
(2014) 09 MAD CK 0065

In the Madras High Court

Case No : Writ Petition (MD) Nos. 5638 of 2014 and batch

Cheran Cements Limited

APPELLANT

Vs

The Joint Commissioner (CT) and Others

RESPONDENT

Date of Decision : 03-09-2014

Acts Referred:

Central Sales Tax Act, 1956 — Section 7(b) — Tamil Nadu General Sales Tax Act, 1959
- Section 16(D), 24(3), 5, 7, 7(c)

Citation : (2015) WritLR 286

Hon'ble Judges : T.S. Sivagnanam, J.

Bench : Single Bench

Advocate : S. Rajasekar for R. Hemalatha, for the Appellant; R. Karthikeyan, A.G.P., for the Respondent

Judgement

T.S. Sivagnanam, J.?The relief sought for in all these writ petitions are interconnected and identical and therefore all these writ petitions were clubbed and heard together and are disposed of by this common order. The petitioners in all these writ petitions is a limited company and a registered dealer on the file of the second respondent under the erstwhile Tamil Nadu General Sales Tax Act and presently under the Tamil Nadu Value Added Tax Act as well as under the Central Sales Tax Act, 1956.

2. The petitioners opted for IFST scheme and availed deferral of sales tax for a period of nine years upto a ceiling of Rs. 420.62 lakhs, which benefit was extended based on an eligibility certificate issued by SIPCOT. An agreement was entered into with the Assistant Commissioner (CT), Karur, and time for repayment was available to the petitioners till 30.06.2017.

3. A show-cause notice was issued to the petitioner, by the Assistant Commissioner (CT), Karur, on 31.08.2005, proposing to cancel the deferral agreement, dated 13.08.1999. The petitioner submitted their explanation and the Assistant Commissioner (CT), Karur, not being satisfied with the explanation offered by the petitioner, by proceedings, dated 27.09.2005, cancelled the

deferral agreement and demanded the entire sales tax deferred and directed the petitioner to pay the deferred tax in one lump sum. Aggrieved by such an action, the petitioner filed a writ petition before this Court in W.P.(MD) No. 11099 of 2005.

4. It is the further case of the petitioner that due to operational problem, demise of its chairman, resignation of few directors, labour unrest and resignation of management staff, who were in-charge of account department, there was no proper attention devoted to the accounting or sales tax matters. The petitioner is said to have filed monthly returns under TNGST Act and under CST Act for the assessment years 1999-2000 to 2006-2007, these returns were finalized by the second respondent on best of judgment basis as the petitioner failed to produce documents, despite notice being issued. The petitioner did not challenge the orders of assessment and filed applications under Section 16(D) of TNGST Act before the first respondent to be dealt with by the special committee for redressal of grievances for all the assessment years. Orders were passed on such applications being presented under Section 16(D) of the Act. Based on the proceedings of the special committee, the second respondent issued notice to the petitioner proposing to make assessment in terms of the orders passed by the special committee.

5. At the relevant time, the Government introduced a settlement scheme by enacting Tamil Nadu Sales Tax (Settlement of Arrears) Act, 2011 (Act No. 29/2011) (hereinafter, referred to as "the Settlement Act"). The scheme provided for one time settlement of arrears subject to conditions. The petitioner opted to avail the benefit of the Settlement Act and submitted applications on 30.04.2012. These applications were pending for nearly two years and they were rejected by the first respondent by passing individual orders, which are impugned in one set of writ petitions in this batch of cases.

6. The entire batch of writ petitions fall under three categories. The first category of cases are filed challenging the order passed by the first respondent rejecting the applications filed under the Settlement Act on the ground that the petitioner having effected payment as required under the Act and the calculation made by them is incorrect apart from stating that the interest is payable from the date on which the tax fell due. The second category of cases is challenging the orders passed by the first respondent rejecting the petitions filed under the Settlement Act on the ground that the special committee constituted under Section 16(D) of the Act has set aside the order of assessment and remitted the matter to the assessing officer for fresh consideration. The third category of cases is challenging the orders of assessment, which have been issued as the consequence of the rejection of the applications filed under the Settlement Act. Though there are three categories of cases, the issue involved in all these writ petitions is one and the same namely as to whether the orders passed by first respondent rejecting the petitioner's applications under the Settlement Act were in accordance with law.

