

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.06.2017

CORAM

THE HONOURABLE MR.JUSTICE RAJIV SHAKDHER

AND

THE HONOURABLE MR.JUSTICE R.SURESH KUMAR

W.A.No. 585 of 2017 and

C.M.P.No.8214 of 2017

U.Ravi ... Appellant/Petitioner

-Vs-

The Commercial Tax Officer,
Ambur Assessment Circle,
Ambur, Vellore District. ...Respondent/Respondent

Writ Appeal filed under clause 15 of Letter Patent to set aside the order passed by this Court in W.P.No.11098 of 2017 dated 28.04.2017.

Prayer in WP.11098/17:

Writ Petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records on the file of the respondent in his impugned proceedings made in TIN NO.33844260209/ 2014-2015 dated 30.12.2016 quash the same

For Appellant : Ms.R.Hemalatha

For Respondent : Mr.S.Kanmani Annamalai, AGP

JUDGMENT

(Judgment of the Court was delivered by RAJIV SHAKDHER, J.)

1. Issue notice. Mr.Kanmani Annamalai, the learned counsel appearing for the Revenue, accepts notice.

2. With the consent of counsels for parties, the captioned appeal is taken up for hearing.

3. By virtue of this appeal, challenge is laid by the appellant to the order of the learned single Judge dated 28.4.2017. The learned single Judge has dismissed the Writ Petition, preferred by the appellant, solely on the ground that there is an alternative remedy available to him. The appellant, being aggrieved, has preferred the captioned appeal.

4. It is the case of the appellant that, what was articulated in the Writ Petition was that the Assessment Order passed in the appellant's case was without jurisdiction, inasmuch as it, inter alia relied, upon the provisions of Section 19(20) of Tamil Nadu Value Added Tax, Act 2006 (in short, 'the 2006 Act'). It was further contended that the Assessing Officer had also relied upon a circular dated 30.11.2009, without taking note of the subsequent circulars dated 04.11.2013 and 11.8.2015.

4.1. In sum, the appellant's case in the Writ Petition was that, the Assessing Officer had included the discount obtained by him from the sellers in his taxable turnover, which is, contrary to the provisions of Section 2(41) of the 2006 Act. The appellant says that since, he had not availed of any Input Tax Credit (ITC), no reversal of the same could have been brought about, as is required under the provisions of Section 19(20) of the 2006 Act, in case, the said provisions is triggered, as was erroneously sought to be done by the respondent.

4.2. For all reasons, according to the appellant, the illegality went to the root of jurisdiction of the respondent. The impugned assessment order, according to the appellant, was thus, liable to be set aside.

5. A perusal of the Assessment Order dated 30.12.2016 would show that the Assessing Officer has included in the taxable turnover, declared by the appellant, the discount, quantified at Rs.1,15,91,011/- The Assessing Officer, thereupon, has proceeded to tax the said turnover (i.e., the value of the discount obtained by the appellant), at the rate of 14 ½ %. Consequently, the appellant has been called upon to pay, in effect, tax, in a sum of Rs.16,80,697/-. Curiously, in the notice of demand, which is in Form-0, wherein, the details with regard to tax payable by the appellant is shown, there is a reference to ITC, when, the appellant has not, admittedly, availed of ITC.

		ITC reversal u/s27(2) Determined	Tax determined	Total
Due	Rs	16,80,697	25,397	17,06,094

6. Mr.Annamalai, the learned counsel, who appears for the Revenue admits as much that it is not a case of 'ITC reversal'.

7. Before we proceed further, the following brief facts are required to be noticed:

7.1. The appellant, who is a dealer in cement, had filed his monthly returns for the relevant year, i.e. 2014-15. The Assessment of the appellant was completed as "deemed assessment" under Section 22(2) of the 2006 Act. Evidently, on 30.11.2016, the Respondent issued a notice whereby he proposed to include discount received by the appellant in his taxable turnover. Consequently, it was also proposed in the very same notice that the said turnover, which, according to the aforementioned notice, was to be treated as value addition, would be taxed at the rate of 14 ½ %. In this behalf, the show cause notice placed reliance on circular dated 30.11.2009. Apart from the above, the notice also adverted to the issue pertaining to the suppression of sales. The allegation was that there was a mismatch in the sale figure shown by the seller and that which was disclosed by the appellant in the returns filed with the Revenue. It is not in dispute that the appellant filed a detailed reply to the notice dated 30.12.2016. The respondent however, was not impressed with the stand taken by the appellant and thus, via order dated 30.12.2016 to which we have made a reference above, proceeded to include the discount in the taxable turnover of the appellant. Accordingly, in the operative portion, the respondent confirmed the proposal articulated in the notice dated 30.11.2016 and, passed the following directions:

Total and taxable turnover determined under section 27(1)(a) of the TNVATACT 2006 for the year 2014-2015. 1. Discount amount received - Rs.1,15,91,011- at 14.5%- Rs.16,80,697- 2. Sales suppression determined based on purchase suppression found - Rs.1,75,153/- at 14.5%- Rs.25,397-	Rs	1,17,66,164/- at 14.5%
TOTAL TAX determined	Rs	17,06,094/-

		ITC reversal u/s 27(2) Determined	Tax Determined	Penalty under Section 27(3) (c) Determined	Penalty under Section 27(4) (ii) Determined	Total
Due	Rs	1680697-	25397-	38096-	1680697-	34,24,887-
Paid	Rs	0	0	0	0	0
Balance	Rs	1680697-	25397-	38096-	1680697-	34,24,887-

7.2. The appellant being aggrieved by the directions contained in the Assessment Order dated 30.12.2016, proceeded to challenge the same by way of writ petition filed under Article 226 of the Constitution.

