

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04.01.2017

Coram

The Honourable **Mr.JUSTICE RAJIV SHAKDHER**

Writ Petition No.35620 of 2016
and WMP No.30613 of 2016

Exelan Networking Technologies Pvt. Ltd.,
represented by its Managing Director,
5/310, Pilliar Koil Street,
Okkiampet, Thoraipakkam,
Chennai-96.

.... Petitioner

Vs.

The Assistant Commissioner,
Sholinganallur Assessment Circle,
No.141, Second Floor, Burma Colony,
First Main Road, Perungudi,
Chennai-600 096.

.... Respondent

* * *

Prayer : Writ Petition filed under Article 226 of The Constitution of India praying for the issuance of Writ of Certiorari, or any other writ, order or direction, in the nature of Writ of Certiorari calling for the records on the file of the respondent herein in his proceedings in impugned notice in CST/864303/2015-16, dated 15.09.2016, and quash the same as in direct violation of Clause (iii) of Explanation to Section 22(5), hence ultra-vires and arbitrary, insofar as the proposal to impose penalty.

* * *

For Petitioner : Mr.T.V.Lakshman

For Respondent : Mr.S.Kanmani Annamalai,
Additional Govt. Pleader (T)

ORDER

1. This is a petition, which has been filed under Article 226 of the Constitution of India, to assail the notice dated 15.09.2016.

1.1. By virtue of this notice, in effect, the respondent proposes to levy tax and penalty on the petitioner.

2. In short, the proposal, as set out in the impugned notice, is predicated on the failure on the part of the petitioner to furnish prescribed declarations in Form C, Form F, Form H, Form I, Form EI and Form EII, within the time limits prescribed under the Central Sales Act, 1956 (in short "the 1956 Act"), or, Central Sales Tax (Registration and Turnover) Rules, 1956, or, the Central Sales Tax (Tamil Nadu) Rules, 1957.

2.1. In other words, the notice holds out that the petitioner's returns are incorrect and incomplete and hence, ineligible for deemed assessment under Section 22(2) of the Tamil Nadu Value Added Tax Act, 2006 (in short "the 2006 Act") read with Section 9(2) of the 1956 Act. Therefore, the respondent proposes to carry out best judgement assessment against the petitioner under Section 22(4) of the 2006 Act read with Section 9(2) of the 1956 Act. In other words, the turnover, as recorded in the impugned notice, is, perhaps, subject to tax at an appropriate local rate under Section 8(2) of the 1956 Act.

2.2. A perusal of the impugned notice shows that the respondent proposes to impose tax in the sum of Rs.67,04,959.36p., at the rate of 14.5%.

2.3. In addition thereto, the impugned notice shows that there is a proposal to levy the penalty at the rate of 150%, in exercise power under Section 22(5) of the 2006 Act, on the difference of tax due and that, which is paid, as per the return filed by the petitioner.

2.4. The impugned notice, however, gives fifteen (15) days time to the petitioner to file its objections.

2.5. The petitioner, being aggrieved by the issuance of the impugned notice, has filed the instant petition.

3. Notice in the instant petition was issued on 06.10.2016, on which date, on behalf of the respondents, the learned Government Pleader, who appeared in the matter, sought time to obtain instructions. Thereafter, the matter has been adjourned on two occasions, i.e., 21.10.2016 and 01.12.2016. No counter-affidavit has been filed on behalf of the respondents.

4. I have put to Mr.S.Kanmani Annamalai, learned Special Government Pleader, who appears for the respondent, whether the matter can be taken up for final hearing at this stage itself, based on the record available with the Court.

4.1. Mr.Kanmani Annamalai, says he would argue the matter based on the record placed before the Court, because the matter is only at the stage of notice, before the respondent, and therefore, the facts that would be set down in the counter-affidavit are already

contained in the impugned notice.

5. The learned counsel for the petitioner has assailed the impugned notice on the ground that the proposal to levy penalty is without jurisdiction and, in a sense, is premeditated. Furthermore, learned counsel for the petitioner says that under the provisions of Section 22(5), Explanation Clause (iii), the petitioner is entitled to furnish the relevant declarations, even at the stage of adjudication, and therefore, the proposal in the impugned notice, in respect of the penalty, is completely, without jurisdiction.

5.1. Learned counsel for the petitioner says that declarations from the buyers have been delayed for various reasons, and therefore, there was a delay in placing the same before the concerned authority.

5.2. Notwithstanding the delay, counsel for the petitioner says that the proposal contained in the impugned notice to levy penalty is premature and contrary to the statutory scheme.

6. Mr.S.Kanmani Annamalai, on the other hand, says that the captioned petition is not sustainable, in view of the fact that opportunity is given to the petitioner to challenge the proposal made in the notice.

