IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **02.11.2016**

CORAM

THE HONOURABLE Mr. JUSTICE T.S.SIVAGNANAM

W.P.No.33530 of 2016

M/s.Neel Auto Private Limited
Plot No.1,2, 5 & 6 TVS Industrial Estate
Harita, Hosur
Krishnagiri District ... Petitioner

vs.

The Assistant Commissioner
(Commercial Taxes)
Hosur (South)
Krishnagiri District ... Respondent

Prayer:

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, Calling for the records on the file of the respondent in TNGST No.3363536/ 2006-2007 dated 30.8.2013 quash the same as illegal, invalid and unsustainable in law and consequently direct the respondent herein to rectify the error in the order of the respondent in TNGST No.3363536/ 2006-2007 dated 24.7.2009 by granting the refund of Additional Sales Tax to the petitioner company by virtue of Notification in G.O.Ms. No.181 Commercial Taxes and Registration (B2) dated 6.11.2007.

For Petitioner : Mr.Palani Selvaraj

For Respondents : Mr.S.Kanmani Annamalai

O R D E R

Heard Mr.Palani Selvaraj, learned counsel appearing for the petitioner and Mr.S.Kanmani Annamalai, learned Additional Government Pleader appearing for the respondent.

2.The petitioner is a registered dealer on the file of the respondent under the erstwhile provisions of Tamil Nadu General Sales Tax Act, 1956 [TNGST Act] and engaged in the manufacture of two wheeler spare parts and accessories for supplies to TVS Motor Company Limited, Hosur. The order impugned in this Writ Petition is an order rejecting the petitioner's Application dated 18.7.2013, filed under section 55 of the TNGST Act, for rectifying the error which has crept in the order of assessment dated 24.7.2009, under the TNGST Act, for the assessment year 2006-2007 and to effect refund of the Additional Sales Tax paid by them. .

3.It would be sufficient to take note of the following facts for the purpose of deciding as to what relief the petitioner is entitled to:

(i)The petitioner while seeking to set aside the impugned order, has prayed for a direction to effect refund of the Additional Sales Tax paid by them by virtue of notification issued by the Government of Tamil Nadu in G.O.Ms.No.181 dated 6.11.2007. The petitioner had filed its returns and claimed exemption from payment of Sales Tax with regard to the raw materials which were supplied to M/s TVS Motor Company for manufacture of two and three wheelers in their factory at Hosur. The claim for exemption was based on a notification issued by the Government in G.O.Ms.No.181. The Government while issuing the said notification passed three orders, all bearing same Government Order Number and date viz. Notification Nos. I, II and III.

(ii)Notification No.I, dealt with exemption in respect of tax payable by any dealer on the sale of goods to M/s TVS Motor Company Limited, Hosur, for certain conditions under the Act. Notification No.II, deals with exemption in respect of additional tax payable on the sale of three wheelers manufactured by M/s TVS Motor Company Limited, Hosur, under the Act and Notification No.III, pertains to tax payable on the sale of two and three wheelers manufactured by M/s TVS Motor Company Ltd., Hosur, for certain conditions under the Central Sales Tax Act.

(iii)The petitioner's claim for exemption is under Notification No.II.

4.There is no dispute to the fact that the benefit of Notification

No.II, was extended to the petitioner and though they have paid tax, Surcharge and Additional Sales Tax for entire turnover under protest, in view of the notification, they were granted refund of tax of Rs.48,36,658/- and Surcharge of Rs.2,63,582/- respectively. However, with regard to the Additional Sales Tax which was remitted by the petitioner based on the sale turnover, the benefit of exemption was not granted, stating that there is no specific exemption for payment of Additional Sales Tax in the said Notification.

5.The petitioner therefore filed an Application for rectification under section 55 of the TNGST Act, pointing out that the Government Notification specifically gave exemption from levy of tax, Surcharge and Additional Sales Tax and in such cases the exempted turnover does not form part of the Taxable Turnover for the purpose of levying Additional Sales tax. Further it was contended that in terms of section 2(1)(aa) of the Tamil Nadu Additional Sales Tax Act, 1970, any addition to the tax payable under the Tamil Nadu General Sales Tax Act, 1959, the dealers shall pay the Additional Sales Tax at appropriate rate when the taxable turnover exceeds Rs.10 crores, whereas in the petitioner’s case the Additional Sales Tax was wrongly levied on the exempted turnover, in violation of the said provision. Therefore, the petitioner requested for rectification and refund of the excess paid Additional Sales Tax.

6.However, the respondent while passing the impugned order merely reiterated the stand taken by the Assessing Officer in the order of assessment dated 24.07.2009, without assigning any reason. The manner in which the power under section 55 of the TNGST Act has to be exercised came up for consideration in the case of *N.KUPPANA GOUNDER v. THE APPELLATE ASSISTANT COMMISSIONER (C.T.) SALEM AND ANR [1973 (vol.XXXII) STC 522],* wherein it was held as follows:

> " In a case where a rectification is sought, it is not for the authorities to lightly discountenance such a request without giving any reason or without adverting to the representations made by the aggrieved partly seeking for rectification. Though the verb used in section 55 is " may" and therefore enabling, yet the power vested by the statute on the appropriate authority cannot be always equated to a discretionary power or a power which could be exercised according to the whims and fancies of such a statutory authority. If circumstances do exist for the exercise of power, it ceases to be a discretionary power but transforms itself into a mandate by statute to exercise that power in public interest and particularly for the avoidance of injustice in taxation matters. A subject cannot be lightly burdened with a tax if he can legally and lawfully avoid it and particularly by having recourse to the specified statutory authorities requesting them to

> rectify an error so as to avoid any illegal assessment; then it cannot be said that even in such a situation the work "may" has to be understood as "may"; on the other hand, it should be understood as "shall".
>
> .....If, therefore, the power vested in the authorities in sub-section (1) of section 55 is not always a discretionary power, but is normally to be understood as a duty with which the concerned authority is enjoined, then the next question is when the power be exercised..."

