IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 01.12.2020

PRONOUNCED ON: 26.02.2021

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P. Nos.9991, 7030, 12110, 5142, 11621, 336, 647, 1766, 2738, 2859, 5039, 5101, 5966, 5969, 6406, 6467, 6596, 8936, 9694 & 16470 of 2020
and 3613, 3617 & 35267 of 2019
and
WMP.Nos.7008, 7564, 7000, 7002, 7007, 11816, 12171, 14248, 5953 5955, 10870, 11815, 385, 386, 762, 2039, 2043, 3182, 3297, 3298, 6018, 6019, 6074, 6077, 7647, 7648, 7816, 7817, 8385, 8388, 10869, 14249, 14853, 14854 & 20491 of 2020 &
WMP.Nos.3956, 3958, 36068 & 36069 of 2019

WP.No.9991 of 2020:
M/s.DMR Constructions
Rep by its Partner
Gandhi Salai, Rasipuram Post and Taluk,
Namkkal District. .. Petitioner

Vs.

The Assistant Commissioner,
Commercial Tax Department, Rasipuram,
Namakkal District. .. Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to Writ of Certiorari to call for the records on the files of the Respondent herein in GST No. 33AAJFD2882L1Z6/ 2017- 18 dated 28.02.2020 and quashing the same as illegal.

For Petitioners : Mr.Sivanandam in W.P. No.9991 of 2020
Mr.N.Murali in W.P. Nos.7030, 647 and 2859 of 2020
Mr.T.Ramesh in W.P. No.12110 of 2020

Mr.R.Senniappan in W.P. Nos.5142,1766,
5039 and 5101 of 2020

Mr.P.Rajkumar in W.P. Nos.2738, 6596 &
16470 of 2020 and 35267 of 2019
Mr.Sujith Ghosh,
Senior Counsel for Mr.Aditya Reddy
in W.P. Nos.11621, 336, 3613, 3617, 5966,
5969, 8936 and 9694 of 2020
Dr.Thiagarajan, Senior Counsel for
Mr.S.Ramesh Kumar in
W.P.No.6406 of 2020
Mr.K.Vaitheeswaran,
in W.P. No.6467 of 2020

For Respondents : Mr.Mohammed Shaffiq, Spl.G.P.
assisted by Ms.G.Dhanamadhri
in the above W.Ps.

COMMON ORDER

This batch of 23 Writ Petitions has been filed by assessees under the Tamil Nadu Goods and Service Tax Act, 2017 ('TNGST Act') who challenge notices issued by the respondent, Commercial Tax Authorities proposing the denial of transition of credit in respect of Tax Deducted at Source (TDS) in terms of Section 13 of the Tamil Nadu Value Added Tax Act, 2006 (in short 'TNVAT Act') in 10 cases, and orders confirming the aforesaid proposals, in 13 cases.

2. The common factual position is that all petitioners, in the era of TNVAT, have accumulated credit of TDS and have also been permitted to carry forward the same from year to year. The petitioners sought transition of the

accumulated TDS into their respective accounts for set off against output tax - GST liabilities. This has been denied.

3. Before setting out the rival contentions, I extract the relevant statutory provisions for ease of reference. Tax has been deducted under Section 13 of the TNVAT Act, that reads as follows:

Section 13 of the TNVAT Act:

> *13. deduction of tax at source in works contract .--. (1) Notwithstanding anything contained in this Act, every person responsible for paying any sum to any dealer for execution of works contract shall, at the time of payment of such sum, deduct an amount calculated, at the following rate, namely:-*
>
> *(i) civil works contract*
>
> *(ii) civil maintenance works contract*
>
> *(iii) All other works contracts two per cent of the total amount payable to such dealer; two per cent of the total amount payable to such dealer; 1[five] per cent of the total amount payable to such dealers:*
>
> *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 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*
>
> *……..*
>
> *(3) Any person who makes the deduction and deposit, shall within fifteen days of such deposit, issue to the said dealer a certificate in the prescribed form for each deduction separately, and send a copy of the certificate of deduction to the assessing authority, having jurisdiction over the said dealer together with such documents, as may be prescribed.*

(4) On furnishing a certificate of 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.

(5) Any person who contravenes the provisions of sub-section (1) or sub-section (2), shall pay, in addition to the amount required to be deducted and deposited, interest at 1[two] per cent per month of such amount for the entire period of default.

(6) Where the dealer proves to the satisfaction of the assessing authority that he is not liable to pay tax under section 5, the assessing authority shall refund the amount deposited under sub-section (2), after adjusting the arrears of tax, if any, due from the dealer, in such manner as may be prescribed.

(7) The tax or interest under this section shall become due without any notice of demand on the date of accrual for the payment by the person as provided under sub-sections (1) and (2).

