IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.01.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P.Nos.4815, 4816 and 4817 of 2000

A.Ponnusamy Pillay & Sons
122, Church Street, Karaikkal-609 602. ... Petitioner in all the W.Ps.

-Vs-

1. The Commercial Tax Officer
Karaikkal.

2. Union Territory of Pondicherry
represented by its Secretary, Finance Department
Pondicherry. ... Respondents in all the W.Ps.

For Petitioner : Mr.N.Prasad
for M/s.N.Inbarajan

For Respondents : Ms.N.Mala,
Special Govt.Pleader
(Pondicherry)

Prayer in W.P.4815/2000 : Writ Petition under Article 226 of the Constitution of India praying for a Writ of Certiorari to call for the records on the file of the first respondent herein in No.1197/00/C dated 09.03.2000.

Prayer in W.P.4816/2000 : Writ Petition under Article 226 of the Constitution of India praying for a Writ of Declaration declaring that Section 4-A of the Pondicherry General Sales Tax Act, 1967 and Notification in G.O.Ms.No.51/96/F.2 dated 21.09.96 and G.O.Ms.No.21/99/F2 dated 30.03.1999 issued under Section 19 of the Pondicherry General Sales Tax Act, 1967 insofar as tobacco products are concerned are ultra vires Section 14(ix) and 15 of the Central Sales Tax Act, 1956 against the scheme of exemption by Section 9 read with Sl.No.25 of the Third Schedule to the Pondicherry General

Sales Tax Act, 1967 being subject to Additional Duties in lieu of sales tax under Additional Duties of Excise (Goods of Special Importance) Act, 1957.

Prayer in W.P.4817/2000 : Writ Petition under Article 226 of the Constitution of India praying for a Writ of Mandamus directing the first and second respondents to forbear from imposing or recoverying the turnover tax under Section 4-A of the Pondicherry General Sales Tax Act, 1967 on the turnover of cigarattes which are subject to Additional Duty of Excise in lieu of Sales Tax under the heading 24.03 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 being declared goods under Section 14(ix) of the Central Sales Tax Act, 1956, for which there is no prescription under Section 15 of the Central Sales Tax Act, 1956 by the second respondent.

C O M M O N   O R D E R

(Order of the Court was made by DR.VINEET KOTHARI, J.)

These writ petitions have been filed by M/s.A.Ponnusamy Pillay & Sons, Karaikkal aggrieved by the order dated 09.03.2000 passed by the Commercial Tax Officer, Karaikkal upon the letter dated 04.03.2000, requesting the Assessing Authority to issue a Tax Clearance Certificate to the Assessee, as the same was required by the Assessee to obtain renewal of the IMFL licence, which was required for one of the commodities dealt with by the Assessee amongst other things. The Assessee seems to be dealing with tobacco products, alcoholic beverages (IMFL), cigarattes, general shop goods like Nestle products, blades and brushes etc., Without the Tax Clearance Certificate, the IMFL Certificate could not be renewed and therefore the Assessee had to approach the concerned authority under the provisions of the Pondicherry General Sales Tax Act for the said purpose. The said application was rejected by the learned Assessing Authority by the impugned order dated 09.03.2000 with the following observations.

> "Inasmuch as they deal in alcoholic beverages (IMFL & Beer) and so long as they deal in cigarattes, notwithstanding the fact that they deal in other general shop goods like Nestle products, blades, brushes etc., they are dealers in alcoholic beverages / cigarattes as per the definition and are liable to pay turnover tax under Section 4-A unquivocally.
>
> The provisions of the Act, nowhere requires that the levy "turnover tax" under Section 4-A that a dealer should exclusively be "a dealer in alcoholic

beverages" or in "cigarattes" and that the provisions nowhere exempt a dealer in both these goods as well as in other goods from the purview of Section 4-A.

The proviso to Section 4-A excludes only the turnover on:
(a) Sale or purchase of goods in inter State
(b) Sale or purchase of goods in export / import
(c) Freight
(d) Charges for purchase etc.,
(e) Amounts allowed as discount
(f) Purchase returns; and
(g) Sales returns

The contention that they had only a turnover of 2.14 Crores in IMFL in 98-99 and that the turnover in that commodity had not reached the limit of Rs.5.00 Crores and that they are not dealers exclusively in cigarattes (whose turnover of Rs.2.86 Crores upto Jan 2000 exceeded the limit of Rs.50.00 lakhs in 99-2000) are not tenable, in view of the position explained above,

The Court has upheld the levy of "turnover tax" on Cigaratte.
To their representation, the Commissioner (CT) Pondicherry has not ordered that they are not liable to pay turnover tax on the grounds putforth by them.
In view of the position explained above, they are liable to pay the turnover tax for the years 98-99 and 99-2000 and they are, therefore, hereby called upon to pay the same, immediately, together with the penal interest due for the period for which the payment was delayed, so as to enable this office to take up their request for consideration."

