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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 09.03.2020

CORAM

THE HONOURABLE Dr. JUSTICE VINEET KOTHARI
AND
THE HONOURABLE Mr. JUSTICE R.SURESH KUMAR

W.P.Nos.8851 and 8852 of 2005 and
W.P.M.P.Nos.9554 and 9555 of 2005

M/s.The Coimbatore Cosmopolitan Club,
Rep. by its Honarary Secretary,
B.Selvaraj, No.200, Race Course Road,
Coimbatore - 641 018. ... Petitioner in both WPs

Vs.

1.The Tamil Nadu Sales
Tax Appellate Tribunal (Addl. Bench), Coimbatore.

2.The Additional Appellate
Assistant Commissioner
of Commercial Taxes, Coimbatore.

3.The Deputy Commercial Tax Officer,
Trichy Road Circle, Coimbatore. ... Respondents in both WPs

Prayers: Petitions filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorari calling for the records on the file of the 1st respondent in his Order in Coimbatore Tribunal Appeal No.358/01 and Appeal No.250/02 dated 05.10.2004 quash the same.

For Petitioner : Mrs.R.Hemalatha
For Respondents : Mr.Mohammed Saffiq
Special Government Pleader (Taxes)

COMMON ORDER

[Order of the Court was made by Dr. Justice VINEET KOTHARI]

These Writ Petitions have been filed by Coimbatore Cosmopolitan Club aggrieved by the order of the learned Tamil Nadu Sales Tax Appellate Tribunal, Coimbatore dated 05.10.2004 upholding the orders passed by the lower authorities and holing against the Assessee that the Assessee was not entitled to deduction of exempted turnover of the food and drinks which they served in their Club even though they had suffered levy of tax at the first point and were exempted on the second sales made by

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such Club within their premises to the customers and therefore, on the total turnover of the Assessee, the Assessee was liable to pay tax in terms of the 2% under Section 3-D as it existed prior to its substitution with effect from 1st April 1999 substituted by Act No.28 of 1999. The reasons assigned by the learned Tribunal in the impugned order are quoted below for ready reference:

> "7.We have heard the arguments of both the sides and perused the connected material records to decide the issue involved in appeals. The same is the assessment made adopting the total turnover as the basis for levy of tax U/S 3-D. The appellants arguments are that the taxable turnover relating to sales of food and drinks alone is liable for assessment the turnover relating to sales of exempted goods and second and subsequent sales of tax suffered goods are eligible for exemption their taxable turnover should be arrived at excluding such exempted turnover as provided under rule 6 of the TNGST Rules and the assessment made treating the total turnover as liable to tax U/S 3-D is improper. The arguments of the Addl. State Representative are that Sec. 3D defines the total turnover as liable to tax, total turnover is liable for assessment and the same assessed for both the years is proper. The appellants are dealing in food and drinks. The assessment made relates to 1997-98 and 1998-99. The appellants have disclosed the total turnover of Rs.72,34,527/- for 1997-98 and Rs.82,56,668/- for 1998-99 and claimed exemption on the turnover relating to sales of exempted goods and second and subsequent sales of tax suffered goods. The Assessing Authority has made assessment for 1997-98 on 29.12.98 determining their total turnover at Rs.72,34,527/-. The taxable turnover of Rs.35,18,678/- along is assessed to tax U/S 3-D. Total turnover disclosed is Rs.82,56,668/- for 1998-99 and the taxable turnover disclosed is Rs.33,74,613/- for 1997-98. After scrutiny of the assessment made for 1997-98, the Assessing Authority has concluded that the total turnover is liable for assessment U/S 3-D and effected revision on 31.8.01 assessing the total turnover determined levying 2% tax as the total turnover determined has exceeded Rs.50 Lakhs. Thus, the revision made is on 31.8.01 for 1998-99, exemption claimed is disallowed and the original assessment made on 10.8.00 and the same is assessed to tax U/s 3-D levying 2% tax as the total turnover determined based on books of accounts is more than Rs.50 Lakhs. The appellants claim for exemption U/R 6 of the TNGST Rules that the turnover representing the sales of exempted goods and second and subsequent sales of tax suffered made is eligible for exemption is rejected on

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the finding that the total turnover is liable for assessment U/S 3-D. Therefore, the charging section 3-D itself defines total turnover as liable for assessment and this section also provides for payment of compounding tax when the total turnover is below 50 Lakhs and tax at 2% when the total turnover exceeds Rs.50 Lakhs. Hence the appellants arguments that the taxable turnover is to be determined after deducting the turnover relating to sales of exempted goods and second and subsequent sales of tax suffered goods as provided under Rule 6 of the TNGST Rules is not applicable for assessment made U/S 3-D as the turnover defined is the total turnover for assessment. Therefore, the revision made for 1997-98 assessing the total turnover determined at Rs.72,34,527/- based on the same disclosed in their books of accounts and the same determined at Rs.82,56,668/- for 1998-99 in the original assessment made on 10.08.00 levy 2% tax U/S 3-D confirmed by the Appellate Assistant Commissioner is treated as proper.

In fine, both the appeals stand DISMISSED."

2.The learned counsel for the Petitioner/Assessee Mrs.R.Hemalatha, submitted that the provisions as they stood prior to 01.04.1999 substitution should be read in the light of clarification made by way of such substitution of the provisions and since in the new provisions of Section 3-D of the Act, the exempted turnover of soft drinks etc. which were not taxable in the hands of the Assessee Club being the second sales, only the net turnover could be considered as total turnover and that being less than the prescribed limit of Rs.50 Lakhs, the Assessee was entitled to pay tax as per the slabs of taxation provided in Part-A of the Ninth Schedule to the Act and not at 2% as per 3-D of the Act.

