

(2010) 08 MAD CK 0135

In the Madras High Court

Case No : W.Ps. 50189, 50190 and 50111 of 2006 and M.P. No's. 1, 1 and 1 of 2003

Thiru Arooran Sugars Ltd.

APPELLANT

Vs

The Assistant Commissioner (CT), The Deputy Commissioner (CT), Tamil Nadu Sales Tax Appellate Tribunal and The State of Tamil Nadu
Arignar Anna Sugar Mills (Unit of Tamil Nadu Sugar Co-operation Ltd.,) Vs The Commercial Tax Officer, The Appellate Assistant Commissioner (CT) and Tamil Nadu Sales Tax Appellate Tribunal (Main Bench)

RESPONDENT

Date of Decision : 06-08-2010

Acts Referred:

Essential Commodities Act, 1955 — Section 3
Madras Sugar Factories Control Act, 1949 — Section 10(2), 14, 14(1)
Rubber Act, 1947 — Section 12, 12(1), 12(2)
Tamil Nadu General Sales Tax Act, 1959 — Section 16, 2, 3(2)

Citation : (2010) 08 MAD CK 0135

Hon'ble Judges : M.M. Sundaresh, J;F.M. Ibrahim Kalifulla, J

Bench : Division Bench

Advocate : N. Prasad, for the Appellant; Haja Nazuruddin, R1, 2 and 4, R3, for the Respondent

Final Decision : Allowed

Judgement

F.M. Ibrahim Kalifulla, J.—The petitioner in W.P. No. 50189 and 50190 of 2006 are common and the petitioner in W.P. No. 50111 of

2006 is one of the appellants before the Tribunal in which a common order came to be passed by the Tribunal dated 9.9.2005 in T.A. Nos. 101

and 102 of 2001, STA Nos. 907 908 of 2001. Therefore, these Writ Petitions are being disposed of by this common order. For the sake of

convenience, we refer to the facts relating to the petitioner in W.P. No. 50189 of 2006.

2. The Assessment Order pertains to 1993-94. The assessment was completed on 30.10.1995. The assessment was however revised by an order

dated 23.4.1999 u/s 16 of the TNGST Act. The petitioners are Sugar Mills. The petitioner in W.P. No. 50189 OF 2006 own lands, from which

sugarcane was procured for crushing, apart from purchasing sugarcane from other growers. It is common ground that by virtue of Section 3 of the

Essential Commodities Act and pursuant to the Sugar Control Order, 1966 came into being, the Central Government used to fix the price of the

sugarcane to be procured apart from additional price fixed by the State Government. Under the Madras Sugar Factories Control Act (in Act

20/1949) and the Madras Sugar Factories Control Rules, 1949, Cess also became payable on entry of sugarcane into the factory. Such cess

levied on the Sugar Mills were to be remitted to the Director of Sugars. The question involved herein is as to whether such cess payable under Act

20/1949 would form part of the sugarcane price and thereby would attract payment of Sales Tax under the provisions of the TNGST Act.

3. To appreciate the issue involved, it is worthwhile to refer to Section 2(r) and 3(2) of the TNGST Act read along with Part- E of First Schedule

as well as Clause 3 and 5A of Sugarcane control Order and Section 10(2) of Act 20/1949 read along with Section 14 of Madras Sugar Factories

Control Act 1949. Section 2(r), Section 3(2) and Entry 22 of Part-E of First Schedule read as under:

Section 2(r) [""turnover"" means the aggregate amount for which goods are bought or sold, or delivered or supplied or otherwise disposed of in any

of the ways referred to in Clause (n), by a dealer] either directly or through another, on his own account or on account of others whether for cash

or for deferred payment or other valuable consideration provided that the proceeds of the sale by a person of agricultural or horticultural

produce, other than tea, [and rubber (natural rubber latex and all varieties and grades of raw rubber] grown within the State by himself or on any

land in which he has an interest whether as owner, usufructuary mortgagee tenant or otherwise shall be excluded from his turnover;

Section 3(2) Subject to the provisions of sub- Section (1), in the case of goods mentioned in the First Schedule, the tax under this Act shall be

payable by a dealer at the rate and only at the point specified therein on the turnover in each year relating to such goods:

Provided that all spare parts, components and accessories of such goods shall also be taxed at the same rate as that of the goods if such spare

parts, components and accessories are not specifically enumerated in the First Schedule and made liable to tax under that Schedule;

[Provided further that in the case of goods mentioned in the First Schedule which are taxable at the point of first sale, the tax under this Act shall be

payable by the first or earliest of the successive dealers in the State who is liable to tax under this section].

