(2012) 02 MAD CK 0274

In the Madras High Court

Case No : Tax Case (Revision) No''s. 1023 and 1041 of 2006

State of Tamil Nadu — APPELLANT

Vs

Safari Industries (India) Ltd. — RESPONDENT

Date of Decision : 02-02-2012

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12A, 12A(1), 16, 16(1)

Citation : (2012) 55 VST 197

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

Bench : Division Bench

Advocate : R. Sivaraman, Special Government Pleader Taxes, for the Appellant; A. Thyagarajan, for S. Balamurugan, for the Respondent

Judgement

D. Murugesan, J.—These tax case revisions are directed at the instance of the Revenue, questioning the common order of the income tax Appellate Tribunal, Additional Bench, Chennai, dated August 10, 2000 in I. T. A. Nos. 226 and 227 of 2000 respectively. Tax Case (Revision) No. 1023 of 2006 relates to the assessment year 1993-94 and the Tax Case (Revision) No. 1041 of 2006 relates to the assessment year 1994-95.

2. These revisions were admitted on the following substantial question of law :

Whether in the facts and circumstances, the Tribunal is right in holding that there is no under invoicing u/s 12A of the Tamil Nadu General Sales Tax Act in respect of sales made to the sister concern of the assessee ?

3. The respondent-assessee Tvl. Safari Industries (India) Limited are dealers in suitcases and briefcases and they have reported a total and taxable turnover of Rs. 1,61,49,148 for the year 1993-94 and Rs. 1,94,78,389 for the year 1994-95. Their accounts were called and checked. The place of business at Chennai was inspected by the Enforcement Wing officers on February 28, 1996 and the officers had ascertained that the assessee are the manufacturers of suitcases, briefcases, etc., having, factory at Gujarat and have 17 branches all over India.

It was also found that the goods are received from the factory on stock transfer basis for sales and from other branches to Madras and no manufacturing and purchases are done at Madras and there was no import or export. The entire sales are to Tvl. Safari Sales Limited, which is their sister concern and also marketer/ distributors. Therefore, the sales effected by the sister concern, viz., Tvl. Safari Sales Limited were compared with the first sales by the assessee and they found that there was a large variation. The price for first sale by manufacturer and the second sale by the marketer, i.e., sales by their sister concern as per the price list are as under :

The price under first sale is inclusive of excise duty, octroi, sales tax, surcharge, freight, etc.

The manufacturer sell the goods to the marketer. This is in the first stage. The marketer sells the goods to the retailers. This is the second stage. In certain cases, the marketers sells directly to the customers. The produce cannot be compared with the selling rate of the similar commodity since the quality size pattern differs with each other.

4. The assessing officer, having noticed that even after deducting the freight, sales tax elements, trade discount, special discount and the like from the second sale value, the difference between the first sale and the second sale exceeds 15 per cent, issued a notice to the assessee inviting objections and the objections were also received on July 21, 1997. Not satisfied with the objections, the assessing officer, in terms of section 12A of the Tamil Nadu General Sales Tax Act, assessed Rs. 5,20,546 as tax due for the assessment year 1993-94 and a sum of Rs. 6,23,610 for the assessment year 1994-95. The said orders were taken on appeal before the Appellate Assistant Commissioner (CT) II, who confirmed the same by dismissing the appeals. However, on further appeals, the Sales Tax Appellate Tribunal allowed the appeals by holding that the provisions of section 12A read with rule 18C are not attracted in these matters and accordingly, set aside both the orders of the Appellate Assistant Commissioner.

5. We have elaborately heard both Mr. Sivaraman, learned standing counsel and Mr. Thyagarajan, the learned senior counsel appearing for the assessee.

6. Before adverting to the factual matrix, we may refer to the relevant provisions of section 12A and rule 18C.

S. 12A. Assessment of sales shown in accounts at low prices.-- (1) If the assessing authority is satisfied that a dealer has, with a view to evade the payment of tax, shown in his accounts sales or purchases of any goods, at prices which are abnormally low compared to the prevailing market price of such goods, it may at any time within a period of five years from the expiry of the year to which the tax relates, assess or reassess the dealer to the best of its judgment on the turnover of such sales or purchases after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show-cause against such assessment.

(2) The provisions of sub-sections (2) to (5) of section 16, shall as far as may be, apply to assessment or reassessment under sub-section (1) as they apply to the reassessment of escaped turnover under subsection (1) of section 16.

