IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22.10.2024

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**
and
THE HONOURABLE **MR. JUSTICE G.ARUL MURUGAN**

Writ Petition Nos.36776 & 36777 of 2004
and WPMP No.44144 of 2004

M/s.Earth Tech Enterprises Ltd,
No.19, Ground Floor, Wellington Estate,
#53, C-in-C Road, Egmore,
Chennai. .... Petitioner in both WPs

Vs

The Assistant Commercial Tax Officer,
Bill Trading Prevention Squad,
Central Enforcement Wing-II,
Papjam Buildings,
Greames Road, Chennai 600 006. .... Respondent in both WPs

PRAYER in WP.No.36776 of 2004: PETITION under Article 226 of the Constitution of India praying for issuance of writ of Certiorari calling for the records of the case on the file of the first respondent herein in G.D 15/04-05 dated 6-12-2004 issued under Sec. 46 of the Tamil Nadu General Sales Tax Act, 1959 and quash the same.

PRAYER in WP.No.36777 of 2004: PETITION under Article 226 of the Constitution of India praying for issuance of writ of Certiorari calling for the records of the case on the file of the first respondent herein in G.D 15/04-05 dated 6-12-2004 issued under Sec. 42 of the Tamil Nadu General Sales Tax Act, 1959 and quash the same.

(In both WPs)
For Petitioner : Ms.Lakshmi Sriram
for Mr.T.Ramesh Kutty

For Respondent : Ms.Amirta Dinakaran,
Government Advocate

COMMON ORDER

(Order of the Court was made by Dr.ANITA SUMANTH,J.)

A common order is passed in respect of both the Writ Petitions under consideration, since the facts involved as well as the cause of action are one and the same.

2. The petitioner is a company engaged in the importation and trading of edible oils, iron and steel scrap. It claims to have applied for registration under the provisions of the Tamil Nadu General Sales Tax Act, 1959 (in short 'TNGST Act') by way of application dated 22.09.2004. The application was returned for rectification of defects and according to the petitioner was re-presented on 07.10.2004.

3. The writ affidavit concedes to the position that no registration certificate has been issued. Per contra, in counter dated 17.12.2004 filed by the Commercial Taxes Department, the authority denies the aforesaid averments. However, there is nothing specific in the counter in regard to the registration status of the petitioner. As the hearing proceeds however, we find that this aspect may not be very material to decide the legal issue that arises in this matter.

4. The petitioner had imported RBD Palmolien oil in bulk (6000 Metric Tonnes) from Malaysia Southern Edible Oil Industries through National Agricultural Cooperative Marketing Federation of India Limited. The import is dated 05.10.2004 and the consignment was received on 08.10.2004 at Chennai Port Trust. According to the petitioner, the transaction was on high sea sales basis. The consignment was kept in a licensed private bonded warehouse inside the customs area and the petitioner states that it had filed necessary bill of entry for bonding.

5. While so, and the petitioner believed that the sale was in the course of import per Section 5(2) of the Central Sales Tax Act, 1956 (in short 'CST Act'), it came to understand that the bonded warehouse had received a detention notice on 17.11.2004. The notice, the petitioner was given to understand, was to verify the genuineness of the transaction. The petitioner claims to have explained the transaction to the authorities reiterating its claim for exemption in terms of Section 5(2) of the CST Act.

6. Thereafter on 23.11.2004, the petitioner was in receipt of a notice calling for various particulars including foreign commercial invoice, bill of lading, bill of entry for ware housing, bills of entry for home consumption, registration certificate under sales tax laws, proof of renewal of registration and other documents to support its claim under the CST Act.

7. This was followed by notice dated 06.12.2004, which is the subject

matter of challenge in W.P.No.36776 of 2004. On the same day, the petitioner has also received a document, also dated 06.12.2004, styled as order passed by the Assistant Commercial Tax Officer (Bill Trading Prevention Squad, Central Enforcement Wing II), Chennai. That order is the subject matter of challenge in W.P.No.36777 of 2004.

8. We have heard Mrs.Lakshmi Sriram, learned counsel for the petitioner and Ms.Amirta Dinakaran, learned Government Advocate for the respondent.

