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**(2011) 07 MAD CK 0398**  
**In the Madras High Court**  
**Case No : T.C. (R) No. 1213 of 2006**

The State of Tamil Nadu

APPELLANT

Vs

A.M. Zaina Labdeen Musaliar

RESPONDENT

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**Date of Decision :** 28-07-2011

**Acts Referred:**

Tamil Nadu General Sales Tax Act, 1959 — Section 12(3), 39B(3)  
Tamil Nadu Sales Tax Appellate Tribunal Regulations, 1959 — Regulation 12

**Citation :** (2012) 49 VST 210

**Hon'ble Judges :** M. Jaichandren, J; Chitra Venkataraman, J

**Bench :** Division Bench

**Advocate :** R. Sivaraman, Special Government Pleader Taxes, for the Appellant;  
Inbarajan, for the Respondent

**Final Decision :** Allowed

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## Judgement

Chitra Venkataraman, J.—The Revenue is on appeal as against the order passed by the Tamil Nadu Sales Tax Appellate Tribunal in respect of assessment year 1991-92. The following substantial questions of law are raised for consideration:

(i) Whether in the facts and circumstances of the case, the Tribunal is correct in accepting the explanation given and documentary evidence adduced for the first time before it contrary to Section 39-B(3) of the TNGST Act and in the absence of leave obtained as per Regulation 12(i) of the Tamil Nadu Sales Tax Appellate Tribunal Regulations?

(ii) Whether in the facts and circumstances, the Tribunal is right in setting aside the estimation suppressions based on documents produced at the stage of second appeal and without appreciating the materials on record independently?

(iii) Whether in the facts and circumstances, the consequential reduction in penalty levied u/s 12(3) at 50% by the Tribunal is legally sustainable?

2. The Assessee's business was subjected to inspection on 20.9.1991, wherein, certain records were recovered on issue of D7 receipt. Originally, records seized

were verified with regular accounts, which reflected unaccounted transactions. It is seen from the order of the Assessing Officer that the seized materials consisted of long size account book and half size account book. Based on the entries found therein, notice of assessment was issued, to which, there was no reply, nor the Assessee produced regular accounts maintained for the year 1991-92. Thus, on the strength of entries found in the records, best of judgment assessment was made with two times addition made to cover the period prior to the inspection.

3. Thus, the turnover of Rs. 77,05,680/- was treated as taxable turnover. The Assessing Officer also levied penalty.

4. Aggrieved by the order of the Assessing Officer, the Assessee went on appeal before the Appellate Assistant Commissioner. The Assessee took the contention that the business carried on by the Assessee was closed with effect from 19.7.1991 and inspection was conducted long thereafter on 20.9.1991. Challenging the validity of the inspection done, the Assessee pointed out that the Assessing Officer refused to grant the time required by the Assessee for filing objection to the pre-assessment notice and also to take xerox copies of the D7 records. Thus in the absence of proper opportunity, the estimation made on D7 records was not correct. The Assessee also pointed out that some of the entries in the diary related to the watchman working under the Assessee. Therefore, the assessment made was arbitrary, liable to be set aside.

5. The Appellate Authority pointed out that the registration was found cancelled only for the assessment year 1993-94, that too on account of non-payment of the renewal fees. The Appellate Assistant Commissioner rejected the contention of the Assessee that the business was closed with effect from 19.7.1991 as not acceptable, since the registration was found renewed by the Assessee on 10.4.1992 for the assessment year 1992-93. Thus, the Appellate Assistant Commissioner found that the Assessee's business continued till the year 1992-93. As regards the validity of the search made, the first Appellate Authority held that the search was validly done and the Assessee was also granted sufficient time to file reply. However, the Assessee had not taken advantage of the same. Nevertheless, the Appellate Authority considered the contention of the Assessee that D7 records included one personal diary of the person who was available in the business place and this pertained to the details on passport, visa etc and other details as found in the diary.