(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.

4. Section 140 of the TNGST Act provides for the transition of input tax credit, and reads as follows:

140. Transitional arrangements for input tax credit.

(1) A registered person, other than a person opting to pay tax under section 10, shall be entitled to take, in his electronic credit ledger, the amount of CENVAT credit carried forward in the return relating to the period ending with the day immediately preceding the appointed day, furnished by him under the existing law in such manner as may be prescribed:

Provided that the registered person shall not be allowed to take credit in the following circumstances, namely:—

(i) where the said amount of credit is not admissible as input tax credit under this Act; or

(ii) where he has not furnished all the returns required under the existing law for the period of six months immediately preceding the appointed date; or

(iii) where the said amount of credit relates to goods manufactured and cleared under such exemption notifications as are notified by the Government.

……..

5. The submissions of the petitioners' counsel are as follows:

(i) Tax deducted at source is nothing but tax and Section 13 of the TNVAT makes this position clear.

ii) Being a value added tax for the purposes of Section 140(1) of the TNGST Act, it is entitled to be carried forward for set off.

iii) Deduction of tax at source is only a mechanism to ensure advance payment and collection of tax without leakage. Thus, TDS is a tax.

iv) Article 265 of the Constitution of India casts a mandate upon all citizens to the effect that collection of any amount styled as 'tax' is under the authority of law. Thus, the requirement of deducting an amount prior to remittance of the same is nothing but collection of tax in advance. The amount credited in advance by the payer assumes the character of tax in the light of Article 265.

v) The power of the State to impose a tax under Entry 54 of List II of the Constitution of India, echoes the constitutional mandate under Article 265. The authority to collect and remit tax is delegated to all payers and carries with it the full import of Article 265. Thus what is collected can be nothing, but tax.

vi) Section 13 of the TNVAT Act casts onerous responsibilities upon the deductor to deduct and remit. In the absence of compliance, the deductor is deemed to be an assessee in default. Thus what is deducted, collected and remitted is nothing but tax.

vii) Rule 9 of the Tamil Nadu Value Added Tax Rules, 2007 (TNVAT Rules) supports the position that what is deducted only constitutes a tax. A comparison of erstwhile Rule 9 with new Rule 9, effective 29.01.2016, and the statements of deduction in Form T and R, support the position that what is deducted constitutes tax.

viii) There are exclusions to the operation of Section 13 relating to labour contracts where there is no transfer of property, inter-state purchases and transactions where there is no liability to tax. This is in consonance with the proper exercise of authority under Article 265, meaning to say that the payer can deduct tax only in those situations where there is a liability to tax and not in the absence of such liability. It follows thus that when such authority is exercised, what is deducted will only constitute a tax.

ix) Several judgments are cited to bring home the proposition that statutory provisions for deduction of tax have survived judicial scrutiny only where they withstood the test of Article 265 and Entry 54 of List II. The provisions for deduction have been struck down in situations where they were unable to sustain the rigour of Article 265/Entry 54. This establishes that the power to deduct/collect/remit under Section 13 is of an amount which constitutes tax.

x) The decisions relied on are as follows:

(a) *SAIL Vs. State of Orissa* [(2000) 3 STC 2000];

(b) *Nathpa Jhakri Joint Venture Vs. State of HP* [(2000 3 STC 162];

(c) *State of Kerala Vs. Builders Association of India* [(1997) 2 SCC 183]

(d) *KEC International Limited Vs. State of Karnataka* [(1997) 10 STC 192];

(e) *Larsen & Toubr8o Ltd. Vs. State of Karnataka* [(2003) 129 STC 401];

(f) *Brajendra Mishra Vs.State of Orissa* [(1994) 92 STC 17];

(g) *Larsen and Toubro Ltd. Vs. CST Gujarat* [(2001) 124 STC 162];

(h) *M/s Construction and Construction Vs. GOI* [(1990) 77 STC 405];

(i) *VK Singhal Vs. State of UP* [(1995) 97 STC 355];

(j) *Builders Association of India Vs. State of Bihar* [(1992) 85 STC 362 (Fb)];

(k) *Larsen & Toubro Ltd. Vs. State of Bihar* [(2000) 117 STC 41];

xi) Support is taken from the jurisprudence under Income Tax law to state that even under Income Tax Act, TDS provisions have been held to be a machinery provision for the collection of tax. TDS being a compulsory exaction would thus be nothing but, tax.

xii) Reliance in the above context is placed on the following judgments:

(a) *Modi Industries Ltd. Vs. CIT* [(1995) 6 SCC 396];

(b) *GE Technology Center Pvt Ltd. Vs. CIT* [10 STC 29 (2010];

