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.44 of 2018

The State of Tamil Nadu,
represented by the Deputy Commissioner (CT),
Chennai (North) Dvn, Greams Road,
Chennai. 600 006. .. Petitioner

Vs.

Tvl. Aditya Enterprises,
138 Anna Pillai Street,
Chennai – 600 079. .. Respondent

Prayer: Tax Case Revision is filed under Section 38 of Tamil Nadu General Sales Tax Act, 1959, to revise the order of the Sales Tax Appellate Tribunal (Additional Bench) Chennai, dated 11.3.97 passed in Tribunal Appeal Number 688/96 and Tribunal Miscellaneous Petition number 22/97.

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

ORDER

(Made by **S.MANIKUMAR, J.)**

Tax Case Revision is filed to revise the order of the Sales Tax Appellate Tribunal (Additional Bench) Chennai, dated 11.03.1997 passed in Tribunal Appeal Number 688/96 and Tribunal Miscellaneous Petition number 22/97.

2. Short facts leading to the Tax Case Revision are that the respondent, Tvl. Aditya Enterprises, dealers in Electrical goods, was finally assessed for a total and taxable turnover of Rs.12,67,128/- and Rs.Nil respectively for the year 1992-93 under the Tamil Nadu General Sales Tax Act, 1959. The levy of penalty of Rs.83,707/- was due under Section 16(2) of the said Act.

3. Aggrieved by the same, the respondent preferred an appeal in A.Nos.703 and 704 of 1995, before the the Appellate Assistant Commissioner(CT) - II, VI Floor, Kurulagam Annexe, Madras and Vide order dated 01.12.1995, modified the order by deleting the addition, as well as, restricting the penalty from 150% to 50%.

4. Aggrieved against the same, the state filed appeal in A.Nos.600 and 688 of 1996 before the Tamil Nadu Sales Tax Appellate Tribunal(Additional Bench), Chennai. Vide common order dated 11.03.1997, the same were dismissed. Revenue-II has filed Enhancement Petition Nos.704 of 1995 and 1995, before the Appellate Assistant Commissioner (CT) - II, Madras, relating to the assessment years 1991-92 and 1992-93 respectively.

5. Being aggrieved by the abovesaid order, the State has filed instant Tax Case Revision on the following grounds that, the Tribunal erred in allowing the appeal on the ground that incriminating records recovered from the residence of one of the partners pertain to the transactions in jewellery and it is not proved by the department that the partner himself did such business.

6. Mr.V.Hari Babu, learned Additional Government Pleader (Taxes), submitted that the Tribunal has failed to note that under the existing provisions of the Act, the dealers who registered himself for doing business in notified commodities is not prohibited from doing business in other commodities also. Hence, the presumption that the

respondent dealing with the electrical goods could not have dealt with other goods is bad in law.

7. He further submitted that the Tribunal has failed to note that 21 slips are recovered from the residence of one of the partners and hence the burden is on them to prove that these slins are not pertaining to the business of the respondent. The tribunal erred in casting the burden on the revenue to prove that the slips are pertaining to the business of the respondent.

8. Learned Additional Government Pleader (Taxes), further contended that the Tribunal has failed to note that inasmuch as the records were recovered from the residence of the partner of the respondent's firm, it is for the respondent to explain as to how the records came to be recovered from the residence of the partner.

9. Heard the learned Additional Government Pleader (Taxes) and perused all the materials available on record.

10. The Appellate Assistant Commissioner (CT) - II, Madras, vide order dated 01.12.1995, discussed and answered the issues and modified the order of the Assessing Authority, as hereunder:-

"9. The first issue in this appeal pertains to the actual suppression. The actual suppression is based on the records recovered during the course of inspection and sales of jewellery by the appellant. Though the appellant had denied that they had done any transaction in jewellery as they dealt basically in electrical goods only. But, nevertheless, the transactions noted in the slips had been cross verified by the Enforcement Wing Officer as well as the assessing authority and in as much as records were recovered from the place of business and residence of the partner of the appellant firm there is no gain saying in the fact by the appellant that they have no connection with the recovered records. In fact, they failed to offer convincing explanation as to how the records came to be recovered from the residence of one of the partners.

