IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED : 17.03.2021
CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Orders Reserved On 29.01.2021	Orders Pronounced On 17.03.2021

W.P.Nos.35839 of 2003, 6254 & 9363 of 2004
and
W.P.M.P.No.43559 of 2003

W.P.No.35839 of 2003 :-

M/s.Swathy Chemicals Ltd.,
Rep., by Rajesh M.Mehta,
Managing Director,
New No.10, George Avenue,
Alwarpet, Chennai-18. .. Petitioner

-vs-

1.The Joint Commissioner III (SMR)
of Commercial Taxes,
Ezhilagam, Chepauk, Chennai-5.

2.The Appellate Assistant Commissioner (CT) IV,
IV Floor, Kuralagam Annexe,
Chennai-108.

3.The Deputy Commercial Tax Officer ,
Royapettah II Assessment Circle,
46, Greenways Road, Chennai-28. .. Respondents

Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari to call for the records on the file of the 1st respondent in Ref.M1/91609/97; (SMR) No.432/98 dated 28.5.2003 and quash the same as being invalid and illegal and without jurisdiction.

W.P.No.6254 of 2004 :-

Swathy Chemicals Ltd.,
New No.10, George Avenue,
Chennai-600 018. .. Petitioner

-vs-

The Deputy Commercial Tax Officer ,
Royapettah II Assessment Circle,
Greenways Road, Chennai-18. .. Respondent

Petition under Article 226 of the Constitution of India praying for issuance of Writ of Mandamus directing the respondent to pay the petitioner a sum of Rs.1,36,768/- along with interest at 12% per annum from 13.05.2003 till the date of payment.

W.P.No.9363 of 2004 :-

M/s.Swathy Chemicals Ltd.,
Rep., by Rajesh M.Mehta,
Managing Director,
New No.10, George Avenue,
Alwarpet, Chennai-18. .. Petitioner

-vs-

1.The Joint Commissioner III (SMR)
of Commercial Taxes,
Ezhilagam, Chepauk, Chennai-5.

2.The Deputy Commercial Tax Officer ,
Royapettah II Assessment Circle,
46, Greenways Road, Chennai-28. .. Respondents

Petition under Article 226 of the Constitution of India praying for issuance of Writ of Certiorarified Mandamus to call for the records on the file of the 1st respondent in Ref.M1/91609/97; dated 5.12.2003 and quash the same as being invalid and illegal and direct the 1st respondent to pass orders afresh in accordance with law, after giving a personal opportunity of being heard to the petitioners.

For Petitioner : Mr.V.Srikanth
(In W.P.Nos.35839/2003
& 9363 of 2004)

For Petitioner : Ms.L.Maithili
(In W.P.No.6254/2004)

For Respondents : Ms.G.Dhanamadhri,
(In all W.Ps.) Government Advocate (Taxes)

COMMON ORDER

T.S.Sivagnanam, J.

The petitioner in all these three writ petitions is a registered dealer on the file of the Deputy Commercial Tax Officer, Royapettah II Assessment Circle, Chennai, under the provisions of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as "the TNGST Act") and the Central Sales Tax Act, 1956 (hereinafter referred to as "the CST Act").

2.In W.P.No.35839 of 2003, the petitioner has challenged the order passed by the first respondent dated 25.08.2003, exercising the suo motu revisional power and interfering with the order passed by the second respondent dated 20.01.1997, in Appeal No.188/95, which was allowed in favour of the petitioner setting aside the assessment made by the third respondent on the turnover of Rs.44,90,687/- at 10% under the CST Act.

3.W.P.No.6254 of 2004 has been filed by the petitioner for issuance of a Writ of Mandamus to direct the Assessing Officer to pay a sum of Rs.1,36,768/- along with interest at 12% from 13.05.2003 till the date of payment.

4.W.P.No.9363 of 2004 has been filed by the petitioner challenging an order passed by the Joint Commissioner rejecting the miscellaneous petition filed to rectify the order impugned in W.P.No.35839 of 2003.

5.Thus, among the three writ petitions, W.P.No.35839 of 2003 is the lead case and the result of the other two writ petitions would depend upon the decision to be arrived at in W.P.No.35839 of 2003.

