



W.P.(MD).No.19482 of 2022

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 24.08.2023

DELIVERED ON: 09.11.2023

CORAM

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

W.P.(MD).No.19482 of 2022

and

W.M.P.(MD).No.14225 of 2022

M/s.Indian Ocean Sands Company (P) Limited,
Represented by its Managing Director,
M.Ramesh

... Petitioner

Vs.

The Assistant Commissioner (ST),
Tuticorin III Assessment Circle,
Tuticorin.

... Respondent

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorari, to call for the records of the respondent in TNET: 33375920283/2007-2008 dated 21.07.2022 and quash the same as it is unlawful and without jurisdiction in terms of the decisions of the Hon'ble Madras High Court reported in 28 VST Page 356, WA(MD).No.332 of 2007 dated 12.04.2022 and W.P.No.13631 of 2005 dated 27.07.2016 and also barred by limitation as per Section 8(5) of the Tamil Nadu Tax on Entry of



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Motor Vehicles Into Local Areas Act 1990.

For Petitioner : Mr.R.D.Ganesan

For Respondent : Mr.R.Suresh Kumar,
Additional Government Pleader

ORDER

The Writ Petition is filed to quash the order dated 21.07.2022 as it is barred by limitation under Section 8(5) of the Tamil Nadu Tax on Entry of Motor Vehicles into Local Areas Act 1990 and hence it is unlawful and without jurisdiction.

2. The writ petitioner is a company had purchased imported Audi Car from Bangalore vide Invoice No.JM/HSS/001/ 2007-2008 dated 31.07.2007. Based on the verification of records the respondent had earlier passed order dated 24.12.2019 levying entry Tax of Rs.2,80,370/- as per the proposals made out vide notice dated 19.08.2019 for the assessment year 2007-08, on the purchase of imported Audi car for the total value of Rs.22,42,960/-. The penalty of Rs.4,20,555/- was imposed under Section 15 of the Tamil Nadu Tax on Entry



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of Motor Vehicles Act, 1990, without any show cause notice for penalty under Section 15 of the Act. Thereafter, the petitioner has filed detailed reply dated 01.10.2021 for revocation of the order dated 24.12.2019. Considering the same the respondent had passed an order dated 05.10.2021, thereby dropped the levy of penalty based on judgments cited, but sustaining the levy of Entry Tax of Rs. 2,80,370/-. In the meantime, third pre-revision-cum-personal hearing notice dated 21.12.2021 had been served on the petitioner proposing to re-impose the penalty which had been already dropped vide order dated 05.10.2021. The reason for re-levy of penalty as stated in the order is that on verification of records, it is noticed that the assessment was revised without any orders from the judicial forum or departmental appellate authorities. It is noted that the revision of assessments without any directions from the judicial forum or departmental appellate authorities is not allowed as it is prejudice to the revenue, hence it is proposed to reimpose the penalty. After receipt of notice, the petitioner has filed detailed reply dated 27.01.2022 and 27.04.2022 along with judgments, but the respondent has not considered the reply and has not considered the issue of limitation. The petitioner sought personal hearing, but the same was not considered. Moreover, the levy of entry tax and penalty is



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barred by limitation as per section 8(5) of Entry Tax Act. The respondent had issued preassessment notice for the assessment year 2007-2008 on 19.08.2019 and the time limit is only three years and which expired on 30.04.2011. Once the original order is time barred, then the revision order dated 05.10.2021 and the impugned order dated 21.07.2022 is void and hence both are liable to be set aside. The petitioner relied on the judgment rendered in W.P.No.39034 of 2002 dated 30.09.2003 in Sri Balakrishna Transport Vs. Commercial Tax Officer, Tambaram-I Assessment Circle, Chennai reported in 28 VST 356 (Mad), which is followed in W.P.No.13631 of 2005 dated 27.07.2016 (M/s.Vishnu Enterprises). Recently the said Balakrishna's case was also followed in W.A. (MD)No.332 of 2007 vide order dated 12.04.2022 and W.A.(MD)No.442, 452 and 453 of 2022 vide order dated 10.04.2023. The respondent is also not empowered to make an assessment under section 8 of the Act in the case of failure to file returns as required under section 7. The respondent has no power to make revision of assessment again and again, once the issue is decided as held in W.P.(MD)No.10647 to 10649 of 2016 dated 08.08.2019 (M/s.Bhavani Saw Mill), wherein it is held there is no jurisdiction to issue second revision notice and third revision notice is beyond any law. Hence the impugned order is



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without any authority of law and jurisdiction. Penalty is not leviable for non-compliance of the provision under bonafide circumstances as held in Hindustan Steel Ltd. reported in 25 CTC 211. Hence the petitioner prays to set aside the revision order as well as the impugned order.

