

Assessment Made To Best Of Judgment Of Authority Would Not Be Sufficient For Imposition Of Penalty: Madras High Court

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DR. ANITA SUMANTH; J.

W.P.Nos.30251, 30256 and 30258 of 2019 and WMP.Nos.30228, 30232 and 30235 of 2019; 14.10.2022

N/s. Sayar Cars versus Appellate Deputy Commissioner (CT)

For Petitioner : Mr.P.Rajkumar; For Respondents : Mrs.K.Vasanthamala, Government Advocate

COMMON ORDER

The petitioner is an authorized sales and service centre for Chevrolet cars in Vellore and a registered dealer under the provisions of the Tamil Nadu Value Added Tax Act, 2006 (in short 'TNVAT Act'). It continues to be a dealer under the provisions of the Tamil Nadu Goods and Services Tax Act, 2017 (in short 'TNGST Act').

2. In respect of the assessment years 2013-14, 2014-15 and 2015-16, assessments were framed based upon an inspection by the officials of the Enforcement Wing in the premises of the petitioner in February, 2016. The officials noticed at the time of inspection that there were lacunae in the monthly returns filed by the petitioner. Specifically, two defects were pointed out. The first related to difference in sales turnover as per invoices and the second related to difference in consideration on sales of old vehicles.

3. To elaborate, and in the interests of clarity, the petitioner had sold old vehicles for a profit, but had not remitted the difference in respect of the profit. The defects were forwarded by the enforcement officials to the assessing authority, who issued a show cause notice prior to assessment. After detailing the allegations relating to escapement of tax, the authority concludes, also proposing to impose penalty under Section 27(3) of the Tamilnadu Value Added Tax Act (in short 'Act') indicating that the same '*may be levied*'.

4. It appears evident to me that the authority had proceeded solely on the basis of the proposals by the enforcement officials that included a proposal to levy penalty as well. To this end, the show cause notice does not satisfy the ingredients of Section 27(3) of the Act which states that the assessing authority must be '*satisfied that the escape from the assessment is due to wilful nondisclosure of assessable turnover by the dealer*'.

5. The satisfaction of the officer is thus not confined to the aspect of nondisclosure alone, but also to the effect that such non-disclosure was wilful. To this extent, show cause notices dated 19.09.2016 (AYs 2013-14 and 2014-15) and 30.11.2016 (AY 2015-16) are found to be deficient.

6. Be that as it may, the assessments were completed along the lines proposed by order dated 21.11.2016 (AYs 2013-14 and 2014-15) and 28.12.2016 (AY 2015-16), and the petitioner challenged the same by way of first appeal. The appellate authority, by order dated 21.05.2018, sustains the orders of assessment and rejects the ground challenging the levy of penalty under Section 27(3), stating that such levy was automatic.

7. It is as against the aforesaid conclusion, that the petitioner is before this Court. The petitioner relies upon a line of decisions of this Court commencing from the decision of the Full Bench in the case of *Kathiresan Yarn Stores V. State of Tamil Nadu* (42 STC 121) that has been followed by a subsequent Full Bench in the case of *State of Tamil Nadu V. Golden Homes* (102 VST 380). Per contra, learned Government Advocate relies upon a decision of the Division Bench of this Court in the case of *Vijay Steels V. State of Tamil Nadu* (2016 SCC on line Mad 2559).

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 scrutinised 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 wilful 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 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 wilful 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.