BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 09.08.2023

CORAM:

THE HONOURABLE **DR.JUSTICE ANITA SUMANTH**
AND
THE HONOURABLE **MR.JUSTICE R.VIJAYAKUMAR**

T.C,(MD).Nos.7 and 90 of 2009

Tvl.Vanitha Colours
105-A, Trivandrum Road
Palayamkottai ...appellant in both petitions

Vs

The State of Tamil Nadu represented by
The Commercial Tax Officer
Palayamkottai ...Respondent in both petitions

Common Prayer: Tax Cases filed under Section 38 of TNGST Act, 1959, to revise the orders of the Sales Tax Appellate Tribunal (Addl.Bench) Madurai dated 28.10.2003 passed in Madurai Tribunal Appeal M.T.A.Nos.566 and 565 of 2008.

(In both cases)

For appellant : Mr.A.Chandrasekaran

For Respondent : Mr.M.Sidharthan
Additional Government Pleader

COMMON JUDGMENT

(Judgment of the Court was made by **R.VIJAYAKUMAR, J.)**

Both the tax cases have been filed by the assessee challenging the orders passed by the Sales Tax Appellate Tribunal (Additional Bench), Madurai in MTA.Nos.565 & 566 of 1998 dated 28.10.2003.

2.The Tax Case No.7 of 2009 relates to the assessment year 1989-1990 ((TNSGT). Tax Case No.90 of 2009 relates to the assessment year 1990-1991 (TNSGT). Since the issue involved in both the tax cases are similar, they are tagged together and a common order is being passed.

3.According to the appellant, he is engaged in the business of photographic jobs like taking photographs, developing and printing of negatives etc., for which, according to him, he collects labour and service charges from the customers. The original order of assessment was completed in the respective assessment years. On 10.11.1992, the officials of the Enforcement Wing are said to have inspected the premises of Photo Marketing Service, Madras -21 and it was alleged that the said entity had received commission for the goods purchased by the assessee under six invoices from Jindal Photo Films, New Delhi. On the basis of the said third party record, the official respondent proposed to pass a revised order of assessment by determining the appellant's turnover under Section 3-B of the TNGST Act 1959 and also to levy penalty under Section 16(2) of the Act.

4.The appellant had submitted a reply denying purchase of goods from the said Jindal Photo Films, New Delhi and had contended that their name and registration number were misused by some one who wanted to evade tax. The appellant had further contended that they are not able to produce the books of accounts, since the entire books of accounts relating to several years have been washed away in the floods on the mid-night 13.11.1992.

5.The respondent had confirmed the proposal notice and passed a revised order of assessment vide his order dated 30.12.1994. The petitioner preferred an appeal in A.P.Nos.58 and 59 of 1995 before the Appellate Assistant commissioner(CT), Tirunelveli. The First appellate Authority had dismissed the said appeals fixing burden of proof on the assessee. Aggrieved over the same, the assessee had filed Second Appeal in M.T.A.No.565 and 566 of 1998 before the Sales Tax Appellate Tribunal (AB) Madurai. The Appellate Tribunal had also confirmed the assessment made in the revised order of assessment. However, penalty levied under Section 16(2) of the Act was reduced from 150% to 50%. Challenging the disallowed portion, the present tax cases have been filed by the assessee.

6.The primary contention of the assessee is that the Enforcement Wing officials are said to have inspected a third party premises in Chennai where they are said to have been found that some records relating to receipt of commission for the goods alleged to have been purchased by the assessee from another third party namely Jindal Photo Films, New Delhi. The entire revision of assessment has been made on the basis of the third party records, a copy of which was not produced to the assessee to defend himself. Moreover, the assessee was not permitted to cross examine the said third party. In view of the above said facts, the assessee was not able to prove the negative. Without taking into consideration the said aspect, the First Appellate Authority and the Second Appellate Authority have confirmed the revision of assessment.

7.Per contra, the learned counsel appearing for the official respondent had contended that sufficient time and opportunities were provided to the assessee to defend his case. The assessee could not produce his documents which were in his possession to establish the fact that he had no transaction whatsoever with the entity in Chennai or New Delhi. Therefore, the order of the First Appellate Authority as well as the Second Appellate Authority are sustainable in the eye of law.

