IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.02.2019

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

Tax Case (Revision) Nos.58 to 61 of 2015

Sri Venkateswara Oxygen (P) Limited,
270-A, Sambal Tottam,
Mettypalayam Road,
Thekkupalayam, Coimbatore. .. Petitioner in all Revisions

-vs-

The State of Tamil Nadu,
Rep., by The Commercial Tax Officer,
Thudiyalur Circle, Coimbatore. .. Respondent in all Revisions

REVISIONS under Section 38 of the Tamil Nadu General Sales Tax Act, 1959 to revise the common order of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore dated 05.02.2015, in C.T.S.A.Nos.141 of 2007, 68 of 2010, 142 of 2007 and 110 of 2010, for the assessment years 2003-04 (CST), 2004-05 (CST), 2003-04 (TNGST) and 2003-04 (TNGST) respectively. against the order passed by the Sales Tax Appellate Tribunal, Coimbatore Bench dated 30.03.2007 made in CTSA No. 141/2007, CTSA 68/2010, CTSA 142/2007 and CTSA 110/2010 respectively for the Assessment year CST 2003-2004, 2004-2005, 2003-2004(TNGST) and 2003-2004 respectively and against the order passed by the Appellate Assistant Commissioner (CT) Main Coimbatore dated 27.10.2006 made in A.P. and year CST 48/2005, the apopellate Deputy Commissioner (CT)(Main) Coimbatore dated 25.07.2008 made in Appeal No. and year CST 06/07, the appellate deputy Commissioner (CT) (Main) Coimbatore dated 27.10.2006 and made in Appeal No. and year 205/2005 and the appellate Deputy Commissioner (CT) (Main) Coimbatore dated 24.03.2009 in Appeal No. and year 94/2007 respectively and against the order passed by the Commercial Tax officer, Thudiyalur Circle, Coimbatore dated 02.08.2005, 08.11.2006, 29.07.2005 dated 08.11.2006 respectively made in CST 641959/2003-2004 CST 641959/2004-2005, TNGST 2023076/2003-2004 and TNGST 2023076/2003-2004 respectively.

For Petitioner :Mr.N.Inbarajan
(In all Revisions)

For Respondent :Mr.Mohammed Shaffiq,
(In all Revisions) Special Govt. Pleader (Taxes)
assisted by Mr.V.Haribabu,
Additional Govt. Pleader (Taxes)

COMMON ORDER

(Common Order of the Court was made by T.S.Sivagnanam, J.)

These tax case revisions have been filed by the petitioner/dealer, under Section 38 of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as "the TNGST Act"), challenging the common order passed by the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore (for brevity "the Tribunal"), dated 05.02.2015, in C.T.S.A.Nos.141 of 2007, 68 of 2010, 142 of 2007 and 110 of 2010, for the assessment years 2003-04 (CST), 2004-05 (CST), 2003-04 (TNGST) and 2003-04 (TNGST) respectively.

2.These tax case revisions have been admitted, on 03.08.2015, on the following substantial questions of law:-

> "(i) Whether in the facts and circumstances of the case and in law, the Sales Tax Appellate Tribunal is right in holding that there is an under-invoicing as provided under Section 12-A of the Tamil Nadu General Sales Tax Act, 1959 in respect of sales made to different customers.
>
> (ii) Whether in the facts and circumstances of the case and in law, the Sales Tax Appellate Tribunal is right in holding that it was not mandatory to make an enquiry as provided under Rule 18-C of the Rules in order to determine the price.
>
> (iii) Whether in the facts and circumstances of the case and in law, the Sales Tax Appellate Tribunal is right in stating that the Appellate Assistant Commissioner has wrongly shifted the burden to the State which is perverse."

3.With the consent of the learned counsels for the parties, T.C.(R) No.60 of 2015 is taken as the lead case.

4.The petitioner, a dealer in industrial oxygen and medical gases, is carrying on business in Coimbatore within the jurisdiction of the Commercial Tax Officer, Thudiyalur Assessment Circle.

