

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.03.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

T.C.(R).No.43 of 2018

The State of Tamil Nadu,
represented by the Deputy Commissioner of
Commercial Taxes,
Thiruchirappalli Division,
Thiruchirappalli.

.. Petitioner

Vs.

1.P.Elayaperumal,

2.T.V.Radha Traders,
Pattukkottai.

3.K.C.Karuppan

4.Tvl.S.M.Traders,
Pattukkottai.

5.V.Periathambi

6.P.A.Palanivel

7.K.R.Thirupathy

8.R.Govindaswamy

9.G.Periathambi

10.M.S.V.Palaiappan

11.S.Rathinam Chettiar

12.S.Thirunadanam Chettiar

13.P.A.Palanivelu

14.S.Murugan

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15.A.Dharmalingam
 16.T.V.Subramanian
 17.K.Rajarathinam
 18.K.C.Kumaran
 19.M.Dhanapal
 20.A.Veerian Chettiar
 21.R.Rajakannu
 22.K.C.Karuppan
 23.V.Periathambi
 24.C.Arunachalam
 25.K.R.Thirupathy
 26.S.L.Muthuveeran Chettiar
 27.T.Swaminathan

.. Respondents

Prayer: Tax Case Revision is filed under Section 38 of Tamil Nadu General Sales Tax Act, 1959, to revise the order dated 25.02.2002 made in T.A.Nos.752 to 757 of 2001, 760 to 762 of 2001, 779 to 793 of 2001 and 944 to 946 of 2001, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai.

For Petitioner : Mr.V.Haribabu
 Additional Govt. Pleader (Taxes)

ORDER

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

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Tax Case Revision is filed to revise the order dated 25.02.2002 made in T.A.Nos.752 to 757 of 2001, 760 to 762 of 2001, 779 to 793 of 2001 and 944 to 946 of 2001, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai.

2. Short facts leading to the Tax Case Revision are that the respondents are the dealers in groundnut at pattukkottai. Purchased groundnuts from the dealers in Karnataka State through Commission Agencies. As per the purchases made from inter-state supplies in Karnataka State were not entered in their Acts. The assessment for the years 1991-92 and 1992-93 were reopened under Section 16(1) of the Tamil Nadu General Sales Tax Act 1959 on the basis of the extracts of purchases of groundnut communicated by the Enforcement Wing Officers of the department (i.e.the State of Karnataka).

3. Aggrieved against the same, the respondents/dealers have filed appeals before the Appellate Assistant Commissioner (CT), Thanjavur. The Appellate Assistant Commissioner (CT), Thanjavur in his order in Ap.Nos.353/2000, 332/2000, 373/2000, 279/2000, 278/2000, 354/2000, 280/2000, 281/2000, 71/2000, 72/2000, 61/2000, 60/2000, 75/2000, 93/2000, 68/2000, 71/2000, 96/2000, 98/2000, 65/2000, 64/2000, 70/2000, 59/2000, 67/2000, 66/2000, 62/2000, 65/2000 and 94/2000, dated 15.05.2001, upheld the revisionary orders of assessment and the consequential imposition of penalty made by the Assessing Officer.

4. Aggrieved by the same, the first appellate authority's decision, the dealers filed appeal in T.A.Nos.752 to 757 of 2001, 760 to 762 of 2001, 779 to 793 of 2001 and 944 to 946 of 2001, before the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai. Vide order dated 25.02.2002, the Tribunal allowed the appeal.

5. Being arrived by the above order of the Tribunal, instant Tax Case Revision is filed by the Revenue, on the following substantial questions of law:-

"(i) The order of the Tribunal is against law, weight of evidence and probabilities of the case.

(ii) The Tribunal did not consider the case in the proper perspective."

6. Supporting the substantial questions of law, Mr.V.Hari Babu, learned Additional Government Pleader (Taxes), submitted that the Tribunal has failed to note that the assessing authority resorted to revision of assessment, in view of the fact that the dealers have not accounted for the purchases of Groundnut from Karnataka dealers, which were detected during the course of verification of extracts received from the Enforcement Wing Officers. Therefore, the Assessing Authority issued

pre-revision notice, obtained objections from the dealers and confirmed the proposals in the absence of recorded evidence and the same is in order.

7. Learned Additional Government Pleader (Taxes), further submitted that the Tribunal ought to have seen that, the first appellate authority had sustained the order of revision made by the Assessing Officer in view of the fact that the dealers had failed to prove with recorded evidence, that they did not effect any sales of Groundnut from Karnataka Dealers. Further, the first appellate authority had categorically stated that reasonable and sufficient opportunities granted to the dealers were not utilised by them properly. Therefore, the first appellate authority had dismissed all the appeals filed by the dealers.

8. He further contended that the Tribunal erred in observing that the department was in possession of the extract sent by the Enforcement Wing Officers and nothing more than that is not acceptable, since it is for the dealers to prove with recorded evidence, that the transactions as mentioned in the revision notice, in the name of the dealers were actually not made. When this is not done, the revision made is quite

9. Learned Additional Government Pleader further submitted that the Tribunal has failed to follow the decisions reported in 8 STC 770, 14 STC 642, 40 STC 278, which squarely apply to the case on hand. He further submitted that the decision in 68 STC 204, squarely applies to the case on hand, wherein it has been held that once the existence of a report on the documents seized, was not disputed, the burden is on the assessee to prove to the satisfaction of the Assessing Officer that no such transactions as alleged by the authorities took place. It is also the submission of the learned Additional Government Pleader (Taxes) that in the reported case, the court also observed that the assessee cannot throw the burden on the department to prove that there was a transaction as alleged by the department and that the dealer should have proved his assertion otherwise.

