

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30.09.2020

Coram

THE HONOURABLE **Mr. JUSTICE T.S.SIVAGNANAM**
AND
THE HONOURABLE **Mrs. JUSTICE V.BHAVANI SUBBAROYAN**

T.C.A.No.799 of 2018

M/s Madura Coats Private Ltd.,
New Jail Road,
Madurai - 625 001

... Appellant

Vs.

The Deputy Commissioner of Income Tax,
Circle 2,
Madurai

...Respondent

Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, is directed against the Order passed by the Income Tax Appellate Tribunal, "D" Bench, Chennai in I.T.A No.548/Chny/2016 dated 05.04.2018 for the assessment year 2011-2012.

For Appellant

: Mr.Sandeep Bagmar

For Respondent

: Mr.M.Swaminathan
Senior Standing counsel

J U D G M E N T

[Judgment of the Court was delivered by T.S.SIVAGNANAM, J.]

This appeal has been filed by the assessee under Section 260A of the Income Tax Act, 1961 ['the Act', for brevity] challenging the Order passed by the Income Tax Appellate Tribunal, "D" Bench, Chennai in I.T.A No.548/Chny/2016 dated 05.04.2018 for the assessment year 2011-2012.

2. The appeal was admitted on 14.11.2018 to consider the following substantial questions of law:

i. Whether the Tribunal was right in holding that TNMM should not be applied for computing the arm's length price in respect of 0.05% of a class of transaction being 'export of goods' selectively, when 99.95% of the international transaction forming part of same class have been subject to transactional net margin method under Rule 10B(1)(e) read with Rule 10C?

ii. Whether the application of CUP method under Rule 10B(1)(a) is correct when the comparative data in relation to the price for exports to AE as against a non AE is very different because of the differences in the geographic

markets of sale? and

iii) Whether the Tribunal was right in not appreciating the legal argument that application of external CUP method under Rule 10B(1)(a) is not possible for cases wherein sale price per product are compared as the comparative data for the export prices is not available in public domain?'

3. We have heard Mr.Sandeep Bagmar, learned counsel appearing for the appellant and Mr.M.Swaminathan, learned senior standing counsel appearing for the respondent.

4. The Tribunal by the impugned order disposed of the appeal by following the assessee's own case for the assessment year 2009-2010 in ITA No.770/Mds/2014 dated 16.11.2016. Against the said order, the appellant / assessee had filed Tax Case Appeal before this Court in TCA No.739 of 2017 raising the following substantial questions of law:-

'1. Whether the finding of the DRP and the Tribunal that the decision of the Tribunal in the appellants' own case for the earlier years has held that CUP method was appropriately used in preference to TNMM is perverse?

2. Whether the Tribunal was right in holding that transactional net margin method should not be applied for

benchmarking/ computing arms length price in respect of 0.88% of a transaction when 99.12% of the international transaction forming part of same class have been subject to transactional net margin method under Rule 10B(1)(e) read with Rule 10C?

3. Whether the application of CUP method under Rule 10B(1)(a) is correct when the comparative data in relation to the price for exports to AE as against a non-AE is very different because of the market, mode of delivery, geography location and volume of sale?

4. Whether the TPO can arrive at NIL arms length price without even rejecting the arms length price arrived by the Appellant and without even mandatorily applying the provisions of Section 92 and 92C wherein the TPO is bound compute the arms length price as per the methods prescribed under Rule 10B?

5. Whether the TPO has the jurisdiction to question the commercial expediency in relation to expenditure incurred by the Appellant for its business purpose?

6. Whether the TPO has the jurisdiction to decide how the assessee should conduct its business and regarding the necessity or otherwise of incurring the expenditure in the interests of its business?

7. Whether the TPO, DRP and Tribunal erred in not appreciating that the The Central Agency ('TCA') renders

various services to the Appellant such as demand and supply management, forecasting of monthly / quarterly / annual demand, rolling forecasts, raising of the purchase orders, acting as a central coordination agent in connection with the supply chain?

