IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved On 04.01.2019	Orders Pronounced On 21.01.2019

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

Tax Case Nos.4 and 5 of 2016
and Civil Miscellaneous Petition Nos.1899 and 1900 of 2016

Sri Aishwaryalakshmi Agencies,
Rep., by its Partner, R.M.Nagu,
No.32/B5, Shenoy Nagar,
Nungambakkam,
Chennai-600 034. .. Petitioner in both Tax Cases

-vs-

State of Tamil Nadu,
Rep., by the Joint Commissioner (CT),
Chennai Central Division,
Chennai-600 006. .. Respondent in both Tax Cases

Tax Cases filed under Section 60(1) of the Tamil Nadu Value Added Tax Act, 2006 against the common order of the Sales Tax Appellate Tribunal (Additional Bench) Chennai, in S.T.A.Nos.217 and 230 of 2014, dated 16.02.2015, against the order of the Appellate Deputy Commissioner(CT) III Station, PAPJM New Building Annexe Chennai-6 made in Appeal No.VAT AP 20/13 and 18/13 respectively dated 21.06.2013 for the Assessment year 2007-2008 and 2008-2009 respectively and against the order of the Assistant Commissioner (CT) Valluvar Kottem Assessment Circle Chennai made in TIN 33771501713/2007-08 and 2008-09 respectively dated 11.01.2013.

For Petitioner :Mr.Soundararajan
(In both Tax Cases)

For Respondent :Mr.V.Haribabu,
(In both Tax Cases) Additional Govt. Pleader (Taxes)

COMMON ORDER

T.S.Sivagnanam, J.

These Tax Cases have been filed under Section 60(1) of the Tamil Nadu Value Added Tax Act, 2006 (hereinafter referred to as "the TNVAT Act") challenging the common order of the Tamil Nadu Sales Tax Appellate Tribunal (Additional Bench), Chennai-600 104 ("the Tribunal" for brevity), in S.T.A.Nos.217 and 230 of 2014, dated 16.02.2015, relating to the assessment years 2007-08 and 2008-09.

2.The petitioner/assessee filed appeals before the Tribunal challenging the orders passed by the Appellate Deputy Commissioner (CT)-III, Chennai, dated 21.06.2013, in VAT AP Nos.18 and 20 of 2013. Those appeals were filed by the assessee challenging the revision of assessments dated 11.01.2013, made under the provisions of the TNVAT Act for the assessment years 2007-08 and 2008-09.

3.The petitioner is a dealer in 'cement' and for the assessment year 2007-08, reported a total taxable turnover of Rs.58,17,984/- and for the assessment year 2008-09, at Rs.92,88,008/-. The place of business of the petitioner was inspected on 07.12.2009 by the Enforcement Wing Officials of the respondent-Department. It was pointed out by the Inspecting Team that freight and coolie charges incurred by the assessee were not included in the taxable turnover and the sale of car and two wheeler was not reported for the assessment year 2007-08 and on the discount offered tax was not paid. The inspection led to issuance of revision notice dated 09.02.2010, in which, the Assessing Officer proposes to impose tax on freight and coolie charges, discount and sale of car and two wheeler. The assessee filed their objections dated 19.02.2010, stating that freight charges are carriage outward expenses as per the accounting system maintained and those charges are not pre-sale expenses, hence, cannot form part of taxable turnover.

4.Further, the petitioner stated that freight charges are shown separately in the accounts and the commodity being cement, the assessee cannot sell the same for a higher price than the price fixed by the cement producing companies and if done, they will loose their dealership. Further, the charges were not collected from the customers and are reflected as indirect expenses in the Profit and Loss account, which, in commercial terms, are 'post-sales expenses' and therefore, freight charges cannot form part of taxable turnover.

