(2010) 07 MAD CK 0359

Madras High Court

Case No: Tax Case (Revision) No. 32 of 2010

Eltex Super Castings Limited		APPELLANT
	Vs	
Tamil Nadu Sales Tax Appellate Tribunal and Another		RESPONDENT

Date of Decision: July 22, 2010

Acts Referred:

- Tamil Nadu General Sales Tax Act, 1959 - Section 12(3), 22(2)

Citation: (2011) 40 VST 49

Hon'ble Judges: M.M. Sundresh, J; F.M. Ibrahim Kalifulla, J

Bench: Division Bench

Advocate: R. Hemalatha, for the Appellant; K Radhakrishnan, Government Advocate for (Taxes), for the Respondent

Judgement

@JUDGMENTTAG-ORDER

F.M. Ibrahim Kalifulla, J.
This revision petition relates to the assessment year 1995-96. The question involved relates only to the penalties levied under Sections 12(3)(b) and 22(2) of the Tamil Nadu General Sales Tax Act, 1959.

2. The assessing authority has found as a matter of fact that there were certain omissions, which he could observe as between the return filed by the revision Petitioner/Assessee and the books of accounts. It is in those circumstances, the tax liability came to be enhanced to an extent of Rs. 3,92,288 along with surcharge. However, on being noticed that there was an excess payment of additional sales tax to the tune of Rs. 8,10,350 and the revision Petitioner was entitled for refund, the assessing authority held that though penalty could be levied u/s 12(3)(b) of the Act as well as Section 22(2) of the Act, the proposal of levy of penalty was dropped.

3. The revision Petitioner preferred an appeal before the Deputy Commissioner of Commercial Taxes (Appeals). While the appeal was pending, the appellate authority issued a show-cause notice dated July 18, 2002 as to why the penalty proposed under Sections 12(3)(b) and 22(2) of the Act, should not be levied. The revision Petitioner submitted its detailed explanation on October 23, 2002. By order dated November 5, 2002, the lower appellate authority took the view that since there was no proof of refund of the excess tax collected to the buyers, to that extent the revision Petitioner had unjust enrichment of the excess tax collected and therefore, levy of penalty u/s 22(2) of the Act, was made, as proposed by the assessing authority. In regard to the levy of penalty u/s 12(3)(b) of the Act, also, the lower appellate authority held that inasmuch as there was a factual finding of non-disclosure of such amounts in the return submitted by the revision Petitioner, the mere payment of excess tax by way of additional sales tax did not absolve the revision Petitioner of the levy of penalty u/s 12(3)(b) of the Act.

4. The Sales Tax Appellate Tribunal having confirmed the said order of the lower appellate authority, the revision Petitioner has come forward with this tax case revision.

5. We heard Ms. R. Hemalatha, the learned Counsel for the revision Petitioner and Mr. K. Radhakrishnan, learned Government Advocate (Taxes), for the Respondents.

6. Having perused the order of the assessing authority, the lower appellate authority as well as the Tribunal, while as regards the levy of penalty u/s 12(3)(b) of the Act, we do not find any fault in the conclusions of the lower appellate authority as well as the Tribunal, as regards the penalty u/s 22(2) of the Act, we are not in a position to affirm the same.

7. As far as the penalty u/s 12(3)(b) of the Act, is concerned, the fact remains that the revision Petitioner was not aggrieved against the tax liability imposed by the assessing authority based on certain omissions noted in the course of the assessment proceedings. In the assessing authority''s order, it is specifically noted that at the time of checking accounts, the deduction claimed towards sales returns was in the order of Rs. 52,23,454 and as per the books, such deductions were only to an extent of Rs. 51,08,305. Similarly, the assessing authority has also noted a misuse of form XVII to an extent of Rs. 1,00,525.34 for the purchase of chemicals and foundry materials. He has also noted other variations as per the books and the returns in paragraph I(iv)(a) and (b). When such factual findings relating to the omissions came to be noticed by the assessing authority based on the books of accounts maintained by the revision Petitioner and the returns submitted by it, the ultimate conclusion relating to such omissions would be nothing, but deliberate suppression made by the revision Petitioner. When once such a conclusion is inevitable, the levy of penalty u/s 12(3)(b) of the Act, would become imperative. Therefore, the mere fact that there was an excess payment of tax by way of additional sales tax by itself cannot absolve the revision Petitioner of the levy of

penalty u/s 12(3)(b) of the Act. We are not, therefore, inclined to interfere with the said part of the order of the Appellate Assistant Commissioner and as confirmed by the Tribunal.

8. However, as regards the penalty imposed u/s 22(2) of the Act, is concerned, it will be worthwhile to refer to the reasoning of the assessing authority in his order dated January 17, 1997. In pages 4 and 5 of the said order, he has observed as under:

Penalty u/s 12(3)(b).

