IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE M.S.RAMESH

W.P.No.4074 of 2010
and
M.P.No.1 of 2010

A.N.A.Naina Mohamed Sons,
Represented by its Partner,
A.N.Abdul Rahman,
No.47 & 48, Big Bazaar Street,
Muthupettai. ... Petitioner

/Vs./

The Commercial Tax Officer,
Thiruthuraipoondi. ... Respondent

Prayer:- Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records on the files of the respondent in TIN No.33383880804/07-08 dated 12.02.2010 and quash the same as being contrary to the principle laid down by this Court in the judgment reported in (2008) 15 VST 398 (Sinetech vs. Commercial Tax Officer, Korattur Assessment Circle, Chennai).

For Petitioner :Mr.R.Senniappan

For Respondent :Mr.Mohamed Shaffiq
Special Government Pleader

ORDER

Heard Mr.R.Senniappan, learned counsel for the petitioner and Mr.Mohamed Shaffiq, learned Special Government Pleader appearing on behalf of the respondent.

2. The brief facts of the case are as follows:

The petitioner herein, who is the dealer in Hardware and Paints had reported a total and taxable turnover for the assessment year 2007-08 and opted to discharge the taxes under composition scheme in terms of Section 3(4) of the 'Tamil Nadu Value Added Tax, 2006' [hereinafter referred to as the 'TNVAT Act' for the sake of convenience and clarity]. Pursuant to an audit carried out wherein, it was found that the dealer had collected tax in respect of three invoices, a notice under Section 3(4) of the TNVAT Act was issued proposing to levy tax under Section 3(2) of the TNVAT Act. The petitioner had given a reply admitting the taxes collected and submitted that the inadvertent collection of meagre taxes was refunded to the buyers. However, the respondent herein was of the view that the dealer having opted to discharge his liabilities by way of composition scheme in terms of Section 3(4) of the TNVAT Act, was in violation of the conditions set out therein and thus, confirmed their proposal to levy taxes under Section 3(2) of the TNVAT Act and thereby, denied the benefit of composition scheme.

3. The learned counsel for the petitioner submitted that when the respondent had permitted the petitioner to discharge taxes under the scheme of composition, it is not permissible thereafter to revisit such permission. In support of such a contention, the learned counsel for petitioner relied upon the decision of the learned Single Judge of this Court, reported in [2008] 15 VST 398 (Mad) in the case of Sinetech vs. Commercial Tax Officer, Korattur, Assessment Circle, Chennai, as well as the order of the Hon'ble Division Bench of this Court dated 04.07.2017 passed in W.A.No.1536 of 2010, whereby the decision of Sinetech was affirmed.

4. The learned Special Government Pleader relies on the proviso to Section 3(4) of the TNVAT Act and would submit that the petitioner having opted to pay the taxes under the composition scheme is prohibited from collecting any amount by way of taxes or purporting by way of taxes. He would rely on the decision of the Hon'ble Division Bench of this Court, in the case of S.Meenakshi and Others vs. The State of Tamil Nadu reported in (1977) 40 STC 201 for the proposition that the moment the conditions were violated, the assessee would go out of the composition scheme and it would be open to the assessing officer to resort to re-assessment by invoking Section 16 of the 'Tamil Nadu General Sales Tax Act, 1959', [hereinafter referred to as the 'TNGST Act' for the sake of convenience] and the benefit of the Scheme would no longer be available.

5. Insofar as the decision of the learned Single Judge in Sinetech and the subsequent decision of the Hon'ble Division Bench of this Court confirming Sinetech are concerned, the learned counsel for the petitioner would submit that the decisions are not applicable, since the scope of Sections 16(A), 16(A)(A) and 16(A)(A)(A) of the TNGST Act, which provides for re-assessment of dealers who had opted for composition, was not considered by the learned Single Judge and the Hon'ble Division Bench had also not dealt on the aspect as to whether it is open to re-assess the dealer, who opts for composition after violating the conditions of the composition scheme.

6. I have given careful consideration to the submissions made by the respondent counsels.

7. The issue that arises for consideration is as to whether a dealer who had opted to discharge taxes under the composition scheme, can be re-assessed on any account?