6. The Appellate Authority held that the explanation given by the Assessee had to be verified with the accounts maintained by the Assessee to work out the actual suppression. Thus, going by the facts therein as well as the contention of the Assessee that the purchases were effected through bought notes and despatched to the head office by delivery note on the same day, the first Appellate Authority set aside the order of the assessment and remanded the matter to the Assessing Officer for redoing the assessment on the basis of the details furnished by the Assessee with regard to the D7 records.

7. The Assessee however filed an appeal before the Tamil Nadu Sales Tax Appellate Tribunal challenging the order of remand. The Tribunal considered as to whether the suppression worked out was based on any material and addition was required for probable omission. Evidently, the Assessee produced some of the details for the first time before the second Appellate Authority, particularly, declaration form, market fee receipt, extract of stock book, counterfoil etc., in order to substantiate that the Assessee had stock transferred goods to the turnover of Rs. 15,75,348/-. Based on the evidence, the Tribunal accepted the plea of the Assessee and deleted the said turnover. A reading of the order of the Tribunal shows that while accepting the case of the Assessee on the turnover of Rs. 15,75,348/- as relating to despatch of cashew kernels to his head office at Quilon, it also deleted the turnover relating to purchase suppression of Rs. 56,260/- arrived at from the long size note book. In the light of the order thus passed accepting the case of the Assessee in deleting the estimated turnover, the Tribunal also cancelled the levy of penalty to the extent of relief granted and sustained the levy of penalty at 50% of the tax due on the turnover sustained by it. The Revenue is on appeal as against this order.

8. As already pointed out, it is a matter of record that the Assessee filed no reply to the pre-assessment notice sent proposing to make the best of judgment assessment based on the materials seized at the time of inspection. For the first time in the appeal filed before the Appellate Assistant Commissioner, the Assessee produced certain records. Since the same required to be cross checked with regular books of accounts, the Appellate Assistant Commissioner thought fit to remand the matter back to the Assessing Officer for proper verification to work out the assessment on record.

9. However, when the Assessee filed the appeal before the Tribunal, on the mere plea made by filing copies of the documents, without even getting a factual report either from the SR or from the AO, the Tribunal tacitly accepted the case of the Assessee on the basis of the xerox copies of the challan note and market fee receipts filed by the Assessee, and thereby deleted the turnover from the assessment. A reading of the order of the Tribunal shows that it accepted the documents from the Assessee without verifying the original records and granted the relief. As already pointed out, the Appellate Assistant Commissioner went through the objections of the Assessee along with the materials produced. Thus, with the materials produced for the first time, the Appellate Assistant Commissioner rightly remanded the assessment back to the Assessing Officer for the purpose of checking the details with reference to D7 records and with the regular books of accounts. When that being the case, we do not find any justification in the order of the Tribunal to allow the case of the Assessee as a matter of course and without even checking the same with reference to the material records and accounts regularly maintained by the Assessee. Hence we feel that the proper course herein would be to reaffirm the view of the Appellate Assistant Commissioner to allow the Assessing Officer to look at the details produced by the Assessee with reference to D7 records as regards despatch of

cashew kernal made to the Head Office at Quilon.

10. It may be noted that the documents produced before the Tribunal were only photocopies. Thus, the Tribunal should have tested the claim of the Assessee with reference to the originals and with reference to the accounts. Without verifying the originals and with the entries in the account, we feel, the Tribunal committed a serious legal flaw in allowing the appeal by accepting the case of the Assessee as a matter of course, thereby, granting the relief. As a final fact finding body, the Tribunal should have either called for a report on the materials produced and the account checked or at least remanded the matter for fresh consideration, as had been done by the Appellate Assistant Commissioner. In the absence of any of these courses adopted, with perversity writ large, the order of the Tribunal, hence, calls for interference by this Court. We have no hesitation in setting aside the order of the Tribunal and that the proper course herein would be to direct the Assessing Officer to get at the details furnished by the Assessee, check them with entries in the D7 records and regular books and arrive at the correct value for the purpose of assessment.

11. In the light of the above, the order of the Tribunal is set aside restoring the matter to the files of the Assessing Officer to do the assessment in accordance with law after giving opportunity of hearing to the Assessee.

12. The Tax Case Revision is allowed. No costs.