

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.09.2019

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P. No.6728 of 2012

& M.P. No.1 of 2012

Tvl. Jasmines Excel
No.4/1, Venkata Subba Reddy Street,
Athipet, Chennai -58.Petitioner

Vs

The Assistant Commissioner (CT),
Koyambedu Wholesale Market Complex,
Chennai - 107. Respondent

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari calling for records on files of the respondent in his proceeding in TNGST 1342076/2003-04 dated 29.07.11 and quash the same as invalid, illegal and unlawful being violative of principles of natural justice.

For Petitioner : Mr.T.V.Lakshmanan

For Respondent : Mr.Mohammed Shaffiq

Special Government Pleader (T)

O R D E R

The petitioner challenges an order of assessment dated 29.07.2011 relating to the period 2003-04 at a time when the provisions of the erstwhile Tamil Nadu General Sales Tax Act, 1959 (in short 'TNGST Act') were in operation. The petitioner filed regular monthly returns and the officer, in the order of assessment refers to summons issued to verify the correctness or otherwise of the returns. According to him, there was no response to the same. This is borne out by the records of assessment that contain notices of summons issued, however, with no receipt of acknowledgement of the same. This was followed up

by an inspection by the Enforcement wing of the Commercial taxes department on 18.09.2003 followed by summons dated 20.02.2004, 06.04.2004, 09.12.2005 and 14.07.2006 that have yielded no response from the petitioner, perhaps for the reason that the same were not served. However, as a fact, the petitioner has neither referred to, nor denied the inspection on 18.09.2003 nor the summons issued prior thereto in its writ affidavit. Moreover, the order also refers to summons issued in Form XII on 05.10.03, 03.11.03, 11.11.03 and 23.12.05 based on the Inspection report and also to the attendance/appearances before the officer of Accounts manager and authorised representative one Thiru.T.Manivannan on 23.03.06 and 20.11.06. Thereafter, since the petitioner had not maintained books of accounts and there were, according to the officer, several discrepancies noticed in the transactions and records maintained by the petitioner in the course of the inspection, the officer proceeded to issue a pre-assessment notice dated 08.07.2008 and pass the impugned order of assessment dated 29.07.11 assessing the petitioner to the best of his judgement.

2. The order of assessment is assailed on three legal grounds. I specifically refrain from advertng to the merits of the additions made as this would impinge on various factual aspects of the transactions and also for the reason that the only arguments advanced turn on three legal issues. The first argument advanced is that the provisions of Rule 15(6) of the Tamil Nadu General Sales Tax Rules (in short 'TNGST Rules') require specifically, the concurrence of the Deputy Commissioner, prior to proceeding with an assessment involving turnover in excess of Rupees one lakh. In the present case, according to the petitioner, such concurrence has not been obtained. Secondly, the notice for pre-assessment is dated 08.07.08 and has been issued post 01.01.2007, in the era of the Tamil Nadu Value Added Tax Act, 2006 (in short 'TNVAT Act'). It is thus, according to the petitioner, not valid in law. Thirdly, and this issue has not been raised in the affidavit filed in support of the writ petition, the impugned assessment is one framed to the best of the Assessing Officers' judgment and this is a power that has to be specifically conferred upon the Assessing Authority. In the present case, there is no power in this regard conferred under Section 22 of the TNVAT Act.

3. In defence, the revenue contends, in seriatim, that (i) on facts, Rule 15(6) has been fully complied with in the present case, (ii) that the provisions of Section 88 of the TNVAT provides for a transition and continuation of the assessment from the TNGST era to the TNVAT era and the issuance of the pre-assessment notice on 08.07.08 is thus in order and (iii) the power of best judgement assessment was available in the TNVAT at the relevant time. Thus, according to the revenue, the impugned assessment was liable to be sustained.

4. Detailed submissions of Mr.Lakshmanan, learned counsel for the petitioner and Mr.Mohammed Shaffiq, learned Special Government Pleader for the respondent have been heard.

5. At the outset, I must state that there has been considerable vacillation by both learned counsel through the course of the hearing as to which enactment, whether the TNGST Act or the TNVAT Act would be attracted to the assessment at issue. In this case, records have been summoned and reveal that summons have been issued in 2003 for the purpose of verification of monthly returns, the inspection by the Enforcement wing has been occasioned on 18.09.2003, summons were thereafter issued on 20.02.2004, 06.04.2004, 09.12.2005 and 14.07.06, and summons in Form XII issued on 15.10.2003, 03.11.2003, 11.11.2003 and 23.12.2005 to which the petitioner has responded, pre-assessment notices issued on 08.07.2007 and 14.12.2010, objections received from the petitioner on 31.03.2009 and 13.12.2010 and impugned order of assessment passed on 29.07.2011. However, the affidavit commences with the sequence of events only from the date of pre-assessment notice in 2008 and to that extent, is wholly bereft of facts and details.

