

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.02.2017

CORAM:

THE HONOURABLE MR. JUSTICE RAJIV SHAKDHER

W.P.No.9778 of 2014
and M.P.No.1 of 2014

Tvl.Simran International
Rep. By its Authorised Signatory
Attarsingh Dhull,
2/4, Mac Fare Lane I Floor,
Periamet, Chennai - 3. ... Petitioner

vs.

The Assistant Commissioner (CT),
Periamet Assessment Circle,
Ritherdon Road,
Chennai-3. ... Respondent

Prayer : Writ petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of Certiorari, or any other appropriate writ by calling for the records of the respondent in his proceedings in TIN 33250422292/2008-09, dated 31.12.2013 and quash the same as illegal and to pass such further or other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case.

For Petitioner :Mr.S.Ramanathan

For Respondents :Mr.S.Kanmani Annamalai,
Additional Government Pleader

ORDER

1. This is a writ petition, which is directed against the order dated 31.12.2013.

1.1. By virtue of the impugned order, the petitioner has been called upon to pay penalty in the sum of Rs.37,032/-.

2. The petitioner submits that, apart from anything else, the impugned order is unsustainable in law, in view of the fact that penalty order has been passed, independent of the assessment order.

2.1. To be noted, the assessment order was passed on 31.07.2013.

3. In order to adjudicate upon the issue raised in the captioned writ petition, the following facts are required to be noticed :

3.1. The petitioner, who is a dealer in finished leather and is registered under the Tamil Nadu Value Added Tax Act, 2006 (in short the 2006 Act), and the Central Sales Tax Act, 1956, had made declaration of taxable turnover in the sum of Rs.6,54,449/-, in respect of Assessment Year (AY) 2008-2009.

3.2. The petitioner, accordingly, based on self-assessment, paid tax in the sum of Rs.26,178/-.

3.3. An order under Section 22(2) of the 2006 Act was passed on 31.05.2010.

3.4. It appears that vide notice dated 18.02.2011, the petitioner was called upon to pay tax in the sum of Rs.24,688/-, on account of the allegation that it had failed to disclose shortages and details of damaged goods, i.e., finished leather; a fact which came to light, pursuant to a VAT audit.

3.5. To be noted, in the said notice, the respondent had made the following observations, in respect of penalty and penal interest:

"Penal Interest, penalty will be levied at appropriate rate, if deemed fit."

3.6. Qua the said notice, the petitioner indicated to the respondent, vide objection dated 21.02.2011, that it had not availed of any input tax credit (ITC) in the assessment order in issue, and therefore, proposal for levying penalty may be dropped.

3.7. Consequently, given the fact that the petitioner had paid the proposed tax in the sum of Rs.24,688/-, while passing the assessment order dated 02.03.2011, the proposed penalty proceeding were not taken further and were resultantly, dropped.

3.8. This order was passed on the premise that the petitioner had not availed of ITC.

4. The record shows that, thereafter, another notice dated 25.03.2013 was issued to the petitioner, whereby, the respondent chose to add a sum of Rs.6,17,205/- as escaped taxable turnover towards shortage and damaged goods, i.e., finished leather.

4.1. According to the respondent, since, the number of such pieces were 1,789 in number, and the value of each piece would be Rs.345/-, the turnover, which had escaped tax assessment would be, the figure given above, i.e., Rs.6,17,205/-.

4.2. In response to the said notice, the petitioner addressed a communication dated 09.07.2013, wherein, it was indicated that tax in the sum of Rs.32,165/- had been paid in response to the earlier notice dated 18.02.2011.

4.3. The respondent, however, proceeded to pass a revised assessment order dated 31.07.2013, whereby, he added the escaped taxable turnover in the sum of Rs.6,17,205/- to the taxable turnover in the sum of Rs.6,54,449/-, which stood already determined.

4.4. Resultantly, the total taxable turnover was re-fixed and pegged at Rs.12,71,654/-. In respect of the aforesaid re-determined taxable turnover, tax was fixed at the rate of 4 %. Consequently, tax due was calculated and pegged at Rs.50,866/-.

4.5. To be noted, since, monies had, in fact, been paid towards tax, which satisfied the possible demand towards tax now calculated, i.e., Rs.50,866/, (as is evident from the facts quoted above), the petitioner was not called upon to pay further tax.

5. Pertinently, after the re-assessment proceeding were over, yet another notice dated 18.12.2013, was issued to the petitioner, with regard to the imposition of penalty in the sum of Rs.37,032/-.

5.1. It is, this proposal, which was confirmed, via the impugned order dated 31.12.2013.

6. As indicated above, the petitioner's challenge to the impugned order dated 31.12.2013, is pivoted on the submission that penalty cannot be levied independent of the assessment order.

6.1. It is submitted that the respondent should have come to such a conclusion, if at all, while passing the impugned order that a case was made out for levy of penalty.

7. It is, therefore, the submission of the learned counsel for the petitioner that, since, the assessment order did not advert to any of these aspects, the penalty order cannot be sustained.

