

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.04.2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case No.91 of 2018
[TC. SR. No.46186 of 2006]

The State of Tamil Nadu
Represented by the Deputy Commissioner (CT)
Coimbatore Division
Coimbatore-18 ... Petitioner

v.

Tvl.Velan Hotels Limited,
41 Kangayam Road,
Tirupur ... Respondent

Prayer: Tax Case Revision is filed under Section 38 (1) of the TNGST Act, 1959, to revise the order dated 28.02.2002, made in C.T.S.A.No.492 of 2000, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore, preferred against the order dated 09.06.2000 made in Appeal No.164/2000 on the file of Appellate Assistant Commissioner (CT), Pollachi, Preferred against order dated 25.02.2000 made in TNGST No.266006/94-95 an the file of the Commercial Tax officer, Central-1, circle, Tiruppur.

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

O R D E R

(Order of the Court was made by S.MANIKUMAR, J)
Instant Tax Case (Revision) is filed by the Revenue as against the order of the Sales Tax Appellate Tribunal dated 28.02.2002 made in C.T.S.A.No.492 of 2000, on the file of the Sales Tax Appellate Tribunal (AB), Coimbatore.

2. The brief facts of the case are as follows:

The assessee/respondent Tvl.Velan Hotels Limited, Tirupur were finally assessed on the total and taxable turnover of Rs.1,27,47,878/- and Rs.92,32,329/- respectively for the year

1994-95, vide proceedings dated 30.04.1996. Their place of business were inspected by the Officers of the Enforcement Wing of the Department on 25.03.1998 and on 02.07.1998. Subsequent to the inspection, books of accounts of the respondent/dealer were called for. But, the dealer has failed to produce the accounts. Therefore, the assessing authority, determined the total and taxable turnover at Rs.4,31,275/- for the year 1994-95 and also levied penalty of Rs.51,107/-, under Section 16(2) of the TNGST Act, vide order dated 25.02.2000.

3. Aggrieved over the above assessment order, the respondent/dealer filed appeal in A.P.No.164 of 2000, before the Appellate Assistant Commissioner (CT), Pollachi, who vide order dated 09.06.2000, deleted the estimation of first sale of software of Rs.2,10,000/-. The first appellant authority also dismissed the penalty levied under Section 16 (2) of the TNGST Act for the year 1994-95.

4. Aggrieved against the order of the first appellate authority, State filed appeal in CTSA No.492 of 2000, before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore. First sales of software estimated for Rs.2,10,000/- is the only issue.

5. On a careful consideration of the submissions made, vide order dated 28.02.2002, the Tribunal, held as follows:

"First sales of software estimated for Rs.2,10,000/- is the only issue in this case. Regarding the first sale of software, the learned Authorised Representative for the respondent argued that there were no sale of software by them. It related to lease finance agreement for the purchase of software from M/s. Intellect Data-System & Software Pvt. Ltd., as per agreement No.1/4208/ dated 05.04.94. The software referred to was not actual sale to M/s.Annamalai Finance Ltd. The software was available in the hotel premises as forming part of the capital assets of the company. Raising of the invoices for the purpose of financial arrangement cannot be treated as sale there is no liability to tax as decided by the Deputy Commissioner (Appeal) Coimbatore in Ap.No.8/97 dated 3.12.97 in the case of Thiagarajar Mills Ltd., for the assessment year 1994-95. Regarding this issue the learned Appellate Assistant Commissioner in his order in Page No.3, in paragraph 4(a) has stated as follows:

"I find that the Enforcement Wing Officials have sent a best judgement D3 proposals in D3-55/99-2000. In this proposal they have discussed about the various summons

issued and the nonchalant attitude of the appellants in not producing the relevant records before them. Based on the sale bill No.1/93-94 dated 20.04.94, they have arrived at a conclusion that the appellants have effected sales of software to Annamalai Finance Ltd., Coimbatore. I find that the appellants have not responded in time to the pre-assessment notice issued also. The Assessing Authority has passed an order on 25.02.2000 where as the appellants have filed their objections on 28.02.2000. I find that the appellants are to blame for this best judgment order, since they have not responded properly both to the summons and notice of the Enforcement Wing Officials and the Assessing Authority. However as rightly claimed by the appellants, they have raised an invoice in the name of Annamalai Finance Ltd., as security to receive financing from them only. A verification of the invoice reveals that in the particulars in it, it is mentioned licence fee for fortune property management system software to be installed at M/s.Velan Hotels Ltd., Tirpur purchased from Intellect Data System and Software Pvt. Ltd., Bangalore."

"It is obvious from the above that this software has been installed at M/s.Velan Hotels Ltd., only and there is no transfer of this property to Annamalai Finance Ltd., Moreover their contention that this software cannot be used by Annamalai Finance Ltd., is also proper. M/s.Annamalai Finance Ltd., have also admitted to having given only finance assistance to the appellants. I have told this software programme cannot be considered as goods and it cannot be treated as sales made to Annamalai Finance Ltd. This Programme is solely intended to the appellants only and the appellants have raised an invoice only for securing finance from the Finance Company. The decision reported in 17 STC 489 in the case of Sundaram Finance will squarely apply to the case on hand.

In this case the Hon'ble Supreme Court of India has held that, the goods purchased by the customer remained at all times with him only. This So-called sale letter is merely a formal document. The finance company's right to seize the goods is merely a licence to

ensure compliance with the terms of the hire-purchase agreement. The transaction is merely a financing transaction and there is no sale when the rights of the finance company are extinguished by the operation of certain clause, whereby on the customer on paying the entire amounts due, the goods will become the sole and absolute property of the customer. There is no real sale of goods intended by the customer to the finance company. In the case on hand the sale bill is raised only as a security and the goods remain with the appellants all along. As held in 28 STC 683 the essential ingredients of a sale are not available in this case. There is no seller or buyer, the goods, the consideration for the sales made etc. The nexus has not been established. There is no transfer of material to the Finance Company to treat the same as a sale made. In view of the above, I hold that estimating the first sale of software for Rs.2,10,000/- is not sustainable. I delete the same and allow the appeal relating to this issue."

8. In 42 STC 348 (SC) in the case of State of Kerala Vs. M.M.Mathew and Another it was held that when no other evidence or reason has been let in by the side of the Revenue, Whether the presumption of the Assessing Authority that there might have been a sale or machinery is right in discussion, with reference to the definition of sale in Section 2(n), with reference to the definition of section 2(i) 'goods' and the 'turnover' in section 2(r) which means the consideration of sales or purchases, for which the goods are sold or brought should be in existence. There must be a physical transfer of property in goods and without the existence of any goods, there could not be any transfer of any consideration for such transfers.

9. In 28 STC 337 in the case of Mahaveer Prasad and another Vs. The Commissioner of Sales Tax, Uttar Pradesh, it is held that suspicion however strong it may be cannot take the place of positive material.

10. In the case of Standard Mercantile Co. Vs. The State of Bihar reported in 29 STC 675, in matters concerning taxation, the assessing authorities must be definite before inflicting tax on the payer and

where an element of doubt pervades the mind of taxing authority, the benefit of doubt would go to the tax payer.

11. The Supreme Court in the case of Alladi Venkateswaralu Vs. State of Andhra Pradesh reported in 41 STC 394 held if two interpretations are possible, the one favours the assessee should prevail.

12. The Supreme Court in the case of State of Kerala Vs. M.M.Mathew and another reported in 42 STC 348 held that strong suspicion, strange coincidences and grave doubts cannot take the place of legal proof.

13. In the case of Sundaram Finance Ltd., Vs. State of Kerala reported in 17 STC 489, the Supreme Court held that the reality of the transactions are the criterion and not the documents.