10. He further submitted that the Tribunal has failed to note that when the department secured documents relating to unaccounted business transactions of the assessee and that the said fact was made known to the assessee, it is for the assessee to show that the transaction indeed did not take place. Mere denial of the transactions involved in dispute will not shift the burden on the department. However, if the

denial is supported by positive proof shown to exist on the basis of documents, and if a prima facie case is shown, then the burden will get shifted on the department. He also contended that, without making a prima-facie case, the assessee cannot ask for cross-examination, as a matter of routine, on mere denial.

11. Learned Additional Government Pleader (Taxes), further submitted that the Tribunal has failed to note that the department has informed the existence of materials gathered from the accounts of the parties with whom the assessee had carried on regular business transactions, and in such circumstances, it is for the assessee to gather further details from such parties and prove that the entries in the third party accounts do not relate to them.

12. He further submitted that the Tribunal has failed to note that the department had gathered materials from the Karnataka State dealers through whom the assessee have regularly purchased groundnut sold by the Marketing committees in the State of Karnataka and where the department had furnished full details of such purchases made from the other State with Bill No., Date, Name of the selling dealer in the other State, quantity of groundnut supplied by the interstate seller in each bill,

the value of the goods moved in each consignment and also the vehicle number in which the consignments were moved, etc., and thus showed evidence on record that the dealers have suppressed their purchases made from Karnataka dealers, it was left to the dealers to show that they were not the recipients of such goods.

13. He has submitted that the Tribunal has failed to note that in transactions of this type, the department cannot go after each and everyone of the dealer for each and every entries found in the accounts to prove that the individual items of transactions did indeed exist. To that extent, the officials of the department were able to lay hands on the materials evidencing suppression, which by itself is a matter of chance. Further, the extent of suppression cannot be correctly gauged, since there is every possibility of destruction of materials by evaders of tax at regular intervals on the transactions are over.

14. He also stated that the Tribunal ought not to have brushed aside the findings of the Assessing Officer with a mere observation that the department was not in possession of any records other than sale extracts of the selling dealers in the State of Tamil Nadu which is bad in law, since the dealers had regular business transactions with the

Karnataka State dealers, and there were several batches of transactions, the selling dealers received monies from the assessee, the complete details of such transactions were mentioned in the show cause notices and made known to the assessee. Therefore, for the assessee to disprove the transactions.

15. He submitted that the Tribunal has failed to note that in the case law reported in 120 STC 224, wherein it has been held that where a prima facie was shown from out of records available in possession of the revenue, the rebuttal by producing cogent evidences shall have to come from the party involved therewith. In the case on hand, the assessee failed to discharge the burden fastened on them by their failing to let in any evidence in support of their stand on the issue.

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

17. On the contentions of the parties, the Appellate Assistant Commissioner (CT), Thanjavur, in his order dated 15.05.2001, while dismissing the appeal filed by the assessee ordered as hereunder:-

"I heard the arguments on both sides. In the case of

those appellants who did not present themselves or were not represented on the date of hearing, the written arguments are considered. The only overwhelming point on which the entire thrust of the appellants' arguments is directed, is the undue reliance placed by the assessing authorities on the accounts of the third parties without the third parties not being individually brought forward for a cross examination to extract the truthfulness or otherwise of such evidence. They add that a cloud of doubt always shrouded the third parties whose intentions cannot be said to be fully honest when it comes to propagating business interests. Firstly, I intend to take case of their mild objections which are almost on the sidelines. Their initial argument that the appellants were not made available with the material on the basis of which the revisions were made does not hold water because the assessing authorities very well confronted the appellants with all the materials at their disposal such as bill numbers, weight and value of the consignments, dates and mode of despatch etc., secondly their objection to the re-assessment on the ground of a mere change of opinion is also misdirected. In the revisions the assessing authorities made use of substantive facts extracted from external sources that were not available the time when the first assessment was made and which could only be brought out after painstaking investigation by the enforcement arm of the department. That the appellants have made light of an otherwise weighty situation needs no elaboration. With these preliminary remarks which have gone entirely in favour of the department I go into the substantial aspect of appeal, namely, failure of the

department to grant the appellants an opportunity or cross-examination. Asking for an opportunity to cross-examine witnesses under a sales tax law is assuming that the sales tax law of the State has expressly replicated in itself the provisions of the law of evidence. On the contrary an exploration can be made in the direction of finding out whether the law of evidence can be read into any part of the sales tax law. The Supreme Court of India in the case of *State of Karnataka Vs. K.T.Shaduli Yusuf* reported in 39 STC 470 lays down the principle in this direction very clearly. The judgment is delivered in two separate decisions first by Honourable Bhagavati.J and the second by Honourable Fazel Ali.J. The court was disposing of civil appeals of the State and interpreted the provisions of best judgment assessment as provided for under section 17(3) of K.G.ST.Act read with rule-15 made under the Act. Facts of the case as stated briefly in the words of Honourable Bhagavathi J. are as follows:-

