

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.02.2020

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P.No.538 of 2020
and WMP No.629 of 2020

M/s.Tamilnadu State Marketing Corpn. Ltd.,
4th Floor, CMDA Tower -II,
Gandhi Irwin Bridge Road,
Egmore, Chennai - 600 008
Represented by its Managing Director,
Shri.R.Kirlosh Kumar

....Petitioner

Vs

The Deputy Commissioner of Income Tax
Corporate Circle - 3(1),
121, Mahatma Gandhi Road,
Chennai - 600 034.

... Respondent

Prayer: PETITION filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari, to call for the records of the petitioner on the file of respondent and quash the impugned order in ITBA/AST/S/143(3)/2019-20/1023480068 (1) dated 30/12/2019 in PAN:AAACT2964P for the Assessment Year 2017-18 issued by the Respondent.

For Petitioner
For Respondent

सत्यमेव जयते : Mr.R.Vijayaraghavan
: Mrs.Hema Muralikrishnan
Senior Standing Counsel

O R D E R

The petitioner is the Tamil Nadu State Marketing Corporation Limited (TASMAC) and challenges an order of assessment dated 30.12.2019 for Assessment Year (AY) 2017-18, passed in terms of the Income Tax Act, 1961 (in short 'Act'). The assessment is assailed both on the alleged violation of the principles of the natural justice as well as on the merits of the disallowance made.

2. When the matter had come up for admission, this Court had passed an order after hearing Mr.Vijayaraghavan, learned counsel for the petitioner and Ms.Hema Muralikrishnan, learned Senior Standing Counsel for the respondents on 10.01.2020 restricting the scope of the Writ Petition only to the disallowance under Section 40(a)(iib) of the Act and relegating the petitioner to statutory appeal in respect of the other issues.

3. Today, learned counsel for the petitioner confirms that an appeal has been filed in respect of other issues arising from assessment and what is assailed in the Writ Petition are the violation of the principles of natural justice as well as the disallowance effected under Section 40(a)(iib).

4. The submissions of the petitioner are that the return of income filed on 31.10.2017 was taken up for scrutiny for the first time by notice under Section 143(2) dated 21.09.2018 only. The petitioner had made certain high value cash deposits during the period of demonetization and on 18.11.2018, a questionnaire was issued calling for certain information that including deposits made during demonetization period that were supplied under cover of letter dated 28.12.2018. The next communication was only on 23.08.2019 by way of a questionnaire again where details of deposits of demonetized notes were sought along with details of expenses falling under the purview of Section 40(a)(iib) and VAT expenses claimed. A response was filed on 13.09.2019 furnishing all details as sought for. This was followed by yet another notice under Section 143(2) dated 27.09.2019, to which also, detailed responses dated 15.10.2019 and 02.11.2019 were filed with supporting annexures. The petitioner also responded to questionnaires under Section 142(1) dated 09.11.2019, 20.11.2019 and 28.11.2019 furnishing all details called for, vide responses dated 19.11.2019 and two responses, both dated 29.11.2019.

5. A show cause notice came to be issued on 21.12.2019 calling specifically for response in regard to (i) proposed addition under Section 40(a)(iib) and (ii) proposed addition of unexplained investment under Section 69 of the Act. The show cause notice was challenged in W.P.No.35820 of 2019, but since no stay of proceedings was granted by this Court, the assessment came to be completed on 30.12.2019 by confirming both the proposals enumerated under the show cause notice. With the passing of the impugned order of assessment, W.P.No.35820 of 2019 is rendered infructuous and is closed as such.

6. The first argument of Mr.Vijayaraghavan is that the provisions of Section 40(a)(iib) have been erroneously interpreted and applied in the impugned order. This provision

states that certain expenses are not liable to be taken into account for the grant of deduction in computing taxable income. One such category is enumerated under clause (iib) thereof, being any amount paid by way of royalty, licence fee, service fee, privilege fee, service charge or any other fee or charge by whatever name called which is levied exclusively on or which is appropriated directly or indirectly from a State Government undertaking by the State Government. According to him, the Value Added Tax (VAT) remitted by the petitioner does not find place in the list of exclusions and would hence stand outside the reach of the section, whereas, according to the revenue, VAT would be covered by the phrase 'any other fee or charge' contained in Section 40(a)(iib).

