
(2001) 10 MAD CK 0079

In the Madras High Court

Case No : Writ Petition No's. 1972 to 1976 of 1999

E.I.D. Parry (India) Limited

APPELLANT

Vs

Assistant Commissioner (CT) and Others

RESPONDENT

Date of Decision : 11-10-2001

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 13(2), 24(3)

Citation : (2002) 126 STC 449

Hon'ble Judges : R. Jayasimha Babu, J;A.K. Rajan, J

Bench : Division Bench

Advocate : C. Natarajan for N. Inbarajan, for the Appellant; T. Ayyasamy, Special Government Pleader (Taxes), for the Respondent

Final Decision : Allowed

Judgement

R. Jayasimha Babu, J.—The assessee has been subjected to levy of interest u/s 24(3) of the Tamil Nadu General Sales Tax Act, 1959, on the ground that though the assessee filed supplementary returns for the relevant assessment years, the years being 1990-91, 1991-92, 1992-93, 1993-94, 1994-95, the assessee had failed to remit the interest for the period of delay between first of April of the relevant assessment year and the date on which the supplementary returns were filed. The supplementary returns for all these years were filed on September 12, 1995.

2. The items covered under the supplementary returns were freight charges and transport subsidy, both of which are amounts paid either to sugarcane grower who delivered sugarcane to the factory or to the third party transporters who transported sugarcane from the field to the factory at the instance of the assessee. The cane so transported was cane which was the subject-matter of the agreement between the growers and the assessee.

3. It is not in dispute that the price payable for sugarcane is the one payable under the Sugarcane (Control) Order being the price notified under Clause 3 as

also the additional price notified under Clause 5-A of that Order. Under the terms of the agreement the sugarcane is to be delivered at the factory gate, and that necessarily implies, that the transport charges for bringing the sugarcane from the field to the factory gate is not an amount which the manufacturer of sugar is required to pay. Despite the absence of such liability, the manufacturer for the purpose of ensuring the continuous supply of cane to feed its sugar mill, paid the transport charges to the grower or the transporter in full or in part. The amount which was not recovered from the grower towards cost of such transportation-- whether the amount be paid to the grower or to the transporter-- was not regarded by the manufacturer as forming part of the price.

4. The transport charges, part of which was regarded by the manufacturer as subsidy as the recovery of the charge was only limited to cases where the distance was 30 kms. or less between the field and the factory, the cost of transportation for the distance beyond 30 kms, being borne by the manufacturer and though regarded by the manufacturer as not forming part of the price the revenue had taken a stand that it formed part of the price. The matter came up before this Court on more than one occasion and was the subject-matter of decisions rendered by this Court starting from 1976, the cases being *State of Tamil Nadu v. Madurantakam Co-operative Sugar Mills* [1976] 38 STC 238, *Kallakurichi Co-operative Sugar Mills Limited v. State of Tamil Nadu* [1985] 60 STC 113, *Perambalur Sugar Mills Ltd. v. State of Tamil Nadu* [1992] 86 STC 17 and finally *Chengalvarayan Co-operative Sugar Mills Ltd. v. State of Tamil Nadu* [1997] 105 STC 497 a decision of the Full Bench of this Court. The decision of the Full Bench of this Court in *Chengalvarayan Co-operative Sugar Mills Ltd. v. State of Tamil Nadu* [1997] 105 STC 497 was affirmed by the Supreme Court in *E.I.D. Parry (I) Ltd. v. Assistant Commissioner of Commercial Taxes* [2000] 117 STC 457.

5. In the case in *The State of Tamil Nadu Vs. The Madurantakam Co-Operative Sugar Mills*, the court made a distinction between the amount paid for transportation when paid to the grower and when paid to the third party transporter, and held that when payment was made to the grower it did not form part of the turnover.

6. In the decision in *Kallakurichi Co-Operative Sugar Mills Limited and Another Vs. The State of Tamil Nadu*, as also in the case of *Perambalur Sugar Mills Ltd. v. State of Tamil Nadu* [1992] 86 STC 17 (Mad.) it was held that the whole of the transport charges whether to be paid to the grower or to a third party transporter, was includible in the turnover.

7. A division Bench of this Court in the year 1995 saw a conflict among the rulings and referred the matter to the Full Bench of this Court to settle the legal position by a larger Bench as these questions are recurring questions. The Full Bench delivered judgment on July 24, 1996 approving the decisions rendered by this Court in *Kallakurichi Co-operative Sugar Mills Limited v. State of Tamil Nadu* [1985] 60 STC 113 *Perambalur Sugar Mills Ltd. v. State of Tamil Nadu* [1992] 86

STC 17. The decision rendered in the case of The State of Tamil Nadu Vs. The Madurantakam Co-Operative Sugar Mills, which held that the payment made to the third party transporter Was not includible, was overruled.