2. Learned counsel for the Writ Petitioner / Assessee, Mr.N.Prasad submitted that in the present Writ Petitions filed by the Assessee, the Assessee also has inter alia challenged the validity of Section 4-A of the Pondicherry General Sales Tax Act, 1967, which provides for Additional Turnover Tax at the rate of 3%. The said provision is quoted below for ready reference.

"4A. Levy of turnover tax # (1) Notwithstanding anything contained in this Act or the Rules made thereunder, every dealer shall pay turnover tax at the rate of three per cent on the total turnover:

Provided that no tax under this section shall be payable on that part of such turnover which relates to, --

(a) sale or purchase of goods in the course of inter-State trade or commerce;
(b) sale or purchase of goods in the course of export out of the territory of India or sale or purchase in the course of import into the territory of India;
(c) all amounts falling under the head 'freight', when specified and charged for by the dealer separately without including such amounts in the price of the goods sold;
(d) all amounts falling under the head 'charges for packing materials and cost of labour', when specified and charged for by the dealer separately without including such amounts in the price of the goods;
(e) all amounts allowed as discount, provided that such discount is allowed in accordance with the regular practice of the dealer or is in accordance with the terms of a contract or agreement entered into in a particular case and provided also that the accounts show that the purchaser has paid only the sum originally charged less discount;
(f) all amounts allowed to purchasers in respect of goods returned by them to the dealer when the goods are taxable on sales provided that the goods were returned within a period of three months from the date of delivery of the goods and the accounts show the date on which the goods were returned and the date on which and the amount for which refund was made; and
(g) all amounts received from the sellers in respect of goods returned to them by the dealer, when the goods are taxable on the purchase value provided that the goods were returned within a period of three months from the date of delivery of the goods and the accounts show the date on which the goods were returned and the date on which and the amount for which refund was received.

(2) The provisions of this Act and the Rules made thereunder shall, so far as may be, apply in relation to the assessment, collection or refund of the turnover tax, as they apply in relation to the assessment, collection or refund of tax under other provisions of this Act.
(3) Notwithstanding anything contained in Section 25, no dealer shall collect from his purchaser the turnover tax payable by him under this section. "

3. Learned counsel for the Assessee has urged before us that the products like cigarattes dealt with by the Assessee were 'Declared Goods' under Section 14 of the Central Sales Tax Act, 1956 and therefore, restrictions under Section 15 of that Act would apply and the Turnover Tax under Section 4-A cannot permit the Assessing Authority to levy the total tax beyond the restricted rate of tax under Section 15 of the Act. Since Section 4-A of the Act does not provide for any such deduction and imposes Turnover Tax on all the dealers, the said provision has to be declared as ultra vires to that extent.

4. He has further submitted that the controversy with regard to the levy of Additional Duty of Excise in lieu of Sales Tax under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 on tobacco products came up for consideration before the Constitution Bench of the Honourable Supreme Court in the case of "Godfrey Philips India Ltd., and another -Vs- State of U.P. And Others (2005) 139 STC 537 (SC)", in which in Paragraphs 69 to 71, the Honourable Supreme Court has clarified that the restrictions imposed by virtue of Article 286 of the Constitution of India read with Section 14 & 15 of the Central Sales Tax Act 1956 and Additional Duties of Excise (Goods of Special Importance) Act, 1957, would apply to the State Governments also and therefore any levy under Entry 54 of the State List would be subject to restrictions under Section 15 of the Act. The said relevant portion of the judgment of the Honourable Supreme Court reads as follows.

> "69. However while widening the scope of Entry 54 of List II, the powers of the State to levy such tax are subjected to a corresponding restriction as a consequence of the constitutional curbs imposed on sales tax under Article 286 read with Sections 14 and 15 of the Central Sales Tax Act, 1956 and the ADE Act, 1957. "The tax leviable by virtue of sub-clause (b) of clause (29-A) of Article 366 of the Constitution thus becomes subject to the same discipline to which any levy under Entry 54 of the State List is made subject to under the Constitution. The position is the same when we look at Article 286 of the Constitution. If any declared goods which are referred to in Section 14 of the Central Sales Tax Act, 1956 are involved in such transfer, supply or delivery, which is referred to in clause (29-A) of Article 366, the sales tax law of a State which provides for levy of sales tax thereon will have to comply with the restrictions mentioned Section 15 of the Central Sales Tax Act, 1956.

