

W.P(MD)Nos.16025 of 2022 & 2220 of 2023

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

<i>Judgment Reserved On</i>	<i>Judgment Pronounced On</i>
20.12.2023	.2024

CORAM

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

W.P.(MD)Nos. 16025 of 2022 & 2220 of 2023

and

W.M.P.(MD)Nos. 11582 of 2022 & 1998 of 2023

T.V.Sundram Iyengar and Sons Limited,
Now known as T.V.Sundram Iyengar and Sons Private Limited,
[Represented by its Senior General Manager – Indirect Taxes
P.Venkatesh]

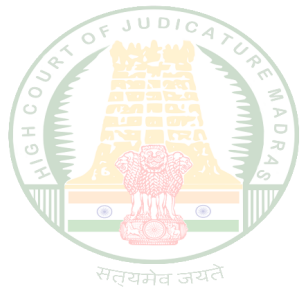
... Petitioner in
both the Writ Petitions

Vs.

The Assistant Commissioner (ST),
West Veli Street Assessment Circle,
Madurai.

... Respondent in
both the Writ Petitions

PRAYER in W.P(MD)No.16025 of 2022: Writ Petition filed under Article 226 of the Constitution of India for issuance of *Writ of Certiorari*, to call for the records on the file of the Respondent herein in her proceedings in TIN Assessment No.33595020002/2012-13 dated 31.05.2022 as modified on 07.07.2022 and to quash the same.



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PRAYER in W.P.(MD)No. 2220 of 2023: Writ Petition filed under Article 226 of the Constitution of India for issuance of *Writ of Certiorari*, to call for the records on the files of the Respondent herein in her proceedings in Assessment No.33595020002/2009-10 dated 04.01.2023 and to quash same.

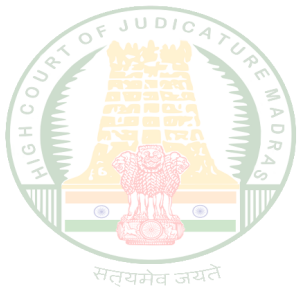
In both the Writ Petitions:

For Petitioner	: Mr.N.Inbarajan
For Respondent	: Mr.A.K.Manikkam, Special Government Pleader

COMMON ORDER

W.P(MD)No.16025 of 2022 is filed to quash the impugned order, dated 31.05.2023 as modified on 07.07.2022.

2. The petitioner is a registered Company under Companies Act. During the relevant period, the petitioner is a registered dealer coming within the purview of Tamil Nadu Value Added Tax Act, 2006. The petitioner is engaged in buying and selling of motor vehicles, chassis and sale of auto parts. Deemed assessment for the year 2012-2013 as provided under Section 22(2) of TNVAT Act (herein after referred as the Act) was completed. While that being so, the turn

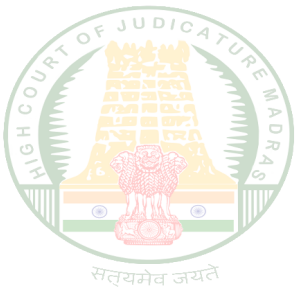


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over was re-determined by the respondent for the year TIN 202-2013 vide proceedings dated 07.04.2016 under Section 27 of the Act. The petitioner challenged the said order before this Court along with the proceedings for the assessment year 2009-2010, 2010-2011 and 2012-2013. This Court has passed a Common order in W.P(MD)Nos.7982 to 7984 of 2016, vide order, dated 08.03.2021 and set aside the order on the grounds of natural justice and the respondent was directed to issue fresh personal hearing notice and while passing the order the respondent ought to consider each and every contention raised by the petitioner.

