IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.01.2021

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANANAN

W.P.No.28639 of 2010

and M.P.No.1 of 2010

M/s.Jasmines Excell,
Represented by its Partner
M.H.Khaleel Rahman .. Petitioner

vs

The Assistant Commissioner (CT),
Koyambedu Assessment Circle,
Station Market Management Committee,
Building, Koyambedu,
Chennai 600 107. .. Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India praying for issuance of a writ of Certiorarified Mandamus to call for the records on the file of the respondent in TNGST.1342076/02-03 dated 29.10.2010 and quash the same as being contrary to the direction of this Court in W.P.No.15039 of 2010 dated 13.07.2010.

For Petitioner : M/s.R.Senniappan

For Respondent : Mr.M.Hariharan

O R D E R

Heard the learned counsel for the petitioner and the respondent Commercial Tax Department.

2. This is the 2nd round of litigation before this Court by the petitioner. Earlier, the petitioner had filed a writ petition and challenged revision order dated 31.03.2010 in W.P.No.15039 of 2010. The said writ petition was disposed with the following observation:-

> " Thereafter, a notice to revise the assessment order was issued to the petitioner on 07.07.2002 which culminated in an assessment order dated 31.03.2010. The said Assessment

Order was challenged by the petitioner in W.P.No.15039 of 2010."

3. In the said writ petition, the petitioner had challenged a revision order dated 31.3.2010 passed by the respondent pursuant to re-opening of the assessment under Section 16 of the Tamil Nadu General Sales Tax Act, 1959 vide notice dated 7.7.2008 based on the proposal of the Enforcement Wing (South). The said notice reopened the regular assessment made on 16.8.2004.

4. The petitioner appears to have collected the records based on which the notice for revising the assessment notice. In reply, the petitioner submitted that the burden of proof on the department to prove any transaction or any turnover of a dealer was not liable to tax and that there was escaped turnover warranting for invoking under Section 16 of the TNGST Act.

5. The learned counsel for the petitioner placed reliance on the decision of the Hon'ble Supreme Court in I.T.C. Ltd., vs. Supdt. Of Commercial Taxes (1997) 11 SCC 88 at page 90.

6. I have considered the arguments of the learned counsel for the petitioner and the respondent. I have also perused the reply of the petitioner that was filed by the petitioner before the respondent and the impugned order.

7. The revision of the assessment was made on the basis of 297 slips that were found in the possession of the petitioner at the time of inspection by the Enforcement Wing of the Commercial Tax Department.

8. While the petitioner has tried to distance from the liability by shifting the burden on the respondent, the respondent on the other hand has passed an order without proper discussion and has merely reiterated the content of the revision notice.

9. It was for the petitioner to have properly explained the case as to why the documents that were collected by the Department during inspection would not justify a revision of the assessment for enhancement of tax liability of the petitioner. In absence of a proper explanation from the petitioner there is a strong presumption that the petitioner deliberately did not account for those transaction in the books of accounts/bills and the sales were clandestine in nature to evade tax. They prima facie indicate that the conduct of the petitioner was to suppress the facts with a view to evade tax.

10. The respondent was therefore entitled to pass a speaking order by drawing adverse inference and confirm the liability as the officers acting under the provisions of the Tamil Nadu General Sales Tax, 1959 are expected to pass orders based on the principles of preponderance of probabilities. However, there is no proper discussion in the impugned order. Nevertheless, the petitioner ought to have filed an appeal before the Appellate Commissioner under the provisions of the Tamil Nadu General Sales Tax Act, 1959. If the petitioner had filed an appeal under the provisions of the Act, petitioner would have pre-deposited 25% as a condition for filing the appeal and another 25% at the time of stay petition before the appeal was taken up for final hearing. Instead, the petitioner present writ petitions and prolonged the litigation for the last 18 years and thereby deprived the revenue to the state.

11. The petitioner has abused the jurisdiction of this Court by filing the writ petitions the present writ petition even though the petitioner had a choice to approach the Appellate Commissioner against the impugned order. By filing the present writ petition, the petitioner has gained time and postponed the liability.

12. Therefore, to meet the ends of justice, while setting aside the impugned order and remitting the case back to the respondent to pass a fresh order within a period of three months from the date of receipt of a copy of this order, I direct the petitioner to deposit 50% of the disputed tax with the respondent within a period of one month from the date of receipt of this order.

13. Needless to state, this amount to be deposited by the petitioner pursuant to this order shall be treated as amount having been paid "under protest" and without prejudice in case the petitioner succeeds in the remand proceedings before the respondent, the aforesaid amount shall be refunded to the petitioner forthwith without any demur and delay. Such order shall be passed after affording an opportunity of personal hearing to the petitioner.

14. It is made clear that in case the petitioner fails to deposit the amount, the impugned order passed by the respondent shall stand revived without further orders with liberty to initiate appropriate recovery proceedings to recover the amounts from the petitioner in accordance with law.

15. Writ petition stands disposed with the above observation. No cost. Consequently, connected miscellaneous petition is also closed.

Sd/-
Assistant Registrar (CS VI)

//True Copy//

Sub Assistant Registrar

kkd

To

1. The Assistant Commissioner (CT),
   Koyambedu Assessment Circle,
   Station Market Management Committee,
   Building, Koyambedu,
   Chennai 600 107.

+1cc to Mr.R. SENNIAPPAN, Advocate, S.R.No.4377
+1cc to the Special Government Pleader, S.R.No.3888

KV(CO)
SM/26/02/2021

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