

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.03.2018

C O R A M

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

Tax Case No.71 of 2018

The State of Tamil Nadu
Rep., by the Deputy Commissioner
(Commercial Taxes),
Coimbatore Division, Coimbatore-641 018. ... Petitioner

v.

Divyar Garments
34 Kongu Nagar Second St,
Tirupur. ... Respondent

Prayer: Tax Case Revision is filed under Section 38 of the TNGST Act, 1959, to revise the order dated 18.10.2001, passed in Coimbatore Tribunal State Appeal No.484/2000, on the file of the Sales Tax Appellate Tribunal (Additional Bench), Coimbatore.

For petitioner ... Mr.V.Hari Babu
Addl. Government Pleader (Taxes)

ORDER

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

Instant Tax Case Revision is filed to revise the order dated 18.10.2001, passed in Coimbatore Tribunal State Appeal No.484/2000, on the file of the Sales Tax Appellate Tribunal (Additional Bench), Coimbatore.

2. Facts as deduced from the material on record are that Tvl.Divyar Garments, were finally assessed, on a total and taxable turnover of Rs.12,05,759.00 and Rs.4,30,759.00 respectively, for the assessment year 1997-98, under Tamil Nadu General Sales Tax Act, 1959, and levied penalty of Rs.70,452.00, under Section 12(3)(b) of the Act. Aggrieved over the assessment, the dealer, filed an appeal before the Appellate Assistant Commissioner (CT), Pollachi, which deleted the penalty and remand the matter back to the assessing officer. Relevant portion of the appellate authority's order, dated 09.06.2000, is extracted hereunder:-

"I heard the arguments of both the Representatives and also verified the records produced before me. The only issue to be decided in these appeals is the levy of penalty under sec.16 (2) of the TNGST Act. The contention of the appellants is that the liability on the sales of special import licence is not yet a settled issue and that under bonafide belief only they have not reported this turnover. They have also

claimed that they had paid the tax due on being pointed out about the tax liability by the inspecting officials. They have claimed for this turnover was shown in the profit and loss account and verified by the assessing authority. Hence there is no wilful non-disclosure of any taxable turnover warranting the levy of penalty. They has claimed that as per section 16(2) of the TNGST Act wilful non-disclosure must be proved before levying this penalty. Since there is no turnvoer dehors the accounts they claimed that the penlaty levied is the availability of the turnover in their accounts. He has mainly stated that they have not reported this turnover in the monthly returns knowing fully well that they have to pay tax on the same. But for the inspection this fact would not have come to the light of the department. Hence he has concluded that there is wilful intention to evade the tax.

As per the provisions of the act penalty under section 16(2) can be levied when the assessing authority is satisfied that the escapement from the assessment is due to wilful non-disclosure of assessable turnover by the dealer. Even in the quantum of penalty prescribed there is the repeated mentioning about the turnover not wilfully disclosed. In the case on hand this turnover is very much available is their accounts which has been verified by the appellants the levy of tax on the sales of special import licence is not yet a settled issue. There is mutual mistake in the case on hand. In

view of the fact that there is no wilful non-disclosure of assessable turnover by the appellants. I hold that the penalty levied u/s 16(2) is not proper. The Hon'ble Tamilnadu Sales Tax Appellate Tribunal (Main Bench) in the decision reported in the case of Sakthi Lungi has held that when the turnover is available in the accounts the penalty levied is not proper. Hence I set aside the penalty levied for the years 96-97 and 97-98 and allow the appeal relating to these two years. Apart from the above, I find that their special import licence has sold to Tvl.Shreeji International, Vapi Road, during the year 1996-97 and to Raj Enterprises, Jamshedpur during the years 97-98, 98-99. Hence the assessment should have been made only under CST Act. The Assessment made under TNGST Act are not sustainable.

For the year 1998-99, the appellants have claimed that they receive the money only in April 1999. They have also claimed that this turnover was reported to the Department in the monthly return for April 1999 and paid the tax due there on during the month of April 1999. In view of the above, I set aside the penalty levied for the year 1998-99 and remand the case back to the assessing authority for fresh verification of the reporting of this turnover in the monthly returns for April 1999 during the year 1999-2000 and for passing appropriate orders.

7. To conclude the appeals relating to years 1996-97, 97-98 are allowed. The appeal relating to the

year 1998-99 is remanded."

3. Being aggrieved by the same, State has preferred C.T.S.A.No.484 of 2000, before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore, disputing the deletion of penalty of Rs.1,30,993/-, under Section 16(2) r/w. Section 12(3)(b) of the Tamil Nadu General Sales Tax Act, 1959, for the year 1993-94. Vide Order, dated 18.10.2001, the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore, dismissed the same, as hereunder:

"5. We have heard the arguments of both the sides and perused the connected material records. The learned Additional State Representative argued that penalty could be levied after 1992-93 relying on 94 STC 139. The learned Authorised Representative for the Respondent in the cross objection has stated that the decision referred by the appellant could be made applicable only in cases where the dealers have wilfully not disclosed the turnover to the department, where such turnover is not reflected in the books of accounts of the decision and not presented to the perusal of the Assessing Officer. But in the case on hand there was no such case of 'wilful non-disclosure' and such turnover was very much available in the books of accounts which was verified by the Assessing Officer who has signed and sealed in the trading and profit and loss account.