7.1. For this purpose, learned counsel for the petitioner relies upon the following judgements of this Court :

(i).The Deputy Commissioner (C.T.), Coimbatore V. S.R.Ramaswami Chettiar and Bros., [1976] 38 S.T.C. 382; and

(ii).Rainbow Foundations Ltd., V. Assistant Commissioner (CT), [2011] 37 V.S.T. 592 (Mad.).

8. Mr.Annamalai, who appears for the respondent, says that, since, there was escapement of tax, which was taken note of in the order revising tax, penalty imposed is an order, notwithstanding the fact that this aspect did not form part of the revised assessment order.

8.1. In order to appreciate the said submission, learned counsel submits, that the provision of Section 27(3) of the 2006 Act, would have to be noted.

8.2. Accordingly, the said provision is extracted hereinbelow :

"I..... 27. Assessment of escaped turnover and wrong availment of input tax credit -

(1)

(2)

(3) In making an assessment under clause (a) of sub-section (1), the assessing authority may, if it is satisfied that the escape from the assessment is due to wilful non-disclosure of assessable turnover by the dealer, direct the dealer, to pay, in addition to the tax assessed under clause (a) of sub-section (1), by way of penalty a sum which shall be -

(a) fifty per cent of the tax due on the turnover that was wilfully not disclosed if the tax due on such turnover is not more than ten per cent of the tax paid as per the return;

(b) one hundred per cent of the tax due on the turnover that was wilfully not disclosed if the tax due on such turnover is more than ten per cent but not more than fifty per cent of the tax paid as per the return.

(c) one hundred and fifty per cent of the tax due on the assessable turnover that was wilfully not disclosed, if the tax due on such turnover is more than fifty per cent of the tax paid as per the return;"

9. To be noted, provisions of Section 27(3) of the 2006 Act are pari materia, with the provision of Section 16(2) of Tamil Nadu General Sales Tax Act, 1959. The said provision is also extracted hereinbelow, for the sake of convenience :

16 (2). In making an assessment under clause (a) of sub-section (1), the assessing authority may, if it is satisfied that the escape from the assessment is due to willful non-disclosure of assessable turnover by the dealer, direct the dealer, to pay, in addition to the tax assessed under clause (a) of sub-section (1), by way of penalty a sum which shall be - (a) fifty per cent of the tax due on the turnover that was willfully not disclosed if the tax due on such turnover is not more than ten per cent of the tax paid as per the return; (b) one hundred per cent of the tax due on the turnover that was willfully not disclosed if the tax due on such turnover is more than ten per cent but not more than fifty per cent of the tax paid as per the return; (c) one hundred and fifty per cent of the tax due on the assessable turnover that was willfully not disclosed, if the tax due on such turnover is more than fifty per cent of the tax paid as per the return; (d) one hundred and fifty per cent of the tax due on the assessable turnover that was willfully not disclosed in the case of self-assessment referred to in sub-section (1) of section 12. Provided that no penalty under this sub-section shall be imposed unless the dealer effected has had a reasonable opportunity of showing cause against such imposition. Provided that no penalty under sub-section (2) shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such imposition."

10. The judgment delivered by the Division Bench of this Court in The Deputy Commissioner (C.T.), Coimbatore V. S.R.Ramaswami Chettiar and Bros., [1976] 38 S.T.C. 382, and the order of the Single Judge of this Court in Rainbow Foundations Ltd., V. Assistant Commissioner (CT), [2011] 37 V.S.T 592 (Mad.), clearly opine that penalty cannot be imposed by a separate, or, an independent order, which does not form part of the assessment order.

10.1. The relevant observation, in this regard, made by the Division Bench of this Court in The Deputy Commissioner (C.T.), Coimbatore V. S.R.Ramaswami Chettiar and Bros., [1976] 38 S.T.C. 382, is extracted hereinbelow :

"..... But, on the other hand, in cases falling under Section 16(2) unless there is a definite finding as to the wilful non-disclosure of taxable turnover, the assessing officer will have no jurisdiction to impose the penalty. Except for this difference, we do not find any other difference between Section 12(3), as it stood at the relevant period, and Section 16(2). As we have already seen, this court in State of Madras Vs. Ramulu Naidu, [1965] 16 S.T.C. 865 held that the levy of penalty should form part of the assessment order itself. Thus, no separate order is also contemplated under Section 16(2). Thiru S.V. Subramaniam, whom we required to argue the case in the absence of the respondent brought to our notice Section 31 relating to the appeal to the Appellate Assistant Commissioner where, while Section 12 is referred to without any reference to the sub-sections in that section, subsections (1) and (2) of section 16 is specifically referred to. It was so mentioned because two separate orders were contemplated under Section 16(1) and (2). On the other hand, only a consolidated order was expected to be made in Section 12 and, therefore, Section 12 is referred to without any reference to the sub-sections therein. We are unable to accept this argument of the learned counsel also. Section 16 has two more sub-sections [subsections (3) and (4)], which do not contemplate making of any orders under that provision; whereas in Section 12, each one of the sub-sections deals with orders and, instead of mentioning each one of the sub-sections, the totality of that section is mentioned in the appeal provision. Further, Section 12 contemplates two different types of orders, one accepting the return under Section 12(1) and another a best judgment assessment under Section 12(2). But Section 31 did not make any specific reference because every one of the orders made under Section 12 is appealable. We are, therefore, unable to hold that separate orders were contemplated under Section 16 (2). In fact, it was not even the case of the Government Pleader that only separate orders could be made under Section 16(2). On the other hand, he contended that it was open to the assessing officer either to make a consolidated order or separate orders under Section 16(2). We are, therefore, of the opinion that the Tribunal was right in holding that no separate order of penalty could be made under Section 16(2)."

