

(2012) 02 MAD CK 0004

In the Madras High Court

Case No : Tax Case (Revision) No. 1487 of 2006

Motel Highway

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 09-02-2012

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 20, 20(2AA)(i), 22, 22(1), 22(2)

Citation : (2013) 60 VST 34

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

Bench : Division Bench

Advocate : P. Rajkumar, for the Appellant; R. Sivaraman, Special Government Pleader (Taxes), for the Respondent

Final Decision : Allowed

Judgement

D. Murugesan J.

1. This tax case revision is at the instance of the assessee being aggrieved by the order of the Tamil Nadu Sales Tax Appellate Tribunal dated

March 5, 1999 made in T. A. No. 702 of 1996. The facts given rise to the present revision are as follows:

The assessee is the dealer in food and drinks, doing business at No. 89, Bangalore Trunk Road, Thirumazhisai, Chennai. The assessment year in

question is 1993-94. The assessee had reported a total and taxable turnover of Rs. 12,26,584.19 and Rs. 11,16,854.51 in the monthly returns.

The accounts were called and checked and it was noticed that on January 23, 1994, there was a change in the constitution and the assessee did

not file an application for registration within 30 days. For that reason, the assessing officer invoked the provisions of section 22(1) of the Tamil

Nadu General Sales Tax Act (in short "the Act") and imposed the penalty u/s

22(2)(ii) at 150 percent of collection made by the assessee on January 23, 1994 on which date, there was a change in the constitution. This order was taken on appeal before the Appellate Assistant Commissioner. Having found that the assessee had collected tax on the date when there was no registration, the Appellate Assistant Commissioner accepted the findings of the assessing officer for imposing penalty u/s 22(2). Nevertheless, having regard to the fact that the assessee had paid the taxes so collected, reduced the penalty and re-fixed the same equal to the taxes so collected. By that order, the Appellate Assistant Commissioner modified the order of the assessing officer. Not being satisfied with the said order, the assessee has made further appeal to the Appellate Tribunal. The Tribunal found that, inasmuch as the tax was collected on the date when the registration was not granted, the assessee had to pay penalty in terms of section 22(2); however, on the discretion exercised by the Appellate Assistant Commissioner for directing the assessee to pay the penalty equivalent to the amount collected was not interfered with. Accordingly, the appeal was dismissed. The present revision is filed by the assessee being aggrieved by the above orders on the ground that on the given facts and circumstances of the case, the provisions of section 22(2) of the Act ought not to have been applied. With that submission, the tax case revision was admitted on the following substantial question of law:

Whether the Appellate Tribunal is correct in sustaining the penalty levied u/s 22(2) of the Tamil Nadu General Sales Tax Act and re-fixed by the Appellate Assistant Commissioner, when there was no excess or illegal collection of tax by the petitioner?

2. We have heard both the learned counsel. The short question that has to be decided in this tax case revision is, whether the assessee is liable to pay penalty in terms of section 22(2) on the ground that at the time when the tax was collected, the assessee was not a registered dealer?

3. Some of the following facts are as under:

Initially, the business was carried on as a proprietorship concern and there was a change in the constitution of partnership with effect from January 23, 1994. Every dealer carrying on business before the commencement of the Act, or commencing business after the commencement of the Act, whose total turnover is Rs. 3 lakhs in any year, shall unless be exempted u/s

20(2AA)(i) submit to the registering authority of the area in which his principal place of business is situated an application for registration within thirty days of his total turnover reaching Rs. 3 lakhs. This requirement is on the basis of rule 24(1) of the Tamil Nadu General Sales Tax Rules. In terms of rule 23(3)(ii), a successor in business or part thereof shall make an application for registration within 30 days of the date on which he succeeds to the business thereof. Rule 24(8A) contemplates that a certificate of registration be issued or deemed to have been issued under sub-rule (8). If such an application is made, the registering authority shall issue, within 30 days from the date of receipt of the application, a certificate of registration in form DI as per rule 24(8). The said rule also contemplates a deeming provision. In the event, the certificate of registration is not received from the registering authority, it is deemed that the registration had been granted in case where the application is made within a period of 30 days. However, in the case of change of business, again, in the event an application is made within 30 days from the date of change of business, as per the very same rule, a certificate of registration should have been granted within 30 days from the date of receipt of the application. For understanding, the relevant rule, i.e., rule 24(8A) is extracted as under:

24. (8A) A certificate or registration- issued or deemed to have been issued under sub-rule (8), shall take effect.-

(a)(i) in the case of a person (other than a person succeeding to the business or part thereof who has made the application within the prescribed

period) from the date of commencement of the business;

(ii) in case of a person who has made the application after the prescribed period, from the date on which the application was received by the

registering authority;

(b) in the case of any person succeeding to the business or part thereof from the date on which he succeeds to the business;

(c) in the case of a person liable for compulsory registration and who has made the application within the time prescribed therefor from the date on

which he commenced the transactions, attracting liability for registration and where he has not made the application within the time so prescribed

from the date on which the application for registration was received by the registering authority; and

(d) in the case of a person intending to commence the business, from the date on which the application was received by the registering authority.

4. For the purpose of determining as to whether the application made by the assessee on February 24, 1994 and granting of registration certificate

on the same date would enure the benefit of the assessee from the date of change of the constitution or the date of the grant of registration, the

provisions of rule 24(3)(ii) read with rule 24(8A)(b) are relevant. In the event an application is made by the successor in business or part thereof

within a period of 30 days time and if the registration is granted, it shall be from the date on which he succeeds to the business, as could be seen

from rule 24(8A)(b). In the given case, the change of the constitution in the business was on January 23, 1994. The application ought to have been

made by the assessee within a period of 30 days from January 23, 1994, i.e., on or before February 23, 1994. Admittedly, the said application

was made on February 24, 1994, i.e., one day after the last date. In these circumstances, the provisions of section 24(8A)(b) cannot be pressed

into service for a deeming clause, namely, the certificate should have been granted from the date on which the assessee has succeeded to the

business.

