

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 20.01.2020
CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.37776 & 37777 of 2015
and
M.P.Nos.1 & 1 of 2015

Kun Motor Company Pvt. Ltd.,
(Represented by its Accounts Manager
R.C. Manivannan)
No.20, G.S.T. Road,
Meenambakkam, Chennai - 600 027. : Petitioner in both W.Ps

Vs

The Assistant Commissioner (CT),
Nandambakkam Assessment Circle,
No.17, Loganathan Nagar, 2nd Street,
Choolaimedu, Chennai - 600 094. : Respondent in both W.Ps

Prayer in W.P.No.37776 of 2015: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records on the files of the Respondent herein in TIN/33581324259/2009-2010, dated 05.11.2015, quashing the same.

Prayer in W.P.No.37777 of 2015: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records on the files of the Respondent herein in TIN/33581324259/2010-2011, dated 05.11.2015, quashing the same.

For Petitioner : Mr.N.Sriprakash & Mr. N. Prasad
(in both W.Ps)

For Respondent : Mr. Mohammed Shaffiq
(in both W.Ps) Special Government Pleader (Tax)

COMMON ORDER

The Petitioner has filed these writ petitions, seeking for issuance of a Writ of Certiorari, to call for the records on the file of the Respondent in TIN/33581324259/2009-2010 & in TIN/33581324259/2010-2011 dated 05.11.2015 respectively and quash the same.

2. In these writ petitions, the Petitioner has challenged the two impugned orders passed by the Respondent on 05.11.2015 in TIN No. 33581324259 for the Assessment Years 2009-2010 & 2010-2011. The Petitioner was issued two Show Cause Notices dated 02.04.2014 for the respective Assessment Years. The Petitioner was called upon to pay tax on the following three heads:

In respect of Assessment Year 2009-10: (W.P. No. 37776 of 2015)

(a) 2009-10/Trade discount Rs.9,13,35,246.00

During the year the Petitioner received Trade discount to a tune of Rs.9,13,35,246.00 which is treated as value addition and proposed to be assessed to tax @ 12.5%.

Tax effect Rs.1,14,16,906/-

(b) Sales of Used car Rs. 23,24,205.00

During the year 2009-2010 the Petitioner sold used car and collected tax @ 4%. As they are dealer in automobiles, they ought to have collected tax @ 12.5%.

Hence it was proposed to assess the above Turnover of Rs. 23,24,205.00 @ 12.5%.

Tax @ 12.5%	Rs. 2,90,526.00
Tax @ 4% already Collected	Rs. 92,967.00
Tax Difference Proposed to be levied	----- Rs. 1,97,559.00 -----

In respect of Assessment Year 2010-11: (W.P. No. 3777 of 2015)

(a) Sales of Used car Rs. 3,96,03,650.00

During the year they have sold used car and collected tax @ 4%. As they are dealer in automobiles, they ought to have collected tax @ 12.5%.

Hence it is proposed to assess this Turnover of Rs. 3,96,03,650.00 @ 12.5%.

Tax @ 12.5%	Rs. 49, 50, 456.00
Tax @ 4% already Collected	Rs. 15, 84, 146.00
Tax Difference Proposed to be levied	----- Rs. 33, 66, 310.00 -----

(b) Stock Transfer Rs. 3,17,48,186.00

During the year, they stock transferred 5 cars to their branch at Pondicherry to a value of Rs. 3,17,48,186.00.

In the absence of Form F, it is proposed to treat this sale as local sales and proposed to assess this turnover @ 12.5%.

Tax Effect Rs.39,68,523.00

(c) Wrong Adjustment of Entry Tax

During the year in the month of January 2011, they have wrongly adjusted the Entry Tax of 3 cars which is amounting to Rs.17,79,107.00 but the said cars were not actually sold in the month of January 2011 and lying in the stock as on 30.06.2011.

