(2010) 12 KAR CK 0097

In the Karnataka High Court

Case No : S.T.R.P. No. 99 of 2010

State of Karnataka	APPELLANT
Vs	
N.L. Cauvery Arts and Crafts	RESPONDENT

Date of Decision : 14-12-2010

Acts Referred:

Citation : (2012) 54 VST 534

Hon'ble Judges : Manjula Chellur, J;Arvind Kumar, J

Bench : Division Bench

Advocate : S. Sujatha, for the Appellant; T.N. Keshavamurthy, for the Respondent

Final Decision : Allowed

Judgement

Mrs. Manjula Chellur, J.—This revision petition pertains to the assessment of financial year 2003-04. The admitted facts in the present revision are as under :

The respondent/assessee is dealing in the business of manufacture and sale of various handicrafts items and declared a total sales within the State at Rs. 23,33,778 and had claimed exemption on the entire turnover. In the annual returns filed, it had admitted export sales turnover of Rs. 31,68,480 and had claimed exemption on the entire turnover. The returns came to be filed on May 31, 2004. Subsequently on November 18, 2004, the business premises of the respondent was inspected by intelligence wing and suppression and omissions were noticed. Immediately on very next day, i.e., on November 19, 2004, the assessee filed revised return declaring total and taxable sales turnover within the State at Rs. 79,19,591 and Rs. 76,87,423 and exemption was claimed on a turnover of Rs. 2,32,168 as representing the turnover on sale of goods as second seller. The assessee admitted the tax liability of Rs. 10,81,978 under the KST Act. However, export sales turnover of Rs. 38,59,180 was declared and exemption was sought on the same. One more revised return came to be filed on September 15, 2005, for the year in question declaring the total and taxable sales turnover as follows :

In the returns filed under the CST Act a turnover of Rs. 38,59,180 was declared as representing the sales in the course of export. The Assistant Commissioner of Commercial Taxes rejected the declared turnover and passed orders determining the total turnover as under :

2. A tax of Rs. 10,87,167 was levied under the KST Act and a penalty of Rs. 6,00,000 was levied u/s 12(4) of the Act holding that assessee had purchased timber worth of Rs. 9,66,635 for use in the manufacture of handicrafts but turnover relating to other inputs and consumable items like polish, hardware items, etc., were not declared, therefore the same was proposed to be estimated at 10 per cent of the value of timber by order dated September 28, 2005. The assessing officer further held that on verification of books of accounts and independent examination of intelligence report, he had a reason to believe that the assessee had indulged in suppression of sales turnover, misclassification of taxable turnover into second sales turnover with the intention of evading taxes payable to the Government and therefore, the assessee had failed to maintain true and complete books of accounts.

3. The assessee preferred an appeal before the Joint Commissioner of Commercial Taxes (Appeal) challenging the orders of the assessing authority. The first appellate authority dismissed the appeals by upholding the correctness of the assessment orders.

4. The respondent/assessee not being satisfied with the said order of the first appellate authority challenged the same before the Karnataka Appellate Tribunal (for short, "the KAT") in STA No. 226 of 2006. The Tribunal by its order dated March 25, 2008 placing reliance on the judgment of the apex court in the case of State of Madras v. S.G. Jayaraj Nadar & Sons (1971) 28 STC 700 (SC) held that there was no "best judgment assessment" in the case on hand as the total turnover declared in the returns and as reflected in the books of accounts being one and the same, there was no suppression of facts. Aggrieved by the said order of the KAT, present revision is filed challenging the orders dated March 25, 2008 in STA 226/2006 by the Revenue.

5. Heard Smt. Sujatha, learned Government Advocate for the Revenue and Sri K.N. Keshavamurthy for the assessee.

6. According to the learned Government Advocate, the assessment order in question is nothing short of best judgment assessment u/s 12(3) of the KST Act and therefore, the Tribunal was not justified in holding that there was no best judgment and penalty u/s 12(3) of the KST Act, could not have been levied. She relies upon the following judgments to substantiate the contentions raised by the Revenue and seeks for setting aside the orders of the Tribunal which had set aside the levy of penalty of Rs. 6,00,000 on the assessee :

(a) Konatham Bhaskar Rao v. State of Andhra Pradesh (1986) 63 STC 297 (AP) ;

(b) M.V. Pavadai Chettiar Sons v. State of Madras (1968) 21 STC 67 (Mad).

