



W.P.No.36940 of 2004

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.10.2022

CORAM

THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN

AND

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.No.36940 of 2004

and

W.M.P.No.44373 of 2004

M/s.Victus Dyeing
Rep.by its Partner
A.Loganathan
SF No.53/2, Chenduraithottam,
Karaipudur Village,
Veerapandy, Tirupur.

... Petitioner

Vs.

- 1.The Sales Tax Appellate Tribunal,
Coimbatore Bench,
Coimbatore.
- 2.The Appellate Assistant Commissioner
of Commercial Taxes,
Pollachi.
- 3.The Deputy Commercial Tax Officer,
Rural Circle, Tirupur.

... Respondents



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Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari, to call for the records on the file of the first respondent in his order in CTSA No.60/03 dated 05.10.2004 which was received by the petitioner on 27.11.2004 and quash the same.

For Petitioner :: M/s.R.Hemalatha

For R2 & R3 :: Mr.C.Harsharaj,
Additional Government Pleader

ORDER

S.VAIDYANATHAN, J.
AND
C.SARAVANAN, J.

This Writ Petition has been filed against the impugned order dated 05.10.2004 passed by the first respondent Sales Tax Appellate Tribunal [hereinafter referred to as “*Appellate Tribunal*”] in Coimbatore Tribunal State Appeal No.60/03 [hereinafter referred to as “*CTSA No.60/03*”].

2. By the impugned order, the first respondent Appellate Tribunal has allowed CTSA No.60/03 filed against the order of the second respondent Appellate Assistant Commissioner dated 05.11.2002 in Appeal No.92/02.



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3. By the said order dated 05.11.2002, the second respondent Appellate Assistant Commissioner had earlier allowed Appeal No.92/02 filed by the appellant against the assessment order dated 27.02.2002 of the third respondent Deputy Commercial Tax Officer bearing reference TNGST No.2384066/2000-2001.

4. The third respondent Deputy Commercial Tax Officer, vide above assessment order dated 27.02.2002, had determined the total taxable turnover of Rs.14,83,446/- as against the total turnover of Rs.8,17,26,820 for the assessment year 2000-2001. The petitioner had received a sum of Rs.7,49,80,793/- towards dyeing and processing charges on job basis. The petitioner purchased raw materials such as Dyes, Chemicals and other consumable like furnace oil etc. from outside the State against Form 'C' and within the State against Form 'XVII' and also without Form 'XVII' in connection with its business. It was concluded that on perusal of Form 'XVII-A' filed, it showed that the petitioner had issued Form XVII for use in manufacture of goods for the purchase of consumables, i.e. furnace oil to the tune of Rs.10,24,025/- during 2000-2001 for being used for dyeing fabrics.



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5. It was therefore concluded that the activity undertaken by the petitioner on job work basis for dyeing fabrics did not amount to manufacture of goods for sale by the consumer and therefore, the petitioner was not eligible to procure furnace oil against Form XVII under Section 3(3) of the Tamil Nadu General Sales Tax Act, 1959.

6. It was concluded that there was no sale by the petitioner and therefore it was proposed to invoke first proviso to Section 3(3) of the Tamil Nadu General Sales Tax Act, 1959 to levy difference of tax at 13%, i.e. 16% - 3%, on the aforesaid turnover of Rs.10,24,025/-. It was also concluded that the petitioner had availed the concessional rate of tax under Section 3(5) of the Tamil Nadu General Sales Tax Act, 1959 by wrongly issuing Form XVII Declaration for purchasing machineries as per Form XVII-A during the period 2000-2001.

7. Thus, a notice was issued to the petitioner on 07.02.2002, to which, the petitioner replied on 13.02.2002 which ultimately culminated in the assessment order dated 27.02.2002. The taxable turnover of the petitioner was determined as under:-



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TAXABLE TURNOVER

<i>Last purchase value of Industrial salt</i>	<i>Rs.14,83,446.00 at 4%</i>
<i>Tax due under section 3(2)</i>	<i>Rs. 59,338.00</i>
<i>Paid</i>	<i>Rs.1,26,844.00</i>
<i>Excess</i>	<i>(+) Rs.67,506.00</i>

A notice in Form C is issued.

