BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 02.09.2022

CORAM

THE HONOURABLE MR. JUSTICE M.NIRMAL KUMAR

Writ Petition (MD) No.21003 of 2022
and
W.M.P.(MD)No.15247 of 2022

M/s.Karthick Agencies,
Rep. by its Proprietor,
Mr.K.M.Kamatchi,
No.12, Sandhai Veedhi,
Ponnamaravathy – 622 407,
Pudukottai District. .. Petitioner

Versus

The Commercial Tax Officer (Main) FAC,
Pudukottai II Assessment Circle,
Pudukkottai. .. Respondent

Prayer :- Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari, to call for the records of the respondent in TIN 33654122525/2016-17, dated 04.09.2018, quash the same as illegal, without jurisdiction and against the principles of natural justice.

For Petitioner : Mr.K.Soundararajan

For Respondent : Mr.P.Subbaraj
Special Government Pleader

ORDER

The petitioner namely, M/s.Karthick Agencies is a dealer in AVT Tea and general goods and a registered dealer under the Tamil Nadu Value Added Tax Act, 2006 [hereinafter referred to as "the TNVAT Act"]. The petitioner effected purchase from the local registered dealers and the turnover was below Rs.50 Lakhs and therefore, opted to pay tax under Section 3(4) of the TNVAT Act. The petitioner filed return for the assessment year 2016-2017 and reported taxable turnover of Rs.46,98,892/- and paid the tax dues thereon. The Enforcement Officials on 14.02.2017, during inspection, found that the turnover reported in the profit and loss account is more than the turnover reported in the returns furnished to the department and thereby, found suppression of sales to the tune of Rs.18,61,707/-. The respondent proposed to levy tax at the rate of 5% for the entire sales turnover and assessed the entire turnover under Section 3(2) of the TNVAT Act instead of under Section 3(4) of the TNVAT Act, since the turn over exceeds Rs.50 Lakhs. The said proposal was communicated to the petitioner on 12.07.2017.

2.The petitioner filed his objections on 20.10.2017 and appeared before the respondent on the same day. Thereafter, the respondent issued a revised notice in TIN 33654122525/2016-17, dated 26.02.2018, in which, further sales suppression estimated. Again, the respondent issued a notice on 02.03.2018 and sought explanations. The petitioner, vide letter dated 10.03.2018, sought sometime. Thereafter, the respondent again issued a notice on 28.03.2018. On 06.04.2018, the petitioner again sought time. The respondent granted time upto 30.04.2018. The petitioner again vide letter dated 26.04.2018, sought time. The respondent, vide letter dated 10.08.2018, granted time upto 29.08.2018. Thereafter, the petitioner filed reply dated 29.08.2018, explaining the sales turnover and the tax worked out by them and submitted that the levy of tax at the rate of 5% for the entire turnover under Section 3(2) of the TNVAT Act is not correct and as per Section 3(4) of the TNVAT Act, the levy of tax is at the rate of 0.5% upto the initial turnover of Rs.50 Lakhs and thereafter, at the rate of 5% for the balance turnover. In this case, the levy of tax for the entire turnover is at the rate of 5%, which is not proper.

3.The respondent, by the impugned order, rejected the petitioner's objections and directed the assessing officer to deduct tax under Section 3(4) of the TNVAT Act. Further, the respondent failed to consider the judgment of a Division Bench of this Court in **State of Tamil Nadu vs. Tvl.Jalaram Timber Depot, Madurai** [Tax Case Revision (MD) No.100 of 2012, dated 11.10.2012], wherein the Division Bench of this Court held that the stock variations arrived by adopting various formulae method in terms of money value is not a scientific method and it is not correct method to calculate the real and true value and the impugned order is not a speaking order. This Court followed the said decision in **Tvl.Kanagavalli Mattu Theevanam Angadi vs. The Commercial Tax Officer** [W.P.(MD)No.250 of 2015, dated 26.07.2018]. In the impugned order, there is nothing to show that the petitioner's objections have been considered. Further, the petitioner made payment of Rs.4,14,209/-, through the State Bank of India, Pudukottai, on 14.11.2017. The Cashier therein misappropriated the amount, not credited the same to the respondent account, though the petitioner paid the amount by way of cash and the petitioner is having valid Challan, confirming the payment made by them. The petitioner given letter to the Treasury, giving particulars as well as sent several communications to the Branch Manager, State Bank of India, Pudukottai, relating to the misappropriation committed by the Cashier and to re-credit the said amount to the petitioner's account.

