IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:09.04.2019

CORAM

The Honourable Mr. Justice SENTHILKUMAR RAMAMOORTHY

Writ Petition No.33892 of 2006 &

M.P.No.1 of 2006

M/s.Jairo Enterprises,
Rep. By its Proprietor, Mr.P.Jayapandian,
No.340-B, Ist Main Road,
VI Cross Street, Nehru Nagar,
Old Mahabalipuram Road,
Chennai-600 096.

... Petitioner

Vs

The Deputy Commercial Tax Officer,
Back Year Assessment Circle-Zone-VII,
No.98A, A.V.Church Road, Besant Nagar,
Chennai-600 090.

... Respondent

PRAYER : Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records of the Respondent in TNGST/0923149//2003-04 quash the impugned proceedings dated 26.06.2006 as without jurisdiction and contrary to the provisions of the Tamil Nadu General Sales Tax Act, 1959.

For Petitioner : Mr.V.Sundareshwaran

For Respondents : Mr.V.Haribabu AGP (Taxes)

ORDER

This writ petition is filed for a Writ of Certiorari to quash the impugned proceedings dated 26.06.2006 as without jurisdiction and contrary to the provisions of the Tamil Nadu General Sales Tax Act, 1959 (TNGST Act).

2.The case of the Petitioner is that the Petitioner is a registered dealer on the file of the Respondent and is a reseller of Pepsi soft drinks. For the Assessment Year TNGST 2003-04, the Petitioner paid a sum of Rs.62,215/- along with the returns. Thereafter, the Respondent issued a notice dated

14.05.2006 to the Petitioner proposing to impose penalty under Section 12(3)(b)(iv) at 125% in view of the difference between the amount that was paid as tax and the amount due towards tax as determined by the Respondent. On receipt of the said notice, the Petitioner requested the Respondent not to proceed with the imposition of penalty and also undertook to remit the balance of re-sale tax. In order to show his bona fides, the Petitioner remitted a sum of Rs.20,000/- by way of cheque dated 05.07.2006 in favour of the Respondent. Meanwhile, the impugned order dated 26.06.2006 was issued whereby penalty of Rs.1,34,516/- was imposed on the Petitioner under Section 12(3)(b)(iv) of the TNGST Act.

3.At the hearing today, the learned counsel for the Petitioner submitted that penalty cannot be imposed unless the Petitioner failed to file a return or the return filed by the Petitioner was duly rejected and thereafter, best judgment assessment was made by the Assessing Officer. In this regard, he invited the attention of this Court to Section 12(2) and 12 (3) of the TNGST Act which read as follows:

> "Section 12(2) If no return is submitted by the dealer under sub-section (1) within the prescribed period, or if the return submitted by him appears to the assessing authority to be incomplete or incorrect, the assessing authority shall, after making such enquiry as it may consider necessary, assess the dealer to the best of its judgement [subject to such conditions as may be prescribed]: Provided that before taking action under this sub-section the dealer shall be given a reasonable opportunity of proving the correctness or completeness of any return submitted by him.
>
> Section 12(3) In addition to the tax assessed [under sub-section (1) or (2),] the assessing authority shall, in the same order of assessment passed [under sub-section (1) or (2) or by a separate order, direct the dealer to pay by way of penalty, a sum - (a) which shall be, in the case of failure to submit return, one hundred and fifty per cent of the tax assessed on final assessment; and (b) which shall be, in the case of submission of incorrect or incomplete return, -

(i) twenty-five per cent of the difference of the tax assessed and the tax paid as per return, if the tax paid as per the return falls short of the tax assessed on final assessment by not more than five per cent;

(i-a) fifty per cent of the difference of the tax assessed and the tax paid as per return, if the tax paid as per the return falls short of the tax assessed on final assessment by more than five per cent but not more than fifteen per cent;

(ii) seventy-five per cent of the difference of the tax assessed and the tax paid as per return, if the tax paid as per the return falls short of the tax assessed on final assessment by more than fifteen per cent but not more than twenty-five per cent;

(iii) one hundred per cent of the difference of the tax assessed and the tax paid as per the return, if the tax paid as per return, falls short of the tax assessed on final assessment by more than twenty-five per cent but not more than fifty per cent;

(iv) one hundred and twenty five per cent of the difference of the tax assessed and the tax paid as per the return, if the tax paid as per the return, falls short of the tax assessed on final assessment by more than fifty per cent, but not more than seventy-five per cent;