(b) *UOI Vs. Tata Chemicals Ltd.* [(2014) 6 SCC 335];

(c) *(d) Danisco India Pvt Ld. Vs. UIO* [(2018) 404 ITR 439];

(e) *Asst. Commissioner of Income Tax Vs. Om Prakash Gattani* [(2000) 2 GLR169];

(f) *Yashpal Sahni Vs. Asst. Commissioner of Income Tax* [(2007) 293 ITR 539];

xiii) Even under CENVAT Credit Rules, deduction as provided under Rule 6(3)(b) would qualify to be a tax, since it is a compulsory exaction under Statute.

xiv) A distinction is made between deduction of tax and the collection of any amount in the nature of a deposit, to counter the submission that where Legislature intends that an amount be collected as a deposit rather than as a compulsory exaction, it indicates so unambiguously. Reliance is placed on the decision of the Bombay High Court in *Mahindra & Mahindra Ltd. Vs. CCE* [(2020) 371 ELT 481].

xv) What is required to be deducted would constitute a portion of the tax payable in respect of a transaction, and any amount in excess thereof can be refunded only in accordance with law. This can be contra distinguished with a deposit where a full return or refund is contemplated on fulfilment of stipulated conditions. The decisions relied on in regard to the proposition that TDS cannot be equated to a deposit under indirect tax laws is as under:

(a) *3E Infotech Vs. CESTAT Chennai* [(2018) 18 GSTL 410];
(b) *United News of India Vs. UOI* [(2004) 168 ELT 442];
(c) *Joshi Technologies International Vs. UOI* [(2016) 339 ELT 21 Guj];
(d) *Swastik Sanitaryware Ltd. Vs. UOI* [(2013) 296 ELT 321 Guj];
(e) *Gujarat Insecticides Vs. UOI* [(2005) 183 ELT 9 Guj.]
(f) Ajni Interiors Vs. UOI [SCA No.10435 of 2018]

xvi) Section 140 does not restrict itself to Input Tax Credit (ITC) and in fact states that there shall be a complete transition of value added tax and entry tax. The question to be decided is whether TDS would fall within the ambit of value added tax or not. By comparison, Section 140(1) of the Central Goods

and Service Tax Act, 2017 contemplates transition of cenvat credit alone. The scope and ambit of Section 140 under the State Act is thus wider as it permits transition of accumulated value added tax and entry tax, in addition to ITC.

xvii) The very fact that transition of entry tax is also permitted under State GST would lend credence to the proposition that a transition of all accumulated credit is envisaged under the State GST Act. The construction that is urged is thus that all credit that could be set off to reduce VAT liability must be transitioned under Section 140(1) of the TNGST Act and thus TDS would also qualify.

6. Per contra, the arguments urged by the Revenue are as follows:

(i) Though nomenclature used in regard to the remittance in question is 'tax deducted at source', one should not go by nomenclature as what is deducted from a payment made by payer to payee does not constitute a tax at the time of collection. The remittance assumes the character of tax only upon adjustment towards tax liability and even then, only to the extent to which such adjustment is made. If at all the amount collected was to be construed as a tax, it would be by way of a deeming fiction which is within the exclusive domain and prerogative of Legislature, not one that can be inferred or assumed by the assessee. Revenue relies on the judgment of the Supreme Court in the case of *Sant Lal Gupta and Others Vs. Modern Co-operative Group Housing Society Ltd. and Others* (2010 13 SCC 336) for this proposition.

(ii) A comparison is made with Section 219 of the Income Tax Act to illustrate how the Income Tax Act deems, by way of fiction, that advance tax is a tax for the purpose of computation. However, there is no such provision inbuilt in the Value Added Tax Act.

(iii) The amount deducted and remitted by a payer is only an approximation of the actual tax payable and not an exact amount. Thus, even if one were to assume that the amount deducted at source constitutes a tax at the time of deduction, whatever remains after adjustment would not retain the character of a tax, since it is, admittedly, in excess of the tax liability. For this proposition reliance is placed on the judgment of the Supreme Court in the case of *Commissioner of Income Tax, Gujarat Vs. Gujarat Fluoro Chemicals* (2012 13 SCC 731) and *Modi Industries Ltd. Vs. CIT* [(1995) 6 SCC 396]. In the latter case, the Bench held that any excess of advance tax paid become refundable and loses its character as tax.

(iv) In summation of the argument at points (ii) and (iii) above, the revenue would urge that amounts collected as tax deducted at source bear a dual character; a tax to the extent to which it stands adjusted against output tax liability and a refund due to the assessee, to the extent to which it represents an excess after adjustment. Such a dual characteristic is not uncommon as noticed by the Supreme Court in *Karnataka Pawn Brokers Assn. and Others Etc. Vs. State of Karnataka and Others Etc.* (1998 7 SCC 707) and *State of*

Maharashtra, Bombay and Others Vs. Britannia Biscuits Co. Ltd. and Others (1995 Supp. (2) SCC 72).