7. The learned counsel for the respondent/assessee contends that there was no suppression or omission of any amounts on the part of the respondent/assessee as there was no suppression of figures in the returns filed which was found in the books of accounts. According to him, mis-classification of certain items or shown as second sales of certain other items is only under misconception by the assessee. Therefore, there was no intention to evade payment of any tax. Hence, there could not have been any best judgment assessment by the assessing officer and in the absence of best judgment assessment u/s 12(3) of the Act, imposition of penalty is uncalled for and therefore, the KAT was justified in setting aside the order of the first appellate authority. He would elaborate his submission by contending that mere mis-classification would not attract levy of penalty and an intention to evade payment of taxes should be the criteria for levy of penalty. He would also submit that the assessing officer in the instant case had not found any material to hold that the assessee had transacted beyond the books of accounts produced and the assessing officer had only disallowed the exemption claimed by the assessee and as such, the Tribunal was justified in relying upon S.G. Jayaraj Nadar''s case [1971] 28 STC 700 (SC) to conclude that the penalty cannot be levied. Hence, he submits that revision be dismissed by answering the question of law in favour of the assessee. In support of his submission he relies upon the following judgments :

(a) Sree Krishna Electricals v. State of Tamil Nadu (2009) 23 VST 249 (SC);

(b) State of Tamil Nadu v. Suguna Agencies (1991) 81 STC 33 (Mad);

(c) S. Durai v. Joint Commissioner (Smr) of Commercial Taxes (1994) 95 STC 372 (Mad) ;

(d) Manager, Text Book Press v. State of Karnataka (2001) 124 STC 303 (Karn) ;

(e) State of Karnataka v. S.R. Agencies (2009) 67 KLJ 349 ; and

(f) State of Karnataka v. Richmond Distilleries (2009) 67 KLJ 351.

8. We have perused the orders of the assessing officer as well as the first appellate authority and the orders of the Tribunal.

9. From the materials placed on record, we note that but for the inspection of the premises of the respondent on November 18, 2004, the misclassification of certain items and claim of second sales pertaining to other items would not have come to light. It is also noticed that the respondent/assessee immediately files a revised return on the next day of the inspection and further files second revised when assessment proceedings were commenced after issuance of notice to the respondent/assessee. It is seen from the records and the assessment orders that the quantum of total taxable turnover did differ from time to time. It is also noticed that the respondent/assessee voluntarily paid the admitted tax and later on paid the balance tax payable by him.

10. The questions raised by the appellant/Revenue are as under :

(a) Whether, on the facts and in circumstances of the case, can it be held that the order dated March 25, 2008 passed by the Karnataka Appellate Tribunal in STA No. 226/2006 is correct and in accordance with law ?

(b) Whether, on the facts and in circumstances of the case, can it be held that the Appellate Tribunal was right in law in applying the decision of S.G. Jayaraj Nadar reported in (1971) 28 STC 700 (SC) to the facts of the case ?

(c) Whether, on the facts and in circumstances of the case, can it be held that the Appellate Tribunal erred in misinterpreting section 12(3) and 12(4) of the Act and the power to levy penalty u/s 12(4) of the KST Act ?

11. The first decision relied upon by the learned Government Advocate is the case of Konatham Bhaskar Rao v. State of Andhra Pradesh (1986) 63 STC 297 (AP). In this case, their Lordships of the Andhra Pradesh High Court after referring to the facts pertaining to S.G. Jayaraj Nadar & Sons case (1971) 28 STC 700 (SC) and facts of Pusuluri Satyanarayana Murthy''s case (1978) 42 STC 103 (AP) held that there was no justifications on the part of the assessee to rely upon the decision of the Supreme Court in S.G. Jayaraj Nadar''s case (1971) 28 STC 700 (SC) as facts were different. At para 9 of the Konatham Bhaskar Rao''s case (1986) 63 STC 297 (AP) it is held as under (page 307 in 63 STC) :