Penalty u/s 12(3)(b) was proposed in this office notice. This is now examined further as under:

a. (i) There was an excess payment of surcharge for Rs. 1,80,848 and additional sales tax for Rs. 8,10,350 whereas the balance of tax works out to Rs. 3,92,288.

(ii) The abnormal excess in surcharge and additional sales tax is due to the following reasons:

(a) Following the Supreme Court''s decision in Bengal Iron Corporation v. Commercial Tax Officer (1993) 90 STC 47, the Special Commissioner has clarified that rough castings are to be considered as ''general goods'' liable to be assessed at eight per cent (+) surcharge at 15 per cent as falling under First Scheduled goods for the relevant period.

The dealers were paying tax at eight per cent towards direct sales and also at three per cent tax plus 0.45 per cent surcharge plus 2.50 per cent additional sales tax against form XVII according to the directions of the Special Commissioner of Commercial Taxes.

(b) In the meantime, the Supreme Court held in (1995) 99 STC 87 in the case of Vasantham Foundry v. Union of India held that the rough castings are to be assessed as declared goods, and ultimately set aside the circular of the Commissioner of Commercial Taxes. This fact has resulted in the refund of abnormal additional sales tax and surcharge. The reason for the balance of tax was arisen, due to the wrong posting of credits of tax into surcharge and additional sales tax.

The Commissioner of Commercial Taxes also following the decision in Vasantham Foundry v. Union of India (1995) 99 STC 87 has ordered for the refund of amount which was excessively collected. As the consolidated revenue resulted in net excess of Rs. 5,86,470 12(3) (b) penalty is not operatable. Hence proposal of levy of penalty is dropped.

Further in regard to, Section 22(2) operation, it is observed that the excess remittance, and collection of tax is neither on own mistake of the dealers nor on mutual mistake of both as discussed in The State of Tamil Nadu Vs. Sasman and Company, , The Associated Cement Companies Ltd. Vs. The State of Tamil Nadu and

Another, , Associated Cement Companies Ltd. v. State of Tamil Nadu (1988) 68 STC 165 (Mad).

As the excess collection and remittance was functioned only on the advice of the Department, no penalty u/s 22(2) shall arise. Further, the Department has no authority to see as to whether the excess collection was refunded to the customers as discussed by the Coimbatore STAT (AB) Shiv Narain and Another Vs. The Sales Tax Officer and Others, in the case of Ambika Press.

9. A perusal of the said conclusion of the assessing authority discloses that the calculation of abnormal additional sales tax and surcharge was due to the specific directions issued by the Special Commissioner of Commercial Taxes. The ultimate refund order also came to be made based on the decision of the honourable Supreme Court reported Vasantham Foundry''s case (1995) 99 STC 87. That apart, the order of the Appellate Deputy Commissioner at page 14 discloses that even as on the date of passing of its order viz., November 5, 2002, the excess tax collected was not factually refunded to the revision Petitioner. It would be worthwhile to refer to the statement found in the order of the Appellate Deputy Commissioner, which is to the following effect:

Here in this instant case, the Appellant''s authorised representative argued that they do not know whether the Department is going to refund it or not. Hence, they were not able to make any other to refund the excess collected from their customers is not a well founded.

10. The above referred to statement found in the order of the Appellate Deputy Commissioner only goes to show that as on that date the excess tax collected by way of additional sales tax and surcharge was not refunded to the revision Petitioner. Therefore, when on the one hand the collection of excess tax was on the specific direction of the Special Commissioner of Commercial Taxes and such excess collection after having been noted was ordered to be refunded was not actually refunded to the revision Petitioner, it runs beyond ones comprehension as to whether even in those circumstances, the revision Petitioner can be held to have had unjust enrichment of the moneys of its buyers. On the other hand, it will have to be stated that so long as the amount lies with the Department, it would be the responsibility of the Department to implement the order of the refund and only thereafter can expect the concerned Assessee to ensure further refund of such amount to the actual buyers.

11. In such circumstance, we are convinced that there was no ground made out for imposing penalty u/s 22(2) of the Act, on the ground of unjust enrichment on the part of the revision Petitioner. The said part of the order of the Appellate Deputy Commissioner as well as that of the Tribunal is, therefore, liable to be set aside. The revision petition stands partly allowed.

12. It is however open to the second Respondent to ensure refund of the excess tax collected and also further ensure that such amount refunded to the revision Petitioner is duly and safely refunded to the concerned buyers and in the event of any violation after such refund, it is open to the second Respondent to take appropriate recourse to the law. No costs. Consequently, M. P. No. 1 of 2010 is closed.