6.1. It is submitted that the contentions raised before the Court can be articulated by the respondent, who would, then, pass

an order after considering the objections of the petitioner.

7. I have heard the learned counsels for the parties and perused the record.

8. The brief facts, which are necessary for adjudication upon the petition, have been recorded by me hereinabove. These facts are not disputed. There are the facts, which are, gleaned from the impugned notice.

9. Therefore, having regard to the submissions made before me, the only issue, that requires determination, is that, is the impugned notice premeditated and/or premature, and hence, liable to be set aside.

9.1. For this purpose, one would have to look at the provisions of Section 22 of the 2006 Act. Section 22 of the 2006 Act, provides for deemed assessment. Sub-section (4) of Section 22 provides that, if, no return is submitted by the dealer for any period, or, if the return filed is incomplete or incorrect, or, if it is not accompanied by prescribed documents or proof of payment of tax, the Assessment Authority, after making an enquiry, as it may consider necessary, can assess a dealer, by adopting the best judgement principle. Before proceeding to best judgement, the

Assessment Officer is required to give the dealer concerned, a reasonable opportunity of being heard in the matter.

9.2. Sub-section (5) of Section 22, provides that in addition to the tax assessed under sub-section (4) of Section 22, the Assessing Authority is empowered to direct the dealer to pay by way of penalty, a sum, which is equivalent to 150% of the difference of the tax assessed and the tax already paid as per the returns.

9.3. This order of penalty can be passed at the time, when, the assessment order is passed under sub-section (4) of Section 22 or, by way of a separate order.

9.4. For the sake of convenience, Sections 22(4) and 22(5) along with explanation, are extracted hereinbelow :

“22. Deemed Assessment and procedure to be followed by the assessing authority.-

(1)

(2)

(3)

(4) If no return is submitted by the dealer for any period of the year or if the return filed is incomplete or incorrect, or if not accompanied with any of the documents prescribed or proof of payments of tax, the assessing authority shall, after making such enquiries as it may consider necessary, assess the dealer to the best of its judgment, subject to such conditions as may be prescribed, after the completion of that year:

Provided that before taking action under this

sub-section, the dealer shall be given a reasonable opportunity of being heard.

(5) In addition to the tax assessed under sub-section (4), the assessing authority shall, in the order of assessment passed under sub-section (4) or by a separate order, direct the dealer to pay by way of penalty, a sum which shall be, one hundred and fifty percent of the difference of the tax assessed and the tax already paid as per the returns:

Provided that no penalty under this sub-section shall be imposed after the period of six years from the date of assessment order (sic – and) unless the dealer affected has had a reasonable opportunity of showing cause against such imposition.

Explanation.—For the purpose of levy of penalty under this sub-section, the tax assessed on the following kinds of turnover shall be deducted from the tax assessed under sub-section (4):--

(i) Any turnover representing additions to the turnover as per the returns made by the assessing authority without reference to any specific concealment of turnover;

(ii) Any turnover estimated by the assessing authority with reference to any specific concealment of turnover as per the returns;

(iii) Any turnover on which tax is paid at the concessional rate subject to the condition of furnishing any declaration but where such declaration could not be furnished at the time of assessment.

(6)”

9.5. A bare reading of the sub-section (5) of Section 22 would show that it is only after an assessment is complete under sub-section (4) of Section 22, that penalty can be imposed by the Assessing Officer. However, it can, either be imposed at the time when, the assessment order is passed, or, by way of a separate order, *albeit*, after the assessment order is passed. Therefore, the proposal in the show cause notice to levy penalty at the rate of 150% prior to adjudication demonstrates premeditation.

10. Furthermore, as has been correctly argued by the learned counsel for the petitioner, as per the provisions of Clause (iii) of the explanation to Section 22(5), the petitioner is entitled to seek deduction from the tax assessed under sub-section (4) of Section 22 of tax paid on any such turnover on which, tax is paid at a concessional rate, if requisite declarations are furnished, before levy of penalty.

11. Having regard to the aforesaid provisions, I am of the view that the impugned show cause notice being both premeditated and/or premature, is required to be set aside. It is ordered accordingly.

11.1. Needless to say that the respondent will be at liberty to issue fresh notice, *albeit*, in accordance with law.

12. The writ petition is disposed of, in the aforesaid terms. The connected miscellaneous petition is closed. No costs.

04.01.2017

Index : Yes/No

Internet: Yes

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To

1. The Assessment Officer,
Revenue Department,
Greater Chennai Corporation,
Chennai-600 028.
2. The Commissioner,
Revenue Department,
Greater Chennai Corporation,
Chennai-600 028.

RAJIV SHAKDHER, J.

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