(2007) 11 MAD CK 0035

In the Madras High Court

Case No : Writ Petition No. 15112 and 15114 of 2007 and M.P. No. 2 of 2007

Kodak India Ltd. (Now Known as Kodak India (P) Ltd.) APPELLANT

Vs

The Assistant Commissioner (CT) RESPONDENT

Date of Decision : 14-11-2007

Acts Referred:

Constitution of India, 1950 — Article 226
Tamil Nadu General Sales Tax Act, 1959 — Section 28A
Tamil Nadu General Sales Tax Rules, 1959 — Rule 26A

Citation : (2009) 20 VST 112

Hon'ble Judges : S. Manikumar, J

Bench : Single Bench

Advocate : K.J. Chandran, for the Appellant; R. Mahadevan, Addl. Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

S. Manikumar, J.—The petitioner in both Writ Petitions, has challenged the assessment order and notice, dated 30.12.2005 for the

assessment years 2000-01 and 2001-02 respectively and sought a direction to the Assessing Officer to levy tax at the rate of 8% on the compact

discs sold by them, in accordance with the clarifications dated 27.08.1999 and 12.10.2000, issued by the Special Commissioner and

Commissioner of Commercial Taxes, Chennai.

2. As both the Writ Petitions deal with the common facts and law, they are taken up together and disposed of by a common order.

3. Brief facts leading to the Writ Petitions are as follows:

The petitioner is a registered dealer on the files of the respondent. By letter dated 17.05.1999, the petitioner requested the Special Commissioner, and Commissioner of Commercial Taxes, Chennai to clarify the rate of tax applicable on the sale of ""Video Compact Disk "" effected by them.

According to the petitioner, the ""Video Compact Disk"" is a CD Media, meant to store digital files, text/images/graphics/drawing for optimum

storage and it is also called as Compact Disk. Along with the application seeking for clarification, the relevant product description documents were

also enclosed, which clearly says that the petitioner was marketing the commodity as ""KODAK Writable CD Media with Infoguard Protection

System"" and it was designed to store upto 580 MB with 63 Minute media and 682 MB with 74 minute media.

4. The Special Commissioner and Commissioner of Commercial Taxes, Chennai, by letter dated 09.07.1999, clarified that ""Video Compact Disk

falls under the category of ""Compact Disc"" in Entry 52 of Part ''D'' of the First Schedule to the TNGST Act. Subsequently, by another clarification

dated 27.08.1999, it was further clarified that the rate of tax on the sale of ""Video Compact Disk"" falling under the category of ""Compact Disc"",

was reduced to 4% with effect from 01.04.1999, by G.Q.Ms. No. 72 , dated 27.03.1999 - Notification No. 11(1) CT/40/(d-3)/99. Thereafter,

the Government issued orders in G.O. Ms. No. 11 CT, dated 23.01.2000, cancelling the earlier Government Order issued in G.O. Ms. No. 72,

dated 27.03.1999 and the items mentioned In Entry 52 of Part ''D'' of the First Schedule to the TNGST Act, were inserted in Entry 59 of Part ''C''

of the First Schedule to the TNGST Act and thereafter, ""Compact disc"" was liable to tax at the rate of 8% with effect from 23.01.2000, as per the

clarification dated 27.08.1999, issued by the Special Commissioner and Commissioner of Commercial Taxes, Chennai.

5. During the assessment year 2000-01, the petitioner claimed that they were liable to sales tax at 4%, only on the ""Compact discs"" sold by them

to the tune of Rs. 53,99,392/-, contending that the same were computer peripherals. However, the assessing officer, by his order dated

18.06.2003, held that the petitioner had sold ""Video compact disc"" and liable to pay tax at 8% on the turnover of Rs. 53,99,392/-. The petitioner

disputed the differential rate of tax at 4% on the turnover of Rs. 53,99,392/- before the Deputy Commissioner (CT) Appeals, the first appellate

authority in Appeal No. 48 of 2003 Similarly, for the assessment year 2001-02, the assessing officer held that the petitioner had sold ""Writable compact disc"" and was liable to pay tax at 11% upto 30.11.2001 and at the rate of 12% from 01.12.2001 to 26.03.2002. Therefore, the

assessing officer, by his order dated 31.12.2004, levied tax at the rate of 11% on the turnover of Rs. 1,01.04,329/- for the period from

01.04.2001 to 30.11.2001 and at the rate of 12% on the turnover of Rs. 30,18,417/- for the period from 01.12.2001 to 26.03.2002 on the sale

of compact disk effected by the petitioner. The petitioner disputed the levy of higher rate of tax before the Deputy Commissioner (CT) Appeal, the

first appellate authority in Appeal No. 8 of 2005.

