

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

and

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

T.C.No.62 of 2018

The State of Tamil Nadu,
Rep. by the Joint Commissioner (CT),
Chennai (North) Division,
Chennai - 6. ... Petitioner

Vs.

Tvl.Viswanatha Oil Mills,
No.2, Thathamuthiappan Street,
Chennai - 600 001. ... Respondent

Prayer: Petition filed under Section 38 of the TNGST Act, 1959,
to revise the order of the Tamil Nadu Sales Tax Appellate
Tribunal (Additional Bench), Chennai, passed in T.A.No.244/2003,
dated 22.12.2011.

PRAYER IN T.A.No.244/2003:

Appeal filed against the order of appellate assistant
commissioner (CT) II dated 29.01.2003 in appeal No. & year
A.P.359/2001 against the order of revision or der dated
31.10.2000 on the file of the Commercial Tax Officer, loon Squar
Assessment Circle Cehnnai 108 in TNGST.034/35/94-95 against the
order of the assessment order dated 19.01.1999 for the year 94-
95 in Assessment Number and year TNGST.034135/94-95.

For Petitioner : Mr.V.Hari Babu
Additional Government Pleader (Taxes)

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O R D E R
(Order of the Court was made by S.MANIKUMAR, J.)

Instant Tax Case (Revision) is filed against the order of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai, dated 22.12.2011, made in T.A.No.244/2003.

2. Facts as deduced from the material on record are that Tvl. Viswanathan Oil Mills, dealers in edible oils, groundnut oil cake and vanaspathy, reported a total and taxable turnover of Rs.4,34,58,552.90 and Rs.52,71,934.13 respectively. During the check of accounts, the Assessing Officer has found certain stock discrepancy and closing stock in the Trading and Profit account for the year ending 31.03.1995. Hence, the Assessing Officer assessed the dealer on taxable turnover of Rs.57,55,528/- for the year 1994-95, under Tamil Nadu General Sales Tax Act, 1959, and also levied penalty of Rs.15,604/- under Section 12(3) of the Act.

3. Aggrieved over the assessment, the dealer, filed an appeal before the Appellate Assistant Commissioner (CT)-II, Chennai, disputing the turnover of Rs.57,55,528/- and levy of penalty of Rs.15,604/-, under Section 12(3)(b) of the Act. The Appellate Assistant Commissioner, vide order, dated 29.01.2003, dismissed the appeal, as follows:

"4. I have heard the arguments of Authorized Representative and Departmental Representative and perused the connected records. At the time of hearing, the Authorised Representative has reiterated the points raised in the grounds of appeal. The Departmental Representative who appeared on behalf of the Revenue has stated that the appellants have already arrived at the stock difference on the basis of the inspection and also added equal addition for probable omissions and as such the addition of Rs.1,15,072/- has to be sustained besides the levy of penalty, as the appellant had willfully suppressed the turnover. But for inspection, the same could not be revealed.

5. The argument of both sides were considered and found that the inspecting officers had arrived at the stock difference of Rs.52,306/- at the time of inspection. The appellants have also accepted the stock difference made by the inspecting officers and as such their plea could not be accepted

in view of the decision reported in 43 STC 525, since the appellants cannot go back on the submission statement given already. Regarding their contention that the stock difference was below 2%. It is not acceptable, since the Assessing Officer had already stated that the stock difference was worked out to 3% of the total value of stock available at the time of inspection. Hence, the assessment made on stock variation of Rs.52,306/- is confirmed. Further, the difference amount of Rs.10,470/- added by the Assessing Officer is also confirmed. Since, the inspecting officers have noticed the stock difference at the time of inspection, to which penalty is called for, the penalty levied by the Assessing Officer for Rs.15,604/- is confirmed.

6. In fine, the appeal stands dismissed."

4. Being aggrieved, the dealer has preferred T.A.No.244 of 2003, disputing the sustaining of penalty of Rs.15,605/-, under Section 12 (3) (b) of the Tamil Nadu General Sales Tax Act, 1959, for the year 1994-95, under the Tamil Nadu General Sales Tax Act, 1959, against the order of the Appellate Assistant Commissioner (CT)-II, Chennai, in A.P.No.359 of 2001, dated 29.01.2003. Vide Order, dated 22.12.2011, the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai, partly allowed the order of the Appellate Assistant Commissioner (CT) - II, Chennai, as hereunder:

"Heard both. Record perused.

The issue to be decided in this appeal is:

(i) Whether the order of the Appellate Assistant Commissioner is sustainable or not ?

