(2009) 04 MAD CK 0044

In the Madras High Court

Case No : Writ Petition No''s. 4709 to 4711 of 2009 and M.P. No''s. 1, 1 and 1 of 2009

Associated Cement Companies Ltd. APPELLANT

Vs

The Assistant Commissioner (CT)(FAC) and Others RESPONDENT

Date of Decision : 21-04-2009

Acts Referred:

Central Sales Tax (Tamil Nadu) Rules, 1957 — Rule 4(3A)
Central Sales Tax Act, 1956 — Section 12(3), 19, 6A, 6A(1), 6A(2)
Constitution of India, 1950 — Article 226, 269(3), 286
Sales of Goods Act, 1930 — Section 2(2), 32, 33, 39(1), 39(2)

Citation : (2009) 23 VST 486

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : C. Natarajan for N. Inbarajan, for the Appellant; Haja Naziruddin, Special Government Pleader assisted by R. Mahadevan, Additional Govt. Pleader for Respondents-1 and 2, for the Respondent

Judgement

V. Ramasubramanian, J.—The petitioner has come up with the present writ petitions, challenging the orders of assessment passed by the

first respondent in all these writ petitions, under the Central Sales Tax Act, 1956, in respect of the assessment years 2001-2002, 2002-2003 and

2003-2004.

2. I have heard Mr. C. Natarajan, learned Senior Counsel for the petitioner and Mr. Haja Naziruddin, learned Special Government Pleader

(Taxes). Since the petitioner bracketed a portion of the turnover as branch transfer and claimed to have paid tax in other States, but the same was

disallowed by the first respondent, the petitioner has also impleaded the States of Kerala and Karnataka apart from the Union Territory of

Pondicherry and the Union of India, as parties to the writ petitions. However, notices to them have been dispensed with, in view of the nature of the disposal that I propose to give to the writ petitions.

3. Admittedly, the petitioner is a registered dealer, manufacturing cement and effecting both local sales as well as inter-State sales. They have a factory at Madukkarai in Coimbatore District. The petitioner claims that the cement manufactured at Madukkarai is despatched, by way of stock transfer, to their warehouses and depots located in the States of Kerala and Karnataka and also in the Union Territory of Pondicherry and that thereafter, it is sold in the respective States and Union Territory, after paying local sales tax in the respective States.

4. On the basis that the cement manufactured in Tamil Nadu is despatched to their warehouses and depots in other States and sold only thereafter, the petitioner made a claim for exemption on the turnover relating to branch/ stock transfer. But suspecting the claim of the petitioner to be untrue and claiming that the petitioner was moving goods to other State buyers from the factory site itself to reach the ultimate buyers in other States, the first respondent started issuing pre-assessment notices. Though the petitioner filed Form ""F"" declarations, together with proof of payment of taxes in other States, the first respondent proceeded to pass orders of assessment dated 11.3.2009, 9.3.2009 and 9.3.2009 in respect of the assessment years 2001-2002, 2002-2003 and 2003-2004 respectively on the ground that the petitioner failed to file the other statements and records as stipulated in Rule 4(3-A) of The Central Sales Tax (Tamil Nadu) Rules, 1957. Aggrieved by these assessment orders, the petitioner has come up with the present writ petitions, by-passing the alternative remedy of appeal.

5. Though several issues are raised in the writ petitions, it is not necessary or proper to go either into factual details or into the merits of the claim made on either side, in view of the admitted position that the petitioner has an alternative remedy of appeal before the Appellate Assistant Commissioner. If the petitioner is found to be not justified in by-passing the alternative remedy, then they should be directed to avail the same. If the petitioner is found to be justified in directly approaching this Court, the only remedy that could be granted to them is to send the matter back to the Assessing Officer. In either case, I need not go into the merits of the claim.

Therefore, the only question that I propose to decide is as to

whether there was sufficient justification for the petitioner to invoke Article 226 and if so, to what remedy, the petitioner would be entitled.

6. The petitioner seeks to justify the invocation of the writ jurisdiction of this Court, by-passing the alternative remedy, primarily on two grounds

viz., (i) that there was violation of the principles of natural justice and (ii) that there was a failure to comply with the mandatory requirement of

Section 6-A(2) of the Central Sales Tax Act, 1956.

Complaint of Violation of Principles of Natural Justice:

7. There is no quarrel with the proposition that the writ jurisdiction of this Court can be invoked without exhausting the alternative remedy, if there

was a violation of the principles of natural justice. In Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, , the Supreme Court

held as follows:

The rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate

case, in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies: (i) where

the writ petition seeks enforcement of any of the fundamental rights; (ii) where there is failure of principles of natural justice; or (iii) where the

orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

The same principles are reiterated in Popcorn Entertainment and Another Vs. City Industrial Development Corpn. and Another, and in M.P. State

Agro Industries Development Corporation Ltd. and Another Vs. Jahan Khan, .

