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Court : Chennai

Decided On : Sep-13-2007

Reported in : (2009)23VST394(Mad)

Judge : S. Manikumar, J.

Acts : Tamil Nadu General Sales Tax Act, 1959 - Sections 16

Appeal No. : W.P. No. 20148 of 2007

Appellant : Victory Timber and Saw Mill

Respondent : Sales Tax Appellate Tribunal, (Additional Bench) and anr.

Advocate for Def. : R. Mahadevan, Additional Government Pleader

Advocate for Pet/Ap. : V. Srikanth, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

S. Manikumar, J.

1. The petitioner has challenged the order of the Sales Tax Appellate Tribunal, the first respondent herein, in T. A. No. 389 of 2001 dated January 3, 2007 as illegal and invalid.

2. Brief facts leading to the writ petition are as follows:

The petitioner is a dealer in timber and had reported a total and taxable turnover of Rs. 1,15,17,950 and Rs. 15,76,613 respectfully in the returns filed for 1992-93. The place of business of the petitioner was inspected on January 4, 1993 and stock discrepancy to the tune of Rs. 80,913 was allegedly noticed at the time of inspection. Treating the said turnover as suppression, the petitioner was finally assessed on a total and taxable turnover of Rs. 1,16,79,776 and Rs. 17,38,439, respectively, as per proceedings, dated September 26, 1994. The assessment was completed after verification of the books of accounts and the account books was also signed on June 28, 1994. Subsequently, the second respondent held that the petitioner had furnished opening stock of Rs. 15,42,750 at the time of final check of accounts and had accordingly arrived at a deficit stock discrepancy of Rs. 12,04,829. The petitioner was accordingly reassessed on a total and taxable turnover of Rs. 1,41,68,572 and Rs. 42,27,235, respectively, as per the proceedings in TNGST. No. 1077708/92-93, dated March 31, 1998. Penalty of Rs. 1,47,109 was also levied under Section 16 of the Tamil Nadu General Sales Tax Act, 1959. Aggrieved by the same, the petitioner filed an appeal before the Appellate Assistant Commissioner (CT) III, Kuralagam Annexe, Chennai, in A.P. No. 342 of 1998, on the following grounds:

1. Whether the total addition based on stock variation noticed at the time of inspection can be sustained?

2. Whether the levy of penalty is warranted?

3. The Appellate Assistant Commissioner, by order dated November 28, 2000 dismissed the appeal with the finding that the sales suppression arrived at by the assessing authority is not bad in law. It was further held that the equal-time addition is warranted as per the decision of this Court in S.D. and Sons in T.C. No. 1574 of 1979 and levy of penalty was in force up to March 11, 1993.

4. The petitioner has further submitted that aggrieved by the order of the Appellate Assistant Commissioner, the petitioner has filed a second appeal in T.A. No. 389 of 2001 before the Sales Tax Appellate Tribunal, the first respondent and the same was dismissed on the ground that the first appellate authority has rendered a clear finding that there was suppression and that the petitioner has not proved either before the assessing officer or before the first appellate authority with supporting documents, that the accounts maintained by them were correct and true. Aggrieved by the appellate order, the petitioner has preferred this writ petition for the relief as stated above.

5. Learned Counsel for the petitioner submitted that the sales tax authorities should have either accepted the findings of inspection or rejected the same in entirety and it is not open to them to accept only those findings which are favourable to the Department and reject the contrary findings, which are in favour of the petitioner. He further submitted that since the stock available as per books of account was more than the actual physical stock available at the time of inspection, it should be construed that the petitioner was not able to prove the physical stock of goods and for that matter, sales suppression on the part of the dealer cannot be alleged, since the goods were admittedly accounted in the books of account, maintained by the petitioner in the course of business.

