IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.10.2022

CORAM

THE HON'BLE MR. JUSTICE S. VAIDYANATHAN

AND

THE HON'BLE MR. JUSTICE C. SARAVANAN

W.P. No. 4662 of 2007

&

M.P. No. 1 of 2007

M/s.Bhoruka Gases Ltd.,
rep. by Purohith,
Director,
6, North Terminus road,
Chennai – 600 081. ..Petitioner

Vs.

1. The Sales Tax Appellate Tribunal,
(Main Bench),
City Civil Court Buildings,
Chennai – 104.

2. The Commercial Tax Officer,
Tondiarpet Assessment Circle,
20, Kummalamman Koil Street,
Chennai – 81. ..Respondents

Prayer: Petition under Article 226 of the Constitution of India praying for issue of a Writ of Certiorari to call for the records on the files of the 1st respondent in S.T.A. No. 37/02 dated 8.12.05, relating to the year 1991-92, and quash the same as being invalid and illegal, unjustified on facts and law.

For Petitioner	::	Mr.V. Srikanth
For Respondents	::	Mr.T.N.C.Kaushik, Addl. Govt. Pleader for R2

O R D E R

S. VAIDYANATHAN,J.

AND

C. SARAVANAN,J.

This writ petition has been filed as against the final order of the 1st respondent/SalesTax AppellateTribunal in STA No. 37 of 2002 vide impugned order dated 08.12.2005.

2. By the impugned order, the Tribunal has partly allowed the said appeal insofar as imposition of penalty under Section 12(5)(iii) of Tamil Nadu General Sales Tax Act, 1959 (hereinafter 'TNGST Act' for brevity) as it stood during the period in dispute i.e, 1991-92.

3. Section 12(5)(iii) of TNGST Act, 1959 reads as follows:

*"**Section 12(5)** The assessing authority may, in the order of assessment or by a separate order, direct that the dealer shall, in addition to the tax assessed under sub-section (4), pay by way of penalty, a sum -*

(i) which, in the case referred to in clause (i) of sub-section (4) shall not be less than fifty per cent but which shall not be more than one hundred and fifty per cent of the amount of tax payable;

(ii) which, in the case referred to in clause (ii) of sub-section (4), shall be equal to two per cent of the tax payable for every month or part thereof during which the default in the submission of the return continued, subject to a maximum of fifty per cent of the tax; and

*(iii) which, in the case referred to in clause (iii) of sub-section (4), shall not be **less than fifty per cent but shall not be more than one hundred and fifty per cent of the difference in***

tax payable on the turnover disclosed in the return and that determined by the assessing authority:

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

4. The relevant portion of the impugned order passed by the 1st respondent Tribunal is extracted hereunder:

"Item (ii) STA 37/02 (1991-92) The Assessing Officer in his Pro.dt. 13.3.97 imposed penalty at Rs.1,04,888. The learned Appellate Assistant Commissioner on appeal, by respectfully following the decision of the Madras High Court, in the case of M. JEYARAJ NADAR & SONS, had deleted the penalty.

In grounds, it is contended that, deletion of penalty by the Appellate Assistant Commissioner is incorrect.

Before the Tamil Nadu Sales Tax Appellate Tribunal, State would argue that, the Appellate Assistant Commissioner is incorrect in deleting the penalty observing that, there there was no concealment of turnover outside the books of accounts.

According to the State, the wrong reporting of taxable turnover under wrong exemption etc. it would attract penalty and hence pleaded for restoration of the order of the Assessing Officer.

The contention of the learned counsel for the respondent seems to be that, the learned Appellate Assistant Commissioner had correctly deleted the levy of penalty and so saying, no penalty can be imposed on the amounts representing Surcharge, Additional Surcharge and Additional Sales Tax as per the decision 136 STC 606 and in turn pleded for dismissal of the State appeal.

While perusing the connected records, it is seen that as per page 267 of the assessment file, the Assessing officer imposed levy of penalty ofRs.1,04,888 under section 12(5)(iii) at 150% of the tax due. The learned Appellate Assistant Commissioner on appeal deleted the entire penalty. The assessment year in the case on hand relates to 1991-92. No doubt, it is an admitted fact that, according to the assessing officer, incorrect/incomplete return was filed by the respondent/assessee. For the incorrect/incomplete return, levy of penalty is warranted. So, considering the facts and circumstances of the case, we feel, in the interest of justice, 50% of levy of penalty would suffice which will meet end of justice and order accordingly."

