IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.02.2020

CORAM

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE R.SURESH KUMAR

W.P.No.29843 of 2006

M/s.KGE YES Residency Private Limited
rep.by its Managing Director P.V.Sanmugam
10, IInd Cross Street, Raja Annamalaipuram
Chennai 600 028. ... Petitioner

Vs.

1.The Tamil Nadu Sales Tax Appellate Tribunal
(Main Bench), City Civil Court Buildings
Chennai-104.

2.The Deputy Commercial Tax Officer
Adyar I Assessment Circle, 46, Greenways
Road, Chennai 600 028. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari calling for the records of the first respondent in its order in S.T.A.No.584 of 2002 dated 01.08.2006 and quash the same as illegal.

For Petitioner : Mr.S.Ramanathan

For Respondent : Ms.G.Dhana Madhiri,
Government Advocate (Taxes)

O R D E R

(Order of the Court was made by DR.VINEET KOTHARI,J.)

The Assessee has filed this writ petition aggrieved by the restoration of the penalty under Section 12(3)(a) of the Sales Tax Appellate Tribunal by an exparte order dated 01.08.2006.

2. Learned counsel for the Assessee submitted that the Assessee had filed the return and paid the due tax and therefore the condition under Section 12(3)(a) of the Act for imposition of penalty was not satisfied and therefore the first appellate authority has rightly deleted the penalty imposed on the Assessee, which was however restored by the Tribunal by an exparte order.

3. The findings of the Assessing Authority in the impugned assessment order itself states that, the Assessee has filed the return. However, without discussing the effect thereof, the assessing authority has imposed the penalty of Rs.1,97,534/- under Section 12(3)(a) of the Act. The relevant portion of the assessment order dated 20.10.1999 is quoted below for ready reference.

> "To a notice issued as above, calling for objections the dealers have filed returns in Form 'A1' for the year showing the total and taxable turnover at Rs.12,74,643.00 which represent the purchase value of Sand, Bricks and Blue Metals and Wood. They have further stated in their objections that as per their books, the purchase turnover for the period from 27.2.97 to 31.3.97 from unregistered dealers are as follows."

4. The first appellate authority, however, deleted the said penalty with the following observations, in his order dated 14.09.2001.

> "9. The Appellant have contended that the Assessing Officer has added 25% towards conversion of timber into doors and windows, normally it would be 10% and 29% added is on higher side. However, they have further contended by taking a different stand that the timber was used in the centering purpose and therefore there was no conversion. In view of the different type of views taken in respect of timber also. As discussed in earliest paragraph, I sustain the assessment made on Rs.1,43,926/- at 10%,

Rs.77,039/- at 10% and on Rs.1,02,386/- at 11% as made by the Assessing Officer.

10. The Assessing Officer has levied penalty of Rs.1,97,534/- under Section 12(3)(a) of the Act. The Authorised Representative for the Appellant correctly has stated that the appellants has already filed monthly return before final assessment and has paid taxes due thereon and therefore no penalty is leviable. It is seen from the assessment order that the assessing officer himself observed in the last paragraph of page 3 of assessment order that the dealers have filed return in Form A1 for the year and tax due to the tune of Rs.1,24,834/- was paid. When the return along with the tax due was paid, there was no reason for levy of penalty under Section 12(3)(a) of the Act. The Assessing Officer is therefore not justified in levying penalty under Section 12(3)(a) of the Act and is set aside accordingly."

5. The learned Tribunal, however restored the said penalty with the following observations.

"2.The appeal was posted for hearing on several occasions ie., on 21.3.06, 23.05.06 and 7.7.06. No representation has been made on the side of the Respondent. Hence the appeal was posted for final hearing on 25.7.2006. The Respondent was called thrice in the Open Court and found absent. Hence, it was decided to dispose of the case on merits after hearing the submissions of the State Representative.

