

(1994) 11 MAD CK 0041

In the Madras High Court

Case No : T.C. No. 161 of 1987 (Revision No. 57 of 1987)

Amrutanjan Limited

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 24-11-1994

Acts Referred:

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

Citation : (1994) 11 MAD CK 0041

Hon'ble Judges : P. Shanmugam, J; K.A. Thanikkachalam, J

Bench : Division Bench

Judgement

Thanikkachalam, J.—The assessee M/s. Amrutanjan Limited, is the petitioner herein. The assessee is carrying on business at No. 42/45,

Luz Church Road, Madras. The assessee granted commission to the stockists in the form of incentive at 5 per cent on the basic value of their

products and claimed exemption from the payment of tax on turnover. They are fully supported by credit notes. The rebate was allowed in

accordance with the regular practice of the dealer and so it was proposed to be allowed in full by the assessing officer. According to the assessing

officer the scrutiny of the connected invoices and credit notes revealed the fact that the tax and surcharge portion of it (on the basic value) have not

been actually refunded, to the stockists, but retained by the dealers. It was also ascertained that the basic value of the products which was sought

to be allowed does not include the sales tax, surcharge and excise duty. As the sales tax and surcharge portion of the amount have not been

refunded along with the basic value, it was held that the dealers have collected the sales tax and surcharge on the rebate for which exemption was

allowed. According to the assessing officer, it amounts to contravention of the

provisions of the Tamil Nadu General Sales Tax Act, 1959

(hereinafter referred to as "the TNGST Act") and penalty is warranted u/s 22(2) of the Act. In respect of such discount also the dealers have

adopted the same procedure as followed in the matter of rebate on the basic value. The sales tax and surcharge portion on the cash discount have

not been refunded. No evidence was produced to prove that the sales tax and the cash discount was refunded. The exemption claimed on the cash

discount was granted. In view of the above facts, it was proposed by the assessing officer to recover the portion of the sales tax and surcharge on

the turnover of the rebate and cash discount by way of penalty u/s 22(2) of the Act.

2. On appeal, the Appellate Assistant Commissioner confirmed the penalty levied u/s 22(2) of the Act, amounting to Rs. 36,969. On further

appeal, the Tribunal held that according to the facts arising in this case, the assessee gave rebate and cash discount only at the end of the

assessment year and, therefore, the collection of sales tax and surcharge on the amount claimed as exemption cannot be considered as illegal. But

the Tribunal pointed out that the assessee has not produced any evidence to show that the excess tax and surcharge collected were refunded to the

stockists and dealers. Therefore, the Tribunal held that, "we feel that this is a fit case for remand to the assessing officer with a direction that he

should verify whether any amount has been refunded by the assessee to the customers and the extent of credit notes issued by the assessee to the

customers. After verifying the same, the excess tax collected but not refunded shall be appropriated towards revenue by levying penalty u/s 22(2)

of the Act. In the result, we set aside the penalty and the matter is remanded to the assessing officer". Against the direction given by the Tribunal,

viz., "that the assessing officer should verify whether any amount has been refunded by the assessee to the customers and the extent of credit notes

issued by the assessee to the customers. After verifying the same the excess tax collected but not refunded shall be appropriated towards revenue

by levying penalty u/s 22(2)", the assessee is in revision before this Court.

3. The learned counsel for the assessee submitted as under :

The assessee gave rebate and discount to its stockists and dealers during the end of the assessment years under consideration. The assessee has

collected sales tax and surcharge on the amount given as rebate and cash discount. This collection of sales tax and surcharge on the discounted

amount and rebate amount were remitted to the Government and the dealers are not keeping the same in their hand. u/s 22(2) of the Act no

penalty can be levied for not refunding the amount collected by way of sales tax and surcharge in accordance with law. The Tribunal has held that

collection of sales tax and surcharge on the amount given as rebate and cash discount are not in violation of any of the provisions of the Act.

Therefore, the penalty levied by the department u/s 22(2) of the Act was cancelled. The return of the sales tax and surcharge collected from the

dealers and the stockists on the amount given by way of rebate and the cash discount is a matter between the stockists and the assessee. The

department cannot levy penalty u/s 22(2) of the Act for non-payment of the sales tax and surcharge collected on the amounts given by way of

rebate and cash discount in accordance with law.