8. In Union of India (UOI) Vs. Hindalco Industries, , the Supreme Court held as follows:

12. There can be no doubt that in matters of taxation, it is inappropriate for the High Court to interfere in exercise of jurisdiction under Article 226

of the Constitution either at the stage of the show-cause notice or at the stage of assessment where alternative remedy by way of filing a reply or

appeal, as the case may be, is available but these are the limitations imposed by the Courts themselves in exercise of their jurisdiction and they are

not matters of jurisdictional factors.

9. In State of Himachal Pradesh v. Gujarat Ambuja Cement Ltd 2005 (6) SCC 499, a three member Bench of the Supreme Court dealt

extensively with the question regarding the exclusion of jurisdiction of Courts when alternative remedies are available. After pointing out that it is a

rule of policy, convenience, discretion and self-imposed limitation and never a rule of law and after tracing the development of law on the issue, the

Supreme Court held in paragraphs-22 and 23 as follows:

There are two well-recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the

forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on

the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has

no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings

itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

23. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are

shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the

High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the

jurisdiction of the Officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the

remedies provided by the statute.

10. Again in L.K. Verma Vs. H.M.T. Ltd. and Another, , the Supreme Court pointed out that despite the existence of an alternative remedy, a

writ court may exercise its discretionary jurisdiction of judicial review inter alia in cases where the court or the tribunal lacks inherent jurisdiction or

for enforcement of a fundamental right or if there has been a violation of a principle of natural justice or where vires of the Act is in question.

11. The grievance of the petitioner is that without providing sufficient opportunity to produce the statements and records and without even an

opportunity to show cause against the proposed penalty, the first respondent passed the impugned orders of assessment and that therefore there

was violation of the principles of natural justice.

12. However, the first respondent has filed a counter affidavit, giving graphic details of the number of opportunities allegedly provided to the

petitioner, in respect of each of these assessment years viz., 2001-2002, 2002-2003 and 2003-2004. Paragraph-8 of the common counter

affidavit filed by the first respondent contains these details and they are extracted as follows:

Opportunities in respect of the assessment year 2001-2002:

Date Details Remarks

Summons issued fixing the date of hearing on The petitioners requested short

5/16/03 29.5.2003. adjournment on 27.5.2003.

Summons issued fixing the date of hearing on No reply filed.

6/10/03 27.6.2003.

Summons issued fixing the date of hearing on By letter dated 9.12.2003, the

10.12.2003. petitioner sought for adjournment

12/2/03 by one month.

Summons issued fixing the date of hearing on By letter dated 12.2.2004, the

13.2.2004. petitioner sought for adjournment

2/3/04 by one month.

Summons issued fixing the date of hearing on By letter dated 25.10.2006, the

26.10.2006. petitioner sought for one month''s

10/10/06 time.

Best judgment notice issued. On 11.9.2007, the petitioner filed

8/10/07 letter requesting some more time.

10/17/07 Notice to produce accounts on 29.10.2007. Part of ''C'' Forms filed.

Pre-assessment notice issued. The petitioner filed letter dated

8/6/08 26.8.2008 sought for 15 days time.

Notice giving time upto 10.9.2008. On 5.9.2008, the petitioner filed

9/4/08 reply to the pre-assessment notice.

A notice was issued narrating all the previous By letter dated 10.10.2008, the notices. petitioner asked for copies of D7

9/30/08 records.

The petitioners were permitted to take copies of

10/17/08 the D7 records on 24.10.2008.

1/13/09 Pre-assessment notice issued. Reply was filed on 27.1.2009.

Summons issued to produce accounts on Accounts books produced on

1/28/09 12.2.2009. 18.2.2009.

3/11/09 Final assessment orders passed.

Opportunities in respect of the assessment year 2002-2003:

Dated Details Remarks

Summons issued fixing the date of hearing on No reply.

4/16/04 26.4.2004.

Summons issued fixing the date of hearing on No reply.

10/10/06 10.11.2006.

Notice issued fixing the date of hearing on On 27.2.2007, the petitioners

1/25/07 28.2.2007. asked for more time.

Dated Details Remarks

Best judgment notice issued granting time upto On 20.8.2007, the petitioners

29.8.2007. produced part of records.

On 5.9.2007, the petitioners

produced some Form XVII, Form-

F etc., and sought for further time

to file Forms.

On 11.9.2007, the petitioners

sought for one month''s time.

On 12.10.2007, the petitioner filed

reply and requested for personal

8/10/07 hearing.

Notice issued to produce accounts on or beforeOn 29.10.2007, part of account

29.10.2007. statements etc., were produced and they sought for short adjournment

10/17/07 to file Form-F.

Pre-assessment notice issued. The notice was received by the

petitioner on 10.8.2008 and they

filed reply on 3.9.2008 requesting

8/7/08 15 days time.

Time limited upto 10.9.2008. On 8.9.2008, the petitioners

requested time upto 18.9.2008.

On 18.9.2008, the petitioners

made a request for copies of D7

9/4/08 records.

A notice was issued narrating all the previous No reply.

9/24/08 notices giving 15 days time.