7. The learned counsel for the petitioner submitted that the first respondent passed erroneous orders by totally ignoring the scope of Section 7 of the Settlement Act and failed to take note that Clauses (a), (b), (c) and (d) of Section 7 are mutually exclusive and no two clauses could be combined to pass such orders. In other words, it is submitted that the petitioner/dealer should either fall under any one of the Clauses (a), (b), (c) and (d) of Section 7 of the Settlement Act. This contention is the sheet anchor of the submission made by the learned counsel for the petitioner.

8. Further, it is submitted that the rejection of the petitioner's applications in other cases on the ground that the since special committee constituted under Section 16(D) has set aside the assessment orders and remitted back the matters to the assessing officer for fresh consideration, the benefit of the Settlement Act could not be availed. This according to the learned counsel for the petitioner is an erroneous finding in the light of the law laid down in *Anitha Plastics v. Principal Secretary & CCT (MAD)*, reported in (2011) 43 VST 493 (Mad), which has been followed in the case of *M/s. Ghcl Limited*, represented by its General Manager *Kumar v. The Joint Commissioner (CT) (FAC)*, Madurai Division and another, in *W.P.(MD) Nos. 16312 to 16314 of 2012*, dated 01.07.2014.

9. It is further submitted that if this Court accepts the contention raised by the petitioner and the orders passed by the first respondent are interfered, then automatically the third category of cases have to be allowed, since those category of cases are challenging the order of assessment, which is a consequence to the rejection of applications filed under the provisions of the Settlement Act.

10. The next contention raised by the learned counsel is that interest could be levied only after completion of the assessment and the observation made by the first respondent in the impugned orders regarding levy of interest is illegal. In this regard, reliance was placed on the decision of the Honourable Supreme Court in the case of *E.I.D. Parry (India) Ltd. Vs. Assistant Commissioner of Commercial Taxes, Chennai*, .

11. It is further submitted that for two years, the settlement applications were kept pending before the first respondent and if the first respondent had afforded an opportunity of personal hearing to the petitioner and called for books of accounts and other records, the entire exercise could have been done in a proper manner and in this regard there is sufficient power for the first respondent to return the applications for rectifying the defects by stipulating a time limit in terms of Rule 3(5) of the Tamil Nadu Sales Tax (Settlement of Arrears) Rules 2011.

12. Further, it is submitted that the impugned order has been passed by the officer, who is successor in office, and not the officer, who prepared the report on the applications so submitted and therefore there is a lack of continuity in the

matter, which has resulted in an erroneous order. By referring to two sample orders, one under the erstwhile TNGST Act and the other one under the CST Act, the learned counsel for the petitioner submitted that in respect of TNGST cases, the petitioner would fall under Section 7(a) of the Settlement Act and in respect of CST cases, the petitioner would fall within the ambit of Section 7(b) of the Settlement Act and the petitioner cannot be said to fall under the category of (a) & (c) and (b) & (d) respectively. On the above grounds, the learned counsel for the petitioner sought to set aside the impugned orders.

13. The learned Additional Government Pleader for the respondents submitted that the petitioner is a registered dealer under the provisions of the erstwhile TNGST Act and CST Act and they have filed applications under Section 5 of the Settlement Act, which was rejected by the impugned orders, since the petitioner did not comply with the conditions laid down under Section 5 of the Settlement Act. It is further submitted that the petitioner was issued a pre-assessment notice calling for objections and failed to avail opportunity in spite of notice served on them and therefore the authority passed the final orders on best of judgment basis as per the provisions of the Act and such orders of assessment cannot be faulted.

14. The petitioner filed applications under Section 16(D) of the Act and in certain cases, orders of assessment were upheld and in certain cases they were set aside and remanded to the assessment officer for fresh consideration. Further, it is submitted that on scrutiny of the petitioner's applications, it was noticed that the petitioner had made short payment exceeding 10% of the total amount payable as worked out under Section 7 of the Settlement Act and therefore the first respondent rightly rejected the petitioner's application. Further, it is submitted that the petitioner had collected tax and admitted his liability in the monthly returns and in such cases the provisions of clauses (b) & (c) of Section 7 would be applicable.