3. The Petitioner replied to the above notices which has culminated in the impugned orders. In the impugned orders, the issue relating to stock transfer and wrong adjustment of Entry Tax has been dropped for the Assessment Year 2010-2011. However, the demand for sales tax on sale of used cars and Trade Discount have been confirmed in the respective orders.

4. The Petitioner is a dealer of Second Hand motor cars. it availed the benefit of Notification No.79, CT & R (B2), dated 23.03.2007. As per Sl. No. 23 to the said notification, a dealer of used cars/motor vehicle was liable to pay tax at the rate of 4% on the value addition without any Input Tax Credit. This notification was subsequently amended by Notification vide G.O.Ms.No.78, CT & R (B2) dated 11.07.2011-No.II(1) CT R/12(R-20)/2011 by increasing rate of tax to 5%.

5. Since there was also another notification vide G.O.Ms.No.36 CT & R (B2) dated 01.04.2008 with effect from 01.04.2008 which was made applicable "to any dealer other than the dealer in automobiles including commercial vehicles, two wheelers and three wheelers, on the sale of used motor vehicles which have suffered tax already either under erstwhile Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959) or the Tamil Nadu Value Added Tax Act, 2006 (Tamil Nadu Act 32 of 2006) and registered within the state of Tamil Nadu under the Motor Vehicles Act, 1988 (Central Act 59 of 1988), subject to the condition that the dealer shall not be eligible to avail Input Tax Credit", the Respondent has denied the benefit of the first mentioned notification to the Petitioner.

6. The Respondent in the impugned order has concluded that in view of G.O.Ms.No.36 CT & R (B2) dated 01.04.2008 the earlier Notification No.79, CT & R (B2), dated 23.03.2007 had been implicitly rescinded and that since notification dated 01.04.2008 was not applicable to the Petitioner, the Petitioner was required to pay tax at 12.5%.

7. The relevant portion of the respective impugned orders which are similar are reproduced below:-

For Used car the operative portion reads as under:-

"The issue in question to be decided is, whether the sale of used cars by the assessee falls under the ambit of the notification cited

supra. The notification issued in G.O.Ms. No.79, Commercial Taxes and Registration (B2) dated 23.03.2007 is extracted as below for better understanding.

"Reduction in the rate of tax payable by any dealer on the sale of following goods to four percent".

Item No.23 used cars/Motor Vehicles on value addition without Input Tax Credit.

Subsequently a notification was issued in G.O.Ms.No.36 CT & R (B2), dated 01.04.2008 with effect from 01.04.2008 and the same is extracted below:-

"Reduction of tax from 12.5% to 4% in respect of tax payable under that by any dealer other than dealer in automobiles including commercial vehicles, two wheelers and three wheelers, on the sale of used motor vehicles which have suffered tax already either under erstwhile Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959) or the Tamil Nadu Value Added Tax Act, 2006 (Tamil Nadu Act 32 of 2006) and registered within the state of Tamil Nadu under the Motor Vehicles act, 1988 (Central Act 59 of 1988), subject to the condition that the dealer shall not be eligible to avail Input Tax Credit.

In order to understand the position stated in both the Government Orders. A combined reading is essential to understand the different and distinct circumstances under which the sale of cars by a dealer in general and sale of used cars which are registered within the state of Tamil Nadu under the Motor Vehicles Act, 1988 is dealt as liable to tax, when the Government Order first cited is general in nature and the Second Government Order is very specific relating the sale of used cars which are registered within the state of Tamil Nadu under the Motor Vehicles Act, 1988.

Hence, I am of the view, the intention of the Government is to treat the sale of used cars which are registered within the state of Tamil Nadu under the Motor Vehicles Act, 1988 to keep beyond the scope of the G.O.79 cited supra and brought separately under the G.O.36. Hence the objections of the dealers are rejected as not sustainable and decided the

transactions in question fails within the specific circumstances as notified in the G.O.Ms.No.36 CT & R (B2) dated 01.04.2008 with effect from 01.04.2008."

