# IN THE HIGH COURT OF JUDICATURE AT MADRAS

**DATED : 01.03.2024**

**CORAM**

**THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ**

**W.P. Nos.2304, 2308, 2310, 2311 of 2021**
**and**
**W.M.P. Nos.2605, 2607, 2610, 2613 of 2021**

M/s.PRV Constructions (P) Ltd.,
represented by its General Manager,
No.6/73, North Silver Street,
St.Thomas Mount,
Chennai 600 016. ..Petitioner in all W.P.'s

Vs.

The State Tax Officer,
Alwarpet Assessment Circle,
Chennai 600 035. ...Respondent in all W.P.'s

**PRAYER in W.P.No.2304 of 2021:** Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records of the respondent in his proceedings in TIN: 33790821247/2009-10 and quash the impugned assessment order dated 21.12.2020.

**PRAYER in W.P.No.2308 of 2021:** Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records of the respondent in his proceedings in TIN: 33790821247/2010-11 and quash the impugned assessment order dated 21.12.2020.

**PRAYER in W.P.No.2310 of 2021:** Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records of the respondent in his proceedings in TIN: 33790821247/2011-12 and quash the impugned assessment order dated 21.12.2020.

**PRAYER in W.P.No.2311 of 2021:** Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorari to call for the records of the respondent in his proceedings in TIN: 33790821247/2012-13 and quash the impugned assessment order dated 21.12.2020.

| | |
|---|---|
| For Petitioner in all W.P.'s | : Mr.R.L.Ramani, Senior Advocate for Mr.B.Raveendran, Mr.P.V.Sudhakar |
| For Respondent in all W.P.'s | : Mr.Haza Nazarudeen Additional Advocate General assisted by Mr.Harsha Raj, Additional Government Pleader |

**COMMON ORDER**

This batch of writ petitions are filed challenging the orders of assessment for the assessment years 2009-10 to 2012-13. At the outset, it was submitted by the learned Senior Advocate appearing for the petitioner that the challenge is confined to the levy of penalty under Section 27(3) of the TNVAT Act, though the writ petitions were filed challenging the orders of assessment.

2. It is submitted by the learned counsel for the petitioner that the petitioner was engaged in the execution of works contract. There was an inspection of the petitioner's place of business on 17.07.2009 followed by another inspection on 11.11.2010. It is submitted that during the course of the 1st inspection, the petitioner was intimated by the inspecting authorities that the petitioner ought to discharge its liabilities by adding gross profit and freight charges to the purchase value. Accordingly, the petitioner filed its returns by adding gross profit and freight charges to the purchase value and discharged its liability on the works contract executed during the relevant assessment years. The following portions of the sworn statement dated 17.07.2009 made by the General Manager of the petitioner Company is relevant in this regard:

> *"Further you have informed that the payment of VAT as per Section 3(2) is not applicable to us as we are dealers in works contractor. So you have advised us to pay the VAT as per Section 5 of the TNVAT Act, 2006. We admitted the above points and accepted to pay the VAT against Deemed sale value by adding of G.P. on the purchase value.*
>
> *.....*
>
> *However, during June – 2009 we have move the entire goods to our work site for use in the contract and paid on liabilities after adding G.P. and transport on the date of Audit we have no stock. <u>As we are paying VAT under Section 5, we have declared on liability after adding transport charges and G.P. as per an accounts appropriately.</u>"*
>
> *(emphasis supplied)*

3. There have been two earlier rounds of litigation with regard to the above assessment years. In the first round of litigation, assessment orders dated 21.05.2015 was challenged in W.P.No.19014 to 19017 of 2015 on the ground of violation of principles of natural justice. The learned Judge vide order dated 30.06.2016 was pleased to set aside the orders of assessment for the assessment years 2009-10 to 2012-13, subject to the condition that the petitioner pays 15% of the disputed tax. The petitioner was then permitted to treat the impugned proceedings as show cause notices, submit their objections to the same. The respondents were directed to afford an opportunity of personal hearing and conclude the proceedings in accordance with law.

