

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 10.01.2018

Coram

The Hon'ble Mr.Justice T.S.Sivagnanam

Writ Petition Nos.39733 to 39745 of 2005

and

W.P.M.P.Nos.42621 to 42633 of 2005

W.P.No.39733 of 2005 :

Tvl.Hotel Peacock,
Unit of Essor Hotels Pvt. Ltd.,
represented by its Managing Director, ...Petitioner

Vs.

1. The Commercial Tax Officer,
Purasawalkam Assessment Circle,
Kurlagam Annexe Building,
Chennai - 600 108.
2. State of Tamil Nadu,
represented by the Secretary to Government,
Commercial Taxes,
Fort St. George,
Chennai. ...Respondents

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Writ Petition, filed under Article 226 of the Constitution of India, for issuance of Writ of Certiorari to call for the records in L.T.H.2/80-81 relating to the assessment year 1980-81, dated 21.10.2005 on the file of the first respondent and to quash the same.

For Petitioner : Mr.K.Mani

For Respondents : Mr.M.Hariharan
Additional Government Pleader

ORDER

Heard Mr.K.Mani, the learned counsel appearing for the petitioner and Mr.M.Hariharan, the learned Additional Government Pleader appearing for the respondents. With the consent on either side, these Writ Petitions are taken up for disposal.

2. The legal issue involved in these Writ Petitions is, as to whether the first respondent was justified in levying and demanding interest under the provisions of the Tamil Nadu Tax on Luxuries Act, 1981, when there is no such provision provided under the Act, especially, Section 9 of the Act.

3. The first respondent seeks to invoke Section 24 (3) of the Tamil Nadu General Sales Tax Act, 1959 to levy penal interest. This question came up for consideration before this Court, in the case of **S.Gurunathan Vs. Deputy Commercial Tax Officer, Thirupathur, and another,**

reported in [(2015) 77 VST 45 (Madras)]. The only difference being in the said enactment, which was the subject matter was, Tamil Nadu Additional Sales Tax Act, 1970. However, the legal issue was, whether levy of interest on belated payment of additional tax is proper or not, when there was no provision, enabling applicability of Section 24 (3) of the Tamil Nadu General Sales Tax Act, 1959. This question was answered in favour of the assessee and against the Revenue, holding that, unless, there is a charging Section for levy of interest, cannot be automatic. At this juncture, it would be worthwhile to refer to the operative portion of the judgment, which reads as follows:-

17. If we paraphrase the above sections slightly they will read thus:-

"The provisions of the TNGST Act as they apply to tax in the said Act shall apply in relation to additional tax payable under clause (aa) of the AST Act." Similarly, the new Section (as amended by Act 14 of 2005) will read like this:

"The provisions of the TNGST Act as they apply to tax and interest in the said Act shall apply in relation to additional tax and interest payable under clause (aa) of the AST Act."

18. Therefore, the reference to the said Act (namely TNGST Act) in S.2(1)(b) was to the provisions of the said Act 'in relation to tax'. Nothing more. Even in Ashok Service Center, the Supreme Court had only said that the Provisions of the Principal Act applied mutatis mutandis to the levy under the Additional Sales Tax Act. The word levy has to be understood in the context of levy of tax alone. That is why after Karthik Roller Mills case the Legislature amended 2(1)(b) to include the words "and interest".

19. State of Tamil Nadu Vs. P. M.A. Mathurai Veerasamy and Co. 14. 52 STC 131 (cited supra) had rightly held that if it was the intention of the legislature that the entire gamut of the provisions of the principal Act were to be applied to the later Act then it could very well have said so: and that if the S.3(2) had been so worded then, there would have been no difficulty to hold that S.22 of the TNGST Act was also attracted by reference. We respectfully think that this is the correct way to understand the Section. We have to read S.2(1)(b) in an identical way. If so, then the AST Act as it reads before the amendment had no charging provision. A charging section is substantive law as seen in 94 STC 422 (cited supra). Therefore, there can be no levy of penalty without the charging section. This is in accordance with India Carbon and J.K. Synthetics.

The judgments, which deal with clarificatory sections are of no help since the S.3-B is not a clarificatory section, it introduces for the first time the power to levy penalty. Karthik Roller Mills case correctly hold that in the absence of the substantive provision, in the AST Act itself, relating to levy of interest, the provisions of the TNGST Act cannot be the source of power of such levy. Similarly, unless there is a charging section for levy of penalty, there can be no automatic reading of the power to levy penalty. The levy of penalty cannot be sustained. We are in agreement with 2004 (136) STC 606(cited supra). In our view, therefore, we see no reason to refer the matter for reconsideration."

20. The above Judgments are squarely applicable to the case on hand. From the above Judgments, it is clear that the interest cannot be demanded for belated payment on Additional Sales Tax, as there is no substantial provision in the TNAST Act itself and similarly, no penalty can be levied, as there is no charging Section under the TNAST Act to levy penalty for the relevant Assessment year. The provisions of the TNGST Act cannot be extracted or read upon for the purpose of levy of interest or penalty under the TNAST Act. The validating Acts are applicable only to the assessment under TNGST Act. The argument of the learned Additional Government

Pleader for the respondents that the petitioner having submitted the application under Samadhan Scheme cannot question the orders levying and confirming interest and penalty also does not hold water, for the simple reason that the question of jurisdiction, being legal point, can be raised at any time. Further, in view of the bar under Article 265 on the state, the question of waiver is not applicable to a taxing statute.

21. In view of the above, the proceedings of the first respondent, dated 26.04.2004, confirmed by the proceedings of the second respondent, dated 12.09.2008, are set aside insofar as the levy and demand of interest of Rs.2,09,700/- and Rs.5,39,532/- towards penalty on the additional sales tax payable by the petitioner. The respondents are hereby directed to pass fresh orders, giving appropriate relief, as indicated above.

As the levy of interest on Additional Sales Tax and Penalty are set aside, this Court feels that there is no necessity to pass further orders in W.P.(MD).No.5111 of 2009."

4. The learned Additional Government Pleader submitted that the

impugned proceedings are only notices, and therefore, the petitioner should be directed to file their objections. However, I am not able to concede to the said submission, for the reason that, when there is a total lack of jurisdiction to levy penal interest, the petitioner need not be prevented to approach the authorities and file their objections to the impugned notices. That apart, the impugned notices are not show cause notices, but demands for payment of interest, that too, without issuing a show cause notice to the petitioner.

5. Thus, for the above reasons and taking note of the decision in the case of **S.Gurunathan Vs. Deputy Commercial Tax Officer, Thirupathur, and another** (supra), these Writ Petitions are allowed and the impugned notices are quashed. No Costs. Consequently, connected miscellaneous petitions are closed.

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Index : yes/no

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T.S.Sivagnanam, J.

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