The petitioners were permitted to take copies ofOn 26.12.2008, the petitioners

D7 records on 24.10.2008. filed reply to the notice dated

10/17/08 7.8.2008.

Pre-assessment notice issued granting 15 days On 16.2.2009, the petitioner

time. sought for 15 days time.

On 2.3.2009, they sought for three

weeks time to cross-examine the

1/30/09 transporter.

3/9/09 Final assessment orders passed

Opportunities in respect of the assessment year 2003-2004:

Date Details Remarks

Summons issued fixing the hearing on On 21.11.2006, the petitioner

10/10/06 22.11.2006. sought for adjournment.

1/25/07 Summons issued fixing the hearing on 9.3.2007. No reply.

The petitioner was issued summons to bring the The petitioners sought more time.

books of accounts on the following dates:

2001-2002 20.02.2007

2002-2003 28.02.2007

1/25/07 2003-2004 09.03.2007

Best judgment notice issued granting time upto On 11.9.2007, the petitioner

8/10/07 31.8.2007. sought for one month''s time.

Notice issued to produce accounts on Part of records produced on

10/17/07 29.10.2007. 29.10.2007.

Pre-assessment notice issued. On 5.9.2008, the petitioner sought

one month''s time.

On 9.9.2008 asked for 15 days

8/7/08 time.

On 18.9.2008, the petitioner asked

for copies of D7 records.

9/18/08

Date Details Remarks

A notice was issued narrating all the previous

9/24/08 notices giving 15 days time.

Opportunity granted to take copies of D7 The petitioner filed reply on

records on 24.10.2008. 26.12.2008 for the notices issued

on 7.8.2008 along with some

10/17/08 declaration Forms.

Pre-assessment notice issued granting 15 days On 16.2.2009, the petitioner

time. sought for 15 days time.

On 2.3.2009 filed letter to cross-

examine the transporter and further

1/30/09 asked for 3 weeks time.

3/9/09 Final assessment order passed.

13. In response to the overwhelming details furnished by the first respondent, in paragraph-8 of the common counter, which is extracted above, the

petitioner filed a common rejoinder contending as follows:

(i) As regards the CST assessment for 2001-2002, all the summons referred to in paragraph-8 of the counter were issued under the Tamil Nadu

General Sales Tax Act and not under the Central Sales Tax Act. The only show cause notice issued for assessment of stock transfer to levy, under

the Central Sales Tax Act, was the one dated 13.1.2009. This notice did not allege either non-cooperation or non-production of books. Therefore

the notices issued under the State Act (Tamil Nadu General Sales Tax Act) cannot be taken to be sufficient opportunity provided for an

assessment under the Central Act (Central Sales Tax Act).

(ii) Even as regards 2002-2003, all the summons were only under the State Act. The first notice under the Central Act was dated 30.1.2009 and

this notice did not allege non-production of records or books. It referred only to non-compliance with Rule 4(3-A) of the CST (Tamil Nadu)

Rules, which is applicable to movement to a selling agent on behalf of a principal and not applicable to a case of stock transfer to one''s own

branch or warehouse.

(iii) Similarly, all notices with regard to the assessment year 2003-2004, were also only under the State Act. But the show cause notice dated

7.8.2008, was under the Central Sales Tax Act, for the years 2001-2002, 2002-2003 and 2003-2004, seeking to delete the stock transfer items.

There was no show cause notice issued till 30.1.2009 to assess the sales in other States under the Central Act.

14. In short, the contention of the petitioner is that under the Central Sales Tax Act, the first notice was issued only on 13.1.2009 in respect of the

year 2001-2002; the first notice was issued on 30.1.2009 in respect of the assessment year 2002-2003 and the first notice was issued on

30.1.2009 for the year 2003-2004. Therefore, according to the petitioner, the claim made in the counter affidavit, as though repeated

opportunities were given for more than 5 years from 2003 onwards, is highly misleading and untrue. Moreover, the petitioner''s grievance is that

notice to levy penalty was issued only after the pre assessment notice, thereby depriving the petitioner of an opportunity to show cause against the

penalty.

15. From the contents of paragraph-8 of the common counter affidavit of the first respondent and the contents of paragraphs-5 to 8 of the

common rejoinder of the petitioner, it is seen that a fundamental dispute has arisen as to whether all the opportunities provided by the first

respondent, related to the assessment under the Central Sales Tax or not. Therefore I directed the learned Special Government Pleader to

produce the copies of the notices referred to in paragraph-8 of the common counter affidavit, so as to see whether they related to the assessment

under the State Act or the Central Act and the learned Special Government Pleader produced the notices as well as the replies.

16. Interestingly, a majority of these notices, as rightly contended by the petitioner in the rejoinder, were only under the State Act and not under

the Central Act. But the question of compliance with the principles of natural justice cannot be judged on the basis of the number of opportunities

granted and the number of notices issued, but to be judged only on the basis of sufficiency of opportunity. Sufficiency of opportunity can be

measured both from the circumstances and from the status of the person who complains of violation of natural justice. Tamed horses and wild

horses react differently to the same command and hence the scales with which one would measure the sufficiency in both cases would differ.