4. Pursuant thereto, the petitioner submitted its objections vide letter dated 27.04.2017 that the difference between the sales turnover reported by the petitioner and the purchase turnover reported by its customer viz., Tvl.Gamesa Wind Turbines Private Ltd., was only in view of the method of computation adopted by the petitioner on the basis of advice / suggestion of the Enforcement Wing Officers. The relevant

portion of the objection for the assessment year 2009 – 10 is extracted hereunder :

> *"2. ..... It is also relevant to state that even on verification of records the Enforcement Officials who conducted inspection on 17.07.2009 and 11.11.2010 have not found out any sales suppression from our records.*
>
> *.....*
>
> *4. ..... At the time of inspection the said Officers enquired about the carry forward input tax without any sales during the same months. After verifying our records they informed us to pay output tax under section 5 of The TNVAT Act, 2006. We admitted and accepted to pay the tax against Deemed sale value by adding transportation charges and gross profit at 10% to the purchase value of the goods. Thereafter, we have followed the said method in paying the output tax in the month in which purchases are effected in order to avoid carry forward of input tax credit. In consequence of this method we do not wait till such time that the goods are used in the works contract or sales Invoice raised for the purpose of payment of output tax.*
>
> *.....*
>
> *6. We submit that there was no discrepancies were noticed as per the VAT Audits conducted twice at our place of business. But you have passed assessment order treating the difference between the sales reported by us and the purchase turnover reported by our customer as sales suppression and levied tax thereon. We have disclosed the entire turnover in our books of accounts, filed monthly returns and paid tax. We had produced our records at the time of filing our objection. The levy of penalty u/s.27(3) of the Act only when there is escapement from assessment due to wilful nondisclosure of taxable turnover by the assessee. In our case the difference in the sales turnover reported by us and the purchase turnover reported by our customer is only due to the change of method of payment of taxes, that too as per the approval of Enforcement Officers. Further in our case no will full non-disclosure was noticed.*
>
> *And secondly, for alleged difference in turnover as stated above, your good self did not consider the labour charges which was added to the cost of the goods sold at the time of raising sale bills. If your good self consider these aspects the question of sales suppression*

*would not have arisen."*

*(emphasis supplied)*

4.1. For the assessment years 2010-11 to 2012-13 as the objections were similar, to avoid repetition and for the sake of brevity, the relevant portion of the objection for the assessment year 2010-11 is extracted hereunder:

> .......
> *3. We submit that your good self have not consider the method followed by us in respect of adjustments of input tax credit. We had been following the system as stated in the 2nd paragraph referred above till in the month of June 2009. Thereafter we changed the system of paying tax as per the advise of the Assistant Commercial Tax Officer, Enforcement East Group II, Chennai. There was an inspection conducted by the above said Officers at our place of business on 17.7.2009. At the time of inspection the said Officers enquired about the carry forward Input tax without any sales during the same months. After verifying our records they informed us to pay output tax under section 5 of The TNVAT Act, 2006. We admitted and accepted to pay the tax against Deemed sale value by adding transportation charges and gross profit at 10% to the purchase value of the goods. Thereafter, we have followed the said method in paying the output tax in the month in which purchases are effected in order to avoid carry forward of input tax credit, in consequence of this method we do not wait all such time that the goods are used in the works contract or sales Invoice raised for the purpose of payment of output tax.*
>
> *4. We submit that thereafter another inspection was conducted by the Commercial Tax Officer (CT) Group IV Central Enforcement II, Chennai at our place of business on 11.11.2010. On verification of our records and returns, the Enforcement Wing Officers pointed the liability to pay purchase tax on the purchase of materials like sand, blue metal, bricks,*