6.Heard Mr.V.Srikanth, learned counsel for the petitioner in W.P.No.35839 of 2003 and W.P.No.9363 of 2004 and Ms.L.Maithily, learned counsel for the petitioner in W.P.No.6254 of 2004 and Ms.G.Dhanamadhri, learned Government Advocate for the respondents in all the three writ petitions.

7.The petitioner was finally assessed for the year 1986-87 on the total and taxable turnover of Rs.1,49,09,403/- and Rs.86,04,729/- respectively, as per the assessment order dated 30.03.1988, under the CST Act. The petitioner filed an appeal before the Appellate Assistant Commissioner (CT) IV, Chennai, disputing the levy of tax at 10% on a turnover of Rs.44,09,687/- on the ground that the turnover represents local sales only assessable to sales tax under the TNGST Act and not direct interstate sales.

8.The First Appellate Authority allowed the appeal by order dated 20.01.1997 and held the transactions to be local sales only, by relying upon the decision reported in the case of S.K.Shanmugavelu & Anr. vs. State of Tamil Nadu [1983 54 STC 12 Mad]. After more than a year, the first respondent, the revisional authority, issued a show cause notice dated

04.05.1998, stating that the order passed by the first appellate authority is not correct, in view of the decision of the Hon'ble Supreme Court in the case of Co-operative Sugars (Chittur) Ltd. vs. State of Tamil Nadu [1993 90 STC 1 SC] wherein, the Court held that it was immaterial whether the sale/purchase took place within Tamil Nadu or within Kerala, so long as the movement of goods was an incident of sale/purchase, it amounted to an interstate sales/purchase. Further, it was observed that it is not necessary that contract of sale had to be expressly provided for the movement of goods and it was sufficient, if the movement of goods was implicitly in the sale. It was stated that the ratio laid down in the said case is applicable to the case of the petitioner and hence, the order passed by the Assessing Officer dated 30.03.1988 has to be confirmed, consequently the order of the first appellate authority dated 20.01.1987 requires to be set aside.

9.The petitioner was called upon to submit their reply. The petitioner submitted an elaborate reply dated 26.02.2003, seeking to sustain the order passed by the first appellate authority. Apart from raising contentions on the merits, it was submitted that the proposal is beyond the revisional powers of the first respondent and the revisional authorities are not empowered to expand the scope of an original order or seek to restore or fill up the lacuna in the same while exercising revisional jurisdiction. The reply submitted by the petitioner was rejected and the first respondent passed the impugned order dated 28.05.2003.

10.The petitioner would contend that the first respondent failed to note that the petitioner had not purchased any goods in Chennai and hence, transportation of the same to Pondicherry does not arise. On the other hand, the petitioner had sold goods ex-works/ex-factory, the buyer took delivery of the goods and transported the same on his own responsibility to Pondichrry and the petitioner had issued Form XX declaration only for the purpose of transportation of goods and did not take the responsibilities of transportation to Pondicherry.

11.It is further submitted that the decision in Co-operative Sugars (Chittur) Ltd. (supra) cannot apply to the facts of the petitioner's case, as the first appellate authority had given a specific finding that the prices quoted were ex-godown and the purchasers had themselves taken delivery of the goods from the petitioner and transported the goods themselves to Pondicherry. Further, the first respondent did not take note of the decision relied on by the petitioner reported in S.K.Shanmugavelu (supra) in their reply to the show cause and non-consideration of the decision will render the impugned proceedings invalid and illegal. Further, it is submitted that in the said decision, on identical facts, it was held to be local sales and taking note of the decision, the proposal made by the first respondent in the show cause notice dated 04.05.1998, ought to have been dropped. On the above grounds, the petitioner seeks for setting aside the impugned order.

12.The Revenue seeks to sustain the impugned proceedings by contending that the dealers themselves had reported the turnover in their monthly returns filed under the CST Act as interstate sales and paid tax at 4% along with their monthly returns. These sales were made to a single dealer in Pondicherry and besides direct interstate sales, the dealers also despatched the goods to the same dealers for sales on consignment sale basis and after a lapse of several years, the dealers claimed the transaction as local sales, since the dealers were not able to get Form-C and Form-F declarations from the buyers and since the order passed by the revisional authority in exercise of suo motu revisional power is proper and justified, the Assessing Officer while completing the assessment by order dated 30.03.1988, pointed out that scrutiny of Form-X reveal that in respect of certain transactions, the petitioners have not filed Form-C declaration and therefore, the said turnover of Rs.44,90,687.57 will be assessed at 10%.