15. Further, it is submitted that the Settlement Act does not contemplate any defaulter to pay 40% of the admitted tax that too collected from their customers and kept with the defaulter for nine years under the deferral scheme. Therefore, Section 7(b) was introduced in the case of tax due on enhancement of turnover and Section 7(c) in the case of tax due on the admitted tax as per returns and both sections should be conjointly considered for settlement of arrears under the Settlement Act. Further, it is submitted that there is no violation of principles of natural justice in passing the impugned orders and the applications were dealt with in accordance with Section 6 and there is no necessity for issuing any show-cause notice in terms of the Act. For all the above reasons, the learned Additional Government Pleader sought to sustain the impugned proceedings.

16. Heard the learned counsel for the parties and perused the materials placed on record.

17. Before we consider the factual and legal aspects raised in these writ

petitions, it would be necessary to examine the manner in which the Settlement Act operates. The Act provides for settlement of arrears of tax, penalty or interest pertaining to sales tax and the matter connected therewith or incidental thereto. The Act came into force on 26.09.2011. Section 2(1)(a) defines "applicant" to mean the dealer as defined in the relevant Act. The "relevant Act" has been defined under Section 2(1)(e) to mean the repealed Tamil Nadu General Sales Tax Act, repealed Tamil Nadu Sales Tax (Surcharge) Act and the repealed Tamil Nadu Additional Sales Tax Act as well as the Central Sales Tax Act and the Rules made or notifications issued under this enactment.

18. The arrears of tax, penalty or interest has been defined in Section 2(1)(b) and it includes additional sales tax, surcharge, additional surcharge and central sales tax or penalty or interest pertaining to the assessment years upto 2006-2007 for which assessment has been made prior to 01.08.2011 under the relevant Act and pending collection on the date of filing of application under the Settlement Act.

19. It is not in dispute that the first respondent is the designated authority under the provisions of the Act and appointed by the Government under Section 3. The persons, who are eligible for settlement under the Act has to fulfill the conditions under Section 4 and in this case it is not in dispute that the petitioner was entitled to avail the provisions of the Settlement Act. The procedure for filing an application has been spelt out in Section 5 of the Act. Section 6 deals with determination of amount payable by the applicant and Section 7 deals with rate applicable in determining amount payable and they are as follows:

"5. Application for settlement.--(1) An application for the purpose of section 4 shall be made to the designated authority by an applicant within six months from the date of commencement of this Act or by such later date as the Government may, by notification, specify, from time to time, in such form, and in such manner, as may be prescribed, with proof of payment of the amount payable at the rates specified in section 7.

(2) A separate application shall be made for each assessment year.

(3) The applicant shall send a copy of the application made under sub-section (1) to the assessing authority, appellate authority or revisional authority under the relevant Act, before whom any proceeding or appeal or revision, as the case may be, is pending, within seven days from the date of making such application before the designated authority.

6. Determination of amount payable by the applicant.--(1) The designated authority shall verify the correctness of the particulars furnished in the application made under section 5 with reference to all relevant records and determine the amount payable at the rates specified in section 7.

(2) The designated authority shall demand further amount payable by the applicant in the form prescribed, if the amount paid by the applicant along with

application falls short of not more than ten percent of the amount determined under sub-section (1).

(3) If the applicant has not paid ninety percent of the amount payable under section 7 along with the application, the designated authority shall summarily reject the application.

(4) The amount determined under sub-section (1) shall be rounded off to the nearest rupee and, for this purpose, where such amount contains a part of a rupee, and, if such part is fifty paise or more, it shall be rounded off to the nearest rupee, and if such part is less than fifty paise, it shall be ignored.

7. Rate applicable in determining amount payable.--The amount payable by the applicant and to be waived shall be determined as follows:--

(a) Where it relates to arrears of tax which was assessed on the best of judgment due to non-production of accounts with corresponding arrears of penalty and interest, the application shall pay forty percent of arrears of tax pending collection on the date of application along with interest calculated at seven and a half percent per annum thereon and on such payment of tax, the balance of tax and interest and the entire penalty shall be waived.