8. Whether the TPO, DRP and Tribunal were 3/22 Dt.14.09.2020 in T.C.A.No.739 OF 2017 M/s. Madura Coats Pvt Ltd. vs. Dy.Commr. Of I.T. correct in disallowing the commission expenditure incurred by the Appellant contending that such expenditure has not resulted in any benefit to the Assessee instead of computing Arms Length Price under Sections 92 and 92C read with Rule 10B?'

The appeal has been disposed of by the Division Bench of this Court by Judgment dated 14.09.2020.

5. It is a submission of the learned counsel appearing for the respondent / revenue that the Division Bench of this Court has infact decided the assessee's appeal and the relevant portion of the Judgment reads as follows:

'3. The learned Tribunal, in the case of the Assessee, which is a manufacturer of various kinds of threads, has held in paragraph 12 of its order, referring to the order for the previous Assessment years, wherein it had clearly decided that for international transactions, CUP method (Comparable Uncontrolled Price Method) was appropriately used for making Transfer Pricing Adjustment (for short, TP Adjustment) under

Section 92C of the Income Tax Act, in comparison to TNM Method (Transactional Net Margin Method) under the said provision, and for recalculating TP adjustment for the present AY 2009-10, the matter was remitted back to the learned Transfer Pricing Officer. Paragraph 12 of the order of the learned Tribunal dated 16 November 2016, is quoted below for ready reference.

"12. In our opinion, the decision of the Tribunal is clear in that CUP method was appropriately used in preference to TNM method. The only modification suggested by the Tribunal was to consider the external comparables also and this direction was given noting, the submissions of the assessee that external comparables could be placed 4/22 Dt.14.09.2020 in T.C.A.No.739 OF 2017 M/s. Madura Coats Pvt Ltd. vs. Dy.Commr. Of I.T. on record for determining the Arms Length Price under CUP method, if it was given an opportunity. The above decision was available with the DRP when it was dealing with the matter for the impugned assessment year. That assessee could not furnish any external comparable has been specifically noted by the Id. DRP at para 2.7 of its order. Hence, in our opinion assessee cannot say that Id. DRP had not taken proper cognizance of the Tribunal order for the earlier years. Apart from this, what we find is that there were forty nine number of items in which internal comparables which were totally uncontrolled were readily available. No doubt, it is true that Pune bench in the case of Amphenol Interconnect India P. Ltd (supra) held that CUP method was not appropriate for evaluating part of the exports. But the reasons for taking the said view was on account of difficulties in carrying out the adjustments for differences between the transactions with Associated Enterprise and Non Associated Enterprise, which is not the case here.

13. Coming to the contention of the Id. Authorised Representative that Sec. 92C of the Act mandates adjustment and determination of Arms Length Price on a class of transactions, it is necessary to have a look of Sec. 92C(1) of the Act, which is reproduced hereunder:-

M/s. Madura Coats Pvt Ltd. vs. Dy.Commr. Of I.T. '1) The arm's length price in relation to an international transaction or specified domestic transaction shall be determined by any of the following methods, being the most appropriate method, having regard to the nature of transaction or class of transaction or class of associated persons or functions performed by such persons or