22. Original Entry From 12-3-1993

Sugarcane excluding sugarcane sets. At the point of 12-03-93

Last Purchase

in the State

Note:

1. This entry is as per substituted

First Schedule to the TNGST Act,

1959 introduced by Act No. 24 of

1993-Tamil Nadu Govt. Gazette.

Extraordinary, Part IV, Section 2

dated 28.5.1993-Effective from

12.3.1993.

2. See Item No. 62 of First

Schedule existed till 11.3.1993.

3. Reduction in rate of tax payable

to eleven per cent on the purchase

of sugarcane by the Sugar Mills was

notified in G.O.P. No. 88 CT and RE

dated 17.3.1993-Notn. No. II(1)/

CTRE/41(b)/93 - Gazettee dated

17.3.1993 Effective from 1.10.1992)

Relevant para of Clause 3 and 5 A of the Sugarcane Control order reads as under:

3. Minimum price of sugarcane payable by producer of sugar.-- (1) The Central

Government may, after consultation with such authorities, bodies or associations as it may deem fit, by notification in the Official Gazette, from time to time, fix the minimum price of sugarcane to be paid by producers of sugar or their agents for the sugarcane purchased by them, having regard to:

- (a) the cost of production of sugarcane;
- (b) the return to the grower from alternative crops and the general trend of prices of agricultural commodities;
- (c) the availability of sugar to the consumer at a fair price;
- (d) the price at which sugar produced from sugarcane is sold by producers of sugar; and
- (e) the recovery of sugar from sugarcane:

[Provided, that the Central Government or with the approval of the Central Government, the State Government may, in such circumstances and subject to such conditions as specified in Cl.(3-A), allow a suitable rebate in price so fixed.]

5-A. Additional price for sugarcane purchased on or after 1st October, 1974.-- (1) Where a producer of sugar or his agent purchases sugarcane, from a sugarcane grower during each sugar year, he shall in addition to the minimum sugarcane price, fixed under Clause 3 pay to the sugarcane grower an additional price, if found due in accordance with the provisions of the Second Schedule annexed to this Order.

Section 10(2) of Act 20/49 as well as Section 14(1) of the Act framed thereunder are as under:

10 (1)....

(2) The occupier of such factory shall enter into an agreement with the growers for the purchase of all sugarcane offered by him in accordance with

Sub-section (1); and the agreement shall be in such form shall be executed on or before such date, and shall contain such terms and conditions as may be prescribed:

Provided that the occupier may refuse to enter into such an agreement where the sugarcane is offered for delivery during a period in respect of which he has already entered into agreements with growers in the reserved area for the purchase of a quantity of sugarcane equal to the maximum

consumption of the factory during such period.

14(1) The Government may, after consulting the Advisory Committee, by notification, levy of a cess not exceeding four annas per standard maund

as defined in the Standards of Weight Act, 1939,

Levy of Cess on sugarcane brought into any area specified in such notification, for consumption, use or sale therein.

Keeping the above provisions in mind, the issue involved has to be examined.

4. The Assessing Authority after completion of the assessment on 30.10.1995, issued a revised Pre-Assessment Notice dated 16.3.1999 and

called upon the petitioner to show cause as to why the Cess payment should not also be included purchase price for the assessment year 1993-94.

The learned Counsel for the petitioners contended that the same will not form part of the purchase price and therefore, it would not fall within the

prescription contained u/s 3(2) read along with Entry 22 of Part-E of First schedule and therefore no tax could be levied. However, rejecting the

contention of the petitioner, by an order dated 23.4.1999, the taxable turn over on the Cess levied under Act 20/49 was determined at a sum of

Rs. 23,73,97,145/- and after giving credit to whatever tax paid, the balance tax due was determined at a sum of Rs. 1,55,83,108/ -. On the said

sum, the surcharge due and the additional tax was also determined apart from imposing penalty of Rs. 6,42,790/ -.

