
(1994) 05 MAD CK 0006

In the Madras High Court

Case No : Writ Petition No's. 14117 of 1988, 12427 of 1989 and 18186 to 18188 of 1990 and W.M.P. No's. 21164 of 1988, 17748 of 1989, 28675 to 28677 of 1990, 30736 of 1992 and 915 and 5251 to 5253 of 1993

G. Packirisamy and Co.

APPELLANT

Vs

State of Tamil Nadu

RESPONDENT

Date of Decision : 10-05-1994

Acts Referred:

Tamil Nadu General Sales Tax Act, 1959 — Section 17, 3, 3(1)

Citation : (1994) 05 MAD CK 0006

Hon'ble Judges : M.S. Janarthanam, J

Bench : Single Bench

Advocate : A. Chandrasekaran, S. Ramanathan and R. Venkataraman, for the Appellant; T. Ayyasamy and A.K. Gopinath, Government Advs. and Mrs. Chitra Venkataraman, Additional Government Pleader, for the Respondent

Judgement

Janarthanam, J.—The subject-matter of challenge is the exigibility or otherwise of the tax under the Tamil Nadu General Sales Tax Act, 1959 (Tamil Nadu Act No. 1 of 1959 - for short "the TNGST Act"), in respect of the products like appalam and vermicelli, in these actions.

2. Sub-section (1) of section 3 of the TNGST Act dealing with levy of taxes on sales or purchases of goods prescribes that every dealer (other than a casual trader or agent of a non-resident dealer), whose total turnover for a year is not less than one lakh of rupees and every casual trader or agent of a non-resident dealer, whatever be his turnover for the year, in respect of sale of goods, shall pay a tax for each year at a rate in a specified percentage of his taxable turnover, at the point of first sale.

3. Sub-section (2) thereof further prescribes that notwithstanding anything contained in sub-section (1), in the case of goods mentioned in the First Schedule, the tax under the said Act shall be payable by a dealer, at the rate and

only at the point specified therein, on the turnover in each year relating to such goods whatever be the quantum of turnover in that year.

4. The First Schedule enumerates goods in respect of which single point tax is leviable under sub-section (2) thereof. Item 103(x) is an entry relevant for our present purpose and the same is couched in the following terms :

-----				Serial
Description of the goods	Point of	Rate of tax	No. levy	(per cent)
-----				103(x)
Foods including preparations of At the point 10 vegetables, fruits, milk, of first sale cereals, flour, starch, birds" in the State eggs, meat and meat offals, animal blood, fish, crustaceans and molluses, which are the products of any manufacturers or suppliers who have registered their products under the Trade and Merchandise Marks Act, 1958 (Central Act 43 of 1958), whether they are sold under the registered brand name or not.				

5. Section 17 dealing with the power of the Government to notify exemptions and reductions of tax, reads as follows :

"17. Power of Government to notify exemptions and reductions of tax. - (1) The Government may, by notification, issued whether prospectively or retrospectively, make an exemption, or reduction in rate, in respect of any tax payable under this Act -

(i) on the sale or purchase of any specified goods or class of goods, at all points or at a specified point or points in the series of sales by successive dealers, or

(ii) by any specified class of persons, in regard to the whole or any part of their turnover, or

(iii) on the sale or purchase of any specified classes of goods by specified classes of dealers in regard to the whole or part of their turnover.

(2) Any exemption from tax, or reduction in the rate of tax, notified under sub-section (1) -

(a) may extend to the whole State or to any specified area or areas therein;

(b) may be subject to such restrictions and conditions as may be specified in the notification.

(3) The Government may; by notification, cancel or vary any notification issued under sub-section (1).

(4) The Government may, in such circumstances and subject to such conditions as may be prescribed, by notification, remit the whole or any part of the tax or penalty or fee payable in respect of any period by any dealer under this Act."

6. Invoking the power u/s 17, the Government of Tamil Nadu (common first

respondent) issued a Notification in G.O.P. No. 303 dated March 26, 1981 [No. II(1)/CTRE/164(c)/81] granting exemption in respect of the tax payable by any dealer on the sales of appalam, vermicelli and bakery products without a brand name or with a brand name not registered under the Trade and Merchandise Marks Act, 1958 (Central Act 43 of 1958 - for short "the TMM Act"), giving prospective effect from April 1, 1981.

