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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

<i>Judgment Reserved On</i>	<i>Judgment Pronounced On</i>
20.12.2023	05.01.2024

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THE HONOURABLE MRS.JUSTICE S.SRIMATHY

W.P.(MD)Nos. 16025 of 2022 & 2220 of 2023

and

W.M.P.(MD)Nos. 11582 of 2022 & 1998 of 2023

T.V.Sundram Iyengar and Sons Limited,

Now known as T.V.Sundram Iyengar and Sons Private Limited,

[Represented by its Senior General Manager – Indirect Taxes

P.Venkatesh]

... Petitioner in

both the Writ Petitions

Vs.

The Assistant Commissioner (ST),

West Veli Street Assessment Circle,

Madurai.

... Respondent in

both the Writ Petitions

PRAYER in W.P(MD)No.16025 of 2022: Writ Petition filed under Article 226 of the Constitution of India for issuance of *Writ of Certiorari*, to call for the records on the file of the Respondent herein in her proceedings in TIN Assessment No.33595020002/2012-13 dated 31.05.2022 as modified on 07.07.2022 and to quash the same.



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PRAYER in W.P.(MD)No. 2220 of 2023: Writ Petition filed under Article 226 of the Constitution of India for issuance of *Writ of Certiorari*, to call for the records on the files of the Respondent herein in her proceedings in Assessment No. 33595020002/2009-10 dated 04.01.2023 and to quash same.

In both the Writ Petitions:

For Petitioner	: Mr.N.Inbarajan
For Respondent	: Mr.A.K.Manikkam, Special Government Pleader

COMMON ORDER

The writ petition in *W.P(MD)No.16025 of 2022* is filed to quash the impugned order, dated 31.05.2023 as modified on 07.07.2022. The writ petition in *W.P(MD)No.2220 of 2023* is filed to quash the impugned order dated 04.01.2023.

2. The petitioner is a registered Company under Companies Act. The petitioner is a registered dealer coming within the purview of Tamil Nadu Value Added Tax Act, 2006 (herein after referred as the Act). The petitioner is engaged in buying and selling of motor vehicles, chassis and sale of auto parts. Deemed



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assessment for the year 2012-2013 as provided under Section 22(2) of TNVAT Act was completed. While that being so, the turnover was re-determined by the respondent for the year TIN 202-2013 vide proceedings dated 07.04.2016 under Section 27 of the Act. The petitioner challenged the said order before this Court along with the proceedings for the assessment year 2009-2010, 2010-2011 and 2012-2013. This Court has passed a Common Order in W.P(MD)Nos.7982 to 7984 of 2016 vide order, dated 08.03.2021 and set aside the impugned orders thereunder on the grounds of principles of natural justice and the respondent was directed to issue fresh personal hearing notice and also directed that while passing the order the respondent ought to consider each and every contention raised by the petitioner. The respondent in order to give effect to the order granted personal hearing to the petitioner and the petitioner has filed their written submission, dated 17.03.2022. But the respondent without appreciating the written submission and without making any further verification and without giving any reason, confirmed the earlier order, dated 31.05.2022 which was communicated on 17.06.2022. In the order the respondent had imposed penalty which was levied without jurisdiction.



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3. Apart from that there was arithmetical error, hence the petitioner filed an application on 22.06.2022 as well as by another petition on 29.06.2022 under section 84 of the Act to rectify the errors apparent on the face of the record. The main ground in the said application is that the reversal of ITC was not taken as per Return more particularly, relating to purchase return and had raised the following grounds:

- (a). Reversal of ITC treating sales turnover of exempted sales to Canteen Stores Department as exempted sales of goods covered under Section 15 of the Act.
- (b) Reversal of ITC as per the return were not taken into consideration more particularly relating to purchase return.
- (c) There is no finding of any wrong availment of ITC or producing false bills etc. which is mandatory for the levy of penalty under Section 27(4) of the Act.
- (d) Penalty under Section 27(4) of the Act for the year 2012-2013 was imposed at 300% of the tax due which was substituted by Act 13 of 2015 effective from 29.01.2016 and therefore such imposition of penalty is without authority of law.
- (e) Penalty under Section 27(3) was imposed without any finding and was determined on the turnover disclosed in the books of account return and from WW for which also there is no jurisdiction to levy penalty under Section 27(3) of the Act.



