



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.09.2021

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THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P. (MD) No.4912 of 2006

and

M.P(MD) .No.2 of 2006

M/s. Susee Auto Limited,
Rep. by its Managing Partner,
R.Vadivel Rajan.

...Petitioner

-Vs-

The Commercial Tax Officer (FAC),
Tuticorin-I, Assessment Circle,
Tuticorin.

... Respondent

Prayer: Writ Petition filed under Article 226 of Constitution of India, to issue a Writ of Certiorari, calling for the records on the file of the respondent in his proceedings in TNGST No.844032/5820022/92-93 & 94-95 to 2001-2002 dated 09.05.2006 and quash the same and direct the respondent herein to permit the petitioner to set off the excess entry tax paid by the petitioner for future payment of entry tax (in the month of March 2006) as per the petitioner's representations dated 23.12.2003, 17.03.2004 and 12.04.2004.

For Petitioner	: Mr.S.Rajasekar for Mrs.R.Hemalatha
For Respondent	: Mr.R.Sureshkumar Government Advocate

O R D E R

Prayer sought for herein is for a Writ of Certiorari, calling for the records on the file of the respondent in his proceedings in TNGST No.844032/5820022/92-93 & 94-95 to 2001-2002, dated 09.05.2006 and quash the same, and direct the respondent herein to permit the petitioner to set off the excess entry tax paid by the petitioner for future payment of entry tax (in the month of March 2006), as per the petitioner's representations, dated 23.12.2003, 17.03.2004 and 12.04.2004.

2.The petitioner is an authorised dealer of two and three wheelers and spare parts at Tuticorin and he is an Assessee, on the file of the Commercial Tax Officer, Tuticorin-I, Assessment Circle, Tuticorin, who is the respondent herein, in TNGST No.844032.



3. After scrutinizing the books of accounts, the respondent passed an order of assessment, in his proceedings for the assessment year 92-93 and 94-95 to 2001-2002 under the Tamil Nadu General Sales Tax Act, 1959.

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4. It is to be noted that in the meanwhile, the Government introduced a new legislation called Tamil Nadu Tax on Entry of Motor Vehicles into Local Areas Act, 1990, which empowers the State Government to collect tax by way of entry tax on the entry of motor vehicles into the local areas for use or sale.

5. Therefore, the petitioner, being the dealer in motor vehicles is liable to pay entry tax under the said enactment. Therefore, as per the rate of entry tax fixed under the legislation, the petitioner has paid entry tax in respect of purchase of two wheeler spares and accessories from outside the State of Tamil Nadu. According to the petitioner, the entry tax during the relevant point of time was 12%, therefore, insofar as the sales is concerned of those vehicles against which entry tax was paid at the 12% rate, the corresponding sales tax was either 11% or 9%, therefore, the said sales tax, payable by the petitioner has to be set off on the basis of the entry tax already paid in respect of those vehicles or accessories concerned.

6. In this regard, it is the further case of the petitioner that insofar as the said assessment year, that is, from 91-92 and 92-93 to 2001-2002, each year, whatever, the vehicles brought from outside States or accessories, entry tax at the rate of 12% had been paid, and therefore, when sales tax had been paid, there must be a set off, at the rate of either 9% or 11%, as the case may be, during the relevant period and this has been done.

7. However, since the entry tax, according to the petitioner, was admittedly 12% and the maximum sales tax during the relevant period was only 11%, and in some cases 9%, therefore, either 3% or at least 1%, there had been an excess payment of entry tax in respect of items covered under the entry tax Act during the relevant point of time, which were dealt with by the petitioner-dealer and therefore, insofar as the excess amount or the difference of amount paid by the petitioner by way of entry tax, shall be refunded to the petitioner, and in this regard, there has been a provision under the said Act under Section 11, under which, whatever the excess amount, which is lying with the taxing authority by way of excess amount, that is, difference amount than the amount payable by way of sales tax in the entry tax account, shall be calculated and be refunded to the petitioner.

8. When such a request for refund of excess entry tax available with the respondent was made, the same was since not considered, the

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petitioner had approached this Court by filing writ petition and following the order passed by this Court, dated 03.11.2003, the request of the petitioner, having been considered, the respondent-assessing authority, has rejected it through the impugned order, dated 09.05.2006. Challenging the same, the present writ petition has been filed.

