

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.12.2017

CORAM:

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

T.C.(R).No.79 of 2017

The State of Tamil Nadu,
rep. by the Joint Commissioner (CT),
Chennai (North) Division,
Chennai - 600 006. .. Petitioner

Vs.

Tvl. Qutbi Enterprises,
No.163/1, Broadway,
Chennai - 600 001. .. Respondent

Prayer: Tax Case Revision Petition filed under Section 60 of Tamil Nadu Value Added Tax Act, 2006, against the order in S.T.A.No.4 of 2012, dated 11.06.2013, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai.

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

For Respondent : No Appearance

ORDER

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

Tax Case Revision is filed against the order in S.T.A.No.4 of 2012, dated 11.06.2013, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai.

2. Short facts leading to the Tax Case Revision are that the respondent herein, are the dealers in tools & hardware and assessee on the files of the Commercial Tax Officer, Loansquare I Assessment Circle, Chennai. They were assessed on a total taxable turnover of Rs.12,40,538/- for the assessment year 2008-09 under TNVAT Act, on self assessment basis. Subsequently, on verification of assessment file, it was noticed that the dealers filed Form K return and paid tax at 0.5% as per Section 3(4) of the TNGST Act. Since the dealers have not exercised their option to pay tax, at 0.5%, as per the amended Act, within the stipulated time, the Assessing Officer by order dated 07.10.2010, revised the assessment, levying tax, at 4% on the said turnover of Rs.12,40,538/-.

3. Aggrieved by the order, the dealer filed appeal before the Appellate Deputy Commissioner (CT)-I, Chennai, following the judgment reported in 31 VST 238, in the case of Customs, Excise and Service Tax

Appellate Tribunal, Ahmadabad, vide order, in VAT AP.5/2011, dated 28.03.2011, set aside the assessment made at 4% on the said turnover and allowed the appeal.

4. Aggrieved by the order of the First Appellate Authority, State filed appeal before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai and the Tribunal, vide order in S.T.A.No.4 of 2012, dated 11.06.2013 dismissed the appeal filed by the State. Aggrieved by the same State has filed this Tax Case (R).

5. Tax Case Revision is filed on the following substantial questions of law:-

“(i) Whether on the facts and in the circumstances of the case the Tribunal was right in law in setting aside the assessment made by the Assessing Officer on the turnover at 4% when the dealer has not exercised their option as per the amendment Act?”

“(ii) Whether on the facts and in the circumstances of the case the Tribunal was right in law holding that mere filing of returns in Form K is enough and filing of fresh option within 30 days from the amendment for the year 2008-09 does not arise?”

6. Supporting the prayer sought for Mr.S.Kanmani Annamalai, learned Additional Government Pleader (Taxes), submitted that the Tribunal has erred in law, in dismissing the appeal, without considering the relevant provisions of the Act and that the Tribunal has also failed to consider that Section 3(4), has been amended by Amendment 2008, with effect from 18.06.2008.

7. He further submitted that the Tribunal has failed to consider that when there is substantial change in the provisions of the Act consequent on the amendment 49/2000, filing of option is mandatory.

8. Learned Additional Government Pleader (Taxes), further submitted that the Tribunal has erred in holding that in as much as the dealer had submitted form K return, the question of exercising option within 30 days from 18.06.2008 would not arise, since the provision stipulates that such option shall exercised within the stipulated time, as per the Amendment Act. The Tribunal has also failed to consider that in view of the substantial change, opinion to be exercised is mandatory and such option should be exercised by the dealer irrespective of the fact whether the dealer has filed return in Form K, even prior to introduction to the Amendment.

9. Heard the learned Special Government Pleader and perused the materials available on record.

10. Perusal of the order of the Commercial Officer (CT), Loan square-I, Assessment Circle, Chennai, shows that for the year 2008-2009, assessment has been made on 07.10.2010, on self assessment basis, on the total taxable turnover of Rs.12,40,538/-.