5. Aggrieved against the said order of the Assessing Authority, the writ petitioner approached the Appellant Assistant Commissioner who by its

order dated 14.12.2000, allowed the appeal holding that no tax is leviable on the Cess paid under the provisions of Act 20/1949. As against the

order of the Appellant Assistant Commissioner, the State went on appeal before the Tribunal in STA No. 907 of 2001 and the Tribunal by the

order impugned in these Writ Petitions dated 9.9.2005, held that the Cess was part of Pre-Assessment expenses and in the light of the decision of

the Hon'ble supreme Court reported in 108 STC 583 State of Kerala v. Madras Rubber Factory Ltd. (S.C.), the revision of assessment made by

the assessing authority was justified. The Tribunal while setting aside the order of the Appellant Assistant Commissioner, restored the order of the

Assessing Authority. However, the Tribunal confirmed the order of the Appellate Assistant Commissioner in so far as deletion of penalty by

holding that there was a change of opinion based on which tax came to be levied.

6. In so far as the petitioner in W.P. No. 50111 of 2006 was concerned, the order of the Assessing Authority was confirmed by the Appellate

Assistant Commissioner as against which the petitioner in W.P. No. 50111 of 2006 went before the Tribunal by filing an Appeal in T.A. No. 1062

of 1993 and T.M.P. No. 567 OF 1996, which came to be dismissed by the Tribunal by its order dated 23.12.2005. As against which the present

Writ Petition has been preferred by the petitioner in W.P. No. 50111 of 2006.

7. Assailing the order of the Tribunal Mr. Prasad, learned Counsel appearing for the petitioners after referring to the clause contained in the

Sugarcane Control Order, under which the minimum price and the additional price are fixed by the Central and State Governments respectively as

well as the Cess leviable under Sections 10(2) and 14 of Act 20/1949 and after taking us through Section 3(2) and Entry 22 of Part-E of the First

Schedule of the TNGST Act, contended that the Cess levied under the provisions of Act 20/49 has absolutely no nexus to the price of sugarcane

procured by the petitioner either from the sugarcane growers or by its own in respect of the sugarcane harvested by itself and brought into its

factory. The learned Counsel would contend that as the expense of levy of Cess u/s 10(2) read along with Section 14 of Act 20/1949, has no

relation at all with the price of the sugarcane and the event of purchase alone would attract payment of tax u/s 3(2) of the TNGST Act, the very

demand made by the Assessing Authority u/s 16 of the Act was not valid in law and consequently the order of the Assessing Authority and the

confirmation of the same by the Tribunal are liable to be set aside.

8. As far as the decision reported in 108 STC 583 is concerned, according to the learned counsel, the same is clearly distinguishable and therefore

the Tribunal's reliance upon the said decision for imposing of tax liability under the provisions of TNGST Act is liable to be interfered with. The

learned Counsel also relied upon the decisions reported in State of T.N. and Others Vs. Kothari Sugars and Chemicals Ltd. and Others, in

support of his submissions.

9. As against the above submissions, Mr. Haja Nazuruddin, learned Special Government Pleader appearing for the State contended that Section

14 of the Act, being a regulatory provision and the petitioners having entered the

payment of Cess as part of their purchase expenses in their ledger, which finding has been made by the Appellate Assistant Commissioner, there was every justification for the respondents to have raised the demand by way of revision of assessment u/s 16 of the Act and therefore the order of the Assessing Authority and the Tribunal does not call for interference.

10. Having heard the respective counsel and having perused the relevant provisions as well as the orders impugned herein, we are of the view that the stand of the petitioner merits acceptance. When we refer to Sections 2(r) and 3(2) of TNGST Act, we find that u/s 2(r) of the Act, the turnover has been defined to mean aggregate amount of goods bought or sold whether for cash or for deferred payment or other valuable consideration. What is excluded is agricultural or horticultural purchase other than Tea grown within the State by the Assessee of any land in which he has interest whether as owner or as usufructuary mortgagee tenant or otherwise. Therefore, for the purpose of inclusion of an amount as turnover, it should be the aggregate amount for which the goods are bought or sold. The said provision has relevance inasmuch as the levy of tax in so far as the petitioners are concerned and the same is to be worked out by invoking Section 3(2) of the TNGST Act as the taxable event in respect of sugarcane is under Entry 22 of Part-E of First Schedule and the point of such levy is the last purchase in the State. u/s 3(2) of the Act, it is specifically stipulated that the tax under the TNGST Act should be paid by a dealer at the rate and only at the point specified on the turnover in each year relating to such case mentioned in the First Schedule.