8. The apex Court to which the matter was taken in appeal by the present assessee against the decision of the Full Bench Reported as Chengalvarayan Co-operative Sugar Mills Ltd. v. State of Tamil Nadu [1997] 105 STC 497 (Mad.), after holding that if the sale price is fixed statutorily, then the only obligation of the purchaser under the agreement would be to pay that price only and no other amount can be included in the purchase price if the same is paid by the purchaser to the seller, proceeded to hold that the transport subsidy given by the assessee to the growers, did form part of the consideration for which the sugarcane was sold by the growers to the assessee as such payment became a part of the implied agreement between the appellant and the sugarcane growers. The court also held that those amounts were paid to ensure scheduled delivery of sugarcane and that the sale of sugarcane became complete only thereafter. The court further held that--"those payments can be regarded either as payments made on behalf of the sugarcane growers or payments made in modification or variation of the earlier agreements entered into by the sugarcane growers for selling sugarcane. In either case they could legitimately be regarded as the components of the sale price as the sellers would have otherwise included those amounts in the sale price."

9. The assessee in this case when it filed the supplementary returns on September 12, 1995, did so with the rider that the amount being paid along with return was being paid under protest reserving right to the assessee to contest the same at the time of the assessment proceedings. All the assessments came to be made only after the supplementary return had been filed and the amount of tax had also been paid.

10. The demand for interest has been made against the assessee by placing reliance on Section 24(3) of the Tamil Nadu General Sales Tax Act. Section 24(1) which to the extent relevant here reads thus :

"24. Payment and recovery of tax.--(1) Save as otherwise provided for in Sub-section (2) of Section 13, the tax assessed or has become payable under this Act from a dealer or person and any other amount due from him under this Act shall be paid in such manner and in such instalments, if any and within such time as may be specified in the notice of assessment, not being less than twenty-one days from the date of service of the notice. The tax under Subsection (2) of Section 13 shall be paid without any notice of demand. In default of such payment the whole of the amount outstanding on the date of default shall become immediately due and shall be a charge on the properties of the person or persons liable to pay the tax or interest under this Act."

The tax which is payable by the assessee according to this provision, is to be paid in such a manner and in such instalments if any and within such time as

may be specified not being less than twenty-one days from the date of service of the notice. The exception to that is tax which becomes payable u/s 13(2) of the Act. Section 13(2) of the Act reads thus :

Section 13 : Advance payment of tax.--(1).....

(2) In lieu of the tax provisionally determined under Sub-section (1), a dealer may, at his option, pay tax in advance during the year on the basis of his actual turnover for each month or for such other periods as may be prescribed. For this purpose, he may be required to furnish returns showing his actual turnover for each month or other periods as may be prescribed and to pay tax on the basis of such returns. The tax under this sub-section shall become due without any notice of demand to the dealer on the date of receipt of the return or on the last due date as prescribed, whichever is later.

11. Section 13(2) is an alternative available to the dealer at his option to what is prescribed in Section 13(1) which reads thus :

"13. Advance payment of tax.--(1) The tax for each year payable under any of the provisions of this Act may be collected in advance during the year in monthly or other prescribed instalments, and for this purpose a dealer may be required to furnish within the prescribed period such returns as may be prescribed. The assessing authority may provisionally determine the amount of tax payable in advance during any year or in respect of any period and on such determination and intimation to the dealer, he shall pay such tax in such instalments and within such period as may be prescribed."

12. While Section 13(1) contemplates an assessment by the authority, Section 13(2) in effect, provides for self-assessment by the dealer who, if he opts to take recourse of Section 13(2) is required to furnish return showing his actual turnover for each month or other periods as may be prescribed and to pay "tax on the basis of such returns".

13. In Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, : while considering a similar provision of the Rajasthan Sales Tax Act, a three-Judge Bench of the apex Court, by a majority judgment, inter alia, held that either by delaying the filing of the return or by filing a return with a wrong claim that certain part of the turnover is not taxable, or by not disclosing a part of the taxable turnover in the return, an assessee cannot escape liability to pay interest u/s 11B(a) of the Rajasthan Act. Bhagawathi, J., who was in the minority in that case, in his dissenting opinion held that the requirement in the Act that every registered dealer furnishes a return in the prescribed period, and pays the full amount of tax on the basis of the return only meant that, what the assessee should pay is the tax as shown in his return as being payable by him, although in the assessment subsequently made a larger amount may be found to be payable by the assessee as tax. It was observed by the learned Judge that :

"It is not the assessed tax nor is it the tax due on the basis of a return which

ought to have been filed by the assessee but it is the tax due according to the return actually filed that is payable under Sub-section (2) of Section 7. This provision is really in the nature of self-assessment and what it requires is that whatever be the amount of tax due on the basis of self-assessment must be paid up along with the filing of the return which constitutes self-assessment."