13.The first appellate authority took note of the contentions advanced before it that the petitioner have effected sales of brass metals to a party at Pondicherry, but the goods were sold and delivered by the petitioner at Madras and the petitioner obtained acknowledgement of the purchasers in all the sales invoices and since the goods were sold and delivered, there was passing of property, the transactions have to be recorded as local sales completed by local delivery and the transactions can be assessed only at 5% multipoint under the local law. Further, the appellate authority took note of the contention that even though the petitioner have effected sales and given local delivery, they issued Form-XX delivery note for transportation purposes at the instances of the purchasers and the acknowledgement given by the purchasers in the sale invoices and delivery challan goes to establish that the sales and delivery were completed within the State of Tamil Nadu, as seen from the contemporaneous endorsement and evidence.

14.Further, the petitioner stated that there was some dispute between the purchasers and petitioner and Form-C declarations have not been issued and the Assessing Officer failed to grant reasonable opportunity to the petitioner to submit the declaration forms and they may be granted reasonable opportunity to produce the Form-C declaration before the appellate authority. The appellate authority after hearing the Departmental representative, held that a perusal of the sale invoice and the delivery challan issued by the petitioner reveal that they have obtained the signature of the purchasers in token of having received the goods, however, they have issued Form XX for the transportation of goods from Madras to Pondicherry showing the petitioner as the consignor and the purchasers as the consignee.

15.The appellate authority took note of the petitioner's submission that they have issued Form XX declaration only at the instance of the purchasers and this would not change the character of the transaction as a local sale. Further, the appellate authority took note of the endorsement in the delivery challan endorsing receipt of the material in good condition and the signature of sale of the purchasers. Thus, the first appellate authority concluded that it is clear that the transactions have been completed as a local sale by the petitioner, as the delivery has taken place at Madras.

16.The first appellate authority took note of the decision of this Court in the case of S.K.Shanmugavelu (supra) and held that if the goods were delivered to the buyers and they transported the goods on their own responsibility, some times in the lorry arranged by the assessee and some times in the lorry arranged by the buyers themselves, the transactions can be called as purely the local sales and cannot be regarded as an interstate sale.

17.Examining the nature of transaction done by the petitioner, it was held that the price payable was ex-assessee's godown and the assessee's own admission that out-of-state buyers or their agents came and took delivery of the goods in the State and even the goods were moved at the cost and responsibility of the purchasers.

18.The first appellate authority took note of the invoices, wherein it has been clearly mentioned that the responsibility of the petitioner ceases as soon as the goods are handed over to the carriers. Furthermore, the petitioners had admitted that the buyers themselves took delivery of the goods as seen from the delivery challan issued by them. Therefore, the first appellate authority held that mere issuing of Form XX for the transportation of goods cannot alter the character of the transaction, as the goods moved at the cost and responsibility of the purchasers. Thus, the appellate authority concluded that the transaction effected by the petitioner cannot be treated as interstate sale and they are only local sales. Accordingly, allowed the appeal.

19.After more than 18 months, the revisional authority issued show cause notice dated 04.05.1998. The show cause notice was solely based upon a decision of the Hon'ble Supreme Court in Co-operative Sugars (Chittur) Ltd. (supra) wherein, it was held that when the movement of goods was an incident of sale/purchase, it amounted to interstate sales/purchase. The first respondent has not mentioned in the show cause notice as to how the said decision would apply to the case of the petitioner especially when, the first appellate authority has examined the factual position and granted relief to the appellant. In the said decision of the Hon'ble Supreme Court, the facts were that the appellant therein had it sugar factory in Kerala State and pursuant to a Government Order issued by the Tamil Nadu Government, specifically permitting them to open office in Coimbatore and Pollachi Taluks only with a view to and exclusively for the purpose of transporting to their factory in Kerala, the Hon'ble Supreme Court held that such sale was an interstate sale. Furthermore, in the said case, whatever was purchased was transported to the factory in Kerala. Under such circumstances, the Hon'ble Supreme Court held that the movement of goods from Tamil Nadu to Kerala was an incident and was inextricably connected with the sale/purchase and that the purchase/transport was part of one transaction. Thus, the said decision was rendered on the fact situation that the purchase and transport could not be disassociated and there was no break between the purchase and movement of goods to another State.

