IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.08.2024

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH
and
THE HONOURABLE MR.JUSTICE G. ARUL MURUGAN

W.P.No.34665 of 2007
and
M.P.No.1 of 2007

M/s.MKR Cashew Exports,
Rep. By its Proprietor R.Kandeepan,
No.70, Amman Koil Street,
Pathirakottai. .. Petitioner

vs

1.The Secretary,
Tamilnadu Sales Tax Appellate Tribunal (MB),
City Civil Court Buildings, IInd Floor,
Chennai – 600 014.

2.The Deputy Commercial Tax Officer,
Panruti (Rural). .. Respondents

Prayer : Petition filed under Article 226 of the Constitution of India praying to issue a writ of certiorarified mandamus to call for the records of the first respondent in T.A.No.64/2004, quash the impugned proceedings dated 10.10.2007 and further direct the second respondent to accept returns filed by the petitioner for the assessment year TNGST 2000-01.

For Petitioner	:	Mr.V.Sundareswaran
For Respondents	:	Mr.V.Prashanth Kiran Government Advocate for R2 R1 - Tribunal

ORDER

(Order of the Court was made by Dr.ANITA SUMANTH.,J)

The petitioner is a dealer in cashew kernels. For the period 2000 – 2001, returns of turnover were submitted in terms of the Tamil Nadu General Sales Tax Act, 1959 (in short, 'Act'), and an order of assessment was passed on self-assessment basis, accepting the returns filed. Finding some discrepancies therein, the assessment came to be revised under Section 16 (1) of the by way of a revision order dated 31.03.2003.

2. One of the issues that arose for consideration was a claim by the petitioner of exemption on second sales of cashew kernels. According to the petitioner, cashew kernels had been purchased from three dealers being, (i) R.Govindasamy, Padayachi, Jayankondam (R.C.No. 3620700) for a sum of Rs.1,59,500; (ii) V.Poorasamy Chettiar, Andimadam, (R.C.NO.3620796) for a sum of Rs.73,500.00; & (iii) T.Annamalai, Andimadam (R.C.No.3621071) for a sum of Rs.84,000.00/-, amounting in toto to a sum of Rs. 3,17,000.00/-.

3. Suspecting the above transactions and the claim of second sales, the assessing authority made a cross verification on 16.03.2001 with the Deputy Commercial Tax Officer, Jayankondam. The enquiry appears to have resulted in findings adverse to the petitioner and in the order of assessment, the officer states that the three persons who had been named as sellers by the petitioner did not exist, and the registration numbers furnished belonged to unconnected, third party dealers.

4. Hence, the authority arrives at the conclusion that the sellers were fictitious and bogus, proceeding to deny the claim of exemption on the ground of second sales. Penalty under Section 16(2) had been proposed and was confirmed in assessment.

5. At the stage of assessment, the petitioner had taken a stand that the purchases had formed part of the accounts and closing balance, that those goods had been sold during the next year i.e., 2001 – 02 and that such sales turnover had been duly verified and accepted by the Department. However, there was no claim of double taxation of the same turnover raised at any stage of the proceedings.

6. As against the order of assessment, an appeal was filed before the first Appellate Authority. Notably, the petitioner did not either produce the three alleged sellers or seek adjustment of tax allegedly paid in the subsequent year. The Appellate Authority confirmed the order of assessment by way of a crisp order that reads as follows:-

> *"A verification of records revealed that the Assessing Officer has answered all the points raised by the appellant in the assessment proceedings dated 31.3.2003. At the time of arguments, the appellant has stated that the details of first purchase made in 2000-2001 kept in stock, subsequent years, sales were effected. In the return argument filed by the Departmental Representative has stated that this reply was already considered by the Assessing Officer in his assessment order. Moreover, the appellant did not file any quantitative details along with profit and loss account at the time of check of accounts. The plea of appellant that the goods were kept as closing stock and that they were sold in 2001-02 is not acceptable. The arguments advanced by the ld.Authorised Representative as well as the Departmental Representative were*

considered and perused the connected records. I am of the opinion that the ld.Assessing Officer has justified in levying tax on the disputed turnover of Rs.26,88,585.00. Hence there is no case for interference. Accordingly, I confirm the levy of tax at 8% on the turnover of Rs.26,88,585.00."

