IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.09.2024

CORAM :

THE HONOURABLE **DR.JUSTICE ANITA SUMANTH**
and
THE HONOURABLE **MR.JUSTICE G. ARUL MURUGAN**

W.P.No.2441 of 2007
and M.P.No.1 of 2007

M/s.Chemical Construction Company (P) Ltd.,
Rep. By its Director O.V.Nambiar,
956/957, Thiruvottiyur High Road,
Chennai – 600 019. .. Petitioner

Vs

1.The State of Tamilnadu,
rep. By the Deputy Commercial Tax Officer,
Thiruvottiyur Assessment Circle,
1095/1, Thiruvottiyur High Road,
Chennai – 600 019.

2.The Secretary,
The Tamilnadu Sales Tax Appellate Tribunal,
2nd Floor, City Civil Court Building,
High Court Campus,
Chennai – 600 104. .. Respondents

Prayer: Petition filed under Article 226 of the Constitution of India praying to issue a writ of Certiorari calling for the records on the file of the second respondent in T.A.No.139/01 dated 15.12.05 and quash the same as illegal.

For Petitioner : Mr.Pramod Kumar Chopda
Senior Counsel
For Mr.Arjun KK

For Respondents : Mr.V.Prashanth Kiran (R1)
Government Advocate
Tribunal – R2

ORDER

(Order of the Court was made by Dr.ANITA SUMANTH.,J)

The Writ Petitioner is a dealer in machinery and parts thereof. There was an inspection in its premises on 02.07.1998 and various discrepancies were found in the course of inspection. The inspecting authorities found that there was evidence for sales having been effected for which central excise invoices, challans for payment of duty and proforma invoices were available.

2. However, those sales had not been reported for the purposes of turnover under the Tamil Nadu General Sales Tax Act, 1959 (in short 'TNGST Act'). Hence, pre-assessment notices were issued to the petitioner and their accounts were called for, checked and verified. An order of assessment came to be ultimately passed on 22.12.1998 based on the results of the inspection. The books of accounts were however not specifically rejected.

3. The assessing authority proposes to bring to tax a sum of Rs.39,80,405/- which comprises 4 components, a sum of Rs.36,82,700/- (approximated to Rs.36.82 lakhs), being work-in-progress (wip) as per the explanation tendered by the petitioner, Rs.1,20,555/- being consultancy charges, Rs.78,890/- being machinery hire charges and Rs.98,170/- being commission and discount, in all amounting to Rs.39,80,405/- (Rs.39.80 lakhs approx.).

4. The component of Rs.36.82 lakhs itself comprises of a sum of Rs.23,87,726 plus a sum of Rs.12.00 lakhs. The explanation tendered by the petitioner was that the amounts reflected as wip had been offered to tax in the subsequent years and hence bringing the aforesaid amounts to tax in the period under consideration, being 1996-97, would tantamount to a double addition.

5. After considering the submissions made, the pre-assessment proposals were confirmed in assessment. An equal time addition was also made. A first appeal was filed before the Appellate Assistant Commissioner (AAC), who partly confirmed the assessment remanding some issues for re-consideration. As against the same, a second appeal was filed before the Tamil Nadu Sales Tax Appellate Tribunal (in short

'STAT'/'Tribunal'), where the order of remand passed by the AAC was confirmed. It is as against the Tribunal's order dated 15.12.2005 that the present Writ Petition has been filed.

6. As regards the consultancy and machinery hire charges, there are findings in paragraphs 13 and 14 of the Tribunal's order to the effect that there were no vouchers or bills produced for perusal. The additions were confirmed on that score. We find no reason to intervene in light of the factual findings of the final fact finding authority. Hence, those additions are confirmed.

7. We now advert to the primary contention of the petitioner which is that the addition of Rs.36.82 lakhs along with equal time addition of Rs.23.87 lakhs has resulted in a triple addition which is wholly unwarranted and illegal. Even the addition at the first instance is unjustified as the same amount has been brought to tax in the subsequent period.

8. To this end, the assessment order for the period 1997-98 dated 18.09.2009 is placed before us for consideration. Mr.Pramod Kumar Chopda, learned Senior Counsel appearing for Mr.Arjun, K.K., learned counsel for the petitioner, would submit that the returns filed were

complete and correct as the turnover relating to the wip had been offered to tax in the previous and subsequent years i.e., 1995-96 and 1997-98.

