

(2010) 03 MAD CK 0233

In the Madras High Court

Case No : T. C. (R.) No"s. 2228 and 2229 of 2008

Arul Constructions

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 18-03-2010

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12(1), 12(2), 12(3), 12(4), 12(5)

Citation : (2011) 43 VST 157

Hon'ble Judges : Prabha Sridevan, J;P.P.S. Janarthana Raja, J

Bench : Division Bench

Advocate : R. Senniappan, for the Appellant; K. Radhakrishnan, Government Advocate (Taxes), for the Respondent

Final Decision : Allowed

Judgement

Mrs. Prabha Sridevan J.

1. These revisions are filed by the assessee on the following questions of law :

1. Whether the Sales Tax Appellate Tribunal was correct in holding that the assessment made by the assessing authority was u/s 12(2) of the Tamil Nadu General Sales Tax Act, 1959 ?

2. Whether the Sales Tax Appellate Tribunal was correct in holding that the statement showing consolidated turnover cannot be taken as a return prescribed ?

3. The Sales Tax Appellate Tribunal has held in one place that the turnover was estimated on best judgment by the assessing officer on the basis of particulars available in the books of account, in another place it is held that the turnover was not the estimate directly based on the books of account. Therefore, the order of the Sales Tax Appellate Tribunal is conflict.

4. The order of the Sales Tax Appellate Tribunal was contrary to the principles stated by the honourable Madras High Court reported in [1993] 89 STC 349

(State of Tamil Nadu v. P. S. Srinivasa Iyengar & Sons) and the judgment of the honourable Madras High Court in W. P. No. 10201 of 2000 dated October 1, 2001 (Rajarajeswari Finance, Sivakasi v. State of Tamil Nadu).

5. The order of the Sales Tax Appellate Tribunal was contrary to the principles stated by the honourable Supreme Court reported in (1971) 28 STC 700 (State of Madras v. S. G. Jayaraj Nadar & Sons).

6. The judgment of the Sales Tax Appellate Tribunal was against the statutory provisions of amending section 12(3) of the Tamil Nadu General Sales Tax Act, 1959, since the appellant had paid the entire tax amount before finalisation of the assessment proceedings.

2. The relevant assessment years are 1995-96 and 1996-97. The assessee submitted a statement for three assessment years 1995-96, 1996-97 and 1997-98 on November 4, 1998. The assessee is engaged in the business of building and flat promotion. The original authority held that the assessee is liable to pay penalty u/s 12(3)(a) of the Tamil Nadu General Sales Tax Act, 1959, since returns had not been filed declaring the tax liability and therefore, the assessment was made on the basis of "best judgment assessment". On appeal, the appellate authority referred to the words in the original order to show that A1 returns had been filed and only because they had not produced agreements, books of account, balance sheet, etc., in support of the A1 returns, and held that once A1 returns had been filed and on the basis of which, the assessment was made, invocation of section 12(3)(a) of the Act, is not correct. On appeal by the State, the Tribunal set aside the order of the Appellate Assistant Commissioner and therefore, the assessee is before us.

3. The learned counsel for the assessee relied on [1993] 89 STC 349 (Mad) (State of Tamil Nadu v. P. S. Srinivasa Iyengar and Sons) and the judgment of the Division Bench of this court dated October 1, 2001 passed in Writ Petition No. 10201 of 2000 The State of Madras Vs. S.G. Jayaraj Nadar and Sons, . Learned counsel pointed out that even in the order of the assessing officer, the following words are found : "it was found from A1 returns filed, they have reported their total and taxable turnover for 1996-97 and 1997-98". The learned counsel submitted that if the assessment has been made on the basis of their statement, then relying on [1993] 89 STC 349 (Mad) (State of Tamil Nadu v. P. S. Srinivasa Iyengar and Sons), it can be held that it should be equated to filing of returns from filing of statement and therefore, there is no case for levy of penalty.

4. The learned Special Government Pleader (Taxes) on the other hand submitted that though for the assessment year 1996-97, returns had been filed, for the assessment year 1995-96, there was no return and the statement cannot be relied on.

5. It is apt to extract the order passed by the Division Bench of this court dated October 1, 2001 passed in Writ Petition No. 10201 of 2000 :

The ground on which the impugned order is challenged is that the assessment has been made on the basis of the books of account maintained by the assessee and not on the basis of any estimates. The assessment was in fact one made u/s 12(1) and not u/s 12(2) of the Tamil Nadu General Sales Tax Act and therefore, the penal provisions u/s 12(3) of the Act, are not attracted.

2. It is submitted by the counsel for the Revenue that the assessment is in fact based upon books of account, though the figures relating to that part of the turnover, on which tax as levied had not been disclosed in the return filed. Having regard to the law laid down by the Supreme Court in the case of *State of Madras v. S. G. Jayaraj Nadar & Sons* [1971] 28 STC 700, it must be held that the assessment made is not a best judgement assessment. It follows therefrom that section 12(3) is not attracted in the levy of penalty and it is unwarranted. The impugned order of the Tribunal is, therefore, set aside and the levy of penalty on the assessee is set aside. The writ petition is allowed.

6. In *State of Tamil Nadu v. P. S. Srinivasa Iyengar & Sons* [1993] 89 STC 349 (Mad), it was held as follows (pages 349-350 in 89 STC) :

No man is penalised for a mistake, which he never intended to commit, but had happened. The case on hand is one such. Having regard to the finding of the Sales Tax Appellate Tribunal :

The turnover in question, viz., Rs. 6,77,719 was shown in the accounts and also furnished to the assessing authority by various statements before initiating the final assessment proceedings.

The appellants have submitted themselves for assessment on the above turnover by furnishing statements which could as well be equated to the filing of returns before final assessment. Hence it may be seen that the omission to include the turnover is not deliberate and wilful. As such there is no case for levy of penalty.

and further having regard to the finding of the Tribunal :

The turnover in question has been reflected in the books of accounts and also the statement filed before the assessing officer. Considering the pleadings of the appellants as the assessment is under best of judgment u/s 12(2) of the Act, penalty u/s 12(5)(iii) is not attracted. Omission to include the turnover in return has not been proved to be wilful.

We are of the view that there is no scope for invocation of section 12(4) of the Tamil Nadu General Sales Tax Act, 1959. The tax case is, therefore, dismissed.

7. In the order of the Tribunal, we find that the assessee had relied on the order passed in W. P. No. 10201 of 2000 dated October 1, 2001 (*Rajarajeswari Finance, Sivakasi v. State of Tamil Nadu*). The Tribunal had noted that in that case the assessment was made on the basis of the books of account and not based on any estimate and therefore levying penalty is not attracted. But, referring to the present case, the Tribunal observed that the turnover was estimated by the

assessing officer "on the basis of the particulars available in the books of account. It was not an estimate directly based on the books of account.". We are unable to see any distinction between the two. It is obvious that the assessment was made on the basis of the statement and the books of account that were produced.

8. If that be the case, the invocation of section 12(3)(a) of the Act, is not warranted and following [1993] 89 STC 349 (Mad) (State of Tamil Nadu v. P. S. Srinivasa Iyengar & Sons and the order passed by this court in W. P. No. 10201 of 2000 dated October 1, 2001 (Rajarajeswari Finance, Sivakasi v. State of Tamil Nadu), these revisions are allowed and the questions are answered in favour of the assessee and against the Revenue.