R. 18C. In making an assessment u/s 12A, the assessing authority shall take into account such of the following factors as may be relevant to the determination of the prevailing market price of the goods, namely,-

(i) the prices charged by other dealers at the relevant stage of sale of similar goods during the relevant period;

(ii) the difference between the price charged by the dealer on his sale and the price charged by the second and subsequent dealers on the sale of the same goods;

(iii) the difference between the price paid by a dealer towards the purchase of the goods from the earlier seller and the price charged for the resale of the same goods; and

(iv) the differential price charged on sales against bulk orders and small orders in respect of the same goods. If the difference in prices, exclusive of the sales tax element, is more than fifteen per cent, the assessing authority shall examine the reasons for the variations, taking into account the relationship between the parties to the transactions, the charges for after sales services, packaging, transport and other expenses incurred by subsequent sellers which add to the cost of the goods at each stage of sale by successive dealers. The assessing authority shall also examine whether there is such difference in the price charged on the sale of the same goods to different customers and whether the goods are made available to all distributors or other customers in unlimited quantities and at the same goods to different customers, and whether the goods are made available to all distributors or other customers in unlimited quantities and at the same prices. After making due allowance towards the variation in prices and normal, profit margin, the assessing authority shall arrive at the market price that should have been charged by the dealer and levy tax on the taxable value so arrived at.

7. The purport and object of section 12A came up for consideration before this court in Jayalakshmi Traders v. Government of Tamil Nadu (1997) 105 STC 337 (Mad) and having considered in detail the object, this court in para 17 has posed the question as to whether section 12A really tries to re-determine the price of sale or purchase of goods or it only empowers the authorities for the purpose of determining the sales tax as to what is the consensual price of goods sold or purchased. Thereafter, the court has held as follows (pages 346 and 347 in 105 STC) :

17.... A reading of the provision contained in section 12A of the Act will clearly show that it is only a machinery provision intended to determine whether the returns submitted by a dealer are true and correct and they represent the consensual price of the transactions. As already pointed out, it is intended to prevent the evasion of payment of tax and for that purpose it empowers the assessing authorities to compare the price mentioned in the accounts relating to sale or purchase of goods as stated in the return submitted with the prevailing market price of such goods, and to make best of judgment assessment on the turnover, after such enquiry as the assessing authority may consider necessary, that too, after giving a reasonable opportunity to the dealer to show cause against such assessment. It may be pointed out that sub-section (2) of section 12A of the Act specifically makes the provisions contained in sub-sections (2) to (5) of section 16 applicable to assessment or reassessment proceedings u/s 12A(1), as they apply to reassessment of escaped turnover u/s 16(1) of the Act. The only distinction between section 16 and section 12A of the Act is that whereas section 16 of the Act relates to escaped turnovers which has/have not been accounted for and section 12A of the Act deals with the turnovers, which have been accounted for but enables the assessing authorities to determine whether the price mentioned therein is bona fide and can be accepted as representing true and real concessional price as reflected in the accounts when compared with the price that prevailed in the market at that time. Therefore, it is not possible to hold that the provisions contained in section 12A of the Act impinge upon the legislative power of the Parliament as contained in entry 92A of List I of the Seventh Schedule, thereby travelling beyond the scope of the power conferred upon the State Legislature under entry 54 of List II of the Seventh Schedule. Therefore, it is not possible to hold that the power to determine, as conferred by section 12A of the Act on the assessing authority, as to whether the price stated in the return relating to sale or purchase of such goods is true and represents the real market price or not, would amount to effecting the deemed sale or interfering with the sale or purchase transaction. In effect the entire exercise u/s 12A of the Act is to determine whether there is an attempt on the part of the dealer to evade the payment of sales tax. This exercise is undertaken when a doubt is entertained about the bona fide and true nature of the sales shown in the accounts at low price. As the very heading of the section indicates, it is nothing but an assessment of sales shown in accounts at low prices. Of course the assessing authority should be careful and should ensure that bona fide transactions of sale are not unnecessarily subjected to this exercise if the assessing authority, taking into consideration surrounding circumstances, is satisfied that there is no attempt to evade tax and the sale transaction is bona fide.

8. A reading of the provisions of section 12A shows that in the event the assessing authority is satisfied that a dealer has, with a view to evade the payment of tax, shown in his accounts, sales or purchase of any goods at prices which are abnormally low compared to the prevailing market price of such goods, it may, at any time within a period of five years from the expiry of the year to which the tax relates, assess or reassess the dealer to the best of its judgment on the turnover of such sales or purchases, should make an enquiry and

thereafter, may consider necessary to make an assessment after giving the dealer a reasonable opportunity to show cause. The application of section 12A shall be only on the above conditions being followed by the assessing officer. Rule 18C also is a mechanism, which the assessing officer has to follow.

