(2007) 09 MAD CK 0160

In the Madras High Court

Case No : Writ Petition No. 17394 and W.P.M.P. No. 18905 of 2005

S.A. Thirumoorthy Nadar and Sons — APPELLANT

Vs

The Appellate Assistant Commissioner and The Commercial Tax Officer — RESPONDENT

Date of Decision : 17-09-2007

Acts Referred:
Tamil Nadu General Sales Tax Act, 1959 — Section 12(3), 55

Citation : (2007) 09 MAD CK 0160

Hon'ble Judges : S. Manikumar, J

Bench : Single Bench

Advocate : S. Ramathan, for the Appellant; J. Ganesan, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

S. Manikumar, J.—The petitioner has challenged the order of the first respondent in M.P.No. 98 of 2004 dated 04.03.2005, dismissing the

appeal filed by the petitioner as time barred.

2. Brief facts leading to the Writ Petition are as follows:

The petitioner is a dealer in Pulses and Grams Salt Edible Oil etc., registered under the TNGST and CST Acts and an assessee on the file of the

Commercial Tax Officer, Udumalpet (North) Circle, Udumalpet, the second respondent herein. By order dated 23.04.2004, the petitioner

suffered an order of assessment in respect of resale tax under 3-H of the TNGST Act on the turnover of Rs. 1,57,60,963/- and penalty of Rs.

32,582/- u/s 12(3)(b) of the TNGST Act. The Commercial Tax Officer did not disallow the claim of exemption made on the sales turnover of salt

of Rs. 4,41,190/-. On receipt of the said order, the petitioner found that there was a mistake in the order with regard to payment details.

Therefore, the petitioner filed a petition on 21.06.2004 before the second respondent, pointing out the omission of short payment details and

requested him to rectify the same and pass a revised order. The second respondent, by order dated 28.09.2004, rectified the earlier order by

giving credit to the short payments and also reduced the quantum of penalty to Rs. 16,606/- from Rs. 32,502/-. Thereafter, the petitioner filed an

appeal on 29.10.2004 before the Appellate Assistant Commissioner, Pollachi, first respondent herein against the orders of the second respondent

dated 24.04.2004 and 28.09.2004, disputing the levy of tax on the turnover of Rs. 4,41,190/- and penalty of Rs. 16,606/-. The Appellate

Assistant Commissioner (CT), Pollachi, the first respondent herein has returned the papers on the ground of limitation.

3. The petitioner has further submitted that he filed a petition to the appellate authority, first respondent and contended that the revised order of

assessment dated 28.09.2004 was received by him only on 01.10.2004 and thereafter, he filed the appeal on 29.10.2004, which is well within the

prescribed period of limitation and requested the first respondent to entertain the appeal. Before the first respondent, petitioner''s authorised

representative pointed out that unless and until, the correct payment details are furnished, they would be forced to pay the tax once again for

admission of the appeal. The petitioner further submitted that the first respondent, without considering the submission made by them and without

appreciating the grounds made in the appeal, has simply rejected the appeal on 04.03.2005, on the ground that the rectification order deals only

with the payment details and not with reference to the issue. The first respondent observed that the petitioner ought not to have waited for the

orders of the Commercial Tax Officer in the rectification petition filed u/s 55 of the TNGST Act, the petitioner should have filed the appeal in time.

The first respondent computed a delay of 167 days and dismissed the appeal as time barred and held that he has no jurisdiction to entertain the

petition beyond 60 days. Aggrieved by the orders of the first respondent, the petitioner has filed the present Writ Petition.

4. Learned Counsel for the petitioner submitted that the first respondent failed to consider that the original assessment order dated 23.04.2004

was received by the petitioner only on 14.05.2004 and that the petitioner has filed the rectification petition on 21.06.2004. The second respondent

entertained the rectification petition and passed orders on 28.09.2004 and on receipt of the said order dated 01.10.2004, the petitioner filed an

appeal on 29.04.2004, which is well within 30 days from the date of receipt of the rectification order. He further submitted that as sale of salt is

exempted from levy of tax, the assessing officer has no jurisdiction to levy penalty and the same is against the decision of the Supreme Court

reported in 28 STC 700, and the decision of this Court reported in 125 STC 505. Placing reliance on an unreported judgment in W.P.No. 8610

of 2005 dated 15.03.2005, learned Counsel for the petitioner submitted that this Court has already considered a similar issue and set aside the

orders passed by the appellate authority. Therefore, he submitted that when the levy of penalty is illegal, the first respondent ought to have

considered the merits of the case and condoned the delay.

5. Mr. J. Ganesan, learned Government Advocate appearing for the State submitted that the appeal is barred by limitation and the impugned order

needs no interference.

6. Heard the counsel appearing for the parties and perused the materials available on record.

7. In the above unreported order, the assessing officer passed an order of assessment dated 16.02.2004, which was subsequently revised on

30.04.2004. After receipt of the revised assessment order, the petitioner therein filed a rectification petition on 08.06.2004, which was rejected on

20.04.2005. Thereafter, the petitioner preferred an appeal on 08.11.2004, before the Appellate Assistant Commissioner (CT), Pollachi. The

appellate authority, without appreciating the fact that the petitioner has filed the appeal only against the order of rejection of the rectification petition

dated 21.10.2004, construed that the appeal is against the original order of assessment dated 16.02.2004 and refused to entertain the appeal

holding that there was an inordinate delay of 141 days in filing the appeal. Upon hearing the counsel, this Court found that the order of appellate

authority suffered from an error apparent on the face of record, the appellate authority failed to consider the reasons for the delay of 145 days in

filing of the appeal and consequently, set aside the order and directed the appellate authority to entertain the appeal, if it is otherwise in order.

8. When the assessing authority has committed certain mistakes in the assessment order and the same was rectified later on by reducing the

penalty, it is not reasonable to expect the assessee to file an appeal against an incorrect assessment order. The assessment merges with the

rectification order, the cause of action for the assessee and the limitation for filing the statutory appeal starts only from the date of receipt of the

rectification order and not from the date of receipt of the original assessment order. The order cited by the petitioner can also be applied to the

facts of this case. Therefore, following the above order, the impugned order of the first respondent in M.P.No. 98 of 2004 dated 04.03.2005 is

set aside and the appellate authority is directed to entertain the appeal, subject to the satisfaction of the other provisions relating to entertaining of

the appeal.

9. In the result, the Writ Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is also closed.