

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.12.2017

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

T.C.(R).No.57 of 2017

The State of Tamil Nadu
rep. by the Deputy Commissioner (CT) /
Now redesignated as Joint Commissioner (CT),
Chennai (North) Division,
Chennai - 6. .. Petitioners

Vs.

Tvl.M.P.Natarajan and Company,
No.284, Mint Street,
Chennai - 600 003. .. Respondent

Prayer: Tax Case Revision filed under Section 38(1) of Tamil Nadu General Sales Appellate Tribunal Act, 1959, against the order in S.T.A.No.259 of 2005, dated 24.10.2008, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai.

For Petitioner : Mr.S.Kanmani Annamalai
for Additional Govt. Pleader(Taxes)

ORDER

(Order of this Court was made by S.MANIKUMAR, J.)

Tax Case Revision is filed against the order made in S.T.A.No.259 of 2005, dated 24.10.2008, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai.

2. Short facts leading to the revision are that the respondent, dealers in, iron and steel, is an assessee on the file of the Deputy Commercial Tax Officer, Park Town-II Assessment Circle, Chennai. On 17.06.2013, their place of business was inspected by the officers of the Enforcement Wing. It was discovered that the assessee, after purchasing CR sheets directly from inter-state supplier for Rs.4,39,17,794/- during the year 2002-03, had wrongly shown them in their books of accounts, as local purchases and claimed exemption from tax, as second sales. Apart from this, physical stock verification also revealed stock difference of Rs.5,61,964/-. On account of the above discrepancies, the assessing officer finalized the accounts of the respondent for the year 2002-2003, by levying tax, on the turnover of Rs.5,08,90,168.67 at 4% and also by levying penalty of Rs.27,67,621/- under section 12(3)(b) of the Tamil Nadu General Sales Tax Act 1959. The respondent filed appeal before the Appellate Assistant Commissioner (CT)-I disputing the levy of tax of Rs.22,640/- on the turnover of Rs.5,66,010/- and also penalty of Rs.27,67,621/-. The Appellate Assistant Commissioner (CT)-I, while

sustaining the levy of tax Rs.22,640/- on the turnover of Rs.5,66,010/- for stock discrepancy, deleted penalty of Rs.27,67,621/- levied under Section 12(3)(b) of the act. Aggrieved against the same, State has appealed before the Tamil Nadu Sales Tax Appellate Tribunal (AB), Chennai, which dismissed the same by confirming the order of the lower appellate authority.

3. Tax Case Revision is filed on the following substantial question of law:-

"Whether in the facts and circumstances of the case, the Tribunal in having confirming the order of the lower appellate authority by deleting the penalty based upon the decision reported in 28 STC 700 and 125 STC 505 is legally correct even after amendment carried out to Section 12(3) of the Tamil Nadu General Sales Tax Act 1959 by Tamilnadu Act 22 of 2002."

4. Supporting the above, Mr.S.Kanmani Annamalai, learned Additional Government Pleader (Taxes), submitted that the order of the Tribunal in is erroneous, having sustained the order of the Appellate Assistant Commissioner (CT) by relying the decisions reported in **28 STC 700 (SC)** and **125 STC 505**.

5. He further submitted that the Tribunal has erred in not taking

note of the amendment made to sub-section (3) of Section 13 of the Tamil Nadu General Sales Tax Act 1959 by Tamil Nadu Act 22 of 2002, and thereby penalty is leviable to the assessment made either under sub-section (1) or under sub-section (2) of the Act. The Tribunal, therefore, ought not to have relied upon the decisions reported in **28 STC 700** and **125 STC 505** which were relevant only to the period, prior to the amendment made by Tamil Nadu Act 22 of 2002.

6. Learned Additional Government Pleader (Taxes) further submitted that the Tribunal has failed to take note that, subsequent to the said amendment, the question **whether assessment was made, as best of judgment assessment or as acceptance** of the accounts, becomes totally irrelevant.

7. Heard, the learned Additional Government Pleader and perused the materials available on record.

8. Earlier, in the proceedings of the Deputy Commercial Tax Officer, Park Town-II, Assistant Circle, the Assessment Order, it has been ordered, as hereunder:-

"They have added that there is no intension to

evade payment of tax and requested that the levy of penalty may be dropped. Regarding the stock difference they have stated that the inspection was carried on for 3 continuous days that they were fatigued and the explanations offered by them were not considered by the inspecting officers, that the stock were taken at haste, that the difference is very meager comparing to the volume of business and so they requested to drop the addition on this account. They also requested to drop the levy of penalty. The objections were carefully examined. Their contention that the interstate purchases have been accounted for in local purchases account by mistake is not an acceptable one and it cannot be viewed as mis-classification. But for inspection, there would have been huge loss of revenue. The willful suppressions has been proved. The stock difference of Rs.5,61,964.00 is not meagre. The dealers have accepted the stock difference. Now they cannot go back to their own statement given at the time of inspection. I therefore over rule the objections and finally determine the total and Taxable turnover of Rs.13,35,72,386.00 and Rs.5,14,56,179.00 respectively."

9. The Assessing Officer ordered penalty, as hereunder:-

"But for inspection, the dealers would not have paid the tax. Hence penalty is called for. I therefore, levy a penalty of Rs.27,67,621.00 at 150% of the tax due

on the actual suppression of Rs.4,61,27,012.00 form 54 notice will issue.

The dealers continue to pay tax under Rule 18 for 2003-2004."

