IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.01.2020

CORAM :

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

W.P.Nos 45451 and 45425 of 2002

The State of Tamil Nadu,
Represented by,
The Deputy Commissioner[CT]
Coimbatore Division,
Coimbatore. .. Petitioner in both W.P.'s

-vs-

1. Tvl.Gem Paints [P] Ltd.,
No.7, Rajalakshmi Nagar, M.K.Palayam Road,
Peelamedu, Coimbatore.

2. The Secretary,
The Tamil Nadu Sales Tax Appellate Tribunal [AB]
Coimbatore. .. Respondents in both W.P.'s

PRAYER IN BOTH W.P.'S: Petitions filed under Article 226 of the Constitution of India praying for issue of Writ of Certiorari to call for the records on the files of the Second Respondent pertaining to the order dated 27.07.2001 made in C.T.A.Nos.107 of 2000 and 106 of 2000 and quash the same as illegal.

For Petitioner (in both W.P.'s) : Mr.Mohammed Shaffiq Special Government Pleader

For Respondents (in both W.P.'s) : Mr.N.Inbarajan

COMMON ORDER

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

These Writ Petitions have been filed by the Revenue aggrieved by the common order dated 27.07.2001 passed by the Tribunal in C.T.A.Nos.106 and 107 of 2000, whereby the learned Tribunal after a detailed fact finding exercise with regard to branch transfers made by the Assessee held that Assessee did not make inter-state sales under the provisions of the Central Sales Tax Act. The operative portion of the order passed by the Tribunal are quoted below for ready reference:

> "23. With regard to the second part agitated in this appeal, which are not covered by any 'D7' records but disallowed exemption by the Assessing Authority our independent verification of the entire set of documents available with the assesses would show the following and we give the findings as under:
>
> [a] The assessee had established a branch and was maintaining them at their own expenses and the expenses are met by the principal office to whom the accounts are rendered and they are covered by the balance sheet produced and verified at the time of hearing [b] The products were dispatched under the cover of stock transfer invoices to the branch/depot without any reference to any particular contract of sale or to a particular person or buyer; [c] The goods consigned were directly to the Trissur depot and none else; [d] The transport charges were paid by the assessee in consonance with the established principles and in the normal practice adopted in the trade; [e] The delivery of goods were taken by the Staff of the Depot; [f] The goods were taken to the stores of the depot, displayed and sold in retail; [g] The property in the goods remained with the depots till they were sold by the depot to any particular buyer after appropriation at the discretion of the depots [h] Delivery of the goods were subsequently effected by the depots to various buyers by their own sale bills; the copy of the invoices were same time sent to the branch at Coimbatore for making effective collections; [i] The goods were not conducted to a buyer through the depot outside the state; [j] The depot in other state are registered under the respective states for the purpose of sales tax and have been assessed to sale tax in that State; [k] The goods were neither manufactured according to the specification of a particular customer nor particular goods were meant for a particular customer, so as

to include the possibility of any adversion; [L] The depot Manager at the discretion to deliver the goods in any quantity or to any customer of their choice; [m] The depot had not acted as conduct pipe and there was no other correspondence with the Head were likely to be supplied from the depot from time to time, but for the instances pointed out in Part No:1; [n] The depot Manager had absolute discretion to supply the goods of any origin from the stock lying at the depot situated outside the State; [o] The form-F filed by the other State depot is found to be in order:

Even though some suspicious have been raised with regard to the nature of signature appended to the Form-F, that observation is based on mere surmises. The factual verification of the records would indicate that but for the few slips related to certain direct connection with the other State dealers, the other documents are all sound to be in order, as could be seen from the records maintained by the appellants.

24. In the decision of the Supreme Court reported in 40 STC 42 in the case of Bhopal Sugar Industries Limited versus Sales Tax Officer, itself that in an agency relationship, the ingredients required are that he has possession land central, demain over the goods entrusted to by the principal, that the transfer of goods between the principal and his agent do not amount to sale, as there was no transfer of property between them, though there may be transfer of possession and custody; that the transaction will become one of the agency till the goods are sold and thereafter the relationship between the two will be one of creditor and debtor. Following the ratio of the decision, we should observe that there was no transfer of property in goods between the appellant and the ultimate buyer in other State.

