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W.P.No.9363 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.11.2024

CORAM :

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

W.P.No.9363 of 2008
and
M.P.No.1 of 2008

Kothari Industrial Corporation Limited,
Rep. by its Senior General Manager,
G.Mohandas,
114 Mahatma Gandhi Road,
Chennai – 600 034.

.. Petitioner

vs

- 1.The Assistant Commissioner (CT),
Fast Track Assessment Circle III,
Greaves Road,
Chennai – 600 006.
- 2.The Deputy Commissioner (CT (Appeals),
III Floor, Wavoo Complex,
191 NSC Bose Road,
Chennai – 600 001.
- 3.The Tamil Nadu Sales Tax Appellate Tribunal
(Additional Bench), rep. by its Secretary,
City Civil Court Buildings,
High Court Complex,
Chennai – 600 104.

.. Respondents

Prayer : Petition filed under Article 226 of the Constitution of India praying to call for the records on the file of the third respondent in T.A.No.137 of 2001 dated 10.01.2008 and issue a writ of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India, 1950 quashing the same upholding the orders of the First and Second Respondents in so far as pertaining to the turnover of Rs.2,26,40,000/- pertaining to the loan transaction in Sulphur, or pass



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such further or other orders as may deem fit and proper in the circumstances of this case, and render justice.

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For Petitioner : Mr.K.A.Parthasarathy
for Mr.N.Inbarajan

For Respondents : Mr.C.Harsha Raj
Additional Government Pleader
for R1, R2
R3 - Tribunal

ORDER

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

The assessment relates to the period 1990-91. The writ petition challenges an order of the Sales Tax Appellate Tribunal (STAT/Tribunal) dated 10.01.2008 confirming both order of assessment dated 12.02.1999 and appellate order dated 01.08.2000. Thus, there are concurrent findings against the assessee.

2. The petitioner is engaged in the manufacture of Sulphuric acid and Super Phosphate for which sulphuric acid is an input. For the aforesaid purpose, the petitioner imports sulphur. The import, storage and manufacture of sulphur is controlled under the Manufacture, Storage and Import of Hazardous Chemical Rules, 1989 (Rules).

3. A perusal of the Schedule to the Rules does not reveal that sulphur, per se, has been classified as a hazardous chemical. However, the Schedule is bifurcated into flammable and hazardous substances and the petitioner has acceded to the position that the import of sulphur was regulated under the Rules. Hence, we proceed on the basis that the commodity imported was subject to import control and regulation.



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4. There was an inspection in the premises of the Appellant on 30.08.1990 and the Commercial Taxes Department found material to indicate receipt of consideration for sales of the imported sulphur camouflaged as loans in the books of account. According to the petitioner, it had not engaged in sales of sulphur. However, the explanation tendered was that the companies engaged in similar lines of businesses, requiring sulphur as an input, had been exchanging the sulphur imported amongst each other based upon their mutual needs.

5. Thus, according to the assessee, a modus operandi had been followed where the imported sulphur was shared amongst the companies in order to meet urgent exigencies and needs. The documents found at the time of inspection were sought to be explained as supporting the aforesaid modus operandi.

6. The petitioner refers to certain documents that it claims were seized in the course of the inspection in an attempt to argue that materials were available to indicate sharing of the imported sulphur with other parties. Reference is made to a document containing the following tabulation:-

Name of the vessel	Month & Year	Amount actually paid by Kamar to			Amount actually paid by Kothari to		
		MMTC	Kothari	Total	MMTC	Kamar	Total
Prabhu Gopal	August'89		23,41,500		23,41,500		
Bangalarmamta	December'89	24,04,000				24,04,000 20,000	
Damodar Ganga	January'90		24,04,000			24,04,000 19,00,000	
Nand nakul	February'90	24,02,000					24,02,000



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Name of the vessel	Month & Year	Amount actually paid by Kamar to			Amount actually paid by Kothari to		
Jai Ambica	February'90		24,02,000 12,01,000		12,01,000 24,02,000 12,01,000		

Extract of Hand-Written Portion:

Ex-Prabhu Gopal

a)	Amount to be paid by Kamar (1000 MT) @ Rs.2504	Rs.25,04,000	A/c
b)	Amount actually paid at 65:35 basis (by Kamar)	Rs.23,41,500	Pl.verify the correctness of the Statement. Kindly advise whether Handling charges, (now paid to Sanco) in respect of balance shipments viz., Damodar Ganga, Nand Nakul and Jai Ambica have been recd in full.
	Short Paid by Kamar	Rs.1,62,500	
	Less : Short paid by KICL in respect of Harbour dues ex-M.V. Bangalar Mamta Due Rs.90,000 Paid Rs.20,000	Rs. 70,000	
	Difference amount now received from Kamar by cheque enclosed	Rs.92,500	

7. We disavow all references to the above documents as we are wholly unaware as to whether they are part of the seized records. That apart, the details produced are mere tabulations and computations by the assessee, self-serving and of very little evidentiary value at this stage of the proceedings.

8. We are unable to accept the explanation tendered. Firstly, it is admitted that the import of sulphur is to be carried out only through the Minerals and Metals Trading Corporation Limited (MMTC). Hence there is no sanction whatsoever for the assessee to have engaged in sharing of the sulphur contrary to the Rules. That apart, there are no documents whatsoever found in the course of the inspection or available on record to



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support the explanation as above. Surely, if at all there was any merit in the explanation, there would have been some documentation found in support of such an internal arrangement and these were conspicuous by their absence. Hence we reject this submission and confirm the orders of the lower authorities that have likewise found no merit in this submission.

9. The operative portion of the concurrent orders of the appellate authorities are extracted below in the interests of completion of the narration:

"Order of Deputy Commissioner (Appeals) dated 01.08.2000

"

24. The assessment records do not contain any reference or indication to all these transactions. Even at the time of final assessment, the statements of accounts and records produced by the appellants do not throw light on these transactions. The explanation offered by the appellant is that the transaction not being in the nature of sale, there was no reason to reflect it in the records and statements. This is definitely not a reasonable explanation. A dealer is required under the law to account for every purchase and its disposal and the appellants failure to do so would only mean that the goods were disposed off without a proper account. The facts abreasting here tend to indicate that only after the Inspection by the Enforcement Wind did the hidden story unfolded itself.

25. In fact, the argument of the learned Departmental Representative is that the appellants had failed to reflect the outstanding loans in the balance sheet and thus suppressed the vital details from the tax authorities. His further argument that necessary details such as, the date of supply, date of receipt, quantity supplied, quantity received an value, which are lacking in the records, is worthy of consideration.

In a nutshell, it will have to be categorically stated here that the appellants who failed to make proper disclosures before the tax authorities, did not come out with clear records even at the time of hearing of the appeal, it is not possible to accept the mere statements hailing from the appellants without the due support from the relevant records, documents and proof.

26. A transaction to classify as a loan should understandably have no ingredients of sale attached therein. A



loan, which bears the normal dictionary meaning of "to lend", is according to general parlance, carried on reciprocal and conciliatory basis. This is an essential ingredient, which is seemingly lacking in the present transactions. There is evidence on record that the appellants had parted with the good after realizing or ensuring the consideration for the same and it goes to show that the idea behind the transaction was not that of a mutual agreement to give and replace, but it is something else, which in other words can be called a sale.

.....
28. From the records on hand, it is but understandable that the intention of the parties was not one of loan for, in which case, the party receiving the supplies would not have paid the consideration. Moreover, in their own letter, the appellants had confirmed that there were no loan transaction during 1990-91. However, later on this statement was corrected by them stating that it was reported to the Assessing Authority without actually looking into the records and facts. It is rather strange that Public Limited Company of this magnitude and dimensions, could make a wrong declaration at one time, only to withdraw it the next moment, if it does not suit the purpose.

29. It will have to be reiterated here that the learned counsel has not put forth records and evidences at the time of hearing to establish that the transactions were duly reflected in the accounts of the appellants then and there, properly acknowledged and reciprocated and disclosed before the authorities concerned. On the contrary, the Assessing Authority hands down a clear-cut finding that all these transactions were for monetary considerations and not properly reflected at all in the appellants accounts. It is not an exaggeration that these transactions would not have surfaced and get caught in the web of tax but for the inspection of the Enforcement Officials and the relevant disclosures of true facts by them.