*consumables purchased from unregistered dealers in the State and used in the execution of works contract and they collected purchase tax from us. The said Enforcement Officers did not find fault with the method of payment of out put tax and adjustment of input tax credit. Hence we continued to pay tax under section 5 of the TNVAT Act, 2006 as stated in 4th paragraph supra. We have in our reply letter dated 17.06.2014 and 19.05.2015 to your notice dated 20.05.2014 and 05.05.2015 clearly explained that the present method of payment of tax under section 5 of the TNVAT Act, 2006 had been adopted on the basis of the directions and the approval of Enforcement Wing Officers. Therefore, your good self could not alleged the short payment of tax by us as stated in the assessment order.*

*Penalty u/s. 27(3): Rs.41,53,142/-*
*5... The levy of penalty u/s.27(3) of the Act only when there is escapement from assessment due to wilful nondisclosure of taxable turnover by the assessee. In our case the difference in the sales turnover reported by us and the purchase turnover reported by our customer is only due to the change of method of payment of taxes, that too as per the approval of Enforcement Officers. Further in our case no will full non-disclosure was noticed. And secondly, for alleged difference in turnover as stated above, your good self did not consider the labour charges which was added to the cost of the goods sold at the time of raising sale bills. If your good self consider these aspects the question of sales suppression would not have arisen"*

*(emphasis supplied)*

4.2. The above objections were reiterated by the petitioner vide reply dated 14.09.2018, 04.10.2019 and 27.12.2019. The following objections were raised for all the four assessment years viz., 2009-10 to 2012-13. For the sake of brevity and to avoid repetition, the relevant portion of the objection dated 27.12.2019 for the assessment years 2009 – 10 is extracted hereunder :

> *"A copy of the statement dated 17.07.2009 is enclosed as Annexure-I. You will find there from that the statement recorded is signed by the Assistant Commercial Tax Officer, Group -II Enforcement (East), Greams Road, Chennai, as well as Mr. N. Subramanian, our Senior Manager. Engn. <u>Therefore, it is evident that we have switched over to the methodology of payment of tax on deemed sale value basis as per section 5 of the TNVAT Act 2006 only as per the suggestion and direction of the inspecting officers. This methodology was continued up to March 2013. Thereafter, objections were raised by the assessment circle and therefore once again we switched over to the old method from April 2013.</u>*
>
> *We would like to bring to your notice that there was yet another inspection conducted by the Enforcement Wing officials on 11.11.2010. A sworn statement was recorded from Mr. N. Subramanian, General Manager Engn & Admin. and a copy of the same is enclosed as Annexure-II. <u>Even at the time of second inspection held on 11.11.2010, the methodology suggested by the inspecting officers during the earlier inspection was not objected to by the authorities. In fact, they asked us to remit whatever tax is payable by us and accordingly we remitted the same.</u>*
>
> *From the above mentioned facts, it is clear that the methodology for payment of tax on deemed sale value basis under Section 5 of the TNVAT Act was suggested and directed only by the inspecting officers. The same is also not objected to by the inspecting officers during their second inspection held on 11.11.2010. Therefore, it is a clear case of bona fide and there is no need or recessity to object the same."*
>
> *(emphasis supplied)*

5. In the meanwhile, the petitioner filed a writ petition in W.P.No.34650 of 2019 for a writ of mandamus, directing the respondent to accept the method of computing tax liability on deemed sales under Section 5 of the TNVAT Act, in terms of the

instructions/directions/suggestions stated to have been issued/ made by the VAT Audit Officers at the time of inspection on 17.07.2009 and accordingly complete the assessments under TNVAT Act for the assessment years 2009-10 to 2012-13. The above writ petition was disposed of with the following observation :

> *"5.The learned single Judge in the order extracted above, has, in my considered view, directed an assessment to be completed, de novo, including specifically the issue of whether the plea raised by the petitioner in regard to method of accounting is bonafide or otherwise. Thus, there is some merit in the argument that the issue as to whether the method of accounting followed was bonafide or otherwise, should be considered specifically as a preliminary issue particularly, in the light of statement dated 17.07.2009.*
>
> *6.Thus, the impugned orders are set aside and these writ petitions disposed, directing the petitioner to appear before the Assessing Authority on Friday the 20 th December, 2019 at 10.30 a.m. without expecting any further notice in that regard. The petitioner shall be heard on all issues arising from the assessment including specifically the question of whether the method of accounting canvassed by it is bonafide or otherwise. The order of assessment passed shall specifically refer to and deal with this issue as well and such order shall be passed within a period of six(6) weeks from date of conclusion of personal hearing. No costs. Consequently, connected miscellaneous petition is closed."*
>
> *(emphasis supplied)*

