IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.09.2021

CORAM

THE HON'BLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HON'BLE MR.JUSTICE SATHI KUMAR SUKUMARA KURUP

W.A.No.2409 of 2021
and
C.M.P.No.15402 of 2021

M/s.Adhithya Polymers,
Rep., by its Partner,
Mr.N.Dhuraiswamy,
No.55/1-A, Anthiyur Road,
Parranchavadi, Ammapettai Post,
Erode District. .. Appellant/Petitioner

-vs-

The State Tax Officer,
Bhavani Assessment Circle,
Bhavani, Erode District. .. Respondent/Respondent

Appeal under Clause 15 of Letters Patent against the order dated 27.05.2021 made in W.P.No.29156 of 2018 and set aside the same.

Prayer in WP.No.29156 of 2018 : Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari, to call for the records of the respondent in TIN No.33873225445/2013-2014 dated 30.06.2018 and quash the same as illegal, arbitrary and against the provisions of the Act.

For Appellant : Mr.K.Soundara Rajan

For Respondent : Mr.M.Venkateswaran,
Government Counsel

JUDGMENT
(Delivered by T.S.Sivagnanam, J.)

The writ petitioner is the appellant before us challenging the correctness of the order dated 27.05.2021 in W.P.No.29156 of 2018.

2.The appellant challenged the revised assessment order dated 30.06.2018 passed under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred to as "the Act") for the assessment year 2013-14. The writ petition was dismissed largely on the ground that the appellant, having admitted the tax liability, cannot maintain a writ petition. However, the Court was of the view that the appellant can avail the statutory appellate remedy before the first appellate authority.

3.The appellant is before us contending that there was no admission of tax liability and also that demand of levy of penalty was not tenable and is without jurisdiction. The correctness of the said submission is to be tested by us in this appeal.

4.We have heard Mr.K.Soundara Rajan, learned counsel appearing for the appellant and Mr.M.Venkateswaran learned Government Counsel for the respondent.

5.The appellant had approached the learned Writ Court on an earlier occasion by filing W.P.No.7286 of 2017 contending that the revision of assessment made by order dated 29.09.2016 is not sustainable in law, as it is solely based on the alleged mismatch found through the system web report pertaining to the purchase details from other end dealers Annexure-II. The writ petition was allowed by order dated 24.03.2017 referring to an earlier order passed by this Court and the matter was remanded back to the Assessing Officer to redo the assessment after following the procedures/directions issued in the said order. On remand, the Assessing Officer issued a pre-revision notice dated 26.02.2018 purported to contain the relevant details. The appellant had submitted a letter dated 14.03.2018 seeking adjournment. Subsequently, another letter dated 02.05.2018 was submitted by the appellant, which was received by the Assessing Officer on 07.05.2018. The subject prays for deleting the penalty and granting time. Apart from these letters, the Assessing Officer while completing the assessment, vide order dated 30.06.2018, has recorded that one of the partners of the appellant had appeared before the Assessing Officer and stated that the omission has occurred due to the lost of purchase bills during transit period of their factory and they are not willingly done any mistake and they are ready to pay the estimated taxes as quantified and requested for dropping the penalty proceedings. After noting the said submission, the proposal made in the pre-revision notice dated 26.02.2018 has been confirmed in full, including the levy of penalty.

6.So far as the demand of tax is concerned, the appellant had an opportunity to go before the Assessing Officer to establish their case by producing records and they are unable to do so on the alleged ground that the purchase bills were missing when there was shifting of the place of business. If such is the case, then obviously, the appellant has not been able to establish that the allegation made against them is not true. Hence, we find that there is no error in the order passed by the Assessing Officer confirming the proposal to levy tax on the enhanced turnover.

7.So far as the levy of penalty is concerned, it is no doubt true that while issuing the pre-revision notice, the appellant was informed that penalty under Section 27(3)(ii) at 100% is also proposed to be levied for the suppression. Section 27 deals with 'assessment of escaped turnover and wrong availment of input tax credit'. In terms of sub-section (3), in making an assessment under Clause (a) of sub-section (1), the assessing authority may, if it is satisfied that the escape from the assessment is due to wilful non-disclosure of assessable turnover by the dealer, direct the dealer, to pay, in addition to the tax assessed under Clause (a) of sub-section (1), by way of penalty, which shall be sum of fifty per cent if the Assessing Authority chooses to exercise Clause (a) or one hundred per cent under Clause (b) or one hundred and fifty percent under Clause (c). Thus, for levy of penalty, under sub-section (3) of Section 27, there should be finding rendered by the Assessing Authority regarding wilful non-disclosure of assessable turnover. The non-disclosure alleged against the appellant is based upon the mismatch, which was deducted in the web portal, that is, the difference noticed in the returns filed by the selling and the purchasing dealers. Despite opportunity, the appellant was not able to reconcile the mismatch not due to lack of merits, but on the ground that the purchase bills were missing on account of shifting of the business premises. This allegation has not been disputed by the Assessing Officer, nor there was any material available with the Assessing Officer to come to the conclusion that such statement was false. Nevertheless, while considering the liability to impose tax, if the appellant is unable to reconcile the mismatch of the details found in the website, the Assessing Officer has no other option except to conclude the assessment as proposed in the pre-revision notice. However, the same yardstick cannot be applied for levy of penalty, where mens rea has to be established. Even while confirming the proposal in the pre-revision notice and completing the assessment vide order dated 30.06.2018, the Assessing Officer does not record any finding that the appellant was guilty of wilful suppression, but the proposal in the pre-revision notice has been confirmed because, the partner of the appellant appeared before the Assessing Officer and submitted that they were unable to produce the records. In fact, the representation given by the appellant on 02.05.2018 is to the effect that there is no wilful misstatement or wilful default committed by them, but only on account of the lost of the purchase bills, they are unable to establish the genuineness of the transaction. Therefore, the case on hand is a very peculiar case wherein, there is nothing specifically brought on record by the Assessing Officer to show that the appellant was wilfully suppressed the assessable turnover. Further, we note in the representation dated 02.05.2018, the appellant has not admitted the penalty because of their inability to produce the records, they agreed to pay the tax, but specifically made request for waiver of penalty on the ground that there was no fault committed by them. Thus, we are satisfied that in the peculiar facts and circumstances of the case, the appellant can be granted a limited relief to the extent of penalty of levy alone.

8.In the result, the writ appeal is partly allowed and the assessment order dated 30.06.2018, insofar as the levy of tax is concerned, is deleted. The benefit of this order will enure to the appellant provided, the appellant pays the entire remaining tax liability within a period of eight weeks from the date of receipt of a copy of this judgment failing which, the benefit of this judgment will not enure to the appellant and the writ appeal will stand automatically dismissed without any reference to this Court. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

//True Copy//

Sub Assistant Registrar

abr

To

The State Tax Officer,
Bhavani Assessment Circle,
Bhavani, Erode District.

+1cc to Mr.K.Soundararajan, Advocate, S.R.No.50593
+1cc to the Special Government Pleader(Taxes), S.R.No. 51039

W.A.No.2409 of 2021

KSM(CO)
GN(21/10/2021)