30. Examining the disputed transactions further, it will have to be said that many a query raised by the Assessing Authority' remain unanswered by them. The appellants did not come out with satisfactory and acceptable replies. First of all, it is a matter of serious import that the appellants did not produce supporting evidences, accounts and records to prove what they claimed, in spite of repeated request made by the Assessing Authority to produce the accounts. No doubt, there is ample reason behind the Assessing Authority's query as to why the appellants had calculated the rate at Rs. 2,504/- per M.T. When it is actually a loan transaction. So also, it is also a point worthy of attention that these loan transactions were not reflected in the accounts for the year 1990 - 91 and, as the Assessing Authority rightly pointed out, if the loan commodity had been returned it should have been reflected in the stock book and other subsidiary registers.



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The Assessing Authority has a strong conviction, that the realisation of cost at the market rate, the port dues and the handling charges very well suggest that these were not loan transactions but sales. The Assessing Authority further questions as to how their transactions were disclosed before the income tax authorities. This has not been conclusively answered by the appellants.

It is a point worthy of mention that Thiru. R. Balasubramaniam, Deputy Manager (Accounts) had declared before the Assessing Authority through his letter dated 12.3.96 that there had been no loan transactions for the year 1990 – 91 adding further that the balance sheet shows no outstanding loan material. It is the View or the learned Assistant Commissioner that if at all these were loan transactions, they should have been reflected in the accounts and stock book of the appellants. This is also a pointer that the appellants had failed to maintain proper accounts.

The Assessing Authority further points out that the appellants failed to produce copies of agreement between the transfer the transferee, sanction order from relevant authority controlling imports and exports for such transactions. The Assessing Authority justifies equal addition to the alleged suppressions of sale on the ground that the appellants had failed to properly substantiate the nature of transactions even after they were permitted the peruse the records recovered at the time of inspection and a clear case was made out that these transactions were not reflected in the accounts.

The position is not dissimilar even at the stage of appeal. As discussed earlier, the appellants have failed to come out with proper record, forms and evidences even at the time of hearing of the appeal. All they had done is only to reiterate what has been said before the Assessing Authority without actually substantiating their claims with records. They have not come out clearly of the embroilge by proving that all these transactions which they claim as loan transactions had been duly entered in the books of accounts and in the stock accounts: are covered by proper records of giving and taking of the goods; and properly disclosed before the tax authorities and other statutory bodies.

In view of the lacunae, as pointed out in the foregone paras, there are no substantial reasons before me to question the stand taken by the Assessing Authority in this behalf.

31. It is also to be recalled here that the appellant themselves have affirmed that the law forbids them from selling the imported seller, supplied to them by Minerals and Metals Trading Corporation, to another manufacturer, it has also been mentioned by them that they had transferred the material to other manufacturers from the Port itself though no concrete records have been put forth in this regard.

Here the argument made by the learned Departmental Representative finds significance. The learned Departmental Representative has raised a point - that Sulphur being a



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highly combustible material, its storage and movement is controlled, supervised by Indian Explosives Act and a permit is required to be taken under the said Act before such materials are moved and stored. Since, the appellants had not been able to put forward evidences to show that such permissions were obtained, he holds the view that the transactions entered into were not within the conformity of the law in force.

32. In as much as the appellants had supplied sulphur for monetary consideration and no substantiating evidences have been produced and in view of the facts that the connected records and entries in this behalf are woefully lacking, the stand taken by the learned Assessing Authority to treat these transactions as outright sales is found to be quite reasonable and justifiable. So also, the appellants failure to reflect the transactions in the accounts then and there and properly and their failure to disclose the transactions duly and promptly before the authorities had given a leverage to the Assessing Authority to make an equal addition to cover up probable suppressions. This is also found to be reasonable in view of the various judgments of the Courts and the facts on hand. Therefore, the assessment made on the turnover of Rs. 2,26,40,000/- is hereby confirmed."

Order of the Tribunal dated 10.01.2006:-

"

25. Under the given facts and circumstances of the case and towards the non-availability of satisfactory records for the loan-transactions claimed by the assessee, the Assessing Officer correctly negated the assessee's claim of loan transactions and fixed tax liability upon sales of imported sulphur made by the assessee. Its affirmation by the Deputy Commissioner (CT) Appeals, cannot also therefore be found fault with. We therefore ordered to uphold the tax liability created at 8% on Rs.1,13,20,000/- as that legally in order.