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(f) Only for the first time a turnover of Rs.48,86,708/-was taken into consideration for the purpose of levy of penalty under Section 27(3) of the Act which was not reflected in the earlier proceedings dated 07.04.2016.

(g) Penalty has been imposed without any finding of willful non-disclosure or wrong availment of ITC.

4. The contention of the petitioner is that he had produced details and explained about the errors apparent on the face of the record and also submitted with regard to the jurisdiction to levy penalty at 300% for the year 2012-2013. The respondent, vide proceedings dated 07.07.2022, modified the said order by dropping the reversal of ITC in so far as it relates to sales of motor vehicles to Canteen Stores Department, but in all other respects confirmed the earlier determination of the tax, reversal of ITC for other sales and penalties under Section 27(3)(C) as well as under Section 27(4) of the Act. The respondent has not stated any reason in the order and the explanations submitted by the petitioner were totally ignored. No other verification was done with regard to quantum of reversal of ITC. In both the orders, it is stated that the penalty under Section 27(3)(C) and Section 27(4) of the Act is proposed to be levied, but no reason was given with regard to levy and imposition of penalty that to at 300% for the year



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2012-2013 for which there is no provision under Section 27(4) of the Act, even by the Amending Act 13 of 2015. Hence, the petitioner has filed this writ petition raising various grounds. Pending writ petition, the respondent further proceeded to impose penalty, vide impugned order, dated 04.01.2023 and has imposed 300% penalty under Section 27(4) (2) of the Act for the Assessment year 2009-2010 and also levied penalty under Section 27(4) of the Act. Therefore, challenging the said impugned order, the petitioner had filed W.P(MD)No.2220 of 2023 stating that the 300% penalty cannot be levied since the substituted section 27(4) was effective only from 29.01.2016 and it has no application for the assessment year 2009-2010. Hence, both the writ petitions are taken up together and this Commons Order is passed.

5. The respondents have filed counter and stated that a proceeding under Section 27 of the Act was passed on 07.04.2016, challenging the same the petitioner had filed W.P(MD)Nos.7982 to 7984 of 2016 and this Court has set aside the order and directed to provide fresh opportunity to the petitioner and pass orders. On receipt of said order, the petitioner had submitted reply and upon verification of the documents produced by the petitioner, the revision order, dated



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07.07.2022 was passed following demand on merits:

Demand arrived in Assessment order dated 07.07.2022 with respect of Reversal of Input Tax Credit.

		Turn Over	ITC Reversal
1	Stock Transfer	Rs.6,73,52,784/-	Rs.13,18,540/-
2	Interstate sale with C Form	Rs.90,64,727/-	Rs.8,57,707/-
3	Interstate sale without C Form	Rs.92,32,405/-	Rs.8,73,573/-

6. This order was passed after due consideration of the petitioner's reply with the supportive valid documents, which would be evident from the fact that prior to modified order the ITC reversal was Rs.34,23,570/-, Rs.8,57,707/-, Rs.32,69,158/- for stock transfer, interstate sale with C Form and interstate sale without C Form respectively. From the above reduction of the ITC reversal, it is clear that the respondents have considered the petitioner's claim and granted reduction of ITC reversal. The other ITC reversal was confirmed as it is pertaining to the wrongly availed Input Tax Credit which was availed by the petitioner vide local purchase and utilized for interstate sales. Hence, the related penalty under Section 27(4) of the Act, is bound to be paid by the petitioner. With respect to the percentage of penalty under Section 27(4) of the Act, 300% is



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imposed on the above ITC reversal as they have not paid the wrongly availed Input Tax Credit. Further only after 29.01.2016 [date of amendment of the Section 27(4) of the Act] the assessment order for the year 2012-2013 has been passed on 07.04.2016, hence, penalty imposed in the assessment order is well in lines with the TNVAT Act and Rules 2007. The respondent further submitted that all the payments made by the petitioner were duly considered in the Assessment order passed on 07.04.2022 under Section 84 of the Act, after due verification. The reversal of Input Tax Credit has not been made by them, even though they very well know the fact that correspondent input tax credit wrongly availed has to be made. They have also not submitted any proof of documents for the payment of ITC reversal made by them in this regards in any of the replies before the Assessment order dated 07.07.2022 was passed. Hence, the contention of the petitioner cannot be accepted.

