

(1960) 11 MAD CK 0044

In the Madras High Court

Case No : Tax Case No. 41 of 1958 (Revision No. 22 of 1958)

Ceylon Thowfeck Hotel

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 02-11-1960

Acts Referred:

Citation : (1961) ILR (Mad) 665 : (1961) 12 STC 238

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

Bench : Division Bench

Advocate : A. Shanmugavel, for the Appellant; The Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Rajagopalan, J.—For the assessment year 1953-54, the petitioner was assessed to sales tax on the turnover of his hotel business at 41/2 pies in the rupee under the proviso to Section 3(l)(b) as it stood then of the Madras General Sales Tax Act (Act IX of 1939) to which we shall here-after refer as the Act. The Tribunal applied the law laid down by this Court in W.P. No. 36 of 1954 Since reported as Krishna Iyer and Anr. v. State of Madras [1956] 7 S.T.C. 346, that the statutory provision authorising the levy of tax at 4 pies in the rupee was unconstitutional and unenforceable and held that the tax should be assessed only at 3 pies per rupee. That decision of the Tribunal was rendered on 28th May, 1956. The excess amount of Rs. 936-1-2 that had been collected from the petitioner was refunded to him by adjustment on 30th September, 1956. The Madras General Sales Tax (Third Amendment) Act (XV of 1956), to which we shall refer hereafter as the Amending Act, received the assent of the President on 1st October, 1956, and was published in the Gazette on 8th October, 1956. Section 17 of the Amending Act validated assessments under the provisions of the proviso to Section 3(1) of the Act before it was amended. In addition the Amending Act amended the proviso to Section 3(1) of the Act with retrospective effect from 1st August, 1949, and the amended proviso authorised levy of tax on the turnover of hotels

at 4 1/2 pies in the rupee.

2. After the Amending Act XV of 1956 came into force, the Deputy Commercial Tax Officer, the assessing authority, issued a notice to the petitioner on 8th January, 1957, asking him to show cause why the assessment should not be revised at the rate sanctioned by the amended Act, that is, at 4 1/2 pies per rupee. The objections of the petitioner were overruled and by his order dated 7th February, 1957, the Deputy Commercial Tax Officer held that the petitioner was liable to be assessed to a tax of Rs. 2,808-3-5 on his turnover, and a demand notice was issued to the petitioner to pay up the balance still due, Rs. 936-1-2, which represented the difference between the tax originally assessed at 3 pies and the tax subsequently assessed at 4-1/2 pies in the rupee. The Commercial Tax Officer, to whom the petitioner appealed against the revised assessment dated 7th February, 1957, dismissed the appeal on the basis, that there had been no assessment on 7th February, 1957, and that, therefore, no appeal lay. The petitioner appealed to the Tribunal. The Tribunal held that Section 17 of the Amending Act XV of 1956 validated the demand made of the petitioner and dismissed the appeal.

3. The petitioner applied to this Court u/s 12-B of the Act to revise the order of the Tribunal.

4. The view taken by the Tribunal was erroneous. Section 17 of the Amending Act XV of 1956 could not validate the order of the Deputy Commercial Tax Officer dated 7th February, 1957. The finality of the original assessment for 1953-54 was under the order of the Tribunal dated 28th May, 1956, and that order directed assessment to tax not at the rate of 4 1/2 pies but at the rate of 3 pies per rupee. Section 17 of the Amending Act did not operate to set aside that order of the Tribunal or to revise the original assessment which the Tribunal had modified. The statutory finality of the assessment which flowed from the order of the Tribunal dated 28th May, 1956, was left untouched by Section 17 of the Amending Act. The learned Government Pleader did not seek to support either the view taken by the Tribunal or that taken by the first appellate authority, the Commercial Tax Officer.

5. The learned Government Pleader contended that the validity of the revised assessment ordered by the Deputy Commercial Tax Officer on 7th February, 1957, could be rested either on Rule 17(3) or Rule 18(1) of the Madras General Sales Tax Rules, 1939, though the order of the assessing authority did not ex facie refer to any provision under which the original assessment was revised.

6. Rule 18(1), which permits rectification of mistakes, could not have been invoked by the assessing authority, the Deputy Commercial Tax Officer, to revise or rectify an order of the Tribunal. We have pointed out that in this case the final order of the original assessment was that of the Tribunal dated 28th May, 1956. Whether the Tribunal could have exercised its power to revise that order under Rule 18(1) and whether the principle laid down by the Supreme Court in Income

Tax Officer, Bombay v. Bombay Dyeing and Manufacturing Co. [1958] S.C.J. 1054 would justify such a rectification did not arise for consideration in this case. Factually the Tribunal did not exercise any such power, and the Deputy Commercial Tax Officer had no jurisdiction under Rule 18(1) to rectify any mistake in the order of the Tribunal which finalised the assessment for 1953-54.

7. The effect of Section 3 of the Amending Act XV of 1956 read with Section 1(2) thereof was that the amended proviso to Section 3(1) of the Act authorising a levy at 4 1/2 pies per rupee was the statutory provision in force in the year of assessment 1953-54. That provision should be deemed to have been in force from 1st August, 1949. But the Amending Act did not provide the machinery for giving effect to that amendment to the proviso to Section 3(1). The machinery to give effect to the amendment had to be sought only in the provisions of the Act of 1939 and the rules thereunder. The question is whether Rule 17(3) vested a jurisdiction in the Deputy Commercial Tax Officer to revise the original assessment which, as we have pointed out more than once, became final only with the order of the Tribunal on 28th May, 1956. The relevant portion of Rule 17(3) runs : "If for any reason any tax has been assessed at too low a rate in any year the assessing authority...may at any time within 5 years next succeeding that to which the tax ... relates, revise the assessment... after issuing a notice to the dealer... and after making such enquiry as he considers necessary." Rule 17(3-A) provided :-

The powers conferred by Sub-rules (1) and (3) on the assessing authority or licensing authority may also be exercised by the appellate authority referred to in Section 11 or as the case may be by the revising authority referred to in Section 12 at any time within a period of five years next succeeding that to which the tax or as the case may be the licence fee relates provided that such authority shall give the dealer concerned a reasonable opportunity of being heard before passing orders under this sub-rule.

