

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.04.2018

C O R A M

THE HON'BLE MR.JUSTICE S.MANIKUMAR

AND

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case No.89 of 2018

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

... Petitioner

V.

Tvl.Vinayagar Cotton Co.,
SF.578, Karuppagoundenpalayam,
Palladam Road, Tirupur.

... Respondent

Prayer: Tax Case Revision is filed under Section 38 of the TNGST Act, 1959, to revise the order dated 21.09.2004, made in C.T.A.No.431 of 2001, on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore.

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 to revise the order dated 21.09.2004, made in C.T.A.No.431 of 2001, on the file of the Tamil Nadu

Sales Tax Appellate Tribunal (Additional Bench), Coimbatore.

2. Facts as deduced from the material on record are that Tvl.Vinayagar Cotton Company, Tirupur, respondent herein are dealers of Cotton Yarn, Cotton lint & Hosiery Cloth and the Assessing Officer vide order in TNGST No.2381891/98-99 dated 03.07.2000, has determined the total and taxable turnover of the respondent/dealer viz Tvl.Vinayagar Cotton Company, Tirupur, as Rs.2,45,08,071/- and Rs.2,52,706/- as against the total and taxable turnover of Rs.2,45,08,071/- and Rs. NIL respectively, reported by them. The respondent has purchased cotton lint, cotton cloth and cotton yarn from local registered dealers and effected second sales. The Assessing Officer has found that though at the bottom of the invoice, it was noticed that "this yarn is sending for sending knitting / fabrication purpose", the yarn was purchased by them and resold locally and hence, one such purchase made for Rs.2,15,435/- is not permissible for exemption and thus, added 2% towards freight and 15% towards gross profit and assessed the first sales turnover of Rs.2,52,706/-. He has also levied penalty u/s.12(3)(b).

3. Aggrieved over the assessment, the dealer, filed an appeal before the Appellate Assistant Commissioner (CT), Pollachi, who vide order, dated 31.08.2001, dismissed the appeal, as follows:

"4. I heard the arguments of both the Representatives and verified the records produced before

me, the only issue to be decided in this appeal is whether the estimation of first sales made on the sales of cotton yarn purchased vide bill No.2130/14.9.98 from Tvl.S.V.A. Syntex Pvt. Ltd., Palani is proper or not? This purchase bill is available at page 23 of the assessment file. The Assessing Officer has found that in this bill the seller Tvl.S.V.A.Syntex Pvt. Ltd., have not charged tax at 4% and collected the same. At the bottom of the invoice it is noted that "this yarn sending for knitting / fabrication charges". The appellants have claimed the same as local purchase and second sales made. Relying on the provisions of Sec.10 of the TNGST Act, 1959 the assessing officer has held that the appellants have not discharged the burden of proof. They shall be deemed to be the first seller and they shall be liable to pay tax since they have not proved that these purchase has been subjected to tax under the TNGST Act, 1959.

5. The appellants have not filed any convincing reply against these conclusions of the assessing officer. They have only claimed that this purchase has been made from the registered dealer and his RC number is also available. They have claimed that they need not prove the sufferance of tax at the earlier stage. Once they have shown that there was an earlier seller, it is for the department to assess this earlier seller. This contention of the appellants is not proper. Their contentions can be accepted prior to the amended provisions to Sec.10. For the earlier period, it could be held that it was not for the dealer who was a subsequent sellers was only to point out that there had

been an earlier sale and not to show that the earlier sale had in fact suffered tax. But subsequent to the amendment made to Sec.10 vide Act.60/97 with effect from 6.11.97 the burden of proof on the person who claims exemption is greater. As per the provision of Sec.10(2) the dealer shall be deemed to be the first sellers and he shall be held liable to pay tax on his sales, unless he proves that this sales had already suffered tax under this Act. In the case on hand the appellants have not discharged this burden of proof. On the other hand the assessing officer has proved with records that in the purchase bill there is no collection of tax and that there is specific mentioning about the sending of the goods for knitting / fabrication purpose. Inasmuch as the purchase bill is available, the appellants cannot deny but they have to accept this conclusion of the assessing authority. The fact remains that in this ale bill the seller has not charged tax and he has mentioned about sending the goods for knitting / fabrication purpose. It is proved that this sale has not been subjected to tax. The appellant have not filed any affidavit from the seller as to how this transaction was accounted for by them. He has not proved with any records as to why there is a mentioning about the sending of the goods for knitting / for fabrication purpose". In view of the above it is proved that the appellants are to be treated as first sellers of the yarn purchased. Inasmuch as the appellants have camouflaged the first sales, I hold that the penalty levied under Sec.12(3)(b) is also proper, I see no reason to interfere with the levy of tax and penalty, I sustain the same and dismiss the appeal.

