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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21/3/2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR
AND
THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case No.59 of 2018

The State of Tamil Nadu
rep. by the Deputy Commissioner (CT)
Chennai (North) Division
Greens Road, Chennai 600 006. ... Petitioner

v.

Tvl.The Paper Products
No.27 Chinnathambi Street
Chennai 600 001. ... 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 S.T.A.No.718 of 2000, dated 2/12/2002 against the order of the Appellate commissioner (CT)II, Chennai, in Appeal No.969/95 dated 01/04/98 against the order of the commercial Tax Officer, Loansquare_I, Assessment Circle in TNGST.NO.034023/93-94 dated 18/08/95.

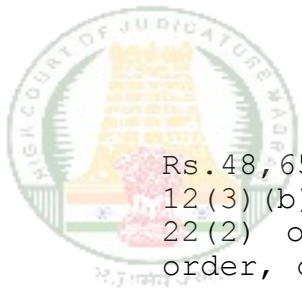
For petitioner ... Mr.V.Hari Babu
Addl. Govt. Pleader (Taxes)

O R D E R

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

Instant Tax Case (Revision) is filed against the order of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai, dated 2/12/2002, made in S.T.A.No.718 of 2000.

2. Facts as deduced from the material on record are that Tvl. The Paper Products Limited, dealer in packing materials, at Chennai, were finally assessed, on a total and taxable turnover of Rs.64,61,796/- and Rs.64,61,796/-, respectively, against the reported total and taxable turnover of Rs.62,93,954.39 and Rs.62,93,954.39 respectively, for the year 1993 - 94, under Tamil Nadu General Sales Tax Act, 1959, and also levied penalty of Rs.1,30,993/-, under Section 12(3)(b) of the Act. Aggrieved over the assessment, the dealer, filed an appeal before the Appellate Assistant Commissioner, disputing the turnover of



Rs.48,65,364/- at 8% and penalty of Rs.1,30,993/-, under Section 12(3)(b) of the Act and penalty of Rs.1,35,289/-, under Section 22(2) of the Act. The Appellate Assistant Commissioner, vide order, dated 01.04.1998, partly allowed the appeal, as follows:

"I heard their arguments and also perused the connected records. The main points for consideration in these appeals are:-

i) Whether the learned Assessing Officer has got the competence levy tax under Section 3B?

ii) Whether the levy of Penalty under Section 12(5)(iii) for 1990-91 is Correct?

iii) Whether the levy of Penalty under Section 12(5)(iii) and 12(3)(b) for 1991-92 and 1993-94 is legal?

iv) Whether the levy of Penalty under Section 22(2) for 1991-92 and 1993-94 can be sustained?

POINT (I):

Admittedly the appellants entered into contract with outside the State parties to manufacture and supply printed was papers and printed telephone papers out of the paper supplied by the parties using their own paraffin wax, printing inks and polyflakes. It has also been a fact that waxing printing took place within Tamil Nadu and the finished printed wax papers and printed telephone papers were despatched directly to parties outside the State as per the directions of the contractees. The appellants received charges as follows:-

1990-91 Rs. 8,88,850/-

1991-92 Rs.66,14,580/-

1993-94 Rs.69,50,524/-

On fining that the execution of works contract of waxing and printing commenced and completed within Tamil Nadu, the learned Assessing Officer invoked the provisions of Section 3B of the Tamil Nadu General Sales Tax Act as amended by Act 25/98 dated 11.3.93, worked out the 70% of the contract receipts and levied tax at 5% for 1990-91 & 1991-92 & at 8% for 1993-94 allowing exemption on 30% towards labour. He also invoked the penal provisions of the Act. Against which the appellants contended that the conversion charges received from parties outside the State cannot be taxed under Section 3B of the Tamil Nadu General Sales Tax as it is works contract receipt under the Central Sales Tax Act, 1956. The contention of the appellants cannot be accepted since the execution of works contract of waxing and printing took place within Tamil Nadu and as rightly pointed out by the learned Assessing Officer only the end product moved outside the State. The fact is also that execution of works contract commenced and



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completed within Tamil Nadu. Hence, the accretion of goods took place only in the State of Tamil Nadu. This position of Law has been clearly held in 88 STC Page 232 and 233 as follows:-

".... Since the taxable even is the transfer of property in goods involved in the execution of works contract and the said transfer of property in such goods take place when the goods are incorporated in the works...."

This makes it crystal clear that the process of delivery of goods either within the State or outside the State after the execution of incorporation in the works contract is a separate even which cannot be clubbed with the incorporation of inputs to claim the benefit of Section 3(a) of the Central Sales Tax Act, 1956. On the ground that the definition of 'Sales' under the Central Sales Tax Act, 1956 has not been amended to include the 'Deemed Sale'.

The Hon'ble Madras Additional Bench of the Tribunal in its Tribunal Appeal No.359/92 and 360/92 dated 21.7.96 in the case of the Appellants themselves confirmed the assessment made by the Assessing Officer for 88-89 and 89-90 under the same facts and identical circumstances relying on the observation of the Hon'ble Supreme Court of India in the case of Ganon Dunkerly & Co (Vs.) State of Rajasthan. In the Tribunal Appeals referred to above the learned Members of the Additional Bench hold as follows:-

"So bearing all these things in mind it is clear that the transfer of property in goods namely wax, printing ink, etc., which were involved in the executing of works Contract had taken place within the State as those goods were within the State itself at the time of transfer and further even if agreement was made for works contract outside the State it would not have any relevance at all whether the assent of the other party is prior to or subsequent to such transfer."