(v) According to the revenue, Section 13 employs deferring terminology in respect of the amount deducted, such as 'amount', 'deposit' 'sums' and 'towards the tax liability'. This is in recognition of the position by Legislature that, (i) at the time of deduction, the amount deducted is only a rough estimate of the tax liability and thus does not represent tax that has to be definite in quantification (ii) in any event, and alternatively, only that portion deducted at source assumes the nature of tax and (iii) the remainder after deduction is liable to be refunded and cannot, in such circumstances, bear the character of tax.

(vi) The words employed in Section 13 are 'deduct', 'amount' and 'deposit of the amount'. Section 13 sub-Section 4 provides for an adjustment of 'an amount deducted towards tax liability' indicating that what was collected does not bear the character of tax as the deduction is of an estimated amount. Again sub-Section 6 talks of refund of the 'amount' deposited. Legislature is thus conscious of the distinction between deposit and tax, stating that what is deducted and collected assumes only the character of 'deposit' and it is only on adjustment that the amount deducted will bear the character of 'tax'. The relevant form for refund is Form P, which also talks of a refund of 'amount deposited'.

(vii) Revenue relies on the judgment of the Supreme Court in the case of *Commissioner of Income Tax New Delhi (Now Rajasthan) Vs. East West Import and Export (P) Ltd. (Now known as Asian Distributors Ltd), Jaipur (1989 1 SCC760)* to state that Legislature is assumed to have applied its mind in the choice of words and language employed in sculpting a statutory provision. One should thus attribute the proper, intended meaning and not assume that the words have been used interchangeably. Further, if the entire amount collected/deducted is to be a tax, it would militate with the concept of refund as it is a well settled proposition that tax, once collected, cannot be refunded to an individual. Any attempt in this regard is contrary to public policy as held by the Supreme Court in *Banaspati Co. Ltd. Vs. State of Punjab,* (1992 AIR SC 1075).

(viii) Section 140 of the Act only provides for transition of input tax credit as may be seen from the marginal note to the provision which is 'transitional arrangement for input tax credit'. The language employed in the marginal note or heading is a relevant aid to construction of the provision itself as held by the Supreme Court in *Eastern Coal Fields Limited V. Sanjay Transport Agency and another* ((2009) 7 SCC 345) and this cannot be lost sight of in deciding the present issue.

(ix) ITC is defined in terms of Section 2(63) of the CGST Act to mean 'credit of Input Tax Act'. This cannot be extended to TDS or any other deduction as what can be transitioned must be ITC only.

(x) Revenue relies on the treatment given to TDS as opposed to that given to ITC. TDS is credited in the cash ledger as opposed to ITC which is credited to the electronic credit ledger. This lends support to the proposition that one cannot be equated with the other. Moreover, Section 19(1) of the TNVAT Act that provide for ITC states that ITC represents taxes paid by the recipient to the buyer whereas TDS represents output tax, which is deducted by the payer on behalf of the buyer. TDS thus, does not constitute ITC even under TNVAT.

(xi) A strict construction has to be given to the concept of ITC as laid down in *Jayam and CO. (S) Vs. Assistant Commissioner and Anr.* (15 SCC 125) and *ALD Automotive Pvt. Ltd.V. Commercial Tax Officer* ((2019) 13 SCC 255) wherein it has been held that ITC is granted as matter of concession and all applicable provisions must be strictly construed.

(xii) In summation, TDS being a machinery provision, and a tentative one at that, is of a nature different and distinct from ITC and one cannot be equated with the other for the purposes of transition.

(xiii) In response to the petitioners' argument that refunds are normally, inordinately delayed, the judgments of the Supreme Court in *Collector of*

Custom, Madras Vs. Sampathu Chetty (1962 SC 316) and *Gannon Dunkerley and Co.Vs. The State of Rajasthan and Others* (88 SCC 204) are relied upon. The proposition that merely because a provision would be rendered unworkable or unviable by reason of a particular interpretation, is not sufficient enough an argument, to render the particular provision invalid.

