BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 08.10.2021

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THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P.(MD)Nos.18440 and 18446 of 2021
and
W.M.P.(MD)Nos.15221, 15222, 15226 and 15228 of 2021

M/s.M.U.Mohamed Sultan & Co.
Represented by its Managing Partner
Mr.Ubayathullah .. Petitioner
in W.P.(MD)No.18440 of 2021

M/s. Omega Traders,
Represented by its partner
Mr.J.Mohamed Yoosuff .. Petitioner
in W.P.(MD)No.18446 of 2021

Vs.

1. Assistant Commissioner(ST),
Pudukottai-I Circle.
Pudukottai.

2. The State Bank of India,
Represented by its Branch Manager,
T.S.No:2664, East Street,
Pudukottai-622001. .. Respondents
in W.P.(MD)No.18440 of 2021

1. Assistant Commissioner(ST)
Pudukottai-I Circle,
Pudukottai.

2. Central Bank of India,
Represented by its Branch Manager,
No. 833, East Main Road,
Pudukottai. .. Respondents
in W.P.(MD)No.18446 of 2021

Prayer in W.P.(MD)No.18440 of 2021: Writ Petition is filed under Article 226 of Constitution of India, to issue a Writ of Certiorarified Mandamus, to quash the impugned order passed by the first respondent in TIN No:3334103969/2021/A3, dated 26.07.2021 and to quash the consequent bank attachment, dated 28.07.2021 of State

Bank of India account bearing DD No.542-827123 made by the second respondent with respect to the above mentioned account and to dispose of the Rectification Petition, dated 19.07.2021 of the petitioner.

Prayer in W.P.(MD)No.18446 of 2021: Writ Petition is filed under Article 226 of Constitution of India, to issue a Writ of Certiorarified Mandamus, to quash impugned order in TIN No.33194100371/2021/A3 passed by the first respondent, dated 26.07.2021 and to dispose of the Rectification Petition, dated 15.07.2021 of the petitioner.

In both cases:

For Petitioners	: Mr.R.Sivaraman
For R1	: Mr.R.Sureshkumar Government Advocate
For R2	: Mr.N.Dilipkumar Standing Counsel

COMMON ORDER

Since the issue raised in both the writ petitioners is one and the same, with the consent of the learned counsel appearing for the parties, these writ petitions were heard together and are disposed of by this common order.

2.The petitioners are the manufacturers of Tobacco products. Though, prior to the 2006-2007 Assessment Year, they involved in manufacturing of some other Tobacco product, only from the Assessment year 2006-2007, they claimed to have started producing the product called “Chewing Tobacco”. The said product 'Chewing Tobacco' has not been included in the schedule appended to the Tamil Nadu Value Added Tax Act, 2006 (in short, 'the TNVAT Act'), thereby, the said product is not a taxable item.

3.Accordingly, insofar as the Assessment Year 2007-2008 is concerned, the Assessment has been made in respect of these two petitioners.

4.Subsequently, by amendment made to the TNVAT Act, 2006, by Act 30 of 2011 in Section 3, the following has been inserted :

> “***3.****In the Second Schedule to the principal Act, after Serial number 12 and the entries relating thereto, the following Serial Number and entries shall be inserted, namely:*
>
> “***13.****(i) Unmanufactured tobacco, tobacco refuse;*
> *(ii) Gutkha, Pan masala;*
> *(iii)Cigars and Cheroots and Cigarettes, Cigarillous of tobacco or of tobacco substitutes;*

(iv) Hooka/ hoodku tobacco;
(v) Smoking mixtures for pipes and cigarettes;
(vi) Homogenised or reconstituted tobacco;
(vii) Chewing tobacco;
(viii) Preparations containing chewing tobacco;
(ix) Jarda, Scented tobacco;
(x) Snuff of tobacco and preparations containing snuff;
(xi) Tobacco extracts and essence;
(xii) Cut tobacco;
(xiii) Any other tobacco product, not specified in any of the Schedules."

5. By virtue of this amendment in the second schedule to the TNVAT Act, after Serial No.12, the Serial No.13 with various products as enumerated herein above had been inserted, wherein, in Serial No.(vii), the product 'Chewing Tobacco' is found placed.

6. Therefore, the 'Chewing Tobacco' also has been inserted in one of the product in the second Schedule to the TNVAT Act, at Serial No.13, thereby, the product also has become liable to be taxed. In this regard, a Government Order has been issued, whereby, the applicability of the amended provision, is made from the date 12.07.2011, by G.O.Ms.No.76, dated 11.07.2011.

