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W.P.No.28005 of 2010

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 15.12.2022

PRONOUNCED ON: 14.06.2023

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

WP.No.28005 of 2010 and
MP.No.1 of 2010

Hi-Tech Carbon
(A Unit of Aditya Birla Nuvo Ltd
Formerly known as
Indian Rayon & Industries Ltd)
Rep. By its Vice President (F & C)
K-16, Phase-II
SIPCOT Industrial Complex P.O.
Gummidipoondi
Thiruvallur-601 201.

... Petitioner

Vs

1. Government of Tamil Nadu
Represented by its
Principal Secretary
Energy Department
Secretariat
Chennai-600 002.

2. The Chief Electrical Inspector
to Government
Thiru-Vi-Ka-Industrial Estate
Guindy, Chennai-600 032.

... Respondents



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PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, to call for the records relating to the impugned order C.No.6848/B1/2008, dated 30.9.2010, passed by the 1st Respondent and quash the same.

For Petitioner : Mr.RaghavanRamabadran
for M/s.Lakshmi Kumaran

For Respondents : Mr.B.Vijay
Additional Government Pleader

ORDER

The petitioner challenges an order passed by the Principal Secretary, Energy Department dated 30.09.2010. The petitioner claims to be a unit of Aditya Birla Nuvo Limited, engaged in the manufacture of carbon black. It had, at the relevant point in time, an installed capacity of 90,000 TPA. The manufacturing process resulted in the emission of combustible gases of high calorific value that are generated from the carbon black particles and fed into specially designed boilers for generation of steam. The said steam is further used for generation of power through turbo generator sets.

2 The petitioner used three turbo generator sets of capacity of 2.5, 6 and 8 MW, each for generation of power. The Government of Tamil Nadu in terms of the power vested in it under Section 27 of the Indian Electricity Tax Act, 1910 (in short '1910 Act') issued G.O.Ms.No.180 dated 17.11.1997 permitting



usage of turbo generators for electricity generation in parallel with the grid operated by the Tamil Nadu Electricity Board (Board/TNEB).

3. A Power Purchase Agreement (PPA) dated 22.03.1999 had been entered into with the Board for wheeling of the power generated from two turbo generators for business use of its sister concerns through the grid. The PPA also provided for TNEB to purchase the power that remained after supply to the sister concerns. The power generated by the petitioner is supplied to the TNEB meter. In addition, there is a charge for using the grid, wheeling charges, that are to be adjusted at 15%, to be adjusted from the total power supplied by the petitioner to the Board.

4. Act 4 of 1962 provides for levy of tax on the consumption charges of electricity. The Tamil Nadu Electricity (Taxation on Consumption) Act, 1962 (in short '1962 Act') had granted exemption in respect of electricity tax payable under the said Act for a period of 5 years from date of commencement of manufacture of principal product if high tension electricity supply is consumed in the process of manufacture of the principal product.

5. G.O.No.2072 dated 19.11.1969 granted exemption for a period of 5 years. G.O.No.1201 dated 18.06.1970 modified G.O.No.2072 extending the



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exemption for a further period of 5 years to industries which consume electricity, generated by itself, in addition to that provided by TNEB.

6. The 1962 Act was in force till 30.04.1979, when G.O.Ms.No.787, Public Works Department was issued on 30.04.1979 revising the tariff structure substantially. The revised electricity tax stood merged with basic rate and there was only one uniform levy thereafter. On and from 01.05.1979 a single tariff was levied and collected and the petitioner was one of the beneficiaries of such rationalisation measures. The Electricity Act, 2003 was in effect on and from 16.06.2003.

7. The cause of action for the present Writ Petition arose with issuance of letter dated 08.06.2005 calling for electricity tax payment for the period July, 1999 to January, 2005, falling under the 1962 as well as 2003 Acts. The demands made were three fold:-

- i) Electricity Tax under Section 3 of the 1962 Act in respect of surplus power sold to Tanfac Industries, Cuddalore, a sister concern of the petitioner, computed for the period July 1999 to 15.06.2003.
- ii) Additional Tax under Section 3A of the 1962 Act for surplus power sold to Tanfac Industries for the same period as above.



