IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.12.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

W.P. No. 38625 of 2015
and
M.P. No. 1 of 2015

M/s. TAW Trading Corporation,
Represented by its Partner Mr.T. Rafeeq Ahmed,
No.55/27, Vepery High Road,
Periamet, Chennai - 600 003. ... Petitioner

vs

The Commercial Tax Officer,
Vepery Assessment Circle,
No.10, Third Floor, Greams Road,
Chennai - 600 006. ... Respondent

Prayer: Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records of the Respondent in TIN:33550524171/2011-2012 quash the impugned order dated 24.07.2015 and further direct the Respondent not to recover any penalty under Section 27 of the Tamilnadu Value Added Tax Act, 2006.

For Petitioner : Mr. V. Sundareswaran
Standing Counsel

For Respondent : Mr. V. Haribabu
Additional Government Pleader

ORDER

The Petitioner has challenged the impugned order dated 24.07.2015 bearing reference TIN:33550524171/2011-12. By the impugned order, the Respondent Commercial Tax Officer, Vepery Assessment Circle has rejected the application filed for rectification of order dated 30.04.2015 bearing reference TIN:33550524171/2011-12.

2. The Petitioner was originally issued with a notice dated 30.01.2015, wherein it was proposed to deny the credit availed in the input tax credit to the extent of Rs.40,808/- on the ground that the selling dealer had

failed to pay tax. The said notice also sought to deny exemption on certain turnover as towards sales return. Accordingly, the Petitioner was called upon to pay the differential tax and reverse of the aforesaid input tax credit.

3. The Petitioner replied to the Show Cause Notice, which culminated in an order dated 30.04.2015 of the Respondent Commercial Tax Officer.

4. Under these circumstances, the Petitioner filed another application for rectification of the said Assessment Order dated 30.01.2015 before the Respondent Commercial Tax Officer on 19.05.2015, which culminated in the impugned order dated 24.07.2015.

5. In these two orders, the Respondent Commercial Tax Officer confirmed the demand for reversal of input tax of Rs.40,808/- and had enhanced the tax due from Rs.2,30,024/- to Rs.2,74,600/- in response to the application filed by the Petitioner for rectification of the order dated 30.04.2015.

6. The Petitioner once again filed another application for rectification on 19.08.2015, which culminated in yet another order dated 25.09.2015 under Section 84 of TNVAT, 2006.

7. The balance tax demanded and penalty imposed under the respective orders are detailed as under:-

Sl.No	Description	Amount Demanded in Order Dated 30.04.2015 Rs.	Amount Demanded in Impugned Order Dated 24.07.2015 Rs.	Amount Demanded in Order Dated 25.09.2015 Rs
1	Balance to be paid	2,30,024.00	2,74,600.00	62,440.00
2	Imposed Penalty	1,55,820.00	* 1,78,108.00	* 1,78,108.00
	Total	3,85,844.00	4,52,708.00	2,40,548.00

Penalty : Rs.1,37,300/- under Section 27(3)(a)
Rs. 40,808/- under Section 27(4)(ii)

Rs. 1,78,108 *
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8. Though the impugned order dated 24.07.2015 has merged with the order dated 25.09.2015, the Petitioner has challenged the impugned order dated 24.07.2015 bearing reference TIN:33550524171/2011-12 in this Writ Petition.

9. The learned counsel for the Petitioner submits that the Petitioner has admitted to the tax liability as far as the denial of exemption is concerned and is not pressing for any relief. He however submits that imposition of penalty under Sections 27(3)(a) and 27(4)(ii)of the TNVAT Act, 2006 cannot be justified.

10. The learned counsel for the Petitioner submits that penalty under Section 27(3) is discretionary and shall be invoked only when the assessing officer had found that there was an "escapement from the assessment and is due to the willful non-disclosure of assessable turnover". On the contrary, when there was a claim of exemption in the return supported by records enclosed, which was rejected by officer, it ceases to be a "non disclosure" much less a "wilful non-disclosure" to visit the petitioner with penalty under Section 27(3).

11. The learned counsel for the Petitioner further submitted that penalty under Section 27(4) can be imposed only when the claim of input tax credit has been availed wrongly by producing "false bills", "false vouchers", "false declaration certificates" or any other false documents, which is not the allegation of the Respondent. On other hand, the reason for reversing the Input tax credit is "mis-match" (i.e) the party on the other end had not reported the turnover in the same month and paid tax due thereon. He also submits that on this issue, this Hon'ble Court had already quashed similar order reported in 50 VST 179 following the same, this Court had allowed number of Writ Petitions.

