IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2019

CORAM

THE HONOURABLE DR. JUSTICE ANITA SUMANTH

W.P.Nos.2732 to 2737 of 2017

WMP.Nos.2681 to 2686 of 2017

M/s. Kalyan Jewellers India Pvt. Ltd.
Rep by its. Manager
No.283, 5th Cross Street
100 Feet Road
Coimbatore ...Petitioner in all the W.Ps

--Vs--

The Assistant Commissioner (CT)
Commercial Taxes
Gandhipuram Circle
Coimbatore ... Respondent in all the W.Ps

Prayer: Writ Petitions filed under Article 226 of the Constitution of India, to issue a Writ or order of direction or any other Writ in the nature Writ of Certiorari, calling for the records of the respondent herein dated 29.12.2016 received only on 04.01.2017 in TIN:33532183658/2008-09 to 2013-14 and quash the same.

For Petitioner : Mr.M.S.Krishnan(SC)

for Mr.R.Krishna Prasad

For Respondents : Mr.V.Haribabu

Additional Government Pleader

O R D E R

This batch of writ petitions challenges orders dated 29.12.2016, in respect of the assessment periods 2008-09 to 2013-14 levying penalty in terms of Section 27(4) of the Tamil Nadu Value Added Tax Act, 2006 (in short 'Act').

2. The petitioner is a dealer on the files of the respondent officer as an assessee engaged in the trading of jewellery and gift articles. There was an inspection by the Enforcement Wing of the Commercial Taxes Department that had

embarked on a field audit of the petitioners' books of accounts relating to the periods 2008-09 to 2012-13. Pursuant to certain discrepancies noticed in the claim of Input Tax Credit (ITC), notices for revision were issued and orders of assessment dated 25.02.2014 passed as against which W.P.Nos.8788 to 8792 of 2014 were filed by the petitioner.

3. The writ petitions were disposed on 29.10.2014 setting aside the impugned orders and permitting the petitioner to file objections to the pre-assessment proposals along with supporting documents. The Assessing Officer was directed to hear the petitioner and pass reasoned orders on merits and in accordance with law. Thereafter, the petitioner filed objections dated 30.12.2014 and 09.05.2015 and revised orders came to be passed by the respondent on 30.11.2015.

4. The petitioner was of the view that the orders of assessment suffered from errors apparent on the face of the record, in so far as the respondent appeared to have failed to take into account the credit of Input Tax (Input Tax Credit 'ITC') available to the petitioner. Thus, a petition under Section 84 of the Act was filed on 22.12.2015 seeking revision of orders dated 30.11.2015. Pending the petition for rectification, the petitioner received notice dated 05.01.2016, reiterating the demands raised under orders dated 30.11.2015 on the ground that the availability of ITC was not brought to the notice of the Assistant Commissioner at the original instance and there was thus no mistake apparent on record, liable to be rectified in terms of Section 84 of the Act.

5. WP.Nos.2653 and 2654 of 2016 then came to be filed where the petitioner sought a mandamus directing the consideration of its petition for Rectification dated 22.12.2015. The writ petition came to be disposed by this Court on 01.02.2016 directing the respondent to consider the Rectification Petition and pass orders on merits and in accordance with law within a period of four weeks from date of receipt of the Courts' order.

6. On 04.01.2017, the petitioner received the impugned order dated 29.12.2016, imposing penalty under Section 27(4) for wrongful availment of ITC. According to the petitioner, the aforesaid order is without any legal sanction and is liable to be quashed since it does not find support from the provisions of Section 27(4) read with Section 27(2) of the Act.

7. In counter, the respondent refers to the modifications effected to the turnover originally in regard to the quantum of stock transfers, reversing the ITC on such stock transfers. Thereafter, it appears that the respondent had taken the rectification petition up for disposal in line with order of this Court dated 01.02.2016. The petitioner had also submitted yet another representation in regard to the reversal of ITC before the Principal Commissioner and Commissioner of Commercial

Taxes, Chennai upon consideration of which the Commissioner issued necessary instructions dated 31.03.2016 in Letter No.D3/723/2016 to the following effect:

> 'As it appears as stated in their representation, there are errors apparent on face of the record warranting revision under section 84 of the Act, it was instructed to examine the representation and relevant documents and revise the assessments under section 84 of the Act, if necessary based on merits in order to adhere not only fairness in Assessments, but also avoid Adverse comments later on by the Higher Judiciary in assessments'

8. Thus, the respondent concedes that there were errors apparent on the face of record warranting revision under Section 84. In the course of personal hearing the petitioner had furnished various records in connection with the reversal of ITC as follows:

> '1. Item wise local purchase, interstate purchase, exempted purchase, purchase from un-registered dealer, stock transfer in ward from other states.
>
> 2. Item-wide out ward stock transfer (overall) to other states from all source of purchases & receipts.
>
> 3. Item-wise outward stock transfer only from local purchases and purchases from un-registered dealer in which ITC was claimed & reversal of ITC to be made under sec 19(4) i.e. proportionate reversal of ITC.
>
> 4. Quantity-wise statement for Gold and Bullion in which major portion of item were transferred out to other states.
>
> 5. Some stock transfer in voices purchase/sales invoices-copies-produced as documentary evidence for support of stock transfer & reversal of ITC under section 19(4).'

