IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.11.2019

CORAM

THE HONOURNABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.No.29903 of 2018
and
W.M.P.No.34908 of 2018
and W.M.P.No.11567 of 2019

Tvl.Arihant Granites & Marbles,
rep. by its Proprietor Mr.Nitesh Bhanavat
New No.105, Mannar Samy Koil Street,
Rayapuram,
Chennai - 13. ...Petitioner

Vs.

The Assistant Commissioner (ST)
Royapuram Assessment Circle,
No.20, Kummalamman Koil Street,
Chennai - 81. ...Respondent

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records on the files of the respondent in TIN/336621181841/2016-17 dated 28.03.2018 and quash the same being illegal, invalid without jurisdiction and violated the principles of natural justice and contrary to law.

For Petitioner : Mr.D.Vijayakumar
For Respondent : Mr.M.Hariharan
Additional Government Pleader (T)

O R D E R

This Writ Petition is filed challenging the order of the respondent dated 28.03.2018, relevant to the assessment year 2016-17 imposing penalty under Section 27(3) of the TamilNadu VAT Act,2006.

2. The short facts and circumstances which have driven the petitioner to file the present writ petition are as follows:

The petitioner is a dealer in granite and marbles and assessee on the file of the respondent. The Enforcement Wing officials inspected the petitioner's place of business on 21.07.2016. The Inspecting officials found that there was excess stock and directed the petitioner to pay the tax amount. Accordingly, the petitioner paid the tax amount of Rs.1,52,309/- by way of cheque dated 27.07.2016. Thereafter, a notice under Section 27(3) proposing to impose penalty was issued. By letter dated 29.05.2017, the petitioner objected the proposal. It is their specific contention that penalty cannot be levied if the tax amount is paid prior to the assessment notice. However, the respondent confirmed the proposal and issued the impugned order imposing the penalty under section 27(3) of the said Act.

3. Counter affidavit is filed narrating various facts and circumstances which warranted the imposition of penalty. It is their contention that the impugned order is a comprehensive order regarding the tax component with escaped turn over and the penalty payable under section 27(3) of the TNVAT Act,2006 and therefore, it is not a separate order for penalty.

4. Learned counsel for the petitioner submitted that the respondent is not entitled to pass the assessment order imposing penalty alone separately without there being an order of assessment in respect of the tax component. In support of his contention, the learned counsel relied on 2011(37) VST 594 (Madras) (SSD Oil Mills Company Ltd. v. State of Kerala) and an order made in W.P.No.32777/2015 dated 28.09.2016.

5. Learned Additional Government Pleader, on the other hand, contended that but for the inspection, the petitioner would have evaded the tax and therefore, the imposition of penalty is justifiable. However, in respect of the specific ground raised by the petitioner that no separate order for penalty can be passed, the learned Additional Government pleaser is not in a position to place any contra decisions as against the decisions relied on by the learned counsel for the petitioner.

6. Heard both sides.

7. It is seen that the petitioner's place of business was inspected by the Enforcement Wing officials on 21.07.2016 and they found some lapse, namely excess stock. Consequently, based on the demand made by the Enforcement Wing officials, admittedly, the petitioner has paid the tax amount of Rs.1,52,309/- on 27.07.2016. Thereafter, based on the report submitted by the Enforcement Wing officials, the respondent issued a notice on 18.04.2017 proposing to impose penalty at the rate of 150% of the tax due under section 27(3) of the Act. The petitioner filed their objection and however, the impugned order, imposing penalty at the rate of 100%, was passed by the respondent.

8. In my considered view, based on the report submitted by the Inspecting officials, the Assessing Officer ought to have issued a notice of proposal to the petitioner, both in respect of his tax liability as well as penalty, if so warranted, and passed the order of assessment thereafter upon hearing the petitioner in respect of both components. The payment of tax amount by the petitioner before the Inspecting officials will not and cannot be a reason for the Assessing Officer in not passing the order of assessment in respect of the tax component as well. It is already found in various decisions made by this Court that the report of the Inspecting officials cannot be the only source or reason for passing the order of assessment and on the other hand, it may be one of the source or reason for doing so, since the Assessing Officer while discharging the function of quasi judicial authority while making the assessment, has to pass an order with independent application of mind. In this case, the Assessing Office has straightaway issued the notice of proposal only for imposing penalty and thereafter, passed the impugned order confirming the proposal. Thus, it is evident that the order impugned in this writ petition is an independent order levying penalty alone without assessing the tax liability. The question as to whether the independent or separate order levying only penalty can be passed or not has been considered by this Court in a case reported in 1976 38 STC 382 wherein it was held that the Assessing Authority has no jurisdiction to impose penalty by a separate and independent order. The said decision was followed in 2011(37) VST 592 (Madras) (Rainbow Foundations Ltd. vs. Assistant Commissioner (CT) (FAC) T.Nagar (South) Assessment Circle, Chennai, wherein it is held as follows:

> 2. Quite apart from that the petitioner has relied on a decision of this Court in The Deputy Commissioner (C.T.) Comibatore V. V.S.R. Ramaswami Chettiar and Bros. reported in 38 STC 382 and stated that there could be no separate or independent order under Section 16(2) of the Act. Consequently, the assessing authority has no jurisdiction to levy penalty by a separate and independent order. However, by order dated July 30, 2009, the respondent confirmed the proposal on the view that Section 12C of the Act was inserted by Act 37 of 2006, consequently, the decision of this Court is passed prior to the insertion of section, which are not applicable to the facts of the case.
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> 3. Heard the learned counsel for the petitioner and the learned Additional Government Pleader (Taxes) appearing for the respondent.
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> 4. The decision of this Court in Deputy Commissioner (C.T.) Coimbatore V. V.S.R. Ramaswami

> Chettiar and Bros. reported in (1976) 38 STC 328 clearly holds that under Section 16(2) of the Act, the assessing authority has no jurisdiction to impose penalty by a separate and independent order. Even if a statute has brought in a new section by way of Section 12C, given the fact that Section 16(2) of the Act remains as it is, the view of the officer that by introduction by 12C Section 16(2) will lose its vitality, hence, the decisions have no relevance cannot be accepted by any standards of reasoning.
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> 5. In the circumstances, even though the writ petition is as against the penalty order, I have no hesitation in setting aside the order of the respondent, having regard to the law declared by this Court in the case of Deputy Commissioner (C.T.) Coimbatore V.V.S.R. Ramaswami Chettiar and Bros. reported in (1976) 38 STC 328 and on the admitted fact that the order passed by the respondent levying penalty is through an independent order under Section 16(2) of the Act. Accordingly, the Writ Petition is allowed. No costs. Consequently, M.P.No.1 of 2009 is closed.

9. In another decision made in W.P.No.32777/2015 dated 28.09.2016, the learned single Judge of this Court followed the above decision made in Rainbow Foundation's case and set aside the impugned oder imposing penalty alone. The said order reads as follows:

> 3. The short issue which falls for consideration in this writ petition is as to whether the impugned order could have been passed by the Assessing Officer imposing penalty by way of a separate order.
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> 4. The learned counsel on either side would fairly state that the issue involved in this writ petition is squarely covered in favour of the dealer, by a decision of this Court reported in [2011] 37 VST 592 [Mad] [Rainbow Foundations Ltd., Vs. Assistant Commissioner [CT] [FAC], T.Nagar [South] Assessment Circle, Chennai]. In the said case, an identical question arose for consideration and it was held as follows:-
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> > "Held, allowing the petition that under section 16[2] of the Act, the assessing authority had not jurisdiction to impose penalty by a separate and independent order. Even if a statute has brought in a new section by way of section 12C, given the

> fact that section 16[2] of the Act remained as it was, the view of the officer that by introduction of section 12C, section 16[2] would lost its validity, rendering the decision irrelevant, could not be accepted by any standard of reasoning. Therefore, the penalty levied through an independent order under section 16[2] of the Act was to be set aside."

5. By applying the above decision to the facts of the instant case, it has to be necessarily held that the impugned order is not sustainable. Accordingly, the writ petition is allowed and the impugned order passed by the respondent dated 10.09.2015 is set aside. No costs. Consequently, the connected miscellaneous petition is closed.

10. Learned Additional Government Pleader, as stated supra, is not in a position to place any contra decision in support of the Revenue.

11. In view of the above stated facts and circumstances and the findings rendered by this Court as well as the case laws relied on by the petitioner as extracted supra, the Writ Petition is allowed and the impugned order is set aside. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

To

The Assistant Commissioner (ST)
Royapuram Assessment Circle,
No.20, Kummalamman Koil Street,
Chennai - 81.

+1 cc to M/s.D.Vijayakumar,Advocate Sr.No. 95401
+1 cc to The Special Government Pleader(T), Sr.No.96146

AKM/16.12.19/5P-4C / W.P.No.29903 of 2018