

(2006) 08 MAD CK 0181

In the Madras High Court

Case No : Writ Petition No. 25001 of 2006

Sree Murugan Engineering Products

APPELLANT

Vs

The Commercial Tax Officer

RESPONDENT

Date of Decision : 09-08-2006

Acts Referred:

Constitution of India, 1950 — Article 226

Tamil Nadu General Sales Tax (Amendment) Act, 1997 — Section 10, 10(3)

Tamil Nadu General Sales Tax Act, 1959 — Section 12(3), 3(3)

Citation : (2006) 148 STC 413

Hon'ble Judges : K. Raviraja Pandian, J

Bench : Single Bench

Advocate : Hemalatha, for the Appellant; A. Shanmugasundaram, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

K. Raviraja Pandian, J.—The petitioner has approached this Court for the relief of issuance of writ of certiorari calling for the records of the first respondent, Commercial Tax Officer, Coimbatore and quash his proceedings dated 30.06.2006, whereby assessment for the assessment year 2003-04 has been framed in respect of the petitioner determining the tax due in a sum of Rs. 2,94,561/- and surcharge in a sum of Rs. 14,726/- resale tax due in a sum of Rs. 38,201/- and further levied penalty u/s 12(3)(b) of the Tamil Nadu General Sales Tax Act in a sum of Rs. 42,907/-. That order is canvassed before this Court on the ground that a turnover in a sum of Rs. 14,85,636/- in respect of sale is covered by Form XVII. As the purchasing dealer has contravened the condition of Form XVII, tax and penalty could be imposed in respect of that turnover only against the purchasing dealer and not against the petitioner, who is the selling dealer, as per the section.

2. In order to sustain the case, an order of the Division Bench of this Court in the case of State of Tamil Nadu v. Madras Petrol Chem Ltd. 89 STC 438 has been

cited. The petitioner has also annexed an unreported order of the Division Bench dated 04.12.2001 made in writ petition No. 10610 of 2000 (State of Tamilnadu v. Seema Udyog) and two interim orders granted by this Court in WPMP Nos. 22290 and 22292 of 2004 in writ petitions Nos. 8677 and 18678 of 2004 dated 14.07.2004 (Screenwell India v. DCTO) and the order made in writ petition No. 7753 of 2006 by a learned single Judge of this Court dated 21.03.2006 (Screenwell India v. DCTO) .

3. Heard the learned Counsel for the petitioner and perused the materials available on record.

4. The only point that has been canvassed for assailing the impugned assessment order is that as per Section 3(3) of the Tamil Nadu General Sales Tax Act, the selling dealer cannot be held liable for the contravention of the conditions of declaration in Form XVII and as per the proviso to Section 3(3) of the Act, only the purchasing dealer is held responsible in the event of the goods so purchased by production of Form XVII has not been utilised for the purpose for which the declaration was produced, and that action can be taken only against the purchasing dealer, that too, for the payment of difference tax on the turnover relating to the sale of goods. In this case, contrary to the statutory provisions action has been taken against the selling dealer.

5. The Bench decision in the case of State of Tamil Nadu v. Madras Petrol Chem Ltd. 89 STC 438, was a case which considered the relevant provision, which was in existence during the assessment year 1978-79. It is clear from paragraph 6 of the said judgment, Section 3(3), as it stood at that relevant point of time, has been taken into consideration. In paragraph 10 of the said judgment the Court proceeded to the effect that having regard to the subsequent legislative enactment referred to therein, the Court has taken the view that no action could be taken against the purchasing dealer by following the earlier judgment in the case of Premier Electro-Mechanical Fabricators v. State of Madras (1968) 22 STC 269. The same is the position in respect of the unreported judgment of a Division Bench of this Court dated 04.12.2001 referred to supra as the relevant assessment year in that case is 1984-85. In that case also, taking into consideration the reported judgment in the case of The State of Madras Vs. Radio and Electricals Ltd. etc., and having specific reference to Section 3(3) of the Tamil Nadu General Sales Tax Act, the Supreme Court has held that the duty of the assessing officer in respect of the declaration form furnished by the selling dealer is to see whether the form is only genuine and the duty of the seller receiving such a declaration is to make sure that the declaration has been duly filled in and signed by the purchasing dealer and that the form given to the seller is the one prescribed and obtained from the prescribed authority. The duty of the seller ends there. The selling dealer was under no further obligation to enquire into whether the buyer is engaged in a process or manufacture and if so, whether the article purchased from the seller are to be put to use as the component part or the product manufactured by the buyer. The above said cases

reached this Court after exhausting all the statutory remedies under the Act.

6. The other single Judge's judgment dated 21.03.2006 (Screenwell India v. DCTO) is in respect of the assessment year 2004-05. But the learned single Judge has not considered any assessment order in that case. What was put in issue in that case was a pre assessment notice. In the circumstances of the case and also having regard to the submission made by the Special Government Pleader appearing for the revenue to the effect that direction may be issued to the respondent to follow the law laid down by this Court in writ petition No. 10610 of 2000 dated 04.12.2001, the respondent therein was directed to consider Form XVII submitted by the assessee and levy tax only at 3% and not at 16% as mentioned in the pre-assessment notice.

