IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.12.2015

CORAM:

THE HONOURABLE MR.JUSTICE R.MAHADEVAN

WP.Nos.13459 and 13837 of 2004
and
WPMP.Nos.15765 and 16282 of 2004

M/s.Senthil Textiles,
SF 302,
Andipalayam,
Mangalam Road,
Tirupur. ...Petitioner-WP.13459/2004

M/s.Tirupur Sri Senthil Cotton Mills Limited
SF 302,
Andipalayam,
Mangalam Road,
Tirupur. ... Petitioner-WP.13837/2004

Vs

The Commercial Tax Officer (FAC)
Rural Circle, Tirupur ... Respondent in both WPs

Prayer:- These Writ Petitions are filed to issue a Writ of Certiorari to call for the records of the Respondent in TNGST 2385069/2001-2002 and TNGST 2385068/2001-2002, dated 31.03.2004 and to quash the same, in so far as the penalty levied under Section 12(3)(b) of the Tamil Nadu General Sales Tax Act, 1959 is concerned, as being invalid, illegal and contrary to the judgement of this Court made in WP.Nos.15015 and 15016 of 2001, dated 19.12.2003.

For Petitioner : Mr.R.Sathiya Mohan

For Respondent : Mr.S.Kanmani Annamalai, AGP

ORDER

In these Writ Petitions, the Petitioners seek to quash the proceedings of the Respondent dated 31.3.2004 in TNGST 2385069/2001-2002 and TNGST 2385068/2001-2002, dated 31.03.2004, in respect of levy of penalty under Section 12(3)(b) of the Tamil Nadu General Sales Tax Act, 1959.

2. The case of the Petitioners is that the Petitioners are registered dealers under the Tamil Nadu General Sales Tax Act, 1959 and the Central Sales Tax Act, 1956 and assessees on the files of the Respondent. For the assessment year 2001-2002, the Petitioners reported the total and taxable turnover and filed returns before the Respondent. The Respondent, after issuing the pre assessment notices and considering the documents and the objections filed by the Petitioners, by the impugned orders, dated 31.3.2004, levied sales tax at 4% on the transfer value of Duty Entitlement Pass Book and at 11% on the sale value of waste cone attai, waste cone, waste fibre and cotton and levied penalty under Section 12(3)(b)(v) of the Act. Hence, these Writ Petitions have been filed, challenging the levy of penalty.

3. The learned counsel for the Petitioners contended that the Respondent failed to appreciate the provisions of Section 12(3)(b) of the Act in a proper and perspective manner and that the sale of DEPB licence cannot be regarded as sale of goods since the transfer of DEPB is nothing but transfer of money itself and therefore, such transfer cannot be said to be treated as goods. The learned counsel further contended that since in the impugned order itself, it has been admitted that the entire turnover has been reflected in the books of account, the question of concealment and suppression does not arise and that unless there is any specific reference about the concealment of turnover pointed out from the books of accounts and when, even according to the Respondent, the turnover is reflected or available in the books of accounts, as seen from the impugned order itself, the levy of penalty under Section 12(3)(b) by the Respondent is unwarranted and prayed for quashing of the impugned orders in so far as the levy of penalty is concerned.

4. The learned Additional Government Pleader for the Respondent supported the impugned orders, by contending that since the dealers had not reported the turnover to the Department and paid the tax, though the turnover is available in their books of accounts and the dealers had neither reported the sales turnover of DEPB along with proof for the payment of tax in the monthly returns filed nor paid the tax due even after receipt of the notice and even at the time of final assessment, the dealers did not file the revised return, disclosing the escaped turnover with necessary evidence for the payment of tax, the tax liability and penalty imposed by the Respondent by the impugned orders warrant no interference by this court and prayed for dismissal of these Writ Petitions.

5. This Court heard and considered the submissions made by the learned counsel on either side and also perused the materials placed on record.