10. The appellants contended that they are not aware of the fact as to how the slips came to be recovered from the residence of the partner. The matter could not be explained property since the managing partner was not available at the time of inspection. However, this plea is not acceptable since the recovery of incriminating records had shown that they had such business dealings and the appellant had something to do with these transactions.

It would be appropriate here to cite the case of Tvl.Nanak Glass works (1979) TC 961 TK 320 (Up) wherein it was laid down that the records having been recovered from the appellant's place it is for them to explain the transactions and the entries therein would have to be *taken as those relating to the assessee.*

11. Having regard to the facts I cannot take a stand dissimilar to what has been taken by the Enforcement Wing Officers and assessing officer as there is a case against the appellant in the light of the records. The actual suppression as found from the slips is, therefore, sustained in both the appeals.

However, with regard to appeal No.704/95, there is a calculation mistake as could be seen from page 177 of the assmt. file. It relates to slip No.21 and Sl.No.2 the value for 1608.650 gms. at the rate of Rs.300/- per gram was taken as Rs.4,85,595/- whereas it actually works out to Rs.4,82,595/-. Thus there is a total error of Rs.3,000/-. The actual turnover works out to Rs.1003215/- and not Rs.1006215/- as shown by the assessing authority. This turnover is therefore, modified as discussed above.

12. With regard to the estimated suppression it needs to be taken note of that the inspection was done on 18.2.93 that is to stay at the fag end of the financial year 92-93. During the course of search and seizure by the enforcement wing officers what all the incriminating records were available had been seized and examined and had been any other spurious records other than this it would also have been unearthed simultaneously. So the facts are simple that all the records which were not reflected in the regular accounts had there been recovered and the recovered records showed complete picture of suppression during the years 91-92 and 92-93. Therefore, there can be no scope to suggest that there *would have been any other suppression for the ensuring period as the inspection period covered both the financial years in full and in 92-93 the period left after inspection was very little so as to suggest probable suppression apart from what has been suppressed in the incriminating records.*

13. Further, another point needs for consideration is the nature of business of the appellant. The appellant were basically dealers in electrical goods and they had been assessed on electrical goods accordingly. The incriminating records showed the case of gold and silver articles. Though the appellant denied any nexus with the recovered slips but the plea could not be accepted by the assessing officer since the recovery of the records was made from the residence of one of the partners and the liability had to be fastened on the appellant firm. There is no corroborative evidence to suggest that the appellant had similar unreflected transactions in such goods other than what had been found in the incriminating records so as to make the case for probable omission.

14. It is further point that the recovery of records was sequal to search of residence of Thiru.S.Prabhakara Rao, partner of the appellant firm i.e. Aditya Enterprises. It is an admitted fact that the appellant firm i.e.Adita Enterprises were dealers in electrical goods and the taxable turnover was NIL for both the years in dispute. As such, the incriminating records were not recovered from the place of business so as to hold the doubt that the appellant firm itself had the dealings *or gold jewellery and silver articles. The liability was fastened on the appellant firm for the reason that all the partners are jointly and severally responsible for the business. Moreover the inspection report says that there was no stock of goods during inspection.*

15. Considering the nature of suppression highlighted and the various facts and circumstances of the case and the fact that the recovery of records was from the residence of the partner and not from the business premises, I hold the view that equal addition for probable omission in both the appeals.

16. The nest point of dispute relates to the levy of penalty. I feel that levy of penalty of 150% of the tax due on the actual suppression would not be fair for the reason that the recovered records were obtained only from the residence of one of the partners and not from the business premises and that the appellant had not been dealers in gold and silver articles and on the contrary, they had dealings only in electrical goos and also for the reason that the recovered records showed transaction hitherto unconnected with business activity of the appellant and so the circumstances involved are not as aggregating as to invite maximum penalty both the cases.

