
(2011) 06 MAD CK 0345
In the Madras High Court
Case No : T.C. (R) No. 1006 of 2006

Tvl. Hari Pipes

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 10-06-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11B, 12A
Tamil Nadu General Sales Tax Act, 1959 — Section 22, 22(1), 22(2), 3(1), 3(2)

Citation : (2011) 06 MAD CK 0345

Hon'ble Judges : P.P.S. Janarathana Raja, J; Chitra Venkataraman, J

Bench : Division Bench

Advocate : S. Ramanathan, for the Appellant; R. Sivaraman, Special Government Pleader (Taxes), for the Respondent

Final Decision : Dismissed

Judgement

Chitra Venkataraman, J.—The Assessee is on revision as against the order of the Tamil Nadu Sales Tax Appellate Tribunal, (Additional Bench), Coimbatore, challenging the levy of penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act. The assessment year under consideration is 1996-97.

2. The Assessee herein is a registered dealer. It reported a total and taxable turnover of Rs. 1,55,261.00 for the above said assessment year. Since the turnover in question was below Rs. 3,00,000/-, there was no liability to pay the sales tax under the charging provisions. Hence, the Assessing Authority viewed that the collection of tax was in violation of the provisions of Section 22(1) of the Act and consequently, he levied penalty u/s 22(2) of the Act. The Assessee filed an appeal before the Appellate Assistant Commissioner, who however dismissed the appeal. The Assessee preferred further appeal before the Tribunal, which once again confirmed the view of the authorities below. Hence, the present revision by the Assessee.

3. It is seen from the facts herein that the total turnover for the said year worked out to Rs. 1,76,239/-. Section 3(1) of the Tamil Nadu General Sales Tax Act is a

charging provision based on the total turnover. As per Section 3(1) of the Act as it stood upto 16.7.1996, the minimum total turnover for attracting the tax liability was fixed at Rs. 1,00,000/-. By Act 38/96, with effect from 17.7.1996, the total turnover was raised to Rs. 3,00,000/-. The total turnover upto 16.7.1996 is Rs. 19,237/- and the turnover from 17.7.1996 to 31.3.97 is Rs. 1,32,001/-. As evident from the above figures, with the chargeable limit remaining at Rs. 3,00,000/- during the relevant assessment year, the taxable turnover of the Assessee was at Rs. 1,76,238.50, which was well below Rs. 3,00,000/- minimum total turnover to attract the charging provisions of the Act. In the order of the assessment, the Officer however added a lump sum of Rs. 25,000/- under the caption of defects found. The total turnover taxable was fixed at Rs. 1,76,238.50. A reading of the order of the assessment shows that except for mere statement as "defects found" for the addition, no reasons are found for sustaining the addition towards defects.

4. On the admitted position of the total taxable turnover, well below the minimum turnover of Rs. 3,00,000/- as per Section 3(1) of the Act, the Assessing Officer held that the collection of tax was contrary to the provisions of Section 22(1) of the Act and hence, penalty was called for to the tune of Rs. 15,608/-. The Assessee contended that going by the decision reported in *Kasturi Lal Harilal Vs. State of U.P. and Others*, the Assessee was entitled to a refund of tax paid, since there was no liability u/s 3(1) of the Act to remit any tax. The Appellate Assistant Commissioner pointed out that when the Assessee had the knowledge of the turnover well below the chargeable turnover as per Section 3(1) of the Act, it should have taken steps to refund the amount of tax collected. Hence, the collection of tax by the Assessee amounted to unjust enrichment. The Assessee had neither refunded the tax to the customers nor remitted the same to the State but retained the same. Since the tax collected would amount to illegal collection and retention was amounting to unjust enrichment at the hands of the Assessee, applying the decision reported in *M/s. Orissa Cement Ltd. and Others Vs. State of Orissa and others*, , the appeal was rejected. The Assessee preferred an appeal before the Tribunal. A reading of the order of the Tribunal shows that it upheld the view of the Appellate Assistant Commissioner on the premise that the Assessee had failed to refund the tax to the customers. Hence, the collection of tax and retention by the Assessee was illegal and unjust. Consequently, it rejected the appeal.

5. Learned Counsel for the Petitioner pointed out that when the authorities below had found that the turnover is well below the minimum taxable turnover, the question of levying of penalty as such u/s 22(2) of the Act would not arise treating the collection of tax as illegal collection, more so, in the case of goods falling under I schedule attracting tax as given u/s 3(2) of the Act. He further pointed out that the Assessee had remitted the tax to the Government as evidenced from the order of assessment and that the tax had been adjusted towards the penalty. Going by the decision of this Court reported in *State of Tamil Nadu Vs. Sakthi Sugars Ltd.*, , Section 22(2) of the Act would not have any

application herein when the Assessee had remitted the tax to the Government. Consequently, the order of the Tribunal has to be set aside.