In the assessments of the assessee to sales tax for the three assessment years, the returns filed by him on the basis of his books of account appeared to the Sales Tax Officer to be incorrect and incomplete since certain sales appearing in the books of account of one "H" as having been effected by the assessee in his favour were not accounted for in the books or account maintained by the assessee. The assessee applied to the Sales Tax Officer for affording him an opportunity to cross examine "H" in regard to the correctness of his accounts, but this opportunity was denied to him and the Sales Tax Officer made a best judgment assessment under Section 17(3) of the Kerala General Sales

Tax Act 1963. The assessee appealed without success, but the High Court, on revision, took the view that the assessee was entitled to have an opportunity to cross-examine "H" before the Sales Tax Officer arrived at any finding and, accordingly, quashed the order of the Sales Tax authorities and remanded the case to the Sales Tax Officer for making fresh assessments according to law after giving an opportunity to the assessee to cross-examine 'H'.

The question that arose for consideration before the court was whether an assessment completed to the best of judgment could be said to be legally done if the assessee asking for a cross-examination of the third party to prove his innocence had been denied an opportunity to do so. In the first place, the court defines the circumstances and conditions when such an opportunity can be granted to the assessee. It goes on to say that no universal principle can be formulated in this matter and each demand for a cross examination must be one through to see if at all the demand is to be met under the given set of facts. In the words of Honourable Bhagawathi.J:-

One of the rules, which constitutes a part of the principles of natural justice is the rule of audi alteram partem which requires that no man should be condoned unheard. This rule which requires an opportunity to be heard to be given to a person likely to be affected by decision is also, like the genus of which it is a species, not an inflexible rule having a fixed connotation. It has a variable cogent depending on the nature of the inquiry, the framework of the law under which it is held, the constitution of the authority holding the inquiry, the nature

and character of the rights affected and the consequences flowing from the decision. It is, therefore, not possible to say that in every case the rule audi alteram partem requires that a particular specified procedure is to be followed. It may be that in a given case the rule of audi alteram partem may import a requirement that witnesses whose statements are sought to be relied upon by the authority holding the inquiry should be permitted to be cross-examined by the party affected while in some other case it may not. The procedure required to be adopted for giving an opportunity to a person to be heard must necessarily depend on the facts and circumstances of each case.

In the words of Hon'ble Fazal Ali.J.

It is true that the words "opportunity of being heard" are to very wide amplitude but in the context the sales tax proceedings which are quasi-judicial proceedings all that the court has to see in whether the assessee has been given a fair hearing. Whether the hearing would extend to the right of demanding cross-examination of witnesses or not would naturally depend upon the nature of the materials relied upon by the sales tax authorities the manner in which the assessee can rebut those materials and the facts and circumstances of each case. It is difficult to lay down any hard and fast rule of universal application (Emphasis supplied).

In this case, the court was dealing with an issue under the provision of the Kerala Act. It is for us to see if the decision would have equal impact on a situation created under the shadow of an altogether difference act. If it is

possible to show that the Tamil Nadu Act is in pari materia with the Kerala Act, the decision of the Supreme Court will apply squarely to the Tamil Nadu Scenerio. The section under the Kerala Act is extracted below:

“If no return is submitted by the dealer sub-section (i) within the prescribed period, or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall, after making such enquiry as it may consider necessary and after taking into account all relevant material gathered by it, assess the dealer to the best of its judgment. Provided that before taking action under this sub-section the dealer shall be given a reasonable opportunity of being heard and where a return has been submitted, to prove the correctness or completeness of such return”.

The provision relating to the best judgment assessment under the Tamil Nadu Act is as follows:

If no return is submitted by the dealer under sub-section(1) within the prescribed period, or if the return submitted by him appears to the assessing authority, to be incomplete or incorrect, the assessing authority shall, after making such enquiry as it may consider necessary, assess the dealer to the best of its judgments:

Provided that before taking action under this sub-section, the dealer shall be given a reasonable opportunity of proving the correctness or completeness of any return submitted by him.

It can be seen that the legislatures of both the States have used identical language in drafting this provision. If will not be an exaggeration if I say it is an though one or the

other is doing an encore. Now coming to the proverbial question whether or not a request for cross examination of the third party asked for by an assessee in line with the principles of natural justice, can be granted, the court has observed.

It is clear on a plain natural construction of the language of this provision that it empowers the Sales Tax Officer to make a best judgment assessment only where one of two conditions is satisfied either no return is submitted by the assessee or the return submitted by him appears to the Sales Tax Officer to be incorrect. It is only on the existence of one of these two conditions that the Sales Tax Officer gets the jurisdiction to make a best judgment assessment. The fulfilment of one of these two prerequisites is, therefore, a condition precedent to the assumption of jurisdiction by the Sales Tax Officer to make assessment to the best of his judgment. Now, where no return has been submitted by the assessee, one of the two conditions necessary for the applicability of section 17, sub-section (3), being satisfied the Sales Tax Officer can, after making such inquiry as he may consider necessary and after taking into account all relevant materials gathered by him, proceed to make the best judgment assessment and, in such a case, he would be bound under the proviso to give a reasonable opportunity of being heard to the assessee. But in the other case, where a return has been submitted by the assessee, the Sales Tax Officer would first have to satisfy himself that the return is incorrect or incomplete before he can proceed to make the best judgment assessment. The decision making process in such a case would really be in

