

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.08.2020

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P.No.8054 of 2020
and WMP No.9528 of 2020

K.Devamani,
S/o Kaliyamoorthi,
No.158, Ambakarathur Salai,
Keezhavoor part, Tirunallar,
Karaikal - 609 607.

.. Petitioner

Vs.

1 Union of India,
Rep. by the Chief Secretary to Govt. of
Pondicherry, Chief Secretariat,
Goubert Avenue, Pondicherry-605 001.

2 The Secretary to Government (Finance),
Office of the Chief Secretariat,
Goubert Avenue, Pondicherry-605 001.

3 The Commissioner of State Tax
Commercial Taxes Department Pondicherry

.. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying Writ of Certiorari to call for the records pertaining to the G.O.Ms.No.24 dated 27.05.2020 issued by the second respondent invoking Section 31 of the Puducherry Value Added Tax Act 2007 in so far it relates to increase of rate of tax payable in respect of Petrol and Diesel in the regions of Union territory of Puducherry and quash the same as ultra vires, void-ab-initio, and non-est in the eyes of law.

For Petitioner : Mr.Sreedhar

For Respondents: Mr.J.Kumaran

Additional Government Pleader (P)

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O R D E R

The petitioner is a resident of Karaikal, Puducherry and seeks a Writ of Certiorari calling for and quashing G.O.Ms.No.24 dated 27.05.2020 issued by the Secretary to Government (Finance), Government of Puducherry/R2 invoking Section 31 of the Puducherry Value Added Tax Act, 2007 (in short 'PVAT Act') increasing the rate of tax payable in respect of Petrol and Diesel and fixing the same at 28% and 21.8% respectively.

2. Pleadings are complete in this matter and both Mr.Sridhar, learned counsel for the petitioner and Mr.J.Kumaran, learned Additional Government Pleader for the respondents have been heard in detail.

3. Petrol and Diesel were covered initially under Entry No.2/PartA/5th Schedule under the head 'List of goods taxable at the rate of 20% at the point of first sale'. With effect from 01.04.2017, these commodities were brought under Entries 2 and 3 of the 6th schedule under the head 'List of goods taxable at the rate of 35% at the point of first sale'. In line with the provisions of Section 75(1) of the PVAT Act that grants power to the Government to alter the rate of tax by amendment to the schedules, Notification dated 31.03.2017 was issued under G.O.Ms.No.20/A1/CD/2017 dated 31.03.2017 and the schedule rate of tax for Petrol and Diesel was raised to 35% at the point of first sale from 01.04.2017. A Bill was introduced and passed in the Legislative Assembly to give effect to the amendments made to the Schedule.

4. On 10.04.2020, vide G.O.Ms.No.17 dated 07.04.2020, the rates of tax upon Petrol and Diesel were reduced to 22.15% and 18.5% respectively. This amendment was made invoking Section 31 of the PVAT Act which confer powers on the Government to, by Notification, reduce the rate of tax on commodities covered by the PVAT Act. Thereafter, the Government decided, at a meeting held on 18.05.2020, to increase the rate of tax as follows in the regions of Puducherry, Karaikal, Mahe and Yanam

Regions	Petrol	Diesel
Puducherry and Karaikal	28.00 %	21.80%
Mahe	23.90%	18.15%
Yanam	25.70%	20.00%

Consequent thereto, impugned G.O. dated 27.05.2020 came to be issued bringing into force the above rates of tax with effect

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from 29.05.2020, for a period of three months again invoking power under section 31 of the Act.

5. The grievance of the petitioner is that the amendment made under G.O.Ms.No.24 dated 27.05.2020 constitutes an excess of power insofar as the provision invoked, Section 31, only provides for the reduction of the tax rate by notification and not an increase, which is what has been done in the present case. By virtue of the impugned G.O., Puducherry has increased the tax rate of petrol and diesel from 22.5% and 18.5% to 28% and 21.8% respectively and this increase, according to the petitioner, could only be made by amendment of the schedule under Section 75. However, since the procedure set out under Section 75 required presentation of the Bill seeking amendment, deliberation and passing thereof by the Legislative Assembly of Puducherry, a cumbersome and time consuming procedure in the best of times, the Union Territory has proceeded to adopt the easier but erroneous procedure set out under Section 31. This, in sum and substance, is the argument of Mr.Sridhar, learned counsel for the petitioner.