6. Learned Counsel for the petitioner further submitted that the question of making equal addition does not arise as per the decision of the Tribunal in T.A. No. 4 of 2002 dated August 2, 2005 and levy of penalty under Section 16 of the TNGST Act is without jurisdiction. He further submitted that penalty cannot be levied for the amounts representing surcharge, additional surcharge and additional sales tax as per the decision of this Court in *S.P.G. Ramasamy Nadar & Sons v. Commercial Tax Officer-III, Virudhunagar* reported in [2004] 136 STC 606. Placing reliance on the decision in *Binani Industries Limited v. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore* reported in : [2007] 6 VST 783 (SC), learned Counsel for the petitioner submitted that at the time of passing the original assessment by the second respondent, the entire materials were available and therefore, it is not open to him to revise the said assessment on mere change of opinion, without giving any reasons.

7. Mr. R. Mahadevan, learned Additional Government Pleader for the respondents, submitted that the fact of suppression had been detected, following an inspection conducted by the enforcement wing officials and suppression is being a question of fact, need not be interfered in the writ jurisdiction.

8. Heard the learned Counsel appearing for the parties and perused the materials available on record.

9. It is not in dispute that the petitioner's place of business was inspected by the enforcement officers on January 4, 1993 and they detected a stock variation for Rs. 80,913, by adopting the opening stock as on April 1, 1992 for Rs. 4,18,834. Subsequently, the assessing officer noticed that the petitioner furnished the opening stock as on April, 11992 as Rs. 15,42,750 at the time of final check of accounts. Hence, the assessing officer had arrived at stock difference at Rs. 12,04,829, by adopting open stock value at Rs. 15,42,750 as on April 1, 1992, by adding gross profit at ten per cent and estimated the sales suppression at Rs. 13,25,311. The assessing officer has made equal-time addition and estimated the total suppression at Rs. 26,50,622 and levied tax at eight per cent. The contention of the petitioner that adoption of Rs. 15,42,750 as opening stock as on April 1, 1992 is not correct. At the time of check of accounts, the opening stock value furnished by the petitioner was Rs. 15,42,750 and therefore, it is not in dispute that the actual stock difference was Rs. 12,04,829. It is evident from the details collected by the enforcement wing, that stock variation was already noticed, with reference to the opening stock as on April 1, 1992. Subsequently, the petitioner himself has furnished books of accounts, stating that the opening stock as on April 1, 1992 was Rs. 15,42,750. Based on the variation noticed by the enforcement and the check of accounts, the assessing officer has rightly come to the conclusion that the assessee has suppressed the actual stock at the time of original assessment. The contention that the assessee was not able to prove the physical stock at the time of verification of books of accounts and therefore, it cannot be concluded as suppression does not seem to be a bona fide cause. Suppression is explicit from the records and the conduct of the assessee.

10. In the case of Utham Prabhat Industries v. State of Tamil Nadu in T.A. No. 4 of 2002, dated August 4, 2005, the contention of the appellant therein was that the stock discrepancy was unjustified on facts and it was due to incorrect stock verification. The appellate authority, taking into consideration of entire fact situation and the details such as opening stock, purchases, freight charges incurred, labour charges paid and physical stock for arriving at an excess stock, deleted the equal-time addition.

11. Whereas, in the instant case, on perusal of records, the assessing authority had arrived at the actual suppression on the ground that there is a mala fide intention of the petitioner to suppress the factual figures by furnishing two different opening stocks at different points of time as stated above. Further, even though the petitioner was given sufficient opportunity to produce the bills to show that their accounts are correct, they failed to prove the same before the appellate authority also. Best judgment assessment can be made based on facts when it is found that the account books of the dealer cannot be accepted. On its face value, as there was contradiction in the inspection and the subsequent details furnished by the assessee, where variation is won't large. Best judgment assessment is related to the suppression established on facts. The basis of best judgment cannot be said to be unreasonable or without application of mind. Further in a case of best judgment assessment, the dealer cannot be permitted to take advantage of his own wrong. Therefore, the decision relied on by the learned Counsel for the petitioner in T.A. No. 4 of 2004 may not be applicable to the facts of this case.

