
(1991) 10 MAD CK 0083

In the Madras High Court

Case No : Tax Case (Revision) No. 1297 of 1982

Bhavani Mills Limited

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 03-10-1991

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12(3), 22(2), 36, 36(3)

Citation : (1991) 10 MAD CK 0083

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

Bench : Division Bench

Advocate : N. Inbarajan, for the Appellant; D. Srinivasan, Additional Government Pleader (Taxes), for the Respondent

Judgement

Kanakaraj, J.—The petitioners are dealers in cotton and cotton yarn. They had reported a total and taxable turnover of Rs. 4,11,55,025.83 and Rs. 1,90,96,778.10 respectively for the assessment year 1979-80. On verification of the account among other things it was found that the assessee had collected surcharge on cotton yarn and hosiery yarn (declared goods) amounting to Rs. 17,661.29. The cotton yarn and hosiery yarn were exempted from levy of surcharge. It was therefore found that the collection of surcharge was contrary to law and a penalty of Rs. 26,492 at 1 1/2 times the surcharge collections was proposed to be levied. The second escaped omission, with which we are concerned, related to a turnover of Rs. 4,76,793.04 being the sales of cotton yarn, cotton, staple fibre and certain sundry sales.

It was proposed by a notice served on the assessee on December 23, 1980 to levy a penalty u/s 22(2) of the Tamil Nadu General Sales Tax Act, 1959 (hereinafter referred to as "the Act") to the tune of Rs. 26,492 and a penalty of Rs. 5,559 at the rate of 50 per cent of the tax due on the suppressed turnover of Rs. 4,76,793.04. The explanation of the assessee regarding the penalty u/s 22(2) of the Act was that they had remitted the collections to the department and that they would refund the surcharge to the consumers provided the

department refunded the amount to the assesseees. On the question of the penalty levied u/s 12(5) of the Act to the tune of Rs. 5,559 the assesseees admitted the omission to report the turnover of Rs. 4,76,793.04 in their returns and contended that there were certain bona fide disputes about the supplies made by the assesseees and the same were regularised and sale invoice raised only on March 30, 1980. Both the explanations were rejected by the assessing authority and the penalties were imposed as proposed in the notice. On appeal, the Deputy Commissioner (CT) cancelled the penalty u/s 22(2) of the Act on the ground that the collections had been paid over to the Government. The appellate authority however, confirmed the penalty levied u/s 12(5) of the Act. On further appeal to the Tamil Nadu Sales Tax Appellate Tribunal, an enhancement petition was filed by the Revenue seeking restoration of penalty u/s 22(2) of the Act. The Tribunal found only the minimum penalty of 50 per cent of the tax had been levied u/s 12(5)(iii) of the Act and found that there was no cause for interfering with the same. So far as the enhancement petition relating to the levy of penalty u/s 22(2) of the Act, is concerned, the Tribunal referred to the undertaking of the assesseees to refund the amount to the customers provided the department refunded the same to the assesseees. Accordingly the Tribunal directed the department to refund the amount to the assesseees, so that the assesseees would in turn refund the same to the customers and provide proof of such refund. If no such proof was produced the department was permitted to impose penalty u/s 22(2) of the Act. The assesseees are in revision before us.

2. Mr. N. Inbarajan, learned counsel for the petitioners, questioned the jurisdiction of the Tribunal to entertain and allow the enhancement petition. There was nothing to be enhanced inasmuch the appellate authority had deleted the entire penalty. The argument is apparently based on the judgment of this Court in *State of Tamil Nadu v. Jakthi Veliyeetakam* [1977] 40 STC 466. It is necessary to notice the facts of the said case in detail to understand the ratio laid down by the court. In that case the assessing officer had levied penalty u/s 12(3) of the Act. On appeal, the penalty was set aside in toto. The assesseees had filed a second appeal before the Tribunal questioning the turnover. In that appeal Revenue filed a petition "to restore the penalty levied by the assessing officer and cancelled by the Appellate Assistant Commissioner". The Tribunal refused to restore the penalty. It is in this context that the Division Bench of this Court observed that the petition for restoration of the penalty was not competent and the Tribunal had no jurisdiction to restore the penalty. The reason for taking that decision was the words "confirm, reduce, enhance or annul" did not include a power to restore the penalty which had been set aside by the appellate authority. We feel that the other observations made in that judgment to the effect that there must be something to be increased for the application of the word "enhance" are more in the nature of obiter. This judgment was following in *Doveton Cafe v. State of Tamil Nadu* [1981] 47 STC 345. While following the earlier judgment, the Division Bench in the later case relied more on the observations made in the nature of obiter and held that the Tribunal will have

jurisdiction to entertain an enhancement petition only if there was something to be enhanced. They, however observed as follows :

"..... Enhancing the penalty already imposed is different from restoring the penalty which was imposed by the original authority but set aside by the Appellate Assistant Commissioner since the subject-matter of the appeal before the Tribunal was the order of the appellate authority and not that of the original authority."

