
(1961) 12 MAD CK 0029

In the Madras High Court

Case No : Tax Case No. 31 of 1960 (Revision No. 23 of 1960)

A.S. Kassam and Co.

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 19-12-1961

Acts Referred:

Citation : (1962) 13 STC 907

Hon'ble Judges : Srinivasan, J; Jagadisan, J

Bench : Division Bench

Advocate : R. Kesava Aiyangar and K. Thirumalai, for the Appellant; G. Ramanujam, for The Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

Srinivasan, J.—The assesseees are dealers in cloth. Before the Deputy Commercial Tax Officer, the levy of tax on a turnover of Rs. 2,92,761 was disputed. The dealers had imported cloth from outside the State and had sold the goods ; they were sought to be taxed u/s 3(2) of the Act as the first sellers and the additional levy of 8 per cent, was made. They contended that they were not the first sellers, but no evidence to establish that fact, the onus of proving which is laid upon the dealer by the proviso to Section 3(2) of the Act, was let in. Another part of the turnover of Rs. 61,782 was also in dispute. That part related to the stock of imported cloth held as on 13th December, 1957, in respect of which the dealers were given the option of compounding the additional tax. No applications for compounding had been made in conformity with the law. The request to compound was accordingly negatived and they were taxed as stated.

2. In the appeal to the Appellate Assistant Commissioner, the principal ground that was advanced was that Government had waived the collection of the additional tax in respect of the sales from it April, 1957, to 17th December, 1957, and that in the light of this waiver, the tax should not be levied on these turnovers. The Appellate Assistant Commissioner pointed out that while it was true that the Government had waived the levy of additional tax, they did so on

condition that the assesseees had not collected any tax on the sales during that period. It was however found that the assesseees in this case had collected the amount of additional tax of 8 per cent, but had noted it in their accounts as "contingent liability." Since, as a matter of fact, the assesseees had collected the tax, the Government order waiving the levy was not applicable to these dealers. In that view, the appeal was dismissed. In the further appeal to the Tribunal, the same contention was put forward. While the assesseees did not deny the fact that they had made collections of certain amounts styled "contingent deposits" from their buyers they urged that these collections were not tax collections and that, therefore, they were not disentitled to the benefit of the waiver of the collection of tax. The Sales Tax Appellate Tribunal however took the view that the relevant order of the Government was an administrative instruction which it was not competent for them to enforce in a judicial determination of the liability of the assesseees.

3. In this petition, it is contended that the Tribunal acted erroneously in not giving effect to the order of the Government and that their application to compound in respect of part of the turnover should also have been permitted.

4. u/s 3(2) of the General Sales Tax Act, the first sale of cloth of certain specified description is subject to the additional rate of tax at 8 per cent, of the turnover. This tax is additional to the general levy u/s 3(1) of the Act. The proviso to Section 3(2) lays down that in the case of goods imported into the State, the tax shall be levied on the first sale effected in the State of Madras by a dealer who is residing in the State of Madras. The burden of proving that the sale is not the first sale is also cast on the dealer. It is not in dispute that Section 3(2) is applicable to the present case.

5. Ordinance IV of 1957 was promulgated. Clause 3 of that Ordinance provided thus:

Notwithstanding anything contained in the 1939 Act and in the 1954 Act, any dealer, liable to pay sales tax in respect of mill cloth... under the provisions of Section 3(2) of the 1939 Act or under the 1954 Act, may, on application to the officer having jurisdiction to assess him to sales tax, made within two weeks of the commencement of this Ordinance, be permitted to compound the sales tax that would become payable in respect of those goods in his possession at the commencement of this Ordinance by paying in lieu thereof a sum equivalent to the additional excise duty which would have been payable on those goods had such mill cloth...remained with the producer or manufacturer.

