

(2008) 12 MAD CK 0236

In the Madras High Court

Case No : T.C. Revision Petition No. 1126 of 2006

R.K. Herbals

APPELLANT

Vs

The State of Tamilnadu

RESPONDENT

Date of Decision : 03-12-2008

Acts Referred:

Income Tax Act, 1961 — Section 254

Tamil Nadu General Sales Tax Act, 1959 — Section 36(3)

Citation : (2010) 251 ELT 514 : (2009) 24 VST 373

Hon'ble Judges : Prabha Sridevan, J;K.K. Sasidharan, J

Bench : Division Bench

Advocate : V. Sundareswaran, for the Appellant; Haja Nazirudeen, Spl. GP, for the Respondent

Final Decision : Allowed

Judgement

Prabha Sridevan, J.—The assessee, inter alia, manufactures herbal shikakai powder. For the assessment year 1996-1997, additional sales tax at 2.25% on the taxable turnover as well as penalty were levied from the assessee. Against that, an appeal was filed. The question was whether the levy of additional sales tax at 2.25 % and the levy of penalty was sustainable. The appeal was partly modified and partly allowed. Before the Sales Tax Appellate Tribunal, the assessee filed a petition to raise the following additional grounds:

1. The order of the lower authority is wrong and illegal imposing sales tax on sale of herbal shikakai powder as cosmetic item.
2. The Appellate Assistant Commissioner and the Appellate Authority failed to see that unless the goods are specifically enumerated in the schedule, it cannot be classified as a specified goods as only a residuary item.
3. Even in common parlance and trade circle, herbal shikakai powder is not treated as shampoo or cosmetic.

The Sales Tax Appellate Tribunal held that there was no reasonable ground for

admitting the additional grounds and applying the principles enunciated in (1991) 83 STC 497 (Southern Nitrochemicals Limited v. State of Tamil Nadu) that a plea which was never in issue or raised before the authorities below, cannot be permitted to be raised as additional ground in the appeal, refused to go into the classification of herbal shikakai powder.

2. Learned Counsel for the assessee also submitted that in T.A. Nos. 732/95, 714/95, 462/96 & 22/98 filed by the same assessee, the Tribunal had modified the rate of tax to 8% on the ground that the product of the petitioner would not come under the category of "drugs or medicine", but only as a "cosmetic". The writ petition filed by the Revenue against this was dismissed by a Division Bench of this Court by its judgment reported in (2004) 136 STC 632 (State of Tamil Nadu v. R.K. Herbal (P) Ltd. and Ors.). In spite of these rulings in the assessee's own case, the Tribunal refused to entertain the new ground. The learned Counsel submitted that the Tribunal can decide the issue on the basis of the records already available and facts before it and not on any fresh material. Learned Counsel for the assessee also referred to the judgments reported in (2002) 253 ITR 202 (Commissioner of Income Tax v. Ashok Leyland Ltd.), National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, and (2003) 132 STC 563 (Bhavani Tax & Produce Co. Ltd. v. State of Kerala) to support his case and also referred to Section 36(3) of Tamil Nadu General Sales Tax Act, 1959.

3. Learned Special Government Pleader (Taxes) relied on the judgment reported in (1991) 83 STC 497 (cited supra) wherein this Court had held that a new plea cannot be allowed to be raised before the Appellate Tribunal for the first time.

4. Now, the main ground urged before us is whether the Tribunal was right in refusing to consider the additional plea which was raised for the first time before the Tribunal. We do not propose to enter into the controversy on merits, but only on the above question of law.