7. Heard learned counsels. When a contract is awarded upon rendition of service, the contractee/payee/assessee/petitioner is paid the contract value less tax deducted at source at 2% of the contract value. The amount, once deducted, is deposited by the depositor/contractor/payer to the account of the petitioner in the Government exchequer and gets auto populated in the contractor's return at Serial No.9 (iv). The heading of Serial No.9(iv) in the return is *'tax deduction at source credit'*. A monthly return is filed by the petitioner taking into account the entirety of the turnover of the petitioner including the turnover from works contract. Then, at column 8 after computing the tax due on the entire turnover earned, and granting credit for the tax deducted and available for set off, the balance tax payable is reflected. If the tax deducted at source is in excess of what is payable, then, by way of an auto populated entry (an automated entry), the excess is reflected as a refund and a Refund Adjustment Order (RAO) is issued. The RAO will be processed upon a specific request for refund to be paid over in cash. Tran -1 which is a form prescribed for seeking transition of ITC permits the transition of *'tax credit and entry tax'*.

8. The issue that arises in these matters is a determination of the nature of the amount deducted. In *SAIL V. State of Orissa* (supra) three Judges of the Supreme Court found the provisions of Section 13-AA of the Orissa Sales Tax Act,1947, to be beyond the powers of the State Legislature and thus ultra vires. At paragraph 15, the Bench states as follows:

> *Section 13AA should have been precisely drafted to make it clear that no tax was levied on that part of the amount credited or paid that related to inter-State sales, outside sales and sales in the course of import, particularly after the previous Section 13AA had been struck down by the Orissa High Court for the reason that it was couched in terms wider than were permissible to the State legislature and that judgment was accepted.*

9. In *Nathpa Jhakri Joint Venture* (supra), the appellant questioned the validity of Section 12 A of the Himachal Pradesh General Sales Tax Act, 1968 and connected Rules, that provided for a deduction of an amount from the bills or invoices of works contractors. The provision had been upheld by the High Court. At para 4, the decision of the High Court was confirmed in the following terms:

> *A bare perusal of the two provisions will make it clear that in either provision there is an obligation to deduct from transactions relating to works contract on bills or invoices raised by the work contractor an amount not exceeding 4 per cent or 2 per cent, as the case may be. Though the object of the provision is to meet the tax in respect of the transactions on all works contract on the valuable consideration payable for the transfer of property in goods involved in the execution of the work contract, the effect of the provision is that irrespective of whether the sales are inter-State sales or outside sales or export sales which are outside the purview of the State Act and those transactions in respect of which no tax can be levied even in terms of the enactment itself such deductions have to be made in the bills or invoices of the contractors. To say that if a person is not liable for payment of tax inasmuch as on completion of the assessment refund can be obtained at a later stage is no solace, as noticed in Bhawani Cotton Mills Ltd. v. State of Punjab & Anr., 1967 (3) SCR 577. Further, there is no provision for certification of the extent of the deduction that can be made by the authority. Therefore, we must hold that arbitrary and uncanalised powers have been*

conferred on the concerned person to deduct upto 4 per cent from the sum payable to the works contractor irrespective whether ultimately the transaction is liable for payment to any sales tax at all. In that view of the matter, we have no hesitation in rejecting the contention advanced on behalf of the State.

10. In *KEC International Limited* (supra) a Division Bench of the Karnataka High Court considered a challenge to the constitutionality of Section 19-A of the Karnataka Sales Tax Act,1957 providing for deduction of tax at source on turnover from works contract. Section 19-A, akin to Section 13, uses the term *'shall'* while directing the deduction of tax at source, but did not exclude categories of those transactions that would not come within the ambit of taxation, such as, labour contracts, interstate transactions or transactions not amenable to tax. The Bench held the provision to be unconstitutional, observing at paragraph 15 that, had only the provision clarified the position that it would not apply qua those transactions that are not amenable to tax, it would have been inclined to uphold its constitutionality. At paragraph 16, they consider the argument that it was only a provision for advance collection and prevention of evasion of tax, but reject the same as over simplification stating that *' Though Section 19-A is only incidental and ancillary to the main charging section, even the conferment of such ancillary power must be within the competence of the State Legislature'*.

11. The Gujarat High Court in the case of *Cibatul Limited, P.O. Atul V. Union of India* ((1979) 4 ELT 407) observed that when testing the validity of a machinery provision, the general principle was that, if the charging section was

intravires, the machinery would also normally be intravires subject to the condition that it does not *'stretch its long arms to pick- up the forbidden fruit along with others*'. Thus, even an ancillary provision enacted to aid the process of collection of tax would have to stay confined within the four corners of legislative power conferred under the entries enumerated in the lists under the Constitution.

12. The Bench also rejects the argument of the State that whatever was deducted would be ultimately adjusted against tax liability and excess, if any, refunded, taking judicial note of the position that refunds by the Commercial Taxes Department were normally, notoriously delayed.

13. There is thus no doubt in my mind, and it is also not the case of the revenue that *'TDS'*, whether collected under the nomenclature of '*amount', 'deposit'* or *'tax*' is with the full blessing and authority of the law.

