IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.08.2019

CORAM:

THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.13938 of 2007
and
W.M.P.No.1 of 2007

M/s.Lumax Samlip Industries Limited
Represented by its Managing Director,
G-15, SIPCOT, Irungattukkottai,
Poonamallee,
Chennai. .. Petitioner

.Vs.

The Commercial Tax Officer,
Sriperumbudur Assemente Circle,
Poonamallee,
Chennai. .. Respondent

PRAYER: Writ petition filed under Article 226 of the Constitution of India, to issue a Writ of Certiorari or any other appropriate writ, or order or direction, calling for the records of the proceedings of the respondent in CST/694656/2003-04/dated 26.02.2007 and quash the impugned proceedings dated 26.02.2017 made therein.

For Petitioner : Mr.S.Ravee Kumar

For Respondent : M/s.Dhana Madhri
Government Advocate (Taxes)

O R D E R

Instant Writ Petition is filed for a Writ of Certiorari, challenging the order dated 26.02.2017 passed by the Commercial Tax Officer, (FAC) Sriperumbudur Assessment Circle, Varadharajapuram, Poonamallee, Chennai, in CST/694656/2003-04/dated 26.02.2017 levying penalty on the petitioner under Section 10-A(1) of the Tamil Nadu General Sales Tax Act, 1959, (TNGST).

2. Supporting the prayer sought for, petitioner has averred as follows:

The petitioner is carrying on business in automotive parts and other consumer products and is registered under the provisions of the Tamil Nadu General Sales Tax (hereinafter referred to as the "TNGST") Act, 1959. The petitioner was granted a registration certificate. In the column wherein the classes of goods are to be specified for enabling the same to be purchased at confessional rate at 4% upon issue of "C" Declaration Forms, the following was stated:

> "Sheet metal pipes, tubes of various metal plastic components hardware machineries and parts, accessories, electrical items wires (SKO Oil Superior kerosene oil"

For the assessment year 2003-2004, the petitioner reported a total and taxable turnover. The petitioner states that for the assessment year 2003-2004, he has also effected interstate purchases of White Kerosene as usable with the machinery items at confessional rate of 4% upon issue of "C" Declaration Forms.

3.The respondent/Commercial Tax Officer issued a notice dated 25.08.2019 stating that verification of the records revealed that the petitioners had effected purchases of White kerosene from 01.04.2003 to 29.07.2003 from other States against declarations in Form C for a sum of Rs.3,36,960/-. The notice states that the verification of the registration certificate of the petitioner No.CST/694656/dated 09.03.1998 revealed that "White Kerosene" or Superior Kerosene Oil had not been included in the registration certificate under any other sub-heads "For re-sale" for use in the manufacturing or processing of re-sale etc. The notice stated that it is proposed to levy a tax Rs.70,762/-, and penalty leviable at Rs.1,06,143/-, total Rs.1,76,905/- under sub-Section(b) of Section 10 of the Tamil Nadu Central Sales Tax (herein after referred to as the "TNCST") Act being penalty provision and liable to levy penalty under Section 10-A of the CST Act.

4.The petitioner sent a reply to the said notice on 23.10.2006. The petitioner states that there was no false representation by them. According to the petitioner, while purchasing the kerosene, as there was no willful contravention of law as it was under a 'bona-fide' belief that 'White Kerosene" which is also a fuel like High Speed Diesel (HSD) can be purchased against "C" Form as it is essentially required for running Generators for factory power generation.

5.The Assessing Authority by the impugned order came to a conclusion of penalty under Section 10-A (1) has to be levied and they rejected the contention raised by the petitioner that there was not false representation when purchasing the Superior Kerosene and that they were bona-fide belief that White Kerosene or Superior Kerosene is also fuel like High Speed Diesel which can be purchased against "C" Form as it is essentially required for running the Generators for factory power generation, because according to the authority mens rea is not an essential ingredient while levying penalty under Section 10-A (1) of Tamil Nadu General Sales Tax Act, 1959. The Appellate Authority followed judgment of Kerala High Court reported in 79 STC 24 and this Court in 110 STC 177 that mens rea is not essential ingredient to be considered while levying penalty.

