IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.04.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

W.P.Nos.48896 & 48897 of 2006

Vijay Anand Confectionery,
S.F.No.41/8-B, Sendamangalam Main Road,
Thotipatty, C.S.Puram,
Rasipuram-637 408
Namakkal District,
Rep.by its Proprietor ..Petitioner in W.P.No.48896/2006

Shanthi Sweets,
30, V.Nagar Road,
Rasipuram – 637 408.
Namakkal District,
Rep.by its Proprietor ..Petitioner in W.P.No.48897/2006

Vs.

1.The Commissioner of Commercial Taxes,
Commercial Taxes and
Religious Endowments Department,
Ezhilagam, Chepauk,
Chennai.

2.The Commercial Tax Officer,
Rasipuram Assessment Circle,
Namakkal District. ..Respondents in both W.Ps

Prayer in W.P.No.48896 of 2006 : Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records of the 2nd respondent in TNGST No.3162880/2004-05 dated 25.10.06, quash the same.

Prayer in W.P.No.48897 of 2006 : Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records of the 2nd respondent in TNGST/3160256/2004-05 dated 25.10.06, quash the same.

For Petitioners	: Mr.S.Raveekumar [in bothW.Ps]
For Respondents	: Mr.R.Swarnavel Government Advocate[Tax] [in both W.Ps]

COMMON ORDER

The common relief sought for in the present writ petitions is to quash the orders of the 2nd respondent dated 25.10.2006, imposing 12% tax under residuary Entry No.40 of Part D of the first schedule of the TNGST Act.

2. The learned counsel for the petitioners reiterated that the petitioners are not the manufacturer of branded products and therefore, the petitioners are not liable to pay 12% tax. The issue regarding the manufacturing and sale of non-branded products, which all are not registered under the Trade and Merchandise Marks Act, 1958, then 12% tax cannot be imposed. The said issue has already been decided by this Court in W.P.No.47913 of 2006 dated 10.11.2017. The relevant paragraphs of the judgment are extracted hereunder:

> *"3.The petitioner has been assessed to higher rate of tax on the ground that the confectionery items produced by him and packed in covers containing the name V.R.S. Confectionery, Rasipuram is to be treated as a brand name and since the petitioner has not registered the same under the Trade and Merchandise Marks Act, 1958, they have to be taxed under the residuary entry 40 of Part D of the first schedule of the TNGST Act at 12% plus surcharge instead of 4% etc.*
>
> *4.The assessments for the years 2002-2003 and 2003-2004 were completed by the Assessing Officer accepting the fact that the petitioner is a producer of the unbranded confectionery and they have charged to tax at 4%. The*

problem arose during the year 2004-05 and it appears that the Assessing Officer informed the petitioner that he should approach the Commissioner of Commercial Tax and obtain clarification as regards the rate of tax for the confectionery products produced by them. The Commissioner of Commercial Taxes by clarification dated 29.08.2005 in clarification No.111 of 2005 clarified that the confectionery items produced by the petitioner, which are branded, but the brand name is not registered and hence, taxable at 12% under the residuary entry no.40 of Part D of the first schedule of the TNGST Act. The Commissioner having given such a clarification, the Assessing Officer was left with no other option and followed the clarification and assessed the petitioner to tax at 12%. The question would be whether the name of the petitioner mentioned in the packing would amount to a brand name.

5.Admittedly, the petitioner has not coined a word or a mark and the packing contains the petitioner's name, namely, V.R.S.Confectionery, Rasipuram, to indicate as to who produced those confectionery items and wherefrom it has been produced. Therefore, to state that the name V.R.S.Confectionery would amount to a brand or a trade name or a trade mark is a wrong interpretation. So far as the *clarification is concerned, admittedly, the petitioner did not have an opportunity of personal hearing before the clarification was issued. Though, the petitioner sought for revision of the clarification, the same was rejected by letter dated 31.07.2006.*

6.In my considered view, the mentioning of the name of the petitioner being the producer of those goods in the packing materials cannot be construed as a brand or a brand name or a trade mark or a trade name. At best, it can be taken to indicate the name of the producer of goods, which are contained in the packs.

7.As pointed out above, the clarification dated 29.08.2005 having been issued without notice to the petitioner, cannot be thrust upon the petitioner and he cannot be made to suffer by paying higher rate of tax. Thus, the clarification is held to be not enforceable against the petitioner, on account of the fact that they did not have adequate opportunity to object to the views of the Commissioner. As a consequence of these findings, the impugned assessment order has to be set aside.

8.One more point is to be noted that the *confectionery items have been specifically mentioned in entry item-4 (iii) of Part-B of first schedule of the TNGST Act taxable at 4%. This being a specific entry the general entry or residuary entry, could be invoked only when a product can be dealt with in any of the entries. Even assuming the respondents construe the products produced by the petitioner as a bakery product, even then, regardless of the product with a brand name or without a brand name registered under the Trade and Merchandise Marks Act, 1958, it would fall under entry Item-11 (ii) of Part-B of first schedule of the TNGST Act.*

12.In the result, the writ petition is allowed and the impugned order is quashed and it is held that the petitioner is liable to the taxed only at 4%. If any excess tax amount is collected from the petitioner, the same shall be refunded/adjusted."

3. In view of the fact that the writ petitions on hand are similar to the same, which was already decided by this Court, this Court is inclined to consider the writ petitions.

4. Accordingly, the orders impugned dated 25.10.2006 passed by the 2nd respondent in TNGST No.3162880/2004-05 and TNGST/3160256/2004-05 are quashed and the both the writ petitions are allowed. It is held that petitioners are liable to be taxed only at 4%. If any excess tax amount is collected from the petitioners, the same shall be refunded/adjusted by following the procedures. No costs.

08.04.2021

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Index : Yes/No
Speaking /Non-speaking order

To
1.The Commissioner of Commercial Taxes,
Commercial Taxes and
Religious Endowments Department,
Ezhilagam, Chepauk,
Chennai.

2.The Commercial Tax Officer,
Rasipuram Assessment Circle,
Namakkal District

S.M.SUBRAMANIAM, J.

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