5. Nevertheless, the said provision has to be considered with reference to section 22(2) of the Act as well. Section 22(1) and 22(2) read as

follows:

22. Collection of tax by dealer.--(1) No person who is not a registered dealer shall collect any amount by way of tax or purporting to be by way

of tax under this Act, and no registered dealer shall make any such collection except in accordance with the provisions of this Act and the Rules

made thereunder:

Provided that, nothing in this sub-section shall apply to the collection of an amount by a registered dealer towards the amount of tax already

suffered under this Act, in respect of goods, the sale or purchase price of which is controlled by any law in force.

Explanation.--For the purposes of this sub-section, any State Government or the Central Government, or any dealer exempt under sub-section

(2AA) of section 20, shall be deemed to be a registered dealer.

(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 which shall be,-

(i) where the excess amount has been collected in the bona fide belief that it had to be collected, one hundred percent of the amount collected;

(ii) where the excess amount has been collected wilfully and knowing that it was not due to be collected, one hundred and fifty percent of the amount collected:

Provided that no proceedings under this sub-section shall be commenced after a period of five years from the expiry of the year in which the amount has been collected:

Provided further that no prosecution for an offence under sub-section (1A) of section 45 shall be instituted in respect of the same facts on which a penalty has been imposed under this sub-section.

6. Sub-section (2) of section 22 contemplates that in case any person or a 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), 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. The penalty would be 100 percent of the amount collected in case excess amount had been collected in the bona fide belief that it had to be collected. The penalty would be 150 percent of the amount collected in case of excess amount had been collected wilfully and knowing that it was not due to be collected.

7. A reading of the above provision, in our opinion, shows that, in the event, a registered dealer collects the amount by way of tax or purporting to be by way of tax, in contravention of the provisions, and the case of bona fide is established, then the penalty would be 100 per cent; otherwise it would be 150 per cent. Though the very same provision is equally applicable in case of such collection in contravention of the provisions of sub-section (1) of section 22 by any person, namely, the assessee, again the said 100 percent or 150 per cent, as the case may be, would be the

penalty.

8. The question is, when the provision employs the word ""may"", whether the above imposition of penalty would be automatic. The contention of

the learned counsel appearing for the assessee is that there was a bona fide belief on the part of the assessee in not applying for registration within

30 days and therefore, the authorities below should have considered the explanation offered in view of the discretion vested on them in not

imposing penalty in a given case. On the other hand, it is the contention of the learned counsel appearing for the Revenue that the provisions of

section 22(2) are mandatory when it is established that the tax had been collected in contravention of the provisions of section 22(1).

9. It is to be seen that section 22(2) authorises the assessing officer to impose penalty after giving an opportunity of being heard. The opportunity

of being heard read with the word ""may"" has some relevance. When the provision gives a lever to the assessing officer to go into the question of

bona fide in the collection of the excess amount by either the registered dealer or unregistered dealer, in the event a registered dealer, by virtue of

the change in the constitution, delays in filing the application for registration, the assessing officer is bound to impose penalty in terms of section

22(2). In our opinion, in a given case, if the assessee is able to establish that the application was not filed due to certain reasons acceptable in law,

the imposition of penalty is not automatic and the assessing officer is left with the discretion in view of the word employed ""may"". The assessing

officer may, in writing, impose by way of penalty. The proprietorship was changed with effect from January 23, 1994. The assessing officer had

noted that the application for registration was made on February 24, 1994, i.e., one day after the expiry of the period of 30 days. Hence, in the

absence of application within 30 days, the assessee should be considered to be an unregistered partnership and therefore, whatever the amount

collected on January 23, 1994 would be in contravention of section 22(2) of the Act. It is also revealed that after the change in the constitution on

January 23, 1994, the assessee had addressed a letter to the assessing officer and filed on February 2, 1994 seeking for certain clarification as to

how the application for registration should be made. The assessing officer clarified only on February 4, 1994. Therefore, the assessee was under

the bona fide impression that they could make an application for registration within 30 days or before February 24, 1994. With that belief only, the

application was made on February 24, 1994. Even assuming that the date should be calculated from the date of change in the constitution, i.e., on

January 23, 1994, the application has been made on February 24, 1994 with a delay of one day. In these circumstances, in our opinion, the

explanation offered by the assessee for not applying the registration within a period of 30 days should have been accepted by the assessing officer.

If that explanation is accepted, in our opinion, the penalty is not automatic and the assessing authority ought to have exercised its discretion not to

levy penalty.

10. That apart, the provision cannot be considered to the mandatory insofar as the quantum of penalty as well, in view of the categorical finding of

the Appellate Assistant Commissioner, who, after holding that the assessee had to pay penalty, reduced the same equivalent to be amount so

collected, which is equal to the 100 per cent. That penalty of 100 percent is determined in terms of rule 22(2)(i) which relates to the bona fide

belief. Hence, the Appellate Assistant Commissioner had also taken into consideration the bona fide belief of the assessee in not making the

application within the period of 30 days.

11. There is one more aspect to be referred, namely, though the assessee had collected the tax, the amount had been paid. In these circumstances,

we are of the considered view that the imposition of penalty by invoking the provisions of section 22(2)(i) of the Act is unwarranted. Hence, the

substantial question of law raised in the revision is answered in favour of the assessee. Accordingly, the tax case revision is allowed. No costs.