
(1969) 11 MAD CK 0014

In the Madras High Court

Case No : Tax Case No. 45 of 1966, (Appeal No. 2)

A. Velayutha Raja, Raja Engineering Co., Madurai

APPELLANT

Vs

Board of Revenue (CT), Madras

RESPONDENT

Date of Decision : 11-11-1969

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 14, 15, 16, 16(1)

Citation : AIR 1971 Mad 137 : (1970) ILR (Mad) 560 : (1970) 83 LW 488 :
(1971) 2 MLJ 546 : (1970) 26 STC 176

Hon'ble Judges : Ramaprasada Rao, J;Ramanujam, J

Bench : Division Bench

Judgement

Ramaprasada Rao, J.—In this Tax Case, the appellant seeks for the cancellation of the order of the Board of Revenue passed u/s 34 of the

Madras General Sales Tax Act, 1959 hereinafter referred to as the Act, on December 28, 1965, and in consequence the cancellation of the order

of demand of tax made by the Joint Commercial Tax Officer. Madurai-1 on January 28, 1966.

2. The appellant is a dealer in oil engines and electrical goods in Madurai. For the assessment year 1958-59 (ending with March 31, 1959), the

Joint Commercial Tax Officer, Madurai-1 assessed the dealer u/s 3(1) of the Madras General Sales Tax Act, 1939. This order was dated

November 30, 1959. Later, the assessing authority revised the said assessment in the purported exercise of its powers u/s 16(1) of the Act and re-

determined the turnover assessable under Section, 3(1) of the Act at 2 per cent on Rs. 98,872/- and the turnover assessable u/s 3(2) of the said

act to an additional rate of 2 per cent on Rs. 11,052/- In fact the said revision was undertaken on the basis of discovery of material from a pocket

book seized by the Special Assistant Commercial Tax Officer, Madurai-1 during his surprise inspection on November 10, 1960. The estimate at

Rs. 11,052/- was based on the incriminating material seen from the pocket book. An appeal to the Appellate Assistant Commissioner was partly

successful, since the Appellate Authority deleted the assessment of Rs. 11,052/- to additional tax at 2 per cent u/s 3 (2) of the Act. It however

confirmed the assessment order relating to the sum of Rs. 98, 872/- at 2 per cent u/s 3(1) of the Act. This order was dated March 23, 1963. The

Board of Revenue (CT), in the purported exercise of their special powers u/s 34, took up the file and issued notice on January 29, 1964, proposing

to set aside the orders of assessing authority and the Appellate Authority and re-fix the turnover at Rs. 2,43,220/- The appellant contended before

the Board that the action of the Board u/s 34 was illegal and any such action by then to be made by the Board would be beyond the prescribed

time limit of five years provided for in Section 16 of the Act for assessing escaped turnover. This contention was apparently made because the

proceedings initiated by the Board on January 29, 1964, were not heard and completed before the expiry of March 31, 1964, which was the outer

limit for the exercise of such jurisdiction. The Board, however rejected the appellant's contention and passed final orders on December 28, 1965

modifying the original order of the assessing authority dated November 30, 1959, and re-fixed the turnover assessable to sales tax at 2 per cent u/s

3(1) of the Madras General Sales Tax Act, 1939, at Rs. 2,43,220/- and further held that the additional sum of Rs. 1,55,440/- was to suffer the

additional rate of tax at 2 per cent u/s 3(2) of the said Act. Prima facie it passed an original order of assessment and gave directions to the

Assessing Officer to give effect to it at once. The Assessing Authority pursuant to the orders of the Board, revised the order of assessment and has

raised a demand for the balance of tax at Rs. 5,994-96. It is as against this order of the Board resulting in the additional demand that the present

appeal has been filed.