(b) Where it relates to arrears of tax, including any arrears of tax accrued due to non-filing of declaration forms which was in excess of the tax admitted as per the returns filed for the year with the corresponding arrears of penalty and interest, the applicant shall pay forty percent of such arrears of tax pending collection on the date of application along with interest at seven and a half percent per annum thereon and on such payment of tax, the balance of tax and interest and the entire penalty shall be waived.

(c) Where it relates to arrears of tax, which was admitted as tax due as per returns filed for the year with corresponding arrears of penalty and interest, the applicant shall pay the entire arrears of tax pending collection along with interest at seven and a half percent, per annum and on such payment, the balance of interest and the entire penalty shall be waived.

(d) Where it relates to arrears of penalty or interest or both and where there is no corresponding arrears of tax pending collection on the date of application, the applicant shall pay ten percent of the penalty and twenty five percent of interest, the balance of penalty and interest shall be waived."

20. In terms of the above provisions, the applications shall be presented within six months from the date of commencement of the Act in the form prescribed with proof of payment of the amount payable at the rates specified in Section 7. Section 7 contains four clauses. Clause (a) deals with the cases relating to best of judgment assessment for non-production of accounts; Clause (b) deals with non-filing of declaration forms, which arise under the provisions of CST Act; Clause (c) relates to arrears of tax, which has been admitted as tax due as per the returns filed for the year with corresponding arrears of penalty and interest

and Clause (d) relates to arrears of penalty or interest or both and where there is no corresponding arrears of tax pending collection on the date of application, the amount which the applicant has to pay under each of the clauses have been mentioned.

21. Therefore, the applicant, while submitting application under Section 5 has to calculate the amount payable as per the rates mentioned in Section 7(a) to (d) and remit the same and file proof of payment along with application. A separate application is required to be filed for each assessment. If any application or revision is pending, then the applicant has to forward the copy of the application to the said authority in terms of Section 5(3). Therefore, at the first instance, the onus lies on the dealer/applicant to determine the payment payable under Section 7. We have noticed that under Section 7, it is a rate applicable for determining the amount payable, which at the first instance is on the dealer/applicant. In terms of Section 6(1), the designated authority is bound to verify the correctness of the particulars furnished in the application made under Section 5 with reference to all relevant records and determine the amount payable at the rate specified in Section 7.

22. Therefore, at that stage the designated authority has to verify as to whether the rates as calculated by the petitioner while submitting application under Section 7 was correct. In the event the designated authority finds any discrepancy, in terms of Section 6(2), shall demand further amount payable in the form prescribed. However, there is an important rider in sub-section 2 to Section 6, which states that if the amount paid by the applicant along with application (in terms of Section 7) falls short of not more than 10% of the amount determined under sub-section (1), then and then alone the question of demanding further amount under Section 6(2) would arise. If the applicant failed to fulfill the conditions under sub-section (2) of Section 6, his application stands summarily rejected in terms of sub-section (3) of Section 6. Thus, the Act being a Settlement Act to give reprieve to the dealer/applicant and bring him out of the misery has first thrown the onus on the dealer/applicant and he has a statutory duty to compute the rate applicable in accordance with Section 7 of the Act, by considering all the relevant records. If the dealer/applicant properly computes the amount and remits the same and encloses proof of such payment along with the application under Section 5, the same will be taken for verification and if the designated authority, on going through the relevant records, finds that further amount is payable and if the same fall short of not more than 10% grant relief to the dealer and if not the application stands summarily rejected. Therefore, the Act operates on strict limits as clearly defined under the Statute. The onus is not only on the dealer to carefully peruse all his records and relevant documents while determining the rate payable by him, but also on the assessing officer while verifying the application as to the correctness of the particulars furnished exercising power, under Section 6(1) by taking into consideration relevant records and then determine the amount payable at the rates specified in Section 7. It is a settled legal principle that any Settlement Act or amnesty scheme have

to be strictly interpreted and there cannot be any substitution or reading down the provision and the dealer/applicant cannot seek for reliefs beyond the scope of the scheme of the Settlement Act.

