



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN
T.C.No.52 of 2018

The State of Tamil Nadu,
Rep. by the Deputy Commissioner (CT),
Chennai (South) Division, Greams Road,
Chennai - 6.

.. Petitioner

Vs.

Tvl.Metal Weld Electrodes,
104/106, Gerugambakkam,
Kunrathur Main Road,
Chennai.

.. Respondent

Prayer: Petition filed under Section 38(1) of the TNGST Act, 1959, to revise the order of the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai, passed in T.A.No.718/2001, dated 24.01.2002 against the order of the Appellate Assistant Commissioner(CT) Appeal No. 126/99, dated 15.03.2001 arising from the order of the Deputy Commercial Tax officer, Sriperumbudur for the assessment No. TNGST1660994/96-97 vide order dated 05.03.1999.

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

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 (Main Bench), Chennai, dated 24/01/2002, made in T.A.No.718/2001.

2. Facts as deduced from the material on record are that Tvl. Metal Weld Electrodes, manufacturers of weld electrodes, reported a total and taxable turnover of Rs.11,09,405/- and Rs.11,00,405/- respectively. During the check of accounts, the Assessing Officer has found that the assessee has not shown any purchases and closing stock in the Trading and Profit account for the year ending 31.03.1997. But actually there was a purchase of Rs.9,81,113/-. This was not brought to profit and



loss accounts. The assessee also effected sale of machinery to the tune of Rs.4,72,000/- which was also not reflected in the profit and loss accounts. Hence, the Assessing Officer assessed the dealer on total and taxable turnover of Rs.25,52,134/- and Rs.20,80,134/- respectively, for the year 1996-97, under Tamil Nadu General Sales Tax Act, 1959, and also levied penalty of Rs.1,32,252/- under Section 12(3) of the Act.

3. Aggrieved over the assessment, the dealer, filed an appeal before the Appellate Assistant Commissioner (CT), Kancheepuram, disputing the turnover of Rs.9,79,729/- at 11 % and levy of penalty of Rs.1,32,252/-, under Section 12(3)(b) of the Act. The Appellate Assistant Commissioner, vide order, dated 15.03.2001, dismissed the appeal, as follows:

"5. The point for determination in this appeal is whether the assessment made is proper ?

6. The learned Authorised Representative for the appellant has appeared and reiterated the contentions put forth in the grounds of appeal and has produced a copy of trading account. The Departmental Representative on the other hand argued supporting the assessment and has filed written arguments.

7. The arguments advanced by both representatives were heard carefully and perused the records. I find that the appellants are manufacturer of welding electrodes and effecting sale of such welding electrodes. It is known fact that the goods manufactured and marketed by the appellants are not only fast moving goods but evasive goods. Therefore the contentions of the appellant that they have incurred heavy loss in the business, in the absence of recorded evidence is not believable. The appellant, though in the grounds of appeal have contended that they have incurred heavy loss in the business, the Authorised Representative for the appellant has produced a copy of trading account showing the Gross Profit of 23.2% at the time of hearing. Further it is seen that the purchase of raw material and consumable for Rs.9,81,133/- was not brought into the trading account and this purchase omission was unearthed by the Assessing Officer by a critical check of accounts. As rightly pointed out by the



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Departmental Representative in the written arguments that the purchase to the extent of Rs.9,81,133/- would have been utilised for the manufacture of electrodes and the resultant sale of such products would not have been brought to account. Therefore Assessing Officer is correct in rejecting the account and estimation of turnover.

8. Regarding the adoption of Gross Profit at 31% in Estimating the actual sale turnover, the appellant on one hand has come forward with a say that there was heavy loss in the business and other hand, the Authorised Representative for the appellant by taking a different stand has produced a copy of trading account showing the Gross profit of 23.2% and therefore the appellant are not sure of loss of profit in their business. I agree with the Assessing Officer's view that Gross Profit as per accounts worked out to 31% and adoption of such Gross Profit by the Assessing Officer is seen to be justified. I therefore see no merit in the contentions of the appellant and sustain the assessment as made by the Assessing Officer.

Regarding levy of penalty but for critical check by the Assessing Officer, the purchase omission would not have been brought to light and the correspondence sale of such manufactured goods would have been suppressed. Therefore there is concealment of turnover as discussed above and it definitely calls for levy of penalty. I therefore sustain the penalty of Rs.1,32,252/- as levied under Section 12(3)(b) of the Act by the Assessing Officer.

In the result, the appeal fails and is dismissed."

