IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.03.2019

CORAM

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case (Revision) Nos.126, 127, 128 and 129 of 2018

Appellate Assistant Commissioner (CT)
Commercial Tax Department
Puducherry – 605 005. ... Petitioner in all the petitions

- Vs -

M/s.Arun Agencies
rep.by its Proprietor, Nagabhushanam
Cuddalore Main Road,
Thavalakuppam, Puducherry. ..Respondent in all the petitions

Prayer : Revisions under Section 58 of the Pondicherry Value Added Tax Act, 2007, against the orders the Income Tax Appellate Tribunal, Puducherry in Tax Appeal Nos. 19, 20, 21 and 22 of 2017 dated 26.04.2018, and this Appeal preferred against the orders dated 12.04.2017 made in Appeal No.23/PGST/2010/11/AAC, Dated 21.04.2017 made in Appeal No.24/PVAT/2010-11/AAC and dated 28.04.2017 made in Appeal No.1 and 2/PVAT/2011-12/AAC respectively on the file of the Appellate Assistant Commissioner (CT) Commercial /tax Dept, Puducherry filed against the Assistant Assessment order dated 23.09.09, and 04.08.10 on the file of the Commercial Tax officer II, Puducherry for the Assessment year 2007-08(PGST), 2008-2009, 2009-2010 respectively.

For Petitioner : Mrs.N.Mala,
Additional Government Pleader (Puducherry)

For Respondent : Mr.A.M.R.Jayaprathap

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JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

Heard Mr.R.Mala, learned Special Government Pleader (Puducherry) and Mr.A.N.R.Jayaprathap, learned counsel appearing for the respondent. There are two sets of tax cases in this batch, one set filed by the revenue and the other filed by the

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respondent, who is the registered dealer on the file of the Commercial Tax Officer-II (Puducherry). In this case, the department shall be referred to as "revenue" and the respondent shall be referred to as "assessee". The revenue has raised the following substantial questions of law for consideration of this court.

> "a. The learned Presiding Officer, for the purpose of reducing penalty amount without valid/adequate justification had accepted the reasoning of the respondent / assessee that due to incurring of heavy loss in the business due to overheads and competition in business, he finds difficulty to pay the penalty amount as imposed by the assessing officer.
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> b. The Presiding Officer has failed to observe that the respondent had paid the entire disputed tax as per the assessment order and also not disputed the tax which was confirmed by the assessing officer based on the suppressed turn over and therefore the respondent has no right to get reduction of the penalty amount levied by the Assessing Officer. Further, the learned Presiding Officer has failed to observe that a court of law cannot exercise its discretionary jurisdiction dehorse the statutory law and its discretion must be exercised in terms of the existing Statute. The learned Presiding Officer has also failed to consider that the respondent had collected the tax for the sold petroleum products as an agent of the Government, but failed to remit the entire tax collected by him and the respondent had not disputed the suppression of turnover and as such the reason adduced by the learned Presiding Officer to reduce the penalty amount is totally against the statute.
>
> c. The learned Presiding Officer failed to consider that sympathy cannot supplant the assessee's culpability act of dishonest suppression of turnover."

2. The matter concerns the levy of penalty on the assessee for suppression of taxable turnover under the provisions of the

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Pondicherry General Sales Tax Act, 1967 for the Assessment Year 2007-08, and Pondicherry Value Added Tax Act for the assessment years 2008-09 and 2009-10. The Assessing Officer issued pre-assessment notices proposing to revise the turnover on the ground that the assessee had suppressed the taxable turnover and the claim for exemption was erroneous. Though the assessee received the pre-assessment notices, they did not submit any reply. Consequently, the proposal in the notices was confirmed and the assessment orders were passed. After the assessment orders were passed, the assessee has paid the entire tax in instalments. For the assessment year 2007-08, the assessee remitted the tax in seven installments, for the assessment year 2008-09 in fourteen installments and for the assessment year 2009-10, in ten installments. Thereafter, the assessee filed the revised return and sought to reopen the assessment. According to the assessee, this revised return has not been taken into consideration and it has not been accepted or rejected. Hence the assessee filed appeals before the Commercial Tax Officer. The first appellate authority dismissed the appeals by separate orders. Aggrieved by the same, the assessee preferred appeals before the Sales Tax Appellate Tribunal, the Court of the Chief Judge, Puducherry. The tribunal, by the impugned order, allowed the appeals filed by the assessee and reduced the penalty to 100% instead of 200% imposed by the Assessing Officer and confirmed by the first appellate authority. The revenue is aggrieved by such reduction and they have filed tax case revisions. The assessee is aggrieved in not deleting the penalty in its entirety.