3. The respondent in order to give effect to the order granted personal hearing to the petitioner and the petitioner has filed their written submission, dated 17.03.2022. But the respondent without appreciating the written submission and without making any further verification and without giving any reason, confirmed the earlier order, dated 31.05.2022 which was communicated on 17.06.2022. The petitioner submitted that there are errors apparent on the face of the record since there are arithmetical error apart from confirmation of penalty which was levied without jurisdiction. The petitioner was advised to file an



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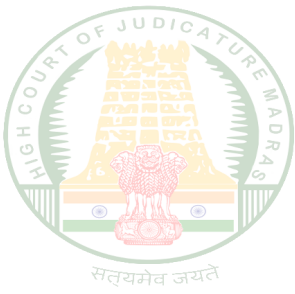
application before the respondent under Section 84 of the Act and the same was filed on 22.06.2022 as well as by another petition on 29.06.2022.

4. The main contention in the said application is that the reversal of ITC as per return was not taken into consideration more particularly, relating to purchase return and there is no binding of any wrong availment of ITC are producing false bill, therefore, the respondent cannot impose penalty. Especially when there is no binding imposition of penalty under Section 24 (4) is without jurisdictions. The petitioner has raised the following grounds:

(a). Reversal of ITC treating sales turnover of exempted sales to Canteen Stores Department as exempted sales of goods covered under Section 15 of the Act.

(b) Reversal of ITC as per the return were not taken into consideration more particularly relating to purchase return.

(c) There is no finding of any wrong availment of ITC or producing false bills etc. which is mandatory for the levy of penalty under Section 27(4) of the Act.



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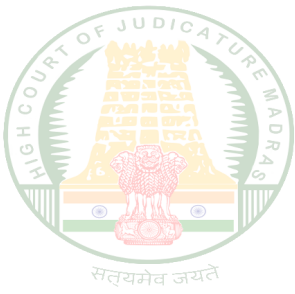
(d) Penalty under Section 27(4) of the Act for the year 2012-2013 was imposed at 300% of the tax due which was substituted by Act 13 of 2015 effective from 29.01.2016 and therefore such imposition of penalty is without authority of law.

(e) Penalty under Section 27(3) was imposed without any finding and was determined on the turnover disclosed in the books of account return and from WW for which also there is no jurisdiction to levy penalty under Section 27(3) of the Act.

(f) Only for the first time a turnover of Rs.48,86,708/-was taken into consideration for the purpose of levy of penalty under Section 27(3) of the Act which was not reflected in the earlier proceedings dated 07.04.2016.

(g) Penalty has been imposed without any finding of willful non disclosure or wrong availment of ITC.

5. The petitioner had produced details and explained about the errors apparent on the face of the record with regard to the jurisdiction to levy penalty at 300% for the year 2012-2013. The respondent, vide proceedings dated



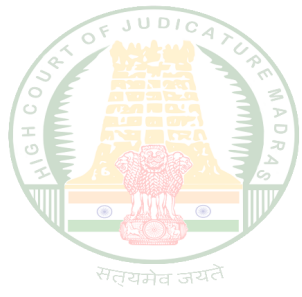
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07.07.2022, modified the said order by dropping the reversal of ITC in so far as it relates to sales of motor vehicles to Canteen Stores Department and in all other respects confirmed the earlier determination of the tax, reversal of ITC and penalties under Section 27(3)(C) as well as under Section 27(4) of the Act.

6. The contention of the petitioner is that the respondent has not stated any reason in the order. The explanations were totally ignored. No other verification was done with regard to quantum of reversal of ITC. In both the orders, it is stated that the penalty under Section 27(3)(C) and Section 27(4) of the Act is proposed to be levied. But, no reason was given with regard to levy and imposition of penalty at 300% for the year 2012-2013 for which there is no provision under Section 27(4) of the Act, even by the Amending Act 13 of 2015. Hence, the petitioner has filed this writ petition.

7. Pending writ petition, the respondent further proceed to impose penalty, vide impugned order, dated 04.01.2023 has imposed 300% penalty under Section 27(4) (2) of the Act for the Assessment year 2009-2010 and also levied penalty under Section 27(4) of the Act. ***Therefore, challenging the said***



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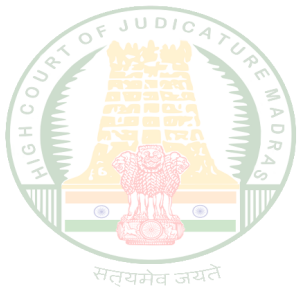
impugned order, the petitioner had filed W.P(MD)No.2220 of 2023. Hence, both the writ petitions are taken up together and this Commons Order is passed.

