

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 15.07.2015

CORAM:

The Honourable Mr. Justice S.VAIDYANATHAN

Writ Petition Nos.20179 of 2014

And M.P.No.1 of 2014

Reserved on 17.03.2015

Bonfiglioli Transmissions Private Ltd.,
Rep. by its Head Commercial
Mr.T.K.Ravi ... Petitioner

Versus

Assistant Commissioner (CT),
Tambaram-1, Assessment Circle,
Chennai-600 045. ... Respondent

Prayer: Writ petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorari, to call for the records in the proceedings of the respondent in TNGST/0883431/2002-03 & 2003-04 CST/772273/2001-02 to 2003-04, dated 16.4.2014 issued by the respondent and quash the same as arbitrary and illegal.

For Petitioner : Mr.Joseph Prabakar

For Respondent : Mr.A.R. Jayaprathap G.A (T)

ORDER

The petitioner is a registered dealers under the Tamil Nadu Value Added Tax Act, 2006 (in short, TNVAT Act, 2006) and Commercial Sales Tax Act, 1956 (in short, CST Act, 1956) with the respondent Tambaram-1 Assessment Circle. The petitioner had established Industrial Unit for the manufacture of industrial gear motor, gear boxes, etc. at SIDCO Industrial Estate, Chennai.

2. According to the petitioner, the Chairman and Managing Director, SIDCO of Tamil Nadu Limited, Egmore, Chennai-06 had granted eligibility Certificate in EC No.312/IX/DN, dated 17.4.2002 for availing interest free Sales Tax deferral (IFST deferral) to an extent of Rs.1725.46 lakhs. Based on the said eligibility

certificate, the petitioner entered into an agreement with the then territorial Assistant Commissioner and out of total eligible sum of Rs.1725.46 lakhs, the petitioner availed sales tax deferral amounting to Rs.1376.96 lakhs for the period from 2002-03 to 2007-08 and reserved a sum of Rs.348.19 lakhs for certain contingencies in order to meet liability that may arise on finalization of assessment.

3. While so, it appears that the respondent passed CST assessment orders for the years 2001-02, 2002-03 and 2003-04 and TNGST assessment orders for the years 2002-03 and 2003-04 and levied differential tax for certain turnovers for the reason that the petitioner did not file Form-C/Form-H and other declarations. According to the petitioner, the differential tax on account of non-submission of declaration forms should also be adjusted against IFST deferral amount for the respective years considering the fact that the petitioner had reserved Rs.348 lakhs out of the total deferral amount. The grievance of the petitioner is that the respondent proceeded on the basis that the differential amount of tax is not eligible to be adjusted against the IFST deferral amount and issued arrear notice dated 30.05.2013 demanding total differential tax of Rs.87,39,916 for CST assessment orders for the years 2001-02, 2002-03 and 2003-04 and TNGST assessment orders for the years 2002-03 and 2003-04. The petitioner sent a reply dated 24.6.2013 and thereafter, the respondent sent a letter dated 29.8.2013, stating that under IFST scheme, amount of tax collected alone could be deferred and where the demand arises on account of difference of tax for any reason, the said amount of tax cannot be brought under the IFST scheme. The petitioner submitted a detailed reply dated 03.09.2013 informing the respondent that they had already paid Rs.84,40,962/- on various dates including Rs.20 lakhs on July 31, 2013 and further issued a cheque for the balance tax of Rs.34,2701/- and thus the petitioner paid the entire amount of Rs.87,39,916/- as demanded by the respondent. The respondent issued notice dated 28.1.2014 stating that the petitioner made delayed payment of tax to tune of Rs.87,39,916/- for CST years 2001-02, 2002-03 and 2003-04 and TNGST 2002-03 and 2003-04 and demanded penal interest of Rs.1,08,88,487/- under Section 24(3) of the TNGST Act, 1959. The petitioner sent a reply dated 14.2.2014, informing that raising a demand for penal interest straight away without issuing a notice would amount to denial of principle of natural justice and contrary to the instructions issued by the Commissioner of Commercial Taxes, dated 20.4.2001. Thereafter, the respondent sent a letter dated 26.2.2014, directing the petitioner to file objections if any within 15 days and also to appear for personal hearing. Pursuant to the same, the petitioner sent a detailed reply dated 11.03.2014 stating that they are eligible for deferral and the differential amount of tax could also be deferred for the respective financial years and if so computed, the number of days delay would get reduced drastically on the amount of interest would

be only Rs.2,51,260/- and accordingly, the petitioner expressed willingness to pay the said amount. However, the respondent issued impugned notice dated 28.01.2014 reiterating that the petitioner is liable to pay Rs.1,08,88,487/-. Aggrieved by the same the petitioner has come forward with the present writ petition.