6. The learned Authorised Representative for the respondent further argued that till the judgment was delivered in 102 STC 106 there was no finality relating to the levy of tax on REP licences. The respondent dealt in Special Import Licences which is similar to REP licences and they have paid the entire tax due on premium receipts at the time of inspection itself. Section 16(2) penalty is leviable only when there is wilful non-disclosure, whereas the income on premium receipts was disclosed by the respondent on the profit and loss account which was signed and sealed by the Assessing Authority, there is no turnover dehors the regular accounts. On perusal of the assessment file we find that for the year 1996-97, the assessment was completed as non-assessment by determining the taxable turnover as Rs.Nil and Rs.Nil respectively in the proceedings dated 22.03.99. For the year 1997-98, the respondent was finally assessed on a total and taxable turnover of Rs.12,05,759/- and Rs.4,30,759/- respectively under the TNGST Act, 1959. Subsequently, the assessment was revised by issue of notice dated 16.03.2001. So it is evident that the turnover of the respondent for the year 1996-97 and 1997-98 were very much available in the books of accounts of the respondent which was seen and signed by the Assessing Authority. The Assessing Authority in a re-assessment proceedings cannot levy penalty under Section 16(2) according to 44 STC 299, in which case it was held that for imposition of penalty

wilful non-disclosure of assessable turnover must be proved beyond doubt. It should be proved that there is a deliberate intention to suppress the assessable turnover. In the case on hand, the respondent have disclosed the turnover in the profit and loss account and they have paid the entire tax due on the premium receipts at the time of inspection itself. The authority should give reasons before proceedings to levy penalty and without a finding of wilful non-disclosure by the authority, the order to levy penalty cannot be held proper according to the decision in the High Court of Chennai in the case of *R.E.M.Ranukutty Nadar v. The State of Madras* reported in 31 STC 48 and 49. The Supreme Court in the case of *Hindustan Steel Ltd v. State of Orissa* reported in 25 STC 211 has held that unless there is a definite finding as to the wilful non-disclosure of the taxable turnover, the Assessing Authority will have no jurisdiction to impose the penalty. The respondent have produced the accounts which was seen and sealed by authority, the turnover was very much available in the books of accounts. In the case of *Vikas Sales Corporation* reported in 102 STC 106, the Supreme Court decided in on 1.5.96 holding that the import licences and exin scrips are liable to tax and till then, there was a doubt regarding the tax liability on the turnover.

7. The learned counsel for the appellants attracted our attention to the decision of the Supreme Court in the case of *Vikas Sales Corporation v. Commissioner of*

Commercial Taxes reported in 102 STC 106, in which it is stated as under:-

"Firstly, it is not brought to our notice that any declaration has been made by the Central Government to the effect that these licences/scripts are can only be fore the period subsequent to the coming into force of the said Amendment, dt, i.e. subsequent to January 30, 1992. All the cases before us pertain to the period earlier to the said date. In this view of the matter, it is not necessary to pursue this argument further".

8. The learned counsel would state that because of this observation, the taxability of Special Import Licences subsequent to the date 30.01.1992 was still very much doubtful and therefore the appellants had not disclosed the turnover in the taxable category but shown in the accounts. Having regard to that fact and having the accounts been seen by the Assessing Authority well after the judgment of the Supreme Court, and allowed exemption, the learned counsel would argue that there was no wilful non-disclosure of the taxable turnover.

9. Hence the contention of the respondent was that they were not aware of tax liability though they have paid the tax at the time of inspection itself following the ratio of Supreme Court in the case of S.G.Jayaraj Nadar and Sons reported in 28 STC 700 and the decision of the Sales Tax Appellate Tribunal (Main Bench) in TA No.162/93 dated 4.3.97 we hold that the learned

Appellate Assistant Commissioners order in allowing the appeal is correct and proper.

