircraft, it would be liable to be taxed at 12%.

8. In order to establish that the sale in Tamil Nadu is the first sale for purposes of the TNGST Act, the learned counsel referred to Article 245 and 246 of the Constitution with regard to the distribution of legislative powers as between Parliament and the state legislatures. He also referred to Article 286 of the Constitution whereby no law of a state shall impose tax on the sale or purchase of goods, if such sale or purchase takes place outside the state or in the course of import of the goods into or export of the goods out of the territory of India. In this connection, he referred to Section 4 of the Central Sales Tax Act, 1956 whereby when a sale or purchase of goods takes place inside a state, such sale or purchase shall be deemed to have taken place outside all other states. He, thereafter, referred to Section 2(n) of the TNGST Act, wherein the expression sale is defined and, in particular, to explanation 3 thereto which reads as under:

"Explanation (3) (a) The sale or purchase of goods shall be deemed for the purposes of this Act, to have taken place in the State, wherever the contract of sale or purchase might have been made, if the goods are within the State
(i) in the case of specific or ascertained goods, at the time the contract of sale or purchase is made;"

9. He also referred to Section 3(2-C) to point out that tax is payable by a dealer at the rate and at the point specified in the XI Schedule. He, thereafter, referred to Section 9 of the TNGST Act, which deals with the stage of levy of taxes and, in relevant part, states as under:

"Section 9. Stage of levy of taxes in respect of imported and exported goods: Where in the case of any goods tax is leviable at one point in a series of sales or purchases, such series shall—

(a) in the case of goods imported into the State either from outside the territory of India or from any other State in India, be deemed to commence at the stage of the sale or purchase effected immediately after the import of such goods."

10. Thereafter, the learned counsel referred to the Full Bench Judgment of the Allahabad High Court in COMMISSIONER, SALES TAX, U.P. Vs. ALLIED CHEMICALS, KANPUR in [1969] 23 STC 1659(All). In specific, the learned counsel referred to paragraphs 1,5,6 and 7 wherein it was held that in view of the prohibition under Article 286 of the Constitution, turnover arising out of sales outside the State of Uttar Pradesh should not be taken into consideration. By relying on the said judgment, the learned counsel for the Respondent pointed out that the Sales Tax Department is, therefore, not concerned with previous transactions relating to the aircraft that took place outside Tamil Nadu. He, thereafter, referred to the judgment of the Hon'ble Supreme Court in STATE OF KERALA AND OTHERS Vs. Fr. WILLIAM FERNANDEZ in 2017 SCC Online SC 1291, which is a judgment dealing with the imposition of entry tax on goods imported from different countries and brought into the local areas of a state. In this judgment, he referred to the issues that were considered therein, which are specified at Paragraph 44 thereof, Paragraphs 72,73,77 and 90, wherein it was held that entry tax could be imposed once the goods entered the territory of the particular state notwithstanding the fact that customs duty was imposed thereon because the goods were imported. By referring to Paragraph 100 and 101 of the said judgment, he pointed out that the payment of customs/import duty is a condition that should be fulfilled before the goods are brought inside the customs barriers but that does not alter the nature or character of the goods, namely, imported goods. In this regard, his specific contention was that Schedule XI of the TNGST Act classifies goods on the basis of the geographical origin of the said goods, and not by reference to the place from which the goods entered the state concerned, i.e. not the activity of importing. He also referred to the judgment of the Hon'ble Supreme Court in STERLING FOODS Vs. THE STATE OF KARNATAKA AND ANOTHER in 63 STC 2390, which is a case relating to the nature and character of raw shrimps, prawns and lobsters. He pointed out as to how the Hon'ble Supreme Court held in the said case that even in respect of frozen shrimps, prawns and lobsters that were processed, the legislature is entitled to