8. The learned counsel for the Petitioner drew my attention to subsequent clarification issued by the Authority for Clarification and Advance Ruling dated 25.10.2016 in the context of Notification No.79, CT & R (B2), dated 23.03.2007. In Paragraph 5, it has been clarified as follows:-

" 5. The applicant dealers are dealers in automobiles and hence the first set of notifications is applicable to them. Hence, in view of the above discussion, this committee clarifies that the "Sale of used and re-conditioned Cars" by the applicant-dealers being a registered automobile dealers are liable to tax on value addition without input tax credit and not on entire sale value at 4% upto 11.07.2011 as per Notification No.II(1)/CTR/30(a-5)/2007 in G.O.Ms.No.79 CT & R(B2) Dept, dt 23.03.2007 and at 5% from 12.07.2011 onwards as per Notification No.II(1)/CTR/12 (R-20)/2011 in G.O.Ms.No.78, CT&R (B2) Dept, dated 11.07.2011."

9. The learned counsel for the Petitioner submits that impugned order to that extent can be set aside and the case may be remitted back to the Respondent to pass a fresh order considering the above clarification issued by the Authority for Clarification and Advance Ruling vide clarification dated 25.10.2016.

10. As far as Trade Discount is concerned, the learned counsel for the petitioner submits that the same is not part of the taxable turnover of the cars sold by the petitioner. It is an incentive given by the manufacturer to the petitioner based on the performance of the petitioner on the sale of car manufactured by the said manufacturer. He further submits the said amount cannot form part of the taxable turnover of the petitioner in terms of Section 2(28) of the Act. He further also submits that as per Section 2(38) of the Act and the definition of taxable turnover under Section 2(40 & 2(41) of the TNVAT, 2006. The learned counsel for the petitioner therefore submits that the impugned order is liable to be quashed.

11. Per Contra, the learned counsel for the Respondent submits that the impugned order is well reasoned and requires no interference. He further submits that the Petitioner has also an alternate remedy as against the impugned orders.

12. I have heard the learned counsel for the Petitioner and the learned Special Government Pleader for the Respondent.

TRADE DISCOUNT

13. As far as trade discount is concerned, a separate order has been passed for Assessment Year 2008-2009 in W.P.No.37775 of 2015 today. The operative portion of the said order reads as under:-

"12. I have considered the impugned order and the notices pursuant to which the impugned order came to be passed. There is no dispute that the Petitioner is a dealer in motor cars and had received trade discount from the manufacturer from whom it had purchased the cars for retail sales at its show rooms. The trade discount which has been offered by the dealer is an incentive given by the manufacturer based on the performance of the Petitioner in the retail market. The trade discount offered by the manufacturer to the Petitioner does not in any manner enhance the taxable value of the motor cars sold by the Petitioner to the retail buyer at its show rooms.

13. I therefore find that there is no basis on which the aforesaid amount of Rs.3,48,08,441/- can be taxed as taxable turn over of the Petitioner. The two transactions are independent transactions. One transaction is between the manufacturer who is also a dealer who had passed on incentives to the Petitioner and the second transaction between the Petitioner and its buyers of its retail show room to whom the Petitioner has sold the cars. As these two are independent transactions there is no basis on which the trade discount passed to it by the manufacturer(dealer) to the Petitioner can be added in to the taxable turn over of the Petitioner for the purpose of assessment under the TNVAT Act, 2006.

14. In the light of the above discussion, the writ petition stands allowed even though the Petitioner has an alternate remedy by way of appeal. These observations is being made as

there are no disputed question of fact involved in the present writ petition. No costs. Consequently, connected miscellaneous petition is closed.

14. In the light of the clarification dated 25.10.2016 of the Authority for Clarification and Advance Ruling issued under Section 48 A of the Tamil Nadu VAT Act, 2006, the issue relating to availability of benefit of G.O.Ms.No.79 CT & R (B2) Dept. dated 23.3.2007 as amended by the of G.O.Ms.No.78 CT & R (B2) Dept. dated 11.7.2011 would require reconsideration by the respondent.