14. The provisions of Section 13 are not under challenge and rightly so, since in drafting Section 13, the rationale of aforesaid judgments and many others that have taken a similar view, stand incorporated. Section 13, has, in directing the deduction of tax at source, specifically excluded from its purview three categories of transactions, labour contracts, inter-state transactions, and exempt transactions that stand outside the pale of taxation. Section 13, thus passes the test of constitutionality and the inference that flows from this

conclusion is that any amount deducted in line with the mandate of Section 13, have to be with the authority of law.

15. To decide this question, I prefer not to go by the nomenclature of the terms employed, since the relevant statutory provisions, rules and forms use terms such as deposit, amount, tax and other similar terms, interchangeably. The language employed varies and will not be decisive in this regard.

16. Article 265 states that no amount may be collected sans the authority of law. Thus, when a payer deducts any amount from out of the amounts payable to a payee/contractee, it is with the full authority of the law. The purpose of such deduction is to facilitate advance payment of tax. This is clear from the fact that whatever is deducted is immediately credited to the account of deductee and is automatically reflected as tax credit.

17. A comparison has been made with the provisions of Income Tax Act, 1961 (in short 'I.T. Act') to illustrate the difference between the provisions of Section 13 of the TNVAT Act and 217 of the I.T. Act that provides for advance tax. Since Section 217 of the I.T Act states that any amount paid in advance shall assume the character of tax, and no such validation is available in Section 13, the Revenue would argue that the purposes are different and Section 13 never envisaged that what was deducted be construed as a tax.

18. The purpose of Section 13 is to facilitate an advance collection of tax. The concept of an advance tax is not alien to revenue laws and tax

deduction/tax collection was envisaged to facilitate certainty in collection of tax and a spread over of tax liability over the year, so that an assessee is not mulcted with an enormous liability towards the close of the year. The destination of the tax deducted is towards defraying tax liability only. If this be the case, can one legitimately take the argument that what is deducted would constitute anything other than a tax ? The excess/short fall available post deduction and determination of tax liability would arise from various situations, such as multiple lines of activity, each with its own tax implications, the quantum of ITC available to be carried forward, to name a few. The ultimate quantification would give rise to a demand if there is a shortfall in the in tax credit, and a refund, if the credit is in excess. This is a matter for computation and can hardly impact a decision on the nature of the amount deducted. In a situation where an asseesee is only a works contractor, then the rate of tax qua the transaction has been crystallised in Section 13 as being 2% for civil works contracts and civil maintenance works contract and 5% in respect of all other kinds of works contracts.

19. Section 5 of the TNVAT Act is a charging Section for Works contracts and reads as follows:

> ***5. Levy of tax on transfer of goods involved in works contract****.- (1) Notwithstanding anything contained in this Act, but subject to the provisions of this Act, every dealer, shall pay, for each year, a tax on his taxable turnover, relating to his business of transfer of property in goods involved in the execution of works contract, either in the same form or some other form, which may be arrived at in such manner as may be prescribed, at such rates as specified in the First Schedule. Explanation. - Where any works contract*

involves more than one item of work, the rate of tax should be determined separately for each such item of work. (2) The dealer, who pays tax under this section, shall be entitled to input tax credit on goods specified in the First Schedule purchased by him in this State.

20. Section 6 deals with compounding qua works contract and extends an option to a dealer to pay tax at the flat rate of 2% /5%. In the case of an assessee falling under Section 5, the methodology to be applied in the computation of turnover and determination of output tax liability would be more complicated. Section 13 however makes no differentiation between deduction of tax in the case of assessees falling under Section 5 or 6. Evidently, the nature of the amounts deducted in both cases have to be one and the same and cannot differ, notwithstanding the differences in the application of both provisions. What is deducted in both cases thus, constitutes only a tax and the difference in nomenclature is irrelevant in deciding this issue.

21. I am supported in this regard by the provisions of Section 13(4) which says that the amount deducted and deposited under Section 13(2) will be adjusted by the Assessing Authority towards tax liability of the dealer, both under Section 5 or Section 6 and shall constitute good and sufficient discharge of such liability.

