

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.03.2021

CORAM:

THE HON'BLE DR.JUSTICE ANITA SUMANTH

W.P. NO.13583 OF 2020
AND WMP.NO.16852 OF 2020

M/s.Sri Balaji Assemblies & Plastics (P) Ltd.
Rep. By its Director
No.176, Vengaivasal Main Road,
Gowrivakkam, Chennai - 601 302

...Petitioner

Vs.

The Assistant Commissioner,
Selaiyur Assessment Circle,
Chennai - 600 073.

....Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorarified Mandamus calling for the records of the respondent in his proceedings in TNGST/0943709/2006-07 dated 19.08.2020 and quash this revised assessment order passed on 19.08.2020 by levying penal interest for the Additional Sales Tax which was already paid, as illegal and direct the respondent to act as per law.

For Petitioner : Mr.C.Baktha Siromani
For Respondent : Mr.ANR.Jaya Prathap,
Government Advocate

ORDER

Heard Mr.C.Baktha Siromani, learned counsel for the petitioner and Mr.ANR.Jayaprathap, learned Additional Government Pleader for the respondent.

2. The petitioner is an assessee for the purposes of Tamil Nadu General Sales Tax Act, 1959 (in short 'TNGST Act') on the file of the respondent/Assessing Officer. The challenge is to an order of assessment dated 19.08.2020 under which interest under section 24(3) of the Act has been levied for delayed remittance of Additional Sales Tax (AST).

3. The sequence of events that are relevant to deciding this matter, are as follows. The proceedings impugned are for the period 2006-07 for which the petitioner has filed monthly

returns of turnover in Form A-1. Taxable turnover of Rs.23.50 (approx.) crores was reported and tax was remitted thereupon. There is no dispute in regard to the position that this reflects the correct position both in terms of the turnover as well as the tax computed thereon.

4. The returns culminated in an order of assessment dated 30.03.2011 to the effect that the petitioner had paid excess tax of an amount of Rs.1451/-. Tax on additional sales had also been remitted and there were 'nil' arrears.

5. However, the petitioner had a liability to AST under the Tamil Nadu Additional Sales Tax Act, 1970 (in short 'TNAST Act'), as its turnover fell within the slab of Rs.10 to 25 crores.

6. A notice thus came to be issued on 10.11.2009 calling upon the petitioner to remit a sum of Rs.23.50 (approx.) crores towards AST, computed at 1% on the taxable turnover, within a period of three days of receipt of notice, failing which coercive action in terms of the Revenue Recovery Act, 1864 was threatened.

7. Immediately on receipt of the notice, the petitioner, under cover of letter dated 26.11.2009, effected part payment promising to pay the balance in four equal monthly instalments. There is no dispute on the position that the petitioner has adhered to the scheme of instalments as promised.

8. On 22.12.2009, a notice was received by the petitioner on the ground that interest had not been remitted on the delayed payments of AST. The AST on the turnover was due on 21.04.2007, being the date for annual return for the period 2006-07, but had been paid only on 30.11.2009, with a delay of 953 days. The petitioner was thus, called upon to remit interest within 7 days from date of notice.

9. The notice was challenged in W.P.No.1640 of 2010 which came to be disposed by this Court on 14.08.2019 directing the Assessing Authority to consider the objections raised by the petitioner and pass orders after hearing the petitioner.

10. Notice dated 16.12.2019 was issued setting out the methodology of computation of interest as per the provisions of Section 24(3) of the Act, and re-quantifying the delay at 1044 days. Representation dated 27.01.2020 came to be filed thereafter, requesting the deferment of interest, relying upon the judgement of the Supreme Court in E.I.D. Parry (India) Ltd. V. Assistant Commissioner of Commercial Taxes (113 VST 233) and

a decision of a Division Bench of this Court in Kone Elevator India Ltd. V. Commercial Tax Officer, Mandaveli Assesment Circle, Chennai (27 VST 577).