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- iii) Tax under Section 3(1)(b) of the 2003 Act for energy sold to Tanfac between 16.06.2003 to January, 2005.

8. Despite objections, the demands were confirmed by the second respondent, i.e., the Chief Electrical Inspector to Government by his order dated 21.09.2005. The petitioner assailed the same under Section 9(2) of the 1962 Act which appeal came to be dismissed by way of the present impugned order. Hence, this Writ Petition.

9. The submission of Mr.RaghavanRamabadran, learned counsel for the petitioner are as follows. He alleges the violation of principles of natural justice, both at the original and appellate stage, since the petitioner has not been heard by either officer. Reliance is placed in this regard upon the judgements of the Hon'ble Supreme Court in the case of *Dharampal Satyapal Limited V. Deputy Commissioner of CE, Gauhati*¹ and of the Bombay in the case of *TLG India Pvt. Ltd. V. DCIT*².

10. Nothing turns on this submission as this Court does not intend to remit the matter, which is the subject matter of a 2010 Writ Petition. Hence, whatever may be the deficiency on this score has been remedied by way of a detailed hearing afforded by this Court.

1(2015 (8) SCC 519)

2(W.P.No.2575 of 2019 dated 18.11.2019)



11. The second submission is that the demand was raised at the tariff rate of Rs.3.20 for the period July 1999 to December, 1999, whereas for that period, the petitioner had charged only Rs.2.504 per unit. Likewise, for the period January, 2000 to November, 2001, the demand is based on a rate of Rs.3.40 per unit, whereas the petitioner had charged rates varying from Rs.2.572 to Rs.2.716 per unit. Electricity tax being an indirect levy is to be collected from the ultimate consumer or should be deemed to have been collected.

12. According to the petitioner, whatever was the collection from the sister unit must thus be treated as inclusive of electricity tax. Reliance is placed on an analogy drawn in the context of Tamil Nadu Prohibition Act, 1937. In brief, the petitioner would urge that the rate charged and collected from Tanfac must be held to be inclusive by following the cum tax formula, which is price charged (excluding tax) = price actually charged (treated as cum tax)/ by 1 plus rate of electricity tax (%).

13. To clarify, the rate of Rs.2.504 per unit of electricity supplied in July, 1999 must be treated as inclusive of electricity tax at 16%. This price must be divided by 1.16 i.e., Rs.2.16, whereas 16% has been applied on the tariff collected, which, according to the petitioner has resulted in excess tax demand. The petitioner relies in this regard the judgment of the Hon'ble Supreme Court



in the case of *Joint Commercial Tax Officer, Division III, Madras V. Spencer & Co. and others*³.

14. In *Spencer & Co*, the appeals before the Hon'ble Supreme Court had arisen from the file of the Madras High Court. *Spencer & Co.* had challenged assessment orders under the Madras General Sales Tax Act, 1959. The authority had proceeded to re-determine taxable turnover including the tax paid by *Spencer* under Section 21A of the Madras Prohibition Act, 1937. The High Court had accepted the case of the assessee directing the exclusion of the tax from the taxable turnover.

15. Section 21A of the Tamil Nadu Prohibition Act provides for the levy of sales tax on sales of foreign liquor to permit holders at the rate of 8 annas in the rupee or such other rate as may be prescribed and is extracted below. The question that arose was as to whether the tax collected under Section 21A of the Prohibition Act must be treated as part of the total turnover of the dealers.

16. Section 21A of the Madras Prohibition Act reads thus:

“Every person or institution which sells foreign liquor-

*(a)-(b) *** shall collect from the purchaser and pay over to the Government at such intervals and in such manner as may be prescribed, a sales tax calculated at the rate of eight annas in the rupee, or at such other rate as may be notified*

³ (1975) 2 SCC 358)



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by the Government from time to time, on the price of the liquor so sold."