7. In G.O.P. No. 804 dated May 30, 1988 [No. II(1)/CTRE/98/88], an amendment had been brought into the aforesaid exemption, by the insertion of a proviso to the following effect :

"Provided that in respect of bakery products, appalams, vadams and vathals, the total turnover of the dealer for a year does not exceed rupees two lakhs."

The same had been published in the Tamil Nadu Government Gazette dated June 15, 1988.

8. In G.O.P. No. 1316 dated October 7, 1988 [No. II(1)/CTRE/144(f)/88] in suppression of the earlier notification dated May 30, 1988 [No. II(1)/CTRE/98/88 - G.O.P. No. 804], the following amendment has been brought in giving retrospective effect on and from April 1, 1988, which reads as follows :

"(v) an exemption in respect of the tax payable by any dealer under the said Act on the sale of appalams, vadams, vathals, vermicelli and bakery products without a brand name or with a brand name not registered under the Trade and Merchandise Marks Act, 1958 (Central Act 43 of 1958) whose total turnover for a year does not exceed rupees three lakhs."

9. In G.O.P. No. 297 dated April 26, 1989 [No. II(1)/CTRE/44(a-2)/89], a further amendment was brought in, effective from the said date, namely, April 26, 1989, which reads as under :

"(v) an exemption in respect of the tax payable by any dealer under the said Act on the sale of vathals, vermicelli and bakery products without a brand name or with a brand name not registered under the Trade and Merchandise Marks Act, 1958 (Central Act 43 of 1958), whose total turnover for a year does not exceed rupees three lakhs."

10. W.P. Nos. 14117 of 1988 and 12427 of 1989 are relatable to dealers in vermicelli, while W.P. Nos. 18186 to 18188 of 1990 are relatable to dealers in appalams. They challenged the vires of the notification dated October 7, 1988. Besides, the dealer in vermicelli in W.P. Nos. 12427 of 1989 also challenged the vires of the notification dated April 26, 1989. The dealers in appalams challenged the differential levy of tax on the basis of registration under the TMM Act.

11. The basis of challenge in these actions bristles to these :

(1) In the absence of express power granted u/s 17 of the TNGST Act to act retrospectively, it is not open to the subordinate legislative body, like the State Government (common first respondent) to issue notification, either taking away

the vested rights or amending the existing provision with retrospective effect.

(2) The differential levy of tax, on the sole basis of registration or otherwise under the TMM Act is nothing but hostile discrimination offending article 14 of the Constitution of India.

12. W.M.P. Nos. 21164 of 1988, 17748 of 1989 and 28675 to 28677 of 1990 had been filed praying for interim relief of injunction, pending disposal of the respective writ petitions, in which favourable orders of interim injunction had been passed. Consequently, W.M.P. Nos. 30736 of 1992 and 915 and 5251 to 5253 of 1993 had been filed to vacate the interim orders of injunction so granted.

13. When all those W.M.Ps. came up for hearing, learned counsel representing the respective parties agreed for the disposal of the main writ petitions themselves and accordingly, their arguments were heard.

14. Let me now take up for consideration the first basis of challenge. Axiomatic a proposition of law is that an authority, which has the power to make subordinate legislation cannot make it with retrospective effect, unless it is so authorised by the legislature, which has that power conferred on it.

15. By the enactment of sub-section (1) of section 17 of the TNGST Act the legislature has given power to the Government to make subordinate legislation, by way of issuance of a notification to grant exemption or reduction of tax, either prospectively or retrospectively. No doubt true it is that under sub-section (3) thereof, the Government inheres power to cancel or vary any notification issued under sub-section (1) by the issuance of another notification. But the language of the said sub-section, if subjected to careful scrutiny, will reveal such a power is not taking in its fold the power to cancel or vary any notification with retrospective effect and to put it otherwise, such a power may be exercised only prospectively.

16. Originally by issuance of the notification dated March 26, 1981, which came into force on and from April 1, 1981, total exemption had been granted to appalams, vermicelli and certain other products, without a brand name or with a brand name, not registered under the TMM Act.

17. Such total exemption in respect of those products was sought to be curtailed by the issuance of another notification dated May 30, 1988, which got published in the Tamil Nadu Government Gazette on the June 15, 1988, the date on which it was to come into force. The curtailment effected therein was that vermicelli had been totally omitted from the purview of exemption and that apart, the exemption limit for appalams and certain other products was restricted to a dealer, whose total turnover for a year does not exceed two lakhs of rupees. The curtailment thus effected was applicable to the assessment year 1988-89.

