IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.01.2018

CORAM

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM

W.P.No.24939 of 2013

M/s.Pooja Marbles,
rep. by its Authorised Signatory, Vinod Rathi,
1/124, Mount Poonamallee Road,
Shivaji Gardens, Manapakkam,
Chennai - 600 089. ... Petitioner

Vs.

The Assistant Commissioner (CT),
Alandur Assessment Circle,
62, Vedagiri Pudupet Street,
Alandur, Chennai - 16. ... Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records of the respondent in his proceedings TIN/33620843990/2006-07 dated 28.06.2013 and quash the same as illegal in so far as the penalty levied under Section 40(2) of the TNVAT Act is concerned and direct the respondent to refund the TDS amount of Rs.1,00,000/- as per the provision of Section 13(6) of the TNVAT Act.

For Petitioner : Mr.S.Ramanathan

For Respondent : Mr.M.Hariharan
Additional Government Pleader

O R D E R

Heard Mr.S.Ramanathan, learned counsel for the petitioner and Mr.M.Hariharan, learned Additional Government Pleader for the respondent.

2.The petitioner who is the registered dealer on the file of the respondent under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (TNVAT Act) and the Central Sales Tax Act, 1956 (CST Act) is engaged in the business of dealing in marbles and also laying of tiles, marble granite work on contract basis. The petitioner had executed a contract work for M/s.DLF Info

City Developers (Chennai) Ltd., who are the developers of Special Economic Zone for the assessment year 2006-2007. The petitioner was assessed to tax on a total and taxable turnover of Rs.1,84,19,590.00 under Section 22 of the TNVAT Act. Subsequently, the petitioner's place of business was inspected by the officers of the Enforcement Wing on 31.08.2012 and during the course of inspection, it was pointed out that the petitioner has done works contract to M/s.DLF at Ramapuram and they have not exercised their option to pay tax under compounded scheme under Section 6 of the TNVAT Act. Therefore, it was pointed out that the petitioner was not eligible to file monthly return in Form "L" and accordingly, the respondent proposed to reject the return and assessed the turnover at 12.5% under Section 3(2) of the Act and to the said effect, notice dated 30.11.2012 was issued. The petitioner submitted their reply to the proposal stating that they undertook works contract for M/s.DLF Info City Developers (Chennai) Ltd. at Ramapuram which is located in Special Economic Zone and to that effect, they are eligible to claim the sale as zero rated sales. A copy of the letter of the Development Commissioner to prove that the contractee is located in Special Economic Zone was furnished for the information of the Assessing Officer. The respondent on receipt of the same accepted the stand taken by the petitioner and held that the petitioner is eligible for exemption on the contract receipt of RS.1,84,19,590.00. However, in the impugned assessment order, the respondent has stated that the TDS amount recovered and remitted by the contractee attracts penalty under Section 40(2) of the TNVAT Act and accordingly levied penalty of Rs.1 lakhs and adjusted the TDS to the said penalty. This order is impugned in this writ petition.

2.Firstly, it has to be pointed out that at no point of time the petitioner deducted the tax at source but it is the contractee for whom the petitioner executed the works contract had deducted tax at source and remitted it to the respondent. Therefore, the petitioner cannot be blamed for such deduction. This fundamental error would render the impugned proceedings as unsustainable. The respondent has referred to Section 40(2) of the TNVAT Act to justify his action in levying penalty. So far as the deduction of tax at source in works contract is concerned, the same is governed by Section 13 of the TNVAT Act. Sub-section (1) of Section 13 of the TNVAT Act starts with a non obstante clause stating that notwithstanding anything contained in the TNVAT Act, every person responsible for paying any sum to any dealer for execution of works contract shall, at the time of payment of such sum, deduct an amount calculated at the rates mentioned in the said provision. In order to protect the interest of dealers who are not liable to pay tax, sub-section (6) of Section 13 of the TNVAT Act provides for a remedy where the dealer can prove to the satisfaction of the Assessing

Officer that he is not liable to pay tax under Section 5 of the TNVAT Act, then the Assessing Officer shall refund the amount deposited under sub-section (2) of Section 13 of the TNVAT Act after adjusting the arrears of tax, if any, due from the dealer. Thus the deduction of tax at source was at the instance of the contractee. Therefore, even assuming such deduction was made, then if the dealer proves to the satisfaction of the respondent that he is not liable to pay tax, then the respondent is liable to refund the amount deposited to the dealer, namely, the petitioner herein.

3.Section 40 of the TNVAT Act deals with collection of tax. In terms of sub-section (1) of Section 40 of the TNVAT Act, no person, who is not a registered dealer, shall collect any amount by way of tax and no registered dealer shall make any such collection except in accordance with the provisions of the Act and the rules made thereunder. Sub-section (2) of Section 40 of the TNVAT Act states that if any person or registered dealer collects any amount by way of tax in contravention of the provisions of sub-section (1) of Section 40, the assessing authority may, after giving such person or dealer a reasonable opportunity of being heard, by order, in writing, impose upon him penalty. Even assuming that there was an illegal collection of tax, then without an opportunity of being heard penalty cannot be imposed. Admittedly in the revision notice dated 30.11.2012, there was no proposal to levy penalty under Section 40(2) of the TNVAT Act. However, more importantly, what is required to be seen is whether Section 40(2) of the TNVAT Act would stand attracted to the case on hand. Admittedly, the petitioner not deducted tax at source and therefore, the petitioner cannot be brought within the ambit of sub-section (1) of Section 40 of the TNVAT Act. If that be so, the question of invoking sub-section (2) of Section 40 of the TNVAT Act does not arise. However, in the instant case the contractee has deducted tax at source on the premise that the works contract are taxable. However, when the assessment proceedings were made, the petitioner was able to convince that the Assessing Officer by records that the transaction done by the petitioner is entitled for exemption which plea was accepted and assessment was completed. Therefore, the respondent could not have levied penalty at the first instance and could not have adjusted the tax which was deducted at source by the contractee and remitted to the respondent towards the petitioner's account. In fact, the respondent should have refunded the amount to the petitioner as a consequence of holding that the petitioner is eligible for exemption of the contract receipt. Thus, for the above reasons, the impugned order is wholly unsustainable in law and the levy of penalty and the adjustment of TDS towards the said penalty is illegal.

4.In the result, the writ petition is allowed, the impugned order is set aside and the respondent is directed to refund a sum of Rs.1 lakh to the petitioner within a period of six weeks from the date of receipt of a copy of this order. No costs.

Sd/-
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

cse
To

The Assistant Commissioner (CT),
Alandur Assessment Circle,
62, Vedagiri Pudupet Street,
Alandur, Chennai - 16.

+1cc to Mr.S.Ramanathan, Advocate Sr.No.6122
+1cc to Special Government Pleader sR.No.6711

sm:9.3.2018

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