6. Mr.Kumaran, learned Additional Government Pleader for the respondents would defend the impugned Notification pointing out that the rate of tax pegged under the Schedule was 35% for both commodities. Power under Section 31 can be invoked in any instance so far as the rate of tax stayed within the rate fixed under the Schedule and did not exceed the same. In the present instance, the rate fixed under the impugned Notification was 28% (petrol) and 21.8% (diesel) which remains within the overall rate fixed under the Schedule, which is 35%. Thus, according to him, there is no violation or error in law, as contended.

7. There is no dispute with regard to the narration relating to the tax treatment of petrol and diesel under the PVAT regime as set out in paragraphs 3 to 6 above and in the interests of brevity, I will not repeat but only reiterate the same at this juncture. The issue to be answered turns upon the proper interpretation of Sections 31 and 75 of the PVAT Act, the former conferring power upon the Government to notify reductions in the rate of tax and the latter, power upon the Government to alter, add to, or cancel any of the schedules to the Act.

8. To appreciate the rival contentions advanced, one would have to note and appreciate the purpose and scope of the two statutory provisions involved. Section 31 of the PVAT Act which mimics Section 30 of the Tamil Nadu Value Added Tax Act, 2006 (in short 'TNVAT Act') and Section 17 of the erstwhile Tamil Nadu General Sales Tax Act, 1959 (in short 'TNGST Act') is a provision for grant of exemption from tax or reduction in rate

of tax, by Notification, for the benefit of a specified class of assesses or transactions. I extract below all three of the provisions aforesaid to illustrate the similarity in structure as well as intent.

TNGST

Section 17 Power of Government to notify exemptions and reductions of tax. - (1) The Government may, by notification, [issued whether prospectively or retrospectively,] make an exemption, or reduction in rate, in respect of any tax payable under this Act - (i) on the sale or purchase of any specified goods or class of goods, at all points or at a specified point or points in the series of sales by successive dealers; or (ii) by any specified class of persons, in regard to the whole or any part of their turnover; [or] (iii) on the sale or purchase of any specified classes of goods by specified classes of dealers in regard to the whole or part of their turnover.

TNVAT

30. Power of Government to notify exemption or reduction of tax.--(1) The Government may, by notification, whether prospectively or retrospectively make an exemption, or reduction in rate, in respect of any tax payable under this Act- (a) on the sale or purchase of any specified goods or class of goods, at all points or at a specified point or points in the series of sales by successive dealers; or (b) by any specified class of persons, in regard to the whole or any part of their turnover; or (c) on the sale or purchase of any specified classes of goods by specified classes of dealers in regard to the whole or part of their turnover. (2) Any exemption from tax, or reduction in the rate of tax, notified under sub-section (1) - (a) may extend to the whole State or to any specified area or areas therein; or (b) may be subject to such restrictions and conditions as may be specified in the notification. (3) The Government may, by notification, cancel or vary any notification issued under sub- section (1).

PVAT

31. Power of Government to notify reductions of tax. - The Government may, by notification, reduce the tax

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payable under sub-section (1) of section 14 of this Act in respect of any goods, subject to such restrictions and conditions as may be specified in the notification.

9. The requirement for satisfaction of conditions is inbuilt in the three statutory provisions as aforesaid. The consequence of non-satisfaction of the inbuilt statutory conditions finds place in Section 32 of the PVAT Act extracted below:

32. Liability to tax persons not observing restrictions and conditions notified under section 31. - If any restriction or condition notified under section 31 is contravened or is not observed by a dealer, the sales or purchases of such dealer may, with effect from the commencement of the year in which such contravention or non-observance took place, be assessed to tax or taxes under the appropriate provisions of this Act as if the provisions of the notification under section 31 did not apply to such sales or purchases.