26. In respect of the assessee's claim against non-spitting of the turnover of Rs.1,13,20,000/- between the assessment years 1989 - 90 and 1990 - 91 and thus their allegation of the Assessing Officer's making wrong assessment for 1990 - 91, it ought to be stated that the assessee's had not kept supportive documents and the accounts for the loan transactions. They did not file details of such transactions before the Assessing Officer for his verification. In fact but for the Enforcement Wing Officers, the transactions of the type claimed by the assessee not attracting taxes, would not have been found out by the department. In the absence of segregating details of the alleged loan-transactions, in a sequence, covered by documents, the Assessing Officer was left with no alternative than to demand tax on the turnover



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of loan transactions as was revealed by the assessee and the said decision cannot be claimed by the dealer to be arbitrary or unscientific or illogical. We therefore find no infirmity in the Assessing Officer's taxing the turnover Of Rs. 1,13,20,000/- during the assessment year 1990-91.

27. The assessee's are also agitated against the assessment made on the further turnover of Rs. 1,13,20,000/- taxed towards 'probable suppressions'. As already pointed out, the learned Deputy Commissioner (CT) Appeals has recorded a clear finding to the effect that it is but towards the appellant's failure to record the transactions in books and also towards their omission to produce documents relevant and above all towards their intentional concealing the turnover from the eyes of the authorities-not only of the Sales Tax Department but also the other related Departments like the Income Tax, Explosives etc., - there is a strong justification for further addition. These points raising a suspicion resulted in the making of the further addition by the Assessing Officer. For the very same reasons, the Deputy Commissioner (CT) Appeals ordered to confirm the addition made to the Appellate Assistant Commissioner's best-judgment.

28. The findings of fact coupled with appreciation of law resulted in the authority's making/upholding the additions. The given facts of the assessee's case and the omissions noticed by the authorities indeed justify the addition made to the Assessing Officer's best-judgment powers. We are therefore not inclined modify the decision of the Appellate Authority in so far as it confirmed the assessment made on the turnover of addition of Rs. 1.13,20,000/- taxed at 8% and it is ordered to be sustained.

29. Thus, in the end, the assessment made on the turnover of Rs. 2,26,40,000/- falling under this item gets affirmed.

30. Consequential of the above findings, the demands of tax, SC, ASC & Additional Sales Tax determined in the impugned assessment order will have to be refixed. The said exercise of refixation of the exact amounts of Tax, SC, ASC & Additional Sales Tax payable by the appellants is directed to be carried out by the Assessing Officer."

10. At the very least the petitioner could have obtained (i) confirmations from the other companies who are stated to be engaged in



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the so-called internal arrangement of sharing (ii) reconciliation of the materials supplied by it and received by it and the manner in which such reconciliation was being maintained with a seal of concurrence from the transacting party, and (iii) approval/sanction from the MMTC for such an arrangement. However, and on the contrary there is no proof produced before the authorities on any of the submissions made.

11. For the above reasons, we confirm the addition of a sum of Rs.1,13,20,000/- towards sale transactions as culled from the records. However, we find no justification in the equal addition made, of 100% of the original addition at Rs.1,13,20,000/-. The premises of the assessee has been searched by the officials and the additions made, relate specifically to the materials found therein relating to loan transactions. There are admittedly no materials found over and above those in respect of the transactions already brought to tax. Thus, in our considered view, there is no scope for any addition over and above what has been made based on materials found in the inspection.

12. We draw support in this regard from the decision in *S.V.Cycle Stores V. Commercial Tax Officer*¹ followed by us in *Chemical Construction Company (P) Ltd v Deputy Commercial Officer, Thirvottiyur Assessment Circle and others* [W.P.No.2441 of 2007 dated 20.09.2024] cancelling an equal addition in similar circumstances as in the present case. Penalty levied in terms of Section 12(3) of the Act at 150% of the taxes shall now

¹ 46 VST 565



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stand restricted to only that component of tax as confirmed under this order.

13. This writ petition is partly allowed. No costs. Connected miscellaneous petition is closed.

[A.S.M., J] [G.A.M., J]
12.11.2024

Index:Yes/No
Neutral Citation:Yes
ssm

To

- 1.The Assistant Commissioner (CT),
Fast Track Assessment Circle III,
Greens Road, Chennai – 600 006.
- 2.The Deputy Commissioner (CT (Appeals),
III Floor, Wavoo Complex, 191 NSC Bose Road,
Chennai – 600 001.
- 3.The Secretary,
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DR. ANITA SUMANTH.,J.
and
G. ARUL MURUGAN.,J.

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