11. The impugned order has come to be passed on 19.08.2020 rejecting the objections raised. The Assessing Authority relies upon the provisions of Section 2(aaa) of the TNAST Act, inserted vide Tamil Nadu Additional Sales Tax (Amendment) Act, 2005 (Act No.14 of 2005), that provides for levy of interest in line with Section 24(3) of the TNGST Act on interest remaining unpaid under the TNAST Act.

12. According to the petitioner, the impugned order is contrary to the provisions of Section 24(3) read with 24(1) of the TNGST Act, insofar as the levy of interest under the aforesaid provisions can only be in a situation where an order of assessment has been passed determining the amount to be paid and raising a demand in regard thereto. The provisions of Section 24(1) provide for a period of 21 days within which the demand is payable and interest would be applicable only if the demand is not honoured with the time frame stipulated.

13. In the present case, the first notice was dated 10.11.2009 in response to which, the petitioner, on 26.11.2009 and 30.11.2009 remitted the amounts due. Thus, when subsequent notice was issued on 22.12.2009, AST had been remitted in full. Thus, in the absence of a quantification by assessment, and consequent demand, no interest was liable to be levied.

14. In addition to the judgements of the Supreme Court in E.I.D. Parry (India) Ltd. (supra) and Philips Ltd. and another V. Assistant Commissioner, Commercial Taxes, Calcutta and others ((2004) 136 STC 636), learned counsel for the petitioner relies on the decision of the Division Bench of this Court in Kone Elevator (supra), wherein, citing the provisions of Section 2 (aaa), this court interprets the phrase 'imposed by the assessing authority remaining unpaid under this Act' to mean that it is only when a determination was made, and delay on the part of the assessee to remit the amount demanded, that liability to interest will arise.

15. Per contra, Mr. Jayaprathap first refers to the provisions of the Amendment Act 2005, consequent upon which, the Assessing Authority has been vested with the power to impose interest for delay in remittance of AST. On the question of whether there has or has not been a delay, he relies upon the provisions of Section 24(1) to state that, in this case, the assessee was well aware that its turnover exceeded the threshold of Rs.10.00 crores, falling within the slab of Rs.10.00 to 25.00 crores.

16. I have given careful consideration to the submissions of both learned counsel. Liability towards interest is set out in Section 24, reading as follows:

Section 24. Payment and recovery of tax: (1) Save as otherwise provided for in sub-section (2) of section 13, the tax assessed or has become payable under this Act from a dealer or person and any other amount due from him under this Act shall be paid in such manner and in such installments, if any and within such time as may be specified in the notice of assessment, not being less than twenty-one days from the date of service of the notice. The tax under sub-section (2) of section 13 shall be paid without any notice of demand. In default of such payments the whole of the amount outstanding on the date of default shall become immediately due and shall be a charge on the properties of the person or persons liable to pay the tax or interest under this Act.

24-(2) . . .

24-(3) On any amount remaining unpaid after the date specified for its payment as referred to in sub-section (1) or in the order permitting payment in instalments, the dealer or person shall pay, in addition to the amount due, *[interest at one and half per cent per month of such amount for the first three months of default and two per cent per month of such amount for the subsequent period of default]:

Provided that if the amount remaining unpaid is less than one hundred rupees and the period of default is not more than a month, no interest shall be paid: Provided further that where a dealer or person has preferred an appeal or revision against 1 [any order of assessment or revision of assessment under this Act], the interest payable under this sub-section, in respect of the amount in dispute in the appeal or revision, shall be postponed till the disposal of the appeal or revision, as the case may be, and shall be calculated on the amount that becomes due in accordance with the final order passed on the appeal or revision 2 [as if such amount had been specified in the order of assessment or revision of assessment, as the case maybe]

17. The corresponding Rules are Rule 18(3) and 18(4) of the Tamil Nadu General Sales Tax Rules, 1959 (Rules), reading as follows:

Rule 18(3). The return in Form A-1 or AB-1] so filed shall, subject to the provisions of sub-rule (4), be provisionally accepted. If the return is submitted without 1 [proof of payment as specified in sub-rule (1) of rule 55] for the full amount of tax payable after deducting therefrom the amount, if any, claimed as reimbursement or refund due in the month under rule 23, such amount of tax shall become due on the date of receipt of the return or on the last due date as prescribed in sub-rule (2), whichever is later, and shall be recovered in accordance with the provisions of the Act without any notice of demand to the dealer.