10. The above provisions are intended to offer the benefit of exemption or reduction or reduced rate of tax to a specified class of transactions or class of assessees upon their satisfying conditions that are to be stipulated in the Notification itself. It is only upon satisfaction of the conditions that the specified assessee or class of transaction will be entitled to exemption or reduced rate of tax and if the conditions were not complied with, then that assessee or transaction would be visited with the regular rate of tax, applicable in general to all assessees and transactions involving that specific commodity.

11. The provisions of Section 86 of the TNVAT Act and 59 of the TNGST Act correspond to the object and purpose contained in Section 75 of the PVAT Act and provide for a wholesale change/alteration in the rate of tax by amendment of Schedule. All three provisions are extracted below:

TNGST

Section 59. Power to amend Schedules:- (1) The government may, by notification, alter, add to or cancel any of the Schedules.

TNVAT

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86. Power to amend Schedules-- (1) The Government may, by notification, alter, add to or cancel any of the Schedules.

(2) Where a notification has been issued under sub-section (1) there shall, unless the notification is in the meantime rescinded, be introduced in the Legislative Assembly, as soon as may be, but in any case during the next session of the Legislative Assembly following the date of the issue of the notification, a Bill on behalf of the Government, to give effect to the alteration, addition or cancellation, as the case may be, of the Schedules specified in the notification, and the notification shall cease to have effect when such Bill becomes law whether with or without modifications, but without prejudice to the validity of anything previously done there under: Provided that if the notification under sub-section (1) is issued when the Legislative Assembly is in session, such a Bill shall be introduced in the Legislative Assembly during that session: Provided further that where for any reason a Bill as aforesaid does not become law within six months from the date of its introduction in the Legislative Assembly, the notification shall cease to have effect on the expiration of the said period of six months.

(3) All references made in this Act to any of the Schedules shall be considered as relating to the Schedules as for the time being amended in exercise of the powers conferred by this Section.

PVAT

75. Power to amend Schedules. - (1) The Government may, by notification, alter, add to, or cancel any of the Schedules.

(2) Where, a notification has been issued under sub-section (1), there shall, unless the notification is, in the meantime, rescinded, be introduced in the Legislative Assembly of Puducherry, as soon as may be, but in any case during the next session of the Legislative Assembly following the date of the issue of the notification, a Bill on behalf of the Government to give effect to the alteration, addition or cancellation, as the case may be, of the Schedules

specified in the notification and the notification shall cease to have effect,-

(a) if a Bill as aforesaid is not introduced in the next session of the Legislative Assembly following the date of issue of the notification, on the date following the date on which such session comes to an end;

(b) if a Bill as aforesaid is so introduced, when such Bill-

(i) becomes law whether with or without modifications, or

(ii) is rejected by the Legislative Assembly, except as respects things done or omitted to be done before the notification so ceases to have effect:

Provided that if the notification under subsection (1) is issued when the Legislative Assembly is in session, every endeavour shall be made to introduce such a Bill in the Legislative Assembly during that session:

Provided also that where for any reason a Bill as aforesaid does not become law within six months from the date of its introduction in the Legislative Assembly, the notification shall cease to have effect on the expiration of the said period of six months except as respect things done or omitted to be done before the notification so ceases to have effect.

(3) All references made in this Act to any of the Schedules shall be construed as relating to the Schedules for the time being amended in exercise of the powers conferred by this section.

12. An amendment to the Schedule would thus apply across the board and impact all assesseees and transactions involving the specified commodity. This is the distinction in application between the two sets of provisions.

13. A Division Bench of this Court in State of Tamil Nadu V. Kannapiran Steel Re-rolling Mills (112 STC 161) had occasion to consider the question as to whether an exemption granted by way of Notification under Section 17 of the TNGST Act could be amended subsequently by Notification, retrospectively. Though we are not concerned with this specific issue in this case, the observations of the Division Bench at paragraph 17 of that case reiterate the object of Section 30 as the extension of an exemption or reduction of rate of tax to a specified class of assesseees or transactions, upon satisfaction of certain

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conditions. Thus, in order for Sections 17, 30 and 31 to apply, Legislature has to carve out a smaller group of assesseees/transactions from the general pool of assesseees/transactions and extend the benefit of exemption or reduced/nil rate of tax to the former only. It is only in such a scenario that the aforesaid provisions can be utilized or deployed. Thus, the amendment of rate of tax in general, sans the imposition of conditions upon satisfaction of which the amended (reduced) rate or exemption would apply, can only be done by way of an amendment to the Schedule.