22. In the case of *Modi Industries* (supra), and *Gujarat Fluro Chemicals* (supra) relied upon by the revenue, the Supreme Court was concerned with a prayer for interest on excess of advance tax paid by an assessee under the provisions of the Income Tax Act. In *Modi Industries,* the Court held that

advance tax or TDS loses its identity once it is adjusted towards final liability and assumes the character of tax paid pursuant to a demand raised in assessment. A three Judge Bench clarified the position that any excess paid would not assume the character of tax and no interest is payable under Section 214/215 by application of Section 219 of the IT Act. At para 47, the question is posed and answer stated as follows:

> *47……..This means that in the assessment order, the Income Tax Officer will have to give credit for the advance tax paid by the assessee by treating the entire amount as income tax paid by the assessee. Thereafter, if there is any excess sum it will be refunded or if there is any shortfall in the payment of advance tax, that will be recovered by the Income Tax Officer. The amount standing to the credit of the assessee, upon assessment and after adjustment of the tax liability as quantified in the assessment order, loses its character as advance tax. It becomes an amount refundable as determined in the order of assessment. If after adjustment of the tax liability any excess amount is standing to the credit of the assessee, interest will be paid on that excess amount upto the date of the assessment order and, thereafter, the assessment order will contain a direction to refund the excess amount. The amount will be refunded with interest, if any, under Section 243.*

23. In *Gujarat Fluro Chemicals* the point that arose was what the character of TDS or advance tax would be under the Income Tax Act and whether interest would be payable by the revenue, if excess advance tax had been paid by an assessee or if excess tax had been deducted at source when compared with the assessed tax. Thus the Court was faced with the question of whether the assessee is not entitled to interest for any such excess paid or deducted.

24. There is a distinction between the Income Tax Act and the Sales Tax Act insofar as the concept of carry forward of credit does not form part of the

scheme of the IT Act. Under the IT Act, an amount paid as advance tax or amount deducted as tax will have limited use only qua the relevant assessment year. Advance tax is paid in four instalments, spread over the previous year relevant to an assessment year. Tax is deducted at source in regard to those transactions that have transpired during the financial year relevant to an assessment year. Such advance tax and TDS will be set off while computing the income relevant for that assessment year only and a refund of excess advance tax paid or a refund of excess tax deducted/collected at source will be determined in that assessment year itself. The Sales Tax enactments also provide for a refund upon completion of assessment that is issued in Form P. A RAO, on the other hand, is not a statutorily sanctioned document and no provision or Rule is brought to my notice in support thereof.

25. Form P determines the refund after adjusting the monthly payments made towards the final tax liability. This has no bearing on the scheme of tax credit in vogue under the Sales Tax Act that provides for carry forward of credit from year to year, such carry forward and accumulated credit automatically reflected in the account of the assessee with the department and automatically set off against output tax liability.

26. The observations of the Supreme Court to the effect that advance tax and TDS under the provisions of the Income tax Act do not carry interest as

they do not bear the character of tax, are not applicable to the issue in discussion now.

27. The argument that at the time of deduction, the amount (for want of a better word) is an 'deposit', when adjusted, it assumes the nature of 'tax', when carried forward, it bears the character of 'credit' and when refunded, it bears the character of an 'amount' would result in a distorted and imbalanced interpretation of the provisions of the Act and scheme set out thereunder.

28. I am thus of the view that once that any deduction made towards anticipated tax liability would assume the character of tax and will not change or fluctuate depending on whether it is held as credit or whether it is an adjustment against tax liability. To attribute such fluctuating character to an amount would distort the scheme of taxation and cause much difficulty in the interpretation on the various ancillary provisions. The interpretation of the provision must be such that it lends itself to certainty in its conclusion.

29. Though only supportive, the substituted Rule 9 (with effect from 29.01.2016) also appears to clarify this position. While erstwhile Rule 9 dealing with tax deduction at source stated that *'any person who makes a deduction under Section 13 shall deposit the same so deducted'* with the assessing authority, the amended rule reads *'any person liable to make deduction and payment of tax under Section 13 shall apply to the registering authority having jurisdiction over the person for a Tax Deductor Identification Number'*, prior to

effecting such deduction. Perhaps Legislature, by employing the language in the substituted Rule has clarified the position that the *'deposit'* and *'amount'* , referred to in Section 13 are only of the nature of tax.

30. The argument that a refund, by collective experience takes an enormous length of time to reach the assessee, and hence the amount deducted must be allowed to carried forward cannot be accepted. As held by the Supreme Court in *Amrit Banaspati* (supra) any amount of procedural wrangles, difficulties and inefficiencies in the manner of working and administration, cannot justify interpretation of a provision in one way and not another. A provision would have to be interpreted on the strength of the object and reasons for which it was inserted and bearing in mind the overall scheme of the Act.

31. Section 140 of the Act talks of carrying forward of the credit of *'VAT'* and Entry Tax under the existing law, defined under Section 2(48) of the TNGST Act to mean any law, notification, order, rule or regulation relating to levy and collection of duty or tax on goods or services made prior to the commencement of the TNGST. Since the amount collected/deducted has been captured in the returns of turnover filed under the erstwhile TNVAT regime, I accept the stand of the petitioners to the effect that such amounts would stand included for the purposes of transition under Section 140.