3. The respondent had filed counter stating the validity of the Tamil Nadu Tax on entry of Motor Vehicles into Local Areas Act, 1990 was upheld by the Hon'ble Supreme Court and it also held that the same is applicable for imported vehicles and in the meanwhile the assessment orders were passed. The period during the pendency of litigation ought to be excluded for calculating limitation. If any assessment order not made then it ought to be taken as deemed assessment. Moreover, the section 8 limitation is applicable where ever the returns are filed, if returns are not filed then section 8(5) has no application. The petitioner is liable to pay entry tax as mandated under section 3 and the petitioner failed to comply with the section 3(3). Any person failing to comply with the provisions of the Act is liable for imposition of penalty under section 15 of the Act. But penalty was deleted since there is no finding of willfulness, but later on it was realized section 15 is nothing to do with "willfulness" and



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hence the same was cancelled. Further the assessment order dated 05.10.2021 did not discuss non filing of return as mandated under section 3. Moreover, the order dated 05.10.2021 was passed based on the petitioner's representations without any direction from the judicial forum, hence pre-revision notice dated 21.12.2021 was issued. The petitioner is having alternative remedy of statutory appeal. Since the petitioner is liable to pay 100% tax before filing the statutory appeal, in order to avoid the same, the present writ petition is filed. Hence the respondents prayed to dismiss the writ petition.

4. The first contention of the petitioner is on limitation. The Tamil Nadu Tax Entry of Motor Vehicles into Local Areas Act 1990 under Section 8 provides for assessment. Under sub clause 5, it has been categorically stated no assessment can be carried out beyond the period of three years. The relevant portion is extracted hereunder:

8.Assessment

“(5) No order of assessment under sub-section (3) or (4) shall be made after the expiry of three years from the last date prescribed for filing of returns of the particular period. If for any reason such order is not made within the period aforesaid then the return so filed shall be deemed to have been accepted as correct and complete for assessing the tax due from such person”.



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The contention of the petitioner is that vehicle was purchased in the year 2007 and the time prescribed for assessment is three years which expired on 30.04.2011. But the respondent had issued pre-assessment notice on 19.08.2019 which is beyond the period of three years prescribed under section 8(5). However, the learned counsel appearing for the respondent submitted since the petitioner has not filed any returns declaring the purchase of Audi car, then the period of limitation ought to be calculated from the date on which it was brought to the knowledge of the respondent, in such circumstances the present assessment order is within the limitation. It is an admitted fact that the petitioner did not file the returns. But the claim of the petitioner, even if the petitioner has not filed returns, then also the limitation is only three years from the date of purchase and not from the date of knowledge to the respondent and hence the respondent is not having power to assess and for which the Learned Counsel appearing for the petitioner relied on the judgment passed by Hon'ble Division Bench in the case of *Sri Balakrishna Transport Vs. Commercial Tax Officer, Tambaram-I Assessment Circle, Chennai* reported in *2010 28 VST 356 (Mad)*. The relevant portion is extracted hereunder:



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"7. Though Section 7 requires every person liable to pay tax under the Entry Tax Act to file a return to the designated authority, there is no specific provision in the Entry Tax Act for assessing a person who has failed to furnish the return. Section 8 of the Act provides for assessment on the basis of the return furnished by a person liable to pay tax and the related proceedings for passing the assessment order on best judgment basis. When the Act does not make a specific provision for assessment of an importer, who failed to furnish the return under Section 7, it was not within the powers of the assessing authority to assess the importer long after the import made by him, by making use of the details furnished by such importer consequent to the notice of demand made by the assessing authority.

