IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 15.06.2015

CORAM

THE HONOURABLE MR. JUSTICE R.SUDHAKAR
AND
THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

T.C. (R) NO. 33 OF 2015

Tvl. Dharmapuri District Co-op.
Milk Producers Union Ltd.
Krishnagiri 635 001. ..Petitioners/Respondent

- Vs -

State of Tamil Nadu
rep. by the Joint Commissioner (CT)
Salem Division
Salem. .. Respondent/ Respondent

Appeal filed under Section 38 of the Tamil Nadu General Sales Tax Act against the order dated 29.10.2012 passed by the Tamil Nadu Sales Tax Appellate Tribunal (Addl. Bench), Coimbatore, made in Coimbatore Tribunal State Appeal No.368 of 2003. against the order of the Appellate Assistant Commissioner (CT) Salem in TNGST No.201/2002 datde 30.9.2002 which was preferred against the order of the Commercial Tax Officer, Krishnagiri in TNGST No.3300503/98-99 dated 22.2.2002.

For Appellant : Mr. Aditya Reddy

For Respondents: Mr. A.R.Jayaprathap, Spl. GP (Taxes)

JUDGMENT

(DELIVERED BY K.B.K.VASUKI, J.)

Mr. A.R.Jayaprathap, learned Special Government Pleader (Taxes), takes notice for the respondent.

2. This Tax Case (Revision) is filed by the assessee against the order of the Tamil Nadu Sales Tax Appellate Tribunal for the assessment year 1998-99.

3. The facts, in a nutshell, are as hereunder :

The assessee, who is a Co-operative Milk Producers Union, otherwise called as Aavin, is engaged in the sale of milk and milk products, such as, butter and ghee. The issue in dispute relates to the assessment year 1998-99. The admitted facts, which are not in dispute, is that the assessee had sold its products for the assessment year in question under the brand name Aavin, which is registered under Trade and Merchandise Act, 1958. The assessee had paid tax at the rate of 10% in respect of butter and ghee sold under the brand name based on the Notification II(1)/CTRE/22/(a-2)/97 Gazette dated 05.03.1997, effective from 05.03.1997 - G.O.Ms.No.73 dated 05.03.1997. The Assessing Officer made an assessment demanding tax at 11% on the sales turnover of Rs.2,93,18,934/= relating to sale of butter and ghee effected by the assessee from 01.04.1998 to 3.5.98 and 4.5.98 to 31.3.99 as against the claim of the assessee that it was taxable at 10% in terms of the above-said Government Order.

4. According to the Assessing Officer, the demand of payment of 11% is on account of the rate of tax as determined in Entry 8 of Part D of the I Schedule to the Tamil Nadu General Sales Tax Act, amended with effect from 04.05.1998 in terms of G.O.No.139, CT& RE dated 04.05.1998. The view of the Department is that consequent to this amendment, the benefit of the earlier G.O.No.73 dated 05.03.1997 will not enure to the benefit of the assessee. On that premise, the tax was demanded at 11%, as against the claim of 10% by the assessee and penalty was also imposed by the Assessing Officer.

5. Aggrieved by the same, the assessee preferred an appeal before the Appellate Assistant Commissioner, who partly accepted the plea of the assessee and remanded the matter back to the Assessing Officer directing the Assessing Officer to re-determine the rate of tax. As against the order of remand and refixation of the rate of tax at 10%, the State filed an appeal before the Tamil Nadu Sales Tax Appellate Tribunal. The Tribunal accepted the plea of the Revenue and dismissed the appeal filed by the assessee holding as follows:

> "9. Now, it is essential to go through the description of relevant entry found in the First Schedule to the Act for the relevant period of time. From 17.7.96 to 3.5.98 " Butter and Ghee sold under a brand name" was taxable at 11% as per Entry No.8 of Part-D of First Schedule to the TNGST Act, 1959. However, the rate of tax was reduced to 10% as per the above said notification w.e.f. 5.3.97. When it is so, the description of above entry was changed to "Butter and Ghee sold under a brand name registered under the Trade and Merchandise Marks Act, 1959" w.e.f. 4.5.98 by G.O.Ms.No.139 CT & RE dated 4.5.96 (Notification No.II(1)/CTRE/49(a-2)/98 Gazette dated 4.5.98. As the Entry itself is changed in the Schedule, the notification which was issued for reduction of tax to 10% would lose its effect on introduction of new entry i.e., from 4.5.98 as per the above said notification. From the above, it is clear that the notification which reduced the rate to 10% is only applicable to previous entry (i.e.,

Butter and Ghee sold under a brand name) and therefore the previous notification reducing the rate of tax at 10% is applicable only for the period from 5.3.97 to 3.5.98. As per new entry, the goods sold by the dealer-respondents is taxable at 11% and not at 10%. In view of the above facts and circumstances of the case, we are unable to accept the findings of the learned Appellate Assistant Commissioner in fixing 10% tax on the sale of butter and ghee under brand name "Aavin" for the period from 4.5.98. Therefore, we set aside the order of the learned Appellate Assistant Commissioner and restore the order of the Assessing Authority making levy of 11% tax on the turnover of Rs.2,57,95,352/=."

6. Aggrieved by the order of the Tribunal, the assessee is before this Court.

7. We have heard Mr.Aditya Reddy, learned counsel appearing for the assessee and Mr.A.R.Jayapratap, learned Special Government Pleader (Taxes) appearing for the respondent.

8. The only question that arises for consideration in this appeal is "whether the butter and ghee sold by the assessee under a brand name registered under Trade Marks and Merchandise Act, 1958 falls under Entry 8(1) of Part D of I Schedule to the Tamil Nadu General Sales Tax Act at the reduced rate of tax at 10% for the assessment year 1998-99".

