

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.09.2017

CORAM

THE HONOURABLE MR. JUSTICE T.S. SIVAGNANAM

W.P. Nos. 23281 to 23284 of 2017

&

W.M.P.Nos. 24383 to 24386 of 2017

Ganga Fortunes,
rep. by its Managing Partner,
Senthil Kumar,
33, Hemavathy Complex Paper
Mills Limited,
Perambur, Chennai - 600 011.

..Petitioner in all the writ
petitions

Vs.

The Commercial Tax Officer,
Perambur Assessment Circle,
15 & 16 Malligai Avenue,
Kolathur,
Chennai - 600 099.

..Respondent in all the
writ petitions

Prayer: Petitions under Article 226 of the Constitution of India praying for
issue of a Writ of Certiorari to call for the records on the files of the
respondent herein in TIN Nos.33891045456/2012-13, 33891045456/2013-2014,
33891045456/2014-2015 & 33891045456/2015-2016 respectively dated
20.07.2017 and quash the same.

For Petitioner :: Mr.N. Inbarajan
For Respondent :: Mr.K. Venkatesh,
Govt. Advocate

ORDER

Heard Mr.N. Inbarajan, learned counsel for the petitioner and Mr.K. Venkatesh, learned Government Advocate for the respondent.

2. The petitioner is a Civil Works Contractor and Flat Promoter registered as a dealer on the file of the respondent from 2013-2014, prior to which the petitioner was an unregistered dealer. In these writ petitions, the petitioner challenges the orders of assessment for the assessment years 2012-2013, 2013-2014, 2014-2015 & 2015-2016 only with regard to the levy of penalty under Section 27(3) of Tamil Nadu Value Added Tax Act, 2006 (TNVAT Act in short).

3. So far as the tax component is concerned, out of the four assessment years, the petitioner is required to pay tax to the tune of Rs.16,215/- for the assessment year 2013-2014 and Rs.1,35,349/- for the assessment year 2014-2015. Learned counsel appearing for the petitioner submitted that the petitioner is not contesting the tax liability for the

aforesaid two assessment years and the petitioner will remit the same. This statement is taken on record.

4. With regard to the other two assessment years, namely, 2012-2013 and 2015-2016 are concerned, even as per the impugned assessment orders, the petitioner has paid the entire tax liability. Thus, the short question to be considered is whether these are cases where the respondent could have levied penalty under Section 27(3) of TNVAT Act, 2006.

5. One glaring error which requires to be pointed out is that in the impugned assessment order dated 20.07.2017 for the assessment year 2012-2013, the respondent has stated that the assessment has been finalised as deemed assessment under Section 22 of TNVAT Act, 2006. In the assessment order, while dealing with penalty, the respondent has pointed out that the petitioner is a registered dealer only with effect from November, 2013. If the petitioner was not a registered dealer before November, 2013, then, obviously, the petitioner could not have been deemed to have been assessed under Section 22 of TNVAT Act, 2006, prior to the said period. This is an indication to show that there has been non-application of mind. Be that as it may. In these cases, it has to be seen as to whether the respondent was justified in imposing penalty @ 150% of the tax due, on the petitioner.

5. The legal position as to under what circumstances, penalty could be imposed was considered by this Court in the case of *Nokia India Private Limited V. Deputy Commissioner (CT)-IV, Large Tax Payers Union, Egmore, Chennai and Others reported in [2015] 79 VST 137 (Madras)*. This Court took into consideration the statutory provisions and the decisions of the Honourable Supreme Court in *Hindustan Steel Limited V. State of Orissa [1970] 25 STC 211 (SC)*, *Uniworth Textiles Limited V. Commissioner of Central Excise, Raipur [2013] 9 SCC 753* & *Abanloyd Chiles Offshore Limited V. Commissioner of Customs [2006] 6 SCC 482* and held that “an act or omission is 'wilfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids or with the specific intent to fail to do something the law requires to be done and that penalty will be imposed if the party had acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest or acted in conscious disregard of its obligation. Therefore, to impose penalty, it would be sufficient to merely mention that there was wilful non-disclosure on the part of the petitioner and that, but for audit, the matter would not have come to light. What is required to be examined is whether the conduct of the assessee was wilful. At this stage, it will be beneficial to refer to the relevant portions of the said decision at paragraph Nos. 72, 73 & 74 and they are as hereunder:

