
(1972) 10 MAD CK 0028

In the Madras High Court

Case No : Tax Case No. 35 of 1968 (Rev.)

Egberts India (P.) Ltd.

APPELLANT

Vs

The State of Madras

RESPONDENT

Date of Decision : 09-10-1972

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 12

Citation : (1973) ILR (Mad) 160 : (1973) 31 STC 569

Hon'ble Judges : V. Ramaswami, J;Ramanujam, J

Bench : Division Bench

Advocate : C. Venkataraman, for the Appellant; K. Venkataswami, First Assistant Government Pleader (C.T.), for the Respondent

Final Decision : Allowed

Judgement

Ramanujam, J.—The assessee in this case is a dealer in chicory and for the assessment year 1963-64, he returned a taxable turnover of Rs. 1,20,674.06. At the stage of the assessment proceedings, the assessing authority called for the account books and found that the sales of chicory to the Coffee Board to the extent of Rs. 3,71,844.45 had been omitted to be included in the assessee's return. When this was pointed out to the assessee, the assessee explained that the supplies to the Coffee Board were made on the basis of pro forma invoice and that unless the account is settled between him and the Coffee Board finally, the same could not be included in the return. The assessing officer rejected this explanation and included Rs. 3,71,844.45 in the turnover return and completed the assessment. He also levied a penalty of Rs. 27,850 u/s 12(3) of the Tamil Nadu General Sales Tax Act for the non-inclusion of the sum of Rs. 3,71,844.45 in the return submitted by him. The assessee thereafter took the matter on appeal to the Appellate Assistant Commissioner and contended before him that the turnover of Rs. 3,71,844.45 could not be brought to charge in the assessment year as the accounts between him and the Coffee Board have not been finally settled in relation to the supplies made. But the appellate authority

did not accept this contention and held that the turnover in question had been rightly brought to tax in the assessment year. The assessee also questioned the imposition of penalty before the appellate authority but without success. There was a further appeal to the Tribunal. But the appeal related only to the question of penalty. Before the Tribunal, it was urged that the levy of penalty cannot be justified u/s 12(3) of the Act. The Tribunal, however, held that the penalty could be levied u/s 12(3) of the Act in the circumstances of the case, but, however, chose to reduce the penalty from Rs. 27,850 to Rs. 10,000,

2. Before us, the assessee's learned counsel contends that the order imposing penalty u/s 12(3) cannot be sustained and he refers to the decision of this court in *S. G. Jayaraj Nadar & Sons v. State of Madras* [1968] 21 S.T.C. 180 and the decision of the Supreme Court against the judgment in *State of Madras v. Jayaraj Nadar and Sons* [1971] 28 S.T.C. 700. The above decisions clearly support the submission made by the learned counsel for the assessee that the mere submission of an incorrect return will not entail a penalty u/s 12(3) and to sustain an order of penalty u/s 12(3) there should have been a best judgment assessment by the assessing authority on rejection of the return and the account books submitted by the assessee. It is pointed out that in this case there was no suppression of the disputed turnover in the account books and the assessing officer has proceeded to complete the assessment only on the basis of the figures available from the account books without making an estimate of the turnover and without making any best judgment assessment in the strict sense of the term. In *State of Madras v. Jayaraj Nadar and Sons* [1971] 28 S.T.C. 700, the Supreme Court construed the scope of Section 12(3) and has expressed the view that the mere filing of an incorrect return will not attract the levy of penalty u/s 12(3) and that Section 12(3) empowers the assessing authority to levy the penalty only when it makes an assessment under Sub-section (2) of Section 12, that is, only when the assessing authority makes the assessment to the best of his judgment, which has to be based on an estimate. In that case also, there was an incorrect return, but the assessee's account books indicated the turnover in dispute and the assessing authority brought that turnover to tax along with the turnover returned. On those facts, the Supreme Court has held that whenever the assessment is made accepting the entries in the books of account of the assessee, Section 12(3) cannot be invoked. The above decision straightaway applies to the facts of the present case.

3. The learned Government Pleader brings to our notice a decision of this court in *Pavadai Chettiar Sons v. State of Madras* [1968] 21 S.T.C. 67. In that case, a Division Bench of this Court upheld an order of penalty levied u/s 12(3). But in that case, there was a best judgment assessment after rejecting the return filed by the assessee as incorrect. Therefore, the court proceeded on the basis that there was an assessment u/s 12(2) so as to attract the imposition of penalty u/s 12(3). In our view, that decision will not apply to the facts of this case. Following the decision in *State of Madras v. Jayaraj Nadar and Sons* [1971] 28 S.T.C 700, the tax case has to be allowed and is allowed accordingly. There will however be

no order as to costs.