3. It is precisely to cover the lacuna in section 36(3) of the Act that the words "restore fully or partially as the case may be" were added by the Tamil Nadu Act 78 of 1986 with effect from January 1, 1987. Therefore the contention is that on the date of the order of the Tribunal on August 10, 1982, the words "restore fully or partially as the case may be" were not available and therefore the restoration of penalty u/s 22(2) of the Act was illegal. To buttress the argument Mr. Inbarajan, also refers to Shri Umed Vs. Raj Singh and Others, . The following passage is relied on :

"The addition of these words shows that the original words "to withdraw from being a candidate" were not regarded as sufficiently comprehensive or wide enough to cover a situation where a contesting candidate retires from the contest. If they were, the Legislature would not have indulged in the superfluity of adding new words. It is a well-settled rule of interpretation that the court should as far as possible, construe a statute so as to avoid tautology or superfluity."

We are not impressed by the above argument of the learned counsel for the petitioner. We do agree that the Legislature had some purpose in introducing the words "to restore fully or partially as the case may be". The amendment was necessary to a limited extent because the Division Bench of this Court pointed out in *State of Tamil Nadu v. Jakthi Veliyeetakam* [1977] 40 STC 466 that the words "confirm, reduce, enhance or annul" were not sufficient enough to include the power to restore a penalty which had been set aside by the appellate authority. In that case Revenue had filed a petition for restoration of the penalty levied by the assessing officer. In the instant case we are satisfied that the word "enhance" is wide enough to enhance the penalty from zero to something. In the present case, the Revenue had filed the enhancement petition to impose penalty which the appellate authority had omitted to impose. We are satisfied that the word "enhance" is sufficient enough to enable the Tribunal to impose penalty which was not imposed by the appellate authority.

4. In support of the view taken by us we may refer to a few decisions. In *T. V. Sundaram Iyengar & Sons (P.) Ltd. v. State of Madras* [1970] 25 STC 160 a Division Bench of this Court held that the word "enhance" should receive its full meaning and in relation to the assessment, the scope of the power to enhance should extend to the entire assessment. They proceed to say that there is no justification for the narrow view that the power of enhancing in appeals can only

be exercised within the limits of the assessment that is objected to by the assessee in his appeals. It was laid down that the power of enhancement extended to the entire range of assessment in *State of Tamil Nadu v. Kutty Flush Doors & Furniture Co. (P.) Ltd.* [1984] 57 STC 217. The Division Bench has taken the view that the power of the Tribunal to make an enhancement of assessment u/s 36(3) of the Act is not subject to any condition, limitation or restriction, so long as the appeal relates to an order of assessment. In that case the enhancement petition was not filed at the first appellate stage but it was sought to be filed only at the time of second appellate stage and it was held that such an enhancement petition was maintainable.

5. In *State of Tamil Nadu v. Rallis India Limited* [1984] 57 STC 218 the question was whether the State could file a petition for enhancement before the Tribunal in respect of a turnover, which was not in dispute before the Appellate Assistant Commissioner. Following several earlier judgments, the Division Bench held that the Tribunal could entertain enhancement petition even in respect of the turnover, which was not questioned by the assessee before the Appellate Assistant Commissioner. Again the same Division Bench in *State of Tamil Nadu v. Periam Pillai Nadar & Co.* [1984] 57 STC 219 dealt with a case, where the assessing authority had exempted a turnover and the exemption was not disputed before the first appellate authority. The question was whether such turnover could be the subject-matter of enhancement for the first time before the Sales Tax Appellate Tribunal. The court held that the Tribunal was in error in dismissing the enhancement petition filed by the Revenue. The court, therefore, directed the Tribunal to entertain the enhancement petition and dispose of the same on merits. More recently in *M. Chokkalingam. v. State of Tamil Nadu* [T.C. (Revision) No. 254 of 1982] (printed at page 127 infra) we have ourselves rendered a decision on the scope of section 36(3)(a)(i) of the Act. The following observation is apposite :

"By the above section, in an appeal preferred by the assessee, the Tribunal has the power to decide the appeal by either confirming, reducing or even enhancing or annulling the assessment or penalty or both. Since, in an appeal preferred by the assessee u/s 36, it is the entire assessment which is set at large before the Tribunal, the Tribunal has the jurisdiction to go into the correctness or otherwise of the order of the assessing authority himself and pass appropriate orders."

We proceeded to say that the enhancement petition filed by the Revenue before the Tribunal was competent and maintainable.