two stages, though the inquiry may be continuous and uninterrupted; the first stage would be the reaching of satisfaction by the Sales Tax Officer that the return is incorrect and incomplete and the second stage would be the making of the best judgment assessment. The first part of the proviso which requires that before taking action under sub-section (3) of section 17, the assessee should be given a reasonable opportunity of being heard would obviously apply not only at the second stage but also at the first stage of the inquiry, because the best judgment assessment, which is the action under Section-17, sub section (3) follow upon the inquiry and the reasonable opportunity of being heard must extend to the whole of the inquiry, including that stages. The requirement of the first part of the proviso that the assessee should be given a "reasonable opportunity of being heard" before making best judgment assessment merely embodies the audi alteram partem rule and what is the content of this opportunity would depend as pointed out above, to a great extent on the facts and circumstances of each case. The question debated before us was whether this opportunity of being heard granted under the first part of the proviso included an opportunity to cross-examine. But it is not necessary for the purpose of the present appeals to decide their question since we find that in any event the assessee was entitled to this opportunity under the second part of the provision. Where a return has been submitted, the assessee should be given a reasonable opportunity to prove the correctness or completeness of such return. This requirement obviously applies at the first stage of the inquiry before the Sales Tax Officer comes to the conclusion

that the return submitted by the assessee is incorrect or incomplete so as to warrant the making of a best judgment assessment. The question is what is the content of this provisions which imposes an obligation on the Sales Tax Officer to give and confers a corresponding right on the assessee to be afforded a reasonable opportunity “to prove the correctness or completeness of such return”. Now obviously “to prove” means to establish the correctness or completeness of the return by any mode permissible under law. The usual mode recognised by law for proving a fact is by production of evidence and evidence includes oral evidence of witnesses. The opportunity to prove the correctness or completeness of the return would therefore, necessarily carry with it the right to examine witnesses and that would include equally the right to cross examine witnesses examined by the Sales Tax Officer.

Thus, it is only for the limited purpose of complying with the provision of best judgment assessment whether it is the Kerala Act or two Tamil Nadu Act, in so far as it relates to the question of proving the correctness or completeness of the returns submitted by the assessee originally, the law of evidence can be read into it and the request of cross-examination may be granted to the assessee though not universally but selectively depending upon the facts and circumstances of each case. Does this mean that the appellants in the batch of cases being disposed of now are right in their similar contentions. If this question is to be answered one has to go into the provisions relating to revision of assessment under the TNGST Act 1959. It needs to be stated in the first place that all the cases under

consideration now are revisions of the first assessments and the property or otherwise of such revisions can be evaluated under the relevant provision only section 16(1)(a) reads.

“Where, for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the assessing authority may, subject to the provisions of sub-section (2), at any time within a period of 5 years from the expiry of the year to which the tax relates determine to the best of its judgment the turnover which has escaped assessment and assess the tax payable on such turnover after making such inquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.

The rigor built into the provisions relating to the original assessment under Section 12(3) of the TNGST Act 1959 is conspicuous by its absence in section 16(1)(a) of the Act. Under revision, it is enough if the assessee is given an opportunity to show cause against such re-assessment. The implication is that the burden of proving the protestations of innocence shifts to the assessee. The duty of the revenue would have been discharged, if the assessee is confronted with all the relevant details gathered from external sources who would not have had any designs against the assessee and could be said to have conducted themselves honestly in the routine course of their business. Nothing could have come in the way of the petitioners to place before the assessing authorities hard evidence to discredit the impugned material which has given rise to this plethora of re-assessments. Instead, their attempt to take refuge under this legal membe-jumbo is obviously dilatory. All the

petitioners have drawn my attention to the decision of the Sales Tax Appellate Tribunal (M.B) Chennai in their T.A.No's 988/99, 597/99 and S.T.A.195/2000 dated 28.4.2000 (Shri Nakoda Stores, Kumbakonam Vs. State of Tamil Nadu). They seem to suggest that the Tribunal is in full agreement with their view that in circumstances when a revision os assessment is made relying on the material gathered from third parties, the revision cannot be said to be validity made if the person affected has not been given an opportunity to cross-examine the third parties to establish that person's innocence. I am afraid the petitioners have not fully appreciated the facts leading to the sort of decision given by the Honourable Court. In that case, the court examined only the power of re-assessment and its exercise. The concern of the Court was whether the authority exercising the power of re-assessment could be said to have acted "objectively" in re-opening an assessment that had already become complete after consideration of certain facts, by a re-consideration of the same facts in a different color. If the answer was charge of opinion when a revision of assessment needed a much larger ground and harder stuff to sustain it. The petitioner was assessed to tax on their sales of skimmed milk powder purchased from various sources against "C" purchases were in fact of Pan-Parag from a who respondent with an extent of purchase of Pan Parag. The Honourable Tribunal's view was that the power of re-assessment was much mere hallowed than what had been made out to be. It would be an exercise in frivolity if no sincere attempt was made to go into the heart of the matter. In this particular case, the investigators did not

