

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.03.2021
PRONOUNCED ON : 29.03.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.18071 of 2013
and M.P.Nos.1 and 2 of 2013

M/s.Saint Gobain Glass India Ltd.,
Plot A-1, Sipcot Industrial Park,
Irrungattukottai,
Sriperumbudur,
Kancheepuram 602 105. ... Petitioner

vs

1. The Appellate Joint Commissioner (CT)
CT Annexe Building, III Floor,
Greams Road, Chennai 600 006.
2. The Deputy Commissioner (CT) IV,
Large Taxpayers Unit,
No.34 (Old No.123),
" Dugar Towers",
5th Floor, Marshal Road,
Egmore, Chennai 600 008. ... Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Certiorari to call for the records of the first respondent in the impugned order dated 17.05.2013 in A.P.No.39/2012, quash the same and the same is passed without jurisdiction and in violation of the provisions of Section 3 of the Central Sales Tax Act, 1956 and other settled principles of law .

For Petitioner : Mr.V.S.Manoj
For Respondents : Mr.R.Swarnavel
Government Advocate

O R D E R

The petitioner has challenged the impugned order dated 17.05.2013 passed by the 1st respondent/Joint Commissioner (CT), Appeals. The impugned order is revision of an order passed by the 2nd respondent/Deputy Commissioner (CT)-IV on 30.08.2012.

2. The issue for consideration before the 1st respondent/Appellate Joint Commissioner was whether the 2nd respondent/ Deputy Commissioner (CT)-IV was justified in demanding tax on certain transactions purportedly involving inter-state sales and branch transfers which were not supported by the Form-C and Form-F respectively.

3. The other issue was relating to the inclusion of freight into the taxable turn over for the purpose of payment of tax under Central Sales Tax Act, 1956.

4. Aggrieved by the order passed by the 2nd respondent, the petitioner had preferred an appeal before the 1st respondent which has culminated in the impugned order dated 17.05.2013.

5. In the impugned order, the 1st respondent accepted the contention of the petitioner that the freight element was not to be included into the taxable turnover as the sale took place at the premises of the petitioner and has therefore concluded that the transactions for which the petitioner had filed returns under Central Sales Tax claiming branch transfers/inter-state sale within the meaning of Section 3 of the Central Sales Tax Act, 1956 were indeed a local sale as the sale took place at the factory gate of the petitioner in Sriperumbadur.

6. Under these circumstances, the 1st respondent has passed the impugned order with the following observations:-

"Levy of Tax at 2% on the turnover relating to Freight Charges in respect of inter-state sales covered by C forms to the extent of Rs.53,91,75,180.00.

In respect of the above three disputes, it is observed from the assessment order that the learned assessing officer has levied tax at 3%, 2% and 12.5% on the turnover relating to Freight charges to the extent of Rs.12,07,33,866.00, Rs.53,91,75,180.00 and Rs.3,53,887.00 on the ground that the freight charges has been paid by the assessee which is only a pre-sale expenses and accordingly, the expenses had been added to the value of sale. Perusal of the sample invoices filed by the appellants revealed the fact that the sale in the hands of the appellants is ex-factory. It was also noted in terms and conditions that the delivery is Ex-factory. It was also certified by the appellants that the amounts indicated represents prices actually charged and that there is no flow of

additional consideration directly or indirectly from the buyer. The invoice raised proved that the delivery of the goods to the buyer takes place at the factory gate and only on the insistence of the buyer the delivery works has been taken by the appellants as it is not practically possible to inform the customer as the number of dispatches is more than 100 per day. As such there is no agreement between the buyer and the appellants and according to the appellants the invoice only formed as basis of the agreement. Thought the terms and conditions mentioned in the invoice form a type of agreement between the appellants and buyers, 7 conditions and terms mentioned therein does not speak clearly about the treatment of freight charges. According to the learned authorized representative, the appellant's acts as both seller and transporter and are acting independently and not related to each other and that too with the insistence of the buyer in other state. If it is so then the necessity of raising the freight charges in the sale invoice does not arise. In so far as decision relied by the appellants, the judgment referred in the case of State of Karnataka Vs. Bangalore soft drinks Pvt. Limited, Vimal Industries Vs. State of Tamil Nadu, Shri Kamraj Waste Paper Store Vs.State of Tamilnadu, Commissioner of Sales Tax Vs.Flour and Food Limited, Kiran Stone Crusher Vs.State of Orrisa, State of Tamil Nadu Vs.Chettinad Cement Corporation, India Potteries Limited Vs. ACCT, State of Tamil Nadu Vs. Larsen and Tourbo is not directly applicable to the instant case as the issue dealt therein related to local movement of goods (I.e within the state of Tamil nadu) and are not related to inter-state movement which is the only basis for the learned assessing officer to determine the issue on hand. The decision relied by the appellants which is related to CST transactions being CTT Vs.Indian Alumnum Cable Company Limited is also not identical to the case as the case referred pertains to charging of the freight charges separately billed and not raised along with the sale bill as in the case of the appellants. The bill relating to freight expenses are not raised simultaneously and are done at later stage. Similarly in the Ram Oxygen Private Limited case, the freight bills are separately raised as