9. The controversy that has been raised by the Department can be laid to rest if Entry 8 of Part D of the I Schedule to the Tamil Nadu General Sales Tax Act is taken on record as it is found in the statute. The said Entry reads as follows:

"Part - D
Goods which are taxable at the rate of 11 percent
8. ENTRY FROM 17-7-1996 TO 3-5-1998
Butter and Ghee sold under a brand name
ENTRY FROM 4-5-1998 (Vide Note 3)
Butter and Ghee sold under a brand name registered under the Trade and Merchandise Marks Act, 1958 (Central Act 43 of 1958)

Note:1. This entry is as per substituted First Schedule introduced by Act 37/96-Gazette dated 17-9-1996 w.e.f. 17-7-1996 (Retrospective)

2. Rate of tax reduced to 10% as per Notn.II(1)/CTRE/22(a-2)/97 - Gazette dated 5-3-1997 - Effect from 5-3-1997.

3. The expression "Butter and Ghee sold under a brand name registered under the Trade and Merchandise Marks Act, 1958 (Central Act 43 of

1958)" was substituted for the expression "Butter and Ghee sold under a brand name"by G.O.Ms.No.139, CT & RE dated 4-5-1998-Notn.No.II(1)/CTRE/49(a-2) 98-Gazette dated 4-5-1998 - Act 21/98 - Gazette dated 18-6-1998 - w.e.f. 4-5-1998."

10. For better clarity, it is also relevant to extract G.O.Ms.No.73 dated 05.03.1997, which reads as follows:

"Notification G.O.Ms.No.73, dated the 5th March, 1997.

No.II(1)/CTRE/22(a-2)/97. - In exercise of powers conferred by sub-section (1) of section 17 of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959), the Governor of Tamil Nadu hereby makes a reduction in rate to ten per cent in respect of the tax payable under the said Act on the sale of following goods by any dealer:

1. Butter and ghee sold under a brand name specified in item 8 of Part D of the First Schedule.
....

3. Butter	
(ii) Sold under a brand name registered under TMM Act	11% under entry No.8 in Part-D of the First Schedule Reduced to 10% by Notification NO.II(1)/CTRE/22(a-2)/97 dated 5.3.97.
4. Ghee	
(i) Sold under brand name and registered under TMM Act	11% under entry No.8 in Part-D of the First Schedule Reduced to 10% by Notification NO.II(1)/CTRE/22(a-2)/97 dated 5.3.97.

11. It is not in dispute that the goods falling under Entry 8 of Part D of I Schedule are taxable at the rate of 11% in relation to butter and ghee if sold under the brand name prior to 04.05.1998. The dispute relates to the period on or after 04.05.1998. The rate of tax, as understood by the Department, in respect of butter and ghee sold under the brand name registered under the Trade Marks and Merchandise Act, 1958 continued to have the benefit of reduced rate of tax at 10% in terms of Notification No.73 dated 05.03.1997, as is evident from the Entry itself. Once the Entry shows that the rate of tax would be 10% in terms of the said notification dated 05.03.1997, even after 4.5.1998, the question of the Department demanding tax at the rate of 11% cannot be justified. The issue becomes more clear in view of the errata issued by the Department on 20.4.2001, which reads as follows:-

ERRATUM

Sl.No.inD.Dis Acts Cell-II/22688/00 dated 20-4-2000	Name of the Commodity	Clarification already issued on 20-04-2000	Erratum
4(ii)	Butter sold under a brand name registered under Trade and Merchandise Marks Act 1958	11% under Entry 8 in Part -D of the First Schedule. However the tax was reduced to 10% by Notification II (1)/CTRE/22 (a-2)/97, dated 05.03.97	11% under Entry 8 in Part-D of the First Schedule with effect from 04-05-98 is substituted. The words from "However the tax was reduced to 10% by Notification II (1)/CTRE/22(a-2)/97, dated 05.03.97"is deleted
5(i)	Ghee sold under a brand name registered under Trade and Merchandise Marks Act 1958	11% under Entry 8 in Part -D of the First Schedule. However the tax was reduced to 10% by Notification II (1)/CTRE/22 (a-2)/97, dated 05.03.97	11% under Entry 8 in Part-D of the First Schedule with effect from 05-05-98 is substituted. The words from "However the tax was reduced to 10% by Notification II (1)/CTRE/22(a-2)/97, dated 05.03.97" is deleted

12. The above erratum makes it clear that prior to the issuance of erratum, Notification No.73 dated 5.3.1997 would hold good and, therefore, the assessee was justified in paying 10% tax. Therefore, it is clear that the Tribunal failed to consider the said Entry 8 of Part D of the I Schedule to Tamil Nadu General Sales Tax Act, as we have already extracted supra.

13. In the result, the issue is answered in favour of the assessee and against the Revenue. Accordingly, this Tax Case

(Revision) is allowed and the order of the Tribunal is set aside. However, in the circumstances of the case, there shall be no order as to costs.

Sd/-
Asst.Registrar (CS III)

/true copy/

Sub Asst. Registrar

GLN

To

1. The Assistant Commissioner
   Tamil Nadu Sales Tax
   Appellate Tribunal (Addl. Bench)
   Coimbatore.

2. Joint Commissioner (CT)
   Salem Division
   Salem.

3. The Commercial Tax Officer
Krishnagiri

4. The Assistant Commissioner (CT)
Dharmapuri

5. The Commercial Tax Officer
Porur Assessment circle, Chennai

1 cc to Mr.Aditya Reddy, Advocate, sr. 29064
1 cc to Spl.Government Pleader,(Taxes), Sr. 29191

T.C. (R) NO. 33 OF 2015

TEJ (CO)
EU 8/7/15