“72. Section 27(3) of the Act states that in making an assessment under clause (a) of sub-section (3) of section 27 of the TNVAT Act (as in the present case) the assessing authority may, if it is satisfied that the escape from 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 section 27(1) by way of penalty, which shall be either 50 per cent, or 100 per cent or 150 per cent., depending upon the parameters set down in clauses (a) to (c) in section 27(3). In terms of the above provision, to levy penalty, the assessing officer should record its satisfaction that the escape from assessment is due to wilful non-disclosure. The Honourable Supreme Court in the case of Hindustan Steel Ltd. V. State of Orissa [1970] 25 STC 211 (SC); AIR 1970 SC 253, while considering imposition of penalty on the assessee under the provisions of the Orissa Sales Tax Act, 1947, pointed out, an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding and penalty will not be ordinarily imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct, contumacious or dishonest or acted in conscious disregard of its obligation and penalty will not be imposed unless it is lawful to do so. Where penalty should be imposed for failure to perform a statutory obligation is a matter is discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. In the instant case, except for observing that there was wilful non-disclosure on the part of the petitioner, and but for the audit, the matter would not have come to light, the assessing authority did not examine as to whether the conduct of the petitioner/dealer

was wilful. Further, the assessing officer has not assigned independent reasons as to the imposition of penalty on the entire demand, which essentially should have been done by the assessing officer.

73.However, the assessing officer did not examine this aspect and merely quoted the expression used in Section 27(3), viz., "wilful non-disclosure". Mere use of expression "wilful" does not make an act or action wilful or deliberate. It is a question of fact to be proved by the person who makes an allegation against another for having acted in a wilfully negligent manner of deliberately acted with mala fide with an intention not to comply with the statutory provisions. This exercise was not done by the assessing officer. Allegations of mala fide are often more easily made than proved and the burden is on the person who alleges it. Furthermore, the payment of the tax and interest even prior to the completion of the audit inspection though may not be the sole reason to exonerate the petitioner but would be a mitigating factor while construing the conduct of the petitioner vis-a-vis the rigour of the expression "wilful". The Honourable Supreme Court in the case of *Uniworth Textiles Ltd.* [2013] 19 GSTR 246 (SC); (2013) 9 SCC 753, pointed out the use of word "wilful" introduces a mental element and hence, requires looking into the mind of the assessee by gauging its actions, which is an indication of one's state of mind. Referring to the meaning of word "wilful" in *Black's Law Dictionary* which states "wilful" to mean "proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass...

An act or omission is "wilfully" done, if done voluntarily and intentionally and with the specific intent to do something the law forbids,

or with the specific intent to fail to do something the law requires to be done..."

74. ...The word "wilful" preceding the words "mis-statement or suppression of facts" clearly spells out that there has to be an intention on the part of the assessee to evade the duty. Thus, the assessing officer was bound to consider whether the conduct of the dealer was wilful."

6. In the case of *State of Tamil Nadu represented by the Joint Commissioner (CT), Chennai (South) Division, Chennai – 6 V. Tvl. Golden Homes Pvt.Ltd in Tax Case Revision Petition No. 24 of 2016*, the Division Bench of this Court considered as to what would be the requirement that has to be fulfilled for levying penalty under Section 27(3) of the TNVAT Act, 2006 and the relevant portion at paragraph No.13 reads as follows:

"13. It is not in dispute that Sub-section (3) of Section 27 of the Act has in turn provided for imposition of penalty charges at the rate of 50%, 100% and 150% of the tax due, on such turnover, which has escaped the assessment earlier, depending upon the frequency of delinquency of the dealer. Sub-section (3) of Section 27 of the Act clearly required the Assessing Officer to be satisfied that the escape from the assessment is due to wilful non-disclosure of assessable turnover by the dealer. The provision under sub-section (3) of Section 27 of the Act, therefore, requires, such a clear finding as a condition precedent for exercise of power available thereunder. The finding that the Assessing Officer is satisfied about the

non-disclosure of turnover by the dealer also requires a specific finding that such non-disclosure is a wilful one, which observation is alone essential for imposition of a penalty."

