WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.09.2022

CORAM

THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P.(MD)No.12809 of 2020
and
W.M.P(MD).No.10871 of 2020

M/s.Poonam Trading Company,
Represented by its Partner Naveen S Patel,
123, Tenkasi – Shencottai Road,
Ilanji,
Tirunelveli District. ... Petitioner

Vs.

1. The Commercial Tax Officer,
   Presently Designated as
   The State Tax Officer,
   Shencottah.

2. The Appellate Deputy Commissioner (ST),
   Commercial Taxes Building,
   Reserve Line, Palayamkottai,
   Tirunelveli. ... Respondents

PRAYER : Petition filed under Article 226 of the Constitution of India praying for issuance of Writ of Certiorari, calling for the records of the 1st Respondent in TIN No.33785701177/2013-14 dated 16.05.2017 and quash the same as unlawful and invalid.

https://www.mhc.tn.gov.in/judis

WEB COPY

For Petitioner : Mr.R.D.Ganesan

For Respondents : Mr.M.Siddharthan
Additional Government Pleader

O R D E R

This Writ Petition has been filed challenging the impugned order of the 1st Respondent dated 16.05.2017, insofar as the levy of penalty under Section 27(3)(a) of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred to as 'the Act').

2. The Petitioner is engaged in business of sales of timber and for the assessment year 2013-14, the Petitioner had reported a total and taxable turnover of Rs.95,35,27,407/- (Rupees Ninety Five Crores Thirty Five Lakhs Twenty Seven Thousand and Four Hundred and Seven only) under Section 22(2) of the Act. The place of business was inspected by the Enforcement Wing Officer on 25.01.2017. After the inspection and on scrutiny of trading and profit and loss account statements for the said assessment year, it was found that the dealer had leased out vehicles to

https://www.mhc.tn.gov.in/judis

WEB COPY

Tvl.DHS Logistics, Coimbatore. The lease rent was not disclosed in the returns nor was tax paid on the same. It was found that the above transaction would constitute levy of tax on right to use the vehicles in terms of Section 4 of the Act.

3. It is submitted by the learned counsel for the Petitioner that there was no transfer of possession, which is a *sine qua non* for a transaction to constitute right to use any goods for levy of tax. The Petitioner has nevertheless paid the entire tax of Rs.6,96,000/- (Rupees Six Lakhs and Ninety Six Thousand only) and the same is also recorded in the order of assessment. The limited grievance of the Petitioner is that the levy of penalty under Section 27(3)(a) of the Act at 50% of the tax is due on the alleged right to use goods. He further submitted that the levy of penalty is bad for want of jurisdiction, inasmuch as the Assessing Authority has not even examined nor rendered any finding of wilful non-disclosure which is a condition precedent for levying penalty under Section 27(3)(a) of the Act. In this regard, reliance was sought to be placed in the cases of ***R.E.M.Ramakutty Nadar vs. The State of Madras*** reported in

https://www.mhc.tn.gov.in/judis

WEB COPY

(1973) 31 STC 44 and ***the Deputy Commissioner (C.T.), Coimbatore vs. V.S.R.Ramaswami Chettiar and Bros*** reported in ***(1976) 38 STC 382***, wherein, it was held that in the absence of finding of wilful non-disclosure which is a jurisdictional fact would vitiate levy of penalty. It was further submitted that there is no non-disclosure as alleged inasmuch as the transaction and the above amount were available in the books of account.

4. To the contrary, it was submitted by the learned Additional Government Pleader for the Respondents that despite notice and opportunity of personal hearing were given to the Petitioner, the Petitioner had not even responded and he filed the present Writ Petition belatedly after a period of three years and therefore, the Writ Petition is liable to be dismissed.

5. This Court agrees that the Petitioner ought to have been vigilant in challenging the orders within a stipulated period of limitation.

6. It is further submitted by the learned counsel for the Petitioner that this Court has also taken a view that under Article 226 of the

https://www.mhc.tn.gov.in/judis

WEB COPY

Constitution of India, whenever an order is back for want of jurisdiction, it has been consistently held that the writ would lie.

7. In the present case, there is a delay of three years. However, the petitioner has come forward with the following explanations that the concerned partner was out of station in view of family commitment and by the time, the time limit for filing statutory appeal was over and thereafter the Petitioner was facing financial problems, consequent to which, the Petitioner was unable to take appropriate measures to challenge the impugned order.

8. The learned counsel for the Petitioner makes it clear that the tax paid is not the subject matter in this petition, though the same may not be liable for tax and the challenge is confined to the levy of penalty as stated above.

9. This Court is of the view that the levy of penalty in the impugned order cannot be sustained and is bad for want of jurisdiction,

https://www.mhc.tn.gov.in/judis

WEB COPY

inasmuch as there is no finding of wilful non-disclosure which is a condition precedent for invoking Section 27(3)(a) of the Act. In this regard, it may be useful to refer to the following judgments:

(I) R.E.M.Ramakutty Nadar vs. The State of Madras reported in ***(1973) 31 STC 44:***

> "***8.*** *Thirdly, the learned counsel for the petitioner contends that the levy of penalty cannot, in any event, be justified for there is no specific finding that there has been a wilful non-disclosure of the assessable turnover by the petitioner in the order of assessment and that such a finding is absolutely essential if an order of penalty is to be justified under section 16. We are inclined to agree with the learned counsel for the petitioner in this regard. In T.P.S.R. Factory P. Ltd. v. Deputy Commercial Tax Officer and Hindustan Steel Ltd. v. State of Orissa, it has been clearly laid down that the power to levy the penalty being a discretionary one, the authority should give reasons before proceeding to levy penalty and that the finding on the non-disclosure of the assessable turnover by the dealer is a sine qua non for the authority levying penalty under section 16(2). We find in these cases that the assessing officer has not given any such finding. Now, that we have construed the order of*

https://www.mhc.tn.gov.in/judis

WEB COPY

assessment as one made under section 16, the order levying the penalty without a finding of wilful non-disclosure by the petitioner could not be upheld."

(ii)*The Deputy Commissioner (C.T.), Coimbatore vs. V.S.R.Ramaswami Chettiar and Bros* reported in ***(1976) 38 STC 382***:

> *"The scheme of Section 16 shows that a reassessment could be made for any reason where any whole or any part of the turnover of business of a dealer has escaped assessment to tax. But if the penalty is to be levied on the ground of escapement of the turnover, a finding is necessary as to the wilful nature of the non-disclosure."*

10. Furthermore, the assessment having been made on the basis of the books of account as would be evident from the fact that even during the inspection, the figures relating to transfer of vehicles were culled out only from Profit and Loss account, the levy of penalty under Section 27(3)(a) is unwarranted, as the question of wilful non-disclosure may not arise in the above circumstances.

https://www.mhc.tn.gov.in/judis

WEB COPY

11. In view of the same, the impugned order insofar as the levy of penalty under Section 27(3)(a) of the Act is set aside.

12. Accordingly, this Writ Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed.

22.09.2022

Index : Yes / No
Speaking Order : Yes / No

vji

To

1. The Commercial Tax Officer,
   Presently Designated as
   The State Tax Officer,
   Shencottah.

2. The Appellate Deputy Commissioner (ST),
   Commercial Taxes Building,
   Reserve Line, Palayamkottai,
   Tirunelveli.

https://www.mhc.tn.gov.in/judis

WEB COPY

MOHAMMED SHAFFIQ, J.

vji

W.P.(MD)No.12809 of 2020
and
W.M.P(MD).No.10871 of 2020

22.09.2022

https://www.mhc.tn.gov.in/judis