11. Therefore a reading of Section 2(r) read along with Section 3(2) and Part-E of the First Schedule makes it abundantly clear that in the case of the petitioners who are dealing with the particular goods namely sugarcane, the point of last purchase in the State is the relevant event and in the event of such last purchase of sugarcane taking place at the instance of the petitioner, the same would attract payment of tax at the rate of 12% on the turnover to be assessed as prescribed u/s 2(r) of the Act.

12. Therefore, in order to find out what is the turnover in the case of the petitioners, necessarily the price of the sugarcane at which it is bought by the petitioner has to be found out. In the said circumstances, the question arise

as to whether apart from Clause 3 and 5-A of the Sugarcane

Control Order, the Cess levied u/s 10(2) read along with Section 14(1) of Act 20/49 would also fall within the component of price of sugarcane.

In so far as the minimum price of sugarcane fixed under Clause (3) by the Central Government and the additional sugarcane price fixed under

Clause 5-A of the State Government is concerned, the petitioner has rightly disclosed the same in its return and the Tax has also been duly paid.

13. When we come to the Cess levied u/s 10(2) of the Act, we find that while Section 10(2) of the act stipulates that the occupier of sugar factory

should enter into an agreement with the grower for production of all sugarcane offered by the grower in accordance with Sub-section (1) and the

agreement should be in such form where it should contain the terms and conditions as may be prescribed.

14. We are not concerned with the proviso to Section 10(2) of the Act. u/s 14(1) of the Rules framed under Act 20/1949, it is prescribed that the

Government have consulted the Advisory Committee by notification levied a cess not exceeding four annas per standard maund as defined in the

Standards of Weight Act, 1939, on sugarcane brought into any area specified in such notification, for consumption, use or sale therein. Therefore,

the crucial words are ""the levy of cess at the prescribed rate by the notification on the sugarcane brought into any area specified"" in the notification.

When the said prescription contained in Section 14(1) of the Act is analysed and read along with Section 3(2) and 2(r) of TNGST Act, it is plain

and unambiguous that there is no element of any purchase or sale involved for the purpose of levy of cess. The mere factum of the sugarcane

entering into the factory would attract the levy of cess on the occupier of factory manufacturing sugar.

15. Such entry of sugarcane brought into the notified area of notification issued u/s 14 of the Act would thus result in levy of cess. Significantly, the

leviability of cess is on the person who owns the sugar factory and the location of such sugar factory in a notified area and nothing more. The only

other event to be ascertained is the entry of sugarcane into an area, which is specified in the notification, either for own consumption, use or even

for sale.

16. As far as the petitioner is concerned, in so far as the liability to pay the tax

under the provisions of TNGST Act is concerned, as was stated earlier, the liability is by virtue of the prescription in abolition of Section 3(2) of the Act and the point of levy being the purchase of sugarcane as stipulated under Entry 22 of Part E of First Schedule. Under no other circumstances, the TNGST Act provides or creates any liability of payment of tax on the petitioner who owns a sugar manufacturing unit and who happen to purchase sugarcane as the basic raw material for the manufacture of sugar.

17. The various other expressions other than the expression "bought and sold" used in Section 2(r) of the Act have no relations to the petitioner which is a sugar factory. Therefore, the turn over which can be ascertained in relation to the petitioner can only relate to the purchase of sugarcane as has been prescribed under Entry 22 of Part-E of First Schedule read along with Section 3(2) of the Act. In so far as the aggregate amount of the purchase involved in the case of the petitioner the same was duly ascertained and assessed and such assessment indisputably was complete as early as on 30.10.1995. Therefore, we are at a loss to understand whether the cess levied u/s 14(1) of Act 20/1949 read along with Section 10(2) of the said Act and remitted to the Director of Sugars could be held to be even remotely relatable to the event of purchase of sugarcane which alone would make the petitioner liable for assessment being made for the purpose of payment of tax under the provisions of TNGST Act. In other words, there being no event of purchase of sugarcane in so far it related to the levy of Cess as stipulated u/s 14(1) of Act 20/1949, we do not find any scope at all for the respondents to seek for and make a demand for payment of tax on the cess so levied by invoking the provisions contained in the TNGST Act.

