IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.11.2022

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P.No.11503 of 2004 and
WPMP.No.13532 of 2004

M/s.Kerala Small Industries Development
Corporation Ltd.,
Post Box No.16,
Gandhi Nagar,
Kochi-682 020. ... Petitioner

Vs

1.The Deputy Commercial Tax Officer-III,
Thoothukudi.

2.The Stae of Tamilnadu
rep. by its Secretary, Commercial Taxes Department,
Fort St. George,
Chennai-600 009.

3.The Assistant Commissioner (Assessment) II,
(Agricultural Income Tax and Sales Tax Department),
Special Circle, Ernakulam.

4.The State of Kerala,
rep. by its Secretary to the Government,
Industries (Finance) Department,
Thiruvananthapuram.

5.The Union of India,
rep. by its Secretary,

Ministry of Finance,
New Delhi.

6.The Union of India,
rep. by its Secretary,
Ministry of Industries,
New Delhi. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Mandamus, to direct the third and fourth respondent to transfer the amount of the sales tax paid by the petitioner under the Kerala General Sales Tax Act, 1963, on the turnover relating to the sales effected in Tamilnadu pursuant to the proceedings in Assessment No.23010239/82-83 KGST dated 19/11/85 to the extent of the petitioner's liability under the Central Sales Tax Act, 1956 in the State of Tamilnadu for the assessment years CST: 1982-83 & 1983-84 in accordance with law as declared by the Apex Court in 105 STC 152 & 134 STC 473 (CA.No.976-979 of 2001 dated 07/01/2004 in the Ashok Leyland Ltd Vs The State of Tamilnadu and others reported in [2004] 2 R.C. 249) and thereafter direct the first respondent to take action in accordance with law.

For Petitioner : Mr.V.Sundareswaran

For Respondents : Ms.Amirtha Dinakaran (for R1 & R2)
Government Advocate

Mr.C.E.Unnikrishnan (for R3 & R4)
Special Government Pleader
(State of Kerala)

No Appearance (for R5 & R6)

O R D E R

The petitioner is the Kerala Small Industries Development Corporation Limited. It seeks a mandamus directing R3 and R4 being the Assistant Commissioner (Assessment) II and the State of Kerala represented by the Secretary to Government, to transfer the Sales Tax remitted by it in terms of the Kerala General Sales Tax Act, 1963 (in short 'KGST Act') for the assessment periods 1982-83 and 1983-84, in settlement of its liability under the Central Sales Tax Act, 1956 (in short 'CST Act').

2. I am of the considered view that mandamus as sought for is not liable to be granted for the following reasons:

(i) the order of assessment in terms of which the demands were raised are dated 11.03.1985, and have attained finality. The petitioner has admittedly remitted the demands. Thus, the question of intervening in those orders at this juncture does not arise, particularly, since there has been no challenge to those orders.

3. According to the petitioner, turnover relating to sales were brought to tax in the State of Tamil Nadu and orders of assessment were passed that were carried in statutory appeals. The petitioner obtained relief at the stage of tax case (revision) before the High Court and the State of Tamil Nadu carried the matter in further appeal to the Hon'ble Supreme Court.

4. In *State of Tamil Nadu vs. Kerala State Small Industries Development and Employment Corporation Limited* (122 STC 608), three Judges of the Hon'ble Apex Court had held that the judgment of the Division Bench is erroneous and unsustainable.

5.The appeal filed by the revenue had come to be allowed with costs and the decision of the Division Bench reversed. At paragraphs 4 to 6, the Bench states as follows:

> *'4.Learned counsel for the appellant contends that before the High Court there was no material whatsoever for coming to the conclusion that the ship berthed at Tuticorin because of congestion at Cochin port and that being the only basis for setting aside the orders of sales tax authorities, the impugned judgment is clearly erroneous and unsustainable.*
>
> *5.Learned counsel for the respondent-Corporation was unable to draw our attention to any material which may show that the unloading of the cement at Tuticorin port had to be undertaken under the circumstances found by the High Court. It is evident that a submission in this regard was made across the Bar before the High Court which was accepted and made the basis for setting aside the findings of fact arrived at by the assessing authority and confirmed in first and second appeals. The authorities, on consideration of material on record, had recorded factual findings that the respondent had opened a branch office at Tuticorin before arrival of ships; during the period of nearly 9 months cement was unloaded at Tuticorin; sale of cement from*

Tuticorin was directly made to the parties in Kerala and the transactions were camouflaged to show as if cement was being sent to warehouse of respondent in Kerala. These findings have been set aside by the High Court without any material whatsoever. There was no basis for the High Court to hold that the respondent in the normal course would have transferred the entire stock of cement to its own godowns at Kerala and from there it would have delivered the cement to its customers in Kerala but it had to be unloaded at Tuticorin on account of the unforeseen congestion in the port in Kerala which led to ship being diverted to Tuticorin. There was also no basis for the High Court to conclude that:

> *"The fact that the lorries loaded with cement at Tuticorin were moved directly to the premises of the customer in Kerala, in the background of these facts, cannot be regarded as a factor tilting the scales in favour of a finding that these were inter-State sales."*

6.It may also be noticed that the sales tax authorities had also come to the conclusion on the basis of record that well before the arrival of the shipment at Tuticorin port, the respondent had opened its office at Tuticorin and that no material had been produced about the non-availability of berth at Cochin when the ship reached Indian Ocean.'

6.With this, the curtains have fallen as far as the question of taxability is concerned and this aspect of the matter has attained finality. The petitioner continues to pursue the matter, exploring two further avenues seeking relief. The first was by way of a petition for waiver invoking Notification No.973 of 1967 dated 27.05.1967. That door has also been closed insofar as the request for waiver is also stated to have been rejected. Learned counsel for the petitioner is unable to provide a copy of the order or even confirm the date thereof. However, and admittedly this order has also been allowed to attain finality.

7. Secondly, learned counsel for the petitioner states that it has filed a representation on 01.03.2004 before the Deputy Commercial Tax Officer-III, Thoothukudi/R1 on the premise that the transactions ought to have been subject to tax only in one State. According to learned counsel for the petitioner, notice has been issued by R1 and the petitioner heard, but no orders have been passed thus far. Again, neither a copy of the representation nor hearing notice is produced before the Court.

8. Recording the above position, I reiterate that the request for mandamus has no merit and is denied. This writ petition is dismissed. No costs. Connected miscellaneous petition is closed.

18.11.2022

Index : Yes
Speaking Order
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