9.The argument before the Tribunal had been that the addition relating to Rs.12 lakhs had been brought to tax under the Central Sales Tax Act (CST Act) in the previous year 1995-96. Bearing in mind the probable double addition on this count, the Tribunal had remanded that issue to the assessing authority for fresh consideration. Hence, and according to the petitioner, the proper course of action would have been for the Tribunal to also remand the issue relating to probable double addition on wip offered in the year 1997-98 to the assessing authority which plea was not accepted. He would thus point to the inconsistency in the Tribunal's approach.

10. The petitioner also assails the levy of penalty under Section 12(3)(b), which is at 150%. The assessing authority has levied penalty on the components of Tax, Surcharge (SC), Additional Surcharge (ASC) and Additional Sales Tax (AST) and in this context, reliance is placed on a decision of this Court in *SPG Ramasamy Nadar & sons V. Commercial Tax Officer-III, Virudhunagar and others*[1] where a Division Bench of

1 136 STC 606

this Court has observed that the levy of penalty should be restricted to the component of tax alone.

11. Reliance is also placed on the decision in *Appollo Saline Pharmaceuticals (P) Limited V. Commercial Tax Officer (Fac) and others*[2]. In all, the petitioner would submit that the entirety of the assessment is nothing but a guess work and relies on the judgment in the case of *State of Kerala V. C. Velukutty*[3] for the proposition that the assessing authority ought not to have acted capriciously and ought to have been ensured that the statutory assessment is based on materials and records.

12. Mr.Prashanth Kiran, learned Government Advocate appearing for the Commercial Taxes Department would fairly accede on the aspect of levy of penalty and the applicability of the decision in *SPG Ramasamy Nadar*. He would however defend the rest of the impugned order submitting that there is no merit in this Writ Petition. The inspection has revealed that sales offered to central excise has been omitted to sales tax.

13.Moreover, the petitioner has been unable to substantiate its stand in regard to the alleged triple addition and hence there is no

2 2001 SCC OnLine Mad 1205
3 17 STC 465

necessity for intervention in the matter. He would support the equal time addition relying on the judgment in the case of *The Commissioner of Sales Tax, Madhya Pradesh V. M/s.H.M.Esufali, H.M.Abdulali, Siyaganj*[4].

14. We have heard the rival contentions advanced and studied the case law relied upon carefully.

15. The issues that arise for our consideration are as follows:

i) Liability to sales tax of a sum of Rs.36.82 lakhs
ii) Liability to sales tax of a sum of Rs.23.87 lakhs towards alleged suppression
iii) Liability to tax of a sum of Rs.23.87 lakhs being equal time addition and
iv) Levy of penalty under Section 12(3)(b) of the TNGST Act at the rate of 150%.

16. We first advert to issue (i). The argument of the petitioner is that the amount of Rs.36.82 lakhs included two components, one represented by wip of Rs.23.87 lakhs and Rs.12 lakhs relating to the previous year. This argument has been negated by the assessing authority for several reasons. Firstly, evidences found during inspection established that sales offered for central excise duty had not been offered to sales tax. The argument is that those amounts represent wip that has been offered to tax in the subsequent year, i.e., 1997-98.

4 32 STC 77

17. Let us now test this argument. In order of assessment dated 18.9.2009 for the period 1997-98, the assessing authority has categorically recorded as follows:

> *As the dealers did not produce the accounts inspite of various opportunities extended, the Assessing Officer passed fresh assessment orders to the best of judgement as the same lines as was done at the time of original assessment.*
>
> *The assessment in their letter fourth cited, prayed for fresh assessment under Section 14 citing the reason that physical incapacitation of their accountant for their inability to produce the accounts. They also filed a return in Form A1 and produced proof for payment of tax admitted to be due.*

18. The above findings have not been challenged by the petitioner and have attained finality. Thus, we have no hesitation in concluding that the accounts of the petitioner were not complete even for the subsequent period and even as on 18.09.2009 when the order of assessment for the period 1997-98 was passed, the petitioner was not in a position to produce the accounts.

19. The discrepancy in the accounts and the fallacies contained therein are thus a matter of fact and the petitioner has unable to get over this position at any stage or even before us. This puts paid to the argument that the turnover representing wip has been offered to tax in 1997-98.

