(2011) 04 MAD CK 0477

In the Madras High Court

Case No : T.C. (Revision) No. 882 of 2006

Sornam Tanners — APPELLANT

Vs

Commercial Tax Officer — RESPONDENT

Date of Decision : 07-04-2011

Acts Referred:
Tamil Nadu General Sales Tax Act, 1959 — Section 22(2), 3B

Citation : (2011) 46 VST 344

Hon'ble Judges : P.P.S. Janarthanaraja, J;Chitra Venkataraman, J

Bench : Division Bench

Advocate : P.R. Kumar, for the Appellant; Haja Nazirudeen, Special Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Chitra Venkataraman, J.—This tax case revision is filed by the assessee as against the order of the Sales Tax Appellate Tribunal (Additional Bench) dated February 26, 2003 made in S.T.A. No. 1629 of 2000, restoring the levy of penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act, 1959 made in connection with the turnover pertaining to the job-work done by the assessee. The assessment year under consideration is 1985-86. The assessee herein is a dealer in hides and skins. The assessee-petitioner executed works contract on a turnover of Rs. 7,87,140 during the assessment year under consideration and collected tax at 70 percent of the turnover of Rs. 3,93,423 based on the provisions of section 3B of the Tamil Nadu General Sales Tax Act as it stood then. The assessing officer levied penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act. Since the entire turnover was to be allowed as deduction, the tax at five percent collected on the turnover of 70 percent would be recovered by way of penalty. The assessee objected to the levy of penalty on the ground that the collection of tax was under the bona fide impression and that the entire tax collected was also remitted to the Government. Hence, the assessee pleaded for dropping of the penalty amount. The objections were, however, overruled and the penalty levied u/s 22(2) of the Act was confirmed.

2. The appeal filed by the petitioner challenging the imposition of penalty before the Appellate Assistant Commissioner was allowed. The State went on appeal before the Sales Tax Appellate Tribunal, which, however, allowed the appeal and restored the penalty. Hence the assessee has preferred the present revision.

3. The learned counsel appearing for the assessee pointed out that having regard to the provisions as it stood then, the collection of tax at 70 percent of the turnover was in accordance with the provisions u/s 3B of the Tamil Nadu General Sales Tax Act. He further pointed out that the constitutional validity of the provisions u/s 3B of the Tamil Nadu General Sales Tax Act came up for consideration in the decision reported in Larsen and Toubro Limited Vs. State of Tamil Nadu and another). While upholding the charging provisions, this court held that the deduction provision under rules 6A and 6B of the Act were unconstitutional and until the Rules are framed for quantifying the taxable turnover, the charging provisions could not be effectuated. In the light of the decision which came long after the assessment year under consideration, no exception could be taken to the petitioner collecting the tax and the same could not be held as an unauthorised collection to invite the provisions u/s 22(2) of the Act.

4. Heard learned counsel appearing for the assessee and the learned Special Government Pleader appearing for the Revenue and perused the material on record.

5. It is seen that the constitutional validity of the provisions levying tax on the execution of the works contract u/s 3B of the Act came up for consideration before this court in the decision reported in Larsen and Toubro Limited Vs. State of Tamil Nadu and another wherein, this court, upholding the charge, held that the provisions under rules 6A and 6B are unconstitutional and illegal and hence, the said provisions were struck down. The said decision was made on December 23, 1992. In the light of the said decision, in the absence of any computation provision, the charging provision could not be effectuated. The assessing authority passed the order of assessment on April 28, 1995, wherein, he considered the imposition of levy of penalty u/s 22(2) of the Act, apparently basing his conclusion on the decision of this court cited above, striking down rules 6A and 6B, that in the absence of any computation, the charge could not be effectuated. Even though the order of the assessment does not speak in so many words on this, yet, a perusal of the order reveals that the imposition of penalty u/s 22(2) of the Act was made on the premise that the collection of tax at 70 percent of the turnover was illegal and contrary to the provisions of the Act.

6. On appeal before the Appellate Assistant Commissioner, the assessee took a similar plea. Following the decision of this court reported in The State of Tamil Nadu Vs. Jaya Pharmacy, that the collection of tax was a result of mutual mistake, the appellate authority allowed the appeal, holding that the penalty

levied u/s 22(2) of the Act was not sustainable. Aggrieved by the same, the Revenue went on appeal before the Tribunal, which, however, restored the order of penalty, holding that the collection of tax was in contravention of the provisions of section 22(2) of the Tamil Nadu General Sales Tax Act. The Tribunal referred to the decision reported in State of Tamil Nadu Vs. Ganesh and Company wherein, this court held that the tax collected by an unregistered dealer, not paid to the Department, attracted the provisions of section 22(2) of the Tamil Nadu General Sales Tax Act. The Tribunal also referred to the decision reported in Entry Tax Officer, Bangalore Vs. Chandanmal Champalal and Co. Etc. Etc., on the aspect of unjust enrichment, consequently set aside the order of the Appellate Assistant Commissioner and restored the order of the assessing officer. Aggrieved by the same, the assessee has come on appeal before this court.

7. We agree with the submission of the petitioner-assessee. It is not denied by the Revenue that on the date of filing the return and arriving at the tax under the provisions of the Tamil Nadu General Sales Tax Act, there was no dispute that the provisions of the Act thus authorised the collection of tax. The question as to the legality of the Rules relating to the claim on deduction and computation came to be considered by this court only on December 23, 1992, with the result that any collection in terms of section 3B of the Tamil Nadu General Sales Tax Act would become illegal, if and only when there was a collection by the assessee after the decision. That being so, the mere fact that this court had subsequently held the provisions of rule 6A and 6B as unconstitutional, does not bring in, any element of illegality in the assessment of tax for the assessment year 1983-84.

8. Thus, when the tax had been collected under a valid provision as it stood then, the question of treating it as unauthorised collection to attract the provisions u/s 22(2) of the Act, leading to levy of penalty thereon, does not arise. Going by the decisions of this court, this is a case of bona fide mistake and a mutual mistake too, which should have been given its due weightage while considering the levy of penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act.

9. In the circumstances, learned counsel appearing for the assessee is justified in placing reliance on the decision reported in The State of Tamil Nadu Vs. Jaya Pharmacy, that in the case of a mutual mistake, the question of invoking section 22(2) of the Tamil Nadu General Sales Tax Act, does not arise. In the background of the decision of this court reported in Larsen and Toubro Limited Vs. State of Tamil Nadu and another on the aspect of the validity of the provisions of the Tamil Nadu General Sales Tax Act and the assessment made thereunder, we have no hesitation in allowing this revision. Consequently, the order of the Tribunal stands set aside and the tax case revision stands allowed. Connected T.C.M.P. No. 1556 of 2006 stands closed.