17. Keeping the above principles in mind, if we look into the notices issued (referred to in paragraph 8 of the common counter affidavit), the

picture that emerges can be projected in a tabular statement as follows:

For the assessment year 2001-2002

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Summon dated 16-5-2003 Under TNGST Act, in Form XII.

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Summon dated 10-6-2003 Under TNGST Act, in Form XII

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Summon dated 2-12-2003 Under TNGST Act, in Form XII

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Summon dated 3-2-2004 Under TNGST Act, in Form XII

--

Summon dated 10-10-2006 Under TNGST Act, in Form XII

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Summon dated 25-1-2007 Under TNGST Act, in Form XII

--

Best of judgment notice dated 10-8-2007 Though this is also only under TNGST Act, it

refers to the claim u/s 6A of CST Act.

In this notice, there is a proposal to disallow

the claim for exemption in the penultimate para.

But it refers only to the inspection by the

Enforcement wing on 14-3-2002 which revealed (i)

lower rate of tax paid on discarded materials

and on fly ash and (ii) purchase of hand gloves

from unregistered dealers.

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Notice dated 17-10-2007 Under TNGST Act directing the petitioner to

produce records, forms, declarations etc.,

on 29-10-2007.

In their reply dated 29-10-2007 to this notice,

the petitioner points out in paragraph-5, that

regarding stock transfer, they had already

submitted F - Forms along with despatch details

and tax paid certificates from other States and

that they are willing to submit any other details.

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Pre assessment notice dated 6-8-2008 It is under CST Act and is actually dated

7-8-2008 and not 6-8-2008.

In internal page-2 of this notice, under Item 3,

the A.O., says that the stock transfer is proposed

to be assessed under TNGST Act in the absence of

relevant declaration forms.

Such a statement is made despite the earlier reply

of the petitioner that Form F declarations already

filed. Therefore a reply is sent on 4-9-2008.

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Notice dated 4-9-2008 This is under CST Act, but calling the petitioner

to file a reply to the pre assessment notice

dated 7-8-2008.

The reply dated 4-9-2008 and this notice had

crossed each other.

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Notice dated 30-9-2008 This is under CST Act calling upon the petitioner

to produce the books of accounts within 15 days.

In the meantime, writ petitions are filed in

W.P. Nos. 23754 to 23759 of 2008 in which

permission is granted to the petitioner to take

photocopies of D-7 records, inspection reports

and statements available with the department.

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Notice dated 17-10-2008 Permission to take copies as per the orders in

the writ petitions

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Pre assessment notice dated 13-1-2009 It is under CST Act. In this notice, in the

3rd last paragraph, it is stated that the

petitioner had filed Form F and tax paid proof,

but had not filed other statements and records

as per Rule 4(3A) of CST (Tamilnadu) Rules.

This notice gives 15 days time, but on the 15th

day viz., 28-1-009, a notice to produce books on

12-2-2009 is issued.

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Notice dated 28-1-2009 to produce books Admittedly, a reply was sent by the petitioner on

on 12-2-2009 issued. 27-1-2009 and the books were produced on 18-2-2009

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Notice dated 2-3-2009 By this notice a proposal to levy penalty under

Section 9(2) read with 12(3)(b) is made.

The petitioner seeks time of 2 weeks to react to

this proposal, but an order is passed on 11-3-2009.

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For the year 2002-2003

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Summon/notice dated 16-4-2004 Under TNGST Act, Form XII

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Summon/notice dated 10-10-2006 Under TNGST Act, Form XII

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Summon/notice dated 25-1-2007 Under TNGST Act, Form XII

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Best of judgment notice dated 10-8-2007 Though it was captioned as one under TNGST Act,

this notice specifically dealt with Branch transfer

and the contention of the department that the goods

moved from Madukkarai were not unloaded at Palakkad,

but continued their journey in the same vehicle to

the buyers under the control of the RMO and that the

depot was acting only as a conduit.

Therefore there was a proposal to disallow exemption

on branch transfer and also to impose penalty

Pre assessment notice dated 7-8-2008 It is clearly under CST Act and specifically dealt

with stock transfer

Notice dated 4-9-2008 Under CST Act

Notice dated 24-9-2008 Under CST Act

Notice dated 17-10-2008 Under CST Act permitting the petitioner to take

copies of D-7 records as per the order of this

court in W.P.Nos. 23745 to 23759 of 2008

Pre assessment notice dated 30-1-2009 Under CST Act

Order dated 9-3-2009

For the year 2003-2004

Summon dated 10-10-2006 Under TNGST Act, Form XII

Summon dated 25-1-2007 Under TNGST Act, Form XII

Best of judgment notice dated 10-8-2007 Though captioned under TNGST Act, it specifically

dealt with branch transfer and Section 6-A of CST

Act and pointed out that the goods proceeded to

the buyer without being unloaded at Palakkad

and proposed to disallow the exemption claimed

Summon dated 17-10-2007 Under TNGST Act, Form XII

Pre assessment notice dated 7-8-2008 Under CST Act

Notice dated 5-9-2008 Under CST Act calling for a reply

Notice dated 24-9-2008 Under CST Act referring to the request of the

petitioner for copies of D-7 records

Letter dated 17-10-2008 permitting the perusal of D-7 records as per High court orders

