
(1991) 08 MAD CK 0091

In the Madras High Court

Case No : T.C. No. 77 of 1981 (Revision No. 37 of 1981)

Bapalal and Co.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 12-08-1991

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12, 16, 16(1), 16(2), 3(1)

Citation : (1991) 08 MAD CK 0091

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

Bench : Division Bench

Advocate : T. Srinivasamurthy, for the Appellant; D. Srinivasan, Additional Government Pleader, for the Respondent

Judgement

Kanakaraj, J.—For the assessment year 1977-78 the petitioners were assessed on April 18, 1979, determining the total turnover as Rs. 1,52,03,546 and the taxable turnover as Rs. 1,50,97,455. A notice was issued u/s 16 of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter called "the TNGST Act") proposing to include a turnover of Rs. 1,42,054.47, representing the excise duty collected by the petitioners. This turnover had not been disclosed in the returns of the petitioners. After hearing objections of the petitioners a fresh assessment order was passed on June 27, 1979, determining the total turnover as Rs. 1,53,45,600 and the taxable turnover as Rs. 1,52,39,509. The assessing authority also found that the petitioners had wilfully suppressed excise duty collections and accordingly levied a penalty at 1 1/2 times the tax due on the undisclosed turnover. The penalty amount was Rs. 8,598.

2. The petitioners filed an appeal before the Appellate Assistant Commissioner disputing only the inclusion of the turnover of Rs. 1,42,054.47 representing the excise duty collected and the levy on Rs. 1,41,459 at the rate of 4 per cent and the balance of Rs. 995 at 9 per cent. The appellate authority found that a sum of Rs. 1,204 represented the excise duty collected on labour charges on the sales of synthetic stones. Inasmuch as exemption had been granted in respect of the

turnover of synthetic stones, the excise duty collected on the labour charges on the sales of synthetic stones being Rs. 1,204 could not have been included. He therefore, deleted the sum of Rs. 1,204. He also reduced the penalty to an amount equivalent to the tax due on the escaped turnover, thus reducing the penalty to Rs. 5,665. He therefore, directed the turnover of Rs. 1,39,855 to be taxed at 4 per cent and the turnover of Rs. 995 to be taxed at 9 per cent. The petitioner filed a Second Appeal T.A. No. 7 of 1980, before the Tribunal. The Revenue filed a Miscellaneous Petition No. 306 of 1980 seeking to enhance the rate of tax applicable for the purchase value or ornaments at 4 per cent multi-point, as against a lower rate, adopted by the assessing authority and confirmed by the appellate authority. The enhancement petition was consequent on the judgment of the Supreme Court in Deputy Commissioner of Sales Tax v. G. S. Pai & Co. [1980] 45 STC 58 holding that ornaments and other articles of gold purchased by the assessee with a view to melting them and making new ornaments or other articles out of the melted gold did not fall within entry 15 of the First Schedule to the Act and were liable to be taxed not at the lesser rate of 1 per cent applicable to "bullion and specie" but at the general multi-point rate u/s 3(1) of the Act. The Tribunal heard the appeal and the enhancement petition and by judgment dated October 31, 1980, dismissed the appeal and allowed the enhancement petition. The assessee has come up on revision against the said order of the Tribunal.

3. Mr. T. Srinivasamurthy, learned counsel for the petitioners, raises the following points before us : (1) The assessee had collected excise duty in the sales bills till June 18, 1977. On and from June 19, 1977, they had raised separate bills for excise duties noting the bill number and the date of the main sales bill with a rubber stamp endorsement in the excise duty collection bills as follows :

"Excise duty refundable subject to the approval of the Government of India."

A separate ledger folio was opened for the said excise duty collections. The argument is that such collections were only as deposits and were liable to be refunded to the parties if the goods were held to be non-excisable goods by the High Court. Therefore there was no case for invoking section 16 of the TNGST Act. (2) In any event, inasmuch as the assessee had acted bona fide in collecting excise duty by way of separate bills disclosing the same in the main sale bill and making an endorsement as quoted supra, they had no wilful intention to suppress the turnover. The levy of penalty u/s 16(2) of the TNGST Act was therefore unwarranted. (3) The enhancement petition was not maintainable because the assessment u/s 16 of the TNGST Act related only to the turnover of Rs. 1,43,054.47 representing the excise duty collections and the appeal before the Appellate Tribunal only related to the excise duty collections. Consequently, the second appeal before the Tribunal also related to only excise duty collection. Therefore in respect of turnover relating to purchase of old jewellery taxable u/s 7-A of the TNGST Act was not at all an issue before the authorities. It was not therefore open to the Revenue to call in question a turnover in respect of which

the assessee did not file either a first appeal or second appeal.