even make an attempt to locate the place where the originals of the "C" forms the investigators should be deemed to have failed miserably if they had not been on the trial of the C.Forms. The fact that this aspect had not been probed into detail alongwith other minuscular evidence such as mode of despatch, payments against purchases etc., made it appear that the assessing authority merely changed his opinion without squarely meeting the "quid pro quo" of the petitioner that their purchases against the controversial C' forms were of none other than the commodity already declared and individuality to the same rules therefore the revision on assessment was set aside by the Court. From the forgoing it can easily be seen, here, the case of the petitioner and the facts are entirely different. However, out petitioners have been confronted with all details of purchase such as bill number and date, quantity and value of the consignment and mode of despatch. There is no "quid pro quo" from their side except a flat denial. This is not sufficient to overthrow a revisional assessment made on the basis of facts and facts alone acquired from other sources. The same view is held in the case of State of Orissa Vs. Murali Manohar Babbu Daya reported in 52 STC 35. "The fact that such material is being confronted to the assessee is sufficient to put him to notice in an appropriate way and then would arise his obligation to place materials before the assessing officer with a view to disabusing his mind, if possible."

Most of the petitioners raised on issue that the revision of assessment itself was not valid as it as barred by limitation. This is not correct. The revision notices in all the

cases have been issued within the statutory time as prescribed under Section 16(1) of TNGST Act 1959 though the completion of the proceedings took some time. Therefore, the revisions are all validly made. The attention of the petitioners is drawn to the case of Bharath Refineries Limited Vs. State of Tamil Nadu reported in (1982) 49 STC 134.

In the result, there is no merit in the appeals preferred by the petitioners. There is really no universality in the matter of application of the principle of audi alteram partem as validly amended by the Apex Court. That for the extension of this principle to revisional proceedings was not at all in the contemplation of the legislation. I also don't see any ambiguity in the material projected against the petitioners for the purpose of revision. The "quid pro quo" expected of the petitioners in the fact of such an aggression on their on their nodesty" except a flat denial, which is a appallingly missing. This silence on the part of the petitioners has come as a blessing in disguise to the department. Had the "quid pro quo" been there, the action or non-action by the department would have made a telling impact on the outcome of any appeal. The legislative intention also was not to burden the department with a need to afford an opportunity first to the petitioners to discredit the evidentiary material rather than to spur the individual affected into action so that his innocence would at once be manifest for all to see. Had the latter been the case; the battle lines would have been drawn evenly, giving either of the opponents a level praying filed. In the light of the foregoing, the reassessment are all sustained including

the additions made and penalties levied.

In the result, the appeals are dismissed.”

18. Let us now consider as to how, the Tribunal has dealt with the facts and issues,

“7. During argument, the learned Authorised Representative has not only reiterated the contentions raised in the grounds of appeal. But he has also filed copies of certain Tribunal orders of this Bench in his support. He has further contended that a remand has been requested in the grounds of appeal, now it becomes very clear that the Department, is not having any other record except the extracts and the remand order will not serve any purpose. He has also filed a copy of the Special Tribunal Order in a batch case dt: 7.12.98. The facts of the case are that there were revised assessments on the basis of certain materials gathered by the Enforcement Wing in Karnataka. The grievance of the dealer was that they had to transact with the dealers in Karnataka and the Assessing Officer could have provided copies of relevant documents or entries in the accounts of the dealer so that the petitioner may have an opportunity to cross examine them. The learned Authorised Representative has contended that the Hon'ble Taxation Special Tribunal has set aside the orders of the Assessing Officer in that batch cases with the direction to the Assessing Officer to furnish copies of bills or evidences with reference to books of accounts to connect the transaction with the dealer in Karnataka with some other transaction pertaining to the dealers recorded therein or in the absence

of any records an opportunity to be given to cross examine. The learned Authorised Representative has further contended that the Special Tribunal has given a clear direction in the year 1998 which was understood, that no opportunity was given for cross examination and no records were produced for perusal to the petitioners. Evidently, the Department is not having any material other than the extracts received from other states. He also filed a copy of letter sent to the Additional Deputy Commercial Tax Officer, Pattukottai. I by one Thiru Thangaraj of Alangudi with a request to comply with the direction of the Special Tribunal. But no such materials were placed. So the learned Authorised Representative has expressed his fear that any remand order will not serve any purpose in the present circumstances.

8. The learned Authorised Representative has further filed a copy of this Tribunal order in TA.Nos.988/99, 597/99, etc., dt; 28.4.2000. In that order, the Tribunal has taken a view that merely on a extract of other State dealer, the revision of assessments cannot be made. All records pertaining to purchases and sales should be made available to the appellants to file his objection and also he must give an opportunity to cross examine. The revision was set aside by the Tribunal in the similar circumstances. So, he prayed that all appeals may be allowed since the Department is not possessing any materials other than the extracts and more extracts will not fix the responsibility on the dealer.

9. On the other hand, the learned State Representative (FAC) has contended that the Karnataka Assistant Commissioner has sent a list of purchases effected

by the Tamil Nadu dealer from the Karnataka dealers. It is a reliable document and revisions made based on the extract is quite in order. He has further contended that it is clearly proved that the appellants are already having transactions with the Karnataka dealers and when they have accounted a portion the failure to account the remaining portion is a clear case of suppression. Even in the check post, advance taxes were paid for the accounted transactions. Once the checkpost authorities have noticed the transport they use to account is and it has failed from the attention of the checkpost authority the dealer has never accounted the transaction. This is the modus operandi followed by various appellants as contended by the learned State Representative.

