(2014) 12 MAD CK 0058

In the Madras High Court

Case No : W.P. No. 31794 of 2014 and M.P. No. 1 of 2014

Dharani Sugars and Chemicals Ltd. APPELLANT

Vs

Assistant Commissioner (CT), Valluvarkottam Assessment Circle and Others RESPONDENT

Date of Decision : 08-12-2014

Acts Referred:
Constitution of India, 1950 — Article 226
Tamil Nadu General Sales Tax Act, 1959 — Section 12(3)(a) 8

Citation : (2015) 83 VST 233

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

Bench : Single Bench

Advocate : N. Prasad, Advocate for the Appellant; A.R. Jayaprathap, Government Advocate, Advocate for the Respondent;

Judgement

T.S. Sivagnanam, J.

1. Heard Mr. N. Prasad, learned counsel appearing for the petitioner and Mr. A.R. Jayaprathap, learned Government Advocate appearing for the first respondent and with the consent of the learned counsel on either side, the writ petition itself is taken up for disposal. The petitioner is a public limited company incorporated under the Companies Act and engaged in the activity of manufacture of cane sugar. The petitioner has established its factory in Tirunelveli District and Tiruvannamalai District. The petitioner are registered dealers under the provisions of the Tamil Nadu Value Added Tax Act and the Central Sales Tax Act.

2. The petitioner in this writ petition seeks for issuance of a writ of certiorari to quash the order dated November 14, 2014 which is an assessment order for the assessment year 2004-2005 under the provisions of the Tamil Nadu General Sales Tax Act (TNGST).

3. The petitioner was issued a notice dated June 23, 2006 upon perusal of the returns filed by the petitioner for the assessment year 2004-05. It is stated in

the notice that the petitioners have purchased sugarcane locally and crushed them and manufactured sugar and the sale of this sugar is not liable to tax as per entry (1) of Part A of the Third Schedule. Further, it was stated that as per the annual report for the year 2004-05, they have imported raw sugar under the advance licensing scheme with obligation to export to the value of 95.24 per cent, of the total imports within the prescribed period. It was alleged that the petitioner has not reported any export sales of sugar out of the imported raw sugar. Therefore, the petitioner was called upon to state whether the raw sugar imported after proving was sold locally and this sale of imported sugar is liable to be taxed at four per cent as per entry 61 of Part B of the First Schedule.

4. Though the notice dated June 23, 2006 deals with the other issues as well, in this writ petition, we are not concerned with the other issues and it is confined only to the import of raw sugar and on consequential sale. The petitioner was granted 15 days time to submit their objections. While so, based on an inspection which was conducted in the business premises of the petitioner on February 3, 2005 and February 4, 2005, the Assistant Commissioner (CT), Enforcement (Central), Chennai, issued a notice dated July 17, 2006 calling upon the petitioner to furnish, among other things, the details of physical quantities of imported raw sugar, received, consumed and in stock for the two factories for the period 2004-2005. The petitioner submitted their reply to the enforcement officer, by reply dated August 25, 2006, disclosing the details sought for. On the same day, the petitioner submitted a reply to the assessing officer to the notice dated June 23, 2006 that the imported raw sugar was processed and re-exported as white sugar. Further, it was stated that they have fulfilled the export obligation as per the advance licence up to August 24, 2006 and the balance quantity will be exported as and when the export ban is lifted, since there is a ban for export of sugar at the relevant time. Further, it was stated that what they have sold locally is the processed white sugar of a quantity of 37,649 metric tones during the assessment year 2004-05.

5. Further, it was stated that entry No. 61 of Part B of the First Schedule to the Act will not apply to their case since the raw sugar imported into India was processed, converted into white sugar and re-exported and what has been sold locally is only the processed white sugar and entry No. 61 of Part B pre-supposes sale, as such the imported raw sugar which has not taken place in their case. Further, it was submitted that the processed sugar sold locally falls under entry No. 1(i) of Part A with the Third Schedule to the Act as sugar falling under Chapter 17.01 of the First Schedule to the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and the process of white sugar sold by them is the sugar falling under Chapter 17019990. Further, the petitioner stated that they have remitted additional duties of excise on the clearances of the process of white sugar. Reliance was placed on the decision of the honourable Supreme Court in the case of Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others, and submitted that the honourable Supreme Court held that it would be unconstitutional for the States to impose any tax on the supply of goods, which

are subjected to additional duties of excise. Therefore, the respondents prayed that sales tax may not be imposed on them.

