IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2024

CORAM :

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

W.P.No.9863 of 2009
and MP.No.1 of 2009

Tvl.Super Butyl Tubes (P) Ltd.,
Represented by its Director,
P.Palanisamy,
138, Trichy Road,
Namakkal-637 002. ... Petitioner

vs

1.The Commercial Tax Officer,
Namakkal (Town),
Namakkal.

2.The Appellate Assistant Commissioner
(CT), Commercial Taxes Buildings,
Salem.

3.The Sales Tax Appellate Tribunal,
(Additional Bench),
C.T.Buildings,
18, Balasundaram Road,
Coimbatore-18. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records on the files of the 3rd respondent in Coimbatore Tribunal State Appeal No.59/2004 dated 20.06.2008 and quash the same and further direct the 3rd respondent to pass order on merits and in accordance with law.

For Petitioner : Mr.R.Ganesh Kanna

For Respondents: Mr.V.Prashanth Kiran (for R1 & R2)
Government Advocate
R3 - Tribunal

ORDER

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

The appellant/assessee challenges an order of the Sales Tax Appellate Tribunal (STAT/Tribunal) dated 20.06.2008.

2.The component of tax determined by the authorities has been paid in full the tax demand is not assailed before us. We hence do not advert to any of the facts relating to the same. What survives is the levy of penalty alone, under Section 23, which reads as follows:

> *'Section 23. Levy of penalty in certain cases.- If any person purchasing goods is guilty of an offence under clause (e) of sub-section (2) of section 45, the assessing authority, may, after giving him a reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum not exceeding one and a half times the tax payable on the turnover relating to the sale of such goods at a rate which is equal to the rate prescribed in the First Schedule less [three per cent:]*
>
> *Provided that no prosecution for an offence under section 45 shall be instituted in respect of the same facts*

on which a penalty has been imposed under this section.

Note: Item 1 in Section 23 the expression "four per cent" was substituted for the expression "three per cent" by Act 29 of 1980-Effective from 5.9.1980. Again the expression "three per cent" was substituted for the expression "four per cent" by Act 34/91 – Gazette dated 23.10.1991 – Effective from 5.9.1991.'

3.There are two disputes that arise. The first relates to the rate of tax and the second relates to the quantification of penalty. As regards the first aspect, we have dealt with the same under order dated 28.10.2024 extracted below:

'Three points are made, the first one is violation of principles of natural justice, since Section 23 of the Tamil Nadu General Sales Tax Act, 1959 (in short 'TNGST Act') expressly provides for a personal hearing.

2. We are not inclined to indulge this argument at this distance of time. Suffice it that petitioner is heard in full before us. This argument is hence rejected.

3. The second point is this. Section 23 provides for levy of penalty not exceeding one and a half times of the tax payable on the turnover relating to sale of such goods at a rate which is equal to the rate prescribed in the First Schedule 'less 3%'.

4. The provision for reduction by 3% has been inserted by Act 12 of 1997 gazetted on 21.02.1997, effective from that date. The assessment year in question in 1998-99. Hence, prima facie it appears that the rate of tax of 16% adopted is incorrect as the rate ought to have been 13%.

5. Thirdly, learned counsel for the petitioner refers to Circular dated 05.01.2001, which has been cited by the Division Bench of this Court in W.P.No.36940 of 2004 (Victus Dyeing V. Sales Tax Appellate Tribunal decision *dated 31.10.2022).*

6. According to him, the portion in italics extracted at paragraph 22 of the aforesaid order states that for levy of penalty under Section 23 of the TNGST Act, tax rate should be only 1% of the difference, whereas in the present case, it is 150%.

7. Mr.Prashanth Kiran, learned Government Advocate for the respondents would submit that the said Circular is dated 05.01.2001 and hence would not be applicable to the year in question.

8. Let the entire Circular be produced with a copy served in advance upon the other side in order that there is clarity on the period to which it relates.

9. List on 07.11.2024.'

4.Mr.V.Prashanth Kiran, learned Government Advocate would accede to the position that the rate of tax ought to have been taken at 13%. There is no dispute on this account.

5.Coming to the second limb in relation to whether the quantification of penalty 150% was correct, we have had occasion to advert to Circular No.5 dated 05.01.2001 bearing Ref.No.02/91364/2000. issued by the Principal Commissioner and Commissioner of Commercial Taxes, Chennai.

6.At the outset, Mr.Prashanth would seek to disavow this Circular stating that Section 28A endows power in the Commissioner only to clarify matters in relation to rate of tax and not penalty. However, seeing as this Circular has itself not been withdrawn, we do not think it appropriate for the Government Advocate to argue against the Circular of the Special Commissioner and hence we do not entertain this argument any further.

7.On the quantification itself, we see that it is an admitted position that the Circular is clarificatory and retrospective in nature. Thus, though it is dated 05.01.200,1 it would apply to all pending assessments, including the present assessment relating to the period 1998-99. The reason for issuance of the Circular appears to an incorrect thinking on the part of the assessing officers that the penalty under Section 23 of the Act must mandatorily of 150% only.

8.What the Commissioner has sought to clarify that the provision allows for discretion to be exercised by the assessing officer under Section 23 to levy penalty of a sum *'not exceeding one and a half times the tax payable'*. Hence, the authorities may impose penalty at any rate upto amount from one to 150%. Despite the officer used to as a matter of rote and mechanically levy penalty only 150%. This is made clear from the later portion of the Circular where the Commissioner states as follows:

> *'It is to be seen that Section 23 of the TNGST Act provides for the maximum penalty to be levied in such cases and it does not prescribe the minimum penalty to be levied.*

So, it is clear that the Assessing Officer may also levy lower penalty for the violation of declaration in form XVII. It is also to be noted that if a generous view is not taken while levying penalty under section 23 of the Act in cases like this the dealers may go for interstate purchases which will result in loss of revenue to the State Government.

Taking into consideration the above position and the provisions of the TNGST Act, the Assessing Authorities are directed to take a uniform view while levying the penalty under section 23 of the TNGST Act and levy a penalty equal to 1% of the difference in tax under Form XVII and diverted without using it in the manufacturing process within our state. In case the diversion is detected by the department and not disclosed voluntarily by the dealer, the penalty may be levied at 5% of course the difference in tax will be collectable in both cases.'

9.The admitted position is that the levy of penalty is attracted qua the present proceedings. However, the officer has erred in not examining as to the quantification of the same and has proceed to automaticaly impose penalty at the rate of 150%. Hence, the matter stands remanded to the file of the assessing authority to determine only the quantification of penalty.

10.For this purpose, the assessee will appear before the Assistant Commissioner (ST), Namakkal Town, who is the present officer dealing with assessments under the old Commercial Tax regime on 15.11.2024 at 11.00 a.m. without awaiting any further notice with complete records in support of his arguments. He shall be granted audience, heard and orders shall be passed within a period of four (4) weeks thereafter i.e., on or before 06.12.2024 in accordance with law.

11.This writ petition is partly allowed. No costs. Connected miscellaneous petition is closed.

[A.S.M., J] [G.A.M., J]
07.11.2024

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

To

1.The Commercial Tax Officer,
Namakkal (Town),
Namakkal.

2.The Appellate Assistant Commissioner
(CT), Commercial Taxes Buildings,
Salem.

3.The Sales Tax Appellate Tribunal,
(Additional Bench),
C.T.Buildings,
18, Balasundaram Road,
Coimbatore-18.

DR. ANITA SUMANTH,J.
and
G. ARUL MURUGAN.,J

vs

W.P.No.9863 of 2009
and MP.No.1 of 2009

07.11.2024