6. In so far as the appeal filed for the assessment year 2000-01, i.e., Appeal No. 48 of 2003, the first appellate authority, by order dated

02.07.2004, held that the ""Compact Disc"" was not a computer peripheral and therefore, the contention of the petitioner that the same was liable to

tax at the rate of 4% was not accepted. The first appellate authority also held that the above mentioned item was not a sound transmitting or sound

recording instrument, liable to tax at 8% and therefore, remanded the issue to the assessing officer with a direction to make a fresh assessment on

the turnover, adopting the correct rate of tax as prescribed under the Act. Pursuant to the order of remand, the assessing officer, issued notice

dated 22.11.2004, proposing to levy tax at 11% on the turnover of Rs. 53,99,392/-, relating to the sale 6f ""Compact Disc"" under the residuary

entry. By another notice dated 31.08.2005, the respondent proposed to revise the assessment on the turnover of Rs. 26,45,646/-and proposed to

levy tax at 11% instead of 8%, as already levied at the time of original assessment. In response to the notices referred to above, the petitioner

submitted their detailed replies on 23.12.2004 and 26.09.2005, stating that as per the clarification dated 26.09.1989, issued by the Special

Commissioner and Commissioner for Commercial Taxes, Chennai, clarifying that the ""Video Compact Disk"" sold by the petitioner was liable to tax

as per the then existing Entry 52 of Part ''D'' of the First Schedule to the TNGST Act, 1959. However, the respondent, without applying the said

clarification, passed the impugned order dated 30.12.2005 levying tax and penalty, which is challenged in W.P. No. 15114 of 2007.

7. In so far as appeal filed for the assessment year 2001-02, i.e., Appeal No. 8 of 2005, the first appellate authority, by order dated 09.09.2005,

remanded the issue back to the respondent to redo the assessment. Pursuant to the remand order, the assessing officer issued notice dated 30

12.2005, proposing to levy tax on compact disks on the turnover of Rs. 44,82,217/- treating the same a residuary item, which is impugned in

W.P. No. 15112 of 2007.

8. Mr. R.L. Ramani, learned Counsel appearing for the petitioner in both the Writ Petitions submitted that when the Special Commissioner and

Commissioner of Commercial Taxes, has issued the clarification, dated 27.08.1999 that the ""Video Compact Disc"" fall under the Entry relating to

Compact Disc'', which is found in Entry No. 52 of Part ''D'' of the First Schedule to the TNGST Act, 1959, as it existed during 1999, the

assessing officer is bound to follow the clarification issued u/s 28-A of the TNGST Act, 1959 and he has no power or authority to travel beyond

the beneficial clarification issued by the Special Commissioner and Commissioner of Commercial Taxes, Chennai and therefore, assessment order

for the year 2000-01 and the notice for the year 2001-02, proposing to levy tax at the rate of 11% on the sale of ""Video Compact Disc"", under

the residuary entry, is patently illegal and contrary to the above clarifications.

9. Learned Counsel for the petitioner, relying on the decision in UCO Bank, Calcutta Vs. Commissioner of Income Tax, West Bengal, , submitted

that the clarification issued by the competent authority cannot create any liability to pay tax and the beneficial power conferred on the highest

administrative authority can (sic) its advantage and in hard cases, can provide the benefit of relaxing the rigour of law. Relying the on the decisions

reported in 248 (sic) 338 and 139 STC 477, learned Counsel for the petitioner submitted that once the Special Commissioner and Commissioner

for Commercial Taxes, has issued clarifications u/s 28-A of the TNGST Act, treating the ""Video Compact Disk"" as one, falling under the category

of ""Compact Disc"" under Entry 52 of Part ''D'' of the First Schedule to the TNGST Act, 1959, the assessing officer is bound by the clarifications

and it is not open to him to act or advance any arguments, contrary to the interpretation of the competent authority.

10. On the other hand, Mr. R. Mahadevan, learned Additional Government Pleader, submitted that the clarification issued by the Special

Commissioner and Commissioner of Commercial Taxes was with respect to

""Video Compact Disk"" and not a ""Writable Compact Disc"". He

further submitted that contention of the petitioner that ""Writable Compact Disc"" sold by the petitioner would be liable to tax at 8% is not tenable,

as the assessing officer, on comparative assessment of the product, has categorically found that the clarification issued by the Special

Commissioner and Commissioner for Commercial Taxes is not applicable to the product sold by the petitioner and therefore, this Court should not

interfere with the finding of fact rendered by the assessing officer.

