

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 12.02.2021

Pronounced on : 19.02.2021

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.No.8255 & 8256 of 2015

and

M.P.Nos.1 & 1 of 2015

(Through Video Conferencing)

Tvl Sri Rajeshwari Stores,
Represented by its Partner
Thiru G.Dhinakaran,
No 9, Union Office Road,
Tirukoilur, Villupuram District.

... Petitioner
in both W.Ps.

Vs.

1.The State of Tamil Nadu,
Represented by
The Secretary to Government,
Commercial Taxes Department,
Fort St. George, Chennai - 600 009.

2.The Commercial Tax Officer,
Tirukoilur Assessment Circle,
2nd floor, No.59A, Sannadhi Street,
Tirukoilur 605 557.

... Respondents
in both W.Ps.

Writ Petitions filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, calling for the records in respect of the Revised Assessment Order TIN 33624760462/2010-11 and TIN 33624760462/2011-12 both dated 30.01.2015 passed by the 2nd respondent in respect of the assessment years 2010-11 and 2011-12 respectively under the Tamil Nadu Value Added Tax Act, 2006, quash the same.

For Petitioner : Mr.Adithya Reddy in both W.Ps.

For Respondents: Mr.R.Swarnavel, Govt. Adv.
in both W.Ps.

C O M M O N O R D E R

By this common order, both the writ petitions are being disposed of.

2. In these writ petitions, the petitioner has challenged the Assessment orders both dated 30.01.2015 passed by the second respondent for the Assessment Years 2010-2011 and 2011-2012. By the impugned orders, the petitioner has been called upon to pay the differential tax on the goods sold in terms of Section 3(4) (b) of the Tamil Nadu Value Added Tax as it stood upto 25.09.2011.

3. The petitioner had availed the benefit of Section 3(4) (a) of the Tamil Nadu Value Added Tax Act, 2006 and had paid tax at concessional rate of tax. As per the aforesaid proviso, every dealer, who effects second and subsequent sale of goods purchased within the State, whose turnover relating to taxable goods, for a year, is less than Rs.50,00,000/- may, at his option, instead of paying tax under sub-section (2), pay a tax, for each year, on his turnover relating to taxable goods at such rate not exceeding one per cent, as may be notified by the Government. Section 3(4) (a) of the Tamil Nadu Value Added Tax Act, 2006 is an exception to Sub-Section (2) to Section 3 and is subject to Sub-Section (1) to Section 3 of the Act.

4. The impugned orders passed by the second respondent confirm the demand in terms of Section 3(4) (b) of the TNVAT Act, 2006 as it stood upto 25.09.2011. The said Sub-Clause was amended by Act No.27 of 2011 with effect from 26.09.2011. The contention of the petitioner in this writ petitions is that the amendment in the year 2011 vide Act No.27 of 2011 clarified the law and is therefore retrospective. Therefore, the petitioner cannot be imposed with tax liability in terms of unamended provisions as it stood prior to its substitution with effect from 26.09.2011.

5. The learned counsel for the petitioner has placed reliance on the following two recent decisions of the Madurai Bench of this Court and this Court:-

i. Tvl.Shandmugamari Timbers V. The Commercial Tax Officer, Chokkikulam Assessment Circle, dated 20.12.2018 in WP(MD).No.3744 of 2015,.

ii.Makkal Stores and Others V. State of Tamilnadu, dated 03.10.2019 in W.P.No.9996 of 2012 and etc.

6. As per these two decisions, the amendment brought to Section 3(4) (b) of the Tamil Nadu Value Added Tax Act, 2006 vide Act No.27 of 2011 clarified the law and therefore the benefit of

amendment was to be granted to the petitioner for a period covered by the prior to amendment.

7. The learned counsel for the petitioner also drew my attention to the statement and objects of the amendment in 2011 to highlight the amendment. He further submitted that it was brought to eliminate the hardship caused to the dealers in as much as the provisions sought to tax on the entire value of the sale, on which, the dealer would not have collected tax at the rate prescribed under Section 3(2) of the Tamil Nadu Value Added Tax Act, 2006.

8. Defending the impugned orders, the learned Government Advocate for the respondents contended that the statement of objects of the Bill, which led to the amendment in 2011, makes it clear that the material alterations were made to the provisions to redress the grievance of the dealer. Prior to 26.09.2011, a dealer could avail input tax credit on the purchases made from the date and on the stock available but this has been done away. He therefore submits that the amendment to Section 3(4)(b) cannot be given retrospective effect.