5.An inspection was conducted in the place of business of the petitioner/dealer and certain defects were pointed out. The defects which are concerned in these tax case revisions are with regard to the rates of Oxygen gas, which was sold by the petitioner/dealer to different dealers. According to the books of accounts maintained by the petitioner/dealer, the higher rate was Rs.28 per cubic meter, whereas, the lowest was Rs.10 per cubic meter, and therefore, the Assessing Officer was of the view that it is an intention to evade payment of duty, and accordingly, issued notice calling upon the petitioner to file objections on or before 26.07.2005. The petitioner/dealer filed their objections stating as to why differential rates were adopted by them in the sale of Oxygen. The Assessing Officer did not accept the explanation offered by the petitioner/dealer and confirmed the proposal in the show cause notice. The dealer filed appeal before the Appellate Deputy Commissioner (CT) Main, Coimbatore. The first appellate authority after considering the explanation offered by the dealer as to why differential rates were adopted, allowed the appeals filed by the dealer. Aggrieved by the same, the Revenue preferred appeals to the Tribunal, which were allowed by the impugned order, and this is how the dealer is before us by way of these tax case revisions.

6.We have elaborately heard Mr.N.Inbarajan, learned counsel for the petitioner/dealer; and Mr.Mohammed Shaffiq, learned Special Government Pleader (Taxes), assisted by Mr.V.Haribabu, learned Additional Government Pleader (Taxes) for the respondent/Revenue.

7.In the order of assessment, the Assessing Officer has not referred to the provision under which the assessment has been made. However, the Tribunal while considering the correctness of the order of the first appellate authority, came to the conclusion that the assessment is under Section 12-A of the TNGST Act.

8.The learned Special Government Pleader submitted that the assessment can also be under Section 16 of the TNGST Act and both in cases of assessment under Sections 12-A and 16, it is a best judgment assessment and definitely, there is an element of guess work and the Assessing Officer having found that there is a gross variance in the sale price of Oxygen to different dealers, adopted a uniform rate and completed the assessment and there is no error in the assessment order and the Tribunal was right in reversing the order passed by the first appellate authority.

9.We do not agree with the submissions of the learned Special Government Pleader that the impugned assessment is an assessment under Section 16 of the TNGST Act. On a reading of the assessment order as well as the order passed by the first appellate authority and the Tribunal, it is evidently clear that the Assessing Officer invoked the power under Section 12-A of the TNGST Act. Therefore, we have to see as to whether, in the facts and circumstances, the power under Section 12-A of the TNGST Act could have been invoked. For easy reference, the said provision is quoted hereinbelow:-

> "Section 12-A. Assessment of sales shown in accounts at low prices. - (1) If the assessing authority is satisfied that a dealer as, with a view to evade the payment of tax, shown in his accounts, sales or purchases of any goods, at prices which are abnormally low compared to the prevailing market price of such goods, it may, at any time within a period of five years from the expiry of the year to which the tax relates, assess or reassess the dealer to the best of its judgement on the turnover of such sales or purchases after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment."

10.A reading of the above provision shows that there are principally two elements which are required, which the Assessing Officer has to be satisfied while invoking the power under Section 12-A of the TNGST Act; first of which being that there is an intention on the part of the petitioner/dealer to evade payment of tax and for such intention, if he had shown that the sale prices are at abnormally lower rates compared to the prevailing market price of such goods, the power can be invoked; and secondly, the power can be invoked within the time stipulated under Section 12-A of the TNGST Act.

11.Admittedly, in the instant case, the Assessing Officer did no enquiry to ascertain the prevailing market price of Oxygen at the relevant time. The assessment has been completed solely based upon the price of gas sold by the petitioner as recorded in their books of accounts. Therefore, we are of the view that unless there was a comparison with the prevailing market price and then the Assessing Officer is satisfied that the price shown in the books of accounts of the dealer was abnormally low compared to the prevailing market price and this was with a view to evade payment of tax, then alone, Section 12-A could have been invoked. There is a marked distinction between the power exercisable under Section 16 and Section 12-A of the TNGST Act.

12.The vires of Section 12-A of the TNGST Act was put to challenge in a batch of cases before the Hon'ble First Bench of this Court in Jayalakshmi Traders vs. Government of Tamil Nadu And Others, (1997) 105 STC 337, which upheld the validity. In the said judgment, the statement and objects for the amendment have been referred to and from which, we find that the object of introducing Section 12-A with effect from 03.12.1979 with a view to provide for assessment of tax in cases where the dealer has, with a view to evade payment of tax, shown in the accounts, sales or purchases of any goods at abnormally low prices compared to the prevailing market price of such goods sold.

