IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 11.03.2022

Coram:

THE HON'BLE MR. JUSTICE R.MAHADEVAN
AND
THE HON'BLE MR. JUSTICE J.SATHYA NARAYANA PRASAD

W.P.No.22069 of 2007

Voltas Limited,
represented by its Senior Executive – Sales Tax,
K.Ulaganathan,
503, Anna Salai,
Chennai – 600 018. ...Petitioner

Versus

1. The Assistant Commissioner (CT) I,
   Fast Track Assessment Circle – II,
   Chennai – 600 006.

2. The Deputy Commissioner (CT) (Appeals),
   Third Floor, Wavoo Complex,
   191, NSC Bose Road,
   Chennai – 600 001.

3. Tamil Nadu Sales Tax
   Appellate Tribunal (Main Bench),
   represented by its Secretary,
   City Civil Court Buildings,
   High Court Complex,
   Chennai – 600 104. ...Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a writ of certiorari calling for the records on the files of the third respondent herein in T.A.No.246/02 dated 20.02.2007 and quashing the same insofar as it has confirmed the proceedings of the second respondent in A.P.No.188/2000 dated 16.08.2001 relating to the imposition of penalty imposed under Section 12(5)(iii) of the Tamil Nadu General Sales Tax Act, 1959.

For Petitioner : Mr.K.A.Parthasarathy
for Mr.N.Inbarajan

For Respondents : Mr.Richardson Wilson,
Additional Government Pleader (Taxes)

ORDER

(Order of the Court was delivered by R.MAHADEVAN, J.)

According to the petitioner, they are the dealer in air-conditioner and textile machinery spares. For the assessment year 1991-92, the first respondent completed the final assessment on 24.03.2000, bringing certain turnovers to tax, besides levying penalty under section 12(5)(iii) of the TNGST Act, 1959. Challenging the said order of assessment, the petitioner preferred a first appeal before the second respondent in AP.No.188/2000, which was partly allowed, by setting aside certain turnovers and remanding the same for fresh consideration by the assessing officer, without deciding the issue relating to penalty, which according to the petitioner, is barred by limitation. Aggrieved over the same, the petitioner preferred a second appeal before the third respondent in TA.No.246 of 2002, which was also partly allowed, by setting aside certain turnovers and remanding the same for fresh consideration, including levy of penalty, by order dated 20.02.2007, which is impugned in this writ petition by the petitioner / assessee.

2.The learned counsel for the petitioner restricted the relief sought herein, only in respect of imposition of penalty by the first respondent on the ground of limitation. According to him, the pre-assessment notice was issued to the petitioner on 07.02.2000, after a lapse of five years from the expiry of the assessment year 1991-92. Without considering the said aspect, the third respondent erred in remanding the issue for fresh consideration by the assessing officer, by the order impugned herein, which vitiates the entire proceedings.

3.On the other hand, the learned Additional Government Pleader (Taxes) appearing for the respondents submitted that after detailed analysis, the third respondent / Tribunal has rightly remanded the issue relating to penalty, among other issues, to the assessing officer for fresh consideration and hence, the same does not require any interference by this court.

4.Heard both sides and perused the materials available on record.

5.In this writ petition, the petitioner questioned the correctness of the order passed by the third respondent only in respect of the imposition of penalty under section 12(5)(iii) of the Act by the first respondent, as the same is barred by limitation. For better appreciation, the relevant finding of the third respondent is extracted below:

> "15.The last item of dispute is the penalty levied under Section 12(5)(iii) of the Act. We find

that the first appellate authority had set aside the entire penalty levied and remanded it back to the Assessing Officer for fresh levy after considering the relief granted by him. As per discussions supra, we have set aside the assessment on turnover of Rs.29,51,307/- relating to Proforma Invoices. Consequently, the penalty of Rs.8,89,266/- is also set aside. Similarly, the assessment on Rs.3,78,740/- relating to works contract had been set aside by us and remanded back for fresh levy after considering the documents available with the appellants. The corresponding penalty of Rs.1,16,463/- is also set aside and remanded back to the ASSESSING OFFICER for fresh levy. In respect of other items of penalty, the remand orders of the first appellate authority is upheld."

6.It is obvious from the aforesaid findings of the Tribunal that the penalty issue was remanded to the assessing officer for fresh consideration, after taking note of the detailed observation of the first appellate authority, which can be quoted below for ready reference:

"(29) No doubt, the appellants have raised a very valid point with regard to the limitation prescribed for levying the penalty. The proviso to section 12(5) runs as below:

"Provided that no penalty under sub-section (3) and (5) shall be imposed after a period of five years from expiry of the order to which the assessment relates and unless the dealer affected has had a reasonable opportunity of showing cause against such imposition".