17. The appeals came to be dismissed in the following terms:

'3. It is clear from Section 21-A of the Madras Prohibition Act, 1937 that the sales tax which the section requires the seller of foreign liquor to collect from the purchaser is a tax on the purchaser and not on the seller. This is what makes the authorities on which counsel for the appellants relied inapplicable to the cases before us. Under Section 21-A the tax payable is on the price of the liquor and that tax is to be paid by the purchaser, the seller is required to collect the tax from the purchaser which he has to pay over to the Government. Section 21-A makes the seller a collector of tax for the Government and the amount collected by him as tax under this section cannot therefore be a part of his turnover. Under the Madras General Sales Tax Act, 1959 the dealer has no statutory duty to collect the sales tax payable by him from his customer, and when the dealer passes on to the customer the amount of tax which the former is liable to pay, the said amount does not cease to be the price for the goods although "the price is expressed as X plus purchase tax". But the amounts collected by the assessee concerned in these appeals under a statutory obligation cannot be a part of their taxable turnover under the Madras General Sales Tax Act, 1959.'

18. The judgments in the case of *George Oakes (P) Ltd. V. State of Madras*⁴, *State of Kerala V. RamaswamiIyer & Sons*⁵ and *Delhi cloth and General Mills Co. Ltd. V. Commissioner of Sales Tax, Indore*⁶ had been cited by the Appellant in support of its stand. In those cases, the tax liability fell upon the selling dealers by operation of statute. The dealers had passed on their

⁴(AIR 1962 SC 1037)

⁵(AIR 1966 SC 1738)

⁶((1971) 2 SCC 559)



liability to the purchasers by including the component of taxes paid by them to the sale price but sought exclusion of those amounts from their turnover for purposes of computing sales tax liability.

19. In that context, the Hon'ble Supreme Court considered the definition of the term 'turnover' under the respective sales tax enactments. In the case of *George Oakes*, the Bench held as follows:

"... when a sale attracts purchase tax and the tax is passed on to the consumer, what the buyer has to pay for the goods includes the tax as well and the aggregate amount so paid would fall within the definition of turnover ... so far as the purchaser is concerned, he pays for the goods what the seller demands viz. price even though it may include tax. That is the whole consideration for the sale and there is no reason why the whole amount paid to the seller by the purchaser should not be treated as the consideration for the sale and included in the turnover."

20. In the case of *Ramaswami Iyer* (supra), the definition of 'turnover' under the provisions of the Travancore Cochin General Sales Tax Act 1950 were considered and in *Delhi Cloth and general Mill*, the corresponding provision under the MP General Sales Tax Act 1958 were taken note of. Both the aforesaid definitions were found to be analogous to the definition of 'turnover'; under the Madras Act. The conclusion was as follows:

"any statutory power on the dealer to collect sales tax as such from any class of buyers.... Unless the price of an article is controlled, it is always open to the buyer and the seller to agree



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upon the price to be payable. While doing so it is open to the dealer to include in the price the tax payable by him to the Government. If he does so, he cannot be said to be collecting the tax payable by him from his buyers. The levy and collection of tax is regulated by law and not by contract. So long as there is no law empowering the dealer to collect tax from his buyer or seller, there is no legal basis for saying that the dealer is entitled to collect the tax payable by him from his buyer or seller. Whatever collection that may be made by the dealer from his customers same can only be considered as valuable consideration for the goods sold."

21. The Court made a distinction between the collection of tax on the ground of a statutory duty/liability, vis-à-vis the passing on of liability of tax paid by it as sale consideration, to the purchaser. In the case of *Spencer*, the addition proposed related to the tax collected by Spencer from its purchasers pursuant to the statutory mandate under Section 21A of the Madras Prohibition Act. Such receipts would thus not partake of the character of 'taxable turnover' under the Madras General Sales Tax Act 1959 as the role of the seller/dealer was only a collector of the taxes for onward transmission to the Government.

