IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.12.2021

CORAM

THE HONOURABLE MR.JUSTICE R.MAHADEVAN
and
THE HONOURABLE MR.JUSTICE MOHAMMED SHAFFIQ

W.P. No.29851 of 2006
and
M.P. No.1 of 2006

T.S.Rajamanickam Chettiar & Co.,
Represented by its Partner,
T.S.R.Govindarajalu,
No.130, VOC Street,
Panruti-607 106. ... Petitioner

Vs.

1.The Commercial Tax Officer,
Panruti (Town), Panruti.

2.The Appellate Assistant,
Commissioner (CT), Cuddalore.

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

4.Tamil Nadu Sales Tax Appellate Tribunal,
Main Branch, Rep. by its Secretary,
City Civil Court Building,
High Court Complex,
Chennai-600 104. ... Respondents

PRAYER: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari calling for the records on the files of the 4th respondent herein in his STA No.691/01 dated 19.06.2006 and quash the same.

For Petitioner : Mr.N.Inbarajan

For Respondents : Mr.N.R.R.Arun Natarajan
Special Government Pleader

O R D E R

(Order of the court was made by MOHAMMED SHAFFIQ, J.)

Heard Mr.N.Inbarajan, learned counsel for the petitioner and Mr.N.R.R.Arun Natarajan, learned Special Government Pleader (Taxes) appearing for the respondents and perused the documents placed before this court.

2.Challenging the order dated 19.06.2006 passed by the fourth respondent / Tamil Nadu Sales Tax Appellate Tribunal (for brevity, “the Tribunal”) in STA.No.691 of 2001, the petitioner / assessee has filed this writ petition.

3.Briefly stated facts are set out hereunder:

The petitioner is a registered dealer on the file of the first respondent herein. They are dealer in cashew. By an order of assessment dated 10.05.1999, the first respondent determined the total and taxable turnover at Rs.2,74,016/- and nil respectively, for the year 1997-98 and allowed the exemption claimed on the entire sales turnover, since the sales turnover of cashew kernal and premium received on REP licence sales was less than Rs.3 lakhs. Accordingly, Form 'C' was issued and the tax collected and paid over along with the returns to the first respondent to the tune of Rs.12,006/-, was refunded to the petitioner. Subsequently, by a proceedings dated 12.11.1999, the first respondent invoked the provision of Section 22(2) of the TNGST Act and levied penalty of an amount equivalent to the tax so collected, stating that the petitioner had collected a tax of Rs.20,330/- and kept it as pending without remitting the same to the Government. Challenging the same, the petitioner carried the matter to the second respondent / First Appellate Authority, who, by order dated 21.11.2000, allowed the appeal by setting aside the revision order passed by the first respondent. Aggrieved over the same, the State took the matter to the fourth respondent / Tribunal, which by order dated 19.06.2006, allowed the appeal by holding that the Tribunal cannot be a party for making the dealer to unlawful enrichment by withdrawing the order of the Assessing Authority and hence, the deletion made by the second respondent/ First Appellate Authority is not in order. Therefore, the petitioner / assessee is before this court with this writ petition.

4.The only point that arises for consideration in this writ petition is, “whether the levy of penalty under section 22(2) of the TNGST Act, 1959 is warranted, when the Assessing Authority had issued the refund order”.

5.At the outset, it would be relevant to refer to the provisions of Section 22(1) and 22(2) of the TNGST Act. 1959, which read as follows:

> "22.(1) No person who is not a registered dealer shall collect any amount by way of tax or purchasing to be by way of tax under this Act, and no registered dealer shall make any such collection except in accordance with the provisions of this Act and the rules made thereunder:
>
> Provided that nothing in this sub-section shall apply to the collection of an amount by a registered dealer, towards the amount of tax already suffered under this Act, in respect of goods, the sale or purchase price of which is controlled by any law in force.
>
> 22.(2) If any person or registered dealer collects any amount by way of tax or purporting to be by way of tax in contravention of the provisions of Sub-Section (1), whether or not any tax is due from such person or dealer under this Act in respect of the transaction in which he collects such amount, the assessing authority may, after giving such person or dealer a reasonable opportunity of being heard, by order in writing impose upon him by way of penalty a sum which shall be--
>
> i) where the excess amount has been collected in the bonafide belief that it had to be collected, one hundred per cent of the amount collected;
>
> ii) where the excess amount has been collected willfully and knowing that it was not due to be collected, one hundred and fifty per cent of the amount collected:
>
> Provided that no proceedings under this sub-section shall be commenced after a period of five years from the expiry of the year in which the amount has been collected:
>
> Provided further that no prosecution for an offence under sub-section (1-A) of Section 45 shall be instituted in respect of the same facts on which a penalty has been imposed under this sub-section."

A reading of aforesaid provision of Section 22(2) of the TNGST Act, 1959 would make it clear that for the levy of penalty to get attracted, the dealer/person must "collect" any amount by way of tax or purporting to be by way of tax in contravention of the provisions of the TNGST Act, 1959.

