IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.01.2021

CORAM

THE HON'BLE MR. JUSTICE C.SARAVANAN

W.P. No. 1768 of 2012

Tvl.Jamals,
Represented by its Managing Director,
Mr.S.C.M.Jamaldeen,
No.758, Mount Road,
Chennai - 600 002. ... Petitioner

Vs

Assistant Commissioner (CT)
Anna Salai-III,
Assessment Circle,
Chennai - 600 006. ... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorarified Mandamus, calling for the records on the file of the Assistant Commissioner (Commercial Taxes), Anna Salai, Assessment Circle, Chennai-6, the respondent herein in TIN No.33980640674/2007-08 dated 26.12.11 and quash the same as arbitrary, illegal violative of principles of natural justice, without jurisdiction and authority of law and consequential direction to the respondent to pass fresh assessment orders accordance with law.

For Petitioner : Mr.H.Nazirudeen
Senior Counsel

For Respondent : Mr.R.Swarnavel
Government Advocate

ORDER

The petitioner has challenged the revised Assessment Order dated 26.12.2011. The original assessment of the petitioner was accepted by order dated 30.08.2010. However, the Pre-Revision Notice was issued on 31.05.2011 on the ground that the petitioner failed to deduct tax on the works carried by the sub-contractors namely Tvl.Elite Contractor, Chennai, and Tvl.Raj Electricals, Chennai.

2. The petitioner replied to the above Pre-Revision Notice and stated that even though the petitioner had failed to deduct tax as required under the provisions of the TNVAT Act, 2006 read with TNVAT Rules, 2007, the sub-contractors who were also

registered dealers under the provisions of the TNVAT Act, 2006 had indeed paid the tax on the amount paid by the petitioner to them and therefore the petitioner should not be burdened with tax liability once again. However, by the impugned order, the respondent has held that the petitioner was liable to pay tax with the following observations:-

> "1. It was stated that Tvl.Elite Contractor, is an assessee in the files of the Assistant Commissioner (CT), Egmore-II Assessment Circle having registration TIN:33860720862 and stated that they have paid tax in Egmore II assessment circle. In support of the statement they have filed the copies of the return filed by Tvl.Elite Contractors in Egmore II Assessment Circle.
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> In this regard, it is informed that the assessee dealer should have deducted tax (TDS) @ 2% on the value of sub-contract of Rs.4,03,73,048.00 as provided under section 13 of the Act. If not, the assessee dealer should have demanded 'no liability certificate' in Form S from the sub-contractor as provided under Rule 9(2) of the TNVAT Rule 2007. But the assessee dealer failed to fulfill either of the above legal requirements. The copies of the return filed by the sub-contractor, may not be a valid proof that the sub-contractor Tvl.Elite Contractor have duly accounted for the said value of contract of Rs.4,03,73,048.00 in their account and paid tax due there on in Egmore II Assessment Circle. If the sub-contractor actually accounted for the said value of contract in their accounts, he could have easily obtained Form S certificate from the assessing authority concerned. In the absence of the above requirements, the value of sub-contract is included in the value of the works contract and the same is assessed to tax as proposed in the notice cited. However, Labour portion @ 30% on the value of the sub-contract witll be deducted and exempted as per the Rule.
>
> 2. Tvl.Raj Electricals:- The dealer filed copy of the assessment order in respect of the above sub-contractor. The value of the sub-contract is also below the taxable limit of 10 lakhs and hence the deduction is allowed as requested by the dealer.
>
> 3. Further, the dealers have stated that the deemed sale value of the materials have been taken for assessment without deducting the tax paid on the purchases of those materials. The dealers have not given the details of the quantum of the tax paid on the purchases. However the tax paid on the purchases has since been deducted from the purchases taken for arriving at the Deemed Sale Value as in the Revised

Annexure enclosed.

In view of the above the proposal proposed in the notice 2nd cited is confirmed with partial modification and the assessment for the year 2007-08 under TNVAT Act 2006 is revised as below.

