IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.04.2019

CORAM :

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

Tax Case (Revision) No. 90 of 2015

Sha Madanraj Subhraj,
No.6, Police Patrol Road,
Shevapet, Salem. ...Appellant

-vs-

The State of Tamil Nadu
Rep by the Deputy Commissioner (CT),
Salem Division, Salem. ...Respondent

Tax Case Revision filed under Section 38 of the Tamil Nadu General Sales Tax Act, 1959 to revise the Order of the Sales Tax Appellate Tribunal (Additional Bench), Coimbatore passed in C.T.S.A.No.92 of 2008 dated 15.06.2015.

For petitioner : Mr.K.Narayanan
for Mr.N.Inbarajan

For Respondents : Mr.V.Hari Babu
Additional Government Pleader

JUDGMENT

(Judgment of the Court was delivered by T.S.Sivagnanam, J.)

This Tax Case Revision filed by the petitioner/dealer under Section 38 of the TNGST Act, 1959 to revise the Order of the Sales Tax Appellate Tribunal (Additional Bench), Coimbatore passed in C.T.S.A.No.92 of 2008 dated 15.06.2015.

2. This Tax Case Revision has been admitted on 04.11.2015 on the following substantial questions of law.

> *"(i) Whether in facts and circumstances of the case, there is any jurisdiction to infer estimation of an inter-State sale under the Central Sales Tax Act, 1956. In the absence of any evidence of movement against a particular order or direction?*
>
> *(ii) Whether in the facts and circumstances of the case, the levy of penalty under Section 16(2) of the Act is justified?"*

3. We have heard Mr.K.Narayanan for Mr.N.Inbarajan, learned counsel appearing for the petitioner and Mr.V.Hari Babu, learned Additional Government Pleader for the respondent.

4. The case on hand has a chequered history which pertains to an assessment under the provisions of the Central Sales Tax Act, 1956 for the assessment year 1995-96. The assessee is a registered dealer under the provisions of the TNGST Act and CST Act on the file of the respondent. The Assessing Officer acted upon the D VII report based on the enforcement findings and reopened the assessment for the relevant assessment year. According to the Assessing Officer, 338 transactions were not accounted for. The assessee submitted their objections denying the allegation, yet the Assessing Officer confirmed the proposals in the show cause notice dated 27.02.2004 and passed the assessment order dated 31.03.2004.

5. Aggrieved by the same, the assessee preferred an appeal before the Appellate Assistant Commissioner. The First Appellate Authority by order dated 30.11.2004 allowed the appeal and remanded the matter to the Assessing Officer with a specific direction to conduct cross examination of the owner of the concerned lorry booking offices after which an order to be passed on merits and in accordance with law. On remand, the Assessing Officer though issued notice to the lorry booking offices, none

appeared before him. However, the Assessing Officer proceeded on the basis that the lorry booking officers were colluding with the appellant and therefore did not appear for cross examination and consequently, drew adverse inference against the appellant and confirmed the assessment. Once again, the petitioner filed the appeal before the First Appellate Authority which was allowed by order dated 07.12.2007. The respondent/state filed appeal before the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Coimbatore. The said appeal was allowed by the impugned order. At this juncture, it would be relevant to take note of the order and direction issued by the First Appellate Authority in its order dated 30.11.2004, in appeal No. CST 59 of 2004. It would be useful to refer to the findings rendered by the First Appellate Authority as to why he came to the conclusion that the matter has to be remanded to the Assessing Officer for cross examining the owners of the lorry booking offices.

> *"10....... As such there had been no assessable inter-state sales turnover in existence having not escaped from assessment on records, the closed assessment of the appellants for the year 1995-96 under the CST Act cannot be re-opened basing vague information such as date, lorry number, destination place and amount of freight reflected in*

the records of third party-lorry booking offices and assessment on best of judgment cannot be made as per ratio of decisions of High Court of Madras reported in 28 STC 450 and 33 STC 320.

To sum up, the impugned assessment was initiated only on the basis of records of lorry booking offices and therefore the Assessing Authority should have granted an opportunity to the appellants to cross examine the lorry transport contractors. The refusal of the Assessing Authority to give an opportunity to the appellants to cross examine the lorry transport contractors in question would vitiate the assessment proceedings.........