4. Being aggrieved, the dealer has preferred T.A.No.718 of 2001, disputing the sustaining of penalty of Rs.1,32,252/-, under Section 12 (3) (b) of the Tamil Nadu General Sales Tax Act, 1959, for the year 1996-97, under the Tamil Nadu General Sales Tax Act, 1959, against the order of the Appellate Assistant Commissioner (CT) - Kancheepuram, in A.P.No.126 of



1999, dated 15.03.2001. Vide Order, dated 24.01.2002, the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai, modified the order of the Appellate Assistant Commissioner (CT) - Kancheepuram, as hereunder:

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

8. The main dispute in this appeal is what is the turnover of Rs.9,81,132.77 represents. According to the learned Authorised Representative there is a purchase of Rs.9,81,132.77 which has been disposed as second sales for Rs.9,81,132.77. The same purchase turnover is found in the sales turnover also. But in the monthly returns only a turnover of Rs.11,00,405/- and Rs.6,56,125 under Central Sales Tax were declared. The appellant had never claimed exemption on this Rs.9,81,132.77. If the entire purchases effected in the disputed year were sold as second sales, then, the opening stock is Rs.11,23,682/- and sales turnover is Rs.7,56 lakhs. But it is not the contention. The entire purchase of Rs.9,81,133/- was not recorded in the Profit and Loss Account. Subsequent Trading Account only this purchase find place. Actually, it is a purchase of raw material and for manufacture. But in the Trading Account subsequently filed there is a claim of second sales of Rs.9,81,132.77 which is not believable. Now the appellant is answerable or the disposal of opening balance of Rs.11,23,682/- and the purchases in the year to an extent of Rs.9,81,133/- so the Assessing Officer is justified in taking both to arrive at the net purchase value. After arriving at the net purchase value he has added the gross profit of 31% to arrive at the probable sales turnover. Therefore, the learned Authorised Representative has pointed out that the gross profit cannot be 31%. While working out the gross profit, manufacturing expenses were not included by the Assessing Officer and they have been taken into consideration, the Gross Profit will work out to 17.8% only. But as already observed by us, the Trading and Profit and Loss Account filed before us show the purchase of Rs.9,81,133/- and the same



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purchases are shown as second sales turnover in the credit column. This is found to be not believable. There is a clear finding by the Assessing Officer that these purchases were used in the manufacture. The only question now to be decided is whether the adoption of 31% Gross Profit by the Assessing Officer is reasonable. Though the learned Authorised Representative has vehemently contended that they have incurred loss it is not proved with the facts and figures. There is force in the argument of the learned Authorised Representative that the Gross Profit may not be 31% if manufacturing expenses are considered. Actually, the Assessing Officer has taken only the opening stock and the sale to decide the Gross profit. So, we order to adopt only 20% to arrive at the probable sale value. If 20% is adopted, the turnover will be fixed as below:

Net purchase value as adopted by the Assessing Officer	Rs.21,04,815/-
Add: 2% Gross Profit	Rs. 4,20,963/-
	Rs.25,25,778/-
Deduct: Inter-State Sales	Rs. 6,56,125/-
	Rs.18,69,653/-

So the taxable turnover is re-fixed at Rs.18,69,653/-

9. PENALTY: The Appellate Assistant Commissioner has made an observation but for the critical check by the Assessing Officer this omission would not have been found. But we find that all the figures are available in the books of accounts. The estimation of sales turnover was done only based on the book purchase turnover. There is no purchase or sales omission found out by the Assessing Officer. As correctly contended by the learned Authorised Representative penalty is not leviable when the figures are culled out from the books of accounts as per the Supreme Court decision in 28 STC 700. Further, the following legal decisions were also cited by the learned Authorised Representative.



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25 STC 211 SC Hindustan Steel Ltd.,
28 STC 700 SC State of Madras V Jayaraj
Nadar
42 STC 121 Kathiresan Yarn Stores.
45 STC 197 SC Cement Marketing Co of India
96 STC 597 Madras v Sivasubramaniam
111 STC 800 Karnataka - Varalakshmi
Enterprises.
W.P.Nos.2180 to 2182/2000, 8367 to 8371 of
2000 etc., dt.1.10.2001 of Madras High Court
in the case of Appollo Saline
Pharmaceuticals Pvt Ltd, Tirunelveli etc.

In view of the above decisions, we feel
that penalty is not leviable under Section
12(3)(b) since the estimation was based on
the book purchase value. So the penalty
levied is set aside.

10. In fine, the appeal is modified as
above."

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



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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-



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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)."



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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:-



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"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.

s/d-
Assistant Registrar(CS VIII)

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Sub-Assistant Registrar

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To

1. The Deputy Commissioner (CT),
Chennai (South) Division, Greams Road,
Chennai - 6.
2. The Appellate Assistant Commissioner (CT)
Kancheepuram.
3. The Deputy Commercial Tax officer
Sriperumbudur Assessment Circle
Sriperumbudur.

T.C.No.52 of 2018

SP (07/05/2018)