3. The learned counsel for the appellant, repeating the arguments already made before the Board, urged three contentions one of which is on the

merits of the appeal. His first contention is that the Board has no jurisdiction to pass an original assessment order in exercise of their powers u/s 34

of the Act. If at all, it could make an assessment order directing in scope and cannot pass the final assessment order and direct the assessing

authority to implement it, as such. His second contention is that the order sought to be revised is the order of the Joint Commercial Tax Office

dated November 30, 1959 and that the order of the Board directing the assessing authority to assess escaped turnover long after a period of five

years to which the assessment relates, is beyond the pale of its power and that the assessing authority had no statutory power to implement the

Board's order. In the alternative and if as noticed by the Board, what a was revised by the Board was the revised order of the Joint Commercial

Tax Officer made on July 18, 1962, even then the Board made in exercise of its revisional jurisdiction cannot overlook the five years period of

limitation prescribed in Section 16 of the Act from the year of escape, for making exigible escaped turnover. In the instant case the year of

escarpment or assessment is 1958-59 (that is ending with March 31. 1959). The jurisdiction u/s 16 was exercisable by the assessing authority

within five years from March 31, 1959. A power to reopen, even if it could be attributed to an order of the Board, passes u/s 34 of the Act, the

prescribed time limit operates and the Board having passed an order only on December 28, 1965 the order is beyond time and in consequence the

demand raised by the assessing authority is unenforceable. Learned Assistant Government Pleader on the other hand strenuously contended that

the power exercisable by the Board u/s 34 is an independent one having no relation to that exercisable by an assessing authority u/s 16 of the Act.

It is stated that the two powers are different in scope and application. In any event, it is said that the period of limitation prescribed u/s 16 of the

Act applies only to orders passed under that section and the impugned order not having been passed under the said section by under the peculiar

revisional jurisdiction of the Board, the rule of limitation appearing in Section 16 is inapplicable. Regarding the other contention it is suggested that it

is only the order dated July 18 1962, that was interfered with by the Board and the order having been passed within four years from that dated as

envisaged in Section 34, it is a valid, legal and enforceable order. On the merits, it is said that the Board had the jurisdiction to reassess and

particularly in a case of suppression of material, the Board was right in estimating the assessable turnover as it did.

4. We shall now take up the first contention. The order of the Board is positive and emphatic instead of being directive and indicative:

The order of the lower authorities are set aside to the extent discussed above as the taxable turnover of the dealer is re-fixed u/s 34 as below :

Turnover originally fixed by the Assessing Officer in the assessment order dated 30-11-1959:---- 87,820-00

ADD: suppression of sales estimated at 21 times the profit of Rs. 7,400/- recorded in the cover of the pocket note book recovered.---- 1,55,400-

00 ----- 2,43,220-00

Out of the above turnover estimated suppression of sales of goods taxable as the additional rate of 2% Section 3(2) of the Act, 1959: 1,55,400-

00.

The assessing Officer is directed to give effect to this order at once.

Though the last line satisfied the form, yet in substance the order is original in scope. The Board, after noticing the material discovered by it re-fixed

the taxable turnover. Fixing of a turnover by itself is one of the essential facts of the machinery of assessment. The question is whether such an

original assessment order can be made by the Board in exercise of its suo motu power of revision u/s 34 of the Act. The statute itself lays down the

limits and limitations for the exercise of such a power. Normally a revising authority cannot go behind the order on the record and act upon further

and additional information placed before it. But there may be circumstances and contingencies when the normal rule may be circumscribed. Such a

contingency may arise, as in the instant case, by fresh material on record not being noticed or adverted to by the other taxing authority functioning

under the Act. In such a case natural justice required that the assessee should be called upon to explain the incriminating material found by them.

Thereafter the Board can consider such material and adjudicate upon them. But it should be noted that while deciding on such additional material,

the Board's function is to see whether in the light of such material, the order or orders sought to be revised is illegal, irregular or improper and

whether such illegality is intrinsic in the order sought to be revised. Even then the Board can make an order protective in effect and scope and

direct the assessing authority to hold a fresh enquiry in the light of its observations and finding. It cannot relegate itself to the armchair of the

assessing authority and entrench upon the powers of the prescribed statutory authorities. The revisional powers exercised by the Board u/s 34 are

subject to the other provisions of the Act. So a best judgment or an original assessment on the ground of escarpment, by the Board u/s 34 is bad

in law and unsustainable. Hence it is that the Legislature has provided that it could make "such orders as it thinks fit". It is not a mere subjective

satisfaction that is envisaged in Section 34. It should stand the test of objectiveness as also the prescribed guide lines set in the section itself. It

should be in accord with the other provisions of the Act.