18. Thereafter, by issuance of the notification dated October 7, 1988, which came into force on April 1, 1988, the curtailment effected by way of omission of vermicelli was sought to be rectified by having the same included for exemption

purposes, along with appalams and certain other products, and while doing so, the exemption limit of the turnover had been raised to three Lakhs of rupees. No doubt, as already stated, this notification was given retrospective effect on and from April 1, 1988, as applicable to the assessment year 1988-89. This retrospectivity cannot at all be stated to be detrimental to the assessee-traders, in the sense of the exemption granted therein, in respect of such of those products being beneficial to them, at least to the extent of one lakh of rupees in respect of appalams and to the tune of three lakhs of rupees in the case of vermicelli. This sort of a ritualistic exercise had apparently been done, invoking the powers under sub-section (1) of section 17 of the TNGST Act.

19. By the issuance of the notification dated April 26, 1989, which was effective from the said date, exemption granted in favour of appalams had been taken away retaining the exemption granted in favour of vermicelli and other products, besides retaining the exemption limit at the same level, that is to say, three lakhs of rupees. The cancellation of the exemption to appalams, by this notification, as already stated, has been done prospectively, that is to say, on and from April 26, 1989, the date of the notification itself. Therefore, it cannot at all be stated that the said notification had been issued by the Government without the sanction of law. The resultant position is that the challenge as respects these notifications has to necessarily face dismal failure.

20. Let me now divert my attention to the submission revolving on the next basis of challenge. Sub-section (1) of section 3 of the TNGST Act levies a general tax on the total turnover of a dealer, in goods of several descriptions. Sub-section (2) thereof is by way of an exception to the general tax. It provides that notwithstanding anything contained in sub-section (1) in the case of goods mentioned in the First Schedule, the tax shall be payable by a dealer at the rate and the point specified in the said Schedule on the turnover relating to such goods. The purport of the provision is that in order to come within the single point scheme of taxation, the goods must be goods mentioned in the First Schedule. If the goods are not mentioned in the First Schedule, they are not eligible for the single point of levy.

21. It is rather well-settled that in order to tax something it is not necessary to tax everything. So long as those within the tax net can be legitimately classified together indicating an intelligible differentia vis-a-vis those left out and the classification so made bears a rational nexus with the object sought to be achieved, the classification is clearly permissible and it does not violate article 14 of the Constitution. In other words, those grouped together must possess a common characteristic justifying their inclusion in the group, but distinguishing them from those excluded; and performance of this exercise must bear a rational nexus with the reason for the exercise.

22. The scope of classification permitted in taxation is greater and unless the classification made can be termed to be palpably arbitrary, it must be left to the legislative wisdom to choose the yardstick for classification in the background of

the fiscal policy of the State to promote economic equality as well. It cannot be doubted that if the classification is made with the object of taxing only the economically stronger while leaving out the economically weaker sections of society, that would be a good reason to uphold the classification, if it does not otherwise offend any of the accepted norms of valid classification under the equality clause.

23. Reasonableness of the classification has to be decided with reference to the realities of life and not in the abstract. The facts of the instant case, if viewed from the well-accepted principles as stated above, it cannot at all be stated that the differential levy of tax in the case of appalams, depending upon the dealer dealing in such goods, whether registered under the TMM Act or not, cannot at all be stated to be not falling within the net of reasonable classification.

24. No doubt true it is that appalams dealt with by a dealer, who has registered his products under the TMM Act is taxable at the point of first sale in the State at 10 per cent as per item 103(x) of the First Schedule. To put it otherwise, appalams dealt with by a dealer, who has not registered his product under the TMM Act is treated differently, in the sense of appalams dealt with by him not being subjected to single point tax at 10 per cent, coming under sub-section (2) of section 3, but attracts liability under sub-section (1) of section 3 of the TNGST Act, as if it is a goods coming under general category, exigible to tax at a rate in a percentage specified therein. Further under sub-section (1) of section 3, if the dealer dealing in appalams happens to be a casual trader or agent of non-resident dealer, then such dealing is exigible to tax liability at the rate mentioned therein, whatever be the quantum of the turnover. But, on the other hand, if the dealer dealing in appalams is not a casual trader or agent of a non-resident dealer, he is exigible to tax liability at the rates mentioned therein, when his turnover is not less than one lakh of rupees. Thus, it is clear that the dealers dealing in appalams had been classified into different categories, for attraction of the tax liability on the turnover either at single point or multi-point. Can it be said that such a classification, which leads to consequent differential treatment is violative of article 14 of the Constitution of India, as being purely discriminatory in nature ? The answer to such a question cannot at all be anyone other than an emphatic "no", on the facts and in the circumstances of the instant case.