9. The learned Government Advocate for the respondent further submitted that since the petitioner's turnover during the Assessment Year 2010-2011 had crossed the threshold of Rs.50,00,000/-, i.e. Rs.50,20,832/-, the petitioner was not entitled for the concession under Section 3(4)(a) of the TNVAT Act, 2006 during the Assessment Year 2011-12.

10. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Government for the respondents. I have also perused the two decisions cited by the learned counsel for the petitioner, wherein, it has been construed that the amendment to the charging Section 3(4)(b) of the Tamil Nadu Value Added Tax Act, 2006 is clarificatory.

11. The amended and unamended Section 3(4)(b) of the TNVAT Act, 2006 read as under:

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Section 3(4) (b) of the TNVAT Act, 2006 upto 25.09.2011	Section 3(4) (b) of the TNVAT Act, 2006 with effect from 1.4.2012 *
If the turnover relating to taxable goods of a dealer paying tax under Clause (a), in a year, reaches rupees fifty lakhs at any time during that year, he shall inform the assessing authority in writing within seven days from the date of which such turnover has so reached. Such dealer is liable to pay tax under sub-section (2) on all his sales of rupees fifty lakhs and above and he is entitled to the input tax credit on the purchases made from the date, and on the stock available with him, the purchases of which has been made within ninety days before the date, on which such turnover has reached rupees fifty lakhs.	Such dealer is liable to pay tax under Sub-Section (2) on all his sales of rupees fifty lakhs and above, the expression "'Such dealer may pay a tax for each year on his turnover relating to taxable goods upto rupees fifty lakhs at such rate not exceeding one per cent, as may be notified by the Government and is liable to pay tax under sub-section (2) on all his sales of taxable goods above rupees fifty lakhs'" shall be substituted.

* Vide G.O.Ms.No.135, Commercial Taxes and Registration (B1), dated 31.10.2011.

12. Under the provision as it read prior to the amendment, on reaching the threshold, a dealer was liable to pay tax under Sub-Section (2), on all his sales of Rs.50 lakhs and above and was entitled to avail input tax credit on the purchases made from and the date, and on the stock available with him, the purchase of which has been made within 90 days before the date, such turnover on which has reached Rs.50 lakhs.

13. Therefore, the petitioner ought to have stopped selling goods on reaching the threshold limit of 50 lakhs. Instead, the petitioner continued to make sales and thereby disqualifying itself from the concession under Section 3(4) (b) of the Tamil Nadu Value Added Tax Act, 2006 for the current assessment year and for the succeeding assessment year.

14. It has to be construed that the petitioner knowingly availed the benefit of concession under Section 3(4) (a) of the Tamil Nadu Value Added Tax Act, 2006 and violated the conditions

during the Assessment Year 2010-2011. The fact that the petitioner may have sold the stocks up to the sale for a value of Rs.50 lakhs by charging tax at 1% and was unable to recover such tax from the customer is of no consequence, as the law mandated the petitioner to pay tax at the normal rate of tax after crossing the threshold limit of Rs.50 lakhs.

15. The concession under Section 3(4)(a) of the Tamil Nadu Value Added Tax Act, 2006 is in the form of a partial exemption from payment of tax and therefore, it was incumbent on the part of the petitioner to have arranged its affairs in accordance with law as it prevailed. This concept of switching over under the value-based exemption is not new under the tax regimes, particularly, in the context of value-based exemptions under the central excise laws.

16. The petitioner should have therefore either restricted the sales to Rs.50 lakhs during the financial year or face the consequence. Having availed the concession under Section 3(4)(a) of the Tamil Nadu Value Added Tax Act, 2006 for payment of tax, the petitioner should have ensured that it did not cross the threshold limit of Rs.50 lakhs. Therefore, petitioner is bound by the consequences under Section 3(4)(b) of the Tamil Nadu Value Added Tax Act, 2006.

17. Since the petitioner crossed the threshold limit of 50 lakhs during the Assessment Year 2010-2011, the petitioner was not entitled to concession under section 3(4)(a) of the Tamil Nadu Value Added Tax Act, 2006 during the succeeding Assessment Year, i.e. Assessment Year 2011-12 in terms of Sub-Clause (ii) to Section 3(4)(a) of the Tamil Nadu Value Added Tax Act, 2006 as the petitioner incurred disqualification for availing the concession during 2010-2011 and for availing concession during 2011-2012.

18. Therefore, there is no case made out by the petitioner for any interference against the impugned orders passed by the second respondent for the Assessment Year 2011-12. Therefore, there is no merits in W.P.No.8256 of 2015.

