

(2008) 12 MAD CK 0302
In the Madras High Court
Case No : Tax Case No. 839 of 2006

Eastern Electrics	Vs	APPELLANT
State of Tamil Nadu		RESPONDENT

Date of Decision : 05-12-2008

Acts Referred:

Central Sales Tax Act, 1956 — Section 15, 2, 8(2), 8(2A), 9(2)
Tamil Nadu Additional Sales Tax Act, 1970 — Section 16, 2(1), 2(2), 24(3)
Tamil Nadu General Sales Tax Act, 1959 — Section 22, 22(2), 3B, 8
Tamil Nadu Sales Tax (Surcharge) Act, 1971 — Section 3(1), 3(2)

Citation : (2009) 22 VST 544

Hon'ble Judges : Prabha Sridevan, J;K.K. Sasidharan, J

Bench : Division Bench

Advocate : N. Inbarajan and S. Sridharan, for the Appellant; Haja Naziruddin, Special Government Pleader (Taxes), for the Respondent

Judgement

Prabha Sridevan, J.—In both the cases, the assesseees are aggrieved by the levy of penalty under the Tamil Nadu Additional Sales Tax Act, 1970 ("the AST Act", in short). According to them, the Department cannot do so, and rely on S.P.G. Ramasamy Nadar and Sons Vs. Commercial Tax Officer-III and Others, .

2. When the matters came up for admission, the learned Special Government Pleader submitted that the above case was decided ignoring earlier decisions of our court S. Rajamani Vs. The State of Tamil Nadu, , Hindustan Import Export Corporation Vs. State of Tamil Nadu, , and above all Ashok Service center and Others Vs. State of Orissa, . He submitted that S.P.G. Ramasamy Nadar and Sons Vs. Commercial Tax Officer-III and Others, might require reconsideration.

3. The learned Special Government Pleader very fairly placed all the decisions for and against the Department and argued the matter.

4. We will first deal with the pure question of law and then the two cases on their individual merits.

5. The AST Act came into force in 1970. The validity of this Act was upheld in *S. Kodar Vs. State of Kerala*, . The Act is a short one. We will extract the same.

The Tamil Nadu Additional Sales Tax Act, 1970

(Act No. XIV of 1970)

(Received the assent of the Governor on May 22, 1970)

An Act to provide for the levy of additional sales tax

Whereas it is considered necessary to levy an additional tax on the sale or purchase of goods;

Be it enacted by the Legislature of the State of Tamil Nadu in the twenty-first year of the Republic of India as follows:

1. Short title and commencement.- (1) This Act may be called the Tamil Nadu Additional Sales Tax Act, 1970.

(2) It shall be deemed to have come into force on the April 1, 1970.

2. Levy of additional tax in the case of certain dealers.- (1)....

(aa)....

(aaa) On any amount of additional tax or penalty imposed by the assessing authority remaining unpaid under this Act, the dealer referred to in Clause (aa) shall pay interest as specified in Sub-section (3) of Section 24 of the said Act, in addition to such amount of additional tax or penalty due. (as amended by Act 14 of 2005)

(b)....

The provisions of the said Act shall apply in relation to the additional tax payable under Clause (aa) as they apply in relation to the tax payable under the said sub-section.

The provisions of the said Act shall apply in relation to the additional tax payable under Clause (aa) and the interest payable under Clause (aaa) as they apply in relation to the tax and interest payable under the said Act. (as amended by Act 14 of 2005).

(3) Any dealer who collects the additional tax payable under Sub-section (1) in contravention of the provisions of Sub-section (2) shall be punishable with fine which may extend to one thousand rupees, and no court below the rank of Presidency Magistrate or A Magistrate of the first class shall try any such offence.

3B. All the provisions relating to offences and penalties of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959), hereafter in this Section referred to as the said Act, shall, with necessary modifications, apply in relation to the assessment, reassessment, collection and the enforcement of payment of

any additional tax required to be collected under this Act, or in relation to any process connected with such assessment, reassessment, collection or enforcement of payment as if the additional tax under this Act, were a tax under the said Act.

