(1991) 07 MAD CK 0051

In the Madras High Court

Case No : Tax Case No. 1307 of 1981

A. Vinayagamurthy Nadar — APPELLANT

Vs

Joint Commissioner-II, Commercial Taxes — RESPONDENT

Date of Decision : 04-07-1991

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 22(2), 34, 34(1), 34(2)(b), 36

Citation : (1991) 07 MAD CK 0051

Hon'ble Judges : A.S. Anand, C.J;Raju, J

Bench : Division Bench

Judgement

Dr. A.S. Anand, C.J.—This tax appeal case is directed against the order of the Joint Commissioner passed in suo motu revision u/s 34 of the Tamil Nadu General Sales Tax Act, 1959, hereinafter referred to as "the Act", in respect of the assessment year 1974-75.

2. The assessee is a partnership firm dealing in grocery. It was assessed to sales tax under the Act by the assessing authority. Apart from determining the taxable turnover, the assessing authority levied penalty u/s 22(2) of the Act for an alleged illegal collection of surcharge on the first sales of mustard in the year of assessment. An appeal was preferred before the Appellate Assistant Commissioner, Madurai against the assessment order. The appellate authority sustained a part of the addition to the taxable turnover but set aside the levy of penalty imposed by the assessing authority u/s 22(2) of the Act. The assessee preferred a second appeal to the Sales Tax Appellate Tribunal against the order of the Appellate Assistant Commissioner. The Tribunal allowed the appeal and accepted the book turnover of the assessee. It appears that the Joint Commissioner proposed to revise the order of the Appellate Assistant Commissioner and after issuing a notice, revised the order of the Appellate Assistant Commissioner to the extent that it granted relief from levy of penalty in favour of the assessee. The order has been put in issue before us.

3. The legal objection raised by the learned counsel for the appellant in the first

instance is that since the order of the Appellate Assistant Commissioner was the subject-matter of an appeal before the Sales Tax Appellate Tribunal, the Joint Commissioner could not exercise power u/s 34 of the Act and the order, therefore, suffers from an illegality, being without jurisdiction.

4. Section 34(2)(b) of the Act provides as follows :

"34(2) The Joint Commissioner of Commercial Taxes shall not initiate proceedings against any such order or proceeding referred to in sub-section (1), if -

(a) ....

(b) the order has been made the subject of an appeal to the Appellate Tribunal or of a revision in the Special Appellate Tribunal ...."

As would be seen this section places a ban on the Joint Commissioner from acting and exercising powers of revision u/s 34 once an appeal had been taken from the order of the Appellate Assistant Commissioner to the Tribunal even in cases where the point dealt with by the Joint Commissioner is not a matter covered by the appeal grounds taken by the assessee before the Tribunal. This view that we take is fortified by a judgment of a Division Bench of this Court in Jeewanlal (1929) Ltd. v. State of Tamil Nadu [1978] 42 STC 263. The Bench laid down as follows :

"Section 34(2)(b) of the Act is a complete ban preventing the Board of Revenue from acting and exercising the power of revision u/s 34 once an appeal has been taken from the order of the Appellate Assistant Commissioner to the Tribunal even though the point dealt with by the Board is not a matter covered by the appeal grounds taken by the assessee before the Tribunal. During the period provided for an appeal, the hands of the Board of Revenue are tied as is clear from section 34(2)(a) and this temporary ban becomes a permanent one once an appeal has been taken under that section. Under the scheme of the Act though the Revenue cannot appeal from the order of the Appellate Assistant Commissioner in regard to a part of the order which is against the Revenue, once an appeal has been taken from that order by the assessee on points held against the assessee, the Revenue can approach the Tribunal for enhancement of the assessment by setting aside the decision of the Appellate Assistant Commissioner against the Revenue which is not really the subject-matter of the appeal, and, in such a case, the power of the Board of Revenue is taken away. If there is no appeal, the ban u/s 34(2)(b) will not be attracted and the Board will be free to exercise its revisional power and rectify a mistake committed by the Appellate Assistant Commissioner. There cannot be simultaneous exercise of the power by the Board as well as by the Tribunal against the order of the Appellate Assistant Commissioner."