5. In *State of Kerala Vs. K.M. Charia Abdullah and Co.*, the Supreme Court observed:

The power to hold an enquiry to take additional evidence is a procedural power in aid of the exercise of the revisional jurisdiction and if the

revisional jurisdiction is not restricted only to cases of arithmetical errors or as the Tribunal called it "arithmetical aspect", there is no reason to

assume that the power under Rule 14-A to make such enquiry as the appellate or the revising authority considers it just to order or to make would

be so restricted. But the power conferred by Rule 14-A by the use of the expression "making such enquiry as such appellate or revising authority

considers necessary" must be read subject to the scheme of the Act. It would not invest the revising authority with power to launch upon enquiries

at large so as either to trench upon the powers which are expressly reserved by the Act or by the Rules to other authorities or to ignore the

limitations inherent in the exercise for those powers. For instance the power to reassess escaped turnover is primarily vested by Rule 17 in the

assessing officer and is to be exercised subject to certain limitations and the revising authority will not be competent to make an enquiry for

reassessing a tax payer. Similarly the power to make a best judgment assessment is vested by Section 9(2)(b) in the assessing authority and has to

be exercised in the manner provided. It would not be open to the revising authority to assume that power. The revisional power has to be

exercised for ascertaining whether the order passed is illegal or improper or the proceeding recorded is irregular and it is in aid of that power that

such orders may be passed as the authority may think fit. One of the inquiries in considering the legality or propriety of the orders passed by the

subordinate office which the revising or the appellate authority may make is about the correctness of the tax levied and if after perusing the record

the authority is prima facie satisfied about the illegality or impropriety of the order or about the irregularity of the proceeding, it may in passing its

order direct as additional enquiry. Neither Section 12 nor Rule 14-A authorising the revising authority to enter generally upon enquiries which may

properly be made by the assessing authorities and to reopen assessments.

In *Swastik Oil Mills Ltd. Vs. H.B. Munshi*, Deputy Commissioner of Sales Tax, Bombay, the above decision has been reiterated.

6. We are therefore of the view that the impugned order of the Board, which is extrovertly an original assessment, is fallacious as the Board

exceeded its powers to pass such an assessment order.

7. The second contention is that the Board's order was passed beyond the prescribed period of limitation. The scheme of the relevant provisions

of the Act may, in so far as it is necessary, be noticed. Section 2(c) define an "assessing authority" as meaning any person authorized by the

Government or by any authority empowered by them, to make are assessment under this Act. Section 2(f) defines "Commercial Tax Officer" as

are person appointed to be a Commercial Tax Officer u/s 28. Section 2(i) explains a "Deputy Commissioner" meaning any person appointed as

such u/s 28. Section 3 is the charging section. Section 12 prescribes the procedure to be followed by the assessing authority while seeking to

assess a dealer either on the return submitted by him or in case no such return is submitted by the dealer to make such enquiry as the assessing

authority deems fit and assess the dealer to the best of its judgment. Section 16 which is important may be extracted:

"16(1)(a). Where for any reason, the whole or any part of the turnover of business of a dealer has escaped assessment to tax, the assessing

authority may, subject to the provisions of sub-section (2) at any time within a period of five years from the expiry of the year to which the tax

relates, determine to the best of its judgment the turnover which has escaped assessment and assess the tax payable on such turnover after making

such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such assessment.

16(1)(b). Where, for any reason, the whole or any part of the turnover of

business of a dealer has been assessed at a rate lower than the rate at which it is assessable, the assessing authority may at any time within a period of five years from the expiry of the year to which the tax relates, reassess the tax due after making such enquiry as it may consider necessary and after giving the dealer a reasonable opportunity to show cause against such re-assessment.

This is a special section which relates to assessment of escaped turnover. It enables the assessing authority to assess escaped turnover at any time within a period of five years from the expiry of the year to which the tax relates. The procedure is subject to sub-section (2) of Section 16. On a scrutiny of such material, if the assessing authority is satisfied that the whole or any part of the turnover of business of a dealer has escaped

assessment to tax, it is empowered to determine to the best of its judgment such turnover which has escaped assessment and assess the same. No

doubt, this should be undertaken after giving the dealer a reasonable opportunity to show cause against such assessment. Section 28 deals with

appointment of Deputy Commissioners of Commercial Taxes, Appellate Assistant Commissioners of Commercial Taxes and Commercial Tax

Officers. Section 31 provides for appeal to the Appellate Assistant Commissioner, Section 32 deals with the special power of the Deputy

Commissioner and Section 33 with the powers of revision of such Officer. Section 34 which has been very much referred to before us needs an

extraction for a proper understanding as to its scope.