6. Clause (aaa) was introduced and Clause (b) was substituted in its present form by the Amendment Act 14 of 2005 with retrospective effect from April 1, 1970.

7. This was because of the decision in *Karthik Roller Flour Mills Pvt. Ltd. v. State of Tamil Nadu Writ Petition Nos. 6777 and 6778 of 2001*, decided on August 14, 2002 - Madras High Court which we will deal with later. Section was inserted by Act 31 of 1996 from April 16, 1997.

8. The Statement of Objects and Reasons for the 1996 Amendment Act is as follows:

With a view to simplifying the assessment and collection of sales tax the Government have decided to collect additional sales tax payable under the Tamil Nadu Additional Sales Tax Act, 1970 (Tamil Nadu Act 14 of 1970) by dealers other than a casual trader or agent of a nonresident dealer or a local branch of a firm or company situated outside the State at the rate of 2.5 per cent in respect of dealers whose taxable turnover exceeds Rs. 100 crores but does not exceed Rs. 300 crores and at three per cent in respect of dealers whose taxable turnover exceeds Rs. 300 crores and to amend the said Act for the purpose.

2. Every dealer, who is liable to pay additional sales tax under the said Act has to furnish returns and statements in the prescribed form. But there is no specific provision in the said Act, to levy penalty for non-submission of return or statement or furnishing incorrect or incomplete return or statement by the dealer. The Sales Tax Appellate Tribunal has also held that, in the absence of specific provisions in the said Act, penalty could not be levied for belated submission of returns or statements. The Government have, therefore, decided to amend the said Act for this purpose also.

3. The Bill seeks to give effect to the above decision.

9. In *Karthik Mills'* case Writ Petition Nos. 6777 and 6778 of 2001 decided on August 14, 2002 this Court held as follows:

7. The Tamil Nadu Additional Sales Tax Act by Section 2(1)(b), makes the provisions of the Tamil Nadu General Sales Tax Act applicable in relation to the additional tax payable, as they apply in relation to the tax payable under the said Act, additional sales tax being a levy provided for in the special enactment relating to the levy of additional sales tax, the substantive provisions in relation to that levy have to be found in that enactment, and there being no substantive provision in the Tamil Nadu Additional Sales Tax Act for the levy of interest on additional tax, the provisions of the Tamil Nadu General Sales Tax Act providing for levy of interest on the sales tax payable under that enactment, cannot be

construed as a source of power to the State to levy interest on the additional sales tax.

8. Having regard to the development of the law subsequent to the decision rendered in the case of Deputy Commissioner (C.T.), Coimbatore Division, Coimbatore Vs. M. Murugesan and Bros., the law laid down in the decision rendered in W.P. No. 11632 of 1999, as also in W. P. No. 11631 of 1999, in our view is consistent with the law declared by the Supreme Court by the Constitution Bench in the case of J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, , and in the case of India Carbon Ltd. etc. Vs. State of Assam, and does not require any reconsideration.

10. This was followed in S.P.G. Ramasamy Nadar and Sons Vs. Commercial Tax Officer-III and Others, , wherein it is held thus: (page 611)

The next question is as to whether levy of penalty on the surcharge is legal and proper?

Learned Counsel, appearing for the Revenue, would draw the attention of this Court to a ruling of this Court in Deputy Commissioner (C.T.), Coimbatore Division, Coimbatore Vs. M. Murugesan and Bros., and submit that the Tamil Nadu Sales Tax (Surcharge) Act (24 of 1971) would clearly stipulate that all the provisions of the Tamil Nadu Sales Tax Act, which apply to the levy of sales tax, will be applicable to levy of surcharge and that being so, penalty can be levied on surcharge as well.