7. Thereby, the product called 'Chewing Tobacco' has become a taxable item, only with effect from 12.07.2011.

8. It is to be noted that as against the insertion of the said product, the Association of the Tamil Nadu Scented & Chewing Manufacturers Association and others, filed writ petitions in W.P.(MD)No.21237 of 2011 etc., batch, where from 15.09.2011, there has been an interim order of stay and those writ petitions were pending up to 2019, as those writ petitions were finally disposed of only on 03.10.2019, by a common order passed by a learned Judge of this Court in the matter of ***Tvl.Makkal Stores v. The State of Tamil Nadu represented by the Secretary, Commercial Taxes and Registration Department, Chennai-09 and others.*** In the said Judgment, ultimately, the impugned amendment was held to be valid, thereby the stay granted by the Court earlier was vacated.

9. Therefore, the said product namely, 'Chewing Tobacco', has become a taxable item from 12.07.2011 and it is further to be noted that, after sometime in the year 2012, the Government banned the production of the said item itself.

10. Only with the aforesaid background of the case, it is the case of the petitioner that, insofar as the Assessment Year 2007-

2008 is concerned, though the petitioners manufactured the said product 'Chewing Tobacco', that was not one of the item to be taxed under the provisions of the TNVAT Act, as admittedly, the said product has been introduced or inserted in the Schedule as mentioned above only with effect from 12.07.2011. Therefore, if at all, any tax to be levied on the petitioners for the said product, the same should have been levied only from 12.07.2011 and not for the Assessment Year 2007-2008, it is the question herein.

11. In this context, it is a further case of the petitioner, that the petitioners have filed rectification petitions under Section 84 of the TNVAT Act on 19.07.2021 and 15.07.2021 respectively, explaining the afore-stated factual as well as legal position, and therefore, stated that the issue has to be rectified, where the petitioners are not liable to pay tax for the said product 'Chewing Tobacco' for the relevant Assessment Year 2007-2008, as this was pursuant to the notice of demand issued by the respondents, dated 08.07.2021, where, the respondents had stated that, by virtue of the disposal of the writ petitions as referred to above, by order, dated 03.10.2019, these petitioners and other similarly placed person should be liable to pay tax for the said product 'Chewing Tobacco' even for the Assessment Year 2007-2008.

12. However, the said rectification petitions, dated 19.07.2021 and 15.07.2021, filed by the petitioners have been kept pending and not disposed of. Unmindful of the same, now, a communication has been issued by the Assistant Commissioner, who is the first respondent herein on 26.07.2021 to the concerned Bank, where the petitioners having account to draw the money to the extent of their alleged arrears payable by them for the Assessment Year 2007-2008 in the form of Demand Draft drawn in favour of the first respondent for adjusting against the alleged arrears of tax due.

13. Felt aggrieved over the said communication, dated 26.07.2021, issued by the first respondent to the concerned Bank, with a copy marked to the petitioners, as the same has been issued without even considering and disposing the rectification petitions filed by the petitioners, they have approached this Court by filing the present writ petitions.

14. Heard Mr.R.Sivaraman, learned counsel for the petitioner, who having reiterated the aforesaid, would contend that the legal position is very clear and unambiguous, where the respondents cannot impose tax on the particular product, namely, 'Chewing Tobacco' manufactured by the petitioners during the relevant Assessment Year 2007-2008, as the said product has become taxable item only with effect from 12.07.2011, and when this position has been made clear in the rectification petitions, dated 19.07.2021 and 15.07.2021, made under Section 84 of the TNVAT Act, without considering the same and keeping it pending, the first respondent has proceeded to recover the money by giving notice to the bank authorities, that is, impugned herein, therefore, the said impugned action on the part of the respondent is liable to be interfered with and consequently, a direction can be given to the first respondent to decide and dispose the petitioners' rectification petitions.

15.I have heard Mr.R.Suresh Kumar, learned Government Advocate appearing for the first respondent, who on instructions, would submit that, the tax due in respect of each of the petitioners for the Assessment Year 2007-2008 was calculated, based on the assessment made for the particular year, that has been made out of the records available with the first respondent office. Moreover, insofar as the said product is concerned, admittedly, the petitioners manufactured that product even in the relevant Assessment Year and therefore, insofar as the closed Assessment Year 2007-2008, if any tax due is there on the part of the petitioners, to pay the same, can at any time be demanded, as for all these years, since the writ petitions filed by the Association, where the petitioners were members, were pending before the High Court and in those cases, there has been interim order of stay granted, such a recovery proceedings could not be initiated immediately, hence, there is every justification on the part of the first respondent to issue the present order, which is impugned herein requiring the Bank authorities to get the money and take a Demand Draft in favour of the first respondent.