14. In the present case, the impugned Notification reads as under:

GOVERNMENT OF PUDUCHERRY

(Abstract)

Commercial Taxes - The Puducherry Value Added Tax Act, 2007 - Rate of tax on petrol and diesel - Notification - Orders - Issued.

COMMERCIAL TAXES SECRETARIAT

G.O.Ms.No.24 Puducherry, the 27th May, 2020

ORDER:

The following notification shall be published in the Extra-ordinary issue of the Official Gazette of the Government of Puducherry.

NOTIFICATION

In exercise of the powers conferred by section 31 of the Puducherry Value Added Tax Act, 2007 (Act No.9 of 2007) and all other powers enabling in this behalf and in supersession of the notification issued vide G.O.Ms.No.17, dated 17th April, 2020 of the Commercial Taxes Secretariat, Government of Puducherry and published in the Gazette of Puducherry, Extraordinary, Part-II, No.14, dated 7th April, 2020, save as respect things done or omitted to be done before such supersession, the Lieutenant-Governor, Puducherry being satisfied that it is necessary so to do in the public interest, is pleased to levy the rate of tax payable in respect of petrol and diesel under the said Act as mentioned below:

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Regions	Petrol	Diesel
Puducherry and Karaikal	28.00%	21.80%
Mahe	23.90%	18.15%
Yanam	25.70%	20.00%

2. This notification shall come into force with effect from the 29th day of May, 2020.

3. The rate of tax mentioned above is valid for a period of three months from the date of effect of this notification.

(By order of the Lieutenant-Governor)

SHURBIR SINGH, I.A.S.,

Secretary to Government (Finance)

15. The rates of tax on petrol and diesel have been altered across the board and ostensibly, 'in public interest'. The notification does not refer to or address a specific class of assesses/transactions and no conditions are imposed upon satisfaction of which the amended rate would apply. A general and omnibus alteration to the rate of tax of this nature would have to be effected only by way of amendment to the Schedule itself under Section 75 and not by issuance of a Notification under Section 31 of the PVAT Act.

16. Though the 2017 amendment to the rate of petrol and diesel from 21.5% and 17.15% to 22.15% and 18.15% respectively was also only by way of Notification under Section 31 and was in force till the present impugned amendment, this does not per se invalidate a subsequent illegitimate and unauthorised levy. A Constitutional Bench of the Hon'ble Supreme Court in the case of Amalgamated Coalfields Ltd V. Janapada Sabha Chhindwara (AIR 1961 SC 964), at paragraph 8 of the judgment, settles the proposition that acquiescence in an illegal tax, for however long a period, is not a ground for denying an assessee relief, where it is established that the levy was invalid or illegitimate in the first place.

17. Incidentally, other states and union territories have also increased the rates of tax on petrol and diesel, namely, New Delhi, Andhra Pradesh, Karnataka, Maharashtra, Telangana, Gujarat, Himachal Pradesh, Assam, Punjab and Rajasthan and such increase has been effected only by amendment to the Schedule.

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18. Though the validity or otherwise of a levy has to be tested on the basis of the relevant provision in the local laws only, I find, on an examination of the relevant provisions in the Value Added Tax statutes of New Delhi, Gujarat, Assam, Rajasthan, Maharashtra and Punjab that, the procedure for amendment of schedule is more or less in pari materia with Section 75 of the PVAT Act.

19. Though it renders this order rather verbose, I extract the relevant provisions in the other VAT statutes as well to illustrate this point effectively:

I. Delhi Value Added Tax Act, 2004

103. Power to amend Schedules

(1) If the Government is of opinion that it is expedient in the interest of general public so to do, it may, by notification in the Official Gazette, add to, or omit from, or otherwise amend, the First, the Second, the Third, the Fourth, the Fifth, the Sixth, or the Seventh Schedules, either retrospectively or prospectively, and thereupon the said Schedules shall be deemed to have been amended accordingly:

PROVIDED that no such amendment shall be made retrospectively if it would have the effect of prejudicially affecting the interests of a dealer.