However, learned Counsel appearing for the petitioner, would draw the attention of this Court to a ruling of this Court in Karthik Roller Flour Mills Pvt. Ltd. v. State of Tamil Nadu Writ Petition Nos. 6777 and 6778 of 2001 decided on August 14, 2002, where, a division Bench of this court, after pointing out the subsequent rulings of the Supreme Court in the case of J.K. Synthetics [1994] 94 STC 422 and in the case of India Carbon Ltd. etc. Vs. State of Assam, , held that the ruling in Deputy Commissioner (C.T.), Coimbatore Division, Coimbatore Vs. M. Murugesan and Bros., is no longer a good law. We find considerable force in the submission made by the learned Counsel for the petitioner. The levy of penalty on surcharge cannot be sustained.

11. The learned Special Government Pleader submitted that the issue will have to be looked at in the context of the State Act and not the CST Act. He submitted that J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, and India Carbon Ltd. etc. Vs. State of Assam, dealt with CST Act, which did not have any provision for levying interest, and those decisions were given in that context. They will not apply to the present case where the original Act, namely, the Tamil Nadu General Sales Tax Act, 1959 ("the TNGST Act" in short) contains the penalty provision and in view of Section 2(1)(b), the penalty Sections in the TNGST Act must be read into the AST Act. He also submitted that the Amendment Act 1976 cannot be

construed as a provision that introduces the levy of penalty for the first time, but as a clarificatory piece of legislation which reiterates what has been the correct position all along. He referred to the following decisions:

- (i) S. Rajamani Vs. The State of Tamil Nadu, .
- (ii) The State of Tamil Nadu Vs. P.M.A. Mathurai Veerasamy and Co., .
- (iii) Ashok Service center and Others Vs. State of Orissa, .
- (iv) Deputy Commissioner (C.T.), Coimbatore Division, Coimbatore Vs. M. Murugesan and Bros., .
- (v) Hindustan Import Export Corporation Vs. State of Tamil Nadu, .
- (vi) Hotel Dasaprakash v. Tamil Nadu Taxation Special Tribunal W.P. Nos. 11631 and 11632 of 1999 - Madras High Court.
- (vii) Karthik Roller Flour Mills Pvt. Ltd. v. State of Tamil Nadu Writ Petition Nos. 6777 and 6778 of 2001 decided on August 14, 2002 - Madras High Court.
- (viii) S.P.G. Ramasamy Nadar and Sons Vs. Commercial Tax Officer-III and Others, .
- (ix) S. Kodar Vs. State of Kerala, .
- (x) Engine Valves Limited v. Union of India [1993] 90 STC 84 (Mad).
- (xi) Thiru Manickam and Co. Vs. The State of Tamil Nadu, .
- (xii) J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, .
- (xiii) India Carbon Ltd. etc. Vs. State of Assam, .
- (xiv) Godrej Soaps Ltd. and Vasant Narayan Gogate, Senior Vice President (Finance) and Secretary Vs. The State of Maharashtra, Service, High Court (O.S.), The Commissioner of Sales Tax and Assistant Commissioner of Sales Tax (Assessment), .
- (xv) Krishnamurthi and Co. etc. Vs. State of Madras, .

12. Mr. Inbarajan, learned Counsel appearing for the assessee, would, on the other hand, submit that the Karthik Mills case Writ Petition Nos. 6777 and 6778 of 2001 decided on August 14, 2002 - Madras High Court lays down the correct law and no reconsideration is required. According to him, no penalty can be levied retrospectively without a charging section. He agrees that the position is different from the date Section 3B was introduced. But for the prior years, i.e., before the Amendment Act was enacted, there can be no levy of penalty. He submitted that the fact that the India Carbon Ltd. etc. Vs. State of Assam, or J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, arose in respect of the CST Act made no

difference to the legal position. He relied on the following:

- (i) Deputy Commissioner (C.T.), Coimbatore Division, Coimbatore Vs. M. Murugesan and Bros., .
- (ii) J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, .
- (iii) India Carbon Ltd. etc. Vs. State of Assam, .

