

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28/3/2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR  
AND  
THE HON'BLE MR.JUSTICE M.GOVINDARAJ

Tax Case No.70 of 2018

The State of Tamil Nadu  
Represented by the Deputy Commissioner (CT)  
Chennai (Central) Division  
Chennai 600 006.

... Petitioner

v.

Tvl.Shardlow India Ltd,  
Huzur Garden,  
Sembium,  
Chennai- 600 011.

... Respondent

**Prayer:** Tax Case Revision is filed under Section 38 of the TNGST Act, 1959, to revise the order dated 17.04.2002, made in S.T.A.No.459 of 2000, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai.

For petitioner

...

Mr.V.Hari Babu

Addl. Govt. Pleader (Taxes)

**ORDER**

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

17.04.2002, made in S.T.A.No.459 of 2000, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai.

2. Facts as deduced from the material on record are that Tvl.Shardlow India Ltd., manufacturers of steel forgings and crank shafts at Huzur Gardn, Madras, were finally assessed, on a total and taxable turnover of Rs.11,73,60,615/- and Rs.11,73,60,615/-, respectively, against the reported total and taxable turnover of Rs.22,20,37,318/- and Rs.11,88,68,103/- respectively, for the year 1990 - 91, under Tamil Nadu General Sales Tax Act, 1959, and also levied penalty of Rs.6,19,703/-, under Section 12(3) of the Act.

3. Aggrieved over the assessment, the dealer, filed an appeals before the Appellate Assistant Commissioner (CT)-VI, Chennai, who vide order, dated 09.01.1998, partly allowed and Partly dismissed the appeals, as follows:

*"5. I heard the argument on both sides and perused the connected records.*

*6. The main point for determination in these cases are whether the orders of the Assessing Officer is liable to be set aside.*

*Since these two appeals are related to the same*

dealer and the issues involved are one and the same dealer and the issues involved are one and the same, a common order is passed.

A. The main issued in there two appeals is die development charges. The appellants are manufacturer of dies and using the dies, they manufacture components. The appeal AP.772/95 related to the same appellant in this appellate forum has been dismissed in the order dated 8.9.97. The appellants have filed written argument and stated that the order of the sales tax appellate Tribunal (Main Bench) in T.A.642/90 and 113/90 has not been considered while passing the order and insisted that these two order have to be considered.

(i) It is held in AP.772/95, that the appellants have maintained separate accounts for the cost of engineering and Technical skills used in the manufacture of forges and crank shafts, as such the cost is usually merged in the cost is usually merged in the cost of final products. The appellants contend that from manufacturing of of sample die upto the finished product namely 'components' have two parts. First is manufacture of sample die. That means, the appellants manufacture die and sent for approval only on approval, from this sample die, original dies are made out of which components are manufactured. The sample dies are kept with the appellant and they will not be given to the party. The amount collected is only

to develop this sample die. The cost of make in other dies to manufacture components, is collected from the party subsequently. So the amount called die developing charges is collected only for the development of sample dies. In as much as the dies are retained by the appellant there is no transfer of property. This amount is taken to the Research and Development (R & D) head in the profit and loss account and not to the cost.

(ii) I have perused the copies of judgment given by the sales tax appellate Tribunal (Main Bench) in T.A.No.113/90 and 642/90. In T.A.No.642/90 in the case of Forge Tools, Madras-21 the appellants have collected die making charges. The sales tax appellate Tribunal held as below:-

"Since the dies remained in the custody of the appellants it can be safely concluded that there was no passing of dies to the customer. Since the dies were retained by the appellant and the appellant used, these dies for further re-casting for further orders, there is no transfer of property and as such, charges involved for making dies represent only Labour charges and this turnover cannot be included in the taxable turnover and the appellants is entitled for the exemption claimed."

(iii) In the same matter, the sales tax Appellate Tribunal (Main Bench) has held below in the case of Ennore Foundaries Ltd, in T.A.113/90, dated 2.5.91.



*"Modification charges can be amount and only labour charges since the pattern remains the property of the customers and there is no transfer of property to the appellant, the charges are only labour charges not liable for assessment."*

*According to the above decision of the Hon'ble Tribunal, the assessment made by the Assessing Officer is not sustainable one as held by sales tax appellate tribunal in T.A.No.642/90 and 113/90, there is no transfer of property and hence tax cannot be levied. The said decisions are squarely applicable to the present case. Though the appellant has not maintained separate account for cost of technical skill and engineering, in as much as the die development charges are collected and maintained separately from the cost of regular dies and components, these accounts are accepted as genuine one.*