supplementary bills along with other incidental expenses and hence not identical to the instant case. Further the decision rendered in the case of Tvl.Indian Rayon and Industries Limited is also not applicable as separate debit note has been raised in respect of freight charges and like the above two cases, this is also not helpful to the appellants. With regard to the decisions referred by the appellants running from 1 to 10 in page 5 of this order is not being lengthly discussed as it has been accepted that the invoice comprises certain terms and conditions that was agreed between the buyer and seller and it acts as a part of the agreement between the buyer and the seller. Now coming to the decision of the Central Excise relied by the appellants with the assumption that the clearance of the goods from the factory as identical to the clearance of the goods from the factory consequent to the sale and the treatment of freight charges with respect to levy of excise duty it has been observed that all conclusions drawn are with reference to the sales are Ex-factory and the place of removal is factory premises. It was also observed in the decisions referred that the delivery to the carrier at factory gate is delivery to the buyer. It was also observed from the sale invoices filed that the goods once sold will not be taken back and the payment terms are immediate. All this along with delivery ex-factory and ex-factory price mentioned in the invoice proved that the responsibility of the seller being appellants ends as soon as the goods are delivered to the buyer. It is also made clear that the appellants are not accepting any responsibility for any acts or omissions of the carrier once the goods are delivered to them from the factory.

This clearly proved that the sale concludes at the factory point which means that the disputed transactions are not CST transactions and only local transactions between the buyer and the appellants. The carrier takes delivery of the goods on behalf of the buyer and in the circumstances of the seller not having any responsibility clearly proved that the sale is a local sale and hence do not come under the purview of CST Act, 1956. Thus if the claim of the appellants that the freight charges do not

form part of the turnover then the entire transactions has to be treated as local sale and accordingly the assessing officer is empowered to assess the CST transaction as local sale and assess at the appropriate local rate at 12.5%. Hence by allowing the claim of the appellants, the learned assessing officer is also directed to pass an order by assessing the entire CST turnover at the local rate at 12.5% as the sale concluded within the State of Tamil nadu."

7. Though there are other issues also relating to discounts and dis-allowance, the impugned order of the 1st respondent primarily sought to be assailed on the ground that the 1st respondent exceeded the jurisdiction under Section 52 of the Tamil Nadu Value Added Tax Act, 2006 (TN VAT Act, 2006 for brevity) as made applicable to assessment under Central Sales Tax Act vide Section 9 (2) of the later Act. It is submitted that the power of the Appellate Authority under Section 52 (2) & (3) of the TNVAT Act, 2006 is restricted.

8. It is submitted that the 1st respondent as an Appellate Authority cannot alter the basis of tax assessed by an original authority in an Appellate Proceedings. It is submitted that his powers are circumscribed in terms of sub-clause 52(2) of the TNVAT Act 2006.

9. In this connection, a reference was made to the decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax (Central), Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria, (1967) 66 ITR 443, wherein, while dealing with Section 31 of the Income Tax Act, 1922, the Court held as follows:-

"The principle that emerges as result of the authorities of this Court is that the Appellate Assistant commissioner has no jurisdiction. Under Section 31(3) of the Act, to assess a source of income which has not been processed by the Income Tax Officer and which is not disclosed either in the returns filed by the assessee or in the beyond the subject-matter of the assessment. In other words, the power of enhancement under Section 31 (3) of the Act is restricted to the subject-matter of assessment or the sources of income which have been considered expressly or by clear implication by the Income Tax Officer from the point of view of the taxability of the assessee. It was argued by Mr Viswanath Iyer on behalf of the appellant that by applying the principle to the present case, the Appellate Assistant commissioner and jurisdiction to enhance the quantum of income of