such other relevant factors as the Board may prescribe, namely : (a) comparable uncontrolled price method ; (CUP) (b) resale price method ; (RPM) (c) cost plus method ; (CPM) (d) profit split method ; (PSM) (e) transactional net margin method ; (TNMM) (f) such other method as may be prescribed by the Board". A reading of the above, clearly indicate that the most appropriate method has to be selected having regard to the nature of transactions or class of transactions. In our opinion, when uncontrolled comparables are available internally on some of the items which was sold to Associated Enterprise then such comparables would form a separate class of its own. TPO had considered forty nine thread types for which there were internal uncontrolled transactions available for comparison. TPO had not made an adjustment for any of the other varieties of thread sales made by the assessee to its Associated Enterprise. Nevertheless, we do find that at least for eight items among these forty nine thread types, mentioned at Sl.No.27, 28, 30, 35, 37, 38, 39 & 44, there was negative differences adjustment which were ignored by the TPO, in the work out at annexure A of its order. When a class of items are considered for adjustment, the negative effect of some of the items therein cannot be ignored. As for contention of the assessee is that there were geographical difference between supplies made to Associated Enterprise and Non Associated Enterprise, there is a clear finding by the Id. DRP that assessee was catering to Asian countries and Associated Enterprise were located in Sri Lanka, Mauritius, Pakistan and Egypt and Non Associated Enterprises were located in Srilanka, Bangladesh, Malawi etc with not much of a geographical difference. Viz-a-viz volume discount mentioned by the Id. Authorised Representative, Id. DRP had given a clear finding that there were substantial sales in atleast in five items falling in the table appearing in para 2.10 of its order. Considering all these, we are of the opinion that lower authorities were justified in selecting CUP method over TNM method. However, as mentioned by us, computation of the Arms Length Price adjustment required on forty nine number of items mentioned in the order of TPO requires to be reworked, so that negative amounts are also considered for aggregation and for working out the Arms Length Price adjustment that is required. For this limited purpose of recalculation, we remit the issue back to the file of the Assessing Officer/TPO.

4. The second issue raised before us, arising from the same order of the learned Tribunal, is with regard to some commission paid to M/s.The Central Agency, appointed by the Assessee under the Supplemental Agreement dated 24 March 2005, to avail its services for finding market for the said threads and procuring the purchase orders from all over the world. The learned Tribunal disallowed the said expenditure in the form of commission paid to M/s.The Central Agency on the ground that there is no evidence for actual agency services availed by the Assessee being produced before the learned Tribunal and merely raising of invoices does not give rise to any presumption of rendering the actual service and therefore, the payment of such commission to M/s.The Central Agency was not an allowable expenditure. The relevant portion of the order of the learned Tribunal in the impugned order in this regard are also quoted below for ready reference :-

“What the assessee was bound to pay was commission based on net invoice value. What the agent was supposed to do was promote the sale of the assessee. Finding of the Id. TPO is that no such services were rendered by the TCA to the assessee. It is not disputed that invoices were raised by the TCA on the assessee, based on the net value of the order. It is also not disputed that supplies were made by the assessee only to its group concerns. The question that is to be addressed is whether TCA had procured the orders for the assessee as its agent. Id. Assessing Officer had given a clear finding that no services in the nature of procurement of any orders were discernable from the e-mail correspondence between the assessee and M/s. TCA. Argument of the assessee before Id. TPO and Id. DRP was that primary role of M/s. TCA was to identify the requirements of the assessee and get orders. However, no evidence whatsoever was produced by the assessee in support of this contention. It was for the assessee to show the services it had received from M/s. TCA. When the supplies were all to group concerns, we cannot fathom what marketing services could have been done by M/s. TCA. No doubt, Hon'ble Delhi High Court in the case of M/s. EKL Appliances Ltd (supra) had held that legitimate business needs of the assessee should be understood from the point of a prudent businessman and it was not for the Assessing Officer to dictate what the business needs. There can be no quarrel on this