8.We have given anxious consideration to the submissions made on either side and perused the material records.

9.The above tax cases have been filed raising the following substantial questions of law:

(i)Whether the Appellate Tribunal is correct in confirming the revision of assessment made on the basis of third party records?

(ii)Whether the Appellate Tribunal is correct in confirming the assessment made on the basis of information collected from the place of business of a third party that too when those information reveal only the commission received by the said third party that too when those information reveal only the commission received by the said third party from one Tvl.Jindal Photo Films, New Delhi another third party, for the invoices allegedly raised in the name of the appellant.

(iii).Whether the Appellate Tribunal is correct in disbelieving the contentions of the appellant that they have not effected any purchase from Tvl.Jindal Photo Films, New Delhi when the department also has no proof to establish that the appellant had

effected purchases from New Delhi?

(iv).Whether the Appellate Tribunal is correct in not giving any finding on the contention raised by the appellant that their books of accounts were washed away in the floods that entered the place of business of the appellant on the midnight of 13.11.1992?

(v)Whether the Appellate Tribunal is correct in holding that the appellant was not able to give any evidence against the information gathered by the department without appreciating the contention of the appellant that their books of accounts were washed away in the floods that entered the place of business of the appellant on the midnight of 13.11.1992?

(vi)Whether the Appellate Tribunal is correct in not following the Principles of Natural Justice while third party records are relied on for assessment and the appellant is not provided with the copies of those records and an opportunity to cross examine the third party?

(vii)Whether the Appellate Tribunal is correct in expecting the appellant to establish a negative fact that too when the appellant contend that their books of accounts were washed away in the floods that entered the place of business of the appellant on the midnight of 13.11.1992?

(viii)Whether the Appellate Tribunal is correct in not following the principles laid down by the Hon'ble Supreme Court of India in the decisions reported in 66 STC Page 4 and 71 STC Page 173 and that of the Hon'ble High Courts reported in 75 STC Page 180, 72 STC Page 7, 62 STC Page 184 and 79 STC Page 177?.

(ix).Whether the Appellate Tribunal is correct in not considering the legal position that to make a revision of assessment and to levy penalty there should be some higher degree of proof which is totally lacking in the appellant's case?

(x)Whether the Appellate Tribunal is correct in refixing the penalty at 50% of the tax levied when the assessment itself is bad in law and unsustainable?"

10.Admittedly, the assessments of the appellant have been revised based upon certain records said to have been seized by the Enforcement Wing from the Photo Marketing Service in Chennai which is said to have revealed that the assessee had purchased the goods vide six invoices from one Jindal Photo Films, New Delhi. Therefore, it is clear that the assessments have been revised based upon third party documents and not based upon any inspection conducted in the premises of the assessee. The authorities have failed to furnish a copy of the said third party document to the assessee, especially when the assessee has taken a stand that their names and registration number have been misused by some one to evade tax. No opportunity has been provided to the assessee to cross examine the said third party. Therefore, it is clear that the entire revision of assessment has been made based on documents which have been screened from the purview of the assessee. On the other hand, the burden has been fixed upon the assessee to prove the negative that he did not have any transaction with those third party entities.

11.In view of the above said facts, the orders of the authorities are clearly in violation of the principles of natural justice and they are liable to be set aside and accordingly, set aside. All the substantial questions of law are answered in favour of the appellant. Both Tax Cases are allowed. No costs.

[A.S.M.J.,] & [R.V.J.,]
09.08.2023

NCC : yes/no
Index :yes/no
Internet :yes/no
msa

To

1. The Sales Tax Appellate Tribunal
(Addl.Bench) Madurai

2.The Commercial Tax Officer
Palayamkottai

DR.ANITA SUMANTH, J.
AND
R.VIJAYAKUMAR, J.

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Pre-delivery Judgment made in
T.C,(MD).Nos.7 and 90 of 2009

09.08.2023