**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

RESERVED ON : 20.09.2016

DELIVERED ON : 29.09.2016

CORAM:

**THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN**
**AND**
**THE HONOURABLE MS.JUSTICE V.M.VELUMANI**

**W.A.(MD)No.174 of 2013**

1.The State of Tamil Nadu,
represented by
The Secretary to Government,
Commercial Taxes Department,
Fort St. George,
Chennai - 9.

2.The Commercial Tax Officer-II,
Thanjavur. ... Appellants/
Respondents

Vs.

M/s.Taher Ali Industries & Projects (P) Ltd.,
represented by its
Power Agent,
Mohamed Fakruddin,
203, Mangalapuram,
Medical College Road,
Thanjavur - 613 007. ... Respondent/
Writ Petitioner

PRAYER: Appeal filed under Clause 15 of the Letters Patent, against the order passed in W.P(MD)No.1831 of 2007, dated 27.09.2011.

For Appellants : Mr.R.Karthikeyan,
Additional Government Pleader

For Respondent : Mr.A.Chandrasekaran

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**JUDGMENT**

**M.SATHYANARAYANAN,J.**

The respondent/writ petitioner made a challenge to the constitutional authority of Explanation V under Section 2(1)(aa) of the Tamil Nadu Additional Sales Tax Act, 1970, introduced by the Amendment Act 23 of 2002, to be ultra vires the Constitution of India and beyond the legislative competence of the State and the learned Single Judge, vide order dated 27.09.2011, had upheld the said plea and held that the said Explanation is ultra vires the Constitution of India, being beyond the competence of the State Legislature.

2. The appellants/Revenue aggrieved by the said order, had filed this writ appeal.

3. The facts leading to the filing of this appeal, briefly narrated, are as follows:

3.1. The respondent/writ petitioner is in the field of manufacturing, laying, joining, testing and commissioning of PSC pipes, for water supply scheme on contract basis and it is a registered dealer under the Tamil Nadu General Sales Tax Act, 1959 (in short 'the TNGST Act') and assessee on the file of the second appellant.

3.2. According to the respondent/writ petitioner, the nature of work carried on by them falls under the category of 'Works Contract' and is paying taxes at the compounded rate as per Section 7-C of the TNGST Act at the rate of 2% as the work done by the petitioner is civil construction work and is paying the taxes on the total value of the contract as per the provisions of the TNGST Act.

3.3. The respondent/writ petitioner would further aver that as per the taxable turnover as defined under Section 2(p) of the TNGST Act and the turnover as defined under Section 2(r) of the TNGST Act, while determining the total and taxable turnover, for the purpose of levy of tax under Section 3 and other Charging Sections, the levy of tax at the compounded rate under Section 7-C of the TNGST Act, does not relate or refer to the taxable turnover, but refers to the value of the works contract or contracts.

3.4. It is further stated by the respondent/writ petitioner that as per Section 2(1)(aa) of the Tamil Nadu Additional Sales Tax Act, 1970 (in short 'the 1970 Act'), if the taxable turnover of a dealer exceeds Ten Crores of Rupees, then an additional sales tax calculated at the rates mentioned in the above provisions has to be paid. However, the Assessing Authority sought to impose additional sales tax in respect of the works contract in relation to which it had opted to pay tax at compounded rate under Section 7-C of the TNGST Act and it was objected to on the ground that insofar as the additional sales tax under the 1970 Act is concerned, it can be levied only on the taxable turnover when there was no determination of taxable turnover in the case of an assessee who opted to pay tax at the compounded rate under Section 7-C of the TNGST Act and further there is no statutory provision available authorising the levy of additional sales tax in respect of such transactions and as such, the said levy would be unconstitutional as being not authorised by law.

3.5. The respondent/writ petitioner, in respect of his stand also placed reliance upon the judgment of the Division Bench of this Court in ***South India Corporation Ltd. v. Commercial Tax Officer, Coimbatore and others*** reported in ***124 STC 654***, wherein the assessee who opted to pay tax under Section 7-C of the TNGST Act, challenged the levy of additional sales tax and it was allowed and as per the said judgment, there could not be any additional sales tax in respect of a contract in relation to which, the assessee had opted to pay under Section 7-C of the TNGST Act and no further challenge has been made and it has become final.