It is thus clear that the penalty under section 12(5)(iii) of the Act cannot be levied after a period of 5 years from the expiry of the year to which the assessment relates.

The Hon'ble Tamil Nadu Taxation Special Tribunal has given a ruling in the case of Madurai District Co-operative Spinning Mills Limited reported in (2001) 122 STC 477, that there would be no bar to the proceedings under section 12(5)(iii) of the TNGST Act 1959 on the question of limitation, if a notice was issued under section 12(5) of the TNGST Act '59 within the period of limitation prescribed therein and that it is not necessary that the final order of penalty should be passed before the end of the period of limitation.

What is to be searched in the records is whether the period of limitation had set in by the time the Assessing Authority issued the notice or not. It could not be denied that the pre-assessment notice was issued by the Assessing Authority only on February 7, 2000 and served on the appellant on 10.2.2000. Definitely, the pre-assessment notice served was long after the said disputed assessment year came to a close.

The learned Departmental Representative has however, argued that the subject matter of works contract and the liability under section 3-B of the TNGST Act had been in dispute in the courts of law for a very long time and as such, there should be a clear exclusion of this period for the purpose of reckoning the limitation of time. According to him whatever period was spent in the courts of law namely the High Court and the Supreme Court would be exclucible and then there is clear protection to the order passed by the Assessing Authority on penalty.

(30) It is not in doubt that the subject relating to works contract, the taxable components of turnover under works contract, the exclusion of turnovers the method of arriving at the taxable turnover the point of levy etc. were unsettled until the decision of the supreme court in the case of L&T Limited was known. Therefore, as rightly pointed out by the learned Departmental Representative this necessitated the Assessing Authority to keep the assessments pending. Penalty being corrolary to assessment, it would not have been possible for the Assessing Authority to proceed separately on the question of penalty. Therefore, this matter weighs heavily in support of the Assessing Authority's case and this very point desist me from giving an opinion on the question of limitation. Unfortunately, no details regarding the pendency of dispute in the court etc. could be traced from the assessment file.

I find it better to leave the matter to the Assessing Authority to decide while passing fresh orders. The Assessing Authority is directed to examine the period under which the subject of works contract, the question of tax under section 3-B of the TNGST Act and the appellant's own disputes under section 3-B of the TNGST Act were locked up in the court of law and whether such period is excludible for the purpose of limitation prescribed under the Act the Assessing Authority shall then decide whether the penalty under section 12(5)(iii) is leviable or not.

Furthermore, another reason for remanding the question of levy of penalty is the changed scenario of the various disputed turnovers such as the fresh claim of credit notes of Rs.12,84,637/-, service charges of Rs.2,86,19,218/-, rate of tax leviable on Life Saving Drugs of Rs.1,26,82,955/- and Government works contract for Rs.24,30,917/- etc. all of which have been remanded back to the Assessing Authority for re-examination and fresh orders. This necessitated the Assessing Authority to have a fresh examination of the penalty leviable, if any.

Thus, for the above reason the penalty levied under section 12(5)(iii) of the Act is set aside and remanded back to the Assessing Authority for re-examination and fresh orders."

7.In the opinion of this court, after considering the entire materials available on record and the pleadings of both the parties, the first appellate authority rendered the aforesaid elaborate findings, while remanding the issue relating to penalty to the assessing officer, which was also confirmed by the Tribunal by the order impugned herein and therefore, the said well considered findings, which appear to be reasonable, cannot be faulted, for its interference.

8.In such view of the matter, the writ petition stands dismissed. However, the petitioner is granted liberty to raise all the issues, including limitation for imposition of penalty before the assessing officer. Considering the period during which the issues are pending, the assessing officer shall complete the proceedings and pass orders, on merits and in accordance with law, after affording due opportunity of hearing to the petitioner, within a period of four weeks from the date of receipt of a copy of this order. No costs.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

mrr

To

1. The Assistant Commissioner (CT) I,
   Fast Track Assessment Circle – II,
   Chennai – 600 006.

2. The Deputy Commissioner (CT) (Appeals),
Third Floor, Wavoo Complex,
191, NSC Bose Road,
Chennai - 600 001.

3. The Secretary,
Tamil Nadu Sales Tax
Appellate Tribunal (Main Bench),
City Civil Court Buildings,
High Court Complex,
Chennai - 600 104.

+1cc to Special Government Pleader (Taxes), SR. No.17078

W.P.No.22069 of 2007

BR (CO)
PR (04/04/2022)