Rule 18(4). If no return is submitted in respect of any month on or before the date specified in sub-rule (2) or before the expiry of the period prescribed in sub-rule (5) or if the return submitted appears to be incorrect or incomplete, the assessing authority shall, after making such enquiry as he considers necessary and after giving the dealer notice as prescribed in rule 12, determine the turnover to the best of his judgement and [provisionally determine the tax or taxes payable] for the month and shall serve upon the dealer a notice in [Form B-3] and the dealer shall pay the sum demanded at the time and in the manner specified in the notice

18. Section 13 deals with advance payment of tax and reads as follows:

Section 13. Advance payment of tax. - (1) The tax for each year payable under any of the provisions of this Act may be collected in advance during the year in monthly or other prescribed instalments and for this purpose a dealer may be required to furnish within the prescribed period such returns as may be prescribed. The assessing authority may provisionally determine the amount of tax payable in advance during any year or in respect of any period and on such determination and intimation to the dealer, he shall pay such tax in such instalments and within such period as may be prescribed.

19. The scheme of levy of interest under the TNGST Act was considered by three Judges of the Supreme Court in E.I.D. Parry (India) Ltd. (supra) and useful reference may be made to the same. The appellants were manufacturers of sugar and offered to tax the turnover from the minimum price of sugar prescribed by clause (3) of Sugarcane (control) order, 1966. The aforesaid

amount was paid upfront, on the purchase of sugar. By virtue of clause 5-A of the Sugar (Control) order, an additional price also came to be payable. The additional price was determined only at the end of the sugar year and thus the additional consideration received by the petitioner was offered as turnover under a revised return.

20. The question that arose before the Supreme Court was whether interest under Section 24(3) may be charged on the additional price under Clause 5-A and from what date. The Supreme Court held, on a consideration of Sections 13, dealing with advance tax, and Section 24, that it would have been impossible for the assessee to foresee the turnover from the additional consideration, since the price was itself known only after close of the year. However, in anticipation, the monthly returns ought to have included the advances received towards additional price as turnover. This was not done. The question that remained was whether non-inclusion of the advance would render such advances liable to the imposition of interest under Section 24(3). The court held that it would not, stating, at paragraph 14, as follows:

14. Under Section 24(1) if the tax has been assessed or has become payable under the Act, then the payment has to be made within the said time as may be specified in the notice of assessment and tax under Section 13(2) has to be paid without any notice of demand. However, as seen above, the tax under Section 13(2), in the absence of any determination by the Assessing Authority, is tax as per the returns. If default is made in payment of such tax then interest becomes payable under the Act. In the present case, it is an admitted position that tax as per the monthly return had been paid within time. It is also an admitted position that there was no assessment, even provisional, by the Assessing Authority prior to the final assessment made after the revised returns had been filed. Interest becomes payable under Section 24 (3) on an amount remaining unpaid after the date specified for its payment under sub-section (1) of Section 24. As seen above sub-section (1) of Section 24 deals with an assessed tax or tax which has become payable under the Act. In cases covered by Section 13 (2) tax must be paid without any notice of demand. But as stated above, under Section 13(2) tax is to be paid "on the basis of such returns". Tax as per the returns has admittedly been paid. If the returns were incomplete or incorrect as now claimed the assessing authority had to determine the tax payable and issue a notice of demand. In the absence of any assessment, even provisional, and a notice of demand no interest

would be payable under Section 24(3). In this case, it is an admitted position that as soon as the revised return was filed the Appellants paid the tax as per the revised return. Therefore they paid the tax even before the final assessment took place. Thus the claim for interest, under Section 24(3) from the date that the advances were paid to the sugarcane growers is not sustainable. There is no provision under the Act which permits charging of interest unless and until there has been a provisional assessment and a notice of demand prescribing the period within which the tax was to be paid.