the assessee. It was pointed out that the fact of alleged transfer of Rs.5,85,000 to for besganj branch was noted by the Income Tax officer and also the fact tht it did not reach Forbesganj on the same day. So, it was argued that in the appeal the Appellate Assistant commissioner had jurisdiction to deal with the question of the taxability of the amount of Rs.5,85,000 and to hold that it was taxable as undisclosed profits in the hands of the assessee. We are unable to accept the argument put forward on behalf of the appellant as correct. It is true that the Income Tax Officer has referred to the remittance of Rs.5,85,000 from the Caluctta branch, but the Income Tax Officer considered the despatch of this amount only with a view to test the genuineness of the ntires relating to Rs.4,30,000 in the books of the Forebsganj branch."

10. It is therefore submitted that it was not open for the 1st Respondent as an Appellate Authority to alter the basis on which the assessment was completed by the lower Authority in the appeal proceedings.

11. A reference was also made to the decision of the Hon'ble Supreme Court in Commissioner of Income-Tax, Bombay City I, Bombay Vs. Shapoorji Pallonji Mistry, [1962] 44 ITR 891 (SC), wherein, the Hon'ble Supreme Court referred to other decision in the case of Commissioner of Income Tax Vs. McMillan and Co, [1957] 31 ITR 909, wherein it was held as follows:-

"It is clear that the Appellate Assistant commissioner has been constituted a revising authority against the decisions of the Income-Tax Officer; a revising authority not in the narrow sense of revising what is the subject-matter of the appeal, not in the sense of revising those matters about which the asessee makes a grievance, but a revising authority in the sense that once the appeal is before him he can revise non only the ultimate computation arrived at by the Income-Tax Officer but he can revise every process which led to the ultimate computation or assessment. In other words, what he can revise is not merely the ultimate amount which is liable to tax, but he is entitled to revise the various decisions given by the Income-Tax Officer in the course of the assessment and also the various incomes or deductions which came in for consideration of

the Income-Tax Officer.

12. The learned counsel for the petitioner further submitted that the decision of the Hon'ble Supreme Court in Commissioner of Income-Tax, Bombay City I, Bombay Vs. Shapoorji Pallonji Mistry, [1962] 44 ITR 891 (SC), held as under:-

" 9. The question is whether we should accept the interpretation suggested by the Commissioner in preference to the one, which has held the field for nearly 37 years. In view of the provisions of Sections 34 and 33-B by which escaped income can be brought to tax, there is reason to think that the view expressed uniformly about the limits of the powers of the Appellate Assistant Commissioner to enhance the assessment has been accepted by the legislature as the true exposition of the words of the section. If it were not, one would expect that the legislature would have amended Section 31 and specified the other intention in express words. The Income Tax Act was amended several times in the last 37 years, but no amendment of Section 31(3) was undertaken to nullify the rulings, to which we have referred. In view of this, we do not think that we should interpret Section 31 differently from what has been accepted in India as its true import, particularly as that view is also reasonably possible."

13. It is further submitted that in case the basis of assessment was to be altered, remedy under Section 55 of the TNVAT Act, 2006 was available to the Assessing Officer who assessed the returns under Tamil Nadu Vat Act, 2006 and it was not open for the Appellate Joint Commissioner (CT), the 1st respondent under Central Sales Tax Act, 1956 herein, to alter the very basis on which the assessment was completed by an authority under TNVAT Act, 2006 as the issue was confined only to non-production of Form-C and Form-F and the inclusion/exclusion of the freight element under Central Sales Tax Act, 1959 before the 1st respondent.

14. Defending the impugned order, the learned counsel for the respondents submits that the scope of Section 52(2)(3) is vast and it includes powers to set aside the assessment and can direct the Deputy Commissioner (Assessment)] to make a fresh assessment after such further inquiry as may be directed or to pass such other orders as he may think fit. He therefore submits that the impugned order is unavailable and therefore the present writ petition is liable to be dismissed.

15. He further submits that the decision of the Hon'ble

Supreme Court in Commissioner of Income Tax (Central), Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria, (1967) 66 ITR 443 cited by the learned counsel for the petitioner is not applicable to the facts of the present case.

16. It is submitted that under Section 52(3)(a)(iii) of the TNVAT Act, 2006 was wide enough 'to pass such other orders as he may think fit'. He submits that this was not there in Section 31 of the Income Tax Act, 1992 when the above decision was rendered and therefore the decisions cited by the learned counsel for the petitioner was distinguishable and in-applicable to the facts of the present case.