9. Assailing the said impugned order, Mrs.R.Hemalatha, learned counsel for the petitioner-Assessee, would submit that, the assessing authority rejected the claim of refund made by the petitioner on the only ground that, the difference between the tax payable under sales tax and the tax paid under entry tax, are two different entities, therefore, the Government is entitled to retain their different entry tax, if any paid. In support of this stand taken by the Government, they have taken clue from the order passed by this Court in **Tvl. Kivraj Motors Ltd., vs. Assistant Commissioner (CT), Fast Track Assessment Circle-III, Chennai**, reported in **139 STC 233**, that is, W.P.Nos.38111 to 38114 of 2003, dated 16.04.2004.

10. In the said Judgment, the proposition held by the writ Court was that, the entry tax paid by the Assessee as well as the sales tax paid by the same Assessee, in respect of the vehicles or spare parts of motor vehicles concerned, are two different entity of tax, therefore, eventhough set off is permitted, the question of refund of excess of entry tax does not arise, and that can be retained by the Government, because, it is the separate entity, therefore, once, the assessment is completed, the question of refund of the alleged excess entry tax does not arise.

11. Therefore, taking the support from the said decision in the Kivraj motors case, cited supra, the respondent has taken a stand that if the entry tax excess anything paid by the petitioner, that cannot be claimed for refund, therefore, accordingly, the plea of the petitioner was rejected through the impugned order, hence, the learned counsel for the petitioner submits that, the impugned order, whether to be sustained or not can be gone into only on the basis of the said judgment.

12. In this context, the learned counsel would further submit that, the said judgment in Kivraj motors, cited supra, has been appealed by the said Assessee in W.A.(MD).Nos.3201 and 3204 of 2004, where a Division Bench of this Court, by order, dated 04.02.2010, in the matter of **Kivraj Motors Limited v. Assistant Commissioner (CT), Fast Track Assessment Circle-III, Chennai and another**, has set aside the said judgment and allowed the writ appeal.

13. In this context, the learned counsel has relied upon paragraph No.11 of the Division Bench order, which throw some light on the issue, therefore, it is extracted hereunder:



Year	Date of order under TNGST Act	Date of order under TN-Entry tax on motor vehicles
1992-1993	1/2/1994	1/2/1994
1994-1995	29/3/1996	29/3/1996
1995-1996	7/3/1997	7/3/1997
1996-1997	9/3/1998	9/3/1998
1997-1998	26/3/1999	26/3/1999
1998-1999	31/8/2000	31/8/2000
1999-2000	5/4/2002	5/4/2002
2000-2001	5/4/2002	5/4/2002
2001-2002	24/4/2003	24/4/2003

I humbly submit that the dealer have purchased automobiles, spares and accessories from outside of State of Tamil Nadu and brought into the Local Areas the dealer have paid entry tax as per Section 4 of Tamil Nadu Entry of Motor Vehicles Act. As per Section 4 of Entry tax on Motor Vehicles Act(1) Where an importer of a motor vehicle liable to pay tax under this Act, being a dealer in Motor in vehicles becomes liable to pay tax under the Tamil Nadu General Sales Tax Act and additional sales tax under the Tamil Nadu Additional Sales Tax Act, 1970 (Tamil Nadu Act XIV of 1970) by virtue of the sale of such motor vehicle, then his liability under those Acts shall be set off to the extent of tax paid under this Act.

8. I humbly submit that the assessing officer has already finalized the assessment proceedings without passing any excess amount ie., refund of excess paid by the dealer as per Section 11 of Tamil Nadu Tax on Entry of Motor Vehicles into Local Areas Act, 1990.

As per Section 11, Refund of tax

The assessing authority shall refund to a person the amount of tax and penalty, if any, paid by such person in excess of the amount due from him. The refund may be either by cash payment or, at the option of the person, by deduction of such excess from the amount of tax and penalty, if any, due from that person in respect of any other period:

9. I humbly submit that the dealer have made assumptions that they have paid excess of entry tax on vehicles into Local Area Act 1990 after set off against the Tamil Nadu General Sales Tax Act, 1959.

10. I humbly submit that the petitioner has also



not approached for re-assessment under Section 9 of Tamil Nadu Entry Tax on Motor Vehicles Act, 1991.