8. The respondents have filed counter and stated that a proceedings under Section 27 of the Act was passed on 07.04.2016, challenging the same the petitioner had filed W.P(MD)Nos.7982 to 7984 of 2016 and this Court has set aside the order and directed to provide a fresh opportunity to the petitioner and pass orders. On receipt of said order, the petitioner had submitted reply and upon verification of the documents produced by the petitioner, the revision order, dated 07.07.2022 was passed following demand on merits:

Demand arrived in Assessment order dated 07.07.2022 with respect of Reversal of Input Tax Credit.

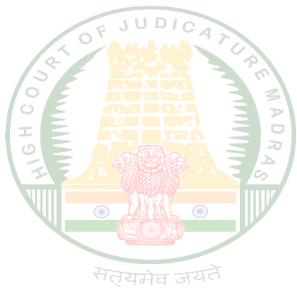
		Turn Over	ITC Reversal
1	Stock Transfer	Rs.6,73,52,784/-	Rs.13,18,540/-
2	Interstate sale with C Form	Rs.90,64,727/-	Rs.8,57,707/-
3	Interstate sale without C Form	Rs.92,32,405/-	Rs.8,73,573/-

On verifying the arrear demand and the subsequent modification it would be cleared that after due consideration of the petitioner's reply with the supportive valid documents, the above ITC reversal is confirmed as it is pertaining to the

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wrongly availed Input Tax Credit which was availed by them vide local purchase and utilised for interstate sales. Hence, the related penalty under Section 27(4) of the Act, is bound to be paid by the petitioner. With respect to the percentage of penalty under Section 27(4) of the Act, 300% is imposed on the above ITC reversal as they have not paid the wrongly availed Input Tax Credit. Also only after 29.01.2016 [date of amendment of the Section 27(4) of the Act] assessment order for the year 2012-2013 has been passed on 07.04.2016. Hence, penalty imposed in the assessment order is well in line with the TNVAT Act and Rules 2007.

9. The respondent further submitted that all the payments made by the petitioner were duly considered in the Assessment order passed on 07.04.2022 under Section 84 of the Act, after due verification. The reversal of Input Tax Credit has not been made by them, eventhough the petitioner is very well known the fact that correspondent input tax credit wrongly availed has to be made. They have also not submitted any proof of documents for the payment of ITC reversal made by them in this regard in any of the replies before the Assessment order was passed. Hence, the contention of the petitioner cannot be accepted.

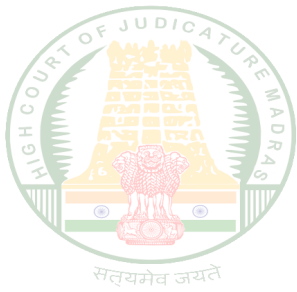


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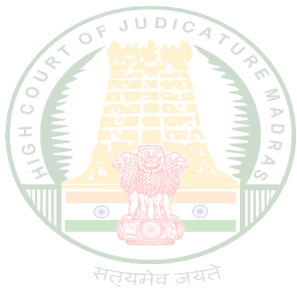
10. The allegation in paragraph No.7 of the petitioner's affidavit is merely a reply filed before the Assessing Officer requesting to revise the Assessment under Section 84 of the TNVAT Act, 2006. The documents submitted by the petitioner was verified and considered in detail and the revision order was passed on 07.07.2022 on merits and in accordance with law. The respondent further submitted that two Assessment orders have been passed already with two different sets issued on 07.04.2016 and 28.03.2018. Hence, the assessment order passed on 07.07.2022 was a consolidated order of earlier two Assessment orders. Also it is to be noted that the petitioner has filed a writ petition against the assessment order passed on 07.04.2016 only and they have not preferred any writ petition against the order passed on 28.03.2018.

