IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 06.08.2024

CORAM

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

W.P.No.19589 of 2005
& W.P.M.P.No.21245 of 2005

M/s.Unicon Engineers
rep. by its Partner
Mr.M.Palanikani
Bharathi Road, Chinn Vedampatty,
Ganapathy, Coimbatore - 6.

... Petitioner

Vs

1. The Tamil Nadu Sales Tax Appellate Tribunal,
(Addl. Bench), Coimbatore,
Commercial Taxes Buildings,
Coimbatore - 18.

2. The Commercial Tax Officer,
Ganapathy Assessment Circle,
Commercial Taxes Building,
Coimbatore - 18.

... Respondents

PRAYER: PETITION filed under Section 226 of the Constitution of India praying of a writ of certiorari calling for the records of the first respondent in its order in CTSA No.68/98 dated 7.10.2004 and quash the same as illegal.

For Petitioner : Mr.S.Ramanathan

For Respondents : Mr.V.Prashanth Kiran
Government Advocate - R2

O R D E R

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

In this Writ Petition, the petitioner challenges an order of the first respondent, being the Tamil Nadu Sales Tax Appellate Tribunal (STAT). The sole issue that arises for our consideration relates to the levy of penalty under Section 12(3)(b) of the Tamil Nadu General Sales Tax Act, 1959 (in short 'Act').

2. The petitioner is a company engaged in rendition of job works. For this purpose, they had purchased consumables, such as electrodes, welding transformers etc. and plant and machinery for the purpose of execution of the job works. The turnover from the purchases and sales have been duly disclosed in the books of accounts and there is no dispute on this position. To clarify, it has never been the case of the Revenue, at any stage, that they have found any suppression of purchase or sales turnover in the course of assessment or appellate proceedings.

3. While so, an assessment came to be made for the period 1995-96 by way of proceedings dated 27.12.1996 that concluded in various demands being raised against the petitioner including penalty.

4. The petitioner challenged the assessment by way of first appeal and by way of an order dated 25.09.1997, the first appellate authority expressed the view that the enquiry conducted was not complete and hence remanded the matter for fresh disposal to the file of the Assessing Officer. We do not have the benefit of appellate order dated 25.09.1997. However, with the remand, all the additions made as well as penalty levied in the order of assessment dated 27.12.1996, stood set aside.

5. Pursuant to the remand, an order of assessment came to be passed on 30.12.1997, wherein the Assessing Authority engaged in enquiry afresh. In conclusion, the tax due at 4% on turnover of sum of Rs.2,83,345/- was computed at a sum of Rs.11,334/- and tax due of 8% on turnover of Rs.3,37,220/- was computed at a sum of Rs.26,978/-, totalling a sum of Rs.38,312/-.

6. The petitioner had duly remitted a sum of Rs.49,436/- consequent on the demand made in the first round of assessment based on the turnover as computed then. With the reduction of turnover in the subsequent proceedings, the demand also stood reduced and hence there was excess of Rs.11,124/- that was determined to be refunded. On this, the Assessing Authority has levied penalty under Section 12(3)(b) of a sum of Rs.33,970/-, with which we are primarily concerned in this Writ Petition. The levy of

penalty was deleted by the first appellate authority and restored in appeal filed by the Revenue by the Sales Tax Appellate Tribunal ('Tribunal'/'STAT').

7. The submissions on behalf of the petitioner are to the effect that Section 12(3)(b) will stand attracted only in the event of submission of incorrect or incomplete returns. Per contra, the submission of the revenue is that penalty is attracted in the present case as 25% of the difference of tax assessed and paid as per return has fallen short of tax assessed by way of assessment by more than 5% per clause (i) of Section 12(3)(b). It is not the case of the revenue that the other situations/circumstances contemplated under clauses (i-a) to (v) of Section 12(3)(b), stand attracted in the present case.

8. Learned counsel would emphasise on the position that there has been an incomplete/incorrect return filed as the petitioner had not included in its returns, turnovers liable to purchase tax under Section 7A of the Act. For his part, he would rely on a decision of this Court in *Indian Oil Corporation Ltd. V. State of Tamil Nadu* (114 STC 552).