6. The TNGST Act has been repealed with the coming into force of the TNVAT Act with effect from 01.01.2007. The assessment in question relates to 2003-04 that falls within the era of the TNGST Act, but has been completed in the era of the TNVAT Act invoking powers under section 88 providing for repeal and savings. This provision is extracted to the extent to which it is applicable to the present case:

'88. Repeal and savings.-- (1).....

(3) Notwithstanding the repeal of the said Act or 1970 Act, as the case may be, --

(a) any action or proceedings already initiated under the said Act or 1970 Act, as the case may be shall validly be continued under the provisions of the said Act or 1970 Act, as the case may be which relates to the period prior to the coming into force of this Act;

(b) any person liable to pay any tax, fee, penalty, interest or other amount under the said Act or 1970 Act, as the case may be for any period before coming into force of this Act, shall be levied, assessed and collected under the provisions of this Act, as if this Act were in force during the said period;'

7. Section 88(3)(a) deals with a situation where 'any action or proceedings' has already commenced/has been occasioned prior to 01.01.2007 and the proceedings are continued thereafter in the regime of the TNVAT Act. In such a situation, the machinery provisions that would be applicable are those provided under the TNGST Act. In a case of an assessment for the period prior to 01.01.2007 where no proceedings/action has been initiated prior to 01.01.07, Section 88(3) states that proceedings shall be initiated and continued utilizing the machinery under TNVAT Act deeming the existence of the Act at the relevant point in time. Thus, in the latter situation, though the TNVAT Act has been notified effective 01.01.2007, the Act will apply even for proceedings for previous years where no action or proceedings have been initiated prior to 01.01.2007 or to put it in another way, where any action or proceedings are initiated for the first time after the enactment of the TNVAT Act.

8. The learned Special Government Pleader appearing for the revenue relies on i) The Kendarnath Jute MFG. Co. Ltd Vs. The Commissioner of Income Tax, (General), Calcutta [(1972) 3 SCC 252]; ii) U.P.Avas Evam Vikas Parishad and Another Vs. Friends Coop. Housing Society Ltd. And Another [(1995) Supp (3) SCC 456]; iii) Gammon India Ltd. Vs. Special Chief Secretary and others [(2006) 3 SCC 354] whereas the petitioner relies upon (i) P.S.Subramaniam Chettiar and Sons, Dindigul Vs. Joint Commercial Tax Officer III, Dindigul ((1966) 18 STC 357) and (ii) State of Haryana and others V. Hindustan Construction Company Limited ((2017) 9 SCC 463).

9. In Gammon India Ltd. (supra) three Judges of the Supreme Court considered the effect of repeal and reenactment of the Andhra Pradesh General Sales Tax Act, 1957 (in short 'APGST Act'). Paragraph Nos.13 and 14 extract Section 80 of the Andhra Pradesh Value Added Tax Act (in short 'APVAT Act') and Section 8 of the Andhra Pradesh General Clauses Act, 1891 (in short 'APGCA') providing for repeal and savings and the effect of repealing an Act, as below:

'Section 80 of the A.P.V.AT Act reads as under : "80(1) The Andhra Pradesh General Sales Tax Act, 1957 is hereby repealed provided that such repeal shall not effect the previous operation of the said Act or section or any right, title, obligation or liability already acquired, accrued or incurred thereunder and subject thereto, anything done or any action taken (including any appointment, notification, notice, order, rule from, regulation, certificate, license or permit) in the

exercise of any power conferred by said Act or Section shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act, as if this Act was in force on the date on which such thing was done or action was taken and all arrears of tax and other amounts due at the commencement of this Act may be recovered as if they had accrued under this Act.

(2) Notwithstanding anything contained in sub-section (1), any application, appeal, revision or other proceedings made or preferred to any officer or authority under the said Act or section and pending at the commencement of the Act, shall, after such commencement, be transferred to and disposed of by the officer or authority who would have had jurisdiction to entertain such application, appeal, revision or other proceedings was made or preferred.

(3) Upon such repeal of the Andhra Pradesh General Sales Tax Act, 1957 the provisions of Sections 8, 8-A, 9 and 18 of the Andhra Pradesh General Clauses act, 1891 shall apply."

Section 80(3) of the A.P.V.A. Tax Act provides for the application of Section 8 of the Andhra Pradesh General Clauses Act, 1891 on the repeal of the APGST Act, 1957. Section 8 of the A.P. General Clauses Act, 1891 deals with the effect of repealing the Act, reads as under :

"Effect of Repealing an Act Where any Act to which this Chapter applies, repeals any other enactment, then the repeal shall not :

(a) affect anything done or any offence committed, or any fine or penalty incurred or any proceedings begun before the commencement of the repealing act; or

(b) revive anything not in force or existing at the time at which the repeal takes effect; or

(c) affect the previous operation of any enactment so repealed or anything duly done or suffered under any enactment so repealed; or

(d) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(e) affect any fine, penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

(f) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, fine, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, any such fine, penalty, forfeiture or punishment may be imposed, as if the repealing Act had not been passed.'