4.The learned counsel further submits that if the said amount was properly credited on the date of remittance by the petitioner, the tax liability worked out would be reduced and not as projected now. Further, the petitioner on 17.09.2018, requested the respondent to revise the assessment order after adjusting the payments made, which was not taken into consideration. The petitioner requested to revise the assessment order passed on 04.09.2018 under Section 84 of the TNVAT Act. Even though the impugned order was passed on 04.09.2018, the petitioner was not able to approach the appellate authorities within the stipulated time, in view of Rs.4,14,209/- misappropriated by the

Bank Officials. Since the amount credited by the petitioner to the respondent account is not properly accounted by the Bank Officials, the petitioner had to suffer and compelled to pay huge amount as pre-deposit for filing appeal. Only after issuance of the assessment order, the petitioner paid the tax demand amount and now, the petitioner is levied with penalty alone.

5.The learned counsel further submits that due to continuous correspondence with the Treasury, Bank Officials and others, delay occurred and the petitioner is unable to file an appeal within time. Now, the respondent has sent notice on 16.12.2021, directing the petitioner to pay the penalty amount, otherwise, to face recovery proceedings under the Revenue Recovery Act. Hence, the petitioner seeks condonation of delay and to file an appeal challenging the penalty proceedings. The petitioner has got good chance to succeed in the appeal. If delay is not condoned, the petitioner is compelled to pay penalty and would be deprived of his right of filing an appeal.

6.Mr.P.Subbaraj, learned Special Government Pleader appearing for the respondent submits that the impugned order is dated 04.09.2018. Only after steps taken to initiate revenue recovery action, on 16.12.2021 the petitioner had thought it fit to file an appeal and that too, it is almost 10 months from the date of issuance of the revenue recovery notice. The petitioner not given proper or valid reasons for the delay. The petitioner having participated in the adjudication proceedings and having known the procedure well, by his own conduct, failed to file appeal, now, cannot take recourse and seek relief by way of filing the present Writ Petition.

7.The learned Special Government Pleader further submits that the due payable by the petitioner is Rs.9,21,251/-. For filing an appeal challenging the penalty, no pre-deposit is required. Therefore, the contention of the learned counsel for the petitioner for non-payment of the amount, citing the discrepancies in his State Bank of India account, cannot be accepted.

8.Considering the rival submissions and on perusal of the materials, it is seen that the petitioner is primarily aggrieved against the calculation of taxable income made by the assessing officer under Section 3(2) of the TNVAT Act, instead of Section 3(4) of the TNVAT Act, wherein for Rs.50,000/- to Rs.50,00,000/-, the tax chargeable is only at the rate of 0.5%, instead, for the entire turnover, it had been worked out at the rate of 5%, thereby, it had cumulative effect in working out the demand as well as penalty. Further, the Department proceeded on the stock discrepancy estimation along with the profit and loss account. A Division Bench of this Court held that stock variation arrived at by adopting various formulae methods in terms of money value is not a scientific method and it is not correct method to calculate the real and true value, a detailed scrutiny of the documents is required. Further, the Cashier of State Bank of India misappropriated a sum of Rs.4,14,209/-, which was credited by the petitioner to the Department account through Treasury, which is not in dispute.

9.Finding valid reason in the petitioner's submission and taking into consideration the attendant circumstances and finding that the petitioner paid the tax due and the impugned order is only with regard to levy of penalty, which is under dispute, this Court is of the view that there is no pre-deposit required for penalty. However, the petitioner is denied the right of filing appeal due to limitation. In view of the same, this Court is inclined to condone the delay caused, due to the above said reasons. The petitioner is directed to file an appeal within 30 days from the date of receipt of a copy of this order. Considering the fact that the issue relates to the assessment year 2016-2017, the appellate authority to consider the petitioner's appeal, not raising any objection with regard to delay and dispose of the same on merits and in accordance with law, within a period of three months from the date of filing of the appeal.

10.With the above directions, this Writ Petition is disposed of. No costs. Consequently, connected Miscellaneous Petition is closed.

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Note:- Registry is directed to return the original impugned order to the learned counsel for the petitioner to enable the petitioner to file an appeal, after substituting a Photocopy of the same.

To

The Commercial Tax Officer (Main) FAC,
Pudukottai II Assessment Circle,
Pudukkottai.

M.NIRMAL KUMAR, J.

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Order made in
W.P.(MD)No.21003 of 2022

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