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W.P.Nos.3547 & 3548 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 03.08.2023	Pronounced on: 19.02.2024
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THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P.Nos.3547 & 3548 of 2020

and

W.M.P.Nos.4153 & 4154 of 2020

Tvl.Transtonelstory Afcons – Joint Venture,
Represented by its Authorized Signatory,
Chennai Metro Rail Project Central Office,
Kannapar Thidal Near Nehru Stadium Sydenhams Road,
Chennai – 600 003. ... Petitioner in both W.Ps.

Vs.

1. The Assistant Commissioner (CT),
Amaidakarai Assessment Circle,
Chennai – 600 102.
2. The Chennai Metro Rail Limited (CMRL),
Represented by its General Manager (F AND A), Administrative
Building,
Chennai Metro Rail Project,
Poonamallee High Road,
Chennai – 600 207.
3. The Assistant Commissioner (ST),
Royapettah Assessment Circle,
Commercial Tax Wing,
Taluk Office Building,
Greenways Road,
Chennai – 600 102. ... Respondents in both W.Ps.



Prayer in W.P.No.3547 of 2020 : Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari to call for the records of the Impugned Show Cause Notice in TIN/33291025998/2012-2013, Audit Slip No.12 dated 13.01.2020 from the files of the respondent herein and quash the same.

Prayer in W.P.No.3548 of 2020 : Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari to call for the records of the Impugned Show Cause Notice in TIN/33291025998/2013-2014, Audit Slip No.12 dated 13.01.2020 from the files of the respondent herein and quash the same.

For Petitioner : Mr.Aparna Nandakumar
(in both W.Ps.)
For Respondents :
For R1 & R3 : Ms.Amirtha Poonkodi Dinakaran
(in both W.Ps.)
For R2 : M/s.Rita Chandrasekaran
(in both W.Ps.)

COMMON ORDER

By this common order both the writ petitions are being disposed of.

2. The petitioner has challenged two Notices dated 13.01.2020 issued by the first respondent for the assessment year 2012-2013 and 2013-2014 pursuant to Audit Slip No.2.



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3. Brief facts of the case is that the petitioner was awarded two contracts for design and construction of underground stations and associated tunnels as detailed below:-

<i>W.P.</i>	<i>Assessment Year</i>	<i>Contract</i>	<i>Amount received by the petitioner</i>	<i>*TDS payable under Section 13(1) of TNVAT Act, 2006</i>
3547/2020	2012-13	UAA-01	80,05,71,995	1,60,11,440
3548/2020	2013-14	UAA-05	567,44,00,000	11,34,00,000
		Total	647,49,71,995	12,94,11,440

[* 2% Payable under Section 13(1) of TNVAT Act, 2006]

4. The petitioner had applied for Form S on 23.03.2011 *proviso* to Section 13(1) of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred to as TNVAT Act, 2006) read with Rule 9(2) of the Tamil Nadu Value Added Tax Rules, 2007 (hereinafter referred to as TNVAT Rules, 2007).



5. Later the petitioner applied for Form S on 25.06.2012 and claimed the Deemed Sale Value of Contract as **Rs.350,83,62,161/-** and claimed exemption from payment of tax for a sum of **Rs.23,39,10,054/-**. Therefore, the petitioner wanted CMRL to not to deduct a sum of **Rs.23,39,10,054/-** towards tax. This exemption was in respect of both contracts in (UAA 01) and (UAA 05) for a total sum of **Rs.23,39,10,054/-**.

6. This was a composite Form S that was obtained by the petitioner soon after the contract was awarded to the petitioner in accordance with the procedure that was prevailing at that point of time Circular No.8/2011 dated 22.03.2011. The petitioner has obtained similar Liability Certificate under Rule 9(2) in Form S for the assessment year 2013-2014. The details of the Form S obtained by the petitioner for the respective contracts are as under:-



WEB COPY **FORM – S:**

Contract : UAA – 01 and UAA – 05 for Rs.25,97,80,50,000/-)