19. The petitioner is therefore entitled input tax credit for being set-off against the tax liabilities as the petitioner was liable to pay tax under Section 3(2) of the Tamil Nadu Value Added Tax Act, 2006.

20. Coming to the previous Assessment Year 2010-11, it should be remembered that the cardinal rule under the taxing statutes law is to apply the law as it stood during the relevant period. There is no scope for interpretation based on the subsequent amendment to the law during the subsequent Assessment Year.

21. This is the law laid down by the Hon'ble Supreme Court in CIT v. Scindia Steam Navigation Co. Ltd, AIR 1961 SC 1633 : (1962) 1 SCR 788. The Hon'ble Supreme Court there held that the liability to pay tax is computed according to the law in force at the beginning of the assessment year, i.e. the first day of April, and any change in law affecting tax liability after that date though made during the currency of the assessment year, unless specifically made retrospective, does not apply to the assessment for that year.

22. Therefore, normally, a subsequent amendment in a taxing statutes cannot be used to reopen the assessment by implying that the law was amended was intended to be applied retrospectively. It can either create a right or liability for the past assessments. To do so would be to imply to what was not implicit in the law as it stood unless such a law has been made with retrospective effect.

23. In this context, the observation of Lord Cairns in Partington Vs. Attorney General, (1869) LR 4 HL 100 is apt when he said "... as I understand the principle of all fiscal legislation it is this: if the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

24. The Hon'ble Supreme Court has also often made reference to a well-known passage of Rowlatt, J. in Cape Brandy Syndicate Vs. Commissioners of Inland Revenue, (1921) 1 KB 64 in several cases. In CIT Vs. Yokogawa India Ltd., (2017) 2 SCC 1 : 2016 SCC OnLine SC 1491, the Honourable Supreme Court observed as under:-

8. The cardinal principles of interpretation of taxing statutes centres around the opinion of Rowlatt, J. In Cape Brandy Syndicate v. Inland Revenue Commissioners [Cape Brandy Syndicate v. Inland Revenue Commissioners, (1921) 1 KB 64] which has virtually become the locus classicus [A classical passage : a standard passage important for the elucidation of a word or subject (See: Webster's Third New International Dictionary, Vol. II, p. 1329).] . The above would dispense with the necessity of any further elaboration of the subject notwithstanding the numerous precedents available inasmuch as the evolution of all such principles are within the

four corners of the following opinion of Rowlatt, J.: (Cape Brandy case [Cape Brandy Syndicate v. Inland Revenue Commissioners, (1921) 1 KB 64] , KB p. 71)

"... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

25. Though the court in Tvl. Shanmugamari Timbers's case referred to supra has interpreted the subsequent amendment to Section 3(4) (b) of the Act to be retrospective by placing reliance on the decision of the Hon'ble Supreme Court in Commissioner of Income Tax (Central) Vs. Vatika Township Private Limited, 2015 (1) SCC 1., it is to be noted that the reasoning given therein would not have actually further the case of the petitioner therein.

26. In CIT Vs. Vatika Township (P) Ltd., (2015) 1 SCC 1, while dealing with 42.1, the Hon'ble Supreme Court referred to the "Notes on Clauses" appended to the Finance Bill, 2002 while proposing insertion of proviso to Section 113 to the Income Tax Act, 1961, wherein, it was stated that "this amendment will take with effect from 1-6-2002".

27. It observed that these become epigraphic [Ed.: As per the Oxford Dictionary, "epigraphic" here means: intending to suggest the theme or purpose of the amendment.] words, when seen in contradistinction to other amendments specifically stating those to be clarificatory or retrospective depicting clear intention of the legislature. The Court also considered few other clauses where it could be seen from the same Notes that a few other amendments in the Income Tax Act were made by the same Finance Act specifically making those amendments retrospective. The Notes on Clauses show that the legislature is fully aware of three concepts:

- i. prospective amendment with effect from a fixed date;
- ii. retrospective amendment with effect from a fixed anterior date; and
- iii. clarificatory amendments which are retrospective in nature.

28. The Hon'ble Supreme Court in Commissioner of Income Tax

(Central) Vs. Vatika Township Private Limited, 2015 (1) SCC 1, further held that an explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous act. The Court there was concerned with proviso to Section 113 inserted by the Finance Act, 2002 with effect from June 2002 which was to the following effect:

"Provided that the tax chargeable under this section shall be increased by a surcharge, if any, levied by any Central Act and applicable in the assessment year relevant to the previous year in which the search is initiated under Section 132 or the requisition is made under Section 132-A."