7. In all the above said three cases, arguments have been advanced and considered by the Court with reference to Section 3(3) of the Tamil Nadu General Sales Tax Act. But as on date, statutory position is not as it was during the time the above referred to cases were considered. Even the Section 3(3) of the Tamil Nadu General Sales Tax Act has been considerably amended and further more, Section 10, which provides for burden of proof on the dealer, who claims that he is not liable to pay tax, has not been taken up for consideration. The other important factor is that Sub-clause (3) has been introduced to Section 10 by Amendment Act 60/1997 with effect from 06.11.1997 which provides that, "where any dealer knowingly produces a false bill vouchers declaration, certificate or other document with a view to support or make any claim that a transaction of sale or purchase effected by him is not liable to be taxed or liable to be taxed at a lower rate, the assessing authority shall on detecting such production direct the dealer producing such document to pay as penalty a sum - (i) which shall be in the case of first such deduction fifty percent of the tax due in respect of such transaction; and (ii) which shall be in the case of second or subsequent deductions one hundred per cent of the tax due in respect of such transaction." This piece of statutory provision has not been taken into consideration in any one of the judgments. At the time of rendering of the judgment of the Division Bench, sub Clause (3) was not incorporated in the section, and the earlier portion of the provisions which was in the statute book has been agitated before the Court.

8. Even in this writ petition all the grounds that have been taken are only in respect of Section 3(3) of the Act with reference to earlier decisions of this Court. The order impugned is an assessment order in respect of the assessment year 2003-04, which is in all fairness amenable to appellate provision provided under the statute book itself. The contention of the petitioner that the selling dealer cannot be penalised for the infraction in the declaration filed by the purchasing dealer and whether penalty can be levied on the selling dealer having regard to Section 10 with particular reference to Section 10(3) are all matters that can very well be agitated before the appellate authority. The availing of appellate remedy is onerous cannot be a point for invoking the extraordinary jurisdiction

under Article 226 of the Constitution of India, particularly in the fiscal statutes. While considering another fiscal enactment, i.e., the Central Excise Act, the Supreme Court has, in the case of *Union of India v. Tata Engineering & Locomotive Co. Ltd.* AIR 1998 SC 287, held as follows:

4. In our view, this petition should not have been entertained by the High Court at all. The Assistant Collector is entitled to complete the assessment as he thinks fit in exercise of his judgment and according to his understanding of the law and facts. For this purpose, he can call for and examine whatever documents he considers relevant. If the Assistant Collector fails to follow any judgment of the High Court or this Court, the assessee had adequate statutory remedies by way of an appeal and revision against the assessment order. The Court should not try to control the mode and manner in which an assessment should be made. If the Assistant Collector is of the view that enquiries are necessary to be made as to the price at which trucks were sold at the Regional Sales Offices, the Court cannot stop him from making such enquiries.

5. Mr Sorabjee, appearing on behalf of the respondents, has complained that the assessments are going on endlessly and without due regard to an earlier judgment of the Patna High Court in respect of an earlier assessment year on the very same issues. Whether the controversy raised in this case is covered by an earlier judgment of the High Court is a matter to be decided by the Assistant Collector. He will have to decide all questions of fact and law. He has to make whatever enquiries he thinks necessary for determination of the value of excisable goods. The High Court in exercise of its jurisdiction cannot give guidance to the Assistant Collector about the manner and mode in which the assessment should be made.

The latest judgment of the Supreme Court dated 16.2.2006 made in Civil Appeal Nos. 7323-7325 of 2000 (*Sabari Jewellery v. Deputy Commercial Tax Officer*) is also to the same effect.

9. This case is a clear example to the above said factual situation. The order impugned is virtually an order appealable under the statute. The appealable time has also not expired. As a matter of fact, it is admitted across the Bar by the learned Counsel for the petitioner that the order challenged in this writ petition has been received by the petitioner on 15.07.2006. Appealable time is still available. Conveniently the original order has not been filed, which is a statutory requirement for filing a writ petition, but a petition in MP. No. 1 of 2006 has been filed to dispense with the production of the original order. The reason given for not filing the original order is more wild. At paragraph 6 of the affidavit the petitioner has stated that he is not able to file the original proceedings of the respondent dated 30.06.2006 and the petitioner has filed only a certified copy. Learned Counsel for the petitioner tenders apology across the bar for not stating any reason for filing the original order. The same is accepted, but, however, it shows that the petitioner is taking a chance before this Court by retaining the original order so as to file an appeal, if the writ petition is not entertained by this

Court. This sort of attitude has to be deprecated and the same is deprecated.

10. In the light of the reasons stated in the foregoing paragraphs, this writ petition is dismissed. No costs. The miscellaneous petitions are consequently dismissed.