17. The learned counsel for the respondents reiterated the submissions in Paragraph (5) of the Counter Affidavit and submitted in respect of para Nos.9 to 11 of the affidavit that the provisions of Section 52 of the TNVAT Act 2006 confer the appellate authority with a wide jurisdiction to issue an order in relation to the matter in appeal before him. This jurisdiction is not merely confined to remand, confirmation, reduction, enhancement or annulment of the assessment under appeal.

18. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Government Advocate for the respondents.

19. Assessments under the Tax enactments are by and large based on the returns filed by an assessee. In the case of Tamil Nadu Value Added Tax, 2006 and the Central Sales Tax Act, 1956, it is certainly driven by the returns filed by a "dealer" unless no returns were filed. In this case the petitioner had filed returns under the provisions of the Central Sales Tax Act, 1956.

20. Section 52(3) of the Tamil Nadu Value Added Tax Act, 2006 reads as under:-

52. Appeal to Appellate Joint Commissioner: -

- (1)
- (2) The appeal shall be in the prescribed form and shall be verified in the prescribed manner and shall be accompanied by such fee not exceeding one hundred rupees, as may be prescribed.
- (3) In disposing of an appeal, the Appellate Deputy Commissioner may, after giving the appellant a reasonable opportunity of being heard, and for the sufficient reasons to be recorded in writing -
 - (a) in the case of an order of assessment -
 - (i) confirm, reduce, enhance or annul the assessment or the penalty

- or both;
- (ii) set aside the assessment and direct the Assistant Commissioner (Assessment) to make a fresh assessment after such further inquiry as may be directed; or
 - (iii) pass such other orders as he may think fit; or
- (b) in the case of any other order, confirm, cancel or vary such order:
- Provided that at the hearing of any appeal, the Assistant Commissioner (Assessment) shall have the right to be heard either in person or by a representative.

21. Section 52 of the Tamil Nadu Value Added Tax Act, 2006 confers wide power on an Appellate Authority like the first respondent as is apparent from a cursory reading of the Section 52(3)(a)(i) & (iii) of the Tamil Nadu Value Added Tax Act, 2006. The power is not limited to merely uphold, modify or set aside the order of the assessment on an appeal. It also extends to issue such directions to the Assessing Officer to make fresh assessment after further enquiry as may be directed or to pass such other orders as he/she may think fit.

22. In this case, the Assessing Officer had wrongly included the freight element into the taxable turnover. Aggrieved by the said order, the petitioner preferred an appeal before the first respondent who on perusing the invoice filed by the petitioner found that the transaction in question was not the transaction which was liable to tax under the provisions of the Central Sales Tax Act, 1956 as the sale took place at the factory gate of the petitioner.

23. The petitioner had also admitted before the first respondent that the freight collected in their invoices did not form part of the sale price since it was not a pre-sale expense as determined by the Assessing Officer as their sales were ex-factory.

24. If in the course of such an appellate proceeding, an Appellate Authority finds that the trajectory of the assessment was deliberately diverted to make an erroneous assessment like in the present case by wrongly claiming the transaction to be an inter-state sale when indeed it was a local -sale at the factory gate of the petitioner and was liable to tax under the provisions of the Tamil Nadu Value Added Tax Act, 2006, in my view, it will be well within the rights of the 1st respondent as an Appellate Authority to direct the assessing officer to pass suitable order under Section 52 of the Tamil Nadu Value Added

Tax Act, 2006 which provision is applicable to appeal under CST Act, 1956. This is what the 1st respondent as an Appellate Authority has done.

25. The first respondent therefore rightly concluded that the sale was concluded at the factory gates itself and therefore the freight element cannot form part of the taxable turnover as was rightly contented by the petitioner.

26. Since the sale took place at the factory gate, the sale never assumed the character of an inter-state sale. It was actually a local sale. It was therefore to be assessed as a local sale under Tamil Nadu Value Added Tax Act, 2006.

27. In my view, Section 52(2) of the said Tamil Nadu Value Added Tax Act, 2006 cannot be interpreted in such a manner that an Appellate Authority will be forced to uphold a wrong assessment. Merely because the returns were filed by treating the transaction as that of the inter-state sale cannot mean such wrong assessment has to be upheld.