9. We are not referred to any principle of law which can support the extraordinary contention raised by the learned counsel for the assessee that once an assessee files a revised return correctly, no notice can be taken of the assessee''s fraudulent acts prior to the filing of the revised returns. If this principle was to be accepted, an assessee can play hide and seek game with the Revenue. An assessee can dishonestly file returns showing turnover far less than what was actually recorded in the account books and challenge the assessing authorities to find for themselves the correct turnover. When eventually the assessing authorities find his correct account books the assessee can rush forward and file revised returns and plead that his dishonest and fraudulent behaviour in filing incorrect and incomplete returns earlier cannot be taken note of because he has filed a correct return after the Revenue officials detected his account books and the correct information. If the provisions of law are clear enough to give protection to such a dishonest assessee, the courts have no say in the matter. If, however, the assessee invites us to interpret the provisions of law in such a way that his dishonesty is rewarded, we would refuse to interpret the provisions to let the dishonest go scot-free. The law should rot be seen to sit by limply while those who defy it to go free. If the courts were to accept interpretation of law to leave the guilty unpunished, the confidence of the public in the efficacy of law would be shaken. The assessee in this case acknowledges that he had dishonestly and fraudulently filed the monthly returns for the months of April and May, 1973, declaring turnover which was far less than what was recorded in the books of account, perhaps in the hope and expectation that his account books would not come to the notice of the tax officials. When the tax officials found the account books showing much larger turnover, the assessee

quickly filed revised returns and did not even offer a word of explanation as to why he filed incorrect or incomplete returns initially. On the contrary, he challenges the Revenue that he cannot be punished by levy of penalty claiming that an interpretation of law must leave him free and reward his guilt. We find no remorse or realisation on the part of the assessee that he committed an offence. On the contrary, he claims protection of law for the offence that he had admittedly committed.

12. Another judgment relied upon by Smt. Sujatha is M.V. Pavadai Chettiar Sons v. State of Madras (1968) 21 STC 67 (SC). In the said case, there was suppression of turnover disclosed in pocket note-book when compared with the books of accounts maintained by the assessee. Therefore inclusion of suppressed turnover in supplementary return and filing of such return before final assessment and imposition of penalty under such circumstances was upheld. It would be necessary to extract relevant paragraph, which reads as under (page 70 in 21 STC) :

It appears to us that when once the assessee elects to be assessed on the basis of his monthly returns, he is obliged to submit correct returns so far as the turnover covered by the monthly returns is concerned. In this case, admittedly at the time when the assessee. . .

13. The learned Government Advocate has also referred to the case of State of Madras v. S.G. Jayaraj Nadar & Sons (1971) 28 STC 700 (SC) which was relied upon by the KAT to contend that the facts in the said case were entirely different from the facts in the present case and as such it is distinguishable on facts. In S.G. Jayaraj Nadar case (1971) 28 STC 700 (SC) it is held as follows (page 702 in 28 STC) :

In the present case the High Court found that the turnovers involved in the first and the third items were not determined on the basis of any estimate or best judgment. The quantum of turnovers in respect of both these items were based on the assessee''s account books. It has almost been conceded on behalf of the Revenue before us that the determination of the turnovers relating to the aforesaid two items was made from the entries in the books of account of the assessee. The true position, therefore, was that certain items which had not been included in the turnover shown in the returns filed by the assessee were discovered from his own account books and the assessing authority included those items in his total turnover. For these reasons the High Court was justified in holding that the assessment of the first and the third items could not be regarded as based on best judgment. The penalty thus could not be levied in respect of those two items.

14. The judgments relied upon by learned counsel for the assessee are analysed as under :

In the case Sree Krishna Electricals v. State of Tamil Nadu (2009) 23 VST 249 (SC), assessee was assessed to tax on the sale of wet grinders under the Tamil

Nadu General Sales Tax Act, 1959. Though assessee had claimed that it was selling only parts of wet grinders, its claim was found to be untrue and tax and penalty were imposed for the year 1992-93 and 1993-94. After verifying from the records, it was found that it was actually selling the wet grinders and not the parts and ultimately held that since the items were found incorporated in account books though it was not included in its turnover, penalty cannot be imposed merely because exemption claimed by the appellant was disallowed.