view taken by the Hon'ble Delhi High Court. Nor can there be any quarrel on the view taken by the same Court that Id. TPO should not question how to conduct the business. These judgments cannot in our opinion be extra-polated to mean that there rested no onus on the assessee, to show the business purpose for which payments were effected by it. Commercial necessity of a payment is something which is well within the power of an assessee to decide considering its business interest. However, it cannot say that such commercial necessity or expediency has to be presumed. Assessee was bound to show the agency services rendered by M/s. TCA which it failed to do. Mere raising of bills cannot give rise to presumption of rendering any services. As already noted by us the orders on which commission was paid was only on items sold to group concerns and not to any third parties. There is much strength in the argument of the Id. Departmental Representative that in such a situation onus of the assessee was much more than in a scenario where orders on which commission was received were on supplies to third parties. Assessee had failed to discharge this. Consolidation of fragmented orders could have been done by the assessee itself and did not require services of an Associated Enterprise or knowledge of any sublims stalls. When assessee was unable to bring on record anything to show for what reason agency commission was paid, in our opinion there arose an exceptional circumstance where by Arms Length Price could be taken as Nil. As for decision of the Delhi Bench of the Tribunal in the case M/s. McCann Erickson India (P) Ltd (supra) strongly relied by the Id. Authorised Representative, assessee therein was able to demonstrate the type of services, description of service and benefits received by the it from its Associated Enterprise. Further, the payment was not agency commission but management commission fees. In the host of other judicial decisions relied by the Id. Authorised Representative also the question dealt was on the management fees and not on agency commission. In these circumstances, we do not find any reason to interfere with the orders of the lower authorities. Ground No.3 stands dismissed.'

5. The learned counsel for the Assessee Mr.Sandeep Bagmar, drew our attention to the previous order of the learned Tribunal dated 21 December 2012, by which the learned Tribunal

decided the appeals for preceding years viz., ITA Nos.2207, 2212 and 2213/Mds/2007 [AY 2002-03 to 2004-05] (Asst. Commissioner of Income Tax vs. M/s.Madura Coats Pvt. Ltd.) as well as ITA Nos.19 & 2032/MDS/2011 (AY 2006-07 and AY 2007-08) (M/s.Madura Coats Pvt. Ltd. vs. Assistant Commissioner of Income Tax). 11/22 Dt.14.09.2020 in T.C.A.No.739 OF 2017 M/s. Madura Coats Pvt Ltd. vs. Dy.Commr. Of I.T. 6. Paragraph 12 of the previous order passed by the learned Tribunal on 21 December 2012 is quoted below for ready reference :

12. In view of the above, we are of the considered opinion that the matter requires *fresh adjudication*. The order passed by the DRP is in subsequent years to the order of CIT(A), the orders passed by CIT(A) in assessment year 2002-03 to 2005-06 will have bearing in later years. We therefore, remit the matter back to the CIT (A) for the assessment years 2006-07 and 2007-08 for deciding the matter afresh by passing a detailed and speaking order. The CIT(A)/DRP while adjudicating the matter afresh shall *interalia* take into account external comparables while determining the international pricing. The counsel for the Assessee has made a statement at the Bar that the Assessee would provide details of international comparables. The CIT(A)/DRP shall also take into consideration the different market conditions. The market conditions does not mean geographical condition alone but also includes the size of the market, demand and other relevant factors influencing the market conditions as a whole.

13. For the Assessment Year 2003-04 and 2004-05 the Revenue has raised additional ground of export incentive provide to the Assessee under Section 80HHC. The D.R. Has fairly conceded that now this issue is squarely covered in favour of the Assessee by the judgment of the Hon'ble Hon'ble Supreme Court of India in the case of Topman Exports vs. CIT, reported as 342 ITR 49(SC). Accordingly, we dismiss this ground of appeal of the Revenue."

7. The learned counsel for the Assessee, Mr.Sandeep Bagmar, therefore, submitted that there was no clear finding of the learned Tribunal in the previous order dated 31 December 2012, for the previous assessment years, that only CUP Method should be adopted for TP adjustment and not TNM Method, which the Assessee wanted to adopt, looking at the nature of

business. The Assessee also undertook before the learned Tribunal that it would supply the data relating to other external comparables in the market available, so that appropriate TP adjustments could be made. But, however, misconstruing the same, the Tribunal has made a remand with specific direction for this AY 2009-10, that CUP Method was the most appropriate method to be adopted under Section 92C of the Act for the Assessee, the learned Tribunal has bound down the lower authorities to adopt the CUP Method and make TP Adjustments accordingly and only for recomputation of the TP Adjustments according to CUP Method, the matter has been remitted back to the lower authorities. He, therefore, submitted that the present remand by the learned Tribunal for AY 2009-10 shall also be held to be only an open remand, leaving it free for the learned TPO to decide once again as to which is the most appropriate method to be adopted in the facts and circumstances of the case, for TP Adjustment, whether CUP method or TNM Method and then make T.P. Adjustments, if any.

