IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.06.2018

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THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

AND

THE HONOURABLE MR.JUSTICE N.SESHASAYEE

T.C. (Appeal).No.1769 of 2008

Tvl.Athiparasakthi Traders
323, East Masi Street
Madurai-1 ...Appellant

vs

The State of Tamil Nadu
rep. by the Commercial Tax Officer
Tamil Sangam Road Circle
Commercial Taxes Buildings
Madurai-20 ...Respondent

Prayer:- Appeal filed under Section 37 of the Tamil Nadu General Sales Tax Act to revise the order of the Joint Commissioner SMR II of Commercial Taes, Chennai-5 in Ref No.F3/11090/95 SMR No.8/96 dated 5.5.98.

For Appellant : Mr.S.Ramanathan

For Respondent : Mr.V.Haribabu
Additional Government Pleader

JUDGMENT

Heard Mr.S.Ramanathan, learned counsel appearing for the appellant and Mr.V.Haribabu, the learned Additional Government Pleader appearing for the respondent.

2.This Tax Case Appeal has been filed by the dealer challenging the order passed by the Joint Commissioner exercising his power of *suo motu* revision. The petitioner is a dealer in Crackers and Fireworks. Based on inspection report dated 24.09.1992, the Assessing Officer assessed the petitioner to tax on the turnover of Rs.2,09,819/-, being the sales suppression noticed and actual stock difference found i.e, Rs.2,07,609 + Rs.2,210/- = Rs.2,09,819/-, and the petitioner was taxed at 8%. The Assessing Officer added 5 times for probable omission i.e, Rs. 10,49,095/- and levied penalty under Section 12(3)(b) of the Act at 1 ½ times, apart from levying surcharge and additional Sales Tax. The dealer preferred an appeal before Appellate Assistant Commissioner, who allowed the appeal and set aside the assessment of sales suppression as the same tallied with the sale invoices and set aside the five times estimation. The appellate

Authority sustained the difference and 5 times addition of stock difference. The Joint Commissioner, by exercising his *suo motu* power, allowed the revision by impugned order and restored the assessment made earlier.

3. The learned counsel appearing for the petitioner submitted that this Court may not go into the merits of the matter, but would dispose of the Tax Case Revision in the light of the Judgment of the Division Bench of this Court in the case of ***the State of Tamil Nadu Vs.Gomathiammal reported in (1984) 55 STC 210,*** *by adopting the ratio of 50:50.* It is further submitted that the penalty, which has been imposed at 150%, may be reduced and 50% penalty may be imposed on the 50% of the escapped turnover. It is further submitted that the concerned Assessing Officer has levied penalty on the additional Sales Tax and surcharge and it is impermissible in the light of the fact that the subject Assessment Year is 1992-93 and Section 3-B of the Tamil Nadu Additional Sales Tax Act was inserted by Tamil Nadu Act 31/96 vide Gazette dated 9.9.1996, effective from 16.04.1997 and therefore, no penalty on additional Sales Tax and surcharge could be levied. In support of such contention, reliance was placed on judgment of a Division Bench of this Court in

S.P.G.Ramasamy Nagar & Sons Vs. Commercial Tax Officer -III, Virudhunagar and Others reported in ***(2004) 136 STC 606.***

4. We heard the learned Additional Government Pleader on the above submission.

5. The Division Bench in the case of ***Gomathiammal,*** considered a some what similar issue where the Assessee was a dealer in steel furniture and clocks and when his place of business was inspected, six account books relating to the Assessment Year 1976-77 were recovered and those books were treated as second set of account books as the Assessee has been assessed on another set of accounts produced by her and on the basis of entries in those books relating to certain sales, which were not accounted in the regular book, the escaped turnover was taken and tax and penalty were levied under Sections 16(1) and 16(2) respectively of the Tamil Nadu General Sales Tax Act, 1959. On appeal, the taxable turn over was re-fixed and penalty was reduced. The Tribunal upheld the order of the Appellate Authority. In revision, Assessee contended that the entire escaped turnover represented second sales of steel furniture, wall-clocks and time-pieces and therefore, no portion of the escaped turnover can be

brought to charge. Taking into consideration the factual position, the Division Bench upheld the case of the assessee and held that the assessee would have purchased goods representing 50% of the escaped turnover from local registered dealers and therefore, to that extent, the sales should be taken to be second sales. Accordingly, the order passed by the Appellate Assistant Commissioner and Tribunal adopting the ratio of 50:50 was held to be justified. In the instant case also, we are of the opinion that such ratio can be adopted, more particularly since it is not disputed that the petitioner is a second seller of crackers and not a manufacturer.

6. The next issue is with regard to levy of penalty on additional sales tax and surcharge. This is wholly impermissible in the light of the decision of the Division Bench in S.P.G.Ramasamy Nadar and sons, wherein it was held that no penalty is imposable on additional Sales Tax and surcharge during the period in dispute. Therefore, to that extent, the impugned assessment needs to be interfered.

In the result, this Tax Case appeal is partly allowed and the Assessing officer is directed to adopt 50:50 ratio on the actual suppression and the petitioner is directed to pay tax on the 50% of the actual suppressed turnover sustained. Penalty levied on the additional Sales Tax and surcharge are set aside. We further opine that the penalty 1 ½ time is excessive and accordingly, we reduce it to 50% on Rs.8,305/-. No costs.

[T.S.S.J.,] [N.S.S.,J]

27.06.2018

gpa

To

1.The Joint Commissioner
SMR II of Commercial Taes
Chennai-5

2. The Commercial Tax Officer
Tamil Sangam Road Circle
Commercial Taxes Buildings
Madurai-20

T.S.SIVAGNANAM.J.,
&
N.SESHASAYEE.J.,

gpa

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