IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: .07.2016

CORAM:

THE HONOURABLE MR.JUSTICE **S.MANIKUMAR**
and
THE HONOURABLE MR.JUSTICE **D.KRISHNA KUMAR**

T.C.(R).P.No.30 of 2016

The Joint Commissioner (CT),
State of Tamil Nadu,
Chennai (Central) Division,
Chennai 600 006. .. Petitioner

versus

Tvl.Saravana Stores (Fast Food),
No.17/3, Ranganathan Street,
T.Nagar, Chennai 600 017. .. Respondent

Prayer: Tax Case Revision filed under Section 38 of TNVAT Act, 2006, against the order made in S.T.A.No.81 of 2009, dated 28.10.2013.

For Appellant : Mr.V.Haribabu,
Additional Government Pleader (Taxes)

ORDER
(Order of the Court was made by **S.MANIKUMAR, J.**)

Tax Case (Revision) is filed by the Joint Commissioner (CT), State of Tamil Nadu, Chennai (Central) Division, Chennai, against the order made in

S.T.A.No.81 of 2009, dated 28.10.2013, passed by the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai.

2. Brief facts leading to the revision petition are as follows:

Tvl.Saravana Stores (Fast Food), dealers in food and drinks, were assessed on a total and taxable turnover of Rs.46,46,105/- for the year 2004-05, under section 3(D)(2) of the Tamil Nadu General Sales Tax Act 1959, by the Deputy Commercial Tax Officer, T.Nagar (South), Assessment Circle, by order, dated 29.12.2005. Subsequently, the place of business of the dealer was inspected by the Enforcement wing officers on 26.02.2005 and they noticed suppression. Based on one day sales, the Assessing Officer has revised the assessment, in his order, dated 27.04.2007, by assessing the turnover of Rs.1,19,06,049/-, relating to food and drinks, at 2% under section 3(D) of the abovesaid Act and Rs.8,63,200/- relating to sale of audio cassettes, at 2% under section 7A of the same Act. He also levied tax, at 12% on a turnover of Rs.85,800/-, an estimation made on cassette, for the period between 26.02.2005 and 03.03.2005 and also levied penalty, under section 12(3)(b) of the said Act.

3. Aggrieved against the revision order, the dealer has filed appeal in A.P.No.121 of 2007, before the Appellate Deputy Commissioner (CT)-III, Chennai. Vide order, dated 26.03.2009, the appellate authority rejected the sales turnover of food and drinks to 20% of the book turnover reported at Rs.9,29,221/- against, Rs.1,19,06,049/- and purchase suppression, at Rs.5,200/- with equal addition, for Audio cassettes against Rs.8,63,200/- and deleted the assessment made on the estimation, made on cassette, on the ground that in both the items, estimated suppression has been arrived at, by adopting one day sales turnover, which is not a scientific method and not justified, as per the decision reported in **State of Tamil Nadu v. Tvl.New Kamaliya Hotel** reported in **147 STC 111** and remanded the matter on the levy of penalty, with a specific direction to levy penalty, under section 16(2) of the Act, with reference, to actual suppression only.

4. Aggrieved against the order of the first appellate authority, State has filed second appeal in STA.No.81/2009, before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai. After hearing the parties, the Tribunal, vide order dated 28.10.2013, dismissed the appeal, holding that estimation made based on one day sales, for whole-year is not correct, as per the abovesaid decision.

5. Aggrieved by the same, the present Tax Case (Revision) Petition, has been filed, on the following substantial questions of law,

(1) Whether on the facts and in the circumstances of the case the Tribunal was right in law in accepting the first Appellate Authority's findings that the sales suppression of food and drinks is at Rs.9,29,221/- being the 20% of the reported turnover, omitting the estimated suppression of Rs.72,59,944/- without any logical conclusion for arriving the suppression at 20% on the reported turnover?.

(2) Whether on the facts and in the circumstances of the case the Tribunal was right in law in accepting the First Appellate Authority finding that sales suppression of audio cassette is at Rs.5,200/- with equal addition of Rs.2,600/- omitting the estimated suppression of Rs.8,63,200/-, when the assessee suppressed the total purchase of audio cassette and one day sale of cassette itself comes to Rs.2,600/-.

(3) Whether on the facts and in the circumstances of the case, the Tribunal was right in modifying the sales suppression of the dealer when similar and identical issue was allowed in STA 289/2008 & TA 71/2009 by the Tamil Nadu Sales Tax Appellate Tribunal would not amounts to violating the judicial discipline?.