9. In order to apply the above provisions of section 12A and rule 18C, the burden, as to satisfaction, is on the assessing authority, supported by relevant materials. In fact, rule 18C(iv) empowers the assessing authority, in case the differential price charged on the sale against bulk orders exclusive of the sales tax element, is more than 15 per cent, (i) to examine the reasons for the variation; (ii) while examining the other reasons for variation, he shall take into account the relationship of the parties to the transaction; and (iii) the charges for after sales services, packaging, transport and other expenses incurred by the subsequent sellers which add to the cost of the goods at each stage of sale by successive dealers. The assessing officer is also bound to further examine, whether there is such difference in the price charged on the sales of the same goods to different customers and whether the goods are made available to all distributors or other customers in unlimited quantities and at the same prices. Only after satisfying himself of the above details, the assessing officer could apply provisions of section 12A and rule 18C, particularly rule 18C(i).

10. In the assessment orders, though the assessing officer had made a comparison of the first sale price and the second sale price and the difference thereon, he has categorically stated that he could not compare the product with the selling rate of the similar commodity since the quality, size and pattern differ with each other. There is absolutely no compliance with section 12A particularly rule 18C(iv). The assessment orders merely proceed that there is a variation exceeding 15 per cent between the first and second sales. In our opinion, the mere variation between the first and second sales could, by itself, would not attract the provisions of section 12A read with rule 18C(i) unless the other conditions which we have enumerated above, are followed by the assessing officer and a satisfaction is arrived at to show that there was a tax evasion to his best of judgment.

11. We may also point out that even before the assessing officer, the assessee filed their objections dated July 21, 1997, wherein they have specifically taken the stand that Safari Sales Limited is not the sister concern of Safari Industries (India) Limited and the assessee has 17 branches all over India and in fact, even in this State, they are making similar sales to M/s. Sanghvi Enterprises, Coimbatore on identical terms and at the same price as applicable to Safari Sales Limited and so on. These are all certain details, which the assessing officer is bound to consider before applying section 12A and rule 18C and factually, these objections, except extracted, were not considered by the assessing officer. In fact, the Appellate Assistant Commissioner also has not considered those objections. When the matters were before the Tribunal, it considered in para 7 of the order that section 12A read with rule 18C is a machinery provision intended

to determine whether the returns submitted by the dealer are true and correct by the assessing officer, but no such exercise by the assessing authority was made and therefore, a finding without such assessment was not justified. As we have pointed out that the assessing authority as well as the Appellate Assistant Commissioner had not gone into the question, we are of the view that the Tribunal had rightly held that the orders of both the assessing officer and the Assistant Appellate Commissioner could not be sustained.

12. However, this leads us to the next question that by virtue of such finding, the Tribunal could allow the appeals in whole without either independently considering the objections raised by the assessee and find out whether the provisions of section 12A read with rule 18C can be applied or not or whether it could have remitted the matters to the assessing officer. The assessment years being 1993-94 and 1994-95, we are not inclined to remit the matters again to the Tribunal for such consideration. In the objections dated July 21, 1997, it is the specific case of the assessee that the wholesale buyers of Safari Industries (India) Limited are separate, identifiable, distinct, legal entities, carrying on business on their own account, one not controlling the other, particularly the goods have been sold by the assessee in the case to M/s. Sanghvi Enterprises, Coimbatore on identical terms and at the same price as applicable to Safari Sales Limited. In terms of section 18C, the assessing officer ought to have considered the above question as to whether the assessee had sold the goods to M/s. Sanghvi Enterprises, Coimbatore, on identical terms or not or had sold on lesser price to Safari Sales Limited to evade tax payment. When such comparison was not made, the provisions under rule 18C are not attracted. In the event the said rule is not attracted, the question of "remittance" does not arise. For the said proposition, we may refer to the judgment of the Madhya Pradesh High Court, at Jabalpur reported in Narbada Ice Factory Vs. Commissioner of Sales Tax,). That case arose u/s 18(7) of the Madhya Pradesh General Sales Tax Act, 1958, which has a similar provision as section 12A. The High Court, while considering the applicability of the provisions, observed that since the conditions for applying the provision have not been complied with, it should be considered that the said provision cannot be made applicable to the facts of the case and ultimately held that the assessment u/s 18(7) of the Act was not justified. We are of the considered view, we could follow the said judgment on the same lines by holding that there was no consideration and strict adherence of rule 18C and hence, the same cannot be made applicable to the assessing officer. For all these reasons, we are not inclined to remit the matters and we hold, on the given facts and circumstances of the case, the application of section 12A read with rule 18C is not justified and the Tribunal is right in setting aside both the orders, accepting the case of the assessee. The substantial question raised in the revisions is answered in the negative, i.e., against the Revenue and in favour of the assessee. Accordingly, both the tax case revisions are dismissed. No costs.