11. The further contention of the petitioner is that only for the first time a turn over of Rs.48,86,708/- was taken into consideration for the purpose of levy of penalty under Section 27(3) of the Act, which is not reflected in the earlier proceedings, dated 07.04.2016 cannot be accepted. As the details of the said turn over has already been discussed in previous order, dated 20.08.2013 which was also duly served to the petitioner. Moreover, the order, dated 28.03.2018 was also

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passed only after giving pre-revision notice and opportunity of hearing. The details of the said orders are also mentioned in the reference of the Assessment order, dated 07.07.2002. Since the content of the assessment order, dated 28.03.2018 was not taken into account in the Assessment order, dated 07.07.2022. Hence the contention of the petitioner is that the contention of the explanations were totally ignored cannot be accepted. Moreover, the petitioner has not preferred an appeal before the Appellate Forum. Therefore, the filing of writ petition is not maintainable. Hence, the respondent prays to dismiss the writ petition.

12. The petitioner had filed re-joinder affidavit and stated that there is no jurisdiction to invoke Section 27(4) of the Act, by stating that there is wrong availment of ITC. As stated earlier, there is no wrong availment of ITC at all and in those circumstances imposing penalty is not maintainable. It is further stated that with regard to the averment on the limitation aspect in invoking Section 27(3) and 27(4) of the Act, the petitioner submitted that the respondent in their counter affidavit stated that the period of pendency of writ petition has to be excluded for the calculation of time limit to initiate proceedings under Section 27

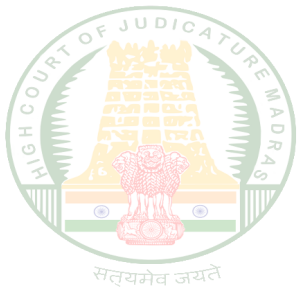


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of the Act. The petitioner reiterates that even as per the proceedings, dated 07.04.2016, the penalty under Section 27(2) of the Act was not proposed and imposed along with the statutory form RR. It is further submitted that even after the direction of this Court, dated 08.03.2021, there was no proposal to levy penalty under Section 27(3) or 27(4) of the Act. Moreover, in the proceedings, dated 07.07.2022 there is no findings of willful non-disclosure of any turnover or wrong availment of ITC by producing false bills, vouchers, declaration certificates or any other document with view to support the claim of ITC. Hence, it is against the principles stated as above in 64 GSTR 167 & 108 VST 380. In view of the jurisdiction of levy penalty including Section 27(1) and 27(2) of the Act the application of the amended jurisdiction retrospectively, the filing of an Appeal is not effective. Therefore, in much as it is to be decided on the principle of law and hence, this writ petition is maintainable.

13. Heard Mr.N.Inbarajan, the Learned counsel appearing for the Petitioner, Mr.A.K.Manikkam, the Learned Special Government Pleader appearing for the Respondent and perused the material documents available on record.



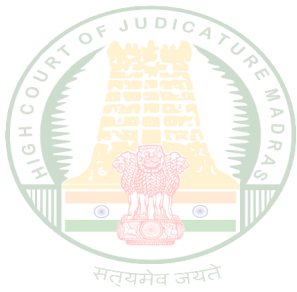
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14. The first contention of the petitioner is there should be a Show cause notice that the petitioner is liable under the Sections 27(1) and 27(2) of the Act. When the show cause notice is not issued by invoking Section 27 and 27(4) of the Act then levying penalty under those sections is violating the principles of natural justice. For which, the petitioner has relied on a Judgment rendered by this Court, dated 14.10.2022 in W.P(MD)No.30251 of 2019 its batch. The relevant portions are extracted hereunder:

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



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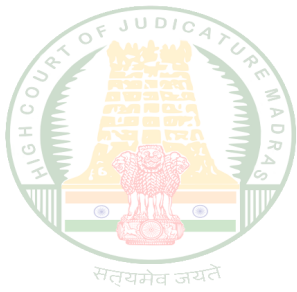
of penalty must be considered on the basis of the judicial determination of the question as to whether grounds exist so as to justify such imposition.