*(iv) The appellants have also produced the order of the excise Department wherein the cost of sample die has been exempted from the levy of excise duty. These all to go to prove that there is no element of sale in the manufacture of sample dies and therefore, the development charges cannot be assessed to tax. In views of the above discussion, I set aside the assessment made of die development charges.*

*B. Apart from this the appellants have also disputed against certain other assessments. They have not pressed for such appeal on those turnover as stated*

*below:-*

*AP.607/95:- Rs.53,704-00 second sales disallowed*

*AP.687/95:- Rs.61,069-00 sales return disallowed.*

*Since the appellants have not pressed for the appeal on these turnovers the assessment on these turnover are sustained.*

*C. The appellants have also disputed against the assessment made on Rs.2,04,327-00 at 8% and Rs.2,01,136-00 at % 8% as sales of REP Licences. As sale of REP Licences have been held taxable in the cases reported in 86 STC 175, 94 STC 139, the assessment made on these turnovers are sustained.*

*Since these appeals are modified, the surcharges, additional surcharges, additional sales tax and penalty are also modified accordingly.*

*Thus the appeal stands partly allowed and partly dismissed."*

4. Being aggrieved, State has preferred S.T.A.No.459 of 2000 before the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai. Vide order dated 17.04.2002, S.T.A.No.459 of 2000 has been dismissed the same, as hereunder:

*"1. We have examined the contentions of both sides and perused the connected records.*

*2. The only issue involved in all these four appeals*

are whether die development charges collected by the respondents are to be included in the taxable turnover or not. According to the dealers, the receipt represents skill, involved in development of dies which is only a labour element with their own material and no transfer of property is included. It is also contended that the respondents retained the dies manufactured and they are taking to stock which are subsequently sold as scrap and tax has been paid. The debit notes raised on the customers only for engineering and development cost and not for manufacture of dies. The dies are manufactured by using the dealers own material and they are not at all sold. The die cost as against the Engg., and development cost is recovered in the selling price of the forgings. The cost structure of the product in which die cost is also recovered from the customers and it is subject to tax in overall price. Whenever the dies are manufactured and shown in the Balance Sheet, it is wrong to state that the dealers are retaining the dies as their own. Further, they did not manufacture dies for the purpose of sale and dies are manufactured for their own consumption to manufacture forgings. It is evident by the fact that dies did not attract excise duty.

3. It is also contended that in a common practice in such kind of industry, to charge development cost in the form of preparation of necessary engineering specific model which will not come under the purview of sale as per section 2-A. Normally manufacture will prepare dies

blocks for manufacturing any products out of their own materials for which cash is recovered from customers to harass loss of revenue if the party has gone back in his order. On examination of the record we have found that debit notes have been raised in the name of the customer. The expenses relate to the cost of the dies manufactured after putting in engineering and development skills, manual labour, designs etc. For this purpose, the dealers are drawing the debt notes. In this context, we have referred to section 2(r) of the Tamil Nadu General Sales Tax Act. In explanation clause 2 it is specifically stated that the turnover means, the amount for which goods are sold and it includes any sums charged for anything done by the dealer in respect of goods sold at the time of or before the delivery thereof. So, as per the section, any activity which has got also connection, if the sale of the finished goods should be included. In the context, our attention is drawn that as per definition of sale, only when the property in goods is transferred it attracts tax. It is contended that the sample die manufactured is not passed through the customer. When there is no transfer of property the turnover is not liable to be taxed as per the contention of the learned Advocate.

4. The learned State Representative has relied on Refrigeration case and MC Dowell's case. There are 2 MC. Dowell delivered. As per the first MC. Dowell's case, the Hon'ble Supreme Court has held that excise duty paid by



*the purchaser did not form part of the turnover of manufacture on consideration of Rule 76 and 79 of Andhra Pradesh General Sales Tax Rules that it was the intending purchaser who were legally responsible for payment of excise duty. So, excise duty paid directly to the excise authority did not form part of the turnover. However in the second MC.Dowell case, the Hon'ble Supreme Court has held that the liability of payment of the excise duty passed on the manufacturer or on behalf of manufacturers have paid the excise duty even though it is includable in the turnover of the manufacture. In the Tamil Nadu Sales Tax Law, the term sales price is not defined. However, the word "turnover" is defined as aggregate of the sale and purchase price with addition or deductions specified. The difference between sale price and turnover has been explained by the Madras High Court in the case law reported in 92 STC 597. The former is consideration for sale while the latter means the net amount which is entered in the books of accounts of parties.*