5.With regard to the handling or coolie charges, the assessee stated that they are paid while loading and unloading cement and will not form part of taxable turnover and similar stand was taken in respect of discount, which was extended for promoting the trade and the same also cannot form part of taxable turnover. The assessee produced sale invoices in support of their claim. The Assessing Officer rejected the objections filed by the assessee stating that the sale invoices are not printed bills, but are manually typed one and no uniform method has been taken by the assessee while allowing discount and freight and coolie charges. The Assessing Officer confirmed the proposal in the revision notice and completed the assessment, vide orders dated 11.01.2013. On appeals before the first appellate authority, the facts were re-examined, books of accounts were considered and the appeals filed by the assessee were allowed holding that freight charges, coolie charges and discount are not taxable. Challenging the finding of the first appellate authority, the State filed Appeals before the Tribunal, which were allowed by the impugned common order dated 16.02.2015. Challenging the correctness of the same, the assessee is before us by way of these tax cases, which have been admitted, on 08.02.2016, on the following substantial questions of law:-

> "(i) Whether the Appellate Tribunal had considered the fact that the sale bills and the accounting system maintained by the petitioner would establish the fact that the freight and coolie charges would not form part of the sale price and therefore, it should not be subjected to tax under the provisions of the Tamil Nadu Value Added Tax Act?
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> (ii) Whether the Appellate Tribunal had considered the fact that the freight charges are carriage outward expenses and borne out by the petitioner, while delivering the cement to the customers and are reflected as 'indirect expenses' in the profit and loss account, which, in commercial terms, are post sale expenses? And
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> (iii) Whether the Appellate Tribunal had considered the fact that the commodity being the cement, it could not be sold more than the price fixed by the company and therefore, anything charged extra would not form part of the taxable turnover?"

6.Heard Mr.K.Soundararajan, learned counsel for the petitioner and Mr.V.Haribabu, learned Additional Government Pleader (Taxes) for the respondent.

7.The Tribunal reversed the orders passed by the first appellate authority on going through the assessment file, which contained sample sale bills and some more sale bills produced at the time of arguments before the Tribunal. The Tribunal found that the sample bills do not contain freight and handling charges. It noted that those expenses were shown as indirect expenses in the profit and loss account and the customers did not reimburse the same. Thus, the Tribunal concluded that if the charges were reimbursed by the customers, it would qualify a post-sale expense. But the dealer collected the entire amount along with all charges before sale of goods and therefore, it is a pre-sale expense. Accordingly, the levy of tax on the same, as done by the Assessing Officer, was approved to be correct. So far as the discount is concerned, the Tribunal concurred with the first appellate authority. The State is not aggrieved by such portion of the order passed by the Tribunal.

8.We are required to examine as to whether the reason assigned by the Tribunal to upset the finding of the first appellate authority was just and proper.

9.The first appellate authority took note of the nature of business done by the assessee, viz., being a retailer in cement. It noted that as a retailer, the assessee has no role in the fixation of price of goods, as they are fixed by the companies through wholesale agents and if there is a shortfall between the procurement price and the sale price inclusive of transportation charges, if any, the expenses incurred by the retailer are compensated by the manufacturers by way of monetary adjustments effected at the time of subsequent purchase.

10.Before the Tribunal, the respondent contended that it is essential to examine the nature of business and subsequent purchase. Further, the respondent contended that the first appellate authority did not make any verification process and in a single line, set aside the order passed by the assessing authority.

11.Before the first appellate authority, the assessee contended that the revised assessment orders are in violation of principles of natural justice without due application to the facts of the cases and devoid of reasons. It was further contended that the Assessing Officer, in the revision orders, states that the assessee has not submitted sale bills for verification. However, the assessee's case was that no direction was issued to the dealer to produce the sale bills and no notice, in this regard, was issued to the assessee.

12.Further, it was contended that the assessee, vide letter dated 12.07.2010, clarified that the freight charges are carriage outward expenses as per the accounting system maintained by them. These charges are not pre-sale expenses, as mentioned in the revision orders. The freight charges are borne by the dealer while delivering the cement to the customers and are reflected under 'indirect expenses' in the profit and loss account, which, in commercial terms, are 'post-sale expenses'. The assessee relied upon a clarification issued by the Commissioner of Commercial Taxes, dated 28.08.2007, in respect of freight charges wherein, it was clarified that the freight charges are transport charges specified or charged for by the dealer separately without including the same in the price of goods sold, and do not form part of taxable turnover.

13.With regard to the coolie / handling charges, it was contended that they are actually incurred by the assessee while loading and unloading of cement, which are shown separately and cannot form part of taxable turnover. The first appellate authority on examining the copies of the profit and loss account, the balance sheet, invoices etc., was satisfied that the same are in order and accordingly, the assessments, made on freight charges, coolie charges and discounts, were set aside.

14.The first and most important aspect to be noted is that the revision of assessments were pursuant to an inspection conducted by the Enforcement Wing of the respondent-Department. Thus, the revision was not done by the Assessing Officer on his own accord and coming to know that the taxable turnover has not been correctly determined. This aspect looms large.