70. No State can therefore by describing an item as a luxury, seek to levy tax on its supply. It cannot be disputed that as far as UP and AP are concerned, were it not for their Interpretation of Entry 62 of List II, the tax would be referable only to Entry 54 List II. If Entry 62 List II does not allow the taxation of goods, the levy would not be constitutionally sustainable.

71. In our opinion to read Entry 62 List II as including articles of luxury cannot allow all these constitutional restrictions to be by-passed allowing States to levy tax on the supply of goods by describing them as luxury goods. As has been rightly contended by Mr. Parasaran appearing for the Union of India, the supply of luxury is nothing but the supply of goods since the goods themselves constitute the luxury.

72.

So even if tobacco is an article of luxury, a tax on its supply is within the exclusive competence of the State but subject to the constitutional curbs prescribed under Article 286 read with Sections 14 and 15 of the Central Sales Tax Act, 1956 and most importantly the ADE Act of 1957 under which no sales tax can be levied on tobacco at all if the State was to take the benefits under that Act."

5. However, Ms.N.Mala, learned counsel appearing for the respondent Revenue submitted that the present Writ Petitions 4815 to 4817 of 2000 have been placed before this Bench in pursuance to a reference order passed by the learned Single Judge on 28.03.2000, upon which, by the orders of the Honourable Chief Justice on 06.04.2000, the matters are placed before the Division Bench. The note prepared by the office and approved by the Honourable Chief Justice is also quoted below for ready reference.

"It is most respectfully submitted that the above W.Ps.4815 to 4817 of 2000 when came up for admission before His Lordship P.Shanmugam, J. on 28.3.2000, His Lordship was pleased to observe that:

"The questions raised in these Writ petitions namely vires of Section 4-A of the Pondicherry General Sales Tax Act, 1967 are similar to the question already raised and decided against the petitioner, against which Writ Appeal Nos.2391/1999 and 77/2000 are pending though

> additional grounds are also raised. Therefore, these writ petitions may also be clubbed along with them and posted for final hearing as well as for further orders in the W.M.Ps. The office is directed to place the papers before My Lord the Chief Justice for posting before the Division Bench."

In this connection, it is respectfully submitted that the above W.A.Nos.2391/199 and 77/2000 are pending before the Hon'ble II Division Bench.

In the circumstances, kind orders of Your Lordship are solicited as to whether the above W.Ps.4815 to 4817 of 2000 may be posted along with W.A.Nos.2391/99 and 77/2000 before the Hon'ble II Division Bench."

6. It is brought to our notice that one of the Writ Appeals in W.A.No.2391 of 1999 was dismissed as infructuous by a Coordinate Bench of this Court on 17.08.2009. However, the other Writ Appeal in W.A.No.77 of 2000 (M/s.H.A.Kader -vs- The Union of India and Others) resulted in a judgment by a Coordinate Bench of this Court on 14.07.2011, in which the Division Bench of this Court held as under:

"20. Thus, the Additional Duties of Excise (Goods of Special Importance) Act, 1957, contemplates that where in the financial year, there is a levy and collection of tax under a State Law on the sale or purchase of tobacco by or under any law of that State, the said State shall not be entitled to any share as regards the collection of additional duties and excise. Thus while Additional Duties of Excise (Goods of Special Importance) Act, 1957 does not bar the State from levying any tax and collecting the same in respect of the goods attracting additional duties of excise, all that it bars herein is that by reason of levy and collection of tax by that State, under the State law, the said State is not entitled to receive its share on the levy and collection of additional duties of excise by the Centre. Thus the State is prohibited from getting its share in the benefit of additional duties and excise, unless the Central Government, by order, otherwise directs. Thus the prohibition as regards goods suffering additional duty of excise operates on a totally different field, referable to the rights of the State to receive its share in the collection and it has no relevance at all to the State exercising its authority to tax sales or purchases under Entry 54, List II of the Constitution. Even though the assessee pointed out that the Revenue had not given the details as to whether the Union Territory of Puducherry had or had not received its share under the additional duties of excise, yet, as rightly pointed out by the learned Special Government Pleader, the counter affidavit, in paragraph 14, specifically states that the Pondicherry Administration is not getting any contribution from the additional duties of excise collected by the Central Government under the Act of 1957. In the light of the above, we do not find any ground to accept the plea of the petitioner herein on the challenge made to the notification. Consequently, we hold that the notification issued by the Pondicherry Administration is perfectly constitutional and there is no repugnancy between the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and the notification issued by virtue of Section 19(1) of the Pondicherry General Sales Tax Act.