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Pre assessment notice dated 30-1-2009 Under CST Act

Order dated 9-3-2009

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18. The above table discloses-

(a) that there was at least one best of judgment notice dated 10-8-2007 under the CST Act, in respect of each of the three assessment years;

(b) that there were at least 2 pre assessment notices under the CST Act, in respect of each of the 3 assessment years (dated 6-8-2008 and 13-1-

2009 in respect of 2001-2002; dated 7-8-2008 and 30-1-2009 in respect of 2002-2003; and dated 7-8-2008 and 30-1-2009 in respect of

2003-2004);

(c) that the petitioner had sufficient time to produce the records and also file a reply in response to the best of judgment notices and the pre

assessment notices under the CST Act; and

(d) that the petitioner in fact filed writ petitions in W.P. Nos. 23754 to 23759 of 2008 seeking copies of D-7 records and obtained orders from

this court, as a consequence of which, the petitioner was permitted to peruse the D-7 records and also take copies even before the issue of the

second pre assessment notice.

19. Therefore, it is uncharitable on the part of the petitioner to contend that there was any violation of the principles of natural justice. The

petitioner is not a petty dealer. It is a company having a wide network and was represented before the Assessing Officer, every time, by

Professionally qualified persons as seen from the replies sent by them. They understood what these notices purported to be. Therefore, I am of the

considered view that the allegation of violation of natural justice, made by the petitioner cannot be accepted.

Non-Compliance With Section 6A of The CST Act:

20. Apart from the allegation of violation of the principles of natural justice, the petitioner also alleges violation of the mandatory provisions of

Section 6A of The Central Sales Tax Act, 1956. The contention of the petitioner is that once an assessee has produced Form-F declarations, the

Assessing Authority is duty bound to conduct an enquiry in accordance with Section 6A(2). But the first respondent obviously did not hold any

such enquiry. Therefore, according to the petitioner, the impugned orders of assessment suffer from a serious error of jurisdiction, in the light of the

law declared by the Division Bench of this court in A. Dhandapani''s case and the Apex Court in Ashok Leyland case.

21. Section 6A of The Central Sales Tax Act, 1956, reads as follows:

6A. Burden of proof, etc., in case of transfer of goods claimed otherwise than by way of sale. - (1) Where any dealer claims that he is not liable to

pay tax under this Act, in respect of any goods, on the ground that the movement of such goods from one State to another was occasioned by

reason of transfer of such goods by him to any other place of his business or to his agent or principal, as the case may be, and not by reason of

sale, the burden of proving that the movement of those goods was so occasioned shall be on that dealer and for this purpose he may furnish to the

assessing authority, within the prescribed time or within such further time as that authority may, for sufficient cause, permit, a declaration, duly filled

and signed by the principal officer of the other place of business, or his agent or principal, as the case may be, containing the prescribed particulars

in the prescribed form obtained from the prescribed authority, along with the evidence of despatch of such goods and if the dealer fails to furnish

such declaration, then, the movement of such goods shall be deemed for all purposes of this Act to have been occasioned as a result of sale.

(2) If the assessing authority is satisfied after making such inquiry as he may deem necessary that the particulars contained in the declaration

furnished by a dealer under Sub-section (1) are true he may, at the time of, or at any time before, the assessment of the tax payable by the dealer

under this Act, make an order to that effect and thereupon the movement of goods to which the declaration related shall be deemed for the

purpose of this Act to have been occasioned otherwise than as a result of sale.

Explanation ï¿½ In this Section, ""assessing authority"", in relation to a dealer, means the authority for the time being competent to assess the tax

payable by the dealer under this Act.

22. A plain reading of Sub-section (2) of Section 6A shows that the Assessing Authority is bound to reach a satisfaction, after making such inquiry

that the particulars contained in Form-F declarations are true. This satisfaction may be arrived either at the time of or at any time before the

assessment. Once the Assessing Authority is satisfied, the second limb of Sub-section (2) requires him to make an order to that effect. Though

Sub-section (2) uses the expression ""he may"", it appears that (i) the scrutiny of the declaration, (ii) conduct of an enquiry, (iii) arriving at a

satisfaction and (iv) then making an order, are all essential requirements, to be satisfied before the assessee can be held to have failed to discharge

the burden of proof cast upon him under Sub-section (1) of Section 6-A.

23. In A. Dhandapani v. State of Tamil Nadu 96 STC 98, a Division Bench of this Court held (in paragraph-4 of its judgment) that ""the failure to

render a finding that the particulars contained in the declaration are untrue, before foisting liability would vitiate the assessment and that the enquiry

with regard to the declaration is mandatory"". Such a view was taken by the Division Bench, even at a time, (before the amendment Act 20 of

2002), when the filing of Form-F declaration was only optional and not mandatory.