Details	Turnover @ 4%	Turnover @ 12.5%	Total
Turnover reported as per returns	16197660.00	21551368.00	37749028.00
Deemed Sale Valuearrived at in the revised Annexure after deducting the tax portion from the purchase value	18335033.00	21449429.00	39784462.00

3. Challenging the impugned order, the learned senior counsel for the petitioner submits that the issue is no longer res integra and squarely covered by the decision of the Hon'ble Division Bench of this Court in S.A.A Ispahani Trust, Chennai Vs The Income Tax Officer T.D.S, Ward II, Chennai, 2013 SCC Online Mad 1260, which was also followed recently by this Court vide order dated 29.07.2019 in W.P. Nos. 22212, 22215 & 22216 of 2019, in M/s.Sulochana Cotton Spinning Mills (P) Limited, Tirupur Vs The Assistant Commissioner (CT), Tirupur. Both these decisions are inspired from the decision of the Hon'ble Supreme Court in Hindustan Coca Cola Beverage (P) Ltd Vs Commissioner of Income Tax, (2007) 8 SCC 463. It will be useful to refer in Paragraph 7 from the decision of the Hon'ble Supreme Court which reads as under:-

> '7. The Tribunal upon rehearing the appeal held that though the appellant assessee was rightly held to be an 'assessee in default', there could be no recovery of the tax alleged to be in default once again from the appellant considering that Pradeep Oil Corporation had already paid taxes on the amount received from the appellant. It is required to note that the Department conceded before the Tribunal that the recovery could not once again be made from the tax deductor where the payee included the income on which tax was alleged to have been short deducted in its

taxable income and paid taxes thereon. There is no dispute whatsoever that Pradeep Oil.'

4. Relevant Paragraphs from the decision of the Division Bench of this Court in S.A.A.Ispahani Trust case (referred to supra) in Paragraphs 10 to 12 reads as follows:-

'10. The Tribunal found that the assessee is obliged in W.P.No.22212, 22215 & 22216 of 2019 under Section 194C to deduct tax at source on contract payments as and when such payments exceed Rs.20,000/- and to pay such TDS to the Government account within one week from the last date of the month in which deduction is made. It is also found by the Tribunal that it is a clear case where the assessee has failed to deduct tax on the entire contract payments made to the contractor and the assessee has also failed to produce any evidence for the taxes already deducted as contended by them. Therefore, the Tribunal found that the assessee is in default under Section 201(1) and also liable to pay interest under Section 201(1A) from the day on which the tax was required to be paid under Section 194C up to the date of actual payment. These factual things rendered by all the authorities below in holding that the assessee is in default under Section 201(1) of the Income Tax Act do not warrant any interference by this Court. On the other hand, as already stated supra, the learned counsel for the assessee wanted this Court to follow the decision of this Court reported in MANU/SC/7803/2007: (2007) 293 ITR 226 (SC) (Hindustan Coca Cola Beverage P. Ltd., Vs Commissioner of Income Tax) and to grant the relief to the assessee as per the law laid down therein.

11. A perusal of the said order of the Hon'ble Supreme Court in Hindustan Coca Cola Beverage case would show that the assessee therein was held "as assessee in default".
Under Section 201(1) of the Act and also levied under Section 201(1-A). The assessee therein contended that the recipient therein has been assessed on their income and the tax due has been recovered from them by the Department and therefore no further tax could have been collected from W.P.Nos.22212, 22215 & 22216 of 2019 assessee therein. The said contention was accepted by the Tribunal. It was held that though the assessee therein was held to be as assessee in default, there could be no recovery of the tax alleged to be in default once again from the assessee therein considering the fact that the recipient had already paid the tax on the amount received from the assessee. The said order of the Tribunal was challenged before

the High Court which in turn interfered with the same. Further appeal came up before the Hon'ble Supreme Court. In the said appeal, the Apex Court found that the Tribunal came to the right conclusion that the tax once again could not be recovered from the appellant therein since the tax has already been paid by the recipient of the income. The Apex Court also relied on the circular issued by the Central Board of Direct Taxes in Circular No.275/201/95-IT (B) dated 29.1.1997 wherein it is declared that no demand visualised under Section 201(1) of the Income Tax Act should not be enforced after the tax deductor has satisfied the Revenue that taxes due have paid by the deductee-assessee. While holding so, the Apex Court however pointed out that such position will not alter the liability to charge interest under Section 201(1A) till the date of payment of taxes by the deductee assessee.

