IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 24.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.32329 of 2016
and
W.M.P.No.28044 of 2016

M/s.Adayar Gate Hotels Limited,
Rep by its Managing Director,
32, T.T.K.Road, Chennai - 600 018. ... Petitioner

Vs.

1.The State of Tamil Nadu,
Rep by its Additional Chief Secretary (FAC),
CT & R Department,
Fort St. George, Chennai - 600 005.

2.The Assistant Commissioner (CT),
Alwarpet Assessment Circle,
Chennai. ... Respondents

Prayer: Writ Petition is filed under Article 226 of the Constitution of India praying for the issuance of Writ of Certiorarified Mandamus, call for the records of the 1st respondent in G.O.(Ms) No.107 CT&R Department, quash the order dated 02.08.2016 passed therein and further direct the 1st respondent to grant waiver/remission of sales tax, surcharge, additional surcharge, additional sales tax and penalty to the petitioner under sec.17(4) of the Tamil Nadu General Sales Tax Act, 1959 read with Rule 48-A of the Tamil Nadu General Sales Tax Act, 1959 in respect of the sale of food and drinks effected by the petitioner at its hotel during the period 03.02.1983 to 31.01.1985.

For Petitioner : Mr.P.V.Sudakar
For Respondents : Mr.A.N.R.Jayaprathap
Government Advocate

O R D E R

In this Writ Petition, the petitioner has challenged the impugned G.O.(Ms).No.107 dated 02.08.2016 rejecting the request of the petitioner for waiver of sales tax for the period between 03.02.1983 and 31.01.1985 covering the Assessment Years 1983-84 & 1984-85.

2.Vires of Entry No.150 of the First schedule to the Tamil Nadu General Sales Tax Act, 1959 (TNGST) was challenged. Entry 150 of the First schedule to the TNGST Act, 1959, w.e.f. 04.10.1980 reads as under:-

> "Articles of food and drinks sold to customers in three star, four star and five star hotels, as recognised by Tourism Department, Government of India whether such articles are meant to be consumed in the premises or outside."

3.The said Entry sought to levy of sales tax for the first time on the sale of food articles in Star Hotels. It was challenged. In Sangu Chakra Hotels Private Limited Vs. The State of Tamil Nadu, (1985) 60 STC 125, this Court had struck down the above Entry.

4. These amendments to TNGST Act, 1959 and KGST Act, 1963 (Kerala General Sales Tax Act) in the years 1980 and 1976 were subject matter of challenge pre-dated the 46th amendment to the Constitution vide Constitution (Forty Sixth Amendment) Act, 1982.

5. Aggrieved by the decision of this Court, the Commercial Tax Department took up the issue before the Hon'ble Supreme Court, which eventually came to be disposed by an order dated 21.02.1990 in Kerala Hotel & Restaurant Association Vs. State of Kerala; State of Tamil Nadu Vs. Sangu Chakra Hotels Private Limited and Others; Hotel Arathy Vs. State of Kerala and Others, (1990) 2 SCC 502. By the said order, the Hon'ble Supreme Court reversed the decision of this Court in Sangu Chakra Hotels Private Limited (supra) and upheld the levy of tax.

6. Pursuant to the aforesaid decision of the Hon'ble Supreme Court, the recovery proceedings were initiated against the petitioner. The said proceedings were once again challenged before the Hon'ble Supreme Court. By an order dated 08.02.1996 in C.A.Nos.101 & 102 of 1995, the Hon'ble Supreme Court directed the State Government to grant waiver / remission of tax for the period between 01.02.1985 and 24.03.1989, i.e. period between the date on which the above Entry was struck down by this Court in Sangu Chakra Hotels Private Limited (supra) and when the Entry 150 was eventually upheld by the Hon'ble Supreme Court.

7. Pursuant to the above directions of the Hon'ble Supreme Court, G.O.Ms.No.140, dated 11.06.1999 was issued. It granted the waiver of interest to the petitioner for the period between 01.02.1985 and 24.03.1989. It prescribed conditions, i.e. Hoteliers should not have collected tax from the customers.

8. The petitioner was thereafter issued with notice dated 30.11.1999. The petitioner was called upon to produce documents to substantiate that it had not collected tax on the sale of food & drinks for the period between 1981-82 and 1984-85 upto 31.01.1985. The petitioner replied to the same and furnished certain documents vide letter dated 07.12.1999, to substantiate that no tax was collected by it.

9. The petitioner informed the Assessing Officer that in respect of the Assessment Years 1983-84 and 1984-85, taxes were collected by the petitioner on flight catering alone and the same were remitted to him and that for the period 01.02.1985 to 24.03.1989 the petitioner was covered by G.O.No.140, dated 11.06.1999 to the extent of taxes amounting to Rs.124.55 lakhs. Thereafter, again, on 30.08.2001, another notice was issued on the same lines directing the petitioner to remit the taxes. A reply was sent on 31.08.2001 itself. Yet another notice dated 12.02.2002 was issued directing the petitioner to pay taxes immediately.

