
(2014) 11 MAD CK 0207
In the Madras High Court
Case No : T.C.R. No. 17 of 2014

Arkay Leathers Private Limited

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 20-11-2014

Acts Referred:

Central Sales Tax Act, 1956 — Section 10(b), 10A, 10A
Civil Procedure Code, 1908 (CPC) — Section 115
Tamil Nadu General Sales Tax Act, 1959 — Section 36(1A), 38

Citation : (2014) 11 MAD CK 0207

Hon'ble Judges : R. Sudhakar, J; R. Karupppiah, J

Bench : Division Bench

Judgement

R. Sudhakar, J.

1. This revision is filed under Section 38 of the Tamil Nadu General Sales Tax Act, 1959 (for brevity, "the TNGST Act") against the order of the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai, dated 28.1.2014 passed in STA.No. 14 of 2009, raising the following questions of law:

(i) Whether the Tribunal committed an error in answering the questions contrary to the facts of the case and law laid down by the Supreme Court in Commissioner of Sales Tax, U.P. Vs. Sanjiv Fabrics, ?

(ii) Whether the Tribunal committed an error of law in concluding that inasmuch as there was "false representation" it would satisfy the ingredient of "mens rea"?

(iii) Whether the Tribunal was correct in ignoring the law that penalty under Section 10A is not automatic unless there is mens rea on the part of the dealer, which had to be established by the Revenue?

(iv) Whether the Tribunal was justified in erroneously concluding that the penalty sustained by the Appellate Assistant Commissioner at 10% is justifiable when the test laid down by the Apex Court in Commissioner of Sales Tax, U.P. Vs. Sanjiv Fabrics, was not satisfied by the Assessing Officer and the Appellate Authority?

(v) Whether the Tribunal misdirected itself and thereby fell into an error in ignoring the Notification dated 24.1.1984, wherein the State Government had clarified that if the dealer is otherwise entitled to purchase the goods for carrying on his business, penalty under Section 10A of the Central Sales Tax Act, 1956 is not warranted?

2.1. The facts in a nutshell are as under: The petitioner is a tanner engaged in the manufacture and sale of leather and is a registered dealer on the file of the Commercial Tax Department. For the purpose of carrying on the said business activity, the petitioner required goods, including machinery for the manufacture of leather. The certificate of registration in Form "B" issued by the registering authority clearly mentioned the various goods and class of goods in clause (b) which relate to "manufacture" of leather.

2.2. During the assessment year 2003-2004, the petitioner purchased machinery for their use by issuing Form "C" and availed the concessional rate of tax at 4%. On verification of the connected certificate of registration issued to the petitioner in Form "B", it was found that the goods (machinery) had not been included to be purchased from inter-State. The department was, therefore, of the view that the petitioner had furnished a false declaration in Form "C" that the goods (machinery) are covered by their certificate of registration, which amounts to misuse of Form "C" declaration. According to the department, the said act of the petitioner constitutes an offence under Section 10(b) of the Central Sales Tax Act, 1956 (for brevity, "the CST Act") warranting levy of penalty under Section 10A of the CST Act. Therefore, a notice was issued on 24.10.2005 proposing to levy penalty to the tune of Rs.3,41,123/-.

2.3. The petitioner submitted his objections and it was their plea that there is no false representation or any mala fide intention on the part of the dealer in violation of the provisions contained in Section 10(b) of the CST Act. It was stated that the error that occurred in issuance of Form "C" for purchase of machinery was purely technical in nature and there is no intention to evade sales tax.

2.4. The Original Authority, after considering the objections of the petitioner, held that the petitioner had availed concessional rate of tax at 4% by issuing Form "C" without inclusion of the said goods (Machinery) in the certificate of registration in Form "B" and thus, they have contravened the provisions of Section 10(b) of the CST Act, punishable under Section 10A of the CST Act. The relevant portion of the order passed by the Original Authority on 30.6.2006 reads as under:

"7. The objections filed were considered and perused the connected records. A perusal of the connected records revealed that the dealers had affected Interstate purchases of Machinery to the tune of Rs.18,95,126/- and paid the CST Tax at 4% on the same. A further verification of the connected Certificate of Registration issued under the CST Act, 1956 revealed that the Goods

"Machinery" had not been included in the Certificate of Registration in Form "B" issued under the CST Act, 1956, while effecting the Interstate Purchases. It is a proved facts on records that the dealers had availed the concessional rate of Taxation at 4% by issue of "C" Form without inclusion of the said Goods "MACHINER" in the "B" Certificates issued at the time of effecting Interstate Purchases. Thus, they have contravene the provisions contained under Section 10(b) of the CST Act, 1956 punishable under Section 10-A of the CST Act, 1956.