LIABILITY UNDER SEC. 3(3)

<i>Purchase value of furnace oil purchased during 2000-01</i>	<i>Rs.10,24,025.00</i>
<i>Difference tax at 13%</i>	<i>Rs. 1,33,123.00</i>
<i>Purchase value on Machinery purchased in 2000-01</i>	<i>Rs.8,66,040.00</i>
<i>Difference tax at 8%</i>	<i>Rs.69,283.00</i>
<i>Tax due</i>	<i>Rs.2,02,406.00</i>
<i>Tax paid</i>	<i>Rs. Nil</i>
<i>Balance</i>	<i>Rs.2,02,406.00</i>

A notice in Form "B3" is issued.



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WEB COPY Penalty under Sec.23 at 150% on the difference tax Rs.2,02,406.00

Penalty due Rs.3,03,609.00

Paid Rs. Nil

Balance Rs.3,03,609.00

A notice in Form 54 is issued.

8. The second respondent Appellate Assistant Commissioner, by his order dated 05.11.2002 in A.P.No.92/2002, modified the assessment order dated dated 27.02.2002 on the strength of Circular dated 05.01.2001 bearing reference No.02/91364/2000 of the Principal Commissioner and Commissioner of Commercial Taxes and thereby reduced the penalty to 5% under Section 23 of the Tamil Nadu General Sales Tax Act, 1959. The relevant portion of the order of the second respondent Appellate Assistant Commissioner dated 05.11.2002 reads as under:-

4. The rival arguments were heard. The connected assessment file was perused. I find that as claimed by the authorized representative, there was no discussion for coming to the conclusion to levy maximum penalty under Sec.23 either in the pre-assessment notice or in the assessment order. It is



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also seen that the appellant had disclosed the every fact of issue of Form XVII on the purchase of Furnace Oil and Machinery. The reasons adduced by the assessing officer for levying tax under proviso to Sec.3(3) were that the appellant was not a manufacturer but was only doing job work. As such the usage of Form XVII to buy the goods at concessional rate was incorrect. In this connection I find that there was mutual mistake on the part of the assessing authority also. Because after fully aware of the fact that the appellant was only doing job work and not eligible to buy any goods by issuing Form XVII, the forms should not have been sold to the appellant.

5. As claimed by the authorized representative the Principal Commissioner and Commissioner of Commercial Taxes in Ref.No.02/91364/2000 dated 05.01.2001 issued circular instructions to the assessing officers under Sec.28-A of the Act. In this circular the Commissioner of Commercial Taxes issued instruction to the assessing officers that for the misuse of Form XVII penalty under Sec.23 may be levied at 1% if the details were voluntarily disclosed by the dealer. If it was detected by the department and not voluntarily disclosed by the dealer then the penalty may be levied at 5% subject to the collection of tax due in both cases. In the case of the appellant there was voluntary disclosure of the issue of Form XVII by filing Form XVIII-A, as mentioned in the assessment order. The tax due on the above was also adjusted from the refund due to the appellant. Further as mentioned earlier there was mutual mistake on the part of the assessing authority for having sold the forms to the appellant. In the circumstances narrated above and in the light of the circular instructions issued by the Commissioner of Commercial Taxes UNDER



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SEC.28-A of the Act. I order for the reduction of penalty under Sec.23 of the Act to 5% of the tax due. Accordingly the penalty under Sec.23 in this case is reduced to Rs.10,120.00.