It is an admitted fact that the appellants place of business was inspected by the Enforcement Wing and found out stock discrepancy and also the statement recorded from the Proprietor of M/s.Viswanatha Oil Mill. However, the Proprietor of M/s.Viswanatha Oil Mill admitted the stock discrepancy. Even though the appellants stated that in the reconciliation statement of the inspecting officer that the stock

found Rs.37,106/- pertains to the second sales of the goods on which the tax had already been suffered. But on perusal of records on the reconciliation statement there is no such fact found out in such circumstances the efforts of appellant ends in vain. Regarding the application of G.O.Ms.200 there is no material found in the records that the stock difference available at the time of inspection is below 2% when, compared to the actual stock available at that time. There is no force in the arguments of the appellant regarding the difference of turnover of Rs.10,470/-. So we feel that there is no error in sustaining the turnover assessed by the Assessing Officer and also there is no error in sustaining the equal time addition also. Regarding the 12(3) (b) penalty, it is found that all the figures were taken from the appellants books of accounts, so there is no omission on the part of the appellants. In such condition the levy of penalty will not arise under Section 12(3) (b) of the Tamil Nadu General Sales Tax Act, 1959. So, we hereby ordered to set aside the penalty which was levied under Section 12(3) (b) of the Tamil Nadu General Sales Tax Act, 1959.

In fine, the Tribunal Appeal is partly dismissed and partly allowed."

5. Being aggrieved, the State has preferred the instant Tax Case Revision.

6. Mr.V.Haribabu, learned Additional Government Pleader (Taxes) submitted that the Tribunal, ought to have seen that the Assessing Officer had levied the penalty in as much as the dealer had claimed incorrect exemption by not reporting the turnover as taxable and paid tax, as prescribed under the Act, which amounts to filing of incorrect and incomplete return and hence, the Assessment made falls under Section 12 (2). Consequently, the levy of penalty under Section 12 (3) (b) is automatic.

7. He further submitted that the Tribunal erred in deleting the penalty holding that levy of penalty under Section 12 (3) (b) is not called for, since as per the amended provisions of Section 12 (3) (b) of the TNGST Act, levy of penalty is automatic and it should be levied when there is balance of tax

payable to the Government.

8. He further submitted that the Tribunal failed to note that the State has preferred Special Leave Petition in an identical issue before the Hon'ble Apex Court, which is pending in SLP.CC.7430/2002/Tagged with C.A.Nos.1683 of 2002 dated 25/6/2002 in respect of the issue relating to levy of penalty under Section 12 (3) (b) of the TNGST Act.

9. Section 12(3)(b) of the Act deals with, submission of incorrect or incomplete return and for the purpose of levy of penalty, under Clause (b), the tax assessed on the following kinds of turnover shall be deducted from the tax assessed on final assessment,

"(i) twenty-five per cent of the difference of the tax assessed and the tax paid as per return, if the tax paid as per the return falls short of the tax assessed on final assessment by not more than five per cent;

(i-a) fifty per cent of the difference of the tax assessed and the tax paid as per return, if the tax paid as per the return falls short of the tax assessed on final assessment by more than five per cent but not more than fifteen per cent;

(ii) seventy-five per cent of the difference of the tax assessed and the tax paid as per return, if the tax paid as per the return falls short of the tax assessed on final assessment by more than fifteen per cent but not more than twenty-five per cent;

10. In Appollo Saline Pharmaceuticals (P) Ltd., Vs. Commercial Tax Officer (FAC) and Others, reported in {(2002) 125 STC 505}, considering a decision of the Hon'ble Supreme Court in State of Madras Vs. Jayaraj Nadar & Sons {(1971) 28 STC 700, at paras 5 to 7, held as follows:-

"5. The Supreme Court in the case of State of Madras Vs. Jayaraj Nadar & Sons {(1971) 28 STC 700, at page 701, after extracting Section 12 (2) of the Tamil Nadu General Sales Tax Act, 1959, which remains in the same form even now, observed thus:-

"The question is whether penalty can be levied while making the assessment under sub-Section (2) of the above Section merely because an incorrect return has been filed.

The High Court was of the view that it is only if the assessment has to be made to the best of the judgment of the assessing authority that penalty can be levied. It seems to us that the High Court came to the correct conclusion because sub-sections (2) and (3) have to be read together. Sub-Section (2) empowers the assessing authority to assess the dealer to the best of its judgment in two events: (i). if no return has been submitted by the dealer under sub-section (1) within the prescribed period, and (ii). If the return submitted by him appears to be incomplete or incorrect. Sub-Section (3) empowers the assessing authority to levy the penalty only when it makes an assessment under sub-Section (2). In other words, when the assessing authority has made the assessment to the best of its judgment, it can levy a penalty. It is well known that the best judgment assessment has to be on an estimate which the assessing authority has to make not capriciously but on settled and recognised principles of justice. An element of guess-work is bound to be present in best judgment assessment but it must have a reasonable nexus to the available material and the circumstances of each case: [see State of Kerala Vs. C.Velukutty {(1966) 17 STC 465 (sc)}]. Where account books are accepted along with other records, there can be no ground for making a best judgment assessment."

6. The law so declared that the best judgment assessment is based on an estimate and is not one based solely on the account books was reiterated by the Supreme Court in the case of Commissioner of Sales Tax, Madhya Pradesh Vs. H.M.Esufali H.M.ABDULALI {(1973) 32 stc 77}.