8. The objections raised by them for the deduction of payment of 4% CST on the above Interstate Purchases of "MACHINERY" to the tune of Rs.18,95,126/- are acceptable one. By taking into consideration of the above facts, the Penalty under Section 10-A of the CST Act, 1956 works out as follows:

The penalty of 150% of Difference of Tax Works out as follows:

9. I, therefore levy a penalty of Rs.2,27,415/- under Section 10-A of the CST Act, 1956 for the year 2003-2004."

2.5. Challenging the said order, the petitioner filed an appeal to the Appellate Assistant Commissioner, who held that the materials purchased by the petitioner against issue of Form "C" are very vital for the business and hence, the degree of contumaciousness on the part of the petitioner is very minimum and accordingly, re-fixed and reduced the penalty to 10% of the tax due. The relevant portion of the said order dated 11.12.2007 reads as under:

"Applying the above principle of the degree of contumaciousness in the instant case, I found that the materials purchased by the appellant against issue of "C" forms as very vital for the business and hence the degree of contumaciousness on the part of appellant is very minimum and hence I have modified the 150% penalty into minimum.

In this case, the Assessing Officer has deducted 4% tax paid on the interstate purchase value of goods and for the balance of tax, he has levied 150% towards penalty. Applying the principles laid down in the case reported in 110 STC 177, the penalty can be computed by taking a lenient view for arriving the penalty on this basis. Thus the penalty was refixed and reduced at 10% of the tax due. Accordingly, the penalty is refixed at Rs.22,742/- and the balance amount of penalty of Rs.2,04,674/- is set aside and allowed."

2.6. Even though the petitioner did not pursue the matter before the Tribunal, the Deputy Commissioner (CT) took up the matter on appeal to the Tribunal aggrieved by the order of the Appellate Assistant Commissioner (CT) on a plea that the penalty modified by the Appellate Assistant Commissioner is erroneous and the original order passed by the Commercial Tax Officer should be restored.

2.7. Before the Tribunal, the appeal was filed on 17.7.2008. The petitioner herein was put on notice. However, they did not chose to file any cross objection, but only submitted written submissions during July, 2013. In the written submission, the petitioner herein relied upon the decision of the Supreme Court in

Commissioner of Sales Tax, U.P. Vs. Sanjiv Fabrics, , wherein it is held that the finding of mens rea is a condition precedent for levying penalty, and pleaded that unless there is a factual finding given by the Original Authority that there was mens rea on the part of the dealer, penalty under Section 10A of the CST Act cannot be levied. The Tribunal, by order dated 28.1.2014, repelled the said plea taken by the dealer and held as under:

"13. In our case Form-B Registration Certificate was issued with effect from 12.8.1999 as per which respondent could purchase "semi-finished leather", "finished leather", "shoe upper and accessories" under the category of "for use in the manufacture or processing of goods for sale". Since 1999 to 2003-2004 the assessee was using "C" forms only for the purchase of above items and only on 2.1.2005 after penal action has been effected by the Assessing Officer the disputed item i.e. "Machinery" was included in the Form-B certificate. The item "machinery" under no stretch of imagination could be equated to the class of items which are already covered in Form-B certificate. The Assessing Officer had clearly recorded a finding to the effect that the dealer had made false representation. The subsequent action on the part of the respondent to have the item i.e. "machinery" included in the Registration Certificate could not establish the bonafide conduct of the respondent and the above action of the respondent after he had been got in his violation of law may not be regarded as proof of his bonafide conduct and therefore there is a mens rea on the part of the assessee. Hence, we are of the considered view that the penalty is warranted in this case. However, taking into consideration of the facts and circumstances of the case, the degree of violation of blame worthy conduct and the machinery purchased by the assessee are very much essential for the business, we are of the considered view that a minimum penalty would be fair and just for the violation committed under Section 10(b) of the Act. The first appellate authority had also recorded a similar finding to the above effect. Hence, we hold that the order of the first appellate authority fixing the penalty at 10% of the tax due i.e. Rs.22,742/- is in order and hence no interference is called for. We answer this point accordingly."

Thus, the Tribunal confirmed the order of the Appellate Assistant Commissioner in re-fixing the penalty at 10% as against 150% imposed by the Original Authority.

2.8. Aggrieved by the said order passed by the Tribunal, the dealer has filed this appeal on the questions of law, referred supra.

3. The learned counsel appearing for the appellant tried to plead that he is entitled to raise the plea regarding mens rea before the Tribunal even without filing a cross objection in view of the law laid down by the Supreme Court in Commissioner of Sales Tax, U.P. Vs. Sanjiv Fabrics, .