6.According to the petitioner, they filed their returns indicating the total and taxable sales turnover and also remitted the entire collection of tax to the treasury. The first respondent / Assessing Authority scrutinised the same and passed the assessment order, determining the total and taxable turnover as Rs.2,74,016/- and nil respectively. Since the total turnover is below the taxable turnover of Rs.3,00,000/-, the same was exempted from tax and accordingly, Form 'C' / refund of tax amounting to Rs.12,006/-, was issued to the petitioner / assessee. Subsequently, the first respondent levied penalty under section 22(2) of the Act, alleging that the petitioner / assessee had retained the collection of tax to the tune of Rs.20,330/-. The said revision order of the first respondent was set aside by the First Appellate Authority, but the same was upheld by the Tribunal.

7.It is settled law that the penalty under section 22(2) of the TNGST Act, can be attracted, only if the amount is not remitted to the State by the dealer, who collects the excess amount of tax. Admittedly, the petitioner being a registered dealer, is entitled to collect tax as per the provisions of the TNGST Act. According to section 3(1)(a), there shall be a levy of tax, only if the total turnover of the year exceeds Rs.3 lakhs and in this case, for the year 1997-98, the total turnover of the petitioner was less than Rs.3 lakhs and therefore, their claim for refund of tax already paid, was allowed and Form 'C' was also issued by the first respondent / Assessing Authority. In such circumstances, it cannot be said that the sum of Rs.20,330/- collected by the petitioner / assessee is an excess of tax and retained the same, without remitting the same to the Government, warranting penalty under the provisions of the TNGST Act. The second respondent / First Appellate Authority in the appeal filed by the petitioner / assessee, placing reliance on the decision of the Supreme court in the case of Moolchand Shyamlal reported in 71 STC 226, was of the view that when the collection of tax is not legally payable or is not in excess of the amount of such tax payable, the assessee cannot be liable to penalty. Accordingly, the revision order of the first respondent / Assessing Authority levying penalty under section 22(2) of the TNGST Act, was set aside and the appeal filed by the petitioner / assessee was allowed. Even the Tribunal, in the appeal filed by the State, has held that the petitioner has not reached the sales turnover of Rs.3 lakhs and hence, they need not pay tax. However, it opined that the Tribunal cannot be a party for making the dealer to unlawful enrichment by withdrawing the order of the Assessing Authority, which cannot be countenanced, according to the opinion of this court.

8.It is to be noted that the expression 'collected' has been dealt with by the supreme court in Joshi, Sales Tax Officer v. Ajit Mills Limited reported in (1977) 40 STC 497, in the context of Section 37(1) of the Bombay Sales Tax, 1959 wherein, it was held that the expression "collected" means collected and "kept as his" by the dealer. Subsequent to the said decision, the Division Bench of this Court in State of Tamil Nadu v. Mohammed Ibrahim Sahib reported in 83 STC 402 has followed the above decision and held as under:

> "Interpreting this section, the Supreme Court dealt with the expression "collected" and opined:
>
> "What does 'collected' mean here? Words cannot be construed effectively without reference to their context. The setting colours the sense of the word. The spirit of the provision lends force to the construction that 'collected' means 'collected and kept as his' by the trader. If the dealer merely gathered the sum by way of tax and kept it in suspense account because of dispute about taxability or was ready to return it if eventually it was not taxable, it was not collected. 'Collected', in an Australian Customs Tariff Act, was held by Griffith, C.J., not 'to include money deposited under an agreement that if it was not legally payable it will be returned'. We therefore, semanticise 'collected' not to cover amounts gathered tentatively to be given back if found non-exigible from the dealer.
>
> It would be relevant to notice here that the above opinion was rendered by the Apex Court on terms of Section 37(1) of the Bombay Act, wherein the expression used was "any sum collected by the person by way of tax.... shall be forfeited...". Thus, even where the forfeiture was preceded by the use of the word "shall", the Court held that the expression "collected" must have reference to "collected illegally and retained" or "collected and kept as his" to attract the penalty of forfeiture. Thus, the circumstances under which the tax was "received" have to be considered by the authorities before imposing the penalty."

9.Applying the above ratio to the facts of the present case, this court is of the view that when the petitioner/assessee after charging taxes, paid it over to the State, penalty cannot be warranted, inasmuch as the initial collection would not qualify as "collected" within the meaning of Section 22(2) of the TNGST Act, 1959. In such view of the matter, the levy of penalty made by the first respondent /

Assessing Authority is unsustainable and the second respondent / First Appellate Authority is right in allowing the appeal filed by the petitioner / assessee. As a sequel, the Tribunal committed error in interfering with the order passed by the First Appellate Authority in the appeal filed by the state.

10.In the result, this writ petition is allowed by setting aside the order passed by the fourth respondent / Tribunal and the order of the second respondent / First Appellate Authority is restored. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

mka

To

1.The Commercial Tax Officer,
Panruti (Town), Panruti.

2.The Appellate Assistant Commissioner,
(CT),Cuddalore.

3.The Deputy Commissioner (CT),
Vellore Division.

4.The Secretary,
Tamil Nadu Sales Tax Appellate Tribunal,
Main Branch, City Civil Court Building,
High Court Complex,
Chennai-600 104.

+1cc to Mr.N.Inbarajan, Advocate SR.No.65730
+1cc to the Special Government Pleader(Taxes) SR.No.66338

W.P. No.29851 of 2006

PCH(CO)
GN(10/02/2022)