9. The petitioner draws attention to the position that in the computation made under order of assessment dated 30.12.1997, there has been a reduction of turnover qua the original assessment made on 27.12.1996 and an excess of tax paid resulting in a refund to the petitioner, consequent on the giving effect

to order passed under Section 39A of the Act.

10. In such circumstances, he would, relying on the judgments of the Supreme Court in *State of Madras V. Jayaraj Nadar & Sons* (28 STC 700) and of this Court in the case of *Appollo Saline Pharmaceuticals (P) Limited V. Commercial Tax Officer (FAC) and others* (125 STC 505), submit that the penalty levied must be set aside.

11. We have heard learned counsel and have perused the material records. The assessment in the present case is not a best judgment assessment and has been made based on the accounts maintained by the assessee. No suppression per se has been found.

12. There is however, a difference of opinion between the assessee and the Department as to whether tax is to be remitted on the purchases of machinery. The explanation that has been put forth by the petitioner before the authorities, is that the petitioner was of the bonafide belief that purchases of machinery would not be exigible to purchase tax, as Section 7A is applicable only in the case of consumables which have been used in the manufacture of other goods for sale or otherwise.

13. Section 7A is applicable in the case of purchases of goods that are consumed/used in the manufacture of other goods for sale or otherwise. It is not in dispute that the petitioner has remitted purchase tax on the

consumables purchased, such as electrodes, welding transformers etc. The stand of the assessing officer was that purchases of plant and machinery used in erection and commissioning in the execution of job works would also attract the provisions of Section 7A of the Act. Whether the petitioner agreed with this position or not, it has accepted the conclusion of the Department and also remitted the tax, even prior to the date of framing of assessment.

14. Section 12(3)(b) envisages that, in addition to the tax assessed under sub-Section (2), the Assessing Authority shall, either in the same order or by a separate order, direct the dealer to pay penalty which, in the case of an incorrect or incomplete return subject to a percentage of the difference on tax assessed and tax paid, if the tax paid as per the return falls short of the tax assessed on final assessment by not more than 5%.

15. The stipulation under the main provision, i.e., Section 12(3) should be read along with stipulation in clause (b) and sub-clause (i) of clause (b), that is, it is only if there is an assessment of tax, a submission of incorrect or incomplete return and the difference as per sub-clause (i) of clause (b) that the liability to penalty would stand attracted.

16. In the present case, the difference of opinion between the assessee and the Department arises from a legal issue as to whether Section 7A would stand attracted even in the case of purchase of plant and machinery. It cannot

therefore be said that the return filed was either incomplete or incorrect.

17. The question of incorrectness or incompleteness cannot be decided in vacuum and has to be seen wholistically. The petitioner has, admittedly, not offered certain turnovers to purchase tax. However, we find that the question as to whether the non-inclusion of such turnover is correct or not, constitutes a debatable point.

18. The revenue has placed reliance on the decision in *Indian Oil Corporation* (supra) the facts of the present case are distinguishable, as seen from paragraphs 7 and 8 of the STC report of that case. In the case of *Indian Oil Corporation,* the Bench has noted that there was no proof of payment of tax filed along with monthly returns and that tax had ultimately been paid after undue delay. Not so in the present case where the petitioner has paid the tax even prior to the framing of the assessment. Importantly, and as stated earlier the respondent would not dispute the position that the assessment was itself was based on the turnover as reflected in the accounts.

19. That apart, as the petitioner has remitted the tax in full, there has been no prejudice caused to the revenue and there have been no financial implications to such non-inclusion. On the other hand, the computation of tax in the assessment payable to the petitioner has led to a refund. Moreover, the entirety of the turnover form part of the financial statements that form the

basis for the computation of income.

DR. JUSTICE ANITA SUMANTH
and
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20. For the reasons above, we are hence of the considered view that the petitioner must succeed. This Writ Petition is allowed. No costs. Connected Miscellaneous Petition is closed.

(A.S.M.,J) (G.A.M.,J)
06.08.2024

Index:Yes/No
Speaking order
Neutral Citation: Yes
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To

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