4. On the contrary, the learned Special Government Pleader (Taxes) appearing for the department strongly relied upon Section 36(1-A) of the TNGST Act, to plead that the department or the person against whom the appeal has been filed,

on receipt of notice of appeal, is entitled to file within sixty days of receipt of the notice, a memorandum of cross objections and such memorandum shall be disposed of by the Appellate Tribunal as if it were an appeal presented within the time stipulated. He added that the said provision also provides a further period of thirty days, beyond the period of sixty days, for filing the memorandum, if sufficient cause is shown for such belated filing. In other words, it is the plea of the learned Special Government Pleader that as the petitioner failed to avail such statutory remedy available to him, the present revision is not maintainable.

5. We have heard the learned counsel for the petitioner and the learned Special Government Pleader appearing for the respondent and perused the orders passed by the Tribunal and the authorities below.

6. In this case, the department has taken a specific plea in the appeal filed before the Tribunal on the quantum of penalty and the dealer was put on notice. However, the dealer failed to file the memorandum of cross objection on the plea of the department for restoration of penalty as per the order of the Original Authority and since the dealer failed to file such a cross objection, it should be deemed that the dealer has accepted the 10% penalty as imposed by the Appellate Assistant Commissioner.

7. The decision of the Supreme Court in Sanjiv Fabrics case, referred supra, on the issue of mens rea is binding. The said decision was rendered by the Supreme Court on 10.9.2010. Even though the dealer pleads that they were aware of such a decision, they had not chosen to file cross objection before the Tribunal and the same only shows that the said plea is only an afterthought.

8. As rightly pointed out by the learned Special Government Pleader appearing for the respondent the issue of mens rea stood already decided by this Court in the decision in The State of Tamilnadu Vs. Tvl. Nu-Tread Tyres, (to which one of us R.Sudhakar, J. was a party). This decision came to be rendered on 27.7.2006, namely, even before the Appellate Assistant Commissioner could make a decision on the issue. The petitioner having not chosen to contest the levy of 10% penalty as ordered by the Appellate Assistant Commissioner, cannot now turn around and plead that no penalty is leviable. The petitioner cannot wake up from its deep slumber and plead at their free will and pleasure. The objection of the learned Special Government Pleader appearing for the respondent that the memorandum of cross objection should have been filed within the time specified after receipt of notice deserves acceptance. The failure on the part of the petitioner to file such a memorandum of cross objection would mean that the dealer is not seriously disputing the 10% penalty levied. An afterthought by the petitioner dealer at their whims and fancies cannot be accepted as a ground to set aside the order on a plea that the Tribunal is empowered to consider the entire gamut of the case once over.

9. The learned counsel for the petitioner relied on a decision of the Madras High Court in The State of Madras Vs. Asher Textiles Ltd. Cotton Yarn and Staple Fibre

Yarn, Tirupur, Coimbatore District, , to plead that powers of an appellate court are co- extensive with those of the original court. The relevant portion of the said decision reads as under:

"... Therefore, it will be open to a revisional Court to take note of a subsequent change in the law, and grant reliefs to the parties on the basis of such law. It is needless to point out that it has been an almost invariable practice of this Court to take note of subsequent events, while disposing of Civil Revision Petitions under section 115, Civil Procedure Code and grant reliefs to the parties in accordance with the altered circumstances. The nature of the jurisdiction is appellate and all the powers inherent in an appellate Court would be available to the Court of revision, subject to the limitation that it could interfere only under those conditions prescribed by the Statute. If those conditions are satisfied, its powers are as wide as those of the Court of first instance or the appellate Court. In one sense the jurisdiction under section 115, Civil Procedure Code, is wider than even the jurisdiction of an appellate Court. In a case under section 115, Civil Procedure Code, for instance, the High Court can call for records of the case suo moto."

10. From a reading of the above decision one can infer that if there is a limitation prescribed by a statute, then that has to be followed. In the present case, Section 36(1-A) of the TNGST Act clearly provides the manner in which cross objection could be filed in an appeal and that right has not been exercised by the petitioner. Even otherwise, as observed by us earlier, the show cause notice clearly makes out a case of false declaration in Form "C" that the goods (machinery) are covered by certificate of registration, which amounts to misuse of the Form "C" declaration, which is an offence under Section 10(b) of the CST Act, warranting levy of penalty under Section 10A of the CST Act and on the basis of that show cause, an order has been passed holding that there is a violation of Section 10(b) of the CST Act punishable under Section 10A of the CST Act. In the light of the show cause notice and the order, we find that there is a clear finding of false claim, which finding clearly attracts the reasoning of the Full Bench in *State of Tamil Nadu v. Nu-Tread Tyres* case, referred supra as well as the Supreme Court in *Commissioner of Sales Tax v. Sanjiv Fabrics* case, referred supra.

Resultantly, we find no good reason to interfere with the order of the Tribunal. We find no question of law, much less substantial question of law, arising for our consideration. Accordingly, this revision is dismissed. No costs.