(1995) 04 MAD CK 0071

In the Madras High Court

Case No : Tax Case No. 1361 of 1984 (Revision No. 265 of 1984)

State of Tamil Nadu APPELLANT

Vs

Sri Shanmughananda and Co. RESPONDENT

Date of Decision : 25-04-1995

Acts Referred:
Tamil Nadu General Sales Tax Act, 1959 — Section 16, 34, 36

Citation : (1995) 04 MAD CK 0071

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

Bench : Division Bench

Advocate : Mrs. Chitra Venkataraman, Additional Government Pleader, for the Appellant; K. Ramagopalan, for the Respondent

Judgement

Thanikkachalam, J.—This revision, filed by the State, is directed against the order passed by the Tribunal refusing to entertain an enhancement petition filed for restoration of the penalty levied by the assessing officer. The assessing officer levied a penalty of Rs. 6,760 u/s 16(2) of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as "the Act"). The Deputy Commercial Tax Officer (Enforcement), Namakkal, assessed the turnover of Rs. 1,12,664 on the basis of the book turnover. On appeal, the Appellate Assistant Commercial, following a decision of the Supreme Court reported as State of Madras v. S. G. Jayaraj Nadar & Sons 1971 28 STC 700 has held that penalty in this case u/s 16(2) of the Act cannot be levied. Aggrieved the department filed an enhancement petition before the Tribunal to restore the penalty levied by the assessing officer in the appeal filed by the assessee against certain other findings made by the Appellate Assistant Commissioner. The Tribunal held that enhancement petition is not entertainable since the Appellate Assistant Commissioner cancelled the penalty levied, in its entirety. It is against that order, the present revision has been filed by the State.

2. The learned Additional Government Pleader submitted that an enhancement petition u/s 36(3) by the Act is maintainable. She further submitted that the

word "enhancement" would include restoration of penalty. Again it was submitted that the amendment introduced to section 36(3) by Act No. 78 of 1986 with effect from January 1, 1987, by inserting the expression "restore fully or partially" would come to the rescue of the department for filing an enhancement petition for the purpose of restoration of penalty. It was further submitted that the amendment introduced by Act No. 78 of 1986 is clarificatory in nature and therefore it would be applicable even for the period prior to January 1, 1987. In order to support the contention, the learned Additional Government Pleader (Taxes) relied upon a decision reported as Bhavani Mills Limited v. State of Tamil Nadu 1944 94 STC 120 Mad wherein after considering the decision rendered by this Court in State of Tamil Nadu v. Jakthi Veliyeetakam 1977 40 STC 466, it was held that the enhancement petition can be filed even to restore the penalty levied by the assessing officer in a case where the penalty was completely cancelled by the Appellate Assistant Commissioner. It was therefore pleaded that the Tribunal was not correct in dismissing the petition filed by the department at the threshold itself.

3. On the other hand, the learned counsel appearing for the assessee submitted that on merits, since the turnover is found in the books, penalty in not eligible u/s 16(2) of the Act. It was further submitted that when the Appellate Assistant Commissioner cancelled the penalty in its entirely, enhancement petition u/s 16(3) of the Act is not entertainable by the Tribunal. The learned counsel supports this contention by relying upon the decision is The State of Tamil Nadu Vs. Jakthi Veliyeetakam, . Therefore, both on merits as well as on jurisdiction, it was submitted that penalty u/s 16(2) of the Act is not exigible in the case of the assessee.

4. We have heard the rival contentions of the learned counsel on both sides. It is the admitted fact that penalty u/s 16(2) of the Act to an extent of Rs. 6,760 was levied by the Deputy Commercial Tax Officer (Enforcement) on the assessed turnover of Rs. 1,12,664. On appeal, the Appellate Assistant Commissioner came to the conclusion that penalty u/s 16(2) is not leviable in the present case, because the turnover assessed by the assessing officer is found place in the books of accounts and the accounts were not rejected by the department. Thus the penalty was cancelled by the Appellate Assistant Commissioner. In an appeal filed by the assessee, aggrieved against some findings made by the Appellate Assistant Commissioner, the department filed an enhancement petition to restore the penalty levied by the assessing officer. According to the Tribunal, the enhancement petition is not entertainable, since the penalty was cancelled by the Appellate Assistant Commissioner in its entirety. It remains to be seen that prior to January 1, 1987, u/s 36(3)(a)(i), in disposing of an appeal, the Appellate Tribunal may, after giving the appellant a reasonable opportunity of being heard, confirm, reduce, enhance or annul the assessment or the penalty or both. After January 1, 1987, under the same provisions, the Tribunal, in disposing of an appeal, may confirm, reduce, enhance, restore fully or partially as the case may be, or annul the assessment or the penalty or both. The expression "restore fully

or partially, as the case may be" was inserted by Act 78 of 1986 with effect from January 1, 1987. The present assessment year under consideration is 1977-78. According to the learned counsel appearing for the assessee, this amendment can have no application for the earlier assessment years. The learned Additional Government Pleader submitted that the amendment brought out by Act 78 of 1986 is only a clarificatory in nature and therefore the amendment can be applicable even to the period earlier to the period January 1, 1987. We consider that there is sufficient force in the argument advanced by the learned Additional Government Pleader (Taxes) in this regard. In this connection, our attention was drawn to the decision in Bhavani Mills Limited v. State of Tamil Nadu 1994 94 STC 120 Mad wherein while considering the expression "enhance" appearing in section 36(3), this Court has held that the word "enhance" in section 36(3) of the Tamil Nadu General Sales Tax Act is wide enough to enhance the penalty from zero to something; that the Revenue had filed the enhancement petition to impose penalty which the appellate authority had omitted to impose and as such the petition was maintainable. In that decision, this Court had also considered the earlier decision of this Court rendered in State of Tamil Nadu v. Jakthi Veliyeetakam 1977 40 STC 466 wherein it was held that the enhancement petition is not maintainable when the Appellate Assistant Commissioner cancelled the penalty in its entirety. This Court in Bhavani Mills Limited v. State of Tamil Nadu 1994 94 STC 120, cited supra, taking into consideration the later amendment brought about to section 36(3) by Act 78 of 1986, held that the word "enhance" would include also the restoration of penalty imposed by the assessing officer. This interpretation is given by this Court on the basis of the circumstances under which the petition for enhancement was filed. When an appeal was filed against the order passed by the assessing officer, the Joint Commissioner will have no power to interfere with the order passed by the assessing officer under revisional jurisdiction contemplated u/s 34 of the Act. So also, when the appeal was filed against the order cancelling the penalty in its entirety by the Appellate Assistant Commissioner the Joint Commissioner cannot interfere with the order passed by the Appellate Assistant Commissioner, under the revisional jurisdiction. Therefore, in such a case, unless the State is permitted to challenge the order passed by the Appellate Assistant Commissioner cancelling the penalty in its entirety, such an order will remain unchallenged. In order to get over this anomaly later on Act No. 78 of 1986 was passed introducing an amendment with effect from January 1, 1987 inserting the expression "restore fully or partially, as the case may be". In view of the aforesaid reasonings, we hold that the enhancement petition filed by the State for restoration of penalty imposed by the assessing officer which was cancelled by the Appellate Assistant Commissioner in its entirety is maintainable.

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.

6. Petition dismissed.