Following earnestly the judgment of the Hon'ble Tribunal (Additional Bench), Chennai. I confirm the levy of tax on 70% of the conversion charges for all the years including the conversion charges received from parties within the State. I relied more on the judgment of Chennai Tribunal since it has been based on the observation of the Hon'ble Supreme Court of India in the case Law reported in 88 STC Page 232 and 233.

POINT (ii):

When the assessment is made under Section 16(1) of the Act, the levy of penalty under Section 12(5)



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(iii) is not correct. However the levy of penalty for the year 1990-91 is remanded back to the Assessing Officer for fresh disposal. He is directed to bear in mind the following while passing orders on the levy of penalty Under Section 16(2):-

"The fact that the assessing authority did not find the explanation of the assessee acceptable and therefore, rejected it and added a certain amount to the assessable turnover would not by itself afford a necessary ingredient of wilful non-disclosure of an assessable turnover. There must be more tangible. Something for more concrete is required which would indicate that the assessee had got the mental element which is called mens rea and that is instead by the Section by the use of the work "wilful non-disclosure of assessable turnover".....

penalty can be imposed under Section 16(2) if the ingredients of the Section are made out".

POINT (iii):

The levy of penalty under Section 12(5)(iii) of the Act for 1991-92 is legal since the assessment is not the one made under Section 12(2), but under Section 12(1) as the turnover as per books of accounts has been accepted by the learned Assessing Officer and is not made de hors the books of accounts. Hence, the penalty levied for 1991-92 under Section 12(5)(iii) is confirmed.

However, the penalty levied under Section 12(3)(b) for 1993-94 is not legal as the assessment is the one made under Section 12(1) of the Act by accepting the book turnover. Hence, it is deleted as per the principles stated in 28 STC 700.

POINT (iv):

The appellants have collected tax on the entire receipt of conversion charges instead of on 70% of the conversion charges which is in contravention of the provisions of the Act as contemplated in Section 22(2) of the Act. Hence, the levy of penalty under Section 22(2) as levied by the Assessing Officer is confirmed for 1991-92 and 1993-94.

In the result the Appeals are partly confirmed, partly remanded and partly allowed."

3. Being aggrieved, State has preferred S.T.A.No.718 of 2000, disputing the deletion of penalty of Rs.1,30,993/-, under Section 12 (3) (b) of the Tamil Nadu General Sales Tax Act, 1959, for the year 1993 - 94, under the Tamil Nadu General Sales Tax Act, 1959, against the order of the Appellate Assistant Commissioner (CT) - II, Chennai, in A.P.No.969 of 1995, dated 1/4/1998. Vide Order, dated 2/12/2002, the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai, dismissed



the same, as hereunder:

"6. We find that the respondent/dealers were finally assessed on a total and taxable turnover of Rs.64,61,796/- for the year 1993-94 under Tamil Nadu General Sales Tax Act, 1959. Aggrieved, the respondents filed appeal before the Appellate Assistant Commissioner, which was allowed with regard to penalty under Section 12(3)(b) of the Act and other issues partly confirmed and partly remanded. The Appellate Assistant Commissioner deleted the penalty under Section 12(3)(b) on the basis that the penalty levied is not legal as the assessment is the one made under Section 12(1) of the Act by accepting the book turnover. The learned Appellate Assistant Commissioner has deleted the penalty as per the principles stated in 28 STC 700. Not satisfied on the orders of Appellate Assistant Commissioner, the appellant/State filed this second appeal before us. The learned counsel for the respondents at the time of hearing before us has argued that the Appellate Assistant Commissioner grouped the appeals of this respondent for the assessment years 1990-91, 91-92, 92-93 and passed a common order, dated 01.04.1998, in which, the Appellate Assistant Commissioner has dismissed the claim of deductions but deleted the penalty levied by the assessing officer. Against the dismissal, the respondents filed appeals before the Sales Tax Appellate Tribunal (Main Branch) in T.A.Nos.978, 980/98 and 461 and 462/99 and the same were allowed by the Tribunal as regards the claim of deductions made on the conversion value received by the respondents from their customers. Hence, the learned counsel for the respondent, based on the above orders of the sales Tax Appellate Tribunal (Main Bench), prayed to dismiss this appeal filed against the common orders of Appellate Assistant Commissioner. The Appellate Assistant Commissioner deleted the penalty on the basis that the assessment is under Section 12(1) of the Act and also as per the principles laid down in the case of Jayaraj Nadar reported in 28 STC 700. When the tax liability has already been allowed by the Tribunal (Main Bench) levy of penalty also has to be allowed as already allowed by the Appellate Assistant Commissioner. In the above circumstances, we are of the view that the orders of the Appellate Assistant Commissioner is correct and we confirm the orders accordingly."

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



5. 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.

6. 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.

7. 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.

8. 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;

9. 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



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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



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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."

11. 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."

12. 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.



13. 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.

Sd/-
Asst.Registrar (CS V)

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Sub Asst. Registrar

To

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

2.The Deputy Commissioner (CT)
Chennai (North) Division
Greens Road, Chennai 600 006.

3.The Commercial Tax Officer, (FAC)
Loansquare-I, Assessment Circle.

Tax Case No.59 of 2018

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