14. The Constitution Bench of the apex Court in the case of J.K. Synthetics Ltd. v. Commercial Taxes Officer [1994] 94 STC 422 overruled the decision of the majority in the case of Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, : and approved the minority view in that case.

15. In the case of Maruti Wire Industries Pvt. Ltd. Vs. S.T.O., Ist Circle, Mattancherry and Others, : a three-Judge Bench, while considering a case arising under the Kerala General Sales Tax Act, followed the law declared by the Constitution Bench J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, : which had approved the minority view in the Associated Cement Company Limited Vs. Commercial Tax Officer, Kota and Others, :

16. For the applicability of Section 13(2) of the Act, what is required to be scrutinised is a return filed by the assessee admitting it's liability to pay tax by treating certain transactions as forming part of it's turnover. The fact that in the assessments made subsequently certain other transactions are also found to form part of the turnover does not on that score alone make the assessee liable for payment of interest for that larger turnover with effect from the date on which the assessee filed returns u/s 13(2).

17. The question for consideration in these cases is as to whether filing of supplementary return subsequent to the filing of a return u/s 13(2) with a demur that the amount is being paid under protest subject to the right of the assessee to contest the same at the time of assessment, can be regarded as return u/s 13(2) for the purpose of levy of interest u/s 24(3) of the Act. The payment made under protest disputing the liability to tax cannot be regarded as an amount which the assessee admits as being payable, but as a payment made by an assessee who entertained a genuine doubt as to whether certain transactions form part of the turnover, the legal position not having, at that time, been settled by the court. It cannot, in such circumstances, be said that a return filed with the qualification that the liability for tax is disputed, and that the assessee will raise such a dispute at the time of assessment, is an instance of self-assessment. Though it may transpire that the assessee would have no right to reclaim the amount deposited under protest, by reason of the transaction which it sought to regard as not forming part of the turnover, being in fact found to be a part of the taxable turnover, it cannot on that score, make a subsequent assessment a self-assessment with effect from a date prior to the actual assessment. Self-assessment u/s 13(2) of the Act is not the same as the assessment which is regularly done by the authority--whether provisionally or finally.

18. Learned counsel for the Revenue submitted that the question of bona fides has no relevance in so far as the applicability of Section 24(3) is concerned and on the consequent liability on the part of the assessee to pay tax. Counsel in this context relied upon the decision in *Godrej & Boyce Manufacturing Co. Ltd. v. Joint Commissioner of Commercial Taxes IV* [1995] 97 STC 44 (Mad.).

19. The question here is not as to whether the interest u/s 24(3) though otherwise payable should be waived. As to whether Section 24(3) is at all applicable is the question which the authorities are required to examine. If in the circumstances the stand which the assessee had taken was bona fide and not as a mere ruse to avoid the payment of interest, then the bona fides of the assessee's action is a matter which requires consideration. The assessee cannot avoid its liability to pay interest u/s 24(3) of the Act merely by adding a rider in the returns that the amount is being deposited under protest subject to its right to dispute its liability at the time of assessment. Any such reservation must be made bona fide, and bona fides must be tested with reference to the objective circumstances in the context of which such a return is filed.

20. As found by the court when the matter was referred to the Full Bench the law with regard to the taxability of the freight charges including the subsidy was not clear and well-settled, and therefore a reference became necessary. The law on this question can be said to have been settled only when the Full Bench rendered the judgment in the year 1996. The assessee had filed a supplementary return and paid the tax even before that judgment. The fact that the assessee's stand was negatived in the order of assessment that followed only meant that, had the assessee not paid the tax earlier the assessee would have been required to pay the tax within 21 days from the date of notice of demand after the assessment had been made.

21. The conduct of the assessee in not including these freight charges and subsidy when it filed the original returns, and raising a dispute about the taxability of those items when it filed the supplementary returns, cannot be said to be lacking in bona fides in the circumstances of the case. The levy of interest on the assessee in these circumstances cannot be upheld.

22. The interest levied on the assessee u/s 24(3) of the Act for these years on the amount of tax on freight and subsidy is, therefore required to be, and is set aside.

23. The writ petitions are allowed.