IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.11.2024

PRONOUNCED ON : 11.11.2024

CORAM:

THE HON'BLE DR.JUSTICE ANITA SUMANTH
AND
THE HON'BLE MR.JUSTICE G.ARUL MURUGAN

T.C. No.1660 of 2008

The State of Tamil Nadu,
Represented by the Deputy Commissioner
of Commercial Taxes,
Madras (North) Division,
Greams Road,
Madras - 600 006. ... Appellant

versus

Tvl.Steel Corporation,
106, Linghi Chetty Street,
Madras - 600 001. ... Respondent

PRAYER: Appeal filed under Section 38 of the Tamil Nadu General Sales Tax Act, 1959 against the order of the Sales Tax Appellate Tribunal (Main Bench), Madras dated 07.08.1991 in T.A.No.46 of 1990.

For Appellant	:	Mr.V.Prashanth Kiran Government Advocate
For Respondent	:	Served through Paper Publication - No Appearance

J U D G M E N T

[*Judgment* of the Court was made by ***G.ARUL MURUGAN, J.***]

This Tax Case has been admitted on the following substantial questions of law:

*"**1**. Whether the facts and circumstances of the case, the Tribunal is legally right in allowing the claim of second sale exemption contrary to established facts that the so-called sellers were either non-existent or had not handled the goods?*

***2**. Whether the order of the Tribunal in having deleted the consequential penalty under Section 12(5)(iii) is legally tenable?"*

2. The respondent is a dealer doing business in Iron and Steel and is registered under the Tamil Nadu General Sales Tax Act, 1959 [in short, 'Act']. As the dealer has not filed the return for the assessment year 1982-83, the accounts were called for and verified by the Assessing Officer. It was found that the dealer has effected sales of Iron and Steel for a sum of Rs.78,10,319.64 as per their accounts for the assessment year 1982-83.

Since the dealer claimed exemption on the entire sales as second sales, the relevant records were verified.

3. The assessee had claimed purchase from 5 entities and on verification, it was found that there was no such dealer in existence and the documents produced were fictitious and bogus one. Since the assessee was not able to prove that the purchases were second sales, the Assessing Officer assessed the dealer under the Act for the assessment year 1982-83 by rejecting the claim of second sales in respect of the purchases made from those 5 firms.

4. Since the return was not filed, penalty was also levied under Section 12(5) of the Act. The assessee preferred an appeal before the Appellate Assistant Commissioner (CT)-I in A.P.No.424/87 and by order dated 02.08.1989, the appeal came to be dismissed confirming the assessment by observing that the exemption claimed on the purchases which are made from spurious dealers cannot be accepted.

5. Assailing the same, the assessee had preferred Second Appeal before the Tamil Nadu Sales Tax Appellate Tribunal in Tribunal Appeal No.46 of 1990. However, the Appellate Tribunal, by order dated 07.08.1991, allowed the appeal on the ground that since the entire purchases were effected from registered dealers, the sales at the hands of the appellant are eligible for exemption. Further, the Tribunal also observed that the Assessing Officer had merely called for a report from various assessment circles and there was no detailed report after enquiry. Challenging the orders passed in the Second Appeal, the Revenue had preferred the above Tax Case.

6. Mr.V.Prashanth Kiran, learned Government Advocate appearing for the appellant submitted that the assessee had claimed exemption only on the ground of second sale and the Assessing Officer after verification, had found that the documents relied on by the assessee from 5 firms were found to be bogus as there were no such dealers. The Assessing Officer had rightly disallowed the claim as the assessee failed to prove that there was a first sale prior to the purchase of the assessee.

7. He further by relying on the decision in the case of ***A.S.Ganapathy Chettiar Vs. The State of Tamil Nadu*** reported in ***(1976) 38 STC 455*** submitted that the burden was on the assessee to prove the second or subsequent sale and that there was an earlier taxable sale.

8. Even though the service has been completed on the respondent and their name is printed in the cause list, no one has entered appearance on the part of the respondent.