7. Though other sub-Sections of Section 12 were amended by the State Legislature subsequent to the date of the judgment in the case of Jayaraj Nadar & Sons {(1971) 28 STC 700 (SC)}, Sections 12 (1) and 12 (2) have remained in the same form. The legislative intention therefore, except during the period December 3, 1979 to May

27, 1993 and on and after April 1, 1996 must be taken to be to, permit the levy of penalty only in case where the assessment is a best judgment assessment made on an estimate and not by relying solely on the accounts furnished by the assessee in the prescribed return. On and after April 1, 1996 an explanation has been added below Section 12 (3) which requires the turnover relating to the tax assessed on the basis of the accounts of the assessee, to be disregarded, while determining the turnover on which the penalty is to be levied under Section 12 (3)."

11. In Indira Industries Vs. State of Tamil Nadu, reported in {2014 (69) VST 139 (Mad.)}, this Court considered a question, as to whether, levy of penalty under Section 12(3)(b) of the Tamil Nadu General Sales Tax Act, 1959, was justifiable, particularly, when there was no suppression pointed out by the Revenue that the Claim of the assessee related only to concessional rate of tax. This Court held as follows:

"8.Thus when the turnover assessed under the assessment order is drawn from the books of accounts itself, and there being no reference to any specific concealment of the turnover in the accounts, the question of invoking section 12(3)(b) of the Tamil Nadu General Sales Tax Act, 1959 would not arise. The Explanation to section 12(3)(b) of the Act specifies the turnover which merited to be excluded for the purpose of levy of penalty, one such being the turnover representing addition related to book turnover itself. Thus, even while calculating the turnover for the purpose of levy of penalty, the turnover, which are already available in the books of accounts are to be excluded and only those turnover which are estimated having reference to a specific concealment alone, the purpose of addition, invite the penal provisions under the Tamil Nadu General Sales Tax Act, 1959. In the decision reported in [2002] 125 STC 505 (Mad) (Appollo Saline Pharmaceuticals (P) Limited v. Commercial Tax Officer (FAC)) this court pointed out that when the assessment is based on the accounts turnover, the question of levy of penalty does not arise."

9. In the circumstances, applying the

said decision reported in [2002] 125 STC 505 (Mad) (Appollo Saline Pharmaceuticals (P) Limited v. Commercial Tax Officer (FAC)) and the Explanation to section 12(3)(b) of the Tamil Nadu General Sales Tax Act, the order of the Sales Tax Appellate Tribunal in levying penalty under section 12(3)(b) of the Tamil Nadu General Sales Tax Act, 1959 is set aside and the tax case (revision) is allowed. No costs."

12. In Tax Case Revision No.186 of 2009, dated 28/7/2016, between Tvl. Shyam Air Fridge, Vellore and The State of Tamil Nadu, rep. By The Deputy Commissioner (CT), Vellore, on the facts and circumstances of the case, at para No.18, a Hon'ble Division Bench of this Court held as follows:-

"Levy of penalty would not be justifiable, if at the time of assessment, turnover has been recorded as per the books of accounts, verified by the department and in such circumstances, suppression cannot be attributed. Transaction giving rise to taxable turnover, has been categorically declared by the assessee as composite works contract and at the concessional rate of 4%, tax has been paid. In such circumstances, it cannot be contended that it is a deliberate and wilful non-disclosure of turnover, in the return and thus rightly proceeded, under Section 12 (3) (b) of the Act, which deals with submission of incorrect or incomplete return. Though penalty is leviable under the provisions of the Act, while exercising discretion, the assessing officer is required to take note of the bona fides of the assessee. Contention of the respondent that levy of penalty under Section 12 (3) is automatic, cannot be accepted, in the light of the explanations to Section 12 (3) of the Act."

13. There is no suppression in the books of accounts and this fact has been categorically stated by the appellate authority, in his order, in which event, the assessee is entitled to invoke explanations (i) and (ii) to Section 12(3)(b) of the Act. Specific written arguments extracted supra, have not been considered at all.

14. In the light of the above discussion and decisions, Tax Case Revision Petition is dismissed and the substantial question of law is answered in favour of the assessee. No costs.

Sd/-
Assistant Registrar(CS-ii)

//True Copy//

Sub Assistant Registrar

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TO.

1 THE PRESIDING OFFICER,
THE SLES TAX APPELLATE TRIBUNAL,
(ADDITIONAL BENCH) CHENNAI.

2 THE JOINT COMMISSIONER (CJ)
CHENNAI (NORTH) DIVISION CHENNAI 6.

3 THE APPELLATE ASSISTANT
COMMISSIONER CT- II, CHENNAI 600 108.

4 THE DEPUTY COMMISSIONER
(CT) (FAC), CHENNAI (NORTH) DIVISION,
CHENNAI 600 006.

5 THE COMMERCIAL TAX OFFICER,
LOAN SQUARE-I ASSESSMENT CIRCLE, CHENNAI.

T.C.No.62 of 2018

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