As per Section 9 - Reassessment if, after a person, liable to pay tax has been assessed under Section 8, for any period, the assessing authority has reason to believe that any purchase value or part thereof, has, in respect of that period, escaped assessment, or has been under assessed or assessed at a lower rate, then the assessing authority may, within five years from the date of the order of assessment of the particular period, after giving the person a reasonable opportunity of being heard, reassess, to the best of his judgment, the tax due from him."

16. Relying upon these averments made in the counter affidavit, learned Government Advocate would contend that, first of all, the petitioner is not entitled to get any refund of alleged excess payment of entry tax under the provisions of the Entry Tax Act, assuming that he is legally entitled in view of the subsequent judgments made by this Court, then, it is the fact that, whether the petitioner has paid any excess tax, which, in turn, make him entitle to get refund of the same, in this aspect, the burden of proof lies only on the Assessee to establish that, he has paid the excess entry tax than the sales tax payable during the relevant period for the said sales, and unless and until, the books of accounts are produced by the Assessee to establish that he has paid the entry tax in excess, the question of claiming any refund does not arise. Therefore, on the basis of the law laid down in the Kivraj Motors case by the writ Appellate Court, which has been heavily relied upon by the assessee, however, even on factual matrix, the petitioner, since has not proved that he has paid the excess entry tax, is not entitled to get any refund. Therefore, the impugned order can be sustained on these reasons assigned, hence, the learned Government Advocate seeks sustainment of the impugned order.

17. I have considered the said rival submissions made by the learned counsel appearing for the parties and have perused the materials placed before this Court.

18. The petitioner is a dealer dealing with motor vehicles and he had to pay the sales tax as per the rate prevailing during the relevant point of time.

19. Insofar as the assessment years, referred to above, are concerned, whether the petitioner has paid any entry tax in excess, based on the Entry Tax Act, that is, Tamil Nadu Tax on Entry on Motor Vehicles into Local Areas Act (13 of 1990), and in that case, whether the petitioner is entitled to get a refund as provided under Section 11 of the Act, is also a question.



20. In this context, if we peruse the impugned order of rejection passed by the respondent, he mainly relied upon the judgment of this Court in Kivraj Motors case, cited supra, that is, 139 STC 233, in order to appreciate the same, the relevant portion of the impugned order is extracted hereunder:

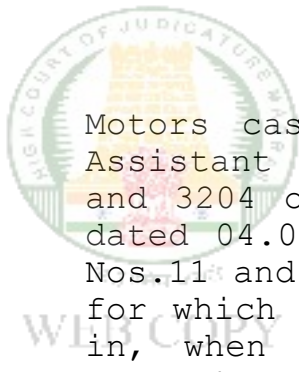
"5. Recently, the Madras High Court in the case of Tvl. Khiviraj Motor Ltd Vs Assistant Commissioner (CT), Fast Track Assessment Circle No. III, Chennai reported in 139 STC 233 (WP.No. 38111 to 38114/2003 and W.P.M.P 46271 to 46274/2003 dated 16.04.2004) after elaborately discussing the case of Ganesh Automobile and other, has held as follows:-

Section - 4 provides reduction of tax liability of the dealer to the extent of Sales Tax and Additional Sales Tax to be paid on the sales of vehicles under TNGST Act on such vehicles. Section - 11 provides for the refund of entry tax collected over and above what the dealer is legally liable to pay. The dealers are entitled to claim set-off only in respect of sales tax payable on the entry tax paid under entry tax Act. If there is difference between the tax payable under Sales Tax Act and tax paid under entry tax Act, the Government is entitled to retain it, as it is totally different tax dealers are not entitled to get back the entry tax amount on the ground that they have paid Sales Tax.

6. In view of the above findings and discussions made supra of this reference and as per latest High Court decision, the dealers are not entitled to claim the refund of Entry Tax already paid. It is therefore concluded that the presentations made in their letter dated 3.11.2003 and 12.9.2005, deserves no merit and consideration and accordingly they are rejected."

21. Therefore, the main contention on the side of the revenue for rejecting the claim of the petitioner for refund of the excess entry tax is concerned, it is based on the law declared by this Court in Kivraj Motors case, referred to above, by the writ Court and accordingly, they have taken a stand that the payment of sales tax and payment of entry tax are two different separate entities, and therefore, based on the claim anything made by the dealer, that he has paid excess entry tax, after set off, towards the sales tax, still if there is excess entry tax, should it be refunded or not is concerned, it need not be refunded, it can be retained by the Government.