8. On the other hand, the learned counsel for the Revenue Mr.Swaminathan, also submitted that in pursuance of the previous remand order of the learned Tribunal dated 21 December 2012, for the previous assessment years, as stated above, for some of the assessment years, orders have been passed by the TPO/DRP below, and again the Assessee has preferred appeals before the learned Tribunal itself which are also pending there. He submitted that for such previous years, since CUP Method was again adopted by the learned authorities like CIT (Appeals) or Dispute Resolution Panel, the Assessee being dissatisfied with the same, has again preferred appeals before the learned Tribunal and even those appeals are pending before the learned Tribunal.

9. Mr.Swaminathan, learned Counsel for the Revenue, fairly submitted that for previous years also, though there was no specific and categoric finding by the learned Tribunal that CUP Method is the most appropriate method for the authorities to adopt in the case of the Assessee, but the Tribunal has observed so in paragraph 12 of the impugned order, for the present Assessment Year 2009-10, as quoted above.

10. On the second issue regarding allowing commission paid to M/s.The Central Agency, Mr.Sandeep Bagmar, learned counsel for the Assessee, argued that for all the previous years,

such expenditure or commission paid the same to M/s.The Central Agency was allowed as 'Business Expenditure', on the basis of similar evidence produced before the authorities below, but the learned Tribunal, for the first time, for the AY 2009-10, has disallowed the same on its own wrong assumption that no such evidence of actual agency services was available on record. He therefore submitted that even this issue deserves to be remanded back to the learned Tribunal for deciding the same on the basis of available materials and evidence on record, as the Assessee had incurred those expenditure actually and there was commercial expediency for incurring the same and such a decision about commercial expediency lies only with the Assessee and not with the Assessing Authority.

11. On the said issue, Mr.Swaminathan submitted that the Tribunal may be permitted to look into the past history of the Assessee and depending on the materials and evidence on record, the Tribunal may decide the issue afresh, in accordance with law.

12. We have heard the learned counsel on both sides and perused the materials on record.

13. While we make it clear that in our opinion, which method will be most appropriate to be adopted for TP Adjustment by the Authorities of the Department, is to be decided by fact finding bodies only, as section 92C does not give any guidelines, as to which method whether CUP Method or TNM Method is appropriate to be applied in the facts and circumstances of a particular Assessee, looking to the nature of business. Though there are rules framed under the said provision in the Income Tax Rules, 1962, but it always depends on the facts and circumstances of each case, as to which method has to be adopted and which method is the most appropriate method to be adopted. In our opinion, it is not even a question of law, to be considered by the High Court.

14. Be that as it may, in our opinion, the only observation which we, in the present appeal, intend to make is that there is obviously a misreading of the previous order dated 21 December 2012, passed by the learned Tribunal for the previous Assessment Years, while deciding the present appeal for AY 2009-10. While the earlier order made an open remand to the authorities below to decide as to which is most appropriate method to be adopted, CUP Method or TNM Method, the learned

Tribunal, by the impugned order dated 16 November 2016 for AY 2009-10 has apparently, fallen into error, in holding that the CUP Method as the appropriate method and that this issue was already decided by Tribunal, which was not the correct reading of the previous order dated 21.12.2012.

15. A bare reading of paragraph 12 of the order passed by the learned Tribunal for the previous years dated 21.12.2012 would also show that it was an open remand and no specific method was finalized by the Tribunal in the previous order of the appeal for previous assessment years. This misreading of the previous order by the learned Tribunal while passing the present impugned order on 16.11.2016 has resulted in multiplicity of the litigation and after remand also, as stated by the learned counsel for the Department before us, a second round of appeals has again come up before the learned Tribunal itself, which appeals are said to be pending before the learned Tribunal as of now.