6. The earlier objections were reiterated vide replies dated 09.03.2020, 27.10.2020 and 05.12.2020, while also submitting that the refusal to consider bonafides of the petitioner by following/ adopting the

method of accounting, as directed by the High Court and instead calling for document is in excess of jurisdiction. The relevant portion of the objection is extracted hereunder:

> *"In view of the above, your action in (a) refusing to consider the bonafides of the methodology as a preliminary issues as directed by the High Court and (b) calling for various documents in a proceedings to give effect to the orders passed by the High Court, is without authority of law. You have exceeded your jurisdiction by issuing the notice dated 10.02.2020."*

7. The impugned orders were made confirming the turnover of Rs.1,78,90,217/- (for the assessment year 2009-10), Rs.3,19,40,468/- (for the assessment year 2010-11), Rs.27,64,27,888/- (for the assessment year 2011-12), Rs.1,16,16,987/- (for the assessment year 2012-13) as allegedly representing suppression.

8. It is submitted that the limited challenge in the present writ petition is whether it is permissible for the respondent to invoke Section 27(3) of the Act, keeping in view the stated factual background viz., that the petitioner discharged the liability for executing works contract on the basis of the method of accounting suggested / advised by the inspecting officers viz., Enforcement Wing Officers.

9. It is submitted by the learned Senior Counsel for the petitioner that there is no question of wilful non-disclosure of assessable turnover since the petitioner only adopted /followed the method suggested / advised by the Enforcement Wing Officers while discharging the liability in respect of the works contract which would show that the petitioner had acted bonafide. In the absence of the jurisdictional fact viz., wilful non-disclosure being present the levy of penalty under Section 27(3) of the Act cannot be justified.

10. To the contrary, it was submitted by the learned Additional Advocate General appearing for the respondent that the liability would have to be determined on the basis of the provisions. It would ill lie in the mouth of the assessee to suggest that they had acted on the advise of the officer while acting in contravention of the provisions of the Act. The learned Additional Advocate General for the respondent would further submit that the very fact that the petitioner had chosen to simply follow the directions / suggestions of the Enforcement Wing Officers itself is indicative of lack of bonafides on the part of the petitioner and thus, the

levy of penalty is justified.

11. Heard both sides. Perused the materials on record.

12. Before I proceed further, it may be relevant to refer to Section 27(3) of the Act:

> *"27(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 a sum which shall be -*
>
> *(a) fifty per cent of the tax due on the turnover that was wilfully not disclosed if the tax due on such turnover is not more than ten per cent of the tax paid as per the return;*
>
> *(b) one hundred per cent of the tax due on the turnover that was wilfully not disclosed if the tax due on such turnover is more than ten per cent but not more than fifty per cent of the tax paid as per the return.*
>
> *(c) one hundred and fifty per cent of the tax due on the assessable turnover that was wilfully not disclosed, if the tax due on such turnover is more than fifty per cent of the tax paid as per the return;"*

12.1. A reading of the above provision would show that the pre-requisite for invoking Section 27(3) of the Act is to find that there was wilful non-disclosure of assessable turnover by the dealer.

13. The impugned orders insofar as it levies penalty under Section

27(3) of the Act cannot be sustained for the following reasons:

a. Absence of finding of wilful non-disclosure of assessable turnover:

There is no finding of wilful non-disclosure of assessable turnover for levy of penalty, independent of the fact, that the turnover was found to have been suppressed resulting in best judgment assessment and levy of tax.