3. The Respondent was a Civil Contractor doing business under the name and style of Tvl.K.Gee Yes Residency Pvt Ltd. For the year 1998-99, the Respondent had not filed any returns before the Assessing Authority. The place of business of the Respondent was inspected by the Officers of the Department and on subsequent verification of the accounts, it was found that the Respondent had purchased timber from local registered dealers and converted the same into doors and windows and used them in the execution of works contract. The sale value of doors and windows attract liability to tax and estimated at Rs.3,85,197/-. It was therefore found that the Respondent had purchased Marbles from outside the State and the deemed sale value of the same was estimated at Rs.92,737/-. There was also purchases of Sand, Blue Metal etc., from non-taxable

sources. Based on the above materials, the Assessing Authority had estimated the deemed sale value liable to tax at Rs.15,83,190/- and assessed the same to tax at appropriate rates. He had also levied a penalty of Rs.1,97,534/- under Section 12 (3)(a) of the Tamil Nadu General Sales Tax Act. On appeal, the first appellate authority had confirmed the assessment made, but had deleted the penalty on the ground that the Respondent had filed returns before assessment and hence penalty is not warranted. We find that the stand taken by the first appellate authority is not correct. But for inspection made by the Department, the liability to tax would not have come to light. Further there was no voluntary filing of return or payment of tax and that the filing of return subsequent to inspection by the Department could not be considered as in compliance of the provisions of the Act. The assessment falls under Section 12(2) of the Tamil Nadu General Sales Tax Act and the penalty levied under Section 12(3)(a) of the Tamil Nadu General Sales Tax Act is found to be in order. We therefore hold that the stand taken by the learned Appellate Assistant Commissioner in deleting the levy of penalty is incorrect, and in turn we restore the order of the Assessing Authority as sought for by the State. In the light of the aforesaid observations, we restore the order of the Assessing Officer for the levy of penalty portion of Rs.1,97,534/- under Section 12(3)(a) of the Tamil Nadu General Sales Tax Act and order accordingly.

4.In the result, the State Appeal stands allowed."

6. Learned counsel for the Assessee relied upon the decision of the Division Bench of this Court "Lingam and Sons -Vs- State of Tamil Nadu" reported in [2010] 29 VST 20 (Mad), wherein it was held as follows.

"8. In Chennai Textile Chemicals Private Limited Vs. State of Tamil Nadu [2002] 125 STC 107, the Division Bench of this Court held as under:

21. ...Even though in a given case or more than one case, the quantum of turnover suppressed or the tax sought to be avoided also, at times, may be one and the same, if the particular assessee, at the time of final assessment, found to have otherwise paid any amount already before such final assessment, sufficient to go to reduce the tax liability ultimately determined, the

imposition of penalty to that extent is reduced..."

Since cheque bearing No.697629 dated January 7, 1998 for Rs.14,905 was given by the assessee even on January 7, 1998, as per the above decision, levy of penalty under Section 12(3) of the Act is not justified. Both the AAC(CT) and the STAT have not taken note of the payment of the amount by way of cheque dated January 7, 1998 and therefore, the impugned orders cannot be sustained."

7. Learned counsel for the Revenue however supported the impugned order of the learned Tribunal and submitted that, but for the inspection carried out at the business place of the Assessee, the Assessee would not have himself registered under the Act and paid the tax after filing the return. Therefore, there is clear intention on the part of the Assessee to evade tax and hence the penalty was justified.

8. Having heard the learned counsel for the parties, we are of the opinion that the learned Tribunal has erred in restoring the penalty, that too by an exparte order. The contingency in which the penalty under Section 12(3)(a) of the Act can be imposed is if an Assessee does not file any return, and it does not talk whether any return is being filed in pursuance of any inspection or otherwise. The fact that the Assessee was not previously registered and later on got registered upon inspection or survey by the Department is not relevant for the purpose of Section 12(3)(a) of the Act. Since the fact that the Assessee got himself registered and filed the return and paid the due tax thereon is not disputed, it is sufficient to set aside the penalty in question.

9. Therefore, in our opinion, the Tribunal has erred in restoring the penalty in the impugned order. The writ petition deserves to be allowed and the same is accordingly allowed. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

KST

To

1.The Tamil Nadu Sales Tax Appellate Tribunal
(Main Bench), City Civil Court Buildings
Chennai-104.

2.The Deputy Commercial Tax Officer
Adyar I Assessment Circle, 46, Greenways
Road, Chennai 600 028.

W.P.No.29843 of 2006

+1cc to Mr.S.Ramanathan, Advocate, S.R.No.17472
+1cc to Government Pleader, S.R.No.18839

MP(CO)
nvi/27.05.2020