15. In the other cases State of Tamil Nadu v. Suguna Agencies (1991) 81 STC 33 (Mad) and S. Durai v. Joint Commissioner (Smr) of Commercial Taxes, Chepauk, Madras (1994) 95 STC 372 (Mad) cited before us, we notice they were already referred to in the case of Sree Krishna Electricals case (2009) 23 VST 249 (SC)

16. Section 12(3) and (4) of the KST Act reads as under :

S. 12(1) to 12(2) . . .

(3) If no return is submitted by the dealer under sub-section (1) before the date prescribed or specified in that behalf, or if the return submitted by him appears to the assessing authority to be incorrect or incomplete, the assessing authority shall assess the dealer to the best of his judgment, recording the reasons for such assessment:

Provided that before taking action under this sub-section the dealer shall be given a reasonable opportunity of proving the correctness and completeness of the return submitted by him.

(4) When making an assessment under sub-section (3), the assessing authority may also direct the dealer to pay in addition to the tax assessed, a penalty,--

(a) not exceeding an amount equivalent to the tax due but not less than one half of the amount of tax due on the turnover that was not disclosed by the dealer in his return ; or

(b) not exceeding an amount equivalent to tax but not less than one half of the tax assessed in the case of failure to submit a return ; or

(c) not exceeding an amount equivalent to the tax due but not less than one half of the amount of tax due on the turnover which in the opinion of the assessing authority would not have been disclosed voluntarily by the dealer in his return if such turnover was not noticed by any of the authorities empowered under this Act :

Provided that no penalty shall be levied on any turnover that has been subject to penalty under sub-section (3A) of section 1213.

17. Reading section 12(3) of the Act would indicate that a "best judgment assessment" could be made by the assessing officer if it appears to the assessing authority that return submitted by the assessee is either incorrect or incomplete.

18. On a perusal of the assessment order in question, it is clear that only after

verification of the books of accounts and independent examination of the intelligence report, he found the assessee had indulged in suppression of sales turnover, misclassification of taxable turnover into second sales turnover only with an intention of evading taxes payable to the Government. This conclusion of the assessing authority is nothing short of "best judgment assessment" made by him as there was misclassification of taxable turnover into second sales turnover.

19. The question is whether it is incomplete or incorrect returns. Incomplete returns would be something, which would be short of declaring actual turnover than what is reflected in the account books. Incorrect return would be something which would describe a particular item wrongly in the return whereas the account books would classify it as something else.

20. The question is whether there was any intention to evade payment of tax to the Government taking shelter under a wrong classification. In the present case, the respondent/assessee claims innocence saying that he was under an impression that sales made to the foreigners within the State were also exempted. Therefore, it was nothing short of a wrong conception or misconception on his part claiming such exemption. Apparently, the respondent/ assessee was not a novice in the said business and admittedly, the assessee is running the business not only in sale of handicrafts but is also engaged in the manufacture of handicrafts. Having an establishment at Mysore, it would not be something strange or new to the respondent/assessee that a foreigner coming and purchasing handicraft items at his shop. The question is whether the assessee took protection behind a smoke screen and unless the said screen is pierced by the assessing authority by verification of accounts, the truth would not have come to light or suppression would not have seen the light of the day. As a matter of fact, in the grounds of appeal urged before the first appellate authority by the assessee at ground G, it is urged as under :

(G) Due to mis-guidance that credit card sales do not attract tax, they have not paid tax thereon and expecting purchase bills from the dealers, they claimed exemption as second sales. But the selling dealers did not issue bills ultimately the appellant was held as first dealer. There is no non-disclosure of turnover, penalty u/s 12(4) levied is illegal and unwarranted.

21. In the present case but for the inspection and gathering intelligence report, actual suppression of details of this credit card sales would not have come to light but for the lifting of the veil and actual taxable turnover would not have come to light. Therefore, it is a case of incorrect returns by giving wrong description of the sales and claiming exemption disclosing wrong information. Therefore, it is a case of definitely incorrect returns as there is suppression of details of the actual credit card sales, which came to light only after verification of the account books. Hence, none of the decisions relied upon by the respondent/assessee would come to its rescue. Hence the contention of the assessee that once the quantum of total turnover shown in the returns filed tallied with the books of accounts, question of suppression of details would not

come into picture is not applicable to the facts on hand. Therefore, the revision petition deserves to be allowed by answering the questions of law raised above in favour of the Revenue and against the assessee. Accordingly the revision petition is allowed by answering the question of law in favour of Revenue and against the assessee. Consequently, the order of Tribunal dated March 25, 2008 is hereby set aside and orders of the first appellate authority dated February 15, 2006 is restored. No costs.