(2) The Commissioner may, on the recommendation of the Ministry of External Affairs, Government of India, if he is of opinion that it is expedient in the interest of general public so to do, by a notification in the Official Gazette, add to, or omit from, or otherwise amend, the Sixth Schedule."

II. Gujarat Value Added Tax Act, 2003

5. (1) The sales and purchases of the goods specified in Schedule I shall be exempt from tax subject to the conditions and exceptions set out therein against each of them in column 3 of that Schedule.

(1A) The State Government may, by notification in the Official Gazette, add to, or enlarge, any entry in Schedule I, or relax or omit any conditions or exceptions specified therein, and thereupon the said Schedule shall be deemed to be amended accordingly.

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(2) (a) Subject to such conditions as it may impose, the State Government may, if it considers necessary so to do in the public interest, by notification in the Official Gazette, exempt any specified class of sales or purchases or sales or purchases of goods by any specified dealer or specified class of dealers from payment of the whole or any part of the tax payable under the provisions of this Act.

(b) Where the State Government considers it necessary so to do in the public interest to continue tax exemption granted to the sales or purchases of goods by industrial units under sub-section (2) of section 49 of the Gujarat Sales Tax Act, 1969, it may, by notification in the Official Gazette, continue such exemption with such modification, subject to such conditions and for such period, as may be prescribed.];

(3) Every notification issued under sub-section (1A) and subsection (2) shall be laid for not less than thirty days before the State Legislature as soon as possible after it is issued and shall be subject to rescission by the State Legislature or to such modifications as the State Legislature may make, during the session in which it is so laid or session immediately following. Any rescission or modification so made by the State Legislature shall be published in the Official Gazette, and shall thereupon take effect."

7. Levy of tax on turnover of sales and rates of tax.
-

(1)

(2) The State Government may, by notification in the Official Gazette, reduce any rate of tax specified in Schedule II or Schedule III in respect of any entry (or part thereof) in the said Schedule II or III and may, by like notification, omit or amend any entry (or part thereof) in the said Schedule II or III but not so as to enhance the rate of tax in any case and thereupon the Schedule I, II or III shall be deemed to have been amended accordingly]

(3) Every notification issued under sub-section (2) shall be laid for not less than thirty days before the State Legislature as soon as possible after it is issued and shall be subject to rescission by the State

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Legislature or to such modifications as the State Legislature may make, during the session in which it is so laid or session immediately following. Any rescission or modification so made by the State Legislature shall be published in the Official Gazette, and shall thereupon take effect.

III. Assam Value Added Tax Act, 2003

17. Powers of Government to amend Schedules:

The Government may, by notification in the Official Gazette, add to or omit from any Schedule any entry or entries or transpose any entry or part of entries or the rate or rates or the point or points of levy or otherwise amend or modify any Schedule, prospectively or retrospectively, and thereupon the Schedule shall be deemed to have been amended accordingly.

Provided that the Government shall not vary the rate of tax so as to enhance it, in any case, exceeding forty paise in a rupee."

106. Power of Government to make rules:

(1) The Government may, subject to the condition of previous publication, make rules, by notification, for carrying out the purposes of this Act; Provided that if the Government is satisfied that circumstances exist which render it necessary for it to take immediate action, if any, it may make any rules without such previous publications; Provided further that any rule under this Act may be made so as to have retrospective effect.

.....

(4) The Government shall cause every rule made under this Act and every notification issued under this Act to be laid, as soon as may be after it is published before the State Legislature while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions in which it is so laid or the sessions immediately following, and if the State Legislature agrees in making any modification or that the rule or notification should not be made, the rule or notification shall thereafter have effect only in such modified form or be of no effect, as the case may be,

so, however, that any such modification or annulment shall be, without prejudice to the validity of anything previously done under that rule or notification.