10. Under these circumstances, the petitioner approached the Tamil Nadu Taxation Special Tribunal. By an order dated 07.03.2002 in O.P.Nos.216 to 220 of 2002, the Tamil Nadu Taxation Special Tribunal directed the petitioner to pay tax for the period between 03.02.1983 and 31.03.1985. The aforesaid period pertains to the period when the order dated 21.01.1985 was passed by this Court strucking down Entry No.150 of the First Schedule to the TNGST Act, 1959. By the order dated 07.03.2002, the Tamil Nadu Taxation Special Tribunal gave further following directions:-

> (a) As agreed to by the learned counsel for the petitioner, all the accounts for the period from 18.03.1981 to 31.01.1985 should be produced before the assessing authority on or before 26.03.2002.
>
> (b) On verification, if no tax has been collected by the assessee on food and drinks for the period from 18.03.1981 to 02.02.1983, then the assessments made already on food and drinks levying tax are deemed to be quashed and therefore, the assessing authority has to make fresh assessments by exempting the food and drinks turnover and raising fresh demands, if any. However, if any tax has been collected by the assessee on food and drinks from 18.03.1981 to 02.02.1983, then the assessments made already are valid, and this position may be informed to the assessee.

(c) For the period from 03.02.1983 to 31.01.1985, on the sales of food and drinks the assessee is liable to tax, whether tax has been collected or not.

(d) However, in respect of the sales turnover of ice-creams, assessed for the period from 18.03.1981 to 31.01.1985, the assessing authority shall verify whether the rate of tax adopted in the assessments is correct in terms of the order of the High Court of Madras and if there is any inconsistency, then to that extent the assessments made have to be re-opened and re-assessed by raising demand afresh for correct taxes due.

(e) If, there is no variation between the tax levied on ice-creams and the rate of tax as ordered by the High Court, then this position has to be informed to the assessee, without disturbing the assessments already made.

11. Aggrieved by the order of the Tamil Nadu Taxation Special Tribunal, the petitioner had filed W.P.No.15207 to 15209 of 2003. By an order dated 24.04.2006, the case was remitted back to the Tamil Nadu Taxation Special Tribunal by this Court, to consider the representation of the petitioner and to pass an order on or before 30.06.2006.

12. The petitioner thereafter filed a representation before the 1st respondent for waiver of tax in the light of Section 17 (4) of the TNGST Act, 1959 read with Section 48A of the TNGST Act, 1959. Though the petitioner had filed the representation as on 11.05.2006, the 1st respondent issued the impugned G.O.(Ms) No.107 dated 02.08.2016, almost 10 years after the petitioner gave its representation. It was thus passed in partial violation of the directions of this Court in W.P.No.15207 to 15209 of 2003 dated 24.04.2006.

13. I have considered the arguments of the learned counsel for the petitioner and the learned counsel for the respondents.

14. It is the case of the petitioner that it has not collected tax for the period between 03.02.1983 and 31.01.1985, and therefore its case should be considered favourably.

15. The impugned G.O. has been passed merely based on records, but without any discussion on the representation of the petitioner and the communication of the principal

secretary/Commissioner of Commercial tax in G.O.Ms.No.157, Commercial Taxes and Religious Endowment Department dated 22.04.1996.

16. The introduction of Entry 150 pre-dated the 46th amendment to the Constitution of India pursuant to which Sub-clause (29-A) was incorporated under Article 366 to the constitution of India, w.e.f. 02.02.1983. By virtue of the aforesaid amendment, the definition on tax of sale or purchase of goods was for first time introduced in the Constitution. Sub-Clause (f) to the Clause (29-A) to Article 366 introduced a tax on the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating), where such supply or service, is for cash, deferred payment or other valuable consideration and such transfer, delivery or supply of any goods shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made.

17. As a result of the amendment, supply of food or any other article for human consumption or any drink (whether or not intoxicating), as supply or service for cash or deferred payment or other valuable consideration, was constitutionally recognised and sanctioned as sale for the first time.

18. The Entry 150 of the TNGST, 1959 was struck down. Later its validity was upheld by the Hon'ble Supreme Court. The Government of Tamilnadu also issued G.O.Ms.No.140 dated 11.06.1999 and granted waiver on the condition that the Hotelier/registered dealer had not collected the tax from the consumers. This was modified by the Tamil Nadu Taxation Special Tribunal. The fact that the petitioner had also been given the exemption for the between 01.02.1985 and 24.03.1989 during the period when Entry 150 was declared as ultravires, is a factor to be considered by the 1st respondent while passing orders if indeed the petitioner had not collected tax.

19. The plea of the petitioner that it should be granted waiver therefore deserves a fresh consideration by the 1st respondent even though during the period in dispute, the 46th amendment to the Constitution had come into force w.e.f. 02.02.1983. If the petitioner had not collected tax from the customer, it may be considered by the 1st respondent.

20. Since the impugned G.O has been passed without considering the submission of the petitioner, I therefore direct the 1st respondent to consider the plea of the petitioner and to pass a fresh order after hearing the petitioner, within a period of three months from the date of receipt of a copy of this order.

21. The Writ Petition stands disposed with the above observations. No cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Additional Chief Secretary (FAC),
State of Tamilnadu, CT & R Department,
Fort St. George, Chennai – 600 005.

2.The Assistant Commissioner (CT),
Alwarpet Assessment Circle,Chennai.

+1cc to the Special Government pleader Sr.16402

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srg 09/07/2020