
(1994) 11 MAD CK 0086

In the Madras High Court

Case No : T.C.No. 403 of 1987 (Revision No. 188 of 1987)

M.N.K. and Co.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 29-11-1994

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12

Citation : (1994) 11 MAD CK 0086

Hon'ble Judges : R. Jayasimha Babu, J;K.A. Thanikkachalam, J

Bench : Division Bench

Advocate : Smt. Chitra Venkataraman, Additional Government Pleader Taxes, for the Appellant;

Judgement

Thanikkachalam, J.—The assessee is the petitioner herein. The assessee is a dealer in tread rubber and rubber chemicals. For the assessment year 1984-85 it reported a taxable turnover of Rs. 41,751.21 claiming second sale exemption in respect of its sales of chemicals purchased within the State of 5 per cent in the sum of Rs. 3,75,368.86 based on the assessment made for the earlier assessment year, in which its claim for second sale exemption in respect of its sale turnover of chemicals was accepted. So also in the assessment year under consideration. The assessing officer issued a notice to the assessee. The assessee filed objection stating that they have not collected sales tax on the sale of chemicals and by mistake they have shown the chemical sale under the exempted turnover column and hence the assessee requested to drop the penalty proceedings. According to the assessing officer the assessee has not shown the commodity of chemicals under the commodity column, in any one of the months from April, 1984 to March, 1985. The assessee has shown only tread rubber. In fact, the assessee is mainly dealing in tread rubber and chemicals only. However, taking into consideration the fact that the assessee has paid the entire tax, surcharge, additional surcharge and additional tax for the sale turnover of chemicals, the assessing officer took a lenient view and levied a penalty of 50 per cent of the tax due on the sale turnover of chemicals u/s 12(5)

(iii) of the Tamil Nadu General Sales Tax Act, 1959. On appeal, the Appellate Assistant Commissioner confirmed the levy of penalty u/s 12(5)(iii) of the Act. On further appeal, the Tribunal came to the conclusion that though the filing of incomplete or incorrect return is not wilful or intentional, penalty u/s 12(5)(iii) is automatic. Accordingly, the Tribunal confirmed the penalty levied u/s 12(5)(iii) of the Act. At the time of hearing, no one was present for the assessee. We have heard the learned Additional Government Pleader (Taxes) and perused the records carefully.

2. The learned Additional Government Pleader (Taxes) submitted that in as much as levy of penalty is automatic u/s 12(5)(iii) of the Act, it is not necessary to go into the question whether the filing of the incorrect return by the assessee is due to sufficient cause and therefore reasonable to excuse the delay. According to the learned Additional Government Pleader, when once the assessee filed an incorrect return, the fact that the assessee has paid the entire tax due on the sale turnover of chemicals, would not absolve the assessee from the levy of penalty u/s 12(5)(iii) of the Act. The learned Additional Government Pleader (Taxes) further pointed out that a plain reading of the provisions contained in section 12(5)(iii) of the Act would go to show that penalty has got to be levied automatically when the return filed by the assessee is incorrect or incomplete.

3. It remains to be seen that the assessee is a dealer in tread rubber and chemicals only. The assessee has not shown the commodity of chemicals in the commodity column in any one of the months from April 1984 to March, 1985. They have shown only tread rubber. But, according to the assessee, by mistake, they have shown the chemical sale in the exempted turnover column. The assessee stated that they have also not collected the sales tax on the sale of chemicals. According to the assessee, since the mistake occurred in the return form, is a bona fide mistake, in view of the fact that levy of penalty u/s 12(5)(iii) of the Act is discretionary, no penalty is necessary u/s 12(5)(iii) of the Act. No doubt, it is true that the penalty is exigible u/s 12(5)(iii) of the Act if the return filed by the assessee is incomplete or incorrect. Admittedly, A. 1 returns were filed with incorrect particulars (i.e.) the chemical sale was shown in the column provided for "exempted turnover" instead of under the column "name of the commodity". Even according to the Tribunal, such mistake committed by the assessee is neither wilful nor intentional. But the Tribunal justified levy of penalty u/s 12(5)(iii) of the Act since the provisions contained in section 12(5)(iii) of the Act empowers the assessing authority to levy penalty automatically when the return filed by the assessee contains incorrect or incomplete particulars. According to the Tribunal, there is no need to consider the bona fide intention on the part of the assessee in committing mistake in the return filed. But a similar question came up for consideration before this Court in [1994] 94 STC 157 [App.] in the case of State of Tamil Nadu v. Indian Silk Traders wherein this Court, while considering the provisions of section 12(5) of the Act, held that section 12 and section 12(5) operate in a different field where the assessment is made on the basis of the books of account rejecting the return submitted by the

assessee as incorrect and incomplete. While the element of deliberateness, wilfulness of blameworthy conduct on the part of the assessee, may not be necessary for invoking section 12(5) of the Act, we are clearly of the opinion that the bona fides of the assessee have to be gone into before imposing penalty. According to the abovesaid judgment of this Court, before imposing penalty u/s 12(5) of the Act, it is incumbent upon the assessing officer to consider whether there is any bona fide on the part of the assessee in filing an incorrect or incomplete return. This view was taken by this Court by following an earlier decision of the Supreme Court in the case of Cement Marketing Co. of India Ltd. v. Assistant Commissioner of Sales Tax [1980] 45 STC 197. As already seen according to the facts arising in this case, the assessee who is a dealer in tread rubber and chemicals, filed returns in A1 return forms, and the sale turnover of chemicals was shown under the column "turnover exempted". It remains to be seen that the assessee has not concealed the sale of chemicals. The sale of chemicals was shown under the wrong column in the returns. After a notice was issued by the assessing officer, the assessee has paid the entire tax, surcharge, additional surcharge and additional tax for the sale turnover of chemicals before completing the assessment finally. By not disclosing the sale turnover of chemicals under right column in the return, Revenue was not prejudiced in the matter of payment of tax on sale turnover of chemicals. As already stated, the entire tax due on the sale turnover of chemicals, was paid by the assessee before completing the assessment. Taking all the these facts into consideration, we are of the opinion that the contention of the assessee that the sale turnover was wrongly mentioned under the column "turnover exempted" and it is due to a bona fide mistake, is acceptable. Accepting the reasons offered by the assessee for the mistake committed in filing incorrect returns, in the light of the decisions cited supra, we hold that penalty u/s 12(5)(iii) of the Act is not exigible. Accordingly, the penalty levied, by the authorities below and confirmed by the Tribunal, is set aside and the revision filed by the assessee is allowed. No order as to costs.

4. Petition allowed.