5. The petitioner is involved in manufacture of goods. The dispute arose as to inclusion of cylinder holding charges and delivery charges in the taxable turnover. It was the specific case of the petitioner that both these amounts were not liable to be included in the taxable turnover and therefore, the petitioner and the department were in dispute for the assessment years 1987-88, 1988-89, 1990-91, 1991-92, 1992-93 and 1994-95.

6. The issue on merits has been recently answered against the petitioner in the petitioner's own case and another, namely, M/s. Karnataka Oxygen Limited by common order dated 18.02.2022 in W.P. Nos. 49280 to 49285 of 2006. The Division Bench of this Court had followed the decision of the Hon'ble Apex Court in ***State of Orissa and another V. Asiatic Gases Limited*** reported in ***(2007) 7 VST 531 (SC)*** and has ultimately answered as follows:

> *"11. In the light of the ratio laid down by the Honourable Supreme Court in the decision mentioned above, we hold that cylinder delivery charges and handling/rental charges are liable to be taxed and it was rightly held by the*

first respondent. We do not find any infirmity in the order passed by the first respondent warranting our interference."

7. As far as imposition of penalty under Section 12(5)(iii) of TNGST Act is concerned, learned counsel for the petitioner has placed reliance on the decision of the Division Bench of this Court in the case of ***State of Tamil Nadu V. Indian Silk Traders*** reported in ***[1994] 94 STC 157 (Mad)*** wherein the decision of the Hon'ble Supreme Court in ***Cement Marketing Co. Of India Ltd. V. Assistant Commissioner of Sales Tax [1980] 45 STC 197*** has been followed.

8. The specific case of the petitioner is that in the light of the decision of this Court in ***State of Tamil Nadu V. Indian Silk Traders*** reported in ***[1994] 94 STC 157 (Mad)***, imposition of penalty even to the extent of 50% cannot be justified.

9. Learned counsel for the petitioner drew the attention of this Court to paragraph Nos. 8 & 9 of the aforesaid decision of this Court. It is further submitted that this view has also been followed by Division Benches

of this Court in the judgments reported in ***116 STC 123 (State of Tamil Nadu V. Periyar District Cooperative Milk Producers Union Ltd.)*** & ***118 STC 160*** (***State of Tamil Nadu V. Papco Offset Printing Works)***.

10. Learned Additional Government Pleader for the 2nd respondent, on the other hand, would submit that the order of the Tribunal is well-reasoned and requires no interference at all. It is submitted that indeed, it is a case where the petitioner had filed incorrect details by claiming exclusion of cylinder holding charges and delivery charges from the taxable turnover. Therefore, the imposition of penalty under Section 12(5)(iii) of TNGST Act, 1959 was rightly upheld by the Appellate Tribunal by restricting the penalty to 50% of the difference in the taxable turnover and the turnover disclosed in the returns. It is submitted that maximum penalty of 150% has not been imposed. On the other hand, it has been restricted to 50%. Therefore, the learned Additional Government Pleader would submit that the writ petition is liable to be dismissed.

11. We have considered the arguments advanced by the learned counsel for the petitioner and the learned Additional Government Pleader for the second respondent. Though the views expressed in ***State of Tamil Nadu V. Indian Silk Traders,*** (1994) 94 STC 157 are fraught with contradictions and require for a re-consideration, we are refraining from taking a different view, as the view of this Court in the aforesaid case was followed by this Court in the following cases:-

i) ***State of Tamil Nadu vs. Periyar District Co-operative Milk Producers United Ltd.,*** (1999) 116 STC 123;

ii) ***State of Tamil Nadu vs. Papco Offset Printing Works,*** (2000) 118 STC 160

Therefore, we do not wish to take a different view. We, however leave the issue open to be decided in an appropriate case when opportunity presents later.

S. VAIDYANATHAN,J.

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12. Accordingly, we are inclined to allow the writ petition and the same is allowed. No costs. Consequently, connected miscellaneous petition is closed.

(S.V.N.J.) (C.S.N.J.)
nv 26.10.2022

To
The Commercial Tax Officer,
Tondiarpet Assessment Circle,
20, Kummalamman Koil Street,
Chennai – 81.

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