Contract	Assessment Year	Date	Date of Form-S	Deemed Sale Value	Tax
UAA - 01	2011-2012	23.03.2011	02.08.2011	Rs.13,88,94,931/-	Rs.62,40,135/-
UAA - 01	2012-2013	25.06.2012	27.09.2012	Rs.350,83,62,161/-	Rs.23,39,054/-
UAA - 01	2013-2014	09.04.2013 (Turnover reported on 31.03.2013)	10.04.2013	Rs.273,13,04,860/-	Rs.18,02,28,681/-
UAA - 05				Rs.219,53,04,882/-	Rs.15,64,93,868/-
TOTAL				Rs.857,38,66,834/-	Rs.34,53,01,738

7. In the affidavit filed in support of the petitioner, it has been stated that the Impugned Notices are without jurisdiction. Grounds reads as follows:-

“It is submitted that the provisions of Section 13(2) of the TNVAT Act, 2006 read with Rule 9(1) of the TNVAT Rules, 2007 mandates the "person" responsible for deducting the TDS to deposit the sum so deducted along with Form R on or before 20th of the succeeding month. Further sub Section (7) of Section 13 of the TNVAT Act, 2006 lays down that the tax or interest under sub Section (1) and (2) under Section 13 TNVAT Act, 2006 would become due without any notice of demand for the payment by the "person". The term "person" has been defined in Explanation to Section 13(1) of the TNVAT Act,



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2006. Similarly Section 13(8) of the TNVAT Act, 2006 lays down that if "such person" contravene the provisions of sub Section (1) and sub Section (2) of Section 13 of TNVAT Act, 2006 the whole amount of tax along with penalty and interest would be recovered from "such person" as if the person was an assessee under the TNVAT Act, 2006. Thus in such an event the issuance of the impugned show cause notice to the petitioner herein who is the works contractor for the alleged contravention of the provisions of Section 13 is an abuse of process of law and wholly without jurisdiction.

It is submitted that in any event the respondent failed to see that the Form 'S' issued on 27.09.2012 was applicable for the entire financial year 2012-13 as per the instructions issued by the Principle Commissioner of Commercial Taxes vide Circular No.8/2011 dated 22.03.2011.

It is further submitted that the respondent herein has failed to consider the fact that Form S has been revalidated for the assessment year 2013-14 and hence the awarder of contract/works contractee was discharged of his obligation to deduct the TDS. In any event the initiation of proceedings against the petitioner herein for alleged non deduction of TDS by the awarder of the contract is wholly without jurisdiction.

It is submitted that several High Courts has held in the context of TDS deduction under the Income Tax Act, 1961 that in case of default, if any, in making over the amount deducted to the treasury, it is obviously the "person" responsible to deduct the TDS and who is deemed to be assessee in default in respect of that amount and that it was not the responsibility of assessee who has accepted the payment of amount from which the tax has been deducted at source.



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It is submitted that thus the respondent herein has jurisdictionally erred in issuing the show cause notice to the petitioner herein for the alleged default of the awarder of the contract/works contractee in the alleged non deduction of TDS.

It is further submitted that the petitioner herein has discharged its tax liability under Section 5 of the TNVAT Act, 2006 which fact has been accepted by the department. Thus when there is no allegation of default on the part of the petitioner herein in discharging its liability under Section 5 of the TNVAT Act, 2006, the action of the respondent herein in proposing to impose the tax and penalty for non deduction of TDS by the awarder of the contract/works contractee is wholly unjustified.”

8. The respondent in their counter has however stated as follows:-

“ It is submitted that however, on verification of Form 'S' issue register maintained in the Respondent office for the year 2012-2013, it does not have entries regarding the issuance of Form 'S' to the Petitioner. It is relevant here to note that

- i. Form 'S' was issued on 27.09.2012, but the CMRL made payments of Rs.80,05,71,993/- from (24.05.2012 to 13.09.2012) towards the above said work without deducting VAT-TDS even though Form 'S' was not produced by the Petitioner at the time of payment;*
- ii. Non- Deduction of TDS without Form 'S' certificate is liable for penalty, and*
- iii. That the CMRL made payment of Rs.567.44 Crore during the year 2013-14 without deducting VAT-TDS.*



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Further, it was verified that no Form 'S' certificate was issued to the Petitioner during the years i.e., 2012-2013 and 2013-2014. The Form 'S' certificate to be issued by the assessing authority contains, inter-alia, the details of value of Form 'S' Certificate, details of works contract to be executed and the certificate is valid only till the end of the financial year.