13. Now we will take up each decision, one by one.

(a) S. Kodar Vs. State of Kerala, dealt with the validity of the AST Act. It was upheld. "Entry 54 in List II authorises the State Legislature to impose a tax on the sale or purchase of goods. So, the contention of the appellants that the additional sales tax is not a tax on sales but on the income of the dealer is without any basis." But the validity is not challenged here. So it is not necessary to dwell on this case any further.

(b) Thiru Manickam and Co. Vs. The State of Tamil Nadu, .

In this, the assessee claimed refund of tax in accordance with Section 15(b) of the CST Act. The Supreme Court held that even if there was some ambiguity in the Clause (b) of Section 15 as it originally read, it had been clarified by the Amendment Act, 1976. In this context, the Supreme Court said: (page 18)

...The amendment made in Clause (b) can thus be taken to be an exposition by the Legislature itself of its intent contained in the earlier provision.... As already mentioned above, the Legislature as a result of the amendment, clarified what was implicit in the provisions as they existed earlier. An amendment which is by way of clarification of an earlier ambiguous provision can be useful aid in construing the earlier provision, even though such amendment is not given retrospective effect....

This was relied on by the Special Government Pleader to buttress his case that the Amendment Act 1996 was only to make clear what was implicit even originally, i.e., the right to levy penalty.

(c) S. Rajamani Vs. The State of Tamil Nadu, .

This related to collection of surcharge under the Tamil Nadu Sales Tax Surcharge Act, 1971. The Division Bench held: (page 452)

The learned Counsel for the appellant then contended that, in any event, with regard to the surcharge part of it, the Board should not have taken any action u/s 22 because Section 22 will not apply to the collection of surcharge. In this context, he relied on Sub-section (2) of Section 3 of the Tamil Nadu Sales Tax (Surcharge) Act, 1971, and contended that that Section does not either expressly or by necessary implication make Section 22 apply to the collection of surcharge. Section 3(2) of the Tamil Nadu Sales Tax (Surcharge) Act, 1971, reads as follows:

Section 3(2) save as otherwise provided in this Act, the provisions of the said Act shall apply in relation to the surcharge payable under Sub-section (1) as they apply in relation to the tax payable under the said Act.

Having regard to the fact that what was sought to be levied under the Act of 1971 was only a surcharge which was dependent upon the liability to pay sales tax and also the language of Section 3(2), we are unable to uphold the contention of the learned Counsel for the appellant. Section 3(2) will apply every provision of the Tamil Nadu General Sales Tax Act, 1959, as is applicable to sales tax, to the surcharge. Under these circumstances, we cannot hold that the order of the Board of Revenue is erroneous from any point of view....

The above Section 3(2) is identical to Section 2(1)(b) in AST Act and therefore, it was contended that it would support the levy of penalty.

(d) The State of Tamil Nadu Vs. P.M.A. Mathurai Veerasamy and Co.,

In this case, the Division Bench held,

The expressions "tax payable" and "surcharge payable" in Section 3(2) of the Tamil Nadu Sales Tax (Surcharge) Act, 1971, stand in contrast with "penalty payable". If, in enacting the Surcharge Act, it was the intention of the Legislature that the entire gamut of the provisions of the Tamil Nadu General Sales Tax Act, 1959, were to be applied to levy of surcharge, then it could have very well said that all the provisions of the Sales Tax Act would apply to the levy of surcharge. In that event Section 22 of the Tamil Nadu General Sales Tax Act, 1959, providing for levy of penalty for any illegal or unauthorised collection of tax would also have been attracted by reference to levy of surcharge. However, Section 3(2) of the Surcharge Act is more restrictively worded, and therefore, on the language of the provision, there is no scope for levy of penalty u/s 22 of the Sales Tax Act for illegal or unauthorised collection of surcharge.

