

(1995) 04 MAD CK 0084

In the Madras High Court

Case No : Tax Case No. 1318 of 1984 (Revision No. 224 of 1984)

State of Tamil Nadu

APPELLANT

Vs

R. Periyalwar Naidu

RESPONDENT

Date of Decision : 04-04-1995

Acts Referred:

Central Sales Tax Act, 1956 — Section 9(2A)

Tamil Nadu General Sales Tax Act, 1959 — Section 12(5)

Citation : (2003) 133 STC 548

Hon'ble Judges : Thanikkachalam, J; Jayarama Chouta, J

Bench : Division Bench

Advocate : Chitra Venkataraman, Additional Government Pleader Taxes, for the Appellant; N. Inbarajan, for the Respondent

Final Decision : Dismissed

Judgement

Thanikkachalam, J.—The State is the petitioner herein. The assessee is one R. Periyalwar Naidu, dealer in grams at Kumbakonam.

2. The final assessment was made on the turnover found in the books for the assessment year 1980-81. The assessee failed to disclose the taxable turnover of Rs. 2,30,688 in the monthly returns in form-I filed for the year 1980-81. Failure to disclose the book taxable turnover in the return warrants levy of penalty u/s 9(2-A) of the Central Sales Tax Act, 1956 (hereinafter referred to as "the Act") read with Section 12(5) of the Tamil Nadu Sales Tax Act, 1959 (hereinafter referred to as "the Act, 1959"). While the original assessment was completed, penalty was not levied. Hence, separate penalty proceedings was initiated. The assessee objected to the levy of penalty. According to the assessee only a nominal fees can be levied and penalty u/s 12(5) of the Act, 1959 cannot be levied since there is no wilfulness on their part, in the non-disclosure of the turnover. The assessing officer was of the view that whether there is wilfulness or not when there is non-disclosure of turnover which warrants penalty u/s 9(2-A) of the Central Act read with Section 12(5) of the Act, 1959. Accordingly, penalty

was levied to the extent of Rs. 4,614 u/s 9(2-A) of the Act. On appeal, the Appellate Assistant commissioner confirmed the penalty levied by the assessing officer. Aggrieved, the assessee filed further appeal before the Tribunal and the Tribunal pointed out that on March 31, 1981 the assessee has filed a statement showing the undisclosed turnover before the assessment was completed. Therefore, according to the Tribunal there is bona fide on the part of the assessee in non-disclosure of the turnover in the monthly return and even otherwise if the assessee filed the revised return or a statement before the completion of the assessment, penalty is not exigible u/s 12(5) of the Act, 1959. Accordingly, the penalty was deleted. As against this order, the department is in revision before this Court.

3. Learned Additional Government Pleader (Taxes) submitted that the Tribunal was not correct in deleting penalty levied u/s 12(5) of the Act, 1959 read with Section 9(2-A) of the Act. It was further submitted that the Tribunal has failed to note that there was omission to include the turnover in the return and that itself is sufficient for levy of penalty u/s 12(5) of the Act, 1959. According to the learned Additional Government Pleader (Taxes), whether there is any bona fide or not, if once the turnover is not disclosed in the return, penalty is exigible u/s 12(5) of the Act, 1959. It was further submitted that similar question was pending before this Court for decision in T.C.1414 of 1982. For these reasons, the learned Additional Government Pleader (Taxes) submitted that the Tribunal was not correct in deleting the penalty levied u/s 12(5) of the Act, 1959.

4. On the other hand, learned counsel appearing for the assessee while supporting the order passed by the Tribunal submitted that the assessee had a doubt in his mind that prior to March 31, 1981 whether there was out right sale in the goods sent to Calcutta and therefore, the turnover was not disclosed in the monthly return by March 31, 1981. The statement from the Calcutta party would go to show that they have treated the goods sent by the assessee as an out right sale. Therefore, the assessee filed a revised statement showing the turnover. Since the revised statement was filed before the completion of the assessment, no penalty is exigible. Further, inasmuch as the turnover was disclosed, before the completion of the assessment, would go to show the bona fide on the part of the assessee in not disclosing the turnover earlier. For these reasons, the learned counsel appearing for the assessee submitted that penalty is not exigible u/s 12(5) of the Act.

5. We have heard the rival submissions. The fact remains that the assessee failed to disclose the taxable turnover of Rs. 2,30,688 in the monthly returns in form I for the assessment year 1980-81. Such failure to disclose the book taxable turnover would warrant penalty u/s 9(2-A) of the Act read with Section 12(5) of the Act, 1959. The assessing officer levied penalty since according to him the failure to disclose the turnover would warrant penalty under the abovesaid provisions, irrespective of fact whether is any bona fide reason for not disclosing such turnover in the return. This was confirmed by the Appellate Assistant

Commissioner on appeal.

6. Before the Tribunal, the assessee gave the following explanation :

"The assessee sold in the course of inter-State trade, green gram to Calcutta buyers. He also sends green gram to the Calcutta buyers for sale on consignment. He has a representative at Calcutta to arrange for the sale or for the despatch of goods for sale on consignment account. He despatches by lorry, green gram from Kumbakonam to Salt Cotaurs. These goods were covered by form XX delivery notes. From Madras they are booked by rail. If the goods are for sale on consignment account, the agent takes delivery of the goods at Calcutta, sells and sends statement of account and form F under the C.S.T. Act. If the goods are sent on the basis of a contract for sale, the buyer will take delivery of the goods. The assessee acts on the advise of his Calcutta representative in sending goods for sale on account or in making outright sale. In both the cases (i.e.) whether the sale is on account or outright, tax is payable to the State of Tamil Nadu, the former u/s 7-A of the Tamil Nadu General Sales Tax Act and the latter suffered....."

Accordingly 240 bags each of green gram were sent to the two dealers for sale on consignment account. The delivery notes will make this position clear. They informed the assessee that they had appropriated the goods to themselves and that they may be treated as buyers. The assessee made out sales bills under the dates on which the goods were railed at Madras. They have accounted for the transaction in the year on March 31, 1981. Hence the sales could not be disclosed in the return. Rule 5-A of the Central Sales Tax (Madras) Rules provides for filing revised return before the assessment and the assessee had placed figures before the assessing authority in the form of a statement which satisfies the statutory requirements as laid down in the decision in the case of The State of Madras Vs. M.S.K. Shahul Hameed, The omission to disclose in form I return is because of the non-resident dealers delayed intimation of his change of view and was beyond the assessee's control. Therefore, penalty is not exigible. The Tribunal accepted that due to the reasons stated by the assessee, the turnover could not be disclosed in the monthly return. But at the same time, it was disclosed in the statement prior to completion of the assessment. Therefore, the Tribunal came to the conclusion that there is bona fide on the part of the assessee in not disclosing the turnover in the monthly returns. Further, according to the Tribunal when once the assessee filed a revised statement disclosing the turnover prior to the completion of the assessment, penalty is not exigible as per Rule 5-A of the Act. Considering the facts arising in this case, and the explanation offered by the assessee, we are of the opinion that the Tribunal was correct in coming to the conclusion that penalty is not exigible u/s 12(5) of the Act, 1959 read with Section 9(2-A) of the Act. Accordingly, we are not inclined to interfere with the order passed by the Tribunal in cancelling the penalty.

7. In the result, the revision is dismissed. No costs.