

(2010) 01 MAD CK 0126

In the Madras High Court

Case No : Tax Case (Revision) No. 2071 of 2006

Modern Printers

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 07-01-2010

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 22, 22(1), 22(2)

Citation : (2010) 30 VST 474

Hon'ble Judges : P.P.S. Janarthana Raja, J;D. Murugesan, J

Bench : Division Bench

Advocate : B. Ravindran, for Chandran Karuppiah, for the Appellant; Haja Nazirudeen, Special Government Pleader (Taxes), for the Respondent

Final Decision : Allowed

Judgement

D. Murugesan, J.—The tax case revision, at the instance of the assessee, questions the order of the Tamil Nadu Sales Tax Appellate Tribunal dated August 18, 1998 made in C.T.A. No. 392 of 1994.

2. The petitioner is carrying on a business in printing materials on works contract basis. For the assessment year 1992-93, the Commercial Tax Officer, Udumalpet, subjected the petitioner, on a turnover of Rs. 4,53,040 to sales tax at five per cent treating the transaction as outright sale of printed materials overruling the plea of the petitioner that the transactions are by way of execution of works contract. Besides levy of sales tax, the petitioner was also subjected to penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act, 1959 (for short "the Act") for the alleged excess collection of sales tax at eight per cent instead of five per cent. The appeal preferred by the petitioner to the Appellate Assistant Commissioner was rejected and the further appeal to the Sales Tax Appellate Tribunal was also rejected. Hence, the petitioner has approached this Court by way of present revision.

3. Mr. B. Ravindran, learned Counsel appearing for the petitioner, would submit

that inasmuch as the petitioner undertakes only contract works for executing the orders placed by the customers by printing bill books, labels, letter pads, ledgers, etc., the finding that the petitioner is manufacturing and selling the products in the open market and consequently is liable to be taxed accordingly is erroneous. The learned Counsel would also submit that in any case, though the materials were placed before both the first appellate authority as well as the appellate Tribunal to sustain the plea that the petitioner undertakes only contract works on work contract basis, the same were not considered. Non-application of mind on the part of the first appellate authority as well as the appellate Tribunal on those materials would vitiate the order, apart from the fact that both the appellate authority and the Tribunal has merely followed the finding of the assessing authority without independent application of mind.

4. Insofar as the penalty is concerned, the learned Counsel for the petitioner would submit that on the bona fide belief that the printed materials are taxable at the rate of eight per cent, the petitioner had collected the said amount of tax for the period from August 1, 1992 to September 30, 1992, whereas, according to the assessing authority, those printed materials are liable to be taxed only at the rate of five per cent. According to the learned Counsel for the petitioner, in any case, for the works contract, no tax is leviable and therefore, the finding that the petitioner is liable to pay tax on the printed materials also suffers for the said reason and correspondingly, the penalty is also liable to be set aside.

5. Mr. Haja Naziruddin, the learned Special Government Pleader, would submit that insofar as the non-consideration of documents, the petitioner/assessee did not place those materials before the assessing authority even when the petitioner was given opportunity by way of show-cause notice calling for objections. Only for the first time, these materials were placed before the first appellate authority. Nevertheless, those materials were considered and rejected and consequently, the assessment order was confirmed by both the appellate authority as well as the Tribunal.

6. Insofar as the imposition of penalty is concerned, the learned Special Government Pleader would submit that once it is found that the dealer had collected tax from the customers, when such tax is not liable to be either collected or levied, Section 22(2) of the Act would come into force automatically and there is no escape by the dealers from payment of penalty.

7. We have considered the rival submissions of both sides. Insofar as the first submission of the learned Counsel for the petitioner is concerned, it is the admitted case that the petitioner did not place materials before the assessing officer to substantiate their stand. However, the assessee had placed all materials before the appellate authority to support their case that they only undertake works contract. On a careful reading of the order of the appellate authority, it is seen that the authorised representative of the petitioner/assessee has made a detailed submission by contending that the assessee undertakes only contract works for executing the orders placed by the customers and there are

