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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.04.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.SUDHAKAR
and
THE HONOURABLE Ms.JUSTICE K.B.K.VASUKI

Tax Case (Revision) No.32 of 2015

The State of Tamil Nadu
represented by
The Deputy Commissioner (CT),
Salem Division,
Salem.

...Petitioner/Respondent

versus

Tvl.Steel Tube Traders and Agencies,
No.5, Kitcipalayam Road,
Salem - 1.

...Respondent/Appellant

PRAYER: PETITION filed under Section 38 of the Tamil Nadu General Sales Tax Act before the Tamil Nadu Taxation Special Tribunal as against the order dated 29.11.2002 made in C.T.S.A.No.427 of 2000 on the file of the Sales Tax Appellate Tribunal (AB), Coimbatore, against the order of the Appellate Assistant Commissioner (CT) Salem, dated 23.12.1998 and made in A.P.No. TNGST 34 of 1998, against the order of the Commercial Tax Officer, Salem Town (South) Salem, dated 06.01.1998 and made in TNGST No.655152/91-92. After the abolition of the Tribunal, the matter has been transferred to this Court and renumbered.

For Petitioner : Mr.Kanmani Annamalai, Spl.G.P

O R D E R
(Made by R.SUDHAKAR, J.)

This Tax Case (Revision) is filed by the Revenue as against the order of the Sales Tax Appellate Tribunal dated 29.11.2002 made in C.T.S.A.No.427 of 2000 on the file of the Sales Tax Appellate



Tribunal (AB), Coimbatore.

2. The primary issue on which the assessment order was passed relates to the disallowance of the claim of deduction of sales tax collected by the dealer from the total turnover of the dealer.

3. The brief facts of the case are as follows:

The assessee/respondent are dealers in pipes and pipe fittings. For the assessment year 1991-92, the Assessing Officer had completed the assessment and subsequently, when the place of business was inspected by the Enforcement Wing Officials, it was noticed that the sale consideration was shown as a consolidated sum without showing the sales tax and surcharge collections separately and the taxable turnover was reported exclusive of sales tax and surcharge collections. On the basis of the report of the Enforcement Wing Officials, the Assessing Officer reopened the assessment and subjected to tax the element of sales tax and surcharge collections and wages paid. Consequently, the Assessing Officer also levied penalty. Aggrieved by the said order of the Assessing Officer, the assessee preferred an appeal before the Appellate Assistant Commissioner, who upheld the assessment made on Sales tax and surcharge collection, but deleted the levy of penalty. Aggrieved by the said order, the assessee preferred further appeal before the Tribunal.

4. The Tribunal, on a careful consideration of the submissions made, confirmed the order of the Appellate Assistant Commissioner with regard to the assessment made holding as follows:

"24. However, in the instant cases above mentioned, the learned Authorised Representative failed to produce the connected sale invoices and the related materials such as price list, sales register bifurcating proper sale price and the amount of tax element etc., for our perusal to ascertain the fact that what was collected as per the bills by the appellants represent not merely the price of the goods but also the tax payable on the sale and the quantum of tax payable. On further perusal of the assessment records, we could find only the bills relating to second sale items of goods (no tax bill) filed in the asst. records and not the taxable bill (First Sales). Further, the learned Authorised Representative has expressed his inability to produce the above material records so as to enable the Tribunal to verify and ascertain the fact that the amount shown in the bill is 'inclusive of tax'. Therefore, considering the facts and circumstances of the case and in the absence of any material evidences produced by the appellants concerned, we see no



other alternative but to confirm the assessment so made by the Assessing Authority."