20. In this context, we also refer to certain observations in the order of assessment dated 22.12.1998 (internal page 4). The assessing authority refers to a revised notice that had been issued to the dealers on 08.12.1998. In their reply dated 21.12.1998, the petitioner/dealer has stated that the work in progress amounting to Rs.36,82,700/- represented amounts received from their various clients and these works are in progress and yet to be completed.

21. The authority also records their statement that as soon as the entire erection and commissioning (erroneously stated as commencing) works were over, the connected bill would be raised and produced before the assessing authority. This order of assessment is dated 22.12.1998 after the close of the period 1997-98, when according to them, the amount representing wip has already been received and offered to tax. Hence, the inaccuracy of the statement is also proved by these observations in the assessment order.

22.We do not agree with the argument that since the Tribunal has remanded the issue relating to probable double addition for 1995-96 and 1996-97 relating to CST/TNGST, the same approach ought to have been taken with regard to the probable addition for 1996-97 and 1997-98 as well, as there is absolutely no material on record to indicate the telescoping of the turnover related to wip for the years 1996-97 and 1997-98. For the aforesaid reasons, we reject this argument.

23. Coming to issue (ii) on the aspect of suppression, we are convinced, based on the factual position noted by the Tribunal at paragraphs 10 and 11 that the addition on account of suppression is justified and warranted, and confirm this addition too. In the interests of completion of narration, we extract paragraphs 10 and 11 below:

> *10. On perusal of records, we find that as per the statements and records furnished at the time of hearing, the appellants admittedly raised proforma invoices where in they have deducted the advance payments made at 25% and retention at 10% and received the balance and received the balance of amount, it reveals that there was transfer of property in goods for money consideration. For the sales effected, as per the proforma invoice vide details available for 1996-97, the appellants ought to have reported the turnover and paid the tax, whereas the appellants have contended that they have reported the turnover as per the final invoice raised by them. It is important to note that alleged final invoices have been raised before the time of inspection, but was not produced before the inspecting authorities. It is therefore clear that the alleged final invoices are nothing but make belief record created to set right the mistakes committed by the appellants. It is also clear that the appellants have admittedly suppressed the turnover with an intention to avoid the payment of tax. The Appellate Assistant Commissioner has therefore held that the Assessing Authority is justified in making assessment on the suppressed turnover. The learned first appellate authority has set aside the assessment on the*

turnover of Rs.26,82,700/- and Rs.23,87,726/- with a direction to assess apportioning the turnover under TNGST Act and CST Act. In as much as the first appellate authority has confirmed the assessment on the suppressed turnover and directed the Assessing Authority to split the turnover both under TNGST and CST Act. Hence, there is no case for interference on the disputed turnover of Rs.36,82,700/- and Rs.23,87,726/-.

11. With regard to the turnover of Rs.36,82,700/- which is work in progress, the appellants have contended that certain turnover were subjected to tax both under the TNGST Act and CST Act for 1996-97 and for 95-96 under CST Act. For the year 1996-97, the appellants-dealers were finally assessed on turnrover of Rs. 2,32,000/- under the CST Act and was re-fixed by the Appellate Assistant Commissioner at Rs.2,10,000/- which was also form part of the turnover of Rs.36,82,700/- assessed under TNGST act for 1996-97 according to the appellants. Similary, the appellants were assessed for the year 1995-96 under CST Act on a turnover of Rs.8,90,879/- and is confirmed by the first appellate authority hich also form part of the turnover of Rs.36,82,700/- assessed under TNGST Act 1996-97. Therefore, it was contended that the same turnover has been subjected to tax twice. We find that there is some force in the argument of the learned counsel for the appellants. We are of the view that if the aversion of the appellants-dealers is found correct, they are not liable to tax twice on the same turnover. In as much as the Appellate Assistant Commissioner has set aside the Assessment for 1996-97 under the TNGST Act and remanded for re-examination while confirming the remand order, we also direct the Assessing Authority to consider the above aspect placed before this Tribunal and pass order accordingly after due consideration.

24. Coming the issue (iii) on the question of equal time addition, Mr.Prashanth has referred to the judgment in the case of *H.M.Esufali*[5] in support of the addition. That judgment has been rendered in the context of a best judgment assessment, where the accounts were rejected.

25. In the present case, as we have noted supra, the accounts of the petitioner have not been specifically rejected though suppression has been made out by the Department. The addition made towards suppression has been confirmed. However, there is no material to indicate escapement/suppression of turnover over and above what has already been noticed by the authority.