5. The aforesaid judgment is followed in subsequent judgment in W.P.No. 13631 of 2005 dated 27.07.2016 (M/s.Vishnu Enterprises). The Hon'ble Division Bench in W.A.(MD)No.332 of 2007 vide order dated 12.04.2022 has also followed and the same is extracted hereunder:

“7. We do not think it will be proper for us now to relegate the appellant to the alternative remedy available under the Act. No doubt, the Writ Court had dismissed the writ petition directing the appellant/petitioner to avail the alternative remedy, but this writ appeal has been entertained by this Court and it has been pending for nearly 15 years. Hence, we do not think we will be justified in relegating the appellant/petitioner to the alternative remedy under the Act. The Division Bench in Sri Balakrishna Transport's case (referred to supra) had held that there is no provision in the Entry Tax Act, for assessing a person who fails to furnish a return under Section 7 of the Act. The appellant has admittedly not filed a return as required under Section 7 of the Act, on the ground that the mobile crane is not a motor vehicle as defined under Section 2(28) of the Motor Vehicles Act, 1988. The vehicle was imported in the year 2001 and the notice impugned was issued in the year 2005.



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8. The Division Bench in Sri Balakrishna Transport's case (referred to supra), dealing with a similar situation, had observed as follows:-

"7. Though section 7 requires every person liable to pay tax under the Entry Tax Act to file a return to the designated authority, there is no specific provision in the Entry Tax Act for assessing a person who has failed to furnish the return. Section 8 of the Act provides for assessment on the basis of the return furnished by a person liable to pay tax and the related proceedings for passing the assessment order on best judgment basis. When the Act does not make a specific provision for assessment of an importer, who failed to furnish the return under section 7, it was not within the powers of the assessing authority to assess the importer long after the import made by him, by making use of the details furnished by such importer consequent to the notice of demand made by the assessing authority.

"8. ... When there is no specific provision in the Entry Tax Act for assessing a person who fails to furnish returns, the respondent was not entitled to make an assessment after a considerable point of time. It is trite that in case the words used in a taxation statute are plain and unambiguous they have to be interpreted in such a manner so as to give full effect to the wording of the statute. It is not permissible for including something in a taxing statute so as to give it a different meaning. In the absence of a provision enabling the tax collector to levy tax, it would be impermissible to levy tax, even if equity is in favour of the State. Therefore, there should be an express provision authorizing the assessing authority to collect tax from an importer, who failed to file returns as provided under section 7 of the Act. However, there is no such provision which enables the authority to make an assessment for the purpose of recovery of entry tax.

9. Therefore, we are of the opinion that the respondent was not justified in demanding entry tax from the appellant."

9. This judgment of the Division Bench was followed by this Court in W.P.No.13631 of 2005, dated 27.07.2016 wherein, the Hon'ble Mr.Justice T.S.SIVAGNANAM, held that the assessing authority has no power to assess and demand tax in the absence of a return being filed by an importer. In view of the abovesaid conclusion, we do not deem it necessary to go into the question whether the mobile crane is a motor vehicle as defined under Section 2(28) of the Motor Vehicles Act, 1988.

10. In view of the above categoric pronouncement of this Court, the Writ Appeal succeeds and the same is, therefore, allowed. The order of the learned Single Judge made in W.P(MD)No.3643 of 2005, dated 21.06.2007, dismissing the writ petition directing the appellant to take recourse to the alternative remedy available under the



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enactment, is set aside. The writ petition will stand allowed.”

6. The petitioner also relied on the judgment rendered in another writ appeal in W.A.(MD)No.442, 452 and 453 of 2022 vide order dated 10.04.2023 and the same is extracted hereunder:

“2. Though the Writ Petitions were filed, seeking a Writ of Certiorari to call for the records pertaining to the Demand Notices of the respondents dated 30.09.2019, 30.12.2020 and 30.12.2020 respectively, demanding entry tax from the petitioner, the issue relating to the payment of entry tax is no longer res-integra. It is covered by a judgment of the Division Bench of this Court in Sri Balakrishna Transport Vs. Commercial Tax Officer, Tambaram I Assessment Circle, Chennai, reported in (2010) 28 VST 356 (Mad). The said judgment was also followed by the Division Bench of this Court to which one of us (R.SURBAMANIAN,J.) is a party in W.A.(MD)No.332 of 2007.

