

(1995) 01 MAD CK 0087

In the Madras High Court

Case No : Tax Case No. 1029 of 1983 (Revision No. 302 of 1983)

State of Tamil Nadu

APPELLANT

Vs

Guhan Traders

RESPONDENT

Date of Decision : 23-01-1995

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 36

Citation : (1995) 01 MAD CK 0087

Hon'ble Judges : T. Jayarama Chouta, J;K.A. Thanikkachalam, J

Bench : Division Bench

Judgement

Thanikkachalam, J.—The department is the petitioner herein. The assessee who is a dealer in pulses, grams and foodgrains, declared total and taxable turnover of Rs. 96,82,250.68 and Rs. 51,28,245.09. The assessing officer determined the total and taxable turnover at Rs. 1,12,72,701 and Rs. 73,44,261. He also levied a penalty of Rs. 1,20,264 u/s 12(3) of the Tamil Nadu General Sales Tax Act. Aggrieved the assessee filed an appeal before the Appellate Assistant Commissioner and the Appellate Assistant Commissioner remanded the matter to find out about the local or fictitious purchases. However, he deleted the penalty. Aggrieved, the assessee filed an appeal before the Appellate Tribunal. The assessee was aggrieved with regard to the order of remand passed by the Appellate Assistant Commissioner. However, in the course of the hearing, the learned counsel appearing for the appellant-assessee was not able to place before the Tribunal any evidence or arguments. Therefore, the Tribunal confirmed the order of remand passed by the Appellate Assistant Commissioner.

2. The State filed an enhancement petition against the deletion of penalty of Rs. 1,20,264. The assessee relied upon the decision reported in The State of Tamil Nadu Vs. Jakthi Veliyeetakam, wherein it was held that where the penalty is entirely deleted by the Appellate Assistant Commissioner, no enhancement petition is possible. According to the department, the order deleting the penalty is inconsistent with the order of remand. It was pointed out that having chosen

to remand the assessment, it was not possible for the Appellate Assistant Commissioner to delete the penalty. The penalty depended mainly upon the question whether the earlier purchase was fictitious or not. The Appellate Assistant Commissioner has not gone into question in detail and that is why the Appellate Assistant Commissioner remanded the assessment. The Appellate Assistant Commissioner has no independent material to delete the penalty. However, the Appellate Tribunal confirmed the order passed by the Appellate Assistant Commissioner and dismissed the enhancement petition filed by the department. As against this order, the Revenue is in revision before this Court.

3. The learned Additional Government Pleader (Taxes) submitted as under :

The Tribunal ought to have allowed the enhancement petition filed by the Revenue against the deletion of penalty of Rs. 1,20,264.64 by the Appellate Assistant Commissioner. The Tribunal having given a finding that the Appellate Assistant Commissioner had no independent material to delete the penalty, ought to have allowed the petition filed by the Revenue to restore the order of the assessing officer. The Tribunal has not appreciated the scope of section 36(3)(a) (iii) of the Act. The view of the Division Bench of this Court reported in 1977 40 STC 466 (State of Tamil Nadu v. Jakthi Veliyeetakam) requires reconsideration in view of another Division Bench judgment in 1981 47 STC 88 (Deputy Commissioner of Commercial Taxes v. Panayappan Leather Industries) and the Full Bench judgment of this Court in 1982 51 STC 381 (State of Tamil Nadu v. Arulmurugan and Company). Penalty proceedings are part of assessment proceedings and as such the penalty levied u/s 12(3) of the Act has to be treated as part of the assessment order and hence the Tribunal has got power of enhancement even though the penalty has been deleted totally by the Appellate Assistant Commissioner. It was, therefore, pleaded that the enhancement petition filed by the department ought to have been allowed by the Tribunal. On the other hand, the learned counsel appearing for the assessee, while supporting the order passed by the Tribunal, submitted that when in the quantum appeal the assessment was set aside and remanded back for fresh disposal, penalty u/s 12(3) of the Act cannot be levied. It is admitted by the department that the appellant had accounted for the purchases of goods to the value of Rs. 20,04,428.38, made from three dealers and claimed exemption on the relevant sales turnover of Rs. 22,04,871.22 towards second second sales of Scheduled goods. It cannot be denied that the transaction has not been brought to accounts and reported to the department. Assessing officer has not pointed out any omissions in purchases or suppressions in sales. Under such circumstances, the Appellate Assistant Commissioner was correct in deleting the penalty, which was confirmed by the Tribunal on appeal. According to the learned counsel, when the assessment made by the assessing officer was set aside and remanded back for fresh disposal, the penalty levied on such assessment, which was set aside and sent back, will have no legs to stand. It was, therefore, pleaded that the Tribunal was correct in confirming the order passed by the Appellate Assistant Commissioner, both in quantum appeal as well as in the penalty appeal.

4. We have heard the rival submissions. The assessee declared a total and taxable turnover of Rs. 96,82,250.68 and Rs. 51,28,245.09. For the reasons stated in his order, the assessing officer determined the total and taxable turnover at Rs. 1,12,72,701 and Rs. 73,44,261. He also levied penalty of Rs. 1,20,264 u/s 12(3) of the Tamil Nadu General Sales Tax Act. The assessing officer, in the course of the order, held that the assessee claimed substantial portion of the turnover as second sales. The alleged purchases were made from three dealers to the value of Rs. 20,04,428.38. After adding a profit margin, the second sales claimed was arrived at Rs. 22,04,871.22. According to the Revenue the abovesaid three persons did not exist during the relevant time of purchase. For the reasons stated in his order, the Appellate Assistant Commissioner set aside the assessment and remanded the same to the file of the assessing officer with a direction to redo the assessment in accordance with law. The Appellate Assistant Commissioner also deleted the penalty levied by the assessing officer u/s 12(3) of the Act. The Tribunal confirmed the order of remand made by the Appellate Assistant Commissioner.

5. The assessee filed an appeal before the Appellate Tribunal against the order of remand made in quantum appeal. The department filed an enhancement petition to restore the penalty levied u/s 12(3) of the Act. According to the department even if the assessment is remanded for fresh disposal after setting aside the assessment made by the assessing officer, the penalty is exigible. When the assessment itself is set aside the remanded back for re-doing the same, the penalty levied u/s 12(3) of the Act on the basis of the original assessment made by the assessing officer will automatically become unsustainable. Under such circumstances, it is not possible for the department to file an enhancement petition to restore the penalty. It was submitted by the department that the assessing officer should be directed to levy penalty while re-doing the assessment. Such a direction is not possible. The assessing officer is re-doing the assessment as per the direction given by the Appellate Assistant Commissioner. While completing the assessment, the power of assessing officer to levy penalty cannot be abrogated. Therefore, there is no infirmity in the order passed by the Tribunal in confirming the order passed by the Appellate Assistant Commissioner, both in the quantum appeal as well as in the penalty appeal. In that view of the matter, the order passed by the Tribunal is confirmed and this tax revision filed by the department is dismissed. No costs.

6. Petition dismissed.