Therefore, our court has construed an identically worded Section as giving no scope, for levying penalty.

(e) Ashok Service center and Others Vs. State of Orissa, .

This is the trump card in the hand of the learned Special Government Pleader, according to whom it answers all the questions. In this case, the question was whether the levy of additional tax under the Orissa AST Act was a single point levy or multipoint levy. This Act is identical to the Tamil Nadu AST Act. Levy of single point tax and prohibition of tax at more than one point is the important feature of the Principal Act. The Supreme Court held as follows: (page 11)

...The assumption made by the High Court that the Act was an independent Act having nothing to do with the principal Act is not correct. The Act only levied some extra sales tax in addition to what had been levied by the principal Act. The nature of the taxes levied under the Act and under the principal Act was the same and the Legislature expressly made the provisions of the principal Act

mutatis mutandis applicable to the levy under the Act. The additional sales tax was in the nature of a surcharge over and above what was due and payable by an assessee under the principal Act. The Act, though it had a long title, a short title and other usual features of every statute, could not be considered as an independent statute. It had to be read together with the principal Act to be effective. In the circumstances the conclusion reached by the High Court that the two Acts were independent of each other was wrong. We are of the view that it is necessary to read and to construe the two Acts together as if the two Acts are one, and while doing so to give effect to the provisions of the Act which is a later one in preference to the provisions of the principal Act wherever the Act has manifested an intention to modify the principal Act....

Therefore, they held that, "when Section 3(1) of the Act is read in the light of Sub-section (2) thereof, Section 8 of the Principal Act which prescribes a single-point levy immediately becomes attracted". According to the learned Special Government Pleader, the observations of the Supreme Court that the AST Act must be read together with the Principal Act, clearly show that right from the beginning the charging provision must be deemed to have existed. We must see whether these observations would extend even to charging Sections by which penalty is levied.

(f) Deputy Commissioner (C.T.), Coimbatore Division, Coimbatore Vs. M. Murugesan and Bros., again dealt with Section 3(2) of the Surcharge Act: (page 148)

...Therefore, in order to effectuate levy and collection of surcharge imposed u/s 3(1), Section 3(2) which forms an integral part of the charging section, should be understood attracting all the provisions of the principal Act, save as otherwise provided in the Surcharge Act, 1971. We find that there is no provision in the Surcharge Act excluding the provision in Section 22 of the principal Act. So long as there is no exclusion contemplated by Section 3(2) of the Surcharge Act, it must be understood as attracting all the provisions of the principal Act, as are applicable to the levy of sales tax, for the levy of surcharge as well. Following the decision of the Supreme Court in Ashok Service Centre v. State of Orissa [1983] 53 STC 1 we hold that the penalty has rightly been levied in this case u/s 22 of the Tamil Nadu General Sales Tax Act, 1959 read with Section 3(2) of the Surcharge Act. In view of the decision of the Supreme Court in Ashok Service Centre v. State of Orissa [1983] 53 STC 1, the decision rendered by this Court in State of Tamil Nadu v. P.M.A. Mathurai Veerasamy & Co. [1983] 52 STC 131 cannot be taken as laying down the law correctly.

(g) Hindustan Import Export Corporation Vs. State of Tamil Nadu, : (page 202)

...yet in view of the specific provisions of Section 3(2) of the Surcharge Act and Section 22(2) of the Sales Tax Act and inasmuch as Deputy Commissioner (C.T.), Coimbatore Division, Coimbatore Vs. M. Murugesan and Bros., has considered the decision of the Supreme Court in Ashok Service Centre v. State of Orissa

[1983] 53 STC 1, we are of the view that the suo motu restoration of the penalty imposed by the assessing authority, by the Board, is correct and in accordance with law.... We hold that the provision in Section 3(2) of the Surcharge Act would apply to all the provisions of the Sales Tax Act.