8. Section 3(4) of the TNVAT Act enables a dealer, with a turnover of less than Rs.5,00,000/- [Rupees Fifty Lakhs only], to be discharged by way of composition, by paying taxes at 0.5% on the turnover, subject to the conditions provided therein. For easier reference, Section 3(4) of the TNVAT Act is extracted hereunder:

> 'Section 3(4)(a) - Notwithstanding anything contained in sub-section (2), but subject to the provisions of sub-section (1), every dealer, who effects second and subsequent sales of goods purchased within the State, whose turnover relating to taxable goods, for a year, is less than rupees fifty lakhs, may, at his option, instead of paying tax under sub-section (2), pay a tax, for each year, on his turnover relating to taxable goods at such rate not exceeding one per cent, as may be notified by the Government. Such option shall be exercised by a dealer,-
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> (i) who commences business, within thirty days from the date of commencement of the business:
>
> (ii) whose turnover is below rupees fifty lakhs during the previous year, on or before the 30th day of April of the year for which he exercises such option;
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> (iii) for the year 2008-2009, within thirty days from the date of commencement of the Tamil Nadu Value Added Tax (Second Amendment) Ordinance, 2008:
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> Provided that such dealer shall not collect any amount by way of tax or purporting to be by way of tax:
>
> Provided further that such dealer shall not be entitled to input tax credit on the goods purchased by him:
>
> Provided also that the dealer who purchased goods from such dealer shall not be entitled to input tax credit on the goods purchased by him.
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> Section 3(4)(b) - if the turnover, relating to taxable goods of a dealer paying tax under clause (a), in a year, reaches rupees fifty lakhs at any time during that year, he shall inform the assessing authority in writing within seven days from the date on which such turnover has so reached. *(Such dealer may pay a tax for each year on the turnover relating to taxable goods upto rupees fifty lakhs at such rate not exceeding one per cent as may be notified by the Government and is liable

to pay tax under sub-section (2) on all his sales of taxable goods above rupees fifty lakhs)* and he is entitled to the input tax credit on the purchases made from the date, and on the stock available with him, the purchases of which has been made within ninety days before the date, on which such turnover has reached rupees fifty lakhs:

Provided that such dealer whose turnover has reached rupees fifty lakhs during the previous year shall not be entitled to exercise such option for subsequent years.'

9. The first proviso to Section 3(4) of the TNVAT Act envisages that a dealer opting to pay taxes under the composition scheme shall not collect any amount by way of taxes or purporting to be by way of tax.

10. It is not in dispute that the petitioners have collected taxes atleast in respect of three invoices, which would be in violation of the conditions of the composition scheme. When the proviso explicitly imposes such a condition, prohibiting the assessee from collecting any amount by way of taxes and when the assessee violates such a condition, he is deemed to have retracted himself from the benefit of the composition scheme.

11. The Hon'ble Division Bench of this Court, in the case of S.Meenakshi and others vs. The State of Tamil Nadu, reported in (1977) 40 STC 201, while dealing with the case of a dealer, who had opted for composition under Section 3(4) of the TNVAT Act and who was found to have suppressed certain turnovers, had held that the moment the conditions were violated, the assessee would go out of the composition scheme and it was open to the assessing officer to resort to re-assessment by invoking Section 16 of the TNGST Act. The relevant portion reads as follows:

'The learned counsel for the petitioners questions this action of reopening and reassessment made by the assessing authority in exercise of the powers under Section 16 of the Act. According to the learned counsel, Section 16 does not authorise any such action in relation to cases covered by Section 7 of the Act. We are unable to accept this argument. The sole basis of the argument of the learned counsel is that Section 16 of the Act talks of turnover escaping assessment and, therefore, the word “turn-over” occurring in Section 16 must necessarily refer to only “taxable turnover" and that as far as Section 7 is concerned, the suppressed or escaped turnover cannot be said to be taxable turnover at all. As we have pointed out already, we are unable to accept this argument. We have extracted the definitions of "taxable turnover", "total turnover" and "turnover". Section 7 talks of "total turnover" and Section 16 talks of "turnover" in general without specifying whether it is "taxable turnover" or "total turnover". As a matter of fact, that Section 16 will take in turnover in general will be clear from the fact that section 3 which is the charging section imposes the liability to tax only when the turnover exceeds a particular limit. Even Section 3 uses only the word "turnover" and not "taxable turnover". In a particular case, the assessee might not even be assessed on the ground that his total turnover did not exceed rupees fifteen thousand as provided for in Section 3(1). Subsequently it may be found that he suppressed his turnover and, therefore, he would not be entitled to the exemption given under Section 3(1). In that context the turnover, which would be added to the turnover of the assessee, would be only the total turnover and not taxable turnover for the purpose of finding out whether the case fell within the limit prescribed in Section 3(1) or not. There is also another ground for holding that the expression "turnover" in section 16 is not confined only to "taxable turnover". We have extracted Section 7 already and it uses the expression "total turnover" only. Out of the total turnover contemplated by Section 7 no part of it may be taxable turnover or the entirety may constitute taxable turnover. The Section does not take note of the portion of the total turnover which constitutes taxable turnover, when it prescribes the lump sum rate of tax payable in respect of different slabs. As we have pointed out already, in the case of an asseessee paying tax under Section 7, he might not have any taxable turnover at all. From this point of view, the concept of taxable turnover and the payment of tax at a particular percentage of the said taxable turnover is foreign to the scope of Section 7. All that Section 7 says is, once an assessee, having regard to the quantum of the total turnover, exercises the option to be assessed under Section 7, Section 3(1) will not apply. But once the limit of turnover provided for in Section 7 is overstepped, automatically the case will go out of Section 7 with the result Section 3(1) will become immediately applicable and that will be the consequence of the non obstante clause occurring in Section 7. In the four cases before us, as we have pointed out already, the turnover, originally assessed plus the suppressed turnover exceeded the maximum limit prescribed in Section 7. Consequently, the moment the turnover was redetermined and the redetermined turnover exceeded the maximum limit of the total turnover fixed in Section 7, the case would go out of Section 7 and would attract Section 3(1). Once Section 3(1) is attracted, there is no dispute that Section 16 will be automatically attracted. Therefore, we have no hesitation whatever in holding that Section 16 is clearly applicable to the facts of the present cases and, accordingly, the reopening and reassessments were done in accordance with law.'

12. In the light of the pronouncement of the Hon'ble Division Bench in S.Meenakshi's case and the express provision of Section 3(4) of the TNVAT Act, legal position would be to the effect that a dealer opting for composition would be entitled to the benefits of the scheme, provided the conditions attached to the composition scheme are duly complied with. Consequently, it requires to be spelt out that once such conditions are violated, the benefit of the scheme, would no longer be available to such an assessee.

13. Pursuant to the judgment of the Hon'ble Division Bench of this Court in S.Meenakshi's case, express provisions have been inserted to the TNGST Act to assess the turnover which has escaped assessment in respect of the dealers who had opted for composition. These provisions read thus:

'Section 16-A. Assessment of turnover and disclosed under the compounding provisions-(1) Where for any reason, any part of the turnover of business of a dealer who had been permitted to pay tax under sub-Section (2) of Section 3-D, Sections 3-E, 3-G or

7-E has escaped assessment from the tax, 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, determine to the best of its judgment the turnover which has escaped assessment and re-assess the tax payable on the total turnover including the turnover already assessed under the said Sections.

(i) in the case where such total turnover is not more than two lakhs of rupees in accordance with the provisions contained in sub-Section (1) of Section 7 or in case where such total turnover is not more than fifteen lakhs of rupees in accordance with the provisions contained in sub-Section (1) of Section 7-B; and

(ii) in other cases, where the total turnover is more than two lakhs of rupees under Section 7 or fifteen lakhs of rupees under Section 7-B in accordance with the other provisions contained in this Act.

(i) in case where such total turnover is not more than [two lakhs of rupees] in accordance with the provisions contained in sub-Section (1) of Section 7; and

(ii) in other cases where the total turnover is more than [two lakhs of rupees] in accordance with the other provisions contained in this Act.

Section 16-A(2) Before making the re-assessment under sub-Section (1), the assessing authority may make such enquiry as it may consider necessary and give the dealer concerned a reasonable opportunity to show cause against such re-assessment.

Section 16-A(3) The amount of tax already paid by the dealer concerned in pursuance of the permission to compound [under the Sections referred to in Sub-Section (1)] shall be adjusted towards the amount of tax due as the result of re-assessment under Sub-Section (1).

Section 16-A(4) The provisions of Sub-Sections (2) to (5) of Section 16 shall as far as may be, apply to re-assessment under Sub-Section (1) as they apply to the re-assessment of escaped turnover under Sub-Section (1) of Section 16.

