IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.11.2018

CORAM :

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Tax Case No.37 of 2015

Saraswathi Metal Mart,
100D Avarampalayam Road,
Ganapathy, Coimbatore - 641 006.

.... Appellant

-vs-

The Joint Commissioner (SMR) of
Commercial Taxes, Office of the
Special Commissioner and
Commissioner of Commercial Taxed,
Chepauk, Chennai - 600 005.

... Respondent

Tax Case Appeal filed under Section 37 of the Tamil Nadu General Sales Tax Act, 1959 (for brevity 'the Act') by the appellant/dealer challenging the order dated 22.04.2002 passed by the Joint Commissioner (SMR)-III of Commercial Taxes, Chennai in excise of his suo-moto powers under Section 37 of the Act, agaginst the order dated 15/02/1995 madein TNGST No.228646(89-90 passed by the Commercial Tax Officer, N.H.Road, Circle, Coimbatore and against the order dated 14/11/94 made in A.no.1271/94 passed by the Additional Appellate Assistant Commissioner (CT) Coimbatore and against the order dated 13/06/94 made min TNGST No.228646/89-90 passed by the Commercial Tax Officer, N.H.Road Circle, Coimbatore.

For Appellant : Mr.B.Sivaraman for
M/s.Lakshmi Sriram

For Respondent : Mr.Mohammed Shaffiq
Spl Government Pleader

JUDGMENT

[Judgement of the Court was delivered by T.S.Sivagnanam, J.]

This Tax Case Appeal filed under Section 37 of the Tamil Nadu General Sales Tax Act, 1959 by the appellant/dealer challenging the order dated 22.04.2002 passed by the Joint Commissioner (SMR)-III of Commercial Taxes, Chennai in excise of his suo-moto powers under Section 37 of the Act.

2.Heard Mr.B.Sivaraman for Ms.Lakshmi Sriram, the learned counsel for appellant and Mr.Mohammed Shaffiq, the learned Special Government Pleader for the respondent.

3.This Tax Case Appeal was admitted on 03.06.2015 on the following Substantial Question of Law:

> "Whether on the facts and in the circumstances of the case, the Joint Commissioner is right in law in exercising suo motu revisional powers under Section 37 of the Act in setting aside the order of the Appellate Authority?"

4.The respondent/Joint Commissioner issued show-cause notice dated 10.11.1997, wherein he proposed to set aside the order passed by the Additional Appellate Assistant Commissioner (CT) Coimbatore, dated 14.11.1994 and restored the order of assessment dated 13.06.1994 under the provisions of TNGST Act for the assessment year 1989-1990. The basis for issuance of show cause notice dated 10.11.1997 is by disbelieving the first sale effected in favour of the appellant thereby proposing to deny second sale exemption to the appellant. The appellant submitted their reply on 26.11.1997 seeking to sustain the order passed by the Appellate Assistant Commissioner dated 14.11.1994. However, reply was rejected and the proposal in the show cause notice was confirmed and order dated 22.04.2002 was passed by the respondent which is impugned in this appeal.

5.The issues which fall for consideration are whether the respondent could exercise suo motu power to set aside the factual finding recorded by the Appellate Assistant Commissioner in his order dated 14.11.1994. The Assessing Officer while completing the assessment vide order dated 13.06.1994 denied the claim made by the appellant for grant of second sale exemption on the ground that the selling dealer of the appellant had closed down their business about one year back and this was found at the time of verification and a certificate issued by the Village Administrative Officer was relied upon.

6.Further, the Assessing Officer found that the Registration Certificate of the selling dealer stood cancelled, therefore, plea of exemption was negatived by the Appellate Assistant Commissioner. A thorough verification was done by him and it was found that the selling dealer's registration was valid upto 31.03.1990 and all the invoices were raised in favour of the appellant were in the month of March, 1990 the goods passed through Ottanchatram check post and the invoices contained the check post. The appellant made payments through banking channels as well as by issuance of cheques and the appellant was in possession of receipts issued by the selling dealer and therefore, the fact that the selling dealer was carrying on business during the year 1989-90 and had sold goods to the appellant and also received the value of the goods stood established.