21. The conclusion of the Bench was that interest could be imposed only if an assessment had been framed, determining the additional turnover and raising a demand upon the assessee. The Bench held that there was no statutory provision which permitted the charging of interest till such time a provisional assessment has been made and a notice of demand raised, prescribing the period within which the assessee would have to remit the tax.

22. Great reliance is placed by Mr. Siromani upon this judgment. However, the position in the present Writ Petition is different, and I am of the view that the aforesaid judgement will not apply. We are not concerned in this case with turnover that has escaped assessment and has not been included in the returns filed. We are concerned with an additional component of tax, being additional sales tax, that the petitioner was liable to pay, on the same turnover as returned originally. To reiterate, there is no dispute on the turnover returned.

23. At paragraph 17, the scheme of tax under Section 24 read with Section 13 dealing with advance tax, has been explained by the Bench. A distinction has been made in the scheme, to the effect that levy of interest in case of non-payment of advance tax will be different from those cases where additional turnover is brought to tax at a later date. The Bench states as follows:

17. The default arising on non-payment of tax on an admitted liability in the case of self-assessment falls under Section 24(3) read with Rule 18(3) which attracts automatic levy of interest whereas the default in filing incomplete and incorrect return falls under Rule 18(4) which the levy of interest is based on the adjudication by the Assessing Officer. Therefore, Rule 18(3) and Rule 18(4) operate in different spheres.

24. The petitioner before me has filed returns in Form A-1, under a self-assessment scheme. It was thus incumbent upon the

petitioner to have included (i) the correct undisputed turnover, as well as (ii) the correct liability in respect of that turnover. There is no dispute with respect to the turnover itself and there is also no dispute with respect to the liability under TNGST. However, the petitioner failed to remit the AST in regard to the turnover returned which is a lapse in self-assessment. The distinction noted by the Bench is very relevant in this case. The Bench states that the default arising on non-payment of tax on an admitted liability in the case of a self-assessment will attract an automatic levy of interest, whereas, default in filing an incomplete or incorrect return would attract interest only based on the adjudication by the Assessing Officer. The present assessment is based on a self-assessment and liability to AST is thus automatic. The question of determination is not relevant in the present case.

25. It is relevant that the petitioner does not dispute either the turnover or the liability to AST. Immediately on being put to notice, at the first instance (on 10.11.2009) the petitioner made the entire payment of AST by 30.11.2009. Liability to AST is thus not in dispute. I am thus of the view that, in the light of judgment in E.I.D. Parry (India) Ltd. (supra) this case attracts interest under Section 24(3) automatically and there is no infirmity in the order challenged.

26. In Philips Ltd. (supra) the Supreme Court considered a challenge to an assessment framed under the provisions of the Bengal Finance (Sales Tax) Act, 1941/West Bengal Sales Tax Act, 1954, that had travelled in appeal before the appellate authority. Pending appeal, conditional stay was granted and the assessee deposited the amounts directed by the appellate authority. The appellate order re-computed the turnover and as a consequence thereof, the tax liability stood reduced. Fresh demand notices were issued levying interest on the entirety of the period, which was challenged by the assessee. When considering the question as to whether the assessee could be held to be one 'in default', liable to pay interest, the Court held, applying its earlier decision in the case of Income Tax Officer V. Seghu Buchiah Setty (52 ITR 538), as follows:

7. The assessee had preferred appeals against the assessment orders. Pending appeals the assessee had not paid the tax. In the appeal the tax payable was substantially reduced. The Income-tax Officer merely informed the assessee the reduced tax liability and called upon him to pay the reduced amount. No fresh notice of demand was issued. The question was whether the assessee could be treated as a defaulter in the absence of a fresh notice of demand. This Court considered the provision of Section 31(3) of the Income-tax Act which also provided that in an appeal

tax may be confirmed, reduced, enhanced or annulled or the appellate authority could set aside the assessment or direct a fresh assessment to be made after making such enquiry or on the basis set out in the appellate order. Thus, that provision was also identical to Section 20. On an analysis of the provisions it has been held, by the majority, that in cases where assessment is reduced, enhanced or annulled or where fresh assessment is directed to be made, then the earlier order ceases to exist and the liability can only arise from the date of fresh demand notice. It has been held that even though there is no provision for issuance of a second demand notice, the department will necessarily have to issue a fresh demand notice. It is held that the party could only be considered as defaulter if payment is not made from the date specified in the fresh demand notice. This authority is binding upon us.

