(2010) 02 MAD CK 0154

In the Madras High Court

Case No : Tax Case (R) No. 223 of 2006

State of Tamil Nadu — APPELLANT

Vs

Rabia Leathers Industries — RESPONDENT

Date of Decision : 04-02-2010

Acts Referred:
Tamil Nadu General Sales Tax Act, 1959 — Section 12(1), 16(1), 16(2)

Citation : (2010) 30 VST 430

Hon'ble Judges : P.P.S. Janarthana Raja, J;D. Murugesan, J

Bench : Division Bench

Advocate : Haja Naziruddin, Special Government Pleader Taxes, for the Appellant; S. Ramanathan, for the Respondent

Final Decision : Dismissed

Judgement

P.P.S. Janarthana Raja, J.—This tax case revision is transferred from the Special Tribunal after its abolition as per Section 3 of the Special Tribunal Repealing Act.

2. The above revision is filed against the order of the Tamil Nadu Sales Tax Appellate Tribunal (Main Bench), Chennai, dated February 18, 2003 in T.A. No. 126 of 2001 by raising the following substantial question of law:

Whether the Sales Tax Appellate Tribunal is right in holding that penalty is leviable u/s 16(2) of the Tamil Nadu General Sales Tax Act, 1959 for the assessment year 1994-95 since the taxability or otherwise of sale of REP licence was ultimately settled by the Supreme Court only in the year Vikas Sales Corporation v. Commissioner of Commercial Taxes [1996] 102 STC 106?

3. The assessee is a dealer in hides and skins at No. 2, Hunters Road, Choolai, Chennai 112. The relevant assessment year is 1994-95. The assessee was originally assessed to tax on a total and taxable turnover of Rs. 1,89,54,948 and nil, respectively. Later the assessment records were scrutinized and the assessing officer found the turnover relating to sale of advance REP licence to the tune of Rs. 26,39,336 as escaped assessment. Therefore, he revised the

assessment and levied tax on the said escaped turnover on the sale of REP licence and levied penalty of Rs. 4,16,950 u/s 16(2) of the Act. Aggrieved by that order, the assessee has filed an appeal to the Appellate Assistant Commissioner. The said Appellate Assistant Commissioner confirmed the order of levying penalty and dismissed the appeal. As against the said order, the assessee has filed an appeal before the Sales Tax Appellate Tribunal. The Tribunal held that there is no wilful non-disclosure of the turnover relating to the sale of REP licence and allowed the appeal, deleting the penalty. Hence, the present revision.

4. The learned Special Government Pleader appearing for the Revenue submitted that the Tribunal is wrong in deleting the penalty u/s 16(2) of the Tamil Nadu General Sales Tax Act, 1959. He further submitted that the Tribunal failed to note that the assessing authority resorted to revision of assessment in view of the fact that the dealers failed to disclose the turnover relating to REP licence. Therefore, the assessing officer has rightly levied penalty u/s 16(2) of the Act for wilful non-disclosure of taxable turnover. He also submitted that the Tribunal ought to have seen that the dealers did not disclose the taxable turnover of REP licence in the monthly Al returns for the year 1994-95 and filed incorrect and incomplete return. He further relied on the decision P.S. Apparels v. Deputy Commercial Tax Officer reported in [1994] 94 STC 139 (Mad), in which the taxability of REP licence was settled and the same was affirmed by the Supreme Court in Vikas Sales Corporation v. Commissioner of Commercial Taxes [1996] 102 STC 106. Therefore the assessee ought to, have disclosed the turnover relating to REP sales and the order passed by the Tribunal is not in accordance with law and the same has to be set aside.

5. The learned Counsel appearing for the respondent/assessee submitted that the Tribunal is correct in deleting the penalty levied on the turnover relating to REP licence. He further submitted that the issue was settled by the Supreme Court only on May 1, 1996 and hence no penalty is leviable. Therefore, the order passed by the Tribunal is in accordance with law and the same has to be confirmed.