14. In T.P.Sokkalal Ram Saif Factory Pvt. Ltd. Vs. The Deputy Commercial Tax Officer, Ambalamudram reported in 20 STC 419 in order to hold that a sale had taken place there must be existence of goods apart from the use of the word 'sales' in the account books in the context of debiting the cost of material supplied, there must be transfer of property in goods under an agreement for a price or promised therefore.

15. In 25 STC 466 in the case of State of Tamil Nadu Vs. Indian Crafts and Industries Ltd., our High Court has held that if an assessee for the purpose of securing higher quota applied to the Director of production it was held that the assessment cannot be respondent and penalty imposed merely on suspicion, observing that the morality and the intention of the assessee cannot enter in the field of adjudication in taxing law and that if he could, by a process which is acceptable by law, avoid taxation he could do so.

16. In 28 STC 331 in the case of Delhi Cloth and General Mills Co. Ltd. Vs. Commissioner of Sales Tax, the Hon'ble Supreme Court held that levy and collection of Sales tax is to be regulated by law and not by contract between parties.

17. The sales tax under the statute attaches to the actual sales i.e. to say sales that have taken place and not to sales which have not taken place (52

STC 351 in the case of State of Tamil Nadu Vs. Rafeeque Ahmed & Co.)

18. The Supreme Court in 76 STC 71 in the case of Good India Ltd., Vs. State of Haryana held that particular manner in which the accounts had to be maintained is no criterion or evidence for determining when the liability to tax arise and the liability is to be determined with reference to statute which creates it.

19. Relying on the decision reported in 40 STC 434 in the case of Deputy Commissioner (CT) Trichy Vs. M.Subramaniam Chettiar, the learned in Section 10 of the TNGST Act, 1959, would not mean any transaction, whatever but only mean transaction of 'sales' or 'purchase'.

20. The Supreme Court in the case of State of Punjab Vs. Jullunder Vegetable Syndicate reported in 17 STC 326 held that in interpreting the fiscal statute the court cannot proceed to make good the deficiency, if there or any in the statute. It shall interpret the status as it stands in case of doubt it should interpret it in a manner favourable to the tax payer. In considering a taxing Act, the court is not justified in straining the language in order to hold the subject liable to tax.

21. Reliance was placed to the decision reported in 8 STC 732 in the case of Giridharalal Jiwanlal v. The Assistant Commissioner of Sales Tax (Appeals) Nagpur 10 STC P.1 in the case of P.K.Moldu Brothers Vs. State of Kerala and all other decisions rendered by the Hon'ble High Court which are on the very same filed.

Replying on the above judgment, we hold that the learned Appellate Assistant Commissioner has rightly deleted the first sales of software estimated for Rs.2,10,000/-.

Since the ingredient of 'sale' are not found in the transaction."

6. Aggrieved against the order of the Tribunal, State has filed the instant Tax case (Revision) on the following grounds:

"1. The Tribunal has failed to note that the dealer had raised sale bill which contains details of the system software sold with value. Further the dealer is the seller and Tvl.Annamalai Finance is

buyer.

2. The tribunal has failed to verify the balance sheet or the ledger account of the dealers to ascertain whether it contains details of capital assets in the deletion column as sale of the system software or the dealer had claimed depreciation even after sale to the finance company.

3. The tribunal has failed to note that the dealer had not produced any recorded evidence to show the repayment of loan amount in instalments. In case the dealer had failed to pay the instalment amount the finance company can renew the system software for the dealers since they possess the hold on the machinery as per the sale bill.

4. The tribunal has failed to note that the dealers had produced details of sundry receipts and first sales of unserviceable articles before the appellate forum which were not produced either before the Assessing Officer or before the Inspective Officers which is against the Principles laid down in Section 39 B of the TNGST Act, 1959.