*5. Section 36(5) of the sale of goods Act prescribed that, unless otherwise agreed the expenses of and incidental to putting the goods in a deliverable state shall be borne by the seller. But under the agreement of sale these charges are to be borne by the buyer they become part of the price whether separately charged or not. The object of the word, "any sum charged for anything done" in the section is to bring within the*

meaning of the term, Turnover, all amounts charged by the seller for making the goods ready and fit for sale. The expression also means that in the popular sense what is demanded and collected or received by the dealer. It can however take him only amounts charging for anything done by the seller in respect of goods sold such as bailing charges for cotton agreed to be sold in bales (101 STC 19). The charges for designing the goods manufactured as per the specification of the buyer is also an amount to be included. (94 STC 261). Other amounts which are collected without having any connection with the sale such as labour charges for selecting the goods to be paid by the purchaser described as lot cooly charges are not includable. (80 STC 393). So we have to necessary refer to American Refrigeration's case which is relied on by the state. In that case, the Tribunal rejecting the assessee's claim to deduction from this turnover all the amounts representing engineering designing of the finding that the petitioner had charged for designing particular type of special coil but also manufactured it and supplied it to the Department. While effecting the sale, he had charged the designed fee and that design was one of the systematic activity of the petitioner and not an isolated case of rendering service. The Hon'ble High Court has confirmed the findings of the Tribunal to the effect that design fee was a pre-sale expense form part of manufacturing cost and therefore not deductible. The Hon'ble High Court has further held that mere fact that

*the engineering designing will be separately shown in invoices would not amply show that it would not form part of the sale price sold to the customers. The learned Advocated has contended this case law is not applicable since in that case, nothing has been brought to the notice of the High Court regarding the findings of the Tribunal.*

*6. After examining section 2(r) and the Indian Refrigeration case, we have found that the manufacturer of sample die has close connection with the manufacturing of final product. When a particular activity has been taken as pre-sale activity, there is no need of any transfer of property of the particular activity. For eg., when the excise duty is found to be includible in the sale price, it cannot be argued that there is no transfer of property involved. There is a transfer of property in the final product. Then what are the expenditure involved in manufacturing the final product and what is the consideration for the sale for the product are alone should be considered. It is true that in any concern, the manufacturing of a technical product involves high degree of engineering technical skill. But when the expenses are split into two, once the cost of engineering and skill are shown separately, that does not mean that expenses do not go into the cost of final product. It is also seen that the dealers are not showing separately the cost of engineering and technical skills used in the manufacture of forging etc. In the manufacture of dies, the cost of engineering and*

*development work will form an integral part of the cost of the ultimate dies.*

*7. Unless the customers offers an order for supply of final product, the dealers will not start to work sample dies. It is not the case that so may designs are also developed and kept for perusal of the customer. Only after receiving orders from the customers, the dealers started to develop sample dies and once it is acceptable, final product has been manufactured and sold. The initial expenses relating to the manufacture of sample dies is also recovered from the customers by way of raising debit notes. It is not the case that the sample dies has also to be sold to bring the turnover into consideration. For developing the sample dies, the dealer had incurred expenses as the first step for the manufacturing and this expenses has been passed over to the customer. Then it can safely be said that the consideration for the sale of forging is inclusive of this die development charge. The relief given by the excise duty has no relevance to the present case since the Tamil Nadu General Sales Tax Act is a separate enactment and we have to follow only with the words and phrases available in Tamil Nadu General Sales Tax Act. Any pre-sale expenses are found to be includible in the sale price the question of exemption from excise duty is not a relevant factor in this case. The deletion of these turnovers by the Appellate Assistant Commissioner is found to be not acceptable. For all the four years, the*



*turnovers are ordered to be restored.*

*8. PENALTY:- The Assessing Officer has levied penalty under section 12(3) of the Tamil Nadu General Sales Tax Act. The turnover is available in the books of accounts. Only with the bonafide belief that it is not the taxable turnover. This sum has not been shown in the monthly returns. As per the decision of the Madras High Court in the case of Appollo Saline Pharmaceuticals reported in 125 STC 505 and in the case of Raja Rajeswari Fine Arts in W.P.No.10201/2000 dt. 1.10.2001 no penalty is leviable when the turnover is available in the books of accounts. Accordingly, the deletion of penalty proportionately to this turnover by the Appellate Assistant Commissioner is confirmed. So, we do not order for the restoration of the penalty, as far as these turnover are concerned.*

*9. In fine, the State Appeals are partly allowed."*

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

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6. Mr.V.Haribabu, learned Additional Government Pleader (Taxes) submitted that the Tribunal did not consider the case in the proper perspective.

7. He further submitted that even though the Tribunal restored the assessment made by the Assessment Officer by set asiding the orders of the first appellate authority, the Tribunal erred in deleting the penalty for the reason that the turnover was available in the books of accounts.