20.As rightly contended by the learned counsel for the petitioner, the facts dealt with in the said decision were peculiar and the first respondent was not justified in issuing show cause to exercise his suo motu power solely based on the said decision, which dealt with on different factual position. The first appellate authority after examining the invoices and the delivery challan, has recorded a finding of fact that a sale was completed in Tamil Nadu and any transportation, which had taken place after the sale at the instance of the buyer from Tamil Nadu to any other State, cannot bring it under the purview of interstate sale in the hands of the petitioner.

21.One more important factor, which we need to take note of is the facts of the case in Co-operative Sugars (Chittur) Ltd. (supra), where the buyer and the seller were the same whereas in the case on hand, the buyer and the seller are two different entities. One more important aspect which has appealed to us is whether the revisional authority while exercising suo motu revisional powers can order for restoration of the original assessment orders on the grounds, which were not contained therein. The answer to the said question should be against the Revenue, because in the original assessment order, there is no reference to the decision of the Hon'ble Supreme Court and seeking to revise the order passed by the first appellate authority by referring to a decision, which was not subject matter of the original assessment order is impermissible. The Revenue was clearly barred from directing the original assessment order to be restored on grounds, which were not contained in the original assessment order. Thus, the first respondent by passing the impugned order has exceeded its jurisdiction in the sense that he has expanded the scope of the original assessment order dated 30.03.1988 by seeking to give a different interpretation that too solely based upon the decision of the Hon'ble Supreme Court without mentioning as to how the decision would apply to the facts and circumstances of the petitioner's case.

22.Thus, we are of the clear view that on the facts and circumstances of the case, the first respondent could not have exercised his suo motu revisional powers to interfere with the order passed by the first appellate authority dated 20.01.1997.

23.For the above reasons, W.P.No.35839 of 2003 is allowed and the order passed by the first respondent dated 28.05.2003, is set aside and the order passed by the first appellate authority dated 20.01.1997 is restored.

24.As we have set aside the order passed by the first respondent dated 28.05.2003, no separate orders are required in W.P.No.9363 of 2004 and accordingly, the same is closed.

25.In W.P.No.6254 of 2004, the petitioner seeks for payment of interest. It is seen that after the first appellate authority allowed the petitioner's appeal, vide order dated 20.01.1997, the assessing authority revised the assessment by order dated 07.11.1997, and ordered for refund under Rule 5(6) of the CST Rules, ordering refund of the excess tax of Rs.2,42,405/-. Though such order was passed, refund was not made to the petitioner and therefore, the petitioner addressed the Assessing Officer by letters dated 10.06.1998 and 15.07.1998 requesting for immediate refund. Since no orders were passed, the petitioner filed W.P.No.10928 of 1998 to direct the Assessing Officer to refund the excess tax paid. The writ petition was disposed of by order dated 13.02.2008, with a direction to refund the said sum within a period of one month from the date of production of the order with interest at 12% from 28.01.1998. The petitioner has forwarded the copy of the order passed in the writ petition and requested for complying with the direction. Thereafter, the Assessing Officer sanctioned refund of Rs.2,22,818/- as against the refund of Rs.2,42,405/- as ordered in the writ petition.

26.On 21.03.2003, the Commercial Tax Officer, Royapettah II Assessment Circle, issued a letter enclosing a refund voucher for Rs.2,22,818/- along with the application in Form-XXXIII for claiming interest under Section 22(4) of the TNGST Act. The petitioner is stated to have complied with whatever was called upon by the Assessing Officer by furnishing the required particulars by letter dated 24.03.2003. Subsequently, on 11.04.2003, the Assessing Officer enclosed a refund voucher bill, after rectifying the defects pointed out by the Pay and Accounts Officer and requested the petitioner to present the same through its bankers. Thereafter, the petitioner was directed to furnish a worksheet giving the interest calculation, which was complied with by letter dated 19.04.2003.