Section 16-AA. Assessment of

turnover not declared under Section 7-C. (1) Where for any reason, any part of the turnover of business of a dealer who has been permitted to pay the tax under Section 7-C has escaped assessment from the tax, the assessing authority may, at any time within a period of five years from the *[date of order of final assessment by the assessing authority], determine to the best of its judgement, the turnover which has escaped assessment and re-assess the tax payable on the total turnover (including the turnover already assessed under Section 7-C) in accordance with the provisions of this Act.

Section 16-AA(2) Before making the re-assessment under Sub-Section (1), the assessing authority may make such enquiry as it may consider necessary and give the dealer concerned a reasonable opportunity to show cause against such re-assessment.

Section 16-AA(3) The amount of tax already paid by the dealer concerned in pursuance of the permission to compound under Section 7-C, shall be adjusted towards the amount of tax due as the result of re-assessment under Sub-Section (1).

Section 16-AA(4) The provisions of Sub-Sections (2) to (5) of Section 16 shall, as far as may be, apply to re-assessment under Sub-Section (1) as they apply to the re-assessment of escaped turnover under Sub-Section (1) of Section 16.

Section 16-AAA. Assessment of draw not declared under Section 7-D. - (1) Where for any reason, any draw has escaped assessment from the payment of compounded amount under Section 7-D, the assessing authority may, at any time within a period of five years from the ** [date of order of final assessment by the assessing authority,] determine to the best of its judgment, the amount in respect of the draw which has escaped assessment and re-assess the amount payable in respect of such draw (including the draw already assessed under Section 7-D) in accordance with the provisions of Section 7-D.

Section 16-AAA(2) Before making

the re-assessment under Sub-Section (1), the assessing authority may make such enquiry as it may consider necessary and give the dealer concerned a reasonable opportunity to show cause against such re-assessment.

Section 16-AAA(3) The compounded amount already paid by the dealer concerned [....] under Section 7-D shall be adjusted towards compounded amount due as a result of re-assessment under Sub-Section (1).

Section 16-AAA(4) In making an assessment under Sub-Section (1), the assessing authority may, if it is satisfied that the escape from the assessment is due to willful non-disclosure of assessable amount in respect of a draw by the dealer, direct the dealer to pay, in addition to the amount assessed under Sub-Section (1), by way of penalty, a sum which shall be -

Section 16-AAA(4)(a) fifty per cent of the amount due on the draw that was willfully not disclosed, if the amount due on such draw is not more than ten per cent of the amount paid as per the return;

(b) one hundred per cent of the amount due on the draw that was willfully not disclosed, if the amount due on such draw is more than ten per cent but not more than fifty per cent of the amount paid as per the return;

(c) one hundred and fifty per cent of the amount due on the assessable draw that was willfully not disclosed, if the amount due on such draw is more than fifty per cent of the amount paid as per the return;

Provided that no penalty under this Sub-Section shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such imposition.

Section 16-AAA(5) The Provisions of Sub-Sections (3) to (5) of Section 16 shall, as far as may be, apply to re-assessment under Sub-Section (1) as they apply to the re-assessment of escaped turnover under Sub-Section (1) of Section 16.'

14. The aforesaid provisions have been expressly enacted by the legislature enabling the assessing officer to assess a dealer who had opted for composition scheme in terms of Section 28 of the TNVAT Act and in terms of Sections 16(A), 16(A)(A), 16(A)(A)(A) of the TNGST Act, by way of abundant caution.

15. If the submission of the learned counsel for the petitioner that, the permission to discharge taxes under Composition cannot be revisited is to be accepted, the permission for composition itself would stand vitiated of having obtained by willful representation of facts that are false and thereby, the principle that the fraud vitiates everything would therefore come into play.

16. The corollary to such a finding would be that the composition scheme can be refunded or re-assessed. The Hon'ble Apex Court in the case of Ashok Leyland Ltd., vs. State of Tamil Nadu and Another reported in 2004 134 STC 473, had dealt with on the aspect 'fraud and collusion' by referring to various other decisions in the following manner:

> '95. In Shrisht Dhawan (1992) 1 SCC 534 this Court has held:
> "20. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct. Michael Levi likes a fraudster to Milton's sorcerer, Compus who exulted in his ability to, 'wing me into the easy-hearted man and trap him into snares'. It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Legal Dictionary, fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words of by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. In Concise Oxford Dictionary, it has been defined as

criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act defines fraud as act committed by a party to a contract with intent to deceive another. From dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the represented by making him believe it to be true. The representation to become fraudulent must be of the fact with knowledge that it was false. In a leading English Case (Derry v. Peek (1886-90) All ER 1) what constitutes fraud was described thus: (ARR ER p. 22 B-C):

'....Fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false."