8. He further submitted that the Tribunal failed to note that the dealer failed to disclose the turnover in their monthly returns and paid the tax dues thereon. The Assessing Authority assessed the turnover concerned and rightly levied penalty under Sec.12(3) of the TNGST Act.

9. Learned Additional Government Pleader (Taxes), further submitted that the Tribunal ought to have considered that the dealer did not disclose the taxable turnover in the monthly A1 returns and paid the tax due thereon. Therefore, the returns filed by the dealer was incorrect and incomplete, despite the transactions have available in the books of accounts.

10. He further contended that the Tribunal failed to note that

the dealer did not disclose the turnover in their returns filed; that

they had failed to disclose the turnover till the time of check of accounts. Therefore this cannot be taken as an act of voluntary discharge of an obligation by the dealer under Section 13(2) of the TNGST Act and hence, the levy of penalty under section 12(3) by the Assessing Officer is in order.

11. He further submitted that the Tribunal ought not to have interfered with the order of the Assessing Authority who has rightly levied penalty under section 12(3) of the TNGST Act.

12. He further submitted that the Tribunal failed to follow the decision rendered by the Hon'ble Supreme Court, in the case of India Pistons Ltd, in Civil Appeal No.360/93 dated 13.1.98 wherein it was held that the appellant had filed at the time of assessment a statement showing correct taxable turnover, but did not pay the tax due. In the above circumstances penalty levied was upheld. This decision of the Apex Court squarely apply to the case on hand.

13. He further submitted that the Tribunal erred in following the decision reported in 125 STC 505 against which the revenue had

<http://www.judis.nic.in> filed Special Leave petition before the Hon'ble Supreme Court of India

and it is pending disposal.

14. 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;

15. 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).”

16. 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.”

17. 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.”

18. There is no suppression in the books of accounts and this fact has been categorically stated by the appellate authority, in his order, and in which event, the assessee is entitled to invoke explanations (i) and (ii) to Section 12(3)(b) of the Act.

19. 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.

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28.03.2018

Index : Yes/No

Internet : Yes/No

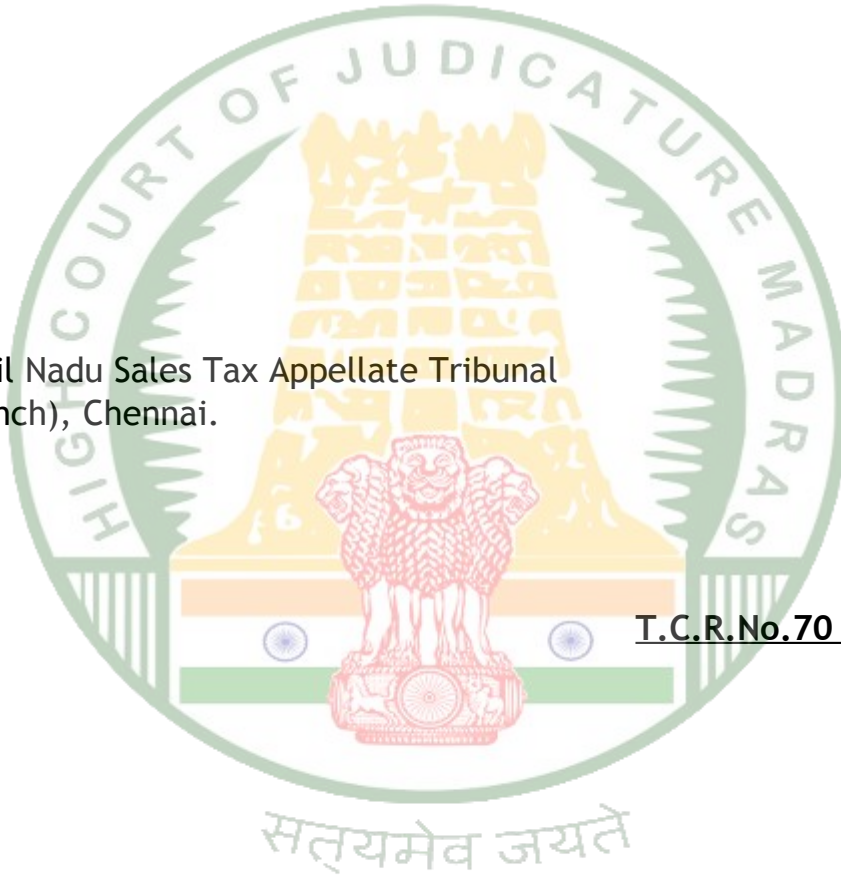
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S.MANIKUMAR,J  
and  
M.GOVINDARAJ,J

dm

To

The Tamil Nadu Sales Tax Appellate Tribunal  
(Main Bench), Chennai.



T.C.R.No.70 of 2018

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