6. From the above, it is seen that the petitioner has submitted their reply to the notice issued by the assessing officer dated June 23, 2006 as well as the notice issued by the enforcement officer dated July 17, 2006 by separate replies dated August 25, 2006. However, no further action was taken for nearly three years and during 2009 the assessing officer, who is a different officer, issued another notice dated August 14, 2009 calling upon the petitioner to furnish the very same information which was sought for in the notice dated June 23, 2006. On receipt of such notice, the petitioner submitted their reply dated October 5, 2009 regarding the details of the imported raw sugar, the details of sugar exported as per the statements appended to their reply. Thereafter, no further proceedings were taken for about more than two years and it is stated by the petitioner that, in the month of January 2012, there was an oral query raised by the assessing officer, who was a different officer from that officer, who issued the notice dated August 14, 2009, calling for the same set of details. The petitioner submitted their reply in writing on January 9, 2012. In the said reply, the petitioner specifically stated for an opportunity of personal hearing may be granted. The copies of their earlier replies dated August 25, 2006 and October 5, 2009 were enclosed along with the reply dated January 9, 2012. That apart, the export obligation redemption letters dated April 21, 2008 and August 4, 2008 and the acknowledgements issued by the Joint Director General of Foreign Trade dated December 21, 2011 and November 11, 2011 were enclosed. Pursuant to that without affording any opportunity of personal hearing, the impugned assessment order has been passed.

7. On perusal of the impugned assessment order, it is seen that the assessing officer has not dealt with any of the contentions raised by the petitioner. The assessing officer came to the conclusion that the petitioner has imported raw sugar and sold the same after processing as white sugar locally but they have not made any exports during the year as per the conditions of the import of the raw sugar. This court is at a loss to understand as to how the said finding could have been rendered, when the petitioner, in their three replies dated August 25, 2006 and October 5, 2009 and January 9, 2012, have stated that they have effected exports. If according to the assessing officer, the information furnished by the dealer is inadequate or if there is any discrepancy or clarification required, then the assessing officer should have afforded an opportunity to the petitioner calling upon the petitioner to explain the documents or sought for records from the petitioner to substantiate their case. This has not been done by the assessing officer and the same is clearly in derogation of the law laid down by the honourable Division Bench of this court in the case of SRC Projects Private Limited v. Commissioner of Commercial Taxes, Chennai reported in [2010] 33 VST 333 (Mad). The conclusion of the assessing officer is solely based on the ground that there is no evidence available. But there is no discussion in the assessment order as to the effect of the submissions made by the petitioner and

the documents produced. The assessing officer does not out rightly reject the explanation offered nor the documents produced. In such circumstances, if the assessing officer was of the view that the documents were not adequate to establish their claim, then fairness demands that the petitioner/dealer should have been issued a notice in this regard, information should have been called for, they should have been directed to appear in person and produce all records. However, the assessing officer appears to have drawn an adverse inference while passing the assessing order which is contrary to law. The legal contentions raised by the petitioner has not been adverted to, the contention that they are exempted from payment of sales tax on the ground that the product imported is raw sugar, it undergoes a process of manufacture and then sold as white sugar and therefore, they are exempted from levy of sales tax, when the white sugar is cleared to the Domestic Tariff Area (DTA).

8. The other contention raised by the petitioner is that in the light of the decision of the honourable Supreme Court in Godfrey Phillips India Ltd. and Another Vs. State of U.P. and Others, , the petitioners are not liable to pay any sales tax as they are paying additional duties of excise. This question has not been adverted to by the assessing officer while finalising the assessment order.

9. In the case of Shree Ambika Sugars Limited v. Assistant Commissioner (CT), Nungambakkam Assessment Circle, Chetpet, Chennai reported in [2013] 63 VST 279 (Mad) , the challenge was to an assessment order rejecting the claim of exemption under section 8 of the TNGST Act. The dealer was also engaged in the manufacture of sugar and had imported raw sugar and after subjecting it to various processes, converted it into white refined sugar for sale locally. In the returns, filed for the assessment year 2004-05, on the turnover relating to sale of white sugar, the dealer claimed exemption under section 8 of the TNGST Act on the ground that the imported raw sugar and the processed and manufactured white sugar out of the imported raw sugar were two different commercial commodities. In the said case, the Commercial Tax Officer assessed the white sugar at the rate of four per cent, under entry 61 of Part B of the First Schedule to the Act and levied penalty at 150 per cent, under section 12(3)(a) of the Act. The assessment was put to challenge on other issues as well before the appellate authority and with regard to the taxability on the sale of white sugar manufactured out of imported raw sugar, the dealer filed a writ petition challenging the assessment on the ground of jurisdiction to impose sales tax on a commodity subjected to additional duties of excise. (The facts in the said case is more or less identical to that of the facts on hand). This court, after considering the impugned assessment order, held in the said writ petition that (pages 284 and 285 in 63 VST):