13.1.This is evident from the extract of the impugned orders dated 21.12.2020 for the assessment years 2009-10 to 2012-13:

TIN:33790821247/2009-10:

"*In view of the above circumstances, I confirmed the order passed on 21.05.2015.*

| | | |
|---|---|---|
| *Suppression Turnover determined* | - | *Rs.1,78,90,217.00* |
| *Tax due* | - | *Rs. 7,15,609.00* |
| *15% Tax paid on 26.08.2016* | - | *Rs. 1,07,341.00* |
| | | *Rs. 6,08,268.00* |

*A Notice in Form "O" issued.*
*Penalty u/s27(3)*

*Penalty levied for the tax due*
*Rs.715609/- at 150%*

| | | |
|---|---|---|
| *Penalty due* | - | *Rs.10,73,413.00* |
| *Penalty paid* | - | *Rs. 0.00* |

| | | |
|---|---|---|
| *Balance* | - | *Rs.10,73,413.00* |

TIN:33790821247/2010-11:

"*In view of the above circumstances, I confirmed the order passed on 21.05.2015.*

| | | |
|---|---|---|
| *Suppression Turnover determined* | - | *Rs.3,19,40,468.00* |
| *Tax due* | - | *Rs. 27,68,761.00* |
| *15% Tax paid on 26.08.2016* | - | *Rs. 4,15,314.00* |
| | | *Rs. 23,53,447.00* |

*A Notice in Form "O" issued.*

*Penalty u/s 27(3)*

*Penalty levied for the tax due*
*Rs.27,68,761/- at 150%*

| | | |
|---|---|---|
| *Penalty due* | - | *Rs.41,53,142.00* |
| *Penalty paid* | - | *Rs. 0.00* |
| *Balance* | - | *Rs.41,53,142.00* |

TIN:33790821247/2011-12:

"*In view of the above circumstances, I confirmed the order passed on 21.05.2015.*

| | | |
|---|---|---|
| *Suppression Turnover determined* | - | *Rs.27,64,27,888.00* |
| *Tax due* | - | *Rs. 1,21,45,789.00* |
| *15% Tax paid on 26.08.2016* | - | *Rs. 18,21,868.00* |
| | | *Rs. 1,03,23,921.00* |

*A Notice in Form "O" issued.*

*Penalty u/s27(3)*

*Penalty levied for the tax due*
*Rs.1,21,45,789/- at 150%*

| | | |
|---|---|---|
| *Penalty due* | - | *Rs.1,82,18,684.00* |
| *Penalty paid* | - | *Rs. 0.00* |
| *Balance* | - | *Rs.1,82,18,684.00* |

<u>TIN:33790821247/2012-13:</u>

"*In view of the above circumstances, I confirmed the order passed on 21.05.2015.*

| | | |
|---|---|---|
| *Suppression Turnover determined* | - | *Rs. 1,16,16,987.00* |
| *Tax due* | - | *Rs. 3,97,066.00* |
| *15% Tax paid on 26.08.2016* | - | *Rs. 59,560.00* |
| | | *Rs. 3,37,506.00* |

*A Notice in Form "O" issued.*
*Penalty u/s27(3)*

*Penalty levied for the tax due*
*Rs.3,97,066/- at 150%*

| | | |
|---|---|---|
| *Penalty due* | - | *Rs. 5,95,599.00* |
| *Penalty paid* | - | *Rs. 0.00* |
| *Balance* | - | *Rs. 5,95,599.00* |

13.2. The failure to examine / render a finding as to the existence of the jurisdictional fact viz., wilful non-disclosure of assessable turnover vitiates the levy of penalty, more so, in view of the specific direction of this Court in W.P.No.34650 of 2019.

