In the High Court of Judicature at Madras

Dated : 03.01.2019

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM
and
The Honourable Mr.Justice N.SATHISH KUMAR

Tax Case Nos.96 to 98 of 2015

M/s.Kannan Enterprises,
No.447-b, Vysyal Street, Coimbatore. ...Petitioner
in all Tax cases

Vs

The State of Tamilnadu
Rep by its Joint Commissioner (CT)
Coimbatore Division
Dr. Balasudaram Road, Coimbatore. ...Respondent
in all Tax cases

Prayer s :: Revisions filed under Section of the Tamil Nadu General Sales Tax Act, 1959 against the order dated 15.06.2015 in C.T.S.A. Nos. 1 to 3 of 2008 on the file of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench) Coimbatore, for the assessment years 2002-03 to 2004-05, the Tamil Nadu Sales Tax Appeal Tribunal(Additional)Bench, Coimbatore-18 State Appeal No.1/08, 2/08, and 3/08 order dated 15/06/2015 against Additional Appellate Assistant Commissioner(CT), Coimbatore AP.Nos.1126/06, 1137/06 and 1136/06 dated 25/01/2007 Assessment year 2002-03, 2004-2005 and 2003-2004 against the Additional Appellate Assistant Commissioner(CT)(FAC), Coimbatore Appn.NO.1136/06 date of hearing 19/01/07, 25/01/2007 Number TNGST 184816/03-04 dated 09/06/06 and Appn.No.1137/06 dated hearing 19/01/07 D/o 25/01/07 Num or year TNGST 1840816/04-05 dated 12/06/06 and Appln No.1126/06 date of hearing 19/01/07 D/o.25/01/07 Number year TNGST 1840816/02-03 dated 16/06/06.

For Petitioner : Mr.V.Sundareswaran

For Respondent : Mr.V.Haribabu, AGP (Taxes)

C O M M O N J U D G M E N T
[Judgment was delivered by T.S.SIVAGNANAM,J]

These tax case revisions have been filed under Section 38 of the Tamil Nadu General Sales Tax Act, 1959 (TNGST Act) by the

Assessee, challenging the order dated 15.06.2015 passed by the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench) Coimbatore in C.T.S.A. Nos. 1 to 3 of 2008.

2.The tax case revisions were admitted on 16.12.2015 on the following substantial questions of law:

> "The tax cases are admitted to consider the following questions of law:-
> 1)Whether the order of the Appellate Tribunal was perverse in reversing the order of the Additional Appellate Assistant Commissioner on assumption that the petitioner had collected tax in violation of Section 22(1) of the TNGST Act, 1959?
> 2) Whether the Appellate Tribunal misdirected itself and thereby fell into an error in ignoring proviso to Section 22(1) of the TNGST Act, 1959?
> 3) Whether the Appellate Tribunal misdirected itself and thereby fell into an error in ignoring that unless the tax collected as excess is shown separately in invoices reverse working from the sale price or formula to fix the alleged excess collection is not permissible?
> 4) Whether the Appellate Tribunal ignored the law that for imposing penalty under Section 22(2) best judgment shall not be exercised?
> 5) Whether the Appellate Tribunal went wrong in ignoring the law that in a revision of assessment penalty under Section 22(2) cannot be invoked?
> 6) Whether the Appellate Tribunal fell into an error in assuming that non-production of books of accounts would given an handle to the assessing officer to presume excess collection and not the actual excess collection in sale bill?
> Notice."

3. Heard Mr.V.Sundareswaran, learned counsel for the Petitioner and Mr.V.Haribabu, learned Additional Government Pleader (Taxes) for the Respondent.

4. The short issue which falls for consideration is, whether the levy of penalty under Section 22(2) of the Tamil Nadu General Sales Tax Act, 1959 [hereinafter referred as 'TNGST Act'] and consequential penalty under Section 16(2) of the TNGST Act are justified.

5. The Petitioner is a registered dealer on the file of the Commercial Tax Officer, Big Bazaar Street Circle, Coimbatore, under the provisions of the TNGST Act. The place of business of the Petitioner was inspected by the officials of the Enforcement Wing on 20.10.2004 and it was pointed out that the Petitioner is

effecting purchase of medicine from registered dealers and sell them within the State and claiming exemption as II Sales. The Inspecting team of the Enforcement Wing has noticed that the Petitioner has collected TS/IC at 10.50% on the sale value of the medicines. It was further pointed out that the Petitioner has collected 10.50% on their sales, which is more than what they have paid on the purchases. In this regard, a sample invoice dated 28.07.2004 was examined. The Petitioner stated that they have not collected tax in their sale bills but collected tax suffered and they have collected the actual tax sufferance with the incidental charges by specific mention of TS/IC and TS would mean Tax Sufferance and IC would mean Incidental Charges. The Petitioner has approached this Court and filed Writ Petition in W.P. No.9497 of 2005, which was disposed of by order dated 21.03.2005, directing the authority to pass orders on the Petitioner's objections. Subsequently, notice was issued to the Petitioner/Dealer on 17.06.2005 to produce the following records before the Deputy Commercial Tax Officer:

1. Opening Stock as on 01.04.2003 & 01.04.2004
2. Purchases in 2003-04 & 2004-05
3. Closing stock as on 31.03.2004 & 31.03.2005
4. Sale in 2003-04 & 2004-05
5. Two copies of Local taxable purchase bills of medicines
6. Relevant two copies of sale bills of medicines.