96. This aspect of the matter has been considered recently by this Court in Roshan Deen v. Preeti Lal AIR (2002) SC 33, Smt. Anita v. R.Rambilas AIR (2003) AP 32, Ram Preeti Yadav v. U.P.Board of High School and Intermediate Education 2003 8 SCC 311 and Ram Chandra Singh v. Savitri Devi (2003) 8 SCC 319.

97. Suppression of a material document would also amount to a fraud on the Court. (See Gowrishankar v. Joshi Amba Shankar Family Trust [1996] 3 SCC 310 and S.P.Chengalvaraya Naidu (Dead) By LRs. v. Jagannath (Dead) by Lrs. 1994 1 SCC 1.

98. There is no law that only because no appeal is provided the order would not attain finality. (See Commissioner of Income Tax, Bombay v. Amritlal Bhogilal & Co. (1959 SCR 713).'

17. In the light of the above observations, this Court is of the affirmed view that it would not be open to an

assessee to violate the terms of the composition scheme and simultaneously claim the benefit therein.

18. The learned counsel for the petitioner places reliance on the decision of the Sinetech and the judgment of the Hon'ble Division Bench of this Court confirming the Sinetech and submitted that when a dealer had exercised his option in making the payment at compounded rate, the defendants cannot withdraw the said option exercised by the concerned dealer.

19. The findings of the learned Single Judge in Sinetech, relied by the learned counsel for the petitioner, reads as follows:

> 7. A Division Bench of this Court in 47 STC 264 [Deputy Commissioner of Commercial Taxes, Vellore v. Devendran & Co.] dealt with the application of Section 16 of the TNGST Act wherein it was held that if earlier assessment is made on a particular percentage and subsequently, if the assessing authority wanted to reopen the assessment by taking away part of the sales turn over from the turn over already assessed for finding out the corresponding purchase turn over of raw hides and skin and subject it to a tax at 13% by invoking Section 16 of the TNGST Act, the same power is not available to the authorities. The funding of the Tribunal was affirmed by the Division Bench in the following lines:
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> > "In this case, as we pointed out already and as admitted, the entire sales turnover relating to the tanned hides and skins had been assessed at 1½ per cent under item 7(b) and the sales turnover was assessable only under that item. Only if the whole or any part of this turnover had escaped such assessment, the whole or any part of the turnover can be said to have been assessed at a lower than the rate at which the same was assessable so as to attract the provisions of Section 16(1)(b). That not being the case, the order of the Tribunal cannot be said to be erroneous in law and consequently the tax revision case is dismissed."
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> 8. The said judgment was affirmed

by the Supreme Court in 103 STC 95.

9. The learned Counsel also produced the work order issued by Indian Oil Corporation in favour of the petitioner, which was also submitted to the respondent. Therefore, the only question that remains for consideration is whether the respondent had power under Section 16 of the TNGST Act to reopen the assessment on the basis of the judgment of the Supreme Court in (2005) 140 STC 22 [cited supra]. The reliance placed upon the said judgment of the Supreme Court in Kone Elevators case is totally misconceived as in the present context, the petitioners have agreed to compound rate by paying the tax in terms of Section 7C of the TNGST Act and also filed the returns in Form A-1. In such a case, the question of revising the compounding order does not arise especially when a dealer is exercising option in payment of rates in compound rate and the petitioner was also made to pay tax at 4% on the entire contract value. Section 16 of the TNGST Act is not intended to withdraw the said option exercised by the petitioner dealer.

10. In the light of the above and in view of the judgment of the Supreme Court in Devendran and Company case (cited supra), the writ petition will stand allowed. The impugned order dated 13.7.2007 will stand set aside. No costs. Connected Miscellaneous Petition is closed.'

20. The aforesaid decision of Sinetech came to be confirmed by a Hon'ble Division Bench of this Court dated 04.07.2017 in W.A.No.1536 of 2010, in the following manner:

'8. Before adverting to the issues raised, let us have a cursory look at the relevant provisions of the TNGST Act, 1959, for the purpose of adjudication of the issues raised before us,

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

Provided that all spare parts, components and accessories of such goods shall also be taxed at the same rate as that of the goods if such spare parts, components and accessories are not specifically enumerated in the First Schedule and made liable to tax under that Schedule.