4. The counter affidavit has been filed on behalf of the respondent, wherein it is stated that the eligible IFST means that the taxes actually collected by the dealers and declared in the monthly returns filed by them during the respective years and deferred the payment of taxes which had been actually collected by them for improving their business. The dealers are not eligible for IFST in respect of transactions where the actual collection of all taxes had not taken place. The arrears of taxes demanded by the respondent actually represents the difference of taxes arrived at on account of non filing of prescribed declarations such as Form C and H etc. for which the dealers are not entitled to avail IFST scheme. It is also stated that the penal interest u/s.24(3) of TNGST Act 1959 was levied for the belated payment of taxes since it is automatic and absolute and no notice is necessary. The issue of a demand notice in Form 54 is a non-standardized form and it is meant only for levying penalties under the Act and not for levy of penal interest under Section 24 (3) of the Act. The word "by way of penalty" was submitted by the word "Penal interest" by Act 22 of 1982 (G.O P 1164 (CT &RE) dt. 15.10.1982 effective from 1.11.1982. Hence the question of issuing Form 54 for the levy of penal interest does not arise. It is also stated that the intimation regarding levying penal interest under Section 24(3) of the Act was already sent on 24.01.2014. It is also stated that the clauses 12 of the deferral Agreement executed by the Petitioners before the Assistant Commissioner (CT), Zone VII, excludes tax and penalty levied or liveable on taxable turnover suppressions of the purpose of this clause the term "Turnover suppressions" means the taxable turnover not shown or not declared as such in the monthly returns filed by the dealers, are not eligible for the loan scheme. On the same analogy the turnover relating to transactions not covered by C Forms and Form H for which taxes had not been collected and not declared in the monthly returns as such should be treated as not eligible for IFST deferral scheme. It is also stated as against impugned proceedings, the petitioner is having remedy by way of revision under Section 33 of the TNGST Act 1959 and without exhausting the same, the writ petition is not maintainable. With these averments, the respondents sought for dismissal of the writ petition.

5. Heard the learned counsel on either side and perused the materials available on record.

6. A perusal of the arrear notice, dated 30.5.2013 issued by the respondent, it appears that in respect of the balance of tax after deducting the eligible IFST in respect of the above mentioned assessment years, a sum of Rs.87,39,916/- has been demanded. According to the respondent, the eligible IFST means that the taxes actually collected by the dealers and declared in the monthly returns filed by them during the respective years and deferred the payment of taxes, which were actually collected by them and the dealers are not eligible for IFST in respect of transactions where actual collection of taxes had not taken place. It is not in dispute that the respondent has passed the assessment orders for the years CST 2001-02, 2002-03 & 2003-04 and TNGST 2002-03 & 2003-04, levying differential tax for certain turnovers on the ground that the petitioner had not filed Form-C/Form-H and other declarations as required and these assessment orders levying differential tax were not questioned by the petitioner.

7. Mr. Joseph Prabakar, learned counsel appearing for the petitioner would contend that under deferral scheme, the petitioner company is eligible to avail a sum of Rs.1725.46 and out of which, a sum of Rs. 348 lakhs has been reserved to meet out certain contingencies and the disputed differential tax demand raised by the respondent for non-submission of declaration forms should also be adjusted against the said reserved IFST deferral amount and therefore, without adjusting the said differential tax amount, the respondent has erroneously passed the arrear notice. He further contended that unilateral decision of the respondent directing the petitioner to pay penal interest is contrary to the instructions of the Special Commissioner and Commissioner for Commercial Taxes dated 20.04.2001, wherein, instructions were given to the assessing officers to issue notice, proposing penal interest under Section 24 (3) of the TNGST Act and penalty should be imposed only after providing sufficient opportunity to the assessee and therefore, the impugned order is violative of principles of natural justice.