8. As stated at the very outset, the learned single Judge dismissed the writ petition on the ground that alternative remedy was available to the appellant.

9. Ms.Hemalatha, who appears on behalf of the appellant, says that the order of the learned single Judge is erroneous as various issues, which had been raised in the writ petition, which have not been dealt with in the impugned judgment. The learned counsel submits, in brief, that the learned single Judge was called upon to decide as to whether the Assessment Order passed by the respondents could be sustained under the provisions of Section 19(20) of the 2006 Act. Furthermore, the learned counsel submitted that the other error, which was, in particular, adverted to, but was not discussed in the impugned Judgment, was that, which pertained to determination of the market price of like goods.

9.1. It was submitted by the learned counsel that the respondent could not have taken recourse to invoke the provisions of Section 19(20) or 24 of the 2006 Act, till he came to the conclusion that the appellant had, either sold goods at price lesser than the price, at which they were purchased, or the appellant had, with a view to evade payment of tax had shown in his accounts, sales or purchase of any goods at price which are abnormally low, compared to the prevailing market price of such goods.

9.2. It was, thus, the submission of the learned counsel for the appellant that since the necessary ingredients for invoking

the provisions of Section 19(20) or Section 24 of the 2006 Act were missing, the entire order was illegal, and therefore, beyond jurisdiction.

9.3. It was also the contention of the learned counsel for the appellant that while an alternative remedy was available to the appellant, that by itself, could not come in the way of this Court exercising jurisdiction, if, otherwise illegality obtaining in the Assessment Order was palpable and was discernible upon a bare perusal. It was the submission of the learned counsel for the appellant that it is within the discretion of this Court, in the given case, to intercede in the matter, where the order is clearly, contrary to the provisions of the statute under which the Assessing Authority operates.

10. Mr. Annamalai, learned counsel for the respondent, on the other hand submits that the appellant, should take recourse to an alternative remedy, as indicated by the learned single Judge in the impugned Judgment. The learned counsel, however, fairly submitted that the Assessing Officer had not fulfilled the mandate of Section 24 of 2006 Act which obliged him to carry out an enquiry and determine the market prices of like goods. Mr. Annamalai also indicated to us that the provisions of Section 19(20) of the 2006 Act could not have been invoked as ITC, in the instant case, was not claimed by the appellant.

11. We have heard the learned counsel for the parties and perused the record.

12. Before we proceed further, we may record that Ms. Hemalatha, who appears for appellant, says that, she is restricting the appeal only to the aspect concerning inclusion of discount in the taxable turnover of the appellant and that the other two aspects which relate to suppression of sales and imposition of penalty are not assailed. In other words, Mrs. Hemalatha says that the tax in the sum of Rs.25,397/- determined on suppression of sales and penalty in the sum of Rs.38,096/- will be paid by the appellant. Therefore, as indicated above, we only require to deal with one aspect of the matter, which is, as to whether discount could have been included in the taxable turnover of the appellant, the facts not being in dispute. For this purpose, we may set out in the first instance, the definition of turnover as given in Section 2(41) of 2006 Act, which is as follows:

“(41) “turnover” means the aggregate amount for which goods are bought or sold, or delivered or supplied or otherwise disposed of in any of the ways referred to in clause (33), by a dealer either directly or through

another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce, other than tea and rubber (natural rubber latex and all varieties and grades of raw rubber) grown within the State by himself or on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover.

Explanation I.....

Explanation II.- Subject to such conditions and restrictions, if any, as may be prescribed in this behalf-

(i) the amount for which goods are sold shall include any sums charged for anything done by the dealer in respect of the goods sold at the time of, or before the delivery thereof;

(ii) any cash or other discount on the price allowed in respect of any sale and any amount refunded in respect of articles returned by customers shall not be included in the turnover;"

Explanation III.....

Explanation IV..... "

(Emphasis is ours)

13. A bare reading of the Explanation II(ii) would show that the discount cannot be included in the taxable turnover of an assessee. The Assessing Officer, it appears, has included the taxable turnover by relying upon the circular dated 30.11.2016. Further, the Assessing Officer, in coming to the conclusion that the appellant had sold goods at a price lesser than the price at which the goods were purchased by him, has adverted to the following workings which have been gleaned from Form W.W, filed by the appellant for the year 2014-2015.