25.In the decision of the Supreme Court in the case of peninsular Traders versus Deputy Commissioner, Sales Tax [Law] Kerala reported in 108 STC 575,it was held that the agreement alone should be taken as the criteria in deciding the terms of an unusual obligation undertaken by any person concerned. The verification of the records would show that the price fixed in the stock transfer invoice to the depot was the exact price at which the goods are to be sold would show that the appellants had realized the same amount contained in price tag. It is the direction of the principal office in determining the nature of the amount to be realized from the ultimate consumers. There is no case for prima-facie even to suspect the nature of the transactions held in the depot at Kerala. The mere existence of the copy of the records relating to the branch available at Coimbatore will not alter the nature of sale effected in the State of Kerala.

26. It cannot be said that there was insufficiency of the documents to claim the exemption. As per the decision of the Madras High Court in the case of Moti and Company versus State of Tamilnadu reported in 113 STC 53, it is a question of fact in each case as to whether the movement forms an integral part of the sale transaction. The facts brought on record were sufficient to reach a definite finding that the movement and sale effected in the depot were independent and does not form part of the same transactions is evident.

27. The establishment of a branch and depot at Kerala was not denied. As ineffective rolls by the depot at Kerala was the observation made by the Assessing Authority and by the learned Appellate Assistant Commissioner in disallowing the claim of exemption. Such a conclusion cannot be derived on the basis of suspicious or surmises.

28. In the decision of the Madras High Court in the case of State of Tamilnadu versus Cocoa products and Beverages Limited reported in 109 STC 634 wherein it was held that the amount relatable to trade discount at five percent and special discount at nine percent and all the discounts mentioned were either given to the ultimate buyers as trade discount or incurred as expenses by way of

octroi duty and for clearing the goods dispatched by the principal to the agent. From this it was clear that PCL effected sales of the cocoa those of the dealer. Therefore PCL acted as agent of the dealer in effecting sales of the cocoa products at Bombay. The ratio of the decision of the High Court is applicable to the case on hand.

29. When the sale of goods effected on the same day or within a day to two has no relevance in determining the nature of the transactions. From the verification of the factual records, it is seen that the stock transfers have been effected in lump sum but the sale has been effected in piecemeal manner in the State of Kerala, as could be seen from the statement filed in respect of sales effected in other States throughout the year. The month-war opening stock register, goods receipt, sales effected and the closing stock at the end of the month are given in the form of a Statement. Such statement do not indicate anything contrary to the established principles of law as decided by the High Court and Supreme Court stated above.

30. On the basis of the decision of the Allahabad High Court in the case of Bareily Resin & Turpentine Manufacturing Company Versus Commissioner of Sales Tax U.P.Lucknow, we have caused verification of the entire transactions Bench] in T.A.Nos.831/98 and C.O.P.No:349/98 dated 18.04.2000 in the case of Kwality Ice-Creams [Madras] private Limiteld, Chennai versus State of Tamilnadu in which it was held that the details were verified by the Assessing Authority if the State of the State of Kerala and the branch was located in that state. The purpose of verification of the details reflected in Form-F has been achieved in such circumstances, the exemption was allowable.

31. In the decision of Madras High Court in the case of DCW Limited, Sahupuram versus State of Tamilnadu reported in [4] TNCTJpage 154-the petitioner produced a number of documents in support of its case

that the transactions are only stock-transfer made to its own godowns located at Thane and Bombay and that only order were placed by the customers after the arrival of the goods at their depot land sales effected thereafter were only local sales on which tax also was remitted to State of Maharashtra.

Holding that whether the transaction is inter-state sale or not cannot depend upon a mere expression of a conviction or reiteration of such conviction, unless that conviction is well founded on facts properly established. The High Court set aside the order of the Tribunal affirming the view of the authorities below, in so far as the despatches to the depots at Thane and Bombay were concerned. They were held to be stock transfers made land not inter-state sales. However, in respect of transactions where the goods were dispatched to Berlia Chemicals, since the Certificate of Registration did not show that as the place of the business of the petitioner as contended the transaction were held to be inter-state sales.

