

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.09.2019

CORAM

THE HONOURABLE Dr. JUSTICE ANITA SUMANTH

W.P.No.9893 & 27479 of 2012

Indian Oil Corporation Ltd.,
Represented by its Chief Finance Manager
S.R.Ganeshan

...Petitioner

Vs.

The Deputy Commissioner (CT-IV) LTU
Large Tax Payers Unit,
Chennai-600008

...Respondent

Prayer in W.P.9893/2012:- Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records of the respondent herein in his TNGST No.44684/1984-85, dated 29.02.2012 and quash the same.

Prayer in W.P.27479/2012:

Writ Petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records of the Respondent herein in his TNGST No.084727/1985-86 dated 27.8.2012 and quash the same in so far as it relates to the levy of penalty imposed under Section 12(5) (iii) of the Act of the TNGST Act 1959 amounting to Rs.3,14,99,338/- which is barred by limitation as provided under the proviso to Section 12 (3) and 12 (5) of the TNGST Act 1959.

For Petitioner :Mr.N.Prasad
in both Petitions

For Respondent :Mr.V.Haribabu,
in both Petitions Additional Government Pleader

O R D E R

The petitioner is the Indian Oil Corporation Ltd., and challenges proceedings of the Deputy Commissioner, Large Tax Payer Unit dated 29.02.2012 and 27.08.2012 for the periods 1984-85 and 1985-1986 passed in terms of the provision of the Tamil Nadu General Sales Tax Act, 1959 (in short 'Act')

2. The petitioner has restricted its challenge only to the levy of penalty under Section 12(5)(iii) of the Act. Though the impugned proceedings have been challenged by way of statutory appeal, the specific ground that has been raised in this writ petition is a legal ground that goes to the root of the matter and hence, I am of the view that the mere fact that levy has been challenged in appeal will not be a bar to the maintainability of the writ petitions. Moreover, even though the levy of penalty was challenged before the first Appellate Authority, a copy of the order passed by the First Appellate Authority that has been placed on record, makes it clear that he has not dealt with the issue on merits perhaps because of pendency of these writ petitions. Thus, the writ petitions are held to be maintainable.

3. On merits, the penalty has been challenged on the question of whether the excise duty component on the clearances of petroleum products would be includable in taxable turnover for the purpose of levy of General Sales Tax.

4. The first decision available on this issue is one of a Division Bench of the Kerala High Court in Deputy Commissioner of Sales Tax Vs. Burmah Shell Oil Storage [(1981) 48 STC 37] that was in favour of the assessee holding that excise duty paid directly by the buyer to the Central Sales Tax Department on petroleum product removed from the bonded warehouse would not form part of taxable turnover. This was confirmed by a Full Bench of the Kerala High Court in Madras Rubber Factory Ltd. Vs. State of Kerala (74 STC 56). A subsequent Full Bench of the same High Court in Hindustan Petroleum Corporation Ltd. Vs. State of Kerala [89 STC 106] overruled the earlier decision in [(1981) 48 STC 37] holding that the excise duty component would form part of taxable turnover.

5. The aforesaid decision was confirmed by the Supreme Court on 09.10.1996 in the case of Deputy Commissioner of Sales Tax (Law) Vs. Hindustan Petroleum Corporation Ltd (118 STC 311). On 19.12.1997, a Full Bench of the Supreme Court in the case of State of Kerala Vs. Madras Rubber Factory Ltd. [108 STC 583] reversed the Full Bench judgment of the Kerala High Court in 74 STC 56 holding the same in line with the judgment of the Supreme Court in 118 STC 311.

6. Thus the prevailing position is adverse to the assessee. Coming to the levy of penalty, the provisions of Section 12(5)(iii) read as follows:

Sec.12(5) The assessing authority may, in the order of assessment or by a separate order direct that the dealer shall, in addition to the tax assessed

under sub-section (4), pay by way of penalty, a sum-

(iii) which, in the case referred to in clause (iii) of sub-section (4), shall not be less than fifty per cent but shall not be more than one hundred and fifty per cent of the difference in tax payable on the turnover disclosed in the return and that determined by the assessing authority.

