

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.03.2021

CORAM

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM
and
THE HONOURABLE MS.JUSTICE R.N.MANJULA

Tax Case Revision No.42 of 2020

The Appellate Assistant
Commissioner (CT),
Commercial Taxes Department,
Puducherry.Petitioner

Vs

M/s.Sri Harish Agencies,
Vazhudavur Road, Katterikuppam,
Puducherry.Respondent

PRAYER: Revision under Section 51 of PVAT Act, 2007 to set aside the impugned order dated 28.11.2019 in Tax Appeal No.14 of 2017, against the order dated 15.02.2017 made in Appeal No.26/PG ST/2010-11 AAC on the file of the Appellate Assistant Commissioner, Commercial Tax Department, Puducherry, against the order dated 14.01.2011 for Assessment number 205695/2006-07 on the file of the Assistant Commercial Tax Officer II, Puducherry.

For Petitioner: Mrs.V.Usha, AGP (Puducherry)

For Respondent: Mr.K.Govi Ganesan

ORDER

(Made by T.S.SIVAGNANAM, J)

This revision has been filed by the Commercial Tax Department of Puducherry under Section 51 of the Puducherry Value Added Tax Act, 2007 ('PVAT Act' for brevity) challenging the order passed by the Puducherry Value Added Tax Appellate Tribunal (for short the Tribunal) dated 28.11.2019 in Tax Appeal No.14 of 2017.

2. The revision is admitted today on the following substantial questions of law :

"1. Whether the Learned Presiding Officer without appreciating the facts of the case had, wrongly concluded that both the

Assessing Officer and the Appellate Authority have admitted that the Respondent herein had paid the entire amount without any objections and it shows no willful suppression?

2. Whether the Learned Presiding Officer failed to consider that the penalty amount was imposed upon the Respondent/Assessee herein as punishment for his act of willful suppression of assessable turnover and to discourage the dishonest act of tax evasion. While so, allowing the Tax Appeal filed by the Respondent and nullifying the penalty amount will result in encouragement of tax evasion and the Tax payers will indulge in similar act of evasion on the pretext that he can be able to avoid penalty burden?

3. Whether the Learned Presiding Officer, in the light of "Balaji Floor and Wall Tiles Vs. State of Tamil Nadu (Tax Case Revision No.5 of 2014)", was right in setting aside the penalty imposed by the Assessing officer in Assessment Order for the year 2006-07 for willful suppression of taxable turnover? and

4. Whether the Learned Presiding Officer, in the light of "The State of Tamil Nadu Vs. Golden Homes Pvt. Ltd. (Tax Case Revision Petition No.24 of 2016)", was right in setting aside the penalty imposed by the Assessing Officer in Assessment Order for the year 2006-07 for willful suppression of taxable turnover."

3. We have heard Mrs.V.Usha, learned Additional Government Pleader (Puducherry) appearing for the petitioner and Mr.K.Govi Ganesan, learned counsel for the respondent.

4. The respondent is a dealer in petrol and high speed diesel in the Union Territory of Puducherry. The petitioner-Department issued pre-assessment notice dated 11.11.2009 in super session of earlier notice dated 05.01.2009 proposing to reject the return filed by the respondent and assessed them on best of judgment passed under Section 13(2) of the Pondicherry General Sales Tax Act, 1967 (the 'PGST Act' for brevity) read with Section 81 of the PVAT Act.

5. The cause of action for issuance of the pre-assessment notice was based on a cross verification done by the Department with regard to the supply details from Hindustan Petroleum Corporation Limited (HPCL) with a sale turnover by the

respondent in their A2 returns and upon such cross verification, it appeared that the respondent had filed incorrect returns for the relevant period, namely 2006-07.

6. Based on these submissions, the petitioner proposed to reject the returns filed by the dealer and determine the correct rate of tax. The respondent, on receipt of the pre-assessment notice, sought for 30 days time by letter dated 28.01.2009 to enable them to submit their reply. They did not submit their reply, but gave another representation dated 18.05.2009 requesting for further time to submit their objections. By another letter dated 23.09.2009, the respondent stated that some invoices were wrongly mentioned and requested to delete the same and they furnished the closing stock. Subsequently, the Department received authenticated copy of C-Form issued by HPCL, which reveal that they had effected total purchase of 230 kl of MS, 746 kl of MSD and Lubricants for the financial year 2006-07 valued at Rs.3,10,12,739/-, but had reported a turn over of Rs.1,06,72,148.87/- in their A2 returns, which proves that the respondent had filed incorrect returns with an intention to evade tax. The respondent was granted an opportunity to submit their objections. In spite of repeated notices, the respondent did not come forward with any justifiable reason, but disputed the allegation made against them by the petitioner.