27.Ultimately, on 13.05.2003, the petitioner received refund of Rs.2,23,818/-. However, no interest was paid. The petitioner submitted representation on 16.06.2003, requesting payment of interest as per the directions of this Court in the earlier writ petition. In response to the said representation, the Assessing Officer, by communication dated 01.07.2003, stated that the correct amount of interest due to the petitioner as on 21.03.2003, was Rs.1,36,768/- and necessary proposal had been sent for obtaining sanction of the amount from the Government. After the said communication, there was a stalemate and the petitioner once against addressed the Assessing Officer by letter dated 31.07.2003, requesting for refund. The petitioner received a reply dated 08.08.2003, stating that the matter is pending with the Government for sanction of interest. Since nothing happened for over six months, the petitioner sent another representation on 11.02.2004. Since the petitioner was not paid the interest in spite of several representations, the petitioner has approached this Court and filed this writ petition.

28.The chain of events will clearly show that the petitioner has been dealt with most unfairly. The Department having revised the assessment in terms of the order passed by the first appellate authority and also refunded the excess tax paid, should have settled the interest amount also.

29.In the counter affidavit filed by the respondent, reliance has been placed on the order passed by the Joint Commissioner dated 28.05.2003, restoring the original assessment order and therefore, it is submitted that prayer for payment of interest does not arise, as it is the petitioner, who has to pay a sum of Rs.4,57,856/- as per the order passed by the Joint Commissioner, and they had paid only 50% of the tax, which has been demanded and the petitioner has retained the balance amount of 50% of the tax due to the Government from 29.08.2003. The order passed by the Joint Commissioner dated 28.05.2003, has been set aside by us in W.P.No.35839 of 2003. Therefore, the contention advanced by the respondent for refusing to pay interest by relying upon the order of the Joint Commissioner is no longer tenable. Therefore, the petitioner is entitled for payment of interest. However, on account of the events, which have taken place in the interregnum, 50% excess tax, which was refunded has been paid back by the petitioner to the Department and the remaining 50% is stated to be lying with the petitioner from 29.08.2003. Therefore, it is necessary that the interest should be re-worked taking note of the events, which have taken place, after the order passed by the first appellate authority and the order passed by the Joint Commissioner in exercise of suo motu revision and also the fact that 50% of the amount of excess tax, which was initially refunded, has been paid back by the petitioner to the Department. Further, the respondent-Department cannot deny payment of interest to the petitioner, in the light of the positive direction in W.P.No.10928 of 1998 dated 13.02.2006 wherein, the Court issued a positive direction to pay the interest at 12% per annum.

30.For all the above reasons, W.P.No.6254 of 2004 is allowed and the respondent is directed to refund 50% of the excess tax, which was paid back by the petitioner, pursuant to the order of the Joint Commissioner dated 28.05.2003, within a period of 30 days from the date of receipt of a copy this order and then re-compute the interest and intimate the petitioner about the interest, which is payable within a period of 10 days from the date of receipt of a copy of this order and on receipt of the computation, it will be open to the petitioner to point out any discrepancies, if any, within 7 days thereafter and intimate the Department after which, the Department shall pay the interest amount within 30 days thereafter.

31.In the result,

(i) W.P.No.35839 of 2003 is allowed, the order passed by the first respondent dated 28.05.2003, is set aside and the order passed by the first appellate authority, dated 20.01.1997 is restored;

(ii) In the light of the order passed in W.P.No.35839 of 2003, no separate orders are required in W.P.No.9363 of 2004 and accordingly, the same is closed; and

(iii) W.P.No.6254 of 2004 is allowed and the respondent is directed to refund 50% of the excess tax, which was paid back by the petitioner, pursuant to the order of the Joint Commissioner dated 28.05.2003, within a period of 30 days from the date of receipt of a copy this order and then re-compute the interest and intimate the petitioner about the interest, which is payable within a period of 10 days from the date of receipt of a copy of this order and on receipt of the computation, it will be open to the petitioner to point out discrepancies, if any, within 7 days thereafter and intimate the Department after which, the Department shall pay the interest amount within 30 days thereafter. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

abr

To

1.The Joint Commissioner III (SMR)
of Commercial Taxes,
Ezhilagam, Chepauk, Chennai-5.

2.The Appellate Assistant Commissioner (CT) IV,
IV Floor, Kuralagam Annexe,
Chennai-108.

3.The Deputy Commercial Tax Officer ,
Royapettah II Assessment Circle,
46, Greenways Road, Chennai-28.

+1cc to Mr.L.Maithili, Advocate, S.R.No. 17012

Pre-delivery Common Order made in
W.P.Nos.35839 of 2003, 6254 & 9363 of 2004

AAB(CO)
GN(17/04/2021)