34(1). The Board of Revenue may, of its own motion, call for and examine an order passed or proceeding recorded by the appropriate authority

u/s 4-A. Section 12, Section 14, Section 15 or sub-section (1) or (2) of Section 16 or an order passed by the Appellate Assistant Commissioner

under sub-section (3) of Section 31 or by the Deputy Commissioner under sub-section (1) of Section 32 and may make such inquiry or cause

such inquiry to be made and subject to the provisions of this Act may pass such order as it thinks fit.

This section deals with the special powers of the Board of Revenue, Amongst the various sections mentioned in the body of sub-section (1) of

Section 34 sub-section (1) or (2) of section 16 is to be noted in particular, in the instant case. It is pertinent to observe that the special power of

the Board of Revenue under this section is subject to the provisions of the Act. The Board of Revenue can, after making such inquiry or causing

such inquiry to be made and always subject to the provisions of the Act, may pass such order as it thinks fit. Section 34-A deals with the power of

the Board of Revenue to transfer appeals and finally Section 35 deals with the general power of revision by the Board of Revenue. It is not strictly

necessary for us to note the other provisions of this Act in this case.

8. Thus certain specified powers are given to each of the authorities in the statutory hierarchy. It should be noted that an assessment being an

integrated process to bring to tax such taxable turnover of dealers under the Act, many of the enumerated processes provided in the Act have a

telescopic impact with one another, if they are interlaced. We are here concerned with the powers of the assessing authority and that of the Board

of Revenue. We have seen that the order which the Board can pass u/s 34 in revision is ""subject to the provisions of the Act."" Whatever may be

said of the other sections referred to in Section 34, the order passed thereunder and which are susceptible to the special powers of the Board u/s

34, we are primarily concerned in this Tax Case with an order passed by the assessing authority u/s 16(1) of the Act. Section 34 enfolds within its

purview orders under Sections 12, 14, 15, 31(3) and 32(1); all these sections do not concern themselves with any rule of limitation. In

juxtaposition to the above sections, we have Section 16(1) which envisages a substantial rule of limitation for the exercise of power thereunder.

Sub-section (1) of Section 16 enables the assessing authority to assess escaped turnover at any time within a period of five years from the expiry

of the year to which the tax relates. In this case, the tax relates to the year of assessment 1958-59. The assessing authority could therefore exercise

powers u/s 16(1) within March 31, 1964. If he fails to do so, a vested right is created in favour of the assessee, which has to be necessarily

respected and not lightly divested. If, therefore, the assessing authority itself could bring to tax escaped turnover, within five years from the date of

the taxable year, can the Board of Revenue acting u/s 34, revise the assessment beyond such period?

9. The Revenue's contention is that such a mode of exercise of power is plausible. Our attention was drawn to Section 34(2) (c) which provides

that the Board of Revenue shall not pass any order under sub-section(1) of Section 34 if more than four years have expired after the passing of the order. Thus it is argued that the order in issue having been passed within four years from July 18,1962, it is valid for all purposes. This overlooks the fact that the order revised is one relating to escaped turnover. Section 16(1) is a special Legislative provision having an impact on assessment relating to escaped turnover. The impact is conveyed through the unshaped chain of assessment, which is one contiguous process embracing within it the special power of the Board u/s 34 of the Act, which power is again a creature of the very same statute. We have noticed that Section 34 is made subject to the provisions of the Act. Section 16 is one such provision. If Section 16 stood alone like any other section, such as Sections 12, 14, 15, 31 or 32, the position would be different. But Section 16(1) adumbrates a substantial rule of limitation. If the assessing authority could not bring into the net of taxation escaped turnover, beyond a period of five years from the date of the year of escaped, can the Board which is expected to revise the order of the assessing authority, make an order so as to defeat the subjective legislative provision as to limitation u/s 16(1) of the Act? We are of the view that the Board cannot pass such an order.