24. In Ashok Leyland Ltd. v. State of Tamil Nadu 1997 134 STC 473, the Supreme Court pointed out in paragraph-32 that prior to the

amendment of Section 6A, the filing of Form-F declaration was optional. But after the amendment under Act 20 of 2002, the filing of such Form,

has become mandatory, as otherwise, a deeming fiction is created by the last limb of Sub-section (1) to the effect that the movement of goods was

occasioned as a result of sale. In paragraph-35, the Supreme Court pointed out that when the dealer furnishes the original Form-F to the Assessing

Authority, ""an enquiry is required to be held"" and that he may pass an order on such declaration, before the assessment or along with the

assessment.

25. In paragraph-41 of the said judgment, the Supreme Court held that Section 6A provides a conclusive proof and hence the reopening of

assessment after an order u/s 6A was impermissible except on a limited ground.

Consequently it overruled the earlier decision in Ashok Leyland

Limited Vs. Union of India (UOI) and Others, .

26. In paragraph-48, the Supreme Court elicited the law relating to the scope of the inquiry u/s 6A(2), from the decision in C.P.K. Trading

Company Vs. Additional Sales Tax Officer and Another, .

27. In the light of the law declared by the Supreme Court in Ashok Leyland case, if we look at the impugned orders of assessment, it is seen that

admittedly the petitioner had filed Form-F declarations along with proof of payment of taxes in other States. But the Assessing Authority has

rejected the claim for exemption, on an ad hoc basis. It will be useful to extract that portion of the impugned orders of assessment, where the first

respondent has dealt with this issue, as follows:

They have claimed exemption stating that F filed together with proof of payment of taxes in other States, whereas not filed the other statements and

records as stipulated in Rule 4(3-A) of CST (Tamil Nadu) Rules, 1957.

Further based on the inspection findings and result of scrutiny of the D7 records recovered from their place of business, it was established crystal

clear that they have moved the goods to other State buyers from factory site itself to reach the ultimate buyers in other States.

28. In all the three impugned orders of assessment, the above paragraphs find a place, with very little modifications. In other words, the claim of

the petitioner that it was a case of stock transfer, has been rejected by the first respondent (i) due to the alleged failure on the part of the petitioner

to file statements and records in terms of Rule 4(3-A) of CST (Tamil Nadu) Rules, 1957 and (ii) on the basis of inspection findings and scrutiny of

D7 records. There is no indication whatsoever, that any kind of inquiry, even a perfunctory one, was conducted by the first respondent, before

coming to the above conclusion. Neither the impugned orders of assessment nor even the common counter affidavit, contain a claim that any such

inquiry was ever conducted. Therefore there is no escape from the conclusion that the first respondent committed a serious error of jurisdiction, in

terms of Section 6A(2) of the Act.

29. As stated above, the non-filing of the statements and records prescribed in Rule 4(3-A) of the CST (Tamil Nadu) Rules, 1957, is one of the

grounds on which the first respondent rejected the claim for exemption on branch transfer. But in A. Dhandapani''s case (cited supra), the Division

Bench of this Court held that Rule 4(3-A) is only directory and not mandatory and that when Form-F declaration is filed, the dealer chooses or

elects the mode of proving that the transfer is otherwise than by way of sale. Therefore, when admittedly the petitioner filed Form-F declarations,

the first respondent had a statutory duty to conduct an enquiry in accordance with Section 6A(2).

30. In paragraph-9 of the common counter affidavit, the first respondent has made an interesting claim, which is as follows:

As a matter of fact, it was found during the time of inspection by the Enforcement Wing Officers that no goods that moved from Madukkarai

works were unloaded at Palakkad Depot, but they continued further journey in the same vehicle after obtaining the delivery orders in the depot.

Hence the entire movement of goods from Madukkarai works till its delivery to the purchasing dealer in the other States is under the direct control

of Regional Marketing Office at Coimbatore and the so called depots located in the other State had acted only as conduit to camouflage the direct

interstate sale as stock transfer in order to avoid payment of tax.

31. The above claim made in the counter affidavit discloses that the first respondent was carried away by two factors viz., (i) the goods not getting

unloaded at the Palakkad depot and (ii) the goods continuing their journey in the same vehicle, after obtaining delivery receipts in the depot.

Unloading and loading of goods at Palakkad and a change of transporter, would have perhaps satisfied the first respondent that it was a case of

stock transfer, rather than an interstate sale in this State.