6. Though Mr.V.Haribabu, learned Additional Government Pleader for Taxes submitted that the Tribunal has erred in restricting the sales turn over for

food and drinks to 20% of the book turnover, notwithstanding the fact that the Enforcement Wing Officers, during their inspection on 26.02.2005, have clearly noticed suppression and that an estimation was made, based on one-day sales turnover and further contended that the Tribunal has erred in relying on a decision of this Court in **State of Tamil Nadu v. Tvl.New Kamaliya Hotel** reported in **147 STC 111** and prayed for an answer, in the affirmative and in favour of the petitioner, this Court is not inclined to accept the said contentions, for the reasons that in **New Kamaliya Hotel's** case (cited supra), the very same contentions have been raised. Before the Hon'ble Division Bench in **New Kamaliya Hotel's** case, the contention of the revenue was that the assessing officer clearly established that there was sales and purchase suppression, and therefore, the estimation made by the Assessing Officer, was just and reasonable and and that the Appellate Assistant Commissioner erred in deleting the entire additions and the restrictions of the appellate authority to only 20%, required reconsideration.

7. After hearing the learned Senior Standing Counsel for Taxes, at Paragraph 4, the Hon'ble Division Bench in **New Kamaliya Hotel's** case (cited supra), held as follows:

> "4. We heard the counsel. The Assessing Officer made estimates based on the one day sales. Normally, sales may differ from auspicious day and inauspicious day. So, taking the one day average for estimation is not a scientific method sanctioned by law. It is only a crude method which has no substance. At least in order to arrive one day sales, either the Assessing Authority or the Enforcement Wing Officers should have made surveys every month taking into consideration the normal day, auspicious day and inauspicious day. Both the authorities below also found that there was no omission established by the Revenue. Mere one day sales could not be attributed to estimate the whole year without considering the festival season, rainy season and other natural calamities. It is also seen that the first Appellate Authority as well as the second Appellate Authority had considered all the relevant materials and came to the correct conclusion. The Assessing Officer had only relied on the one day sale for making estimation. The Tribunal is correct in holding that the Assessing Officer was wrong in estimating the additions which was solely based on one day sales. We are of the firm view that the Assessing Officer cannot make estimate based on one day sales."

8. In **New Kamaliya Hotel's** case (cited supra), inspection was conducted on 19.07.1999 by the Enforcement Wing. Sales, parcel service and sales at counter, were recorded by the Enforcement Wing. Based on the above,

the Assessing Officer, on an estimation, determined the total and taxable turnover. In the appeal filed by the assessee, the Appellate Assistant Commissioner, deleted the entire estimation, sustained 20% addition, to the book turnover and brought the assessee to the below tax liability. The revenue filed an appeal before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Madurai, which dismissed the appeal. The substantial question of law, raised in **New Kamaliya Hotel's** case (cited supra), was, “whether the Sales Tax Appellate Tribunal is right in approving the reappraisal of evidence made by the first appellate authority dislodging the cogent and convincing reasons given by the assessing officer?”

9. Though, in the case on hand, substantial questions of law have been framed slightly in a different manner, facts in **New Kamaliya Hotel's** case (cited supra) and the decision of the Hon'ble Division Bench of this Court, rendered therein, are squarely applicable to the present case. When the basis of estimation made by the Assessing Officer, on the material recorded by the Enforcement Wing officials, has been held, as not a scientific method, sanctioned by law, and when the same has also been held as a crude method, which has no substance, and when the above reported decision is followed by

the authorities, we are of the considered view that on the facts and circumstances of the instant case, no substantial questions of law, are involved in the instant Tax Case (Revision) Petition.

10. A question of law should be debatable, not previously settled by the law of the land, or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties, are concerned. On a similar set of facts, this Court in **New Kamaliya Hotel's** case (cited supra), has already rejected the substantial question of law, raised by the revenue, and extracted supra. Binding effect of a decision in **New Kamaliya Hotel's** case (cited supra), rendered by a Hon'ble Division Bench of this Court, on the appellate authority and appellate tribunal, is not disputed.

11. In the light of the discussion and the decision considered, we are of the view that no substantial questions of law, arose in the instant Tax Case Revision Petition. Accordingly, the Tax Case Revision Petition is dismissed. No costs.

(S.M.K., J.) (D.K.K., J.)
12.07.2016

To

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

S.MANIKUMAR, J.
AND
D.KRISHNAKUMAR, J.
skm

T.C.(R).P.No.30 of 2016

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