4. Being aggrieved, State has preferred C.T.A.No.431 of 2001 before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore. Vide order dated 21.09.2004, C.T.A.No.431 of 2001 has set aside the penalty levied under Section 12(3)(b), and modified the appeal as hereunder:

"We have heard the arguments of both the sides and perused the connected material records to decide the issues involved they are assessment made on the disputed turnover as first sales for the purchasers established as not genuine dealers and 12(3)(b) penalty levied. The appellants arguments are that they have effected the purchase of cotton cones relating to the disputed turnover from registered dealers only, their sales at their hands are second sales only eligible for exemption, assessment of the disputed turnover is improper and penalty levied is improper as the assessment made is accepting their books turnover u/s.12(1). Arguments of the Additional State Representative are that the disputed turnover treated as first sales is improper as the appellants have failed to prove the earlier sales as taxable sales and 12(3)(b) penalty levied for shortfall established in tax payment on final assessment are proper. The disputed turnover is claimed by the appellants as purchased from S.V.A. Syntex (P) Ltd., Thalayuthu Village, Palani and they are registered dealers. The purchases effected from them is only second sales not liable to tax. The burden of proof prescribed under TNGST Act could not be applied for cotton yarn falling under declared goods. The Sales effected is second sales ones

eligible for exemption. The verification of records confirms that the appellants have failed to prove the sellers as registered dealers, proving the burden of proof imposed on them by Sec.10 with reference to the amendment brought to Section 10 by Act 60/97 with effect from 6.11.97, a person claiming exemption on any turnover has to prove the burden of proof imposed on him. Otherwise, the relevant sales would be treated as first sales and also taxable sales at the hands of the dealers claiming exemption. The appellants have not discharged the burden imposed on that the sellers from whom they effect purchased the yarn are registered dealers, liable for payment of tax. The bill produced as evidence for the purchase of yarn made from the said dealer contains no evidence for collection of tax. Further, there is specific mention in the bill that the goods involved is sent for knitting and fabrication purpose. Therefore, the same indicate that there is no conclusive evidence that the sellers effected the sales of the yarn and the same is liable to tax. Evidences produced by the appellant have not indicated the sellers are genuine registered dealers liable for payment of tax. But the evidences produced mention the yarn involved as sent for knitting and fabrication purpose. Therefore, such evidences cannot be treated as conclusive evidence for the status of the selling dealers as registered dealers and also for the transaction as taxable sales. Hence the assessment made on the disputed turnover as first sales at the hands of the appellants for their inability to prove the earlier purchases made from genuine dealers and the payment of tax on the relevant sales involved is proved as taxable sales. Hence the disputed turnover held as first sales is confirmed.

7. The next issue relates to 12(3)(b) penalty levied at Rs.15,162/-. The appellants have argued that the assessment made is under Section 12(1), the turnover relating to the goods is treated as first sales rejecting the claim and the assessment made is accepting their books of accounts and levy of penalty would not arise as decided by the Hon'ble Supreme Court in case of S.G.Jayaraj Nadar and Sons reported in 28 STC 700 and also the decision reported in 125 STC 505. The appellants have argued further that the penalty is not leviable as per Act 60 of 1997 added to Section 12(3)(b) with effect from 1.4.96 and the tax due falling under explanations 1 to 3 have to be excluded for the purpose of arriving at the tax due for levy of penalty. In the appellants case, as already marked the disputed turnover is disclosed by them in their books of accounts and also exemption claimed on the same as second sales. The exemption disallowed is only rejecting their exemption claimed on the disputed turnover and the turnover is not established by the Assessing Officer as existing outside their accounts. Therefore, the assessment made on the relevant turnover is an accounted turnover in the books of accounts and also disclosed to the department. Hence the decisions cited by the appellants are quite applicable to their case and the assessment made itself is only u/s.12(1). Therefore the levy of penalty u/s.12(3)(b) would not arise, 12(3)(b) penalty levied at Rs.15,162/- is set aside."

5. Being aggrieved, State has preferred the instant Tax Case

6. Mr.V.Haribabu, learned Additional Government Pleader (Taxes) submitted that the Tribunal did not consider the case in the proper perspective. He further submitted that the tribunal failed to note that in the instant case, the first sale of yarn did not suffer single point tax and it was found to be sold under the guise of own use by the seller to this dealer and the dealer had resold the same and claimed incorrect exemption.