3.6. The State of Tamil Nadu, in order get over the effect of the said judgment, introduced an amendment to the Tamil Nadu Sales Tax Act, by introducing Explanations III, IV and V to Section 2(1)(aa) of the said Act by Amendment Act 23 of 2002 and Explanation V is applicable to the assessees, like the respondent/writ petitioner and as per the said Explanation, 'taxable turnover' for the purpose of this clause in respect of a dealer liable to pay tax under Section 7-C of the said Act for the financial years commencing from 01.04.1993, shall be the total value referred to in the said Section. Thus, in respect of the assessees covered by Section 7-C of the Act, who had opted to pay taxes therein, the total value of contracts entered into during the year formed the basis for levy of additional tax and it was introduced with retrospective effect from 01.04.1993.

3.7. The second appellant, as a consequence of the said amendment, sought to levy tax on the total value of the contract entered into during the year in the case of an assessee, who had opted for payment of tax under the compounded rate under Section 7-C of the Act and accordingly, issued a notice dated 18.01.2007 proposing to treat the total value of the contracts executed by the petitioner as the taxable turnover and levy not only additional tax, but also penalty at the rate of 150% of the additional tax so levied.

3.8. The petitioner made a challenge to the said amendment, contending among other things that a new and arbitrary definition of taxable turnover is brought in under the additional sales tax, which the legislature has no power to do and the mode of adoption is totally different stand under the Additional Sales Tax Act as the basis for levy would be without jurisdiction and ultra vires.

3.9. The petitioner would further contend that in the light of the judgment in ***South India Corporation Ltd. v. Commercial Tax Officer, Coimbatore and others*** reported in ***124 STC 654***, the claim for additional sales tax is not at all permissible and it has also been held that the limits of legislative competence of the said legislature would render any such exercise wholly impermissible, but, precisely Explanation V seeks to set aside the objective. The first respondent without curing the lacuna pointed out in the above cited judgment, sought to introduce the Explanations and the same is wholly impermissible in law.

3.10. It is also contended that the first appellant has failed to take into consideration the fact that the additional sales tax cannot be collected from the customers and thereby, it casts an unconscionable burden on an assessee and therefore, it is in clear contravention of the provisions of the said Act as well as Articles 14 and 19 of the Constitution of India.

3.11. The learned Single Judge of this Court, after considering the rival submissions and taking note of the decisions rendered by the Honourable Supreme Court, observed that the imposition of sales tax on the total contract value, therefore, is not within the competence of the State Legislature, as it is only the transfer of goods, on which tax can be imposed and the impugned Explanation V to Section 2(1)(aa) of the Act, thus, expands, the scope of charging Section, which is not permissible, in view of the law laid down by the Honourable Supreme Court in ***S.Sundaram v. V.R.Pattabhiraman*** reported in ***AIR 1985 SC 582***. Therefore, it has been held that the impugned Explanation V to Section 2(1)(aa) of the Act is contrary to the provisions of the Act and therefore, declared as arbitrary and beyond the competence of the State Legislature.

4. The learned Special Government Pleader appearing for the appellants/Revenue would contend that the respondent/writ petitioner admittedly had opted to pay tax under Section 7-C of the Act and as such, it is bound by the impugned amended provisions. In terms of Section 53 of the TNGST Act, the Government is having

power to make Rules and under Section 53(2)(b) of the said Act to determine the total turnover or turnover of a dealer for the purposes and any amendment introduced or substituted under the said Act in the interest and to protect the Government Revenue will not be declared ultra vires or unconstitutional and the retrospective amendment is also held to be valid and therefore, prays for setting aside the impugned order and allowing the writ appeal.