5. Section 36(3) of the Tamil Nadu General Sales Tax Act, 1959 reads as follows:

36(3) In disposing of an appeal, the Appellate Tribunal may, after giving the appellant a reasonable opportunity of being heard, and for sufficient reasons to be recorded in writing-

(a) in the case of an order of assessment-

(i) confirm, reduce, enhance, restore fully or partially, as the case may be, or annul the assessment or the penalty or both; or

(ii) set aside the assessment and direct the assessing authority to make a fresh assessment after such further inquiry as may be directed; or

(iii) pass such other orders as it may think fit; or

(b) in the case of any other order, confirm, cancel, or vary such order:

Provided that at the hearing of any appeal against an order of the Appellate

Assistant Commissioner or the Appellate Deputy Commissioner or the Deputy Commissioner, the Government shall have the right to be heard by a representative:

Provided further that, if the appeal involves a question of law on which the Appellate Tribunal has previously given its decision in another appeal and either a revision petition in the Special Tribunal against such decision or an appeal in the Supreme Court against the order of the Special Tribunal thereon is pending, the Appellate Tribunal may defer the hearing of the appeal before it, till such revision petition in the Special Tribunal or the appeal in the Supreme Court is disposed of.

In *Jute of Corporation of India Ltd. Vs. Commissioner of Income Tax and another*, , the Supreme Court held thus:

(ii) An appellate authority has all the powers which the original authority may have in deciding the question before it subject to the restrictions or limitations, if any, prescribed by the statutory provisions. In the absence of any statutory provision, the appellate authority is vested with the plenary powers which the subordinate authority may have in the matter. There is no good reason to justify curtailment of the power of the Appellate Assistant Commissioner in entertaining an additional ground raised by the assessee in seeking modification of the order of assessment passed by the Income Tax Officer.

Again in *National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax*, , it was held by the Supreme Court as hereunder:

Under Section 254 of the Income Tax Act, 1961, the Appellate Tribunal may, after giving both the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power of the Tribunal in dealing with appeals is thus expressed in the widest possible terms. The purpose of the assessment proceedings before the taxing authorities is to assess correctly the tax liability of an assessee in accordance with law. If, for example, as a result of a judicial decision given while the appeal is pending before the Tribunal, it is found that non-taxable item is taxed or a permissible deduction is denied, there is no reason why the assessee should be prevented from raising that question before the Tribunal for the first time, so long as the relevant facts are on record in respect of the item. There is no reason to restrict the power of the Tribunal u/s 254 only to decide the grounds which arise from the order of the Commissioner of Income Tax (Appeals). Both the assessee as well as the Department have a right to file an appeal/cross-objections before the Tribunal. The Tribunal should not be prevented from considering questions of law arising in assessment proceedings, although not raised earlier. The view that the Tribunal is confined only to issues arising out of the appeal before the Commissioner (Appeals) is too narrow a view to take of the powers of the Tribunal.

Undoubtedly, the Tribunal has the discretion to allow or not to allow a new ground to be raised. But where the Tribunal is only required to consider the question of law arising from facts which are on record in the assessment

proceedings, there is no reason why such a question should not be allowed to be raised when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.

The Supreme Court further held that the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee and therefore, remitted the matter to the Tribunal for consideration of the new grounds raised by the assessee on merits.

6. In (2002) 253 ITR 426 (cited supra), the Division Bench of this Court held thus:

The first part of the second question concerns the correctness of the Tribunal's view that the additional ground could be allowed to be raised for the first time before it. The view of the Tribunal is correct. The Apex Court has, in the case of National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, , held that it is within the jurisdiction of the Tribunal to entertain a new ground for the first time, if the facts required for answering the new plea are available on record. The part of the question is answered against the Revenue.

7. Section 36(3) of the Tamil Nadu General Sales Tax Act gives the Tribunal the power "to pass orders as it thinks fit". The words are the same as those used in Section 254 of the Income Tax Act which is extracted by the Supreme Court in National Thermal Power Corporation case. So, we are of the opinion that the Tribunal shall consider the new grounds raised by the assessee which arise from the facts before it and on the basis of the materials available before it, the Tribunal can consider the new grounds raised. We are bound to follow the decision reported in National Thermal Power Co. Ltd. Vs. Commissioner of Income Tax, and not (1991) 83 STC 497 (cited supra) and hold the Tribunal, as the final fact finding authority, is bound to answer the new grounds raised by the assessee when the facts required for answering the new plea are already available on record. The revision is allowed and the matter is remitted to the Tribunal, which shall decide the issue on merits and in accordance with law.