9. Heard the learned Government Advocate appearing for the appellant and perused the materials available on record.

10. The respondent, who is a registered dealer under the Act, had effected sales of Iron and Steel for a sum of Rs.78,10,319.64, as per the accounts for the assessment year 1982-83. The dealer claimed the exemption on the entire sales of M.S.Goods as it is second sales. To ascertain the correctness, the Assessing Officer had called for the purchase bills relied on by the assessee and verified with the records and accounts of the dealers.

11. As per the records, the assessee had purchased M.S.Goods for a sum of Rs.10,69,684.80 from one Tv1.Ramanlal & Company. On verification of the place of business of the dealer, it revealed that there was no such dealer in existence. Further, the TNGST number noted in the sale bills as TNGST.96184/76-77 related to one Tvl.Oriental Central Industries and further enquiry revealed that no such dealers had effected business at any point of time in the above place.

12. In respect of the purchases made from one Tvl.Yasmeen Steel Traders for a sum of Rs.59,12,211.58 with TNGST.661389/80 also revealed that there was no such dealer in that address. Further, in respect of the other purchases made from Tvl.Mahalakshmi Engineering Works with TNGST 23146, Tvl.Alamelu Industries and Tvl.General Steel Suppliers, all have been verified and found that there are no such dealers and the documents are all in a fictitious name and the TNGST noted in the bills are all bogus ones in the name of non-existing bogus dealers.

13. As there was no proof that the purchases made from those parties suffered tax at an earlier stage, the Assessing Officer passed an order of assessment dated 17.08.1987 by rejecting the claim of second sale and brought all those purchases to tax. The total turnover for the assessment year 1982-83 was determined to Rs.78,10,319.64 and the same was assessed for tax at 4% single point to the tune of Rs.1,40,464/-.

14. In the appeal preferred by the assessee, appellate authority took note of the fact that the assessee has not filed any documents to prove that the purchases were made from genuine dealers other than the purchase bills and the accounts maintained by them. Further, on verification and enquiry, it was found that the alleged sellers itself are bogus dealers in which some other registration numbers of dealers have been created in fictitious names. As such by relying on the decision of STAT in T.A.No.1785/84 dated 12.03.1987, which was passed by following the decision of the Andhra Pradesh High Court in 62 STC 71, wherein it was held that the person claiming the exemption under the second sales should necessarily identify the person within the State and when the alleged seller itself is a bogus dealer there is no need for further probe, thereby had rejected the appeal.

15. However, in the Second Appeal, the Tribunal by shifting the burden on the revenue by observing that the authorities were not able to actually prove that the sales at the hands of the assessee are liable to tax and further observing that the Assessing Authority had not conducted a detailed enquiry after receiving the report, allowed the appeal and set aside the assessment.

16. When the respondent / assessee had claimed the exemption on the purchase of Iron and Steel on the ground that it was a second sale, then it was on the assessee to produce the materials to establish that it was actually a second sale. In view of Section 10 of the Act, the burden of proving a transaction falls upon the dealer to establish the transaction / claim of second sales. In the instant case, when the respondent / assessee had only relied on the purchase bills from 5 firms, which after verification and enquiry were found to be bogus and fictitious, the respondent was not able to produce any material to establish the purchases from the alleged dealers.

17. Therefore, when the burden was on the dealer to prove the factum of second sale, the respondent had not discharged the burden of proving the actual first sale, for him to successfully claim the exemption on the ground of second sale. The Tribunal had erroneously shifted the burden from the dealer to the revenue, which is against Section 10 of the Act and had come to the conclusion that the revenue had not established by proving that the purchase of the respondent was a first sale.

18. In this regard, we had an occasion to deal with a similar issue in ***W.P.No.34665 of 2007 dated 07.08.2024 [M/s.MKR Cashew Exports Vs. The Secretary, Tamilnadu Sales Tax Appellate Tribunal (MB)]*** where the dealer was not able to prove the factum of first sale to claim the exemption on the ground of second sale, as the burden of proof was on the assessee to prove the transaction. The relevant portion of the said order is extracted hereunder:-