18. The above legal position stated by us is also fortified by the Division Bench decision of this Court reported in 29 STC page 1 Cauveri Sugars v. State of Tamil Nadu - The Joint Commercial Tax Officer. This very issue namely as to whether the cess will form part of transaction of purchase of sugarcane was the direct question involved in the said decision and the Division Bench after a detailed consideration has held as under:

The cess does not even form part of transaction of purchase of sugarcane and is not by any means in any case part of the consideration for the

purchase of sugarcane. The cess paid is not taken into account for fixing the price u/s 12(1). The grower seller has neither any liability for the cess

nor is it paid on its behalf. (emphasis supplied). It is true that where a seller pays excise duty and includes it in the purchase price, such excise duty

will undoubtedly form part of the consideration like sales tax or any other tax which he has included in the consideration. But that cannot be the

case where cess as in this case is paid by the purchaser on his own liability and not on behalf of the seller. In fact the payment of cess u/s 14 read

with relevant rule is unconnected with the transaction of the purchase and price fixed u/s 12(1) The view of the Department as well as the Tribunal

that cess is integral part of the purchase, turnover of sugarcane cannot therefore be accepted as correct.

Then again the Court observed that

in fixing the price of the sugarcane cess was not taken into account. There was also no stipulation between the assessee and the growers - sellers

that the duty should as between them, be borne by the seller and that when a buyer on whom the liability was, paid the cess, it should be on behalf

of the seller. The cess paid by the assessee in discharge of their own statutory liability and on their own account cannot therefore form part of the

purchase price and therefore of the purchase turnover chargeable to tax. The inclusion of cess in the chargeable purchase turnover was, therefore

illegal.

We are therefore convinced that the question is no longer *res integra* inasmuch as the issue is directly covered by the above referred Division Bench

Decision.

19. Once we steer clear of the legal position and when we examine the correctness of the orders impugned, we find that the Assessing Officer in

his order has not given any reasons except stating that the petitioner failed to include the cess payment in the taxable purchase turnover and failed

to pay tax thereon and therefore the assessment was being made and for the very same reason also imposed the penalty.

20. In the case of the petitioner in W.P. No. 50189 of 1990, the Appellate Assistant Commissioner in his order dated 14.12.2000, in the first

instance, rightly held that the Cess would not form part of the purchase price and therefore no tax could be levied. The Appellate Assistant

Commissioner also followed the earlier Division Bench decision reported in Cauvery Sugars and Chemicals Ltd. and Others Vs. The Joint

Commercial Tax Officer and Another, and Appellate Assistant Commissioner also distinguished the decision reported in State of Kerala Vs.

Madras Rubber Factory Ltd., .

21. The Tribunal unfortunately without examining the issue with reference to the relevant provisions, has taken the view that the cess payment made

by the petitioner under the provisions of Act 20/1949 came to be disclosed in the ledger as purchase expenses and consequently it should be held

to be part of the sales turnover as prescribed u/s 2(r) of the TNGST Act, apart from relying upon State of Kerala Vs. Madras Rubber Factory

Ltd., .

22. As far as the reasoning that the petitioner disclosed the payment of cess as part of purchase price is concerned, the learned could brought to

our notice the relevant entry made by the petitioner in its ledger, a copy of which was stated to have also been placed before the Tribunal by filing

necessary Application. We had the benefit of perusing one such extract of the General Ledger at page No. 107 of the material papers filed as

Volume-2 in W.P. Nos. 50189 and 50190 of 2006. We find that the Account Head noted therein is ""cane cess"". The entry made therein disclose

the cane cess paid for the relevant month based on the total quantity in metric tonnes subtracted by the quantity of sugarcane which were brought

into the factory from within the local area itself and for arriving at the total quantity of sugarcane brought within the factory premises from outside

the local area, the value was made and the cess payable was debited to the concerned accounts for different months.