(v) one hundred and fifty per cent of the difference of the tax assessed and the tax paid as per the return, if the tax paid as per the return, falls short of the tax assessed on final assessment by more than seventy-five per cent;"

4.In order to substantiate his submission, the learned counsel for the Petitioner invited the attention of this Court to the decision of the Hon'ble Division Bench of this Court in APPOLLO SALINE PHARMACEUTICALS (P) LTD., V. COMMERCIAL TAX OFFICER (FAC) AND OTHERS, 125 STC 2002 wherein at paragragh-5, it was held as follows:

"5. The Supreme Court in the case of State of Madras v. Jayaraj Nadar & Sons after extracting Section 12(2) of the Tamil Nadu General Sales Tax Act, 1959 which remains in the same form even now, observed thus :

"The question is whether penalty can be levied while making the assessment under Sub-section (2) of the above section merely because an incorrect return has been filed. The High Court was of the view that it is only if the assessment has to be made to the best of the judgment of the assessing authority that penalty can be levied. It seems to us that the High Court came to the correct conclusion because Sub-sections (2) and (3) have to be read together. Sub-section (2) empowers the assessing authority to assess the dealer to the best of its judgment in two events : (i) if no return has been submitted by the dealer under Sub-section (1) within the prescribed period, and (ii) if the return submitted by him appears to be incomplete or incorrect. Sub-section (3) empowers the assessing authority to levy the penalty only when it makes an assessment under Sub-section (2). In other words, when the assessing authority has made the assessment to the best of its judgment, it can levy a penalty. It is well-known that the best judgment assessment has to be on an estimate which the assessing authority has to make not capriciously but on settled and recognised principles of justice. An element of guess-work is bound to be present in best judgment assessment but it must have a reasonable nexus to the available material and the circumstances of each case : [see State of Kerala v. C.Velukutty (1966) 17 STC 465(SC] . Where account books are accepted along with other records there can be no ground for making a best judgment assessment."

5.Accordingly, the learned counsel for the Petitioner submitted that the instant case is squarely covered by the judgment of the Division Bench of this Court in the above mentioned case and that in view of the fact that the return filed by the Petitioner was not rejected by the Assessing Officer, penalty cannot be imposed under Section 12(3) read with 12(2) of the TNGST Act.

6.In response, the learned counsel for the Respondent pointed out that before imposing penalty by impugned order dated 26.06.2006, a notice dated 14.05.2006 was issued to the Petitioner calling for objections, if any, and that no objection was received from the Petitioner.

7.By way rejoinder submissions, the learned counsel for the Petitioner submitted that, on receipt of the said notice dated 14.05.2006, the Petitioner met the Respondent and requested that penalty should not be imposed and also undertook to remit the balance of the resale tax amount. In that connection, it was submitted that the Petitioner remitted a sum of Rs.20,000/- by way of cheque dated 05.07.2006, which is also included in the typed set of papers.

8.On considering the affidavit, documents on record and oral submissions, it is very clear that the Assessing Officer proceeded to impose penalty by impugned order dated 26.06.2006 without rejecting the return filed by the Petitioner. This course of action is contrary to the provisions of Section 12(2) of the TNGST Act. Consequently, penalty cannot be imposed under Section 12(3) of the said Act. As correctly contended by the learned counsel for the Petitioner, the Hon'ble Division Bench of this Court held that penalty cannot be imposed unless return is not filed or the filed return is rejected and, thereafter, assessment is made on best judgment basis. Neither of these requirements were fulfilled in the instant case. Accordingly, the impugned order is liable to be set aside.

9.In the result, the Writ Petition is allowed and the impugned order dated 26.06.2006 is set aside. No costs. Consequently, connection miscellaneous petition is closed.

sd/
ASSISTANT REGISTRAR

/TRUE COPY/

SUB-ASSISTANT REGISTRAR

To

The Deputy Commercial Tax Officer,
Back Year Assessment Circle-Zone-VII,
No.98A, A.V.Church Road, Besant Nagar,
Chennai-600 090.

+1 CC to Mr.V.Sundareshwaran, Advocate Sr.No.35460

+1 CC to The Special Government Pleader (Taxes) Sr.No.35460

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PA (CO)
TA-07/06/2019