BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.07.2020

CORAM

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN**

W.P.(MD)Nos.7858, 7859 and 7860 of 2020
and
W.M.P.(MD)Nos.7330, 7331 and 7332 of 2020

TVL Sarathas,
Rep. by its Partner,
Mr.M.Sharath,
No.45, N.S.C.Bose Road,
Trichy-2. ... Petitioner in all writ petitions

Vs.

The Assistant Commissioner (ST)
Rock Fort Assessment Circle,
Trichy-2. ... Respondent in all writ petitions

**Common Prayer:** Writ petition is filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari, to call for the records of the impugned order in TNGST/3400018/2004-05 and TNGST/3400018/2005-06, respectively, dated 29.06.2020 from the files of the respondent herein, quash the same.

| | | |
|---|---|---|
| For Petitioner (in all petitions) | : | M/s.Aparana Nandakumar |
| For Respondent (in all petitions) | : | Mrs.J.Padmavathi Devi Special Government Pleader |

**COMMON ORDER**

Heard the learned counsel appearing for the writ petitioner and the learned Special Government Pleader appearing for the respondent.

2.Though there are three writ petitions and the assessment years are different, the issue raised in all the writ petitions is one and the same. For the assessment year 2004-05, two assessment orders had been passed and for the assessment year 2005-06, yet another assessment order had been passed.

3.The petitioner is engaged in the business of retail sales of textiles and clothing. The petitioner was carrying out renovation works in respect of their business premises in the years 2004 to 2006. Therefore, the petitioner needed to import aluminium sheets, air conditioners, etc., from other States. The petitioner was under the impression that since they are importing goods only as a one time measure for own consumption, they were not obliged to file returns under the Entry Tax Act. However, the petitioner had paid entry tax at the rate of 3%. But when on inspection was made on 17.11.2004 by the enforcement wing officials, it was pointed out to the petitioner that the entry tax should have been paid at 10%. Without questioning the stand taken by the department, the petitioner is said to have remitted the balance amount at the rate of 7%. When there was another inspection on 02.02.2006, it was noted by the enforcement wing that the petitioner had imported the said materials in the second half of 2004-05 and again in 2005-06, but did not make any payment of entry tax for those imports. Based on the demand raised by the department, on the spot, tax at the rate of 10% was duly remitted by the petitioner herein.

4.The petitioner was under the genuine impression that the issue had been given a quietus. While so, the respondent issued a pre-assessment notice for all the three transactions covered in two assessment years, namely, 2004-05 and 2005-06 on 12.06.2020. The petitioner submitted a detailed reply on 24.06.2020. Not satisfied to the same, the impugned assessment orders came to be passed on 29.06.2020, levying the impugned penalty on the petitioner. The details of levy of penalty are as under:-

| **Details** | **Turnover** | **Tax @ 10%** | **Penalty @ 150%** |
|---|---|---|---|
| Taxable turnover assessed to tax penalty levied | Rs.13.18, 598/- | Rs.1,31,860/- | --- |
| Amount of Tax levied for the year 2004-05 | | Rs.1,31,860/- | |
| **<u>Amount paid</u>** | | | |
| 1.Amount of Entry Tax actually paid during the year | | Rs.46,532/- | |
| 2.Amount paid at the time of inspection | | Rs.85,328/- | |
| 3.Penalty @ 150% | | --- | Rs.1,27,992 |
| Balance to be paid | | Rs. -Nil- | Rs.1,27,992/- |

| Details | Turnover | Tax @ 10% | Penalty @ 150% |
|---|---|---|---|
| Taxable turnover assessed to tax penalty levied | Rs.3,46,646/- | Rs.34,665/- | --- |
| Amount of Tax levied for the year 2004-05 | | Rs.34,665/- | Rs.51,997/- |
| Amount paid at the time of Inspection | | Rs.34,665/- | Rs. -Nil- |
| Balance payable (-) | | Rs. -Nil- | Rs.51,997/- |

| Details | Turnover | Tax | Penalty |
|---|---|---|---|
| Taxable turnover assessed to tax penalty levied | Rs.4,03,929/- at 20% | Rs.80,785/- | --- |
| Amount paid | | Rs.80,785/- | Rs.1,21,178/- |
| Amount paid at the time of Inspection | | Rs.80,785/- | Rs. -Nil- |
| Balance amount to be paid (-) | | Rs. -Nil- | Rs.1,21,178/- |

The impugned order are put to challenge in these three writ petitions.

