(2010) 07 MAD CK 0265

In the Madras High Court

Case No : Writ Petition No. 49883 of 2006

Lucky Plastics and Chemicals Company Limited — APPELLANT

Vs

The Appellate Assistant Commissioner (CT) V and The Commercial Tax Officer (Addl.) — RESPONDENT

Date of Decision : 20-07-2010

Acts Referred:
Tamil Nadu General Sales Tax Act, 1959 — Section 31

Citation : (2011) 39 VST 520

Hon'ble Judges : K.B.K. Vasuki, J

Bench : Single Bench

Advocate : P. Rajkumar, for the Appellant; K. Radhakrishnan, for the Respondent

Final Decision : Allowed

Judgement

K.B.K. Vasuki, J.—On consent, this writ petition is taken up for final hearing.

2. The writ petition is filed against the order of the first respondent/The Appellate Assistant Commissioner (CT)V, Kancheepuram, dated 28.11.2006 made in M.P. No. 93 of 2006, to quash the same and to further direct the first respondent to entertain the appeal filed by the petitioner against the assessment order of the second respondent dated 27.06.2006.

3. The brief facts relevant herein are that the petitioner was works contractor and was assessee under Tamil Nadu General Sales Tax Act, 1959 and Central Sales Tax Act, 1956. The petitioner has for the assessment year 2004-2005 filed the return reporting taxable turnover of Rs. 2,23,59,709/- consisting of works contract sales turnover of grid and sales turn over of PVC Board and PVC tiles. The assessment return was accepted by the authority concerned with due acknowledgment dated 14.04.2004. The second respondent has thereafter issued notice on 10.03.2006 thereby, intimating the petitioner for its proposal to levy 20% tax on the works contract turnover to the tune of Rs. 1,55,67,323/- the levy of tax on works contract sales turnover of grid on the ground as

mentioned in the order. The petitioner has on receipt of the notice filed detailed objections questioning the authority of the respondent to levy tax in respect of the works contract etc. and the same is followed by the assessment order dated 27.06.2006. Such assessment order was challenged by the petitioner in W.P. No. 24621 of 2006 and the same was dismissed at the admission stage on 03.08.2006 on the ground of availability of alternative statutory appeal remedy.

4. The petitioner challenged the order of the Single Judge before the Division Bench of this Court in W.A. No. 1173 of 2006. The Division Bench has by order dated 11.09.2006 permitted the petitioner to avail the statutory appeal remedy along with the application for condoning the delay within four weeks, with further direction issued to the appellate authority to decide the matter on merits. In compliance with such order, the petitioner filed the statutory appeal on 06.10.2006 after complying with pre condition deposit of 25% of disputed tax and admitted tax. The appeal is also filed along with an application for condoning the delay of 63 days. It is further stated in the same petition that the proceedings was pending before this Court for nearly 27 days between 05.07.2006 to 01.08.2006 and if such period is excluded the total period of delay in filing the appeal is only 16 days coming within the outer limit of 30 days specified under the proviso to Section 31 of the Tamil Nadu General Sales Tax Act. However, the first respondent appellate authority dismissed the petition for condoning the delay mainly on the ground that the total number of delay is 63 days and the first respondent is having authority to condone the delay of maximum limit of only 30 days and as the same is beyond 30 days. The first respondent has no authority to entertain the petition and the appeal is time barred, such order passed by the first respondent is now under challenge before this Court.

5. It is now argued by the learned Counsel for the petitioner that the petitioner was on earlier occasion, bonafide prosecuted the matter before this Court by invoking the extraordinary jurisdiction and the availability of statutory appeal remedy is known to him, only in pursuance of the order passed by this Court, while disposing of the earlier writ petition as such the period during which the petition was pending before this Court is to be necessarily excluded from the total period of delay and if that is excluded the actual number of delay in preferring the appeal will be reduced to 13 days coming within the purview of the proviso to Section 31 of the TNGST Act.