16. He would also submit that, insofar as the provision at Section 84 of the TNVAT Act is concerned, there is a limitation period of five years, under which, within five years period from the date of any order passed by the Assessing authority, such an application to rectify the error apparently on the face of the record, if any, shall be filed.

17. Quoting this provision, the learned Government Advocate would submit that, first of all, there is no apparent error on the face of the record, consequently, as against the order passed in the year sometime in 2009, where the five years period is over, the Section 84 applications or petitions for rectification cannot be entertained at this late hour. Since it was admittedly filed in July 2021, the impugned communication issued to the bank is very much sustainable and therefore, no interference is called for, he contended.

18.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.

19. It is a fact remains that, the product called 'Chewing Tobacco', admittedly manufactured by these petitioners from 2006-07 was not at all included as one of the item scheduled in TNVAT Act as a taxable item. Realising this omission or lacuna or with the wisdom of the legislature, Act 30 of 2011 was brought in, under which, the TNVAT Act, 2006 underwent amendment, wherein as per Section 3 of the Amending Act, after Serial No.12 to second schedule Serial No.13 was inserted, whereas, one of the item in Serial No.(vii)-'Chewing Tobacco' also has been mentioned. Admittedly, the said amendment has come into the effect only from 12.07.2011, therefore, the product 'Chewing Tobacco' has become a taxable item only from 12.07.2011.

20. In this context, it is a definite case of the petitioners that because of the said product, namely, 'Chewing Tobacco', which they manufactured in the year 2007-2008, excess tax had been calculated by the first respondent, as if that, it is a taxable item, however, the fact remains that the product has become a taxable item only from 12.07.2011 and therefore, these apparent mistake available on the face of the record has to be rectified, that is the reason why, they filed the rectification applications, which are admittedly pending before the first respondent.

21. Insofar as the five years limitation, as pointed out by the learned Government Advocate, is concerned, the five years limitation period is no doubt starts from the order passed by the authorities, which was passed sometime in 2009, however, from October 2011, there has been a stay, which was in operation for all these years up to 03.10.2019, the date on which, those writ petitions were disposed of. Therefore, the period between 15.09.2011, the date on which originally interim stay was granted till the disposal of the writ petition, that is, dated 03.10.2019 has to be excluded. If that period is excluded, certainly the present rectification petitions, dated 19.07.2021 and 15.07.2021, filed by the petitioners would be within the time of five years limitation period, as contemplated under Section 84 of the TNVAT Act. Therefore, that objection raised by the learned Government Advocate cannot be countenanced.

22. In that view of the matter, this Court feel that, unless the rectification petitions filed by the petitioners is decided by taking into account the aforesaid factual as well as the legal aspects projected by the petitioners, the first respondent cannot proceed further pursuant to the alleged due for the Assessment Year 2007-2008. In that view of the matter, the impugned orders requiring the bank authorities to recover the amount and to pay it in favour of the first respondent may not be justifiable and accordingly, those orders are liable to be interfered with.

23. In the result, the following orders are passed in these writ petitions:

> "that the impugned orders are quashed and the matters are remitted back to the first respondent, where the rectification petitions filed by the petitioners, dated 19.07.2021 and 15.07.2021, shall be considered first and orders shall be passed. While considering the rectification petitions, the afore-stated legal as well as factual position shall be borne-in-mind and after passing the order in the rectification petitions, depending upon the outcome of the same, the further course of action, if any needed, can be taken by the first respondent in accordance with law."

24. With these observations and directions, these writ petitions are disposed of. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (AD II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

PJL

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1. The Assistant Commissioner(ST)
   Pudukottai-I Circle, Pudukottai.

+2 CC to M/s.M.P.SENTHIL, Advocate (SR-32037[F] & SR-32036[F] dated 20/10/2021)

+1 CC to M/s.N.Dilipkumar, Advocate (SR-31706 dated 08/10/2021)

+1 CC to M/s.SPL.GP (SR-31953[F] dated 11/10/2021)

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MGJ(10.12.2021) 7P 6C