32. But unfortunately for the first respondent, the orthodox or conservative methods of determining either the factum of sale or the situs of sale,

may not any longer be of relevance in today''s context. Unlike a transfer of right, title or interest in an immovable property, a transfer of title in

movable property, was traditionally identified by a contract followed by payment and delivery. Section 32 of the Sale of Goods Act, 1930,

stipulated that the delivery of goods and payment of the price are concurrent conditions, unless otherwise agreed. The word ""delivery"" itself was

defined u/s 2(2) of the Sale of Goods Act, 1930, as voluntary transfer of possession from one person to another and Section 33 enabled the

delivery of goods sold, by doing anything either agreed to between the parties or which had the effect of putting the goods in the possession of the

buyer or any person authorised by him. Section 39(1) of the Sale of Goods Act, 1930, creates a deeming fiction by holding that the delivery of the

goods by the seller to a carrier, whether named by the buyer or not, in pursuance of a contract of sale, to be a delivery of the goods to the buyer.

However, Sub-section (2) creates certain obligations on the part of the seller to make such contract with the carrier as would be reasonable,

having regard to the nature of the goods and other circumstances.

33. Today, with the development of on-line trading and such other electronic methods, a transfer of title in movable property can take place both

without the actual payment of the price and without actual delivery taking place. It takes place at times without even the buyer and the seller

knowing or ever meeting each other. Today, many transactions are initiated, conducted and closed at the click of the mouse, as the operators in

the field of trade and commerce, have also got into ""mouse-traps"". Therefore, the mere fact that the goods sent from Madukkarai were not

unloaded at the Palakkad depot and that after taking delivery receipts, the transporter proceeded further, cannot by itself, create a conclusive

presumption that it was a case of interstate sale. As a matter of fact, the tests to be applied in the case of standard goods, are not the same as

those to be applied in the case of goods manufactured to specifications, as pointed out in paragraph-62 of the judgment of the Apex Court in

Ashok Leyland case (cited supra). At any time after the journey commenced for the goods from Madukkarai, but before they reached Palakkad

depot, if the branch at Palakkad had received an order for the purchase of goods, there was nothing wrong in the Palakkad depot engaging the

same transporter to proceed further, so that the expenses towards loading and unloading and the opportunity cost of providing storage space could

be saved.

34. As a matter of fact, the question of fixing the situs of sale was also considered by the Supreme Court in Ashok Leyland case and it was held in

paragraphs-65 and 66 as follows:

65. There cannot be any doubt or dispute that while defining sale, the situs of

sale can be fixed by the Parliament which having regard to Article

286 is within its exclusive domain and in the context of Article 269(3) having regard to the following factors:

(i) Place where agreement of sale is concluded;

(ii) Passing of property in the goods;

(iii) Where the parties to the contract reside; and

(iv) Goods are located or manufactured.

66. Once the situs of sale either by way of legal fiction or otherwise is determined, the State Legislature will be denuded of its power to fix another

situs having regard to the fact that the Parliament alone has the exclusive jurisdiction therefor. A sale may have several elements and all of them

need not necessarily take place in one State and in that view of the matter a presumption had to be provided for by a deeming provision as a

logical corollary of the principles laid down by a law of Parliament.

35. Even the effect of delivery of railway receipts to the agent of the buyer against payment of price, vis-a-vis actual delivery of goods and the

impact of Section 39(1) of the Sale of Goods Act, upon Article 286 of the Constitution was considered by a Constitution Bench of the Supreme

Court as early as in 1964 in Shree Bajrang Jute Mills Ltd. Vs. State of Andhra Pradesh, . It was held in paragraph-9 therein that the mere delivery

of railway receipts representing the title to the goods, will not constitute actual delivery of goods for the purpose of Article 286.

36. Moreover, in business transactions attracting fiscal statutes, the motive or substance is of little consequence than the form in which they take

place. In Board of Revenue, Madras Chief Controlling Revenue Authority, Madras Vs. N. Narasimhan and Another, , it was held by the Full

Bench of this court as follows:

31. In the application of a taxing enactment to a subject, the emphasis on the so called substance of the transaction in antithesis to the form of it

should be made with a good deal of caution. In AIR 1940 183 (Privy Council) , Sir Lancelot Saunderson delivering the judgment of the Board

observed thus:

Their Lordships think it necessary once more to protest against the suggestion that in revenue cases, ''the substance of the matter'' may be regarded as distinguished from the strict legal position. In Inland Revenue Commissioner v. Duke of Westminster 1936 AC 1 disapproval of this doctrine

was expressed in the opinions of Lord Tomlin and Lord Russesl of Killowen. A passage from the opinion of Lord Russel of Killowen at page 24

may usefully be cited. It is as follows: I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if in

accordance with a Court''s view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation

or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and

circumstances of his case.

32. There can be no legal impediment to a party selecting and adopting a particular form of transaction to minimise the expenses of stamp duty.

The Revenue cannot say that the object of the transaction was to achieve a purpose not disclosed in the document and that therefore the document

should be deemed to be that which it is not. In the words of Viscount Summer in Levene v. Inland Revenue Commrs. (1928) 13 Tax Case 486 at

p.501.

It is trite law that His Majesty''s subjects are free if they can, to make their own arrangements, so that their cases may fall outside the scope of the

taxing Act. They incur no legal penalties and, strictly speaking, no moral censure, if having considered the lines drawn by the legislature of the

imposition of taxes, they make it their business to walk outside them.