7. The allegation in paragraph No.7 of the petitioner's affidavit is merely a reply filed before the Assessing Officer requesting to revise the Assessment under Section 84 of the TNVAT Act, 2006. The documents submitted by the petitioner was verified and consider in detailed and the revision order was



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passed on 07.07.2022 on merits and in accordance with law. Further two assessment orders have been passed already with two different sets of issues on 07.04.2016 and 28.03.2018. Hence, the assessment order passed on 07.07.2022 was a consolidated order of earlier two Assessment orders. Also it is to be noted that the petitioner has filed a writ petition against the assessment order passed on 07.04.2016 only and they have not preferred any writ petition against the order passed on 28.03.2018. Further contention of the petitioner is that “only for the first time a turnover of Rs.48,86,708/-was taken into consideration for the purpose of levy of penalty under Section 27(3) of the Act, which is not reflected in the earlier proceedings, dated 07.04.2016” is not acceptable as the details of the said turnover has already been discussed in previous order, dated 20.08.2013 which was also duly served to the petitioner.

8. Moreover, the order, dated 28.03.2018 was also passed only after giving pre-revision notice and opportunity of hearing. The details of the said orders are also mentioned in the reference of the Assessment order, dated 07.07.2002. As the petitioner did not contend of the assessment order, dated 28.03.2018, only the facts enumerated in that order was taken into account in the



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Assessment order, dated 07.07.2022. Hence the contention of the petitioner that the explanations were totally ignored cannot be accepted. Moreover, the petitioner has not preferred an appeal before the Appellate Forum, but directly filed writ petition hence the writ petition is not maintainable. As far as the issue raised in W.P.(MD)No.2220 of 2023 is concerned the respondent submitted that the it has been clearly mentioned in the impugned order dated 07.07.2022 that penalty is imposed for the wrongly availed ITC portion. Further the assessment order was passed on 07.04.2016 which is subsequent to the amendment date of 29.01.2016, hence the same is imposable. Hence, the respondent prays to dismiss the writ petition.

9. The petitioner had filed re-joinder affidavit and stated that there is no jurisdiction to invoke Section 27(4) of the Act, by stating that there is wrong availment of ITC. As stated earlier, there is no wrong availment of ITC at all and in those circumstances imposing penalty is not maintainable. It is further stated that with regard to the averment on the limitation aspect in invoking Section 27(3) and 27(4) of the Act, the petitioner submitted that the respondent in their counter affidavit stated that the period of pendency of writ petition has to be



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excluded for the calculation of time limit to initiate proceedings under Section 27 of the Act. The petitioner reiterates that even as per the proceedings, dated 07.04.2016, the penalty under Section 27(2) of the Act was not proposed and imposed along with the statutory Form RR. It is further submitted that even after the direction of this Court, dated 08.03.2021, there was no proposal to levy penalty under Section 27(3) or 27(4) of the Act. Moreover, in the proceedings, dated 07.07.2022 there is no findings of willful non-disclosure of any turnover or wrong availment of ITC by producing false bills, vouchers, declaration certificates or any other document with view to support the claim of ITC. Hence, it is against the principles stated as above in 64 GSTR 167 & 108 VST 380. In view of the jurisdiction of levy penalty including Section 27(1) and 27(2) of the Act and the application of the amended jurisdiction retrospectively, the filing of an Appeal is not effective remedy. Since the principle of law ought to be decided, hence this writ petition is maintainable. Hence the petitioner prayed to allow the writ petition.

10. Heard Mr.N.Inbarajan, the Learned counsel appearing for the Petitioner, Mr.A.K.Manikkam, the Learned Special Government Pleader



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appearing for the Respondent and perused the material documents available on record.