22. In the case on hand, reliance on the judgement in *Spencer* does not advance the case of the petitioner. In fact, the distinction as noted in the case of *Spencer* would stand wholly attracted, to its detriment. Firstly, it cannot be deemed that the amount paid by the petitioner is inclusive of the tax. No material has been placed on record to support this statement. In fact, this question had come up in the course of the proceedings and the petitioner asked



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to produce some material to establish that the consumers had met the tax demand. No material has been placed by the petitioner in this regard either before the authorities or before this Court.

23. That apart, the liability in question falls upon the petitioner under the statute and it is thus for the petitioner to meet the same. The question of passing the liability on to the consumers would, as held in the judgements in the cases of *George Oakes*, *Ramaswamy Iyer* and *Delhi Cloth and General Mills*, be a matter of contract between the petitioner and the consumer which has no bearing upon the charge or quantification of liability. This argument is hence rejected.

24. The third argument turns on the interpretation of two Government orders, being G.O.No.2072 dated 19.11.1969 (1st G.O) and G.O.No.1201 dated 18.06.1970 (2nd G.O.). G.O. 2072 continues an exemption from electricity consumption tax to new industries drawing HT supply, whether or not licensed under the Industries (Development and Regulation) Act, (in short 'IRDA') for a further period of 2 years from the original period of 3 years granted under G.O.Ms.No.1798/P.W./dated 19.10.1969, the relevant portion of which reads thus:

Government of Tamil Nadu
Abstract



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ELECTRICITY – Tamil Nadu Electricity (Taxation on Consumption), Act, 1962 – Abolition of 10% tax on H.T.Supplies to Industries in Thermal area – Concession to new industries – Notification – Issued.

PUBLIC WORKS DEPARTMENT

G.O.Ms.No.2072 Dated: 19.11.69

Read again:

G.O.Ms.No.1798/P.W./dt.14.10.1969

ORDER:

.....

NOTIFICATION

In exercise of the powers conferred by Sub-section (1) of Section 13 of the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962 (Tamil Nadu Act 4 of 1962), the Governor of Tamil Nadu hereby makes an exemption in respect of the electricity tax payable under the Act by --

.....

2(b) the person running the industries which are not licensed under the Industries (Development and Regulation) Act, 1951 (Central Act LXV of 1951) and which consume energy under High Tension Supply into the process of manufacturing or producing the principal product for a period of five years from the date of the commencement of the manufacture or production of the principal product in such understanding:

.....

25. Under G.O.Ms.No.1201 dated 18.06.1970, it was noticed that G.O.

2072 does not cover those cases of HT industries generating and consuming



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energy. Thus, this was sought to be covered under G.O.Ms.No.1201 in the following terms:

GOVERNMENT OF TAMIL NADU

ABSTRACT

ELECTRICITY – Tamil Nadu Electricity (Taxation on Consumption) Act, 1962 – Levy of Electricity Tax on consumption recorded by private generating sets generating power under L.T. and owned by H.T.Industrial consumers – Exemption orders – Issued.

PUBLIC WORKS DEPARTMENT

G.O.Ms.No.1201 Dated: 18.06.1970

Read:

- 1. G.O.Ms.No.2404/Public Works/dt.8.9.64.*
- 2. G.O.Ms.No.2072/Public Works/dt.19.11.69.*
- 3. From the CEIG, Lr.No.39537/Tax/69, dt.29.1.70.*

ORDER:

In G.O.Ms.No.2404, Public Works, dt.8.9.64, the Government have exempted under Section 13(1) of the Tamil Nadu Electricity (Taxation on Consumption) Act, 1962 all persons who consume energy under low tension supplied to them for consumption in any industrial undertaking owned or controlled by them and licensed under the Industries (Development and Regulation) Act 1961 (Central Act LXV of 1951) in respect of electricity tax payable on the quantity of energy under L.T. Generated and consumed for a period of three years from the date of commencement of the manufacture or production of the principal product in such undertaking. In G.O.Ms.No.2072, Public Works, dated 19.11.1969, the Government have extended the period of exemption from levy of tax on the energy consumed in the process of manufacture or production of the principal product to five years in respect of all H.T.industries. The Chief Electrical Inspector to Government has pointed out that there is no mention in the said exemption about the energy generated and



consumed by industries. He has, therefore, requested that necessary orders may be issued under Section 13(1) of the Tamil Nadu Electricity (Taxation on consumption) Act 1962 to bring the consumption of energy generated also within the scope of G.O.Ms.No.2072, Public Works, dated 19.11.1969 with retrospective effect from 19.11.69. The Government agree with the Chief Electrical Inspector to Government is informed that retrospective effect cannot however be given to the notification issued under Section 13(1). The following notification will be published in the next issue of the Tamil Nadu Government Gazette.

NOTIFICATION

In exercise of the powers conferred by Sub-section (1) of Section 13 of the Tamil Nadu Electricity (Taxation on consumption) Act, 1962, (Tamil Nadu Act 4 of 1962) the Governor of Tamil Nadu hereby makes an exemption in respect of the Electricity Tax payable under the Act by --

*.....
(b) the persons running the industries which are not licensed under the Industries (Development and Regulation) Act 1951 (Central Act LXV of 1951) and consuming energy purchased under High Tension Supply who consume energy generated by themselves in the process of manufacturing or producing the principal product for a period of five years from the date of the commencement of the manufacture or production of the principal product in such undertaking in respect of such energy generated by them.*

.....”
26. The petitioner submits that with the expansion of scope of the exemption under G.O.Ms.No.1201, it is entitled to exemption in respect of all energy generated by it whether consumed by it or sold to another entity through grid. This submission is misconceived. The first G.O. dated 19.11.1969 is the primary G.O that granted an exemption to persons running industries that were



not licensed under the Industries (Development and Regulation) Act, 1951 and which consumed energy under HT supply.

27. The second G.O expanded the scope of the first G.O. that had omitted mention in regard to the energy generated and consumed by industries and it was to correct this lacunae that second G.O. was issued. The relief granted in regard to such industries was prospective.

28. However, the petitioner is, in my considered view not entitled to exemption at all, either under the I or II G.O. insofar as the energy has not been produced and consumed by it for manufacture or generated and consumed by it for manufacture. The conditions of production or generation of energy, and consumption of energy, are to be concurrently satisfied. In the present case, the petitioner has admittedly sold the energy generated to a third party, albeit a sister concern, and hence in my view is not entitled to the exemption sought.

29. The last submission made relates to the plea of limitation. In this context, the petitioner would rely on the following sequence of events:-

- (a) the period in question relates to the period July 1999 to June 2003
- (b) the first notice received by the petitioner called for partial details and is dated 05.06.2002
- (c) on 30.01.2004, some details had been supplied



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(d) on 01.01.05 a reminder was issued by the respondent

(e) on 25.01.2005, a statement was filed by the petitioner objecting to the proposal for levy of tax

(f) On 01.08.2005, further details were furnished

(g) On 15.02.2005, yet another reminder was issued

(h) It is only on 07.05.2005 that full details have been supplied

(i) impugned order was passed on 08.06.2005

30. The statutory provision relating to limitation is Section 9 of the 2003 Act and Section 9(3) states that no assessment under that Section shall be made after the expiry of four years. The period of levy commences from 1999, which is even prior to coming into force of 2003 Act and hence would be covered by the provisions of the erstwhile enactments, when there was no limitation provided at all. The Indian Electricity Act, 1910 and Electricity Supply Act, 1948 do not stipulate any limitation for raising of a demand under those enactments. The limitation for the purpose of demand was first raised only under the 2003 Act in terms of Section 9.