9. The above order of the second respondent Appellate Assistant Commissioner dated 05.11.2002 in A.P.No.92/2002 was reversed by the Appellate Tribunal vide impugned order dated 05.10.2004 in CTSA.No.60/03. The relevant portion of the impugned order reads as under:-

6. We have heard the arguments of both the sides and perused the connected material records to decide the issue involved in the State Appeal. The same is the 23 penalty levied by the Assessing Authority at the maximum level for misuse of Form XVII declaration but the same reduced by the first appellate authority to 1% considering the differential rate of tax levied on the purchase of relevant materials and the penalty reduced by the first appellate authority is disputed in the State appeal by the appellant. Here, the assessment made for the respondent dealers is for 2000-01. They have effected the purchase of Furnace Oil as consumables for Rs.10,24,025/- and machineries for Rs.8,66,040/- U/S. 3(5) availing concessional rate of tax. The Assessing Authority concluded the respondent dealers are doing job work of dyeing only and they are not eligible to effect the purchase of the said consumable and machinery availing concessional rate of tax U/S 3(3) and 3(5). Section 3(3) authorizes the manufacturers to effect the purchase of raw materials required to make use of the same for



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manufacture of finished goods meant for effecting direct sales under the TNGST Act and also under the CST Act. In the same way, the same also authorize the manufacturers to effect machinery of capital goods nature required for the manufacturing venture availing concessional rate of tax U/S.3(3). So when the respondent dealers business venture is not once of manufacturing, they are concluded as not eligible to effect the purchase of the said materials. Therefore their business venture is such, they are not permitted by Section 3(3) to effect the purchase of materials involved. Hence, misuse of Form XVII declaration is very well established by wrongly availing the concessional rate of tax for the purchase of the said materials made as if they are manufacturers. Therefore, the yard stick for the levy of 23 penalty considering the balance of tax cannot be accepted as correct one. Further, the levy of penalty U/S 23 stands entirely on a different footing. Therefore, the respondent dealers have misused Form XVII declarations by effecting the purchase of the said goods U/S/3(3) 23(5) to make use of the same for manufacture and their venture is not at all a manufacturing one to enable them to effect the purchase of the said materials U/S.3(3). Therefore, the maximum penalty is leviable with reference to the decision reported in 101 STC 126. The clarification cited and also relied on by the Appellate Assessing Commissioner for reducing the 23 penalty levied to 1% of balance of tax as per in Final Assessment is not acceptable as the penalty levied U/S. 23 stands on a different footing and that too for clear misuse of Form XVII declaration established. Hence maximum penalty as prescribed U/S.23 is leviable. The case laws relied on by the respondent dealers reported in 83 STC 207 and 90 STC 359 have no application for 23 penalty levied for offence established falling U/S.45(2)(e) relating to misuse of Form XVII



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declaration. The essence of the decisions cited are that the Assessing Authority cannot make an indepth study about the misuse of 'C' Forms received by the dealers and also about the misuse. But Sec.3(3) clearly emphasis conditions for the manufacturers to effect the purchase of raw materials and others availing concessional rate of tax and also specifies penalty for misuse of Form XVII declarations established. Therefore, the 23 penalty levied at Rs.3,03,605/- reduced to Rs.10,120/- by the first appellate authority is set aside and the penalty levied by the Assessing Authority at Rs.3,03,605/- is ordered to be restored.

10. The petitioner has confined the challenge to the impugned order of the Appellate Tribunal only in so far as the imposition of penalty under Section 23 of the Tamil Nadu General Sales Tax Act, 1959.

11. It is submitted that the third respondent Deputy Commercial Tax Officer while passing the assessment order, has not discussed the very concept of 'reasonable or not reasonable excuse' to levy penalty under Section 23 of the Tamil Nadu General Sales Tax Act, 1959. It is submitted that the third respondent, while invoking Section 23 of the Act, to levy penalty at the rate of 150%, has not complied with the requirements of granting opportunity of hearing as per Section 23 of the Act.