12. Going by the said decision, what emerges is that the even though the appellant herein is held as assessee in default, tax cannot be recovered from them, if the same has been paid by the recipient viz., TNREL. However, it would not absolve their liability to pay interest under Section 201(1A) from the date of its liability till the date of actual payment made by the recipient. There are no findings rendered by the authorities below with regard to the payment of tax by the W.P.Nos.22212, 22215 & 22216 of 2019 recipient and its quantum. Therefore, the matter requires to be remitted back to the Assessing Officer to re-work the quantum of liability as well as the interest in the light of the decision made by the Hon'ble Supreme Court reported in MANU/SC/7803/2007: (2007) 293 ITR 226 (SC) (Hindustan Coca Cola Beverage P. Ltd., Vs Commissioner of Income Tax). It is needless to say that the Assessing Officer should find out as to what extent the recipient had paid the tax. If the entire tax amount as claimed from the assessee herein has been paid by the recipient, then there cannot be any further demand of the same from the assessee. On the other hand, if the recipient had only paid part of the tax amount, then rest of the same shall be recovered from the assessee. Insofar as the interest demand is concerned, the assessee is liable to pay the interest from the date of its liability till the date of actual payment made by the recipient. Accordingly, the Assessing Officer is directed to re-compute the liability of the assessee and pass fresh orders. The questions of law raised in both the appeals are answered accordingly. The Tax Case Appeals are

disposed of accordingly. Consequently, the connected M.P is closed. No costs'.

5. In M/s.Sulochana Cotton Spinning Mills (P) Limited, Tirupur Vs The Assistant Commissioner (CT), Tirupur, this Court has remitted the case back under a similar circumstances to ascertain whether the sub-contractors had indeed paid tax or not. In paragraph 10, the Court held as follows:-

> '10. There is no disputation that the principle of law or the proposition is that, in cases of TDS, when the deductee has paid the entire tax liability on the monies received, the entity/person, who has the obligation to deduct at source cannot be mulcted with liability. However, the rider is that the entity which has the obligation of deduction and has not complied with the same is liable to pay interest for the delayed period, W.P.Nos.22212, 22215 & 22216 of 2019 besides penalty under Section 13(5) and 13(8) (respectively) of TNVAT Act.'

6. The learned counsel for the respondent submits that there are no contra decision of the subject and therefore submits that the matter can be remitted back in terms of Para (10) of the decision of this Court in M/s.Sulochana Cotton Spinning Mills (P) Limited, Tirupur Vs The Assistant Commissioner (CT), Tirupur referred to supra.

7. The impugned order also has been passed without following the Principles of Natural Justice. If the respondent had heard the petitioner before the impugned order perhaps the respondent may have dropped the proceedings. Therefore, the impugned order is quashed and the case is remitted back to the respondent to pass a fresh order to ascertain whether the sub-contractors engaged by the petitioner had indeed paid tax on the total value of the consideration paid by the petitioner.

8. In case, there was delay in payment of tax by sub-contractors, the petitioner will also be liable to pay interest on such delayed payment of tax. The petitioner will also be liable to pay penalty under Section 13(5) & 13(8) of the TNVAT Act, 2006 as held in M/s.Sulochana Cotton Spinning Mills (P) Limited, Tirupur Vs The Assistant Commissioner (CT), Tirupur.

9. The petitioner shall file his reply/representation if any together with evidence within a period of one month from the date of receipt of a copy of this order. The petitioner shall be heard by the respondent in person through physical hearing or through video-conferencing before fresh orders are passed in the remand proceeding.

10. The writ petition stands allowed by way of remand to the respondent to pass a fresh order within the period of three months from the date of receipt of a copy of this order. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To
Assistant Commissioner (CT)
Anna Salai-III,
Assessment Circle,
Chennai – 600 006.

+1 cc to Special Government Pleader, Sr.No. 3886/21

W.P. No. 1768 of 2012

SMI(CO)
RMP(19/02/2021)