5.The learned counsel appearing for the writ petitioner reiterated the contentions set out in the affidavits filed in support of the writ petitions and wanted this Court to quash the same.

6.Per contra, the learned Special Government Pleader placed materials and wanted me to sustain the orders impugned in the writ petitions.

7.I carefully consider the rival contentions and went through the materials on record.

8.A mere reading of the impugned orders would indicate that the penalties came to be levied only for the sole reason that the petitioner had not filed the relevant returns. That is why, the respondent has chosen to invoke Section 10 of the Tamil Nadu Tax on Entry of Goods Into Local Areas Act, 2001 r/w Section 12(3) of Tamil Nadu General Sales Tax Act 1959. The relevant provision reads as under:-

*"...**10.Tax authorities, returns, assessments, payments and recovery.-***

*1.Subject to the other provisions of this Act and the rules made thereunder, the authorities for the time being empowered to assess, re-assess, inspect, search, seize, confiscate, collect and enforce payment of any tax under the General Sales Tax Act shall assess, re-assess, inspect, search, seize, confiscate, collect and enforce payment of tax, including any interest or penalty, payable by a dealer, an importer under this Act as if the tax or interest or penalty by such importer under this Act is a tax or interest or penalty payable under the General Sales Tax Act, and for this purpose they may exercise all or any of the powers they have under the General Sales Tax Act; and the provisions of the General Sales Tax Act, including provisions relating to returns, provisional assessment, advance payment of tax, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, reviews, references, refunds rebates, penalties, charging or payment of interest, inspection of the premises of transporters, goods/vehicles, business premises, search of the residential accommodation, seizure and confiscation of unaccounted for scheduled goods, seizure of documents, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly.*

*2.All the provisions relating to offences, interest and penalties including provisions relating to penalties in lieu of prosecution for an offence or in addition to the penalties or punishment for an offence of the General Sales Tax Act shall, with necessary modifications, apply in relation to the assessment, re-assessment determination of the value or the fair market price of goods, collection and enforcement of payment of any tax required to be collected under this Act, or in relation to any process connected with such assessment, re-assessment, collection or enforcement of payment as if the tax under this Act were a tax under the General Sales Tax Act..."*

*''....**Section 12(3).**In addition to the tax assessed under sub-section (2), the assessing authority shall, in the same order of assessment passed under sub-section (2), or by a separate order, direct the dealer to pay a penalty, a sum-*

*(a)which shall be in the case of failure to submit return, one hundred and fifty per cent of the tax assessed on final assessment; and*

*(b)which shall be , in the case of submission of incorrect or incomplete return-*

*(i)twenty-five per cent of the difference of the tax assessed and the tax paid as per the return, if the tax paid as per the return falls short of the tax assessed on final assessment by not more than five per cent;*

*(i-a)fifty per cent of the difference of the tax assessed and the tax paid as per return, if the tax paid as per the return, falls short of the tax assessed on final assessment by more than five per cent but not more than fifteen per cent;*

*(ii)seventy-five per cent of the difference of the tax assessed and the tax paid as per the return, if the tax paid as per the return, falls short of the tax assessed on final assessment by more than fifteen per cent but not more than twenty-five per cent;*

*(iii)one hundred per cent of the difference of the tax assessed and the tax assessed on final assessment by more than twenty-five per cent but not more than fifty per cent;*

*(iv)one hundred and twenty-five per cent of the difference of the tax-assessed and the tax paid as per the return, if the tax paid as per the return, falls short of the tax assessed on the final assessment by more than fifty per cent, but more than seventy-five per cent;*

*(v)one hundred and fifty per cent of the difference of the tax assessed and the tax paid pas per the return, if the tax paid as per the return, falls short of the tax assessed on the final assessment by more than seventy-five per cent.*

*(c)which shall be, in the case of submission of the prescribed return after ten days after the expiry of the prescribed period, two per cent of the tax payable for every month or part thereof during which the default in the submission of the return continued:*