7.If the impugned order is tested on the basis of the view taken in the above referred decision viz. *N.KUPPANA GOUNDER,* the only conclusion that could be arrived is by holding that the impugned order is unsustainable in law. The respondent did not appreciate the scope of section 55 of the Act and failed to assign any independent reason. If the mistake is apparent on the face of the record, and it is brought to the notice of the Assessing Officer, then the Assessing Officer should consider the same and cannot lightly discountenance such a request, without giving any reason or without adverting to the submissions made by the dealer seeking rectifications. This is sufficient to hold that the impugned order is illegal. However, as a consequence, the matter has to be remitted back to the authority.

8.But, in this case the Writ Petition is pending from the year 2014 and there is also a prayer for grant of refund, by applying the exemption notification. Though counter affidavit has not been filed, the respondent has given written instructions to the learned Special Government Pleader vide his proceedings dated 24.12.2013, in which the stand taken in the assessment order has been reiterated. Therefore, this Court is inclined to test the correctness of the stand taken in the assessment order, holding that there is no specific provision exempting additional sales tax in the exemption notification and therefore, the petitioner is not entitled for exemption. This view is not sustainable for more than one reason, in the light of the decision of the Hon'ble Supreme Court as well as the decision of the Hon'ble Division Bench of this Court.

9.In the case of *ASHOK SERVICES CENTRE AND ANOTHER v. STATE OF ORISSA [1983 (volume 53) STC 1],* identical issue arose for consideration arising under the provisions of the Orissa Sales Tax Act and Orissa Additional Sales Tax Act 1975. The facts of the said case were also somewhat identical to the instant case and the question arose as to whether the levy of additional tax under the Additional Sales Tax Act is a single point levy or a multiple point levy. After elaborately considering the statutory provisions, as well as the statements of objects and reasons on the Orissa Sales Tax Act and

Orissa Additional Sales Tax Act, it was held that the additional sales tax is in the nature of a surcharge over and above what is due and payable by an assessee under the principal Act. It is necessary to read and construe the two Acts together as if the two Acts were one. By reason of section 3(2) of the Additional Sales Tax Act, section 8 of the principal Act, which is given an overriding effect by the use of the non obstante clause, is applicable to the levy of additional tax also. The " dealer" who is referred to in section 3(1) of the 1975 Act should be understood as a "dealer" who is liable to pay tax under the principal Act. The "gross turnover" referred to in the 1975 Act should be understood as that part of the gross turnover which is taxable under the principal Act.

10.Therefore, any dealer who is not liable to pay tax under the principal Act, either by reason of his not having sufficient gross turnover of goods or by reason of exemption given under section 7 of the principal Act, is not liable to pay the additional sales tax. If a dealer is exempted by the State Government under the second proviso to section 3(1) of the Act of 1975, he is also not liable to pay the additional sales Tax. Further, the turnover in respect of goods whose sales or purchases are not taxable under the principal Act in the hands of any dealer by reason of section 8 of the principal Act is not liable to the payment of additional tax by reason of the first proviso to section

3(1). Any other turnover which is exempted by the State Government under the second proviso to section 3(1) is also not liable to additional tax.

11.Thus by applying the above decision, the only conclusion that could be arrived it is that the turnover in respect of the goods, which is sales or purchases are not taxable under the principal Act in the hands of any dealer by reason of section 8 of the principal Act, is not liable to payment of additional tax.

12.In the case of *HSI AUTOMOTIVES LIMITED v. THE STATE OF TAMIL NADU [Tax Case (Revision) No.92 of 2014 dt/16.09.2015*], one of the question which arose for consideration is whether once the taxable turnover determined for the purpose of Tamil Nadu General Sales Tax Act, 1959, is at a particular amount, the taxable turnover determined for the purpose of Tamil Nadu Additional Sales Tax Act, 1970, can be different. The question was answered by the Hon'ble Division Bench holding that the Tribunal committed an error of law in treating the exempted sales effected by the petitioners to M/s Hyundai Motors India Limited, as part of the taxable turnover of the petitioner for the purpose of Tamil Nadu Additional Sales Tax Act., 1970, and consequently held that the levy of penalty was wrong. Thus, by applying the above referred two decisions, the petitioner herein is entitled to the relief sought for.

13.Accordingly, the Writ Petition is allowed, the impugned order is quashed and the respondent is directed to extend the benefit of the exemption notification and effect the refund of the Additional Sales Tax paid by the petitioner, by considering their claim date 18.07.2013, under section 55 of the TNGST Act. The above direction shall be complied with by the respondent, within a period of eight weeks from the date of receipt of a copy of this order. No costs.

02.11.2016

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To

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T.S.SIVAGNANAM, J

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