7. The levy of penalty is subject to discretion to be exercised by the officer having regard to whether the dealer would be liable for such levy or not. The petitioner has also produced a copy of an order of the Sales Tax Appellate Tribunal in a batch of cases in which it is also part, in support of the position that the Tribunal has taken a view that no penalty be levied in identical circumstance for earlier assessment years. This order has not been challenged by the Revenue and has become final. The relevant portion of the order of the Tribunal is as follows:

7.Point No.2. The grounds raised in the grounds of appeals, and the arguments advanced by the counsel and State Representative at the time of hearing have been considered. It is the argument of the appellants that for imposition of penalty under Section 12 (5) (iii) of the Tamilnadu General Sales Tax Act, there must be complete absence of bonafides, that the judgment of the Madras High Court reported in 94 STC 157 makes this clear, that it is the clear stand of the appellants that although they had not disclosed the excise duty paid by them, which was subsequent to the purchase when the goods were cleared from the bonded warehouse, as part of their purchase turnover, even so the omission to disclose was bonafide and not wanton or deliberate and that the following will support the position:

(1) The assessment years in question before this Tribunal in the present appeals is between 1981-82 to 1986-87. During that period, the only judgment which considered the question as to whether excise duty paid by a purchaser of petroleum products much after the purchase was part of the purchase turnover or not was the judgment of the Division Bench of the Kerala High Court reported in 48 STC 37. In that case, that question was clearly answered in favour of the assessee who is also one of the appellants in the present appeals. Therefore, when the appellants filed their monthly returns under the Act they were under the bonafide belief that excise duty paid by them subsequent to the purchase was not part of their purchase turnover for the purpose of imposition under Section 7-A of the Act.

8. The Tribunal considered the series of judgment that I have referred to above at paragraphs 4 and 5 and in conclusion holds as follows:

...If the issue on hand is analysed in the light of the above said decisions, it cannot be said that bonafide of the dealers could not be gone into before imposing penalty. The issue whether purchase tax gone into before imposing penalty. The issue whether purchase tax liability under Section 7-A of the Tamilnadu General Sales Tax Act is attracted and the Excise duty paid by the appellants on the clearance of petroleum products from their bonded warehouse has reached the finality only in the year 1996 when the supreme court decided the issue in the case reported in 118 STC 311. Till then, the inclusion that there was no wilful non-disclosure of turnover and therefore penalty under section 16(2) of the Tamilnadu General Sales Tax Act is not called for in all the caeses.

This order has been accepted by the Revenue.

9. In the light of the order of the Tribunal, the final fact finding authority as above, and in the light of the categoric decisions that I have noted earlier, I am of the view that the levy of penalty in this case cannot be sustained and is liable to be set aside. The penalty is seen to relate not only to the component of excise duty but to other issues as well and two charts are circulated by the learned counsel for the petitioner showing the attribution of penalty to the (i) issue involving excise duty and (ii) other issues.

10. Thus, the levy of penalty in regard to the excise duty component for the period 1984-85 is a sum of Rs. 2,09,01,048/- and for the period 1985-86, is Rs.3,14,95,144/-. Learned counsel for the Revenue does not dispute the aforesaid quantification or attribution. In the light of the aforesaid, the levy of penalty, only to the extent as set out above, will stand cancelled.

11. These writ petitions are allowed in the above terms.
No costs.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

To

The Deputy Commissioner (CT-IV) LTU
Large Tax Payers Unit,
Chennai-600008

+1 CC to The Spl. Govt. Pleader (T) sr 79850.
+1 CC to Mr.N.Inbarajan, Advocate sr 79464.

W.P.No.9893 & 27479 of 2012

PA(CO)
SP(18/12/2019)



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