4. The first contention is easily answered because under the Madras General Sales Tax (Second Amendment) Act, 1969, the excise duty collections are certainly exigible to tax. The plea that at the time of collection of the excise duties there was a dispute pending in the High Court, cannot avail the petitioners. The fact remains that in law excise duty collections are taxable and in fact the assessee had paid over the same to the Central Excise Department. The fact also remains that the assessee did not disclose the turnover of Rs. 1,42,054.47 being the excise duty collections in his return. Therefore the power u/s 16(1) of the TNGST Act was rightly exercised and the turnover was brought to tax. In this connection a reference may be made to the Madras General Sales Tax (Second Amendment) Act, 1969, which received the assent of the Governor on March 4, 1969, and which contains deeming provisions which the assessee cannot get over in this case. While on this point, the judgment of the Supreme Court in McDowell & Company Limited v. Commercial Tax Officer [1985] 59 STC 277 has to be necessarily referred to. While making it clear that excise duty shall always form part of the sale price, the apex Court has held as follows :

"Admittedly, the bills issued by the appellant did not include the excise duty. As already found, payment of excise duty is a legal liability of the manufacturer; its payment is a condition precedent to the removal of the liquor from the distillery and payment by the purchaser is on account of the manufacturer. According to normal commercial practice, excise duty should have been reflected in the bill either as merged in price or being shown separately. As a fact, in the hands of the buyer the cost of liquor is what is charged by the appellant under its bill together with excise duty which the buyer has directly paid on seller's account. The consideration for the sale is thus the total amount and not what is reflected in the bill. We are, therefore, clearly of the opinion that excise duty though paid by the purchaser to meet the liability of the appellant, is a part of the consideration for the same and is includible in the turnover of the appellant. The purchaser has paid the tax because the law asks him to pay it on behalf of the manufacturer."

The judgment, then, is a complete answer to the first contention of the learned counsel.

5. The second contention that there was certainly no wilful non-disclosure or wilful suppression of the turnover cannot also be accepted. We have already taken note of the method adopted by the assessee for the collection of excise duty by issuing separate bills with specific endorsement. The appellate authority rightly points out that excise duty collections had not been reported in A2 return submitted to the department. What is more, the assessee did not disclose the said records to the assessing officer at the time of check of accounts or at any later stage until the fact was detected by the department. Thus the attitude of the assessee certainly discloses a culpable intention to conceal the collections. The Tribunal has also referred to the various decisions on the point and held that

the non-disclosure of such collections made in separate bills amounts to wilful non-disclosure attracting the penal provisions of section 16(2) of the TNGST Act. We are in entire agreement with the views expressed by the authorities below and hold that the assessee had wilfully suppressed the turnover, consequently making themselves liable for penalty u/s 16(2) of the TNGST Act.

6. So far as the last contention relating to the maintainability of the enhancement petition as well as the correctness of the claim made by the Revenue in the enhancement petition is concerned, we have necessarily got to deal with the contentions in two parts. We will first take up the question of maintainability. The argument is that the original assessment order u/s 12 of the TNGST Act was made on April 18, 1979. The order u/s 16 of the TNGST Act was made on June 27, 1979. The only difference between the two orders is with reference to the excise duty collections totalling Rs. 1,42,054.47. When the petitioners filed an appeal they challenged only the inclusion of the excise duty collections. Similarly, in the second appeal before the Tribunal also they challenged only the turnover relating to excise duty collections. Therefore enhancement petition relating to the purchase of old jewels from April 1, 1977 to February 20, 1978 to the tune of Rs. 36,71,762 and the purchase of old jewels from February 21, 1978 to March 31, 1978 to the tune of Rs. 3,33,803 do not form the subject-matter of either the appeal before the appellate authority or second appeal before the Tribunal. Therefore the enhancement petition relating to the above purchase turnovers is incompetent. The argument is attractive at the first blush. But when we examine the assessment order u/s 16 of the TNGST Act dated June 27, 1979, we find that the assessing authority has made a composite order including all the transactions which formed part of the first order u/s 12 of the TNGST Act, dated April 18, 1979 also. In other words, the assessment order which is subject-matter of the first and second appeals refixes the entire total and taxable turnover. There is a clear reference to the purchase turnover of old jewels from April 1, 1977 to February 20, 1978, namely, Rs. 36,71,762 taxed at 1 per cent and the purchase of old jewels from February 21, 1978 to March 31, 1978 to the tune of Rs. 3,33,803 taxed at 2 per cent, treating as "bullion and specie" under entry 15 of the First Schedule to the TNGST Act in the order u/s 16. Such being the position, when an appeal is filed, the entire assessment is before the appellate authority. This legal position is also well-settled by a Division Bench of this Court in T.C. Nos. 449, 486, 1082 and 1083 of 1979 dated December 11, 1979 (Deputy Commissioner of Commercial Taxes v. Panayappan Leather Industries [1981] 47 STC 88. The following passage may be usefully referred to :

"Consequently, having regard to the wide language contained in section 36(3) which corresponds to section 31(3) of the Act, it is clear that when an assessee prefers an appeal either to the Appellate Assistant Commissioner or to the Tribunal, the entire assessment is set at large, and the Appellate Assistant Commissioner or the Tribunal is given power to redo the entire assessment according to law."