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12. It is also submitted that the Principal Commissioner and Commissioner of Commercial Taxes has issued Circular dated 05.01.2001 bearing reference No.02/91364/2000, wherein, the Authorities were directed to take a uniform view while levying the penalty under Section 23 of the TNGST Act and levy a penalty equal to 1% of the difference in tax under Form XVII and diverted without using it in the manufacturing process within State. In case the diversion is detected by the Department and not disclosed voluntarily by the dealer, the penalty may be levied at 5% of course the difference in tax will be collectable in both cases.

13. It is submitted that based on the above Circular, the second respondent Appellate Assistant Commissioner has correctly reduced the rate of penalty to 5%. However, the first respondent Appellate Tribunal has failed to note the above Circular, ignored the same without considering and reversed the well considered order of the second respondent Appellate Assistant Commissioner vide impugned order. Therefore, the impugned order is liable to be quashed and the order the second respondent is liable to be confirmed.



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14. This Writ Petition is opposed by the learned Special Government Pleader (T) on the ground that the petitioner has accepted that it has violated the provisions while procuring furnace oil at the concessional rate of tax on the strength of Form XVII under Section 3(3) of the Tamil Nadu General Sales Tax Act, 1959 and therefore, the imposition of penalty under Section 23 of the Tamil Nadu General Sales Tax Act, 1959 was correctly made by the third respondent Deputy Commercial Tax Officer vide assessment order 27.02.2002 which decision was affirmed by the first respondent Appellate Tribunal vide impugned order dated 05.10.2004. It is therefore prayed for dismissal of this Writ Petition.

15. We have considered the arguments advanced by the learned counsel for the petitioner and the learned Special Government Pleader (T) for the respondents.

16. The point for consideration in this Writ Petition is whether the Appellate Tribunal was justified in restoring the penalty imposed by the



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third respondent Deputy Commercial Tax Officer on the petitioner under
Section 23 of the Tamil Nadu General Sales Tax Act, 1959?

17. The petitioner has admitted that the petitioner has wrongly availed the benefit of Form XVII under Section 3(3) and Section 3(5) of the Tamil Nadu General Sales Tax Act, 1959. Section 3(3) and Section 3(5) of the Tamil Nadu General Sales Tax Act, 1959 as it stood during the period when the assessment order dated 27.02.2002 was passed by the third respondent Deputy Commercial Tax Officer reads as under:-

Section 3(3) of TNGST Act, 1959	Section 3(5) of TNGST Act, 1959
Section 3(3) Notwithstanding anything contained in sub-section(2), but subject to the provisions of sub-section (1), the tax payable by a dealer in respect of sale of any goods including consumables, packing materials and labels, but excluding plant and machinery, to another dealer for use by the latter in the manufacture, and assembling, packing or labeling in connection with such manufacture inside the State, for sale by him of any goods other than ethyl alcohol, absolute alcohol, methyl alcohol, rectified spirit, neutral spirit and denatured spirit, goods falling under Part A of the Third Schedule, goods falling under item 1 of the Sixth Schedule and	Section 3(5) Notwithstanding anything contained in sub-section(2), but subject to the provisions of sub-section (1), the tax payable by a dealer in respect of sale of any of the goods mentioned in the Eighth Schedule to any other dealer for installation of, and use in his factory site situate within the State for the manufacture of any goods shall be at the rate of three per cent on the turnover relating to such sale; <i>Provided</i> that the provisions of this sub-section shall not apply to any sale, unless