9. The impugned order has thereafter been passed on 29.12.2016 after consideration of the petition for rectification as well as the Instructions issued by the higher officials, as per which there is no liability to regular tax after giving effect to the ITC claimed. The demand due from the petitioner has been quantified after reversal of ITC in terms of Section 19 (4), as follows:

Year	Tax Due u/s.12	Tax demand on reversal of ITC	Penalty	Total Amount
2008-09	26,66,277/-	Nil	6,28,062/-	32,94,339/-
2009-10	---	Nil	25,15,236/-	25,15,236/-
2010-11	33,99,999/-	Nil	2,87,13,538/-	3,21,13,537/-
2011-12	---	Nil	4,20,61,189/-	4,20,61,189/-
2012-13	---	Nil	8,12,34,786/-	8,12,34,786/-
2013-14	---	Nil	6,89,50,062/-	6,89,50,062/-
TOTAL	60,66,276/-	Nil	22,41,02,873/-	23,01,69,149/-

10. The penalty levied in the present case is in terms of Section 27(4) read with Section 27(2). The provisions are extracted herein to the extent they are relevant.

> 27. Assessment to escaped turnover and wrong availment of input tax credit.-...
>
> (2) Where, for any reason, the input tax credit has been availed wrongly or where any dealer produces false bills, vouchers, declaration certificate or any other documents with a view to support his claim of input tax credit or refund, the assessing authority shall, at any time within a period of five years from the date of order of assessment, reverse input tax credit availed and determine the tax due after making such a enquiry, as it may consider necessary:
>
> Provided:that no order shall be passed under sub-sections (1) and (2) without giving the dealer a reasonable opportunity to show cause against such order.
>
> ....
>
> (4) In addition to the tax determined under sub-section (2), the assessing authority shall direct the dealer to

pay as penalty a sum which shall be three 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.

11. The scheme of assessment under Section 27(2) relates to the wrongful availment of ITC supported by the production of false bills, vouchers, declaration certificates or other documents.

12. The quantification of such penalty hinges upon the tax determined to be due by the assessee. A demand of tax due to the revenue by an assessee is thus a sine qua non for the levy of penalty under Section 27(4), the provisions of sub-Section 4 making it amply clear that the levy of penalty shall be 300% of the tax due and as quantified under Section 27(2).

13. In the present case the tax due has been quantified as 'nil' in all the impugned orders (see the tabulation at paragraph 9). This is an admitted position. We are not concerned with the demand of purchase tax raised, for the reason that the reference to 'tax due' in Section 27(4) relates specifically to amount computed under Section 27(2) of Act and not under Section 12, relating to purchase tax. Thus, in a case such as the present, where there is no tax computed, the machinery for computation of penalty, being a percentage of the tax due, fails. The revenue is unable to produce any other order of assessment passed subsequent to order of this Court dated 01.02.2016 raising a demand of tax on reversal of ITC.

14. The relevant portion of the computation as per the impugned orders are extracted below:

2008-09

6.	Actual Balance due as per this order	Rs.	12,56.124/-
7.	Less:Reversal of ITC made in the return out of Rs.460329458	Rs.	12,56.124/-
8.	Net Balance Due	Rs.	Nil

2009-10

7.	Actual Balance due as per this order	Rs.	52,09,460/-
8.	Less:Reversal of ITC made out of Rs.460329458 in the monthly return	Rs.	52,09,460/-
9.	Net Balance Due	Rs.	Nil

2010-2011

	Actual Balance due as per this order	Rs.	5,08,00,363/-
	Less:Reversal of ITC made out of Rs.460329458 in the monthly return	Rs.	5,08,00,363/-
	Net Balance Due	Rs.	Nil

2011-12

7.	Actual Balance due as per this order	Rs.	7,32,38,879/-
8.	Less:Reversal of ITC made out of Rs.460329458/- in the monthly return	Rs.	7,32,38,879/-
9.	Net Balance Due	Rs.	Nil

2012-13

6.	Actual Balance due as per this order	Rs.	15,54,52,949/-
7.	Less:Reversal of ITC made out of Rs.460329458 in the monthly return	Rs.	15,54,52,949/-
8.	Net Balance Due	Rs.	Nil

2013-14

6.	Actual Balance due as per this order	Rs.	13,96,28,537/-
7.	Less:Reversal of ITC made out of Rs.460329458 in the monthly return	Rs.	13,96,28,537/-

6.	Actual Balance due as per this order	Rs.	13,96,28,537/-
8.	Net Balance Due	Rs.	Nil

15. The scheme of assessment & levy of penalty in terms of Section 27(2) read with Section 27(4), supports the position that the quantification of tax should result in an actual 'due' from the assessee in order to render the provision for levy of penalty workable.

16. The revenue also argues that the petitioner has an alternate remedy of statutory appeal and hence the present writ petition is not maintainable. I am of the view that the issue arising for determination as to the leviability of penalty per se, is a legal issue and hence the petitioner need not be relegated to statutory appellate remedy. This contention is also rejected.

17. In the light of the aforesaid discussion, the impugned orders are quashed and the present writ petitions allowed. Connected Miscellaneous Petitions are closed. No costs.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

Ska/s

To

The Assistant Commissioner (CT)
Commercial Taxes
Gandhipuram Circle
Coimbatore

+1 CC to The Spl. Govt. Pleader(T) sr 93148
+1 CC to M/s. Sarvabhuman Associates sr 92999.

W.P.No.2732 to 2737 of 2017

MP.Nos.1 & 1 of 2015

PVS(CO)

SP(14/02/2020)