6.The learned counsel appearing for the petitioner reliance on a Full Bench of this Court in C.S.Parthasarathy Chetty v. State of Tamil Nadu reported in [2006] 148 STC 256 (Madras). The Full Bench was considering a reference to resolve a conflict of opinion on the issue as to whether mensrea must be established before levy under Section 10 CST or not. In paragraph no.2 of the judgment reads thus:

> “2. The decisions of this Court under Section 10-A of the Act have not been consistent, while in some of the decisions such as State of Tamil Nadu v. Betala Industries, 1993 (88) STC 328; Sri Lakshmi Machine Works v. State of Madras, 1973 (32) STC 407 and in Dharmapuri District Co-operative Sugar Mills Limited v. State of Tamil Nadu, 1991 (82) STC 296, it was held that it was necessary to find out whether the act or omission of the assessee resulting in commission of the violations of the Act and dealt with in clauses (b), (c) and (d) of Section 10 of the Act, mens rea was present, in Vijaya Electricials v. State of Tamil Nadu, 1991 (82) STC 268; Kumudham Printers (P) Ltd. v. State of Tamil Nadu, 1994 (95) STC 453; State of Tamil Nadu v. C.A. Akthar And Co., 1998 (108) STC 510; State of Tamil Nadu v. Srinath Pharma, 1998 (110) STC 177; Chennai Textile Chemicals Pvt. Ltd. v. State of Tamil Nadu, 2002 (125) STC 107; Bhuvaneshwari Traders v. State of Tamil Nadu, 2006 (143) STC 608 it was held that there was nothing in Section 10-A of the Act which requires that mens rea must be established before penalty can be levied under that provision. Before we deal with this problem in the light of the statutory provisions we will state the material facts which have given raise to this reference.”

7.After considering the decisions on the point, the Full Bench of this Court answered in para No.21 reads thus:

> 21. Section 10(b) of the Act provides for an offence if any person being registered dealer falsely represents when purchasing any class of goods that goods of such class are

covered by his certificate of registration. The expression "falsely represents" clearly shows that the element of mens rea is the necessary component of the offence. In the absence of mens rea resort to penal provision would nto be proper unless it is established that violation of the statutory provision or fillful disregard thereof. If the registered dealer honestly believes that any particular goods are embraced by the certificate of registration and on dthat belief makers a representation, he cannot be held guilty of the offence under Section 10(b) of the Act and no penalty can be imposed under Section 10-A of the Act. The question whether the assessee acted under the honest belief is a question of fact. Therefore, in our view, " mens rea" is an essential ingredient for the levy of penalty under Section 10(b) of the Central Sales Tax Act, 1956. The reference is answered accordingly.

8. The learned Full Bench held, that mens rea is an essential ingredient for levying of penalty under Section 10(b) of the Tamil Nadu General Sales Tax Act, and it is incumbent on the authorities to consider this aspect before penalty.

9. The learned counsel appearing for the petitioner would contend that in view of the Full Bench Judgment of this Court, the impugned order is to be set aside and the penalty be dropped.

10. On the other hand, the learned counsel appearing for the petitioner would contend that on the facts of this case it has not been adjudicated by the Assessing Authority as to whether there was mens rea or not, the learned counsel for the respondent would contend that the matter be sent back to the Adjudicating Authority to consider this issue. The learned counsel for the petitioner would reliance on a Division Bench judgment of this Court in Shoetex Agencies v. State of Tamil Nadu reported in [2014] 68 VST 19 (Mad) wherein the Hon'ble Division Bench after placing reliance on the Full Bench of this Court set aside the judgment of the Adjudicating Authority and set aside the penalty. The Division Bench did so only after considering the facts of the case. This Court is not entitled to go into the facts of the present case.

11. A reading of the Adjudicating Authority would show that there is no discussion on "mens rea". The impugned order passed by the Commercial Tax Officer, Sriperumbudur Assessment Circle in CST/694656/2003-04 dated 26.02.2007 is set aside. This

matter is referred to remand back to the Adjudicating Authority (FAC) Sriperumbudur Assessment Circle, Varadharajapuram, Poonamallee, Chennai, to consider this issue on levy of penalty after considering the defence of the petitioner that the purchase was made by them on a bona fide belief in the light of the judgment of the Full Bench of this Court. The Adjudicating Authority shall complete the exercise within a period of six weeks from the date of receipt of a copy of this order.

12 .With the above observations, the Writ Petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

msm

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

The Commercial Tax Officer,
Sriperumbudur Assessment Circle,
Varadharajapuram,
Poonamallee, Chennai.

+1cc to Mr.S.Raveekumar, Advocate, SR.No.70952
+1cc to the Govt.Pleader, Vide Sr.No.69979

W.P.No.13938 of 2007

Kak(18/09/2019)