28. The decision of the Hon'ble Supreme Court in the case of Commissioner of Income Tax (Central), Calcutta Vs. Rai Bahadur Hardutroy Motilal Chamaria, (1967) 66 ITR 443 and another decision of the Hon'ble Supreme Court in Commissioner of Income Tax, Bombay City I, Bombay Vs. Shapoorji Pallonji Mistry, (1962) 44 ITR 891 (SC) rendered in the context of Section 31 of the Income Tax Act, 1922 are not relevant to the facts of the present case and cannot be applied as first respondent has not enhanced the tax in the impugned order.

29. Though, these provisions are parimateria, the presence of Sub clause (b) to Section 52(3) of the Tamil Nadu Value Added Tax Act, 2006 makes all the difference. Both the provisions are reproduced below:-

35. Section 52 of the Tamil Nadu Value Added Tax Act, 2006	Section 31 of the Income Tax Act, 1922.
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(3) In disposing of an appeal, the Appellate Deputy Commissioner may, after giving the appellant a reasonable opportunity of being heard, and for the sufficient reasons to be recorded in writing - (a) in the case of an order of assessment - (i) confirm, reduce, enhance or annul the assessment or the penalty or both; (ii) set aside the assessment and direct the Assistant Commissioner (Assessment) to make a fresh assessment after such further inquiry as may be directed; or (iii) pass such other orders as he may think fit; or (b) in the case of any other order, confirm, cancel or vary such order: Provided that at the hearing of any appeal, the Assistant Commissioner (Assessment) shall have the right to be heard either in person or by a representative.	(3) In disposing of an appeal the Appellate Assistant Commissioner may, in the case of an order of assessment, (a) confirm, reduce, enhance or annul the assessment, or (b) set aside the assessment and direct the Income Tax Officer to make a fresh assessment after making such further inquiry as the Income Tax Officer thinks fit or the Appellate Assistant Commissioner may direct, and the Income Tax Officer shall thereupon proceed to make such fresh assessment and determine where necessary the amount of tax payable on the basis of such fresh assessment....
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30. That apart, the first respondent has merely directed the proper officer to pass appropriate orders which is within the powers vested with the 1st respondent. Therefore, I am inclined to differ with the views expressed in these two cases.

31. It must be remembered, an appellate proceeding under a tax enactment is a continuation of the original assessment proceeding like an appellate proceeding against a decree or order in a civil suit. Its purpose is to determine the correct tax liability of an assessee or the dealer as the case may be. An assessee is neither required to pay more or less. It is required to pay the correct tax liability. Likewise, the authority under the Act can neither dole out concession which is not available or include any amount on which no tax is payable.

32. As an Appellate Authority, the 1st respondent is required to merely examine the correctness of the order passed based on the returns filed by an assessee. Therefore, if the first respondent as an Appellate Authority, finds that the petitioner had wrongly filed return by treating a transaction as that of an inter-state when it indeed it was that of a local sale, as an Appellate Authority, the 1st respondent was well within his rights to direct the Assessing officer to complete assessment in accordance with law.

33. In the impugned order, the first respondent has not added any tax liability in the impugned order. The first respondent has merely directed the jurisdictional Assessing Officer to exercise the jurisdiction by revising the assessment. The original assessment which was impugned before the 1st respondent proceeded on a wrong assumption that the transactions were liable to tax under the provisions of the Central Sales Tax Act, 1956 when indeed the transaction in question was liable to tax under the provisions of the Tamil Nadu Value Added Tax Act, 2006.

34. In my view, the direction in the impugned order to the Assessing Officer was not outside the scope of Section 52 of the Tamil Nadu Value Added Tax Act, 2006. The impugned order was based on the facts put forth by the petitioner. Therefore, I do not find any merits in the present Writ Petition.

35. While upholding the impugned order insofar as it directs the second respondent to complete the assessment under the provisions of the Tamil Nadu Value Added Tax Act, 2006, I also direct the Assessing Officer to complete the assessment under the provisions of the Central Sales Tax Act, 1956 regarding the transaction involving branch transfer if the petitioner has produced requisite Form F. This exercise shall be carried out within a period of three months from the date of receipt of a copy of this order.

36. This Writ Petition is disposed of with the above observations. No cost. Consequently, connected Miscellaneous Petitions are also closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

kkd

To

1. The Appellate Joint Commissioner (CT)
CT Annexe Building, III Floor,
Greams Road, Chennai 600 006.
2. The Deputy Commissioner (CT) IV,
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+1cc to K.Vaitheeswaran, Advocate, SR.No.21713.

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