no materials available before the authorities to hold that the assessee is also manufacturing and selling printed materials in the open market on commercial basis. Though such arguments were advanced, a reading of the order does not indicate consideration of the materials placed by the petitioner. In fact, the learned Counsel appearing for the petitioner has produced those materials before us and on a perusal of the same, it appears, *prima facie*, to us that the petitioner receives order from the specified customers for printing of ledgers, receipts, bill books, etc., and these works are undertaken and after the printings are completed, the printed materials are supplied to the customers who placed orders. There is absolutely no discussion about the above materials by the appellate authority as well as the Tribunal. In fact, the appellate authority has also admitted that "the appellant would produce the order book and the relevant invoices at the time of hearing of the appeal to prove that the transactions are works contracts only". Nevertheless, there is no independent finding as to those materials. In fact, the appellate authority has merely relied upon the earlier finding, viz., that the dealers have sold printed book, forms to the public and on verification of the assessment file found that the assessee had paid tax both at the rate of eight per cent and five per cent, as pointed out by the assessing authority. There are no materials in support of the said finding. Hence, on the said ground alone, the findings of both the appellate authority as well as the Tribunal are liable to be set aside and the matter should be remitted back to the assessing officer for fresh consideration.

8. The next question is as to whether the Revenue is entitled to invoke the provisions of Section 22(2) of the Act and impose penalty on the given facts and circumstances of the case. Before we consider the facts of the present case, the law on this issue can be referred to. The learned Special Government Pleader would brought to our notice that in terms of Clause (i) of Section 22(2) of the Act, if any person or registered dealer collects any amount by way of tax or purporting to be by way of tax in contravention of the provisions of Sub-section (1), penalty shall be levied at the rate of 100 per cent of the amount collected, even where excess amount is collected in bona fide belief that it could be collected. This provision gives no option for the Revenue except to impose the penalty and collect the same from the dealer, who collected the tax in violation of the provision of Sub-section (1) of Section 22. In support of the said submission, the learned Special Government Pleader relied upon the judgment of this Court in *A. Vinayagamurthy Nadar v. Joint Commissioner II (Commercial Taxes)* [1993] 90 STC 562.

9. We have carefully considered the above said judgment. That was a case where the dealer filed the return showing collection of tax at the rate of 3 1/2 per cent on the sales of mustard and the return was accepted by the assessing authority. Subsequently, the assessing authority found that the rate applicable was only three per cent and therefore, levied penalty u/s 22(2) of the Act for excess collection of tax and surcharge. While considering the challenge to the levy and collection of penalty, this Court held that Section 22(2) of the Act leaves no

option to the assessing authority, once he comes to the conclusion that the dealer had collected amount by way of tax or purported to be by way of tax in contravention of Sub-section (1), to impose penalty not exceeding VA times of the amount collected. However, from the said judgment, we are unable to find out as to whether the excess tax so collected by the assessee has been retained by him or has been paid to the Department.

10. On the other hand, we may refer to yet another Division Bench judgment in State of Tamil Nadu v. K. Mohammed Ibrahim Sahib reported in [1991] 83 STC 402 (Mad). In that judgment, the Division Bench was considering a similar question where excess tax was collected and it was also repaid and the Bench also elaborately considered the meaning of the expression "collected". In fact, the Division Bench had relied upon the judgment of the Supreme Court R.S. Joshi, Sales Tax Officer v. Ajit Mills Limited reported in [1977] 40 STC 497, where the apex court considered the meaning of expression "collected" under Sections 37(1)(a) and 46(2) of the Bombay Sales Tax Act. The Supreme Court observed as follows (page 514):

...What does "collected" mean here? Words cannot be construed effectively without reference to their context. The setting colours the sense of the word. The spirit of the provision lends force to the construction that "collected" means "collected and kept as his" by the trader. If the dealer merely gathered the sum by way of tax and kept it in suspense account because of dispute about taxability or was ready to return it if eventually it was not taxable, it was not collected. "Collected", in an Australian Customs Tariff Act, was held by Griffith, C.J., not "to include money deposited under an agreement that if it was not legally payable it will be returned": (Words and Phrases, page 274). We therefore semanticise "collected" not to cover amounts gathered tentatively to be given back if found non-exigible from the dealer.