17. The matter of levy of penalty has been lucidly dealt with in a number of cases. To being with, the cse law reported in (1978) 42 STC 121 (Mad) in the case of Kadiresan Yarn Stores Vs. State of Tamil Nadu is appropriate here. The verdict given therein stand as follows:-

"It cannot be stated that the process of imposition of penalty is an automatic one whenever the estimate is made, when it is found that no return has been filed or that the return filed did not indicate the turnover to the extent fixed on the basis of heat judgment assessment. All the circumstances of the case will have to be carefully scrutinised and the question whether penalty should be imposed must be considered on the basis of judicial deter inaction on the question whether ground exist for the imposition of such penalty. It order that penalty may be imposed it must be possible first to come to the conclusion that there was actually the turnover which was not disclosed. The mere fact of best judgment assessment particularly when the assessment is based on the interference from the inability the purpose of imposition of penalty is of a much higher order than that required for the purpose of making best judgment assessment."

18. So far as the levy of penalty is concerned, the assessing authority is justified as the incriminating records had been scrutinesned and were brought forth the turnovers suppressed and the case of undisclosed turnover cannot be 1st off lightly. The need to invoke the penalty provisions of the Act stands justified.

But so far as the quantum of penalty imposed is concerned it needs interference as the assessing authority had imposed in penalty notwithstanding the fact that the transactions business activity of the appellants and that the records recovered were not from the business premises but only from the residence of the *partner.*

In the case reported in 69 STC 170 and 77 STC 118 it was laid down by the Courts of Law that the quantum of penalty should depend upon the gravity of offence and circumstances of the case, so also in the judgment reported in 48 STC 360 it was laid down that the order imposing penalty must show that the need for penalty as well as the quantum of penalty were considered judiciously and that maximum penalty should not mechanically be imposed in all the cases.

19. A more pertinent case is that of Govardhan Trading Co., V. State of Andhara Pradesh report (1995) 94 STC 1. It was held in this case that the approach that should be adopted in levying penalty should just and reasonable and only when there are aggravating circumstances with regard to the suppression of turnover that the sales tax authorities would be justified in levying the maximum penalty.

Considering the facts and circumstances of the case and the judgments in this behalf I am of the opinion that the circumstances involved in the present case do not call for the maximum levy of penalty. On the contrary penalty of 50% of the tax due on the suppressed turnover would be enough to fulfill the ends of justice. The assessing authority is therefore directed to reduce the refix the penalty accordingly at 50% of the tax due on the actual suppressions confirmed.

20. In the result, both the appeals are modified."

11. Contentions of the rival parties and the decision of the

Appellate Tribunal in A.No.600 of 1996 and Tribunal Miscellaneous Petition No.835 of 1996 and Tribunal Appeal No.688 of 1996 and Tribunal Miscellaneous Petition No.22 of 1997, dated 11.03.1997, are extracted hereunder:-

> *"3. Thiru.S.Jothiramalingam, Additional State Representative, appearing on behalf of the Revenue Submitted and argued that when the Appellate Assistant Commissioner sustained the actual turnover, he should have also sustained the actual addition. He further submitted that the Appellate Assistant Commissioner restricted the penalty from 150% to 50%. For his argument, he has relied the decision here in the case of H.M.Esufali, H.M.Abdulali reported in 32 STC 77. He further submitted that when the turnover was called out from the records equal addition to the turnover is very reasonable. The Appellate Assistant Commissioner without giving importance to the facts and circumstances of the case deleted equal addition which is illegal. Thus he argued for the restoration of the order of the assessing officer.*
>
> *4. Thiru.V.A.Varadhan, Advocate appearing on behalf of the argued that at the time of inspection and search number of records were recovered. The transaction as per the books marked A, B,C,D,E,F,G and H were duly accounted for in the accounts of the appellants. Those transaction relate to business of electrical goods. But the book 'C' constrains transactions in silver and gold jewellery. The appellants are not dealers in jewellery. Without proper investigation and probe, the assessing officer assessed the turnover relating to the gold and silver jewelleries as if they relate to their business. He further*

submitted as the turnover does not relate to the business penalty levied under Section 16(2) is also not legally valid. He has also filed detailed counter to the Enhancement Petitions.