23. Apart from the above referred provisions, Section 8 of the Act deals with settlement of arrears and issuance of certificate. If the authority is satisfied about the payment of amount determined under Section 6(1), by an order, settle the arrears of tax, penalty or interest and issue a certificate in such form as may be prescribed, and thereupon the applicant shall be discharged from his liability or interest. In terms of sub-section (2) to Section 8, the designated authority, for reasons, to be recorded in writing, may refuse to settle the arrears of tax, penalty or interest and such orders shall be passed after giving reasonable opportunity to the applicant to show-cause against such refusal. In terms of sub-section (3) to Section 8, the authority notified by the Government may, at any time, within ninety days from the date of issuance of certificate under sub-section (1) of Section 8 by the designated authority, modify the certificate by rectifying any error apparent on the face of the record. Therefore, the applicant to be entitled to certificate under Section 8(1) has to first satisfy the designated authority about the payment of the amount determined under sub-section (1) to Section 6. Even if the applicant satisfies such requirements, still the designated authority has power to refuse to settle the arrears of tax, penalty or interest by recording reasons in writing after issuing show-cause notice.

24. In the preceding paragraphs, we have seen as to how the Settlement Act works and now the issue to be considered is as to whether the petitioners applications were dealt with as per the procedure contemplated under the Act. Before proceeding further, it has to be pointed out that the applications filed by the petitioners were kept pending for two years and there is no reason assigned in the counter affidavit for such a long delay and the delay remains unexplained.

25. The petitioner submitted applications for settlement under Section 5(1) by enclosing proof of payment of arrears of tax pending collection as per Section 7(c) in respect of TNGST assessments and Section 7(b) in respect of assessments under CST Act. As per the procedure under the Act, the applications should be verified by the designated authority under Section 6(1), with regard to the correctness of the particulars furnished in the applications filed under Section 5 with reference to all relevant records and it is only thereafter determination of the amount payable at the rates specified in Section 7 could be arrived at. The fundamental error committed by the first respondent is at the time when the applications were scrutinized. It is evident that there is serious procedural flaw in the manner in which the petitioner's applications were considered by the designated authority. Verification of the correctness of the particulars furnished in the applications made under Section 5 shall not mean verification of the contents of the applications alone, but also all relevant records. It could not have been done without issuing notice to the petitioner to produce books of accounts and relevant records.

26. The respondents have not placed any materials to show that the petitioner/applicant was issued such notice to produce records based on which they determined the rate applicable under Section 7. This fundamental error has resulted in the impugned orders. Unless and until the petitioner/applicant satisfies the requirements under Section 6(1), then and then alone the designated authority shall apply sub-section (2) to Section 6 for determining the further amount payable. In the impugned order, the designated authority took up the applications for scrutiny and stated that the computation made by the petitioner in both TNGST and CST cases was incorrect as they were required to pay not only 40% of the arrears of tax pending collection assessed on best of judgment due to non-production of accounts or non-filing of declaration, but also the arrears of tax admitted in their returns. Therefore, the designated authority was to consider the applications in the light of the returns filed by the petitioner, orders of assessment, other relevant records etc. Since the assessment itself was on best of judgment basis, the designated authority proceeded to calculate the amount payable at 40 + 7 % and 40 + 10% under TNGST Act and CST Act respectively and by calculating the figure based on the order of assessment stated that the amount paid by the applicant does not fall short of more than 10%, hence the applications cannot be considered.

27. In my view, the issue to be decided at the first instance is whether these applications were verified as per the provisions of Section 6(1). It is only thereafter the question of considering the further amount payable would arise under Section 6(2). This again is a procedural infirmity, which goes to the root of the matter. The designated authority at the time of verification of the correctness of the particulars in the applications filed by the petitioner, under Section 5(1), is entitled to return the applications for rectification of defects in terms of Rule 3 of the Rules. If this had been done, then the designated authority could have communicated the petitioner/applicant that the rates so determined by the petitioner itself is an erroneous calculation. This could have avoided the entire litigation in the matter. It is true that the statute does not specifically provide for an opportunity of personal hearing or issuance of show-cause notice and the only place where the authority is statutorily bound to issue show-cause notice is while deciding a case and refusing to settle the arrears of tax, penalty or interest under Section 8(2) of the Act. However, there is no statutory prohibition for the designated authority to call for particulars, hear the assessee or scrutiny of the books of accounts etc., while examining the applications under the provisions of Section 6. As noticed above, application has to be verified with reference to all relevant records and then only the correctness of determination done under Section 7 could be considered.