11. The first contention of the petitioner is there should be a finding that there is willful non-disclosure for invoking Section 27(3) Act. Moreover, in the present case the turnover are reflected in the accounts / return Form WW, hence there is no jurisdiction to invoke the penalty under section 27(3). For which, the petitioner has relied on a judgment rendered by this Court, dated 14.10.2022 in W.P.(MD)No. 30251 of 2019 and batch in M/s.Sayar Cars Vs. the Appellate Deputy Commissioner (CT) and another and the relevant portions are extracted hereunder:

8. Heard both learned counsel and perused the materials placed on record. The question of whether penalty under Section 27(3) of the Act is automatic is not a novel one, and has engaged the attention of this Court on more than one occasion. As early as in 1978, a Full Bench had looked into this very issue and had concluded, after noticing earlier decisions of this Court in *Madras Metal Works V. State of Madras* (31 STC 566), *Rajam Textiles V. State of Tamil Nadu* (39 STC 124), *A.V.Meiyappan V. Commissioner of Commercial Taxes* (20 STC 115) and *Ponnusamy Asari V. State of Tamil Nadu*



(T.C.Nos.451 to 455 of 1969) in favour of the assessee, that such imposition was not automatic.

9. All relevant circumstances arising in a case, the Full Bench said, would have to be carefully scrutinized and the levy of penalty must be considered on the basis of the judicial determination of the question as to whether grounds exist so as to justify such imposition.

10. The mere fact that the assessment was made to the best of judgment of the authority would not be sufficient for the imposition of penalty, as the degree of proof required for imposition of penalty is quite different from, and much higher, than that required for the purpose of framing a best judgment assessment.

11. It is the above decision that had persuaded the subsequent Full Bench in the case of Golden Homes (supra) to conclude likewise. In Golden Homes, the Bench had specifically noted that the books of accounts maintained by that dealer, reflected payments that had not been disclosed to tax, and thus, it could not be said that there had been non-disclosure or suppression by the assessee.

12. Furthermore, there was no finding recorded by the assessing authority specific to the position that the escapement of turnover was as a result of willful non-disclosure or suppression by the assessee concerned. This would also vitiate the levy of penalty.

13. The aforesaid decision in the case of Kathiresan (supra) does not appear to have been cited before the Bench in the case of Vijay Steels (supra). To be noted, that the decision of the subsequent Full Bench in the case of Golden Homes (supra) has been rendered



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only on 14th September, 2016, after the decision in the case of Vijay Steels (supra), which is dated 03.02.2016.

14. It is an admitted position that none of the assessment orders or, for the matter, the show cause notices, reveal any application of mind to the aspect of willful suppression. The officer merely proceeds on the fact that there was a difference in turnover between the books of accounts and the monthly returns and this, according to him, justifies the invocation of Section 27(3).

15. An additional factor in this matter is that the petitioner has admittedly remitted the difference in tax along with interest even at the time of inspection. This aspect of the matter is not disputed by the learned Government Advocate. Bearing in mind the conspectus of facts and available precedents, I am of the considered view that the conclusion arrived at by the appellate authority, that the imposition of penalty under Section 27(3) is automatic, is erroneous in law. The appellate order, to this extent, is set aside.

16. These Writ Petitions are allowed in the above terms. No costs. Connected Miscellaneous Petitions are closed.

12. In the present case the assessment orders or revision orders there is no finding recorded by the assessing authority that the escapement of turnover was as a result of willful non-disclosure or suppression by the assessee concerned, hence this would vitiate the levy of penalty. Further the orders would



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reveal there is no application of mind to the aspect of willful suppression and the authorities merely proceeds on the fact that there was a difference in turnover between the books of accounts and the monthly returns and invoked the Section 27(3). It is pertinent to note that earlier the respondents had stated that there was ITC reversal to the tune of Rs.34,23,570/-, Rs.8,57,707/-, Rs.32,69,158/-. But on reconsideration based on High Court order passed in W.P.(MD)No.7982, 7983, 7984 of 2016 the respondents had revised the ITC reversal as Rs.13,18,540/-, Rs. 8,57,707/- and Rs.8,73,573/-. Infact the respondent had stated in the counter that they have considered the plea of the petitioner by referring to the evidence and reduced the ITC reversal. This fact would clearly indicate that there is no willful suppression on the part of the petitioner. In such circumstances, the levy of penalty without willful suppression is illegal. More so there is no finding by the respondents that there is willful suppression by the petitioner. In any tax laws the imposition of penalty is not automatic, it requires a degree of proof for imposition of penalty and the proof is much higher than that is required for imposing tax. Therefore this Court is of the considered opinion that there is no such proof or finding in the present case and hence the imposition is illegal and liable to be set aside.