5. We have heard the arguments of both sides and perused the connected records.

6. The assessing officer revised the assessment based on the details of the transactions as seen from book marked 'C'. The appellant deals the transactions. We have perused the records and found that book marked 'C' is nothing but bundle of slips. There are 22 slips. All the slips contain the transaction of gold and silver articles. These slips also certain expenses payment to various persons including labour charges. Further they also contain name of some important leading dealers in jewelleries in Chennai. It is not disputed that the appellants were exclusively dealing in electrical goods. We have perused the assessment records. The assessment records do not speak anything about the business activities of the appellants in jewelleries. It is also not disputed that the appellants are doing electrical goods throughout the business till closure. From the beginning the appellants denied the transactions. The lowers authorities held that the records were recorded at the time of search of the residence of one Thiru.Prabahar Rao who is the partner of the above concern. They also held that it is the duty of the appellants to explain the details of these records. It is also not disputed that the appellants denied the transactions even at the time of assessment proceedings. As we have detailed above, these slips contain the name of the seller and leading dealers in jewellery. When the appellants denied even at the time of assessment proceedings it is the duty of the assessing officer to examine those dealers as found in the slips.

By way of examination, they could have ascertain some details regarding the ownership of the slips and details as the transactions. Further the slips also contain the transactions with Lakshmi Vilas Bank, Chennai. The account number is also noted in the in the slip. The assessing officer would have verified these bank's transactions and come to the conclusion whether these slips relate to the appellants or not.

7. It is accepted that the appellants are not manufacturers of Jewelleries. The appellants did not also deal in silver jewellery articles. There should have been infrastructure for such business. The assessing officer could have examined the 'asari' to ascertain whether the appellants did business in jewellery clandestinely. He could have also investigated and enquired the neighbours in and around to ascertain whether the appellants were doing transactions in silver and gold jewelleries. Further the records were recovered only from the residence of Prabahar Rao who is the partner of the above concern. There is possibility that Prabahar Rao could have done the business individually without the knowledge of other partner of business. But however the firm was assessed. Moreover it is also not proved that Prahabar Rao alone did huge business clandestinely. Even on the above assumption the assessing office did not probe and investigate. The only reason relied on for the assessment is that the records recovered from the residence of Thiru.Prabahar Rao partner of the above firm. The appellants from the beginning stated that the guests who attended their family function would have left these papers. In the absence of investigation by the department we find that there is a force in the argument of the appellant. The assessing officer did not take any steps of efforts to connect the *transaction as per the slips to the transactions dealt by the appellants. The appellants are exclusively dealing in electrical goods. So it is highly imaginery to come to the conclusion that the electrical dealers would have done such huge business in jewelleries without any infrastructure. In the absence of any categorical investigation, probe and enquiry, we are unable to accept the assessment made by the lower authorities on the basis of the records which contain different transactions not connected with the regular business of the appellants. We, therefore delete the assessment made in the revision proceedings for both years.*

8. As the assessment are deleted penalty under Section 16(2) is also deleted for both years.

9. Regarding enhancement petition, as the appeals were allowed for the reasons detailed in the above paras we hold that the enhancement petitions are not entertainable.

12. Though Mr.Hari Babu, learned Additional Government Pleader (Taxes), made submissions seeking for reversal of the order of the Tribunal, on the grounds stated supra, we do not find any material irregularity or illegality in appreciation of the evidence, both by the Appellate Authority and Tribunal. Respondent is not a dealer of Silver and Gold Jewellery.

13. Assessing Officer has assessed the turnover, relating to silver and gold, as if they relate to the business of the respondent dealer.

There is no perversity in the finding. There is no irregularity or illegality, warranting reversal of the order of the Tribunal. There is no question of law, much less substantial question of law.

14. Hence, the Tax Case Revision is dismissed. No Costs.

[S.M.K., J.] [V.B.S., J.]

16.03.2018

Index : Yes\No

Internet : Yes\No

dm

S.MANIKUMAR, J.

AND

V.BHAVANI SUBBAROYAN, J.

dm

T.C.(R).No.44 of 2018

16.03.2018