IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19/4/2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case No.107 of 2018

The State of Tamil Nadu
rep. by the Deputy Commissioner (CT)
Madras (South) Division
Madras 600 006. ... Petitioner

Vs.

Tvl.Chakra Marketing Associates
No.G-44 Anna Nagar East
Madras 102. ... Respondent

Petition filed under Section 38 of the TNGST Act, 1959, to revise the order of the Sales Tax Appellate Tribunal (Additional Bench), Chennai, passed in T.A.No.111 of 1991, dated 27/8/1991.

For petitioner ... Mr.V.Hari Babu
Addl. Govt. 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 27/8/1991, made in T.A.No.111 of 1991. Which was preferred against the order of the Appellate Assistant Commissioner (CT) in Appeal No.266/89 dt 02.08.1989 against the assessment order dt 22.12.88 for the year 1985-1986 by the Deputy Commissioner Tax Officer.

2. Facts as deduced from the material on record are that Tvl. Chakra Marketing Associates, is a dealer in potato chips, soaps and cleaning powder, etc. Assessing Officer, has assessed the respondent on the turnover of Rs.2,41,252/-, at 5% in respect of potato chips, a sum of Rs.43,078/- at 6%, in respect of detergent soaps, a sum of Rs.3,253/- at 6%, in respect of cleaning powder, a sum of Rs.2,303/- at 5% in respect of ball point refills and levied a penalty of Rs.22,456/-, under Section 12 (5) (iii) of the Act.

3. Being aggrieved, the respondent has preferred an appeal, before the Appellate Assistant Commissioner (C.T) – III, Madras. The Appellate Assistant Commissioner sustained the turnover of Rs.2,41,252/- and Rs.2,303/-, and deleted the other turnover and penalty. The dealer filed T.A.No.111 of 1991, before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai. Vide Order, dated 27/8/1991, the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai, dismissed the same, as hereunder:

> "6. We have heard the arguments of both sides and perused the connected records. The learned Appellate Assistant Commissioner has elaborately dealt with each item and sustained the above turnover in respect of potato chips and ball point pen refills. Since the appellant has not produced any evidence to show that the potato chips sold by Trade and Merchandise Mark Act, 1955. Even at the time of hearing, the learned counsel has not produced any evidence in this regard. Since the potato chips were sold in the trade name 'Goldeer'' which has not been registered under Trade and Merchandise Mark Act, 1955, the learned Appellate Assistant Commissioner was justified in rejecting the claim of the appellants. It is seen from the appeal memorandum, that that the appellant has not filled up the Form III properly. As per this memorandum, the disputed turnover is only Rs.27,222/- at 5% and tax due in the turnover is Rs.1,361/-. In the column of any other relief claimed a sum of Rs.68.05 in respect of surcharge was shown.
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> 7. Since the ball point pen refills are taxable at multipoint rate of tax, they are not eligible for any exemption.
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> 8. Under these circumstances, we see no reason to interfere with the order of the learned Appellate Assistant Commissioner.
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> 9. In the end, the appeal is dismissed.
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> 10. Regarding enhancement petition, the learned Additional State representative has stated that deletion of penalty is not correct and the assessment was made under Section 12 (4) only and not under Section 12 (2). There is a force in the argument of the learned Additional State representative. The enhancement petition

has been called out for the accounts only. It is not an imaginary figure and it cannot be terms as for the best of the judgment of the Assessing Officer. The figures are available in the accounts and the gross profit has been adopted as per the accounts only. This assessment is made under Section 12 (4) of the Act. There is a reason for deleting the penalty. The learned Appellate Assistant Commissioner has observed that in the bonafide belief that the potato chips are exempted, the appellants have not reported this as taxable turnover. The bona fide belief is accepted and penalty was cancelled. We see nothing wrong in the deletion of the penalty on the basis of bonafide belief. We see no reason to have a different view. Accordingly, the enhancement petition is dismissed.

In the end, the appeal and enhancement petition are dismissed."

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

5. Mr.V.Haribabu, learned Additional Government Pleader (Taxes) submitted that when the returns were found to be incorrect, in view of wilful wrong claim of exemption, the levy of penalty is clearly unwarranted. He further submitted that the Tribunal erred in law, in taking the view that since the appellant has recorded the turnover in his books of accounts, no penalty could be levied under Section 12 (5) (iii).

6. 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;

7. 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:-
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> "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)."

8. 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 section12(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."

9. 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."

10. 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.

11. In the light of the above discussion and decisions, Tax Case Revision Petition is dismissed. No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

mvs.

To

1 The Sales Tax Appellate Tribunal (Additional Bench), Chennai

2 The Appellate Assistant Commissioner, (CT) Chennai.

3 The Deputy Commercial Tax Officer, Amaindakarai.

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TM(CO)
KP(29/05/2018)