(h) We have already extracted from Karthik Mills case Writ Petition Nos. 6777 and 6778 of 2001 decided on August 14, 2002 - Madras High Court.

(i) Engine Valves limited v. Union of India [1993] 90 STC 84 (Mad).

In this case, our High Court held thus: (page 85)

The words "sales tax law of the appropriate State" in Sections 2(i), 8(2)(b) and 8(2A) of the Central Sales Tax Act, 1956, will encompass any law providing for the levy of sales tax, and not merely the general sales tax law only. The additional tax, surcharge and additional surcharge levied under the Tamil Nadu Additional Sales Tax Act, 1970 and the Tamil Nadu Sales Tax (Surcharge) Act, 1971, respectively, are therefore, includible in the computation of the rates of tax for the purposes of Section 8(2)(b) and Section 8(2A) of the Central Sales Tax Act, 1956.

(j) J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another,

In this, the dispute was whether the assessee was required to pay interest on the additional sales as under the Rajasthan Act. The following extracts are useful, (pages 432, 437)

Before we proceed further we must emphasise that penalty provisions in a statute have to be strictly construed and that is why we have pointed out earlier that the considerations which may weigh with the authority as well as the court in construing penal provisions would be different from those which would weigh in construing a provision providing for payment of interest on unpaid amount of tax which ought to have been paid.

....

16. It is well-known that when a statute levies a tax it does so by inserting a charging Section by which a liability is created or fixed and then proceeds to provide the machinery to make the liability effective. It, therefore, provides the machinery for the assessment of the liability already fixed by the charging section, and then provides the mode for the recovery and collection of tax, including penal provisions meant to deal with defaulters. Provision is also made for charging interest on delayed payments, etc. Ordinarily the charging Section which fixes the liability is strictly construed but that Rule of strict construction is not extended to the machinery provisions which are construed like any other statute. The machinery provisions must, no doubt, be so construed as would effectuate the object and purpose of the statute and not defeat the same. See *Whitney v. Commissioners of Inland Revenue* [1926] AC 37, *Commissioner of*

Income Tax v. Mahaliram Ramjidas [1940] 8 ITR 442 , India United Mills Ltd. Vs. Commissioner of Excess Profits Tax, Bombay, and Gursahai Saigal Vs. Commissioner of Income Tax, Punjab, . But it must also be realised that provision by which the authority is empowered to levy and collect interest, even if construed as forming part of the machinery provisions, is substantive law for the simple reason that in the absence of contract or usage interest can be levied under law and it cannot be recovered by way of damages for wrongful detention of the amount. See AIR 1938 67 (Privy Council) and Union of India (UOI) Vs. A.L. Rallia Ram, . Our attention was, however, drawn by Mr. Sen to two cases. Even in those cases Commissioner of Income Tax, Andhra Pradesh Vs. M. Chandra Sekhar, and Central Provinces Manganese Ore Co. Ltd. Vs. Commissioner of Income Tax, , all that the court pointed out was that provision for charging interest was, it seems, introduced in order to compensate for the loss occasioned to the Revenue due to delay. But then interest was charged on the strength of a statutory provision, may be its objective was to compensate the Revenue for delay in payment of tax. But regardless of the reason which impelled the Legislature to provide for charging interest, the court must give that meaning to it as is conveyed by the language used and the purpose to be achieved. Therefore, any provision made in a statute for charging or levying interest on delayed payment of tax must be construed as a substantive law and not adjectival law. So construed and applying the normal Rule of interpretation of statutes, we find, as pointed out by us earlier and by Bhagwati, J. in the Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, that if the Revenue's contention is accepted it leads to conflicts and creates certain anomalies which could never have been intended by the Legislature.

From this, it is clear that the Section providing for charging of penalty is a substantive provision.