6. Heard the learned Counsel on either side and perused the materials placed on record. The assessee was assessed to tax on total turnover and taxable turnover at Rs. 1,89,54,948 and nil, respectively. The assessing officer noticed that the turnover relating to sale of REP licence escaped assessment and informed the assessee that the sale of REP licence is kept pending in view of the stay order of the Supreme Court. The apex court held that it is taxable in the case of Vikas Sales Corporation reported in [1996] 102 STC 106. The Supreme Court delivered the judgment only on May 1, 1996. According to the assessing officer, the assessee ought to have filed revised return. Because of the failure on the part of the assessee in not filing the return, the assessing officer levied penalty u/s 16(2) of the Act. It is not in dispute that the assessee reported the turnover relating to REP licence. It is also to be noted that during the relevant assessment year, this Court in the case of P.S. Apparels v. Deputy Commercial Tax Officer

reported in [1994] 94 STC 139, has held that the sale of REP licence subject to tax. The said judgment has not reached finality. Hence the matter was taken to Supreme Court, in which, the Supreme Court has granted stay. In view of the same, the assessee has claimed exemption on the ground that the matter has not reached finality and the same is pending before the apex court. Hence no penalty is leviable till the Supreme Court''s judgment. The assessee was under the bona fide belief and claimed exemption. Therefore, it cannot be said that it amounts to wilful non-disclosure of turnover, for the purpose of levying penalty u/s 16(2) of the Act. Section 16(2) of the Act reads as follows:

16. (2) In making an assessment under Clause (a) of Sub-section (1), the assessing authority may, if it is satisfied that the escape from the assessment is due to wilful non-disclosure of assessable turnover by the dealer, direct the dealer, to pay, in addition to the tax assessed under Clause (a) of Sub-section (1), by way of penalty a sum which shall be-

(a) fifty per cent of the tax due on the turnover that was wilfully not disclosed if the tax due on such turnover is not more than ten per cent of the tax paid as per the return;

(b) one hundred per cent of the tax due on the turnover that was wilfully not disclosed if the tax due on such turnover is more than ten per cent but not more than fifty per cent of the tax paid as per the return;

(c) one hundred and fifty per cent of the tax due on the assessable turnover that was wilfully not disclosed, if the tax due on such turnover is more than fifty per cent of the tax paid as per the return;

(d) one hundred and fifty per cent of the tax due on the assessable turnover that was wilfully not disclosed, in the case of self-assessment referred to in Sub-section (1) of Section 12:

Provided that no penalty under this Sub-section shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such imposition.

7. From a reading of the above, it is clear that for the purpose of levying penalty u/s 16(2), there should be wilful non-disclosure of the turnover in the return. In the present case, the turnover was shown, but under the bona fide belief, the assessee claimed exemption. Therefore, the condition precedent for invoking the provision u/s 16(2) has not been satisfied. In the case of State of Tamil Nadu v. Sri Shanmughananda and Co. reported in [1997] 104 STC 61 this Court considered the scope of levying penalty u/s 16(2) of the Act. The relevant portion of the order reads as under (page 64):

5. In so far as the merits of case, in levying penalty u/s 16(2) of the Act, is concerned, it was represented that the turnover of Rs. 1,12,664 was assessed on the basis of book turnover. The assessed turnover was stated to be found in the books of accounts and the accounts were accepted by the Department. In such a

case, the Appellate Assistant Commissioner pointed out that in view of the decision of the Supreme Court in State of Madras v. S.G. Jayaraj Nadar & Sons [1971] 28 STC 700 penalty is not exigible u/s 16(2) of the Act. This situation was not disputed seriously. Therefore, on merits, penalty u/s 16(2) of the Act is not exigible in the case of the assessee. Under such circumstances, we have no other alternative, but to dismiss the revision filed by the Department. Accordingly, the tax case (revision) is dismissed. No costs.

8. Applying the above principle, levying of penalty by the assessing officer u/s 16(2) of the Act is not justified. The Tribunal has correctly held that the levy of penalty is not justified and therefore deleted penalty. We do not find any error of law or illegality in the order passed by the Tribunal warranting interference. The finding given by the Tribunal is based on valid materials and evidence and it is a question of fact. It is not a perverse order. Therefore, we confirm the order of the Tribunal and answer the question of law in favour of the assessee and as against the Revenue. The appeal filed by the Revenue is devoid of merits and the same is dismissed. No costs.