The correctness of this judgment was doubted and a reference was made to the Full Bench. In Ashok Leyland Limited v. State of Tamil Nadu [1981] 47 STC 155

(Mad), Ismail, J. (as he then was) speaking for the Bench found that the decision in Jeewanlal''s case [1978] 42 STC 263 did not require any reconsideration. The case as summarised in the headnote of Ashok Leyland Limited v. State of Tamil Nadu [1981] 47 STC 155 reads thus :

"Against the order of the Commercial Tax Officer assessing the assessee to sales tax, the assessee preferred an appeal to the Appellate Assistant Commissioner challenging the liability to sales tax on four items of the turnover, and the Appellate Assistant Commissioner rejected the claim of the assessee in respect of one item and granted relief to the assessee in respect of the other three items. The assessee preferred an appeal to the Sales Tax Appellate Tribunal against the order of the Appellate Assistant Commissioner disallowing one item and the Tribunal allowed that appeal. Subsequently the Board of Revenue issued a notice to the assessee in exercise of its suo motu power of revision u/s 34 of the Tamil Nadu General Sales Tax Act, 1959, proposing to revise the order of the Appellate Assistant Commissioner in respect of the items on which the relief was granted by him on the ground that even such items were liable to be taxed by virtue of a Supreme Court decision. The assessee objected to the exercise of the revisional jurisdiction by the Board putting forward the contention that against the order of the Appellate Assistant Commissioner deciding the item against the assessee, an appeal had been preferred by the assessee to the Sales Tax Appellate Tribunal, that the Tribunal had allowed the appeal reversing the decision of the Appellate Assistant Commissioner, that the State itself had filed a tax case in the High Court against the decision of the Tribunal and that in that situation the Board of Revenue could not invoke its revisional jurisdiction u/s 34 of the Act because of the restriction contained in section 34(2)(b) of the Act. The Board of Revenue overruled this objection and revised the order of the Appellate Assistant Commissioner. The assessee filed an appeal in the High Court and when the matter came before a Division Bench of the High Court, the case was referred to a Full Bench in view of the apparent conflict between Jeewanlal (1929) Ltd. v. State of Tamil Nadu [1978] 42 STC 263 and Puthuthotam Estates (1943) Ltd. Vs. State of Tamil Nadu, :

Held, that the moment the order of the Appellate Assistant Commissioner had been made the subject of an effective appeal, the power of the Board of Revenue to interfere with the order of the Appellate Assistant Commissioner came to an end. The statute itself does not contemplate the order of the Appellate Assistant Commissioner being split up into different orders dealing with different items of reliefs claimed by the dealer and granted or rejected by the Appellate Assistant Commissioner but treats the order of the Appellate Assistant Commissioner as a single order not capable of being dissected into different pieces. In an appeal preferred by a dealer u/s 36 of the Act there is scope for the department intervening and calling upon the Tribunal to enhance the assessment or penalty and, in view of this, there is no justification to confer an independent power of revision on the Board of Revenue after the order of the Appellate Assistant Commissioner has been made the subject of an appeal. Therefore the Division

Bench was right in holding in Jeewanlal (1929) Ltd. v. State of Tamil Nadu [1978] 42 STC 263 that once the order of the Appellate Assistant Commissioner had been made the subject of an appeal, the Board lost its power to interfere with the order of the Appellate Assistant Commissioner u/s 34(1) of the Act. Accordingly the Board of Revenue in the present case had no jurisdiction to revise the order of the Appellate Assistant Commissioner purporting to exercise its powers u/s 34(1) of the Act."

5. Both these judgments clearly apply to the facts of the present case. In view of the law settled by the Full Bench this tax appeal has to succeed and is accordingly allowed. The order of the Joint Commissioner is set aside. There shall, however, he no order as to costs.

6. Appeal allowed