10. On a wholistic appreciation of Sections 80 and 8 of the APVAT Act and APGCA, the Bench, at paragraph Nos.46, 71,72 and 73 states as follows:

46. The principle which has been laid down in this case is that whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purposes of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore, subscribe to the broad proposition that Section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section.

.....

71. Since the effect of a repeal is to obliterate the statute and to destroy its effective operation in future, or to suspend the operation of the common law, when it is a common law principle which is abrogated, any proceedings which have not culminated in a final judgment prior to the repeal are abated at the consummation of the repeal. When, however, the repeal does not contemplate either a substantive common law or

statutory right, but merely the procedure prescribed to secure the enforcement of the right, the right itself is not annulled but remains in existence enforced by applying the new procedure.

72. In the instant cases, there is a simultaneous repeal and the re-enactment and the A.P.V.A. Tax Act clearly saves the earlier provisions in toto. Consequently, rights and liabilities accrued or incurred under the A.P.G.S. Tax Act shall continue even after it is repealed.

73. On critical analysis and scrutiny of all relevant cases and opinions of learned authors, the conclusion becomes inescapable that whenever there is a repeal of an enactment and simultaneous reenactment, the reenactment is to be considered as reaffirmation of the old law and provisions of the repealed Act which are thus reenacted continue in force uninterruptedly unless, the reenacted enactment manifests an intention incompatible with or contrary to the provisions of the repealed Act. Such incompatibility will have to be ascertained from a consideration of the relevant provisions of the reenacted enactment and the mere absence of saving clause is, by itself, not material for consideration of all the relevant provisions of the new enactment. In other words, a clear legislative intention of the reenacted enactment has to be inferred and gathered whether it intended to preserve all the rights and liabilities of a repealed statute intact or modify or to obliterate them altogether.'

11. Applying the principles laid down as above to the present case, as far as the TNVAT Act is concerned, Section 88 provides for the procedure for commencement and completion of proceedings even for earlier periods so long as the proceedings are initiated afresh and for the first time after 01.01.2007. In fact, this is the basis of the distinction between Clause (a) and (b) of section 88(3). Thus, in a case where proceedings have already been commenced, such proceedings will be continued and completed using the existing machinery, being, machinery provisions under the erstwhile Statutes. Evidently, this is to prevent a clash and consequent confusion between the procedure under the earlier enactments and the TNVAT Act. However, in cases where no proceedings have been initiated at all, only the machinery available under the TNVAT Act would come into play.

12. The Supreme Court in the case of State of Haryana Vs. Hindustan Construction Co.Ltd [(2017) 9 SCC 463] has held as follows:

8. We have considered the respective submissions. A simple repeal of an Act leaves no room for expression of a contrary opinion. However, if the repeal is followed by a fresh enactment on the same subject, the applicability of the General Clauses Act would undoubtedly require an examination of the language in the new enactment to see if it expresses a different intention from the earlier Act. The enquiry would necessitate an examination if the old rights and liabilities are kept alive or whether the new Act manifests an intention to do away with or destroy them. If the new Act manifests a different intention, the application of the General Clauses Act will stand excluded.

9. There were no proceedings pending against the respondent under the Act of 1973 when the new Act came into force on 01.04.2003. The suo-moto revisional power under Section 40 of the former Act was exercised on 07.06.2004. The repeal and saving clause in Section 61 of the Act of 2003, saved only pending proceedings under the repealed Act. The intendment clearly was that matters which stood closed under the Act of 1973 had to be given a quietus and could not be reopened.

13. Thus, the proper and appropriate enactment to govern the assessment in the present case will be the TNGST Act only. In the light of the provisions of Section 88(3)(a) of the Act, I see no legal infirmity in the issuance of notice dated 08.07.08 in terms of the TNGST Act. This ground is rejected.

14. Now coming to the question of the applicability of Rule 15(6), the Rule reads as follows:

Rule 15(6). If no return is submitted or if the return submitted appears to the assessing authority to be incorrect or incomplete, the assessing authority may, after following the procedure prescribed in rules 11 and 12, finally assess the tax or taxes payable under 1 [sections 3, 3-A, 3-B, 3-C, 3-D, 3-E, 3-G, 3-H, 3-I, 3-J, 2 [4, 4-F, 5, 7, 7-A, 7-C, 7-D or 7-E]] according to the best of his judgement.