11. Under these facts and circumstances of the case on hand, I hereby ordered to set aside the assessment made on the turnover of Rs.9,00,822/- and remitted it back to the Assessing Officer with a direction to conduct cross-examine the owners of the concerned lorry booking office against the alleged consignment mentioned in the notice and then pass appropriate further orders after completing the cross examination with the lorry transport owners from whom the records were recovered.......″

6. The above finding rendered by the First Appellate Authority was not questioned by the Department. On remand, the Assessing Officer issued notice to the owners of the lorry booking

office but they did not turn up for being subjected to examination and subsequently for cross examination by the petitioner/dealer. Unfortunately, the Assessing Officer failed to understand the basic legal concept as to how adverse inference could be drawn.

7. To be noted that the assessment has been reopened by the Assessing Officer suspecting that transactions were not accounted for. Though, there was suspicion in respect of 338 transactions, only 9 transactions fell under a cloud as petitioner was able to establish their genuineness in respect of 329 transactions. Thus, if the Department is of the view that transactions were doubtful, it is they who have to produce evidence to prima facie establish the same, only thereafter, the burden of proof shifts on petitioner/ dealer. However, the parties who are summoned for cross examination did not turn up, then adverse inference cannot be drawn against the petitioner/dealer and no best judgment assessment can be made on the said ground. The right to cross examination will occur only after the witnesses are examined in chief. Therefore, when notice is issued to the third parties by the Assessing Officer, the first requirement is to record a statement from the said person so summoned, after the statement is recorded

and if there is any adverse remarks is made by the said third party, then the assessee is entitled to cross examine the third party on the imputations made by the third party against the petitioner/dealer.

8. In the present case, such contingency never arose as the owners of the lorry booking offices did not turn up to give evidence. Consequently, no adverse inference could have been drawn against the petitioner/dealer. For the second time, the petitioner/dealer approached the First Appellate Authority and filed the appeal in CST No.25 of 2007. The Appellate Authority allowed the appeal and the reasons assigned by the Appellate Authority are as follows:

> "*But, in the instant case, the assessing officer has not adduced any evidence on record to prove that the appellants have actually transported the goods from Tamil Nadu to outside the State. He has no evidence on record to show that the appellants have actually received any sale proceeds from out of state buyers. It can be very well seen that the names and addresses of the ultimate buyers at outside the State is not at all found in the records recovered. Further, the names of the goods, quantity, value etc., are not at all found recorded in the extract recovered from the lorry shed. Thus, it is clear that orders passed by*

the assessing officer is purely a surmise and not based on any evidence on record to prove the contentions that the appellants have actually effected interstate sales of goods. Finally, it can be seen that the directions of Appellate Assistant Commissioner (CT), Salem in his remand order and without conducting any cross examination with the parties from whom the records were recovered based on which the assessment was made. The entire assessment passed by the assessing officer is purely an arbitrary one and therefore, it is not found sustainable."

9. The Tribunal had to test the correctness of the order passed by the First Appellate Authority referred above. Unfortunately, the Tribunal did not make a follow up exercise to consider as to whether the findings are correct or not but was carried away by the findings of the Assessing Officer which infact was set aside by the First Appellate Authority. The Tribunal was expected to independently assign reasons as to why it is confirming or setting aside the order of the First Appellate Authority. The Tribunal also committed a serious error by drawing adverse inference against the petitioner/dealer on account of the absence of transporters before the Assessing Officer. As we have observed, it is the duty of the Department to record statement from the

transporters and if there is any imputation against the petitioner/dealer, then he has to be afforded an opportunity to cross examine the third party before the statement can be relied on. The third party having not appeared before the Assessing Officer, the question of drawing adverse inference against the petitioner/dealer does not arise.

10. Thus, in our considered view, the Tribunal committed a serious error in interfering with the order passed by the First Appellate Authority. For the above reasons, this tax case revision is allowed and the order passed by Tribunal is set aside and the order by the First Appellate Authority dated 07.12.2007 is restored and the substantial questions of law are answered in favour of the petitioner/dealer.

11. In the result, this Tax Case Revision is allowed. No costs.

(T.S.S.,J.) (V.B.S.,J.)
04.04.2019

mrm
Index: Yes/No
Internet: Yes/No

T.S.Sivagnanam, J.
And
V.Bhavani Subbaroyan, J.

mrm

Tax Case (Revision) No. 90 of 2015

04.04.2019