THE HON'BLE DR. JUSTICE SHAMEEM AKTHER
AND
THE HON'BLE SRI JUSTICE E.V.VENUGOPAL

WRIT PETITION No.23798 OF 2003

ORDER: (Per Hon'ble Dr. Justice Shameem Akther)

This Writ Petition, under Article 226 of the Constitution of India, is filed by the petitioner, wherein, the following prayer is made:

> "to issue a Writ of Mandamus or any other appropriate writ or order or direction set aside the assessment orders of the Commercial Tax Officer for the assessment years 1995-96, 1996-97 & 1997-98 in so far as they impose tax of Rs.2,20,880/-, Rs.21,17,129/- & Rs.28,35,996/- on lease rentals under Section 5-E of the APGST Act and set-aside the assessment orders of the Commercial Tax Officer as the Supreme Court has held Section 5-E(b) of the APGST Act as unconstitutional and read it down and held the situs of sale to be the place where the agreement is executed and direct the Respondent to revise the assessment orders accordingly and to refund the aforesaid taxes paid by the Petitioner and pass such other order or orders..."

2. We have heard the submissions of Sri S.Dwarakanath, learned senior counsel appearing for the petitioner, Sri K.Raji Reddy, learned Senior Special Standing Counsel for Commercial Taxes representing the respondents, and perused the record.

3. Learned senior counsel for the petitioner would submit that the petitioner is a manufacturer of paper and paper boards, having its factory and registered office at Erode in Tamilnadu State. Though the petitioner entered into certain transactions for sale and lease back of assets-machinery at Tamilnadu, the customers and assets were situated in erstwhile State of Andhra Pradesh. Hence, the petitioner *bona fidely* paid tax on the ground that the assets were situated in the State of Andhra Pradesh. The tax levied and paid by the petitioner for the assessment years 1995-96, 1996-97 and 1997-98 was Rs.2,20,880/-, Rs.21,17,129 and Rs.28,35,996/- respectively, totaling to Rs.51.74 lakhs. While so, in the case of **20th Century Finance Corporation Limited and another Vs. State of Maharashtra**[1], the Hon'ble Apex Court read down clause (b) of Section 5-E of the A.P. General Sales Tax Act, 1957 (A.P. Act 6 of 1957), holding that the situs of sale would be the place where the property in goods passes and not the place of location of the goods where they are put to use. In view of the same, the petitioner made a representation, dated 20.10.2000, to the respondent No.1-Commercial Tax Officer, Narayanaguda Circle, Hyderabad, requesting to review the assessment orders and grant refund of tax paid by the petitioner from the assessment year 1995-96 onwards. However, the petitioner's claim for the later assessment years, i.e., 1998-99 and 1999-2000 was allowed by the assessment authority following the decision of the Hon'ble Apex Court in **20th Century Finance Corporation Limited**'s case supra. Meanwhile, the Deputy

[1] (2000) 6 Supreme Court Cases 12

Commissioner initiated revision of assessment for the years 1998-1999 and 1999-2000 proposing to levy tax under Section 5-E of Act 6 of 1957 on lease rentals, on an ironical ground that lessees have denied the lease transactions and hence, execution of lease agreement in Chennai is immaterial. Later, the Deputy Commissioner confirmed the revision and levied tax. As the tax was levied on the same transactions on another ground, it delayed the petitioners' effort to claim relief for the assessment years 1995-96 to 1997-98, as the assessing authority would adopt the same stand as of his superior. However, the respondents, neither revised the assessment orders for the years 1995-96 to 1997-98, nor acted upon the representation, dated 20.10.2000, till date and ultimately prayed to allow the writ petition as prayed for. In support of his contentions, the learned senior counsel had relied on **20th Century Finance Corporation Limited**'s case *supra* and **Mafatlal Industries Limited and others Vs. Union of India and others**[2].

4. On the other hand, the learned Senior Special Standing Counsel appearing for the respondents would contend that though the clause (b) of Section 5-E of the Act 6 of 1957 was read down by the Hon'ble Apex Court, the petitioner is not entitled for any revision of the assessment orders of the years 1995-96 to 1997-98, as it has

[2] (1997) 5 SCC 536

not preferred any appeal against the said assessment orders. The petitioner is not entitled for the relief claimed in this writ petition and ultimately prayed to dismiss the writ petition. In support of his contention, learned Senior Special Standing Counsel had relied on a decision of the erstwhile High Court of Andhra Pradesh in **Servet Feeds & Minerals (P) Limited and another Vs. Commercial Tax Officer, Jeedimetla and others**[3].

5. We have considered the rival submissions and gone through the entire material placed on record. Here, it is apt to extract paragraph 52 of **20th Century Finance Corporation Limited**'s case (1 supra), which read as follows:

> **52**. We have already held that since the definition of sale so far as it relates to transaction of transfer of right to use any goods is concerned in Central Sales Tax Act has not been amended, the provisions of Section 4 of the Central Sales Tax Act will not be applicable to such transactions. Thus, we find that clause (b) of Section 5-E is in excess of legislative power of the State under Entry 54 of List II of Seventh Schedule. We, therefore, direct that clause (b) of Section 5.E of the Act shall be read down to this effect that it would not be applicable to the transaction of transfer of right to use any goods if such deemed sale is (i) an outside sale, (ii) sale in course of the import of the goods into or export of the goods out of the territory of India and (iii) an inter-State sale.