10. We have examined the contentions of both sides and perused the connected records.

11. In all these batch of cases, revision of assessments under Section 16 has been made by various Assessing Authorities for various dealers. Though the time bar question has been raised before the Appellate Assistant Commissioner, it was not raised before this Tribunal. We have also noticed that the revision notice has been initiated within the time prescribed under Section 16. In all the revised proceedings, it is stated that verification of record show that the dealers have not accounted certain purchases of groundnut from dealers at Karnataka State. When the proposal was objected, the Assessing Officer has over-ruled the objection by stating that already the bill number consignor's name, quantity, value and mode of transport were furnished. He is of the opinion that the Assessing

Officer cannot go and search in the check post whether it has passed through the Check Post, so he has confirmed the proposals.

12. The Appellate Assistant Commissioner has confirmed the order of the Assessing Officer. The Appellate Assistant Commissioner has mainly dealt with scope of cross examination. According to him, cross examination need not be given in all the cases. He is required to give certain decisions and come to a conclusion that the revision of assessment is in order.

13. It is brought to our notice that the Karnataka Assistant Commissioner has sent the list of purchases effected by the Tamil Nadu dealers. Based on that, all the revisions were made. It is explained by the learned Authorised Representative that actually all the consignor's name, shown in the revision order are not registered dealers. But are only commission agents who are arranging purchase of groundnut from the Market Committee. To suit the needs of some unscrupulous dealers they used the name of the well known dealers in Tamil Nadu. He has further pointed out that the bill number and date shown in the revision order is not the invoice number of the revision order. But the mediator bill which cannot give any reliability. It is not clear from the assessment order whether the consignors noted in the revision order are registered dealers and whether the bill noted in the order refers to invoice issued by a regular registered dealer. When revision notices were issued, all the appellants have demanded a copy of the records which has been verified by the Assessing Officer. They

have demanded that merely giving bill number, date, address of the dealer will not be sufficient. They demanded xerox copy of the bills referred in the notice. If any statements have been obtained, they should be made available. They also demanded cross examination. All these requests have been turned out by the Assessing Officer. According to him, it is sufficient to give the details of bill number, date invoice etc. Before examining the correctness of their contentions, it is better first to refer to the Special Tribunal order in the identical circumstances.

14. The Special Tribunal in a batch of cases ordered in O.P.Nos.2193 to 2200 etc., Dt:7.12.98 has dealt with the identical case. There is a specific direction given by the Special Tribunal that when the petitioners have denied the purchase the Department must furnish relevant records or evidence connecting them with the transactions. Though relevant details other than address of Karnataka dealer have been given is not sufficient. So the Special Tribunal has set aside the assessment with the direction to Assessing Officer furnish copies of bills or evidences or in the absence of any evidence, a cross-examination to be arranged. It is brought to tour notice even after 3 years, the Assessing Officer are not in a position to give any evidences or arranging for cross-examination. So the grievance of the learned Authorised Representative is that the direction of the Special Tribunal is not complied by the Assessing Authorities since they do not have any further records excepts the extracts. On perusal of certain records produced before us, such as letter addressed to the Additional Deputy

Commercial Tax Officer, Pattukottai, II Circle, we find that except the extract received from other state the Department is not having any further details. This is clearly proved. Now it is to be decided whether the report received from the Karnataka Assistant Commissioner can be solely relied on or not. According to the learned State Representative (FAC), it is a reliable document and it has to be given effect to.

15. The learned Authorised Representative has relied on the Kerala High Court decision reported in 122 STC 461. There, the Hon'ble High Court of Kerala at Ernakulam has observed that the Officer is empowered to make best judgement assessment. That assessment is based on reasonable conclusion. The principles of natural justice also applies to such proceedings. The assessee has clearly in his objection stated that he wanted an opportunity to cross-examine the witnesses who provided information to the Department. There has been a violation of principle of natural justice in denying that opportunity to the assessee. This decision quoted by the learned Authorised Representative is relevant in the present case. However, the Special Tribunal has given a direction first all the evidences must be produced and in the absence of any evidences, atleast cross-examination should be arranged. Section 16 of the Tamil Nadu General Sales Tax Act gives power to the Assessing Officer to make a revision of assessment. The revision of assessment must be based on acceptable data. Mere change of opinion is not sufficient to re-open. When all the facts were before the authority at the original assessment then revision is not proper. When account books

of third party are carried on, it is the duty of the Assessing Officer to afford an opportunity to the assessee on whom the re-assessment is sought to be made to examine the party which should be done only if the Assessing Officer had summoned the party with account books as prayed by the assess (69 STC 229.).

16. The dealers turnover cannot be enhanced on the basis of entry found in the records of the third party or on submission made by the latter until and unless the dealer is given an opportunity of rebutting an evidence or cross examining the third party.(66 STC 292) (Supreme Court).

17. The Hon'ble Special Tribunal in T.C.(R) No.309 to 313/2001 dt 1.11.2011 in the case of Tvl. Sha Shawarlal Lakmichand, has framed certain guidelines for affording cross examination.