7. The petitioner was unsuccessful in second appeal as well, where the adverse findings of the lower authorities were confirmed. The petitioner is hence before us aggrieved by the concurrent findings of the authorities in rejecting the claim of second sales exemption.

8. Mr.Sundareswaran, learned counsel for the petitioner, would vehemently argue that there has been gross violation of the principles of natural justice as the inspection report obtained by the assessing officer was never furnished to the assessee either at the stage of assessment or appeal. He also makes a tentative submission that, had he been supplied with the report, he could have sought cross examination of the dealers. He also submits that the burden of disproving the claim of second sales falls upon the revenue.

9. Per contra, Mr.Prashanth Kiran, appearing for the respondents, would draw attention to the provisions of Section 10 of the Act to illustrate that the burden of proof in any transaction or turnover of a dealer would fall solely upon the dealer.

10. We have carefully considered the rival submissions. The assessment in this case was originally made on a deemed basis accepting the returns filed. Enquiry commenced at the stage of regular assessment. We agree with the argument that even if the sellers had not been

registered as dealers, the petitioner could still have claimed second sales exemption. However, the issue that arises is as to whether at all there was any first sale in this case.

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.

21. As regards the argument that the purchases have suffered tax in the subsequent year, we are not inclined to consider the same at this juncture. The following observations have been made by the assessing officer that indicate that the assessee has been following a similar modus operandi for the earlier and later years as well:

> *"In the previous year also the dealers have effected such purchases from bogus dealers and from the dealers whose total turnover are less than Rs.3/- lakhs of rupees and claimed exemption and subsequently a revision of assessment was made and they have accepted the assessment and paid / paying taxes. Further their sales during the year 2001-02 has been verified and found that they have sold to a tune of Rs.72,009.00 only towards interstate sales during the months of August 2001 and October 2001 for which they have paid the taxes only on 7.8.2002 i.e. after a total delay of more than one year."*

22. To reiterate, the assessee has not, at any stage of the proceeding, raised the question of double jeopardy or sought adjustment

of the demand against the amounts already paid. This issue thus involves the factual question of whether at all there is double taxation which cannot be considered at this stage.

23. Coming to the levy of penalty, the petitioner submits that the return had been filed in Form 8(1), which required the accompanying financials to be audited by a Chartered Accountant. Since the financials had not been rejected, the disallowance of the exemption claim is based only on materials on record and there is hence no justification for the levy of penalty.

24. Section 16(2) states that penalty would be payable if there is wilful non-disclosure of assessable turnover by the dealer. Petitioner's argument is that the assessment is based on its own accounts. However, we are not in this matter concerned with either with suppression or non-disclosure of turnover but with wrongful claim of exemption. In the discussion supra, we have considered the claim of the petitioner and the basis of rejection of the same by way of concurrent orders of the lower authorities and have found the rejection to be justified.

25. The admitted facts on record establish the position that the petitioner has (i) consciously put forth a claim of exemption on second sales (ii) furnished the details of fictitious dealers in support of the aforesaid claim (iii) the supporting particulars submitted are false to the knowledge of the petitioner as no attempt was made to produce those dealers before the authorities for confirmation of the alleged first sales. The aforesaid factual position would, in our view, establish fully that the

matter falls within the four contours of the phrase *'wilful non-disclosure of assessable turnover'.* Hence we uphold the levy of penalty as well.

26. In light of the detailed discussion as above, we dismiss this writ petition. No costs. Connected miscellaneous petition is closed.

[A.S.M., J] [G.A.M., J]
07.08.2024

Index:Yes
Neutral Citation:Yes
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