12. In so far as equal-time addition is concerned, the same is warranted and cannot be said to be illegal, as per the decision of this Court in the case of S.D. and Sons in T.C. No. 1574 of 1979. As regards levy of penalty, all the three authorities have found that it is not a case of mere difference in furnishing stock, but it is a case of suppression of factual figures by furnishing different opening stock at two stages. Therefore, in such circumstances, levy of penalty which was in force up to March 11, 1993 at 100 per cent of the tax, imposed on the actual sales suppression, cannot be said to be excessive or without jurisdiction.

13. At the time of original assessment, the assessing officer made the assessment on the basis of the books of account produced by the dealer. Later on, the inspection conducted by the enforcement wing officials on January 4, 2003, a stock difference of Rs. 80,913 was found by adopting the opening stock at Rs. 4,18,834. Again with reference to the opening stock as on April 1, 1992, furnished to the assessing officer by the dealer, it was found that the petitioner had suppressed certain turnover by declaring two different opening stocks. In *Binani Industries Limited v. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore* reported in : [2007] 6 VST 783 (SC), there was merely a change of opinion and therefore, on facts of the above case, this Court was pleased to accept the contention of the dealer therein. But in the case on hand, there is no change of opinion. When the suppression of the actual stock was unearthed by the enforcement officials and found by the assessing officer on the basis of check of accounts, the revision of assessment cannot be said to be a mere change of opinion. Change of opinion would arise only in the case where reassessment is made on the same set of facts and with the same material on records. If fresh materials are brought on record or if there was something to show that the assessee had concealed some material from the assessing officer, then the application of mind to new facts or materials by the assessing officer cannot be said to be mere change of opinion.

14. In *Lakshmi Vilas Bank Ltd. v. Commissioner of Income-tax* reported in : [2006] 284 ITR 93, this Court held that no Tribunal on fact has any right or jurisdiction to come to the conclusion contrary to the one reached by another bench of the same Tribunal on the same facts. In the reported case, the assessee was a scheduled bank. For the assessment years 1985-86 and 1986-87, the assessee-bank held Government securities as stock-in-trade. While computing the taxable income, the fall in the market value was claimed by the bank as deduction, which was not allowed by the assessing officer. Aggrieved by the order of the assessing officer, the assessee filed an appeal before the Appellate Assistant Commissioner, who allowed the case of the assessee. Against the said order, the Revenue filed an appeal before the Tribunal and the Tribunal held that the assessee was holding Government securities as investments and not as stock-in-trade and allowed the Department's appeals. For the earlier assessment years, the Revenue had

accepted the plea of the assessee that the Government securities held by them were stock-in-trade and the previous assessment orders reached its finality. There was no change of method of accounting of the securities for the earlier assessment years. But for the later assessment years, viz., 1985-86 and 1986-87, the Tribunal held that the Government securities held by the assessee as capital assets. In these circumstances, the Division Bench of this Court held that the Tribunal was not justified in not following the orders of the Tribunal in ease of earlier assessment, under identical circumstances. In the case on hand, on the basis of stock variation, the assessment has been revised and appropriate penalty has also been levied on the suppression. Therefore, the above reported judgment is not applicable to the facts of the present case.

15. In the hierarchy of adjudication of disputes under the statute, Tribunal is the last fact-finding authority and finding pf facts can be interfered with only when they are not supported by any material on record or they are otherwise perverse. This Court in *State of Tamil Nadu v. Krishna Oil Mills* reported in [2003] 133 STC 347, held that when the findings of the Tribunal are not based on the material facts and if it is perverse, to avoid travesty of justice, the court can interfere in revision. In the case on hand, the Tribunal has recorded its findings on the basis of material facts and also considered the various contentions raised by the dealer before the appellate authority. I do not see any perversity in the finding.

16. In view of the above, I do not find that the order of the Tribunal suffers from any material irregularity or the finding could be treated as perverse warranting interference. Therefore, as rightly held by all the three authorities, levy of tax on the turnover suppressed by the assessee, equal time addition and penalty, do not call for any interference. Hence, the writ petition is dismissed. No costs.