(k) India Carbon Ltd. etc. Vs. State of Assam,

Now, the words "charging or payment of interest" in Section 9(2) occur in what may be called the latter part thereof. Section 9(2) authorises the sales tax authorities of a State to assess, reassess, collect and enforce payment of the Central sales tax payable by a dealer as if it was payable under the State Act; this is the first part of Section 9(2). By the second part thereof, these authorities are empowered to exercise the powers they have under the State Act and the provisions of the State Act, including provisions relating to charging and payment of interest, apply accordingly. Having regard to what has been said in the case of Khemka and Co. (Agencies) Pvt. Ltd. Vs. State of Maharashtra, , it must be held that the substantive law that the States' sales tax authorities must apply is the Central Act. In such application, for procedural purposes alone, the provisions of the State Act are available. The provision relating to interest in the latter part of Section 9(2) can be employed by the States' sales tax authorities only if the Central Act makes a substantive provision for the levy and charge of interest on

Central sales tax and only to that extent. There being no substantive provision in the Central Act requiring the payment of interest on Central sales tax the States' sales tax authorities cannot, for the purpose of collecting and enforcing payment of Central sales tax, charge interest thereon.

(1) Godrej Soaps Ltd. and Vasant Narayan Gogate, Senior Vice President (Finance) and Secretary Vs. The State of Maharashtra, Service, High Court (O.S.), The Commissioner of Sales Tax and Assistant Commissioner of Sales Tax (Assessment),

Where a statute is passed for the purpose of supplying an obvious omission in a former statute or to "explain" a former statute, the subsequent statute has relation back to the time when the prior Act was passed. The Rule against retrospectivity is inapplicable to such legislations as are explanatory and declaratory in nature....

14. It is clear from the above cases that the State is competent to impose tax on sale or purchase of goods (entry 54, List II); and this would include levy of additional sales tax; the words "sales tax law of the appropriate State" include AST, surcharge and additional surcharge; the General Sales Tax Act which is the principal Act and the AST Act must be read as if they are one so as to give effect to the provisions of the Act except where the later Act manifests an intention to modify the main Act; the charging provisions are substantive provisions; there can be no levy of penalty without a charging section. The Rule against retrospectivity is not applicable to clarificatory legislation.

15. Bearing this in mind, we will go back to Section 3B.

3B. Levy and collection of penalty. - All the provisions relating to offences and penalties of the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act 1 of 1959), hereafter in this Section referred to as the said Act, shall, with necessary modifications, apply in relation to the assessment, reassessment, collection and the enforcement of payment of any additional tax required to be collected under this Act, or in relation to any process connected with such assessment, reassessment, collection or enforcement of payment as if the additional tax under this Act, were a tax under the said Act.

16. Section 3B says that all the provisions relating to offences and penalties in the TNGST Act shall apply in relation to the assessment, reassessment, collection and the enforcement of payment of any additional tax under the AST Act, as if additional sales tax is a tax under the TNGST Act. Is this provision only clarificatory? Was it implicit in Section 2(1)(b)? Let us read that Section as it originally stood.

Section 2(1)(b). - The provisions of the said Act shall apply in relation to the additional tax payable under Clause (aa) as they apply in relation to the tax payable under the said sub-section.

The provisions of the said Act shall apply in relation to the additional tax payable

under Clause (aa) and the interest payable under Clause (aaa) as they apply in relation to the tax and interest payable under the said Act. (as amended by Act 14 of 2005)

17. If we paraphrase the above Sections slightly they will read thus:

The provisions of the TNGST Act as they apply to tax in the said Act shall apply in relation to additional tax payable under Clause (aa) of the AST Act.

Similarly, the new Section (as amended by Act 14 of 2005) will read like this:

The provisions of the TNGST Act as they apply to tax and interest in the said Act shall apply in relation to additional tax and interest payable under Clause (aa) of the AST Act.