9. Several arguments have been raised before us touching upon the legality or otherwise of the notice and order, both dated 06.12.2004. We have perused the impugned notice as well as the order and find that order dated 06.12.2004 proceeds to examine the legality of the import transaction and the exemption claimed under Section 5(2) of the CST Act coming to the conclusion that the transaction is nothing but a domestic transaction with a view to sell the goods imported, locally and to other States piece meal.

10. The entire sale value of the goods has been brought to tax and a demand raised rejecting the exemption claimed under Section 5(2) of the CST Act. The authority passing the order has also granted the facility of instalments to the petitioner as a pre-condition for release of the goods from detention.

11. Normally, any order should be preceded by a notice/show cause notice. In the present case, both the impugned documents, one styled as 'notice' and the other styled as 'order' are dated 06.12.2004. The proceedings number is

also the same in both, being G.D.No.15/2004-2005, the subject and the reference in both are also the same except that in the document styled as notice, the authority has written in hand *'Compounding Fees – proposal – Notice – Issued.'* in the subject in addition to the subject matter that figures in the order as well.

12. Though both the Notice and order dated 06.12.2004 refers to notice dated 23.11.2004, it is unlikely that that notice is a proposal for compounding in light of the writing in hand in the impugned notice indicating that that notice is the first notice containing a proposal for compounding. The subject and reference in both the impugned Notice and order are identical and read thus:

> *SUB: TNGST Act 1959 – Enforcement Wing – Chennai – Tvl.Earth Tech Enterprises Limited, Chennai – Goods Detained – Advance Tax – Demanded – Notice issued – Reply received – Examined – Orders passed. - Compounding Fees – Proposal. Notice – Issued.*
>
> *REF: 1. This office order in G.D.No.15/2004-2005/BTPS/CEW II dated 17.11.2004*
> *5. Letter dated 20.11.2004 received from Tvl. Earth Tech Enterprises Limited, Chennai.*
> *6. This office Notice G.D.No.15/2004-2005/BTPS/CEW II dated 23.11.2004.*
> *7. Letter dated 24.11.2004 received from Tvl.Earth Tech Enterprises Limited, Chennai.*

13. The Court thus proceeds on the basis that both the notice and the order dated 06.10.2004 have been issued on the same day and there is no earlier notice containing a proposal for compounding. Since both the documents are of the same date, it is impossible to ascertain which one has preceded which. This

is one aspect of the matter.

14. The second, and more important aspect, is as to whether a compounding notice and order may proceed along the lines of an assessment itself. In this connection, we have specifically posed a question to the learned Government Advocate as to whether any assessment order has been passed in this matter and have also granted her sufficient time to verify and confirm the same. She has confirmed, on verification of the records, that no assessment has been made and that the files do not reveal even the issuance of a pre-assessment notice by the Assessing Officer.

15. Though there is a difference of opinion inter se the parties as to whether the petitioner has obtained registered under the TNGST Act, the Commercial Taxes Department is categoric that no registration has been obtained and proceeds on the basis that the petitioner is an unregistered dealer.

16. This position however does not preclude an assessment in terms of the provisions of the TNGST Act and such assessment must be preceded by the issuance of a notice to any entity engaged in a transaction which the Department believes is exigible to sales tax. This, admittedly, not been done in this case. The impugned notice and order thus fail to pass muster in the face of the admitted position that no assessment has been made under the provisions of the TNGST Act.

17. Section 46 of the TNGST Act refers to compounding of offences and

Section 46(1)(a) and the relevant portion thereof, read as follows:

> *Section 46. Composition of offences:- (1) The prescribed authority, may, whether on application made to it in this behalf or otherwise, give any person who has committed or is reasonably suspected of having committed an offence under this act, option to pay within a specified period, by way of composition of such offence*
> *Section 46(1)(a) where the offence consists of the failure to pay, or the evasion of, any tax recoverable under this Act, in addition to the tax so recoverable, a sum of money not exceeding one thousand rupees or double the amount of the tax recoverable, whichever is greater..*

18. Section 46(1)(a) deals with the offence of failure to pay or evasion of tax recoverable under the TNGST Act. Thus, the provision can be invoked only in cases where an assessment has been made on a dealer as the tax demand that remains unpaid should have been quantified as per the mandate of Section 46(1)(a). Proceedings for compounding thus draw sustenance only from an order of assessment that must precede such compounding order.