12. He further submitted that the entire tax had already been remitted. It is only for the reason that the Respondent had taken steps to recover penalty.

13. Per contra, the learned counsel for the Respondent submits that the penalty under Section 27 (3) is not discretionary. As per Section 27(3) of the Act penalty is

leviable when assessable turnover was willfully not disclosed.

14. The learned counsel for the Respondent further submits that defects were noticed at the time of inspection, that every defects involve some taxable turnover which were not willfully disclosed by the Petitioner in the monthly returns filed. In view of the facts, penalty levied under Section 27(3) was in order.

15. He further submitted that penalty levied under Section 27(4) is for wrong availment of ITC. But not for production of false bills, vouchers etc as presumed by the Petitioner.

16. It is further submitted that the Petitioner has not remitted the entire tax and penalty as per assessment order dated 25.09.2015. In fact, the Petitioner has not paid any amount of balance of tax and penalty of Rs.1,78,108/-.

17. I have considered the submissions of the learned counsel for the Petitioner and the Respondent and also perused the orders passed by the respondent. The imposition of penalty under section 27 (3) of the TNVAT Act, 2006 is attracted if the assessing authority is satisfied that the escape from the assessment was due to wilful non-disclosure of assessable turnover by the dealer.

18. Section 27(3) & 27(4) of the TNVAT Act, 2006 reads as under:-

> 27. Assessment of escaped turnover and wrong availment of input tax credit:-
> (1)....................
> (2)....................
> (3) In making an assessment under clause (a) of sub-section (1), the assessing authority may, if it is satisfied that the escape from the 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 sub-section (1), by way of penalty a sum which shall be -
>
> (a) fifty per cent of the tax due on the turnover that was wilfully not disclosed if the tax due on such turnover is not more than ten per cent of the tax paid as per the return;
>
> (b) one hundred per cent of the

tax due on the turnover that was wilfully not disclosed if the tax due on such turnover is more than ten per cent but not more than fifty per cent of the tax paid as per the return.

(c) one hundred and fifty per cent of the tax due on the assessable turnover that was wilfully not disclosed, if the tax due on such turnover is more than fifty per cent of the tax paid as per the return;

(4) in addition to the tax determined under sub-section (2), the assessing authority shall direct the dealer to pay as penalty a sum

(i) which shall be in the case of first such detection fifty per cent of the tax due in respect of such claim; and

(ii) which shall be in the case of second or subsequent detections, one hundred per cent of the tax due in respect of such claim:

Provided that no penalty shall be levied without giving the dealer a reasonable opportunity of showing cause against such imposition.

19. In this case, the Petitioner had wrongly claimed exemption. Thus, there is a non-disclosure of the assessable turnover in the returns filed by the Petitioner for the purpose of assessment. Therefore, it cannot be argued that there was adequate disclosure of the taxable turnover by the Petitioner.

20. At the same time, there is no discussion as to whether such non-disclosure of assessable turnover was wilful by the Petitioner in the impugned order. Therefore, imposition of penalty under section 27(3) of the TNVAT Act, 2006 cannot be sustained without reasoning.

21. Similarly, to impose a penalty under section 27(4)(ii) of the TNVAT Act, 2006 in the case of 2nd or subsequent deduction, an amount equal 100% of the tax in

respect of such claim can be imposed. Again there is no discussion in the impugned order as to how the penalty was imposable. Therefore, the penalty imposed under the respective provisions of the TNVAT Act, 2006 being without proper discussion cannot be sustained.

22. Under these circumstances, the impugned order is quashed and the case is remitted back to the Respondent to pass a speaking order. The Respondent shall pass a speaking order within a period of three months from the date of receipt of a copy of this order, giving proper reasons and justification, as to why penalty under the respective provisions can be imposed on the Petitioner. Such order shall be passed after giving adequate opportunity to the Petitioner to represent itself in such de novo proceeding.

23. The writ petition stands allowed with the above observation. No cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

arb
To
The Commercial Tax Officer,
Vepery Assessment Circle,
No.10, Third Floor, Greams Road,
Chennai - 600 006.

+1 cc to Spl Government Pleader(Taxes) Sr.No. 104076

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and
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A.SK(24/02/2020)