6. A perusal of the aforementioned paragraph makes it clear that clause (b) of Section 5-E of the Act 6 of 1957 was declared as unconstitutional by the Hon'ble Apex Court.

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[3] Decided on 22.03.1999 in WP Nos.4850 & 4851 of 1999

7. Further, In **Mafatlal Industries Limited**'s case (2 supra), the Hon'ble Apex Court, in paragraph No.108(ii), held as follows:

> (*ii*) Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition. This principle is, however, subject to an exception: Where a person approaches the High Court or the Supreme Court challenging the constitutional validity of a provision but fails, he cannot take advantage of the declaration of unconstitutionality obtained by another person on another ground; this is for the reason that so far as he is concerned, the decision has become final and cannot be reopened on the basis of a decision on another person's case; this is the ratio of the opinion of Hidayatullah, C.J. in *Tilokchand Motichand* [(1969) 1 SCC 110 : (1969) 2 SCR 824 : AIR 1970 SC 898] and we respectfully agree with it.
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> Such a claim is maintainable both by virtue of the declaration contained in Article 265 of the Constitution of India and also by virtue of Section 72 of the Contract Act. In such cases, period of limitation would naturally be calculated taking into account the principle underlying clause (*c*) of sub-section (1) of Section 17 of the Limitation Act, 1963. A refund claim in such a situation cannot be governed by the provisions of the Central Excises and Salt Act or the Customs Act, as the case may be, since the enactments do not contemplate any of their provisions being struck down and a refund claim arising on that account. In other words, a claim of this nature is not contemplated by the said enactments and is outside their purview.

8. As held by the Hon'ble Apex Court in **Mafatlal Industries Limited**'s case (2 supra), the power under Article 226 has to be exercised to effectuate the regime of law and not for abrogating it. Even while acting in exercise of the said constitutional power, the High Court cannot ignore the law, nor can it override it. The power under Article 226 of the Constitution of India is conceived to serve the ends of law and not to transgress them. In the instant case, since the clause (b) of Section 5-E of the A.P. Act 6 of 1957 was read down by the Hon'ble Apex Court as indicated above holding that the situs of sale would be the place where the property in goods passes and not the place of location of the goods where they are put to use, the respondents are under obligation to review the assessment of tax for the years 1995-96 to 1997-98 of the petitioner and consequently, the petitioner is entitled for refund of tax paid by it for the said assessment years. Further, in view of the decision of the Hon'ble Apex Court in **Mafatlal Industries Limited**'s case, there is no need for the petitioner to file a separate suit before the civil Court claiming refund and the same can be adverted to in this writ petition.

9. Learned senior Special Standing Counsel appearing for the respondents placed reliance on **Servet Feeds & Minerals (P) Limited and another**'s 3 supra. Paragraph No.7 of the said judgment reads as follows:-

> "It will thus be seen that it is not open to any person to make a refund claim on basis of a decision rendered in the case of another person. It is not open for a person to say that the decision of the Court or Tribunal in another person's case has enabled him to discover mistake under which he has paid tax. A petitioner cannot claim that he is entitled to prefer a writ petition or to institute a suit on discovery of such mistake. A person must fight his own battle and succeed or fail in his proceedings. This is the ratio of the decision in Mafatlal Industries' case (2 supra). In the view of the matter, we find absolutely no force in the petitioner's cases that they are entitled to the benefit of the G.O.Ms.No.1055, (Revenue) dated 17.10.1994 merely because some other assessee has succeeded in his own writ petition. Consequently, the petitioner cannot claim refund on basis of success of some other person, i.e. Srinivas Poultry's case (1 supra)."

10. In the above decision, the party to the said writ petition sought refund of tax on the basis of a decision rendered in a case of another person. Under those circumstances, it was held that it was not open for a person to say that the decision of the Court or Tribunal in another person's case has enabled him to discover mistake under which he has paid tax. But in the instant case, the petitioner is not seeking refund of tax basing on the decision rendered in a case of another person, but is seeking review of assessment orders and refund of tax on the ground that the very provision of law itself under which tax was levied was read down by the Hon'ble Apex Court. Hence, the decision cited by the learned Senior Special Standing Counsel is clearly distinguishable on facts.

11. It is borne by record that the tax paid by the petitioner for the assessment years 1995-96, 1996-97 and 1997-98 was Rs.2,20,880/-, Rs.21,17,129 and Rs.28,35,996/- respectively. Therefore, the respondents are directed to refund the tax paid by the petitioner, i.e., Rs.2,20,880/-, Rs.21,17,129/- and Rs.28,35,996/- for the assessment years 1995-96, 1996-97 and 1997-98 respectively, to the petitioner, within a period of sixty (60) days from the date of receipt of a copy of this order.

12. The Writ Petition is, accordingly, allowed.

Miscellaneous petitions, if any, pending in this writ petition, shall stand closed. There shall be no order as to costs.

Dr. SHAMEEM AKTHER, J

E.V.VENUGOPAL, J

01st September, 2022
Bvv

Note:
Mark LR copy.
(B/O) BVV.