It is further submitted that a verification of Form 'S' issue register at the office of the DC (CT), Zone V, also revealed that there were no entries in the Form 'S' approval register maintained in the office in respect of Form 'S' said to be issued to the Petitioner. In view of the non-availability of entries neither in the assessment circle nor at the office of the DC (CT), Zone V, Chennai, for having issued Form 'S' for Rs.25,97,80,50,000/-, which was pointed out during AG audit, the Petitioner was requested to furnish the relevant documents to the Respondent vide show cause notice dt. 13.1.2020. But, the Petitioner instead of furnishing the documentary evidences called for by the Respondent, straightaway approached this Hon'ble Court to quash the notice of this Respondent, which is not maintainable in law."

9. In the written submission filed by the learned Government Advocate for the first and third respondents, it is submitted that the first respondent has jurisdiction to issue Impugned Notices to the petitioner as no certificate was issued to the petitioner in Form S to claim exemption under proviso to Sub Clause (c) to Section 13(1) of the TNVAT Act, 2006 read with Rule 9 of the TNVAT Rules, 2007.



10. It is submitted that FORMS R and FORM T submitted by the petitioner in Contract No.(UAA-05) is for the assessment year 2012-2013, whereas the AG Audit Slip No.12 dated 24.08.2016 notified transactions with regards to Contract No.(UAA-01) for the assessment year 2012-2013.

11. It is further submitted that in respect of Contract No.(UAA-05) for the assessment year 2013-2014, there are discrepancies in the Form S as per the records maintained by the first respondent and the Form S submitted by the petitioner in their typed set.

12. It is further submitted that the second respondent has failed to submit copies of FORMS R and FORM T to the first respondent as required under Section 13(3) of the TNVAT Act, 2006.

13. In the common counter filed by the respondents, it is submitted that the claim of the petitioner that they have received Form S for the assessment year 2012-2013 is not acceptable since the Form S Register maintained by the respondent office does not have any records regarding the claim of the petitioner.



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14. It is submitted in the common counter that the petitioner was requested to furnish any proof / documentary evidences vide Show Cause Notice dated 13.01.2020 in respect of its claim for issuing Form S for **Rs.25,97,80,50,000/-**. Instead of furnishing the proof the petitioner had approached this Court to quash the Show Cause Notice.

15. It is further submitted that the petitioner failed to furnish any proof / documentary evidence with regard to renewal of Form S Certificate for the financial year 2013-2014 as required under notice dated 13.01.2020.

16. In support of the plea, the learned counsel for the petitioner relied in the case of **Union of India (UOI) and Others vs. Vicco Laboratories**, MANU/SC/4450/2007.

17. On behalf of the respondents, learned Government Advocate for the respondents has placed reliance on the following decisions:-

- i. **Union of India and Others vs. VKC Footsteps India Private Limited**, (2022) 2 SCC 603;



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- ii. **Commissioner of Income Tax, Mysore, Travancore-Cochin and Coorg, Bangalore vs. The Indo Mercantile Bank Ltd.**, 1959 Supp (2) SCR 256, AIR 1959 SC 713, (1959) 36 ITR 1;
- iii. **Union of India and Another vs. Kunisetty Satyanarayana**, (2006) 12 SCC 28;
- iv. **State Bank of India Officers Association (CC) vs. The Assistant Commissioner (ST)**, W.P.No.2451 of 2020.

18. I have considered the arguments advanced by the learned counsel for the petitioner and the learned Government Advocate for the first and third respondents and the learned counsel for the second respondent.

19. Section 13(1) of TNVAT Act, 2006 contemplates deduction of tax by the person responsible (namely employer) for paying any amount to a dealer whose service is engaged for executing a works contract for civil contract work and / or civil maintenance works contract for the former.