*Provided that no penalty under this sub-section shall be imposed after the period of five years from the date of the order of the final assessment under this Section and unless the dealer affected has had a* *reasonable opportunity of showing cause against such imposition.*

*[Provided further that no penalty under this sub-section or the interest under sub-section (3) of Section 24 of the Act, shall be imposed on the oil companies as explained in the Explanation-II of the Eleventh Schedule if the difference of tax due as per accounts and the tax paid as per the returns is less than five per cent and revised return is filed along with the difference of tax due within a period of three months from the due date for filing the monthly return]''*

9.It is not the case of the department that the petitioner is a regular importer of these goods or that the petitioner had been trading in them. Therefore, non-filing of returns may not really mutter much in a case of this nature. It is true that there was omission on the part of the petitioner in making a declaration at the relevant point of time. But then, the fact remains that immediately after it was pointed out, the petitioner had promptly remitted the entry tax in question. The petitioner had not even challenged the stand of the respondent.

10.In fact, the learned counsel for the writ petitioner would draw my attention to the notification No.II(2)/ct/568(f-4)/2002-G.O.No.81, dated 01.07.2002, which states that the petitioner needs to pay entry tax only at the rate of 3%. In fact, the petitioner's counsel would state that the respondent erred in levying an extra 7% on the petitioner on these transactions. She would also point out that before the levy of penalty, the petitioner ought to have been personally heard and such an opportunity was not even afforded in this case.

11.The core argument is that penalty can be levied only if non-payment of tax was willful. In this regard, the petitioner would draw my attention to the order dated 13.06.2018 made in ***W.P.(MD)Nos.14255 and 14256 of 2018 [U.D.Enterprises, Rep. by its Proprietrix S.Usha Vs. The Commercial Tax Officer]***, wherein, it was held as under:-

*"...4.In the show cause notices dated 15.09.2017, the respondent ought to have put the petitioner on notice that despite the petitioner paying the tax even at the time of inspection, the non disclosure alleged against the petitioner was wilful. In the absence of such a specific observation, the notices proposing levy of penalty under Section 27(4) of the said Act have to be held to be defective. This Court took such a view in the*

*case of* ***M/s.Saravana Super Market, Vandavasi Vs. CTO, Vandavasi, Tiruvannamali District [W.P.Nos.35019 and 35020 of 2016, dated 01.12.2016].*** *Thus, the conduct of the petitioner in paying the tax even at the time of inspection prior to issuance of the show cause notices can very well be taken as a factor for not imposing penalty on the petitioner. That apart, the respondent has not recorded his satisfaction that escapement of tax was due to wilful non disclosure by the assessee."*

12.In this case, the following aspects projected by the writ petitioner's counsel impress me.

a) The initiation of proceedings after a gap of more than 14 years. Of course, the learned Special Government Pleader would state that the Entry Tax Act itself was struck down by the Madras High Court as well as other High Courts and the Act was sustained only by the Hon'ble Supreme Court in the year 2017 and that is why, there was a delay in initiating the proceedings for levy of penalty.

b) Payment of the primary tax component immediately on being demanded without the department being dragged to any litigation or challenge.

13.It is well settled that levy of penalty involves a penal element. Therefore, the element of *mensrea* should be recorded to be present. In this case, no such finding can be discerned in the orders impugned in the writ petitions. We are living in pandemic times. But the respondent has shown considerable speed in concluding the entire proceedings. The pre-assessment notice was issued on 12.06.2020. The reply was given on 24.06.2020. The impugned order came to be passed on 29.06.2020. Even personal hearing was not afforded to the petitioner.

14.For all these reasons, I am of the view that the orders impugned in the writ petitions deserve to be quashed. They are accordingly quashed and the writ petitions are allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (Crl.Side)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

Note:In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

The Assistant Commissioner (ST)
Rock Fort Assessment Circle,
Trichy-2.

+1 CC to M/s.APARNA NANDAKUMAR, Advocate ( SR-13428[F] dated 31/07/2020 )

W.P.(MD)Nos.7858, 7859 and 7860 of 2020
30.07.2020

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