15. In the light of the above discussion, the following orders are passed:

i) the issue relating valuation is answered in favour of the Petitioner. Thus, the demand of tax on Trade Discount in the impugned orders are quashed to that extent.

ii) As far as the issue relating to rate of tax is concerned, the same is remitted back to the respondent to pass fresh order in the light of the clarification issued by the Authority for Clarification and Advance Ruling vide its order dated 25.10.2016.

iii). The operative portion of the impugned order on the issue relating rate of Tax may be treated as a show cause notice and if necessary, the respondent may issue appropriate corrigendum to the petitioner within a period of one month from date of receipt of copy of this order.

iv) The petitioner shall thereafter file a reply/representation before the respondent within a period of 30 days from the date of receipt of copy of this order irrespective of the fact whether corrigendum is issued or not.

16. These writ petitions stand disposed with the above observations. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CJ Conf)

// True Copy//

Sub Assistant Registrar

arb

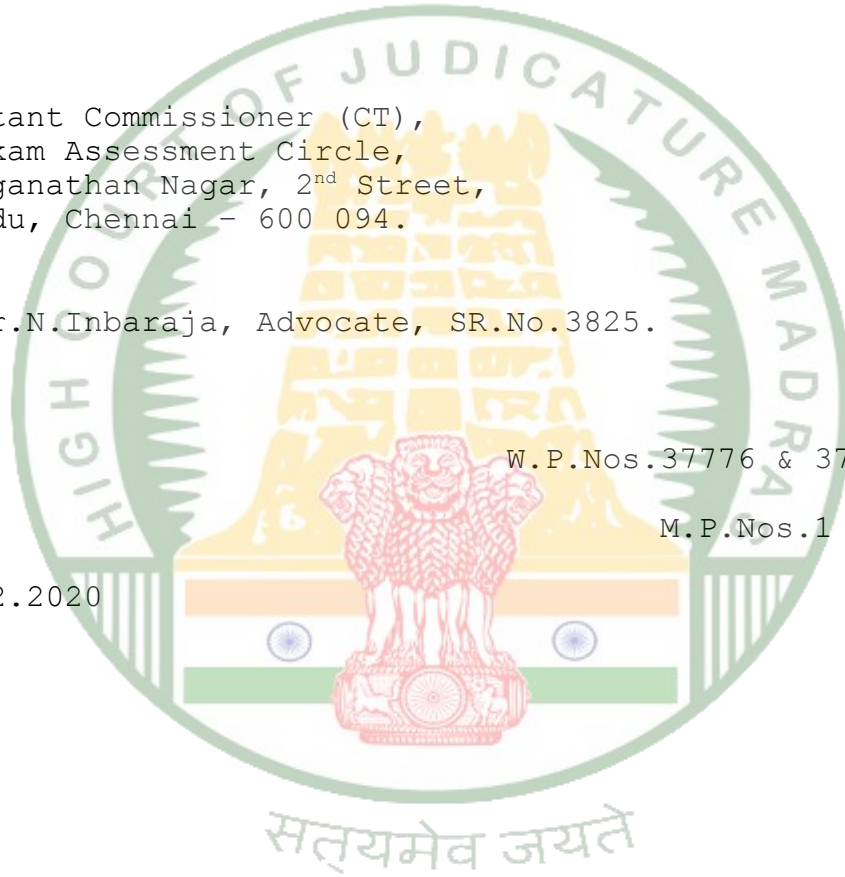
To

The Assistant Commissioner (CT),
Nandambakkam Assessment Circle,
No.17, Loganathan Nagar, 2nd Street,
Choolaimedu, Chennai - 600 094.

+1cc to Mr.N.Inbaraja, Advocate, SR.No.3825.

W.P.Nos.37776 & 37777 of 2015
and
M.P.Nos.1 & 1 of 2015

GP (CO)
CSR: 24.02.2020



WEB COPY