Though the notice was received by the Petitioner, they have failed to produce the records, in spite of four months time granted to them to do so. Accordingly, the Assessing Officer having left with no other option completed the assessment by adopting a formula.

6. Being aggrieved by such order, the Assessee preferred appeals before the First Appellate Authority. The First Appellate Authority by common order dated 25.01.2007 allowed the appeals, on the ground that the assessing officer should have culled out the exact amount of tax paid from the sale bills issued by the Petitioner. The State preferred an appeal against the said order before the Tribunal. The Tribunal after taking into consideration the factual aspects, held that the order passed by the First Appellate Authority is perverse and required interference and accordingly, the Appeal was allowed.

7. The sheet anchor of the argument of the learned counsel for the Petitioner is that, there can be no estimation done under Section 22(2) of the TNGST Act. Under normal circumstances this argument could have been considered. In the instant case the same cannot be taken into consideration for the simple reason that the Petitioner miserably failed to place the records called for nor responded to the notice issued to them, permitting them to file objections on or before 23.01.2006.

Therefore, with the available records, the assessing officer has adopted a formula and worked out the excess tax collected from the sale and purchase value for the respective years. Therefore, we see no error in the manner in which the assessing officer has proceeded with to assess the Petitioner. Further, the Tribunal rightly placed reliance on the decision reported in 106 STC 367, wherein, it has been held that the excess collection in whatever name, that is handling charges, incidental charges, tax suffered should be taken into account while calculating penalty under Section 22 (2) of the TNGST Act.

8. The learned counsel for the Petitioner contended that the matter may be remanded to the assessing officer to enable the Petitioner to produce the records.

9. However, such a plea cannot be entertained by us in these tax case revisions, which have been filed under Section 38 of the TNGST Act, as we are required to consider as to whether there is a question of law to be decided by the Court in an appeal.

10. The mandate under Sub-section (1) of Section 38 is very clear that the jurisdiction of the revisional court is to decide whether the appellate tribunal has either decided erroneously or failed to decide any question of law. The learned Additional Government Pleader placed reliance on the decision of the Hon'ble Division Bench in the case of Ellon Curative Pvt. Ltd. Vs. Deputy Commercial Tax Officer, Velachery Assessment Circle, Chennai and another reported in [2009] 25 VST 402 (Mad). In the said tax case revision, identical question of law was raised for consideration and the Court after taking note of Section 22(2) of the Act, held that any collection made unauthorisedly is definitely a violation under section 22 of the TNGST Act and the amount has to be recovered from the person, who collected the same, of course, by way of penalty under the provisions of the TNGST Act. Article 265 of the Constitution of India also emphasizes that tax cannot be collected without any authority of law. The learned counsel for the Petitioner relied on the decision of the Hon'ble Supreme Court in the case of Commissioner of Sales Tax, U.P. Vs. Mool Chand Shyam Lal reported in (1988) 4 SCC 486. The said decision arose out of assessment proceedings under the U.P. Sales Tax Act, 1948 and the High Court on the facts found that it should be examined if the excess realisation was of sales or purchase tax thus incurring penal liability under Sub-clause (qq) of Sub-section (1) of Section 15-A or it was excess realisation of price over and above that the assessee was entitled to charge from its customers under Notification issued under the Essential Commodities Act. In the back ground of those facts, the Hon'ble Supreme Court pointed out that the method of realisation in case

of indirect tax is in terms of Section 8-A of the said Act and the penalty can be levied or is leviable for realisation of excess tax legally payable under Section 8-A(2)(b). Further it was pointed out the realisation of excess amount is not permissible but what is not permissible is realisation of excess amount as tax.

11. In our considered view, the decision can in no manner advance the case of the Petitioner before us and it is clearly distinguishable on facts. In the instant case what was collected as incidental charges or service charges was found to recoup the sale tax liability payable by the Petitioner. The onus of proof was on the Petitioner to establish that there was no excess collection of sales tax. However, the Petitioner failed to discharge the burden cast upon them rather failed to co-operate in the assessment proceedings, which is evident from the conduct in not responding to the show cause notice dated 04.01.2006.

12. Even earlier in obedience to the directions issued by this Court in a Writ Petition filed by the Petitioner dated 21.03.2005 to produce records, which have been referred above, the notice was received by the Petitioner dated 17.06.2005 and even after the lapse of 4 months, the records were not produced by the Petitioner. Therefore, the assessing officer was well justified in drawing the adverse inference in the manner of estimation, which was based on the sale bills raised by the Petitioner and not on the other records. This stand was rightly noted by the Tribunal while allowing the appeal filed by the State.

13. In the light of the above, we find that there is no error of law nor any substantial question of law arising out of consideration. With the above, these tax case appeals stand dismissed. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

To

The Joint Commissioner (CT),
Coimbatore Division,
Dr. Balasudaram Road,
Coimbatore.

+3cc to Mr.V.Sundareswaran, Advocate srno.735
+1cc to Special Government Pleader(Taxes) Sr.1133

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