6. This clause related to the goods in the possession of the dealer on a particular date and permitted the dealer to compound the sales tax that would become payable u/s 3(2) of the Madras Act by the payment of the additional excise duty, which according to the definition contained in the Ordinance, means the excise duty payable under the Additional Duties of Excise Levy and Distribution Bill, 1957, introduced in Parliament on 13th December, 1957. This provision related

only to the stock of goods held by the dealer on the relevant date, and it enabled him to compound, provided he made an application within two weeks from the date of the commencement of the Ordinance. It is not denied that no such application was made. But what is contended for by the learned counsel, Mr. Kesava Aiyangar, is that the additional excise duty referred to was still only the subject-matter of a Bill before the Parliament and that inferentially, at any rate, till the Bill was passed and became law, the dealer need not make his application. We are unable to accept this contention. Whatever the quantum of the excise duty might be as finally laid down in the Bill, as passed and would become law, the right to compound is conditioned by the filing of the necessary application within two weeks from the date of the commencement of the Ordinance. Since that condition was not complied with, the department rightly rejected the prayer to compound.

7. The next contention is that the Government had waived the collection of additional sales tax u/s 3(2) . A copy of the order of the Government in this regard has not been filed before us. But a letter addressed to the Honorary Secretary, Madurai Piece-goods Merchants' Association, Madurai, by the Deputy Commissioner of Commercial Taxes, Madurai, has been produced. This letter reads thus :

The Honorary Secretary.. .is informed that necessary instructions have already been issued to the assessing officers to waive the collection of additional tax on the sales of mill cloth during the period from 1st January, 1957 to 17th December, 1957, if the dealers have not collected it from their customers.

8. We shall assume that this communication was based upon Government instructions and that there was an authoritative announcement by the Government that they were willing to waive the collection of additional tax if the dealers had not collected it from their customers. It seems to us that on the facts before the Tribunal, there can be no dispute that these dealers had in fact collected tax from their customers. That a collection amounting to 8 per cent, of the sale value in each case was in fact made by the dealers is not denied by Mr. Kesava Aiyangar. What he claims is that this was not collected as a tax but only as " "contingent liability". What contingency this collection was intended to meet, Mr. Kesava Aiyangar discreetly declines to disclose. The inference from the circumstances surrounding the collection is irresistible that it was a collection made only to cover the demand of 8 per cent. of the additional sales tax. That is a question of fact upon which all the officers of the department and the Tribunal as well have unanimously concluded that it was a collection of sales tax and nothing else. Assuming for a moment that the Tribunal could give effect to an executive instruction of the Government regarding the waiver of collection of sales tax, it is patent that in the present case the conditions pre-requisite to such waiver do not obtain. The dealer can get the benefit of this waiver only if he had not collected sales tax and that, as we have pointed out, is not the case here.

9. We are in entire agreement with the Tribunal in the view that it took that it

was not competent to give effect to the executive instructions. What the Government purported to do was only to waive the collection of the tax. We would certainly make a distinction between a levy under the charging provisions of the Act whereby a dealer becomes liable to pay the tax which the statute imposed and the further proceeding relating to the collection of the tax. The Government order in our opinion does not amount to the grant of an exemption from the levy of the tax. Mr. Kesava Aiyangar concedes that Section 6 of the General Sales Tax Act empowers the Government to make an exemption in respect of any tax payable under the Act. Such exemption can be granted by the Government by notification in the Fort St. George Gazette. It is not necessary for us to examine the precise manner in which such exemption can take effect. It is sufficient to take note of the fact that an exemption in respect of any tax payable under this Act can be granted by the Government in the exercise of their powers u/s 6 of the Act. The short question then is whether the waiver of collection of the tax in the present case is an exemption in respect of any tax payable under the Act.

10. Mr. Kesava Aiyangar concedes that there was no notification issued by the Government u/s 6 of the Act in this regard. But he wants us to take the view that where the Government exercise a power, a power which is referable to the Act, it must be assumed that that power was so exercised under that authority. That proposition would no doubt be valid if the Government had in fact purported to exercise their undeniable power to grant an exemption from the incidence of the tax liability. What appears to have happened is that the order of the Government left the liability to pay tax unaffected, for the Government only stated that in respect of transactions during a certain period, they would not enforce the collection against a dealer if the dealer had not in fact collected the tax from his customers. That being the narrow extent of the scope of the waiver of the collection by the Government, the liability to tax of the dealer was left unaffected. The Tribunal had jurisdiction only to examine any exemption from liability to tax of a dealer under the provisions of the Act and if it declined to consider and apply the Government order which had been issued under the above-stated circumstances, the Tribunal was, to our minds, correct.

11. The petition fails and is dismissed with costs. Counsel's fee Rs. 100.