5. Per contra, the learned Counsel for the respondent/writ petitioner would contend that the question whether the additional sales tax could be claimed on the taxable turnover relating to works contract, came up for consideration in the judgment reported in ***124 STC 654*** (cited supra) and the Division Bench of this Court has held that the works contract not only involves transfer of goods, but also involves the rendering of several services, which cannot be subjected to tax under the Sales Tax Act and the consent given by the dealer under Section 7-C for the levy of percentage of total contract value towards the tax otherwise payable under Section 3-B cannot be stretched to include the payment of additional sales tax under any other enactment by treating the contract value as taxable turnover for the payment of tax under the Additional Sales Tax Act and in the absence of any determination of the value of the goods transferred under the works contract in cases where a dealer has

exercised an option under Section 7-C, there is no determination of the taxable turnover as the dealer is not required to maintain books of accounts and is not called upon to render any account in relation to the actual value of the goods transferred under the works goods transferred under such contract in cases where option has been exercised under Section 7-C. The first appellant in order to get over the effect of the said judgment, merely brought forth Explanation V through the amendment on 01.07.2002 with retrospective effect from 01.04.1993 and the same is impermissible in law.

6. He would further submit that the learned Single Judge of this Court, on a correct application of law, has held that it is ultra vires the Constitution of India and beyond the competence of the State Legislature and rightly allowed the writ petition and therefore, prays for the dismissal of this writ appeal.

7. This Court has considered the rival submissions and perused the materials placed on record.

8. In ***South India Corporation Ltd. v. Commercial Tax Officer, Coimbatore and others*** reported in ***124 STC 654***, the Division Bench of this Court has considered the scope of Section 3-B and Section 7-C of the TNGST Act and has considered the

arguments advanced on behalf of the dealer that the Tamil Nadu Additional Sales Tax Act, which imposes the additional tax on the tax payable under the TNGST Act, with reference to the taxable turnover of such a dealer-a tax which cannot be passed on by the dealer to any other-is not attracted to the amounts paid by the dealer under Section 7-C of the TNGST Act, and has observed that despite the declared intention to levy additional tax on the sale or purchase of goods, the tax levied under that Act having been linked solely to the taxable turnover, mere payment of tax under the principal enactment would not render the dealer liable for the additional sales tax unless taxable turnover of that dealer is determinable under the principal Act.

9. It has been further held in the said judgment that the determination of turnover of a dealer who has opted for payment of tax under Section 7-C of the TNGST Act is not possible at all under the parent Act, as the amount computed under Section 7-C of the Act is not an amount which is determined as tax on the taxable turnover, but is determined with reference to the total value of the works contract in respect of which option is exercised and there is no provision in the Act which deems the said total contract value as total turnover.

10. It is relevant to extract paragraphs 17 to 19 of the said judgment hereunder:

> "17. Turnover, as defined in the Act, is the aggregate of value of sales effected or purchase effected by the dealer. The works contract not only involves the transfer of goods but also involves the rendering of several services which cannot be subjected to tax under the Sales Tax Act. The consent given by the dealer under section 7-C for the levy of percentage of total contract value towards the tax otherwise payable under section 3-B cannot be stretched to include the payment of additional sales tax under any other enactment by treating the contract value as taxable turnover for the payment of tax under the Additional Sales Tax Act.
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> 18. In the absence of any determination of the value of the goods transferred under the works contract in cases where a dealer has exercised an option under section 7-C, there is no determination of the taxable turnover as the dealer is not required to maintain books of accounts and is not called upon to render any account in relation to the actual value of the goods transferred under the works contract. There is no scope of determining the actual value of the goods transferred under such contract incases where option has been exercised under section 7-C.
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> 19. While it may be convenient to the Revenue to treat the value of the works contract as the turnover of the dealer and even regard it as taxable

> turnover the limits of the legislative competence of the State Legislature render any such exercise wholly impermissible. In the absence of any determination of taxable turnover, no tax under the Additional Sales Tax Act can be levied. The claim for additional sales tax by treating the contract value as the taxable turnover is not permissible under the provisions of either the TNGST Act or the Additional Sales Tax Act."

11. The first respondent in order to get over the effect of the said judgment, had introduced the impugned Explanation V, vide amendment 23 of 2002 and it is relevant to extract the same hereunder:

> "Taxable Turnover" for the purpose of this clause in respect of a dealer liable to pay tax under Section 7-C of the said Act for the financial years commencing on the 1st day of April 1993, shall be the total value referred to in the said Section"

12. During the course of arguments in the writ petition, the learned Additional Advocate General has placed reliance upon the judgments of the Honourable Supreme Court in ***Gannon Dunkerley & Co., and others v. State of Rajasthan and others*** reported in ***1993 (Vol.88) STC 204*** and also in ***M/s.Ashok Service Centre and others v. State of Orissa*** reported in ***1983***

***(2) SCC 82***, and contended that the Legislature can change in general by changing on the basis of the decision has been given by the Court and the impugned Explanation was added and the same submission has also been put forth in this writ appeal also.