10. After considering the decision of the Hon'ble Supreme Court, in ***State of Madras Vs. S.G.Jeyaraj Nadar and sons***, reported in **26 STC 700** and other decision of this Hon'ble Court in ***TVL. Apollo Saline Pharmaceuticals Private Limited Vs. Commercial Tax Officer (Fac) and Others***, reported in **125 STC 505**, the Appellate Assistant Commissioner (CT) - I, Chennai, allowed appeal No.93 of 2004 in entirety, and partly allowed Appeal No.97 of 2004.

11. Thereafter, State of Tamil Nadu represented by the Deputy Commerssioner (CT), Chennai (North) Division, filed S.T.A.No.259 of 2005, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai, against the order in appeal No.97 of 2004, dated 02.07.2004, relating to assessment year 2002-2003. Vide order dated 24.10.2008 in S.T.A.No.259 of 2005, the Tribunal dismissed the said appeal, and ordered as hereunder:-

"6. The subject matter of the dispute in this appeal is the levy of penalty under section 12(3)(b) of Tamil Nadu General Sales Tax Act, 1959. Admittedly in

this case, the assessment was made on the accounts furnished by the assessee. As per principle laid down by the Hon'ble Supreme Court in the case of State of Madras Vs. Jayaraj Nadar (1971) 28 STC 700, and that in Appollo Saline Pharmaceuticals (P) Ltd., (2002) 125 STC 505, where the determination of the turnover was based on the assessee's accounts and no addition was made to the book turnover exercising the Assessing Authority's best - judgment powers, there could be no penalty under section 12(3) of the Tamil Nadu General Sales Tax Act.

7. Therefore, there is no irregularity or illegality in the order passed by the Appellate Assistant Commissioner (CT) and as such this Tribunal is not inclined to interfere with the decision rendered by Appellate Assistant Commissioner (CT). Accordingly, the above State appeal fails and the same is ordered to be dismissed."

12. Though, Mr.S.Kanmani Annamalai, learned Additional Government Pleader (Taxes), made submissions, in support of the above said substantial question of law, this Court is not inclined to accept the same, in the light of the decisions of the Hon'ble Supreme Court and High Court, stated supra.

13. In ***State of Madras Vs. S.G.Jeyaraj Nadar and sons***, reported

in **26 STC 700**, in the Hon'ble Supreme Court, observed as hereunder:-

“The question whether penalty can be levied while making the assessment under sub-section (2) of the above section merely because an incorrect return has been filed. The High Court was of the view that it is only if the Assessment has to be made to the best of the judgment of the Assessing Authority that penalty can be levied. It seems to us that the High Court came to the correct conclusion because sub-sections (2) and (3) have to be read together. Sub-section(2) empowers the Assessing Authority to assess the dealer to the best of its judgment in two events:

(1) If no return has been submitted by the dealer under sub-section (1) within the prescribed period and (2) if the return submitted by him appears to be incomplete or incorrect. Sub-section (3) empowers the Assessing Authority to levy the penalty only when it makes an assessment under sub-section (2). In other words, when the Assessing Authority has made the Assessment to the best of its judgment, it can levy a penalty. It is well – known that the best judgment assessment has to be on an estimate which the Assessing Authority has to make not capriciously but on settled and recognized principles of justice. An element of guess – work is bound to be present in best judgment assessment but it must have a reasonable nexus to available material and the circumstances of each case (See The State of Kerala + V.C.Valukutty), where account books are accepted along with other records there can be no ground for making the best judgment assessment.

2) 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 or best judgment. The quantum of turnovers in respect of both these items were based on the

assess'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 has 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."

14. In TVL. Apollo Saline Pharmaceuticals Private Limited Vs. Commercial Tax Officer (Fac) and Others, reported in 125 STC 505, a Hon'ble Division Bench of this Court ordered hereunder:-

"Though other sub-section of section 12 were amended by the State Legislative subsequent to the date of the judgment in the case of Jayaraj Nadar and Sons (1971/26 STC 700 (SC)), Section 12(1) and 12(2) have remained in the same Form. The legislative intention therefore, except during the period December 3, 1979 to May 27, 1993 and on and after April 1, 1996 must be taken to be to, permit the levy of penalty only in case where the assessment is a best judgment assessment made on an estimate and no by relying solely on the accounts furnished by the assessee in the prescribed return. On and April 1, 1996 an explanation has been added below section 12(3) which requires the turnover relating to the tax assessed on the basis of the accounts of the assessee, to be disregarded, while determining the turnover on which the

penalty is to be levied under section 12 (3).

In view of the above penalty levied by the disallowing the claim of exeption are deleted.

In fine, the appeal stands in AP.93/2004 – Allowed and in AP.97/2004 – Partly dismissed and Partly allowed.”

15. The above cited decisions are squarely applicable to the case on hand and therefore, we have no hesitation to follow the same. On the facts and circumstances of the case, we find no merits in the instant Tax Case Revision No.57 of 2017.

16. In the result, instant Tax Case Revision is dismissed. No costs. Substantial question of law is answered against the revenue.

[S.M.K., J.] [R.P.A., J.]
20.12.2017

Index : Yes
Internet : Yes
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To

The Deputy Commissioner (CT) /
Now redesignated as Joint Commissioner (CT),
State of Tamil Nadu,
Chennai (North) Division,
Chennai - 6.

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S.MANIKUMAR, J.
AND
R.PONGIAPPAN, J.

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