BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 11.06.2019

CORAM

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P(MD)No.6039 of 2019
and
W.M.P(MD)No.4825 of 2019

Tvl.Aiswariya Fuels ... Petitioner

/Vs./

1.The Commissioner of Commercial Taxes,
O/o. The Principal and Special Commissioner of Commercial Taxes,
Ezhilagam, Chepauk, Chennai - 600 005.

2.The Assistant Commissioner (ST),
Palayamkottai Assessment Circle,
Commercial Taxes Buildings,
Reserve Line Road, Palayamkottai,
Tirunelveli District - 627 002. ... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari, calling for records pertaining to the impugned proceedings of the 2nd respondent in TIN 33425564993/2012-13 dated 30.08.2018 and quash the same.

For Petitioner : Mr.B.Rooban
For Respondents : Mrs.J.Padmavathi Devi
Special Government Pleader

ORDER

This writ petition has been filed seeking a Writ of Certiorari, quashing the impugned proceedings of the second respondent dated 30.08.2018.

2. Heard the learned counsel appearing for the petitioner and the learned Special Government Pleader appearing on behalf of the respondents.

3. The petitioner is an assessee on the file of the second respondent. It is a sole proprietorship and manages a Petroleum outlet of the Hindustan Petroleum Corporation Limited.

4. In respect of the period 2012-13, the petitioner filed returns within the timelines stipulated by the Tamil Nadu Value

Added Tax, 2006, [in short 'TNVAT Act'] reporting a total and taxable turnover of Rs.3,25,40,365/- and Rs.36,87,399/- respectively. The returns are to be accompanied with proof of remittance of the returned taxes. The petitioner enclosed cheques towards the tax dues, which were returned citing the reason 'insufficient funds'. The petitioner claims to have been facing financial crisis and on account of the same as well as her advanced age, did not also comply with the requirement to filed audited statement in Form-WW.

5. The second respondent thus issued a notice dated 24.07.2018 proposing to reverse input tax credit and to assess the turnover in accordance with law. The proposal also included levy of penalty under Section 22(5) of the TNVAT Act. Admittedly, there was neither compliance with the pre-assessment notice nor any co-operation extended by the petitioner for completion of assessment. Thus, the proceedings culminated in the impugned order of assessment dated 30.08.2018 confirming the proposal in full.

6. In assessment, the authority confirmed the proposals in notice, computing the tax upon the total and taxable turnover as returned by the petitioner at a figure of Rs.5,34,673/- along with interest under Section 42(3) of the TNVAT Act. This amount, admittedly, has been remitted by the petitioner on 18.02.2019.

7. The order of assessment also rightly levies penalty of a sum of Rs.10,000/- under Section 63-A of the TNVAT Act for non filing Form-WW. This has also been admittedly remitted by the petitioner on 18.02.2019.

8. Inter alia, the assessing authority has also levied penalty under Section 22(5) of the TNVAT Act and it is this levy that forms the challenge in the writ petition.

9. According to the learned counsel appearing for the petitioner, penalty under Section 22(5) of the TNVAT Act shall be levied only upon the difference, if any, between the turnover returned and turnover assessed. In the present case, there is no difference and as such, the provisions of Section 22(5) of the TNVAT Act are not attracted at all.

10. The petitioner relies on the decision of following decisions:

(i) Appollo Saline Pharmaceuticals (P) Ltd. vs. Commercial Tax Officer (Fac) and Others (2002 125 STC 505 Mad) (Division Bench of the Madras High Court);

(ii) Sri Kanchi Steel Pvt. Ltd., vs. The Deputy Commercial Tax Officer (Decision dated 03.08.2017 in W.P.No.8223 & 8224 of 2006 of the Learned Single Judge of the Principal Bench of this Court);

(iii) Thiru.R.Krishnamurthy vs. Special Commissioner of Commercial Tax and another (Decision dated 09.08.2017 in

W.P.No.16404 & 16405 of 2005 of the Learned Single Judge of the Principal Bench of this Court).

11. Per contra, the second respondent argues that the levy of penalty is perfectly in order and is not liable to be disturbed.