13. In the case on hand, in the form of Explanation, in order to get over the effect of the judgment in ***South India Corporation Ltd. v. Commercial Tax Officer, Coimbatore and others*** reported in ***124 STC 654***, the scope of Charging Sections has been expanded. The learned Single Judge has considered the scope of Charging Sections, viz., amended Section 2(1)(aa) of the Act, and by placing reliance on the judgment of the Honourable Supreme Court in ***S.Sundaram v. V.R.Pattabhiraman*** reported in ***AIR 1985 SC 582*** and also the opinion of the learned Authors, has held that it is contrary to the provisions of the Act.

14. It is a settled position of law that the Explanation normally should be read so as to harmonise with and clear up any ambiguity in the main section and it should not be so construed as to widen the ambit of the section and also to clarify the doubtful point in law and to serve as a proviso to main section.

15. In ***S.Sundaram v. V.R.Pattabhiraman*** reported in ***AIR 1985 SC 582***, the following objects of an Explanation to a statutory provision have been culled out and it is relevant to extract the same as under:

> "(a) to explain the meaning and intendment of the Act itself;
>
> (b) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve;
>
> (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful;
>
> (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in interpreting the true purport and intendment of the enactment, and
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> (e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation of the same."

16. Section 7-C of the TNGST Act, is extracted hereunder:

> "**7-C. Payment of tax at compounded rates by works contractor.-** (1) Notwithstanding anything contained in Section 3-B, every dealer referred to in item (vi) of clause (g) of Section 2, may, at his option, instead of paying tax in accordance with Section 3-B, pay, either on the total value of each works contract or on the total value of all works contracts, executed by him in a year, tax calculated at the following rate, namely:-
>
> (i) Civil works contract. : Two per cent of the total contract value of the civil works executed;"

17. The dealer need to pay tax based on his taxable turnover determined after allowing various deductions admissible under law and without amending the said provision, merely the Explanation V is added to get over the effect of the judgment in ***South India Corporation Ltd. v. Commercial Tax Officer, Coimbatore and others*** reported in ***124 STC 654***.

18. In the light of the judgment of the Honourable Supreme Court in ***S.Sundaram v. V.R.Pattabhiraman*** reported in ***AIR 1985 SC 582***, this Court is of the considered view that the impugned Explanation sought to widen the scope of taxable turnover as defined under Section 2(p) of the TNGST Act and the

learned Judge in the impugned order has taken into consideration the well settled position of law and held that the impugned Explanation is contrary to the provisions of the Act and allowed the writ petition.

19. In paragraph 19 of the judgment in ***South India Corporation Ltd. v. Commercial Tax Officer, Coimbatore and others*** reported in ***124 STC 654***. the Division Bench of this Court also held that the claim for additional sales tax by treating the **contract value** as the taxable turnover is not permissible under the provisions of either the TNGST Act or the Additional Sales Tax Act. The said judgment has also reached finality as no further challenge has been made and therefore, on that ground also, the impugned Explanation is to be declared as ultra vires and it was rightly declared so in the impugned order passed in the writ petition.

20. This Court upon scrutiny and consideration of the relevant materials and in the light of the above judgment is the considered opinion that there is no error apparent or infirmity in the reasons assigned in the impugned order in allowing the writ petition and finds no merit in the writ appeal.

21. Therefore, this writ appeal is dismissed and the order passed in W.P(MD)No.1831 of 2007, dated 27.09.2011, is confirmed. No costs.

Index :Yes/No **(M.S.N.,J) (V.M.V.,J.)**
Internet :Yes/No **29.09.2016**
rsb

**M.SATHYANARAYANAN,J.**
**AND**
**V.M.VELUMANI,J.**

rsb

**PRE-DELIVERY JUDGMENT MADE IN**
**W.A.(MD)No.174 of 2013**

**29.09.2016**