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Section 3(3) of TNGST Act, 1959	Section 3(5) of TNGST Act, 1959
arrack, shall be at the rate of only three percent on the turnover relating to such sale. <i>Provided</i> that the provisions of this sub-section shall not apply to – (a) any sale of goods falling under items 1 and 2 in Part-F and item 2 in Part-I of the said schedule; and (b) any sale, unless the dealer selling such goods furnishes to the assessing authority in the prescribed manner and within the prescribed period, a declaration duly filled in and signed by the dealer to whom the goods are sold containing the prescribed particulars in the prescribed form obtained from the prescribed authority; <i>Provided further</i> that any dealer who, after purchasing the goods in respect of which he had furnished any declaration, fails to make use of the goods so purchased for the purpose specified in the declaration but disposes of such goods in any other manner, shall pay the difference of tax payable on the turnover relating to sale of such goods at the rate prescribed and three per cent: <i>Provided also</i> that the dealer purchasing the goods maintains a separate stock account for each of the goods purchased by him showing such particulars as may be prescribed.	the dealer selling such goods furnishes to the assessing authority in the prescribed manner and within the prescribed period, a declaration duly filled in and signed by the dealer to whom the goods are sold, containing the prescribed particulars in the prescribed form obtained from the prescribed authority; <i>Provided further</i> that any such dealer, who, after purchasing the goods in respect of which he had furnished any declaration, fails to install the goods and make use of the goods so purchased for the purpose specified in the declaration or disposes of such goods in any other manner within a period of five years shall pay the difference of the tax payable on the turnover relating to sale of such goods at the rate prescribed and three per cent.



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18. Clause (a) of the first proviso to Section 3(3) of the Tamil Nadu General Sales Tax Act, 1959 was substituted with the following Clause by Act 20/2002 – Gazette dated 03.06.2002 with effect from 27.03.2002:-

“(a) any sale of high speed diesel oil, light diesel oil and molasses; and”

19. Failure to comply with the requirement of Section 3(3) of the Act attracts Section 3(4) of the Act which reads as under:-

Section 3(4) *Where any dealer, after availing the concessional rate of tax under sub-section (3), does not sell the goods so manufactured, but despatches them to a place outside the State either by branch transfer or by transfer to an agent, by whatever name called, for sale, or in any other manner, except as a direct result of sale or purchase in the course of inter-State trade or commerce, shall pay, in addition to the concessional rate of tax already paid under sub-section (3), tax at one per cent on the value of the goods so purchased.*

20. The penalty under Section 23 of the Act is attracted where if any person purchasing goods is guilty of an offence under Section 45(2)(e) of the Act. As per said Section 23, the authority can impose penalty for a maximum amount not exceeding one and a half times (150%) the tax payable on the turnover relating to the sale of such goods at a rate which



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is equal to the rate prescribed in the First Schedule less three percent.

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Section 23 of the Act as it stood then reads as under:-

Section 23. Levy of penalty in certain cases:- *If any person purchasing goods is guilty of an offence under clause (e) of sub-section (2) of section 45, the assessing authority may, after giving him a reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum not exceeding one and a half times the tax payable on the turnover relating to the sale of such goods at a rate which is equal to the rate prescribed in the First Schedule less three percent:*

Provided that no prosecution for an offence under section 45 shall be instituted in respect of the same facts on which a penalty has been imposed under this section.

21. As per Section 45(2)(e) of the Act, if any person who after purchasing any goods in respect of which he has made a declaration under the second proviso to Sub-Section (3) or Sub-Section (5) of Section 3 fails without reasonable excuse to make use of the goods for the declared purpose, such person is a guilty of such offence and penalty may be imposed on him. Section 45(2)(e) of the Act as it stood then reads as under:-

Section 45. Offenses and Penalties. —



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(1).....

(2) Any person who —

(a).....

.....

(e) after purchasing any goods in respect of which he has made a declaration under the second proviso to sub-section (3) or sub-section (5) of section 3 fails without reasonable excuse to make use of the goods for the declared purpose; or

22. Circular dated 05.01.2001 was issued by the Principal Commissioner and Commissioner of Commercial Taxes, wherein, certain instructions were given to the Assessing Officer in respect of levy of penalty under Section 23 of the Act. The operative portion of the Circular dated 05.01.2001 reads as under:-

Taking into consideration the above position and the provisions of TNGST Act, the Assessing Authorities are directed to take a uniform view while levying the penalty under section 23 of the TNGST Act and levy a penalty equal to 1% of the difference in tax under Form XVII and diverted without using it in the manufacturing process within our state. In case the diversion is detected by the department and not disclosed voluntarily by the dealer, the penalty may be levied at 5% of course the difference in tax will be collectable in both cases.