12. Heard learned counsel and perused the judgments relied upon.

13. The provisions of Section 22(5) of the TNVAT Act are material to the adjudication of the lis in this matter and are extracted below:

> 'Section 22. Deemed assessment and procedure to be followed by assessing authority.-
>
> .....
>
> Section 22(5) In addition to the tax assessed under sub-section (4), the assessing authority shall, in the order of assessment passed under sub-section (4) or by a separate order, direct the dealer to pay by way of penalty, a sum which shall be, one hundred and fifty per cent of the difference of the tax assessed and the tax already paid as per the returns
>
> Provided that no penalty under this sub-section shall be imposed after the period of six years from the date of assessment order unless the dealer affected has had a reasonable opportunity of showing cause against such imposition.
>
> Explanation.- For the purpose of levy of penalty under this sub-section, the tax assessed on the following kinds of turnover shall be deducted from the tax assessed under sub-section (4):-
>
> (I) Any turnover representing additions to the turnover as per the returns made by the assessing authority without reference to any specific concealment of turnover;
>
> (ii) Any turnover estimated by the assessing authority with reference to any specific concealment of turnover as per the returns;
>
> (iii) Any turnover on which tax is paid at the concessional rate subject to the condition of furnishing any declaration but where such declaration could not be furnished at the time of assessment."

14. The provisions of Section 22 of the TNVAT Act provide for the procedure to be followed in cases of deemed assessment. In terms of Sub-Section 1 thereof, an assessment shall be made on the turnover returned by the petitioner; Sub-Section 2 stipulates that the returns shall be accepted if they are in the prescribed form, accompanied with the prescribed documents and proof of payment of

tax. Sub-Section 3 provides for a random selection of returns for initiation of detailed scrutiny of such returns. Sub-Section 4 empowers the assessing authority to assess a dealer to the best of his judgment, if the dealer has not come forth to file a return of income or if the return filed is incomplete or incorrect or unaccompanied by required documents or proof of payment of tax. Sub-Section 5 prescribes penalty to be imposed upon the difference of tax assessed and tax paid as per returns.

15. In this case, the tax assessed is a sum of Rs.5,34,673/- and though the returns of turnover also compute the turnover at an identical amount, no tax was paid along with the returns, admittedly. The demand was settled by the petitioner only on 18.02.2019, post-assessment. There is, thus a variation between the tax assessed and tax paid as per returns.

16. The Explanation to the provision states that tax assessed upon three kinds of turnover shall be deducted from the tax assessed under Sub-Section 4 of Section 22 of the TNVAT Act and it is only the resultant tax that shall be the basis for the levy of penalty. The three kinds of turnover relate to (i) turnover representing additions made by the assessing authority, (ii) turnover estimated without reference to concealment and (iii) turnover on which taxes paid at a concessional rate subject to furnishing of declaration, where such declaration has not been furnished at the time of assessment.

17. A perusal of the impugned order relates that there has been no addition to the turnover at all and the returns filed by the petitioner have been accepted as such and absolutely. Tax computed is thus on the basis of the returned turnover only. In such circumstances, tax imposed on the entirety of the turnover will stand excluded by virtue of the explanation and nothing remains, upon which penalty could be levied. If it were so, the demand of Rs.5,34,673/- that has been remitted with interest under Section 42 (3) of the TNVAT Act cannot be the basis for levy of penalty under Section 22(5) of the TNVAT Act and the exercise of levy of penalty will have to fail in such circumstances.

18. The decisions relied upon by the petitioner are in the context of Section 12 of the erstwhile Tamil Nadu General Sales Tax Act, 1959 (in short 'TNGST Act'). The law settled in that context is that the penal provisions of Section 12(3) of TNGST Act [in short 'TNGST Act'] would not be attracted to an assessment framed on the basis of returns filed and accounts maintained by the assessee. The ratio of those decisions can well be extended to the present case as well. In fact, the provisions of Section 22 of the TNVAT Act as noted by me above are in pari materia with the provisions of Section 12, specifically Section 12(3)(b) which imposes a penalty in the event of submission of incorrect or incomplete returns. The provision also contains an Explanation identical to the Explanation extracted above.

19. Section 22(5) of the TNVAT Act is thus attracted only in such cases where there is a variation in the turnover as reported by an assessee and as computed by an assessing officer. In addition, there should be a finding by the assessing officer to the effect that turnover added by the officer has been concealed by the assessee.

20. In the light of the above discussion, impugned proceedings of the 2nd respondent in TIN 33425564993/2012-13 dated 30.08.2018 are set aside. Accordingly, this writ petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar

To

1.The Commissioner of Commercial Taxes,
O/o. The Principal and Special Commissioner of Commercial Taxes,
Ezhilagam, Chepauk, Chennai - 600 005.

2.The Assistant Commissioner (ST),
Palayamkottai Assessment Circle,
Commercial Taxes Buildings,
Reserve Line Road, Palayamkottai,
Tirunelveli District - 627 002.

+1 CC to M/s.B.ROOBAN, Advocate (SR-68204[F] dated 12/06/2019)

Order made in
W.P(MD)No.6039 of 2019
11.06.2019

CM/SM
MS/13.09.2019/5P.4C