11. Contending inter alia, that they were defects, notice has been issued on 27.08.2010 and after considering the objections, passed a revised orders dated 07.10.2010, imposing tax of Rs.43,420/-. When the said decision was taken on appeal, the Appellate Deputy Commissioner (CT) - II, Chennai, posed two questions, as to whether, the assessment already made under Section 3(4) of the Act by disallowing the eligibility of the appellant to be assessed at the compounded rate and assessed the entire turnover at 4% under section 3(2) of the TNVAT Act, 2006.

12. Considering the facts that the appellant dealer had already filed the return in Form-K and paid tax under Section 3(4) of the Act from 2006-07 i.e. from the introduction of the TNVAT Act, 2006 and the Amendment Act 49/2008, has come into effect from 18.06.2008, the

Assistant Deputy Commissioner (CT) - II, Chennai, ordered, as hereunder:-

“The appellant had filed their return in form K and paid tax u/s 3(4) of the Act from 2006-07 i.e. from the introduction of the Tamil Nadu Value Added Tax Act 2006. At the time of introduction of the Act there is no provision to exercise their option to pay tax u/s 3(4) in each year. Hence, the appellant had filed his option for the year 2006-07. In the absence of such provision “as each year” the appellant had paid the tax u/s 3(4) for the year 2008-09 also further the Act amended in the middle of the year is not aware by the appellant. If an amendment made in the Act the Assessing Officer has to issue notice to the dealer who has paid compounding tax to file their option immediately. It is not done by the Assessing Officer.

Further the amendment made in December 2008 will not attract with effect for 01.04.2008. The Customs, Excise and Service Tax Appellate Tribunal, Ahmadabad held that an amendment insert to section will not have retrospective effect in the case of B.A. Research India Limited and others Vs. Commissioner of Service Tax, Ahmadabad reported in 31 VST 238. It is squarely applicable in this case hence, the order passed by the Assessing Officer is set aside.

In the result the appeal is Allowed.”

13. When the State has preferred an appeal in S.T.A.No.4 of 2017, before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai, statutory provision of Section 3(4), before Amendment Act

49/08, has been considered and vide order dated 11.06.2013 in S.T.A.No.4 of 2012, the Tribunal ordered as hereunder:-

“Notwithstanding anything contained in sub-section (2) but subject to the provisions of sub-section (1) every dealer, who effects second and subsequent sales of goods purchased within the State, whose total turnover, for a year, is less than rupees fifty lakhs, may, at his option, instead of paying tax under sub-section(2), pay a tax, for each year, on his total turnover at such rate not exceeding one percent, as may be notified () by the Government. Such option shall be exercised by the dealer within 30 days from the date of commencement of this Act:*

Provided that such dealer shall not collect tax exceeding the rate notified by the Government under this sub-section.

Provided further that such dealer shall not be entitled to Input Tax Credit on goods purchased by him:

Provided also that the dealer who purchased goods from such dealer shall not be entitled to Input Tax Credit on the goods purchased by him.

(*) Notified as half a per cent by G.O.Ms.No.2 dated 1st January 2007 of CTR Department.

Amendment 49/08 with effect from 18.06.2008

Section 3 (4):-

Notwithstanding anything contained in sub-section (2), but subject to the provisions of sub-section

(1), every dealer, who effects second and subsequent sales of goods purchased within the State, whose turnover relating to taxable goods, for a year, is less than rupees fifty lakhs, may, at his option, instead of paying tax under sub-section (2), pay a tax, for each year on his (*) (turnover relating to taxable goods) at such rate not exceeding one per cent, as may be notified (**) by the Government. Such option shall be exercised by a dealer-

i) who commences business, within thirty days from the date of commencement of the business;

ii) whose turnover is below rupees fifty lakhs during the previous year, on or before the 30th day of April of the year for which he exercise such option;

iii) for the year 2008-2009, within thirty days from the day of commencement of the Tamil Nadu Value Added Tax (Second Amendment) Ordinance, 2008;

(*) These words were submitted for the words "total turnover" by Section 2 (3)(a) of the Amendment Act (21 of) 2007, with effect from 1st January 2007.

