BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 05.05.2017

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

and

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

TAX CASE REVISION(MD)No.8 of 2011

Tvl.DCW Ltd.,
Sahupuram,
Tiruchendur Taluk .. Petitioner / Appellant

Vs.

The Commercial Tax Officer,
Tiruchendur. .. Respondent / Respondent

PRAYER: Tax Case Revision is filed under Section 38 of the TNGST Act, 1959, to revise the order of the Tamil Nadu Sales Tax Appellate Tribunal (AB), Madurai dated 09.06.2011 passed in M.T.A.No.159 of 2007.

For Petitioner : Mr.S.Karunakar

For Respondent : Mr.R.Karthikeyan,
Additional Government Pleader.

ORDER

[Order of the Court was made by **T.S.SIVAGNANAM, J.**]

Heard Mr.S.Karunakar, learned Counsel appearing for the petitioner and Mr.R.Karthikeyan, learned Additional Government Pleader appearing for the respondent.

2.This Tax Case Revision has been filed by the petitioner / assessee raising the following substantial question of law:

> "Whether on the facts and circumstances of the case, the Tribunal was right in fixing the Penalty under Section 23 of the TNGST Act, 1959?"

3. To answer the question framed, it may be first necessary to refer to Section 23 of the TNGST Act, which reads as follows:

> "**23.Levy of Penalty in certain cases.**- If any person purchasing goods is guilty of an offence under clause (c) of sub-section (2) of Section 45, the assessing authority may, after giving him a reasonable opportunity of being heard, by order in writing, impose upon him by way of penalty a sum not exceeding one and a half

times the tax payable on the turnover relating to the sale of such goods at a rate which is equal to the rate prescribed in the First Schedule less three per cent:

Provided that no prosecution for an offence under Section 45 shall be instituted in respect of the same facts on which a penalty has been imposed under this Section."

On a perusal of the above provision, it is evident that the use of the word "may" in this section indicates that the levy of penalty under it is purely discretionary. Thus, the Assessing Officer is not required to levy penalty in all cases unless there is a *mala fide* intention on the part of the assessee in utilising the goods for the purposes other than those indicated in Form XVII.

4. The Hon'ble Full Bench of this Court in the case of ***State of Tamil Nadu vs. Nu.Tread Tyres*** reported in ***[2006] 148 STC 256 (Mad) [FB]*** considered the provisions of Section 10-A of CST Act, 1956, which is in *pari materia* with Section 23 of TNGST Act, 1959 and held that Section 10(b) of the CST Act provides for an offence if any person or registered dealer falsely represents when purchasing any class of goods that they are covered by the certificate of registration. The expression "falsely represents" was held to show that the element of *mens rea is* necessary component of the offence. It is further pointed out that in the absence of *mens rea,* the invocation of the penal provision would not be appropriate, unless it is established that the conduct of the dealer was contumacious or that there was deliberate violation of the statutory provision or willful disregard thereof. Further, it was pointed out that if the registered dealer earnestly believes that any particular goods are embraced by the certificate of registration and that belief makes a representation, he cannot be held guilty of the offence under Section 10(b) of the CST Act and no penalty can be imposed under Section 10-A of the Act. Therefore, *mens rea* is an essential ingredient for levy of penalty under Section 10(b) of the CST Act.

5. The above decision would apply with full force to the case arising under Section 23 of the TNGST Act as in the instant case. In the instant case, the assessment was made under TNGST Act for the year 1998-99, which was put to challenge by the assessee before the Appellate Assistant Commissioner which rejected the appeal, by order dated 20.12.2006. As against the said order, the petitioner preferred appeal before the Tamil Nadu Sales Tax Appellate Tribunal (AB), Madurai in M.T.A.No.159 of 2007, which was dismissed by the Tribunal, by order dated 09.06.2011. This order has been put to challenge in this Tax Case Revision only with regard to one of the issues which was considered by the Tribunal with regard to levy of penalty under

Section 23 of the TNGST Act.

6. The Appellate Tribunal, after considering the facts of the case, held that the petitioner had used the goods purchased against Form XVII for the declared purpose and the levy of penalty under Section 23 of the Act is not warranted. Inspite of rendering such a finding, the Tribunal refixed the levy of penalty at Rs.1 lakh as against the penalty of Rs.15,38,582/- imposed by the Appellate Assistant Commissioner. First of all, there is no finding recorded by the Tribunal to hold that the conduct of the petitioner/dealer was contumacious or there was a deliberate violation of the statutory provisions or willful disregard to the statutory provisions. Thus, in the absence of any *mens rea* on the part of the petitioner/dealer the question of imposition of penalty would not arise. For all the above reasons, the question of law which has been framed for consideration is answered in favour of the petitioner/dealer and against the Revenue.

7. In the result, levy of penalty, as ordered by the Tribunal at Rs.1 lakh, is set aside. Since the other portion of the order of the Tribunal are not put to challenge, this revision is allowed only to the extent indicated above. No costs.

Sd/-
Assistant Registrar (Records)

/True copy/

Sub Assistant Registrar

To

1.The Tamil Nadu Sales Tax Appellate Tribunal (AB), Madurai.

2.The Commercial Tax Officer, Tiruchendur.

+1 CC to M/s.S.KARUNAKAR, Advocate, SR No. 55845

GCG
PSM/SV/17.05.2017/3P/4C

ORDER MADE IN
TAX CASE REVISION(MD)No.8 of 2011
05.05.2017