Provided further that in the case of goods mentioned in the First Schedule which are taxable at the point of first sale, the tax under this Act shall be payable by the first or earliest of the successive dealers in the State who is liable to tax under this section.

Section 7-C: Payment of tax at compounded rates by (works contractors) – (1) Notwithstanding anything contained in Section 3-B, every dealer referred to in item (vi) of clause (g) of Section 2, May, at his option, instead of paying tax in accordance with Section 3-B, pay, [either on the total value of each works contract or on the total value of all works contract, executed by him in a year, tax calculated at the following rate, namely:-

....

9. Notice, dated 13.07.207, has been issued, to the dealer, for revision of assessment, under Section 15 of the TNGST Act, 1969, for the assessment year 2004-05, on the following issues,

'(1) The copy of the order of works contract has not been furnished by the dealers, at the time of assessment.

(2) As per the decision in STC 140 in the case of Tvl.Kone Elevators Ltd., it was held that the supply and installation of goods at the purchaser's premises does not amount to works contract but amounts to sale.

(3) It is also not known, whether the materials were owned by the dealers or supplied by the purchasers. If the materials were owned by the dealers and works executed at site, the supply and fixing of sine board at the site or premises does not amount to works contract but it will be treated as sale and liable to levy of tax at 12.6%'

In the said notice, the Commercial Tax Officer, Korattur Assessment Circle, has stated that in the absence of any objections to the above details, it is proposed to revise the assessment, under Section 16 of the TNGST Act, with connected records, in support of the claim.

10. However, instead of submitting the objections, the writ petitioner/ respondent, has chosen to file W.P.No.26831 of 2007, contending inter alia that during the financial year 2004-05, they have received the work order from the Indian Oil Corporation Ltd., and Bharath Petroleum Corporation Ltd., for supply, fabrication and installation of retail visual identity elements (sign boards) at retail outlets of the said companies.'

21. The decision in Sinetech dealt with a dealer of works contract, who had opted for discharge of taxes under the composition scheme, in terms of Section 7(c) of the TNGST Act. After the dealer was permitted to discharge taxes under the Composition Scheme, the Assessing Authority issued notices under Section 16 of the TNGST Act, proposing to revoke the composition and revise the assessment, by placing reliance on the decision of the Hon'ble Supreme Court reported in the State of Andhra Pradesh vs. Kone Elevators (India) Ltd., reported in 2005 (140) STC 22 (SC), wherein the Hon'ble Apex Court had held that the transaction of supply, erection, commissioning and escalation of lifts constitutes a sale transaction and not a works contract. Placing reliance on the above, the assessing authority proceeded to hold that the transaction of the assessee is a conventional sale transaction and thus, ineligible to opt for composition under Section 7(C) of the TNGST Act, which only enables a works contractor to discharge the taxes under the Composition Scheme. The learned Single Judge held that it was not permissible for the Assessing Officer to withdraw the option under Section 16, once the compounding facility was extended, for which purpose, reliance was placed on a decision of the Hon'ble Division Bench of this Court in the case of Deputy Commissioner of Commercial Taxes, Vellore Vs. Devendran & Company reported in 1981 (47) STC 264.

22. As observed earlier, prior to the decision of the Hon'ble Division Bench in Devendran and Company's case (supra), an earlier Division Bench of this Court in S.Meenakshi's case (supra) had held that when the conditions of the compounding scheme are violated, the dealer goes out of the scheme and renders himself open to assessment as a regular dealer. The decision in S.Meenakshi's case (supra) (1977) was earlier in point of time than Devendran and Company's case (supra) (1980).

23. The learned Single Judge, had also observed in Sinetech that the decision in Devendran and Company (supra)

was affirmed by the Hon'ble Supreme Court in the State of Tamil Nadu V. Devendran & Company reported in 1996 (103) STC 95. The affirmation by the Hon'ble Apex Court was done in the following manner:

> "1.We have read the judgment of a Division Bench of the Madras High Court under appeal, now reported in Deputy Commissioner of Commercial Taxes V. Devendran & Co., [1981 (47) STC 264 (Mad)]. We have heard learned counsel. We are satisfied that no interference is called for. Section 16(1)(b) applies only if assessment has been made at a rate lower than the assessable rate. In the instant case, the assessment is not at a rate lower than that at which the turnover ought to have been assessed; it is really a case of seeking to reassess under a different head.
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> 2.In the result, the civil appeals and the special leave petitions are dismissed with no order as to costs."