16. We are therefore constrained to observe that the Tribunal, being the final fact finding body, ought to have finalized the said exercise of final fact finding at its own level, instead of remanding cases again and again, which in our opinion defeats the very purpose of expeditious disposal of TP adjustments in the case of international transactions u/s 92C of the Act, read with relevant Rules framed under the provisions of the Act, as such huge delays upon remand/ reassessment or readjudication, and then again, second round of appeal before the Tribunal, unnecessarily projects a very bad image of delays by the Revenue Department on the international scenario, where the expectations of the Revenue Department in India is of expeditious adjudication and not a remand and readjudication and then second round of appeals, as if it was a shuttle game between the Assessee and the Revenue Authorities. With the Revenue Authorities as well as the final fact finding Appellate Forum, are two places where the issues like this are expected to achieve a finality.

17. We do not want to make any kind of adverse comments in this regard, having high respect for a final fact finding body like the Income Tax Appellate Tribunal, under the Income Tax Act, but we leave it for the learned Tribunal, with a request to decide the issue on merits, on the issues of TP Adjustments, giving a finality on the basis of materials and evidence before it. It is needless to say that the learned Tribunal

itself enjoys the power of a Civil Court to summon the relevant evidence and material before itself. As given in the present case, if the data relating to external comparables were not available before it, the learned Tribunal could have very well directed both the sides, viz., the Revenue Authorities below and the Assessee, to adduce relevant evidence before itself. The Assessee in the present case had undertaken to produce the relevant data relating to external comparable before the learned Tribunal. Therefore, it was only matter of some time to be granted by the Tribunal to direct both the sides to adduce such evidence from the public domain available for comparison, to decide as to which is the most appropriate method to be adopted looking to the nature of business etc. as in Section 92C of the Act. Of course, the mathematical computation work could have been left to the Adjudicating Authorities below, or done by the Tribunal itself with the assistance of Counsels/Assessees etc. As far as the appropriateness of the method to be adopted for TP adjustments was required to be done, in our considered opinion, the Tribunal should not have remanded the matter back to the authorities below and that too to the two different authorities, viz., Dispute Resolution Panel and Commissioner of Income Tax (Appeals), in previous order, and that too by committing a mistake of misreading of the previous order dated 21.12.2012 and holding that CUP Method was already decided to be the only appropriate method, whereas the Assessee has been contending otherwise throughout, and is aggrieved by the adoption of the CUP method and was pressing of TNM Method. In the facts and circumstances of the case, and Assessee is again in the second round of appeals before the learned Tribunal against the orders passed by the authorities below on the remand made by the previous order dated 21.12.2012.

18. Like we are seeing in the present case, it was expected of the learned Tribunal also to realize the consequences of an open remand made or a remand made to the authorities below only for re-computation with the appropriateness of the method decided finally at its own end. The multiplicity of the litigation and rounds of appeal, what we have described as a shuttle game, should have been seen by the learned Tribunal and therefore, we expect at least from now on, the learned Tribunal will decide on the issue of the appropriateness of the method for TP adjustments, while

deciding all the pending appeals before it, as far as this Assessee is concerned and also other Assesseees by recording its own reasons and taking into account the relevant evidence and materials on record, and if necessary, by calling additional evidence before it, with regard to the external comparables, from both the sides. We do not expect a further open remand by the learned Tribunal on the said issue any more because such decision of the learned Tribunal is likely to affect not only the years under consideration before the learned Tribunal but also the future assessment years, as the Assessee continues to remain in the same business for such future years also.