"Thus, a reading of provisions as contained in Chapter 3 of the Tamil Nadu General Sales Tax Act shows that as far as the consideration on exemption under the Third Schedule is concerned, all that we need to look at therein is not as to whether sugar to be exempted under the Sales Tax Act has suffered additional duties of excise duty levy, but whether what is sold by the petitioner fits in with the description given under the First Schedule to the Additional Duties of Excise Act. In so identifying the goods, the question of entering into an enquiry as to whether there is a payment of the liability under the Excise Act to result in sharing of the revenue between the Central and the State. Thus a reading of the Third Schedule makes it plain that the relevancy of reference to the additional duties of excise is a restricted one to the extent of borrowing the definition from the said Act to the Tamil Nadu General Sales Tax Act for the purposes of identifying the goods for grant of exemption.

In the light of the above, if sugar is to attract sales tax under the First Schedule, then it must be one other than what is specified for grant of exemption under the Third Schedule. Considering the emphasis in the Third Schedule that the goods produced or manufactured in India as described in the Additional Duties of Excise (Goods of Special Importance) Act, 1957 alone is taken up for consideration, the only sugar that can hence fall for consideration under First Schedule must be one other than what is enumerated in the Third Schedule. Rightly, entry 61 of Part B of the First Schedule gave the description of ''sugar'' that is sought to be taxed in the First Schedule as, ''sugar imported into India from foreign countries''. Thus irrespective of the kind of sugar, once it is an imported sugar, the sales tax levy under entry 61 of Part B stands automatically attracted to the sales.

Thus imported sugar sold as such, retaining its original character attracts tax at four per cent, under the First Schedule to the Act. But when once imported sugar is not dealt with as such for sale, but has been subjected to a manufacturing process, the liability under the First Schedule no longer stands attracted to the manufactured sugar..."

10. In the said decision, the other objection raised by the authorities regarding the maintainability of the writ petition was also considered and it was pointed out that exclusion of the writ jurisdiction by availability of an alternate remedy is rule of discretion and not one of compulsion and there could be contingencies in which jurisdiction under article 226 of the Constitution could be exercised inspite of availability of an alternate remedy. It was further pointed out that the assessing officer, after narrating the objections made by the dealer, simply fulfilled the objections ignoring the specific materials placed by the dealer.

11. As pointed out earlier, in the case on hand, the assessing officer did not advert into the contentions raised by the petitioner as regards the manufacturing processes. The effect of decision in the case of Shree Ambika Sugars [2013] 63 VST 279 (Mad) can also be pressed into service by the petitioner in support of their contention.

12. Hence, for all the above reasons, this court is of the view that the petitioner need not be relegated to avail of the alternate remedy available under the Act, since the impugned proceeding is vitiated on the ground of violation of principles of natural justice and without due application of mind to the facts and

contentions raised. The assessing officer did not endeavour to deal with the merits of the contentions raised by the dealer and therefore, it is a fit case for the assessment to be redone.

13. It is relevant to point out that the proceedings commenced in the year 2006 and concluded in 2014, three assessing officers had changed in the interregnum. Apart from that there is no reference to the proceedings initiated by the enforcement wing, the assessment order is silent about the delay in finalising the matter and the delay remains unexplained. As pointed out by the Commissioner in various circulars issued which are binding on the assessing officer, when the assessing officer proposed to reopen the assessment by issuing a notice, the matter cannot be left to lie over for unreasonably long period and there is a duty cast upon the assessing officer to complete the proceedings at the earliest point. For all the above reasons, the writ petition is allowed and the impugned order is set aside and the matter is remanded to the first respondent for fresh consideration, to consider the liability relating to the sale of white sugar manufactured in India out of the imported raw sugar, the petitioner is entitled to canvass all their contentions which were raised in their replies dated August 25, 2006, October 5, 2009 and January 9, 2012 and the first respondent shall consider all the documents produced by them and if any further particulars are required, the first respondent should call for the same and after affording an opportunity of being heard in person, the first respondent shall pass orders on merits and in accordance with law. The second respondent being neither a proper or necessary party to this writ petition, the second respondent is deleted from the array of respondents. No costs. Consequently, connected miscellaneous petition is closed.