The issue that arises for consideration in the present Writ Petition is as to whether the ratio in Sinetech on the authority of the Assessing Officer to withdraw the option under Section 16 is permissible or not? To such a ratio, the learned Judge, in Sinetech, had relied on Devendran and Company's case (supra). When the decision in Devendran and Company's case (supra) came to be affirmed by the Hon'ble Apex Court in the manner extracted above, the ratio held in Devendran and Company's case (supra) was neither affirmed nor upheld. But rather, the applicability of Section 16(1)(b) of the TNGST Act on assessments made at a lower rate alone was discussed. Thus, it cannot be said that the Hon'ble Apex Court had affirmed the specific proposition on the authority of the Assessing Officer to withdraw the option under Section 16, as expressed in Devendran and Company's case (supra). Above all, Devendran and Company's case (supra) would have no bearing to the issue involved in the present Writ Petition, inasmuch as they were not dealing with the Scheme of Composition, but merely with the power on reassessment of a regular dealer. With due respects to the Hon'ble Single Judge and without any disrespects, this Court is of the opinion that the decision in Sinetech placing reliance on the later judgment of Devendran and Company's case (supra), in preference of S.Meenakshi's case (supra), may be considered as a decision Per Incuriam.

24. In National Insurance Company Limited V. Pranay Sethi and others reported in 2017 (16) SCC 680, the Constitutional Bench of Five Judges of the Hon'ble Apex Court had dealt with the doctrine Per Incuriam and held as follows:-

> 27.We are compelled to state here

that in Munna Lal Jain (supra), the three-Judge Bench should have been guided by the (2015) 6 SCC 347 principle stated in Reshma Kumari which has concurred with the view expressed in Sarla Devi or in case of disagreement, it should have been well advised to refer the case to a larger Bench. We say so, as we have already expressed the opinion that the dicta laid down in Reshma Kumari being earlier in point of time would be a binding precedent and not the decision in Rajesh.

28.In this context, we may also refer to Sundeep Kumar Bafna v. State of Maharashtra and another which correctly lays down the principle that discipline demanded by a precedent or the disqualification or diminution of a decision on the application of the per incuriam rule is of great importance, since without it, certainty of law, consistency of rulings and comity of courts would become a costly casualty. A decision or judgment can be per incuriam any provision in a statute, rule or regulation, which was not brought to the notice of the court. A decision or judgment can also be per incuriam if it is not possible to reconcile its ratio with that of a previously pronounced judgment of a co- equal or larger Bench. There can be no scintilla of doubt that an earlier decision of co-equal Bench binds the Bench of same strength. Though the judgment in Rajesh's case was delivered on a later date, it had not apprised itself of the law stated in (2014) 16 SCC 623 Reshma Kumari (supra) but had been guided by Santosh Devi (supra). We have no hesitation that it is not a binding precedent on the co-equal Bench.

[Emphasis supplied by me]

25. In the aforesaid decision of National Insurance Company (supra), the three Judge Bench had followed the principle that in a decision rendered post another decision and by referring to such reliance, the Constitutional Bench had held that the dicta laid down in the earlier decision would be a binding precedent on the co-equal Bench and held the later decision to be Per Incuriam.

26. The decision in Sinetech came to be affirmed by a Hon'ble Division Bench of this Court in W.A.No.1536 of 2010 through its order dated 04.07.2017. The learned counsel for the petitioner submitted that the ratio laid down in Sinetech, since affirmed by the Hon'ble Division Bench, has become final and thereby, the authorities are not empowered to withdraw the option of compounding exercised by the dealer.

27. The Hon'ble Division Bench of this Court in the aforesaid decision had placed reliance on the decision of the Hon'ble Apex Court in the case of State of Andhra Pradesh vs. Kone Elevators (India) Ltd., reported in 2005 (140) STC 22 (SC) and held that the composition confirming the basis for rejection and denying the composition scheme by the assessing officer was overruled by the Constitutional Bench of the Hon'ble Apex Court and thus, the very basis for revisiting the composition scheme did not survive.