“(1) Ordinarily, if statements recorded from third parties and documents received from third parties are taken into account and are sought to be relied upon, an opportunity must be given go the assessee to cross-examine the third party or peruse the documents sought to be relied upon, especially, then the assessee so desires an opportunity, at the earliest point of time.

(2) The right of cross-examination of witnesses is not always and attribute of the principles of natural justice. It will depend upon the facts of each case.

(3) If the Statement of a person is relevant for assessing the turnover of an assessee and if the said person refused to submit himself to cross-examination, it will still be open to the assessing authority to take the statement of the person into account along with other evidence, if such

other evidence corroborates the statement of the third party and made an assessment in accordance with law.

(4) The duty of an assessing officer to made assessment under Section 12 of the Tamil Nadu General Sales Tax Act, cannot be taken away by dubious methods of evading cross-examination and participation in an enquiry. If other evidence is available to corroborate the statements of the third party, such evidence can be taken into account along with the disputed statement of the third party for finding out the correct turnover.”

According to the learned Appellate Assistant Commissioner, reasonable opportunity has been given by supplying the extract. As observed by us in earlier paragraphs, the Special Tribunal in similar circumstances has held extract communication is not sufficient. In the case law cited by us for the cross verification, the facts are difference. In a particular case, re-assessments were based on details secured from Bombay dealers. Apart from the extract of transaction, gathered from the Bombay sellers, the Assessing Authority also furnished photo copies of C.Forms and also letters written by the petitioner including Demand Draft for settlement of transactions. The re-assessments were based on materials showing the transaction of the petitioner, the cross examination is not a must since reasonable evidence are produced. But in all these batch of cases we find that no other evidences were made available to the dealers for rebuttal. The reliance on the so called mediator in other state will not be sufficient to fix the liability. If the dealers have purchased the groundnuts then, the payment details

would have been collected and made available to the dealers. If they have actually crossed all the checkposts, the details would have been furnished.

18. The Assessing Officer in his order has observed that it is not the duty of the Assessing Officer to find out whether each transaction crossed during the check post. There is also possibility of non-stopping at the check post. But here, the dealers are denying the purchases of transaction. The dealer cannot prove a negative point. It is only the Assessing Officer to prove the alleged suppressions. The learned State Representative in-charge has pointed out that the dealers have transactions with Karnataka dealers and they have even paid advance takes it some check posts which clearly shows that they are transporting with defective or with no documents.

19. But the learned State Representative is not in a position to prove that the alleged purchase omissions as per the extract have been proved as if they have passed through the check posts. Whenever the Check Post records are received from the Check Posts, they are found to be accounted. In all the transactions as per the extract, there is no single checkpost record available to prove the movement of goods from the Karnataka dealer to various appellants in these cases.

20. Finally, to sum up all our findings, it is seen that the Department is in possession of the extract sent by the Karnataka Assistant Commissioner and not more than that. The payment details if any, the transport document verification are not available. It is also seen that the dealers in Tamil Nadu are going to Karnataka State and

making purchases from Marketing Committee and the agents at Karnataka are arranging the purchases. The commission agent obtains the cess receipt and produced to the dealer with his mediator invoice which mentions the description, grantity etc. We have also perused one of the mediator invoice available in the assessment file. When the purchases are effected from Marketing Committee, the invoice raised by the Marketing Committee were not made available. Based on a commission agent's account and simply because the quantity, transport, lorry number and dealer's name are mentioned, the Department cannot make the assessment unless it is proved with other records. We have also taken a view that cross examination is a must if no other evidence are available. When both are not available, then it is to be decided that the Department has not taken any material other than the extract to fix the liability on the dealers. We also quite agree with the learned Authorised Representative that even after the remand order of the Special Tribunal, no further evidence were produced on it is clearly an indication that the Department is not having any evidence other than the extract copy. By taking all these factors into consideration, we feel that the Assessing Officer is not equipped with any material to prove his claim that the dealers have purchased groundnut from Karnataka dealers and not accounted them. The business connection with the Karnataka Commission agents are the dealer will not be a conclusive proof to show whatever the transactions accounted in the order State are genuine unless the

purchasers role has been proved beyond doubt. In none of the transaction there in no single checkpoint records produced. The Assessing Officer cannot simply brush aside by stating that it is not his duty when heavy burden is cast upon the dealers and when the dealers are asked to prove the negative point. There is no other alternative except the Department to prove to provide all the required materials. Since the materials have not been provided after reasonable opportunity, we come to a conclusion that the alleged purchase omissions by the dealers are not proved beyond doubt. So we set aside the revision orders passed by the Various Assessing Authorities in these batch of appeals as the suppressions not proved. When we have not sustained the turnover in the revisional assessments, the penalty also gets automatically cancelled.

21. In fine, all the appeals are allowed.

(emphasize by us)”

19. Disputed questions of facts have been properly adverted to by the Tribunal. Evidence available on record has been analysed and material in support of the allegations have been found not furnished to the assessee to disprove the same. There is no perversity in the finding of the Tribunal nor any illegality, warranting reversal.

20. The issue as to whether reasonable opportunity has been given to the assessee, has been, held in favour of the assessee.

21. For all the above reasons, we are not inclined to accept the contention of the department, and reverse a well considered order of the Tribunal.

In the result, the Tax Case Revision is dismissed. However, there shall be no order as to cost.