Dealing with the power of enhancement of Division Bench observed as follows :

"It is admitted that neither in the Act nor in the Rules there is any provision for the Revenue formally filing an enhancement petition. However, as we have seen, the power to enhance the assessment is vested in the Tribunal itself. Consequently, the procedure of filing an enhancement petition is merely by way of putting the assessee on notice that in the appeal preferred by the assessee the Revenue is going to request the Tribunal to enhance the assessment, so that the assessee may not be taken unaware if the Tribunal proceeds to concede the request of the Revenue and enhances the assessment."

7. The next point which remains to be considered is whether while invoking section 16 of the Act and passing an order on June 27, 1979, the assessing authority had completely redone the assessment or whether he had only passed an order relating to the escaped turnover. We have already pointed out that in this case there is a composite order and the subject-matter of enhancement was also subject-matter of the assessment order dated June 27, 1979. In this connection, the Division Bench judgment of this Court in Writ Appeal Nos. 835 to 837 of 1988 dated February 27, 1991 [Reported as Joint Commercial Tax Officer v. Ekambareeswarar Coffee and Tea Works [1991] 83 STC 457 is instructive. The Division Bench has clearly elucidated the different fields of operations of an order u/s 16(1)(a) of the Act and an order u/s 16(1)(b) of the Act. While normally, an order u/s 16(1)(a) of the Act need only relate to the escaped turnover keeping intact the original assessment u/s 12 of the Act, the proceedings u/s 16(1)(b) of the Act will properly relate to a reassessment of the entire turnover replacing the original order u/s 12 of the Act. But the Division Bench has also visualised a situation where an order u/s 16(1)(a) may be made in a composite manner. The following passage refers to this aspect of the case :

"The order u/s 16(1)(a) of the Act, therefore, does not require reflection of the original order of assessment in that order, but in the event the authority chooses to make a composite order by including in the order relating to the escaped turnover, the tax liability already determined in the original assessment proceedings by bodily lifting the original assessment order and adding to it the order u/s 16(1)(a) of the Act, it may clothe the assessee with the right, while questioning an order u/s 16(1)(a) to also question the original assessment, which has been included in the order u/s 16(1)(a) of the Act and the period of limitation in such a case may commence from the date of the composite order, irrespective of the fact that the period for questioning the original order of assessment had expired from the date of the original assessment."

The Division Bench had considered the decision in Deputy Commissioner (C.T.) v. Indian Refrigeration Industries P. Ltd. [1980] 46 STC 264 The Commissioner of Sales Tax, Madhya Pradesh Vs. H.M. Esufali, H.M. Abdulali, Siyaganj, Main Road, Indore, , and The Deputy Commissioner of Commercial Taxes Vs. H.R. Sri Ramulu, . We feel that it is not necessary to go through the exercise once over again, because the ratio has been clearly laid down and we have quoted supra,

the relevant passage. Consequently, the conclusion is inescapable that the enhancement petition was maintainable and rightly entertained by the Tribunal.

8. What remains now to be considered is whether the purchase of old jewellery will come under entry 15 of the First Schedule relating to "bullion and specie". The argument of Mr. Srinivasamurthy is that only worn out and twisted jewels, beaten out of shape had been purchased. The lac had been melted out of the jewels and they were out of shape. Therefore, it is argued that what was purchased was not jewellery but only "bullion" or "specie". While there is absolutely no material to show that the jewellery purchased had been twisted and beaten out of shape, we are of the opinion that the issue is beyond controversy after the judgment of the Supreme Court in [1980] 45 STC 58 (Deputy Commissioner of Sales Tax v. G. S. Pai & Co.). The apex Court has clearly pointed out that ornaments and other articles of gold cannot be regarded as "bullion", because even if old and antiquated, they are not raw or unwrought gold or gold in the mass, but they represent manufactured or finished products of gold. In common parlance, the Supreme Court points out, the word "specie" means any metallic coin which is used as currency. Therefore ornaments and other articles of gold cannot be described as "specie". The Supreme Court takes the issue beyond any controversy by observing that ornaments and other articles of gold purchased by the assessee with a view to melting them and making new ornaments, or other articles out of melted golds would not fall within the words of "bullion and specie". The findings of both the authorities below is that the assessee purchased old jewellery or worn out jewellery. The only question is whether it will come under the entry 15 of the First Schedule "bullion and specie". If it does not come within the said entry necessarily it has to be taxed under the general rate provided by section 3(1) of the Act. This is precisely what has been done by the Tribunal, while allowing the enhancement petition. We do not find any error in the order of the Tribunal while allowing the enhancement petition.

9. Consequently all the points raised by the assessee are rejected. The tax case (revision) fails and is dismissed but without costs.

10. Petition dismissed.