10. The effect of such a period of limitation envisages in Section 16(1) is wide enough and cannot be said to be limited to assessment of escaped turnover under the sub-section by the assessing authority only. In our view, it is to be invoked in all cases where a statutory functionary under the Act assumes jurisdiction to assess escaped turnover. One such case is when the Board exercises its special powers u/s 34 of the Act. This is explicable. If the Board passes a directive order beyond five years correcting an assessment order u/s 16(1) and remits the matter for implementation of the same by the assessing authority, the assessing authority is helpless because it cannot pass an effective order u/s 16(1) because of the stringent Legislative provision which prescribes a specified period of five years before which it could act. Reliance was placed by the Revenue on State of Madras Vs. Madurai Mills Co., Ltd., . That was not a case of an assessment of escaped turnover and hence it has no application to the facts of this case. Learned Assistant Government Pleader, however pointed out certain hardships which might arise if the

interpretation we have sought to place on the powers of the Board of Revenue is to be accepted. We may at once state that such hardships were

noticed by the Supreme Court in *The State of Orissa Vs. Dabaki Devi and Others*, . There the majority judgment was delivered by Das Gupta, J.

The Court was dealing with similar provisions under the Orissa Sales Tax Act (14 of 1947). The second proviso to Section 12(6) of the Orissa

Sales Tax Act, 1947, provided that no order "assessing the amount of tax shall be passed after the lapse of 36 months from the expiry of the

period." Speaking for the Bench, Das Gupta, J., held that;

Such a provision is in substance not a real proviso to that section but an independent legislative provision of the Act. It is not in terms limited only

to orders of assessment made u/s 12 but on its language applies to and governs any order assessing the amount of tax which would include an

assessment under any provision of the Act besides Section 12. Therefore even if an order of assessment made in exercise of the powers of revision

u/s 23 be held not to be an order u/s 12 the limitation provided by the proviso will be applicable to such an assessment. But any order of

assessment made by the revising authority u/s 23(3) is an order passed under S. 12 as well as Section 23(3) and therefore the period of limitation

prescribed in the second proviso to Section 12(6) applies to such an assessment also.

The Revenue there pointed out the anomaly if the interpretation put upon the relevant provision of the Orissa Sales Tax Act, 1947, were to be

accepted. the learned Judges, repelling the argument, said:

This obvious answer to this argument is that if that was the intention of the Legislature nothing could have been easier than to say so.

As contended by the learned Assistant Government Pleader before us counsel for the Revenue then pointed out several practical difficulties in the

matter of the reopening of assessment which has escaped the clutches of taxation; but again the Supreme Court would say that even taking into

consideration such difficulties, it cannot be said that the Legislature intended, without saying so, that the period of limitation prescribed applied only

to original orders of assessment. Respectfully adopting the reasoning of the learned Judges in the above case we have no hesitation to hold that the

provisions as to the period of limitation within which escaped turnover can be

brought to tax as provided in Section 16(1) equally applies when such an order is sought to be passed by the Board in exercise of its powers u/s 34 of the Act. Hence we are of the view that the impugned order was passed beyond time and therefore unenforceable in the eye of law.

11. The last contention is one revolving on merits. No doubt, a pocket book was discovered and the same was available before the assessing authority as well as the Appellate Authority. But the Board was able to discover on its own, an entry in the cover page of the incriminating pocket book to the effect that a profit of Rs. 7,400/- is found to have been earned in the year 1958-59. It is common ground that the entry exactly represented as ""Anamath Labam"". The word ""Anamath"" is commercially understood to be profits earned from an unknown source. Therefore, it cannot with precision be attributed to the business of the dealer during the assessment year. It may be that he secured a profit by various other enterprises unconnected with the business from which the taxable turnover arose. The Board, after noticing the expression ""anamath labam"" in the pocket book, came to the conclusion straightway that it is attributable to the business and on that basis multiplied such profit by 21 times and arrived at the conclusion that there was suppression of sales to the extent of Rs. 1,55,400/-. In our view the conclusion has not been judiciously arrived at. It appears to be hopelessly naked and arbitrary. We are unable to appreciate that there was any acceptable basis before the Board to revise the assessment in the manner it did and re-fix the turnover as if it was an original assessing authority at Rs. 2,43,220/-. Even on merits, therefore, the appeal should be allowed.

12. In the result, the appeal is allowed. There will be no order as to costs.

13. Appeal allowed