19. Moreover, the officer has made an assessment in the course of the compounding order, ostensibly, and merely to sustain the order of compounding. The officer discussing the facts of the matter and the petitioner's claim ultimately rejecting it as follows:

> *The transactions, as seen by the records, furnished by the dealers do not satisfy the above to conditions for the reasons stated below:*
> *1) Transfer of document of title*
> *The Dealer can not / shall not transfer a document of title to goods to more than one buyer since he splits the goods covered by a single document and sells the goods to more than one buyer. Moreover, the section contemplates transfer of document" which means that the documents which is in existence at the relevant point of time*

should be transferred; but in this case, the dealer is "creating a document" which is titled as transfer of ownership", by which the ownership is transferred. "transfer of document" and "creation of document" can not be considered one and the same. Thus, the dealers fails to satisfy this condition.

2. Crossing the Custom barrier of India

The dealer has split the goods covered by a single bill of lading into several parts by entering into agreement with difference dealers and apportions -the goods to them. The act of appropriating an unidentified portion of goods from out of a bulk brings the import to an end and the transaction of the dealer by way of "transfer of ownership" is nothing but a local sale and it can not be classified as a sale in the course of import.

Further, the subject goods have been stored in a private warehouse. Honourable High Court of Madras in its order in Revision No. 95 of 1989 in TC No. 235 of 1989 dated 28.7.1998 was held that Clearance of goods from the Private Warehouse does not amount to clearance of goods before the goods had cross the Customs Frontier of India.

Thus in both the score, the dealers had failed to satisfy the conditions laid down in section 5 (2) of CST Act 1956. Hence, their claim that their transactions fall under the said section is rejected as untenable.

It is established beyond in any doubt that the dealers have filed bill of entry for warehousing and kept the goods in Private Warehouse with a view to sell them locally and to other State buyers in piecemeal.

20. It is thus clear that the officer has, in the impugned order made an assessment of the turnover rejecting the claim under section 5(2) of the CST Act and thereafter passed an order of compounding. The impugned order is an assessment in the garb of a compounding order and cannot be sustained.

21. For the purpose of framing an assessment which is to be done in terms of Section 12 of the TNGST Act, the Assessing Authority shall be authorised by the Government or any authority empowered by them to make an assessment

under the TNGST Act in terms of Section 2(c) of the TNGST Act.

22. Section 46 of the TNGST Act empowers the prescribed authority to compound an offence. Rule 53 of the Tamil Nadu General Sales Tax Rules, 1959 stipulates that an Assistant Commercial Tax Officer, Deputy Commercial Tax Officer, Commercial Tax Officer or Assistant Commissioner, may exercise the powers specified under Section 46 of the Act subject to the overall control and direction of the Deputy Commissioner of Commercial Taxes and the Commissioner of Commercial Taxes.

23. Thus, the two streams, one of adjudication and one of compounding of offences, are separate and distinct and the officers competent to, and vested with the requisite powers to carry out the same, are also distinct and different.

24. On the facts and circumstances noted supra, we find that the impugned order (i) has not been preceded by a compounding notice extending sufficient opportunity of reply to the petitioner is in violation of the principles of natural justice (ii) is not based on an assessment made by the competent Assessing Authority as admitted, no assessment has been framed for that period by the Assessing Officer.

25. Though several submissions have been made on the claim of exemption under Section 5(2) of the CST Act, we find it unnecessary to revert to the same in light of the conclusions above. Impugned notice and order, both dated 06.12.2004 are hence quashed.

26. On 21.12.2004, this Court has passed an order that on payment of tax at the rate of 4.2% by the petitioner, the goods detained would be released forthwith. There is nothing available on record to indicate compliance with this order and neither learned counsel is in a position to confirm whether the amount has been paid and the goods released. Hence, we leave this aspect of the matter open. If at all any amount has been paid by the petitioner, it is open to the petitioner to seek refund of the same in terms of this order.

27. These Writ Petitions are allowed. No costs. Connected Miscellaneous Petition is closed.

(A.S.M.,J) (G.A.M.,J)
22.10.2024

Index:Yes
Speaking order
Neutral Citation: Yes
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To

The Assistant Commercial Tax Officer,
Bill Trading Prevention Squad,
Central Enforcement Wing-II,
Papjam Buildings,
Greames Road, Chennai 600 006.

DR. ANITA SUMANTH,J.
and
MR. G.ARUL MURUGAN,J.

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