28. In a case, where the designated authority is not in possession of the relevant record, obviously he has to direct the petitioner/applicant to produce the records. In such circumstances, an opportunity of personal hearing is inevitable and in fact the disputed question of facts can very well be thrashed out if the assessee is called upon by the designated authority to state as to how they computed the

amount based on their books of accounts or records. Therefore, though the statute does not prohibit an opportunity of personal hearing while considering the application under Section 6(1), going by the scheme of the Act, there is no error on the part of the designated authority to afford an opportunity of personal hearing so as to ensure fairness and transparency in procedure and also to satisfy the cardinal rule, *Audi alteram partem*.

29. In view of the above procedural defects, the impugned orders passed by the designated authority rejecting the petitioner's applications are liable to be set aside with a direction to the designated authority to re-consider the entire matter in terms of the scheme of the Act.

30. As regards the levy of interest, it has to be pointed out that the Honourable Supreme Court in the case of *E.I.D. Parry (I) Ltd.* (cited supra) held as follows:

"...Tamil Nadu General Sales Tax Act, 1959, then such a levy is different from the levy of interest, which is dependent on the discretion of the assessing officer. The default arising on non-payment of tax on an admitted liability in the case of self-assessment falls under section 24(3) read with rule 18(3), which attracts automatic levy of interest whereas the default in filing incomplete and incorrect return falls under rule 18(4) which attracts best judgment assessment in which the levy of interest is based on the adjudication by the assessing officer. Therefore, rule 18(3) and rule 18(4) operate in different spheres."

31. The above legal principle also should be taken into consideration by the first respondent while considering the applications afresh as it is a relevant fact while verifying the correctness of the computation by the petitioner.

32. Regarding the other category of cases, the authority rejected the applications filed under Section 5 also on the ground that the special committee exercising power under Section 16(D) of the Act has set aside the best of judgment assessment orders and remanded the matter to the assessing officer and there is no order of assessment in force and therefore the question of settlement does not arise. As far as these category of cases are concerned, it is relevant to note that this Court in the case of *Anitha Plastics* (cited supra) held that the petitioner could not be deprived of the benefit merely because the order was passed after remand. As a matter of fact, the fresh order passed after remand, should be taken to have been passed, only because of the appellate authority finding fault with the original order. In such circumstances, the benefit of the scheme could not be denied to the petitioner and the said decision has also been followed in the case of *M/s. S.P.S. Jayam & Co., rep. by it's proprietor Mr. S.P.S. Selvaraj v. The Principal Secretary/Commissioner of Commercial Taxes and another*, in W.P. (MD) No. 8706 of 2009, dated 25.11.2009. Therefore, the rejection of the applications filed by the petitioners on the said ground is also not tenable. Even in these category of cases, the point raised in the first category of cases also arises and those orders also suffer from same procedural irregularity and the impugned orders in these category of cases also are required to be set aside.

33. Having set aside the impugned orders passed in the second category of cases, it has to necessarily follow the consequential order of assessment made pursuant to the order passed by the designated authority cannot be enforced as on date. Therefore, until fresh orders are passed by the designated authority by following the procedure contemplated under the Settlement Act, the impugned orders of assessment, which have been challenged, have to be kept in abeyance. In the result,

"(i) W.P. (MD) Nos. 3940, 3941, 5638, 5639, 5640, 5641, 5642, 5643, 5644, 5645, 5646, 5647, 5648 & 5649 of 2014 are allowed and the impugned orders are quashed and the matter is remanded back to the first respondent for fresh consideration in terms of the provisions of the Settlement Act, after affording opportunity of personal hearing to the petitioner to produce books of account and relevant records for the purpose of verifying the correctness of the particulars furnished by the petitioner in the application made under Section 5 of the Settlement Act and the computation made by the petitioner under Section 7 of the Act. The first respondent shall pass final orders, on merits and in accordance with law, within a period of three months from the date of receipt of a copy of this Order.

(ii) W.P. (MD) Nos. 8409, 8410, 8411, 8412, 8413, 8414 and 8415 of 2014 are disposed of with a direction to the first respondent to keep the impugned orders of assessment in abeyance until fresh orders are passed by the designated authority as directed supra. Consequently, connected miscellaneous petitions are closed. No costs."