4. On the other hand, learned Government Advocate (Taxes) submitted as under :

The assessee collected sales tax and surcharge on the amounts given by way of rebate and cash discount to its stockists. The excessive amount

collected by the assessee by way of sales tax and surcharge is refundable to its stockists. There is no record to show that the assessee has

refunded such sales tax and surcharge collected by the assessee. If the assessee has not refunded the sales tax and surcharge collected by it on the

amount given by way of rebate and cash discount, the assessee would be liable for illegal collection of sales tax and surcharge. In such a case the

department is justified in levying penalty u/s 22(2) of the Act, if the amounts collected by way of sales tax and surcharge were not refunded.

5. We have heard the rival submissions.

6. The fact remains that the assessee at the end of the assessment year gave certain rebate and cash discount to its stockists. The assessee has

collected sales tax and surcharge on the amounts given by way of rebate and cash discount to its stockists. According to the department the

assessee should refund the sales tax and surcharge collected by it to its stockists and dealers since the collection of such sales tax and surcharge is

illegal. It remains to be seen that the Tribunal held that the assessee is perfectly justified in collecting the sales tax and surcharge on the amounts

given by way of rebate and cash discount to its stockists and dealers, since rebate and cash discount were given at the end of the assessment year

under consideration. Hence the Tribunal deleted the penalty levied by the authorities below for collecting such sales tax and surcharge on the

amounts given by way of rebate and cash discount. While so, the Tribunal directed the assessing officer to ascertain whether the assessee has

refunded the sales tax and surcharge collected by the assessee on the amounts given by way of rebate and cash discount to its stockists and if the

assessee has not refunded the amount collected by way of sales tax and surcharge then further direction was given to the assessing officer to levy

penalty u/s 22(2) of the Act.

7. The point for consideration is whether the Tribunal was justified in giving such direction to levy penalty u/s 22(2) of the Act if the assessee failed

to return the sales tax and surcharge collected on the amounts given by way of rebate and cash discount to its stockists and dealers.

8. According to section 22(2) of the Act ""if any person or registered dealer collects any amount by way of tax or purporting to be collected by

way of tax in contravention of the provisions of sub-section (1) whether or not any tax is due from such person or dealer under this Act in respect

of the transaction in which he collects such amount, the assessing authority may after giving such person or dealer a reasonable opportunity of being

heard, by order in writing impose upon him by way of penalty"". In the present case, the Tribunal deleted the penalty levied by the department

u/s 22(2) of the Act on the ground that sales tax and surcharge collected by the assessee on the amount given by way of rebate and cash discount

to its stockists is not in contravention of any of the provisions of the Act. Penalty u/s 22(2) the Act is directed to be levied if the assessee failed to

refund the sales tax and the surcharge collected by it on the amounts given by way of rebate and cash discount to its stockists. If the tax is

collected by any person or by a registered dealer in contravention of sub-section (1) of section 22 of the Act, then alone the penalty is exigible u/s

22(2) of the Act.

9. The Supreme Court in R. S. Joshi, Sales Tax Officer, Gujarat v. Ajit Mills Limited [1977] 40 STC 497, while considering the provisions of

sections 37(1)(a), 46(2) and 64(1) of the Bombay Sales Tax Act, as applicable to

the State of Gujarat held as under :

If a dealer merely gathered a sum by way of tax and kept it in suspense account because of dispute about its taxability or was ready to return it if

eventually it was found to be not taxable, it was not collected within the meaning of section 37(1). The spirit of the provision lends force to the

construction that "collected" means "collected and kept as his" by the trader.

Under the section the Commissioner is vested with a discretion to forfeit the whole or any lesser sum or none at all. The meaning of the expression

"shall be forfeited" should therefore be limited to "shall be liable to be forfeited". The forfeiture should operate only to the extent and not in excess

of, the total collections less what has been returned to the purchasers. The Commissioner should also consider any undertaking given by the dealer

that he will return the amounts collected from purchasers to their. The State will but be obliged not to forfeit sums already returned, undertaken to

be returned and the like.

10. In the case of *S. Rajamani v. State of Tamil Nadu* [1980] 46 STC 451, while considering the provisions of section 3(2) of the Tamil Nadu

Sales Tax (Surcharge) Act (24 of 1971) and section 22(2) of the TNGST Act (1 of 1959) this Court held as under :

..... As a matter of fact, it would appear that the Board of Revenue expressly called upon the appellant whether he was prepared to refund the

amount collected from the customers. Even then the appellant did not give a straight reply, but tried to put forward the contention that he had

passed credit notes in favour of the customers to the extent of Rs. 9,200 and purported to produce the certificate of posting for communicating

those credit notes to the customers. The Board of Revenue did not accept this as sufficient proof of refund. We are unable to hold that the Board

of Revenue committed any error in coming to this conclusion having regard to the fact that more than one opportunity was given by the Board of

Revenue to the appellant and the appellant failed to make use of the said opportunities.