6. Per contra, the learned standing counsel appearing for the first respondent would seriously urge that the entire period of delay is to be taken into account and in the absence of any observation made by this Court, while disposing of the earlier writ petition directing the first respondent to entertain the appeal without referring to the period of limitation, the period during which the proceedings are pending before the High Court is also to be treated as delay and the delay petition is rightly rejected and the petitioner cannot raise any grievance against the same.

7. Heard the rival submissions made on both sides.

8. It is not in dispute that the petitioner availed the statutory appeal remedy only on the strength of the permission granted by this Court in the earlier writ petition and such permission is granted to file the appeal along with petition to condone the delay. Though the total number of delays from the date of the earlier order till the date of filing of the appeal is 63 days, part of delay to be excluded according to the petitioner is the time gap between the date of assessment order and the date of disposal of the writ petition i.e. 05.07.2006 to 03.08.2006 which comes to 29 and the date on which the writ order was made ready and writ appeal is preferred and disposed of i.e. between 21.08.2006 and 11.09.2006 comes to 19 days and if the total period during which the proceedings were pending before High Court stands excluded the delay period falls within outer limit of the authority concerned. The learned Counsel for the petitioner has also cited the following Judgments in support of his contention.

(1) 1998-1999 (4) TNCTJ 182, the Division Bench of our High Court in Amar Chemicals v. The Tamil Nadu Taxation Special Tribunal and Anr.

(2) The Division Bench of our High Court reported in Maheswari Fireworks Industries Vs. Commercial Tax Officer and Others,

(3) The Division Bench of our High Court reported in 2004-2005 (10) TNCTJ 168 in M. Krishnaswamy v. The Registrar and Ors.

(4) Unreported Judgment of Division Bench of our High Court dated 21.12.2006 in W.A. Nos. 1632 and 1633 of 2006 in Sam Turbo Industry Limited v. The Appellate Assistant Commissioner of Commercial Taxes (Main) FAC, Coimbatore and Anr.

(5) Unreported Judgment of our High Court dated 25.04.2008 in W.A. Nos. 514 and 515 of 2008 in Sri Shanmuga Ginning Factory v. The Appellate Assistant Commissioner (CT) Erode and Anr. and

(6) AIR 2000 SC 2023 in P. Sarathy v. State Bank of India.

9. The case dealt with by the Supreme Court is arising under Tamil Nadu Shops and Establishments Act, whereas the other cases dealt with by our High Court are arising under the same Tamil Nadu General Sales Tax Act, in all these cases, our Apex Court and Division Bench of our High Court are of the categorical view that the period spent in the proceedings before this Court under writ jurisdiction are to be necessarily excluded and the total number of delay is to be calculated after excluding such period and when the total period so calculated was less than the outer limit prescribed under the relevant provisions of the Act, the Supreme Court and our High Court are pleased to condone the same as sought for by the respective petitioners therein. That being the dictum laid down in the authorities above cited, the same is squarely applicable to the period of delay occurred herein, wherein also the total number of delay after excluding the period spent before this Court is less than 30 days. The same is having regard to the reasons

set out in the affidavit filed in support of the delay petition and having regard to the fact that the petitioner is permitted in writ appeal to file the statutory appeal along with condone delay petition and by adopting liberal attitude as per well settled legal position in the matter of condoning delay ought to have been condoned by the first respondent. In the considered view of this Court, the approach adopted by the first respondent in considering the delay petition is contrary to well established legal principles and is hence liable to be set aside, with further direction issued to the appellate authority to entertain the appeal and to dispose of it on merits.

10. In the result, the writ petition is allowed by setting aside the impugned order dated 28.11.2006 made in M.P. No. 83 of 2006 with further direction issued to the first respondent to entertain the appeal filed by the petitioner against the assessment order passed by the second respondent in his proceedings dated 27.06.2006 and to dispose of the same on merits as per law. No costs.