20. The person responsible for paying tax amount has to deduct tax at 2% or 5% of the amount payable as the case may be as below under Section 13(1) of the TNVAT Act, 2006:-



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(i) Civil works contract	Two per cent of the total amount payable to such dealer;
(ii) Civil maintenance works contract	Two per cent of the total amount payable to such dealer;
(iii) All other works contract	[Five per cent] of the total amount payable to such dealers

21. A person responsible for paying amount need not deduct tax at the rate prescribed in Section 13(1) of TNVAT Act, 2006 if the conditions prescribed in proviso to Section 13(1) is attracted. Proviso to Section 13(1) reads as under:-

“Provided that no deduction under sub-section (1) shall be made where-

- (a) no transfer of property in goods (whether as goods or in some other form) is involved in the execution of such works contract; or*
- (b) transfer of property in goods (whether as goods or in some other form) is involved in the execution of works contract in the course of inter-State trade or commerce or in the course of import; or*
- (c) the dealer produces a certificate in such form as may be prescribed from the assessing authority concerned that he has no liability to pay or has paid the tax under Section 5:
Provided further that no such deduction shall be made under this Section, where the amount or the aggregate of the amount paid or credited or likely to be paid or credited, during the year, by such person to the dealer for execution of the works contract including civil works contract does not or is not likely to, exceed rupees one lakh.”*



22. As per Sub Clause (2) to Section 13 of the TNVAT Act, 2006,

Tax deducted at Source has to be deposited with such authority in the prescribed manner within such time as may be prescribed.

23. As per Rule 9(1) of TNVAT Rules, 2007 read with Section 13(2) of TNVAT Act, 2006 any person who makes a deduction under Section 13(1) of TNVAT Act, 2006 has to deposit the amount deducted electronically with the Assessing Authority having jurisdiction along with a Statement in **electronic Form R** on or before 20th day of succeeding of every month along with the proof of electronic payment.

24. As per Section 13(4) of the TNVAT Act, 2006, the amount deposited under Sub Section (2) on furnishing of certificate in sub section 3 shall be adjusted by the assessing authority towards tax liability of the dealer under Section 5 or Section 6 of the TNVAT Act, 2006 as the case may be and shall constitute a good and sufficient discharge of the tax liability of the person responsible for making deductions to the extent of the amount deposited.



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25. However, as per proviso to Sub-Section(4) to Section 13 of the TNVAT Act, 2006, the burden is on the dealer who claims tax has been paid. Section 13(4) of the TNVAT Act, 2006 together with the proviso reads as under:-

Section 13(4) of the TNVAT Act, 2006

13(4) On furnishing a certificate a deduction referred to in sub-section (3), the amount deposited under sub-section (2), shall be adjusted by the assessing authority towards tax liability of the dealer under Section 5 or Section 6, as the case may be, and shall constitute a good and sufficient discharge of the liability of the person making deduction to the extent of the amount deposited:

Provided that the burden of proving that the tax on such works contract has already been deposited and of establishing the exact quantum of tax so deposited shall be on the dealer claiming the deduction.

26. Sub-Section (6)to Section 13 of the TNVAT Act, 2006 further makes it clear that, if the amount was wrongly deducted or deducted in excess and that the dealer was not liable to pay tax under Section 5, Assessing Authority shall refund the amount back after adjusting the arrears of tax if any of the dealer.

27. Thus, a mechanism is prescribed under the Act, whereby the



amount that is deducted on the payment made is to be adjusted towards liability and excess amount paid is to be refunded back under Section 13(6) of the TNVAT Act, 2006 read with the Rules thereunder.

28. Failure on the part of the person responsible for deducting tax entails proceedings against such a person under Sub-Section (8) to Section 13 of the TNVAT Act, 2006. Sub-Section (8) to Section 13 of the TNVAT Act, 2006 reads as under:-

(8) If any person contravenes the provisions of sub-section (1) or sub-section (2), the whole amount of tax payable shall be recovered from such person and all provisions of this Act for the recovery of tax including those relating to levy of penalty and interest shall apply, as if the person is an assessee for the purpose of this Act

29. As per Sub Section 8 to Section 13 of the TNVAT Act, 2006, if any person contravenes the provisions of Sub Section (1) or Sub Section (2), the whole amount of tax payable shall be recovered from such person and all provisions of this Act for the recovery of tax including those relating to levy of penalty and interest shall apply, as if the person is an assessee for the purpose of this Act. Thus, tax has to be recovered only from the person who was responsible for deducting tax.