23. Therefore when the ledger entry distinctly disclose that the payment of cess debited to the concerned Act was not by way of any purchase

price, it can only be held that the said factor was completely omitted to be noted both by the Tribunal as well as by the Appellate Assistant

Commissioner. In fact the Tribunal appear to have merely gone by what has been recorded in one of the orders of the Appellate Assistant

Commissioner in Appeal No. 401/91 etc. dated 19.1.1993 relating to the petitioner in W.P. No. 50111 of 2006, wherein in page No. 15 of its

order, the Appellate Assistant Commissioner has made the statement to the

effect that "consideration of the above point, the Assessing Officer had rightly revised the assessment and levied tax on the above pre purchase expenses...." Except the statement found in that particular order of the Appellate Assistant Commissioner, we do not find any other materials relied upon either by the Assessing Authority or the Appellate Assistant Commissioner or the Tribunal in order to state with any definite terms that the petitioner at no point of time construed or treated the cess paid under the provisions of Act 20/1949 as an element of either purchase price or even purchase expenses. Therefore, the said finding of the Tribunal cannot be a ground at all for affirming the revised assessment made by the original authority.

24. When we examine the decision of the Hon^{ble} Supreme Court reported in State of Kerala Vs. Madras Rubber Factory Ltd., , as rightly contended by the learned Counsel for the petitioners, the said decision has to be understood in the light of the specific provision contained u/s 12

of Rubber Act 1947 and Section 5 read along with Entry 71 of the Kerala General Sales Tax Act. Section 12 of the Rubber Act has been

extracted in the said decision at page No. 589, which reads as under:

Imposition of new rubber cess.-- (1) With effect from such date as the Central Government may, by notification in the Official Gazette, appoint,

there shall be levied as a cess for the purposes of this Act, a duty of excise on all rubber produced in India at such rate, not exceeding fifty naye

paise per kilogram of rubber so produced, as the Central Government may fix.

(2) The duty of excise levied under Sub-section (1) shall be collected by the Board in accordance with rules made in this behalf either from the

owner of the estate on which the rubber is produced or from the manufacturer by whom such rubber is used.

25. While a reading of Section 12 of the Rubber Act disclose that though the levy of Cess was on the rubber produced at a particular rate, as

provided u/s 12(1) of the Rubber Act, the collection of the said Cess is made obligatory both on the manufacturer by whom such rubber is used as

well as the owner of the Estate concerned. In the event of there being a manufacturer intervening in the production of rubber as provided under

Sub-section 2 of Section 12 then and there alone by virtue of the specific stipulation contained in Section 12(2) it will be mandatory either for the

owner or the manufacturer to pay the Cess on the quantum of rubber produced. Thus, there is a statutory liability of inclusion of Cess also in the

price of the rubber payable by the manufacturer to the person concerned who is involved in the production of rubber for the purpose of levy of

Excise duty and collection of such levy either from the owner of the Estate or from the Manufacturer if there is one who use such rubber. The

Hon"ble Supreme Court has dealt with the said consequence in paragraph Nos. 17 and 18 and therefore, it was held that the liability of tax as

prescribed under Kerala General Sales Tax as per Section 5 read along with Entry 71 would include the cess payable u/s 12 of the Act.

26. Therefore the said decision having been based on the specific provisions contained in Section 12 of the Rubber Act as well as Section 5 of the

Kerala Sales Tax Act, which is clearly distinguishable as compared to the provisions contained in Section 14(1) of Act 20/1949, there is absolutely

no scope for applying the said decision to the facts of this case. The case on hand is directly covered by the earlier Division Bench decision of this

Court in Cauvery Sugars and Chemicals Ltd. and Others Vs. The Joint Commercial Tax Officer and Another, and therefore, there is absolutely no

scope for including the payment of cess for the purpose of assessing the liability of tax under the provisions of TNGST Act.

26. Having regard to our above conclusion, we do not find any need to refer to other decisions placed before us. Therefore the orders of the

Tribunal impugned in these Writ Petition are set aside. The Writ Petitions stand allowed. Consequently, connected Miscellaneous Petitions are

closed.