8. One of the requirements of Rule 17(3) that the tax had been assessed at too low a rate, was satisfied in this case. On 28th May, 1956, when the assessment was finalised the law as it stood then authorised a levy only at three pies per rupee, and the assessment was at that rate. But that law was amended and with retrospective effect by the Amending Act XV of 1956, with the result that the lawful rate applicable to the turnover of hotels in the assessment year 1953-54 was 4 1/2 pies in the rupee. Thus the original assessment was at too low a rate within the meaning of Rule 17(3).

9. No doubt Rule 17(3) clothes the assessing authority with jurisdiction to revise the assessment if for any reason the original assessment was at too low a rate. The words "if for any reason" appear very wide. The question is, are they wide enough to enable the assessing authority to revise not his assessment but an assessment made final by an order of a higher authority, in this case the Tribunal.

10. If we examine the scheme that appears to underlie Sub-rules (1), (1-A), (3)

and (3-A) of Rule 17-it should be remembered that Sub-rule (3-A) takes in both Sub-rules (1) and (3)-it seems clear to us that Rule 17(3) does not authorise the assessing authority to revise the assessment ordered or finalised by a higher authority. In our opinion, under Rule 17(3) the assessing authority can revise only his own orders of assessment. Under Rule 17(3-A) the Commercial Tax Officer as the appellate authority u/s 11 can revise his order, and the revising authority specified in Section 12 can revise his order. The assessing authority cannot revise the order of the appellate authority or that of the revising authority.

11. We shall illustrate our point by some examples. Suppose the proper rate applicable to the turnover of an assessee was in issue, as it was in this case. Let us further assume that the Commercial Tax Officer, as the appellate authority, differed from the assessing authority on the lawful rate applicable. The assessing authority cannot revise that order of the Commercial Tax Officer on the ground, that in the opinion of the assessing authority the view taken by the Commercial Tax Officer was erroneous, and that, therefore, the turnover had been assessed at too low a rate. Let us pursue that example a step further. In the case of assessee A a Commercial Tax Officer differs from the assessing authority on the lawful rate to be applied in assessing the turnover. If subsequent to the decision, the Tribunal in the case of another assessee B overrules a similar view taken by the Commercial Tax Officer, can the assessing authority revise the order of the Commercial Tax Officer with reference to assessee A under Rule 17(3). Similarly, if the lawful rate applicable to the turnover is decided in the case of A by the High Court, and in a subsequent case with reference to another assessee B the view of the High Court is overruled by the Supreme Court, can the assessing authority revise the assessment of assessee A, disturbing under Rule 17(3) the finality that had attached to the assessment of A under the order of the High Court. In such cases it should be remembered the Tribunal and the Courts only declare what the law has always been. The amendment of the law by the Legislature with retrospective effect can make no difference in principle. Legislation by recourse to a statutory fiction says that that was the law in the relevant period, though factually it was not.

12. While Rule 17 permits revision by the Departmental authorities, it should be noted that neither the Tribunal nor the High Court can revise its orders under Rule 17. Rule 18(1) gives a power of rectification to the Departmental authorities as also to the Tribunal, but not to the High Court. We have referred to these features only to emphasise what we have said above, that the apparently wide words of Rule 17(3) have to be interpreted consistent with the scheme of the Act and the Sales Tax Rules, principally Sub-rules (1), (1-A) and (3-A) of Rule 17.

13. The learned Government Pleader relied on *B P HALDER AND SONS IN RE.*, which was a decision u/s 34 of the Income Tax Act. The learned Judges held that the assessing authority, the Income Tax Officer, can issue a notice u/s 34 of the Income Tax Act even after the assessment had become final under the order of an appellate authority. But the scheme of Section 34 of the Income Tax Act and

the rest of that Act is not analogous to that of Rule 17 of the Madras General Sales Tax Rules. u/s 34 of the Income Tax Act only the Income Tax Officer, the assessing authority, can take the initiative to direct a reassessment. The scope of Rule 17(3) cannot be determined on the basis of the analogy of a different statutory provision the language of which is not even in pan materiel.

14. In *M. M. Muthukaruppan Chettiar v. Deputy Commercial Tax Officer* [1960] 11 S.T.C. 220, the principle laid down in which was approved of and extended by a Division Bench of this Court in *Sundaram Ayyangar and Sons v. Deputy Commercial Tax Officer* [1960] 11 S.T.C. 443, Rajagopala Aiyangar, J., pointed out that there was no machinery to demand a payment of the sales tax refunded to an assessee under similar circumstances. Neither the Act nor the Amending Act provided a machinery for effecting recovery of the amount refunded without a revision of assessment. Rule 18(1) provided for rectification, but that machinery was not availed of in this case, and it could not have been availed of by the Deputy Commercial Tax Officer. The machinery provided for revision of assessment in Rule 17(3) could not have been availed of in this case by the assessing authority to revise not his order of assessment but that of the Tribunal.

15. In our opinion the order passed by the Deputy Commercial Tax Officer and ultimately confirmed by the Tribunal was without jurisdiction and has therefore to be set aside. This petition is allowed and the order of the Tribunal confirming the order of the Deputy Commercial Tax Officer dated 7th February, 1957, will stand set aside. The petitioner will be entitled to his costs. Counsel's fee Rs. 100.