classify the goods as it deems fit for determining liability to sales tax. He, thereafter, referred to the Division Bench judgment of this Court in SONY INDIA LTD Vs. COMMERCIAL TAX OFFICER, CHENNAI in 2007 (5) Mad LJ 881 (the Sony India Ltd. Case), which is a case dealing with the manufacture and sale of colour television sets, audio products and other consumer electronic products, which were imported into India from abroad through New Delhi and Mumbai and, thereafter, despatched to branch offices/warehouses located in various parts of India. The learned counsel pointed out that the Division Bench of this Court held that the power to levy customs duty on imported goods cannot curtail the power of the State Government to levy sales tax. He further pointed out that, in the said case, sales tax was levied at 20% by applying the XI Schedule because the goods were treated as imported goods. He also referred to the judgment of the Hon'ble Supreme Court in the Civil Appeal arising out of the above mentioned SONY INDIA LTD Case wherein the matter was remanded to the First Appellate Authority and the judgment of the Division Bench of this Court was set aside. He also appended the judgment of the Hon'ble Supreme Court in POLESTAR ELECTRONIC (Pvt.) LTD. Vs. ADDITIONAL COMMISSIONER, SALES TAX (1978) 1 SCC 636, to his notes on submissions, and relied upon paragraphs 6,7,8 and 11 of the said judgment wherein it was held that when the word used in the relevant provision is 're-sale', without specifying a geographical limitation, the words "in Delhi" cannot be read into it. Likewise, according to the learned counsel, the words "into Tamil Nadu" should not and cannot be read into Entry 9 of the XI Schedule after the word "imported".

11. By way of rejoinder submissions, the learned Senior Counsel appearing for the Petitioner pointed out that taxes were levied at 12% as per Entry-2, Part - D of the I Schedule and that this amount was remitted to the Sales Tax Department after the sale in Tamil Nadu. He further pointed out that 10% CST was paid when the aircraft was brought into Tamil Nadu by way of inter-state sale. He, thereafter, referred to the judgment of the Hon'ble Supreme Court in PORRITTS AND SPENCER (ASIA) LTD Vs. STATE OF HARYANA in AIR 1979 SC 300 wherein the Hon'ble Supreme Court held that in a taxing statute, words of every day use must be construed not in their scientific or technical sense but as understood in common parlance. In this connection, paragraph 5 of the said judgment is relevant and reads as under:

"5. Now, the word 'textiles' is not defined in the Act, but it is well settled as a result of several decisions of this Court of which we may mention only a few, namely, Ramavatar Budhalprasad v. Assistant Sales Tax Officer, Akola MANU/SC/0320/1961 : [1962] 1 SCR 279 and Motipur Jamindary Co. Ltd. V State of Bihar

MANU/SC/0316/1961 : AIR 1962 SC 660 and the State of West Bengal v. Washi Ahmec MANU/SC 0309/1977; [1977] 3 SCR 149 that in a taxing statute words of every day use must be construed not in their scientific or technical sense but as understood in common parlance. The question which arose in Ramavatar's case (supra) was whether betel leaves are vegetables and this Court held that they are not included within the term. This Court quoted with approval the following passage from the judgment of the High Court of Madhya Pradesh in Madhya Pradesh Pan Merchant's Association, Santara Market, Nagpur v. State of Madhya Pradesh 7 S.T.C. 99 at 102:

In our opinion, the word "vegetables" cannot be given the comprehensive meaning the term bears in natural history and has not been given that meaning in taxing statutes before. The term "vegetables" is to be understood as commonly understood denoting those classes of vegetable matter which are grown in kitchen gardens and are used for the table."

He concluded his submissions by submitting that the Petitioner is not insisting on the refund claim in respect of 12% taxes paid on the sale of aircraft.

12.The affidavit, documents on record, oral submissions, points for consideration and notes on submissions of both sides were carefully considered.

13.The issues that arise for consideration in this case are whether the sale of the aircraft in Tamil Nadu on 08.03.2004 should be considered as the first sale for purposes of the TNGST Act and whether the said sale in Tamil Nadu is to be considered as the sale of an imported item notwithstanding the fact that the said aircraft was imported into India in July 1992 and, thereafter, changed hands on a couple of occasions by way of domestic sales before being brought into the State of Tamil Nadu on payment of CST.

14.As regards the first question, namely, whether the sale is to be regarded as the first sale for purposes of the TNGST Act, the contentions of the learned counsel for the Respondent are well founded. In specific, the learned counsel for the Respondent referred to various Articles of the Constitution so as to establish that legislative powers have been clearly