18. Therefore, the reference to the said Act (namely the TNGST Act) in Section 2(1)(b) was to the provisions of the said Act "in relation to tax". Nothing more. Even in *Ashok Service Centre* [1983] 53 STC 1, the Supreme Court had only said that the provisions of the Principal Act applied *mutatis mutandis* to the levy under the Additional Sales Tax Act. The word "levy" has to be understood in the context of levy of tax alone. That is why after *Karthik Roller Flour Mills case* Writ Petition Nos. 6777 and 6778 of 2001 decided on August 14, 2002 - Madras High Court the Legislature amended Section 2(1)(b) to include the words "and interest".

19. *The State of Tamil Nadu Vs. P.M.A. Mathurai Veerasamy and Co.*, had rightly held that if it was the intention of the Legislature that the entire gamut of the provisions of the principal Act were to be applied to the later Act then it could very well have said so: and that if Section 3(2) had been so worded then, there would have been no difficulty to hold that Section 22 of the TNGST Act was also attracted by reference. We respectfully think that this is the correct way to understand the section. We have to read Section 2(1)(b) in an identical way. If so, then the AST Act as it reads before the amendment had no charging provision. A charging Section is substantive law as seen in *J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another*, . Therefore, there can be no levy of penalty without the charging section. This is in accordance with *India Carbon Ltd. etc. Vs. State of Assam*, and *J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another*, . The judgments, which deal with clarificatory Sections are of no help since the Section 3B is not a clarificatory section, it introduces for the first time the power to levy penalty. *Karthik Roller Flour Mills case* Writ Petition Nos. 6777 and 6778 of 2001 decided on August 14, 2002 - Madras High Court correctly hold that in the absence of the substantive provision, in the AST Act itself, relating to levy of interest, the provisions of the TNGST Act cannot be the source of power of such levy. Similarly, unless there is a charging Section for levy of penalty, there can be no automatic reading of the power to levy penalty. The levy of penalty cannot be sustained. We are in agreement with *S.P.G. Ramasamy Nadar and Sons Vs.*

Commercial Tax Officer-III and Others, . In our view, therefore, we see no reason to refer the matter for reconsideration.

20. Now we come to the merits of each case.

(1) T.C. No. 1499 of 2006 deals with the assessment year 1994-95. The only question raised with regard to payment of penalty. The assessee has paid the AST. Therefore, this has to be allowed and the question is answered in favour of the assessee.

(2) T.C. No. 839 of 2006, the following questions of law are raised:

(i) Whether in the facts and circumstances of the case the Sales Tax Appellate Tribunal is right in relying on the resale price of the goods sold by the petitioner.

(ii) Whether in the facts and circumstances of the case the Sales Tax Appellate Tribunal is right in stating that there is under-invoice considering the selling price of Jothy Limited in its invoice dated March 31, 1992 which was consistent with the resale price of the petitioners with M/s. Chandrie & Co. Pvt. Ltd.

(iii) Whether in the facts and circumstances of the case the Sales Tax Appellate Tribunal is right in confirming the levy of penalty u/s 16 of the Act.

The assessment year is 1992-93. The categorical finding is that there is undervaluation. It was contended by the assessee that when the purchase price from their seller Jyothi is borne out by proper bills the fact that their purchasers Chandrie & Co. had sold at a higher price is not relevant. The appellate authority has given sound reasons for not accepting the assessee's case.

A scrutiny of the assessment records disclose that the Check-post Officer has noticed lesser value adopted in the sale bill. Further he has not accepted the records submitted by Tvl. Chandrika & Co. Pvt. Ltd., Mylapore, Chennai and it is not acceptable since the actual sales were made only on June 3, 1992 Tvl. Eastern Electricals, the appellant, whereas the sale bill submitted by Chandrika & Co. Pvt. Ltd., dated May 7, 1992.

21. We are not inclined to interfere with these findings of fact. The question Nos. 1 and 2 are pure questions of fact and do not require consideration. Question No. 3 is answered in favour of the assessee, in so far as the levy of penalty is concerned.