11. Learned Additional Government Pleader further submitted that even though, the contentions of the petitioner that the assessing officer is bound

by the clarifications of the Commissioner issued u/s 28-A of the TNGST Act and cannot give any different interpretation, is acceptable, but

however, on merits of the case, a ""Writable Compact (sic) cannot be clarified either as an integral part of the computer in Entry No. 18 or 87 of

Part ''B'' of the First Schedule to the TNGST Act nor it could be included as one of the item of goods mentioned under the category of sound

recording and reproducing quipments etc., which are liable to tax at 8%. Therefore, according to him, when the ""Writable Compact Disc"" is a

distinct class of Its kind, it cannot be construed as ""Video Compact Disk"", classifiable under Entry 59 of Part ''C'' of the First Schedule to the

TNGST Act and under such circumstances, the sales representing ""Writable Compact Disc"" could be assessed only at 11% under Entry 67 of

Part ''D'' of the First Schedule to the TNGST Act. Learned Additional Government Pleader further submitted that the assessing officer has acted

within the four corners of law and that there has been no transgression of his powers and that he has not acted contrary to the clarification issued

by the commissioner for Commercial Taxes. In fine, he submitted that when the principles of natural justice have been properly adhered to by the

respondent and the impugned order is will within his jurisdiction, it is not open to the petitioner to bye-pass the alternative remedy, provided under

the statute and file a Writ Petition and therefore, prayed for dismissal of the Writ Petitions.

12. Heard Mr. K.J. Chandran, learned Counsel for the petitioner and Mr. R. Mahadevan, learned Additional Government Pleader, for the

respondent.

13. Before dealing with the factual matrix of the case, let me extract the relevant entry, where the goods viz., the ""Compact Disc"" is mentioned in

the TNGST Act. Along with the sound recording and re-producing equipments classified in Item No. 49 of Part ''C'' of the First Schedule to the

TNGST Act, the ''Compact Disc'' was also included in Entry. 52 in Part ''D'' of the First Schedule and the rate of tax at the point of First sale was

11% between 17.07.1996 and 04.03.1997. The said Entry is extracted hereunder:

Sound recording and reproducing equipments (excluding item 49 in Part C) including dictaphones, car cassette players, tape-decks, tape players,

compact disc players (including a combination of any of them) with or without wireless reception instruments and compact disc, magnetic tapes,

micro tapes and micro fische for use therewith parts and accessories thereof and head cleaner in any form.

14. Subsequently, the Government in G.O. Ms. No. 72, dated 27.03.1999, issued a notification No. II(1)/CT/40(d-3)/99, reducing the rate of tax

on the sale of ""Video Compact Disc"" falling under the category of ""Compact Disc"" from 11% to 4%, with effect from 01.04.1999. On the request

of the petitioner dated 17.05.1999, the then Special Commissioner and Commissioner of Commercial Taxes, Chennai issued clarification dated

27.08.1999, informing the petitioner that ""Video Compact Disk"", falling under the category of ""Compact Disc"" in Entry 52 of Part ''D'' of the First

Schedule to the TNGST Act, would be taxable at lessor rate.

15. Thereafter, the Government issued orders in G.O. Ms. No. 11 CT, dated 23.01.2000, where, the above said items of goods mentioned in

Entry No. 52 of Part ''D'' of the First Schedule of TNGST Act, were inserted in Entry No. 59 of Part ''C'' of the First Schedule to the TNGST

Act and the rate of tax at the first point of sale was fixed at 8%. The tax leviable on the ""Compact Disc"" under Entry 59 of Part ''C'' of the First

Schedule to the TNGST Act, with effect from 23.02.2000, was 8%. A perusal of description of the goods as explained by the petitioner and

annexed in pages 7 to 9 of the typed set of papers in W.P. No. 15114 of 2007, show that the ""Compact Discs"" sold by the petitioner are Kodak

Writable Compact Disc Media With Inforguard Protection System and the type of ""Compact Disc"" is described as Kodak Digital Science Cd-R

Media Type S. In the application dated 17.05.1999, the petitioner sought clarification in respect of rate of tax to be paid for ""Video Compact

Disc"" and the Commissioner, on the strength of the Government Order in G.O. Ms. No. 72, dated 27.03.1999 - Notification No. II (1)

CT/40/(d-3)/99, had issued a clarification dated 27.08.1999 that the ""Video Compact DisK"" falling under the category of ""Compact Disc"" in the

then existing Entry 52 of Part ''D'' of the First Schedule, is liable to tax at 4%. It is further evident from Form XIV, the application submitted under

Rule 26-A of the TNGST Rules, the name of the goods mentioned in SI. 3, for which, the clarification regarding the rate of tax was required, is

Video Compact DisK"". Therefore, no infirmity can be found n the order of Commissioner, clarifying the rate of tax for the goods ""Video Compact

Disc"".