demarcated as between Parliament and state legislatures and that, consequently, no state can impose a tax on transactions that take place outside the state concerned. He further referred to Section 4 of the CST Act and Section 2(n) of the TNGST Act to contend that once a sale takes place within a State, it is deemed that it has taken place outside all other states in India. Accordingly, he submitted that the sales that took place within India but outside Tamil Nadu are liable to be disregarded for purposes of deciding as to whether it is the first sale. As stated earlier, this contention is liable to be accepted. The ancillary submission, in this regard, by the learned counsel for the Respondent that notwithstanding the imposition of customs duty and the clearance of the goods concerned for home consumption pursuant thereto, sales tax may be levied on goods imported into India and sold in the territory of the state concerned, at the rate applicable under the relevant law, is also a valid submission. In this connection, the judgment of the Hon'ble Supreme Court in the case reported in 2017 SCC Online SC 1291(cited supra) is apposite. In other words, the goods in question may lose their character as imported goods for the purposes of the Customs Act, 1962, immediately upon being cleared for home consumption, but do not do so for purposes of the TNGST Act. In effect, if an aircraft was imported into India through Tamil Nadu, and the first sale in Tamil Nadu happens thereafter, sales tax may be imposed at the rate applicable to imported items notwithstanding the clearance for home consumption upon payment of customs duty. This leads to the next question, namely, as to whether the aircraft, in the instant case, which was brought into Tamil Nadu under an inter-state sale upon payment of CST, is liable to be treated as an imported item for purposes of levying sales tax at 20% as per Entry 9 of the XI Schedule to the TNGST Act. In this connection, it is relevant to extract Entry 9 of the XI Schedule which reads as under:

"Imported cigarettes, medium density fibre boards, textiles and other items falling in Parts D and E of the First Schedule" (emphasis added).

15. In response to a question as to why sale transactions relating to the aircraft that took place outside Tamil Nadu should be taken into account for purposes of establishing that the aircraft is an imported item when such transactions were ignored for the purposes of deciding as to whether it is the first sale, the learned counsel for the Respondent submitted that the geographical origin of the goods should be reckoned for the purposes of ascertaining whether the goods are imported and,

therefore, taxable under the XI Schedule. He further submitted that the word 'imported' qualifies the goods and not the activity of bringing the goods into India or Tamil Nadu.

16. In a nutshell, the relevant question is whether Entry 9 of Schedule XI deals with goods of foreign origin irrespective of the manner in which the said goods entered Tamil Nadu. In this connection, it is relevant to bear in mind that words cannot be read into a taxing statute and intent is not a valid basis to construe a tax statute. In other words, the words of the relevant provision of the tax statute should be construed literally so as to discern the correct meaning and scope thereof. In the instant case, as is evident from the language of Entry 9 of the XI Schedule, the expression used is imported items falling in Parts-D and E of the I Schedule. Therefore, the meaning of the word imported items should be examined. The word imported is not defined in the TNGST Act. However, it is evident from provisions such as Section 9 that the TNGST Act envisages import of goods from other parts of India into Tamil Nadu and also import of goods from outside India into India. In the case of aircraft, it is the admitted position that it would be taxable at 12% if it is treated as a non-imported item, whereas it would be taxable at 20%, if it is treated as an imported item. The learned counsel for the Respondent also fairly states that Entry 9 of Schedule XI only deals with goods that are imported from outside India. In the absence of a definition of the word imported in the TNGST Act, it is necessary to look at the dictionary definition of the word imported. The word 'import' is defined in the Oxford Advanced Learner's Dictionary, 9th Edition, "as a product or service that is brought into one country from another." The Reader's Digest Great Illustrated Dictionary, 1st Edition, defines the word 'import' as "to bring or carry in from an outside source; especially, to bring in (goods) from a foreign country for trade or sale". Therefore, the word 'import' and the cognate expression 'imported' qualify the goods but with reference to the activity by which the goods are brought into the country concerned from outside that country. For instance, goods manufactured in India by a foreigner owned or controlled entity cannot be considered as imported goods notwithstanding the provenance of the goods or the technology used in the manufacture thereof. Equally, in the converse situation, goods manufactured outside India by an Indian owned or controlled entity and brought into India would be considered as imported goods notwithstanding the provenance of the goods or the technology used in the manufacture thereof. If the aircraft in question had been imported into India from abroad, so as to enter India through the State of Tamil Nadu or another state from which it was stock transferred into Tamil Nadu, and was