(**) This rule has been notified as half a percent by Notification No.II (1)/CTR/(A-1)/2007-G.O.No.2 dated 1st January 2007, effective from that date.

Provided that such dealer shall not collect, 1[any amount by way of tax or purporting to be by way of tax]

Provided further that such dealer shall not be entitled to Input Tax Credit on the goods purchased by him:

Provided also that the dealer who purchased goods from such dealer shall not be entitled to Input Tax Credit on the goods purchased by him.

(1) These words were substituted of the words “tax exceeding the rate notified by the Government under this sub-section”, by Section 2 (3)(b) of the Amendment Act (21 of) 2007, with effect from 1st January 2007.

(b) if the turnover, relating to taxable goods of a dealer paying tax under clause (a), in a year, reaches rupees fifty lakhs at any time during the year, he shall inform the Assessing Authority in writing within seven days from the date on which such turnover has so reached. (2) [Such dealer is liable to pay tax under Sub-Section (2) on all his sales of rupees fifty lakhs and above] and he is entitled to the Input Tax Credit on the purchases made from the date, and on the stock available with him the purchases of which he has been made within ninety days before the date, on which such turnover has reached rupees fifty lakhs: Provided that such dealer whose turnover has reached rupees fifty lakhs during the previous year shall not be entitled to exercise such option subsequent years.

(2) These words have been substituted by Section 2 of the Tamil Nadu Amendment Act 27 of 2011, from a date to be notified, by the words “Such dealer may pay a tax for each year on his turnover relating to taxable goods upto rupees fifty lakhs at such rate not exceeding

one per cent as may be notified by the Government and is liable to pay tax under Sub-Section (2) on all his sales of taxable goods above rupees fifty lakhs". This date has been notified as 1st April 2012 by notification No.II (2) / CTR/437 (c-2)/2011 - G.O.Ms.No.135 dated 31st October 2011.

From this section it is very clear that the option should be given on or before 30th April of that year of the taxable turnover is below Rs.50 lakhs in the previous year. But this Amendment came into effect from 18.06.2008 only. Even before and after the Amendment the dealer has filed return in Form-K issued under Section 3 (4) of the Act and not Form-I issued under Section 3(2) of the Act. So the filing of fresh option within 30 days from the Amendment for the year 2008-09 does not arise in our case.

In view of the above discussion, this Tribunal come to the conclusion that the re-assessment order of Assessing Officer is not correct and the order of Appellate Deputy Commissioner set asiding the order of Assessing Officer is correct and no Interference is warranted."

14. Though, Mr.S.Kanmani Annamalai, learned Additional Government Pleader (Taxes), made submissions, seeking for reversal, going through the well considered orders of both the Appellate Deputy Commissioner (CT)-I, Chenani, in VAT AP.5/2011, dated 28.03.2011 and in

S.T.A.No.4 of 2017, dated 11.06.2013, passed by the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai, we are of the view that the reasoning of the both the Authorities, cannot said to be manifestly illegal, warranting interference. Act has been amended in the middle of the Financial Year. It cannot be given retrospective effect. Tax has been paid, even before amendment to the Act, with effect from 18.06.2008. Besides, he has been paying tax by submitting Form-K, as per the rule 3(4) of the Tamil Nadu Value Added Tax Act, 2006. Submissions of Form K, is an inference of exercising option.

15. In the light of the above discussion, we are not inclined to interfere with the decision. Hence, instant Tax Case Revision is dismissed. No costs. On the facts and circumstances of the case the substantial questions of law are answered against the revenue.

[S.M.K., J.] [R.P.A., J.]
18.12.2017

Index : Yes
Internet : Yes
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S.MANIKUMAR, J.
AND
R.PONGIAPPAN, J.

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To

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



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