23. In view of the overall facts and circumstances of the case, we



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are of the view that above Circulars of the Principal Commissioner and Commissioner of Commercial Taxes and the instructions therein are no doubt binding on the officers of the Department. However, they are not binding either on the Higher Jurisdiction Forum such as Tribunal, High Court or the Supreme Court in terms of the decision of the Hon'ble Supreme Court in **Commissioner of Central Excise, Bolpur Vs. Ratan Melting & Wire Industries**, (2008) 13 SCC 1 : 2008 SCC OnLine SC 1527. Paragraph No.7 of the said decision reads as under:-

7. Circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes, but when the Supreme Court or the High Court declares the law on the question arising for consideration, it would not be appropriate for the court to direct that the circular should be given effect to and not the view expressed in a decision of this Court or the High Court. So far as the clarifications/circulars issued by the Central Government and of the State Government are concerned they represent merely their understanding of the statutory provisions. They are not binding upon the court. It is for the court to declare what the particular provision of statute says and it is not for the executive. Looked at from another angle, a circular which is contrary to the statutory provisions has really no existence in law.

24. At the same time, we are of the view that Section 23 of the Act



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is elastic in nature. Discretion of power is vested with the Authority to impose penalty which is a maximum penalty. Discretion vested with a *quasi* jurisdictional authority cannot be taken away by a Circular. Therefore, Circular / Clarification of the Principal Commissioner and Commissioner of Commercial Taxes which is contrary to the provisions of the Act is not binding on the Court.

25. The activity undertaken by the petitioner would have amounted to manufacture within the meaning of Central Excise Act, 1944 with introduction of Section 3A of the Central Excise Act, 1944 with effect from 14.05.1997 which was later omitted by Finance Act, 2001. The dispute pertains to the Assessment Year 2000-2001.

26. By virtue of Section 3A of the Central Excise Act, 1944, processing of dyeing was made liable to tax and tax was payable based on the annual capacity of production of the machine. In our view, the petitioner being a manufacturer would have been compelled to take out a Central Excise Registration during the period in dispute as the activity amounted to manufacture with effect from 14.05.1997.



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27. Be that as it may, though this Court in **Beauty Dyers Vs. Union of India**, 2001 SCC OnLine Mad 1284 : (2004) 166 ELT 27 held that levy to be unconstitutional which was affirmed by the Honb'le Supreme Court in **Union of India and others Vs. Beauty Dyers**, (2015) 17 SCC 817 : 2009 SCC OnLine SC 259, the fact remains that the petitioner would have been entertained *bonafide* doubt that the activity amounted to manufacture and therefore entitled to the benefit of procurement under Form XVII.

28. We are therefore of the view that though the order of the second respondent Appellate Assistant Commissioner has placed reliance on the Circular / Instruction of the Principal Commissioner and Commissioner of Commercial Taxes dated 27.02.2002 which was reversed by the Appellate Tribunal, considering the fact that the petitioner has also paid back the tax and concessional availed, the reduced penalty imposed by the second respondent Appellate Assistant Commissioner in the peculiar facts of the case is to be upheld and the impugned order of the Appellate Tribunal dated 05.10.2004 is quashed. Therefore, we are inclined to allow this Writ Petition.



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WEB COPY 29. Accordingly, this Writ Petition stands allowed with the above observations. No cost. Consequently, connected Miscellaneous Petition is closed.

S.V.N., J C.S.N., J.
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Internet : Yes / No
Index: Yes/ No
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To

- 1.The Sales Tax Appellate Tribunal,
Coimbatore Bench,
Coimbatore.
- 2.The Appellate Assistant Commissioner
of Commercial Taxes,
Pollachi.
- 3.The Deputy Commercial Tax Officer,
Rural Circle, Tirupur.

S.VAIDYANATHAN, J.
AND



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