IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.06.2022

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THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P. Nos.25456 to 25460 of 2010
and M.P.Nos. 1,2,1,1, and 1 of 2010

W.P.No.25456 of 2010:

Coimbatore Pioneer Fertilizers Ltd.,
represented by its Managing Director,
Muthugoundanpudur Post,
Via Sulur-641 406,
Coimbatore-641 406. …Petitioner

Vs.

1.The Superintending Engineer,
Coimbatore Electricity Distribution Circle (South),
Tamil Nadu Electricity Board,
Coimbatore-641 012.

2.The Government of Tamil Nadu,
Rep. by its Secretary to Government,
Energy Department, Fort St.George,
Chennai-600 009.

3.The Tamil Nadu Electricity OMBUDSMAN,
No.19A, Rukmini Lakshmipathy Salai,
(TIDCO Complex), Egmore, Chennai-600008. …Respondents

PRAYER in W.P.25456 of 2010:

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus Calling for the records of the 3rd respondent culminating in its Common Order dt.31.3.2010 passed in Petition Nos.12-16 24 33 36-46 53-59 64 65-70 and 76-83 of 2009 and Petition Nos.1 of 2010 9 of 2010 and 12 of 2010 quash the same in so far as the petitioner is concerned and direct the 1st and 2nd respondents to refund or adjust against the future bills of the petitioner the sum of Rs.2 98 204/-(Rupees Two Lakhs Ninety Eight Thousand Two Hundred and Four Only) paid by the petitioner under the head maximum demand charge at 4% covering the period from September 1991 to May 2003 in respect of their HT SC No.20.

For Petitioner (In all W.P's)	: Mr.Arun Anbumani
For R1 and R3 (In all W.P's)	: Mr.Abul kalam Standing Counsel for TNEB
For R2 (In all W.P's)	: Mr.S.Jaya Chandran Government Advocate

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COMMON ORDER

These Writ Petitions have been filed seeking issuance of a Writ of Certiorarified Mandamus, to call for the records of the 3rd Respondent culminating in its Common Order dated 31.03.2010 passed in Petition Nos.12-16 24 33 36-46 53-59 64 65-70 and 76-83 of 2009 and Petition Nos.1 of 2010, 9 of 2010 and 12 of 2010 and quash the same insofar as the petitioners are concerned and direct the 1st and 2nd Respondents to refund or adjust against the future bills a sum of Rs.2,98,204/-(Rupees Two Lakhs Ninety Eight Thousand Two Hundred and Four Only) paid by the petitioner under the Head Maximum Demand Charge at 4% during the period September 1991 to May 2003 in respect of their HT SC No.20.

2. The petitioner has a High Tension supply connection to its factory bearing HT SC No.20. Electricity Tax was imposed and collected from the petitioner originally under the provisions of the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962. From 06.06.2003 the Electricity Tax was collected under the provisions of the Tamil Nadu Tax on Consumption on Sale of Electricity Act, 2003.

3. The present writ petitions raises a question as to the legality/validity of levy of tax on Maximum Demand Charges under the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962. The levy of

Electricity Tax on Maximum Demand Charges for the period from September, 1991 to May 2003 under the provisions of the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962 was the subject matter of challenge before the Hon'ble Supreme Court in *SPIC vs. Electricity Inspector and E.T.I.O and others reported in 2007 (5) SCC 447*, wherein it was held that the levy of tax on Maximum Demand Charges would fall outside the purview of Entry 53 of list II of VII Schedule to the Constitution of India. The said Entry reads as "Taxes on the consumption or sale of electricity". Any levy on tax which is not on the event of consumption or sale of electricity was found impermissible in terms of Article 246 read with Entry 53 list II of VII Schedule of the Constitution of India. It may be relevant to refer to the following passage of the decision of the Hon'ble Supreme Court cited supra which would show that the Apex Court found that Maximum Demand Charges is not on actual delivery of electricity and thus the levy/imposition of tax is beyond the pale of Entry 53 of List II of VIIth Schedule of Constitution of India. The relevant para is extracted below:

> ***154.** Our attention has been drawn to a simple bill, from a perusal whereof it appears that although permitted MD was 350*

kVA, the recorded demand being 144 kVA, electricity tax was charged only on the basis of 144 kVA and not on the basis of 350 kVA. Keeping in view the fact that the maximum demand postulates something other than actual delivery of electricity, the question of imposition of any tax thereupon does not arise. The decision of this Court in Northern India Iron & Steel Co. [(1976) 2 SCC 877] did not assign any reason. The said decision did not take into consideration the provisions of Article 366(12) of the Constitution of India or the effect of Entry 53 of List II of the Seventh Schedule of the Constitution of India. It has also not been taken into consideration that the State cannot impose tax only because the State Electricity Board would be entitled to levy tax on certain services. It would bear repetition to state that the concept of tariff and tax is different. Whereas tariff would include a list of charges, the tax must be on actual basis. It is also not the case nor can it be that imposition of tax on actual sale or consumption of electrical energy was impossible keeping in view the particular fact situation. As noticed herein before, two different meters are installed, one, for the purpose of actual consumption of electrical energy and another being a trivector, the same merely records the maximum demand.

(emphasis supplied)

3. Thereafter, the State of Tamil Nadu had passed Act 38 of 2007

with a view to validate the levy of tax on on Maximum Demand Charges. Act No. 38 of 2007 introduced a number of amendments including Section 2(7) wherein while defining "consumption charges" it provided that the "consumption charges" would include the charges on maximum demand and power factor sur-charge. The relevant provision of the Validation Act is extracted below:

ACT No. 38 of 2007

An Act to amend the Tamil Nadu Tax on consumption or sale of Electricity or sale of Electricity Act,2003

Be it enacted by the Legislative Assembly of the State of Tamil Nadu in the Fifty-eighth Year of the Republic of India as follows:-

1. *1. This Act may be called the Tamil Nadu Tax on Consumption or Sale of Electricity (Amendment) Act,2007.*

2. (a) All sections, except Section 6, shall be deemed to have come into force on the 16th day of June 2003.

(b) Section 6 shall come into force at once

2. *In Section 2 of the Tamil Nadu Tax on Consumption or Sale of Electricity Act, 2003 (hereinafter referred to as the principal Act):-*

(1) after clause (2) the following clause shall be inserted, namely:-

"(2-A) "Charge on maximum demand" means the charge levied on the highest value of the average kilovolt- Ampers delivered at the point of supply to the consumer during any consecutive thirty minutes in a month,:.

(2) for clause (7) the following clause shall be substituted, namely:-

(7) " consumption charge" means the amount charged by a licensee for the supply of electricity to a consumer before deduction of rebate, if any, allowed by the licensee for payment on or before such date as may be specified by the licensee, but does not include:-

(i) meter charges:
(ii) interest on delayed payment
(iii) fuel charges; and
(iv) fuse off call charges and re-connection charges:

Provided that in the case of High Tension supply of electricity, consumption charge includes the charge on maximum demand and power factor surcharge.

Explanation – If electricity is supplied to any person free of charge or at a concessional rate (other than tariff concession) the consumption charge would mean the tariff fixed by the Tamil Nadu Electricity Regulatory commission in tis Tariff order to similar consumer,:

***6.** Notwithstanding anything contained in the principal Act or the rules made on notification issued thereunder, or in any other law for the time being in force or in any Judgment, decree, or order of any Court or other authority:-*

(a) any tax on the electricity sold or consumed, paid by any license under sub-section (1) of Section 3 of the Principal Act, during the period commencing on the 16th day of June 2003 and ending with the date of publication of the Tamil Nadu Tax on Consumption or Sale of Electricity (Amendment) Act, 2007 in the Tamil Nadu Government Gazette, shall be deemed to be and shall be deemed always to have been paid in accordance with law, as if the principal Act as amended by this Act, had been in force as all material

time when such tax was paid.

(b) all acts done or proceedings taken under the Principal Act, during the period commencing on the 16th day of June 2003 and ending with the date of publication of the Tamil Nadu Tax on consumption or sale of Electricity (Amendment) Act, 2007 in the Tamil Nadu Government Gazettee, shall be deemed to be and shall be deemed always to have been validity done or taken in accordance with law as if the principal Act as amended by this Act, had been in force at all material times when such acts or proceedings were done or taken.