30. As per Section 13(4) of the TNVAT Act, 2006, the amount deposited under Sub Section (2) on furnishing of certificate in sub



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section 3 shall be adjusted by the assessing authority towards tax liability of the dealer under Section 5 or Section 6 of the TNVAT Act, 2006 as the case may be and shall constitute a good and sufficient discharge of the tax liability of the person responsible for making deductions to the extent of the amount deposited.

31. However, as per proviso to Sub-Section(4) to Section 13 of the TNVAT Act, 2006, the burden is on the dealer who claims tax has been paid. Section 13(4) of the TNVAT Act, 2006 together with the proviso reads as under:-

Section 13(4) of the TNVAT Act, 2006

13(4) On furnishing a certificate a deduction referred to in sub-section (3), the amount deposited under sub-section (2), shall be adjusted by the assessing authority towards tax liability of the dealer under Section 5 or Section 6, as the case may be, and shall constitute a good and sufficient discharge of the liability of the person making deduction to the extent of the amount deposited:

Provided that the burden of proving that the tax on such works contract has already been deposited and of establishing the exact quantum of tax so deposited shall be on the dealer claiming the deduction.

32. Sub-Section (6)to Section 13 of the TNVAT Act, 2006 further makes it clear that, if the amount was wrongly deducted or deducted in



excess and that the dealer was not liable to pay tax under Section 5, Assessing Authority shall refund the amount back after adjusting the arrears of tax if any of the dealer.

33. In this case, payments have been made by CMRL to the petitioner without corresponding Tax Deducted at Source (TDS). Such action may warrant proceeding against CMRL under Section 13(8) of the TNVAT Act, 2006.

34. Irrespective of the fact whether the tax was to be paid under Section 5 or 6 of the TNVAT Act, 2006, at compounded rate, CMRL was required to deduct tax at the rates specified in Section 13(1) of the TNVAT Act, 2006.

35. As far as the petitioner is concerned, any deficit in the tax payable under Section 5 of the TNVAT Act, 2006, barring the amount deductible and payable under Section 13(1) and payable under Section 13(2) of TNVAT Act, 2006, by CMRL is to be recovered from the petitioner. In case, any excess is paid, the petitioner is entitled to refund as per Section 13(6) of the TNVAT Act, 2006.



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36. Whether the petitioner was liable to pay tax under Section 5 or 6 of the TNVAT Act, 2006 is not clearly forthcoming from the documents filed before this Court. It is quite possible that the petitioner had opted to pay tax under Section 5 of the TNVAT Act, 2006 and therefore had obtained Form S Certificate of no tax *liability* under *proviso* to Section 13(1) of the TNVAT Act, 2006 read with TNVAT Rules, 2007 but had failed to pay the tax. This would require a fresh determination.

37. However, it remains unexplained, as to why, by the CMRL having opted to pay tax at compounded rate under Section 6 of the TNVAT Act, 2006, the petitioner would procure Form S from the Commercial Tax Department under *proviso* to Section 13(1) of the TNVAT Act, 2006 read with 9(2) of the TNVAT Rules, 2007. This require a proper explanation by the petitioner.

38. Therefore, if CMRL had failed to deduct the amounts under Section 13(1) of the TNVAT Act, 2006, machinery under Section 13(8) of the TNVAT Act, 2006, is to be directed only against CMRL.



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Therefore, to that extent the Impugned Notices are without jurisdiction.

The 2% demand proposed in the Impugned Notices is to be directed only against CMRL and not on the petitioner.

39. Therefore the proposed demand in the Impugned Notices are quashed. However, liberty is given to the Commercial Tax Department to complete the assessment if the petitioner was liable to pay tax under Sections 5 and Section 6 of the TNVAT Act, 2006.

40. These writ petitions stands allowed with the above observations. No costs. Consequently, connected miscellaneous petitions are closed.

19.02.2024

Index : Yes / No
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Neutral Citation : Yes / No
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C.SARAVANAN, J.

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