(2011) 06 MAD CK 0261

In the Madras High Court

Case No : Tax Case (Revision) No. 573 of 2006

State of Tamil Nadu APPELLANT

Vs

Allied Engg. Industries RESPONDENT

Date of Decision : 09-06-2011

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12(3)(b), 22, 22(1), 22(2)

Citation : (2012) 52 VST 335

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

Bench : Division Bench

Advocate : R. Sivaraman, Special Government Pleader T, for the Appellant; S. Ramanathan, for the Respondent

Judgement

Mrs. Chitra Venkataraman, J.—This revision petition is filed by the Revenue as against the order of the Sales Tax Appellate Tribunal for the assessment year 1995-96. The revision is admitted on the following substantial question of law :

Whether, in the facts and circumstances of the case, the deletion of penalty levied u/s 22(2) of the TNGST Act by the Tribunal is legally sustainable ?

Even though the Revenue has stated in the memorandum of valuation that they are questioning the cancellation of levy of penalty u/s 12(3)(b) of the Tamil Nadu General Sales Tax Act also, since the question of law framed on which the tax case was admitted relates to penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act, 1959 alone, we do not find any justification to consider the correctness of the cancellation of levy of penalty u/s 12(3)(b) of the Tamil Nadu General Sales Tax Act in this tax case revision.

2. The assessee herein collected eight per cent tax on overhead travelling cleaners, which was used in textile machinery to control the air pollution in textile mills. In respect of the rate of tax on the sale of overhead travelling cleaners, in the clarification issued by the Commissioner of Commercial Taxes in D. Dis. Acts cell.II/55618/96 dated December 3, 1996 on the basis of the G.O.

87 dated March 17, 1993, it was held that the commodity dealt with by the assessee would fall under textile machinery, assessable to tax at four per cent. Admittedly, the assessee collected tax at the rate of eight per cent during the assessment year 1995-96 and the same had been remitted to the Department. It is admitted by the Department that in respect of the immediate preceding year 1994-95, the assessee had collected eight per cent tax; remitted the same and the assessment was also completed by the Revenue accepting the rate of tax at eight per cent. The said assessment had reached finality both at the hands of the Revenue and at the hands of the assessee. However, strangely, in respect of the assessment year 1995-96, the Revenue sought to assess the same based on the Commissioner''s clarification in respect of rate of tax at four per cent. The Revenue viewed that collection of rate of tax at eight per cent by the assessee was in contravention of the provisions of the Act warranting levy of penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act. Accordingly, notice was issued to the assessee and after hearing the objection, the levy of penalty was made as part of the assessment to the tune of Rs. 5,60,282 which was equivalent to the excess tax collected by the assessee.

3. An appeal was preferred by the assessee as against the order of the assessment challenging the levy of penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act, apart from the levy of penalty u/s 12(3)(b) of the Tamil Nadu General Sales Tax Act. The first appellate authority sustained the levy of penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act, but remanded the levy of penalty u/s 12(3)(b) of the Tamil Nadu General Sales Tax Act. Aggrieved by the same, the assessee went on appeal before the Tribunal.

4. A perusal of the order of the Tribunal shows that in respect of the similar situation, this court had held in the decision State of Tamil Nadu v. Oil Dale Trading Private Ltd. reported in [1999] 116 STC 440 (Mad) that in a case of mutual mistake as regards the rate of tax, the assessee could not be mulcted with any penal liability. Thus applying the said decision, the Tribunal cancelled the levy of penalty. The Tribunal also referred to the decisions of this court in T. C. Nos. 1017 and 1018 of 1984 (State of Tamil Nadu v. Sikri and Grover) and Parameswari & Company v. State of Tamil Nadu [1997] 106 STC 423 (Mad) as well as the decision of the Supreme Court in S. L. P. (Civil) No. 8067 and 8068 of 1985, to come to the conclusion that having regard to the consistency in the assessment made in the immediate preceding years, the levy of penalty made was unsustainable. Aggrieved by the same, the Revenue is on revision before this court.

5. The learned Special Government Pleader appearing for the Revenue placed reliance on the decision of this court reported in A. Vinayagamurthy Nadar v. Joint Commissioner-II (Commercial Taxes), Chepauk, Madras [1993] 90 STC 562 (Mad) wherein this court had confirmed the levy of penalty holding that section 22(2) of the Act leaves no option to the assessing authority once he comes to the conclusion that the dealer had collected an amount by way of tax or purported to

be by way of tax in contravention of sub-section (1) of section 22 of the Act, thus leading to the levy of penalty.