31. The question that would thus arise is as to whether the respondents can sustain the demand for the period 1999 to mid 2003 by way of the



impugned order dated 08.06.2005. The provisions of Section 9 dealing with assessment reads as follows:-

9. Assessment. – (1) If no return in respect of any period is submitted by a licensee or a person required to submit return under section 8 or if the return submitted by such licensee or person appears to the Director to be incorrect or incomplete, the Director shall, after giving such licensee or person as the case may be, a reasonable opportunity of being heard, proceed in such manner as may be prescribed to assess to the best of his judgment the amount of electricity tax payable under this Act by such licensee or person.

(2) The amount of electricity tax assessed under subsection (1) for a period less the sum, if any, already paid in respect of the said period, shall be paid by the licensee or the person by such date as may be specified in a notice issued by the Director in this behalf and the date to be specified shall be ordinary not less than 30 days from the date of service of such notice.

(3) No assessment under this section shall be made after the expiry of four years.

Explanation.- For the purpose of this section, “year” means the year commencing on the first day of April and ending on the last day of March.”

32. In the present case, there is really no assessment as such which has been made and only demands raised by the respondents culminating in a final demand dated 08.06.2005 where the authority proceeds on the basis that the impugned demands would, by itself, constitute valid assessments.

33. The Electricity Act, 2003 comes into force on 16.06.2003 and with it, the provisions of Section 9(3). Since the period of demand prior thereto did not



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mandate any specific order to be passed or stipulate any limitation in respect of the raising of a demand, the demand for the period between July 1999 and 16.06.2003, stands protected. There is nothing untoward in the impugned order conveying such demand on 08.06.2005 and the same is sustained.

34. The last submission made relates to the lack of proper procedure set out under the statute for levy of tax, filing of return, procedure for assessment, finalization of assessment, raising of demand and process of rectification. The petitioner would submit that in the absence of a proper procedure set out under the Act, the respondents cannot simply raise demands as per their will and pleasure. There is no process of assessment that has been followed and hence the impugned communication raising a demand is not liable to be sustained.

35. Per contra, the respondents would point out that the 2002 Act read with the Regulations and Rules sets out a comprehensive procedure for assessment and appeal. Hence, the impugned communication dated 08.06.2005 is a continuation of the proceedings that have been initiated even prior to coming into force of the Act. I agree with the respondents on this score.

36. The Petitioner has relied upon the judgments in *K.T.Moopil Nair v State of Kerala* ((1961) 3 SCR 77), and *CIT vs B.C.Srinivasa Shetty* ((1981)2 SCC 460) among others. These judgments would be of no avail to the petitioner



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seeing as the 2003 Act does provide for a procedure for the filing of returns, process of assessment and statutory appeals. This argument is thus rejected as being devoid of merit.

37. Incidentally, this writ petition is of the year 2010 and has been filed pursuant to a decision of this Court in a batch of writ petition in *Tvl. Iyappan Textiles Limited and others v State of Tamil Nadu and ors* dated 13.07.2006 (W.A.No.329 of 2004 etc batch). The Court is concerned with a demand for the period 1999 – 2003, that has been raised in 2005. The writ petition has thus been filed belatedly, though that is not the ground upon which the decision to dismiss the same rests. Dismissed with no order as to costs. Connected M.P. closed.

Sl

14.06.2023

Index : Yes / No

Speaking Order/Non-speaking order

Neutral Citation: Yes / No

To

1. Government of Tamil Nadu

Represented by its

Principal Secretary

Energy Department

Secretariat

Chennai-600 002.



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DR.ANITA SUMANTH, J.

Sl

2.The Chief Electrical Inspector
to Government
Thiru-Vi-Ka-Industrial Estate
Guindy, Chennai-600 032.

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