13.So far as the power under Section 16 of the TNGST Act is concerned, the power deals of escapement of assessment to tax or under-assessment to tax. Therefore, the powers under Section 12-A of the TNGST Act cannot overlap with the powers exercisable under Section 16 of the TNGST Act. Thus, having come to such a conclusion, it is axiomatic that the Assessing Officer should be satisfied that the petitioner, with a view to evade payment of tax, has shown in his books of accounts, sales of goods at prices, which are abnormally low compared to the prevailing market price. In the absence of any such exercise in the case on hand, it has to be held that the assessment, as done on the petitioner, is unsustainable in law.

14.The Tribunal in the impugned order has made an observation, in paragraph 9, that there has been no explanation by the dealer for the price variance. This is factually incorrect because, the Assessing Officer, in the order of assessment dated 29.07.2005, has referred to the explanation offered by the dealer as to why differential price was adopted.

15.In sum and substance, the contention was that the price varies based on purity, size of the cylinders, nature of operation in which the purchaser is engaged when cylinder is brought by the customer for filling up of the case, when the petitioner/dealer sells the gas along with their cylinders etc. Apart from that, the petitioner specifically pointed out the name of three suppliers in Coimbatore, one of whom was an assessee on the file of the Commercial Tax Officer, Thudiyalur Assessment Circle and stated that they also charged on the same line. Therefore, the Assessing Officer if wants to reject the stand taken by the petitioner, ought to have made an enquiry in this regard. Unfortunately, the Assessing Officer by a cryptic order, rejected the objections. The first appellate authority has carefully analysed the explanation offered by the dealer and found that the best judgment assessment on the alleged assessment was wholly unsustainable.

16.In the decision of the High Court of Kerala in the case of Deputy Commissioner of Sales Tax (Law) vs. K.E.Korah, (1997) 107 STC 226, the Court was considering the scope of Section 19-B of the Kerala General Sales Tax Act, 1963, which is in para materia with Section 12-A of the TNGST Act, and it was pointed out that under the said Section, a duty is cast on the Revenue to prove that the dealer factually collected more than the ostensible consideration shown in the accounts, and such a finding is essential to sustain assessments under Section 19-B of the Kerala General Sales Tax Act, 1963.

17.In the case on hand, the Assessing Officer has gone only by the difference in price of the gas sold by the petitioner/dealer and there is nothing on record to indicate that the petitioner/dealer had collected more than what was shown in their books of accounts. Therefore, unless the twin tests stipulated in Section 12-A were satisfied, the question of invoking the same would not arise. The Tribunal erred in holding that it would be unnecessary to make an enquiry with the other dealers.

18.In the case on hand, the dealer has specifically pointed out that there were other similar manufacturers, who were also selling for the same price. If the Assessing Officer chose to disbelieve the statement, it goes without saying that he has to enquire the other dealers. Without doing so, he cannot discredit or reject the explanation or statement made by the petitioner/dealer. However, as already pointed out, the Assessing Officer did not undertake any such exercise. In fact, the order is cryptic and devoid of reasons. Furthermore, the first appellate authority rightly noted that the inspecting authority had not recovered any incriminating records from the petitioner/dealer to establish that the dealer had indulged in suppression of turnover by way of under-invoicing. Further, the first appellate authority has also pointed out that the assessing authority has failed to enquire the competitive dealers to ascertain the prevailing market price. Hence, the first appellate authority was fully justified in holding that the assessment was based on surmises and conjectures and the power under Section-12A of the TNGST Act could not have been invoked.

19.Considering the reasons assigned by the first appellate authority, we find that there were no grounds to reverse the said decision taken by the first appellate authority, and the Tribunal erred in doing so.

20.Thus, for the above reasons, these tax case revisions are allowed and substantial questions of law are answered in favour of the petitioner/dealer. No costs.

-s/d-
Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

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To

1.The Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench),
Coimbatore-18.

2.The Commercial Tax Officer,
Thudiyalur Circle, Coimbatore.

3.The Appellate Assistant Commissioner (CT) Main,
Coimbatore.

4. The Sales Tax Appellate Tribunal
Coimbatore Bench.

5. The Appellate Deputy Commissioner(CT)(MAIN)
Coimbatore

+1 CC to Mr.N.Inbarajan, Advocate sr 13730.
+1 CC to Spl. Govt. Pleader'sr 14283.

T.C.(R) Nos.58 to 61 of 2015

SR(CO)
SP(25/03/2019)