sold in Tamil Nadu, there is no doubt that it would be classified as an item imported from outside India for the purposes of the XI Schedule to the TNGST Act. However, in the instant case, the aircraft was brought into India through Mumbai in the State of Maharashtra and after at least two more transactions of sale, it was brought into the State of Tamil Nadu upon payment of CST for the inter-state sale. In these facts and circumstances, at the point of sale in Tamil Nadu, the said aircraft does not qualify as an item imported into India but was an item imported into Tamil Nadu from another Indian state. In effect, the geographical origin of the goods does not qualify the goods de hors the manner of entry of the goods into the territory of the state concerned because that would tantamount to substituting the words "items of foreign origin" instead of "imported items". As stated earlier, the meaning of words in a statute, in general, and, in particular, in a tax statute, should be gathered from the language used therein and the expression "goods of foreign origin" or "aircraft of foreign origin" cannot be substituted for or read into the words "imported items". If the intention of the State Legislature was to tax goods of foreign origin at higher rates notwithstanding the fact that the goods entered Tamil Nadu by way of inter-state sale upon payment of CST, the expression that should have been used is goods of foreign origin. In this connection, the judgment of the Five Judge Bench of the Hon'ble Supreme Court in the COMMISSIONER OF CUSTOMS Vs. DILIP KUMAR, (2018) 9 SCC 1, on the interpretation of tax statutes, is relevant. At paragraph 55 of the said judgment, it was held as under:

"There is abundant jurisprudential justification for this. In the governance of rule of law by a written Constitution, there is no implied power of taxation. The tax power must be specifically conferred and it should be strictly in accordance with the power so endowed by the Constitution itself. It is for this reason that the courts insist upon strict compliance before a State demands and extracts money from its citizens towards various taxes. Any ambiguity in a taxation provision, therefore, is interpreted in favour of the subject/assessee. The statement of law that ambiguity in a taxation statute should be interpreted strictly and in the event of ambiguity the benefit should go to the subject/assessee may warrant visualising different situations. For instance, if there is ambiguity in the subject of tax, that is to say, who are the persons or things liable to

pay tax, and whether the Revenue has established conditions before raising and justifying a demand. Similar is the case in roping all persons within the tax net, in which event the State is to prove the liability of the persons, as may arise within the strict language of the law. There cannot be any implied concept either in identifying the subject of the tax or person liable to pay tax. That is why it is often said that subject is not to be taxed, unless the words of the statute unambiguously impose a tax on him, that one has to look merely at the words clearly stated and that there is no room for any intendment nor presumption as to tax. It is only the letter of the law and not the spirit of the law to guide the interpreter to decide the liability to tax ignoring any amount of hardship and eschewing equity in taxation. Thus, we may emphatically reiterate that if in the event of ambiguity in a taxation liability statute, the benefit should go to the subject/assessee. But, in a situation where the tax exemption has to be interpreted, the benefit of doubt should go in favour of the Revenue, the aforesaid conclusions are expounded only as a prelude to better understand jurisprudential basis for our conclusion...."

17. The conclusions that follow from the above analysis are as follows:

(i) The sale of the aircraft in Tamil Nadu on 08.03.2004 is the first sale for purposes of the TNGST Act.

(ii) If goods are imported into India and sold in Tamil Nadu, sales tax may be imposed at the rate specified in Entry 9 of the XI Schedule of the TNGST Act notwithstanding the fact that the goods were cleared earlier for home consumption under the Customs Act, 1962, provided the goods can reasonably be qualified by the words "imported from outside India" at the point of sale in Tamil Nadu.

(iii) In the instant case, the aircraft was imported into India through Maharashtra in the year 1992 and after two domestic sales outside Tamil Nadu was brought into Tamil Nadu by way of inter-state sale upon payment of CST.

(iv) Consequently, at the point of entry into and sale in Tamil Nadu, the aircraft was not an item imported from outside

India and, therefore, Section 3(2-C) read with Entry 9 of the XI Schedule of the TNGST Act was not applicable. Instead, the sale of the aircraft was liable to be taxed at 12% as per Section 3 (2) read with Entry 2 of Part D of the I Schedule to the TNGST Act.

18. For the foregoing reasons, this Writ Petition is liable to be allowed and the Impugned Re-assessment Order dated 28.11.2006 is liable to be quashed in so far as it imposes the rate of 20% on the sale of the aircraft by the Petitioner on 08.03.2004. However, in view of the finding that it is a first sale for the purposes of the TNGST Act, the tax that was levied and collected earlier at the rate of 12% is valid and not liable to be refunded.

19. In fine, the Writ Petition is allowed and the Impugned Order is quashed to the extent indicated above. There shall be no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

rrg

To

The Commercial Tax Officer,
Anna Salai III Assessment Circle,
Chennai - 600 006.

+1cc to Special Government Pleaser sr.44436
+1cc to M/s.B.Raveendran, Advocate sr.44364

W.P.No.50274 of 2006

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