13.3. There are divergent views expressed by this Court as to whether finding of wilful non-disclosure of assessable turnover is necessary condition precedent for invoking penalty under Section 27(3) of the Act. The Madras High Court in the following judgments had held that finding of wilful non-disclosure of assessable turnover is a condition precedent for invoking penalty under Section 27(3) of the Act and failure to render a finding of “wilful non-disclosure of assessable turnover” would prove fatal to the levy of penalty. The relevant portion is extracted hereunder:

*(i) State of Tamil Nadu v. S. M. Baba Sahib reported in [1979] 44 STC 299):*

> *".... A wilful non-disclosure of assessable turnover is a necessary ingredient to make out that part of the section, namely, a deliberate intention to suppress an assessable turnover which should, in fact, have existed. It is not possible to say, merely from the fact that there has been a reassessment of escaped turnover on the basis or best judgment, that there has been a wilful non-disclosure of assessable turnover. There must be something to indicate that the turnover did in fact exist and that the assessee had wilfully not disclosed that assessable turnover."*
>
> *(emphasis supplied)*

*ii) Deputy Commissioner of Commercial Taxes v. Adam and Company reported in (1979) 43 STC 508:*

***"3.** It is the judgment of the assessing authority on a scrutiny of the books of account of the assessee and taking into consideration the surrounding circumstances. Unless there is a finding by the assessing authority that there has been a wilful suppression, which springs from the contumacious conduct on the part of the assessee, which is discernible from the course of his conduct as a businessman, it would not be safe to assume that, by reason of the best judgment assessment and by reason of the increase in the assessable turnover as discovered by the assessing officer, there is an automatic conclusion about the suppression and that too wilful suppression of assessable turnover by the assessee. Each case has to be decided on its own merits. In the instant case, it is not stated that there was such a finding which would provoke a reasonable assessing authority, while exercising suo motu powers of revision, to assume that there was such a wilful suppression of sales turnover on the part of the assessee. The Deputy Commissioner, no doubt, had the right to look into the records and scrutinise the order of the statutory functionary in the lower hierarchy, so as to correct it, if such a correction was necessary. But it is very doubtful whether he could assume that in every case where the best judgment method is adopted as a result of which there is an increase in the assessable turnover as discovered by the assessing authority that there has been a wilful suppression of sales turnover. Levy of penalty springs from the act which amounts to misconduct and being penal in nature ought not to be the product of any assumption. The Deputy Commissioner in the exercise of his revisional power thought that he could fix the penalty at Rs. 2,061, once again on the supposition that there was wilful suppression. There was no such direct or telling finding by the assessing authority. It is not even contended to be so before us. It was in those circumstances that the Tribunal, in the appeal filed by the aggrieved assessee for cancellation of the penalty levied* *by the Deputy Commissioner, who did so in exercise of his revisional authority, cancelled the penalty. The Tribunal would say that the Deputy Commissioner exceeded his limits of revisional jurisdiction, wlfen, as revisional authority, he was only reviewing the order of assessment made by the original authority and that, in the circumstances, he exceeded the power to impose penalty, as if he was the original authority. It was in that light that the Tribunal corrected the order of the Deputy Commissioner. As ultimately we are satisfied that this is not a case in which it could be reasonably said that there was a wilful suppression of taxable turnover, we are not inclined to interfere."*

1. The above judgment of this Court in (1979) 44 STC 299 was followed in the cases of *Rallis India Ltd. v. State of Tamil Nadu,* reported in *(2014) 73 VST 466* and *the State of Tamil Nadu v. Estate of V.U.Panneer Nadar* reported in *(1979) 44 STC 300.*

*2.*

13.4. From a reading of the above judgments, two aspects would emerge viz., finding of wilful non-disclosure is a *sine-qua-non* for attracting penalty under Section 27(3) of the Act. Though there may be reasons for making a best judgment assessment, penalty does not automatically follow in all cases of best judgment. In the impugned orders of assessment, there is no finding of wilful non-disclosure of assessable turnover while invoking penalty under Section 27(3) of the Act. Thus, the levy of penalty is without jurisdiction in terms of the above judgments.

b.Finding of Suppression – whether adequate to attract Section 27(3) of the Act:

13.5. As stated supra, while the cases referred above would require finding of wilful non-disclosure as a condition precedent for invoking penalty under Section 27(3) of the Act. However, this Court in the case of *P.M.Perianna Pillai vs. The Commissioner, Board of Revenue (C.T.)* reported in *(1980) 46 STC 94* held that finding of wilful non-disclosure is not a formula and mere repetition of the above expressions would not attract levy of penalty. In other words, failure to render a finding on wilful non-disclosure would not prove fatal under all circumstances. On the other hand, it was held that if on perusal of the orders of assessment one is able to discern that there was in fact wilful non-disclosure of assessable turnover, absence of a finding to the said effect may not prove fatal. After referring to the judgment of this Court in the case of *State of*

*Tamil Nadu v. Sri Swamy and Co*. reported in *(1977) 39 STC 85* and in the case of *State of Tamil Nadu v. R.R.Ramachari and Sons* reported in (1977) *40 STC 542* wherein it was found that the use of expression "suppression" by itself would show that the assessing officer had found that there was wilful non-disclosure, this Court proceeded to consider the scope of the expression "not wilfully disclosed" employed in Section 12(3) of the Act and it was held as under:

> "*The whole question for consideration is what exactly is the ambit of the expression "not wilfully disclosed" occurring in section 12(3). This expression has been the subject-matter of consideration by this Court. All that we are interested in pointing out at this stage is that for the purpose of sustaining the levy of penalty under section 12(3), it is not necessary that the officer imposing the penalty must mechanically reproduce the expression "not wilfully disclosed" as if it were a formula or manthram to be repeated in order to attract the levy of penalty or sustain the levy of penalty. <u>If the discussion in the order of the assessing authority clearly shows that he had applied his mind to the question as to whether the non-disclosure was wilful or otherwise and had come to the conclusion that the non-disclosure was wilful, the fact that he had not actually used the expression in the ultimate portion of the order that he was levying the penalty under that provision because the non-disclosure was wilful, will not in any way invalidate or vitiate his order.</u>"*
>
> *(emphasis supplied)*

13.6. Applying the above reasoning contained in the case of *P.M.Perianna Pillai* and on perusal of the assessment orders, one finds that the pre-requisite for invoking Section 27(3) of the act viz., wilful non-disclosure of assessable turnover may not be available in the facts of the present case. The petitioner had discharged the liability only on the basis of the instructions/ suggestions of the Enforcement Wing Officers made during the course of inspection. The petitioner having acted on the basis of the instructions of the Enforcement Wing authorities cannot be imputed with motives. Further, there is no enquiry as directed by this Court in W.P.34650 of 2019 to examine the issue of bonafides as preliminary issue. As a matter of fact, there is no finding for levy of penalty independent of the fact that the turnover was found to have been suppressed for the purpose of levy of tax. After recording that the petitioner had not produced books of accounts and documents called for, it was found that the petitioner does not have any valid reason for difference in the sales turnover reported to that of the purchase turnover claimed by the dealer at the other end. i.e., Tvl. Gamesa Wind Turbines Private Limited. The following portion of the order is extracted hereunder:

> *"The dealer has not furnished any valid reasons for the difference in the sales turnover reported to that of the purchase turnover claimed by the dealer at the other end. i.e., Tvl. Gamesa Wind Turbines Private Limited (TIN:33080905979) as it is noticed that they have reported lesser sales whereas, the dealer at the other end has reported more purchases and thereby availed*

*excess ITC."*

13.7. From a reading of the above portion of the impugned orders, it is evident that the assessment orders only states that the reasons put forth by the petitioner for difference between the sales turnover reported by the petitioner vis-a-vis purchase turnover Tvl. Gamesa Wind Turbines Private Limited is not valid. Mere rejection of reasons / explanation for the difference of turnover reported by the petitioner and its purchaser may not necessarily result in concluding that there was wilful non-disclosure of assessable turnover.

c. Method of computation for discharging liability of works contract -within knowledge of the department – no suppression:

13.8. Yet another reason why penalty may not be warranted in the present case is in view of the fact that the method of computation of liability was on the basis of instruction issued by Enforcement Wing Officers. In any view, the method of accounting was disclosed to Enforcement Wing Authorities. The above aspect being within the knowledge of the department, the question of suppression would not arise. In this regard, it may be useful to refer to the following judgments:

*i)* <u>*CCE v. C.M.S. Computers (P) Ltd.*</u>, <u>reported in (2005) 10 SCC 46 :</u>

> ***"1.** This appeal is against the judgment of the Tribunal dated 24-11-1998. The respondents manufactured mini computer processing system of the following models:*
>
> ……
>
> ***2.** Prior to March 1987 computers were totally exempt from payment of duty. Therefore, the respondents were clearing the computers without paying the duty. With effect from 1-3-1987, computers became a dutiable item. The respondents, therefore, filed a classification list which was approved. In this classification list they did not include monitors and printers. The respondents also claimed benefit of Notification No. 175/86-CE dated 1-3-1986.*
>
> ****....****
>
> ***3.** Show-cause notices were issued to the respondents claiming that monitors and printers were part of the computers. It was claimed that the value of monitors and printers was required to be included in the value of the computers. It was claimed that if these were included then the respondents would not be entitled to the benefit of the notification inasmuch as the turnover of the respondents would then be beyond the limit specified in the notification. The demand against them was confirmed by the Collector. However, the Tribunal has by the impugned judgment set aside the demand by holding that the demand was beyond time as the extended period under Section 11-A was not available.*
>
> ***7.** <u>Even otherwise, we find that the Tribunal was right in holding that the demand was barred inasmuch as the classification list had been approved. All facts were therefore within the knowledge of the Department. The extended period of limitation was not available to it."</u>*
>
> *(emphasis supplied)*

<u>*ii. Anand Nishikawa Co. Ltd. v. CCE reported in (2005) 7 SCC 749, 759:*</u>

> *"It is settled law that mere failure to declare does not amount to wilful "suppression of fact". There must be some positive act on the part of the assessee to find wilful suppression. <u>Where the facts are</u>*

> *known to both the parties, there cannot be a "suppression of fact" under Section 11-A of the Act."*
>
> *(emphasis supplied)*

iii.*Pushpam Pharmaceuticals Co. v. Collector of Central Excise, reported in 1995 Supp (3) SCC 462:*

> *"The expression "suppression of fact" is to be construed strictly because it has been used in company of such strong words as fraud, collusion or willful default. It does not mean omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties, the omission by one to do what he might have done and not that he must have done, does not render it suppression."*
>
> *(emphasis supplied)*

14. In the light of the above discussion, I am of the view that in the circumstances levy of penalty under Section 27(3) of the Act may not be warranted for the following reasons:

a. There is no finding of wilful non-disclosure of assessable turnover which is a condition precedent for attracting Section 27(3) of the Act.

b. Even on reading of the assessment orders as a whole, it is not possible to discern wilful non-disclosure of assessable turnover of the petitioner in view of the fact that the method of accounting adopted / followed by the petitioner was itself suggested / instructed by the revenue.

c. In any view, method of accounting adopted by the petitioner which is the reason for the difference between the sales turnover reported by the petitioner vis-a-vis purchase turnover Tvl.Gamesa Wind Turbines Private Limited was within the knowledge of the department, thus question of wilful non-disclosure of assessable turnover does not arise.

15. In the circumstances, the impugned orders insofar as the levy of penalty under Section 27(3) of the TNVAT Act are thus set aside, the remaining portions of the impugned orders of assessment dated 21.12.2020 for the assessment years 2009-2010 to 2012-13 remains undisturbed.

16. The writ petitions stand disposed of on the above terms. No Costs. Consequently, connected miscellaneous petitions are closed.

**01.03.2024**

Speaking (or) Non Speaking Order
Index:Yes/No
Neutral Citation: Yes/No
spp

To:
The State Tax Officer,
Alwarpet Assessment Circle,
Chennai 600 035.

**MOHAMMED SHAFFIQ, J.**

spp

**W.P. Nos.2304, 2308, 2310, 2311 of 2021**
**and**
**W.M.P. Nos.2605, 2607, 2610, 2613 of 2021**

**01.03.2024**