6. Heard learned Counsel for the Assessee as well as the learned Special Government Pleader (Taxes) for the Respondent.

7. A perusal of the judgment of this Court reported in *State of Tamil Nadu Vs. Sakthi Sugars Ltd.*, , shows that the Assessee therein treated the gallonage fee as part of the turnover and collected the tax from the buyers and remitted the same to the State. In the judgment reported in *E.I.D. Parry (India) Ltd. Vs. The State of Tamil Nadu*, , this Court held that gallonage fee was not liable to be included in the turnover and hence, following the same, the Assessee's assessment herein was completed holding that gallonage fee was not liable to be taxed. It was pointed out that the State had preferred an appeal as against the judgment reported in *E.I.D. Parry (India) Ltd. Vs. The State of Tamil Nadu*, . In the meantime, the Assessee preferred refund claim. Thereupon, the Sales Tax Officer, imposed penalty u/s 22(2) of the Act with a condition that if satisfactory arrangements were made by the dealer to refund the tax that the dealer had collected from its customers within 30 days, the amount of tax recovered as penalty would be refunded. The Tribunal set aside the order of levying penalty u/s 22(2) of the Act. The State filed revision before this Court. Rejecting the plea of the Revenue, this Court held that in the absence of any provision corresponding to Sections 11-B and 12-A of the Central Excises and Salt Act, 1944 in the Tamil Nadu General Sales Tax Act, 1959, it was not permissible for the authorities under the Act to impose a penalty on the sole ground that it was meant to offset a refund, which otherwise would result in unjust enrichment to the dealer. In so holding, this Court also referred to the decision of this Court reported in 83 STC 402 *State of Tamilnadu v. K. Mohammed Ibrahim Sahib* stating that Section 22(2) of the Act would have no application to cases where a dealer receives the amount of the tax from his buyers and remits the same to the State. Such action on the part of the dealer would not bring the case within the mischief of the provision.

8. A reading of the decision reported in 83 STC 402 *State of Tamilnadu v. K. Mohammed Ibrahim Sahib*, in turn shows that it related to the case of decorticating millers. The Respondents therein carried on the business of decorticating groundnut kernel. Eventhough they were only decorticating millers, they registered as dealer under the direction of the Department. The decorticates purchased kernal from oil mill owners, who in turn purchased the same from agriculturists. Though the oil mill owners were liable to pay tax as first purchasers, yet, because of the doubt as to the stage whether the decorticates are to be treated as dealers or not, at the behest of the sales tax authorities, the decorticates collected the tax from the oil mill owners and remitted it to the Government to the account of the said oil mill owners. On a levy of penalty u/s 22(2) of the Act, this Court held that all that the decorticates had done was to "receive" the tax due from the oil mill owners, who were the first purchasers in

the State and liable to pay the sales tax and that the collection of tax by the decorticates was at the instance of the sales tax authorities and the same was remitted to the Government. Given the fact that the decorticates had remitted the tax to the Government on account of the purchasing oil millers as per the list furnished by the Revenue, it could not be said that the Respondents had collected any amount by way of tax or purporting to be by way of tax, in contravention of the principle of the Act u/s 22(1) of the Act. Following the decision of the Apex Court reported in *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, this Court pointed out that Section 22(2) of the Act gives a discretion to the assessing authority to consider the facts and circumstances of each case and determine whether or not penalty should be imposed and if so the quantum thereof.

9. A reading of the above said decision reported in 83 STC 402 *State of Tamilnadu v. K. Mohammed Ibrahim Sahib*, thus show that the levy of penalty for violation of Section 22(1) of the Act is not an automatic one. On the other hand, the levy of penalty is discretionary, that on the facts and circumstances of the each case, the Assessing Officer could justify whether penalty should be levied and if so, the extent of that penalty within the maximum penalty provided for under the Section. This Court further pointed out that in the case of mutual mistake collection of tax or any amount by way of tax, would not mean contravention of the provisions of the Act to attract Section 22(1) of the Act. Although strong reliance was placed by the learned Counsel on the above said decision, we do not think, the said decision would be of any assistance to the Assessee herein since the facts in the said case is distinguishable from the one on hand. The decision reported in 83 STC 402 *State of Tamilnadu v. K. Mohammed Ibrahim Sahib* hence has to be read in the context of the facts stated therein. So too the decision reported in *State of Tamil Nadu Vs. Sakthi Sugars Ltd.*, wherein this Court pointed out that when this Court pointed out that the levy of penalty just to offset the refund, with a condition imposed on the dealer to make arrangements to refund the same would not be well within the provisions of Section 22 of the Act. Considering the fact that the refund claim at the hands of the Revenue itself was not sustainable under any of the provisions of the Act and that too under the provisions of the Tamil Nadu General Sales Tax akin with the Central Excises and Salt Act, 1944, this Court had taken the view that it was not permissible for the authorities concerned to impose penalty to offset a refund.

10. As far as the present case is concerned, it is not denied by the Assessee that the turnover during the period 16.7.1996 was Rs. 19,237.50, which was well below Rs. 1,00,000/- turnover limit prevailing during the period. So too the taxable turnover from 17.7.1996 to 31.3.1997 was Rs. 1,32,001/-. By Act 38/96, the turnover limit for attracting charge was raised to Rs. 3,00,000/-. Thus, irrespective of whether the turnover upto 16.7.1996 is taken as one block and from 17.7.1996 to 31.3.1997 as one block, with the total turnover, in any event, remaining at Rs. 1,76,239/- and hence, below the chargeable minimum, it is too

difficult for us to accept the case of the Assessee that when the reported turnover was very much within the knowledge of the Assessee at Rs. 1,51,237/- and that too well below the minimum, the Assessee could justifiably contend that there are no ground to warrant levy of penalty u/s 22(2) of the Act.

11. Learned Counsel for the Petitioner pointed out that the Assessee had remitted the tax before the assessment, consequently, the question of levy of penalty does not arise. We do not agree with the said submissions. The Assessee had retained the tax collected in spite of the fact that it had the knowledge that the total turnover was well below the chargeable limit. The fact that it had remitted the sum before the assessment was not justifiable of its violation, more so when it had the knowledge of the turnover well below the chargeable limit. We are not satisfied with the claim of the Assessee herein in retaining the tax collected without taking any steps to refund the same to the customers even by 31.3.1997, when by that time it had realised the taxable limit was well below Rs. 3,00,000/-.

12. In the absence of any circumstances shown as to the bonafide of its conduct, we have no hesitation in rejecting the plea of the Assessee. Consequently, the revision is dismissed. No costs.