



**NON-REPORTABLE**

**IN THE SUPREME COURT OF INDIA**

**CIVIL APPELLATE JURISDICTION**

**CIVIL APPEAL NO. 3821 OF 2020**

**(Arising from S.L.P.(Civil) No.10613/2020)**

**M/s Tamil Nadu State Marketing  
Corporation Ltd.**

**...Appellant**

**Versus**

**Union of India and others**

**...Respondents**

**J U D G M E N T**

**M.R. SHAH, J.**

1. Leave granted.
2. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 11.03.2020 passed by the High Court of Judicature at Madras in Writ Petition No. 6284 of 2020, by which the High Court has not entertained the said writ petition at this stage and consequently has dismissed the said writ petition

without deciding the issue involved in the writ petition on merits, the original writ petitioner has preferred the present appeal.

3. That the appellant herein – original writ petitioner filed the aforesaid writ petition before the High Court challenging the validity of Section 40(a)(iib) of the Income Tax Act, 1961. It was the case on behalf of the original writ petitioner that the amount which is deductible in computing the income chargeable in terms of the Income Tax Act is not being allowed under the garb of the aforesaid provision. According to the original writ petitioner, the said provision is discriminatory and violative of Article 14 of the Constitution of India, inasmuch as there are many Central Government undertakings which have not been subjected to any such computation of income tax and are enjoying exemption.

At this stage it is required to be noted that a show cause notice was issued by the assessing officer for the Assessment Year 2017-18 stating that the VAT expense levied on the appellant is an exclusive levy by the State Government and therefore squarely covered by Section 40(a)(iib) of the Income Tax Act and therefore VAT expenditure is not allowable as deduction in accordance with Section 40(a)(iib) of the Income Tax Act, while computing the income of the appellant. That the assessing

officer finalised the assessment and passed the assessment order for the Assessment Year 2017-18 vide order dated 30.12.2019.

3.1 The High Court vide judgment and order dated 26.02.2020 in Writ Petition No. 538 of 2020 set aside the assessment order dated 30.12.2019 insofar as disallowance in terms of Section 40(a)(iib), on the ground of violation of principles of natural justice. Thus, the matter was pending before the assessing officer. The appellant thereafter filed the present writ petition No. 6284 of 2020 before the High Court challenging the vires of Section 40(a)(iib) of the Income Tax Act being ultra vires Articles 14, 19 and 265 of the Constitution of India. By the impugned judgment and order, as observed hereinabove, the High Court has dismissed the said writ petition without deciding the validity of Section 40(a)(iib) of the Income Tax Act by observing that the issue of raising a challenge to the vires of the provision at this stage need not be entertained as the matter is still sub judice before the Income Tax Authority, even though it is open to the aggrieved party to question the same at the appropriate moment.

3.2 Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court in dismissing the said writ petition, without deciding the vires of Section 40(a)(iib)

of the Income Tax Act on merits, the original writ petitioner – M/s Tamil Nadu State Marketing Corporation Limited has preferred the present appeal.

4. Having heard Shri Rakesh Dwivedi, learned Senior Advocate appearing on behalf of the appellant and Shri K.M. Natraj, learned Additional Solicitor General appearing on behalf of the Union of India and others and considering the impugned judgment and order passed by the High Court by which the High Court has dismissed the said writ petition without deciding the vires of Section 40(a)(iib) of the Income Tax Act on merits, we are of the firm opinion that the impugned judgment and order passed by the High Court is not sustainable at all.

5. When the vires of Section 40(a)(iib) of the Income Tax Act were challenged, which can be decided by the High Court alone in exercise of powers under Article 226 of the Constitution of India, the High Court ought to have decided the issue with regard to vires of Section 40(a)(iib) on merits, irrespective of the fact whether the matter was sub judice before the Income Tax Authority. Vires of a relevant provision goes to the root of the matter. The High Court has observed that the issue of raising a challenge to the vires of the provision at this stage need not be

entertained, as the matter is still sub judice before the Income Tax Authority, even though it is open to the aggrieved party to question the same at the appropriate moment. Once the show cause notice was issued by the assessing officer calling upon the appellant – assessee to show cause why the VAT expenditure is not allowable as deduction in accordance with Section 40(a)(iib) of the Income Tax Act, while computing the income of the appellant, it can be said that the cause of action has arisen for the appellant to challenge the vires of Section 40(a)(iib) of the Income Tax Act and the appellant may not have to wait till the assessment proceedings before the Income Tax Authority are finalised. The stage at which the appellant approached the High Court and challenged the vires of Section 40(a)(iib) of the Income Tax Act can be said to be an appropriate moment. Therefore, the High Court ought to have decided the issue with respect to the challenge to the vires of Section 40(a)(iib) of the Income Tax Act on merits. The High Court has failed to exercise the powers vested in it under Article 226 of the Constitution of India by not deciding the writ petition on merits and not deciding the challenge to the vires of Section 40(a)(iib) of the Income Tax Act on merits.

6. In view of the above and as the High Court has not decided the issue with respect to vires of Section 40(a)(iib) of the Income Tax Act on merits, the matter is required to be remanded to the High Court to decide the writ petition on merits and decide the question with respect to challenge to the vires of Section 40(a)(iib) of the Income Tax Act on merits.

7. In view of the above and for the reasons stated above, the present appeal succeeds. The impugned judgment and order passed by the High Court is hereby quashed and set aside and the matter is remitted to the High Court to decide the writ petition on merits with respect to challenge to the vires of Section 40(a)(iib) of the Income Tax Act. However, it is made clear that we have not expressed any opinion on merits with respect to legality and validity of Section 40(a)(iib) of the Income Tax Act and we have remanded the matter on the aforesaid ground alone.

8. The appeal is accordingly allowed. No order as to costs.

.....J.  
[ASHOK BHUSHAN]

.....J.  
[R. SUBHASH REDDY]

NEW DELHI;  
NOVEMBER 25, 2020.

.....J.  
[M.R. SHAH]