7. Submissions have been advanced by learned counsel in some detail on this aspect and reference made to case law as well. For the sake of completion, the case law cited by the petitioner and the respondent respectively, are tabulated below:-

- i) Dalmia Cement (Bharat) Ltd. V. CIT (375 ITR 419)
- ii) Om Prakash Agarwal V. Giri Raj Kishori & Others (164 ITR 376)
- iii) Municipal Corpn V. Mohd. Yasin & Another (142 ITR 737)
- iv) CIT V. Mc Dowell & Co. 314 ITR 84
- v) CIT V. Lakshmi Thirtha Swamiar (1954 AIR 282)
- vi) CIT V. Varas International (P) Ltd. (225 ITR 831)
- vii) Srikakollu Subba Rao & Co. V. UOI (173 ITR 708)
- viii) CIT V. Dineshkumar Gordhanlal (226 ITR 826)
- ix) CIT V. Mohanlan Mishrilal & Sons (135 CRT 483)
- x) CIT V. Udaipura Distillery Co. Ltd. (268 ITR 305)
- xi) Corporation of Calcutta V. Liberty Cinema (1965 SCR (2) 477)
- xii) Orissa Cement Ltd. V. State of Orissa (1991 SCR (2) 105)
- xiii) The Hingir-Rampur Coal Co., V. The State of Orissa (1961 SCR (2) 537)
- xiv) Kewal Krishnan Puri V. State of Punjab (1979 SCR (3) 1217)
- xv) P.M.Ashwathanarayana Setty V. State of Karnataka (1988 SCR suppl.(3) 155)
- xvi) Sreenivasa General Traders V. State of Andhra Pradesh (1983 SCR (3) 843)
- xvii) Municipal Corporation of Delhi V. Mohd. Yasin (1983 SCR (2) 999)
- xviii) Karnataka State Beverages Corpn. Ltd. V. Commissioner of Income Tax (391 ITR 185) and
- i) Commissioner of Income Tax V. Popular Minerals (258 ITR 593)

- ii) Commissioner of Income Tax V. Gorelal Dubey (89 Taxman 49)
- iii) Super Sales India Ltd. V. CESTAT (2016 (306) ELT 502)
- iv) Union of India V. T.R.Verma (AIR 1957 SC 882)
- v) C.A.Ibrahim V. ITO (AIR 1961 SC 609)
- vi) H.B.Gandhi V. M/s.Gopinath & Sons (1992 (Suppl) 2 SCC 312)
- vii) Karnataka Chemical Industries V. Union of India (1999 (113) ELT 17)
- viii) A.Venkatasubbiah Naidu V. S. Chellappan ((2000) 7 SCC 695)
- ix) Sheela Devi V. Jaspal Singh (AIR 1999 SC 2859)
- x) Punjab National Bank V. D.C.Krishna (2001 (6) SCC 569)
- xi) National Insurance Co. Ltd. V. Nicolletta Rohtagi ((2002) 7 SCC 456)
- xii) Genpact India (P) Ltd. V. DCIT ((2019) 111 Taxmann.com 402)
- xiii) Authorised Officer, State Bank of Travancore & Anr. V. Mathew K.C. ((2018) 3 SCC 85)
- xiv) Rajkumar Shivhare V. Assistant Director, Directorate of Enforcement (2010 (253) ELT 3)

8. However, I need hardly go to the adjudication of the issue on merits since a perusal of the sequence of dates and events circulated by the parties leaves me no doubt that the principles of natural justice have been given a go-by in the present case.

9. The petitioner filed its return on 31.10.2017. The revenue places on record another return of income dated 29.12.2018, also stated to be an original return. This return has not been referred to in the impugned order by the Assessing Officer and in any event, all figures, of gross total income, total income, net tax payable, interest payable and total tax and interest payable as also advance tax, TDS, TCS and self-assessment tax remain identical in both returns of income.

