(2011) 06 MAD CK 0570

In the Madras High Court

Case No : Writ Petition (MD) No''s. 3014 to 3016 of 2008

Sterlite Industries (India) Ltd. APPELLANT

Vs

The Commercial Tax Officer RESPONDENT

Date of Decision : 27-06-2011

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 12(5), 16, 16(2), 22(2)

Citation : (2012) 51 VST 48

Hon'ble Judges : D. Hariparanthaman, J

Bench : Single Bench

Advocate : N. Inbarajan, for the Appellant; D. Muruganandam, Additional Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

D. Hariparanthaman, J.—The Petitioner has assailed in W.P.(MD)Nos. 3014 to 3016 of 2008 the three revised assessment of tax orders issued by the Respondent by order, dated 27.02.2008 for the assessment years 2001-2002, 2002-2003 and 2003-2004 respectively u/s 16 of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred as the Act). Those orders also imposed penalty u/s 23 of the Act and the same is also questioned in the writ petitions.

2. The Petitioner is a Company having the registered office at SIndian Penal Code OT Industrial Complex, Madurai by Pass Road, Tuticorin. The Petitioner was assessed by the Respondent as per the turnover reported for the assessment years 2001-2002, 2002-2003 and 2003-2004 u/s 12 of the Act. The Petitioner purchased machinery parts and accessories against the issue of Form XVII declaration u/s 3(5) of the Act. Based on the assessment orders for the assessment year 2001-2002, 2002-2003 and 2003-2004, the tax was paid by the Petitioner.

3. While so, the Respondent exercised his revisional power u/s 16 of the Act. According to the Respondent, there was an escape turnover and the Petitioner

was not entitled to claim the rate of tax at the rate of 3% u/s 3(5) of the Act. The said conclusion was arrived at by the Respondent based on a circular dated 08.09.2004 issued by the Commissioner of Commercial Taxes, Chennai. Furthermore, the Respondent relied on the audit report.

4. It is admitted that there exists alternate remedy u/s 31 of the Act against the revised assessment of tax u/s 16 of the Act. The learned Counsel for the Petitioner submits that the appellate authority may be permitted to entertain the appeal without insisting 25% of the tax payable under the impugned order as the Petitioner already deposited 25% of the amount pursuant to the condition imposed by this Court for the grant of interim order. The deposit of 25% of the amount by the Petitioner pursuant to the condition imposed by this Court for grant of stay is not disputed by the learned Additional Government Pleader. In these circumstances, the writ petitions questioning the revised assessment of tax are dismissed with liberty to the Petitioner to prefer appeal before the appellate authority to question the revised assessment of tax, within a period of two weeks from the date of receipt of a copy of this order and in such an event, the appellate authority is directed to consider the appeal and dispose the same on merits, without reference to delay and without insisting 25% of the amount payable under the impugned orders. Further, the Registry is directed to return the original impugned orders to the Petitioner to prefer appeal.

5. While passing the revision of assessment order dated 27.02.2008 for the assessment year 2001-2002, 2002-2003 and 2003-2004, the Respondent also passed an order u/s 23 of the Act levying penalty on the Petitioner. Admittedly, the Petitioner was not personally heard. Section 23 of the Act contemplates reasonable opportunity of ''being heard'' in contrast to proviso to Section 16(2) of the Act, wherein the wordings are differently used. Section 23 of the Act is extracted hereunder:

Levy of penalty in certain cases: If any person purchasing goods is guilty of an offence under Clause (c) 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 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 u/s 45 shall be instituted in respect of the same facts on which a penalty has been imposed under this Section.

Proviso to Section 16(2) of the Act is extracted hereunder:

16(2):In making an assessment under Clause (a) of Sub-section (1), the assessing authority may, if it is satisfied that the escape from the assessment is due to wilful non-disclosure of assessable turnover by the dealer, direct the dealer, to pay, in addition to the tax assessed under Clause (a) of Sub-section (1), by way of penalty a sum which shall be:

....

....

Provided that No. penalty under this Sub-section shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such imposition.

6. In proviso to Section 16(2) of the Act, No. personal hearing is contemplated. Hence, while imposing penalty u/s 23 of the Act, an opportunity of being heard is necessary. I am of the view, that there is some force in the submission made by the learned Counsel for the Petitioner that while leaving penalty u/s 23 of the Act, an opportunity by way of ''personal hearing'' should be given to the Petitioner.

7. This Court in the decision reported in 1995(8) M.T.C.R. (Rajam Offset Printers v. The Commercial Tax Officer) has been held that Section 22(2) of the Act contemplates ''personal hearing''. Paragraph 8 of the said decision is extracted hereunder in this regard:

Mere giving of notice calling for objections can be neither considered as adequate opportunity in terms of the language of Section 22(2) nor it can be substituted for personal hearing. In view of the plain and clear language of Section 22(2) providing personal opportunity of hearing to the person concerned. I have No. hesitation to say such a reasonable opportunity of hearing is imperative. In view of the legal position as stated above, the arguments of the learned Government Advocate that issuing of notice itself is sufficient in the absence of filing objections by the Petitioner is only to be noticed to be rejected.

8. Likewise, in the decision reported in (2001) 122 STC 70 the Tamil Nadu Taxation Special Tribunal, held that proviso to Section 55(1) of the Act contemplates ''personal hearing''. Paragraph 25 of the said decision is extracted hereunder in this regard:

In fine, we do not see any ground at all for taking a contrary view than the one taken in (2000) 118 STC 504 (TNTST) (Vinayaga Spinning Mills v. Commercial Tax Officer). We reiterate that Section 55 is certainly a provision enabling the assessing authority to revise his order and it is justifiably prescribed that where rectification has the effect of enhancing an assessment or any penalty, not only notice should be given to the dealer, but he should also be allowed to have a personal hearing before a decision is taken. The various decisions cited by us certainly make us hold that the provision of law visits the assesses with grave civil consequences, if the rectification results, in the enhancing of the assessment or the penalty. Therefore, the Respondent/Assessee is right in his arguments that the penalty levied u/s 12(5)(iii) of the TNGST Act, 1959, cannot be enhanced in the revision made u/s 55 of the TNGST Act, 1959, without giving the Assessee a personal hearing before the rectification is made.

9. Therefore, applying the aforesaid Principles, I am of the view that the

Petitioner should have been given a personal hearing before passing a penalty order, since Section 23 of the Act is similarly worded like Section 22(2) and 55(1) of the Act. Hence, the impugned orders in so far as levying penalty is concerned are quashed and the matter is remanded back to the Respondent to pass fresh orders after providing personal hearing.

10. The writ petitions are disposed of as under:

i) The writ petitions are dismissed in so far as questioning the revised assessment of tax with liberty to the Petitioner to prefer appeal before the appellate authority to question the revised assessment of tax, within a period of two weeks from the date of receipt of a copy of this order and if such an appeal is filed, the appellate authority is directed to consider the appeal and dispose of the same on merits without reference to delay and without insisting 25% of the amount payable under the impugned orders;

ii) The writ petitions are allowed in so far as levying penalty and the matter is remanded back to the Respondent to pass fresh orders after providing personal hearing; and

iii) The Registry is directed to return the original impugned orders to the Petitioner to prefer appeal. No. costs.

