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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED :**26.02.2018**

CORAM:

THE HONOURABLE MR.JUSTICE **T.S.SIVAGANAM**

and

THE HONOURABLE MRS.JUSTICE **R.THARANI**

W.A(MD)No.136 of 2018
and
C.M.P.(MD).No.702 of 2018

Tvl. Famous Tiles Park,
represented by its Partner
Thiru C.C.Chandramohan,
D.No.13/165-5, Selvavinayaga Puram,
Pavoor Chatram, Branch at 24-B2, S.N.High Road,
Tirunelveli. ... Appellant

Vs.

1. The Commissioner of Commercial Taxes,
2nd Floor, Elilagam, Chepauk,
Chennai 600 005.

2. The Assistant Commissioner (C.T)(FAC),
Tenkasi,
Tirunelveli District. ... Respondents

PRAYER: Writ Appeal is filed under Clause 15 of Letters Patent against the order passed by this Court in W.P.(MD).No.3454 of 2011, dated 24.11.2017.

Prayer in WP(MD). 3454/ 2011 :

Writ Petition is filed under Article 226 of the Constitution of India, praying this Court to issue a WRIT OF CERTIORARIFIED MANDAMUS, to call for the records relating to the proceeding passed in TIN 33345683959/2010-11 dated 28-12-2010 received by the Petitioner on 06-01-2011 and quash the same and to direct the second Respondent to consider the advance tax paid by the Petitioner for adjustment of the same in the monthly return for the month of October 2010.

For Appellant : Mr.A.S.Mujibur Rahman

For Respondents : Mr.A.Muthu Karuppan
Additional Government Pleader

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JUDGMENT

[Judgment of the Court was delivered by **T.S.SIVAGANAM,J.**]

Heard Mr.A.S.Mujibur Rahman, learned counsel for the appellant and Mr.A.Muthu Karuppan, learned Additional Government Pleader appearing for the respondents.

2. With the consent of either side, the Writ Appeal itself is taken up for disposal.

3. The appellant has filed this writ appeal challenging the order in W.P.(MD).No.3454 of 2011, dated 24.11.2017. The appellant/writ petitioner has filed the said writ petition challenging the proceedings of the second respondent, dated 28.12.2010, which is an assessment order passed by the second respondent under the provision of Tamil Nadu Value Added Tax Act, 2006 (TNVAT Act). The appellant/writ petitioner, who is the registered dealer on the file of the second respondent under the provisions of Tamil Nadu Value Added Tax Act, is dealing in Ceramic Tiles. The business premise of the appellant/writ petitioner was subjected to VAT Audit, in which there was an allegation that there was a deficit stock of Rs.22,45,288/-. During the course of the VAT Audit, a sum of Rs.3,08,727/- was collected as the value added tax for the deficit stock. The second respondent issued a notice, dated 22.11.2010, while admitting that a sum of Rs.3,08,727/- was collected as tax on the deficit stock, the same cannot be adjusted towards monthly tax due. On receipt of the notice, the appellant / writ petitioner submitted their objection, dated 14.12.2010, requesting that the payment collected from them may be adjusted. However, the second respondent, while completing the assessment and passing the order dated 28.12.2010, accepted that a sum of Rs.3,08,727/- was collected by the Audit officials, declined to reckon the said payment towards the monthly tax due and directed the appellant to pay the amount along with the interest under Section 42(3) of the VAT Act. This order was put to challenge by the appellant/writ petitioner by way of the writ petition.

4. At the time when the writ petition was entertained, an interim order was granted, directing the appellant / writ petitioner to pay 30% of the disputed tax within a time frame. The appellant/writ petitioner had given a Demand Draft for Rs.95,000/-, which has been acknowledged by the second respondent, vide endorsement in the letter delivery book, dated 04.05.2011. The writ petition came to be dismissed on the ground of availability of alternative remedy and that the appellant did not produce the receipt to prove that the interim order was complied with. In our considered view, since the writ petition was pending since 2011 and the assessment pertains to the year 2010 - 2011,

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it would be un-equitable to ask the appellant to avail the alternative remedy in the year 2017, especially when the entire tax due on the stock deficit has been recovered by the VAT Audit Officials.

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5. The settled legal position is that the Officials of the Enforcement Wing and the Audit Department are not entitled to collect tax during the course of audit, as if it is a payment towards advance tax and the Enforcement official is to make necessary proposals to the Assessing Officer of the concerned dealer to enable them to take action in accordance with law.

6. In our considered view, when the appellant has produced the endorsement in the letter delivery book showing that the Demand Draft for Rs.95,000/- was received by the second respondent, the burden is on the Department to state that the payment was not received by them and the appellant cannot be made to prove the same. Therefore, we are inclined to remand back the matter to the Assessing Officer for adjusting the tax collected from the appellant by the Audit Wing.

7. For the above reasons, the Writ Appeal is allowed and the impugned assessment order dated 28.12.2010, for the year 2010 under the TNVAT Act is set aside and the matter is remanded back to the second respondent for fresh consideration, who shall reckon the payment of Rs.3,08,727/- towards the tax liability and re-do the assessment in accordance with law, after affording an opportunity of personal hearing to the appellant. No costs. Consequently, the connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar

To

1. The Commissioner of Commercial Taxes,
   2nd Floor, Elilagam, Chepauk,
   Chennai 600 005.

2. The Assistant Commissioner (C.T)(FAC),
   Tenkasi,
   Tirunelveli District.

AKV

VB/SKN/RSK/SAR3/10.04.2018/3P/3C

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