27. The ratio of the judgment is that the assessee cannot said to be 'in default' unless a fresh adjudication of income/turnover was made, a demand raised stipulating a time frame for remittance of the amount, and the assessee violated the same.

28. In the present case, the petitioner falls under a self-assessment scheme where liability to AST is automatic. In that case, Philips Ltd. (supra) the demand stood varied by virtue of an appellate order and the question that was decided was interest liability in the case of variation between original demand and demand consequent upon an appellate order. This decision is of no assistance to the petitioner and the aforesaid ratio is not applicable to the facts and legal position in this matter.

29. The case of Kone Elevator India Ltd. (supra) was decided without reference to the 2005 Validation Act as the same does not appear to have been brought to the notice of the Bench. It is hence distinguishable.

30. In the light of the discussion as aforesaid, this Writ Petition is dismissed. No costs. Connected Miscellaneous Petition is also dismissed.

Sd/-

Asst.Registrar (CS VII)

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Sub Asst. Registrar

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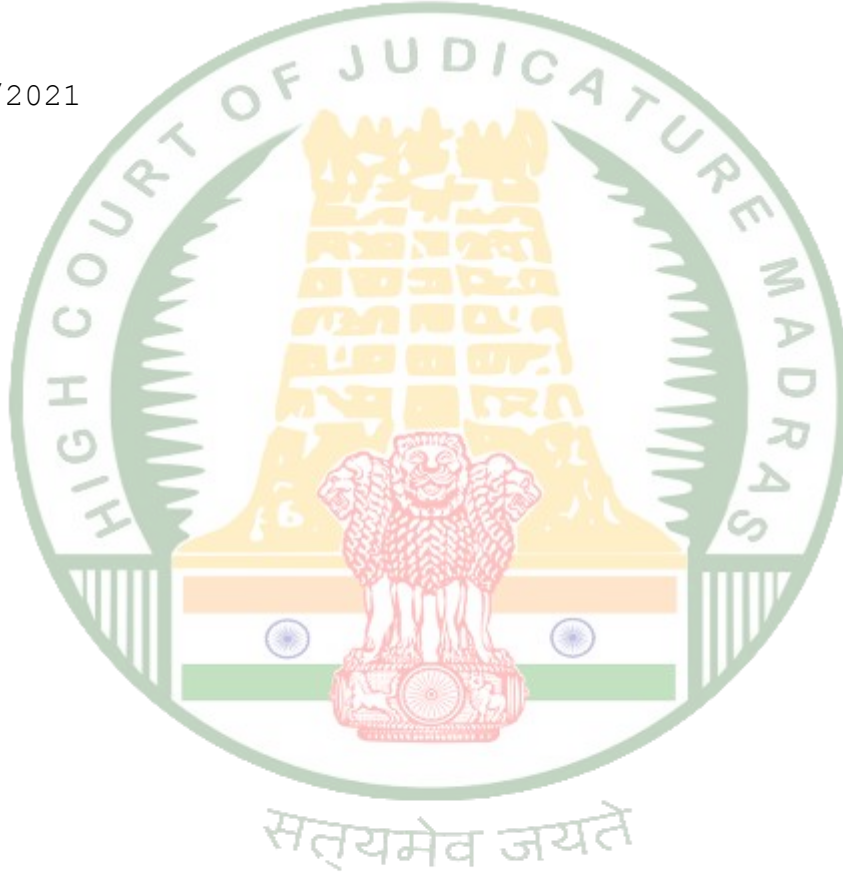
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+1cc to Mr.C.Baktha Siromani, Advocate, Sr.No.13057
+1cc to Special Government Pleader(Taxes), Sr.No.12982

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and WMP.No.16852 of 2020

PMK (CO)

KKV/16/03/2021



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