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



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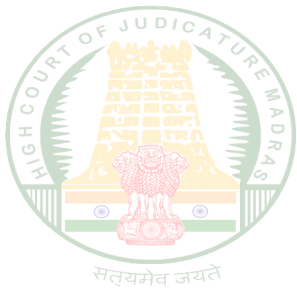
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the case of Vijay Steels (supra). To be noted, that the decision of the subsequent Full Bench in the case of Golden Homes (supra) has been rendered only on 14th September, 2016, after the decision in the case of Vijay Steels (supra), which is dated 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.



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15. He further submitted that Section 27 of the Act, was amended and sub Section (4) was substituted and the same came into effect on 27.01.2016.

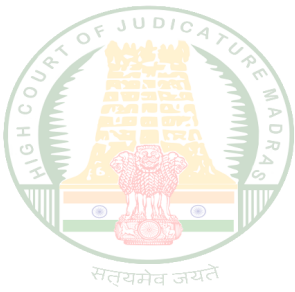
The said amendment is extracted hereunder:

11. Amendment of Section 27 : In Section 27 of the Principal Act, for Sub-Section (4), the following sub-section shall be *substituted*, namely:

“(4) In addition to the tax determined under sub-section (2), the assessing authority shall direct the dealer to pay as penalty a sum which shall be three hundred per cent of the tax due in respect of such claim.

Provided that no penalty shall be levied without giving the dealer reasonable opportunity of showing cause against such imposition”.

16. The said amendment proposes to impose 300% tax and it states that the said penalty cannot be imposed without giving the dealer reasonable opportunity of showing cause against the such imposition. When the Sub Clause (4) came into effect on 27.01.2016. The respondent cannot impose the same for the assessment year 2012-2013, since the amendment is subsequent to the assessment order.

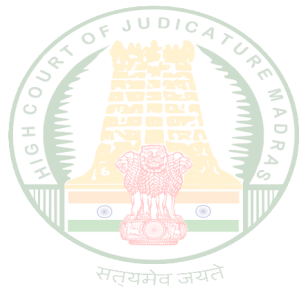


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17. As rightly pointed out by the Learned Senior counsel appearing for the petitioner, even if the respondent is intended to impose the penalty under Section 27(4), then a show cause notice ought to be issued to impose under Section 27(4) simply, because show cause notice was issued under Section 22(2) the respondent cannot impose 300% penalty, retrospectively, by invoking Section 27(2) of the Act. Moreover, there must be a finding that wrong availment of ITC are produced false bills etc. The absence of such finding, the respondent lapsed jurisdiction for which the Judgment relied earlier i.e.(earlier Judgment) is applicable.

18. In the present case also the respondent have not rendered the such finding. In such circumstances, invoking section 27(4) read with 27(2) penalty cannot be imposed. Moreover, penalty cannot be imposed automatically. Some criminalities ought to be in existence to impose penalty and the framing of proof required for imposition of penalty is different from and much higher than i.e., required for the purpose of framing the best Judgment demand assessment. Therefore, the impugned orders cannot be sustained. Hence the impugned orders are quashed.



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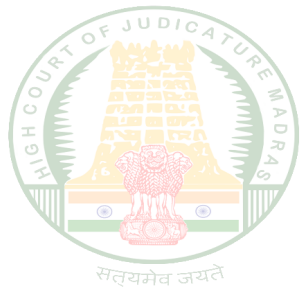
19. Accordingly, these Writ Petitions are allowed. The impugned order, dated 31.05.2023 as modified on 07.07.2022 and 04.01.2023 are hereby quashed. No costs. Consequently, connected miscellaneous petitions are closed.

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19.01.2023

To

The Assistant Commissioner (ST),
West Veli Street Assessment Circle,
Madurai.



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S.SRIMATHY, J

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Pre-Delivery
Common Order made in
W.P.(MD)Nos.16025 of 2022 &
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