7. On the contrary, they started effecting payments in terms of the proposal made in the pre-assessment notice, though not by way of single payment, but in installments, which the Department had accepted without objections. Ultimately, the assessment was completed by order dated 14.01.2011 determining the total tax payable at Rs.35,47,435/- and penalty was also levied at 1½ times in terms of Section 13(3) of the PGST Act read with Section 81 of the PVAT Act.

8. Aggrieved over the same, the assessee preferred appeal before the Appellate Assistant Commissioner (CT), Puducherry. The assessee raised a plea that the purchase details obtained from the HPCL should not have been relied on by the Assessing Authority without allowing the respondent to cross examine the supplier to verify the veracity of the details furnished before making the assessment.

9. With regard to the penalty, the respondent stated that the relevant year, namely 2006-07, was the first year of their business and there was lot of difficulty faced by them and that there was no actual intention to evade payment of tax. The First Appellate Authority considered the submissions made by the respondent and not being convinced, dismissed the appeal by order dated 15.02.2017.

10. Aggrieved by the same, the respondent preferred appeal before the Tribunal, questioning the levy of penalty at 1.5 times of the tax demand and reiterating that it is their first year of business by placing reliance on the decision of this Court in the case of State of Tamil Nadu Vs. Golden Homes Pvt. Ltd. [TC(R).No.24 of 2016 dated 14.09.2016] and Balaji Floor and Wall Tiles Vs. State of Tamil Nadu [TC(R).No.5 of 2014 dated 27.11.2018]. The Tribunal, after taking note of the contentions placed before it, held that the respondent had paid the entire tax prior to the completion of assessment and by taking note of the mistakes, which were pointed out by the petitioner, the Tribunal held that there was no willful suppression.

11. The finding of the Tribunal that there was no willful suppression is incorrect, because the respondent did not have any defence as against the proposal made in the pre-revision notices and in fact, they had accepted the stand taken by the Department and paid the tax, not in one lump sum, but in installments as and when the Department issued notices.

12. The respondent could not controvert any of the allegations made against them in the pre-revision notices. The cross verification of the records obtained from the HPCL clearly showed suppression of the turn over. Therefore, the Tribunal was not right in concluding that there was no willful suppression. If, according to the respondent, there was a genuine and bona fide mistake, they ought to have established the same. Therefore, the suppression, which was done, has to be taken as willful suppression.

13. The plea, which was raised before the First Appellate Authority that the records of the HPCL ought not to have been relied upon and they should be permitted to cross examine the official's pleading, has to be outrightly rejected.

14. In fact, such a plea was rejected by this Court in the case of M/s.Surya Service Station Vs. The Appellate Assistant Commissioner [TC(R). Nos.29 to 31 of 2018, etc., batch dated 29.11.2018]. The decisions, which were referred to by the respondent and relied on by the Tribunal, are distinguishable.

15. The decision in the case of Golden Homes would not be applicable to the facts and circumstances of the case, because it is a case where the assessment was a revision of an assessment pursuant to an inspection and not a regular assessment as in the case of the respondent. Equally, the decision in the case of Balaji Floor and Wall Tiles would also not be applicable, because in the said case, it was also a case of revision of assessment pursuant to inspection, but the dealer therein had paid the entire tax, which was prior to the issuance

of pre-revision notice. Therefore, the two decisions, which were relied on by the respondent, are not applicable and are distinguishable on facts.

16. In the case of Surya Service Station, more or less, an identical issue was considered by the Court and the ground raised by the dealer was rejected. The operative portion of the order reads as follows:

"38. Examining the order passed by the first appellate authority, we find that the first appellate authority has also assigned reasons, thought not very cogent but, yet in his understanding, he has assigned reasons, with regard to why the penalty should be sustained. In fact, the first appellate authority has pointed out that the dealer has signed in every page of Form C declaration and its annexures with details of invoice wise purchase of petroleum products for re-sale in Mahe. Thus, we find that the reasons have been assigned by the first appellate authority. Coming to the judgment of the Tribunal, the Tribunal, being the last fact finding authority, is required to examine as to whether the decision of the first appellate authority and the Assessment Orders were just and proper. In our considered view, this exercise has been undertaken by the Tribunal. The reasons have to be culled out from various paragraphs of the judgment because, each paragraph commencing from paragraph 8 of the judgment, not only gives the finding of the Tribunal, but also prefaces the contention advanced by the dealer and the contention advanced by the Government Pleader. If we examine in that angle, we find the judgment of the Tribunal also to be a reasoned judgment. Therefore, we do not agree on the said contention of the dealer.

39. While discussing the need for cross examination, we have also discussed as to why the burden of proof has always remained with the petitioner. We reiterate the same and hold that the burden of proof had remained with the dealer and it is not for the Department to establish anything in the matter, as it is a document generated by the dealer.

40. The final aspect would be whether penalty levied by the Assessing Officer requires interference or not. The arguments of the learned counsel for the petitioner is that mens rea is required and in this regard, placed strong reliance in Tvl.Nu-Tread Tyres (supra), which was a case arising under the provisions of the Central Sales Tax Act, 1956.