32. My conclusion also finds support from the language of Section 20 of the TNVAT Act dealing with assessment of tax, as per which, tax under that

Act was to be assessed, levied or collected in the manner prescribed, bringing within the ambit of assessment, collection by way of deduction under Section 13 of that Act.

33. In *Magma Fincorp Ltd. V. State of Telangana* (2019 (26 GSTL 7) the High Court at Telangana has considered this very issue, interpreting Section 140 purposively stating that *'Once it is admitted that credit was available to the petitioner on the date of switch over from VAT regime to GST regime and once it is admitted that the petitioner may be entitled to make a claim for this credit in other modes, we think that the second respondent ought to have given a purposive interpretation to Section 140 of the Act read with Sections 16 to 21 of the Telangana GST Act 2017. As he has failed to do the same, the matter requires reconsideration'*. Section 140 of the Telangana Goods and Service TaxAct, 2017 is in pari materia with the same provision in the TNGST and the observations of the Telangana High Court would also support the view I have now taken.

34. A detailed circular has been issued on tax deduction at source (Circular No.54 of 2014 bearing Ref.No.D3/34075/2011) wherein the Principal Secretary/Commissioner of Commercial Taxes Dated 14.11.2014 has issued guidelines on the subject of taxability of works contracts, including the aspects of assessment and TDS. The relevant portions of the Circular are extracted below:

. . . . . .

(H) Va lue of the goods for the purpose of making assessment on works contract:

In order to determine the assesable value of the goods, it is permissible to take the entire value of the works contract as the basis and the value of the goods involved in the execution or the works contract can be arrived at by deducting the following amounts from the value of the works contract:-

(1) All amounts involved in respect of goods involved in the execution of works contract,

i. *In the course of export of the goods out of the territory of India or*

ii. *In the course of import of the goods into the territory of India or,*

iii. *In the course of inter-state trade or commerce*

RuIe 8 (5)(a)

(2) Goods involved in the execution of works contract which are specifically exempted from tax

Rule 8 (5)(b)

(3) *All amounts paid to the Sub-contractors:*
Condition: - The Sub-contractor must be a registered dealer under VAT Act, 2006. He must be liable to pay tax under this Act. The turnover of such amount is included in the return filed by him.

Rule 8 (5)(c)

Unless the genuineness of payments made to sub-contractor is ensured by supporting documents such as bank statements, etc, exemption could not be granted. Even if there is any difference in turnover, which shaII be brought under assessment at higher rate of tax.

(4) *All amounts towards labour charge and other charges not including any transfer of property in goods, actually incurred in connection with the execution of works contract;*

(5) *If the charges are not ascertain able from accounts maintained and produced by a contractor before the assessing authority, deduction is allowable at the following rates given below: -*

. . . . . .

35. In *Seaford Court Estates Ltd. V. Asher* ((1949) 2 ALL ER 155), the Kings Bench speaks eloquently about the language to be employed in interpreting a provision stating:

The question for decision in this case is whether we are at liberty to extend the ordinary meaning of "burden" so as to include a contingent burden of the

kind I have described. Now this court has already held that this sub-section is to be liberally construed so as to give effect to the governing principles embodied in the legislation (Winchester Court Ld. v. Miller [17]); and I think we should do the same. Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticized. A judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word sc as to give "force and life" to the intention of the legislature. That was clearly laid down by the resolution of the judges in Heydon's case, and it is the safest guide to-day. Good practical advice on the subject was given about the same time by Plowden in his second volume Eyston v. Studd. Put into homely metaphor it is this: A judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done. A judge must not alter the material of which it is woven, but he can and should iron out the creases.

36. In the light of the detailed discussion as above, the impugned orders are set aside, and the petitioners held to be entitled to transition TDS under the TNVAT Act in terms of Section 140 of the TNGST 2017. Allowed. Connected Miscellaneous Petitions are closed with no order as to costs.

26.02.2021

Sl/ska

Index : Yes/No
Internet :Yes/No
Speaking Order/Non Speaking Order

To

The Assistant Commissioner,
Commercial Tax Department, Rasipuram,
Namakkal District.

Dr.ANITA SUMANTH, J.

Sl/ska

W.P. Nos.9991, 7030, 12110, 5142, 11621, 336, 647, 1766, 2738, 2859, 5039, 5101, 5966, 5969, 6406, 6467, 6596, 8936, 9694 & 16470 of 2020
and 3613, 3617 & 35267 of 2019
and
WMP.Nos.7008, 7564, 7000, 7002, 7007, 11816, 12171, 14248, 5953 5955, 10870, 11815, 385, 386, 762, 2039, 2043, 3182,

26.02.2021