4. The validity of the said amendment was challenged before this Court and was upheld. It is informed that the decision of this Court has been challenged and presently pending consideration before the Hon'ble Supreme Court. However, it is submitted by the learned counsel for the petitioner that the pendency may have no relevance inasmuch as the Validation Act only validates the levy of tax on Demand Charges for the period commencing from 16.06.2003 while the present demand is for the period between September 1991 to May 2003.

5. It is submitted by the learned counsel for the petitioner that a sum of Rs.2,98,204/- was paid in respect of their HT SC No.20, under the Head Maximum Demand Charge at 4% for the period September 1991 to May 2003. An application claiming refund of the tax paid already was filed

before the Tamil Nadu Electricity Ombudsman. The Electricity Ombudsman rejected the submission of the petitioner that the Validation Act may not have any bearing in relation to the claim of refund of tax on demand paid by the petitioner in respect of periods prior to June 2003. The relevant portion of the order is extracted below:-

> *" a) It could have never been the intention of the legislature to validate the collections arising out of the Act 2003 and part with the collections arising out of the Act of 1962. If that be so, it would have been specifically mentioned in the Act 38 of 2007. It may be a case of omission to include the tax collections pertaining to the Act of 1962 within the purview of Act 38 of 2007. But in my opinion, the legislature would have never thought of having a different set of rule for the claims arising out of Act of 1962........*
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> *...... In the backdrop of the same, any decision rendered by me as sought for by the counsel for the petitioners, even if it is based on the judgment of the Hon'ble Supreme Court under reference, would amount to encroaching the jurisdiction of the High Court before which the matter relating to the validity of refund of electricity tax is sub judice. In other words, it may be said that if as contended by the counsel for the appellants, I am to direct the refund of tax by applying the judgment of the Hon'ble Supreme Court of India, I will, infact, be discharging the functions of the High Court when the High Court is seized the issue. I am of the considered opinion that the same is not permissible in law. Hence, I am unable to be of any help to the petitioners. In the result, the petitioners are not entitled to seek relief before me at this stage."*

It was thus concluded by the OMBUDSMAN/ 3rd respondent herein that the relief sought for by the petitioner cannot be granted, in view of the fact that the Amending Act 38 of 2007 was under challenge before Madras High Court, which as stated above has been disposed of by this Court upholding the validity of the amendment Act, the said order of this Court is pending consideration before the Hon'ble Supreme Court.

5. I am of the view that the 3rd respondent has completely mis-directed itself in looking to Act 38 of 2007 while dealing with the claim of refund of tax on Maximum Demand Charges for the period prior to June 2003. The Validation Act which has been relied upon by the 3rd respondent only validates the levy of tax on Maximum Demand Charges from 16.06.2003 and not prior thereto. Admittedly, all the refund/claim forming the subject matter of the present Writ Petitions are in relation to the period prior to June 2003.

6. In view of the same, the order of the learned 3rd Respondent suffers from error apparent on the face of the record inasmuch as it contrary to the express provisions of Act 38 of 2007 validating the levy on tax on Maximum Demand Charges only from 16.06.2003 and thus set aside.

7. Consequently, the petitioner shall be entitled to refund of the sum of Rs.2,98,204/- representing tax on Maximum Demand Charges or they may be permitted to adjust the said amount of Rs.2,98,204/- against the future current consumption bills.

8. Accordingly, these writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

17.06.2022

Speaking (or) Non Speaking Order
Index : Yes/ No
Psa/smn
To:
1.The Superintending Engineer,
Coimbatore Electricity Distribution Circle (South),
Tamil Nadu Electricity Board,
Coimbatore-641 012.

2.The Secretary,
Government of Tamil Nadu,
Energy Department, Fort St.George,
Chennai-600 009.

3.The Tamil Nadu Electricity OMBUDSMAN,
No.19A, Rukmini Lakshmipathy Salai,
(TIDCO Complex), Egmore, Chennai-600008.

MOHAMMED SHAFFIQ, J.

Psa/smn

W.P. Nos.25456 to 25460 of 2010
and M.P.Nos.2 to 4 of 2015

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