IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.11.2015

CORAM:

THE HON'BLE MR. JUSTICE R. MAHADEVAN

W.P.No.17731 of 2004
and
W.P.M.P.No.21082 of 2004

M/s Leder Fx,
No.85, Sydenhams Road
Periamet, Chennai 3. ... Petitioner

Vs

The Deputy Commercial Tax Officer
Vepery Assessment Circle
No.5, Ritherdon Avenue
Ritherdon Road, Vepery
Chennai 600 007. ... Respondent

Writ Petition filed under Article 226 of the Constitution of India seeking a writ of certiorari to call for the records of the respondent in TNGST.No.0522809/2001-2002, quash the impugned order dated 29.08.2003 as beyond the jurisdiction of the respondent under the provisions of the Tamil Nadu General Sales Tax Act, 1959.

For petitioner : Mr.V.Sundareswaran

For respondent : Mr.S.Kanmani Annamalai, Additional Government Pleader(T)

O R D E R

Heard the learned counsel for the petitioner and Mr.S.Kanmani Annamalai, learned Additional Government Pleader (Taxes) for the respondent.

2. This writ petition has been filed challenging the order of the respondent dated 29.08.2003 as beyond the jurisdiction of the respondent under the provisions of the Tamil Nadu General Sales Tax Act, 1959.

3.1 According to the petitioner, the petitioner, being an exporter of hides and skins is a registered dealer under the provisions of the Act. For the export made by it, the Union of India, grants incentives in the form of refund of the customs duties, which is paid by it and the same is credited to the accounts of the exporter from time to time. The account of the exporter is called as "Duty Entitlement Pass Book" (shortly DEPB). Since the petitioner's turnover for the year related to export, it was granted the refund of customs duty in its account called DEPB.

3.2 According to the petitioner, since the issue as to whether such DEPB are goods and transfer of such DEPB is liable to sales tax under the Act was settled by the decision rendered by this Court on 19.12.2003 in W.P.Nos.15015 and 15016 of 2001, based on the decision of the Hon'ble Apex Court reported in 102 STC 106, they were under the impression that the said transfer of DEPB does not fall under the purview of the Act.

3.3 In the meantime, according to the petitioner, an inspection was conducted at the business premises of the petitioner on 26.07.2002 by the Enforcement Wing Authorities, during which, it was pointed out that the transfer of the said DEPB for Rs.9,38,175/- is liable to tax and the petitioner has to pay the same, which, according to the learned counsel for the petitioner was also paid on 27.07.2002, without any delay.

3.4. Thereafter, the petitioner filed returns disclosing the taxable turnover under the Act as Rs.9,38,175/- for the year ending 2002 in Form A12 under the provisions of the Act. The assessment was also completed by the respondent by an order dated 29.11.2002, accepting the turnover. When that being the case, the petitioner was surprised to receive a notice dated 31.03.2003 proposing to initiate penalty proceedings under Section 16(2) of the Act, which was served on the petitioner on 06.06.2003. The only reason given by the department is that the petitioner did not file monthly returns or annual returns and paid the tax due to the department and since it was detected only by the department from the extracts of the Joint Director of Imports and Exports and the transactions have not come to light by the petitioner, the proposal was made.

3.5 Further, according to the petitioner, the respondent initiated the re-assessment proceedings only for the purpose of imposition of penalty under Section 16(2) of the Act at 150% of the tax due and not for the tax which was already paid by the petitioner even before the initiation of the assessment proceedings.

3.6 On receipt of the said notice, according to the petitioner, they have filed detailed objections on 19.06.2003 inviting the attention of the respondent that penalty is not warranted by quoting the decisions of this Court reported in 38 STC 382 in the case of Deputy Commissioner of Commercial Taxes vs S.R.Ramaswami Chettiar and Bros., since the section contemplates that under Section 16(2) of the Act, while making an assessment under clause (a) of sub-section (1) of the Act, in addition to tax assessed, a penalty can be imposed. Therefore, if once the assessment order was passed earlier, no penal proceedings under Section 16(2) can be initiated or imposed separately. However, by the impugned proceedings dated 29.08.2003, the proposal was confirmed. Aggrieved over the same, the petitioner is before this Court.

4. The subject matter in this writ petition is against the assessment order, wherein penalty was sought to be levied. According to the learned counsel for the petitioner, the entire turnover is culled out only from the books of the petitioner and there is no attempt to evade any tax to be remitted to the department. Hence, the learned counsel for the petitioner would submit that the petitioner seeks indulgence of this Court for setting aside the levy of penalty.

5. On the other hand, the learned Additional Government Pleader (Taxes) would submit that only on the basis of the inspection conducted by the Enforcement Wing Authorities, the transactions were unearthed and accordingly, penalty was imposed. Hence, the assessment order passed by the respondent is to be sustained.

6. This Court considered the submissions made by the learned counsel on either side and perused the materials available on record.

7. The issue involved in this writ petition is already settled by the decisions of the Hon'ble Apex Court as well as the decisions of this Court. The Hon'ble Apex Court in the case reported in 28 STC 700 (The State of Madras vs. S.G.Jayaraj Nadar and Sons) has held that where certain items which are not

included in the turnover are discovered from the dealer's own account books and the assessing authority includes these items in the dealer's turnover, the assessment cannot be regarded as based on best judgment and penalty cannot be levied in respect of such items. As far as the case in hand is concerned, when there is no intention for evading of payment of tax and when the entire turnover is very much reflected in the books of accounts, there is no reason for levying penalty. This Court in the case reported in 125 STC 505 (Appollo Saline Pharmaceuticals (P) Ltd., vs. Commercial Tax Officer (FAC) and others), has held that levy of penalty without considering the bona fides of the petitioner could not be sustained.

8. Hence, in the light of the decision of the Hon'ble Apex Court reported in 28 STC 700 cited supra and the decision of this Court reported in 125 STC 505 referred to above, the petitioner is entitled to succeed.

9. Accordingly, the impugned order passed by the respondent dated 29.08.2003 is set aside and the writ petition is allowed. No costs. Connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

The Deputy Commercial Tax Officer
Vepery Assessment Circle
No.5, Ritherdon Avenue
Ritherdon Road, Vepery
Chennai 600 007.

+1cc to Mr.V.Sundareswaran, Advocate, S.R.No.62802
+1cc to the Special Government Pleader(T), S.R.No.62797

W.P.No.17731 of 2004

GJ(CO)
CA(30/11/2015)