7. In the case on hand, except alleging that there has been wilful non-disclosure of assessable turnover, there is nothing on record to show that the petitioner had deliberately acted with an intention to avoid payment of tax. In fact, all the materials have been gathered from the monthly returns filed by the petitioner and there is no other allegation to show that the petitioner had wilfully suppressed the turnover or refused to pay tax and intentionally avoided payment of tax. In such circumstances, the question of levy of penalty on the petitioner for the assessment years 2012-2013 & 2015-2016 does not arise.

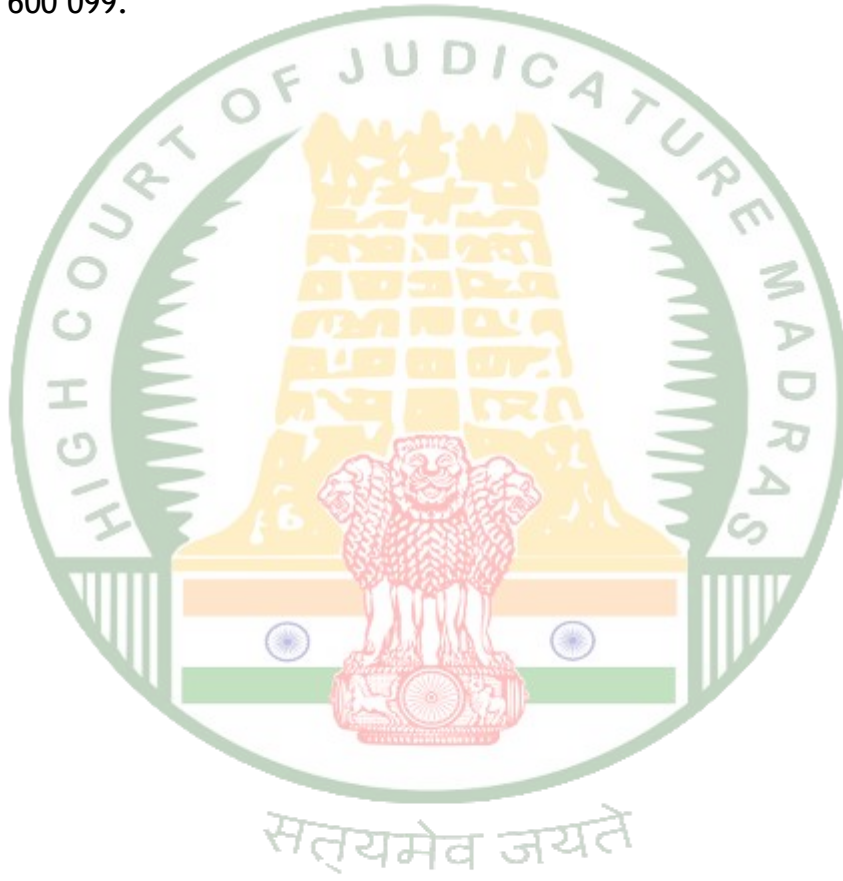
8. For all the above reasons, the writ petitions are allowed and the impugned orders of assessment levying penalty for the assessment years 2012-2013 & 2015-2016 are set aside. No costs.

nv/sai

06.09.2017

To

The Commercial Tax Officer,
Perambur Assessment Circle,
15 & 16 Malligai Avenue,
Kolathur,
Chennai - 600 099.



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T.S. SIVAGNANAM,J.

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