21. Going by the definition of "total turnover" as defined under Section 4-A of the Pondicherry General Sales Tax Act, we have no hesitation in rejecting the plea of the petitioner. In view of the above, W.P.No.18038 of 1999 stands dismissed.

22. W.A.No.77 of 2000 is preferred as against the order dated 18.11.1999 in W.P.No.18498 of 1999, wherein, this Court had rejected the assessee's writ petition based on the order dated 08.10.1999 in W.P.No.15808 of 1999 (M/s.Lakshmi Agencies, Yanam, by its Managing Partner Vs. Union Territory of Pondicherry and another). We agree with the view of the learned single Judge in the order dated 08.10.1999 in W.P.No.15808 of 1999 on the validity of the notification. Thus in the light of the order passed by this Court rejecting the prayer of the writ petitioner on the challenge made to the notification, we have no hesitation in rejecting the writ appeal, thereby confirming the view of this Court in W.P.No.15808 of 1999. Consequently W.A.No.77 of 1999 stands rejected.

23. As far as W.P.No.2991 of 2001 is concerned, the said writ petition relates to the challenge made to the assessment order passed, relating to the assessment year 1999-2000 under Assessment Order No.75 dated 12.1.2001. In the light of the order passed in W.P.No.18038 of 1999, the said writ petition, challenging the assessment order, stands dismissed. Having regard to the fact that the petitioner has approached this Court immediately after the receipt of the assessment order dated 12.1.2001, in fitness of

things, we grant the assessee four weeks' time to file an appeal, from the date of receipt of the order of this Court, if the assessee desires to file an appeal as against the order of assessment.

24. In the result, W.P.No.18038 of 1999, W.A.No.77 of 2000 and W.P.No.2991 of 2001 stand dismissed. No costs. Connected W.M.P.No.26244 of 1999 also stands dismissed. "

7. Having heard the learned counsel for the parties, we are of the clear opinion that the present Writ Petitions were not only premature even when the same was filed, but also, barring the ground of validity of the provisions of Section 4-A of the Act, the same were not even maintainable. The ground of validity of the said provision appears to have been raised as a tangent attack just to maintain the writ petitions. The question, really if any arises, is only of the applicability and interpretation of the provisions of Section 4-A of the Act. The said provision providing for the levy of the Turnover Tax would naturally involve determination of facts and extent of turnover for applying the said provisions.

8. As we have already noted above, the present case arises on the application filed by the Assessee for seeking a Tax Clearance Certificate even when the assessment of the year concerned were not finalised by the Assessing Authority. Therefore, taking the figures of turnovers tentatively, a prima facie satisfaction was arrived by the Assessing Authority that since the turnover of some of the products dealt with by the Assessee exceeded the prescribed limit, Section 4-A stood attracted in the case and without that tax liability being cleared by the Assessee to that effect, the Tax Clearance Certificate could not be issued to the Assessee.

9. Therefore, the said order does not call for any interference of this court in the extraordinary jurisdiction at this stage. Whether the Assessee was entitled to issuance of the Tax Clearance Certificate or not would naturally depend upon the assessment of the turnover of the Assessee finally by the Assessing Authority in accordance with the provisions of the Act, including the application of Section 4-A of the Act. As far as the interpretation of the question of law arising in the matter about the restrictions under Article 286 of the Constitution of India read with Section 14 and 15 of the Central Sales Tax Act is concerned, the said controversy is no longer res integra , as it has been settled by the Constitution Bench of the Honourable Supreme Court in "Godfrey Philips India Ltd., and another -Vs- State of U.P. And Others" case cited supra.

10. Therefore, we are not required to go into the facts at this stage and we leave it free for the Assessee to raise these

questions during the assessment proceedings, if any, before the concerned authorities of the Department. Therefore, leaving these questions open to the Department or the Assessing Authority or the higher Appellate Authorities, as mixed questions of facts and law are involved, we dispose of the present Writ Petitions at this stage. However, there shall be no order as to the costs.

s/d-
Assistant Registrar(CS VI)

True Copy

Sub-Assistant Registrar

KST
To

1.The Commercial Tax Officer, Karaikkal.

2.Secretary, Finance Department, Union Territory of Pondicherry.

+1 CC to The Spl. Govt. Pleader(T) sr 2342.
+1 CC to The Govt. Pleader, Puducherry sr 2096.
+1 CC to Mr.N.Inbarajan, Advocate sr 1690.

W.P.Nos.4815 to 4817 of 2000

PP(CO)
SP(11/02/2020)