32. Following the ratio of the decision of the High Court, we have distinguished the transactions into two parts- one is direct sales land another is stock transfer to the Branch. Such a distinction was drawn on the basis Department.

In view of the above factual findings,we would determine the taxable turnover under part-I as under:

1996-97

Claim of exemption disallowed on basis of records....Rs.1,23,661/-

1997-98

Claim of exemption disallowed on the Basis of records.Rs.2,79,136/-

34. With regard to the rest of the claim of exemption made by the dealers, they are all found to be in order and the claim

of the exemption is allowable.

35. The Assessing Authority in his order far the year 1996-97 levied a penalty of Rs.7,84,925/- and Rs.14,10,750/- for the year 1997-98. The learned Counsel for the appellants would rely up the decision of the Supreme Court in the case of Cement Marketing company of India Limited versus Assistant Commissioner of Sales Tax, Indore and others reported in 45 STC 197 where in it was held that where the assessee does not include a particular item in the taxable turnover under a bonafide belief that he is not liable so to included it, it would not be right to condemn the return as a "false" return inviting imposition of penalty.

36. Further reliance was placed on the Madras High Court decision in the case of Kathiresan Yarn Stores versus The State of Tamilnadu reported in 42 STC 121, it was held that in order to impose penalty, it must be possible first to come to the conclusion that there was actually a turnover and further that turnover was not disclosed. The mere fact that there is a best judgment assessment, particularly when the assessment is based assessee to establish the case pleaded by him, will not be sufficient for the purpose of imposition of penalty for the degree of proof required for the imposition of penalty is quite difference from and is of a much higher order that that required for the purpose of marking a best judgment assessment. However, in this case, we have deleted substantial portion of the turnover made liable to tax by the Assessing Authority. During the year of assessment, an amendment has been brought to Section 12[3] of the TNGST Act fixing the penalty on a liable to tax, but for the inspection that turnover would not have been brought to assessment under CST Act, which relates to direct inter-state sales. As we observed in respect of certain transactions contained as per the letters secured by the officers of the Enforcement Wing land therefore we hold that the levy of penalty could be made. While so levying penalty the graded penalty

would have to be fixed under section 9[2] of the CST Act read with Section 12[3][b] of the TNGST Act. We would therefore set aside the levy of penalty and remand the matter to the Assessing Authority for fixation of correct penalty in respect of the turnover upheld by us.

37. With regard to turnover deleted by us, no penalty could be levied for the reason stated already. When all the relevant transactions are duly accounted for in the accounts and duly disclosed in the returns it could not be observed that the appellants had failed to incorporate any of the turnovers. Following the ratio of the decision of the Supreme Court in the case of Hindustan Steels limited versus State of Orissa reported in 25 STC 211, the penalty levied by the Assessing Authority is ordered to be deleted in respect of the second part of the dispute.

2. Having heard the learned counsel for the parties, we are satisfied that these findings of facts, even though giving rise to the mixed question of facts and law as to inter-state sales or branch transfers, but such question of law does not arise in the facts of the present case. The correct findings of fact has been arrived at by the learned Tribunal based on the relevant documents and evidence, which they have analyzed in detail and came to the conclusion that branch transfers cannot be subjected to tax treating those transfers as interestate sales as per the relevant provisions of the Central Sales Tax Act 1956.

3. We find no merit in the Writ Petitions filed by the Revenue. Accordingly, these Writ Petitions stand dismissed. No costs.

Sd/-
Assistant Registrar(CS-VI)

//True copy//

Sub Assistant Registrar

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To:

1. The Secretary,
   The Tamil Nadu Sales Tax Appellate Tribunal [AB]
   Coimbatore.

+1cc to Mr.N.Inbarajan, Advocate SR.No.1632

+1cc to Government Pleader (Tax)SR.No.1964

W.P.Nos 45451 and 45425 of 2002

RK(CO)
GMY(11/02/2020)