15.On a reading of the revised assessment orders wherein, the Assessing Officer says that the inspecting officials have verified and found that the assessee has not shown the freight and coolie charges and discount allowed in the sale bills issued by them. Further, the Assessing Officer states that the assessee has not produced sale bills issued by them for verification before him. The next sentence in the revision orders speaks of verification from the bill wise details furnished in respect of discount, freight and coolie charges and it is stated that no uniform method has been followed. This is probably a part of the report submitted by the inspecting officials.

16.We have come to such a conclusion because, the Assessing Officer himself records that no sale bills were produced. Therefore, the Assessing Officer could not have verified any bill, as he alleges that sale bills were not produced. Therefore, in our considered view, the revision of assessments itself are based upon a report of the Enforcement Wing. It has been held in several decisions that if incriminating material is unearthed during the course of inspection, it cannot form a basis of a revision of assessment. In other words, the Assessing Officer would be entitled to issue show cause notice to the assessee calling upon the assessee to explain as to why the turnover should not be revised; and why higher rate of tax should not be levied and demanded. Upon issuance of such notice and receipt of the reply from the dealer, it is incumbent upon the Assessing Officer to take an independent decision in the matter based on the materials placed before the Assessing Officer. If the Assessing Officer proceeds solely based on the findings of the inspecting officers without verifying the correctness of the stand taken by the assessee, then it would amount to abdication of the powers of an Assessing Officer consequently, leading to an illegal and erroneous order of revision being bad in law. On facts, we are satisfied that in the instant case, the Assessing Officer did no thorough verification.

17.The assessee's specific case is that no notice was issued to them calling for any documents. The assessee raised such a specific ground before the first appellate authority. The Assessing Officer could have proved before the first appellate authority that he did call for documents, but the assessee failed to produce the same. No such attempt was made by the Assessing Officer, nor there was any notice for production of documents found in the assessment file. Therefore, the first appellate authority has gone through the assessment file, the profit and loss account, balance sheet, invoices, etc., and found the same to be true. To reverse such a factual finding rendered by the first appellate authority, the only reason assigned by the Tribunal for reversing the order is that the charges have not been reimbursed.

18.The assessee is a dealer in cement and they clearly explained as to how in their particular line of business, freight charges are accounted for under the head 'indirect expenses'. Admittedly, the appellate Tribunal, as a matter of fact, found that the sale bills and the accounting system maintained by the assessee would establish the fact that freight and coolie charges would not form part of sale price. Having come to such a conclusion on facts, it is not clear as to how the Tribunal came to the conclusion that the same should be included in the taxable turnover. The explanation given by the dealer that freight charges are carriage outward expenses borne out by the assessee while delivering the cement to the customers and reflected as 'indirect expenses' in the profit and loss account, which, in commercial terms, are post-sale expenses was not disbelieved by the Tribunal. In other words, there is no finding by the Tribunal that the stand taken by the assessee that it is an indirect expense and in commercial terms, it is a post-sale expense was never disbelieved. Consequently, the appellate Tribunal could not have included the said amounts in the taxable turnover. More importantly, cement, being a controlled commodity, price fixation is done by the manufacturer or wholesale distributor, and the assessee, being a small retailer, has no role in fixation of the price, any other charges cannot form part of taxable turnover. The decision of the Hon'ble Supreme Court in Vinod Coal Syndicate vs. Commissioner of Sales Tax, [1989] 73 STC 317 (SC) would support the case of the assessee.

19.Thus, for the above reasons, these tax cases are allowed and the substantial questions of law are answered in favour of the assessee. No costs. Consequently, the connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

(abr)

To

1.The Sales Tax Appellate Tribunal (Additional Bench) Chennai.

2.The Appellate Deputy Commissioner (CT)-III,
Chennai-6.

3.The Assistant Commissioner (CT) Valluvar Kottam,
Assessment Circle, Chennai.

4.The Joint Commissioner (CT),
State of Tamil Nadu,
Chennai Central Division,
Chennai-6.

+2cc to Mr.S.Saravanan, Advocate Sr.Nos.4171 & 4172
+1cc to the Special Government Pleader sr.4768
+1cc to Mr.K.Soundararajan, Advocate sr.5185

mp[co]
srg 19/02/2019