29. The court there held that it is well settled that if a statute is curative or merely declaratory of the previous law, retrospective operation is generally intended.

30. It observed that provision for surcharge under the Finance Act, 2002 was in existence since 1995, insofar as levy of surcharge for block assessment was concerned. However, it was introduced by insertion of aforesaid proviso to Section 113 therefore a question arose as to whether this surcharge on block assessment has been levied for the first time by the aforesaid proviso coming into effect from 1-6-2002 or it is only clarificatory in nature because of the reason that the provision for surcharge was made in the Finance Act in the year 1995 and that covered surcharge on block assessment as well.

31. After discussion, the Court in para 26 held as follows:-

26. Notwithstanding the aforesaid position clarified by us, we are of the opinion that dehors this discussion, in any case, on the application of general principles concerning retrospectivity, the proviso to Section 113 of the Act cannot be treated as clarificatory in nature, thereby having retrospective effect. To make it clear, we need to understand the general principles concerning retrospectivity.

32. Again in para 31 the Court held as under:-

31. When we examine the insertion of the proviso in Section 113 of the Act, keeping in view the aforesaid principles, our irresistible conclusion is that the intention of the legislature was to make it prospective in nature. This proviso cannot be treated as

declaratory/statutory or curative in nature.

33. The discussion in rest of the paragraphs in the said judgment explained when an enactment would be and when it would not be clarificatory.

34. The Court observed that a Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit*: law looks forward not backward. It further observed that in *Phillips v. Eyre* [(1870) LR 6 QB 1], it was held that a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

35. Only where a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators' object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective.

36. If a new Act is 'to explain' an earlier Act, it would be without object unless construed retrospective. An explanatory Act is generally passed to supply an obvious omission or to clear up doubts as to the meaning of the previous Act. It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended. The language 'shall be deemed always to have meant' is declaratory, and is in plain terms retrospective.

37. In the absence of clear words indicating that the amending Act is declaratory, it would not be so construed when the pre-amended provision was clear and unambiguous. An amending Act may be purely clarificatory to clear a meaning of a provision of the principal Act which was already implicit. A clarificatory amendment of this nature will have retrospective effect and, therefore, if the principal Act was existing law which the Constitution came into force, the amending Act also will be part of the existing law."

38. Tamil Nadu Value Added Tax (Fourth Amendment) Act, 2011

[Act No.27 of 2011] received the assent of the Governor on 26.09.2011. Section 1(2) of the Tamil Nadu Value Added Tax (Fourth Amendment) Act, 2011 [Act No.27 of 2011] states that the amendment will come into force on such date as the State Government may, by notification, appoint. This is evident from the reading of the aforesaid Gazette Notification which reads as under:-

The following Act of the Tamil Nadu Legislative Assembly received the assent of the Governor on the 26th September 2011 and is hereby published for general information:-

ACT No. 27 of 2011.

An Act further to amend the Tamil Nadu Value Added Tax Act, 2006.

BE it enacted by the Legislative Assembly of the State of Tamil Nadu in the Sixty-second Year of the Republic of India as follows:-

1. (1) This Act may be called the Tamil Nadu Value Added Tax (Fourth Amendment) Act, 2011.

(2) It shall come into force on such date as the State Government may, by notification, appoint.

2. In section 3 of the Tamil Nadu Value Added Tax Act, 2006, in sub-section (4), in clause (b), for the expression "Such dealer is liable to pay tax under sub-section (2) on all his sales of rupees fifty lakhs and above", the expression "Such dealer may pay a tax for each year on his turnover relating to taxable goods upto rupees fifty lakhs at such rate not exceeding one per cent, as may be notified by the Government and is liable to pay tax under sub-section (2) on all his sales of taxable goods above rupees fifty lakhs" shall be substituted.

(By order of the Governor)

G. JAYACHANDRAN,
Secretary to Government, Law Department.

39. The above amendment to Section 3(4)(b) of the Tamil Nadu Value Added Tax Act, 2006 received the assent of the Governor on 26.09.2011. It was notified vide G.O.Ms.No.135, Commercial Taxes and Registration (B1), dated 31.10.2011 for the purpose of

Section 1(2) of Act No.27 of 2011.

40. Though the said amendment was notified vide G.O.Ms.135, Commercial Taxes and Registration (B1), dated 31.10.2011, the Government appointed the 1st day of April 2012 as the date from which the said amendment was to come into force. It has not declared that the amendment will come into force from an anterior date. The relevant portion of the said G.O.Ms. is reproduced below:-

DATE OF COMING INTO FORCE OF THE VALUE ADDED TAX
(FOURTH AMENDMENT), ACT, 2011.