[S.M.K., J.]

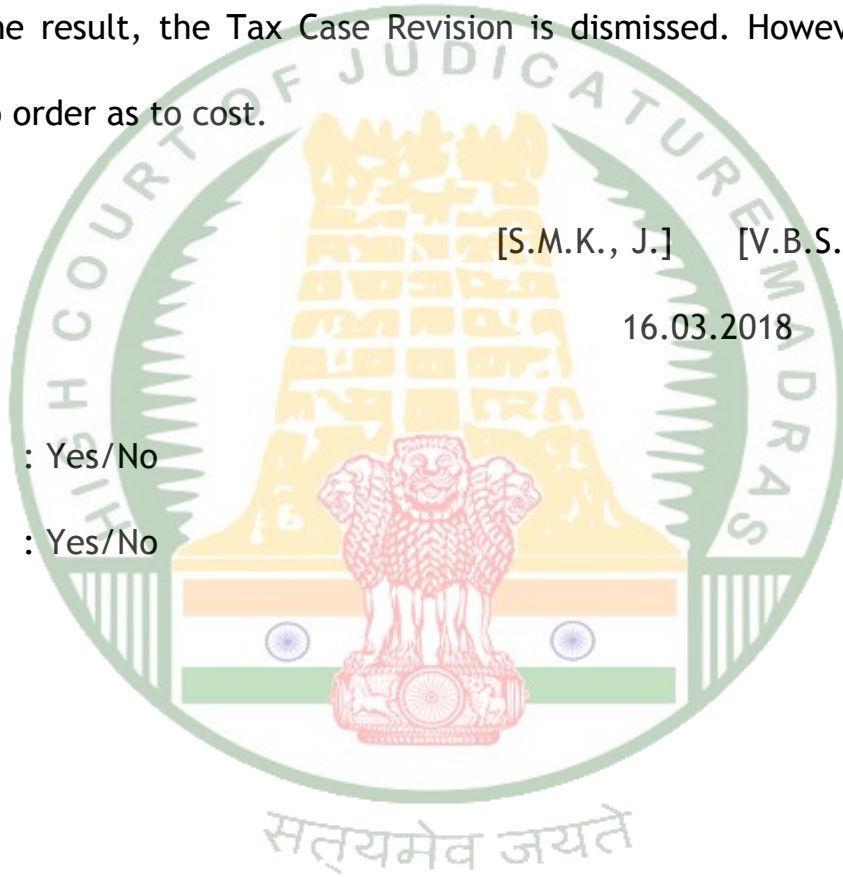
[V.B.S., J.]

16.03.2018

Index : Yes/No

Internet : Yes/No

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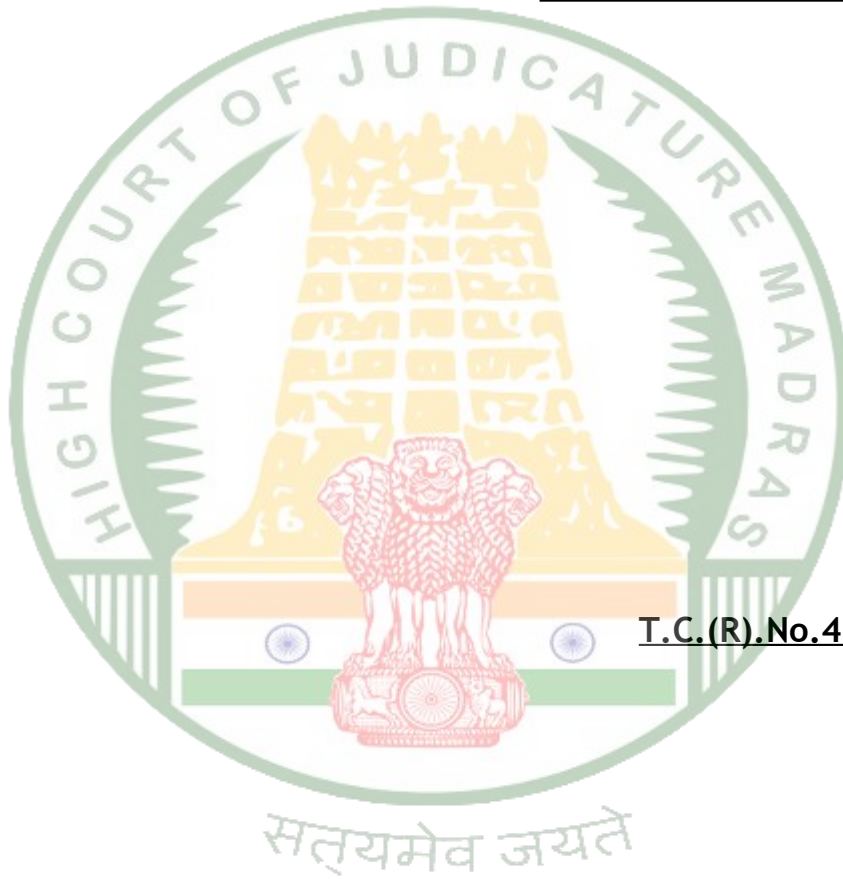
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S.MANIKUMAR, J.

AND

V.BHAVANI SUBBAROYAN, J.

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T.C.(R).No.43 of 2018

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