The first return filed by the petitioner was itself taken up for assessment only by issue of notice under Section 143(2) dated 21.09.2018. There is thus a yawning gap between the date of filing of return and the date when proceedings were first commenced. Though this is sought to be explained by the revenue by production of the second return, the Assessing Authority does not appear to have proceeded on the basis of the second return at all, since there is no reference to the same in the order of assessment. Thus, I am of the view that nothing turns upon the second return of income filed by the petitioner except perhaps that a second notice dated 27.09.2019 was issued by the assessing officer in terms of Section 143(2) of the Act, which really is of no relevance.

10. Questionnaires were issued on 23.08.2019, and 13.09.2019 raising various issues again after the elapse of nearly eight months from the last exchange of communication, and at points 10 and 11, specifically calling for details of VAT expenses and expenses falling under the purview of Section 40(a) (iib) and disallowed by the petitioner, for the relevant assessment year. In response, the petitioner vide reply, also dated 13.09.2019, answers query Nos.10 and 11 as follows:

'Q.10. Kindly give the details of the VAT Expenses claimed for the AY 2017-18

You are requested to furnish detailed explanation on the reason cited above along with supporting documents and evidences in support of your claim as per the return of Income furnished by you for AY 2017-18.

Reply Tamil Nadu State Marketing Corporation Limited (TASMAC), is a company, wholly owned by the Government of Tamil Nadu. The VAT (Value Added Tax) was paid as per the Tamil Nadu Value Added Tax Act, 2006. The Value Added Tax paid during the period is Rs.14,575.74 crores.

Q.11. Kindly give the details of expenses falling under the purview of 40(a)(ii)b and disallowed for the AY 2017-18.

You are requested to furnish detailed explanation on the reason cited above along with supporting documents and evidences in support of your claim as per the return of Income furnished by you for AY 2017-18.

Reply The Tamil Nadu State Marketing Corporation Limited (TASMAC) has made payment of Rs.6,06,700/- u/s.40(a)(ii)b of the Income Tax Act, 1961, to the Commissioner of Prohibition and Excise, Prohibition and Excise Department, Government of Tamilnadu, for renewal of License for 43 IMFS Depots and exclusive privilege of retail vending of License for 43 IMFS Depots and exclusive privilege of retail vending of India Made Foreign Spirit in shops. No other fee or expenses falls under section 40(a)(ii)b. The above payment of Rs.6,06,700/- has been disallowed in Memo of Income for the Assessment Year 2017-18.'

11. Thus the petitioner had clearly brought to the notice of the Assessing Authority as early as on 13th September, 2019 that it had incurred VAT expenses of an amount of Rs.14,574.74

crores and what had been disallowed in terms of Section 40(a) (iib) was only a sum of Rs.6.00 lakhs (approx.), being payment made to the Commissioner of Prohibition and Excise for renewal of licence fee and exclusive privilege of retail vending of IMFL in shops.

12. A notice under Section 143(2) had come to be issued on 27.09.2019 when certain other particulars were sought for, and duly furnished by the petitioner. The issue of disallowance under Section 40(a)(iib)/VAT was not raised. Again questionnaires were issued on 23.10.2019, 25.10.2019, 05.11.2019 and 07.11.2019 that were duly responded to. It is not necessary to elaborate on the same, since they do not touch upon the issue in question. Finally on 09.11.2019 a questionnaire was issued once again calling for details of VAT expenses with computation of VAT, copies of VAT returns, Input Tax Credit (ITC) claimed and supporting evidences.

13. The petitioner responded on 19.11.2019 reiterating that the payment of VAT, amounting to a sum of Rs.14,574.74 crores, had been claimed as expenditure on actual basis in terms of Section 43B of the Act in the return of income. In support of its submission, the petitioner extracted the second schedule of the Tamil Nadu Value Added Tax Act (in short 'TNVAT') that provided for the remittance of VAT and the provisions of Section 43B that provided for a deduction to be claimed on actual payment. No ITC had been claimed in line with the prescription contained in Section 3(5) of the TNVAT Act. VAT returns in Form WW were annexed. Questionnaires were issued on 14.11.2019, 20.11.2019 and 28.11.2019 touching upon the aspect of demonetization only, that were also replied to, on 29.11.2019.