5. Insofar as the levy of penalty is concerned, the Tribunal concurred with the view of the Appellate Assistant Commissioner that there was no justification in penalising the assessee, as the turnover in question was based on assessee's books of accounts and there was no element of wilful non-disclosure of turnover. Placing reliance on the decision reported in 91 STC 112 (P.Subba Reddy V. State of Tamil Nadu) and 104 STC 61 and 94 STC 120, the Tribunal held as follows:

"25. With regard to the penalty, the learned Additional State Representative, would argue that the deletion of the above penalties are not correct as the tax levied on the actual suppressions has been upheld. The learned Authorised Representative would contend that the penalties have been imposed u/s.16(2) of the Act, it was imperative on the department to show that there was a 'wilful non-disclosure' of the taxable turnover. When the turnover which was considered by the Department to be taxable was very much available in the assessee's own books and the accounts in full shape, were also produced before the Assessing Authority at the time of assessment adopting the very same amounts as shown in the assessee's books and which were considered to be non-taxable at the time of initial assessment. Hence the Assessing Officer cannot create a penalisation under section 16(2) of the Act. Just because an assessment was created on the turnover impugned, it will not mean that the element of 'wilfulness' was attributable thereon attracting a penalisation u/s.16(2) of the TNGST Act. The would also contend that the imposition of penalty during all the years of assessments was time barred and that the penalties were imposed much after the completion of 5 years from the closure of financial year of assessment. Therefore, the penalisation was bound to be declared as that legally void, as held in the decision reported in 91 STC 112.

26. The learned Appellate Assistant Commissioner has rightly observed that the Assessing Officer would derive the turnover for assessment from out of the assessee's own books of accounts and the very same turnover was available in the books even at the time of original assessment and any attribution of wilful non-disclosure of the turnovers from their getting taxed under the Act,



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shall not be possible. Hence, the penalisation created u/s. 16(2) of the TNGST Act is to be held as illegal. Thus, the learned Appellate Assistant Commissioner has set aside the penalty so levied relying on the case laws reported in 104 STC 61 (Madras) and 94 STC 120, wherein, it was held that where the assessed turnover was found in the assessee's books of accounts, penalty cannot be imposed u/s.16(2) of the TNGST Act.

27. The learned Appellate Assistant Commissioner has further observed that for all the years of assessment penalties have been imposed very much belatedly, after the expiry of five years from the year to which the taxes related to, the penalisation again suffers from a legal sanction towards its being time-barred, as held in the case law reported in 91 STC 112 (P.Subba Reddy v. State of Tamil Nadu) wherein, it was been specifically held that :

"Under the proviso to sub-section (5) of Section 12 of the Tamil Nadu General Sales Tax Act, 1959 penalty cannot be imposed after the period of five years from the expiry of the year to which the assessment relates".

Further, it has been held as follows:

"Under proviso to sub-section (5) of Section 12 of the Act, penalty cannot be imposed after the period of five years from the expiry of the order to which the assessment relates. There is no dispute in this case that the assessment year in question is 1972-73. The penalty has been imposed by an order dated September 30, 1982. Though the relevant section underwent a change in 1979, we are not concerned with that. As the section stood during the assessment year in question 1972-73 penalty should have been imposed before March 31, 1978. The fact that the notice has been issued on March 1, 1978, will not take away the rigour of the section by which the penalty ought to have been imposed. Though a question was taken before us whether the amendment which came into force on December 1, 1972, could be made applicable for the assessment year 1972-73, we are not expressing any opinion on this question because we propose to dispose of this tax revision case on the ground that no penalty has been imposed within the period of five years ending assessment year 1972-73".



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28. Therefore under the given facts and circumstances of the case, the order passed by the first appellate authority in setting aside the penalty is found to be in order and hence it calls for no interference."

6. A reading of the order of the Tribunal reveals that, on facts, there is no dispute that there was no wilful non-disclosure, but the claim for deduction from the total turnover, viz., the component of sales tax collected, was negatived, as the assessee did not produce any material in support of their claim.

7. Insofar as levy of penalty is concerned, the finding and the reasoning of the Tribunal affirming the order of the Appellate Assistant Commissioner that there was no willfulness attributable to the dealer and therefore penalty under Section 16(2) of the Act is not leviable, does not warrant any interference.

Accordingly, the order of the Tribunal stands confirmed and this Tax Case (Revision) stands dismissed. No costs.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar

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To

1. The Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore.

2. The Appellate Assistant Commissioner (CT) Salem.

3. The Commercial Tax Officer, Salem Town (South), Salem.

1 CC to the Spl.Government Pleader (T), SR.No. 22790

Tax Case (Revision) No.32 of 2015

UG (CO)

PSI (22.05.2015)