(emphasis is mine)

10.2. Similar observations are made by a Single Judge of this Court in Rainbow Foundations Ltd., V. Assistant Commissioner (CT), [2011] 37 V.S.T. 592 (Mad.), which followed the aforementioned judgment of the Division Bench :

"..... The decision of this Court in Deputy Commissioner (C.T.), Coimbatore V. V.S.R. Ramaswami Chettiar and Bros. reported in [1976] 38 STC 382, clearly holds that under section 16(2) of the Act, the assessing authority has no jurisdiction to impose penalty by a separate and independent order. Even if a statute has brought in a new section by way of section 12C, given the fact that section 16 (2) of the Act remains as it is, the view of the officer that by introduction of 12C, section 16(2) will lose its validity, hence, the decision has no relevance, cannot be accepted by any standards of reasoning.

In the circumstances, even though the writ petition is as against the penalty order, I have not hesitation in setting aside the order of the respondent, having regard to the law declared by this Court in the case of Deputy Commissioner (C.T.), Coimbatore V. V.S.R. Ramaswami Chettiar and Bros. reported in [1976] 38 STC 382, and on the admitted fact that the order passed by the respondent levying penalty is through an independent order under section 16(2) of the Act. Accordingly, the writ petition is allowed. No costs. Consequently, M.P.No.1 of 2009 is closed."

11. Having regard to the aforesaid legal position, in my view, the submission of the learned counsel for the petitioner will have to be accepted.

11.1. Accordingly, the impugned order is set aside.

12. The captioned writ petition is disposed of, in the aforementioned terms. Resultantly, the connected application is closed. There shall, however, be no order as to costs.

Sd/-
Assistant Registrar(CS VII)

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Sub Assistant Registrar

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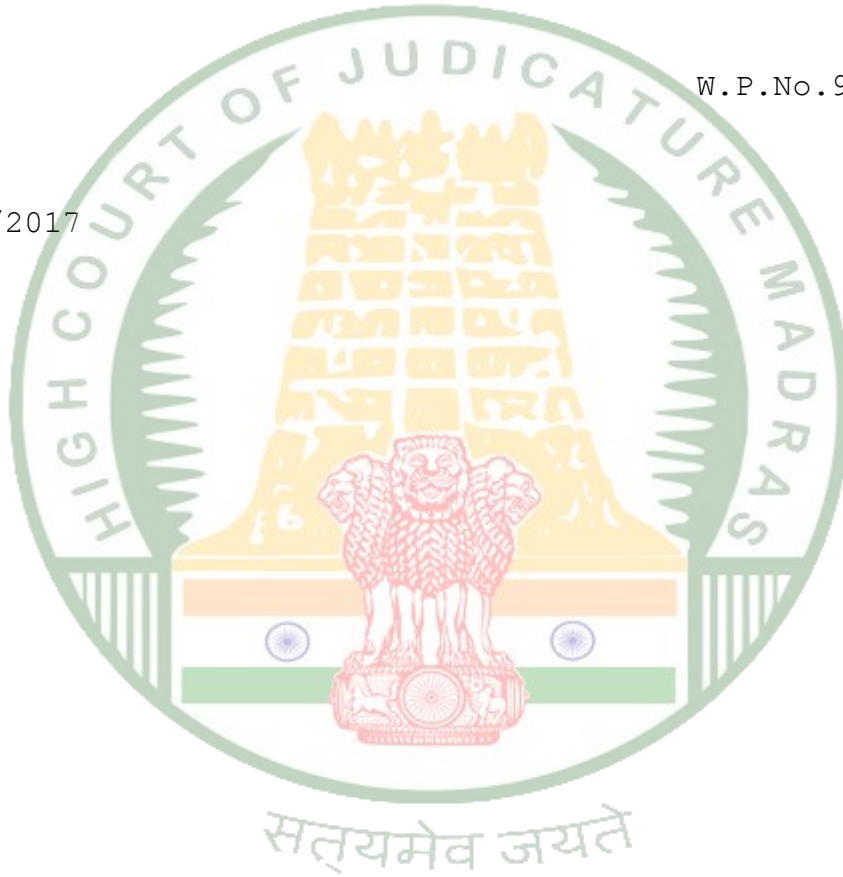
To

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+lcc to Mr.S.Ramanathan, Advocate Sr.8231

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