7.Further the Appellate Assistant Commissioner averred that the finding of the Assessing Officer stating that the invoice did not contain serial number in the movement register of the check post and the time of passing of the vehicle by observing that no verification was done by the Assessing Officer in that angle. Further, it was held that the appellant has purchased the goods from the dealers which is evidenced by the fact that the check post seal, and which shows the movement of goods and therefore reversed the orders passed by the Assessing Officer.

8.In the show cause notice issued by the respondent dated 10.11.1997, though he has referred to the order passed by the Appellate Assistant Commissioner including that portion of the order where reference was made to check post seal, while passing final orders, failed to discuss the same nor rendered any finding to the effect as to why the check post seal should be disbelieved. The check post seal is affixed by the Government Authorities and upon certification, the authenticity of the document is presumed to be valid. Therefore, a person who disputes its authenticity is bound to prove the same as the burden of proof lies on the person who disputes the authenticity of the record certified by the Governmental authorities.

9.However, no such endeavour was made by the department. Therefore, the respondent was not justified in reversing the well considered order passed by the Appellate Assistant

Commissioner. In the case of State of Andhra Pradesh Vs. Thungabhadra Industries Ltd., (1986) 62 STC 71, the Division Bench of the High Court of Andhra Pradesh held that in order to determine eligibility of an assessee, a registered dealer, who claimed exemption as a second seller of product, taxable at the first point of sale, within the State, two tests which are applicable are namely (1) that the first seller should be a real and identifiable dealer within the State and (2) that mere non-payment of tax by the first seller within the State does not shift liability to pay tax on the second seller.

10.In the case on hand, the documents namely, the validity of the registration certificate is upto 31.03.1990 is not disputed by the Department. The payment made through Banking channels have been found to be correct. Therefore, the petitioner has discharged the onus cast upon them to prove that the first seller is real and identifiable person. By merely relying upon the Village Administrative Officer certificate, these records produced by the appellant could not have been discredited by the respondent.

11.The cancellation of the registration of the selling dealer with effect from 01.04.1990 would have no impact on the transaction in question particularly on the appellant and the liability to pay tax cannot be shifted on the appellant. As noted above, the transactions done by the appellant are much prior to the cancellation of the selling dealers registration. In the case of V.Subramanian Vs. State of Tamil Nadu, the Hon'ble Division Bench of this Court considered somewhat a similar issue as regards the burden of proof of the purchase vouchers containing check post seal and held that the department had not investigated the actual person who had made the transaction in question.

12.The Assessing Officer failed to verify the correctness of the claim of exemption at the time of final assessment and the purchase vouchers containing the check post seal and it was not correct to hold that the dealer is entirely responsible for non-payment of tax on the disputed turnover. After noting the documents produced, it was held that the dealer has established prima facie that his purchases were all taxed and solely because the department has not been able to trace and levy tax on first seller the dealer cannot be treated as first seller and taxed. The decision in V.Subramanian (Supra) would squarely apply to the facts of this case. The reasons assigned by the respondent in the impugned order are wholly untenable and therefore, calls for interference.

13.In the result, the tax case appeal is allowed and the order passed by the respondent is set aside and the order passed by the Appellate Assistant Commissioner dated 14.11.1994 is restored and the Substantial Question of Law is answered in favour of the appellant.

Sd/-

Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

mrm

To

1. The Joint Commissioner (SMR)-III of Commercial Taxes, Chennai

2. The Additional Appellate Assistant Commissioner (CT) Coimbatore.

3. The Commercial Tax Officer, N.H.Road Circle, Coimbatore.

+1cc to Special Government Pleader (T)SR.No.81484

T.C.No.37 of 2015

SAI(CO)
GMY(07/01/2019)