6. In view of the overwhelming wealth of authority for the proposition that even when the matter was not before the first appellate authority, it was open to the Revenue to file the enhancement petition before the Tribunal, we are constrained to hold that the judgments, relied on by the learned counsel for the petitioner in *State of Tamil Nadu v. Jakthi Veliyeetakam* [1977] 40 STC 466 and *Doveton Cafe v. State of Tamil Nadu* [1981] 47 STC 345 should be restricted to the facts of those cases. In these cases, we have already pointed out that the Revenue filed

an enhancement petition to restore the penalty imposed by the assessing officer and cancelled by the Appellate Assistant Commissioner. The court held that such a petition for restoration was not available on the relevant date.

7. We have no hesitation in overruling the preliminary objection that the Tribunal had no power to entertain the enhancement petition. On the merits it is not disputed that the levy of penalty for the collection of surcharge under the Tamil Nadu Sales Tax (Surcharge) Act, 1971, is legal and valid in view of the judgment of this Court in Deputy Commissioner (CT) v. M. Murugesan and Bros. [1985] 58 STC 143. Consequently it follows that the Tribunal was justified in allowing enhancement petition and giving direction to which we have already made reference.

8. So far as the levy of penalty u/s 12(5)(iii) of the Act, is concerned Mr. Inbarajan contends that the dispute relates to the supply made by the assesseees was settled and the sale invoices were raised on March 30, 1980. Even at the time of check of amounts, the assesseees had voluntarily made a statement of sales and paid the tax voluntarily. Therefore on the date of passing of the assessment order there was no tax to be paid by the assesseees on the turnover of Rs. 4,76,793.04, which had been omitted to be shown in the returns. Inasmuch as before the assessment order was finalised on January 31, 1981, the turnover had been disclosed and the tax paid voluntarily there was no case for levying penalty u/s 12(5)(iii) of the Act. Reliance is placed on the judgment of a single Judge of the Court in Kalyani Agencies v. State of Tamil Nadu (1984) 10 STL 151 (W.P. No. 9129 of 1982 dated March 29, 1984). G. Ramanujam, J., had laid down as follows :

"Even assuming that the turnover to in A-2 return is incorrect or incomplete, if the assessee has filed a return showing the correct taxable turnover, the assessing authority is entitled to make a final assessment on the taxable turnover submitted by the assessee at the time of the finalisation of the assessment. If a mistake has crept in, in A-2 return, the assessee will be entitled to rectify that mistake by bringing in the correct turnover before the original assessment."

To the same effect is the judgment of the Division Bench of this Court in State of Tamil Nadu v. P. S. Srinivasa Iyengar & Sons [1993] 89 STC 349; (1989) 10 STC 155 (T.C. No. 77 of 1989 dated April 19, 1989). The Division Bench has approved the findings of the Tribunal which were as follows :

"The appellants have submitted themselves for assessment on the above turnover by furnishing statements which could as well be equated to the filing of returns before final assessment. Hence it may be seen that the omission to include the turnover is not deliberate and wilful. As such there is no case for levy of penalty."

7. As against the contention of the learned counsel for the petitioner Mr. Chopda representing the Additional Government Pleader (Taxes) argues that the

mistakes having been rectified and the sale invoices were raised even as early as on March 30, 1980, there was no reason why the petitioners should wait till the pre-assessment notice served on December 23, 1980 and disclose the turnover only thereafter. It is pointed out that if the assessee had paid the tax even a few days from March 30, 1980, the ratio of the above judgments could be applied. But on the other hand if he had delayed the payment of tax till after the issue of the notice on December 23, 1980, his conduct does not deserve any indulgence and should be taken as wilful. He therefore contends that the levy of penalty u/s 12(5)(iii) of the Act should be confirmed. There being factual dispute as to when the assessee disclosed the turnover of Rs. 4,76,793.04 and voluntarily paid the tax, we called for the records. We have perused the records. Neither the learned counsel for the petitioner nor the counsel for the Revenue is able to pinpoint the date on which the revised statement disclosing the turnover of Rs. 4,76,793.04 was disclosed. But at the time of the check of accounts in pursuance of a notice dated October 22, 1980 statements were filed by the assessee and in one of those statements the said turnover of Rs. 4,76,793.04 had been disclosed. But there is absolutely no indication as to the date on which the tax on this turnover was paid by the assessee. Even so we are satisfied that the assessee has made good the ground that in pursuance of a notice calling for documents he had disclosed the accounts in October, 1980. The fact that the tax on this amount had also been paid is not disputed, but the date of payment is not available. Therefore even before the pre-assessment notice issued on December 23, 1980, the assessee had filed a revised statement and as per the revised statement no suppression could be inferred. Consequently following the judgments quoted above we hold that the penalty u/s 12(5)(iii) of the Act cannot be justified.

8. The revision is accepted in part and the penalty of Rs. 5,559 imposed for the suppression of the turnover of Rs. 4,76,793.04 is deleted. The penalty u/s 22(2) of the Act, to the extent of Rs. 20,492 is upheld. The tax revision case is allowed in part to the above extent. But there will be no order as to costs.

9. Petition partly allowed.