3.On the other hand, the learned Special Government Pleader Mr.Mohammed Shaffiq submitted that the definition of the "total turnover" is given in Section 2(q) of the TNGST Act read with Rules 5 and 6 of the TNGST Rules makes it clear that the exempted turnover is also a part of total turnover and the total turnover - (minus) the exempted turnover would only reflect the net taxable turnover which is also defined in Section 2(p) of the Act. He submitted that the definition of "total turnover" in Section 2(q) means 'the aggregate turnover in all goods of a dealer at all places of business in the State, whether or not the whole or any portion of such turnover is liable to tax or not'. Rule 6 further clarifies this position by providing that for determining the taxable turnover, the following item shall be deducted from the total turnover. Clause (g) of Rule 6 provides that all amounts for which goods specified in First and Second and Sixth Schedules to the Act are sold or purchased by a dealer provided that the sale or purchase is not at the point of

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levy prescribed in the said Schedules. Rule 6 of the TNGST Rules is quoted below for ready reference.

"6. The tax or taxes under section 3 or 4 shall be levied on the taxable turnover of the dealer. In determining the taxable turnover, the amounts specified in the following clauses shall, subject to the conditions specified therein, be deducted from the total turnover of a dealer:-

a) all amounts for which goods specified in the Third Schedule to the Act are sold;

b) all amounts for which goods exempted by a Notification under section 17 are sold or purchased, as the case may be, provided that the terms and conditions, if any, for the exemption in the notification are complied with;

(c) all amounts falling under the following three heads when specified and charged for by the dealer separately, without including them in the price of the goods sold:-

(i) freight;

(ii) [……]

(iii) charges for delivery;

(cc) […..]

(d) […….]

(e) all amounts for which goods are sold or purchased in the course of export of the goods out of the territory of India or in the course of import of the goods into the territory of India or in the course of inter-State trade or commerce;

(f) [.…]

(g) all amounts for which goods specified in First, Second and Sixth Schedules to the Act are sold or purchased by a dealer provided that the sale or purchase is not at the point of levy prescribed in the said Schedules;

(h) the turnover of sales or purchases made by a dealer through his agent in respect of which tax has been paid by the agent.

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(i) All amounts charged as interest on the unpaid amount payable in respect of goods delivered on hire-purchase or on any such system of payment in instalments, where such interest is specified and charged for separately without including such amounts in the price of the goods delivered.

(j) All amounts realised by way of insurance charges in respect of goods delivered on hire-purchase or on any such system of payment by instalments, where such charges are specified and charged for separately without including such amount in the price of the goods delivered."

4.He therefore submitted that the Tribunal as well as the two authorities below were justified in denying the benefit of slab rate of taxation to the Assessee in the present case as prescribed in Part-A of Ninth Schedule to the Act and applying 2% flat rate of tax on total turnover as per Section 3-D of the Act as it then stood.

5.Having heard the learned counsels for the parties, we are unable to accept the submissions made by the learned counsel for the Assessee for the simple reason that the concept and definition of total turnover, exempted turnover and taxable turnover are distinct in the Sales Tax Law and these terms are separately defined in the definition caluses of the Act and the Rules made thereunder. The total turnover obviously would include the total turnover of all the goods made by the Assessee, irrespective of the liability to pay tax thereon. If the turnover in question is exempted from payment of tax, it would nonetheless remain part of the "total turnover" even though it may not form part of the "taxable turnover". Section 3-D of the Act as it stood prior to 01.04.1999 clearly mentioned the "total turnover" for applying the said flat rate of 2% tax. Even after amendment from 01.04.1999, the words "total turnover" have been employed in said Section 3-D of the Act. We do not find any merit in the argument raised by the learned counsel for the Assessee that the provisions after its substitution from 01.04.1999 should be held to be clarificatory in nature and to apply to the period even prior to 01.04.1999 i.e. Assessment year 1997-1998 which is the assessment year involved in the present case. A substantive provision of the Act unless specifically made retrospective by the Legislature cannot, by a deeming fiction, be construed to be a retrospective provision.

6.As far as the words "total turnover" is concerned, we have no doubt that the "total turnover" would include even the exempted turnover. Since obviously the total turnover of the Assessee in question for the Assessment Year 1997-98, 1998-99 was beyond the prescribed limit of Rs.50 Lakhs viz., being Rs.72,34,527/- and Rs.82,56,668/- as quoted above, we have no doubt that the learned Tribunal and the authorities below were justified in not applying the Section 3-D of the Act to the present case. We do not find any merit in the present Writ

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Petitions filed by the Assessee and they are liable to be dismissed and the same are accordingly dismissed. No costs. Connected Miscellaneous Petitions are also dismissed.

Sd/-
Assistant Registrar(CS IV)

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Sub Assistant Registrar

To

1.The Tamil Nadu Sales
Tax Appellate Tribunal (Addl. Bench), Coimbatore.

2.The Additional Appellate
Assistant Commissioner
of Commercial Taxes, Coimbatore.

3.The Deputy Commercial Tax Officer,
Trichy Road Circle, Coimbatore.

+1 cc to M/s.R.Hemalatha, Advocate,sr.20809

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