37. In A.V. Fernandez Vs. The State of Kerala, , the Constitution Bench of the Apex court held as follows:

29. It is no doubt true that in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of

the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the Court that the case falls strictly within the

provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing

statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was

the substance of the matter.

Before coming to the said conclusion, the Supreme Court actually referred to the very same observations of Lord Russel of Killowen in Inland

Revenue Commissioner v. Duke of Westminster and that of Lord Cairns in Partington v. Attorney-General as well as the decision of the Privy

Council in AIR 1940 183 (Privy Council) which were followed by the Full Bench of this Court in Board of Revenue v. V.N. Narasimhan (supra).

38. Therefore, tax planning as opposed to tax evasion, has legal sanction. If a dealer plans his transactions in such a manner that he pays less tax, it

is not open to the revenue to subject him to a conscience audit or moral assessment. The power to lift the veil, has to be exercised with great care

and caution. In the case on hand, the dealer has a factory in Tamilnadu and he claims exemption in this State on stock transfer made to his

branches in other States. In an exact reversal of the situation, another dealer having a factory in other States, may make similar claims in those

States on the basis of the stock transferred to a branch in Tamilnadu and the tax paid here under the local sales tax law. While the State is deprived

of revenue in the former situation, it is benefited with revenue in the latter situation. It would be embarrassing for the State to take different positions

in these two situations.

39. I am not for a moment deciding the merits of the dispute between the petitioner and the first respondent, as to whether it is in fact a case of

branch transfer or interstate sales. The endeavour of my discussion in the above paragraphs, is only to show that the first respondent was wholly in

error in arriving at an ad hoc conclusion, without an enquiry u/s 6-A(2) of the Act that the transactions are interstate sales, merely on account of the

goods not getting unloaded at Palakkad, but proceeding further in their journey to the buyer''s place.

40. If the first respondent had conducted an enquiry and passed an order u/s 6-A(2) of the Act, coming to the very same conclusion, holding the

transactions to be inter state sales, then the remedy of the petitioner would only be to go before the Appellate Authority and then to the Tribunal

and thereafter to the mechanism created u/s 19 of the Act (Central Sales Tax Appellate Authority) to resolve such disputes. But since the first

respondent has failed to comply with the mandate of Section 6-A(2), the orders are vitiated. The fact that an enquiry u/s 6-A(2) would have made

all the difference is clear from a very interesting statement in paragraph-9 of the common counter affidavit. It reads as follows:

9. As regards paragraphs-5, 6 and 7, the petitioners have explained the modus operandi of the transactions effected by them which were not put

forth at the time of assessment despite grant of several opportunities to file their objections. Such detailed facts could only be examined and

appreciated on the basis of documentary evidence by the concerned appellate authority. With regard to the allegations in paragraph-8 of the

affidavit that the transactions that this respondent has not applied his mind the allegation is specifically denied and it is submitted that the findings of

this respondent have been rendered in the assessment order on the basis of the records available.

41. The above statement makes it clear that even according to the first respondent, there was a possibility, even if remote, that he could have come

to a different conclusion, if the petitioner had explained the modus operandi of the transactions, in the manner in which they have done in the

affidavit in support of the writ petitions. This statement substantiates the claim of the petitioner that if an enquiry had been held, u/s 6-A(2), the

result could have been different.

42. Therefore, the impugned orders are liable to be set aside, though not on the ground of violation of principles of natural justice, but on account

of the failure of the first respondent to hold an inquiry and pass orders in terms of Section 6A of the Central Sales Tax Act, 1956.

43. In view of the above, the writ petitions are allowed, the impugned orders of assessment are set aside and the matters remitted back to the first

respondent for an enquiry u/s 6-A(2) of the CST Act. The first respondent shall issue a notice to the petitioner within 2 weeks from the date of

receipt of a copy of this order, specifically fixing 2 alternative dates for the enquiry u/s 6-A(2) of the Central Sales Tax Act, 1956. The notice shall

contain proposals both in respect of tax and in respect of penalty and also call upon the petitioner to substantiate their claim regarding branch

transfer. The notice shall specify 2 alternative dates for the hearing fixed by the first respondent and the notice shall be served at the office of the

petitioner at 96, Kamaraj Road, Redfields, Coimbatore, at least 7 days in advance of the first date of hearing, so as to avoid any technical

objection by the petitioner at a later point of time. The petitioner shall participate in the enquiry on the date fixed in the notice without fail and co-

operate in the completion of the assessments as well as in the finalisation of the enquiry u/s 6-A(2) of the Act, failing which it will be open to the

first respondent to pass orders on the basis of available records. The first respondent shall remember to pass orders of assessment as well as

orders u/s 6-A(2). The first respondent shall complete the assessment and pass an order both covering Section 6-A(2) and also complete the

assessment within a total period of four weeks from the date of receipt of a copy of this order.

45. The writ petitions are allowed on the above terms. No costs. Consequently connected miscellaneous petitions are closed.