16. The Appellee Authority, on analysis of the issue as to whether a ''Writable Compact Disc'' can be classified as sound recording and

reproducing equipments under Entry 52 of Part ''C'' of the First Schedule to the TNGST Act, remitted the matter to the assessing officer for fresh

consideration. On remand, the assessing officer considered the contentions raised by the dealer and overruled the same with the following findings:

The clarification issued by the Special Commissioner and Commissioner of Commercial Taxes, dated 27.08.1999, referred to by the dealers

pertains to only ''Video Compact Discs'' and not Writable Compact Discs. The claim of the dealers is that the Schedule liable to be taxed @ 8%

only and @ 11% w.e.f. 23.01.2000 with reduction in rate to 4% from 01.04.1999 to 22.01.2000 by notification under Entry 52 of Part D to the

First Schedule. The above entry contains the commodity Compact Disc whereas the Writable Compact Discs sold by the dealers is not the same

as the item goods mentioned under the category of sound recording and reproducing equipments, liable to tax @ 8%. Hence, it cannot be

concluded, that the meaning of the expression ''Compact Discs'' in the Entry 59 has the same meaning as that of compact Disc dealt by the

assessee. ''Writable Compact Disc'' cannot be classified as sound recording and reproducing equipment and also the same cannot be construed as

''Video Compact Disc'' classifiable under Entry 59 of Part C to the First Schedule.

Further, their claim that Compact Disc would fall under Entry 18 of Part B to the

First Schedule is also not acceptable as the item ''Compact Disc''

has not been explicitly included either in Entry 18 or 87 of Part B to the First Schedule. The ''Writable Compact Disc'' cannot be classified either

as an integral part of a computer in as much as computer can work even without ''Writable Compact Discs'' or an accessory, which has no

function whatsoever to assist in operating or controlling as Secondary to any primary items in the computer. Therefore, the objections are

overruled and the turnover of Rs. 69,53,038/- representing sales of compact discs (R) is assessed to tax @ 11% under Entry 67 D of the First

Schedule to the TNGST Act'' 59.

17. Certainly, the assessing officer is bound by the clarifications issued by the Commissioner of Commercial Taxes, Chennai, who is the competent

authority. The clarification dated 27.08.1999, was only with reference to the product described in the application submitted by the petitioner as

Video Compact Disc"" and therefore, the Commissioner has rightly issued a clarification that the said product is taxable at 4%, in view of the

orders issued in G.O. Ms. No. 72 , dated 17.03.1999 by the Government reducing the rate of tax from 11% to 4% for the ""Video Compact

Disc"". However, the Commissioner has not expressed anything as to the rate of tax applicable to a ""Writable Compact Disc"".

18. The assessing officer, on the basis of the documentary evidence produced before him, had categorically found that the ''Writable Compact

Disc'' cannot be classified as Sound recording and reproducing equipment and also cannot be construed as ""Video Compact Disc'', classifiable

under Entry 59 of Part ''C'' of the First Schedule. The clarification issued under the Statute is applicable only to the nomenclature of goods as

described by the dealer in their application submitted to the competent authority and the rate of tax clarified by such authority cannot be applied to

a different item of goods. In view of the above, the assessing officer cannot be said to have failed to implement the clarifications of the

Commissioner nor he had denied the benefit of the clarifications.

19. In a recent decision of the Supreme Court in Star Paper Mills Ltd. Vs. State of U.P. and Others, , the Supreme Court held that recourse to a

remedy under Article 226 of the Constitution of India is permissible, if the petitioner applies for enforcement of the fundamental rights; where there is violation of the principles of natural justice or where the orders of proceedings are wholly without jurisdiction or vires of an Act is challenged.

Whether the petitioner had sold ""Writable Compact Disc"" or ""Video Compact Disk"" is a matter of evidence and therefore, this Court would not

venture to deal with the factual aspects. The order impugned in this Writ Petition cannot be termed as unfair or unreasonable or defies reason.

Where factual adjudication of the matter is necessary, writ petition would not be the proper remedy. The petitioner has not satisfied any one of the

parameters to avail the extra-ordinary remedy provided under Writ Jurisdiction.

In view of the above, the Writ Petitions are dismissed. No costs. Consequently, connected Miscellaneous Petition is dismissed.