> *"**11**. Admittedly, the petitioner has not produced any material, barring invoices, to establish purchases from the alleged sellers. No attempt was made at any stage of the proceedings to produce the three entities who are stated to have effected sales to the petitioner. Moreover, the enquiry conducted by the respondents has established that the dealer registration numbers furnished by the petitioner belonged to other registered dealers and not the entities named as sellers by the petitioner.*
>
> ***12**. In the aforesaid circumstances, the provisions of Section 10 of the Act stand attracted. Section 10(1) of the Act reads thus:*

> *Section 10. Burden of proof: – (1) For the purpose of assessment of tax under this Act the burden of proving that any transaction or any turnover of a dealer is not liable to tax shall lie on such dealer.*

***13**. The burden of proving a transaction falls upon the entity making the claim in respect of that transaction and thus, the onus of establishing a claim of second sales falls solely upon the dealer making such claim. Section 10(2) specifically states that 'Notwithstanding anything contained in this Act or in any other law for the time being in force, a dealer in any of the goods liable to tax in respect of the first sale or first purchase in the State shall be deemed to be the first seller or first purchaser as the case may be of such goods and shall be liable to pay tax accordingly on his turnover of sale or purchase relating to such goods, unless he proves that the sale or purchase, as the case may be of such goods had already been subjected to tax under this Act.' The argument of the petitioner that the burden of establishing that the sales in question are not second sales and that the claim of exemption is incorrect falls on the revenue, is thus devoid of merit and contrary to statute.*

***14**. In the present case, the dealer could well have produced the alleged vendors to support the claim of second sales. This was never done at any stage of the proceedings and we are hence of the categoric view that there is nothing to support the assessee's contention in this regard.*

***15**. Reliance is placed by the petitioner on the following decisions (i) Govindan and Co., v The State of Tamil Nadu [(1975) 3 STC 50 (Mad)] and (ii) Kathiresan Yarn Stores v The State of Tamil Nadu [(1978) 42 STC 121].*

***16**. In Govindan & Co (supra), there was an inspection of that assessee's premises. Clarifications were sought in regard to certain purchases and the explanation put forth by Govindan and Co., was that the purchases had been made from 12 dealers. Since that dealer had not been in a position to prove the purchases, that turnover had been estimated and brought to tax.*

17. In appeal, the matter was remanded to afford reasonable opportunity to that assessee. Govindan and Company challenged the remand order before the Sales Tax Appellate Tribunal, which confirmed the same. Before the High Court, the case of Govindan and Co., was that there was no necessity for it to establish an anterior sale and that the matter ought not to have been remanded but ought to have been allowed in their favour instead. The appeal was allowed in the following terms:

> *"3. Though the order of the Tribunal is one upholding the remit order passed by the Appellate Assistant Commissioner, the learned counsel for the petitioners contends that the direction of the Tribunal that the petitioners are to prove that the twelve dealers from whom they purchased the goods were real persons and that they had in fact paid the tax on the iron and steel is not correct and that it is not the duty of the petitioners to prove that their sellers have in fact paid the tax on their sales. The learned counsel appears to be right in his submission that the petitioners who claimed exemption from tax on the ground that their sales are second sales are bound to show that there has been an anterior taxable sale and that they need not prove that tax had in fact been paid on those anterior sales. To claim the benefit of tax on the ground that their sales are second sales, the petitioners need not show that their sellers have in fact paid tax and it is enough for them to show that the earlier sales are taxable sales and that the tax is really payable by their sellers. Therefore, the direction given by the Tribunal that the petitioners are to show that the tax has been paid by their sellers on the iron and steel goods sold by them to the petitioners does not appear to be correct."*

18. The petitioner relies on the finding that 'to claim the benefit of tax on the ground that their sales are second sales, the petitioners need not show that their sellers have in fact paid tax and it is enough for them to show that the earlier sales are taxable sales and that the tax is really payable by their sellers'.

__19__. The above finding does not, in our view, advance the case of the petitioner. What has been held is that, in order to establish an anterior sale for claiming second sales exemption, it is not necessary for an assessee to establish that tax had actually been paid by the first seller. It would suffice that the factum of first sale was established. In other words, non-payment of tax at the point of first sale by the seller would not stand in the way of a claim of second sale, provided that the first sale had been proved.