28. However, the issue involved in the present writ petition is as to whether the composition scheme is open for revisit under any circumstances, including violation of the conditions of the very scheme itself. This aspect was not addressed by the Hon'ble Division Bench and thus, the reliance on the decision of the Hon'ble Division Bench of this Court, confirming the decision in Sinetech, in support of the proposition that the composition scheme cannot be subject of re-assessment under any circumstances, may not be relevant. In other words, the Hon'ble Division Bench, had not examined the question, which arises for consideration before this Court in the present case, as to whether it is open to re-assess a dealer, who had opted for composition scheme and violated the conditions of the very composition scheme. Thus, the decision relied upon by the learned counsel for the petitioner in Sinetech as confirmed by the Hon'ble Division Bench of this Court, is not applicable.

29. A decision would stand as a precedent for what is actually decided and not what logically flows therefrom. This proposition has been enunciated in the case of State of Orissa and Others vs. Md.Illiyas reported in (2006) 1 SCC 275, in the following manner:

> '12. When the allegation is of cheating or deceiving, whether the alleged act is wilful or not depends upon the circumstances of the case concerned and there cannot be any straitjacket formula. The High Court unfortunately did not discuss the factual aspects and by merely placing reliance on an earlier decision of the Court held that prerequisite conditions were absent. Reliance on the decision without looking into the factual background of the case before it, is clearly impermissible. A decision is a precedent on its own facts.

> Each case presents its own features. It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. According to the well-settled theory of precedents, every decision contains three basic postulates: (i) findings of material facts; (ii) statements of the principles of law applicable to the legal problems disclosed by the facts; and (iii) judgment based on the combined effect of the above. A decision is an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically flows from the various observations made in the judgment. The enunciation of the reason or principle on which a question before a Court has been decided is alone binding as a precedent. A case is a precedent and binding for what it explicitly decides and no more. The words used by Judges in their judgments are not to be read as if they are words in an Act of Parliament. In Quinn v. Leathem the Earl of Halsbury, L.C. Observed that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which are found there are not intended to be the exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are found and a case is only an authority for what it actually decides.'

30. If and when the aforesaid decision is applied to the facts of the present case and in the light of the observations made by this Court, the ratio laid down in S.Meenakshi's case (supra) would stand in preference to the ratio laid down in Sinetech and consequently, the decision of the Hon'ble Division Bench affirming Sinetech will not be of relevance to the law involved in the instant Writ Petition.

31. The learned counsel for the petitioner would place an alternate submission that in view of the fact that the assessee had refunded the tax collected to the respective dealers, the collection may not constitute as collection of taxes and thus, would not amount to violation of the condition under the proviso to Section 3(4) of the TNVAT Act. For such

a submission, learned Special Government Pleader places reliance on the decision in the case of State of Tamil Nadu vs. K.Mohammed Ibrahim Sahib reported in (1991) 83 STC 402W (Mad).

32. The issue as to whether the taxes have actually been refunded by the petitioner to the respective customers or not is a factual aspect, which requires to be examined by the respondent herein and in the absence of any proof for the alleged refunded taxes, this Court may not be justified in exercising its powers under Article 226 of the Constitution of India to render a finding on such a factual aspect. Nevertheless, if the matter is remanded back to the assessing officer for reconsideration, on the aforesaid limited proposition placed before this Court, the ends of justice could be secured. Accordingly, the petitioner is granted liberty to approach the respondent herein setting forth his objections.

33. In the light of the observations, the petitioner is granted liberty to submit his objections before the respondent within a period of four weeks from the date of receipt of a copy of this order and on receipt of the same, the respondent herein shall consider the same on its own merits and pass appropriate orders, preferably within a period of twelve (12) weeks therefrom, after affording due opportunity of personal hearing to the petitioner. Till such time, the respondent shall refrain from taking any further action pursuant to the impugned proceedings in TIN No.33383880804/07-08 dated 12.02.2010. This Writ Petition stands disposed of accordingly. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-III)

//True copy//

Sub Assistant Registrar

DP/sm
To

1. The Commercial Tax Officer,
   Thiruthuraipoondi.

2. The Commercial Tax Officer,
   Korattur Assessment Circle, Chennai

+1cc to Mr.R.Senniappan, Advocate SR.No.56000
+1cc to Special Government Pleader (Taxes) SR.No.56623

W.P.No.4074 of 2010

MG(CO)
GMT(01/07/2020)