Provided that before making assessment under this rules, the assessing authority shall obtained the concurrence of the Deputy Commissioner having jurisdiction if the assessment results in imposition of tax of one lakh rupees and above or enhancement

of tax due to the extent of one lakh of rupees over and above the tax due as reported in the returns.

15. The Rules provide that prior approval has to be obtained from the Deputy Commissioner in all matters where the original assessment involves a sum in excess of Rs.1,00,000/-. The records were summoned to ascertain this position. Letter dated 27.09.2010 issued by the Assessing Officer to the Deputy Commissioner is as follows:

``Sub: TNGST Act 1959 - Office of the Assistant Commissioner (CT) - Koyambedu Assessment Circle - Tvl.Jasmine Excell - 2003-04 - Accounts not produced - Best of Judgment Notice issued - Demand more than Lakh - sought for permission under Rule 15(6) of the TNGST Act - Regarding.

Ref: This Office Notice dt.08-07-2008.

I submit that Tvl.Jasmine Excell had been called for the accounts for the year 2003-04 by the then Commercial Tax Officer. The dealers have not produced their accounts. Hence, the then Commercial Tax Officer had issued Best of Judgment notice considering the D3 Proposals received from the Enforcement Wing. As seen from the notice the tax due works out is more than a Lakh. If any order passed as best of judgement the tax liability is more than one lakh, concurrence has to be obtained from the Joint Commissioner (CT) of the Territorial under Rule 15(6) of the TNGST Act 1959.

Therefore, the Deputy Commissioner (CT), Zone-x may kindly addressed to the Joint Commissioner (CT) South Division to permit me to pass assessment order in respect of Tvl.Jasmine Excell for the year 2003-04.

Sd/-

Assistant Commissioner (CT)
Koyambedu Assessment Circle'

16. The Deputy Commissioner has forwarded the request of the Assessing Officer for consent to the Joint Commissioner, who has replied vide letter dated 30.05.2011 addressed both to the Assessing Officer as well as to the Deputy Commissioner as follows:

`Sub: TNGST Act 1959 - Commercial Tax Department - Koyambedu Assessment Circle - Tvl.Jasmine Exceell - for the year 2003-04 - Accounts not produced - Best Judgment notice issued - Demand more than a lakh - sought for permission under Rule 15(6) of the TNGST Act - Report sent - Regarding.

Ref: 1. Assistant Commissioner (CT), Koyambedu Assessment circle, TNGST No.1342076/03-04, dated 27.09.2010.

2. Deputy Commissioner (CT) None-X, Chennai - 6 RC.4091/10/B2, dated 04.10.2010.

I invite your attention to the references cited.

In the reference I cited the Assistant Commissioner (CT), Koyambedu Assessment Circle had sought concurrence under Rule 15(6) of the TNGST Rules 1959, with regard to implementation of D3 proposal of the above dealer for the year 2003-04. The question of granting permission under Rule 15(6) will arise only when there is no response from the dealer, which is not the case here. Hence 15(6) concurrence is not necessary in this case. Also you are instructed to pass final assessment order early. I enclose herewith the D3 proposal file. Receipt of the record may be acknowledged.

Sd/-

R.Sumathi,

For Joint Commissioner (CT)
Chennai (South) Division.'

17. The records have been shown to the learned counsel for the petitioner as well. It is clear on a perusal of these documents that the matter has been escalated to the level of Joint Commissioner for his approval. The Joint commissioner has indicated that, in his view, no approval need be obtained except in a matter where the assessee has not responded to summons. According to learned counsel for the petitioner this statement does not indicate approval having been obtained in the manner as contemplated under Rule 15(6). I disagree. The very fact that the instant assessment was brought to the notice of the Joint Commissioner (an authority superior to the Deputy Commissioner) would, in my view indicate that the matter had indeed been placed for his attention/approval as envisaged under Rule 15(6). His observation that approval was not warranted is, to my mind incidental, in so far as he is seen to have applied his mind to the matter and specifically directs the Assessing Officer to expedite completion of the assessment. Thus Rule 15(6) is seen to have been complied with/satisfied in the present case.

18. The final argument raised revolves around the concept of a best judgement assessment and whether Section 22, providing for 'Deemed Assessment and procedure to be followed by assessing authority' conferred such power upon the officer at the relevant time. An adjudication of this issue is academic and unnecessary in the light of my conclusion upon issues (i) and (ii) above.

19. For the aforesaid reasons, this writ petition is dismissed. Consequently, connected miscellaneous petition is closed with no order as to costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The Assistant Commissioner (CT),
Koyambedu Wholesale Market Complex,
Chennai - 107.

+1cc to Mr.T.V.Lakshmanan, Advocate Sr.81251

+1cc to the Special Government Pleader Sr.81489

W.P. No.6728 of 2012

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srg 03/02/2020

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