__20__. Thus, actual payment of the tax at the point of sale is not necessary to establish a second sale. However, in the present case, the petitioner has not discharged the burden of proving the first sale and thus can draw no benefit from the ratio of Govindan and Co. In light of the discussion supra, the concurrent conclusion of the authorities in rejecting the claim of second sales is unassailable and we uphold the same."

19. Further, in ***A.S.Ganapathy Chettiar Vs. The State of Tamil Nadu*** reported in ***(1976) 38 STC 455***, relied on by the learned Government Advocate for the appellant, the Division Bench of this Court has held that the burden of proving that there was an earlier taxable sale was on the assessee. The relevant portion is extracted hereunder:

"The question of liability to sales tax could not be approached from the point of view of the entry made by the assessee. It is the admitted case that there were certain sales which the assessee claimed as second sales exempt from sales tax. Once it is accepted that there was a sale by the assessee, it is for him to prove that that sale was not liable to sales tax as it is the second or the subsequent sale. The burden is on him to show that it is a second or a subsequent sale by proving that there was an earlier

taxable sale. This was the view we have held already in Govindan & Co. v. State of Tamil Nadu [1975] 35 S.T.C. 50. It was held therein that if an assessee claims exemption from tax on the ground that his sales are second sales, he is bound to show that there was an earlier taxable sale though it was not necessary for the assessee to prove that the earlier sale had actually suffered tax. This was also the view expressed in Imperium Traders v. State of Madras [1975] 36 S.T.C. 6. The learned counsel relied on an unreported judgment in T.C.Nos.295 and 296 of 1964 dated 10th July, 1967 Mehaboob and Company v. Government of Madras, in support of his contention that it is for the department to show that the sale effected by him is a taxable sale and not a second sale. We are unable to agree that that decision in any way helps the learned counsel. The ratio of the judgment, in our opinion, is that in order to make a transaction liable, it must be proved to be a sale and if once it is proved to be a sale, it is for the assessee to prove that that sale is exempt because every transaction of sale is liable to tax under Section 3(1) of the Tamil Nadu General Sales Tax Act.

We are, therefore, of the opinion that the burden of proving that there was an earlier taxable sale was on the assessee."

20. In view of the above decisions and the fact that the respondent dealer had failed to prove the transaction of the factum of first sale, the first question of law is answered in favour of the revenue and against the assessee.

21. In so far as the levy of penalty, the Tribunal had set aside the penalty levied under Section 12(5)(iii) of the Act on the ground that the entire turnover is not liable for tax at the hands of the respondent as they are only second sales and therefore, the question of filing return does not arise and in the absence of any obligations to file return, there cannot be any levy of penalty.

22. In the instant case, the respondent had put forth a claim of second sales and further they submitted the documents, which on enquiry were found to be bogus and fictitious and the respondent had made no attempts to produce the documents through dealers before the authorities for confirmation of the alleged first sale. In view of our findings arrived at question No.1, the respondent, who is liable to pay tax had not filed any return for the assessment year 1982-83 and have wilfully suppressed taxable turnover and therefore, the Assessing Officer had rightly imposed the penalty under Section 12(5)(iii) of the Act.

23. In view of the above, the decision of the Tribunal in deleting the penalty imposed by the Assessing Officer under Section 12(5)(iii) of the Act cannot be sustained. Under such circumstances, the second question of law is also answered in favour of the revenue and against the assessee.

24. Accordingly, the impugned order of the Tribunal dated 07.08.1991 in T.A.No.46 of 1990 is set aside and the assessment order as confirmed by the appellate authority stands restored.

25. In the result, this Tax Case stands ***allowed***. There shall be no order as to costs.

[A.S.M.J.,]

[G.A.M.J.,] **11.11.2024**

Speaking order / Non-speaking order
Index : Yes / No
Neutral Citation : Yes / No

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To

The Deputy Commissioner
of Commercial Taxes,
State of Tamil Nadu,
Madras (North) Division,
Greams Road,
Madras - 600 006.

Dr. ANITA SUMANTH, J.
AND
G.ARUL MURUGAN, J.

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Pre-Delivery Judgment made in
T.C. No.1660 of 2008

11.11.2024