
(1983) 02 MAD CK 0044

In the Madras High Court

Case No : Tax Case No's. 68 and 69 of 1983

Bengal Behar Construction Co. (P.) Ltd.

APPELLANT

Vs

The State of Tamil Nadu

RESPONDENT

Date of Decision : 09-02-1983

Acts Referred:

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

Citation : (1983) 54 STC 176

Hon'ble Judges : P. Shanmugam, J;G. Ramanujam, J

Bench : Division Bench

Advocate : C.S. Chandrasekara Sastri, for the Appellant;

Judgement

Ramanujam, J.—The assessee in this case is a building contractor. It was assessed on turnovers of Rs. 75,000 and Rs. 50,000 for the assessment years 1971-72 and 1972-73, u/s 12(2) of the Tamil Nadu General Sales Tax Act, and a penalty for both the assessment years has also been levied u/s 12(3) of the Act. Both the assessment and levy of penalty were challenged by the assessee before the Appellate Assistant Commissioner, but without success. Thereafter the matter was taken up in appeal to the Sales Tax Appellate Tribunal, which, while confirming the assessment, reduced the penalty in each case to fifty per cent of the tax due on the turnovers assessed. Aggrieved against the said order of the Tribunal, the present tax revision cases have been filed.

2. Before us the assess questions not only the validity of the assessment, but also the propriety of the levy of penalty. According to the learned counsel for the assessee, the turnovers in dispute for both the assessment years relate to the sale of cranes, which had become unserviceable, that the sale was not effected in the regular course of business, that therefore the principle laid down by the Supreme Court in the case of State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another, will not apply and hence the turnovers in dispute cannot be brought to charge. It is the submission of the learned counsel for the assessee that the cranes which were sold during the

assessment years in question have not been shown to have been purchased in this State so as to enable the department to treat the assessee as carrying on the business of purchase and sale of cranes in the State. It is not in dispute that there is no material on record to show as to when and where the cranes which had been sold during the assessment years in question had been purchased. Even assuming that the cranes had been purchased only in the State of West Bengal, where the assessee has got its registered office, still it is not possible to hold that the assessee is not carrying on business in this State. The assessee is admittedly carrying on construction activity in this State. In the course of carrying on such business activity, the assessee has sold unserviceable articles, and such sales have to be treated as ancillary or incidental to its main business as a building contractor, which is admittedly being carried on in this State. We are therefore of the view that on the facts of the present case, the principle laid down by the Supreme Court in *State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another*, directly applies and as such the assessee cannot escape liability to tax in respect of the turnovers for the assessment years in question.

3. The learned counsel then contends that, in any event, the levy of penalty is neither legal nor proper. According to the learned counsel, the assessment in this case is not a best judgment assessment, as the assessment was based on a letter given by the assessee showing the turnovers in question and on the figures furnished by the assessee. It is seen from the records that the assessee did not file any return at all. Only in the course of investigation and verification of the accounts of one M/s. Ranga Structural it was found that the assessee had effected sales of discarded items to the extent of turnovers in question, and when an enquiry was made in respect of the turnovers in question, the assessee furnished details of the sales effected during the assessment years 1971-72 and 1972-73, and with the figures furnished by the assessee in its letter, the assessing authority completed the assessment. The question is whether the assessment made in this case in respect of the two assessment years can be said to be one of best judgment. According to the learned counsel for the assessee, once the figures furnished by the assessee are accepted and the assessment is made on that basis, then the assessment cannot be said to be one of best judgment, and if there is no best judgment assessment, then the levy of penalty is not called for u/s 12(3) of the Act. We are not inclined to accept this submission of the learned counsel for the assessee. As already stated, the assessee had not filed any return, and it was only when it was found on investigation that the assessee had taxable turnovers, the assessee furnished details of the sales and they were adopted as the basis for the assessment. According to the learned counsel for the assessee, once the figures furnished by the assessee are accepted and are taken as the basis for the assessment, the assessment cannot be said to be one of best judgment. We are of the view that the term "best judgment assessment" is not a term of art. Section 12(2) contemplates making best judgment assessment in two circumstances : (i) if no

return is filed by the dealer u/s 12(1) within the prescribed period; or (ii) if the return submitted by the dealer is found to be incomplete or incorrect. Therefore any assessment made under either of the two contingencies mentioned above will have to be taken as a best judgment assessment. When the section itself refers to the assessment made under either of the two contingencies as a best judgment assessment, we will not be justified in interpreting the expression "best judgment assessment" with reference to the general principle bearing on the question as to when an assessment can be said to be based on best judgment. Even though the assessment in this case may be based on the figures furnished by the assessee, so long as no return was submitted by the assessee u/s 12(1), the assessment made by the assessing authority is one made u/s 12(2) which is referred to therein as a best judgment assessment. Once the assessment in this case is taken as one made u/s 12(2) of the Act, section 12(3) is automatically attracted.

4. Though the learned counsel for the assessee sought to contend that the assessment in this case is not one made u/s 12(2) at all, he was not able to sustain that contention. Admittedly in this case the assessment is not one made u/s 12(1) based on the returns submitted by the assessee. Therefore the assessment can only fall u/s 12(2). If, as contended by the learned counsel for the assessee, it is not an assessment u/s 12(2), we fail to see under what provision of law the assessments in these cases can be brought, apart from section 12. We have therefore to reject the contention of the learned counsel for the assessee that the assessment in this case is not one falling u/s 12(2) of the Act.

5. The learned counsel then contends that, even though section 12(3) will be attracted, so long as the non-submission of the return showing the turnover in dispute was due to a bona fide mistake of law and not wilful, the levy of penalty is not called for. According to the learned counsel, till the decision of the Supreme Court in *State of Tamil Nadu Vs. Burmah Shell Oil Storage and Distributing Co. of India Ltd. and Another*, was rendered the uniform view taken by this Court was that the sale of discarded capital assets cannot be taken to be a sale in the course of the business of the assessee, and the assessee was, therefore, under the bona fide impression that the turnover in question were not taxable and it was only under that bona fide impression the assessee did not file the return.

6. As already stated, the assessee did not file the return offering the turnover for assessment. It was only during investigation of third party's accounts that the sales effected by the assessee in favour of third parties were detected and it was at that state that the assessee furnished details of the sales. No doubt section 12(3) contemplates wilful non-disclosure of the turnover by the dealer in his return and wilful failure to submit the return. But admittedly in this case there was non-submission of the return. Even if the non-submission of the return is viewed as a bona fide mistake, it is still a wilful failure to submit the return. The

mere fact that after the detection of the sales by the assessing authority, the assessee furnished details of the sales, cannot make the non-submission of the return a bona fide act on the part of the assessee. It is in this view that the Tribunal has sustained the levy of penalty, but, taking into consideration certain extenuating circumstances, reduced the quantum of penalty from 150 per cent of the tax assessed to fifty per cent.

7. The learned counsel for the assessee would contend that the extenuating circumstances referred to by the Tribunal are sufficient to hold that no penalty is called for in this case. We are not able to accept this contention. The mere fact that the Tribunal has referred to certain extenuating circumstances cannot be taken as completely exonerating the assessee from the levy of penalty. In this view of the matter, we agree with the view of the Tribunal and dismiss the tax revision cases.