11. The Division Bench placing reliance on the above observations of the Supreme Court with regard to the expression "collected", has ultimately found that where any amount collected by way of tax or purported to be by way of tax under the Act except in accordance with the provision of the Act or the Rules, shall mean "collected illegally and retained" or "collected and kept as his". The Division Bench had considered that in the event the tax collected by the dealer, which otherwise the dealer would not have, but had repaid, the collection was bona fide on the part of the dealer and therefore, the provision cannot be made applicable automatically.

12. As the judgment in K. Mohammed Ibrahim Sahib's case [1991] 83 STC 402 (Mad), is rendered on the basis of the Supreme Court judgment in regard to the power of the Revenue to impose penalty u/s 22 when excess tax collected or the tax was collected when it ought not to have, we are inclined to follow the said judgment on the facts of this case.

13. There is yet another judgment of a Division Bench of this Court in State of

Tamil Nadu v. Simpson & Co. Ltd. reported in [1995] 99 STC 32, wherein this Court had an occasion to consider that the excess tax collected was refunded to the customer and when Section 22 was invoked, it was held that on the bona fide belief the excess amount was collected, as it was supported by the fact that the tax so collected was repaid to the customers and therefore, Section 22(2) cannot be made applicable.

14. That apart, there is one more aspect as to whether invocation of Section 22(2) is automatic or not. Though the learned Special Government Pleader would rely upon the provision of Clause (i) of Sub-section (2) of Section 22, that provision came into force only with effect from May 28, 1993, whereas the tax in issue was collected by the petitioner for the period from April 1, 1992 to September 30, 1992, much prior to the said amendment had come into force and the dealer had also filed the return and the return relates to the assessment year 1992-93. In view of the above factual background, the amended provision may not be applicable to the facts of this case. The only provision that could be made applicable is Section 22(2), which existed prior to the amendment and the same reads as under:

22. (2) If any person or registered dealer collects any amount by way of tax or purporting to be by way of tax in contravention of the provisions of Sub-section (1), whether or not any tax is due from such person or dealer under this Act in respect of the transaction in which he collects such amount, the assessing authority may, after giving such person or dealer a reasonable opportunity of being heard, by order in writing impose upon him by way of penalty a sum not exceeding one and a half times such amount.

15. The above provision contemplates a reasonable opportunity of being heard to be provided to the dealer before invocation of the provision for penalty. While considering the said provision, in our opinion, invocation of that provision is not automatic and the dealer is entitled to satisfy the authorities as to their stand, necessarily meaning thereby that there may be occasion for the Revenue in not invoking that provision in the event the dealer is able to satisfy with the sufficient explanation. Such explanation may also include the bona fide belief on the part of the dealer in collecting the said tax. This is what precisely considered by this Court in K. Mohammed Ibrahim Sahib's case [1991] 83 STC 402, wherein it has been held that in the event there was a bona fide belief, the application of provision is not automatic.

16. We may also note that there must be a specific application of mind by the assessing authority as to the invocation of Section 22(2) for levy of penalty in a given case and satisfy himself as to the above. A careful reading of the assessment order does not indicate anything of such application of mind satisfying the assessing officer for imposition of penalty and both the first appellate authority as well as the Tribunal have also not independently applied their mind to this aspect.

17. For the foregoing discussion, we are of the considered opinion that on both the grounds, the proceedings relating to the assessment year 1992-93 are liable to be set aside and the matter should be remitted back to the assessing officer for fresh consideration. Accordingly, the entire issue relating to the assessment year 1992-93 is remitted back to the assessing officer for consideration of such of those materials, which were placed before the first appellate authority by the petitioner/dealer and to arrive at independent conclusion as to whether the petitioner had undertaken only works contract for the relevant period concerning the assessment year and also whether the provision of Section 22(2) could be invoked in the given set of facts. It is submitted by the learned Counsel for the petitioner/assessee that subsequent to the assessment order levying penalty, the petitioner has not collected excess tax on coming to know of the actual tax to be collected. Therefore, the earlier collection of tax at eight per cent was only on the bona fide belief and the amount so collected has also been remitted to the Department. Therefore, while considering the invocation of Section 22(2), the assessing authority shall also take into consideration the bona fide on the part of the petitioner.

18. With the above direction and observation, the tax case revision is allowed. No costs.