8. The Government of Tamil Nadu introduced IFST Scheme named as "Deferral Scheme" to extend certain tax benefits to the industries which were set up in the backward areas, by which, the assessee/companies to collect sales taxes from the customers and to retain with them for 5 to 9 years and thereafter to make month-wise repayments starting from the month after expiry of 5th or 9th year. The petitioner was granted eligibility Certificate in EC No.312/IX/DN, dated 17.4.2002 for availing interest free Sales Tax deferral (IFST deferral) to an extent of Rs.1725.46 lakhs by the Chairman and Managing Director, SIDCO of Tamil Nadu Limited, Egmore, Chennai-06. Therefore, as per the said scheme, the

petitioner is eligible to avail same in respect of taxes actually collected and declared in the monthly returns filed by them during the respective years. It appears that in respect of differential tax amount, the petitioner had not filed prescribed declarations, such as Form C and Form H, etc., Therefore, when once the said declaration was not made by way of filing the said forms, it is to be construed that there was no actual tax collection. Hence the respondent has rightly passed the arrears notice, dated 30.5.2013, demanding differential tax at Rs.87,39,916/-.

9. The petitioner rest their claim on Clause 12 of the Deferral agreement which reads as under:

"12. Tax etc. or penalty leveied/leviable on taxable turnover suppressions (for the purpose of this clause the term "turnover suppression" means the taxable turnover not shown or not declared as such in the monthly returns filed by the party of the second party) are not eligible for the loan scheme".

Relying on the above, the petitioner contended that as per the scheme, the petitioner is eligible for IFST deferral of full tax, subject to the ceiling specified in Eligibility Certificate, not exceeding Rs.1725.46 lakhs and Clause 12 of the Deferral agreement excludes only the tax and penalty levied or leviable by the assessing officer on taxable turnover suppressions from IFST deferral and since the petitioner has not made any suppressions no case of non-declaration of taxable turnover in returns was made out against the petitioner and therefore, they are entitled for IFST deferral on the entire tax assessed on the taxable turnover declared in returns. This technical ground raised by the petitioner, in my opinion, is illogical and untenable for the simple reason that even without collecting the actual taxes and declaring the same in monthly returns, the petitioner cannot avail IFST scheme. The intention of the petitioner behind not declaring in the monthly returns by filing Form C and H, etc., is that if the department fails to take note of the same, the petitioner can get the benefit of the IFST scheme in respect of transactions where the actual collection of taxes was in fact not taken place. It is to be noted that when the department has noticed and raised demand of differential tax, it is not appropriate on the part of the petitioner to take stand that they are entitled to avail the IFST scheme as they did not exceed the limit and a considerable amount has been reserved, etc., Therefore, I do not find any merit in the claim made by the petitioner.

As regards the issuance of notice before resorting to impose penal interest under Section 24(3) of the Act as per the instructions of the Special Commissioner and Commissioner for Commercial Taxes dated 20.04.2001 which insist that penalty should be imposed only

after providing sufficient opportunity to the assessee is concerned, this Court finds no considerable force in the said contention. Admittedly, the respondent sent arrear notice on 30.5.2013 and thereafter, by proceedings dated 29.8.2013, the respondent once again requested the petitioner to pay the tax while clarifying the eligibility of the petitioner to avail IFST scheme and only on 28.1.2014, the respondent has invoked Section 24(3) of the Act and levied penal interest since the petitioner failed to pay the tax. Thereafter, at the instance of the petitioner, 15 days time was given for filing objections and also granted personal hearing. Pursuant to the same, a representative of the petitioner appeared for personal hearing and filed objections on 11.3.2014 and after considering the same, the impugned proceedings, dated 16.4.2014 came to be issued by the respondent. Further, it is the specific contention of the petitioner that the liability to pay interest under Section 24(3) of the Act is automatic and absolute and no notice is necessary for levying interest. In fact, a bare perusal of Section 24(3) of the Act, this Court find that there is no provision contemplated that the levy of interest should be imposed only after issuance of notice. In this regard, it is worthwhile to refer to a decision of this Court in "M/s.Kone Elevator India Pvt.Ltd. versus The Commercial Tax Officer, Mandaveli Assessment Circle" wherein, under similar circumstances, this Court has held as under:

"19. Section 24(3) of the Tamil Nadu General Sales Tax Act, which provides for levy of penal interest, is extracted hereunder:

"On any amount remaining unpaid after the date specified for its payment as referred to in sub-section (1) or in the order permitting payment in instalments, the dealer or person shall pay, in addition to the amount due, interest at one and a half per cent per month of such amount for the first three months of default and two per cent per month of such amount for the subsequent period of default:

Provided that if the amount remaining unpaid is less than one hundred rupees and the period of default is not more than a month, no interest shall be paid:

Provided further that where a dealer or person has preferred an appeal or revision against any order of assessment or revision of assessment under this Act, the interest payable under this sub-section, in respect of the amount in dispute in the appeal or revision, shall be postponed till the disposal of appeal or revision, as the case may be, and shall be calculated on the amount that becomes due in accordance with the final order passed on the appeal or revision as if such amount had been specified in

the order of assessment or revision of assessment, as the case may be."

"20. Sections 25 to 27 of the Parent Act, viz., TNGST Act provide for recovery of penalty or interest. Rule 9 of the TNAST Rules states that save as otherwise expressly provided for in TNAST Rules, the provisions of the Tamil Nadu General Sales Tax Rules, 1959 shall apply mutatis mutandis to the additional tax leviable under Section 2 of the Act. With the above statutory provisions relating to the levy of penal interest in the Parent Act as well as in the Saving Clause provided in the TNAST Rules, the Tamil Nadu Special Tribunal in a batch of cases in *E.I.D. Parry (India) Ltd., v. Asst. Commr. (CT) (TNTST)*, reported in 1999 (113) STC 233, considered the following and other issues,

(i) The competence of the Assessing Officer in issuing notice/order which levied 24(3) penal interest for belated submission/payment of tax or payment of tax on the basis of revised returns filed before final assessment or confirmation orders passed in Revision.

(ii) The validity of the notice/order which levied 24(3) penal interest on additional tax/surcharge tax for belated payment or payment made by filing returns before the completion of final assessment or orders passed in revision justifying such orders.

(iii) The point of time, to which, the penal interest under Section 24(3) of the Act is leviable with reference to the revised returns filed and payments made.

(iv) The plea of refund due to the petitioner has not been adjusted properly and hence penal interest levied under Section 24(3) of the Act has to be cancelled.

.....

"25. The amendment Act 14 of 2005, enabling the assessing authority to levy interest on any amount remaining unpaid after the specified date in addition to such amount of additional tax or penalty due, has not been challenged so far. The main contention of the petitioner that in the absence of any substantial provisions under the TNAST Act, authorising the levy of penal interest, the penalty imposed by the respondent under Section 24(3) of the TNGST Act, for belated payment of additional sales tax is without jurisdiction, has already been answered by the Full Bench of the Special Tribunal in *E.I.D. Parry (India) Ltd., v. Asst. Commr. (CT) (TNTST)*, reported in 1999 (113) STC 233, and it has become final. That apart,

the above amendment in Act 14 of 2005, giving retrospective effect, for the levy of penal interest on the remaining amount unpaid after the specified date, and the validation provision are squarely applicable to the facts of this case and therefore, the contentions of the petitioner that the demand made by the assessing officer without jurisdiction, is not tenable."

10. In view of the above discussion, this Court does not find any irregularity or illegality in the impugned proceedings, dated 16.4.2014 issued by the respondent.

Accordingly, the Writ Petition fails and it is dismissed No costs. Consequently, connected MP is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

Suk

To

Assistant Commissioner (CT),
Tambaram-1, Assessment Circle,
Chennai-600 045.

1 cc to Mr. Joseph Prabakar, Advocate, sr. 36496

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W.P.No.20179 of 2014
and
M.P.No.1 of 2014

CTK (CO)

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