6. On a careful analysis of the issue, this Court finds that the turnover reported and the turnover assessed after verification of books of accounts, are one and the same. The transactions involved herein are available in the books of accounts. Under such circumstances, the levy of penalty is unwarranted. This issue is well settled in the decision of the Division Bench of this Court in S.G.Jayaraj Nadar and Sons v. The State of Madras reported in 1968 (21) STC 180 (Mad), wherein the levy of penalty was set aside, for the reason that the turnover assessed was unearthed only from the books of accounts of the dealer. In paragraphs 4 to 6, it is held as follows:

> "4. In this case so far as the turnovers involved in the first and third items are concerned, they are not based on any estimate or best judgment. The quantum of turnovers in respect of those two items are just those based on the assessee's account books. The assessment on those two items cannot, therefore, be regarded as based on best judgment for no estimate was necessary, or was made in respect of them. When that is the position it is not possible to say that the assessment on those items falls within the purview of Sub-section (2).
>
> 5. The case of the second item is, however, different, for, as we said, the assessee himself invited the Revenue to arrive at the correct turnover by best judgment and, in fact, it was arrived at on that basis. This item will literally, therefore, fall within the ambit of Sub-section (2) and it would follow therefrom that ipso jure the jurisdiction to levy penalty under Sub-section (3) becomes available. The whole of the assessment as we read Section 12, need not necessarily be only under Sub-section(2) of that section. The assessment may be partly under Sub-section (1) and partly under Sub-section (2). In any case, where part of the assessment is not based on estimate or best judgment, it is clearly not within the purview of Sub-section (2) and, therefore, in respect of such part of the assessment, there will be a bar to levy penalty under Sub-section (3).
>
> 6. On that view, we allow the appeal so far as items 1 and 3 are concerned, but dismiss it in regard to the , second item and the penalty in respect of it. In view of the fact that the assessee has partly succeeded and partly failed before us, we make no order as to costs."

7. The above said decision of the Division Bench of this Court has been upheld by the Honourable Supreme Court in State of Madras v. M/s.S.G.Jayaraj Nadar and sons reported in 1971 (28) STC 700, wherein it is held as follows:

"4. In the present case, the High Court found that the turnovers involved in the first and the third items were not determined on the basis of any estimate of best judgment. The quantum of turnovers in respect of both these items were based on the assessee's account books. It has almost been conceded on behalf of the Revenue before us that the determination of the turnovers relating to the aforesaid two items was made from the entries in the books of account of the assessee. The true position, therefore, was that certain items which had not been included in the turnover shown in the returns filed by the assessee were discovered from his own account books and the assessing authority included those items in his total turnover. For these reasons the High Court was justified in holding that the assessment of the first and the third items could not be regarded as based on best judgment. The penalty thus could not be levied in respect of those two items."

8. In Appollo Saline Pharmaceuticals v. Commercial Tax Officer (FAC) and others reported in (2002) 125 STC 505 Mad, the Division Bench of this Court has followed the decision of the Honourable Supreme Court in State of Madras v. M/s.S.G.Jayaraj Nadar and sons reported in 1971 (28) STC 700.

9. Similarly, in M/s.M.M.Exports v. The Deputy Commercial Tax Officer [W.P.Nos.15015 and 15016 of 2001, decided on 19.12.2003], the Division Bench of this Court has laid down thus:

"26. So far as the penalty is concerned, however, the assessee is entitled to relief. The assessment is made on the basis of figures gathered by the assessing authorities from the books of accounts that had been produced by the assessee. Having regard to the explanation to Section 12(3) of the State Act, no penalty could have been imposed in such a case. The penalty that had been levied on the petitioner is, therefore, set aside. The writ petitions are allowed in part. Connected miscellaneous petitions are closed."

10. Following the ratio laid down in the aforesaid decisions, this Court is of the view that the impugned orders in respect of penalty under Section 12(3)(b) of the TNGST Act, are liable to be set aside and accordingly, they are set aside.

11. In fine, both the writ petitions are allowed as above. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(AS)

//True Copy//

Sub Assistant Registrar

Srcm/rsb

To:

The Commercial Tax Officer (FAC),
Rural Circle, Tirupur.

+ 2 ccs to M/s. T.R. Sathyamohan, Advocate sr.68599, 68598

WP.Nos.13459 and 13837 of 2004
and
WPMP.Nos.15765 and 16282 of 2004

RSI(CO)
EU 03.03.16