5. The tribunal has failed to follow the decision of the tribunal rendered in K.K.Marbles, Thanjavur Vs. CTO, Thanjavur II in TC.(R) No.163 & 212 of 2000 dated 01.08.2000, wherein it was held that the dealer had not discharged their initial onus to let in satisfactory evidence to prove that the transactions are not sales. This decision squarely apply to the case on hand"

7. On proper appreciation of material on record, and placing reliance on the decisions, both the appellate authority and Tribunal have rightly held that there was no sale, warranting levy of tax and consequently, penalty under Section 16(2) of the Act. Though Mr.V.Haribabu, learned Additional Government Pleader (Taxes) made submissions on the above grounds, we do not find any manifest illegality in the order impugned. Order impugned is sustained. Tax Case (Revision) is dismissed. No costs.

Sd/-

Assistant Registrar (CS-viii)

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Sub Assistant Registrar

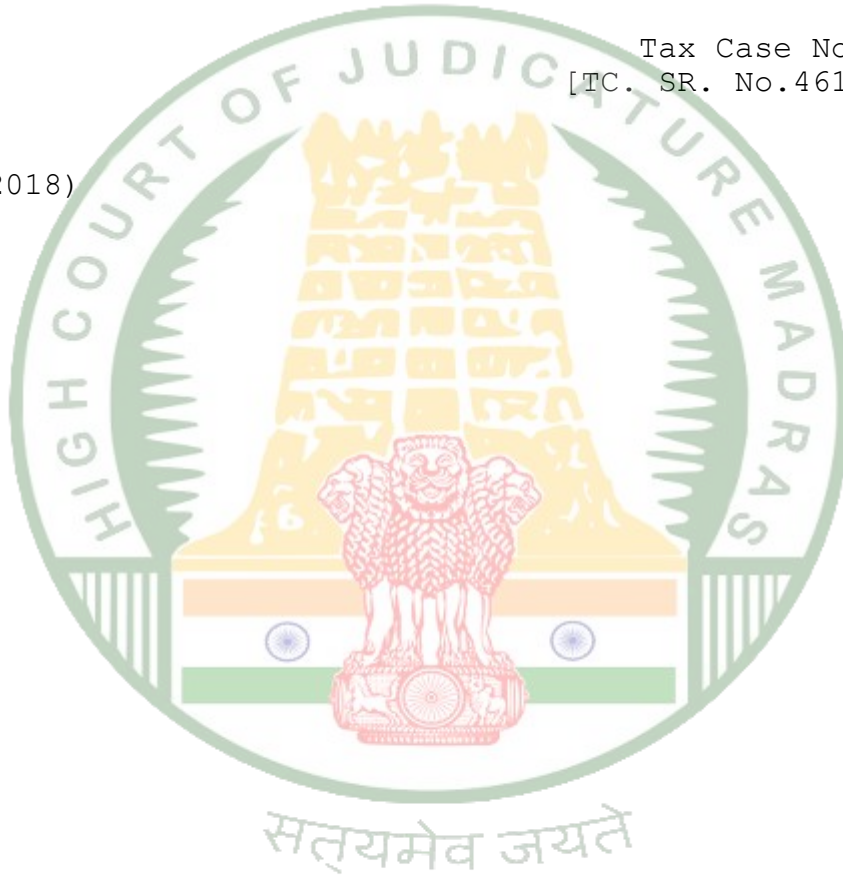
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TO

1. THE TAMIL NADU SALES TAX APPELLATE TRIBUNAL
(ADDITIONAL BENCH), COIMBATORE.
2. DEPUTY COMMISSIONER OF COMMERCIAL TAX, COIMBATORE
3. THE APPELLATE ASSISTANT COMMISSIONER (CT), POLLACHI.
4. THE COMMERCIAL TAX OFFICER, CENTRAL-1 CIRCLE, TIRUPPUR.

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[TC. SR. No.46186 of 2006]

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TR(15/05/2018)



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