13.1. For the sake of convenience, the relevant extract taken from the Assessment Order, which forms, the pivot for imposition of tax on the discount, which has been included in the taxable turnover, is set forth herein below:

" On scrutiny of the Form WW filed for the year 2014-2015, it was ascertained from the Profit and Loss

account for the year ended 31st March 2015, that the assessee had sold the goods at a price with a minimum profit which is lesser than the price of the goods purchased by him as detailed below.

Opening Stock as per form ww	Rs	1096475
Add: Purchases as per others Annex II data	Rs	8,55,23,004
Total	Rs	8,66,19,479
Less: Closing Stock as per form ww	Rs	955148
Net Purchase	Rs	8,56,64,331
Sale Value	Rs	8,60,68,851
Gross Profit	Rs	404520
% of profit or loss	Rs	0

14. A perusal of the table extracted above, would show that the sales turnover for the period 2014-2015, for the year ending 31st March 2015 is Rs.8,60,68,851/-. The total purchases made during the year is a sum of Rs.8,55,23,004/-. Though not articulated clearly, it appears that the Assessing Officer has come to a conclusion that the sale price is lesser than the price at which the appellant has purchased the goods by including in the purchase turnover, the opening stock amounting to Rs.10,96,475/-. Thus, the total purchase turnover, has been calculated by the Assessing Officer by pegging the same at Rs.8,66,19,479/-.

15. According to us, the very basis of the calculation is flawed. The Assessing Officer was required to compare the unit sale price of the goods in issue with the unit purchase price. The inclusion of the opening stock, to our minds, has led to an erroneous conclusion that the appellant has sold the goods at a price lesser than the price at which they had been purchased by him. This apart, as conceded by Mr.Annamalai, the exercise, which is contemplated under Section 24 of the 2006 Act, has not been carried out by the Assessing Officer.

16. For the sake of convenience, the provisions of Section 24 are set out hereafter:

"24. Assessment of sales shown in accounts at low prices.-

1. If the assessing authority is satisfied that a dealer has, with a view to evade the payment of tax, shown in his accounts, sales or purchases of any goods, at prices which are abnormally low compared to the prevailing market price of such goods, it may, at any time within a period of five years from the expiry of the year to which the tax relates, assess or reassess the dealer to the best of its judgement on the turnover of such sales or purchases after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.

(2) The provisions of sub-sections (3) to (8) of section 27, shall, as far as may be, apply to assessment or re-assessment under sub-section (1) as they apply to the re-assessment of escaped turnover under sub-section (1) of section 27."

17. A perusal of the aforementioned Section would show that were the Assessing Officer to carryout a best judgment, he would have had to carry out an exercise via which, he would have demonstrate that the appellant, in order to evade tax, had shown in his accounts, sales or purchases of any goods, at prices which are abnormally low, compared to the prevailing market prices of such goods. Before concluding a best judgment assessment, the Assessing Officer is required to reach a satisfaction in this behalf. Clearly, such an exercise has not been carried out by the Assessing Officer. Furthermore, a perusal of the provisions of Section 19(20) would also show that, only if, the Assessing Officer comes to the conclusion that the price of the goods sold is lesser than the price at which they were brought, can he, obtain jurisdiction to adjust the ITC, to the extent the amount of ITC exceeds the output tax on the goods. As indicated herein above, the appellant has not availed of ITC in respect of the subject goods i.e., cement. Therefore, there was no occasion for the Assessing Officer, in any event, to invoke the provisions of Section 19(20) of the 2006 Act. In order to appreciate what is observed above, the provisions of Section 19(20) of 2006 Act are extracted hereafter:

"Notwithstanding anything contained in this section, where any registered dealer has

sold goods at a price lesser than the price of the goods purchased by him, the amount of the input tax credit over and above the output tax of those goods shall be reversed."

18. Thus, having regard to the aforesaid, in our view, the Assessment Order contains errors which are palpable and discernible on the face of the order. Having coming to this conclusion, according to us, the fact that an alternate remedy was available to the appellant would not detain us from exercising jurisdiction in the matter. It is well settled that the fact that alternate remedy is available to assessee cannot prevent the Court from interceding in the matter, if, it is otherwise, of the view that the matter requires intercession. In our opinion as alluded to above, the fact that the Assessing Officer has taken recourse to those provisions of the 2006 Act which were not clearly available to him, in our view, gives us sufficient reasons to intercede in the matter by way of writ jurisdiction. Thus, having regard to the foregoing discussion, the Assessment Order is set aside to the limited extent that it seeks to include the discount quantified at Rs.1,15,91,011/-, in the taxable turnover of the appellant. The Assessing Officer is, therefore, directed to redo the assessment, bearing in mind the aforesaid discussion.

19. The captioned Writ Appeal is accordingly, allowed. The impugned judgment is set aside in the aforementioned terms. Consequently, CMP.No.8214 of 2017 stands closed.

Sd/-

Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

kua/sl

To

The Commercial Tax Officer,
Ambur Assessment Circle,
Ambur, Vellore District.

+lcc to Ms.R.Hemalatha,Advocate sr.39628

W.A.No. 585 of 2017 and
C.M.P.No.8214 of 2017

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ss(16/6/2017)