3. The first contention raised by the assessee is on the ground that they have filed revised return under Section 26 of the Puducherry Value Added Tax Act and such revised return was neither considered / accepted or rejected. The question is whether the assessee is entitled to file a revised return. The answer lies in Section 26 of the Act, which reads as follows.

> "26.If any registered dealer discovers any mistake or error in any return furnished by him, he may furnish a revised return subject to following conditions:
> (a) A dealer shall not be eligible to furnish revised return if any action, either has been initiated or is pending under section 24 or section 30 or under any other section of this Act.
> (b)If any amount is becoming due for refund as per revised return, such revised return shall be furnished within three months from the close of the year to which such return relates to and shall be accompanied by an application stating the circumstances on which the revised return is filed. The refund will be due only after confirmation by the

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assessing authority by issue of a notice as may be prescribed.

(c) If any amount is due to be paid by a dealer as per revised return, such return may be furnished at any time and will be accepted by the assessing authority, if the return is accompanied by the proof of payment of balance tax as per the revised return and penalty as prescribed under sub-section (4) of section 37 of this Act."

4. In terms of Clause (a) of the Puducherry Value Added Tax Act, the dealer shall not be eligible to file revised return if any action either has been initiated or pending under Section 24 or under Section 30 or under any other Section under the Puducherry Value Added Tax Act. Admittedly, the proceedings were initiated under Section 24(1) of the Act and the pre-assessment notices were issued in June 2006. The assessee, after having suffered the assessment order and agreeing to pay the tax, had filed the revised return. Such revised return is not a return in the eye of law and it is not maintainable. Therefore, the question of either accepting or rejecting such return does not arise, as such return can never be taken on file. Therefore, the contention raised by the assessee before us, based on the plea that they have filed revised return, deserves to be outrightly rejected and it is accordingly rejected.

5. Learned counsel for the assessee would contend that given the fact that the assessee has paid the entire tax in the installments provided for, the Court may exercise jurisdiction and waive the penalty in toto or reduce it substantially so that the assessee is relieved of her burden. Mrs.R.Mala, learned Additional Government Pleader (Puducherry) would vehemently contend that the question of exercising sympathy does not arise in such matters and what the tribunal has done, is a clear case of misplaced sympathy and therefore, the order passed by the Assessing Officer should be restored and the tax case revisions filed by the revenue should be allowed.

6. Section 24 falls in Chapter 4 of the Puducherry Value Added Tax Act, which deals with the assessment of tax in terms of sub-section (1) to Section 24, which provides that every registered dealer shall file the tax return for each period within 15 days after the end of the period in such a manner as may be prescribed. Sub section (2) to Section 24 states that the return submitted by the dealer along with tax due thereon shall be accepted as self assessment. The proviso empowers the assessing officer to exercise either at his discretion or as directed by the Commissioner, any dealer for detailed assessment for a year by scrutiny of accounts and may make best judgement assessment if so required. The power under the proviso has been invoked in the instant case, resulting in issuance of pre-

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assessment notices. The matters came to light by the assessing officer on cross verification of the purchase details of MS and HSD contained in C-forms issued by the assessee, which copy was received from Hindustan Petroleum Corporation Limited and from those documents, the assessing officer was of the prima facie opinion that there is suppression of taxable turnover. Therefore, the assessing officer proposed to revise the assessment for all the three years both under the Puducherry General Sales Tax Act and Puducherry Value Added Tax Act.