19. As far as the second question is concerned about allowing of the commission paid to M/s. The Central Agency as 'Business Expenditure', we leave it free for the Tribunal to look into the past history of the Assessee about the allowability of the said expenditure, and as such expenditure for the previous years has been consistently allowed by the Revenue Authority below, and there was no contrary finding by the learned Tribunal for the previous years. We do not find the reasons given by Tribunal in its impugned order dated 16.11.2016, sufficient enough to distinguish the judgment of Delhi High Court in the case of M/s. EKL Appliances Ltd. The learned Tribunal may re-decide the said issue also fairly and objectively in the light of the materials available before it for the present AY 2009-10 also. 20. With these observations, without answering the questions of law raised before us, we set aside the order of the learned Tribunal dated 16 November 2016 for AY 2009-10, with a request to decide both the issues appropriately, as noted above, after giving opportunity of hearing to both sides and if necessary, to allow them to adduce relevant evidence also before it. In view of the matters having already taken long so far to be decided right from AY 2002-03 to AY 2009-10, after which about 10-11 years have now passed by, we request the learned Tribunal to decide the appeals now within a period of six months from today."

Following the above decision in the assessee's own case, the

present appeal also stands disposed of in terms of the observations made in T.C.A.No.739 of 2017 dated 14.09.2020. No costs.

(T.S.S.J.)

(V.B.S.J.)

30.09.2020

Index :Yes / No ;
Internet :Yes / No
Speaking Judgment / Non Speaking Judgment

To

The Income Tax Appellate Tribunal, "D" Bench,
Chennai

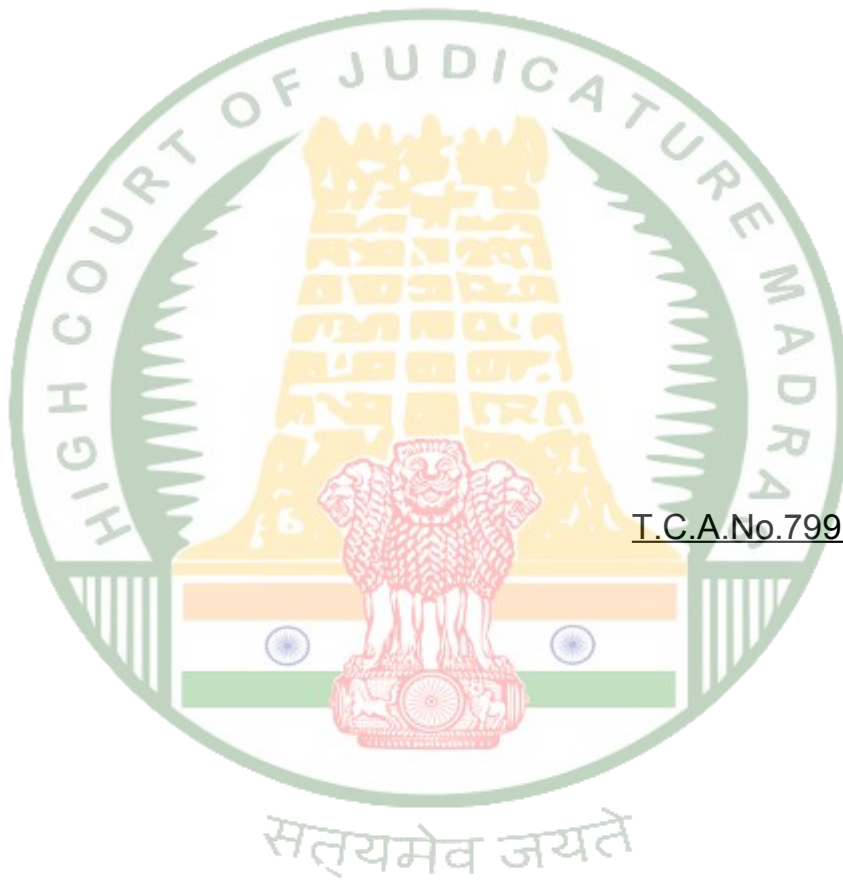


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T.C.A.No.799 of 2018

**T.S.SIVAGNANAM,J.,
AND
V.BHAVANI SUBBAROYAN, J.,**

ssd



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