[G.O. Ms. No. 135, Commercial Taxes and
Registration (B1), 31st October 2011, Aippasi 14,
Thiruvalluvar Aandu-2042.]

No. II(2)/CTR/437(c-2)/2011.

In exercise of the powers conferred by sub-section (2) of Section 1 of the Tamil Nadu Value Added Tax (Fourth Amendment) Act, 2011 (Tamil Nadu Act 27 of 2011), the Governor of Tamil Nadu hereby appoints the 1st day of April 2012, as the date on which the said Act shall come into force.

41. This clearly indicates the intention of the Government to alter the levy under Section 3(4)(b) of the Tamil Nadu Value Added Tax Act, 2006 only w.e.f. 01.04.2012. Thus, the amendment was to give prospective and not retrospective. The amendment could have been notified with retrospective effect or at least from the date of its publication in G.O.Ms.135, Commercial Taxes and Registration (B1), dated 31.10.2011 if the intention was to that effect.

42. In this context, it must be recalled that the previous amendment to Section 3(4) vide Tamil Nadu Act 49 of 2008 was with retrospective effect from 18.06.2008, though the Act received the assent of the Government on the subsequent date, i.e. 28.11.2008. There the intention was to make it retrospective w.e.f. 31.10.2011.

43. Though the bill that was introduced for bringing in the amendment in 2011 to Sub-Section (4)(b) to Section 3 of the Tamil Nadu Value Added Tax Act, 2006 and had considered the hardship caused to the dealers on account of the operation of the said provision, it cannot be said that the amendment was to have a retrospective operation.

44. Under Section 1(2) of ACT No.27 of 2011, the legislature has consciously conferred a discretion with the Government to notify the date from which the amendment was to be come into force. The discretion was vested with the Government to give effect to the amendment with prospective effect or retrospective effect or with effect from the date of such publication of the amendment. There was no restriction.

45. Though in Tvl.Makkal Stores, the Court has followed the previous decision rendered by the Madurai Bench of this Court in Tvl.Shanmugamari Timbers, and has come to a conclusion that the amendment to Section 3(4)(b) of the Tamil Nadu Value Added Tax Act, 2006 was retrospective and the amendment will apply to all Assessment Years from 2006 onwards, it is to be noted that this was not the intention of the legislature when amendment was brought to the Act vide Act No. 27 of 2011. If that was the intention of the legislature was to give a retrospective operation, the proposed amendment at the Bill stage itself would have clarified the position.

46. Since the Government has not given the amendment effect from an earlier date during the Assessment Years 2010-2011 & 2011-2012, it cannot be given effect with retrospective date on an earlier date. This aspect was not brought to the attention of the Court in the two decisions which were cited. Therefore, I am unable to accept the two decisions referred by the learned counsel for the petitioner.

47. In the light of the above discussion, I dispose these two Writ Petitions by upholding the orders of the second respondent in so far as demand under Section 3(4)(b) of the Tamil Nadu Value Added Tax Act, 2006 has been made on the petitioner. For the Assessment Years 2010-2011 and 2011-2012, the petitioner has not been given the benefit of Input Tax Credit available as per the law as it stood during the material period.

48. Therefore, while upholding the impugned orders, I remit the cases back to the respondents for a limited purpose for passing fresh Revised Assessment Orders by allowing the petitioner to adjust the Input Tax Credit in terms of Section 3(4)(b) of the Tamil Nadu Value Added Tax Act, 2006 which benefit has not been given to the petitioner. This excise shall be carried out by the respondents within a period of three months from the date of receipt of a copy of this order.

49. The petitioner shall file its reply/representation, if

any, within a period of one month from the date of receipt of a copy of this order. Needless to state, before such orders are passed, the petitioner shall be heard.

50. Accordingly, these Writ Petitions are disposed of with the above observation. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Asst.Registrar (CS VII)

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Sub Asst. Registrar

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To

1.The Secretary to Government,
Commercial Taxes Department,
The State of Tamil Nadu,
Fort St. George, Chennai - 600 009.

2.The Commercial Tax Officer,
Tirukoilur Assessment Circle,
2nd floor, No.59A, Sannadhi Street,
Tirukoilur 605 557.

+2 cc to Mr.Adithya Reddy Advocate sr7988 & 10092

+1 cc to Special Government Pleader(Taxes) sr10404

W.P.No.8255 & 8256 of 2015
and M.P.Nos.1 & 1 of 2015

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