6. We have gone though the said decision. It is seen that in the decision State of Tamil Nadu v. Jaya Pharmacy reported in [1984] 57 STC 164 (Mad), which was distinguished by this court in the decision A. Vinayagamurthy Nadar v. Joint Commissioner-II (Commercial Taxes), Chepauk, Madras reported in [1993] 90 STC 562 (Mad), this court held that in a case of mutual mistake as regards the rate of tax, the levy of penalty u/s 22(2) of the Act could not be upheld. This court pointed out that in the decision in The State of Tamil Nadu Vs. Jaya Pharmacy, the assessee therein collected 30 per cent tax on the sales of arishtams and subsequently at eight per cent treating the same as drugs. The assessee contested that the goods were taxable only at four per cent, however, the assessing authority did not agree with the same, thus resulted in the assessee going on appeal to get a ruling in its favour. In the circumstances, this court held that when the assessee and the assessing officer were under mutual mistake as to the rate of tax, the question of levy of penalty u/s 22(2) of the Act was not attracted.

7. It is seen from the decision in A. Vinayagamurthy Nadar v. Joint Commissioner-II (Commercial Taxes), Chepauk, Madras reported in [1993] 90 STC 562 (Mad), which is distinguishable from the decision in The State of Tamil Nadu Vs. Jaya Pharmacy, , that the assessing authority revised the assessment to tax the sale of mustard at three per cent as against the originally levied 31/2 per cent rate of tax. The assessee, taking advantage of the original assessment that the assessing officer had treated the rate of tax at 31/2 per cent, took the plea that it was a case of mutual mistake and hence, penalty could not be levied. Rejecting the said contention, this court pointed out that when the assessing authority himself had realised the mistake in accepting the return of the assessee, there was no question of any mutual mistake and the facts in that case were distinguishable from the one in The State of Tamil Nadu Vs. Jaya Pharmacy, The facts in the present case before us do not stand on the same lines of what was considered in the decision in A. Vinayagamurthy Nadar v. Joint Commissioner-II (Commercial Taxes), Chepauk, Madras reported in [1993] 90 STC 562 (Mad).

8. Under identical circumstances, in the decision in State of Tamil Nadu v. K. Mohammed Ibrahim Sahib reported in [1991] 83 STC 402 (Mad), this court pointed out that the assessee, who carried on the business on decorticators, collected higher rate of tax from the mill owners at the behest of the Revenue and remitted the same to the Government. On the levy of penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act alleging contravention of section 22(1) of the Tamil Nadu General Sales Tax Act, this court held as follows (407 in 83 STC) :

Having itself directed the assessees to recover the tax from the purchasing merchants and remit it to the Government, it ill-behoves the Revenue to now turn round and charge the assessees for having contravened section 22(1) of the Act by collecting the sales tax at its behest. Since the uncontroverted findings of fact, as noticed above, were arrived at on the basis of the material on record, the conclusion is inescapable that the assessees had not contravened section 22(1) of the Act by carrying out the directions of the Department to collect sales tax from the purchasing merchants and to remit the same to the Government treasury. The provisions of section 22(1) of the Act have to be construed with reference to the context, and in the context of the facts as established in this case, the view of the Tribunal that the assessees did not contravene the provisions of section 22(1) of the Act is quite sound and commends to us.

9. As far as the present case is concerned, it s not denied by the Revenue that the Commissioner''s clarification was made available only on December 3, 1996, just a few days before the assessment order was passed on December 26, 1996. It is also an admitted fact that the assessment in respect of the immediate preceding year, viz., 1994-95 was made by the Revenue accepting the rate of tax at eight per cent. The said assessment order has reached finality and it has not been in any manner revised by the Revenue. Given the fact that both the assessee and the assessing authority, were under the impression that that the rate of tax was at eight per cent on the overhead travelling cleaners, till the Commissioner''s clarification came and the Revenue sought to revise the same at four per cent consequent on the Commissioner''s clarification long after the assessment order was passed, we have no hesitation to hold that it is fair case of mutual mistake; that but for the assessment made by the assessing officer for the immediate preceding assessment year accepting the tax at the rate of eight per cent, the question of the assessee collecting tax at the rate of eight per cent would not have arisen. It is also of relevance to note that throughout the assessment year, the assessee had been collecting the tax at the rate of eight per cent and at no point of time, even during the course of the assessment year, the Revenue did not take the objection to the rate of tax at eight per cent. In the light of the above, we have no hesitation in confirming the order of the Tribunal cancelling the levy of penalty. Accordingly, the order of the Tribunal is confirmed and the tax case (revision) is dismissed. No costs.