11. Similarly in, *Metal Sales Corporation v. Joint Commercial Tax Officer, Harbour III Assessment Circle* [1983] 52 STC 392, this Court while

considering the provisions of section 22 of the TNGST Act and rule 24(16)(ii) of TNGST Rules, held as under :

But the Act, as it stood amended at the material time, nowhere required the collections to be paid over to the State. And in any case, the penalty

u/s 22(2) was not for non-payment of collections into the Government Treasury, but for collection by way of tax from transactions not liable for

tax. It was not the case of the taxing authorities that the petitioners had collected any tax per se on transactions which were second sales of the

same goods. Hence, whether one called that collection as a recoupment, reimbursement, plusage or by any other name, such a collection only

related to the transaction which was strictly taxable under the Act, and therefore, any collection of tax in respect of such transaction could not be

regarded as a collection in contravention of either rule 24(16)(ii) of the Rules or of section 22(1) of the Act. Therefore, it followed that penalty

could not be levied for making such collections.

12. Another decision brought to the notice of this Court by learned counsel appearing for the assessee was Commissioner of Income Tax, Tamil

Nadu-III Vs. Thirumalaiswamy Naidu and Sons., . According to the facts arising in that decision, the High Court in the proceedings taken

challenging the validity of levy of sales tax held "that jaggery was exempt from Central sales tax. Consequently the amount paid by the assessee to

the Sales Tax Department as Central sales tax on inter-State sales of jaggery came to be refunded to the assessee resulting in the assessee being

obliged to refund the amount to its customers. As the refund was received by the assessee in the course of the account year relevant for the

assessment year 1974-75, the ITO held that the refund received by the assessee would represent taxable trading profit for the year in question by

reason of section 41 of the Income Tax Act, 1961". In that case the learned counsel appearing for the department contended that when the amount

of Rs. 1,37,379 is liable to be refunded the assessee has got to be taxed on it. If not and if the assessee is allowed to go scot-free, this freedom

from taxation might prove undeserved in the event of the assessee retaining to itself either the entire refund of Rs. 1,37,379 or any portion thereof,

without passing it on to the customers. According to the learned counsel since the assessee had already shifted the burden of sales tax on to the

customers by collecting the sales tax from them. It would be an unjust enrichment on the part of the assessee, if the assessee does not now shift the

benefit of refund to the customers. While considering this contention this Court observed as follows :

The contention smacks of pulpit morals. It does not bear on the postulates of fiscal jurisprudence. Suppose the assessee intends to obtain unjust

enrichment from the refund of Rs. 1,37,379 or even commit the seven deadly sins, even so, we do not see how the amount could be taxed as

income in the assessee's hands. The taxing power under the I.T. Act is not meant to be an instrument for chastising an assessee for straying from

the straight and narrow path, or prevent him from doing so. The Income Tax authorities cannot play the role of a moral policeman of the business

world. The tax code is quite an amoral instrument, and even as it taxes the just as well as the unjust, so also, on occasions, it excludes from

taxation, the just as well as the unjust. In any case, the taxing of the element of unjust enrichment is no guarantee that any of the money would be

disgorged. In which event, the tax would have merely served as a penal censure on bad morals, and not as a levy on income.

13. According to the facts arising in this case, the assessee has already deposited with the Government the sales tax and the surcharge collected on

the amounts given by way of rebate and cash discount to its stockists and dealers. The assessee has also given an undertaking that it will return the

sales tax and surcharge collected from its customers and dealers on the amount given by way of rebate and cash discount. Section 22(2) of the Act

cannot be invoked if the assessee fails to return the sales tax and surcharge collected by its on the amounts given by way of rebate and cash

discounts since such a collection was held to be legal by the Tribunal. Only if the collection of tax is illegal by the registered dealer in contravention

of the provisions of section 22(1) of the Act, then alone section 22(2) would be attracted and penalty is exigible. Accordingly considering the facts

arising in the present case, in the light of the judicial pronouncements cited supra, we hold that the Tribunal was not correct in directing the

assessing officer to levy penalty u/s 22(2) of the Act, if on verification the assessing officer comes to the conclusion that the assessee has not

refunded amount collected by way of sales tax and surcharge on the amount given by way of rebate and cash credit. Therefore, such direction

given by the Tribunal is set aside and the appeal filed by the assessee is allowed. No costs.

14. Appeal allowed.