41. The Hon'ble Full Bench pointed out that the expression "falsely represents" clearly shows that the element of mens rea is necessary component of the offence and in the absence of mens rea, resort to penal provision would not be proper, unless it is established that the conduct of the dealer was contumacious or that there was deliberate violation of the statutory provisions or wilful disregard. The Hon'ble Full Bench had referred to the decision in the case of Vijaya Electricals vs. State of Tamil Nadu, (1991) 82 STC 268, wherein, the dealer, who knew what was contained in the certificate of registration uses the C Form declarations in respect of goods not mentioned in the certificate and the representation made by the dealer was false. The Court noted this decision and held that it is sufficient to indicate that mens rea has application in tax default cases.

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43. However, we are not convinced with the manner in which the Tribunal had interfered with the order passed by the first appellate authority by reducing the penalty merely, on the ground that the dealer accepted and paid the tax. There can be no concession on this ground and it is a clear case of misplaced sympathy. If the dealer has not paid the correct rate of tax, it is illegal. If the dealer has collected tax and not remitted to the Department is all the more illegal. Therefore, there is no case for exercising any sympathy in such cases more particularly, when the transactions are all financial transactions especially dealing with the petroleum products, which can be handled only by licensed dealers such as the

petitioner."

17. As pointed out in the above decision, there cannot be any concession merely because the dealer has paid the tax in installments after issuance of pre-assessment notices and no sympathy can be exercised on the said ground. However, the power available with the Assessing Officer is with regard to the quantum of penalty, which can be imposed on the dealer and Sub-Section (3) of Section 13 of the Act states that a penalty, not exceeding 1½ times of the tax due on the turn over that was not disclosed by the dealer in his return, can be imposed. Therefore, at best, to that extent, the Assessing Officer may have a limited jurisdiction to look into the case of the dealer.

18. There have been several cases where the assessee would take a stand before the Assessing Officer upon issuance of re-opening of assessment with a view to purchase peace and the entire tax liability could be admitted by the assessee and tax paid and they would plead that this factor should be reckoned and penalty should not be imposed. One such issue came up for consideration before the Hon'ble Supreme Court in the case of Mak Data P. Ltd. Vs. Commissioner of Income Tax.

19. In the said decision, the question was whether, when the assessee offered to surrender by way of voluntary disclosure, can it be a factor for not initiating penalty proceedings and prosecution in terms of Section 271(1)(c) of the Income Tax Act, 1961. The Hon'ble Supreme Court pointed out that the Assessing Officer shall not be carried away by the plea of the assessee like 'voluntary disclosure', 'buy peace', 'avoid litigation', 'amicable settlement', etc., to explain away its conduct and the question is whether the assessee has offered any explanation for concealment of particulars of income or furnishing inaccurate particulars of income and the burden is on the assessee to show otherwise, by cogent and reliable evidence. However, the Hon'ble Supreme Court has pointed out that it is trite law that the voluntary disclosure does not release the appellant-assessee from the mischief of penalty proceedings.

20. In the earlier paragraph, we have held that the Tribunal was not right in concluding that there was no willful suppression. Applying the law laid down by the Hon'ble Supreme Court in the case of Mak Data P. Ltd. would fortify the conclusion arrived at by us. As pointed out earlier, when the Assessing Officer levied penalty 1½ times of the tax demanded, the assessee claimed that it was their first year of business. However, that cannot be a sole reason. However, if the assessee is able to show some bona fide reasons, which prevented them from disclosing the full turn over, then the Assessing Officer would be entitled to examine the same for its correctness.

21. Therefore, only to that extent, we are of the view that the Assessing Officer can be directed to look into the aspect as to whether the penalty can be imposed or not. He shall do so by taking note of the conduct of the respondent prior to the issuance of the pre-assessment notice and during the assessment proceedings.

22. Mr.K.Govi Ganesan, learned counsel for the respondent would submit that the conduct of the assessee thereafter has not been called in question and that they have been promptly paying the tax. This aspect can also be verified by the Assessing Officer.

23. In the result, the tax case revision filed by the Revenue is allowed and the questions of law are answered in favour of the Revenue and the finding of the Tribunal confirming the imposition of penalty at 1.5 times alone is set aside and the matter is remanded back to the Assessing Officer for a fresh consideration bearing in mind the observations made in this order.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. Puducherry Value Added Tax Appellate Tribunal, Puducherry.
2. The Appellate Assistant, Commissioner (CT), Commercial Taxes Department, Puducherry.
3. The Assistant Commercial Tax Officer-II, Puducherry.

+1cc to Mr.K.Govi Ganesan, Advocate, S.R.No.12660.

+1cc to the Government Pleader, S.R.No.12958.

TC(R).No.42 of 2020

AK-II(CO)

CSR 31.03.2021