10. In the decision of the Supreme Court in the case of E.I.D.Parry (India) Ltd v. Assistant Commissioner of Commercial Taxes and another in Civil Appeal Nos.7517 and 7518 of 1998, Thiru Arroran Sugars Limited v. Assistant Commissioner of Commercial Taxes and others in Civil Appeal Nos.7519 to 7524 of 1998, while upholding the levy of tax on the disputed turnover, have deleted the levy of penalty with the following observations:-

"But so far as levy of penalty is concerned, we do not think that the sales tax authorities were justified in levying it. Till the judgment of the Madras High Court, on July 15, 1991, in Perambalur Sugar Mills Ltd v. State of Tamil Nadu (1992) 86 STC 17, the correct portion of law within the state of Tamil Nadu was not free from doubt. Even thereafter, the Sales Tax Tribunal had in subsequent orders held that transport subsidy was not includible in the taxable turnover. Such a view was held by the Tribunal in March, 19, 1993. It appears that on bonafide belief that planting and transport subsidies were not includible in the taxable turnover, the appellants had not include those amount in their turnover and for that reason non-inclusion of these two items in the turnover do not seem to be intentional. Though we have now held that the appellants were not right in not including the amounts of planting subsidy and

transport subsidy in the taxable turnover, considering the facts and circumstances of the case, it would not be correct to say that they had acted deliberately in defiance of law or that their conduct was dishonest or they had acted in conscious disregard of their obligation under the Sales Tax Act. The Sales Tax authorities were, therefore, wrong in passing the orders of penalty and upholding the same. The High Court also, in our opinion, committed an error in upholding the orders of penalty. In the result, these appeals are partly allowed. The order of the High Court and the orders of the sales tax authorities imposing the upholding levy of penalty are set aside. Only to that extent the appellants succeed and their appeals are allowed. The judgment of the High court in respect to the planting subsidy and transport subsidy is upheld. In facts and circumstances of the case, there shall be no order as to costs".

11. This decision of the Supreme Court is applicable to the case of the respondent and therefore we are to give a finding that there was no wilful non-disclosure of the taxable turnover in the returns and therefore the levy of penalty could not be sustain under Section 16(2) of the TNGST Act. In the stated circumstances, the order of the Appellate Assistant Commissioner does not call for any interference.

To concludes, both the State Appeals stand dismissed."

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

5. Mr.V.Haribabu, learned Additional Government Pleader (Taxes) submitted that the Assessing Officer has resorted to the best judgment assessment, by rejecting the returns filed by the dealer as incorrect and incomplete, in view of the fact that the dealer has failed to disclose the turnover relating to special licence under the taxable turnover column and paid the tax dues thereon. The assessing officer also levied penalty under Section 16(2) of the Act read with Section 12(3)(B) of the TNGST Act. Hence, there was a difference of tax assessed with that of the tax paid and that there was balance of tax payable by the dealer.

6. He further submitted that the Tribunal ought to have considered that the import licence in the monthly A1 returns for the year 1997-98 and paid the tax due thereon. Therefore, when the returns filed by the dealer becomes incorrect and incomplete, despite the transactions were available in the book of accounts, the Tribunal

ought to have followed the ratio laid down in the decision reported in <http://www.judis.nic.in>

94 STC 139, wherein, the taxability of REP licence was settled, which was affirmed by the Hon'ble Supreme Court in the case reported in **102 STC 106**. In the above case, it was ruled that penalty can be levied on REP Sales from 01.04.1992 onwards.

7. Learned Additional Government Pleader (Taxes), contended that in the assessment year 1997-1998, the dealers did not disclose the turnover, relating to REP sales in their returns filed and that they had failed to disclose the turnover even at the time of check of accounts, but disclosed the turnover, only after issue of pre-assessment notice, proposing to assess the turnover relating to REP licence. Therefore, he submitted that the said act cannot be taken as an act of voluntary discharge of an obligation by the dealer, under Section 13(2) of the TNGST Act, 1959 and hence, levy of penalty under Section 16(2) read with Section 12(3)(B) by the Assessing Officer, is in order.

8. He further contended that when the dealer had not filed any revised return and paid the tax before the final assessment, the Tribunal ought not to have interfered with the order of the Assessing Officer, who has rightly levied penalty under Section 12(3) of the Act.

The Tribunal ought to have seen that the assessing officer imposed the penalty, inasmuch as the dealers have not reported the above turnover and paid tax as prescribed under the Act, which amounts to filing of incorrect and incomplete returns and hence, the assessment made falls under Section 12(2) and consequently, the penalty under Section 16(2) read with Section 12(3), is automatic.

13. Learned Additional Government Pleader (Taxes) for the petitioner submitted that the Tribunal has failed to follow the decision of this Court in W.A.No.1013/97, dated 30.04.1998 and the decision of the Hon'ble Supreme Court of India in **India Piston Ltd's** case [Civil Appeal No.360/93, dated 13.01.98] has held that,

"the appellant had filed at the time of assessment a statement showing correct taxable turnover but IDI not pay tax due. It was in this circumstance that penalty was levied and its imposition cannot be set aside".

The above principles squarely apply to the case on hand.

14. Heard the learned counsel appearing for the parties and perused the materials available on record.

15. 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;

16. 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).”

17. 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.”

18. 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.”

S.MANIKUMAR, J.
and
M.GOVINDARAJ, J.

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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.

(S.M.K.,J) (M.G.R.,J)
28.03.2018

Index : Yes/No
Internet : Yes/No

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To

The Sales Tax Appellate Tribunal
(Additional Bench), Coimbatore.

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