14. On 07.12.2019, summons had been issued for personal attendance. This was followed by a show cause notice (SCN) dated 21.12.2019 wherein for the first time, the petitioner was called upon to respond to the proposal for disallowance under Section 40(a)(iib), since the Assessing Authority was of the view that the said provision was attracted to the VAT remittances effected by the petitioner. His reasoning, as seen from the SCN, is this. TASMAC is a wholly owned undertaking of the State. VAT, remitted by TASMAC enures directly and exclusively to the benefit of the State. Thus, according to the officer, the levy was itself a camouflage, in any event directly covered by the provisions of Section 40(a)(iib).

15. The State had originally imposed a privilege fee for the exclusive retail vending of IMFL that had been granted to TASMAC under the Tamil Nadu Prohibition Act. The appropriation of surplus of special privilege fee attracted the provisions of Section 40(a)(iib) after its amendment with effect from

01.04.2017. For this reason, according to the officer, the levy of special privilege fee had been withdrawn, only to be replaced by the levy of VAT. The timing of the withdrawal of privilege fee and introduction of VAT is no doubt curiously aligned to the amendment to Section 40(a)(iib) of the Act. This modus operandi, the Officer states, is nothing but a sham to escape the levy of tax. However, lauding the wisdom of the Legislature that had anticipated such innovative methods for appropriating surplus, the officer notes that the provision included 'any other fee or charge by whatever name called which is levied exclusively on or which is appropriated directly or indirectly from a State Government undertaking by the State Government' which encompasses the levy of VAT as well.

16. The petitioner was called upon to file a reply to the SCN on or before 24.12.2019. Some time was sought by the petitioner and a detailed reply came to be filed on 27.12.2019. This has culminated in the impugned order of assessment, wherein the Officer confirms the proposal in the SCN, albeit by way of a short order. The length of an order is hardly a parameter to indicate application of mind or otherwise by an Assessing Authority. However, in the present case, the impugned order insofar as it relates to this issue is seen to be a mere repetition of the entire show cause notice and the legal arguments raised by the petitioner in reply dated 27.12.2019 and case-law referred to, have not been adverted to at all. An addition of a sum of Rs.14,574.74 crores, in my considered view, does merit some amount of detailed discussion on the legal aspects involved, particularly in the light of the allegation regarding collusion between the State and TASMAC. In effect, the argument of the Officer is that the identity of TASMAC and the State are one and the same and the levy of VAT being within the control of the State has been used as a convenient/colourable device to get over the amendment to Section 40(a)(iib).

17. These issues should have been addressed in some detail by the Officer after examining the contentions of the petitioner as well but have been dealt with in haste, perhaps since the issue was itself crystallized only under show cause notice dated 21.12.2019 issued at the eleventh hour.

18. The SCN soliciting a response could well have been issued in a timely manner particularly when the contentious issue had been identified as early as on 23.08.2019 and 13.09.2019 when queries had been put to the petitioner and its responses solicited. Valuable time has elapsed between 13.09.2019 and 21.12.2019 when the SCN was issued which could have been put to good use had the notice been issued well in advance on this issue at least. After all it is not necessary that all issues arising from the return are fully assimilated

and crystallized for a comprehensive show cause notice to be issued. Specific issues, as and when identified, may be put to the assessee then and there to ensure timely and proper response and finalisation.

19. For the aforesaid reasons, the assessment insofar as it relates to disallowance in terms of Section 40(a)(iib) is set aside. The petitioner will appear before the Assessing Officer with its replies already filed as well as any other information that it has in its possession to defend the stand of the revenue, on Thursday, the 5th March, 2020 at 10.30 a.m. without expecting any further notice in this regard. After hearing the petitioner and consideration of all material filed/to be filed, a detailed order of assessment on this issue shall be passed de novo by the Officer within a period of six (6) weeks from date of conclusion of the personal hearing.

20. This Writ Petition is allowed in the aforesaid terms. No costs. Connected Miscellaneous Petition is closed.

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

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To

The Deputy Commissioner of Income Tax
Corporate Circle - 3(1),
121, Mahatma Gandhi Road,
Chennai - 600 034.

+1 CC to M/s. Subbaraya Aiyar, Advocate sr 16858
+1 CC to Mrs.Hema Muralikrishnan, Advocate sr 16657.

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W.P.No.538 of 2020

BS (CO)

SP(28/02/2020)