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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20/3/2018

C O R A M

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

Tax Case No.60 of 2018

The State of Tamil Nadu
rep. by the Deputy Commissioner (CT)
Chennai (Central) Division
Chennai 600 006. ...Petitioner/Appellant

Vs.

Tvl.Rathna Fan House Pvt. Ltd
No.36/1 Rajabather Street
T.Nagar
Chennai 17. ...Respondent/Respondent

Petition filed under Section 38 of the TNGST Act, 1959, to revise the order of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai, passed in S.T.A.No.43 of 2011, dated 22/2/2012 against the order the appellate Deputy Commissioner (CT) III made in Appeal No.A.P. VAT 17/2010 order dated 27.10.2010 arising out of order of the Commercial Tax Officer, T.Nagar (North) Assessment Circle made in TIN.No.33531521342/2007 2008 order dated 20.07.2010.

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 22/2/2012, made in S.T.A.No.43 of 2011.

2. Facts as deduced from the material on record are that Tvl.Rathna Fan House (P) Ltd., Chennai, dealers in fans and domestic appliances. Dealers were assessed, under Self-assessment scheme, as per Section 22 (2) of TNVAT Act, 2006, for the year 2007 - 08, based on the monthly returns filed by them.

3. Place of business of the dealers was audited by the Enforcement - I officials during the period from 19/11/2009 to 20/11/2009 and audit revealed the following defects:-



(i). Dealers during the year 2007 - 2008, have wrongly claimed input tax credit, to the tune of Rs.87,624/-, on the purchase of UPS for their office computers and van for office use.

(ii). Dealers effect purchases of taxable goods locally but declared as exempt purchases.

(iii). The dealers effected sale of fan to the units situated in SEZ units for which they have not reversed ITC, as per Section 19 (2) but availed the ITC on their purchases.

4. Based on the audit report, assessment passed under Self-Assessment was re-opened and revised assessment orders, reversing the wrong availment of ITC, was passed on 20/7/2010 for the assessment year 2007 - 2008.

5. While revising the assessment, penalty for the wrong availment of ITC, as warranted under Section 27 (4) of TNVAT Act, 2006, was also levied as hereunder:-

Year	Penalty at	Penalty levied (Rs.)
2007 - 2008	100% of ITC availed for wrong availment on the sale of goods to SEZ	Rs.14,298/-

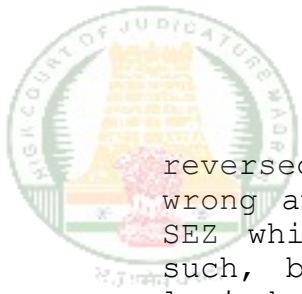
6. Aggrieved against the revised orders, dealer filed three appeals before the Appellate Deputy Commissioner (CT) - III in A.P.17 of 2010 and while disposing the appeals, the Appellate Deputy Commissioner (CT)-III, remanded the assessment portion of the Assessing Officer, deleted the penalty levied by the Assessing Officer, under Section 27 (4) of TNVAT Act, 2006, for the year 2007 - 2008, vide order, dated 27/10/2010.

7. Assessee filed appeals before the Tribunal. Since the Department did not agree with the views of the Appellate Deputy Commissioner (CT) - III, Cross Appeals were filed by the Department before the Tamil Nadu Sales Tax Appellate Tribunal.

8. Vide common order, dated 22/2/2012, in S.T.A.Nos.42, 43 and 40 of 2011, dismissed the appeals and upheld the deletion of penalty by the Appellate Deputy Commissioner (CT) - III, Chennai, stating that penalty cannot be imposed on a mechanical manner without independent evaluation and appraisal and that before imposing penalty, the authority has to find out that there has been an attempt to evade tax as held in 89 STC 494.

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

10. Mr.V.Haribabu, learned Additional Government Pleader (Taxes) submitted that for the year 2007 - 2008, ITC was



reversed, as per Section 27 (2) of TNVAT Act, 2006, for the wrong availment of ITC on the sale of fan to unit located in SEZ which was detected by the department during audit. As such, being the second year, an amount of Rs.14,298/- was levied as penalty under Section 27 (4) TNVAT Act, 2006 being 100% of ITC reversed at Rs.14,298/- which was wrongly availed.

11. He further submitted that in the absence of documentary evidence, the Assessing Officer, confirmed the original assessments on reversal of ITC and also levy of purchase tax and deleted the penalty portion.

12. He further submitted that deletion of penalty by the Appellate Deputy Commissioner (CT) and upheld by the Tribunal, is not acceptable and that ITC was reversed under Section 27 (2), as it was wrongly availed. This wrong availment was already accepted by the dealer and ITC reversed.

13. Heard Mr.V.Haribabu, learned Additional Government Pleader (Taxes) for the appellant and perused the materials available on record.

14. 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;

15. 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



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{(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



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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)."

16. 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."



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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."

17. 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."

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

Sd/-

Assistant Registrar (CS -VI)

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Sub Assistant Registrar



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To

1. The Sales Tax Appellate Tribunal (Additional Bench),
Chennai.
2. The Commercial Tax Officer, T.Nagar (North)
Assessment Circle Chennai.
3. The Appellate Deputy Commissioner (CT) III,
Chennai 600 108.
4. The Deputy Commissioner (CT) Zone XI, Chennai-6.

Tax Case No.60 of 2018

SR(CO)
EU(24/04/2018)