26. It is relevant to note that the assessment is based on a detailed inspection by a team of Enforcement officials. Thus, the additions to turnover in such an event must be based on, or at least related to, the material found. On the basis of the material found, the authority has made an addition towards suppression of turnover. In our view there is no warrant or justification for an equal time addition over and above the addition towards suppression. Such an addition would be nothing but a pure estimate unsupported by any materials whatsoever that is impermissible. Thus, we set aside the equal time addition made. We draw

5 Foot Note Supra (4)

support in this regard from a decision of this Court in *S.V.Cycle Stores V. Commercial Tax Officer*[6].

27. Coming to issue (iv) on the aspect of penalty, in light of confirmation of turnover relating to Rs.36.82 lakhs towards suppression, we have no justification to intervene in the levy of penalty and confirm the same, save to the extent to which we have deleted already, referring to the decision in *SPG Ramasamy Nadar & sons*[7].

28. The petitioner has referred to the Explanation under Section 23-B to state that the turnover representing additions figured as entries in the books of accounts, and hence no penalty can be levied. We disagree. The authority has concluded that there has been suppression of turnover and hence the mere fact that there were some entries that found place in the trading account, will not come to the rescue of the petitioner.

29. In the case of *Appollo Saline Pharmaceuticals (P) Limited*[8], the assessment related to the period 1993-94 and 1994-95 and the assessments were made under Section 12(1) of the TNGST Act on the basis of the returns filed by the assessee and the accounts maintained. The assessing authority in that case had accepted the value of the bottles

6 46 VST 565
7 Foot Note Supra (1)
8 Foot Note Supra (2)

purchased and without enquiry, had included the turnover relating to the bottles in the taxable turnover relating to purchase tax. It is in that context that the levy of penalty was examined by this Court.

30. The petitioner specifically relies on paragraphs 7 and 8, which are extracted below:

> *7. Though other sub-sections of Section 12 were amended by the State Legislature subsequent to the date of the judgment in the case of Jayaraj Nadar & Sons [1971] 28 STC 700 (SC), sections 12(1) and 12(2) have remained in the same form. The legislative intention therefore, except during the period December 3, 1979 to May 27, 1993 and on and after April 1, 1996 must be taken to be to, permit the levy of penalty only in case where the assessment is a best judgment assessment made on an estimate and not by relying solely on the accounts furnished by the assessee in the prescribed return. On and after April 1, 1996 an explanation has been added below Section 12(3) which requires the turnover relating to the tax assessed on the basis of the accounts of the assessee, to be disregarded, while determining the turnover on which the penalty is to be levied under Section 12(3).*
>
> *8. The assessments for the assessment years 1993-94 and 1994-95 which were assessments made on the basis of the accounts, and not based on any other material and were not estimates, have therefore, to be regarded as assessments made under Section 12(1) to which the penal provisions of Section 12(3) are not attracted. The levy of penalty for those two assessment years is set aside.*

31. At paragraph 8, the Court records that the assessments for the periods 1993-94 and 1994-95 were made based on the accounts, and not

based on any other material. Though the entries relating to wip figured in the trading account of the assessee, we have rejected the plea for telescoping those figures for reasons assigned in the paragraphs supra. Hence, the mere fact that some entries were reflected in the accounts would have no bearing in the matter. The fact remains that the documents found in the inspection revealed suppression of turnover.

32. Thus, we find that the decision in *Appollo Saline Pharmaceuticals (P) Limited*[9], does not come to the aid of the petitioner as suppression has been made out in the present case unequivocally.

33. In light of the aforesaid, issue Nos.(i) and (ii) are answered against the petitioner and issue No.(iii) in favour of the petitioner. With regard to issue No.(iv) though we have confirmed the levy of penalty, the same will be re-worked consequent on the conclusions above.

34. This Writ Petition is disposed in the aforesaid terms. No costs. Connected Miscellaneous Petition is closed.

[A.S.M., J] [G.A.M., J]
20.09.2024

Index:Yes
Neutral Citation:Yes
speaking order
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9 Foot Note Supra (2)

To

1.The State of Tamilnadu,
rep. By the Deputy Commercial Tax Officer,
Thiruvottiyur Assessment Circle,
1095/1, Thiruvottiyur High Road,
Chennai – 600 019.

2.The Secretary,
The Tamilnadu Sales Tax Appellate Tribunal,
2nd Floor, City Civil Court Building,
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