3.In view of such settled position of law, where this Court held that the demand notice is not valid, since there is no specific provision for assessment of a person, who has not filed return, these Writ Appeals stand allowed, the order of the writ court is set aside and the impugned Demand Notices stand quashed. No costs. Consequently, connected miscellaneous petition is closed.”

7. However the Learned Additional Government Pleader has submitted that the judgment rendered in *M.H.Khanusiya Vs State of Gujarat* reported in 2018 SCC Online Gujarat 2191, confirmed by the Division Bench of Gujarat High Court in the case of *Hasti Petrochemicals and Shipping Limited Vs State of Gujarat* reported in *Special Civil Application No.15866 / 2021* would cover



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the issue. Moreover, the aforesaid judgments are against the Balakrishna's case.

On perusal of the M.H.Khanusiya's case and Hasti Petrochemicals' case the Hon'ble Court had proceeded the filing of return is mandatory and limitation is applicable. If return is not filed then the prescribed limitation is not applicable and the relevant portion is extracted hereunder:

“....Therefore, the limitation for assessment as provided under sub-section(5) of Section 8 shall be three years from the last date prescribed for furnishing the return, provided the importer has filed the return. In case, the importer has not filed the return at all, sub-section(5) of Section 8 shall not be applicable. We are fortified with the aforesaid view by the decision of the Kerala High Court in the case of A. Kunhikoya Thangal (supra). The Kerala High Court in the aforesaid decision while considering pari materia provisions under the Kerala Act has specifically observed and held that limitation apply to the cases where return has been filed by the assessee and the period of limitation not applicable, where no return is filed by the assessee.

11.6. Therefore, submission on behalf of the petitioner that impugned notice and / or assessment order are barred by limitation as provided under Section 8 of the Act is concerned, cannot be accepted.”

8. The above referred judgments had referred to the Kerala High Court judgment rendered in A.Kunhikoya Thangal and has held that limitation prescribed thereunder is applicable only if the return is filed and limitation not applicable if return not filed. However, in Balakrishna's case the Hon'ble High Court of Madras had held that,

“It is trite that in case the words used in a taxation statute are plain and unambiguous they have to be interpreted in such a manner so as to give



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full effect to the wording of the statute. It is not permissible for including something in a taxing statute so as to give it a different meaning. In the absence of a provision enabling the tax collector to levy tax it would be impermissible to levy tax even if equity is in favour of the State. Therefore, there should be an express provision authorizing the assessing authority to collect tax from an importer, who failed to file returns as provided under section 7 of the Entry Tax Act....”

The Hon’ble Court has held that when express provision is not there then the authority is not having power to impose. Infact in other taxing statues like Income Tax Act there are provisions to take action if the assessee has not filed any return. The income tax authorities are empowered to take action, impose interest and to impose penalty, if returns are not filed. Such provisions are not available in the Entry Tax Act. The Act is silent in case if return not filed. The Act is not empowering the authorities to take action for not filing returns. This Court is of the considered opinion that the Balakrishna’s case has more precedential value. Moreover, the Balakrishna’s judgment is rendered by Jurisdictional High Court and the same decision has binding precedent, hence the Balakrishna’s case is applicable. Moreover, the said Balakrishna’s case is followed by another Learned Single judge of this Court in W.P.No.13631 of 2005 dated 27.07.2016 (M/s.Vishnu Enterprises). Recently another two



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coordinated Division Benches of Madras High Court has confirmed the Balakrishna's Case in W.A.(MD)No.332 of 2007 vide order dated 12.04.2022 and in W.A.(MD)No.442, 452 and 453 of 2022 vide order dated 10.04.2023. Therefore, this Court is of the considered opinion that the Balakrishna's case judgment is applicable to the present case. Therefore this Court is of the considered opinion that the three years limitation is applicable, even if return is not filed.

9. For the reasons stated supra, this Court is of the considered opinion that the impugned order is liable to be quashed and accordingly quashed.

10. In view of the above, the Writ Petition is allowed. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

09.11.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes/ No



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To

- 1.The Assistant Commissioner (ST)-2,
Tuticorin – 2 Circle,
Tuticorin.
- 2.The Assistant Commissioner (ST),
Tuticorin III Assessment Circle,
Tuticorin.

S.SRIMATHY, J.

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