IV. Rajasthan Value Added Tax Act, 2003:

4. Levy of tax and its rate. -

(1) Subject to the other provisions of this Act and the provisions of the Central Sales Tax Act, 1956 (Central Act No. 74 of 1956), the tax payable by a dealer under this Act, shall be at such point or points as may be prescribed in the series of sales by successive dealers, and shall be levied on the taxable turnover of sale of goods specified in Schedule III to Schedule VI at the rate mentioned against each of such goods in the said Schedules.

.....

(5) Subject to such conditions as it may impose, the State Government may, if it considers necessary so to do in the public interest, by notification in the Official Gazette, add to or omit from, or otherwise amend or modify the Schedules, prospectively or retrospectively, or reduce the rate of tax payable in respect of any goods and thereupon the Schedule shall be deemed to have been amended accordingly.

(6) Every notification issued under sub-section (5) shall be laid, as soon as may be after it is so issued, before the House of the State Legislature, while it is in session for period of not less than thirty days which may be comprised in one session or in two successive sessions and if before the expiry of the session in which it is so laid or of the session immediately following the House of the State Legislature makes any modification in such notification or resolves that any such notification should not be issued, such notification thereafter have effect only in such modified form or be of no effect, as the case may be, so however, that any such modification or annulment shall be without prejudice to the validity of anything previously done thereunder."

V. Maharashtra Value Added Tax Act, 2002:

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9. Amendment of Schedule :-

(1) The State Government may, from time to time, by notification in the Official Gazette,-

(a) amend the Schedule by adding or modifying or deleting any entry therein and thereupon the Schedule shall stand amended accordingly for the purpose of levy of tax;

(b) provide for reducing or enhancing the rates of tax or for specifying the rates of tax where NIL rates are specified, and thereupon the Schedule shall stand amended for the purposes of this Act:

1[* **]

2[***]

(2) The provisions contained in sub-section (6) of section 83 regarding rules made by the State Government shall apply mutatis mutandis to any notification issued under sub-section (1) as they apply to the rules made by the State Government."

83. Power to make rules :-

(1) The power to make rules under this Act shall be exercisable by the State Government, by notification in the Official Gazette.

.....

(6) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of the State Legislature while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made and notify such decision in the Official Gazette, the rule shall, from the date of publication of such notification, have effect only in such modified form or be of no effect, as the case may be; so, however, that, any such modification or annulment shall be without prejudice to the validity of anything previously done or omitted to be done under that rule."

VI. Punjab Value Added Tax Act, 2003:

8. (1) Subject to the provisions of this Act, there shall be levied on the taxable turnover of a person other than a registered person, VAT at such rate, as specified in Schedules, but not exceeding thirty paise in a rupee:

Provided that the rate of tax applicable on purchase or sale of declared goods, shall not exceed four percent or such rate, as specified in clause (a) of section 15 of the Central Sales Tax Act, 1956.

.....

(3) The State Government after giving fifteen days notice by notification, of its intention so to do, may by like notification, alter the rate of tax specified in any of the Schedules, add to or omit from or otherwise amend the Schedules and thereupon, the Schedule shall be deemed to have been amended accordingly:

Provided that if, the State Government is satisfied that circumstances exist, which render it necessary to take immediate action, it may, for reasons to be recorded in writing, dispense with the condition of previous notice."

(emphasis by underlining, supplied)

20. Except for some differences in detail, the amendment of schedules in the VAT enactments extracted above, uniformly require that the notification for amendment once made, be placed before the House within the timeframes stipulated therein for deliberation and ratification. It was thus incumbent upon the respondents to have followed the proper procedure for amendment of schedules set out under Section 75 of the PVAT Act and the invocation of Section 31 in the above circumstances is contrary to law.

21. In the light of the discussion as above, this Writ Petition is allowed and the impugned Notification quashed. Connected Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

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To

- 1.The Chief Secretary to Govt. of
Pondicherry, Chief Secretariat,
Goubert Avenue, Pondicherry-605 001.
- 2.The Secretary to Government (Finance),
Office of the Chief Secretariat,
Goubert Avenue, Pondicherry-605 001.
- 3.The Commissioner of State Tax
Commercial Taxes Department Pondicherry.

W.P.No.8054 of 2020
and WMP No.9528 of 2020

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