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13. The next contention of the petitioner is that the respondent has no jurisdiction to impose 300% penalty by invoking Section 27(4) of the Act which was substituted and the same came into effect on 27.01.2016 and it has no application prior to 29.01.2016. Moreover, the respondents have not issued any notice prior to imposing the penalty as stated in the provision. The said amendment is extracted hereunder:

11. Amendment of Section 27: In Section 27 of the Principal Act, for Sub-Section (4), the following sub-section shall be substituted, namely;

“(4) In addition to the tax determined under sub-section (2), the assessing authority shall direct the dealer to pay as penalty a sum which shall be three hundred per cent of the tax due in respect of such claim.

Provided that no penalty shall be levied without giving the dealer reasonable opportunity of showing cause against such imposition”.

The said amendment proposes to impose 300% penalty and it states that the said penalty cannot be imposed without giving the dealer reasonable opportunity of showing cause against the such imposition. Admittedly in the present case there is no show cause notice issued to the petitioner. The assessment order states that,

“As per G.O.No.16/2016 dated 29.01.2016, penalty at 300% of the ITC that was wrongly claimed and availed for the year 2012-2013 is also proposed to be levied under section 27(4)(ii) of TANVAT Act 2006”



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But this cannot be considered as “show cause notice”. It is only reserving the right to initiate proceedings for imposing penalty. When the proviso states that the penalty shall not be imposed without issuing showing cause then the respondents are not empowered to impose penalty without show cause notice. When the Act prescribes to do or to follow certain procedures then the authorities are bound to as prescribed or bound to follow the procedures and non-compliance or any deviation is not permissible. If not followed then the same is liable to be quashed.

14. Further the Section 27 Sub-Clause (4) came into effect on 27.01.2016 and the respondent cannot impose penalty for the assessment year 2012-2013. But the contention of the respondent is that the said assessment order for the year 2012-2013 was passed on 07.04.2016 i.e. after the amendment and hence the respondents are empowered to impose 300% penalty. The contention of the respondents cannot be accepted since the provisions cannot have retrospective effect. Unless the provisions states that the same is applicable retrospectively, all the provisions are applicable only prospectively. The issue of retrospective effect was considered in *Star India (P) Ltd. Vs. Commissioner of Central Excise Mumbai and Goa* reported in (2005) 7 SCC 203 wherein it is held that,



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“8. The liability to pay interest would only arise on default and is really in the nature of a quasi-punishment. Such liability although created retrospectively could not entail the punishment of payment of interest with retrospective effect.”

15. In the present case it is imposition of penalty which is punishment and any punishment cannot be imposed for any transaction carried out prior to the amendment. If imposed then it would amount to giving retrospective effect to the provisions which is impermissible. The Learned Senior Counsel further relied on the judgment rendered in Commissioner of Income Tax Vs. Vatika Township (P) Ltd. reported in (2014) 367 ITR 466 (SC) in which the Hon’ble Supreme Court was considering the issue whether the proviso appended to section 113 of the Income Tax Act 1961 which was inserted by Finance Act 2002 is to operate prospectively or is clarificatory and curative in nature and therefore has retrospective operation. The Hon’ble Supreme Court had held that

“...the law are founded on the bed rock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as Lex Prospicit Non Respicit: law looks forward not backward. As was observed in Phillips Vs. Eyre reported in (1870) LR 6 QB 1, a retrospective legislation is contrary to the general principle that



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legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried upon the faith of the then existing law.”

16. Therefore, unless specifically provides for retrospective effect then laws are applicable only prospective. Hence the amendment of section 27(4) will be applicable only from 27.01.2016 and the same shall not be applicable prior to 27.01.2016. Consequently, the imposition of 300% penalty for the assessment 2009-2010 and 2012-2013 and for any assessment years prior to 27.01.2016 is illegal. Therefore, the impugned orders cannot be sustained and accordingly the impugned orders are quashed.

17. Accordingly, these Writ Petitions are allowed. The impugned orders, dated 31.05.2023 as modified on 07.07.2022 and 04.01.2023 are hereby quashed. No costs. Consequently, connected miscellaneous petitions are closed.

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05.01.2024



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To

The Assistant Commissioner (ST),
West Veli Street Assessment Circle,
Madurai.



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S.SRIMATHY, J

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Common Order made in
W.P.(MD)Nos.16025 of 2022 &
2220 of 2023

05.01.2024