7. The assessee was offered an opportunity to put forth their objections. Though the assessee received the pre-assessment notices and requested time to submit their objections, which was also granted by the assessing officer, no objections were filed and subsequently, the assessing officer completed the assessment and confirmed the proposal in the pre-assessment notices. The assessee was successful before the first appellate authority as well as before the tribunal insofar as the tax liability is concerned. The assessee, even before us, does not dispute the tax liability and the entire liability has been cleared. The dispute before us is only with regard to the penalty. The revenue contends that 200% penalty as ordered by the assessing officer should be confirmed. The assessee contends that 100% penalty as reduced by the tribunal itself is excessive and the Court should wipe out the entire penalty, taking into account the fact that the assessee has paid the entire tax.

8. Section 24(3) states that when making any assessment under sub-section (2), the assessing authority may also direct the dealer to pay in addition to the tax assessed, a penalty not exceeding double the amount of tax due on the turnover that was not disclosed by the dealer in his return or, in the case of failure to submit a return, double the amount of tax assessed, as the case may be. The proviso uses the expression “may also direct”, which appears to give an opinion that there is a discretion vested with the assessing officer. Mrs.R.Mala, learned Special Government Pleader would contend that the discretion cannot be exercised without taking into consideration of the facts more particularly when it has been established that there has been suppression of the taxable turnover. Mr.Jayaprathap, learned counsel for the petitioner would contend “may also direct” denotes that there is a discretion with the assessing officer.

9. The tribunal, in the impugned order, has reduced the penalty to 100% from 200% as imposed by the assessing officer and confirmed by the first appellate authority. In doing so, the tribunal pointed out that though the Act provides that levy of penalty at the time of determination of tax liability,

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considering the facts and circumstances of the case, the tribunal holds that it is not appropriate to levy double the amount of penalty and was inclined to reduce the quantum of penalty to one time the tax due.

10. Learned Additional Government Pleader is right in her submission that the order passed by the tribunal does not contain elaborate reasons, as to why the tribunal was inclined to interfere with the penalty. She also presses into service the decision of the Division Bench in the case of Surya Service Station -Vs- The Appellate Assistant Commissioner (CT), Puducherry in Tax Case Revision Nos.29 to 31 etc., of 2018 batch of cases, dated 29.11.2018, wherein the Court had dismissed the tax case revisions filed by the assessee and allowed the tax case revisions filed by the department and restored the order of the original authority on identical set of facts.

11. As pointed out earlier, Section 24(3) uses the expression "may also direct" . In all cases, where the expression "may" is used, it cannot be stated it is discretionary. Similarly, whenever an expression "shall" is used, it may not always mean that is is mandatory. The provisions have to be interpreted considering the nature of the statute, in which such provision has been made and the facts of the case. In the instant case, the assessee was a dealer in petroleum products and admittedly there has been a suppression of taxable turnover. However, the fact remains that the assessee has paid the tax as quantified by the assessing officer, though not in one single shot, but in installments as granted by the department. The imposition of 200% penalty would require a clear finding of the condemnatious conduct of the assessee and that the conduct of the assessee was thoroughly lacking bonafide. In the assessment order, there is a proposal for one and a half or two times penalty for suppression. It is true that the assessee did not give any explanation to the pre-assessment notice. The objections raised by the assessee before the tribunal was identical to the objections raised in the case of Surya Service Station cited supra, which were rejected. However, taking note of the peculiar facts and circumstances of the case, we are of the view that imposition of penalty at 200% was excessive and levy of penalty at 100% would meet the ends of justice. Admittedly, the assessee has paid the entire tax liability in installments as granted by the department along with the tax equal to 2% of such amount for each month or part thereof, after the date specified for its payment in terms of Section 37(4) of the Puducherry Value Added Tax Act and therefore, we are of the view that the judgment of the tribunal needs to be sustained.

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12. For the above reasons, the tax case revisions are dismissed and the judgment of the tribunal dated 26.04.2018 is confirmed. No costs.

Sd/-
Assistant Registrar(CS-IV)

//True copy//

Sub Assistant Registrar

KST

To

1. The Appellate Assistant Commissioner (CT)
   Commercial Tax Department
   Puducherry - 605 005

2. The Principal District Judge, Sales Tax-Tax Appellate Tribunal, Puducherry.

3. The Commercial Tax Officer II, Puducherry

+8ccs to Mr.ANR.Jayaprathap, Advocate SR.No.24308

+1cc to Government Pleader SR.No.(Pondy)24323,24324,24325

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