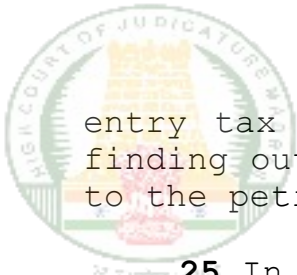
22. However, after the rejection order made through the impugned order by the respondent, the very order of the writ Court in Kivraj



Motors case, cited supra, had been appealed in Kivraj Motors v. Assistant Commissioner as referred to above, in W.A.(MD).Nos.3201 and 3204 of 2004, where a Division Bench of this Court, by order, dated 04.02.2010, has passed a detailed order, where at paragraph Nos.11 and 12, they have stated or reiterated, what is the purpose, for which entry tax was brought in and after entry tax was brought in, when Section 7 is to be made applicable for proportionate deduction in liability, whenever the entry tax paid on the higher side vide Section 11 of the Act, shall not be made applicable for refunding such excess entry tax, was considered and decided. The relevant portion of the said order of the Division Bench has already been quoted hereinabove.

23.As against these orders, it seems that, though attempts have been made to file SLP that become unsuccessful on the part of the respondent, and therefore, as pointed out by the learned counsel for the petitioner, the prevailing law is that, Section 4 as well as Section 11 of the Act, would apply to the case in hand, therefore, if the petitioner has paid any excess entry tax, certainly, he would be entitled to get the refund of the same.

24.However, the learned Government Advocate has raised a point that, ofcourse on the basis of the counter affidavit filed by the respondent, the burden of proof, as to whether the petitioner has paid excess entry tax, which, in turn, make him entitled to get refund of the same, lies only on the shoulders of the petitioner alone, and in this regard, by filing the books of accounts, only the petitioner has to establish before the respondent-assessing authority that, he has paid the excess entry tax, during the relevant point of time, and that make him entitle to claim the remaining entry tax after set off towards the sales tax, to be refunded, unless this is established by the petitioner, he would not be entitled to get any refund, and merely because of the statement that he has paid entry tax, it does not become automatic to seek for any refund is concerned, no doubt, whether the petitioner has paid excess entry tax or not, during the relevant point of time, has to be proved only by the petitioner, however, in this context, it is to be noted that the entry tax was 12% during the relevant point of time and the sales tax was either 9% or 11% during the relevant point of time, and therefore, against the sale, to be made in this regard by the dealer for which entry tax had already been paid, certainly, there would be a difference of either 3% or atleast 1% and that kind of excess tax paid in the name of entry tax even after setting off is made, would be made available as excess amount in the hands of the Government, therefore, in this regard, after verifying the total entry tax paid by the petitioner, for each of the assessment years referred to above, and the sales tax paid or set off, can be taken into account with the aid of the books of account of the petitioner, which can be submitted by him, the assessing officer can very well arrive at a figure as to what was the excess



entry tax paid and it is available with the Government, and after finding out the same, the excess entry tax can very well be refunded to the petitioner.

25. In that view of the matter, based on the afore-stated discussions, this Court is inclined to dispose of this writ petition with the following orders:

"that the impugned order, for the reasons stated above, since would not stand in the legal scrutiny, is liable to be quashed, accordingly, it is quashed.

As a sequel, it is open to the petitioner to produce the books of account to the respondent assessing officer to establish that during the relevant point of time, the petitioner has paid entry tax, which is admittedly 12% and also the corresponding sales tax paid or set off, which is admittedly, either 9% or 11%, therefore, what shall be a difference of the entry tax paid by the petitioner as excess, can be easily calculated by the assessing officer with the help of the petitioner-assessee, and based on which, the ultimate excess entry tax amount available with the hands of the respondent can be refunded to the petitioner. The needful as indicated above shall be undertaken by the respondent within a period of three months from the date of receipt of a copy of this order, for which the petitioner is expected to give utmost cooperation to complete the task as indicated."

26. With these directions, this writ petition is disposed of accordingly. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(Records)

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Sub Assistant Registrar(CS)

PJL

To

The Commercial Tax Officer (FAC),
Tuticorin-I, Assessment Circle, Tuticorin.

+1 CC to M/s.GP (SR-28707[F] dated 09/09/2021)

Order made in

W.P. (MD) No.4912 of 2006

Dated: 08.09.2021

MMS (CO)

TR(29.11.2021) 9P 3C

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