7. Learned Additional Government Pleader also contended that even though the Tribunal confirmed the assessment made by the Assessment Officer by rejecting the claim of exemption made by the dealers, as second sales on a turnover of Rs.2,15,435/- erred in deleting the penalty levied thereon on the ground that the assessment was one made under Sec.12(1) and the turnover was available in the books of accounts, which is not acceptable.

8. It is the submission of the learned Additional Government Pleader that the tribunal failed to note that the assessment was one made to the best of judgment because, the taxable turnover was not reported by the dealers to the Department, and the tax due thereon was not paid till the time of final assessment, that the turnover was brought to assessment by the Assessing Officer only on final assessment. this warrants levy of penalty under Section 13(3)(b) of the TNGST Act in view of the fact that there was a

difference of tax assessed with that of the tax paid and there was balance of tax payable by the dealers.

9. Learned Additional Government Pleader (Taxes), further submitted that the Tribunal ought to have seen that the Assessing Officer had levied the penalty in as much as the dealer have not reported the above turnover and paid tax as prescribed under the Act which amounts to filing of incorrect and incorrect return hence, the assessment made falls under Section 12(2). Consequently, the penalty under Section 12(3)(b) is automatic.

10. Further, the learned Additional Government Pleader submitted that the tribunal erred in deleting the penalty on the view that the levy of penalty under Section 12(3)(b) is not called for, in this case, 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.

11. Learned Additional Government Pleader further submitted that the Tribunal erred in following the decision reported in **Appollo Saline Pharmaceuticals (P) Ltd., Vs. Commercial Tax Officer (FAC) and Others**, reported in **{(2002) 125 STC 505}**, against which the revenue had filed

Special Leave petition before the Hon'ble Supreme Court of India and it is pending disposal.

12. 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;

13. 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-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).”

14. 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.”

15. 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.”

16. The above decisions apply to the case on hand. Following the same, Tax Case Revision Petition is dismissed. No costs.

(S.M.K., J) (V.B.S.,J)

05.04.2018

Index : Yes/No

Internet : Yes/No

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To

The Tamil Nadu Sales Tax Appellate Tribunal
(Additional Bench), Coimbatore.

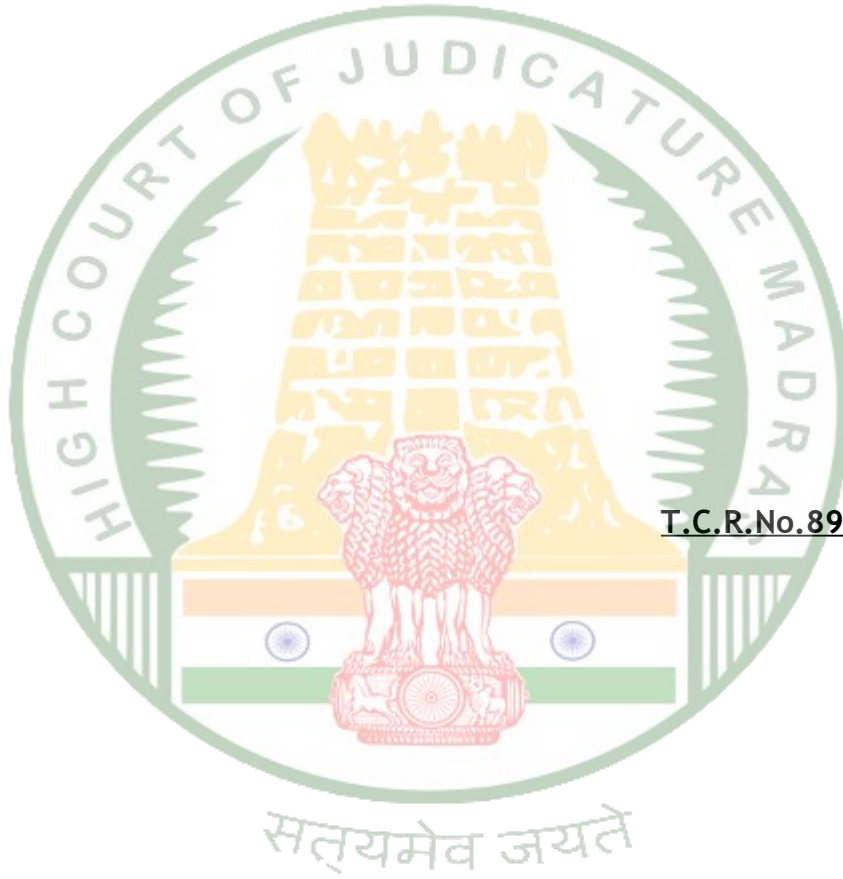
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