25. Rather than myself venturing to find out the rationale or reason for such an answer, better it is, I think, to seek to my aid, in an authoritative fashion, a precedent emerging from the apex Court of this country in K.M. Mohamad Abdul Khader Firm Vs. State of Tamil Nadu and Others, , wherein their Lordships, while dealing with similar contention, based on article 14, observed as follows :

"Dealing with the contention that since the provisions of the Act imposed different rates of tax on different dealers depending upon their turnover there was a violation of article 14 of the Constitution, Mathew, J., who spoke for the court observed : S. Kodar Vs. State of Kerala,] :

"The last contention, namely, that the provisions of the Act impose different rates of tax upon different dealers depending upon their turnover which in effect means that the rate of tax on the sale of goods would vary with the volume of the turnover of a dealer and are, therefore, violative of article 14 is also without any basis. Classification of dealers on the basis of their respective turnovers for the purpose of graded imposition so long as it is based on differential criteria relevant to the legislative object to be achieved is not unconstitutional. A classification, depending upon the quantum of the turnover for the purpose of exemption from tax has been upheld in several decided case. By parity of reasoning, it can be said that a legislative classification making the burden of the tax heavier in proportion to the increase in turnover would be reasonable. The basis is that just as in taxes upon income or upon transfers at death, so also in imposts upon business, the little man, by reason of interior capacity to pay, should bear a lighter load of taxes, relatively as well as absolutely, than is borne by the big one. The flat rate is thought to be less efficient than the graded one as an instrument of social justice. The large dealer occupies a position of economic superiority by reason of his greater volume of his business. And, to make his tax heavier, both absolutely and relatively, is not arbitrary discrimination, but an attempt to proportion the payment to capacity to pay and thus to arrive in the end at a more genuine equality. The economic wisdom of a tax is within the exclusive province of the Legislature. The only question for the court to consider is whether there is rationality in the belief of the Legislature that capacity to pay the tax increases, by and large, with an increase of receipts.

"Certain it is that merchants have faith in such a correspondence and act upon that faith If experience did not teach that economic advantage goes along with larger sales, there would be an end to the hot pursuit for wide and wider markets In brief, there is a relation of correspondence between capacity to pay and the amount of business done. Exceptions, of course, there are. The law builds upon the probables, and shapes the measure of the tax accordingly At the very least, an increase of gross sales carries with it an increase of opportunity for profit, which supplies a rational basis for division into classes, at all events when coupled with evidence of a high degree of probability that the opportunity will be faithful." (Stewart Dry Goods Company v. Lewis 294 US 550 : See the dissenting judgment of Cardozo, J. Brandeis, J., and Stone, J.).

The reasoning of the minority in that case appeals to us as more in consonance with social justice in an egalitarian State than that of the majority.

As we said, a large dealer occupies a position of economic superiority by reason of his volume of business and to make the tax heavier on him, both absolutely and relatively, is not arbitrary discrimination, but an attempt to proportion the payment to capacity to pay and thus arrive in the end at a more genuine equality. The capacity of a dealer, in particular circumstances, to pay tax is not an irrelevant factor in fixing the rate of tax and one index of capacity is the quantum of turnover. The argument that while a dealer beyond certain limit is

obliged to pay higher tax, when others bear a less tax, and it is consequently discriminatory, really misses the point, namely, that the former kind of dealers are in a position of economic superiority by reason of their volume of business and form a class by themselves. They cannot be treated as on a par with comparatively small dealers. An attempt to proportion the payment to capacity to pay and thus bring about a real and factual equality cannot be ruled out as irrelevant in levy of tax on the sale or purchase of goods. The object of a tax is not only to raise revenue but also to regulate the economic life of the society.""

Further, the principle laid down, as above, does not appear to have undergone any change, by subsequent pronouncement of the Supreme Court.

26. In this view of the matter, I do not think that there is any force in the second bone of contention that the differential levy of tax on the sole basis of registration or otherwise under the TMM Act is nothing but discrimination offending article 14 of the Constitution of India.

27. For all the above reasons, I am of the view that all these writ petitions are devoid of merits and therefore, they are dismissed. Consequently, all W.M.Ps. are also dismissed. There shall, however, be no order as to costs, in the circumstances.

28. Writ petitions dismissed.